No. 23-12923-D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MARCUS CASTER, et al.,
Plaintiffs-Appellees,

v.

HON. WES ALLEN, in his Official Capacity as the Secretary of State of Alabama,
Defendant-Appellant.

On Interlocutory Appeal from the United States
District Court for the Northern District of Alabama
No. 2:21-cv-1536-AMM

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Respectfully submitted this 11th day of September 2023.

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INTRODUCTION[1]

In 2021, Plaintiffs sued to preliminarily enjoin Alabama's congressional redistricting plan. The heart of their case was how Alabama had long "splintered" the Black Belt into different congressional districts.[2] The Black Belt is a mostly rural region "'in the central part of the state'" named for its fertile black soil; it is defined by its "'historical boundaries,'" not "'demographic[s].'" *Allen v. Milligan*, 143 S. Ct. 1487, 1511 n.5 (2023). Following past district lines, the 2021 Plan split the core Black Belt counties into three districts, while keeping Alabama's Gulf Coast counties in a single district.[3] Plaintiffs argued §2 of the Voting Rights Act did not permit that "inconsistent treatment" of these communities of interest because of its resulting discriminatory effect on predominantly black voters in the Black Belt.[4] The three-judge district court agreed that Plaintiffs were likely to prevail on that claim, and the Supreme Court affirmed. *See Singleton v. Merrill*, 582 F. Supp. 3d 924 (N.D. Ala. 2022).

[1] Secretary Allen is contemporaneously seeking a stay from the Supreme Court in *Milligan v. Allen*, Case No. 2:21-cv-1530 (N.D. Ala.) (three-judge court). The opinion and order appealed from in *Caster* and *Milligan* are materially the same, except that the *Caster* order is signed by a single judge and is appealable to this Court and the *Milligan* order is signed by a three-judge court and is appealable to the Supreme Court. *See* 28 U.S.C. §§1253, 2284(a). In the State's earlier appeal in this litigation, this Court held *Caster* in abeyance the day after the State moved for a stay pending appeal, and the U.S. Supreme Court then granted a stay and certiorari before judgment to decide the *Caster* appeal alongside *Milligan*. *See Merrill v. Milligan*, 142 S. Ct. 879 (2022).

[2] Br. of *Caster* Respondents 15-16, *Caster v. Merrill* (No. 21-1087) (filed July 11, 2022) ("*Caster* Br.") (describing 2021 Plan's adherence to district lines, dating back to 1970s plan that "splintered the Black Belt among Districts 1, 2, 3, and 7."); *see also* Br. of *Milligan* Respondents 5, *Allen v. Milligan* (No. 21-1086) (filed July 11, 2022) ("*Milligan* Br.").

[3] *Milligan* Br. 12, 20-21.

[4] *Johnson v. De Grandy*, 512 U.S. 997, 1015 (1994); *Caster* Br. 36; *see also id.* at 35 (challenging "double standard"); *Caster v. Allen*, No. 2:21-cv-1536, ECF 56 at 9 ("striking … how HB 1 cracks Alabama's Black population in the historic Black Belt").

Alabama answered with new legislation unifying the Black Belt. In the newly enacted 2023 Plan, core retention took a back seat to the goal of unifying the Black Belt. The 2023 Plan places Black Belt counties into only two districts, the fewest number possible without violating population equality requirements.[5] No Black Belt county is split between districts. Statewide, districts are more compact, county splits are minimized, and communities in the Gulf and Wiregrass regions are also kept together.

Even so, the District Court enjoined the 2023 Plan because it did not contain a second majority-black district. App.4-6. A stay pending appeal is warranted. Without a stay, the State will have no meaningful opportunity to appeal before the 2023 Plan is replaced by a court-drawn map that no State could constitutionally enact. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 635, 657 (1993) (*Shaw I*) (majority-minority district added for §5 compliance could be challenged as unconstitutional "racial gerrymandering," which "even for remedial purposes, may balkanize us into competing racial factions"); *Miller v. Johnson*, 515 U.S. 900, 921-28 (1995) (majority-minority district added for §5 compliance was unconstitutional and would "demand the very racial stereotyping the Fourteenth Amendment forbids"); *Bush v. Vera*, 517 U.S. 952, 979-81 (1996) (plurality) (majority-minority districts drawn for §2 compliance were unconstitutional because they "exhibit a level of racial manipulation that exceeds what §2 could justify"); *Abbott v. Perez*, 138 S. Ct. 2305, 2334-35 (2018) (majority-minority district drawn for §2

[5] The "core" and "sometimes" Black Belt counties are listed at App.20 n.7.

compliance "to bring the Latino population back above 50%" was "an impermissible racial gerrymander"); *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1247-49 & n.1 (2022) (per curiam) (insufficient evidence that majority-minority district added for §2 compliance could pass strict scrutiny). Earlier today, the District Court denied the Secretary's motion for a stay pending appeal. *See* App.623; *see also* Fed. R. App. P. 8.

Secretary Allen thus respectfully requests a ruling from this Court as soon as practicable. In the last appeal, this Court held the appeal in abeyance within one day of the filing of the motion to stay. *See* Order of January 28, 2022, *Caster v. Merrill*, No. 22-10272.

BACKGROUND

A. In 2021, three sets of Plaintiffs filed lawsuits challenging Alabama's 2021 congressional redistricting plan. *See Allen*, 143 S. Ct. at 1502. The *Milligan* and *Caster* Plaintiffs moved to preliminarily enjoin the use of the 2021 Plan because it likely violated §2. *Id.* From day one, their cases centered on Alabama's treatment of the Black Belt.[6] The Black Belt is named for its "fertile soil" and is "defined by its 'historical boundaries'—namely, the group of 'rural counties plus Montgomery County in the central part of the state.'" *Allen*, 143 S. Ct. at 1505, 1511 n.5. The crux of Plaintiffs' challenge was that the Black Belt had been dispersed into too many districts, and the crux of the State's defense

[6] *Caster* Br. 15-16; *Milligan* Br. 1; *id.* at 39 (Alabama's 'inconsistent treatment' of Black and White communities [wa]s 'significant evidence' of a § 2 violation."); *Milligan*, 2:21-cv-1530, ECF 94 at 15 (discussing State's choice "to preserve one set of communities of interest—most or all of which are majority white—at the expense of respecting majority-Black communities of interest like the Black Belt and Montgomery County"); *id.*, ECF 59 at 9; *id.*, ECF 84 at 17.

was that it was lawful to maintain longstanding district lines for race-neutral reasons. *See id.* at 1505.

The District Court concluded that Plaintiffs' 11 illustrative plans, along with evidence on the other *Gingles* factors, sufficed to establish a likely §2 violation and preliminarily enjoined the State from using the 2021 Plan. *Singleton*, 582 F. Supp. at 936. The State appealed *Caster* to this Court and sought a stay pending appeal, and the State appealed *Milligan* to the Supreme Court and sought a stay pending appeal. This Court held the *Caster* appeal in abeyance, and the Supreme Court stayed the preliminary injunction and granted certiorari before judgment in *Caster*. *Merrill v. Milligan*, 142 S. Ct. 879 (2022). Later, the Supreme Court affirmed in *Caster* and *Milligan* that Plaintiffs established a likely §2 violation. *Allen*, 143 S. Ct. at 1517.

The Supreme Court concluded that Plaintiffs' plans were on par with the State's according to the traditional criteria. *See id.* at 1504-05. For example, on communities of interest, Plaintiffs' maps were "reasonably configured because," while they split the Gulf, "they joined together a different community of interest" in the Black Belt, which 2021 Plan had split. *Id.* at 1505. Crucially, there would "be a split community of interest in both" the State's 2021 Plan and Plaintiffs' alternatives. *Id.*

With respect to constitutional issues, four Justices rejected Alabama's argument that race predominated in the *Caster* Plaintiffs' expert's illustrative plans, without addressing the *Milligan* expert's illustrative plans. *Id.* at 1511-12 (op. of Roberts, C.J.); *see id.* at 1529-30 (Thomas, J., dissenting). The opinion reasoned that the *Caster* plans were

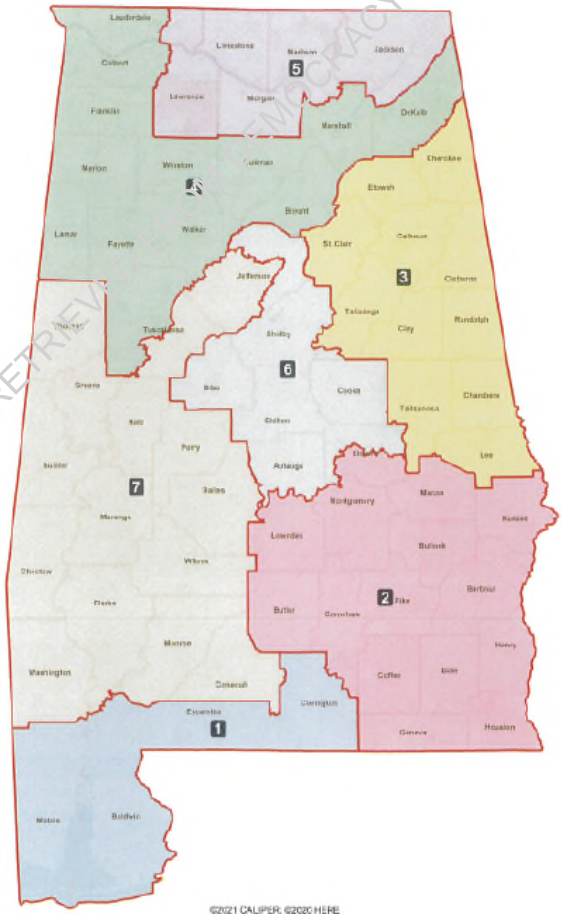
race-conscious but not race-predominant. *Id.* at 1511-12 (op. of Roberts, C.J.). The Court understood those illustrative plans as treating the Black Belt as "a '*historical* feature' of the State," to be "defined by its 'historical boundaries,'" "not a demographic one.'" *Id.*

B. One week after *Allen*, the State informed the District Court that the "Legislature intend[ed] to enact a new congressional redistricting plan that w[ould] repeal and replace the 2021 Plan." App.18. On June 27, 2023, the Governor called a special session of the Legislature to enact new districting legislation. App.92. The Legislature considered testimony on communities of interest and took documentary evidence. App.74.[7] The resulting legislation identified the Black Belt, Gulf Coast, and Wiregrass as communities of interest that should be kept together to the fullest extent possible. Ala. Code §17-14-70.1(4)(d). It was undisputed that the Black Belt is a community of interest based on its historic boundaries. App.19 n.7; *see also Allen*, 143 S. Ct. at 1511 n.5. The enacted statute includes express findings fact supporting that the Gulf Coast and Wiregrass are communities of interest too. Ala. Code §17-14-70.1(4)(f), (g).[8]

[7] *See, e.g.*, *Milligan*, 2:21-cv-1530, ECF 220-1; ECF 266-1 through 266-23.

[8] Evidence supporting the findings was before the District Court. *E.g., id.*, ECF 220-5, at 8, 10, 23 (detailing the hundreds of thousands of jobs and billions of dollars supported by the Port Authority in the Gulf Coast); *id.*, ECF 220-3 (evidence detailing the South Alabama Regional Planning Commission's five-year Comprehensive Economic Development Strategy Plan for the Gulf Coast); *see also* Ala. Code §11-85-51(b) (statute binding Mobile, Baldwin, and Escambia Counties together in SARPC in recognition of "community of interest"); *Milligan* ECF 220-2 at 24:14-25:7, 25:14-21, 26:5-25 (former Mayor of Dothan testifying on the importance of keeping the Wiregrass's communities together).

With that new legislative record before it, the Legislature passed, and the Governor signed into law, new redistricting legislation that repealed the 2021 Plan and replaced it with the 2023 Plan. Now, the core 18 Black Belt Counties are kept together in two districts. Not a single Black Belt county is split between districts, and Montgomery County is kept whole in District 2. The Gulf Coast counties are kept together in District 1. And all but one of the nine Wiregrass counties are kept together in District 2. The ninth (Covington County) is necessarily split between Districts 1 and 2 to allow District 1 to meet equal population and contiguity requirements without having to split counties in the Black Belt. Ala. Code § 17-14-70.1(g)(3).



C. Plaintiffs submitted their own proposal to the Legislature. App.75 & n.16. The Legislature rejected that proposal, and the *Milligan* and *Caster* Plaintiffs have since waived it as a *Gingles I* map. App.75 n.16.

D. Before the special session, the State explained that if a new plan was enacted, the only question that would remain before the District Court is whether that plan violated federal law anew.[9] After Alabama enacted the 2023 Plan, Plaintiffs returned to the District Court to object. The court then told the parties that "th[e] remedial hearing" regarding those objections would be "limited to the essential question whether the 2023 Plan complies with the order of this Court, affirmed by the Supreme Court, and with Section Two of the Voting Rights Act."[10]

At no point as part of their "objections" did the *Milligan* or *Caster* Plaintiffs present any new illustrative plans. The *Milligan* Plaintiffs argued that the 2023 Plan did not remedy the 2021 Plan's §2 violation "because it does not include an additional opportunity district." App.65. The *Caster* Plaintiffs argued "[t]he demographic statistics" of the 2023 Plan "speak for themselves."[11]

The State responded, explaining that the 2023 Plan was a response to Plaintiffs' arguments that the Black Belt must be unified into two congressional districts.[12] The State explained how the 2023 Plan accomplishes that goal without sacrificing the Gulf

[9] *Caster*, No. 2:21-cv-1536, ECF 180-1 at 44-45.
[10] *Milligan*, 2:21-cv-1530, ECF 203 at 3-4.
[11] *Caster*, No. 2:21-cv-1536, ECF 179 at 7.
[12] *Milligan*, 2:21-cv-1530, ECF 220.

and Wiregrass communities of interest, county splits, or compactness.[13] Plaintiffs argued that the remedial hearing should be limited to the question whether the 2023 Plan creates a second majority-black district.[14]

At the hearing, the Court asked the State how the 2023 Plan could comply with §2 without adding a majority- or nearly-majority black district. *See* App.530, 607-09, 617. The State said the redrawn districts were "as close as you could get without violating the Constitution" and "without violating *Allen*." App.617.

E. The District Court enjoined the 2023 Plan because it did not create a second majority-black district. App.3, 6. The court described that decision as resting on "two separate, independent, and alternative grounds." App.129. But both grounds boil down to the same thing: only a plan with two majority- or nearly majority-black districts would have been good enough. The court first held that the 2023 Plan fell short of that "necessary remedy," regardless of the 2023 Plan's changes (or its virtues under traditional criteria). App.6. At times, the court used the language "Black-opportunity district," which the court defined to mean a district with "a Black 'voting-age majority or something quite close to it.'" App.134-37. With respect to its second holding, the District Court ended in the same place. The 2023 Plan violates §2 anew because it "perpetuate[d] the vote dilution" in the 2021 Plan by failing to add another majority-black district.

[13] *Id.* The State submitted more than 1,000 pages of evidence in support. All such evidence is on the electronic docket in *Milligan* at ECF 220-1 through ECF 220-18, ECF 224-1, and ECF 266.

[14] *Milligan*, 2:21-cv-1530, ECF 233 at 8, 12; *Caster*, No. 2:21-cv-1536, ECF 201 at 8, 12.

App.161-62, 170, 191. To do so, Alabama *must* "split the Gulf Coast" to combine black voters from the Gulf Coast with black voters in the Black Belt. App.166.

Secretary Allen moved for a stay pending appeal on the same day. On September 11, 2023, the District Court denied the stay. App.623. Meanwhile, remedial proceedings are underway. The court has directed a special master to propose three remedial plans and a report and recommendation by no later than September 25, 2023. App.223-24. Each plan shall include "'either an additional majority-Black congressional district" "'or something quite close to it.'" App.224; App.135. Objections to the proposed plans are due three days later, and a hearing will be held October 3, 2023, if necessary. App.230. Secretary Allen will apprise this Court of any relevant remedial developments.

ARGUMENT

When deciding whether to stay the district court's preliminary injunction, this Court reviews underlying legal conclusions *de novo* and findings of fact for clear error. *Swain v. Junior*, 958 F.3d 1081, 1088 (11th Cir. 2020). The Court considers: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* The State's "interest and harm merge with the public interest." *Id.*

I. This Court will likely reverse the preliminary injunction of the 2023 Plan.

A. The District Court's framing did not give due regard to the 2023 Plan as lawfully enacted legislation.

The District Court first erred by misconceiving the task before it. The court expressly rejected that Plaintiffs, as part of their new challenge to the new 2023 Plan, were required to prove "Section Two liability under *Gingles*" with respect to that new plan. App.116-129. It was irrelevant how much the 2023 Plan deviated from the 2021 Plan or Plaintiffs' old plans. App.5-6, 116-17, 134-37, 165-66. Plaintiffs' challenge to the 2023 Plan was instead reduced to whether the 2023 Plan ensured that Democrats are likely to win two congressional districts. App.5-6, 116-17, 134-37.

Contrary to that framing, when a State successfully enacts new redistricting legislation, even in response to litigation, the new legislation is the "governing law unless it, too, is challenged and found to violate federal law." *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978) (op. of White, J.). The State has the "'freedom'" to "'devise substitute[]'" redistricting legislation however it wishes, so long as it complies with federal law. *Id.* at 540. That new legislation is entitled the presumption of legality, and Plaintiffs bear the burden of proving its unlawfulness. *Abbott*, 138 S. Ct. at 2324-25 (2018).

This Court has rejected the District Court's approach. A district court must not simply take "the findings that made the original electoral system infirm and transcribe[] them to the new electoral system." *Dillard v. Crenshaw Cnty.*, 831 F.2d 246, 249-50 (11th

Cir. 1987). "To find a violation of Section 2, there must be evidence that the new plan denies equal access to the political process." *Id.* at 250.

The District Court flouted those general remedial principles. Instead of asking "whether the proffered remedial plan…fails to meet the same standards applicable to [the] original challenge," *McGhee v. Granville Cnty.*, 860 F.2d 110, 115 (4th Cir. 1988), the District Court asked whether it created a second race-based district, App.5-6, 116-129, 134-37. The "district court transferred the historical record but incompletely assessed the differences between the new and old proposals." *Dillard*, 831 F.2d at 250.

The District Court's error infected its "alternative" holding that Plaintiffs' old illustrative plans were enough to reject the 2023 Plan. *See supra*, pp.8-9. It declined to defer to legislative findings and new policy choices in the 2023 Plan based on the same flawed premise that the 2023 Plan does not add a second majority-black district. App.161-62, 164, 168-70. But "'[p]ast discrimination'" can't justify not deferring to the Legislature, *see Abbott*, 138 S. Ct. at 2324, based on *preliminary* findings about a repealed statute, *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 394-95 (1981). The District Court should have deferred to the 2023 Plan. *See Upham v. Seamon*, 456 U.S. 37, 42 (1982).

B. The District Court misinterpreted the Voting Rights Act to require a second majority-Black district as the only way the 2023 Plan could comply with §2.

The District Court enjoined the 2023 Plan because the State did not racially gerrymander a second majority-black district. That was error. No State is required to violate "'traditional districting principles such as maintaining communities of interest'" to

"create, on predominantly racial lines," a second majority-black district. *Abrams v. Johnson*, 521 U.S. 74, 92 (1997). Section 2 "never requires" that. *Allen*, 143 S. Ct. at 1510 (cleaned up). But no plan would have been good enough in the District Court's view unless it contained a second majority-black district "or something quite close to it." App.6. No fewer than ten times, the District Court repeated that the 2023 Plan "perpetuates" the likely vote dilution of the 2021 Plan because it did not contain a second majority-black district. App.116, 139, 160-62, 164, 170, 173, 190. Without a stay, the District Court's rudimentary rule will be applied to impose a race-segregated plan that sacrifices the State's redistricting principles. *But see Upham*, 456 U.S. at 42.

C. The District Court did not require Plaintiffs to prove that there were "reasonably configured" alternatives to the 2023 Plan.

The District Court also included what it called an "alternative" holding that "a fresh and new *Gingles* analysis [of] the 2023 Plan still meets the same fate"—that it fails without a second majority-black district. App.130. But the court never held Plaintiffs to their standard of proof, requiring a showing that there was likely a discriminatory effect in the 2023 Plan akin to that in the 2021 Plan. *See* App.139-178. Instead, the court concluded that Plaintiffs' illustrative plans were reasonably configured in 2021-2022 and so are still reasonably configured today. *See, e.g.*, App.149-150.

But the Plaintiffs added no new maps showing that the newly enacted 2023 Plan likely denies equal access to the political process—and it isn't enough that the old plan likely did. Answering whether the *2023 Plan* violates §2 requires (1) an "'intensely local

appraisal'" of the 2023 Plan, *Allen*, 143 S. Ct. at 1503, and (2) a comparison of the 2023 Plan to at least one illustrative plan, *id.* at 1507.

With the 2023 Plan, the Legislature "eliminat[ed]" the unlawful features of the repealed plan through "race-neutral means." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Affairs*, 576 U.S. 519, 545 (2015). The likely violation in the repealed plan was its alleged "crack[ing]" of "majority-Black communities of interest" in the Black Belt and Montgomery,[15] for the sake of core retention, *Allen*, 143 S. Ct. at 1505. Shown below, the new legislation that unifies communities of interests better than any of Plaintiffs' illustrative plans, while also improving districts across other criteria statewide.[16]

	2023 Plan	2021 Plan	Duchin A	Duchin B	Duchin C	Duchin D	Cooper 1	Cooper 2	Cooper 3	Cooper 4	Cooper 5	Cooper 6	Cooper 7
Districts w/ 18 Core Black Belt Counties	2	3	3	4	3	3	4	4	3	4	4	5	3
Districts with Gulf Coast Counties	1	1	2	2	2	2	2	2	2	2	2	2	2
Districts with Wiregrass Counties	2	1	2	3	2	2	2	2	3	2	3	3	3
Districts with Montgomery County	1	2	1	1	1	1	2	2	1	2	2	1	1
County Splits	6	6	9	7	9	6	6	7	6	6	6	7	5

[15] *See Milligan* Br. 5, 16, 39.

[16] *Milligan*, 2:21-cv-1530, ECF 220-12 at 9-12 (compactness and county splits); *id.*, ECF 68-5 at 7, 10 (Duchin Plans' lines and BVAP); *Caster*, No. 2:21-cv-1536, ECF 48 at 23-33 (Cooper Plans 1-6 lines and BVAP); *id.*, ECF 65 at 2-3 (Cooper Plan 7 lines and BVAP); App.21 (2021 Plan and 2023 Plan BVAP for Districts 2 and 7); App.20 (2023 Plan lines); App.32 (2021 Plan lines); App.24 n.8 (describing Gulf Coast and Wiregrass); App.95 (describing Black Belt).

	2023 Plan	2021 Plan	Duchin A	Duchin B	Duchin C	Duchin D	Cooper 1	Cooper 2	Cooper 3	Cooper 4	Cooper 5	Cooper 6	Cooper 7
Reock Average	0.411	0.389	0.363	0.358	0.335	0.384	0.320	0.327	0.324	0.325	0.283	0.306	0.400
Reock (Least Compact District)	0.285 (CD1)	0.248 (CD5)	0.192 (CD1)	0.185 (CD1)	0.185 (CD1)	0.190 (CD1)	0.188 (CD1)	0.187 (CD1)	0.185 (CD1)	0.185 (CD1)	0.171 (CD1)	0.212 (CD1)	0.186 (CD1)
Polsby Popper Average	0.282	0.222	0.256	0.282	0.255	0.249	0.180	0.176	0.183	0.214	0.183	0.159	0.211
Polsby Popper (Least Compact District)	0.185 (CD6)	0.154 (CD6)	0.129 (CD1)	0.156 (CD1)	0.149 (CD2)	0.132 (CD1)	0.134 (CD7)	0.115 (CD2)	0.124 (CD4)	0.131 (CD6)	0.112 (CD7)	0.098 (CD6)	0.129 (CD7)
District 7 BVAP	50.65%	55.3%	51.5%	50.24%	53.5%	51.73%	53.28%	53.79%	50.09%	50.09%	50.09%	51.09%	50.31%
District 2 BVAP	39.93%	30.6%	51.37%	51.06%	50.06%	50.05%	50.09%	50.28%	50.27%	50.07%	50.24%	51.28%	51.88%

Contrary to the District Court, there is no longer "'a split community of interest in both'" the State's plan and Plaintiffs' old illustrative plans. App.166. Still, the District Court held that the Gulf Coast *must* be split to attain the District Court's goal of two majority-black districts. App.166. As the court saw it, the 2023 Plan "explains the reason why there remains a need to split the Gulf Coast: splitting the Black Belt as the 2023 Plan does dilutes Black voting strength"—meaning it does not result in a majority-black district. *Id.*[17] That conclusion is fundamentally flawed.

[17] The District Court acknowledged that there was substantial new evidence about the Gulf as a community of interest. App.159-60. The District Court clearly erred by describing that community of interest as "overlapping" with the Black Belt. App.166. The Black Belt is defined by its historic grouping of counties, none of which include the Gulf-coast counties of Baldwin and Mobile. *See Allen*, 143 S. Ct. at 1511 n.5; *see also* App.19-20 n.7; App.95.

First, the Supreme Court already said in *Allen* that §2 does not require "flouting traditional criteria" in pursuit of proportionality. 143 S. Ct. at 1509. Section 2 "never require[s] adoption of districts that violate traditional redistricting principles." *Allen*, 143 S. Ct. at 1510.

Second, that command transforms this case into one about racial outcomes alone, contrary to *Allen*. In *Allen*, the Supreme Court did not fault the State's treatment of the Black Belt in those overtly racial terms. Rather, *Allen* was premised on defining the Black Belt as "a '*historical* feature' of the State, not a demographic one." 143 S. Ct. at 1510-11 n.5. After *Allen*, the District Court veered off course. The Black Belt is now, in that court's view, a community characterized by features "many of which relate to race." App.156, 160-65, 167; *see also* App.161 (rejecting the "State's assertion that the Black Belt is a 'nonracial' community of interest").

Third, the District Court couldn't point to a "[d]eviation" between the *2023 Plan* and any illustrative plan. *Allen*, 143 S. Ct. at 1507; *compare, e.g.*, *id.* at 1504; *id.* at 1518 n.2 (Kavanaugh, J., concurring). Plaintiffs' themselves described the requirement that a §2 Plaintiff must show that their illustrative plans "meet or beat" the 2023 Plan on the governing traditional principles the Legislature chose. *See, e.g.*, Oral Arg. Tr. 67, 83; *Singleton*, 582 F. Supp. 3d at 979, 1006, 1012. The District Court relied on its comparisons between the old illustrative plans and the *2021 Plan*, App.147-49; IV.B, but those old plans do not respect the Legislature's neutral districting principles "at least as well as

Alabama's [new] redistricting plan," *Allen*, 143 S. Ct. at 1518 n.2 (Kavanaugh, J., concurring).

D. Constitutional avoidance compels a stay pending appeal.

In just a few paragraphs, the District Court rejected constitutional arguments that §2 cannot require Alabama to subordinate neutral redistricting principles to the race-based goal of enacting a second majority-black district. *See* App.185-88. If left undisturbed, the District Court's understanding of §2 will require the intentional creation of race-based districts to "extend indefinitely into the future." *See Allen*, 143 S. Ct. at 1519 (Kavanaugh, J., concurring). For the following four reasons, constitutional avoidance requires rejecting the District Court's mistaken view.

1. First, nothing in *Allen* "diminish[ed] or disregard[ed]" the persistent concern "that §2 may impermissibly elevate race in the allocation of political power within the States." *Allen*, 143 S. Ct. at 1517. *Allen* said that "[f]orcing proportional representation is *unlawful* and inconsistent with this Court's approach to implementing § 2." *Id.* at 1509 (emphasis added). The upshot of *Allen* is that "§2 never requires adoption of districts that violate traditional redistricting principles," *id.* at 1510 (cleaned up), because §2 could not *constitutionally* require such a thing. But here, the District Court redefined "compliance with Section Two" to mean attaining a second majority-black district, as distinct from a map that fairly applies principles of communities of interest, county splits, and compactness. App.149. With respect to each of those neutral principles, the District Court explicitly held that it didn't matter if the alternative plans fared worse

because, "fundamentally," the 2023 Plan didn't create a second majority-black district. *See* App.149, 164. If the Legislature had adopted any of Plaintiffs' illustrative proposals, there'd be no doubt that neutral principles "came into play only after the race-based decision had been made." *Shaw v. Reno*, 517 U.S. 899, 907 (1996) (*Shaw II*).

2. Second, imposition of the District Court's race-based remedy cannot be squared with the Constitution. *All* race-based government action must satisfy strict scrutiny. *SFFA, Inc. v President & Fellows of Harvard College* , 143 S. Ct. 2141, 2161 (2023). "Because "the Equal Protection Clause restricts consideration of race and the VRA demands consideration of race," a §2 remedy that would require the State to put race first and other criteria second must satisfy strict scrutiny. *See Abbott*, 138 S. Ct. at 2315. The Supreme Court has never held that §2 compliance is a compelling government interest that can justify race-first redistricting. *See*, *e.g.*, *Abbott*, 138 S. Ct. at 2315. And the 2023 Plan is a more narrowly tailored means of complying with §2 than the District Court's race-first remedy.

3. Third, the District Court would require the State to intentionally create a district based on race. App.3, 6. That race-based action "fail[s] to comply with the twin commands of the Equal Protection Clause that race may never be used as a 'negative' and that it may not operate as a stereotype." *Harvard*, 143 S. Ct. at 2168.

The District Court's order uses race as a negative because it rejected the 2023 Plan based on the pernicious fiction that black Alabamians across the State were the relevant community of interest required to be districted together. *See* App.157-161, 164-

166. The Legislature's finding that the Gulf should be kept together, Ala. Code §17-14-70.1(d), (f)(1)-(10), was set aside because Plaintiffs' expert said "'Black Mobile'" doesn't have enough in common with "whiter Baldwin County," App.157-58. So white voters *must* be separated from their black neighbors and black voters in the Gulf must be districted with black voters hundreds of miles away. App.165-66.

Likewise, the District Court's remedial order requires racial stereotyping. This Court has held that governments may not operate on the belief that members of racial minorities "'always (*or even consistently*) express some characteristic minority viewpoint on any issue.'" *Harvard*, 143 S. Ct. at 2165 (emphasis added). Subordinating "nonracial communities of interest" to the goal of a second majority-black district indulges that "prohibited assumption." *League of United Latin American Cities (LULAC) v. Perry*, 548 U.S. 399, 433 (2006).

4. Fourth, the District Court's rule has no logical endpoint. The State would have to continue intentionally creating a second majority-black district in lieu of keeping together communities of interest until "'Black Mobile'" has enough in common with other parts of the Gulf, *see* App.157-61. So long as black voters "'express some characteristic minority viewpoint'" "consistently," *see Harvard*, 143 S. Ct. at 2165, §2 requires "combin[ing] two farflung segments of a racial group," *LULAC*, 548 U.S. at 433-34. There's "no end in sight," *see Harvard*, 143 S. Ct. at 2166.

But just as this Court held that "race-based" affirmative action in education "at some point" had to "end," *Harvard*, 143 S. Ct. at 2165-66, 2170-73 (majority), the same

principle applies to affirmative action in districting. "[E]ven 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." *Allen*, 143 S. Ct. at 1519 (Kavanaugh, J., concurring).

II. The equites favor a stay.

A stay of the District Court's injunction is necessary to prevent the irreparable harm of replacing lawfully enacted redistricting legislation with a court-drawn plan. *See, e.g.*, *Abbott*, 138 S. Ct. at 2318-19; *Karcher*, 455 U.S. at 1306-07 (Brennan, J., in chambers). Precluding the State from enforcing its statute is irreparable harm. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers); *Abbott*, 138 S. Ct. at 2324 n.17.

The balance of harms supports a stay. Race-based redistricting at the expense of traditional redistricting principles "bears an uncomfortable resemblance to political apartheid." *Shaw I*, 509 U.S. at 647. It sends an "equally pernicious" message to elected representatives of those districts "that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Id.* at 648. Race-based voter assignments "cause society serious harm." *Miller*, 515 U.S. at 912.

A stay will also further the public interest. The 2023 Plan reflects valid State policies to which the District Court should have deferred. *Wise*, 437 U.S. at 539-40 (op. of White, J.) (collecting cases). Like any duly enacted statute, the 2023 Plan "is in itself a declaration of public interest." *Virginian Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515, 552 (1937); *see also Berman v. Parker*, 348 U.S. 26, 32 (1954).

CONCLUSION

This Court should stay the preliminary injunction pending appeal. Alternatively, this Court should hold this appeal, including the motion to stay in abeyance, as it did in earlier litigation. An order holding the appeal in abeyance would allow the Supreme Court to consider *Caster* alongside *Milligan*, as it did in *Allen*.

Dated: September 11, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with Rule 27(d)(2) because it contains 5,197 words, excluding the parts that can be excluded. This motion complies with Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: September 11, 2023

/s/ Edmund G. LaCour Jr.
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CERTIFICATE OF SERVICE

I filed this brief with the Court via ECF, which will electronically notify all parties.

Dated: September 11, 2023

/s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
Counsel for Secretary of State Allen

No. 23-12923-D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MARCUS CASTER, et al.,
Plaintiffs-Appellees,

v.

HON. WES ALLEN, in his Official Capacity as the Secretary of State of Alabama,
Defendant-Appellant.

On Interlocutory Appeal from the United States
District Court for the Northern District of Alabama
No. 2:21-cv-1536-AMM

APPENDIX TO TIME SENSITIVE MOTION FOR STAY PENDING APPEAL: VOLUME 1 OF 3

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BOBBY SINGLETON, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No.: 2:21-cv-1291-AMM**
	)	
WES ALLEN, *in his official capacity as Alabama Secretary of State*, *et al.*,	)	**THREE-JUDGE COURT**
	)	
Defendants.	)	

EVAN MILLIGAN, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No.: 2:21-cv-1530-AMM**
	)	
WES ALLEN, *in his official capacity as Alabama Secretary of State*, *et al.*,	)	**THREE-JUDGE COURT**
	)	
Defendants.	)	

Before MARCUS, Circuit Judge, MANASCO and MOORER, District Judges.

PER CURIAM:

INJUNCTION, OPINION, AND ORDER

These congressional redistricting cases have returned to this Court after the Supreme Court of the United States affirmed in all respects a preliminary injunction this Court entered on January 24, 2022. *See Allen v. Milligan*, 143 S. Ct. 1487, 1498, 1502 (2023).

These cases allege that Alabama's congressional electoral map is racially gerrymandered in violation of the United States Constitution and/or dilutes the votes of Black Alabamians in violation of Section Two of the Voting Rights Act of 1965, 52 U.S.C. § 10301 ("Section Two"). *See Singleton v. Allen*, No. 2:21-cv-1291-AMM (asserting only constitutional challenges); *Milligan v. Allen*, No. 2:21-cv-1530-AMM (asserting both constitutional and statutory challenges); *Caster v. Allen*, No. 2:21-cv-1536-AMM (asserting only statutory challenges).

Milligan is now before this three-judge Court, and *Caster* is before Judge Manasco alone, for remedial proceedings.[1] The map this Court enjoined ("the 2021 Plan") included one majority-Black district: District 7. District 7 became a majority-Black district in 1992 when a federal court drew it that way in a ruling that was summarily affirmed by the Supreme Court. *Wesch v. Hunt*, 785 F. Supp. 1491, 1497–1500 (S.D. Ala. 1992) (three-judge court), *aff'd sub nom. Camp v. Wesch*, 504 U.S. 902 (1992), *and aff'd sub nom. Figures v. Hunt*, 507 U.S. 901 (1993).

After an extensive seven-day hearing, this Court concluded that the 2021 Plan likely violated Section Two and thus enjoined the State from using that plan in the 2022 election. *See Milligan* Doc. 107; *Allen*, 143 S. Ct. at 1502.[2]

[1] *Singleton* remains before this three-judge Court but is not a part of the Section Two remedial proceedings. *See infra* at Part I.C.5.

[2] When we cite an order or other filing that appears in more than one of these cases, for the reader's ease we cite only the document filed in the *Milligan* case.

Based on controlling precedent, we held that "the appropriate remedy is a congressional redistricting plan that includes either an additional majority-Black congressional district, or an additional district in which Black voters otherwise have an opportunity to elect a representative of their choice." *Milligan* Doc. 107 at 5.[3] We observed that "[a]s the Legislature consider[ed remedial] plans, it should be mindful of the practical reality, based on the ample evidence of intensely racially polarized voting adduced during the preliminary injunction proceedings, that any remedial plan will need to include two districts in which Black voters either comprise a voting-age majority or something quite close to it." *Id.* at 6.

Because federal law dictates that the Alabama Legislature should have the first opportunity to draw a remedial plan, we gave the Legislature that opportunity. *See id*. The Secretary of State and legislative defendants ("the Legislators" and collectively, "the State") appealed. *Allen*, 143 S. Ct. at 1502.

On June 8, 2023, the Supreme Court affirmed the preliminary injunction. *See id*. The Supreme Court "s[aw] no reason to disturb th[is] Court's careful factual findings, which are subject to clear error review and have gone unchallenged by Alabama in any event." *Id.* at 1506. Likewise, the Supreme Court concluded there was no "basis to upset th[is] Court's legal conclusions" because we "faithfully

[3] Page number pincites in this order are to the CM/ECF page number that appears in the top right-hand corner of each page, if such a page number is available.

applied [Supreme Court] precedents and correctly determined that, under existing law, [the 2021 Plan] violated" Section Two. *Id*.

The State then requested that this Court allow the Legislature approximately five weeks — until July 21, 2023 — to enact a new plan. *Milligan* Doc. 166. All parties understood the urgency of remedial proceedings: the State previously advised this Court that because of pressing state-law deadlines, Secretary Allen needs a final congressional districting map by "early October" for the 2024 election. *Milligan* Doc. 147 at 3.[4] In the light of that urgency, and to balance the deference given to the Legislature to reapportion the state with the limitations set by *Purcell v. Gonzalez*, 549 U.S. 1, 4–8 (2006), we delayed remedial proceedings to accommodate the Legislature's efforts, entered a scheduling order, and alerted the parties that any remedial hearing would commence on the date they proposed: August 14, 2023. *Milligan* Doc. 168.

On July 21, 2023, the Legislature enacted and Governor Ivey signed into law a new congressional map ("the 2023 Plan"). Just like the 2021 Plan enjoined by this Court, the 2023 Plan includes only one majority-Black district: District 7. *Milligan* Doc. 186-1 at 2.

All Plaintiffs timely objected to the 2023 Plan and requested another

[4] In a later filing, the State advised the Court that Secretary Allen needs a final map by October 1, 2023. *Milligan* Doc. 162 at 7.

injunction. *See Singleton* Doc. 147; *Milligan* Doc. 200; *Caster* Doc. 179. The *Milligan* and *Caster* Plaintiffs argue that the 2023 Plan did not cure the unlawful vote dilution we found because it did not create a second district in which Black voters have an opportunity to elect a candidate of their choice (an "opportunity district"). *Milligan* Doc. 200 at 16–23; *Caster* Doc. 179 at 8–11. Separately, the *Milligan* and *Singleton* Plaintiffs argue that the 2023 Plan runs afoul of the U.S. Constitution. The *Milligan* Plaintiffs contend that the State intentionally discriminated against Black Alabamians in drawing the 2023 Plan, in violation of the Equal Protection Clause of the Fourteenth Amendment. *Milligan* Doc. 200 at 23–26. And the *Singleton* Plaintiffs argue that the 2023 Plan is an impermissible racial gerrymander — indeed, just the latest in a string of racially gerrymandered plans the State has enacted, dating back to 1992. *Singleton* Doc. 147 at 13–27.

The record before us thus includes not only the evidentiary materials submitted during the preliminary injunction proceedings, but also expert reports, deposition transcripts, and other evidence submitted during this remedial phase. *See Singleton* Docs. 147, 162, 165; *Milligan* Docs. 200, 220, 225; *Caster* Docs. 179, 191, 195; Aug. 14 Tr. 92–93; Aug. 15 Tr. 24–25. We also have the benefit of the parties' briefs, a hearing, three *amicus* briefs, and a statement of interest filed by the Attorney General of the United States. *Milligan* Docs. 199, 234, 236, 260.

The State concedes that the 2023 Plan does not include an additional

opportunity district. Indeed, the State has explained that its position is that notwithstanding our order and the Supreme Court's affirmance, the Legislature was not required to include an additional opportunity district in the 2023 Plan. Aug. 14 Tr. 159–64.

That concession controls this case. Because the 2023 Plan does not include an additional opportunity district, we conclude that the 2023 Plan does not remedy the likely Section Two violation that we found and the Supreme Court affirmed. We also conclude that under the controlling Supreme Court test, the *Milligan* Plaintiffs are substantially likely to establish that the 2023 Plan violates Section Two. As we explain below, our conclusions rest on facts the State does not dispute.

Because the record establishes the other requirements for relief — that the Plaintiffs will suffer irreparable injury if an injunction does not issue, the threatened injury to the Plaintiffs outweighs the damage an injunction may cause the State, and an injunction is not adverse to the public interest — under Federal Rule of Civil Procedure 65(d) we **PRELIMINARILY ENJOIN** Secretary Allen from conducting any elections with the 2023 Plan.

Under the Voting Rights Act, the statutory framework, and binding precedent, the appropriate remedy is, as we already said, a congressional districting plan that includes either an additional majority-Black district, or an additional district in which Black voters otherwise have an opportunity to elect a representative of their

choice. *See, e.g.*, *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (plurality opinion); *Cooper v. Harris*, 581 U.S. 285, 306, (2017). We discern no basis in federal law to accept a map the State admits falls short of this required remedy.

"Redistricting is primarily the duty and responsibility of the State," *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (internal quotation marks omitted), but this Court "ha[s] its own duty to cure" districts drawn in violation of federal law, *North Carolina v. Covington*, 138 S. Ct. 2548, 2553 (2018). We are three years into a ten-year redistricting cycle, and the Legislature has had ample opportunity to draw a lawful map.

Based on the evidence before us, including testimony from the Legislators, we have no reason to believe that allowing the Legislature still another opportunity to draw yet another map will yield a map that includes an additional opportunity district. Moreover, counsel for the State has informed the Court that, even if the Court were to grant the Legislature yet another opportunity to draw a map, it would be practically impossible for the Legislature to reconvene and do so in advance of the 2024 election cycle. Accordingly, the Special Master and cartographer are **DIRECTED** to commence work forthwith on a remedial map. Instructions shall follow by separate order.

Because we grant relief on statutory grounds, and "[a] fundamental and longstanding principle of judicial restraint requires that [we] avoid reaching

constitutional questions in advance of the necessity of deciding them," *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988); *see also League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 442 (2006) ("*LULAC*"); *Thornburg v. Gingles*, 478 U.S. 30, 38 (1986), we again **RESERVE RULING** on the constitutional issues raised by the *Singleton* and the *Milligan* Plaintiffs, including the *Singleton* Plaintiffs' motion for a preliminary injunction.

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We have reached these conclusions only after conducting an exhaustive analysis of an extensive record under well-developed legal standards, as Supreme Court precedent instructs. We do not take lightly federal intrusion into a process ordinarily reserved for the State Legislature. But we have now said twice that this Voting Rights Act case is not close. And we are deeply troubled that the State enacted a map that the State readily admits does not provide the remedy we said federal law requires.

We are disturbed by the evidence that the State delayed remedial proceedings but ultimately did not even nurture the ambition to provide the required remedy. And we are struck by the extraordinary circumstance we face. We are not aware of any other case in which a state legislature — faced with a federal court order declaring that its electoral plan unlawfully dilutes minority votes and requiring a plan that provides an additional opportunity district — responded with a plan that the state

concedes does not provide that district. The law requires the creation of an additional district that affords Black Alabamians, like everyone else, a fair and reasonable opportunity to elect candidates of their choice. The 2023 Plan plainly fails to do so.

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I. BACKGROUND

A. Procedural Posture

1. Liability Proceedings

On September 27, 2021, after the results of the 2020 census were released, the *Singleton* Plaintiffs filed a complaint against John Merrill, the former Secretary of State of Alabama.[5] *Singleton* Doc. 1. The *Singleton* Plaintiffs asserted that holding the 2022 election under Alabama's old congressional map ("the 2011 Plan") would violate the Equal Protection Clause of the Fourteenth Amendment because the districts were malapportioned and racially gerrymandered. *Id*. The Chief Judge of the Eleventh Circuit convened a three-judge court to adjudicate *Singleton*. *Singleton* Doc. 13.

On November 3, 2021, the Legislature passed the 2021 Plan. The next day, Governor Ivey signed the 2021 Plan into law, and the *Singleton* Plaintiffs amended their complaint to stake their claims on the 2021 Plan, asserting a racial gerrymandering claim under the Equal Protection Clause of the Fourteenth Amendment and an intentional discrimination claim under the Fourteenth and Fifteenth Amendments. *Singleton* Doc. 15 at 38–48. "The *Singleton* plaintiffs are registered voters in Alabama's Second, Sixth, and Seventh Congressional Districts

[5] On January 16, 2023, Wes Allen became the Secretary of State of Alabama. Pursuant to Federal Rule of Civil Procedure 25(d), Secretary Allen was substituted for former Secretary Merrill as a defendant in these cases. *Milligan* Doc. 161.

under the [2021] Plan; the lead plaintiff, Bobby Singleton, is a Black Senator in the Legislature." *Singleton* Doc. 88 at 10.

On the same day the *Singleton* Plaintiffs filed their amended complaint, the *Caster* Plaintiffs filed a lawsuit against Secretary Merrill. *Caster* Doc. 3. *Caster* is pending before Judge Manasco sitting alone. The *Caster* Plaintiffs challenged the 2021 Plan only under Section Two and asserted a single claim of vote dilution. *Id.* at 29–31. "The *Caster* plaintiffs are citizens of Alabama's First, Second, and Seventh Congressional Districts under the [2021] Plan." *Caster* Doc. 101 at 20.

On November 16, 2021, the *Milligan* Plaintiffs filed suit against Secretary Merrill and the Legislators, who serve as co-chairs of the Legislature's Committee on Reapportionment ("the Committee").[6] *Milligan* Doc. 1. The *Milligan* Plaintiffs asserted a vote dilution claim under Section Two, a racial gerrymandering claim under the Fourteenth Amendment, and an intentional discrimination claim under the Fourteenth Amendment. *Id.* at 48–52. "The *Milligan* plaintiffs are Black registered voters in Alabama's First, Second, and Seventh Congressional Districts and two organizational plaintiffs — Greater Birmingham Ministries and the Alabama State Conference of the National Association for the Advancement of Colored People,

[6] Former Senator Jim McClendon then served as co-chair of the Committee. Senator Steve Livingston has since become co-chair of the Committee. *See Milligan* Doc. 173. Pursuant to Federal Rule of Civil Procedure 25(d), Senator Livingston was substituted as a defendant in these cases. *Milligan* Doc. 269.

Inc. ('NAACP') — with members who are registered voters in those Congressional districts and the Third Congressional District." *Milligan* Doc. 107 at 12–13. The Chief Judge of the Eleventh Circuit convened a three-judge court to hear *Milligan* that includes the same three judges who comprise the *Singleton* Court. *Milligan* Doc. 23.

The Legislators intervened as defendants in *Singleton* and *Caster*. *See Singleton* Doc. 32; *Caster* Doc. 69.

Each set of Plaintiffs requested that this Court enjoin Alabama from using the 2021 Plan for the 2022 election. *Singleton* Doc. 1 at 47; *Milligan* Doc. 1 at 52; *Caster* Doc. 3 at 30–31; *see also Singleton* Doc. 57; *Milligan* Doc. 69; *Caster* Doc. 56. The *Singleton* Court consolidated *Singleton* and *Milligan* "for the limited purposes" of preliminary injunction proceedings; set a hearing for January 4, 2022; and set prehearing deadlines. *Milligan* Doc. 40. The *Caster* Court then set a preliminary injunction hearing for January 4, 2022 and set the same prehearing deadlines that were set in *Singleton* and *Milligan*. *Caster* Doc. 40. All parties agreed to a consolidated preliminary injunction proceeding which permitted consideration of evidence in a combined fashion.

A preliminary injunction hearing commenced on January 4 and concluded on January 12, 2022. *Allen*, 143 S. Ct. at 1502. During the hearing, this Court "received live testimony from 17 witnesses, reviewed more than 1000 pages of briefing and

upwards of 350 exhibits, and considered arguments from the 43 different lawyers who had appeared in the litigation." *Id*.

We evaluated the *Milligan* and *Caster* Plaintiffs' statutory claims using the three-part test developed by the Supreme Court in *Gingles*, 478 U.S. 30. And we preliminarily enjoined Alabama from using the 2021 Plan. *Milligan* Doc. 107. We held that under controlling precedent, "the appropriate remedy is a congressional redistricting plan that includes either an additional majority-Black congressional district, or an additional district in which Black voters otherwise have an opportunity to elect a representative of their choice." *Id.* at 5. Because we issued an injunction on statutory grounds, we declined to decide the constitutional claims of the *Singleton* and *Milligan* Plaintiffs. *Id.* at 214–17.

Because "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt," we gave the Legislature the first opportunity to draw a new map. *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978) (White, J.); *Milligan* Doc. 107 at 6. The State appealed, and the Supreme Court stayed the injunction. *Allen*, 143 S. Ct. at 1502; *Merrill v. Milligan*, 142 S. Ct. 879 (2022).

On February 8, 2022, the *Singleton* Plaintiffs moved this Court for an expedited ruling on their constitutional claims. *Singleton* Doc. 104. All other parties opposed that motion, *see Singleton* Doc. 109; *Milligan* Doc. 135; *Caster* Doc. 127,

and we denied it on the ground that we should not decide any constitutional claims prematurely, *Singleton* Doc. 114.

On April 14, 2022, we held a status conference. *See Milligan* Doc. 143. Mindful that under Alabama law, the last date candidates may qualify with major political parties to participate in the 2024 primary election is November 10, 2023, *see* Ala. Code § 17-13-5(a), we directed the State to identify the latest date by which the Secretary of State must have a final congressional districting map to hold the 2024 election, *Milligan* Doc. 145. The State advised us that the Secretary needs the map "by early October." *Milligan* Doc. 147 at 3.

On November 21, 2022, this Court ordered the parties to meet and confer and file a joint report of their positions on discovery, scheduling, and next steps. *Milligan* Doc. 153. The parties timely filed a joint report and proposed a scheduling order, which we entered. *Milligan* Docs. 156, 157.

On February 8, 2023, we held another status conference. *See Milligan* Doc. 153. We again directed the State to identify the latest date by which the Secretary required a map to hold the 2024 election. *Milligan* Doc. 161. The State responded that a new plan would need to be approved by October 1, 2023, to provide time for the Secretary to reassign voters, print and distribute ballots, and otherwise conduct the election. *Milligan* Doc. 162 at 7.

On June 8, 2023, the Supreme Court affirmed the preliminary injunction in all

respects. *See generally Allen*, 143 S. Ct. 1487. The Supreme Court then vacated its stay. *Allen v. Milligan*, 143 S. Ct. 2607 (2023).

2. Remedial Proceedings

After the Supreme Court's ruling, this Court immediately set a status conference. *Milligan* Doc. 165. Before the conference, the State advised us that "the . . . Legislature intend[ed] to enact a new congressional redistricting plan that will repeal and replace the 2021 Plan" and requested that we delay remedial proceedings until July 21, 2023. *Milligan* Doc. 166 at 2.

During the conference, the parties indicated substantial agreement on the appropriate next steps. *Milligan* Doc. 168 at 4. We delayed remedial proceedings until July 21, 2023 to accommodate the Legislature's efforts; entered a briefing schedule for any objections if the Legislature enacted a new map; and alerted the parties that if a remedial hearing became necessary, it would commence on the date they suggested: August 14, 2023. *Id*. at 4–7.

On June 27, 2023, Governor Ivey issued a proclamation that a special session of the Legislature would convene to consider the congressional districting map. *Milligan* Doc. 173-1. That same day, the Committee met, elected its co-chairs, and held its first public hearing to receive comments on potential plans. *Milligan* Doc. 173 ¶ 2.

On July 13, 2023, the Committee met and re-adopted its previous redistricting

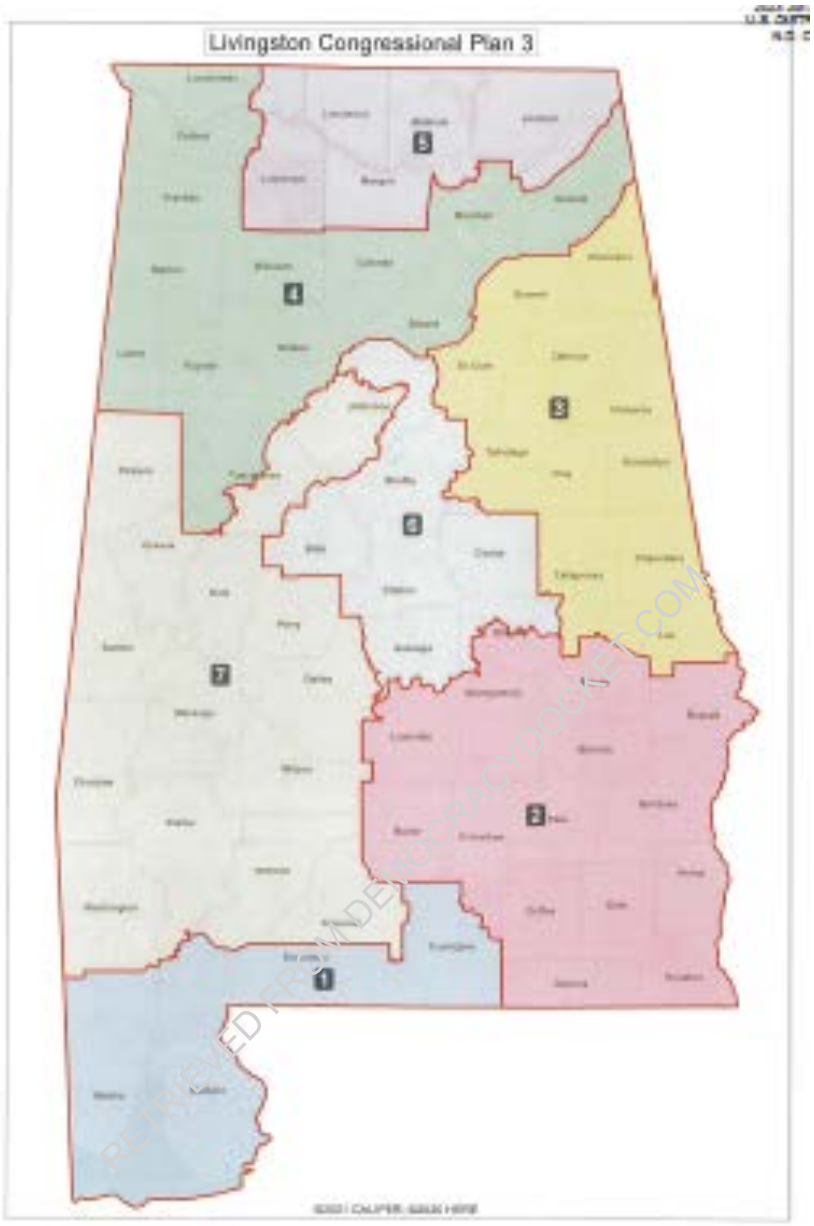
guidelines ("the guidelines"). *Milligan* Doc. 180 ¶ 1; *Milligan* Doc. 107 app. A; *Milligan* Doc. 88-23. That day, the Committee held a second public hearing to receive comments on proposed remedial plans. *Milligan* Doc. 180 ¶ 1.

The special session of the Legislature commenced on July 17, 2023. *See Milligan* Doc. 173-1. On July 20, 2023, the Alabama House of Representatives passed a congressional districting plan titled the "Community of Interest Plan." *Milligan* Doc. 251 ¶¶ 16, 22. That same day, the Alabama Senate passed a different plan, titled the "Opportunity Plan." *Id.* ¶¶ 19, 22. The next day, a six-person bicameral Conference Committee passed the 2023 Plan, which was a modified version of the Opportunity Plan. *Id.* ¶ 23. Later that day, the Legislature enacted the 2023 Plan. *Milligan* Doc. 186.

Although neither the 2021 Plan, nor the Community of Interest Plan, nor the Opportunity Plan was accompanied by any legislative findings, when the Legislature enacted the 2023 Plan, it was accompanied by eight pages of legislative findings. We append the legislative findings to this order as Appendix A.

Governor Ivey signed the 2023 Plan into law the same day. *Milligan* Doc. 251 ¶ 26; Ala. Code § 17-14-70. It appears below. The 2023 Plan keeps Mobile and Baldwin counties together in District 1 and combines much of the Black Belt in Districts 2 and 7.[7]

[7] The parties previously stipulated that the Black Belt "is named for the region's



fertile black soil. The region has a substantial Black population because of the many enslaved people brought there to work in the antebellum period. All the counties in the Black Belt are majority- or near majority-BVAP," where "BVAP" means Black share of the voting-age population. *Milligan* Doc. 53 ¶ 60. They further stipulated that the Black Belt includes eighteen "core counties" (Barbour, Bullock, Butler, Choctaw, Crenshaw, Dallas, Greene, Hale, Lowndes, Macon, Marengo, Montgomery, Perry, Pickens, Pike, Russell, Sumter, and Wilcox), and that five other counties (Clarke, Conecuh, Escambia, Monroe, and Washington) are "sometimes included." *Id.* ¶ 61.

Milligan Doc. 186-1 at 1.

The 2023 Plan, like the 2021 Plan enjoined by this Court, has only one majority-Black district. *Compare Milligan* Doc. 186-1 at 2, *with Milligan* Doc. 107 at 2–3. In the 2023 Plan, the Black share of the voting-age population ("BVAP") in District 7 is 50.65% (it was 55.3% in the 2021 Plan). *Compare Milligan* Doc. 186-1 at 2, *with Milligan* Doc. 53 ¶ 57. The district with the next largest BVAP is District 2. *Milligan* Doc. 251 ¶ 3. In District 2, Black Alabamians account for 39.93% of the voting age population (it was 30.6% in the 2021 Plan). *Compare Milligan* Doc. 186-1 at 2, *with Milligan* Doc. 53 ¶ 128.

On July 26, 2023, the parties jointly proposed a scheduling order for remedial proceedings. *Milligan* Doc. 193. We adopted it. *Milligan* Doc. 194.

On July 27, 2023, the *Singleton* Plaintiffs objected to the 2023 Plan. *Singleton* Doc. 147. The *Singleton* Plaintiffs assert that the 2023 Plan violates the Fourteenth Amendment because the districts are racially gerrymandered. *Id.* at 16–22. The *Singleton* Plaintiffs request that the Court enjoin Secretary Allen from using the 2023 Plan and order a remedy, such as their own plan, which plan they say is race-neutral, honors traditional districting principles, and gives Black voters an opportunity to elect candidates of their choice in two districts. *Id.* at 27–28.

Also on July 27, 2023, the United States filed a Statement of Interest "to assist th[is] Court in evaluating whether the 2023 Plan fully cures the likely Section 2

violation in the 2021 Plan." *Milligan* Doc. 199 at 20. "The United States expresses no view on any factual disputes," "nor on any legal questions other than those related to applying Section 2 to the proposed remedy in this case." *Id.* at 5. The United States asserts that if this Court "conclude[s] that the 2023 Plan fails to completely remedy the likely Section 2 violation in the 2021 Plan, it must assume the responsibility of devising and implementing a legally acceptable plan." *Id.* at 19.

The *Milligan* and *Caster* Plaintiffs also timely objected to the 2023 Plan. *Milligan* Doc. 200; *Caster* Doc. 179. The *Milligan* Plaintiffs assert that the 2023 Plan offers no greater opportunity for Black Alabamians to elect a candidate of their choice than the 2021 Plan offered. *Milligan* Doc. 200 at 16–23. The *Milligan* Plaintiffs further say that the events giving rise to the 2023 Plan raise constitutional concerns because evidence suggests that the 2023 Plan was drawn to discriminate against Black Alabamians. *Id.* at 23–26. The *Milligan* Plaintiffs also ask us to enjoin Secretary Allen from conducting the 2024 election based on the 2023 Plan and order the Court-appointed Special Master to devise a new plan. *Id.* at 26.

The *Caster* Plaintiffs likewise assert that the 2023 Plan does not remedy the Section Two violation because it fails to create an additional district in which Black voters have an opportunity to elect a candidate of their choice. *Caster* Doc. 179 at 7–11. The *Caster* Plaintiffs also request that the Court enjoin the 2023 Plan and proceed to a court-driven remedial process to ensure relief for the 2024 election. *Id.*

at 3, 11.

The Court held a status conference on July 31, 2023. *See Milligan* Doc. 194 at 3. Before that conference, the parties indicated substantial disagreement about the nature of remedial proceedings. *See Milligan* Docs. 188, 195, 196, 201. During the conference, the Court and the parties discussed (1) a motion filed by the *Milligan* and *Caster* Plaintiffs to clarify the role of the *Singleton* Plaintiffs, *Milligan* Doc. 188; *see also Milligan* Docs. 195, 196, 201; (2) the *Singleton* Plaintiffs' motion for a preliminary injunction, *Singleton* Doc. 147; and (3) next steps.

After that conference, the Court clarified that remedial proceedings would be limited to whether the 2023 Plan complies with the order of this Court, affirmed by the Supreme Court, and Section Two. *Milligan* Doc. 203 at 4. The Court further clarified that because the scope of the remedial hearing would be limited, the constitutional claims of the *Singleton* Plaintiffs would not be at issue. *Id.* at 5. The Court then set a remedial hearing in *Milligan* and *Caster* for August 14, 2023, *id.* at 3, and a preliminary injunction hearing in *Singleton* to commence immediately after the remedial hearing, *id.* at 6.

On August 3, 2023, the State moved for clarification of the scope of remedial proceedings. *Milligan* Doc. 205. All Plaintiffs responded. *Milligan* Doc. 210; *Caster* Doc. 190; *Singleton* Doc. 160. Also on August 3, 2023, Congresswoman Terri Sewell (who represents District 7) and members of the Congressional Black Caucus

of the United States Congress sought leave to file an *amici curiae* brief in support of the Plaintiffs, which we granted, *Milligan* Docs. 208, 232, 236. Congresswoman Sewell and members of the Congressional Black Caucus assert that the 2023 Plan is an insufficient remedy for the likely Section Two violation found by this Court. *Milligan* Doc. 236 at 5. They too assert that this Court "should enjoin [the 2023 Plan] and direct the Special Master to redraw a map that complies with the Voting Rights Act." *Id.* at 10.

On August 4, 2023, the State responded to the Plaintiffs' objections to the 2023 Plan. *See Milligan* Doc. 220. The State defends the 2023 Plan as prioritizing "to the fullest extent possible" three communities of interest: the Black Belt, the Gulf Coast, and the Wiregrass.[8] *Id.* at 9. The State further asserts that the 2023 Plan fairly applies traditional districting "principles of compactness, county lines, and communities of interest," and because the *Caster* and *Milligan* Plaintiffs' "alternative plans would violate the traditional redistricting principles given effect in the 2023 Plan, [their] § 2 claims fail." *Id.* at 9–10.

On August 6, 2023, we again clarified the scope of the remedial proceedings

[8] We already have described the Black Belt. *See supra* at n.7. When the State refers to the "Gulf Coast," it refers to Mobile and Baldwin counties. *See Milligan* Doc. 220-11 at 5. When the State refers to the "Wiregrass," it refers to an area in the southeast part of the state that includes Barbour, Coffee, Covington, Crenshaw, Dale, Geneva, Henry, Houston, and Pike counties. *See id.* at 8.

in *Milligan* and *Caster*. *Milligan* Doc. 222. We explained that the purpose of those remedial proceedings would be to determine whether the 2023 Plan remedies the likely Section Two violation found by this Court and affirmed by the Supreme Court. *Id*. at 8–9. We reiterated that the remedial proceedings would not relitigate the findings made in connection with the previous liability determination. *Id*. at 11.

On August 7, 2023, all Plaintiffs replied in support of their objections to the 2023 Plan. *See Milligan* Doc. 225; *Caster* Doc. 195. The replies share a common premise: that any alleged reliance by the Legislature on traditional districting principles does not absolve the Legislature of its obligation to cure the Section Two violation found by this Court and affirmed by the Supreme Court. *See Milligan* Doc. 225 at 12; *Caster* Doc. 195 at 7–8.

On August 9, 2023, the National Republican Redistricting Trust ("the Trust") moved for leave to file an *amicus curiae* brief in support of the 2023 Plan, which the Court granted. *See Milligan* Docs. 230, 232, 234. The Trust asserts that the "2023 Plan adheres to traditional districting principles better than any of the Plaintiffs' plans, maintaining communities of interest that the 2021 Plan did not." *Milligan* Doc. 234 at 7. The Trust urges this Court to reject the Plaintiffs' remedial plans. *Id.* at 25.

Later that day, the *Milligan* and *Caster* Plaintiffs moved *in limine* to exclude testimony from certain experts and "any and all evidence, references to evidence,

testimony, or argument relating to the 2023 Plan's maintenance of communities of interest." *Milligan* Doc. 233 at 1. The State responded. *Milligan* Doc. 245.

On August 11, 2023, certain state and local elected officials in Alabama moved for leave to file an *amici curiae* brief in support of the Plaintiffs, which the Court granted. *See Milligan* Docs. 255, 258, 260. The elected officials join in full the *Milligan* Plaintiffs' objections and assert that this Court should enjoin Secretary Allen from using the 2023 Plan on the same grounds that we enjoined the 2021 Plan. *Milligan* Doc. 260 at 5, 14–15.

We held a remedial hearing in *Milligan* and *Caster* on August 14, 2023. *See Milligan* Doc. 203. Based on the agreement of all parties, the Court considered all evidence admitted in either *Milligan* or *Caster*, including evidence admitted during the preliminary injunction hearing, in both cases unless counsel raised a specific objection. *Id.* at 4; *Caster* Doc. 182; Aug. 14 Tr. 61. After the hearing, we directed the parties to submit proposed findings of fact and conclusions of law on August 19, 2023, and they did so. *See Milligan* Docs. 267, 268; *Caster* Docs. 220, 221.

B. Factual and Legal Background

1. Constitutional and Statutory Provisions for Race In Redistricting

Article I, § 2, of the United States Constitution requires that Members of the House of Representatives "be apportioned among the several States . . . according to their respective Numbers" and "chosen every second Year by the People of the

several States." U.S. CONST. art. I, § 2. Each state's population is counted every ten years in a national census, and state legislatures rely on census data to apportion each state's congressional seats into districts.

Redistricting must comply with federal law. *Bartlett*, 556 U.S. at 7 (plurality opinion); *Reynolds v. Sims,* 377 U.S. 533, 554–60 (1964). At present, these cases concern a federal statutory requirement — Section Two, which 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.

52 U.S.C. § 10301.

A state violates Section Two "if its districting plan provides 'less opportunity' for racial minorities [than for other members of the electorate] 'to elect representatives of their choice.'" *Abbott*, 138 S. Ct. at 2315 (internal quotation marks

omitted) (quoting *LULAC*, 548 U.S. at 425).

"The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. "Such a risk is greatest where minority and majority voters consistently prefer different candidates and where minority voters are submerged in a majority voting population that regularly defeats their choices." *Allen*, 143 S. Ct. at 1503 (internal quotation marks omitted) (alterations accepted).

"[A] plaintiff may allege a § 2 violation in a single-member district if the manipulation of districting lines fragments [or cracks] politically cohesive minority voters among several districts or packs them into one district or a small number of districts, and thereby dilutes the voting strength of members of the minority population." *Shaw v. Hunt*, 517 U.S. 899, 914 (1996) ("*Shaw II*").

"For the past forty years," federal courts "have evaluated claims brought under § 2 using the three-part framework developed in [*Gingles*]." *Allen*, 143 S. Ct. at 1502–03. To prove a Section Two violation under *Gingles*, "plaintiffs must satisfy three preconditions." *Id.* at 1503 (internal quotation marks omitted). "First, the minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district." *Id.* (internal quotation marks

omitted). "A district will be reasonably configured . . . if it comports with traditional districting criteria, such as being contiguous and reasonably compact." *Id.* "Second, the minority group must be able to show that it is politically cohesive." *Id.* (internal quotation marks omitted). "And third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." *Id.* (internal quotation marks omitted).

"Finally, a plaintiff who demonstrates the three preconditions must also show, under the totality of circumstances, that the political process is not equally open to minority voters." *Id.* (internal quotation marks omitted). "Courts use factors drawn from a report of the Senate Judiciary Committee accompanying the 1982 amendments to the [Voting Rights Act] (the Senate [F]actors) to make the totality-of-the-circumstances determination." *Georgia State Conf. of NAACP v. Fayette County Bd. of Comm'rs*, 775 F.3d 1336, 1342 (11th Cir. 2015); *accord Johnson v. De Grandy*, 512 U.S. 997, 1010 n.9 (1994); *infra* at Part IV.B.4.

The Senate Factors include:

> (1) the history of voting-related discrimination in the State or political subdivision; (2) the extent to which voting in the elections of the State or political subdivision is racially polarized; (3) the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; (4) the exclusion of members of the minority group from candidate slating processes; (5) the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health,

> which hinder their ability to participate effectively in the political process; (6) the use of overt or subtle racial appeals in political campaigns; and (7) the extent to which members of the minority group have been elected to public office in the jurisdiction.

De Grandy, 512 U.S. at 1010 n.9 (quoting *Gingles*, 478 U.S. at 44–45) (numerals added). Further, the Senate Factors include (8) "evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and (9) that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous may have probative value." *Id.* (quoting *Gingles*, 478 U.S. at 45) (numeral added).

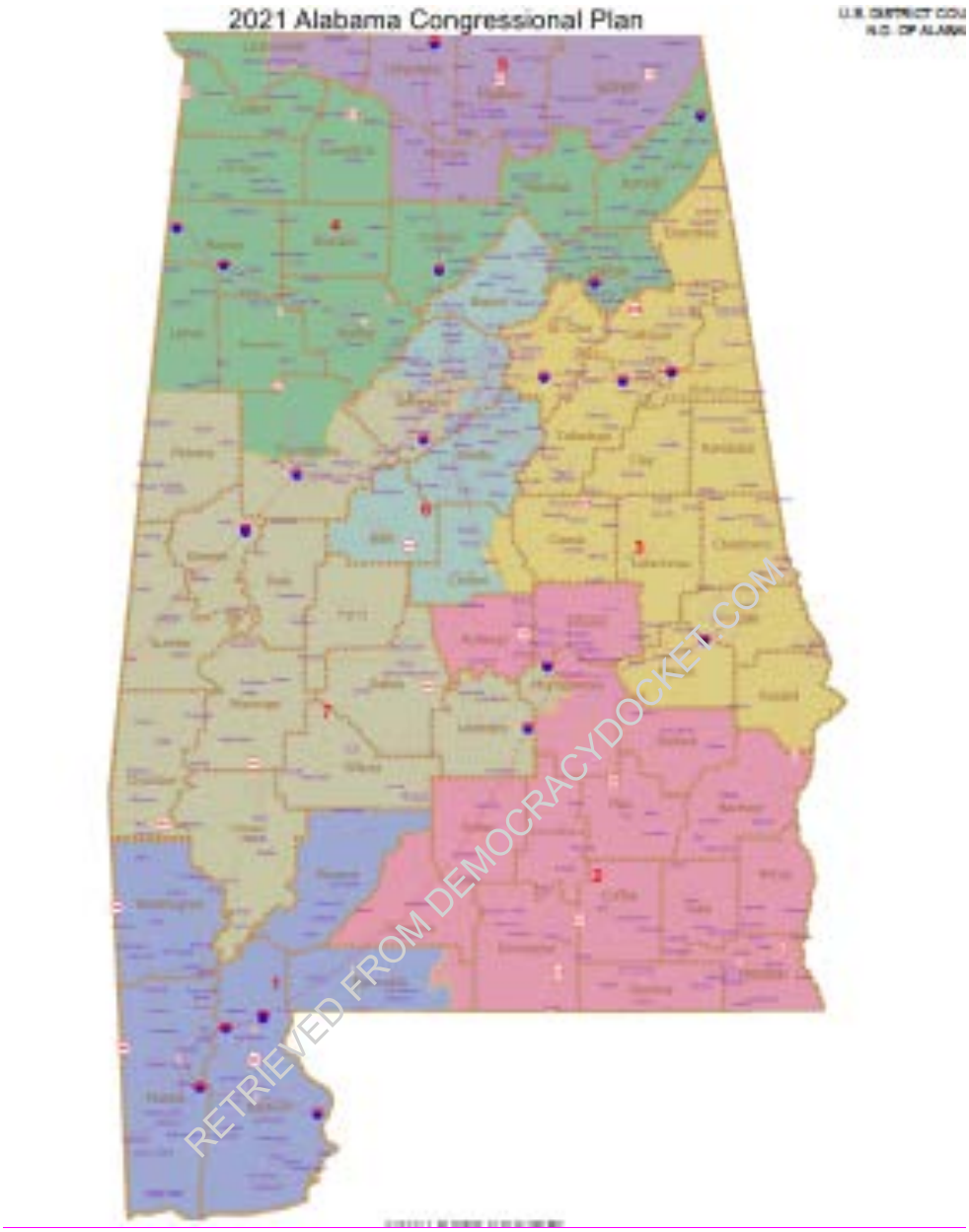
The Senate Factors are not exhaustive. "Another relevant consideration is whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area." *LULAC*, 548 U.S. at 426; *accord De Grandy*, 512 U.S. at 1000. When a plaintiff alleges vote dilution "based on a statewide plan," the proportionality analysis ordinarily is statewide. *LULAC*, 548 U.S. at 437–38. Although proportionality may be a "relevant consideration" under the controlling Supreme Court test, it cannot be dispositive. Section Two does not "establish[] a right to have members of a protected class elected in numbers equal to their proportion in the population," 52 U.S.C. § 10301, and the Supreme Court has described at length the legislative history of that proportionality disclaimer. *See Allen*, 143 S. Ct. at 1500–01.

Because "the Equal Protection Clause restricts consideration of race and the

[Voting Rights Act] demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to competing hazards of liability." *Abbott*, 138 S. Ct. at 2315 (internal quotation marks omitted). "In an effort to harmonize these conflicting demands, [the Supreme Court has] assumed that compliance with the [Voting Rights Act] may justify the consideration of race in a way that would not otherwise be allowed." *Id.*; *accord Cooper*, 581 U.S. at 292.

2. Congressional Redistricting in Alabama

Since 1973, Alabama has been apportioned seven seats in the United States House of Representatives. *Milligan* Doc. 53 ¶ 28. In all House elections held after the 1970 census and the 1980 census, Alabama elected all-white delegations. *Id.* ¶ 44. After the 1990 census, the Legislature failed to enact a congressional redistricting plan. *See Wesch*, 785 F. Supp. at 1494–95. Litigation ensued, and a federal court ultimately ordered elections held according to a plan that created one majority-Black district (District 7). *Wesch v. Folsom*, 6 F.3d 1465, 1467–68 (11th Cir. 1993); *Wesch*, 785 F. Supp. at 1498, 1581 app. A. In the 1992 election held using the court-ordered map, District 7 elected Alabama's first Black Congressman in over 90 years. *Milligan* Doc. 53 ¶ 44. District 7 remains majority-Black and in every election since 1992 has elected a Black Democrat. *Id.* ¶¶ 44, 47, 49, 58. After 2020 census data was released, Mr. Randy Hinaman prepared the 2021 Plan:



Milligan Doc. 70-2 at 40; *Milligan* Doc. 88-19.

3. These Lawsuits

Three groups of plaintiffs sued to stop the State from conducting the 2022 elections with the 2021 Plan. *Allen*, 143 S. Ct. at 1502. As relevant here, we discuss the Section Two cases:

a. *Milligan*

The *Milligan* Plaintiffs alleged that Section Two now requires two majority-Black or Black-opportunity congressional districts in Alabama.[9] The *Milligan* Plaintiffs asserted that the 2021 Plan reflected the Legislature's "desire to use . . . race to maintain power by packing one-third of Black Alabamians into [District 7] and cracking the remaining Black community." *Milligan* Doc. 1 ¶ 4.

To satisfy the first *Gingles* requirement, that Black voters as a group are "sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district." *Cooper*, 581 U.S. at 301 (internal quotation marks omitted). The *Milligan* Plaintiffs relied on the testimony of expert witness Dr. Moon Duchin. We found Dr. Duchin highly credible. *Milligan* Doc. 107 at 148–50.

Dr. Duchin opined in her report that because 27.16% of Alabama residents identified as Black on the 2020 Decennial Census, Black Alabamians are sufficiently numerous to constitute a majority in more than one congressional district. *Milligan* Doc. 68-5 at 5. Dr. Duchin testified that the 2021 Plan "pack[ed] Black population

[9] When we use the phrase "opportunity district" or "Black-opportunity," we mean a district in which a "meaningful number" of non-Black voters often "join[] a politically cohesive black community to elect" the Black-preferred candidate. *Cooper*, 581 U.S. at 303. We distinguish an opportunity district from a majority-Black district, in which Black people comprise "50 percent or more of the voting population and . . . constitute a compact voting majority" in the district. *Bartlett*, 556 U.S. at 19 (plurality opinion). For additional discussion, see *infra* at Part III.

into District 7 at an elevated level of over 55% BVAP, then crack[ed] Black population in Mobile, Montgomery, and the rural Black Belt across Districts 1, 2, and 3, so that none of them has more than about 30% BVAP." *Id.* at 6 fig.1; Tr. 564.[10]

As for compactness, Dr. Duchin included in her report a map that reflects the geographic dispersion of Black residents across Alabama. *Milligan* Doc. 68-5 at 12 fig.3. She opined that it is possible to draw two contiguous and reasonably compact majority-Black congressional districts; and she offered four illustrative plans ("the Duchin plans"). *Id.* at 7 fig.2. Dr. Duchin offered extensive analysis in her report and testimony during the preliminary injunction hearing about how her plans satisfied the one-person-one-vote rule, included contiguous districts, respected existing political subdivisions, and attempted to minimize county splits. *Id.* at 8; Tr. 586–90, 599, 626; *Milligan* Doc. 92-1.

Dr. Duchin also offered exhaustive analysis and testimony about the compactness of the districts in her plans. She described how she computed compactness scores using three metrics that are commonly cited in professional redistricting analyses: the Polsby-Popper score, the Reock score, and the cut-edges

[10] When we cite to the transcript from the 2022 preliminary injunction hearing, pincites are to the numbered pages of the transcript, not the CM/ECF pagination. *See Milligan* Doc. 105.

score. *Milligan* Doc. 68-5 at 9; Tr. 590–94.[11] Dr. Duchin provided average compactness scores for each of her plans on each of these metrics, *Milligan* Doc. 68-5 at 9, and testified, among other things, that all four of her plans were "superior to" and "significantly more compact than" the 2021 Plan using an average Polsby-Popper metric, *id.*; Tr. 593.

Dr. Duchin also testified that her plans respected the Black Belt as a community of interest as defined in the Legislature's 2021 redistricting guidelines. *See Milligan* Doc. 68-5 at 13; *Milligan* Doc. 88-23 at 2–3. Dr. Duchin observed that in the 2021 Plan, eight of the eighteen core Black Belt counties are "partially or fully excluded from majority-Black districts," while "[e]ach of the 18 Black Belt counties is contained in majority-Black districts in at least some" of her alternative plans. *Milligan* Doc. 68-5 at 13; *see also* Tr. 666–68. Ultimately, Dr. Duchin opined that the districts in her plans were "reasonably" compact. Tr. 594.

To satisfy the second and third *Gingles* requirements, that Black voters are "politically cohesive," and that each challenged district's white majority votes "sufficiently as a bloc to usually defeat [Black voters'] preferred candidate," *Cooper*, 581 U.S. at 302 (internal quotation marks omitted), the *Milligan* Plaintiffs relied on a racial polarization analysis conducted by expert witness Dr. Baodong Liu. We

[11] For an explanation of these metrics, *see Milligan* Doc. 107 at 61–62 n.9.

found Dr. Liu credible. *See Milligan* Doc. 107 at 174–175.

The *Milligan* Plaintiffs asked Dr. Liu to opine (1) whether racially polarized voting occurs in Alabama, and (2) whether such voting has resulted in the defeat of Black-preferred candidates in Alabama congressional elections. *Milligan* Doc. 68-1 at 1. Dr. Liu studied thirteen elections and opined that he observed racially polarized voting in all of them, which resulted in the defeat of Black-preferred candidates in all of them except those in District 7. *Milligan* Doc. 68-1 at 9, 11, 18. At the preliminary injunction hearing, Dr. Liu emphasized the clarity and starkness of the pattern of racially polarized voting that he observed. *See* Tr. 1271–76. He testified that racially polarized voting in Alabama is "very clear." Tr. 1293.

The *Milligan* Plaintiffs next argued that the Senate Factors "confirm[ed]" the Section Two violation. *Milligan* Doc. 69 at 16. The *Milligan* Plaintiffs emphasized Senate Factors 2 and 7 — racially polarized voting and a lack of Black electoral success — because in *Gingles* the Supreme Court flagged them as the "most important" factors, and because the parties' stipulations of fact established that they were not in dispute. *See id.* (citing *Milligan* Doc. 53 ¶¶ 44, 121, 167–69). The *Milligan* Plaintiffs asserted that Factors 1, 3, and 5 also are present because "Alabama has an undisputed and ongoing history of discrimination against Black people in voting, education, employment, health, and other areas." *Id.* at 17–18. The *Milligan* Plaintiffs relied on numerous fact stipulations, which we laid out at length

in the preliminary injunction. *See Milligan* Doc. 107 at 73–78 (quoting *Milligan* Doc. 53 ¶¶ 130–54, 157–65).

In addition to the stipulated facts, the *Milligan* Plaintiffs relied on the expert testimony of Dr. Joseph Bagley, whom we found credible. *See Milligan* Doc. 69 at 17–18; *Milligan* Doc. 107 at 185–187. Dr. Bagley opined about Senate Factors 1, 5, 6, 7, and 8, and he considered Factor 3 in connection with his discussion of Factor 1. *Milligan* Doc. 68-2 at 3–31. He opined that those Factors are present in Alabama and together mean that the 2021 Plan would "result in impairment of black voters' ability to participate fully and equitably in the political process of electing candidates of their choice." Tr. 1177.

For all these reasons, the *Milligan* Plaintiffs asserted that they were likely to prevail on their claim of vote dilution under the totality of circumstances.

b. *Caster*

The *Caster* Plaintiffs likewise alleged that the 2021 Plan violated Section Two because it "strategically cracks and packs Alabama's Black communities." *Caster* Doc. 3 ¶ 1. The *Caster* Plaintiffs also requested a remedy that includes two majority-Black or Black-opportunity districts. *Id.* at 31; *Caster* Doc. 97 ¶¶ 494–505.

To satisfy the first *Gingles* requirement, the *Caster* Plaintiffs relied on the expert testimony of Mr. Bill Cooper. *Caster* Docs. 48, 56, 65. We found Mr. Cooper highly credible. *See Milligan* Doc. 107 at 150–52. Mr. Cooper first opined that Black

Alabamians are sufficiently numerous to constitute a majority in more than one congressional district; Mr. Cooper explained that according to 2020 census data, Alabama's Black population increased by 83,618 residents, which constitutes a 6.53% increase in Alabama's Black population since 2010, which is 34% of the state's entire population increase since then. *Caster* Doc. 48 at 6–7. Mr. Cooper explained that there was a loss of 33,051 white persons during this time frame, a 1.03% decrease. *Id.* at 6 fig.1.

Mr. Cooper also opined that it is possible to draw two contiguous and reasonably compact majority-Black congressional districts; and he offered seven illustrative plans ("the Cooper plans"). *Caster* Doc. 48 at 20–36; *Caster* Doc. 65 at 2–6. Mr. Cooper testified that when he began his work, he expected to be able to draw illustrative plans with two reasonably compact majority-Black congressional districts because, at the same time the Legislature enacted the 2021 Plan, the Legislature also enacted a redistricting plan for the State Board of Education, which plan included two majority-Black districts. *Caster* Doc. 48 at 15–20; Tr. 433–37. Mr. Cooper testified that the Board of Education plan has included two Black-opportunity districts since 1996, and that continuously for those twenty-five years, more than half of Black voters in Alabama have lived in one of those two districts. *Caster* Doc. 48 at 16; Tr. 435. Mr. Cooper explained that the Board of Education plan splits Mobile County into two districts (with one district connecting Mobile

County to Montgomery County, and another connecting Mobile County to Baldwin County). Tr. 435–36; *Caster* Doc. 48 at 17 fig.8.

Like Dr. Duchin, Mr. Cooper offered extensive analysis and testimony about how his plans satisfied the one-person-one-vote rule, included contiguous districts, respected existing political subdivisions, and attempted to minimize county splits. Tr. 441–44, 446–47; *Caster* Doc. 48 at 22; *Caster* Doc. 65 at 5–6.

Also like Dr. Duchin, Mr. Cooper offered exhaustive analysis and testimony about the compactness of the districts in his plans. Mr. Cooper testified that he considered geographic compactness by "eyeballing" as he drew his plans, obtaining readouts of the Reock and Polsby-Popper compactness scores from the software program he was using as he drew, and trying to "make sure that [his] score was sort of in the ballpark of" the score for the 2021 Plan, which he used as a "possible yardstick." Tr. 444–46. He testified that all his plans either were at least as compact as the 2021 Plan, or they scored "slightly lower" than the 2021 Plan; he opined that all of his plans are "certainly within the normal range if you look at districts around the country." Tr. 446, 458; *accord Caster* Doc. 48 at 35–37.

Mr. Cooper further testified that he considered communities of interest in two ways: first, he considered "political subdivisions like counties and towns and cities," and second, he has "some knowledge of historical boundaries" and the Black Belt, so he considered the Black Belt. Tr. 447.

To satisfy the second and third *Gingles* requirements, that Black voters are "politically cohesive," and that each challenged district's white majority votes "sufficiently as a bloc to usually defeat [Black voters'] preferred candidate." *Cooper*, 581 U.S. at 302 (internal quotation marks omitted), the *Caster* Plaintiffs relied on a racial polarization analysis conducted by Dr. Maxwell Palmer, whom we found credible. *See Milligan* Doc. 107 at 174–176.

Dr. Palmer analyzed the extent to which voting is racially polarized in Congressional Districts 1, 2, 3, 6, and 7 because he was told that the proposed Black-opportunity districts would include voters from those districts. *Caster* Doc. 49 ¶ 9; Tr. 704. He examined how voters in those districts voted in the 2012, 2014, 2016, 2018, and 2020 general elections, as well as the 2017 special election for the United States Senate, and statewide elections for President, the United States Senate, Governor, Lieutenant Governor, Secretary of State, Attorney General, and several other offices. *Caster* Doc. 49 ¶¶ 6–7, 10; *see also* Tr. 707–13 (explaining how he used precinct-level data and analyzed the results on a district-by-district basis).

Dr. Palmer opined that "Black voters are extremely cohesive," *Caster* Doc. 49 ¶ 16, "[w]hite voters are highly cohesive," *id.* ¶ 17, and "[i]n every election, Black voters have a clear candidate of choice, and [w]hite voters are strongly opposed to this candidate," *id.* ¶ 18. He concluded that "[o]n average, Black voters supported their candidates of choice with 92.3% of the vote[,]" and "[o]n average, [w]hite

voters supported Black-preferred candidates with 15.4% of the vote, and in no election did this estimate exceed 26%." *Id.* ¶¶ 16–17. In his testimony, he characterized this evidence of racially polarized voting as "very strong." Tr. 701.

The *Caster* Plaintiffs then analyzed the Senate Factors, and they relied on judicial authorities, stipulated facts, and the testimony of Dr. Bridgett King, whom we found credible, *Milligan* Doc. 107 at 185–87. *Caster* Doc. 56 at 19–38. Dr. King opined that racially polarized voting in Alabama is "severe and ongoing," and "significantly and adversely impact[s] the ability of Black Alabamians to participate equally in the state's political process." *Caster* Doc. 50 at 4.

For all these reasons, the *Caster* Plaintiffs asserted that they were likely to prevail on their claim of vote dilution under the totality of circumstances.

c. The State

The State, in turn argued that the Committee properly started with the prior map and adjusted boundaries only as necessary to comply with the one-person, one-vote rule and serve traditional districting criteria. *See Milligan* Doc. 78 at 16. The State asserted that "nothing" in the Voting Rights Act "requires Alabama to draw two majority-black districts with slim black majorities as opposed to one majority-black district with a slightly larger majority." *Id.* at 17. We first discuss the State's position in *Milligan* during the preliminary injunction proceedings, and we then discuss the State's position in *Caster*.

i. The State's Arguments in *Milligan*

The State argued in *Milligan* that "[n]othing in Section 2 supports Plaintiffs' extraordinary request that this Court impose districts with Plaintiffs' surgically targeted racial compositions while jettisoning numerous traditional districting criteria." *Id.* at 18. The State relied on the expert testimony of Mr. Thomas M. Bryan. After an exhaustive credibility determination, we assigned "very little weight" to Mr. Bryan's testimony and found it "unreliable." *Milligan* Doc. 107 at 152–156; *see also infra* at Part IV.B.2.a.

The State argued that the Duchin plans did not respect the communities of interest in Alabama's Gulf Coast and the Wiregrass region. *Milligan* Doc. 78 at 82–84. The State objected to the Duchin plans on the ground that they "break up the Gulf Coast and scramble it with the Wiregrass," "separate Mobile and Baldwin Counties for the first time in half a century," and "split Mobile County for the first time in the State's history." *Id.* at 85. The State asserted that the Duchin plans did not respect the Black Belt because they split it between two districts. *Id.* at 85–86 n.15.

Mr. Bryan opined about compactness. He first opined that in each Duchin plan "compactness [wa]s sacrificed." *Milligan* Doc. 74-1 at 3. He later acknowledged and opined, however, that "Dr. Duchin's plans perform generally better *on average* than the [2021 Plan], although some districts are significantly less compact than

Alabama's." *Id.* at 19 (emphasis in original). And Mr. Bryan testified that he has "no opinion on what is reasonable and what is not reasonable" compactness. Tr. 979.

As for communities of interest, Mr. Bryan opined that Mobile and Baldwin counties are "inseparable." Tr. 1006. And he testified that the Black Belt is a community of interest and ultimately conceded that the Duchin plans had fewer splits than the 2021 Plan in the Black Belt. Tr. 1063–65.

Mr. Bryan explained his overall opinion that Dr. Duchin was able to "achieve a black majority population in two districts" only by "sacrific[ing]" traditional districting criteria. Tr. 874. He explained further his concern about "cracking and packing of incumbents." Tr. 874.

The State also offered testimony about the Gulf Coast community of interest from former Congressman Bradley Byrne, who testified that he did not want Mobile County to be split because he worried it would "lose[] its influence" politically. Tr. 1744.

The State briefly asserted that the *Milligan* Plaintiffs could not establish *Gingles* II and III because their racial polarization analysis was selective. *See Milligan* Doc. 78 at 97. But at the preliminary injunction hearing, the State offered the testimony of Dr. M.V. Hood, whom we found credible, *see Milligan* Doc. 107 at 176–77, and Dr. Hood testified that he and Dr. Liu "both found evidence of" racially polarized voting in Alabama. Tr. 1421.

The State then asserted that the "balance" of the Senate Factors favors the State because things in Alabama have "changed dramatically." *Milligan* Doc. 78 at 101–02 (internal quotation marks omitted) (quoting *Shelby County v. Holder*, 570 U.S. 529, 547 (2013)). As for Factor 1, the State acknowledged Alabama's "sordid history" and assert that it "should never be forgotten," but said that Alabama has "[o]vercome [i]ts [h]istory." *Id.* at 102. As for Factor 5, the State disputed that Black Alabamians still "bear the effects of discrimination," and that those effects "hinder their ability to participate effectively in the political process." *Id.* at 112 (internal quotation marks omitted) (quoting *Gingles*, 478 U.S. at 37). As for Factor 6, the State argued that historical evidence of racial appeals in campaigns is not probative of current conditions. *Id.* at 113–14. As for Factor 7, the State argued that minorities "have achieved a great deal of electoral success in Alabama's districted races for State offices." *Id.* at 116. As for Factor 8, the State vehemently disputed that elected officials in Alabama are not responsive to the needs of the Black community. *Id.* at 117–19. And as for Factor 9, the State urged that a procedure is tenuous only if it "markedly departs from past practices" and argued that the 2021 Plan was not tenuous because it did not meaningfully depart from the 2011 Plan. *Id.* at 119–20 (quoting S. Rep. 97-417 at 29 n.117).

The State did not offer any expert testimony about the Senate Factors.

ii. The State's Arguments in *Caster*

The State took much the same position in *Caster* that it took in *Milligan*, and Mr. Bryan attacked the Cooper plans for many of the same reasons he attacked the Duchin plans. We recite only a few relevant points.

First, with respect to *Gingles* I. On cross examination, Mr. Bryan conceded that he did not evaluate and had no opinion about whether the Cooper plans respected contiguity, or "the extent to which Mr. Cooper's plan[s] split political subdivisions." Tr. 931–32. When Mr. Bryan testified about compactness, he explained that he relied on compactness scores alone and did not "analyze any of the specific contours of the districts." Tr. 971.

After Mr. Bryan offered that testimony, the *Caster* Plaintiffs recalled his earlier testimony about how the Cooper plans "draw lines that appear to [him] to be based on race" and asked him where he offered any analysis "of the way in which specific districts in Mr. Cooper's illustrative plans are configured outside of their objective compactness scores." Tr. 972–73. Mr. Bryan testified that it "appears [he] may not have written text about that." Tr. 973.

When Mr. Bryan was asked about his opinions about communities of interest, he acknowledged that he did not analyze the Cooper plans based on communities of interest. Tr. 979–80.

As for *Gingles* II and III, Dr. Hood testified at the hearing that he had not

identified any errors in Dr. Palmer's work that would affect his analyses or conclusions. *See Caster* Doc. 66-2 at 2–34; Tr. 1407–11, 1449–50, 1456, 1459–61. Dr. Hood also testified that he did not dispute Dr. Palmer's conclusions that (1) "black voters in the areas he examined vote for the same candidates cohesively," (2) "black Alabamians and white Alabamians in the areas he examined consistently preferred different candidates," and (3) "the candidates preferred by white voters in the areas that he looked at regularly defeat the candidates preferred by black voters." Tr. 1445. Dr. Hood testified that he and Dr. Palmer both found a "substantive pattern" of racially polarized voting. Tr. 1448.

4. Our Findings and Conclusions on Liability

"After reviewing th[e] extensive record," we "concluded in a 227-page opinion that the question whether [the 2021 Plan] likely violated § 2 was not a close one." *Allen*, 143 S. Ct. at 1502 (internal quotation marks omitted); *accord Milligan* Doc. 107 at 195; *Caster* Doc. 101 at 204. "It did." *Allen*, 143 S. Ct. at 1502; *accord Milligan* Doc. 107 at 195; *Caster* Doc. 101 at 204.

The parties developed such an extensive record and offered such fulsome legal arguments that it took us nearly ninety pages to describe their evidence and arguments. *See Milligan* Doc. 107 at 52–139. Our findings of fact and conclusions of law consumed eighty more pages. *See id.* at 139–210. They were exhaustive, and we do not repeat them here in full. We highlight those findings and conclusions that

are particularly relevant to our remedial task.

In our *Gingles* I analysis, we first found that the Plaintiffs "established that Black voters as a group are sufficiently large . . . to constitute a majority in a second majority-minority legislative district." *Id.* at 146 (internal quotation marks omitted). We then found that the Plaintiffs established that Black voters as a group are sufficiently geographically compact to constitute a majority in a second reasonably configured district. *Id.* at 147–74.

We began our compactness analysis with credibility determinations about the parties' expert witnesses. We found the testimony of Dr. Duchin and Mr. Cooper "highly credible," *id.* at 148–51, and we "assign[ed] very little weight to Mr. Bryan's testimony," *id.* at 152–56. We did not take lightly the decision not to credit Mr. Bryan. We based that decision on two evaluations — one that examined his credibility relative to that of Dr. Duchin and Mr. Cooper, and one that was not relative. *See id.* We expressed concern about instances in which Mr. Bryan "offered an opinion without a sufficient basis (or in some instances any basis)," enumerated seven examples, reviewed other "internal inconsistencies and vacillations," and described a demeanor that "reflected a lack of concern for whether [his] opinion was well-founded." *Id.* at 153–56.

We then reviewed "compactness scores" to assess whether the majority-Black congressional districts in the Duchin plans and the Cooper plans were "reasonably"

compact. *Id.* at 157–59. We determined that regardless of whether we relied strictly on the opinions of Dr. Duchin and Mr. Cooper about the reasonableness of the scores, or compared the scores for the illustrative plans to the scores for the 2021 Plan, the result was the same: the Plaintiffs' plans established that Black voters in Alabama could comprise a second reasonably configured majority-Black congressional district. *Id.* at 159.

Next, we considered the "eyeball" test for compactness. *See id.* at 159–62. Based on information in Dr. Duchin's report that the State did not dispute, we found that "there are areas of the state where much of Alabama's Black population is concentrated, and that many of these areas are in close proximity to each other." *Id.* at 161. We then found that the majority-Black districts in the Duchin plans and the Cooper plans appeared reasonably compact because we did not see "tentacles, appendages, bizarre shapes, or any other obvious irregularities that would make it difficult to find that any District 2 could be considered reasonably compact." *Id.* at 162.

Next, we discussed whether the Duchin plans and the Cooper plans "reflect reasonable compactness when our inquiry takes into account, as it must, traditional districting principles such as maintaining communities of interest and traditional boundaries." *Id.* (internal quotation marks omitted); *accord id.* at 162–74. We found that the Duchin plans and the Cooper plans respected existing political subdivisions

"at least as well as the [2021] Plan," and in some instances better than the 2021 Plan. *See id.* at 163–64.

We then turned to communities of interest. Before making findings, we reiterated the rule "that a Section Two district that is **reasonably** compact and regular, taking into account traditional districting principles, need not also defeat a rival compact district in a beauty contest." *Id.* at 165 (emphasis in original) (internal quotation marks omitted) (alterations accepted) (quoting *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion)). We were "careful to avoid the beauty contest that a great deal of testimony and argument seemed designed to try to win." *Id.*

We found that the Black Belt is an important community of interest, and that it was split among four congressional districts in the 2021 Plan: "Districts 1, 2, and 3, where the *Milligan* plaintiffs assert that their votes are diluted, and District 7, which the *Milligan* plaintiffs assert is packed." *Id.* at 167. In the Duchin plans and the Cooper plans, the "overwhelming majority of the Black Belt" was in "just two districts." *Id.* at 168. We noted that Mr. Bryan conceded that the Duchin plans and Cooper plans performed better than the 2021 Plan for the Black Belt. *Id.*

We then found that "[t]ogether with our finding that the Duchin plans and the Cooper plans respect existing political subdivisions, our finding that [they] respect the Black Belt supports a conclusion that [they] establish reasonable compactness." *Id.* at 169.

Although "we need not consider how . . . Districts 2 and 7 might perform in a beauty contest against other plans that also respect communities of interest," we nevertheless discussed the State's argument that the Duchin plans and Cooper plans ignored the Gulf Coast community of interest. *Id.* at 169–71. We found the "record about the Gulf Coast community of interest . . . less compelling," and that the State "overstate[d] the point." *Id.* at 169–70. Only two witnesses testified about the Gulf Coast. We discounted Mr. Bryan, and we found that the other witness did not support the State's "overdrawn argument that there can be no legitimate reason to split Mobile and Baldwin Counties consistent with traditional redistricting criteria." *Id.* at 170. We noted that the Legislature split Mobile and Baldwin Counties in its districting plan for the State Board of Education. *Id.* at 171.

We found that the State "d[id] not give either the *Milligan* Plaintiffs or the *Caster* Plaintiffs enough credit for the attention Dr. Duchin and Mr. Cooper paid to traditional redistricting criteria." *Id.* at 173. We found that their illustrative plans satisfied the reasonable compactness requirement for *Gingles* I.

Our findings about *Gingles* II and III were comparatively brief because the underlying facts were not in dispute. *See id.* at 174–78. We credited the testimony of Doctors Liu (the *Milligan* Plaintiffs' expert), Palmer (the *Caster* Plaintiffs' expert), and Hood (the State's expert). *See id.* All three experts found evidence of racially polarized voting in Alabama. Based on their testimony, we found that Black

voters in Alabama "are politically cohesive," that the challenged districts' "white majority votes sufficiently as a bloc to usually defeat Black voters' preferred candidate," *id.* at 174 (internal quotation marks omitted) (alterations accepted), and that "voting in Alabama, and in the districts at issue in this litigation, is racially polarized" for purposes of *Gingles* II and III, *id.* at 177–78.

We then discussed the Senate Factors. We found that Senate Factors 2 (racially polarized voting) and 7 (the extent to which Black Alabamians have been elected to public office) "weigh[] heavily in favor of" the Plaintiffs. *Id.* at 178–81. We found that Factors 1, 3, and 5 (all of which relate to Alabama's history of official discrimination against Black Alabamians) "weigh against" the State. *Id.* at 182–88. And we found that Factor 6 (racial appeals in political campaigns) "weighs in favor of" the Plaintiffs but "to a lesser degree" than Senate Factors 2, 7, 1, 3, and 5. *Id.* at 188–92. We made no findings about Factors 8 and 9, *id.* at 192–93, and we found that no Factor weighed in favor of the State. *Id.* at 195.

Finally, we discussed proportionality. We explained our understanding that under the Voting Rights Act and binding Supreme Court precedent, it is relevant, but not dispositive. *Id.* at 193. We rejected the State's argument that the Plaintiffs' arguments were "naked attempts to extract from Section 2 a non-existent right to proportional . . . racial representation in Congress." *Id.* at 195 (internal quotation marks omitted). And we stated that we did not resolve the motion for preliminary

injunctive relief "solely (or even in the main) by conducting a proportionality analysis" because, consistent with precedent, we conducted a thorough *Gingles* analysis and considered proportionality only as "part and parcel of the totality of the circumstances." *Id.*

Ultimately, we explained five reasons why we did not regard the liability question as "a close one":

> (1) We have considered a record that is extensive by any measure, and particularly extensive for a preliminary injunction proceeding, and the *Milligan* plaintiffs have adduced substantial evidence in support of their claim. (2) There is no serious dispute that the plaintiffs have established numerosity for purposes of *Gingles* I, nor that they have established sharply racially polarized voting for purposes of *Gingles* II and III, leaving only conclusions about reasonable compactness and the totality of the circumstances dependent upon our findings. (3) In our analysis of compactness, we have credited the *Milligan* plaintiffs' principal expert witness, Dr. Duchin, after a careful review of her reports and observation of her live testimony (which included the first cross-examination of her that occurred in this case). (4) Separately, we have discounted the testimony of Defendants' principal expert witness, Mr. Bryan, after a careful review of his reports and observation of his live testimony (which included the first cross-examination of him that occurred in this case). (5) If the *Milligan* record were insufficient on any issue (and it is not), the *Caster* record, which is equally fulsome, would fill in the gaps: the *Caster* record (which by the parties' agreement also is admitted in *Milligan*), compels the same conclusion that we have reached in *Milligan*, both to this three-judge court and to Judge Manasco sitting alone.

Id. at 195–96. "Put differently," we said, "because of the posture of these consolidated cases, the record before us has not only once, but twice, established that the [2021] Plan substantially likely violates Section Two." *Id.* at 196.

5. Supreme Court Affirmance

The Supreme Court affirmed the preliminary injunction in a 5-4 decision. We discuss that decision in three parts. We first discuss the part of the opinion that is binding precedent because it was joined by a majority of the Justices ("the Opinion of the Supreme Court"); we then discuss the portion of the Chief Justice's opinion that is the opinion of four Justices; we then discuss Justice Kavanaugh's concurrence.

a. Controlling Precedent

The Supreme Court began by directly stating the ruling:

> In January 2022, a three-judge District Court sitting in Alabama preliminarily enjoined the State from using the districting plan it had recently adopted for the 2022 congressional elections, finding that the plan likely violated Section 2 of the Voting Rights Act. This Court stayed the District Court's order pending further review. After conducting that review, we now affirm.

Allen, 143 S. Ct. at 1498 (internal citations omitted). Next, the Supreme Court recited relevant portions of the history of the Voting Rights Act, redistricting in Alabama, and these cases. *Id.* at 1498–1502. The Supreme Court then reiterated its ruling: "The District Court found that plaintiffs demonstrated a reasonable likelihood of success on their claim that [the 2021 Plan] violates § 2. We affirm that determination." *Id.* at 1502.

Next, the Supreme Court restated the controlling legal standards, as set forth in *Gingles* and applied by federal courts "[f]or the past forty years." *Id.* at 1502–04.

The majority opinion then again restated the ruling: "[a]s noted, the District Court concluded that plaintiffs' § 2 claim was likely to succeed under *Gingles*. Based on our review of the record, we agree." *Id.* at 1504 (internal citations omitted).

The Supreme Court then reviewed our analysis of each *Gingles* requirement. *Id.* at 1504–06. The Supreme Court agreed with our analysis as to each requirement. It did not hold, suggest, or even hint that any aspect of our *Gingles* analysis was erroneous. *See id.*

"With respect to the first *Gingles* precondition," the Supreme Court held that we "correctly found that black voters could constitute a majority in a second district that was reasonably configured." *Id.* at 1504 (internal quotation marks omitted). The Supreme Court ruled that "[t]he plaintiffs adduced eleven illustrative maps—that is, example districting maps that Alabama could enact—each of which contained two majority-black districts that comported with traditional districting criteria." *Id.*

The Supreme Court then considered the Duchin plans. It observed that we "explained that the maps submitted by [Dr. Duchin] performed generally better on average than did [the 2021 Plan]." *Id.* (internal quotation marks omitted) (alterations accepted). Likewise, the Supreme Court considered the Cooper plans. The Supreme Court observed that Mr. Cooper "produced districts roughly as compact as the existing plan." *Id.* And that "none of plaintiffs' maps contained any tentacles, appendages, bizarre shapes, or any other obvious irregularities that would make it

difficult to find them sufficiently compact." *Id.* (internal quotation marks omitted).

Next, the Supreme Court held that the "Plaintiffs' maps also satisfied other traditional districting criteria. They contained equal populations, were contiguous, and respected existing political subdivisions . . . . Indeed, some of plaintiffs' proposed maps split the same number of county lines as (or even *fewer* county lines than) the State's map." *Id*. (emphasis in original). Accordingly, the Supreme Court "agree[d] with" us that "plaintiffs' illustrative maps strongly suggested that Black voters in Alabama could constitute a majority in a second, reasonably configured, district." *Id.* (internal quotation marks omitted) (alterations accepted).

Next, the Supreme Court turned to the State's argument "that plaintiffs' maps were not reasonably configured because they failed to keep together a traditional community of interest within Alabama." *Id.* The Supreme Court recited the State's definition of "community of interest," as well as its argument that "the Gulf Coast region . . . is such a community of interest, and that plaintiffs' maps erred by separating it into two different districts." *Id.*

The Supreme Court "d[id] not find the State's argument persuasive." *Id.* at 1505. The Supreme Court reasoned that "[o]nly two witnesses testified that the Gulf Coast was a community of interest," that "testimony provided by one of those witnesses was partial, selectively informed, and poorly supported," and that "[t]he other witness, meanwhile, justified keeping the Gulf Coast together simply to

preserve political advantage." *Id.* (internal quotation marks omitted) (alterations accepted). The Supreme Court concluded that we "understandably found this testimony insufficient to sustain Alabama's overdrawn argument that there can be no legitimate reason to split the Gulf Coast region." *Id.* (internal quotation marks omitted).

Next, the Supreme Court considered an alternative basis for its agreement with our *Gingles* I analysis: that "[e]ven if the Gulf Coast did constitute a community of interest . . . [we] found that plaintiffs' maps would still be reasonably configured because they joined together a different community of interest called the Black Belt." *Id.* The Supreme Court then described the reasons why the Black Belt is a community of interest — its "high proportion of black voters, who share a rural geography, concentrated poverty, unequal access to government services, . . . lack of adequate healthcare, and a lineal connection to the many enslaved people brought there to work in the antebellum period." *Id.* (internal quotation marks omitted).

The Supreme Court agreed with us again, ruling that we "concluded—correctly, under [Supreme Court] precedent—that [we] did not have to conduct a beauty contest between plaintiffs' maps and the State's. There would be a split community of interest in both." *Id.* (internal quotation marks omitted) (alterations accepted) (quoting *Vera*, 517 U.S. at 977 (plurality opinion)).

The Supreme Court then rejected the State's argument that the 2021 Plan

satisfied Section Two because it performed better than Plaintiffs' illustrative plans on a core retention metric — "a term that refers to the proportion of districts that remain when a State transitions from one districting plan to another." *Id.* The Supreme Court rejected that metric on the ground that the Supreme Court "has never held that a State's adherence to a previously used districting plan can defeat a § 2 claim" because "[i]f that were the rule, a State could immunize from challenge a new racially discriminatory redistricting plan simply by claiming that it resembled an old racially discriminatory plan." *Id.* "That is not the law," the Supreme Court made clear: Section Two "does not permit a State to provide some voters less opportunity . . . to participate in the political process just because the State has done it before." *Id.* (internal quotation marks omitted).

The Supreme Court next discussed the second and third *Gingles* requirements. The Supreme Court accepted our determination that "there was no serious dispute that Black voters are politically cohesive, nor that the challenged districts' white majority votes sufficiently as a bloc to usually defeat Black voters' preferred candidate." *Id.* (internal quotation marks omitted). The Supreme Court recited the relevant racial polarization statistics and noted that the State's expert "conceded that the candidates preferred by white voters in the areas that he looked at regularly defeat the candidates preferred by Black voters." *Id.* (internal quotation marks omitted).

In the last step of its review of our analysis, the Supreme Court concluded that

the Plaintiffs "had carried their burden at the totality of circumstances stage." *Id.* at 1505–06. The Supreme Court upheld our findings that "elections in Alabama were racially polarized; that Black Alabamians enjoy virtually zero success in statewide elections; that political campaigns in Alabama had been characterized by overt or subtle racial appeals; and that Alabama's extensive history of repugnant racial and voting-related discrimination is undeniable and well documented." *Id.* at 1506 (internal quotation marks omitted).

The Supreme Court concluded its review of our analysis by again stating its ruling: "We see no reason to disturb the District Court's careful factual findings, which are subject to clear error review and have gone unchallenged by Alabama in any event. Nor is there a basis to upset the District Court's legal conclusions. The Court faithfully applied our precedents and correctly determined that, under existing law, [the 2021 Plan] violated § 2." *Id.* (internal quotation marks and citation omitted).

We have carefully reviewed the Opinion of the Supreme Court and discern no basis to conclude that any aspect of our Section Two analysis was erroneous.

Next, the Supreme Court turned to arguments by the State urging the Supreme Court to "remake [its] § 2 jurisprudence anew," which the Supreme Court described as "[t]he heart of these cases." *Id.* The Supreme Court explained that the "centerpiece of the State's effort is what it calls the 'race-neutral benchmark.'" *Id.* The Supreme

Court then described the benchmark, found the argument "compelling neither in theory nor in practice," and discussed problems with the argument. *Id.* at 1507–10.

Of special importance to these remedial proceedings, the Supreme Court rejected the State's assertion that "existing § 2 jurisprudence inevitably demands racial proportionality in districting, contrary to" Section Two. *Id.* at 1508. "[P]roperly applied," the Supreme Court explained, "the *Gingles* framework itself imposes meaningful constraints on proportionality, as [Supreme Court] decisions have frequently demonstrated." *Id.* The Supreme Court then discussed three cases to illustrate how *Gingles* constrains rather than requires proportionality: *Shaw v. Reno,* 509 U.S. 630, 633–34 (1993); *Miller* v. *Johnson*, 515 U.S. 900, 906, 910–11 (1995); and *Vera*, 517 U.S. at 957 (plurality opinion). *Allen*, 143 S. Ct. at 1508–09.

"Forcing proportional representation is unlawful," the Supreme Court reiterated, and Section Two "never requires adoption of districts that violate traditional redistricting principles." *Id.* at 1509–10 (internal quotation marks omitted) (alterations accepted). Rather, its "exacting requirements . . . limit judicial intervention to those instances of intensive racial politics where the excessive role of race in the electoral process . . . denies minority voters equal opportunity to participate." *Id.* at 1510 (internal quotation marks omitted) (alterations accepted).

In Part III-B-1 of the opinion, the Supreme Court then discussed "how the race-neutral benchmark would operate in practice." *Id.* Justice Kavanaugh did not

join Part III-B-1. *See id.* at 1497. Part III-B-1 is the only part of the Chief Justice's opinion that Justice Kavanaugh did not join. *See id.* We discuss it separately in the next segment of our analysis. *See infra* at Part I.B.5.b.

Finally, the Supreme Court rejected the State's arguments that the Supreme Court "should outright stop applying § 2 in cases like these" because it does not apply to single-member redistricting and is unconstitutional as we applied it. *Allen*, 143 S. Ct. at 1514. The Supreme Court observed that it has "applied § 2 to States' districting maps in an unbroken line of decisions stretching four decades" and has "unanimously held that § 2 and *Gingles* certainly . . . apply to claims challenging single-member districts.'" *Id.* at 1515 (internal quotation marks omitted) (alterations accepted) (quoting *Growe v. Emison*, 507 U.S. 25, 40 (1993)). The Supreme Court reasoned that adopting the State's approach would require it to abandon this precedent. The Supreme Court explained its refusal to do so: "Congress is undoubtedly aware of our construing § 2 to apply to districting challenges. It can change that if it likes. But until and unless it does, statutory *stare decisis* counsels our staying the course." *Id.*

The Supreme Court then rejected as foreclosed by longstanding precedent the State's argument that Section Two is unconstitutional as we applied it. *Id.* at 1516–17. The Court affirmed our judgments in *Caster* and *Milligan*. *Id.* at 1517.

b. Part III-B-1 of the Chief Justice's Opinion

In Part III-B-1, the Chief Justice, in an opinion joined by three other Justices, explained why the State's race-neutral benchmark approach would "fare[] poorly" in practice.[12] *Id.* at 1510 (Roberts, C.J.). The four justices explained that Alabama's benchmark would "change existing law" by "prohibiting the illustrative maps that plaintiffs submit to satisfy the first *Gingles* precondition from being based on race." *Id.* (internal quotation marks omitted). The four justices then explained why they saw "no reason to impose such a new rule." *Id.* The four justices acknowledged that the "line between racial predominance and racial consciousness can be difficult to discern," and explained their view that "it was not breached here." *Id.* at 1510–11.

We have considered Part III-B-1 carefully, and we do not discern anything about it that undermines our conclusion that the 2023 Plan does not remedy the Section Two violation that we found and the Supreme Court affirmed.

c. Justice Kavanaugh's Concurrence

Justice Kavanaugh "agree[d] with the [Supreme] Court that Alabama's redistricting plan violates § 2 of the Voting Rights Act." *Allen*, 143 S. Ct. at 1517

[12] We distinguish Part III-B-1, the opinion of four justices, from a "plurality opinion." "A plurality opinion is one that doesn't garner enough appellate judges' votes to constitute a majority, but has received the greatest number of votes of any of the opinions filed, among those opinions supporting the mandate." Bryan A. Garner, et al, The Law of Judicial Precedent 195 (2016) (internal quotation marks and footnote omitted) (alterations accepted). All the other parts of the Chief Justice's opinion garnered five votes.

(Kavanaugh, J., concurring). He "wr[o]te separately to emphasize four points." *Id.* (Kavanaugh, J., concurring). *First,* Justice Kavanaugh emphasized that "the upshot of Alabama's argument is that the Court should overrule *Gingles*," "[b]ut the *stare decisis* standard for this Court to overrule a statutory precedent, as distinct from a constitutional precedent, is comparatively strict." *Id.* (Kavanaugh, J., concurring). Justice Kavanaugh observed that "[i]n the past 37 years . . . Congress and the President have not disturbed *Gingles*, even as they have made other changes to the Voting Rights Act." *Id.* (Kavanaugh, J., concurring).

"*Second*," Justice Kavanaugh emphasized, "Alabama contends that *Gingles* inevitably requires a proportional number of majority-minority districts, which in turn contravenes the proportionality disclaimer" in Section Two, but "Alabama's premise is wrong." *Id.* at 1517–18 (Kavanaugh, J., concurring). "*Gingles* does not mandate a proportional number of majority-minority districts." *Id.* at 1518 (Kavanaugh, J., concurring). Rather, "*Gingles* requires the creation of a majority-minority district only when, among other things, (i) a State's redistricting map cracks or packs a large and 'geographically compact' minority population and (ii) a plaintiff's proposed alternative map and proposed majority-minority district are 'reasonably configured'—namely, by respecting compactness principles and other traditional districting criteria such as county, city, and town lines." *Id.* (Kavanaugh, J., concurring).

Justice Kavanaugh explained further that if "*Gingles* demanded a proportional number of majority-minority districts, States would be forced to group together geographically dispersed minority voters into unusually shaped districts, without concern for traditional districting criteria such as county, city, and town lines," but "*Gingles* and [the Supreme] Court's later decisions have flatly rejected that approach." *Id.* (Kavanaugh, J., concurring).

"*Third*," Justice Kavanaugh explained, "Alabama argues that courts should rely on race-blind computer simulations of redistricting maps to assess whether a State's plan abridges the right to vote on account of race," but as the Supreme Court "has long recognized—and as all Members of [the Supreme] Court . . . agree[d in *Allen*]—the text of § 2 establishes an effects test, not an intent test." *Id.* (Kavanaugh, J., concurring).

"*Fourth*," Justice Kavanaugh emphasized, "Alabama asserts that § 2, as construed by *Gingles* to require race-based redistricting in certain circumstances, exceeds Congress's remedial or preventive authority," but "the constitutional argument presented by Alabama is not persuasive in light of the Court's precedents." *Id.* at 1519 (Kavanaugh, J., concurring).

Justice Kavanaugh reiterated that he "vote[d] to affirm" and "concur[red] in all but Part III–B–1 of the Court's opinion." *Id.* (Kavanaugh, J., concurring).

***

The State argues that Part III-B-1 tells us that only a plurality of Justices "concluded that at least some of the plans drawn by Bill Cooper did not breach the line between racial consciousness and racial predominance." *Milligan* Doc. 267 ¶ 39 (internal quotation marks omitted) (alterations accepted). The State overreads Part III-B-1 as leaving open for relitigation the question whether the Plaintiffs submitted at least one illustrative remedial plan in which race did not play an improper role.

The affirmance tells us that a majority of the Supreme Court concluded that the Plaintiffs satisfied their burden under *Gingles* I. This necessarily reflects a conclusion that the Plaintiffs submitted at least one illustrative map in which race did not play an improper role. Justice Kavanaugh's concurrence is to the same effect — Justice Kavanaugh did not suggest, let alone say, that he "vote[d] to affirm" despite finding that the Plaintiffs submitted no illustrative map that properly considered race. What Part III-B-1 tells us — and no more — is that only four Justices agreed with every statement in that Part.

C. Remedial Proceedings

We first discuss the Plaintiffs' objections to the 2023 Plan and the State's defense. We then discuss the parties' stipulations of fact and the remedial hearing.

1. The *Milligan* Plaintiffs' Objections

The *Milligan* Plaintiffs object to the 2023 Plan on the ground that it "ignores this Court's preliminary injunction order and instead perpetuates the Voting Rights

Act violation that was the very reason that the Legislature redrew the map." *Milligan* Doc. 200 at 6. The *Milligan* Plaintiffs assert that the 2023 Plan does not remedy the Section Two violation we found because it does not include an additional opportunity district. *Id.* They argue that District 2 is not an opportunity district because the performance analyses prepared by Dr. Liu and the State indicate that "Black-preferred candidates in the new CD2 will continue to lose 100% of biracial elections . . . by 10%-points on average." *Id.* at 6–7 (citing *Milligan* Doc. 200-2 at 4 tbl.2).

The *Milligan* Plaintiffs make three arguments to support their objection. *First*, the *Milligan* Plaintiffs argue that the 2023 Plan fails to remedy the Section Two violation we found because the 2023 Plan itself violates Section Two and dilutes Black votes. *Id.* at 16–19. The *Milligan* Plaintiffs contend that the 2023 Plan "fails th[e] § 2 remedial analysis for the same reasons its 2021 Plan did," because it "permit[s] the white majority voting as a bloc in the new CD2 to easily and consistently defeat Black-preferred candidates." *Id.* at 17.

The *Milligan* Plaintiffs first rely on the State's evidence to make their point. The Alabama Performance Analysis "found that *not once* in seven elections from 2018 to 2020 would Black voters' candidates overcome white bloc voting to win in CD2." *Id.* at 18. And Dr. Liu's[13] analysis of 11 biracial elections in District 2

[13] The *Milligan* Plaintiffs relied on testimony from Dr. Liu during the preliminary

between 2014 and 2022 "shows zero Black electoral successes, with an average margin of defeat of over 10 percentage points," *id.*, because "voting is highly racially polarized," *Milligan* Doc. 200-2 at 1. Thus, the *Milligan* Plaintiffs say, "the new CD2 offers no more opportunity than did the old CD2." *Milligan* Doc. 200 at 19.

Second, the *Milligan* Plaintiffs argue that the legislative findings that accompany the 2023 Plan perpetuate the Section Two violation and contradict conclusions that we and the Supreme Court drew based on the evidence. *See id.* at 20–23. The *Milligan* Plaintiffs offer evidence to rebut the State's suggestion that there can be no legitimate reason to split Mobile and Baldwin counties: (1) a declaration by Alabama Representative Sam Jones, the first Black Mayor of Mobile, who "explains the many economic, cultural, religious, and social ties between much of Mobile and the Black Belt, in contrast to Baldwin County, which shares 'little of these cultural or community ties' with Mobile," *id.* at 22 (quoting *Milligan* Doc. 200-9 ¶ 15); and (2) an expert report prepared by Dr. Bagley,[14] who contrasts the "'intimate historical and socioeconomic ties' that the 'City of Mobile and the northern portion of Mobile County, including Prichard, have . . . with the Black Belt,'" with the "'ahistorical' effort to treat the Wiregrass or 'Mobile and Baldwin

injunction proceedings, and we found him credible. *Milligan* Doc. 107 at 174–75.

[14] The *Milligan* Plaintiffs relied on expert testimony from Dr. Bagley about the Senate Factors during the preliminary injunction proceedings, and we found him credible. *See Milligan* Doc. 107 at 78–81 and 185–87.

Counties as an inviolable'" community of interest, *id.* (quoting *Milligan* Doc. 200-15 at 1).

Further, the *Milligan* Plaintiffs urge that under binding precedent, we cannot defer to a redistricting policy of a state if it perpetuates vote dilution. *See id.* at 20 (citing *Allen*, 143 S. Ct. at 1505, and *LULAC*, 548 U.S. at 440–41).

The *Milligan* Plaintiffs assail the legislative findings on the grounds that they "contradict the Committee's own recently readopted guidelines, were never the subject of debate or public scrutiny, ignored input from Black Alabamians and legislators, and simply parroted attorney arguments already rejected by this Court and the Supreme Court." *Id.* at 20. The *Milligan* Plaintiffs observe that although the legislative findings prioritize as "non-negotiable" rules that there cannot be "more than six splits of county lines" and that the Black Belt, Gulf Coast, and Wiregrass be kept together "to the fullest extent possible," the guidelines prioritize compliance with Section Two over those rules. *Id.* at 20–21 (citing *Milligan* Doc. 200-4, Section 1, Findings 3(d), 3(e), 3(g)(4)(d), and *Milligan* Doc. 107 at 31) (internal quotation marks omitted). The *Milligan* Plaintiffs also observe that the guidelines did not set an "arbitrary ceiling" on the number of county splits and that the legislative findings "redefine[] 'community of interest.'" *Id.* at 21.

The *Milligan* Plaintiffs argue that the State ignores the Supreme Court's finding that the Duchin and Cooper plans "comported with traditional districting

criteria" even though they split Mobile and Baldwin counties. *Id.* at 21 (internal quotation marks omitted). And the *Milligan* Plaintiffs argue that in any event, the 2023 Plan does not satisfy the legislative finding that the specified communities must be kept together "to the fullest extent possible" because only the Gulf Coast is kept together, while the Black Belt remains split in a way that dilutes Black votes in District 2. *Id.* at 22 (internal quotation marks omitted).

Third, the *Milligan* Plaintiffs argue that the 2023 Plan raises constitutional concerns because it "may be" the product of intentional discrimination. *Id.* at 23–26. The *Milligan* Plaintiffs rest this argument on the "deliberate failure to remedy the identified [Section Two] violations"; white legislators' efforts to "cut out Black members on the Reapportionment Committee" from meaningful deliberation on the Committee's maps; public statements by legislators about their efforts to draw the 2023 Plan to maintain the Republican majority in the United States House of Representatives and convince one Supreme Court Justice to "see something different"; and the established availability of "less discriminatory alternative maps." *Id.* at 24–25 (internal quotation marks omitted).

The *Milligan* Plaintiffs ask that the Court enjoin Secretary Allen from using the 2023 Plan and direct the Special Master to draw a remedial map. *Id.* at 26.

2. The *Caster* Plaintiffs' Objections

The *Caster* Plaintiffs assert that "Alabama is in open defiance of the federal

courts." *Caster* Doc. 179 at 2. They argue that the 2023 Plan "does not even come close to giving Black voters an additional opportunity to elect a candidate of their choice" because, like the 2021 Plan, it contains just one majority-Black district and "fails to provide an opportunity for Black voters to elect their preferred candidates in a second congressional district." *Id.* at 2, 8–9.

The *Caster* Plaintiffs rely on a performance analysis Dr. Palmer[15] prepared to examine District 2 in the 2023 Plan. *See id.* at 9–10; *Caster* Doc. 179-2. Dr. Palmer analyzed 17 statewide elections between 2016 and 2022 to evaluate the performance of Black-preferred candidates in District 2; he found "strong evidence of racially polarized voting" and concluded that Black-preferred candidates would have been defeated in 16 out of 17 races (approximately 94% of the time) in the new District 2. *Caster* Doc. 179-2 at 3, 6.

The *Caster* Plaintiffs urge us to ignore as irrelevant the discussion in the legislative findings about communities of interest. They contend that we and the Supreme Court already have found the State's arguments about communities of interest "'insufficient to sustain' Alabama's failure to provide an additional minority opportunity district." *Caster* Doc. 179 at 10 (quoting *Allen*, 143 S. Ct. at 1504–05).

If we consider the legislative findings, the *Caster* Plaintiffs identify a

[15] The *Caster* Plaintiffs relied on testimony from Dr. Palmer during the preliminary injunction proceedings, and we found him credible. *See Milligan* Doc. 174–76.

"glaringly absent" omission: "*any* discussion of the extent to which [the 2023 Plan] provides Black voters an opportunity to elect in a second congressional district." *Id.* at 11 (emphasis in original). According to the *Caster* Plaintiffs, the failure of the Legislature to explain how the 2023 Plan "*actually complies* with" Section Two is telling. *Id.* (emphasis in original).

The *Caster* Plaintiffs, like the *Milligan* Plaintiffs, ask us to enjoin Secretary Allen from using the 2023 Plan and "proceed to a judicial remedial process to ensure . . . relief in time for the 2024 election." *Id.*

3. The State's Defense of the 2023 Plan

At its core, the State's position is that even though the 2023 Plan does not contain an additional opportunity district, the Plaintiffs' objections fail under *Allen* because the 2023 Plan "cures the purported discrimination identified by Plaintiffs" by "prioritiz[ing] the Black Belt to the fullest extent possible . . . while still managing to preserve long-recognized communities of interest in the Gulf and Wiregrass." *Milligan* Doc. 220 at 9. The State contends that the "2023 Plan improves on the 2021 Plan and all of Plaintiffs' alternative plans by unifying the Black Belt while also respecting the Gulf and Wiregrass communities of interest." *Id.* at 27.

According to the State, "Plaintiffs cannot produce an alternative map with a second majority-Black district without splitting at least two of those communities of interest," so their Section Two challenge fails. *Id.* at 9. The State leans heavily on

the statement in *Allen* that Section Two "never require[s] adoption of districts that violate traditional redistricting principles." 143 S. Ct. at 1510 (internal quotation marks omitted).

The State argues that it is not in "defiance" of a court order because "[t]here are many ways for a State to satisfy § 2's demand of 'equally open' districts." *Milligan* Doc. 220 at 9. The State contends that the Plaintiffs "now argue that § 2 requires this Court to adopt a plan that divides communities of interest in the Gulf and Wiregrass to advance racial quotas in districting, but *Allen* forecloses that position." *Id*. at 10.

The State makes four arguments in defense of the 2023 Plan. *First*, the State argues that the 2023 Plan remedies the Section Two violation we found because the 2023 Plan complies with Section Two. *Id.* at 29. The State begins with the premise that it "completely remedies a Section 2 violation . . . by enacting *any* new redistricting legislation that complies with Section 2." *Id.* (emphasis in original). The State then reasons that the Plaintiffs must prove that the 2023 Plan is not "equally open." *Id.* at 31 (internal quotation marks omitted). The State argues that our "assessment," *id.* at 32, that "any remedial plan will need to include two districts in which Black voters either comprise a voting-age majority or something quite close to it," *Milligan* Doc. 107 at 6, was "'based on the [2021] Legislature's redistricting guidelines'" and "'choices that the [2021] Plan made,' all of which came *before*" the

2023 Plan, *Milligan* Doc. 220 at 32 (emphasis in original) (quoting *Milligan* Doc. 7 at 149, 151).

The States cites *Dillard v. Crenshaw County*, 831 F.2d 246, 250 (11th Cir. 1987), to say that we cannot focus exclusively on evidence about the 2021 Plan to evaluate whether the 2023 Plan is a sufficient remedy. *Milligan* Doc. 220 at 34–35 ("The evidence showing a violation in an *existing* election scheme may not be completely coextensive with a *proposed* alternative." (emphasis in original)).

The State contends that the 2023 Plan remedied the discriminatory effects of the 2021 Plan by applying traditional redistricting principles "as fairly" to majority-Black communities in the Black Belt and Montgomery "as to the Gulf and the Wiregrass." *Id.* at 33. The State claims that the 2023 Plan is "entitled to the presumption of legality" and "the presumption of good faith," and is governing law unless it is found to violate federal law. *Id.* at 36–37.

Second, the State asserts that the 2023 Plan complies with Section Two, and Plaintiffs cannot produce a reasonably configured alternative map. *See id.* at 37–60. The State urges that neither we nor the Supreme Court "ever said that § 2 requires the State to subordinate 'nonracial communities of interest' in the Gulf and Wiregrass to Plaintiffs' racial goals." *Id.* at 38. The State contends that the Plaintiffs cannot satisfy *Gingles* I because they did not offer a plan that "meet[s] or beat[s]" the 2023 Plan "on the traditional principles of compactness, maintaining

communities of interest, and maintaining political subdivisions that are adhered to in the State's plan." *Id.* at 38–39 (internal quotation marks omitted). "The focus now is on the 2023 Plan," the State says, and the Plaintiffs cannot lawfully surpass it. *Id.* at 40–41.

As for communities of interest, the State asserts that the 2023 Plan "resolves the concerns about communities of interest that Plaintiffs said was 'the heart' of their challenge to the 2021 Plan." *Id.* at 41. The State says that the Supreme Court's ruling that it was "not persuaded that the Gulf was a community of interest" would "surprise Alabamians and has been answered by the legislative record for the 2023 Plan." *Id.* at 41–42. The State claims that its argument on this issue is beyond dispute because the 2023 Plan "answers Plaintiffs' call to unify the Black Belt into two districts, without sacrificing indisputable communities of interest in the Gulf and Wiregrass regions." *Id.* at 42. The State contends that "[t]here can be no dispute that the 2023 Plan's stated goal of keeping the Gulf Coast together and the Wiregrass region together is a legitimate one, and § 2 does not (and cannot) require the State to disregard that legitimate race-neutral purpose in redistricting." *Id.* at 43. And the State contends, quoting the principal dissent in *Allen*, that the Gulf Coast is "indisputably a community of interest." *Id.* at 44 (internal quotation marks omitted) (alterations accepted).

The State offers two bodies of evidence to support its assertions about

communities of interest: (1) the legislative findings that accompanied the 2023 Plan, and (2) evidence about the Gulf Coast and the Wiregrass that the Legislature considered in 2023. *Id.* at 44–50. Based on this evidence, the State concludes that this is "no longer a case in which there would be a split community of interest in both the State's plan and Plaintiffs' alternatives," and "Plaintiffs will not be able to show that there is a plan on par with the 2023 Plan that also creates an additional reasonably configured majority-Black district." *Id.* at 51 (internal quotation marks omitted) (alterations accepted).

As for compactness and county splits, the State asserts that "each of Plaintiffs' alternative maps fails to match the 2023 Plan on compactness, county splits, or both." *Id.* at 56. The State argues that "a Plaintiff cannot advocate for a less compact plan for exclusively racial reasons." *Id.* at 57. The State urges us to disregard our previous finding that the Plaintiffs adduced maps that respected the guidelines because "evidence about the 2021 Plan based on its 2021 principles does not shine light on whether the 2023 Plan has discriminatory effects." *Id.*

The State relies on the expert report of Mr. Sean Trende, who "assessed the 2023 Plan and each of Plaintiffs' alternative plans based on the three compactness measures Dr. Duchin used in her earlier report." *Id.* Mr. Trende concluded that "the 2023 Plan measures as more compact" on all three scores "than Duchin Plans A, C, and D" and all the Cooper plans. *Id.*; *see also Milligan* Doc. 220-12 at 6–11. Mr.

Trende concedes that on two of the measures (Polsby-Popper and Cut Edges), the Duchin Plan B ties or beats the 2023 Plan, and on one of the measures (Cut Edges), a map that the *Milligan* and *Caster* Plaintiffs submitted to the Committee during the 2023 legislative process ("the VRA Plan")[16] ties the 2023 Plan. *See Milligan* Doc. 220 at 57. The State argues that Duchin Plan B and the VRA Plan "still fail under *Allen* because they have more county splits" (seven) than the 2023 Plan has (six). *Id.* at 58.

The State claims that if "Plaintiffs' underperforming plans could be used to replace a 2023 Plan that more fully and fairly applies legitimate principles across the State, the result will be . . . affirmative action in redistricting," which would be unconstitutional. *Id.* at 59–60.

Third, the State urges us to reject the Plaintiffs' understanding of an opportunity district on constitutional avoidance grounds. *See id.* at 60–68. The State begins with the undisputed premise that under Section Two, a remedial district need not be majority-Black. *Id.* at 60. The State then argues that nothing in *Allen* could "justify . . . replacing the 2023 Plan with Plaintiffs' preferred alternatives that elevate

[16] The *Milligan* and *Caster* Plaintiffs do not offer the VRA Plan in this litigation as a remedial map for purposes of satisfying *Gingles* I or for any other purpose. *See* Aug. 14 Tr. 123. It is in the record only because they proposed it to the Committee and the State's expert witness, Mr. Bryan, prepared a report that includes statements about it. *See Milligan* Doc. 220-10 at 53, *discussed infra* at Part IV.B.2.a.

the Black Belt's demographics over its historical boundaries." *Id.* at 61. The State then argues that "*all* race-based government action must satisfy strict scrutiny," that "[f]orcing proportional representation is not a compelling governmental interest," and that "sacrificing neutral [redistricting] principles to race is unlawful." *Id*. at 63 (emphasis in original) (internal quotation marks omitted).

The State argues that Plaintiffs' interpretation of Section Two contravenes "two equal protection principles: the principle that race can never be used as a negative or operate as a stereotype and the principle that race-based action can't extend indefinitely into the future." *Id.* at 64–67. The State says that the Plaintiffs' position "depends on stereotypes about how minority citizens vote as groups . . . and not on identified instances of past discrimination." *Id.* at 68.

In their *fourth* argument, the State contends that we should reject the *Milligan* Plaintiffs' intentional discrimination argument as cursory and because there is an "obvious alternative explanation for the 2023 Plan: respect for communities of interest." *Id.* at 68–71 (internal quotation marks omitted). And the State says the *Milligan* Plaintiffs "rely on the complaints of Democrats in the Legislature." *Id.* at 70.

The State submitted with its brief numerous exhibits, including the 2023 Plan, transcripts of the Committee's public hearings, a supplemental report prepared by Mr. Bryan, Mr. Trende's report, and materials from the legislative process about two

of the three communities of interest they urge us to consider: the Gulf Coast and the Wiregrass. *See Milligan* Docs. 220-1–220-19.

The State cites Mr. Bryan's 2023 report four times, and three of those are in reference to the VRA Plan. *See Milligan* Doc. 220 at 21 (in the "Background" section of the brief, to describe how the VRA Plan treats Houston County); *id.* (also in the "Background" section of the brief, to say that in the VRA Plan, the BVAP for District 2 is 50%, and the BVAP for District 7 is 54%); *id.* at 58 (in the constitutional avoidance argument, to assert that the VRA Plan splits counties "along racial lines, in service of hitting a racial target"). The fourth citation was as evidence that District 2 in the 2023 Plan has a BVAP of 39.93%, which is a stipulated fact. *See id.* at 28; *Milligan* Doc. 251 ¶ 4.

Nowhere does the State argue (or even suggest) that District 2 in the 2023 Plan is (or could be) an opportunity district.

4. The Plaintiffs' Replies

a. The *Milligan* Plaintiffs

The *Milligan* Plaintiffs reply that it is "undisputed and dispositive" that the 2023 Plan "offers no new opportunity district." *Milligan* Doc. 225 at 2. The *Milligan* Plaintiffs accuse the State of ignoring the finding by us and the Supreme Court that they already have satisfied *Gingles* I, and of "try[ing] to justify the 2023 Plan through newly contrived [legislative] 'findings' that perpetuate the [Section Two] violation

and contradict their own guidelines." *Id.*

The *Milligan* Plaintiffs assert that the State "cannot . . . cite a single case in which a court has ruled that a remedial plan that fails to meaningfully increase the effective opportunity of minority voters to elect their preferred representatives is a valid [Section Two] remedy." *Id.* at 2–3.

The *Milligan* Plaintiffs distinguish their claim of vote dilution, for which they say the remedy is an additional opportunity district, from a racial gerrymandering claim, for which the remedy is "merely to undo a specific, identified racial split regardless of electoral outcomes." *Id.* at 4. The *Milligan* Plaintiffs say that the State's arguments about unifying the Black Belt fail to appreciate this distinction. *Id.*

The *Milligan* Plaintiffs resist the State's reliance on *Dillard* to reset the *Gingles* analysis. *Id.* at 5. They say the State misreads *Dillard*, which involved a complete reconfiguration of the electoral mechanism from an at-large system to a single-member system with an at-large chair. *See id.* (citing *Dillard*, 831 F.2d at 250). In that context, the *Milligan* Plaintiffs say, it "makes sense" for a court to "compare the differences between the new and old" maps with the understanding that "evidence showing a violation in an existing [at-large] election scheme may not be completely coextensive with a proposed alternative election system." *Id.* at 6 (internal quotation marks omitted). According to the *Milligan* Plaintiffs, that understanding does not foreclose, in a vote dilution case without an entirely new

electoral mechanism, focusing the question on "whether the new map continues to dilute Black votes as the old map did or whether the new map creates an 'opportunity in the real sense of that term.'" *Id.* (quoting *LULAC*, 548 U.S. at 429).

The *Milligan* Plaintiffs urge that if we reset the *Gingles* analysis, we will necessarily allow "infinite bites at the apple[:] Alabama would be permitted to simply designate new 'significant' communities of interest and anoint them *post hoc*, point to them as evidence of newfound compliance, and relitigate the merits again and again—all while refusing to remedy persistent vote dilution." *Id.*

The *Milligan* Plaintiffs argue that the State's defense of the 2023 Plan invites the very beauty contest that we must avoid, and that federal law does not require a Section Two plaintiff to "meet or beat each and every one of [a State's] selected and curated districting principles" on remedy. *Id.* at 8. If that were the rule, the *Milligan* Plaintiffs say they would be required to "play a continuous game of whack-a-mole that would delay or prevent meaningful relief." *Id.*

The *Milligan* Plaintiffs point out that the guidelines the Legislature used in 2023 were the exact same guidelines the Legislature used in 2021. *Id*. at 9. And the *Milligan* Plaintiffs say that if we pay as much attention to the legislative findings that accompanied the 2023 Plan as the State urges us to, we will run afoul of the rule that legislative intent is not relevant in a Section Two analysis. *Id.*

Finally, the *Milligan* Plaintiffs say that the State badly misreads *Allen* as

"authoriz[ing] states to reverse engineer redistricting factors that entrench vote dilution." *Id.* at 11. The *Milligan* Plaintiffs argue that *Allen* "specifically *rejected* this theory when it held that a state may not deploy purportedly neutral redistricting criteria to provide some voters less opportunity . . . to participate in the political process." *Id.* (emphasis in original) (internal quotation marks omitted).

b. The *Caster* Plaintiffs

The *Caster* Plaintiffs reply that "Alabama is fighting a battle it has already lost[]" and that "[s]o committed is the State to maintaining a racially dilutive map that it turns a deaf ear to the express rulings of this Court and the Supreme Court." *Caster* Doc. 195 at 2. The *Caster* Plaintiffs urge us "not [to] countenance Alabama's repeated contravention" of our instructions. *Id.*

The *Caster* Plaintiffs make three arguments on reply. *First*, they argue that Section Two liability can be remedied "only by a plan that cures the established vote dilution." *Id.* at 3. They urge that the liability and remedy inquiries are inextricably intertwined, such that whether a map "is a Section 2 *remedy* is . . . a measure of whether it addresses the State's Section 2 *liability*." *Id.* (emphasis in original).

The *Caster* Plaintiffs attack the State's attempt to "completely reset[] the State's liability such that Plaintiffs must run the *Gingles* gauntlet anew" as unprecedented. *Id.* at 4. The *Caster* Plaintiffs assert that *Covington*, 138 S. Ct. at 2553, forecloses the State's position, and they make the same argument about

Dillard that the *Milligan* Plaintiffs make. *See Caster* Doc. 195 at 4–6.

The *Caster* Plaintiffs criticize the State's argument about legislative deference to the 2023 Plan as overdrawn, arguing that "deference does not mean that the Court abdicates its responsibility to determine whether the remedial plan in fact remedies the violation." *Id.* at 8.

The *Caster* Plaintiffs expressly disclaim a beauty contest: "Plaintiffs do not ask the Court to reject the 2023 Plan in favor of a plan it finds preferable. They ask the Court to strike down the 2023 Plan because they have provided unrefuted evidence that it fails to provide the appropriate remedy this Court found was necessary to cure the Section 2 violation." *Id.* at 9 (internal quotation marks omitted).

Second, the *Caster* Plaintiffs assert that the State misreads the Supreme Court's affirmance of the preliminary injunction. *Id.* at 10–12. The *Caster* Plaintiffs argue that *Allen* did not require a "'meet or beat' standard for illustrative maps" and did not adopt a standard that "would allow the remedial process to continue ad infinitum—so long as one party could produce a new map that improved compactness scores or county splits." *Id.* at 10–11.

The *Caster* Plaintiffs reply to the State's argument about affirmative action in redistricting by directing us to the statement in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 143 S. Ct. 2141, 2162 (2023), that "remediating specific, identified instances of past discrimination that violated the

Constitution or a statute" is a "compelling interest[] that permit[s] resort to race-based government action"; and the holding in *Allen,* 143 S. Ct. at 1516–17, that for the last forty years, "[the Supreme] Court and the lower federal courts have repeatedly applied" Section Two "and, under certain circumstances, have authorized race-based redistricting as a remedy" for discriminatory redistricting maps. *Caster* Doc. 195 at 12.

Third, the *Caster* Plaintiffs argue that the State concedes that the 2023 Plan does not provide Black voters an additional opportunity district. *Caster* Doc. 195 at 13–14. The *Caster* Plaintiffs urge us that this fact is dispositive. *See id.*

Ultimately, the *Caster* Plaintiffs contend that "[i]f there were any doubt that Section 2 remains essential to the protection of voting rights in America, Alabama's brazen refusal to provide an equal opportunity for Black voters in opposition to multiple federal court opinions—six decades after the passage of the Voting Rights Act—silences it, resoundingly." *Id.* at 15.

5. The Parties' Motions for Clarification

While the parties were preparing their briefs, the *Milligan* and *Caster* Plaintiffs, as well as the State, each filed motions for clarification regarding the upcoming hearing. *See Milligan* Docs. 188, 205. The *Milligan* and *Caster* Plaintiffs sought to clarify the role of the *Singleton* Plaintiffs, *Milligan* Doc. 188 at 2, while the State asked for a ruling on whether the Court would "foreclose consideration" of

evidence it intended to offer in support of their *Gingles* I argument, *Milligan* Doc. 205 at 4–5. The State advised us that it would offer evidence "on whether race would now predominate in Plaintiffs' alternative approaches, as illuminated by new arguments in Plaintiffs' objections and their plan presented to the 2023 Reapportionment Committee." *Id.* at 5. And the State alerted us that it would not offer any evidence "challenging the demographic or election numbers in the performance reports" offered by the Plaintiffs (*i.e.*, the Palmer and Liu Reports). *Id.* at 6 (internal quotation marks omitted).

In response, the *Milligan* Plaintiffs asserted that "the sole objective of this remedial hearing is answering whether Alabama's new map remedies the likely [Section Two] violation." *Milligan* Doc. 210 at 1. "As such," the *Milligan* Plaintiffs continued, the State is "bar[red] . . . from relitigating factual and legal issues that this Court and the Supreme Court resolved at the preliminary injunction liability stage—including whether Mobile-Baldwin is an inviolable community of interest that may never be split, whether the legislature's prioritizing particular communities of interest immunizes the 2021 Plan from Section 2 liability, and whether Plaintiffs' illustrative maps are reasonably configured." *Id.* at 2. The *Milligan* Plaintiffs asserted that "the undisputed evidence proves that [the 2023 Plan] does not satisfy the preliminary injunction." *Id.* at 2–3.

The *Caster* Plaintiffs responded similarly. The *Caster* Plaintiffs argued that

"the question of Alabama's liability is not an open one for purposes of these preliminary injunction proceedings," because "[t]hat is precisely what the Supreme Court decided when it affirmed this Court's preliminary injunction just a few months ago." *Caster* Doc. 190 at 2 & Part I. "Rather," the *Caster* Plaintiffs argued, "the question before the Court is whether the 2023 Plan actually remedies the State's likely violation." *Id.* at 2, 7–8. The *Caster* Plaintiffs asserted that to answer that question, we needed only to determine "whether the 2023 Plan remedies the vote dilution identified during the liability phase by providing Black Alabamians with an additional opportunity district." *Id.* at 8. Likewise, the *Caster* Plaintiffs asserted that we should exclude as irrelevant the State's evidence that the 2023 Plan respects communities of interest. *Id.* at 12–13. The *Caster* Plaintiffs argued that on remedy, Section Two is not "a counting exercise of how many communities of interest can be kept whole." *Id.* at 12. They urged that the Gulf Coast evidence was merely an attempt to relitigate our findings about that community, which should occur only during a trial on the merits, not during the remedial phase of preliminary injunction proceedings. *Id.* at 13–14.

We issued orders clarifying that the scope of the remedial hearing would be limited to "the essential question whether the 2023 Plan complies with the order of this Court, affirmed by the Supreme Court, and with Section Two." *Milligan* Doc. 203 at 4; *see also Milligan* Doc. 222 at 9. We cited the rules that "any proposal to

remedy a Section Two violation must itself conform with Section Two," and that "[t]o find a violation of Section 2, there must be evidence that the remedial plan denies equal access to the political process." *Milligan* Doc. 222 at 10 (alterations accepted) (quoting *Dillard*, 831 F.2d at 249–50).

Accordingly, we ruled that "[a]lthough the parties may rely on evidence adduced in the original preliminary injunction proceedings conducted in January 2022 to establish their assertions that the 2023 Plan is or is not a sufficient remedy for the Section Two violation found by this Court and affirmed by the Supreme Court, th[e] remedial hearing w[ould] not relitigate the issue of that likely Section Two violation." *Milligan* Doc. 203 at 4. We reasoned that this limitation "follow[ed] applicable binding Supreme Court precedent and [wa]s consistent with the nature of remedial proceedings in other redistricting cases." *Id.* (citing *Covington*, 138 S. Ct. at 2348; and *Jacksonville Branch of the NAACP v. City of Jacksonville*, No. 3:22-cv-493-MMM-LLL, 2022 WL 17751416, 2022 U.S. Dist. LEXIS 227920 (M.D. Fla. Dec. 19, 2022)). We specifically noted that "[i]f the Defendants seek to answer the Plaintiffs' objections that the 2023 Plan does not fully remediate the likely Section Two violation by offering evidence about 'communities of interest,' 'compactness,' and 'county splits,' they may do so." *Milligan* Doc. 222 at 10. But we reserved ruling on the admissibility of any particular exhibits that the parties intended to offer at the hearing. *Id.* at 10–11.

We explained that "it would be unprecedented for this Court to relitigate the likely Section Two violation during these remedial proceedings," and that we "w[ould] not do so" because "[w]e are not at square one in these cases." *Milligan* Doc. 203 at 4. We observed that "this manner of proceeding [wa]s consistent with the [State's] request that the Court conduct remedial proceedings at this time and delay any final trial on the merits . . . until after the 2024 election." *Id.* at 5. And we explained why we would not require Plaintiffs to amend or supplement complaints, as the State suggested. *See id.* at 6–7.

6. The Plaintiffs' Motion *in Limine*

The *Milligan* and *Caster* Plaintiffs also jointly filed a motion *in limine* in advance of the remedial hearing to exclude "the expert testimony of Mr. Thomas Bryan and Mr. Sean Trende, as well as any and all evidence, references to evidence, testimony, or argument relating to the 2023 Plan's maintenance of communities of interest." *Milligan* Doc. 233 at 1. The Plaintiffs asserted that because of the limited scope of the hearing, this evidence was irrelevant and immaterial. *See id.* at 3–12.

As for Mr. Trende, the Plaintiffs asserted that his "analysis—which compares Plaintiffs' illustrative plans, a plan Plaintiffs proposed to the Legislature, and the State's 2021 and 2023 Plans under compactness metrics, county splits, and the degree to which they split three identified communities of interest—sheds no light on whether the 2023 Plan remedies this Court's finding of vote dilution." *Id.* at 4

(internal quotation marks omitted). And the Plaintiffs asserted that "Mr. Bryan's analysis of a smaller subset of the same plans concerning the number of county splits and . . . the size and type of population that were impacted by them to offer opinions about whether there is evidence that race predominated in the design of the plans, similarly tilts at windmills." *Id.* (internal quotation marks omitted).

The Plaintiffs further asserted that those experts' "statistics regarding the 2023 Plan" are irrelevant in light of the State's "conce[ssion] that the Black-preferred candidates would have lost" in District 2 in "every single election studied by their own expert." *Id*. They urged us that "[t]he topics on which Mr. Trende and Mr. Bryan seek to testify have already been decided by this Court and affirmed by the Supreme Court." *Id*.

Similarly, the Plaintiffs asserted that the State's evidence about communities of interest is irrelevant. *Id.* at 7–12. The Plaintiffs argued that this evidence does not tend to make any fact of consequence more or less probable because it does not tell us anything about whether the State remedied the vote dilution we found. Put differently, the Plaintiffs say this evidence tells us nothing about whether the 2023 Plan includes an additional opportunity district. *Id*. And because the State concedes that District 2 is not an opportunity district, the Plaintiffs assert the evidence about communities of interest is not relevant at all. *Id.* at 11–12.

Separately, the Plaintiffs attacked the reliability of Mr. Bryan's testimony. *Id.*

at 5–7.

In response to the motion, the State argued that its evidence is relevant to the question whether the 2023 Plan violates Section Two. *Milligan* Doc. 245 at 2–7. More particularly, the State argued that the evidence is relevant to the question whether the Plaintiffs can establish that the 2023 Plan violates Section Two "under the same *Gingles* standard applied at the merits stage." *Id.* at 5 (internal quotation marks omitted). The State reasoned that "[n]o findings have been made (nor could have been made) regarding the 2023 Plan's compliance with § 2." *Id.* at 6. The State defended the reliability of Mr. Bryan's analysis. *Id.* at 7–9.

D. Stipulated Facts

After they filed their briefs, the parties stipulated to the following facts for the remedial hearing. *See Milligan* Doc. 251; *Caster* Doc. 213. We recite their stipulations verbatim.

I. Demographics of 2023 Plan

1. The 2023 Plan contains one district that exceeds 50% Black Voting Age Population ("BVAP").

2. According to 2020 Census data, CD 7 in the 2023 Plan has a BVAP of 50.65% Any-Part Black.

3. Under the 2023 Plan, the district with the next-highest BVAP is CD 2.

4. According to 2020 Census data, CD 2 in the 2023 Plan has a BVAP of 39.93% Any-Part Black.

Population Summary

Thursday, July 20, 2023 7:14 PM

District	Population	Deviation	% Devn.	[% White]	[% Black]	[% AP_Wht]	[% AP_Blk]	[% 18+_Blk]	[% 18+_AP_Blk]
1	717,754	0	0.00%	65.36%	25.07%	70.31%	26.46%	23.8%	24.63%
2	717,755	1	0.00%	50.86%	39.93%	54.97%	41.63%	38.83%	39.93%
3	717,754	0	0.00%	70.79%	20.39%	75.16%	21.76%	19.93%	20.7%
4	717,754	0	0.00%	81.53%	6.93%	86.55%	7.9%	6.74%	7.22%
5	717,754	0	0.00%	69.02%	17.59%	75.72%	19.29%	17.33%	18.33%
6	717,754	0	0.00%	70.23%	19.36%	75.03%	20.51%	18.58%	19.26%
7	717,754	0	0.00%	40.89%	51.32%	44.15%	52.59%	49.68%	50.65%

II. General Election Voting Patterns in the 2023 Plan

5. Under the 2023 Plan, Black Alabamians in CD 2 and CD 7 have consistently preferred Democratic candidates in the general election contests Plaintiffs' experts analyzed for the 2016, 2018, 2020, and 2022 general elections, as well as the 2017 special election for U.S. Senate. In those same elections, white Alabamians in CD 2 and CD 7 consistently preferred Republican candidates over (Black-preferred) Democratic candidates. In CD 2, white-preferred candidates (who are Republicans) almost always defeated Black-preferred candidates (who are Democrats). In CD 2, white candidates (who were Republicans) always defeated Black candidates (who were Democrats).

III. Performance of CD 2 in the 2023 Plan

6. The *Caster* Plaintiffs' expert Dr. Maxwell Palmer analyzed the 2023 Plan using 17 contested statewide elections between 2016 and 2022. That analysis showed:

a. Under the 2023 Plan, the average two-party vote-share for Black-preferred candidates in CD 2 is 44.5%.

b. Under the 2023 Plan, the Black-preferred candidate in CD 2 would have been elected in 1 out of the 17 contests analyzed.

Table 4: Vote Share of Black-Preferred Candidates — SB 5 Plan

		CD 2	CD 7
2022	U.S. Senator*	38.6%	
	Governor*	37.5%	
	Attorney General*	39.1%	
	Sec. of State*	39.2%	
	Supreme Ct., Place 5*	39.7%	
2020	U.S. President	45.4%	61.4%
	U.S. Senator	47.7%	63.2%
2018	Governor	45.1%	63.7%
	Lt. Governor*	45.7%	62.7%
	Attorney General	48.3%	64.5%
	Sec. of State	45.8%	62.6%
	State Auditor*	46.6%	62.9%
	Supreme Ct., Chief	48.1%	65.5%
	Supreme Ct., Place 4	46.1%	63.2%
2017	U.S. Senator	55.8%	72.0%
2016	U.S. President	44.2%	60.3%
	U.S. Senator	43.9%	59.1%

* Indicates that the Black candidate of choice was Black.

7. The *Milligan* Plaintiffs' expert Dr. Baodong Liu completed a performance analysis of the 2023 Plan using 11 statewide biracial elections between 2014 and 2022. That analysis showed:

a. Under the 2023 Plan, the average two-party vote-share for Black-preferred candidates in CD 2 is 42.2%.

b. Under the 2023 Plan, the Black-preferred candidate in CD 2 would have been elected in 0 out of the 11 contests analyzed.

Table 1: RPV in the 11 Biracial Elections based on the Livingston Plan, CD2

Election	Black Pref-Cand	White Pref-Cand	% vote cast for BPC in Livingston Plan	Black Support for Black Cand (95% CI)	White Support for Black Cand (95% CI)	BPC Won in Livingston Plan?	RPV?
2022 Governor	Yolanda Flowers	Kay Ivey	37.8%	94.0% (90-96)	4.9% (4-6)	No	Yes
2022 US Senate	Will Boyd	Katie Britt	38.8%	93.5% (89-96)	6.0% (4-9)	No	Yes
2022 Attorney General	Wendell Major	Steve Marshall	39.3%	94.3% (91-97)	6.3% (5-8)	No	Yes
2022 Secretary of State	Pamela Laffitte	Wes Allen	39.4%	94.2% (90-97)	6.0% (4-9)	No	Yes
2022 Supreme Court, Place 5	Anita Kelly	Bradley Byrne	39.9%	94.2% (91-97)	6.6% (5-10)	No	Yes
2018 Lt Governor	Will Boyd	Will Ainsworth	46.0%	93.6% (91-96)	6.3% (5-10)	No	Yes
2018 State Auditor	Miranda Joseph	Jim Zigler	46.9%	94.2% (90-97)	8.2 (6-13)	No	Yes
2018 Public Service Commission, Place 1	Cara McClure	Jeremy Oden	46.9%	95.7% (93-97)	6.5% (5-10)	No	Yes
2014 Secretary of State	Lula Albert-Kaigler	John Merrill	43.6%	91.5% (88-94)	6.2% (5-8)	No	Yes
2014 Lt Governor	James Fields	Kay Ivey	43.4%	91.3% (88-93)	6.3% (4-9)	No	Yes
2014 State Auditor	Miranda Joseph	Jim Zigler	41.7%	88.0% (81-91)	9.1% (6-14)	No	Yes

8. Dr. Liu also analyzed the 2020 presidential election between Biden-Harris and Trump-Pence. His analysis of both the 2020 presidential election and the 11 biracial elections between 2014 and 2022 showed:

a. Under the 2023 Plan, the average two-party vote-share for Black-preferred candidates in CD 2 is 42.3%.

b. Under the 2023 Plan, the Black-preferred candidate in CD 2 would have been elected in 0 out of the 12 contests analyzed.

9. The Alabama Legislature analyzed the 2023 Plan in seven election contests: 2018 Attorney General, 2018 Governor, 2018 Lieutenant Governor, 2018 Auditor, 2018 Secretary of State, 2020 Presidential, and 2020 Senate. That analysis showed:

a. Under the 2023 Plan, the average two-party vote-share for Black-preferred candidates in CD 2 is 46.6%.

b. Under the 2023 Plan, the Black-preferred candidate in CD 2 would have been elected in 0 out of the 7 contests analyzed.

Democrat CD	2018 AG	2018 GOV	2018 LTGOV	2018 AUD	2018 SOS	2020 PRES	2020 SEN	Average
1	39.2%	38.5%	36.7%	37.6%	36.9%	34.8%	38.2%	**37.4%**
2	48.5%	45.3%	46.0%	46.8%	46.0%	45.6%	48.0%	**46.6%**
3	33.3%	32.6%	31.2%	31.8%	31.5%	29.3%	31.9%	**31.6%**
4	24.8%	24.8%	21.7%	22.6%	21.7%	18.6%	21.9%	**22.3%**
5	39.2%	38.6%	36.8%	38.0%	37.4%	36.2%	39.5%	**37.9%**
6	35.6%	36.2%	32.8%	33.7%	33.2%	33.4%	35.9%	**34.4%**
7	64.7%	64.0%	62.9%	63.2%	62.9%	61.6%	63.4%	**63.2%**

Republican CD	2018 AG	2018 GOV	2018 LTGOV	2018 AUD	2018 SOS	2020 PRES	2020 SEN	Average
1	60.8%	61.5%	63.3%	62.4%	63.1%	65.2%	61.8%	**62.6%**
2	51.5%	54.7%	54.0%	53.2%	54.0%	54.4%	52.0%	**53.4%**
3	66.7%	67.4%	68.8%	68.2%	68.5%	70.7%	68.1%	**68.4%**
4	75.2%	75.2%	78.3%	77.4%	78.3%	81.4%	78.1%	**77.7%**
5	60.8%	61.4%	63.2%	62.0%	62.6%	63.8%	60.5%	**62.1%**
6	64.4%	63.8%	67.2%	66.3%	66.8%	66.6%	64.1%	**65.6%**
7	35.3%	36.0%	37.1%	36.8%	37.1%	38.4%	36.6%	**36.8%**

IV. The 2023 Special Session

10. On June 27, 2023, Governor Kay Ivey called a special legislative session to begin on July 17, 2023 at 2:00 p.m. Her proclamation limited the Legislature to addressing: "***Redistricting***: The Legislature may consider legislation

pertaining to the reapportionment of the State, based on the 2020 federal census, into districts for electing members of the United States House of Representatives."

11. For the special session, Representative Chris Pringle and Senator Steve Livingston were the Co-Chairs of the Permanent Legislative Committee on Reapportionment ("the Committee"). The Committee had 22 members, including 7 Black legislators, who are all Democrats, and 15 white legislators, who are all Republicans.

12. Before the Special Session, the Committee held pre-session hearings on June 27 and July 13 to receive input from the public on redistricting plans.

13. At the Committee public hearing on July 13, Representative Pringle moved to re-adopt the 2021 Legislative Redistricting Guidelines ("Guidelines").

14. The Committee voted to re-adopt the 2021 Guidelines.

15. The only plans proposed or available for public comment during the two pre-session hearings were the "VRA Plaintiffs' Remedial Plan" from the *Milligan* and *Caster* Plaintiffs and the plans put forward by Senator Singleton and, Senator Hatcher.

16. On July 17, the first day of the Special Session, Representative Pringle introduced a plan he designated as the "Community of Interest" ("COI") plan.

17. The COI plan had a BVAP of 42.45% in Congressional District 2 ("CD2"), and Representative Pringle said it maintained the core of existing congressional districts.

18. The COI plan passed out of the Committee on July 17 along party and racial lines, with all Democratic and all Black members voting against it. Under the COI plan, the Committee's performance analysis showed that Black-preferred candidates would have won two of the four analyzed-statewide races from 2020 and 2022.

COMMMUNITY OF INTEREST PLAN

Year	Race	CD2		CD7	
		% Dem.	% Rep.	% Dem.	% Rep.
2020	Pres.	47.53	51.56	61.94	37.28
2020	U.S. Senate	50.23	49.77	64.19	35.81
2018	Gov.	47.77	52.23	63.89	36.11
2018	A.G.	50.97	49.03	64.34	35.66

19. The "Opportunity Plan" (or "Livingston 1") was also introduced on July 17. Senator Livingston was the sponsor of the Opportunity Plan.

20. The Opportunity Plan had a BVAP of 38.31% in CD2.

21. Neither the COI Plan nor Opportunity Plan were presented at the public hearings on June 27 or July 13.

22. On July 20, the House passed the Representative Pringle sponsored COI Plan, and the Senate passed the Opportunity Plan. The votes were along party lines with all Democratic house members voting against the COI plan. The house vote was also almost entirely along racial lines, with all Black house members, except one, voting against the COI plan. All Democratic and all Black senators voted against the Opportunity Plan.

23. Afterwards, on Friday, July 21, a six-person bicameral Conference Committee passed Senate Bill 5 ("SB5"), which [is] a modified-version of the Livingston plan ("Livingston 3" plan or the "2023 Plan").

24. The 2023 Plan was approved along party and racial lines, with the two Democratic and Black Conference Committee members (Representative England and Representative Smitherman) voting against it, out of six total members including Representative Pringle and Senator Livingston.

25. Representative England, one of the two Democratic and Black legislators on the Conference Committee, stated that the

2023 Plan was noncompliant with the Court's preliminary-injunction order and that the Court would reject it.

26. On July 21, SB5 was passed by both houses of the legislature and signed by Governor Ivey.

27. In the 2023 Plan enacted in SB5, the Black voting-age population ("BVAP") is 39.9%.

28. The map contains one district, District 7, in which the BVAP exceeds 50%.

29. SB5 passed along party lines and almost entirely along racial lines. Out of all Black legislators, one Republican Black House member voted for SB5, and the remaining Black House members voted against.

30. SB5 includes findings regarding the 2023 Plan. The findings purport to identify three specific communities of interest (the Black Belt, the Wiregrass, and the Gulf Coast).

V. Communities of Interest

31. The Black Belt is a community of interest.

32. The Black Belt includes the 18 core counties of Barbour, Bullock, Butler, Choctaw, Crenshaw, Dallas, Greene, Hale, Lowndes, Macon, Marengo, Montgomery, Perry, Pickens, Pike, Russell, Sumter, and Wilcox. In addition, Clarke, Conecuh, Escambia, Monroe, and Washington counties are sometimes but not always included within the definition of the Black Belt.

33. The 2023 Plan divides the 18 core Black Belt counties into two congressional districts (CD-2 and CD-7) and does not split any Black Belt counties.

34. The 2023 Plan keeps Montgomery County whole in District 2.

35. The 2023 Plan places Baldwin and Mobile Counties together in one congressional district.

36. Baldwin and Mobile Counties have been together in one congressional district since redistricting in 1972.

37. Alabama splits Mobile and Baldwin Counties in its current State Board of Education districts, as well as those in the 2011 redistricting cycle.

E. The Remedial Hearing

Before the remedial hearing, the *Milligan* and *Caster* parties agreed to present their evidence on paper, rather than calling witnesses to testify live. *See, e.g.*, *Milligan* Doc. 233 at 1; Aug. 14 Tr. 92. Accordingly, no witnesses testified live at the hearing on August 14. Three events at the hearing further developed the record before us: (1) the attorneys made arguments and answered our questions; (2) we received exhibits into evidence and reserved ruling on some objections (see *infra* at Part VII), and (3) the parties presented for the first time certain deposition transcripts that were filed the night before the hearing, *see Milligan* Doc. 261.[17] We first discuss the deposition transcripts, and we then discuss the attorney arguments.

1. The Deposition Testimony

The *Milligan* Plaintiffs filed transcripts reflecting deposition testimony of seven witnesses: (1) Randy Hinaman, the State's longstanding cartographer, *Milligan* Doc. 261-1; (2) Brad Kimbro, a past Chairman of the Dothan Area

[17] The depositions were taken after the briefing on the Plaintiffs' objections to the 2023 Plan was complete. *See Milligan* Doc. 261. The State did not raise a timeliness objection, and we discern no timeliness problem.

Chamber of Commerce, *Milligan* Doc. 261-2, who also prepared a declaration the State submitted, *Milligan* Doc. 220-18; (3) Lee Lawson, current President & CEO of the Baldwin County Economic Development Alliance, *Milligan* Doc. 261-3, who also prepared a declaration, *Milligan* Doc. 220-13; (4) Senator Livingston, *Milligan* Doc. 261-4; (5) Representative Pringle, *Milligan* Doc. 261-5; (6) Mike Schmitz, a former mayor of Dothan, *Milligan* Doc. 261-6, who also prepared a declaration, *Milligan* Doc. 220-17; and (7) Jeff Williams, a banker in Dothan, *Milligan* Doc. 261-7, who also prepared a declaration, *Milligan* Doc. 227-1.

During the remedial hearing, the *Milligan* Plaintiffs played video clips from the depositions of Mr. Hinaman, Senator Livingston, and Representative Pringle. (The Court later reviewed all seven depositions in their entirety.)

Mr. Hinaman testified that his understanding of the preliminary injunction was that the Legislature "needed to draw two districts that would give African Americans an opportunity to elect a candidate of their choice." *Milligan* Doc. 261-1 at 20, 22.[18] Mr. Hinaman testified that he drew the Community of Interest Plan that the Alabama House of Representatives passed. *Id.* at 23. He testified that of the maps that were sponsored by a member of either the Alabama House or the Alabama Senate, the Community of Interest Plan is the only one he drew. *Id.* at 24.

[18] When we cite a deposition transcript, pincites are to the numbered pages of the transcript, not the CM/ECF pagination.

Mr. Hinaman testified that he did not know who drew the Opportunity Plan, which the Alabama Senate passed. *Id.* at 31–32. He testified that he "believe[d] it was given to Donna Loftin, who is . . . supervisor of the reapportionment office, on a thumb drive." *Id.* at 32. Mr. Hinaman testified that he had no understanding of how the Opportunity Plan was drawn or why he did not draw it. *Id.* 32–34.

Mr. Hinaman testified that he had "numerous discussions with members of congress" and their staff during the special session. *Id.* at 45. Mr. Hinaman testified about the performance analyses he considered and that he was "more interested in performance than the raw BVAP number" because "not all 42 or 43 or 41 or 39 percent districts perform the same." *Id.* at 65–66.

When Mr. Hinaman was asked about the legislative findings, he testified that he had not seen them before his deposition, that no one told him about them, and that he was not instructed about them as he was preparing maps. *Id.* at 94.

Senator Livingston testified that he was "familiar" that the preliminary injunction ruled that a remedial map should include "two districts in which Black voters either comprise a voting-age majority or something quite close to it," but that his deposition was the first time he had read that part of the injunction. *Milligan* Doc. 261-4 at 51–52. Senator Livingston testified that he was "personally not paying attention to race" as maps were drawn or shown to him. *Id.* at 56.

When Senator Livingston was asked why he changed his focus from the

Community of Interest Plan to other plans, he said it was because "[t]he Committee moved, and [he] was going to be left behind." *Id.* at 66. He testified that the Committee members "had received some additional information they thought they should go in the direction of compactness, communities of interest, and making sure that . . . congressmen or women are not paired against each other," but he did not know the source of that information. *Id.* at 67–68.

Senator Livingston testified that a political consultant drew the Opportunity Plan, and Senator Roberts delivered it to the reapportionment office. *Id.* at 70. Senator Livingston testified that he did not have "any belief one way or another about where [the Opportunity Plan] would provide a fair opportunity to black voters to elect a preferred candidate in the second district." *Id.* at 71. Senator Livingston testified that Black-preferred candidates "have an opportunity to win" in District 2 even if they actually won zero elections. *Id.* at 96–97.

When Senator Livingston was asked who prepared the legislative findings, he identified the Alabama Solicitor General and testified that he did not "have any understanding of why those findings were included in the bill." *Id.* at 101–02.

Representative Pringle testified that he was familiar with the guidance from the Court about the required remedy for the Section Two violation. *Milligan* Doc. 261-5 at 17–18. Representative Pringle testified that he understood "opportunity to elect" to mean "a district which they have the ability to elect or defeat somebody of

their choosing," although he "ha[d] no magic number on that." *Id.* at 19–20. Representative Pringle twice testified that his "overriding principle" is "what the United States Supreme Court told us to do." *Id.* at 22– 23.

Representative Pringle testified that during the special session, he spoke with the Speaker of the United States House of Representatives, Mr. Kevin McCarthy. *Id.* He testified that Speaker McCarthy "was not asking us to do anything other than just keep in mind that he has a very tight majority." *Id.* at 22. Representative Pringle testified that like Mr. Hinaman, he had conversations with members of Alabama's congressional delegation and their staff. *Id.* at 23–24.

Representative Pringle testified that the only map drawer that he retained in connection with the special session was Mr. Hinaman. *Id.* at 25. Representative Pringle also testified that the Alabama Solicitor General "worked as a map drawer at some point in time." *Id.* at 26–28. Like Senator Livingston, Representative Pringle testified that the Opportunity Plan was drawn by a political consultant and brought to the Committee by Senator Roberts. *Id.* at 72.

Unlike Senator Livingston, Representative Pringle testified that he did not know who drafted the legislative findings. *Id.* at 90. He testified that he did not know they would be in the bill; the Committee did not solicit anyone to draft them; he did not know why they were included; he had never seen a redistricting bill contain such findings; and he had not analyzed them. *Id.* at 91–94.

Representative Pringle testified repeatedly that he thought that his plan (the Community of Interest Plan) was a better plan because it complied with court orders, but that he could not get it passed in the Senate. *See, e.g.*, *id.* at 99–102.

In heated testimony, Representative Pringle recounted that when he learned his plan would not pass the Senate, he told Senator Livingston that the plan that passed could not have a House bill number or Representative Pringle's name on it. *Id.* at 101–02. When asked why he did not want his name on the plan that passed, Representative Pringle answered that his plan "was a better plan" "[i]n terms of its compliance with the Voting Rights Act." *Id.* at 102.

Representative Pringle was asked about a newspaper article that he read that reported one of his colleagues' public comments about the 2023 Plan. *See id.* at 109–10. Neither he nor his counsel objected to the question, nor to him being shown the article that he testified he had seen before. *Id.* The article reported that the Alabama Speaker of the House had commented: "If you think about where we were, the Supreme Court ruling was five to four. So there's just one judge that needed to see something different. And I think the movement that we have and what we've come to compromise on today gives us a good shot . . . ." *Id.* at 109.

When Representative Pringle was asked whether he "agree[d] that the legislature is attempting to get a justice to see something differently," he answered that he was not, that he was "trying to comply with what the Supreme Court ruled,"

but that he did not "want to speak on behalf of 140 members of the legislature." *Id.* at 109–10. Representative Pringle also testified that his colleague had never expressed that sentiment to him privately. *Id.* at 110.

2. Arguments and Concessions

During the opening statements at the remedial hearing, the *Milligan* Plaintiffs emphasized that there is "only one" question now before us: whether the 2023 Plan "remed[ies] the prior vote dilution, and does it provide black voters with an additional opportunity to elect the candidates of their choice." Aug. 14 Tr. 10. Nevertheless, the *Milligan* Plaintiffs walked us through their *Gingles* analysis, in case we perform one. *See* Aug. 14 Tr. 10–23. The *Milligan* Plaintiffs asserted that we previously found and the Supreme Court affirmed that they satisfied *Gingles* I. Aug. 14 Tr. 10–11. The *Milligan* Plaintiffs said that we can rely on that finding even though the Legislature enacted the 2023 Plan because *Gingles* I does not "look at the compactness of plaintiffs' map," but "looks at the compactness of the minority community," which we found and the Supreme Court affirmed. Aug. 14 Tr. 10–11. And the *Milligan* Plaintiffs assert that it is undisputed that they satisfy *Gingles* II and III because "there is serious racially polarized voting" in Alabama. Aug. 14 Tr. 11.

The *Milligan* Plaintiffs further urged that the key elements of the performance analysis are undisputed: "there is no dispute that the 2023 plan does not lead to the election of a . . . second African-American candidate of choice," Aug. 14 Tr. 11, and

that the 2023 Plan, "like the old plan, also results in vote dilution" because "black candidates would lose every election" in District 2, Aug. 14 Tr. 12.

The *Milligan* Plaintiffs accused the State of "rehash[ing] the arguments that both this Court and the Supreme Court have already rejected," mainly that "there could be no legitimate reason to split Mobile and Baldwin counties," "the Court should compare its allegedly neutral treatment of various communities in the 2023 plan to the treatment of the same alleged communities in" the illustrative plans, and "the use of race in devising a remedy is improper." Aug. 14 Tr. 12–13.

The *Milligan* Plaintiffs said that if we reexamine any aspect of our *Gingles* analysis, we should come out differently than we did previously on Senate Factor 9 (which asks whether the State's justification for its redistricting plan is tenuous). Aug. 14 Tr. 14–22. We made no finding about Factor 9 when we issued the preliminary injunction, but the *Milligan* Plaintiffs said that the depositions of Mr. Hinaman, Senator Livingston, and Representative Pringle support a finding now. *See* Aug. 14 Tr. 14–22.

During their opening statement, the *Caster* Plaintiffs argued that the State was in "defiance of the Court's clear instructions," because "[t]here is no dispute that the 2023 Plan . . . once again limits the state's black citizens to a single opportunity district." Aug. 14 Tr. 27–28. Based on stipulated facts alone, the *Caster* Plaintiffs urged this Court to enjoin the 2023 Plan because it "perpetuat[es] the same Section

2 violation as the map struck down by this Court last year." Aug. 14 Tr. 28.

The *Caster* Plaintiffs argued that we should understand the State's argument that we are back at square one in these cases as part and parcel of their continued defiance of federal court orders. Aug. 14 Tr. 29. The *Caster* Plaintiffs further argued that we should reject the State's argument that the 2023 Plan remedies the "cracking" of the Black Belt because the 2023 Plan merely "reshuffled Black Belt counties to give the illusion of a remedy." Aug. 14 Tr. 29–30. The *Caster* Plaintiffs reasoned that "Alabama gets no brownie points for uniting black voters and the Black Belt community of interest in a district in which they have no electoral power and in a map that continues to dilute the black vote." Aug. 14 Tr. 30. Finally, the *Caster* Plaintiffs urged us to ignore all the new evidence about communities of interest, because "Section 2 is not a claim for better respect for communities of interest. It is a claim regarding minority vote dilution." Aug. 14 Tr. 30.

In the State's opening statement, it asserted that if the Plaintiffs cannot establish that the 2023 Plan violates federal law, then the 2023 Plan is "governing law." Aug. 14 Tr. 33. The State assailed the Plaintiffs' suggestion that the question is limited to the issue of whether the 2023 Plan includes an additional opportunity district as a "tool for demanding proportionality," which is unlawful. Aug. 14 Tr. 36.

The State asserted that the Plaintiffs must come forward with new *Gingles* I evidence because under *Allen*, it "simply cannot be the case" that the Duchin plans

and Cooper plans are "up to the task." Aug. 14 Tr. 36. The State's principal argument was that those plans were configured to compete with the 2021 Plan on traditional districting principles such as compactness and respect for communities of interest, and they cannot outdo the 2023 Plan on those metrics. Aug. 14 Tr. 36–39. According to the State, the 2023 Plan "answers the plaintiffs' challenge" with respect to the Black Belt because it "take[s] out . . . those purportedly discriminatory components of the 2021 plan." Aug. 14 Tr. 39–41. Because "[t]hat cracking is gone," the State said, "the 2023 plan does not produce discriminatory effects." Aug. 14 Tr. 41.

Much of the State's opening statement cautioned against an additional opportunity district on proportionality grounds and against "abandon[ing]" legitimate traditional districting principles. *See* Aug. 14 Tr. 39–47. According to the State, "now proportionality is all that you are hearing about." Aug. 14 Tr. 47–48.

After opening statements, we took up the Plaintiffs' motion *in limine*. The Plaintiffs emphasized that even if they are required to reprove compactness for *Gingles* I, they could rely on evidence from the preliminary injunction proceeding (and our findings) to do so, because all the law requires is a determination that the minority population is reasonably compact and that an additional opportunity district can be reasonably configured. The Plaintiffs emphasized that under this reasonableness standard, they need not outperform the 2023 Plan in a beauty contest by submitting yet another illustrative plan. Aug. 14 Tr. 50–51, 58–59. According to

the Plaintiffs, "nothing can change the fact that" Black voters in Alabama "as a community are reasonably compact, and you can draw a reasonably configured district around them." Aug. 14 Tr. 54. Indeed, the Plaintiffs say, "[t]he only thing that can substantially change" where Black voters are in Alabama for purposes of *Gingles* I "would be a new census." Aug. 14 Tr. 55.

The Plaintiffs suggested that the State confused the compactness standards for a Section Two case, which focus on the compactness of the minority population, with the compactness standards for a racial gerrymandering case, which focus on the compactness of the challenged district. Aug. 14 Tr. 55, 57.

The State based its response to the motion *in limine* on arguments about the appropriate exercise of judicial power. *See* Aug. 14 Tr. 63. On the State's reasoning, the Plaintiffs "have to relitigate and prove" the *Gingles* analysis because the Court cannot "just transcribe the findings from an old law onto a new law." Aug. 14 Tr. 61, 63. Significantly, the State conceded that the Plaintiffs have met their burden in these remedial proceedings on the second and third *Gingles* requirements and the Senate Factors. Aug. 14 Tr. 64–65. So, according to the State, the only question the Court need answer is whether the Plaintiffs are required to reprove *Gingles* I. *See* Aug. 14 Tr. 64–66. The State said they must, because "it is [the State's] reading of *Allen* that reasonably configured is not determined based on whatever a hired expert map drawer comes in and says, like, this is reasonable enough. It has to be tethered

. . . to objective factors to a standard or rule that a Legislature can look at ex ante . . . ." Aug. 14 Tr. 67.

The State answered several questions about whether the Plaintiffs now must offer a new illustrative map that outperforms the 2023 Plan with respect to compactness and communities of interest. In one such exchange, we asked whether the State was "essentially arguing [that] whatever the state does, we can just say they shot a bullet, and we have now drawn a bull's eye where that bullet hit, and so it's good?" Aug. 14 Tr. 72. We followed up: "It's just some veneer to justify whatever the state wanted to do that was short of the [Voting Rights Act?]" Aug. 14 Tr. 72. The State responded that precedent "makes clear that the state does have a legitimate interest in promoting these three principles of compactness, counties, and communities of interest." Aug. 14 Tr. 72.

Again, we asked the State whether the Duchin plans and Cooper plans were subject to attack now even though we found (and the Supreme Court affirmed) that the additional opportunity districts they illustrated were reasonably configured. Aug. 14 Tr. 67. The State answered that because the comparator is now the 2023 Plan, the Duchin plans and Cooper plans could be attacked once again, this time for failing to outperform the 2023 Plan even though we found they outperformed the 2021 Plan. Aug. 14 Tr. 67–70.

We further asked the State whether "our statement that the appropriate remedy

for the . . . likely violation that we found would be an additional opportunity district ha[s] any relevance to what we're doing now?" Aug. 14 Tr. 75. "I don't think so," the State said. Aug. 14 Tr. 75. We pressed the point: "it is the state's position that the Legislature could . . . enact a new map that was consistent with those findings and conclusions [by this Court and the Supreme Court] without adding a second opportunity district?" Aug. 14 Tr. 75. "Yes," the State replied. Aug. 14 Tr. 75.

Moreover, the *Caster* Plaintiffs argued (in connection with the State's isolation of the dispute to *Gingles* I) that under applicable law, the *Gingles* I inquiry already has occurred. According to the *Caster* Plaintiffs, "[n]either the size of the black population nor its location throughout the state is a moving target[]" between 2021 and 2023. Aug. 14 Tr. 88. Likewise, they say, "[n]othing about the 2023 map, nothing about the evidence that the defendants can now present . . . can go back in time" to undermine maps drawn "two years ago." Aug. 14 Tr. 88. They add that "[n]othing about the tradition of Alabama's redistricting criteria has changed[]" since 2021, and that "[i]f anything, it is Alabama that has broken with its own tradition . . . in creating these brand new findings out of nowhere, unbeknownst to the actual committee chairs who were in charge of the process." Aug. 14 Tr. 89.

We carried the motion *in limine* with the case and received exhibits into evidence (we rule on remaining objections *infra* at Part VII).

We then asked for the State's position if we were to order (again) that an

additional opportunity district is required, and the State replied that such an order would be unlawful under *Allen* because it would require the State to adopt a map that violates traditional principles. Aug. 14 Tr. 157. When asked "at what point the federal court . . . ha[s] the ability to comment on whether the appropriate remedy includes an additional opportunity district" — "[o]n liability," "[o]n remedy," "[b]oth," "or [n]ever" — the State said there is not "any prohibition on the Court commenting on what it thinks an appropriate remedy would be." Aug. 14 Tr. 157–58.

The State then answered questions regarding its argument about traditional districting principles and the 2023 Plan. The Court asked the State whether it "acknowledge[d] any point during the ten-year [census] cycle where the [Legislature's] ability to redefine the principles cuts off and the Court's ability to order an additional opportunity district attaches." Aug. 14 Tr. 159. The State responded that that "sounds a lot like a preclearance regime." Aug. 14 Tr. 159.

Ultimately, the State offered a practical limitation on the Legislature's ability to redefine traditional districting principles: if the Court rules that "there is a problem with this map," then the State's "time has run out," and "we will have a court drawn map for the 2024 election barring appellate review." Aug. 14 Tr. 159–60.

We continued to try to understand how, in the State's view, a court making a liability finding has any remedial authority. We asked: "[W]hen we made the

liability finding, is it the state's position that at that time this Court had no authority to comment on what the appropriate remedy would be because at that time the Legislature was free to redefine traditional districting principles?" Aug. 14 Tr. 160. "Of course, the Court could comment on it[,]" the State responded. Aug. 14 Tr. 160.

Next, we queried the State whether Representative Pringle's testimony about the legislative findings should affect the weight we assign the findings. Aug. 14 Tr. 161–62. The State said no, because Representative Pringle is only one legislator out of 140, there is a presumption of regularity that attaches to the 2023 Plan, and the findings simply describe what we could see for ourselves by looking at the map. Aug. 14 Tr. 162. The State admonished us that "it's somewhat troubling for a federal court to say that they know Alabama's communities of interest better than Alabama's representatives know them." Aug. 14 Tr. 163.

Ultimately, we asked the State whether it "deliberately chose to disregard [the Court's] instructions to draw two majority-black districts or one where minority candidates could be chosen." Aug. 14 Tr. 163. The State reiterated that District 2 is "as close as you are going to get to a second majority-black district without violating *Allen*" and the Constitution. Aug. 14 Tr. 164. Finally, we pressed the question this way: "Can you draw a map that maintains three communities of interest, splits six or fewer counties, but that most likely if not almost certainly fails to create an opportunity district and still comply with Section 2?" Aug. 14 Tr. 164. "Yes.

Absolutely," the State said. Aug. 14 Tr. 164*; see also* Aug. 14 Tr. 76.

F. The Preliminary Injunction Hearing

The next day, the Court heard argument on the *Singleton* Plaintiffs' motion for a preliminary injunction. The *Singleton* Plaintiffs walked the Court through the claim that the 2023 Plan "preserves" and "carries forward" a racial gerrymander that has persisted in Alabama's congressional districting plan since 1992, when the State enacted a plan guaranteeing Black voters a majority in District 7 pursuant to a stipulated injunction entered to resolve claims that Alabama had violated Section Two of the Voting Rights Act, *see Wesch*, 785 F. Supp. At 1493, *aff'd sub nom. Camp*, 504 U.S. 902, *and aff'd sub nom. Figures*, 507 U.S. 901. August 15 Tr. 8, 10–15. The State disputed that race predominated in the drawing of the 2023 Plan, but made clear that, if the Court disagreed, the State did not contest the *Singleton* Plaintiffs' argument that the 2023 Plan could not satisfy strict scrutiny. Aug. 15 Tr. 82. The Court received some exhibits into evidence and reserved ruling on some objections. Aug. 15 Tr. 25–31, 59–60. We heard live testimony from one of the Plaintiffs, Senator Singleton; the State had the opportunity to cross-examine him. Aug. 15 Tr. 32–58. And we took closing arguments. Aug. 15 Tr. 61–85.

II. STANDARD OF REVIEW

As the foregoing discussion previewed, the parties dispute the standard of review that applies to the Plaintiffs' objections. We first discuss the standard that

applies to requests for preliminary injunctive relief. We then discuss the parties' disagreement over the standard that applies in remedial proceedings, the proper standard we must apply, and the alternative.

A. Preliminary Injunctive Relief

"[A] preliminary injunction is an extraordinary remedy never awarded as of right." *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (internal quotation marks omitted). "A party seeking a preliminary injunction must establish that (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Vital Pharms., Inc. v. Alfieri*, 23 F.4th 1282, 1290–91 (11th Cir. 2022) (internal quotation marks and citation omitted).

B. The Limited Scope of the Parties' Disagreement

The Plaintiffs' position is that the liability phase of this litigation has concluded, and we are now in the remedial phase. On the Plaintiffs' logic, the enactment of the 2023 Plan does not require us to revisit any aspect of our liability findings underlying the preliminary injunction. The question now, they say, is only whether the 2023 Plan provides Black voters an additional opportunity district.

The State's position is that the enactment of the 2023 Plan reset this litigation

to square one, and the Plaintiffs must prove a new Section Two violation. "Only if the Legislature failed to enact a new plan," the State says, "would we move to a purely remedial process, rather than a preliminary injunction hearing related to a new law." *Milligan* Doc. 205 at 3; *Milligan* Doc. 172 at 45–46. On the State's logic, the Plaintiffs must reprove their entitlement to injunctive relief under *Gingles*, and some (but not all) of the evidence developed during the preliminary injunction proceedings may be relevant for this purpose.

As a practical matter, the parties' dispute is limited in scope: it concerns whether the Plaintiffs must submit additional illustrative maps to establish the compactness part of *Gingles* I, and the related question whether any such maps must "meet or beat" the 2023 Plan on traditional districting principles. This limitation necessarily follows from the fact that the State concedes for purposes of these proceedings that the Plaintiffs have established the numerosity component of *Gingles* I, all of *Gingles* II and III, and the Senate Factors. Aug. 14 Tr. 64–65.

The parties agree that in any event, the Plaintiffs carry the burden of proof and persuasion. *Milligan* Doc. 203 at 4.

C. The Remedial Standard We Apply

When, as here, a district court finds itself in a remedial posture, tasked with designing and implementing equitable relief, "the scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies."

Brown v. Plata, 563 U.S. 493, 538 (2011) (internal quotation marks omitted). But this power is not unlimited. The Supreme Court has long instructed that the "essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." *Swann v. Charlotte-Mecklenburg Bd. Of Ed.*, 402 U.S. 1, 15 (1971) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944)). The court "must tailor the scope of injunctive relief to fit the nature and extent of the . . . violation established." *Haitian Refugee Ctr. V. Smith*, 676 F.2d 1023, 1041 (5th Cir. 1982). In other words, the nature and scope of the review at the remedial phase is bound up with the nature of the violation the district court sets out to remedy. *See id.*; *Wright v. Sumter Cnty. Bd. Of Elections & Registration*, 979 F.3d 1282, 1302–03 (11th Cir. 2020) ("[A] district court's remedial proceedings bear directly on and are inextricably bound up in its liability findings.").

The Voting Rights Act context is no exception. Following a finding of liability under Section Two, the "[r]emedial posture impacts the nature of [a court's] review." *Covington v. North Carolina*, 283 F. Supp. 3d 410, 431 (M.D.N.C.), *aff'd in relevant part*, *rev'd in part*, 138 S. Ct. 2548 (2018). "In the remedial posture, courts must ensure that a proposed[[19]] remedial districting plan completely corrects—rather than

[19] We understand that the 2023 Plan is enacted, not merely proposed. *Covington* used "proposed" to describe a remedial plan that had been passed by both houses of the North Carolina General Assembly after the previous maps were ruled

perpetuates—the defects that rendered the original districts unconstitutional or unlawful." *Id.* Accordingly, the "issue before this Court is whether" the 2023 Plan, "in combination with the racial facts and history" of Alabama, completely corrects, or "fails to correct the original violation" of Section Two. *Dillard*, 831 F.2d at 248 (Johnson, J.).

When, as here, a jurisdiction enacts a remedial plan after a liability finding, "it [i]s correct for the court to ask whether the replacement system . . . would remedy the violation." *Harper v. City of Chicago Heights*, 223 F.3d 593, 599 (7th Cir. 2000) (citing *Harvell v. Blytheville Sch. Dist. # 5*, 71 F.3d 1382, 1386 (8th Cir. 1995)). In a Section Two case such as this, that challenges the State's drawing of single-member district lines in congressional reapportionment, the injury that gives rise to the violation is vote dilution — "that members of a protected class 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *Shaw II*, 517 U.S. at 914. At the remedy phase, the district court therefore properly asks whether the remedial plan "completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." *United States v. Dall. Cnty. Comm'n*, 850 F.2d 1433, 1438 (11th

unconstitutional. *See* 283 F. Supp. 3d at 413–14, 419; *see also infra* at 121–23.

Cir. 1988).

Evidence drawn from the liability phase and the Court's prior findings "form[] the 'backdrop' for the Court's determination of whether the Remedial Plan 'so far as possible eliminate[d] the discriminatory effects'" of the original plan. *Cf. Jacksonville Branch of NAACP*, 2022 WL 17751416, at *13, 2022 U.S. Dist. LEXIS 227920, at *33 (rejecting city's invitation to conduct analysis of its remedial plan "on a clean slate" because "the remedial posture impacts the nature of the review" (internal quotation marks omitted) (alterations accepted) (quoting *Covington*, 283 F. Supp. 3d at 431)). "[T]here [i]s no need for the court to view [the remedial plan] as if it had emerged from thin air." *Harper*, 223 F.3d at 599; *accord Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1115–16 (3d Cir. 1993)).

That said, a federal court cannot accept an unlawful map on the ground that it corrects a Section Two violation in an earlier plan. "[A]ny proposal to remedy a Section 2 violation must itself conform with Section 2." *Dillard*, 831 F.2d at 249. So if the 2023 Plan corrects the original violation of Section Two we found, but violates Section Two in a new way or otherwise is unlawful, we may not accept it.

Accordingly, we limit our analysis in the first instance to the question whether the 2023 Plan corrects the likely Section Two violation that we found and the Supreme Court affirmed: the dilution of Black votes in Alabama congressional districts. Because we find that the 2023 Plan perpetuates rather than corrects that

violation, *see infra* at Part IV.A, we enjoin it on that ground. If we had found that the 2023 Plan corrected that violation, we then would have considered any claims the Plaintiffs raised that the 2023 Plan violates federal law anew.

For seven separate and independent reasons, we reject the assertion that the Plaintiffs must reprove Section Two liability under *Gingles*.

First, the State has identified no controlling precedent, and we have found none, that instructs us to proceed in that manner. We said in one of our clarification orders that it would be unprecedented for us to relitigate the Section Two violation during remedial proceedings, *see Milligan* Doc. 203 at 4, and the State has not since identified any precedent that provides otherwise.

Second, the main precedent the State cites, *Dillard*, aligns with our approach. *See* 831 F.2d at 247–48. In *Dillard*, Calhoun County stipulated that its at-large system of electing commissioners diluted Black votes in violation of Section Two. *Id.* The County prepared a remedial plan that altered the electoral mechanism to elect commissioners using single-member districts and retained the position of an at-large chair. *Id.* at 248. The plaintiffs objected on the ground that the remedial plan did not correct the Section Two violation. *Id.* The district court agreed that under the totality of the circumstances, the use of at-large elections for the chairperson would dilute Black voting strength. *Id.* at 249.

The Eleventh Circuit reversed on the ground that the district court failed to

conduct a fact-specific inquiry into the proposed remedy. *Id.* at 249–50. The appeals court ruled that when the district court simply "transferred the historical record" from the liability phase of proceedings to the remedial phase, it "incompletely assessed the differences between the new and old proposals." *Id.* at 250. The appeals court observed that in the light of the new structure of the commission, the nature of the chairperson's duties and responsibilities, powers, and authority would necessarily differ from those of the commissioners in the old, unlawful system. *See id.* at 250–52. Accordingly, the appeals court held that the district court could not simply rely on the old evidence to establish a continuing violation. *Id.* at 250.

The State overreads *Dillard*. The reason that new factual findings were necessary in *Dillard* was because, as the Eleventh Circuit observed, "procedures that are discriminatory in the context of one election scheme are not necessarily discriminatory under another scheme." *Id.* at 250. If the new system diluted votes, the method by which that could or would occur might be different, so the court needed to assess it. *See id.* at 250–52. Those concerns are not salient here: there is no difference in electoral mechanism. In 2023, the State just placed district lines in different locations than it did in 2021.

Accordingly, we do not read *Dillard* to support the *Gingles* reset that the State requests. When the entire electoral mechanism changes, it makes little sense not to examine the new system. But this reality does not establish an inviolable requirement

that every court faced with a remedial task in a redistricting case must begin its review of a remedial map with a blank slate.

Even if we are wrong that this case is unlike *Dillard*, what the State urges us to do is not what the Eleventh Circuit said or did in *Dillard*. After the appeals court held that the "transcription [of old evidence] does not end the evaluation," it said that it "must evaluate the new system in part measured by the historical record, in part measured by difference from the old system, and in part measured by prediction," and it faulted the district court for "incompletely assess[ing] the differences between the new and old proposals." *Id.* at 249–50.

We discern no dispute among the parties that a proper performance analysis of the 2023 Plan evaluates it "in part measured by the historical record, in part measured by difference from the old system, and in part measured by prediction." *Id.* at 250; *see Milligan* Doc. 251 at 2–6. Indeed, every performance analysis that we have — the State's, the *Milligan* Plaintiffs', and the *Caster* Plaintiffs' — does just that. *Milligan* Doc. 251 at 2–6. This understanding of a performance analysis is consistent with the analytical approach that the United States urges us to take in its Statement of Interest. *Milligan* Doc. 199 at 9–15.

Accordingly, we understand *Dillard* as guiding us to determine whether District 2 in the 2023 Plan performs as an additional opportunity district, not as directing us to reset the *Gingles* liability determination to ground zero.

Third, *Covington*, cited by both the State and the Plaintiffs, aligns with our approach. In *Covington*, the North Carolina General Assembly redrew its state legislative electoral maps after a three-judge court enjoined the previous maps as unconstitutional in a ruling that the Supreme Court summarily affirmed. 283 F. Supp. 3d at 413–14, 419. The plaintiffs objected to the remedial map, and the legislative defendants raised jurisdictional objections, including that "the enactment of the [remedial p]lans rendered th[e] action moot." *Id.* at 419, 423–24.

The district court rejected the mootness challenge on the ground that after finding a map unlawful, a district court "has a duty to ensure that any remedy so far as possible eliminate[s] the discriminatory effects of the past as well as bar[s] like discrimination in the future." *Id.* at 424 (internal quotation marks omitted) (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)). The district court cited circuit precedent for the proposition that "federal courts *must* review a state's proposed remedial districting plan to ensure it completely remedies the identified constitutional violation and is not otherwise legally unacceptable." *Id.* (emphasis in original) (collecting cases, including Section Two cases).

Further, the district court emphasized that its injunction was the only reason the General Assembly redrew the districts that it did. *Id.* at 425. (In *Covington*, the State itself was a party to the case.) The court reasoned that "[i]t is axiomatic that this Court has the inherent authority to enforce its own orders," so the case could not

be moot. *Id.* (also describing the court's "strong interest in ensuring that the legislature complied with, but did not exceed, the authority conferred by" the injunction). The Supreme Court affirmed this ruling by the district court. *Covington*, 138 S. Ct. at 2553 (concluding that the plaintiffs' claims "did not become moot simply because the General Assembly drew new district lines around them").

We do not decide the constitutional issues before us and the State has not formally raised a mootness challenge, but those distinctions do not make *Covington* irrelevant.[20] Both parties have cited it, *see Caster* Docs. 191, 195; *Milligan* Docs. 220, 225, and we understand it to mean that on remedy, we must (1) ensure that any remedial plan corrects the violation that we found, and (2) reject any proposed remedy that is otherwise unlawful. We do not discern anything in *Covington* to

[20] Notwithstanding that the issue was never formally presented to us by motion, federal courts have an "independent obligation to ensure that jurisdiction exists before federal judicial power is exercised over the merits" of a case, *see Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1275 (11th Cir. 2000), so we have carefully considered the mootness issue. It is clear to us that under *Covington* this case is not moot. Just as the district court in *Covington* (1) "ha[d] a duty to ensure that any remedy so far as possible eliminate[s] the discriminatory effects of the past as well as bar[s] like discrimination in the future," and (2) "ha[d] the inherent authority to enforce its own orders," 283 F. Supp. 3d at 424–25, so too do we (1) have a duty to ensure that the State's proposed remedy completely cures the Section Two violation we have already found, and (2) have the inherent authority to enforce our preliminary injunction order. Moreover, we are acutely aware of the fact that Black Alabamians will be forced, if we do not address the matter, to continue to vote under a map that we have found likely violates Section Two. That constitutes a live and ongoing injury.

suggest that if we do those two things, we fall short of our remedial task.

None of the other cases the State has cited compel a different conclusion. For instance, in *McGhee v. Granville County*, the County responded to a Section Two liability determination by drawing a remedial plan that switched the underlying electoral mechanism from an at-large method to single-member districts in which Black voters would have an increased opportunity to elect candidates of their choice. 860 F.2d 110, 113 (4th Cir. 1988). The district court rejected the remedial plan as failing to completely remedy the violation, but the Fourth Circuit reversed, holding that the district court was bound to accept this remedial plan because once "a vote dilution violation is established, the appropriate remedy is to restructure the districting system to eradicate, to the maximum extent possible *by that means*, the dilution proximately caused by that system." *Id.* at 118 (emphasis in original). The district court was not free to try to eradicate the dilution by altering other "electoral laws, practices, and structures" not actually challenged by the claim; instead, the district court had to evaluate the extent to which the remedial plan eradicated the dilution in the light of the electoral mechanism utilized by the State. *Id.* (internal quotation marks omitted).

The Fourth Circuit in *McGhee* did not hold that *Gingles* I compels a district court to accept a remedial map that provides *less* than a genuine opportunity for minority voters to elect a candidate of their choice. *See id.* To the contrary, the court

emphasized that the "appropriate remedy" for a vote dilution claim is to "restructure the districting system to eradicate . . . the dilution proximately caused by that system" "to the maximum extent possible," within the bounds of "the size, compactness, and cohesion elements of the dilution concept." *Id.*

Fourth, consistent with the foregoing discussion and our understanding of our task, district courts regularly isolate the initial remedial determination to the question whether a replacement map corrects a violation found in an earlier map. *See, e.g.*, *United States v. Osceola County*, 474 F. Supp. 2d 1254, 1256 (M.D. Fla. 2006); *GRACE, Inc. v. City of Miami*, --- F. Supp. 3d ---, No. 1:22-CV-24066, 2023 WL 4853635, at *7, 2023 U.S. Dist. LEXIS 134162, at *19–20 (S.D. Fla. July 30, 2023).

One three-judge court — in a ruling affirmed by the Supreme Court — has gone so far as to describe its task as "determining the meaning of the Voting Rights Act at the remedial stage of a case in which defendants are proven violators of the law." *Jeffers v. Clinton*, 756 F. Supp. 1195, 1199 (E.D. Ark. 1990), *aff'd*, 498 U.S. 1019 (1991). We do not go that far: no part of our ruling rests on assigning lawbreaker status to the State. *Id.* We are ever mindful that we "must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus," and we generally presume the good faith of the Legislature. *Abbott*, 138 S. Ct. at 2324 (internal quotation marks omitted). And the Supreme Court has specifically held that the "allocation of the burden of proof [to the plaintiffs] and the presumption of

legislative good faith are not changed by a finding of past discrimination." *Id.* This is because "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Id.* (internal quotation marks omitted) (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 75 (1980) (plurality opinion)).

As we explain below, *see infra* at Part IV, we have afforded the 2023 Plan the deference to which it is entitled, we have applied the presumption of good faith, and we have measured it against the evidentiary record by performing the legal analysis that we understand binding precedent to require. Put simply, the 2023 Plan has received a fair shot. (Indeed, we have substantially relaxed the Federal Rules of Evidence to allow the State to submit, and we have admitted, virtually all of the materials that it believes support its defense of the 2023 Plan. *Infra* at Part VII; Aug. 14 Tr. 91–142.)

Fifth, resetting the *Gingles* analysis to ground zero following the enactment of the 2023 Plan is inconsistent with our understanding of this Court's judicial power. At the remedial hearing, we queried the State about the relevance for these remedial proceedings of our statement in the preliminary injunction that the appropriate remedy was an additional opportunity district. *See supra* at Part I.E.2. According to the State, the statement has no legal force, Aug. 14 Tr. 74 — there is not any "prohibition on the Court commenting on what it thinks an appropriate

remedy would be," Aug. 14 Tr. 158, but such comments are limited to the context of the 2021 Plan, meaningless when the Legislature undertakes to enact a remedial map, and irrelevant when a court assesses that map. The State did not use the word "advisory," but in substance its argument was that the "comment" had no force or field of application and was merely our (erroneous) advice to the Legislature.

The State's view cannot be squared with this Court's judicial power in at least two ways. As an initial matter, it artificially divorces remedial proceedings in equity from liability proceedings in equity. As we already observed, federal courts must tailor injunctions to the specific violation that the injunction is meant to remedy; the idea is that the equitable powers of a federal court are among its broadest and must be exercised with great restraint, care, and particularity. *See, e.g.*, *Haitian Refugee Ctr.,* 676 F.2d at 1041 ("Although a federal court has broad equitable powers to remedy constitutional violations, it must tailor the scope of injunctive relief to fit the nature and extent of the constitutional violation established.").

In this way, a liability determination shapes the evaluation of potential remedies, and the determination of an appropriate remedy necessarily is informed by the nature of the conduct enjoined. *Id.*; *see also Covington*, 581 U.S. at 488 (citing *NAACP v. Hampton Cnty. Election Comm'n*, 470 U.S. 166, 183 n.36 (1985)). Again, redistricting cases are no exception. *See, e.g.*, *Dillard*, 831 F.2d at 248. We cannot reconcile these basic principles with the State's suggestion that after an exhaustive

liability determination, we cannot make a relevant or meaningful statement about the proper remedy.

Separately, the State's view is inconsistent with the Article III judicial power because it allows the State to constrain (indeed, to manipulate) the Court's authority to grant equitable relief. The State agrees that if the Legislature had passed no map, it would have fallen to us to draw a map. But the State argues that because the Legislature enacted a map, we have no authority to enjoin it on the ground that it does not provide what we said is the legally required remedy. Rather, the State says, we must perform a new liability analysis from ground zero. The State acknowledges that if we find liability, Alabama's 2024 congressional elections will occur according to a court-ordered map, but that's only because time will have run out for the Legislature to enact another remedial map before that election. Aug. 14 Tr. 159–60.

Put differently, the State's view is that so long as the Legislature enacts a remedial map, we have no authority to craft a remedy without first repeating the entire liability analysis. But at the end of each liability determination, the argument goes, we have no authority to order a remedy if the Legislature plans and has time to enact a new map. In essence, the State creates an endless paradox that only it can break, thereby depriving Plaintiffs of the ability to effectively challenge and the courts of the ability to remedy. It cannot be that the equitable authority of a federal district court to order full relief for violations of federal law is always entirely at the

mercy of a State electoral and legislative calendar.

Sixth, we discern no limiting principle to the State's argument that we should reset the liability analysis to ground zero, and this causes us grave concern that accepting the argument would frustrate the purpose of Section Two. As the Plaintiffs have rightly pointed out and we have described, the State's view of remedial proceedings puts redistricting litigation in an infinity loop restricted only by the State's electoral calendar and terminated only by a new census. *See Milligan* Doc. 210 at 6. These are practical limitations, not principled ones. The State has not identified, and we cannot identify, any limiting principle to a rule whereby redistricting litigation is reset to ground zero every time a legislature enacts a remedial plan following a liability determination. This is a significant reason not to accept such a rule; it would make it exceedingly difficult, if not impossible, for a district court ever to effectuate relief under Section Two.

It is as though we are three years into a ten-year baseball series. We've played the first game. The Plaintiffs won game one. The State had the opportunity to challenge some of the calls that the umpires made, and the replay officials affirmed those calls. Now, instead of playing game two, the State says that it has changed some circumstances that were important in game one, so we need to replay game one. If we agree, we will only ever play game one; we will play it over and over again, until the ten years end, with the State changing the circumstances every time

to try to win a replay. We will never proceed to game two unless, after one of the replays, there is simply no time for the State to change the circumstances. Nothing about this litigation is a game, but to us the analogy otherwise illustrates how poorly the State's position fits with any reasonable effort to timely and finally dispose of redistricting litigation.

Seventh, the State's argument that we must reset the *Gingles* analysis to ground zero ignores the simple truth that the 2023 Plan exists only because this Court held — and the Supreme Court affirmed — that the 2021 Plan likely violated Section Two. If the State originally had enacted the 2023 Plan instead of the 2021 Plan, we would have analyzed the Plaintiffs' attacks on the 2023 Plan under *Gingles*. But that's not what happened, so we won't proceed as though it did.

Further, we reject the State's argument that by limiting our initial remedial determination to the question of whether the 2023 Plan provides an additional opportunity district, we violate the proportionality disclaimer in Section Two. The State argues that we have staked the fate of the 2023 Plan on whether it provides proportional representation, which is unlawful. *See Milligan* Doc. 220 at 60–68.

The State is swinging at a straw man: the Plaintiffs' analysis did not and does not rest on proportionality grounds, and neither does ours. As an initial matter, we did not enjoin the 2021 Plan on the ground that it failed to provide proportional representation. We performed a thorough *Gingles* analysis and expressly

acknowledged a limited, non-dispositive role for evidence and arguments about proportionality. *See Milligan* Doc. 107 at 193–95. The Supreme Court affirmed our analysis, which we presume it would not have done were the analysis infected with a proportionality error. *See Allen*, 143 S. Ct. at 1502. Our remedial analysis cannot go back in time and taint our earlier ruling.

Likewise, the Plaintiffs do not urge us to enjoin the 2023 Plan on the ground that it fails to provide proportional representation. They urge us to enjoin it on the ground that it fails to provide the required remedy because District 2 is not an opportunity district. *See Milligan* Doc. 200 at 6–7; *Caster* Doc. 179 at 2–3. Federal law does not equate the provision of an additional opportunity district as a remedy for vote dilution with an entitlement to proportional representation; decades of jurisprudence so ensures. *Allen*, 143 S. Ct. at 1508–10. Any suggestion that the Plaintiffs urge us to reject the 2023 Plan because it fails to provide proportional representation blinks reality.

And as we explain below, we do not enjoin the 2023 Plan on the ground that it fails to provide proportional representation. We enjoin it on two separate, independent, and alternative grounds, neither of which raises a proportionality problem. *See infra* at Parts IV.A & IV.B.

For all these reasons, it is not a proportionality fault that we limit our initial determination to whether the 2023 Plan provides the remedy the law requires.

D. In the Alternative

Out of an abundance of caution, we have carefully considered the possibility that the foregoing analysis on the standard of review is wrong. We have concluded that even if it is, after a fresh and new *Gingles* analysis the 2023 Plan still meets the same fate. As we explain in Part IV.B below, even if we reexamine *Gingles* I, II, and III, and all the Senate Factors, relying only on (1) relevant evidence from the preliminary injunction proceedings, (2) relevant and admissible evidence from the remedial proceedings, and (3) stipulations and concessions, we reach the same conclusion with respect to the 2023 Plan that we reached for the 2021 Plan: it likely violates Section Two by diluting Black votes.

III. APPLICABLE LAW

"This Court cannot authorize an element of an election proposal that will not with certitude *completely* remedy the Section 2 violation." *Dillard*, 831 F.2d at 252 (emphasis in original); *accord, e.g.*, *Covington*, 283 F. Supp. 3d at 431. The requirement of a complete remedy means that we cannot accept a remedial plan that (1) perpetuates the vote dilution we found, *see, e.g.*, *Covington*, 283 F. Supp. 3d at 431; or (2) only partially remedies it, *see, e.g.*, *White v. Alabama*, 74 F.3d 1058, 1069–70 (11th Cir. 1996).

The law does not require that a remedial district guarantee Black voters' electoral success. "The circumstance that a group does not win elections does not

resolve the issue of vote dilution." *LULAC*, 548 U.S. at 428. Rather, the law requires that a remedial district guarantee Black voters an equal opportunity to achieve electoral success. "[T]he ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *De Grandy*, 512 U.S. at 1014 n.11.

Thus, as we said in the preliminary injunction, controlling precedent makes clear that the appropriate remedy for the vote dilution we found is an additional district in which Black voters either comprise a voting-age majority or otherwise have an opportunity to elect a representative of their choice. And as the Supreme Court explained in *Abbott*, this requirement is not new: "In a series of cases tracing back to [*Gingles*], [the Supreme Court has] interpreted [the Section Two] standard to mean that, under certain circumstance, States **must draw** 'opportunity' districts in which minority groups form 'effective majorit[ies].'" 138 S. Ct. at 2315 (emphasis added) (quoting *LULAC,* 548 U.S. at 426).

Our ruling was consistent with others in which district courts required additional opportunity districts to remedy a vote-dilution violation of Section Two. *See, e.g.*, *Perez v. Texas*, No. 11-CA-360-OLG-JES-XR, 2012 WL 13124275, at *5, 2012 U.S. Dist. LEXIS 190609 (W.D. Tex. Mar. 19, 2012) (on remand from the Supreme Court, ordering the "creation of a new Latino district" to satisfy Section Two); *League of United Latin Am. Citizens v. Perry*, 457 F. Supp. 2d 716, 719 (E.D.

Tex. 2006) (ordering, on remand from the Supreme Court, a remedial plan that restored an effective opportunity district); *accord, e.g.*, *Baldus v. Members of Wis. Gov't Accountability Bd.*, 862 F. Supp. 2d 860, 863 (E.D. Wis. 2012) (rejecting a state's remedial plan and adopting a Section Two plaintiff's remedial proposal that increased a remedial district's minority population to ensure an "effective majority-minority" district).

We have reviewed the relevant jurisprudence for guidance about how to determine whether the 2023 Plan includes an additional opportunity district. The State appears to have charted new waters: we found no other Section Two case in which a State conceded on remedy that a plan enacted after a liability finding did not include the additional opportunity district that the court said was required.

In any event, we discern from the case law two rules that guide our determination whether the 2023 Plan in fact includes an additional opportunity district. *First*, we need a performance analysis (sometimes called a functional analysis) to tell us whether a purportedly remedial district completely remedies the vote dilution found in the prior plan. A performance analysis predicts how a district will function based on statistical information about, among other things, demographics of the voting-age population in the district, patterns of racially polarized voting and bloc voting, and the interaction of those factors. *See generally Milligan* Doc. 199.

Appellate courts commonly rely on performance analyses to review district court decisions about remedial plans. *See, e.g.*, *LULAC*, 548 U.S. at 427 (reviewing a district court's evaluation of a proposed remedial district on the basis of a performance analysis that included evidence of the minority share of the population, racially polarized voting in past elections, and projected election results in the new district); *Dall. Cnty. Comm'n*, 850 F.2d at 1440 (rejecting a remedial plan because a performance analysis demonstrated that racially polarized voting would prevent the election of Black-preferred candidates in the proposed remedial district).

District courts also commonly rely on performance analyses to evaluate remedial plans in the first instance. *See, e.g.*, *Osceola County*, 474 F. Supp. 2d at 1256 (rejecting a remedial proposal that, "given the high degree of historically polarized voting," failed to remedy the VRA violation); *League of United Latin Am. Citizens*, 457 F. Supp. 2d at 721 (ordering remedial plan with three new "effective Latino opportunity districts" and basing determination that districts would "perform" on population demographics and statewide election data).

Second, the Supreme Court has not dictated a baseline level at which a district must perform to be considered an "opportunity" district. Nor has other precedent set algorithmic criteria for us to use to determine whether an alleged opportunity district will perform. But precedent does clearly tell us what criteria establish that a putative opportunity district will not perform. When a performance analysis shows that a

cohesive majority will "often, if not always, prevent" minority voters from electing the candidate of their choice in the purportedly remedial district, there is a "denial of opportunity in the real sense of that term." *LULAC*, 548 U.S. at 427, 429. And when voting is racially polarized to such a "high degree" that electoral success in the alleged opportunity district is "completely out of the reach" of a minority community, the district is not an opportunity district. *Osceola County*, 474 F. Supp. 2d at 1256.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Our findings and conclusions proceed in two parts. We first consider whether, under the precedent we just described, the 2023 Plan completely remedies the likely Section Two violation that we found and the Supreme Court affirmed. We then consider whether, starting from square one, the Plaintiffs have established that the 2023 Plan likely violates Section Two.

A. The 2023 Plan Does Not Completely Remedy the Likely Section Two Violation We Found and the Supreme Court Affirmed.

The record establishes quite clearly that the 2023 Plan does not completely remedy the likely Section Two violation that we found and the Supreme Court affirmed. The 2021 Plan included one majority-Black congressional district, District 7. This Court concluded that the Plaintiffs were substantially likely to establish that the 2021 Plan violated Section Two by diluting Black votes. *See Milligan* Doc. 107. We determined that under binding precedent, the necessary remedy was either an

additional majority-Black district or an additional Black-opportunity district. *Id.* at 5–6. We observed that as a "practical reality," because voting in Alabama is intensely racially polarized, any such district would need to include a Black "voting-age majority or something quite close to it." *Id.* at 6.

We explicitly explained that the need for two opportunity districts hinged on the evidence of racially polarized voting in Alabama — which the State concedes at this stage — and that our *Gingles* I analysis served only to determine whether it was reasonably practicable, based on the size and geography of the minority population, to create a reasonably configured map with two majority-minority districts.

The Supreme Court affirmed that order in all respects; it neither "disturb[ed]" our fact findings nor "upset" our legal conclusions. *Allen*, 143 S. Ct. at 1502, 1506. The Supreme Court did not issue any instructions for us to follow when the cases returned to our Court or warn us that we misstated the appropriate remedy. We discern nothing in the majority opinion to hold (or even to suggest) that we misunderstood what Section Two requires. We have carefully reviewed the portion of the Chief Justice's opinion that received only four votes, as well as Justice Kavanaugh's concurrence, and we discern nothing in either of those writings that adjusts our understanding of what Section Two requires in these cases. We do not understand either of those writings as undermining any aspect of the Supreme Court's affirmance; if they did, the Court would not have affirmed the injunction.

We simply see no indication in *Allen* that we misapplied Section Two.

Because there is no dispute that the 2023 Plan does not have two majority-Black districts, *Milligan* Doc. 251 ¶ 1, the dispositive question is whether the 2023 Plan contains an additional Black-opportunity district. We find that it does not, for two separate and independent reasons.

First, we find that the 2023 Plan does not include an additional opportunity district because the State itself concedes that the 2023 Plan does not include an additional opportunity district. *See id.* ¶¶ 5–9; Aug. 14 Tr. 163–64. Indeed, the State's position is that the Legislature was not required to include an additional opportunity district in the 2023 Plan. Aug. 14 Tr. 157–61, 163–64.

Second, we find that the 2023 Plan does not include an additional opportunity district because stipulated evidence establishes that fact. District 2 has the second-highest Black voting-age population after District 7, and District 2 is the district the Plaintiffs challenge. *See Milligan* Doc. 200 at 6–7; *Milligan* Doc. 251 ¶ 3. District 2 (with a Black voting-age population of 39.93%) is, according to the State, "as close as you are going to get" to a second majority-Black district. Aug. 14 Tr. 164.

Based on (1) expert opinions offered by the *Milligan* and *Caster* Plaintiffs and (2) the Legislature's own performance analysis, the parties stipulated that in District 2 in the 2023 Plan, white-preferred candidates have "almost always defeated Black-preferred candidates." *Milligan* Doc. 251 ¶ 5; *see also Milligan* Docs. 200-2, 200-3;

Caster Doc. 179-2.

Standing alone, this stipulation supports a finding that the new District 2 is not an opportunity district. Because voting is so intensely racially polarized in District 2, a Black-voting age population of 39.93% is insufficient to give Black voters a fair and reasonable opportunity to elect a representative of their choice: it will either never happen, or it will happen so very rarely that it cannot fairly be described as realistic, let alone reasonable.

The evidence fully supports the parties' stipulation. The *Milligan* Plaintiffs' expert, Dr. Liu, examined the effectiveness of Districts 2 and 7 of the 2023 Plan in eleven biracial elections between 2014 and 2022. *Milligan* Doc. 200-2 at 1. Dr. Liu opined that in District 2, "[a]ll Black-preferred-candidates . . . in the 11 biracial elections were defeated." *Id.* at 2. Dr. Liu further opined that the District 2 races were not close: the average two-party vote share for the Black preferred candidates in District 2 was approximately 42%. *Id.* at 3; *Milligan* Doc. 251 ¶ 7. Accordingly, Dr. Liu concluded that "voting is highly racially polarized in [Districts 2] and [7] in the [2023] Plan," and the new District 2 "produces the same results for Black Preferred Candidates" that the 2021 Plan produced. *Milligan* Doc. 200-2 at 1.

The *Caster* Plaintiffs' expert, Dr. Palmer, reached the same conclusion using a different analysis. Dr. Palmer analyzed the 2023 Plan using seventeen contested statewide elections between 2016 and 2022. *Milligan* Doc. 251 ¶ 6; *Caster* Doc. 179-

2. Dr. Palmer opined that "Black voters have a clear candidate of choice in each contest, and White voters are strongly opposed to this candidate." *Caster* Doc. 179-2 ¶¶ 8, 11–12. Dr. Palmer further opined that "Black-preferred candidates are almost never able to win elections in" District 2 because "[t]he Black-preferred candidate was defeated in 16 of the 17 elections [he] analyzed." *Id.* ¶¶ 8, 11–12, 18, 20; *accord Milligan* Doc. 251 ¶ 6. Dr. Palmer observed that Black preferred candidates regularly lost by a substantial margin: the two-party vote share for the Black preferred candidates in District 2 was 44.5%. *Caster* Doc. 179-2 ¶ 18; *see also Milligan* Doc. 213 ¶ 6. Accordingly, Dr. Palmer opined that the new District 2 does not allow Black voters to elect a candidate of their choice. *Caster* Doc. 179-2 ¶ 20.

We credited both Dr. Liu and Dr. Palmer in the preliminary injunction proceedings, *see Milligan* Doc. 107 at 174–76, and we credit them now for the same reasons we credited them then. Both experts used the same methodology to develop their opinions for these remedial proceedings that they used to develop their opinions on liability. *See Milligan* Doc. 200-2 at 2; *Caster* Doc. 179-2 ¶ 9 & n.1. And the State has not suggested that we should discredit either expert, or that we should discount their opinions for any reason.

Indeed, the Legislature's analysis of the 2023 Plan materially matches Dr. Liu's and Dr. Palmer's. The Legislature analyzed the 2023 Plan in seven election contests. *Milligan* Doc. 251 ¶ 9. The Legislature's analysis found that "[u]nder the

2023 Plan, the Black-preferred candidate in [District] 2 would have been elected in 0 out of the 7 contests analyzed." *Id*. And it showed that the losses were by a substantial margin: "Under the 2023 Plan," the Legislature's analysis found, "the average two-party vote-share for Black preferred candidates in [District] 2 is 46.6%." *Id*.

All the performance analyses support the same conclusion: the 2023 Plan provides no greater opportunity for Black Alabamians to elect a candidate of their choice than the 2021 Plan provided. District 2 is the closest the 2023 Plan comes to a second Black-opportunity district, and District 2 is not a Black-opportunity district. Accordingly, the 2023 Plan perpetuates, rather than completely remedies, the likely Section Two violation found by this Court.

B. Alternatively: Even If the Plaintiffs Must Re-Establish Every Element of *Gingles* Anew, They Have Carried that Burden and Established that the 2023 Plan Likely Violates Section Two.

Even if we reset the *Gingles* analysis to ground zero, the result is the same because the Plaintiffs have established that the 2023 Plan likely violates Section Two. We discuss each step of the *Gingles* analysis in turn.

1. *Gingles* I - Numerosity

The numerosity part of *Gingles* I considers whether Black voters as a group are "sufficiently large . . . to constitute a majority" in a second majority-Black congressional district in Alabama. *Cooper*, 581 U.S. at 301 (internal quotation marks

omitted). This issue was undisputed during the preliminary injunction proceedings, *Milligan* Doc. 107 at 146, and the State offers no evidence to challenge our previous finding. Accordingly, we again find that Black voters, as a group, are "sufficiently large . . . to constitute a majority" in a second majority-Black congressional district in Alabama. *Cooper*, 581 U.S. at 301 (internal quotation marks omitted).

2. *Gingles* I - Compactness

We next consider whether the *Milligan* and *Caster* Plaintiffs have established that Black voters as a group are sufficiently geographically compact to constitute a majority in a second reasonably configured congressional district. We proceed in three steps: *first*, we explain our credibility determinations about the parties' expert witnesses; *second*, we explain why the State's premise that reasonable compactness necessarily requires the Plaintiffs' proposed plans to "meet or beat" the 2023 Plan on all available compactness metrics is wrong; and *third*, we consider the parties' arguments about geographic compactness on the State's own terms.

a. Credibility Determinations

In the preliminary injunction, we found Dr. Duchin and Mr. Cooper "highly credible." *Milligan* Doc. 107 at 148–52. The State has not adduced any evidence or made any argument during remedial proceedings to disturb those findings. We also found credible Dr. Bagley, who earlier testified about the Senate Factors and now opines about communities of interest. *Id.* at 185–87. Likewise, the State has not

adduced any evidence or made any argument during remedial proceedings to disturb our original credibility determination about Dr. Bagley. Accordingly, we find credible each of Plaintiffs' *Gingles* I experts.

Although we "assign[ed] very little weight to Mr. Bryan's testimony" in the preliminary injunction and explained at great length why we found it unreliable, *id.* at 152–56, the State again relies on Mr. Bryan as an expert on "race predominance," this time through an unsworn report where he "assessed how county 'splits differ by demographic characteristics when it comes to the division of counties' in Plaintiffs' alternative[]'" plans. *See Milligan* Doc. 267 ¶ 156 (quoting *Milligan* Doc. 220-10 at 22). When we read the State's defense of the 2023 Plan, it is as though our credibility determination never occurred: the State repeatedly cites Mr. Bryan's opinions but makes no effort to rehabilitate his credibility. *See generally Milligan* Doc. 220.

Likewise, when we read Mr. Bryan's 2023 report, it is as though our credibility determination never occurred. Mr. Bryan makes no attempt to rehabilitate his own credibility or engage any of the many reasons we assigned little weight to his testimony and found it unreliable. *See generally Milligan* Doc. 220-10. Mr. Bryan even cites this case as one of two cases in which he has testified, without mentioning that we did not credit his testimony. *See id.* at 4. The district court in the other case found "his methodology to be poorly supported" and that his "conclusions carried little, if any, probative value on the question of racial predominance."

Robinson v. Ardoin, 605 F. Supp. 3d 759, 824 (M.D. La. 2022).

When we read the State's response to the Plaintiffs' motion to exclude Mr. Bryan's 2023 report as unreliable, it is again as though our credibility determination never occurred. The State does not acknowledge it or suggest that any of the problems we identified have been remedied (or at least not repeated). *See generally Milligan* Doc. 245.

Against this backdrop, it is especially remarkable that (1) the State did not call Mr. Bryan to testify live at the remedial hearing, and (2) Mr. Bryan's report is not sworn. *See Milligan* Doc. 220-10. "[C]ross-examination is the greatest legal engine ever invented for the discovery of truth." *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987) (internal quotation marks omitted) (quoting 5 J. Wigmore, Evidence § 1367 at 29 (3d ed. 1940)). Cross-examination strikes us as especially important because this Court already has found this expert witness' testimony incredible and unreliable. It strikes us as even more valuable when, as here, a witness has not reduced his opinions to sworn testimony.

Standing alone, these circumstances preclude us from assigning any weight to Mr. Bryan's 2023 opinion. But these circumstances don't stand alone: even if we were to evaluate Mr. Bryan's 2023 opinion without reference to our earlier credibility determination, we would not admit it or assign any weight to it.

As the Supreme Court made clear in *Daubert v. Merrell Down*

Pharmaceuticals, Inc., 509 U.S. 579 (1993), Federal Rule of Evidence 702 requires this Court to "perform the critical 'gatekeeping' function concerning the admissibility" of expert evidence. *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (*en banc*) (quoting *Daubert*, 509 U.S. at 589 n.7). That gatekeeping function involves a "rigorous three-part inquiry" into whether:

> (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

Id. (quoting *City of Tuscaloosa v. Harcos Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998)). "The burden of establishing qualification, reliability, and helpfulness rests on the proponent of the expert opinion." *Id.*

The State has not met its burden on at least two of these three requirements. *First*, as explained above, this Court ruled that Mr. Bryan was not a credible witness in January 2021. *Milligan* Doc. 107 at 152. *Second*, Mr. Bryan's report is not reliable. For that, the Court "assess[es] 'whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue.'" *Frazier*, 387 F.3d at 1261–62 (quoting *Daubert*, 509 U.S. at 592–93). There are two parts to the methodology question: relevance and reliability. *See Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310–12 (11th Cir. 1999). Under the relevance part, "the

court must ensure that the proposed expert testimony is relevant to the task at hand, . . . i.e., that it logically advances a material aspect of the proposing party's case." *Id.* at 1312 (internal quotation marks omitted). "[T]he evidence must have a valid scientific connection to the disputed facts in the case." *Id.*

Under the reliability part, courts consider "four noninclusive factors," namely "(1) whether the theory or technique can be tested; (2) whether it has been subjected to peer review; (3) whether the technique has a high known or potential rate of error; and (4) whether the theory has attained general acceptance within the scientific community." *Id.* The "primary focus" should "be solely on principles and methodology, not on the conclusions that they generate," so "the proponent of the testimony does not have the burden of proving that it is scientifically correct, but that by a preponderance of the evidence, it is reliable." *Id.* (internal quotation marks omitted). As explained below, Mr. Bryan's report is neither relevant nor reliable.

Mr. Bryan's 2023 opinion is that "race predominated in the drawing of both the [Districts 2] and [7] in the [VRA Plan] and the Cooper Plans." *Milligan* Doc. 220-10 ¶ 7. That opinion rests on what Mr. Bryan calls a "[g]eographic [s]plits [a]nalysis of [c]ounties." *Id.* at 22. *First*, as to reliability, "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the

opinion proffered." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

The Plaintiffs attack Mr. Bryan's 2023 opinion as *ipse dixit*, and we agree. Mr. Bryan's report does not explain how his opinion about race predominance is connected to the geographic splits methodology that he used, or even why an evaluation of race predominance ordinarily might be based on geographic splits analysis. *See Milligan* Doc. 220-10 at 22–26. Mr. Bryan simply presents the results of his geographic splits analysis and then states in one sentence a cursory conclusion about race predominance. *Id.* The State's response does nothing to solve this problem. *See Milligan* Doc. 245 at 7–10.

Second, as to helpfulness, the Plaintiffs have not offered the VRA Plan as an illustrative plan for *Gingles* I, so we have no need for Mr. Bryan's opinion about that plan. The Plaintiffs did offer the Cooper plans, but we also have no need for his opinion about those: we presume the preliminary injunction would not have been affirmed if there were an open question whether race played an improper role in the preparation of all of them, given that the State squarely presented this argument to the Supreme Court. And even if we were to accept Mr. Bryan's opinion about the Cooper plans (which we don't), the State stakes no part of its defense of the 2023 Plan on arguments about that opinion: the State cites Mr. Bryan's opinion only once in the argument section of its brief, and that is to make an argument about the VRA Plan. *Milligan* Doc. 220 at 58. Accordingly, nothing in Mr. Bryan's report is helpful

to this Court's decision whether the Plaintiffs have established that the 2023 Plan likely violates Section Two.

Because we again do not credit Mr. Bryan and we find his 2023 opinion unreliable and unhelpful, we **GRANT IN PART** the Plaintiffs' motion *in limine* and **EXCLUDE** his opinion from our analysis. *See* Fed. R. Evid. 702; *Daubert*, 509 U.S. at 589–92. For those same reasons, even if we were to receive Mr. Bryan's opinion into evidence, we would assign it no weight.

We turn next to Mr. Trende's opinion. *See Milligan* Doc. 220-12. The State relies on Mr. Trende to "assess[] the 2023 Plan and each of Plaintiffs' alternative plans based on the three compactness measures Dr. Duchin used in her earlier report." *Milligan* Doc. 220 at 57–58. Mr. Trende is a Senior Elections Analyst at Real Clear Politics, he is a doctoral candidate at Ohio State University, and he has a master's degree in applied statistics. *Milligan* Doc. 220-12 at 2–4.

The Plaintiffs do not contest Mr. Trende's qualifications to testify as an expert. And because he uses the same common statistical measures of compactness that Dr. Duchin used, the Plaintiffs do not contest the reliability of his methods. Accordingly, we admit Mr. Trende's report for the limited and alternative purpose of conducting a new *Gingles* analysis. We explain the weight we assign it in that analysis below.

b. The "Meet or Beat" Requirement

We now pause to correct a fundamental misunderstanding in the State's view of step one of the *Gingles* analysis. Our task is not, as the State repeatedly suggests, to compare the Plaintiffs' illustrative plans with the 2023 Plan to determine which plan would prevail in a "beauty contest." *Allen*, 143 S. Ct. at 1505 (internal quotation marks omitted) (alterations accepted). As the Supreme Court affirmed in this very case, "[t]he District Court . . . did not have to conduct a beauty contest between plaintiffs' maps and the State's." *Id.* (internal quotation marks omitted) (alterations accepted); *see also Vera*, 517 U.S. at 977 (plurality opinion) ("A § 2 district that is *reasonably* compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries" is not required "to defeat rival compact districts designed by [the State] in endless 'beauty contests.'" (emphasis in original)).

Nevertheless, the State frames the "focus" of these proceedings as "whether Plaintiffs can produce an alternative map that equals the 2023 Plan on the traditional principles that *Allen* reaffirmed were the basis of the § 2 analysis." *Milligan* Doc. 220 at 33. But neither *Allen* nor any other case law stands for that proposition. Our preliminary injunction order — affirmed by the Supreme Court — explained that "[c]ritically, our task is not to decide whether the majority-Black districts in the Duchin plans and Cooper plans are 'better than' or 'preferable' to a majority-Black

district drawn a different way. Rather, the rule is that '[a] § 2 district that is **reasonably** compact and regular, taking into account traditional districting principles,' need not also 'defeat [a] rival compact district[]' in a 'beauty contest[].'" *Milligan* Doc. 107 at 165 (emphasis in original) (quoting *Vera*, 517 U.S. at 977–78 (plurality opinion)).

Instead of the "meet-or-beat" requirement the State propounds, the essential question under *Gingles* I is and has always been whether the minority group is "sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district." *Cooper*, 581 U.S. at 301 (internal quotation marks omitted). This standard does not require that an illustrative plan outperform the 2023 Plan by a prescribed distance on a prescribed number of prescribed metrics. An illustrative plan may be reasonably configured even if it does not outperform the 2023 Plan on every (or any particular) metric. The standard does not require the Plaintiffs to offer the *best* map; it requires them to offer a reasonable one. Indeed, requiring a plaintiff to meet or beat an enacted plan on every redistricting principle a State selects would allow the State to immunize from challenge a racially discriminatory redistricting plan simply by claiming that it best satisfied a particular principle the State defined as non-negotiable.

Accordingly, that the 2023 Plan preserves communities of interest differently from the Plaintiffs' illustrative maps, or splits counties differently from the

illustrative maps, does not automatically make the illustrative maps unreasonable. As Mr. Cooper testified, different maps will necessarily prioritize traditional districting criteria in different ways. This is why the maps offered by a Section Two plaintiff are only ever *illustrative*; states are free to prioritize the districting criteria as they wish when they enact a remedial map, so long as they satisfy Section Two. The State has essentially conceded that it failed to do so here, maintaining that it can skirt Section Two by excelling at whatever traditional districting criteria the Legislature deems most pertinent in a redistricting cycle.

The bottom line is that the Plaintiffs' illustrative maps can still be "reasonably configured" even if they do not outperform the 2023 Plan on every (or any particular) metric. The premise that forms the backbone of the State's defense of the 2023 Plan therefore fails.

More fundamentally, even if we were to find that the 2023 Plan respects communities of interest better or is more compact than the 2021 Plan — that the 2023 Plan "beats" the 2021 Plan — that would not cure the likely violation we found because the violation was not that the 2021 Plan did not respect communities of interest, or that it was not compact enough. We found that the 2021 Plan likely diluted Black votes. The State cannot avoid the mandate of Section Two by improving its map on metrics **other than compliance with Section Two**. Otherwise, it could forever escape remediating a Section Two violation by making each

remedial map slightly more compact, or slightly better for communities of interest, than the predecessor map. That is not the law: a Section Two remedy must be tailored to the specific finding of Section Two liability.

In any event, we do not find that the 2023 Plan respects communities of interest or county lines better than the Plaintiffs' illustrative maps. *See* infra at Part IV.B.2.d.

c. Geographic Compactness Scores

We next turn, as we did in the preliminary injunction, to the question whether the compactness scores for the Duchin plans and the Cooper plans indicate that the majority-Black congressional districts in those plans are reasonably compact. In the preliminary injunction, we based our reasonableness finding about the scores on (1) the testimony of "eminently qualified experts in redistricting," and (2) "the relative compactness of the districts in the [illustrative] plans compared to that of the districts in the [2021] Plan." *See Milligan* Doc. 107 at 157.

The enactment of the 2023 Plan has not changed any aspect of Dr. Duchin and Mr. Cooper's testimony that the compactness scores of the districts in their plans are reasonable. *See id.* (citing such testimony at Tr. 446, 471, 492–493, 590, 594). Because that testimony was not relative — it opined about the Duchin plans and Cooper plans standing alone, not compared to any other plan — the enactment of a new plan did not affect it.

Neither does Dr. Trende's opinion affect the testimony of Dr. Duchin and Mr. Cooper about reasonableness. When we originally analyzed that testimony, we concluded that because Mr. Bryan "offered no opinion on what is reasonable and what is not reasonable in terms of compactness," "the corollary of our decision to credit Dr. Duchin and Mr. Cooper is a finding that the Black population in the majority-Black districts in the Duchin plans and the Cooper plans is reasonably compact." *Id.* at 157–58 (internal quotation marks omitted). Like Mr. Bryan then, Mr. Trende now offers no opinion on what is reasonable or what is not reasonable in terms of compactness. *See Milligan* Doc. 220-12 at 6–11 ("Analysis of Maps"). Accordingly, the State still has adduced no evidence to question, let alone disprove, the Plaintiffs' evidence that the Black population in the majority-Black districts in the illustrative plans is reasonably compact.

When we examine the relative compactness of the districts in the Duchin plans and the Cooper plans compared to that of the districts in the 2023 Plan, the result remains the same. Mr. Trende acknowledges that on an average Polsby-Popper metric, Duchin plan 2 is "marginally more compact" than the 2023 Plan, and that on a cut edges metric, Duchin plan 2 outperforms the 2023 Plan. *Id.* at 10. (Nevertheless, Mr. Trende opines that the 2023 Plan outperforms all illustrative plans when all three metrics are taken in account. *Id.*) And Mr. Trende does not opine that any of the Duchin plans or Cooper plans that received lower statistical scores

received unreasonably lower scores or unreasonable scores. *See id.*at 8–10.

"[A]s far as compactness scores go, all the indicators [again] point in the same direction. Regardless how we study this question, the answer is the same each time. We find that based on statistical scores of geographic compactness, each set of Section Two plaintiffs has submitted remedial plans that strongly suggest that Black voters in Alabama are sufficiently numerous and reasonably compact to comprise a second majority-Black congressional district." *Milligan* Doc. 107 at 159.

d. Reasonable Compactness and Traditional Redistricting Principles

As we said in the preliminary injunction, "[c]ompactness is about more than geography." *Id.* If it is not possible to draw an additional opportunity district that is reasonably configured, Section Two does not require such a district. In the preliminary injunction, we began our analysis on this issue with two visual assessments: one of the Black population in Alabama, and one of the majority-Black districts in the Duchin and Cooper plans. *See id.* at 160–62.

Our first visual assessment led us to conclude that "[j]ust by looking at the population map [of the Black population in Alabama], we can see why Dr. Duchin and Mr. Cooper expected that they could easily draw two reasonably configured majority-Black districts." *Id.* at 161. The State suggests no reason why we should reconsider that finding now. And the enactment of the 2023 Plan does not change the map we visually assessed, or the conclusion that we drew from it.

Our second visual assessment led us to conclude that we "d[id] not see tentacles, appendages, bizarre shapes, or any other obvious irregularities [in the Duchin or Cooper plans] that would make it difficult to find that any District 2 could be considered reasonably compact." *Id.* at 162. The enactment of the 2023 Plan does not change the maps that we visually assessed, nor the conclusion that we drew from them.

In the preliminary injunction, "we next turn[ed] to the question whether the Duchin plans and the Cooper plans reflect reasonable compactness when our inquiry takes into account, as it must, 'traditional districting principles such as maintaining communities of interest and traditional boundaries.'" *Id.* (quoting *LULAC*, 548 U.S. at 433). We follow the same analytic path now.

This step of the analysis is at the heart of the State's assertion that the 2023 Plan moved the needle on *Gingles* I. The State argues that "the lesson from *Allen* is that Section 2 requires Alabama to avoid discriminatory effects in how it treats communities of interest, even if that means sacrificing core retention," and that neither we nor the Supreme Court have "ever said that [Section Two] requires the State to subordinate 'nonracial communities of interest' in the Gulf and Wiregrass to Plaintiffs' racial goals." *Milligan* Doc. 267 ¶¶ 215–16 (quoting *LULAC*, 548 U.S. at 433). The State contends that the Plaintiffs cannot "show that there is a reasonably configured alternative remedy that would also maintain communities of interest in

the Black Belt, Gulf, and Wiregrass, on par with the 2023 Plan." *Milligan* Doc. 220 at 37 (internal quotation marks omitted).

At its core, the State's position is that no Duchin plan or Cooper plan can "meet or beat" the 2023 Plan with respect to these three communities of interest and county splits. The State leans heavily on additional evidence about these communities of interest, the rule that Section Two "never require[s] adoption of districts that violate traditional redistricting principles," *Allen*, 143 S. Ct. at 1510 (internal quotation marks omitted), and the legislative findings that accompany the 2023 Plan.

The State contends that "this is no longer a case in which there would be a split community of interest" in both the Plaintiffs' plans and the enacted plan, because in the 2023 Plan, the "Black Belt, Gulf, and Wiregrass communities are maintained to the maximum extent possible." *Milligan* Doc. 220 at 51 (internal quotation marks omitted) (alterations accepted). The State asserts that the 2023 Plan "rectifies what Plaintiffs said was wrong with the 2021 Plan" because it "puts all 18 counties that make up the Black Belt entirely within Districts 2 and 7" and keeps Montgomery whole in District 2. *Id.* at 42–43.

For their part, the *Milligan* Plaintiffs say that the 2023 Plan changed nothing. They attack the legislative findings about traditional districting principles — more particularly, the legislative findings about communities of interest, county splits, and

protection of incumbents — as perpetuating the vote dilution we found because these findings were "tailored to disqualify" the Plaintiffs' illustrative plans. *Milligan* Doc. 200 at 20. The *Milligan* Plaintiffs accuse the State of "ignor[ing] that the Supreme Court recognized" that the Duchin plans and Cooper plans "comported with traditional districting criteria, even though they split Mobile and Baldwin counties"; they say that the record continues to support that conclusion; and they cite a declaration from the first Black Mayor of Mobile and a supplemental report prepared by Dr. Bagley. *Id.* at 21–22 (internal quotation marks omitted). The *Milligan* Plaintiffs assert that the 2023 Plan keeps together only the Gulf Coast while perpetuating vote dilution in the Black Belt and splitting the Wiregrass between Districts 1 and 2. *Id.* at 22–23.

Before we explain our findings and conclusions on these issues, we repeat the foundational observations that we made in the preliminary injunction: (1) these issues were "fervently disputed," (2) the State continues to insist that "there is no legitimate reason to separate Mobile County and Baldwin County," (3) our task is not to decide whether the majority-Black districts in the Duchin plans and Cooper plans are "better than" any other possible majority-Black district, and (4) "we are careful to avoid the beauty contest that a great deal of testimony and argument seemed designed to try to win." *Milligan* Doc. 107 at 164–65.

i. Communities of Interest

As we previously found and the Supreme Court affirmed, the Black Belt "stands out to us as quite clearly a community of interest of substantial significance," but the State "overstate[s] the point" about the Gulf Coast. *See Milligan* Doc. 107 at 165–71; *accord Allen*, 143 S. Ct. at 1505. The evidence about the Gulf Coast is now more substantial than it was before, but it is still considerably weaker than the record on the Black Belt, which rests on extensive stipulated facts and includes extensive expert testimony, and which spanned a range of demographic, cultural, historical, and political issues. *See Milligan* Doc. 107 at 165–67.

As the Supreme Court recognized, in the preliminary injunction we found that, "[n]amed for its fertile soil, the Black Belt contains a high proportion of black voters, who share a rural geography, concentrated poverty, unequal access to government services, . . . lack of adequate healthcare, and a lineal connection to the many enslaved people brought there to work in the antebellum period." *Allen*, 143 S. Ct. at 1505 (internal quotation marks omitted).

We now have the additional benefit of Dr. Bagley's testimony about the Black Belt, Gulf Coast, and Wiregrass. *See Milligan* Doc. 200-15. We credit his testimony and find his opinions helpful, particularly (1) his opinion further describing the shared experience of Black Alabamians in the Black Belt; and (2) his opinion that "treating Mobile and Baldwin Counties as an inviolable" community of interest is

"ahistorical" in light of the connections between Mobile and the Black Belt. *See id.* at 1.

Dr. Bagley's testimony further describes the shared experiences of Alabamians in the Black Belt, which are "not only related to the fertility of the soil and the current poverty" there, but "are also characterized by" many shared racial experiences, including "Indian Removal, chattel slavery, cotton production, Reconstruction and Redemption, sharecropping, convict leasing, white supremacy, lynching, disenfranchisement, the birth of Historically Black Colleges and Universities . . . , struggles for civil and voting rights, Black political and economic organization, backlash in the form of violence and economic reprisal, repressive forms of taxation, [and] white flight," to name a few. *Id.* at 2.

Dr. Bagley opines that "many of these characteristics" also apply to "metropolitan Mobile," which Dr. Bagley describes as "Black Mobile." *Id.* at 2–3. Dr. Bagley explains that the Port of Mobile (a cornerstone of the State's arguments about the Gulf Coast community of interest) "historically saw the importation and exportation of human chattel, up to the illegal importation of enslaved individuals by the crew of the Clotilda in 1860," as well as "the export of the cotton grown by the enslaved people in the Black Belt." *Id.* at 2. And Dr. Bagley explains that Black Alabamians living in modern Mobile share experiences of "concentrated poverty" and a "lack of access to healthcare" with Alabamians in the Black Belt, such that

Black Alabamians in Mobile have more in common with people in the Black Belt than they do with people in whiter Baldwin County. *Id.* at 3–4.

Further, Dr. Bagley opines that treating Mobile and Baldwin Counties as an inseparable community of interest is "ahistorical." *Id.* at 1, 4–7. His testimony is that the State overstates the evidence of "alleged connections" between Mobile and Baldwin Counties and fails to acknowledge the reality that "Black Mobile is geographically compact and impacted by poverty relative to Baldwin County, which is, by contrast, affluent and white." *Id.* at 4.

The State does little to diminish Dr. Bagley's testimony. *See Milligan* Doc. 220 at 44–49. *First,* the State disputes only a few of the many details he discusses, none of which undermines his substantive point. *See id. Second*, without engaging Dr. Bagley's testimony about the connections between the Black Belt and Mobile, or his testimony that treating the Gulf Coast as "inviolable" is "ahistorical," the State reiterates its previous argument that the Gulf Coast is "indisputably" a community of interest that Plaintiffs would split along racial lines. *Id.* at 39–40. *Third,* without engaging Dr. Bagley's point about the shared racial experiences of Alabamians living in the Black Belt (or the stipulated facts), the State asserts that the 2023 Plan successfully unites the Black Belt as a "nonracial community of interest." *Id.* at 38. And *fourth,* the State urges us to assign Dr. Bagley's opinion little weight because a "paid expert cannot supersede legislative findings, especially where, as here, the

expert's opinions are based on a selective retelling of facts." *Id.* at 48–49. We discuss each argument in turn.

First, the State's effort to refute specific details of Dr. Bagley's testimony about the Black Belt is unpersuasive. Dr. Bagley's report is well-supported and factually dense. *See Milligan* Doc. 200-15. Even if we accept *arguendo* the State's isolated factual attacks, *see Milligan* Doc. 220 at 44–49, neither the basis for nor the force of the report is materially diminished.

Second, the State continues to insist that the Gulf Coast is "indisputably" a community of interest that cannot be separated, especially "along racial lines," but the record does not bear this out, particularly in the light of the State's failure to acknowledge, let alone rebut, much of Dr. Bagley's testimony. The State says nothing about Dr. Bagley's testimony that treating Mobile and Baldwin Counties as inseparable is ahistorical because those Counties were in separate congressional districts for almost all the period between 1876 and the 1970s. *Milligan* Doc. 200-15 at 7. The State ignores his testimony that Black Alabamians living in poverty in Mobile don't have very much in common with white, affluent Alabamians living in Baldwin County. The State ignores his testimony that those Black Alabamians have more in common (both historically and to the present day) with Black Alabamians living in the Black Belt. Put simply, even if we accept all the new evidence about the Gulf Coast, it fails to establish that the Gulf Coast cannot be separated under any

circumstance, let alone to avoid or remedy vote dilution.

Third, Dr. Bagley's report further disproves what the parties' fact stipulations already had precluded: the State's assertion that the Black Belt is merely one of three "nonracial" communities of interest that the 2023 Plan keeps together as much as possible. *Milligan* Doc. 220 at 38. The Plaintiffs have supported their claims with arguments and evidence about the cracking of Black voting strength in the Black Belt. *See, e.g.*, *Milligan* Doc. 69 at 19, 29–30; *Caster* Doc. 56 at 7, 9–10. Extensive stipulations of fact and extensive expert testimony have described a wide range of demographic, cultural, historical, and political characteristics of the Black Belt, many of which relate to race. *See Milligan* Doc. 107 at 165–67.

On remedy, the Plaintiffs argue that the new District 2 perpetuates rather than remedies the dilution we found in the Black Belt. *Milligan* Doc. 200 at 19. And Dr. Bagley's testimony is that many of the shared experiences of Alabamians living in the Black Belt are steeped in race. *Milligan* Doc. 200-15 at 1–4. The State's failure to rebut Dr. Bagley's testimony undermines its insistence that the Black Belt is no longer at the heart of this case and is merely one of three nonracial communities of interest maintained in the 2023 Plan.

We already faulted the State once for pressing an overly simplistic view of the Black Belt. In the preliminary injunction, we relied on the substantial body of evidence about the Black Belt (much of it undisputed) to reject the State's assertion

that the Plaintiffs' "attempt to unite much of the Black Belt as a community of interest in a remedial District 2 is 'merely a blunt proxy for skin color.'" *Milligan* Doc. 107 at 168 (quoting *Milligan* Doc. 78 at 86). As we explained, "[t]he Black Belt is overwhelmingly Black, but it blinks reality to say that it is a 'blunt proxy' for race – on the record before us, the reasons why it is a community of interest have many, many more dimensions than skin color." *Id.* at 169. The State's assertion that the Black Belt is a "nonracial" community of interest now swings the pendulum to the opposite, equally inaccurate, end of the spectrum.

Fourth, the State argues that as between Dr. Bagley's testimony about communities of interest and the legislative findings about communities of interest, we are required by law to defer to the legislative findings. *Milligan* Doc. 220 at 48–49. But the State ignores the Plaintiffs' argument that no deference is owed to a legislature's redistricting policies that perpetuate rather than remedy vote dilution. *Compare Milligan* Doc. 200 at 20 (*Milligan* Plaintiffs' objection to deference, citing discussions of core retention in *Allen* and incumbency protection and partisan political goals in *LULAC*), *with Milligan* Doc. 220 (State's filing, making no response).

We regard it as beyond question that if we conclude that the 2023 Plan perpetuates vote dilution, we may not defer to the legislative findings in that Plan. Ordinarily, that rule would not matter for our present task: because the point of a

Gingles I analysis is to determine whether a challenged plan dilutes votes, we would not refuse deference to legislative findings for *Gingles* I purposes on the ground that the findings perpetuate vote dilution. It would be circular reasoning for us to assume the truth of our conclusion as a premise of our analysis.

This is not the ordinary case: we found that the Plaintiffs established that the 2021 Plan likely violated Section Two by diluting Black votes, and the State has conceded that District 2 in the 2023 Plan is not a Black-opportunity district. In this circumstance, we discern no basis in federal law for us to defer to the legislative findings.

The *Milligan* Plaintiffs impugn the findings on numerous other grounds — namely, that they were "after the fact 'findings' tailored to disqualify" the Plaintiffs' illustrative plans; "contradict" the guidelines; "were never the subject of debate or public scrutiny"; "ignored input from Black Alabamians and legislators"; and "simply parroted attorney arguments already rejected by this Court and the Supreme Court." *Milligan* Doc. 200 at 20. And the *Milligan* Plaintiffs urge us to reject the findings' attempt to "enshrine as 'non-negotiable' certain supposed 'traditional redistricting principles'" about communities of interest and county splits. *Id.* Ultimately, the *Milligan* Plaintiffs suggest that the legislative findings are not what they purport to be: the result of the deliberative legislative process. The testimony and evidence were that the findings were drafted by the Alabama Solicitor General,

were adopted without review or debate by the Legislature or even really knowing why they were placed there, and included only at counsel's instigation.

We have reviewed the legislative findings carefully and make three observations about them for present purposes. *First*, although the northern half of Alabama is home to numerous universities, a substantial military installation, various engines of economic growth, and two significant metropolitan areas (Huntsville and Birmingham), the legislative findings identify no communities of interest in that half of the state. *See* App. A. *Second*, the legislative findings, unlike the guidelines, give no indication that the Legislature considered whether the 2023 Plan dilutes minority voting strength. The guidelines set that as a priority consideration, but the legislative findings do not mention it and set other items as "non-negotiable" priorities (*i.e.*, keeping together communities of interest and not pairing incumbents).[21] The only reason why the 2023 Plan exists is because we enjoined the 2021 Plan on the ground that it likely diluted minority voting strength. And *third*, there is a substantial difference between the definition of "community of interest" in the legislative findings and that definition in the guidelines: the legislative findings stripped race out of the list of "similarities" that are included in

[21] To facilitate the reader's opportunity to make this comparison conveniently, we attach the guidelines to this order as Appendix B. *Compare* App. B at 1, *with* App. A at 2.

the guidelines definition. *Compare* App. A at 4, *with* App. B. In a case involving extensive expert testimony about a racial minority's shared experience of a long and sordid history of race discrimination, this deletion caught our eye. We further observe that the legislative findings explicitly invoke the "French and Spanish colonial heritage" of the Gulf Coast region while remaining silent on the heritage of the Black Belt. App. A at 6.

In any event, we do not decline to defer to the legislative findings on the grounds the *Milligan* Plaintiffs suggest. We decline to defer to them because the State (1) concedes that District 2 in the 2023 Plan is not an opportunity district, and (2) fails to respond to the Plaintiffs' (valid) point that we cannot readily defer to the legislative findings if we find that they perpetuate vote dilution.

Ultimately, we find that the new evidence about the Gulf Coast does not establish that the Gulf Coast is the community of interest of primary importance, nor that the Gulf Coast is more important than the Black Belt, nor that there can be no legitimate reason to separate Mobile and Baldwin Counties.

And we repeat our earlier finding that the Legislature has repeatedly split Mobile and Baldwin Counties in creating maps for the State Board of Education districts in Alabama, and the Legislature did so at the same time it drew the 2021 Plan. *Milligan* Doc. 107 at 171 (citing *Caster* Doc. 48 ¶¶ 32–41).

We further find that the new evidence about the Gulf Coast does not establish

that separating the Gulf Coast to avoid diluting Black votes in the Black Belt violates traditional districting principles. At most, while the State has developed evidence that better substantiates its argument that the Gulf Coast is or could be a community of interest, the State has not adduced evidence that the Gulf Coast is an inseparable one.

We specifically reject the State's argument that the 2023 Plan "rectifies what Plaintiffs said was wrong with the 2021 Plan" by "unifying the Black Belt while also respecting the Gulf and Wiregrass communities of interest." *Milligan* Doc. 220 at 27, 42; *accord* Aug. 14 Tr. 39 (arguing that the 2023 Plan "cures the cracking" of the Black Belt); July 31, 2023 Tr. 32 (arguing that "now there are three communities of interest that are at issue," the State "cracked none of them," and the Plaintiffs "cracked two of them"). On this reasoning, the State says that "there is no longer any need to split the Gulf" to respect the Black Belt, because the 2023 Plan keeps the Gulf Coast together and splits the Black Belt into only two districts. *Milligan* Doc. 267 at ¶ 225.

The problem with this argument is the faulty premise that splitting the Black Belt into only two districts remedies the cracking problem found in the 2021 Plan. "Cracking" does not mean "divided," and the finding of vote dilution in the 2021 Plan rested on a thorough analysis, not the bare fact that the 2021 Plan divided the Black Belt into three districts. *See, e.g.*, *Milligan* Doc. 107 at 55, 147–74. As the

Supreme Court has explained, "cracking" refers to "the dispersal of blacks into districts in which they constitute an ineffective minority of voters." *Bartlett*, 556 U.S. at 14 (plurality opinion) (quoting *Gingles*, 478 U.S. at 46 n.11).

The Plaintiffs have established — and the State concedes — that in the new District 2, Black voters remain an ineffective minority of voters. *Milligan* Doc. 251 ¶¶ 5–9. This evidence — and concession — undermines the State's assertion that the 2023 Plan remedies the cracking of Black voting strength in the Black Belt simply by splitting the Black Belt into fewer districts. In turn, it explains the reason why there remains a need to split the Gulf Coast: splitting the Black Belt as the 2023 Plan does dilutes Black voting strength, while splitting the Gulf Coast precipitates no such racially discriminatory harm.

The long and the short of it is that the new evidence the State has offered on the Gulf Coast at most may show that the Black Belt and the Gulf Coast are geographically overlapping communities of interest that tend to pull in different directions. These communities of interest are not airtight. At best, the Defendants have established that there are two relevant communities of interest and the Plaintiffs' illustrative maps and the 2023 Plan each preserve a different community, suggesting a wash when measured against this metric. In other words, "[t]here would be a split community of interest in both." *Allen*, 143 S. Ct. at 1505. Thus, positing that there are two communities of interest does not undermine in any way the

determination we already made that the eleven illustrative maps presented in the preliminary injunction are reasonably configured and are altogether consonant with traditional redistricting criteria.

In our view, the evidence about the community of interest in the Wiregrass is sparse in comparison to the extensive evidence about the Black Belt and the somewhat new evidence about the Gulf Coast. The basis for a community of interest in the Wiregrass — essentially in the southeastern corner of the State — is rural geography, a university (Troy), and a military installation (Fort Novosel). These few commonalities do not remotely approach the hundreds of years of shared and very similar demographic, cultural, historical, and political experiences of Alabamians living in the Black Belt. And they are considerably weaker than the common coastal influence and historical traditions for Alabamians living in the Gulf Coast. Not to mention that these commonalities could apply to other regions in Alabama that the State fails to mention as possible communities of interest.

Further, there is substantial overlap between the Black Belt and the Wiregrass. Three of the nine Wiregrass Counties (Barbour, Crenshaw, and Pike) are also in the Black Belt. Accordingly, any districting plan must make tradeoffs with these communities to meet equal population and contiguity requirements.

Finally, a careful review of the testimony about the Wiregrass reveals that the State makes the same error with its Wiregrass argument that we (and the Supreme

Court) previously identified in its Gulf Coast argument. To support its assertions about the community of interest in the Wiregrass, the State relies on three witnesses: a former Mayor of Dothan, a past Chairman of the Dothan Area Chamber of Commerce, and a commercial banker in Dothan. *See Milligan* Doc. 261-2 (Kimbro deposition); *Milligan* Doc. 220-18 (Kimbro declaration); *Milligan* Doc. 261-6 (Schmitz deposition); *Milligan* Doc. 220-17 (Schmitz declaration); *Milligan* Doc. 261-7 (Williams deposition); *Milligan* Doc. 227-1 (Williams declaration). Much of their testimony focuses on the loss of political influence and efficacy that may occur if the Wiregrass region is not mostly kept together in a single congressional district. *See Milligan* Docs. 220-17 ¶¶ 3–5, 7, 9 (Schmitz Declaration); 220-18 ¶¶ 5–9 (Kimbro Declaration); 224-1 ¶¶ 11–13 (Williams Declaration). But as we earlier found with respect to the Gulf Coast, testimony about keeping a community of interest together "simply to preserve political advantage" cannot support an argument that the community is inseparable. *See Allen*, 143 S. Ct. at 1505 (internal quotation marks omitted) (alterations accepted). Accordingly, we assign very little weight to the argument and evidence about a community of interest in the Wiregrass.

We do not reject only the State's **factual** argument — that the Plaintiffs' illustrative plans are not reasonably compact because they violate traditional redistricting principles related to communities of interest. More broadly, we also reject the State's legal argument that communities of interest somehow are a

dispositive factor in our analysis such that we must accept a remedial map that purports to respect communities of interest, but does not cure the vote dilution we found in the 2021 Plan.

Throughout remedial proceedings, the State has used arguments about communities of interest as the foundation of its defense of the 2023 Plan. The State starts with the premise that "[t]here are many ways for a plan to comply with" Section Two, *Milligan* Doc. 267 ¶ 179, *see also* Aug. 14 Tr. 46; cites the rule that Section Two "never require[s] adoption of districts that violate traditional redistricting principles," *Milligan* Doc. 220 at 8, 10, 14, 34, 39, 60 (internal quotation marks omitted); says that the Legislature knows Alabama's communities of interest better than federal courts, Aug. 14 Tr. 163; and extrapolates from these truths that any illustrative plan that splits an area the State defines as a community of interest does not satisfy *Gingles* because it "violates" communities of interest, *Milligan* Doc. 267 ¶¶ 158, 208; *see also Milligan* Doc. 220 at 40, 59. The State's position is that if it can prove that the 2023 Plan serves communities of interest better than the Plaintiffs' illustrative plans, the 2023 Plan survives a Section Two challenge on that ground regardless of whether it includes one or two Black-opportunity districts.

Indeed, on the State's reasoning, because the 2023 Plan better serves communities of interest than do the Plaintiffs' illustrative plans, an order requiring an additional Black-opportunity district to cure vote dilution is unlawful. Aug. 14

Tr. 157. The State maintains that this is true even if we find (as we do) that the 2023 Plan perpetuates rather than remedies the vote dilution that we and the Supreme Court found in the 2021 Plan. Aug. 14 Tr. 157–60. Put differently, the State asserts that communities of interest are the ultimate trump card: because the 2023 Plan best serves communities of interest in southern Alabama, we must not enjoin it even if we find that it perpetuates vote dilution. *See* Aug. 14 Tr. 157–60.

We cannot reconcile the State's position with any of the authorities that control our analysis. We cannot reconcile it with the text or purpose of Section Two, nor with the Supreme Court's ruling in this case, nor with other controlling Supreme Court precedents. We discuss each authority in turn.

First, we cannot reconcile the State's position that communities of interest work as a trump card with the text or purpose of Section Two. As the Supreme Court explained in this case, the Voting Rights Act "'create[d] stringent new remedies for voting discrimination,' attempting to forever 'banish the blight of racial discrimination in voting.'" *Allen*, 143 S. Ct. at 1499 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)). To that end, for more than forty years, Section Two has expressly provided that a violation is established based on the "totality of circumstances." *Id.* at 1507 (internal quotation marks omitted) (quoting 52 U.S.C. § 10301(b)). Subsection (b) of Section Two of the Voting Rights Act provides, in pertinent part:

> 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.

52 U.S.C. § 10301(b).

Section Two does not mention, let alone elevate or emphasize, communities of interest as a particular circumstance. *See id.* If communities of interest really are (or even could be) **the** dispositive circumstance in a Section Two analysis (liability or remedy), the statute would not direct a reviewing court's attention to the totality of circumstances without saying a word about communities of interest.

Second, we cannot reconcile the State's position that communities of interest work as a trump card with the Supreme Court's ruling in this case. The Supreme Court "d[id] not find the State's argument persuasive" on communities of interest for two reasons: the evidence did not support the "overdrawn" assertion that "there can be no legitimate reason to split" the Gulf Coast, and even if the Gulf Coast is a community of interest, splitting it is not a fatal flaw in the Plaintiffs' illustrative plans because those plans better respect a different community of interest, the Black Belt. *See Allen*, 143 S. Ct. at 1505 (internal citations omitted). The Supreme Court then continued its analysis of the "totality of circumstances" and affirmed our preliminary injunction on the ground that the 2021 Plan likely violated Section Two. *Id.* at 1506.

Nothing in the Court's ruling says, let alone suggests, that a remedial plan would cure vote dilution if only the evidence were better on the Gulf Coast and the Black Belt were not split quite so much. The Supreme Court specifically ruled that we "did not have to conduct a beauty contest between plaintiffs' maps and the State's," and the Supreme Court emphasized the importance of considering the "totality" of circumstances. *Id.* at 1505–07 (internal quotation marks omitted) (alterations accepted). Indeed, the Supreme Court rejected the State's proposed "race-neutral benchmark" in part because that approach "suggest[ed] there is only one circumstance that matters," and "[t]hat single-minded view of § 2 cannot be squared with the [statute's] demand that courts employ a more refined approach." *Id.* at 1506–08 (internal quotation marks omitted) (alterations accepted).

Third, we cannot reconcile the State's position with other Supreme Court precedents. Our research has produced no Section Two precedent that rises and falls on how well a plan respects any particular community of interest.

Further, as Section Two precedents have tested the idea that one circumstance is particularly important in the *Gingles* analysis, the Supreme Court has time and again rejected the idea that any circumstance can be the circumstance that allows a plan to dilute votes. *See, e.g.*, *id.* at 1505 (rejecting argument that core retention metric is dispositive and reasoning that Section Two "does not permit a State to provide some voters less opportunity . . . to participate in the political process just

because the State has done it before" (internal quotation marks omitted)); *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1250 (2022) (per curiam) (faulting district court for "focus[ing] exclusively on proportionality" instead of "totality of circumstances analysis"); *LULAC*, 548 U.S. at 440–41 (rejecting argument that incumbency protection can justify exclusion of voters from a district when exclusion has racially discriminatory effects). Indeed, we have been unable to locate any case where the Supreme Court has prioritized one traditional districting criterion above all others.

For each and all these reasons, we reject the State's argument that because the 2023 Plan best serves communities of interest in southern Alabama, we cannot enjoin it even if we find that it perpetuates racially discriminatory vote dilution.

ii. County Splits

In the preliminary injunction, we found that the Plaintiffs' illustrative plans "reflect reasonable compactness" because they respected county lines. *See Milligan* Doc. 107 at 162–63. When it affirmed this finding, the Supreme Court observed that "some of plaintiffs' proposed maps split the same number of county lines as (or even *fewer* county lines than) the State's map." *Allen*, 143 S. Ct. at 1504 (emphasis in original).

By way of reference: the only applicable guideline when the 2021 Plan was passed was that "the Legislature shall try to minimize the number of counties in each

district"; the 2021 Plan split six counties; and no illustrative plan splits more than nine counties. *See Milligan* Doc. 107 at 32, 61, 88–89.

When the Legislature passed the 2023 Plan, it enacted a "finding" that "the congressional districting plan shall contain no more than six splits of county lines, which is the minimum necessary to achieve minimal population deviation among the districts. Two splits within one county is considered two splits of county lines." App. A at 3. Like the 2021 Plan, the 2023 Plan splits six counties.

The State now argues that because of the Legislature's finding, we must discard any illustrative map that contains more than six county splits. *Milligan* Doc. 220 at 58–59. Based on the report of the State's expert, Mr. Trende, this ceiling would disqualify five of the Plaintiffs' illustrative maps: Cooper Plans 2 and 6, which split seven counties; Duchin Plan B, which splits seven counties; and Duchin Plans A and C, which split nine counties. *See Caster* Doc. 48 at 22; *Milligan* Doc. 220 at 58; *Milligan* Doc. 220-12 at 12. Most notably, this ceiling would disqualify Duchin Plan B, which is the only illustrative plan that the State concedes ties or beats the 2023 Plan on statistical measures of compactness (Polsby-Popper and Cut Edges). *See Milligan* Doc. 220 at 57–58. So when looking at the county splits metric alone, even on the State's analysis, six of the Plaintiffs' illustrative maps satisfy the ceiling the Legislature imposed: Cooper Plans 1, 3, 4, 5, and 7, and Duchin Plan D. Mr. Trende's chart shows this clearly:

Number of County Splits, by Map	
Map	County Splits
Illustrative 7	5
Duchin 4	6
Illustrative 1	6
Illustrative 3	6
Illustrative 4	6
Illustrative 5	6
2021 Map	6
2023 Map	6
Duchin 2	7
Illustrative 2	7
Illustrative 6	7
Ps Remedial	7
Duchin 1	9
Duchin 3	9

Milligan Doc. 220-12 at 12.

But the State would not have us look at the county splits metric alone. As we understand the State's argument about the legislative finding capping county splits at the stated minimum, the finding operates like the ace of spades: after ten of the eleven illustrative plans lose in a compactness beauty contest, the finding trumps the last illustrative plan left (Duchin Plan B). On the State's reasoning, the Plaintiffs have no plays left because the Legislature has decreed that the cap on county splits is "non-negotiable." App. A at 3.

But we already have refused to conduct the compactness beauty contest, so the legislative finding cannot work that way. If it guides our analysis, it must function differently. For all the same reasons we refused to conduct a compactness

beauty contest, this legislative finding cannot demand that we conduct a county-split beauty contest. *See supra* at Part IV.B.2.b.

Nevertheless, in an abundance of caution, we measure all the illustrative maps against the legislative finding. As explained above, if we limit our analysis to the illustrative plans that comply with the finding, we consider six plans: Duchin Plan D and Cooper Plans 1, 3, 4, 5, and 7. *See Milligan* Doc. 220-12 at 12.

We first discuss Cooper Plan 7, because it is the only illustrative plan that outperforms the 2023 Plan on county splits. (Duchin Plan D and Cooper Plans 1, 3, 4, and 5 tie the 2023 Plan. *See id.*) Even if we were to indulge the idea that the legislative finding capping county splits works as an ace, it could not trump Cooper Plan 7. The State attacks Cooper Plan 7 on the ground that it does not minimize population deviation. *Milligan* Doc. 220 at 58 n.13.

The State's argument about Cooper Plan 7 is an unwelcome surprise. We found in the preliminary injunction that all the illustrative maps "equalize population across districts." *Milligan* Doc. 107 at 162–63. We based that finding on the agreement of the parties and the evidence. *See id.* (citing *Milligan* Doc. 68-5 at 8, 13; *Caster* Doc. 48 at 21–34; *Caster* Doc. 65 at 2–6; Tr. 930). And the Supreme Court affirmed that finding. *Allen*, 143 S. Ct. at 1504 (finding that the Plaintiffs' maps "contained equal populations, were contiguous, and respected existing political subdivisions, such as counties, cities, and towns").

We returned to Cooper Plan 7 to confirm that it minimizes population deviation. *See Caster* Doc. 65 at 5 fig.2. The least populated congressional district in Cooper Plan 7 includes 717,752 people; the most populated congressional district in Cooper Plan 7 includes 717,755 people. *Id.* We summarily reject the State's cursory, unsupported suggestion in a footnote that a deviation of three humans (or 0.00000418%) precludes a finding that Cooper Plan 7 equalizes population across districts and disqualifies Cooper Plan 7 as a reasonably configured illustrative map under *Gingles* I.

Thus, even if we were to conduct the "meet or beat" beauty contest that the State asks us to, the undisputed evidence shows that the Plaintiffs have submitted at least one illustrative map that beats the 2023 Plan with respect to county splits. We also find that the Plaintiffs have submitted at least five illustrative maps (Duchin Plan D and Cooper Plans 1, 3, 4, and 5) that meet the 2023 Plan on this metric by splitting the same number of counties — six.

***

Accordingly, we again find that the Plaintiffs have established that an additional Black-opportunity district can be reasonably configured without violating traditional districting principles relating to communities of interest and county splits. This finding does not run afoul of the Supreme Court's caution that Section Two never requires the adoption of districts that violate traditional redistricting principles.

It simply rejects as unsupported the State's assertion that the Plaintiffs' illustrative plans violate traditional redistricting principles relating to communities of interest and county splits.

3. *Gingles* II & III – Racially Polarized Voting

During the preliminary injunction proceedings, "there [wa]s no serious dispute that Black voters are politically cohesive nor that the challenged districts' white majority votes sufficiently as a bloc to usually defeat Black voters' preferred candidate." *Milligan* Doc. 107 at 174 (internal quotation marks omitted); *accord Allen*, 143 S. Ct. at 1505.

At the remedial hearing, the State stipulated that *Gingles* II and III are again satisfied. Aug. 14 Tr. 64–65 ("We will have no problem stipulating for these proceedings solely that they have met II and III.").

The evidence fully supports the State's stipulation: Dr. Liu opined "that voting is highly racially polarized in" District 2 and District 7 of the 2023 Plan "and that this racial polarization . . . produces the same results for Black Preferred Candidates in both [Districts 2] and [7] as the results in the 2021" Plan. *Milligan* Doc. 200-2 at 1. Dr. Palmer's opinion is materially identical. *Caster* Doc. 179-2 ¶¶ 11–14, 16–20.

4. The Senate Factors

During the preliminary injunction proceedings, we found that Senate Factors 1, 2, 3, 5, 6, and 7 weighed in favor of the Plaintiffs. *Milligan* Doc. 107 at 178–92.

We adopt those findings here. We made no finding about Senate Factors 8 and 9. *Id.* at 192–93.

During the remedial hearing, the State conceded that it has put forth no new evidence about the Senate Factors and the Plaintiffs have "met their burden" on the Factors for purposes of remedial proceedings. Aug. 14 Tr. 65.

The *Milligan* and *Caster* Plaintiffs now urge us, if we reset the *Gingles* analysis, to consider evidence adduced since we issued the preliminary injunction that bears on Factors 8 and 9. Aug. 14 Tr. 147–48. The State concedes that the evidence relevant to an analysis of these Factors is "exceedingly broad." Aug. 15 Tr. 79. We consider each remaining Senate Factor in turn, and we limit our discussion to new evidence.

a. Senate Factor 8

Senate Factor 8: "[W]hether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group." *Gingles*, 478 U.S. at 37.

Senate Factor 8 considers "the political responsiveness of" elected officials. *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1573 (11th Cir. 1984) (emphasis omitted). The Plaintiffs' argument is that the political responsiveness of elected officials to this litigation — more particularly, to the Supreme Court's affirmance of the preliminary injunction — weighs in favor of the Plaintiffs. Based on our review of undisputed evidence, we cannot help but find that the circumstances

surrounding the enactment of the 2023 Plan reflect "a significant lack of responsiveness on the part of elected officials to the particularized needs" of Black voters in Alabama. *Gingles*, 478 U.S. at 37. Our finding rests on three undisputed facts.

First, the process by which the Legislature considered potential remedies for the vote dilution that Black Alabamians experienced precludes a finding of responsiveness. The 2023 Plan was neither proposed nor available for comment during the two public hearings held by the Committee. *Milligan* Doc. 251 ¶ 15. Likewise, neither of the plans that originally passed the Alabama House (Representative Pringle's plan, the Community of Interest Plan), and the Alabama Senate (Senator Livingston's plan), was proposed or available for comment during the Committee's public hearings. *See id.* ¶¶ 15–21.

The 2023 Plan was passed by the Conference Committee on the last day of the Special Session. *Id.* ¶ 23. Representative Pringle did not see the bill that became the 2023 Plan, including its legislative findings and the State's performance analysis showing that Black voters would consistently lose in the new District 2, until that morning. *See Milligan* Doc. 261-5 at 92, 97. He first saw those documents that morning, and the 2023 Plan was Alabama law by that evening. As Representative Pringle testified, "[i]t all happened so fast." *Id.* at 105.

The availability of the 2023 Plan is noteworthy not only because of its late

timing, but also because of its apparently mysterious provenance: its original source and cartographer were unknown to one of the Committee chairs, Senator Livingston, when he voted on it. *See Milligan* Doc. 238-2 at 3. To this day, the record before us does not make clear who prepared the 2023 Plan.

Representative Pringle testified about his frustration that his plan did not carry the day, and his reason is important: he thought his plan was the better plan for compliance with Section Two (based in part on a performance analysis that he considered), his plan was initially expected to pass both the House and the Senate, and he either did not understand or did not agree with the reason why support for it unraveled in the Senate the day it passed the House. *See Milligan* Doc. 261-5 at 22–23, 31–32, 41–42, 69–70, 75–76, 80–81, 98–102.

Representative Pringle testified that he was not a part of the discussions that led his Senate colleagues to reject his plan because those occurred behind closed doors. *Id.* at 28, 101. Although Representative Pringle ultimately voted for the 2023 Plan, he testified (testily) that he told Senator Livingston that he did not want his name or an Alabama House bill number on it. *Id*. at 101–02. When asked why the Alabama Senate insisted on leaving District 2 at a 39.93% Black voting-age population in the 2023 Plan, Representative Pringle directed the question to Senator Livingston or the Alabama Solicitor General. *Id.* When asked specifically about a media comment from Representative Ledbetter (the Speaker of the Alabama House)

that the 2023 Plan gives the State "a good shot" at getting "just one judge" on the Supreme Court "to see something different," Representative Pringle testified that he was not "attempting to get a justice to see something differently," but he did not "want to speak on behalf of 140" Legislators. *Id.* at 109–10.

For his part, Senator Livingston testified that his focus shifted from Representative Pringle's plan to a new plan after other senators "received some additional information" which caused them to "go in [a different] direction" focused on "compactness, communities of interest, and making sure that" incumbents are not paired. *Milligan* Doc. 261–4 at 67–68. According to Senator Livingston, this "information" was a "large hiccup" — it was the reason why "the committee moved" and "changed focus" away from Representative Pringle's plan. *Id.* at 65–68. But Senator Livingston testified that he did not know what this "information" was, where it had come from, or even who received it. *Id.* Senator Livingston recalled that he first learned of the "information" in a "committee conversation," but he did not recall who told him about it and had no "idea at all" of its source. *Id.* at 68.

Second, the unprecedented legislative findings that accompany the 2023 Plan preclude a finding of responsiveness. *See* App. A. This is for two reasons. As an initial matter, as we have already previewed, a careful side-by-side review of the legislative findings and the guidelines (which were the same in 2021 and 2023) reveal that the findings excluded the statement in the guidelines that "[a] redistricting

plan shall have neither the purpose nor the effect of diluting minority voting strength." *Compare* App. B at 1, *with* App. A. at 2. Although the findings eliminated the requirement of nondilution, they prioritized as "non-negotiable" the principles that the 2023 Plan would "keep together communities of interest" and "not pair incumbent[s]." App. A at 3. Under this circumstance, we cannot find that the legislative findings support an inference that when the Legislature passed the 2023 Plan, it was trying to respond to the need that we identified for Black Alabamians not to have their voting strength diluted.

Separately, the undisputed testimony of members of the Legislature counsels against an inference in favor of the State based on the findings. Representative Pringle and Senator Livingston both testified that the Alabama Solicitor General drafted the findings, and they did not know why the findings were included in the 2023 Plan. *Milligan* Doc. 261-4 at 102 (Senator Livingston); *Milligan* Doc. 261-5 at 91 (Representative Pringle); *Milligan* Doc. 238-2 at 6 (joint interrogatory responses). Representative Pringle testified that he had not seen another redistricting bill contain similar (or any) findings. *Milligan* Doc. 261-5 at 91. And of the three members of the Legislature who testified during remedial proceedings, none had a role in drafting the findings. *Milligan* Doc. 261-4 at 101–03 (Senator Livingston); *Milligan* Doc. 261-5 at 90–91 (Representative Pringle); Aug. 15 Tr. 58 (Senator Singleton). In the light of this testimony, which we reiterate is not disputed (or even questioned),

we cannot conclude that the findings weigh in favor of the 2023 Plan.

If we had any lingering doubt about whether the 2023 Plan reflects an attempt to respond to the needs of Black Alabamians that have been established in this litigation, that doubt was eliminated at the remedial hearing when the State explained that in its view, the Legislature could remedy the vote dilution we found without providing the remedy we said was required: an additional opportunity district. *See* Aug. 14 Tr. 163–64. For purposes of Factor 8, we are focused not on the tenuousness of the policy underlying that position, but on how clearly it illustrates the lack of political will to respond to the needs of Black voters in Alabama in the way that we ordered. We infer from the Legislature's decision not to create an additional opportunity district that the Legislature was unwilling to respond to the well-documented needs of Black Alabamians in that way.

Lest a straw man arise on appeal: we say clearly that in our analysis, we did not deprive the Legislature of the presumption of good faith. *See, e.g.*, *Abbott*, 138 S. Ct. at 2324. We simply find that on the undisputed evidence, Factor 8, like the other Factors, weighs in favor of the Plaintiffs.

b. Senate Factor 9

Senate Factor 9: Whether the policy underlying the 2023 Plan "is tenuous." *Gingles*, 478 U.S. at 37.

We again make no finding about Senate Factor 9.

C. We Reject the State's Remaining Argument that Including an Additional Opportunity District in a Remedial Plan To Satisfy Section Two Is Unconstitutional Affirmative Action in Redistricting.

The State asserts that the Plaintiffs' illustrative plans "sacrifice communities of interest, compactness, and county splits to hit predetermined racial targets"; that if those "underperforming plans could be used to replace a 2023 Plan that more fully and fairly applies legitimate principles across the State, the result will be court-ordered enforcement of a map that violates the 2023 Plan's traditional redistricting principles in favor of race"; and that this would be "affirmative action in redistricting" that would be unconstitutional. *Milligan* Doc. 220 at 59–60; *see also id.* at 60–68.

As an initial matter, it is premature (and entirely unfounded) for the State to assail any plan we might order as a remedy as "violat[ing] the 2023 Plan's traditional redistricting principles in favor of race." *Milligan* Doc. 220 at 59. Moreover, we have rejected based on the evidence before us every premise of the State's argument: that the Plaintiffs' plans "sacrifice" traditional redistricting principles, that their illustrative plans are "underperforming," and that the 2023 Plan "more fully and fairly applies legitimate principles across the State." *See supra* Parts IV.A & IV.B. We also have rejected the faulty premise that by accepting the Plaintiffs' illustrative plans for *Gingles* purposes, we improperly held that the Plaintiffs are entitled to

"proportional . . . racial representation in Congress." *Milligan* Doc. 107 at 195 (internal quotation marks omitted).

This mistaken premise explains why affirmative action cases, like the principal case on which the State relies, *Harvard*, 143 S. Ct. 2141, are fundamentally unlike this case. In the *Harvard* case, the Supreme Court held that Harvard and the University of North Carolina's use of race in their admissions programs violated the Equal Protection Clause and Title VI of the Civil Rights Act of 1964. *Id.* at 2175. Based on the record before it, the Supreme Court found that the admissions programs were impermissibly aimed at achieving "proportional representation" of minority students among the overall student-body population, and that the universities had "promis[ed] to terminate their use of race only when some rough percentage of various racial groups is admitted." *Id.* at 2172. Based on these findings, the Court concluded that the admissions programs lacked any "logical end point" because they "'effectively assure that race will always be relevant and that the ultimate goal of eliminating' race as a criterion 'will never be achieved.'" *Id.* (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989)).

In contrast, the Voting Rights Act and the *Gingles* analysis developed to guide application of the statute "do[] not mandate a proportional number of majority-minority districts." *Allen*, 143 S. Ct. at 1518 (Kavanaugh, J., concurring). Section Two expressly disclaims any "right to have members of a protected class elected in

numbers equal to their proportion in the population." 52 U.S.C. § 10301(b). And "properly applied, the *Gingles* framework itself imposes meaningful constraints on proportionality, as [Supreme Court] decisions have frequently demonstrated." *Id.* at 1508 (majority opinion). So unlike affirmative action in the admissions programs the Supreme Court analyzed in *Harvard*, which was expressly aimed at achieving balanced racial *outcomes* in the makeup of the universities' student bodies, the Voting Rights Act guarantees only "equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *De Grandy*, 512 U.S. at 1014 n.11. The Voting Rights Act does not provide a leg up for Black voters — it merely prevents them from being kept down with regard to what is arguably the most "fundamental political right," in that it is "preservative of all rights" — the right to vote. *See Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1315 (11th Cir. 2019).

But a faulty premise and prematurity are not the only problems with the State's argument: it would fly in the face of forty years of Supreme Court precedent — including precedent *in this case* — for us to hold that it is unconstitutional to order a remedial districting plan to include an additional minority-opportunity district to satisfy Section Two. In the Supreme Court, the State argued that the Fifteenth Amendment "does not authorize race-based redistricting as a remedy for § 2 violations." *Allen*, 143 S. Ct. at 1516. The Supreme Court rejected this argument

in two sentences: "But for the last four decades, this Court and the lower federal courts have repeatedly applied the effects test of § 2 as interpreted in *Gingles* and, under certain circumstances, have authorized race-based redistricting as a remedy for state districting maps that violate § 2. In light of that precedent . . . we are not persuaded by Alabama's arguments that § 2 as interpreted in *Gingles* exceeds the remedial authority of Congress." *Id.* at 1516–17 (internal citations omitted).

D. The Record Establishes the Elements of Preliminary Injunctive Relief

We find that the Plaintiffs have established the elements of their request for preliminary injunctive relief. We discuss each element in turn.

For the reasons we have discussed, *see supra* Parts IV.A & IV.B, we find that the Plaintiffs are substantially likely to succeed on the merits of their claims that (1) the 2023 Plan does not completely remedy the likely Section Two violation that we found and the Supreme Court affirmed in the 2021 Plan; and (2) the 2023 Plan likely violates Section Two as well because it continues to dilute the votes of Black Alabamians.

We further find that the Plaintiffs will suffer irreparable harm if they must vote in the 2024 congressional elections based on a likely unlawful redistricting plan. "Courts routinely deem restrictions on fundamental voting rights irreparable injury. And discriminatory voting procedures in particular are the kind of serious violation of the Constitution and the Voting Rights Act for which courts have granted

immediate relief." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (internal quotation marks omitted) (citing *Obama for Am. v. Husted,* 697 F.3d 423, 436 (6th Cir. 2012); *Alternative Political Parties v. Hooks,* 121 F.3d 876 (3d Cir. 1997); and *Williams v. Salerno,* 792 F.2d 323, 326 (2d Cir. 1986)) (quoting *United States v. City of Cambridge*, 799 F.2d 137, 140 (4th Cir. 1986).

"Voting is the beating heart of democracy," and a "fundamental political right, because it is preservative of all rights." *Democratic Exec. Comm. of Fla.*, 915 F.3d at 1315 (internal quotation marks omitted) (alterations accepted). And "once the election occurs, there can be no do-over and no redress" for voters whose rights were violated and votes were diluted. *League of Women Voters of N.C.*, 769 F.3d at 247.

The Plaintiffs already suffered this irreparable injury once in this census cycle, when they voted under the unlawful 2021 Plan. The State has made no argument that if the Plaintiffs were again required to cast votes under an unlawful districting plan, that injury would not be irreparable. Accordingly, we find that the Plaintiffs will suffer an irreparable harm absent injunctive relief.

We observe that absent relief now, the Plaintiffs will suffer this irreparable injury until 2026, which is more than halfway through this census cycle. Weighed against the harm that the State will suffer — having to conduct elections according to a court-ordered districting plan — the irreparable harm to the Plaintiffs' voting

rights unquestionably is greater.

We next find that a preliminary injunction is in the public interest. The State makes no argument that if we find that the 2023 Plan perpetuates the vote dilution we found, or that the 2023 Plan likely violates Section Two anew, we should decline to enjoin it. Nevertheless, we examine applicable precedent.

The principal Supreme Court precedent is older than the Voting Rights Act. In *Reynolds*, which involved a constitutional challenge to an apportionment plan, the Court explained "once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." 377 U.S. at 585. "However," the Court acknowledged, "under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid." *Id.* The Court explained that "[i]n awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles." *Id.*

More recently, the Supreme Court has held that district courts should apply a

necessity standard when deciding whether to award or withhold immediate relief. In *Upham v. Seamon*, the Court explained: "[W]e have authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements. Necessity has been the motivating factor in these situations." 456 U.S. 37, 44 (1982) (per curiam) (internal citations omitted).

We conclude that under these precedents, we should not withhold relief. Alabama's congressional elections are not close, let alone imminent. The general election is more than fourteen months away. The qualifying deadline to participate in the primary elections for the major political parties is more than two months away. Ala. Code § 17-13-5(a). And this Order issues well ahead of the "early October" deadline by which the Secretary has twice told us he needs a final congressional electoral map. *See* Milligan Doc. 147 at 3; *Milligan* Doc. 162 at 7.

V. REMEDY

Having found that the 2023 Plan perpetuates rather than corrects the Section Two violation we found, we look to Section Two and controlling precedent for instructions about how to proceed. In the Senate Report that accompanied the 1982 amendments to Section Two that added the proportionality disclaimer, the Senate Judiciary Committee explained that it did not "prescribe[e] in the statute mechanistic rules for formulating remedies in cases which necessarily depend upon widely varied

proof and local circumstances." S. Rep. No. 97-417 at 31, 97th Cong., 2d Sess. 26, *reprinted in* 1982 U.S. Code Cong. & Adm. News 177, 208.

Rather, that committee relied on "[t]he basic principle of equity that the remedy fashioned must be commensurate with the right that has been violated," and explained its expectation that courts would "exercise [our] traditional equitable powers to fashion . . . relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." *Id.*

That committee cited the seminal Supreme Court decision about racially discriminatory voting laws, *Louisiana*, 380 U.S. at 154. S. Rep. No. 97-417 at 31 n.121. In *Louisiana*, the Supreme Court explained that upon finding such discrimination, federal courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." 380 U.S. at 154.

The Supreme Court has since held that a district court does not abuse its discretion by ordering a Special Master to draw a remedial map to ensure that a plan can be implemented as part of an orderly process in advance of elections, where the State was given an opportunity to enact a compliant map but failed to do so. *See Covington*, 138 S. Ct. at 2553–54 (rejecting State's argument that district court needed to "giv[e] the General Assembly—which 'stood ready and willing to

promptly carry out its sovereign duty'—another chance at a remedial map," and affirming appointment of Special Master because the district court had "determined that 'providing the General Assembly with a second bite at the apple' risked 'further draw[ing] out these proceedings and potentially interfer[ing] with the 2018 election cycle'" (internal citations omitted)).

Because we enjoin the use of the 2023 Plan, a new congressional districting plan must be devised and implemented in advance of Alabama's upcoming congressional elections. The State has conceded that it would be practically impossible for the Legislature to reconvene in time to enact a new plan for use in the upcoming election. Aug. 14 Tr. 167. Accordingly, we find that there is no need to "provid[e] the [Legislature] with a second bite at the apple" or other good cause to further delay remedial proceedings. *See Covington*, 138 S. Ct. at 2554.

We will therefore undertake our "duty to cure" violative districts "through an orderly process in advance of elections" by directing the Special Master and his team to draw remedial maps. *Id.* (citing *Purcell*, 549 U.S. at 4–5). We have previously appointed Mr. Richard Allen as a Special Master and provided him a team, including a cartographer, David R. Ely, and Michael Scodro and his law firm, Mayer Brown LLP to prepare and recommend to the Court a remedial map or maps for the Court to order Secretary of State Allen to use in Alabama's upcoming congressional elections. *See Milligan* Docs. 102, 166, 183. The procedural history preceding these

appointments has already been catalogued at length in our prior orders. *See Milligan* Docs. 166, 183. Specific instructions for the Special Master and his team will follow by separate order.

VI. CONSTITUTIONAL OBJECTIONS TO THE 2023 PLAN

In the light of our decision to enjoin the use of the 2023 Plan 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 any constitutional issues at this time. More particularly, we **RESERVE RULING** on (1) the constitutional objections to the 2023 Plan raised by the *Singleton* and the *Milligan* Plaintiffs, and (2) the motion of the *Singleton* Plaintiffs for preliminary injunctive relief on constitutional grounds, *Singleton* Doc. 147.

This restraint is consistent with our prior practice, *see Milligan* Doc. 107, and the longstanding canon of constitutional avoidance, *see Lyng*, 485 U.S. at 445 (collecting cases dating back to *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring)). Where, as here, a decision on the constitutional issue would not entitle a plaintiff "to relief beyond that to which they [are] entitled on their statutory claims," a "constitutional decision would [be] unnecessary and therefore inappropriate." *Id.* at 446. This principle has particular salience when a court considers (as we do here) a request for equitable relief, *see id.*, and is commonly applied by three-judge courts in redistricting cases, *see, e.g.*,

LULAC, 548 U.S. at 442; *Gingles*, 478 U.S. at 38.

VII. EVIDENTIARY RULINGS

During the remedial hearing, the Court accepted into evidence many exhibits. *See generally* Aug. 14 Tr. 91–142. Most were stipulated, although some were stipulated only for a limited purpose. *Id.* We have since excluded one exhibit: the State's Exhibit J, Mr. Bryan's 2023 Report. *See supra* at Part IV.B.2.a.

At the hearing we reserved ruling on the motion *in limine* and on some objections to certain of the State's exhibits. *See* Aug. 14 Tr. 91, 105–142. Most of the objections we reserved on were relevance objections raised in connection with the motion *in limine*. *See id.* at 108–30 (discussing such objections to State Exhibits C2, D, E, F2, G, H, I, L, M, N, O, P, Q, R, and S).

As we discussed in Parts II.B and II.C, we conclude that our remedial task is confined to a determination whether the 2023 Plan completely remedies the vote dilution we found in the 2021 Plan and is not otherwise unlawful, but we consider in the alternative whether under *Gingles* and the totality of the circumstances the Plaintiffs have established that the 2023 Plan likely violates Section Two. *See supra at* Parts II.B, II.C, IV.A & IV.B.

Accordingly, the motion *in limine* is **GRANTED IN PART AND DENIED IN PART**, and all of the Plaintiffs' relevance objections raised in connection with the motion *in limine* are **OVERRULED** to the extent that we consider the evidence

as appropriate in our alternative holding.

After considerable deliberation, we dispose of the remaining objections this way:

- Objections to State Exhibits A, B2, B3, C2, D, N, and P are **OVERRULED**. These exhibits are admitted to establish what was said at public hearings held by the Committee and what materials were considered by the Committee, but not for the truth of any matter asserted therein.
- Objections to State Exhibits E, F2, G, H, I, L, M, O, Q, R, and S are **OVERRULED**. These exhibits are admitted.
- Objections to the *Milligan* Plaintiffs' Exhibits M13, M32, M38, and M47 are **SUSTAINED**. These exhibits are excluded.

DONE and **ORDERED** this 5th day of September, 2023.

STANLEY MARCUS
UNITED STATES CIRCUIT JUDGE

ANNA M. MANASCO
UNITED STATES DISTRICT JUDGE

TERRY F. MOORER
UNITED STATES DISTRICT JUDGE

APPENDIX A

SB5 ENROLLED

ACT #2023 - 563

XBT977-3

By Senator Livingston

RFD: Conference Committee on SB5

First Read: 17-Jul-23

2023 Second Special Session

SB5 Enrolled

Enrolled, An Act,

To amend Section 17-14-70, Code of Alabama 1975, to provide for the reapportionment and redistricting of the state's United States Congressional districts for the purpose of electing members at the General Election in 2024 and thereafter, until the release of the next federal census; and to add Section 17-40-70.1 to the Code of Alabama 1975, to provide legislative findings.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. Section 17-14-70.1 is added to the Code of Alabama 1975, to read as follows.

§17-14-70.1

The Legislature finds and declares the following:

(1) The Legislature adheres to traditional redistricting principles when adopting congressional districts. Such principles are the product of history, tradition, bipartisan consensus, and legal precedent. The Supreme Court of the United States recently clarified that Section 2 of the Voting Rights Act "never requires adoption of districts that violate traditional redistricting principles."

(2) The Legislature's intent in adopting the congressional plan in this act described in Section 17-14-70.1 is to comply with federal law, including the U.S. Constitution and the Voting Rights Act of 1965, as amended.

(3) The Legislature's intent is also to promote the following traditional redistricting principles, which are

given effect in the plan created by this act:

a. Districts shall be based on total population as reported by the federal decennial census and shall have minimal population deviation.

b. Districts shall be composed of contiguous geography, meaning that every part of every district is contiguous with every other part of the same district.

c. Districts shall be composed of reasonably compact geography.

d. The congressional districting plan shall contain no more than six splits of county lines, which is the minimum number necessary to achieve minimal population deviation among the districts. Two splits within one county is considered two splits of county lines.

e. The congressional districting plan shall keep together communities of interest, as further provided for in subdivision (4).

f. The congressional districting plan shall not pair incumbent members of Congress within the same district.

g. The principles described in this subdivision are non-negotiable for the Legislature. To the extent the following principles can be given effect consistent with the principles above, the congressional districting plan shall also do all of the following:

1. Preserve the cores of existing districts.

2. Minimize the number of counties in each district.

3. Minimize splits of neighborhoods and other political subdivisions in addition to minimizing the splits of counties

and communities of interest.

(4)a. A community of interest is a defined area of the state that may be characterized by, among other commonalities, shared economic interests, geographic features, transportation infrastructure, broadcast and print media, educational institutions, and historical or cultural factors.

b. The discernment, weighing, and balancing of the varied factors that contribute to communities of interest is an intensely political process best carried out by elected representatives of the people.

c. If it is necessary to divide a community of interest between congressional districts to promote other traditional districting principles like compactness, contiguity, or equal population, division into two districts is preferable to division into three or more districts. Because each community of interest is different, the division of one community among multiple districts may be more or less significant to the community than the division of another community.

d. The Legislature declares that at least the three following regions are communities of interest that shall be kept together to the fullest extent possible in this congressional redistricting plan: the Black Belt, the Gulf Coast, and the Wiregrass.

e.1. Alabama's Black Belt region is a community of interest composed of the following 18 core counties: Barbour, Bullock, Butler, Choctaw, Crenshaw, Dallas, Greene, Hale, Lowndes, Macon, Marengo, Montgomery, Perry, Pickens, Pike, Russell, Sumter, and Wilcox. Moreover, the following five

counties are sometimes considered part of the Black Belt: Clarke, Conecuh, Escambia, Monroe, and Washington.

2. The Black Belt is characterized by its rural geography, fertile soil, and relative poverty, which have shaped its unique history and culture.

3. The Black Belt region spans the width of Alabama from the Mississippi boarder to the Georgia border.

4. Because the Black Belt counties cannot be combined within one district without causing other districts to violate the principle of equal population among districts, the 18 core Black Belt counties shall be placed into two reasonably compact districts, the fewest number of districts in which this community of interest can be placed. Moreover, of the five other counties sometimes considered part of the Black Belt, four of those counties are included within the two Black Belt districts — Districts 2 and 7.

f.1. Alabama's Gulf Coast region is a community of interest composed of Mobile and Baldwin Counties.

2. Owing to Mobile Bay and the Gulf of Mexico coastline, these counties also comprise a well-known and well-defined community with a long history and unique interests. Over the past half-century, Baldwin and Mobile Counties have grown even more alike as the tourism industry has grown and the development of highways and bay-crossing bridges have made it easier to commute between the two counties.

3. The Gulf Coast community has a shared interest in tourism, which is a multi-billion-dollar industry and a

significant and unique economic driver for the region.

4. Unlike other regions in the state, the Gulf Coast community is home to major fishing, port, and ship-building industries. Mobile has a Navy shipyard and the only deep-water port in the state. The port is essential for the international export of goods produced in Alabama.

5. The Port of Mobile is the economic hub for the Gulf counties. Its maintenance and further development are critical for the Gulf counties in particular but also for many other parts of the state. The Port of Mobile handles over 55 million tons of international and domestic cargo for exporters and importers, delivering eighty-five billion dollars ($85,000,000,000) in economic value to the state each year. Activity at the port's public and private terminals directly and indirectly generates nearly 313,000 jobs each year.

6. Among the over 21,000 direct jobs generated by the Port of Mobile, about 42% of the direct jobholders reside in the City of Mobile, another 39% reside in Mobile County but outside of the City of Mobile, and another 13% reside in Baldwin County.

7. The University of South Alabama serves the Gulf Coast community of interest both through its flagship campus in Mobile and its campus in Baldwin County.

8. Federal appropriations have been critical to ensuring the port's continued growth and maintenance. In 2020, the Army Corps of Engineers allocated over two hundred seventy-four million dollars ($274,000,000) for the Port of Mobile to allow the dredging and expansion of the port.

Federal appropriations have also been critical for expanding bridge projects to further benefit the shared interests of the region.

9. The Gulf Coast community has a distinct culture stemming from its French and Spanish colonial heritage. That heritage is reflected in the celebration of shared social occasions, such as Mardi Gras, which began in Mobile. This shared culture is reflected in Section 1-3-8(c), Code of Alabama 1975, which provides that "Mardi Gras shall be deemed a holiday in Mobile and Baldwin Counties and all state offices shall be closed in those counties on Mardi Gras." Mardi Gras is observed as a state holiday only in Mobile and Baldwin Counties.

10. Mobile and Baldwin Counties also work together as part of the South Alabama Regional Planning Commission, a regional planning commission recognized by the state for more than 50 years. The local governments of Mobile, Baldwin, and Escambia Counties, as well as 29 municipalities within those counties, work together through the commission with the Congressional Representative from District 1 to carry out comprehensive economic development planning for the region in conjunction with the U.S. Economic Development Administration. Under Section 11-85-51(b), factors the Governor considers when creating such a regional planning commission include "community of interest and homogeneity; geographic features and natural boundaries; patterns of communication and transportation; patterns of urban development; total population and population density; [and] similarity of social

and economic problems."

g.1. Alabama's Wiregrass region is a community of interest composed of the following nine counties: Barbour, Coffee, Covington, Crenshaw, Dale, Geneva, Henry, Houston, and Pike.

2. The Wiregrass region is characterized by rural geography, agriculture, and a major military base. The Wiregrass region is home to Troy University's flagship campus in Troy and its campus in Dothan.

3. All of the Wiregrass counties are included in District 2, with the exception of Covington County, which is placed in District 1 so that the maximum number of Black Belt counties can be included within just two districts.

Section 2. Section 17-14-70, Code of Alabama 1975, is amended to read as follows:

"§17-14-70

(a) The State of Alabama is divided into seven congressional districts as provided in subsection (b).

(b) The numbers and boundaries of the districts are designated and established by the map prepared by the Permanent Legislative Committee on Reapportionment and identified and labeled as ~~Pringle Congressional Plan 1~~ Livingston Congressional Plan 3-2023, including the corresponding boundary description provided by the census tracts, blocks, and counties, and are incorporated by reference as part of this section.

(c) The Legislature shall post for viewing on its public website the map referenced in subsection (b), including

the corresponding boundary description provided by the census tracts, blocks, and counties, and any alternative map, including the corresponding boundary description provided by the census tracts, blocks, and counties, introduced by any member of the Legislature during the legislative session in which this section is added or amended.

(d) Upon enactment of ~~Act 2021-555, adding~~the act amending this section and adopting the map identified in subsection (b), the Clerk of the House of Representatives or the Secretary of the Senate, as appropriate, shall transmit the map and the corresponding boundary description provided by the census tracts, blocks, and counties identified in subsection (b) for certification and posting on the public website of the Secretary of State.

(e) The boundary descriptions provided by the certified map referenced in subsection (b) shall prevail over the boundary descriptions provided by the census tracts, blocks, and counties generated for the map."

Section 3. The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, that declaration shall not affect the part which remains.

Section 4. This act shall be effective for the election of members of the state's U.S. Congressional districts at the General Election of 2024 and thereafter, until the state's U.S. Congressional districts are reapportioned and redistricted after the 2030 decennial census.

Section 5. This act shall become effective immediately upon its passage and approval by the Governor, or upon its

otherwise becoming law.

SB5 Enrolled

President and Presiding Officer of the Senate

Speaker of the House of Representatives

SB5
Senate 19-Jul-23
I hereby certify that the within Act originated in and passed the Senate, as amended.

Senate 21-Jul-23
I hereby certify that the within Act originated in and passed the Senate, as amended by Conference Committee Report.

Patrick Harris,
Secretary.

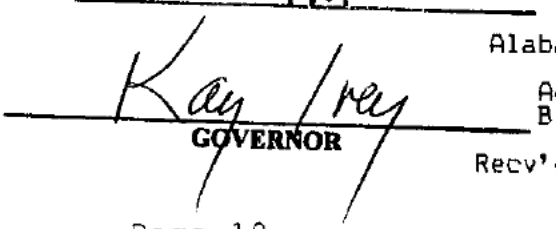
House of Representatives
Amended and passed: 21-Jul-23

House of Representatives
Passed 21-Jul-23, as amended by Conference Committee Report.

By: Senator Livingston

APPROVED July 21, 2023

TIME 5:28 PM



GOVERNOR

Alabama Secretary Of State

Act Num....: 2023-563
Bill Num...: S-5

Recv'd 07/21/23 05:41pmSLF

SOR
Livingston
PONSORS

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App.209

SENATE ACTION

I hereby certify that the Resolution as required in Section C of Act No. 81-889 was adopted and is attached to the Bill, SB _____.

yeas_____nays_____abstain_____

PATRICK HARRIS,
Secretary

I hereby certify that the notice & proof is attached to the Bill, SB _____ as required in the General Acts of Alabama, 1975 Act No. 919.

PATRICK HARRIS,
Secretary

CONFERENCE COMMITTEE

Senate Conferees _____

_____

_____

HOUSE ACTION

DATE: 7-19 2023

RD 1 RFD SG

REPORT OF STANDING COMMITTEE

This bill having been referred by the House to its standing committee on State Government was acted upon by such committee in session, and returned therefrom to the House with the recommendation that it be (Passed) w/amend(s) _____ w/sub ✓.

This 20 day of July, 2023.

Chris Sells, Chairperson

DATE: 7-20 2023

RF w sub RD 2 CAL

DATE: 20__

RE-REFERRED ☐ RE-COMMITTED ☐

Committee _____

I hereby certify that the Resolution as required in Section C of Act No. 81-889 was adopted and is attached to the Bill, SB _____.

YEAS_____ NAYS_____

JOHN TREADWELL,
Clerk

FURTHER HOUSE ACTION (OVER)

APPENDIX B

REAPPORTIONMENT COMMITTEE REDISTRICTING GUIDELINES

May 5, 2021

I. POPULATION

The total Alabama state population, and the population of defined subunits thereof, as reported by the 2020 Census, shall be the permissible data base used for the development, evaluation, and analysis of proposed redistricting plans. It is the intention of this provision to exclude from use any census data, for the purpose of determining compliance with the one person, one vote requirement, other than that provided by the United States Census Bureau.

II. CRITERIA FOR REDISTRICTING

a. Districts shall comply with the United States Constitution, including the requirement that they equalize total population.

b. Congressional districts shall have minimal population deviation.

c. Legislative and state board of education districts shall be drawn to achieve substantial equality of population among the districts and shall not exceed an overall population deviation range of ±5%.

d. A redistricting plan considered by the Reapportionment Committee shall comply with the one person, one vote principle of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

e. The Reapportionment Committee shall not approve a redistricting plan that does not comply with these population requirements.

f. Districts shall be drawn in compliance with the Voting Rights Act of 1965, as amended. A redistricting plan shall have neither the purpose nor the effect of diluting minority voting strength, and shall comply with Section 2 of the Voting Rights Act and the United States Constitution.

g. No district will be drawn in a manner that subordinates race-neutral districting criteria to considerations of race, color, or membership in a language-minority group, except that race, color, or membership in a language-minority group may predominate over race-neutral districting criteria to comply with Section 2 of the Voting Rights Act, provided there is a strong basis in evidence in support of such a race-based choice. A strong basis in evidence exists when there is good reason to believe that race must be used in order to satisfy the Voting Rights Act.

h. Districts will be composed of contiguous and reasonably compact geography.

i. The following requirements of the Alabama Constitution shall be complied with:

(i) Sovereignty resides in the people of Alabama, and all districts should be drawn to reflect the democratic will of all the people concerning how their governments should be restructured.

(ii) Districts shall be drawn on the basis of total population, except that voting age population may be considered, as necessary to comply with Section 2 of the Voting Rights Act or other federal or state law.

(iii) The number of Alabama Senate districts is set by statute at 35 and, under the Alabama Constitution, may not exceed 35.

(iv) The number of Alabama Senate districts shall be not less than one-fourth or more than one-third of the number of House districts.

(v) The number of Alabama House districts is set by statute at 105 and, under the Alabama Constitution, may not exceed 106.

(vi) The number of Alabama House districts shall not be less than 67.

(vii) All districts will be single-member districts.

(viii) Every part of every district shall be contiguous with every other part of the district.

j. The following redistricting policies are embedded in the political values, traditions, customs, and usages of the State of Alabama and shall be observed to the extent that they do not violate or subordinate the foregoing policies prescribed by the Constitution and laws of the United States and of the State of Alabama:

(i) Contests between incumbents will be avoided whenever possible.

(ii) Contiguity by water is allowed, but point-to-point contiguity and long-lasso contiguity is not.

(iii) Districts shall respect communities of interest, neighborhoods, and political subdivisions to the extent practicable and in compliance with paragraphs a through i. A community of interest is defined as an area with recognized similarities of interests, including but not limited to ethnic, racial, economic, tribal, social, geographic, or historical identities. The term communities of interest may, in certain circumstances, include political subdivisions such as counties, voting

precincts, municipalities, tribal lands and reservations, or school districts. The discernment, weighing, and balancing of the varied factors that contribute to communities of interest is an intensely political process best carried out by elected representatives of the people.

(iv) The Legislature shall try to minimize the number of counties in each district.

(v) The Legislature shall try to preserve the cores of existing districts.

(vi) In establishing legislative districts, the Reapportionment Committee shall give due consideration to all the criteria herein. However, priority is to be given to the compelling State interests requiring equality of population among districts and compliance with the Voting Rights Act of 1965, as amended, should the requirements of those criteria conflict with any other criteria.

g. The criteria identified in paragraphs j(i)-(vi) are not listed in order of precedence, and in each instance where they conflict, the Legislature shall at its discretion determine which takes priority.

III. PLANS PRODUCED BY LEGISLATORS

1. The confidentiality of any Legislator developing plans or portions thereof will be respected. The Reapportionment Office staff will not release any information on any Legislator's work without written permission of the Legislator developing the plan, subject to paragraph two below.

2. A proposed redistricting plan will become public information upon its introduction as a bill in the legislative process, or upon presentation for consideration by the Reapportionment Committee.

3. Access to the Legislative Reapportionment Office Computer System, census population data, and redistricting work maps will be available to all members of the Legislature upon request. Reapportionment Office staff will provide technical assistance to all Legislators who wish to develop proposals.

4. In accordance with Rule 23 of the Joint Rules of the Alabama Legislature "[a]ll amendments or revisions to redistricting plans, following introduction as a bill, shall be drafted by the Reapportionment Office." Amendments or revisions must be part of a whole plan. Partial plans are not allowed.

5. In accordance with Rule 24 of the Joint Rules of the Alabama Legislature, "[d]rafts of all redistricting plans which are for introduction at any session of the Legislature, and which are not prepared by the Reapportionment Office, shall be presented to the Reapportionment Office for review of proper form and for entry into the Legislative Data System at least ten (10) days prior to introduction."

IV. REAPPORTIONMENT COMMITTEE MEETINGS AND PUBLIC HEARINGS

1. All meetings of the Reapportionment Committee and its sub-committees will be open to the public and all plans presented at committee meetings will be made available to the public.

2. Minutes of all Reapportionment Committee meetings shall be taken and maintained as part of the public record. Copies of all minutes shall be made available to the public.

3. Transcripts of any public hearings shall be made and maintained as part of the public record, and shall be available to the public.

4. All interested persons are encouraged to appear before the Reapportionment Committee and to give their comments and input regarding legislative redistricting. Reasonable opportunity will be given to such persons, consistent with the criteria herein established, to present plans or amendments redistricting plans to the Reapportionment Committee, if desired, unless such plans or amendments fail to meet the minimal criteria herein established.

5. Notice of all Reapportionment Committee meetings will be posted on monitors throughout the Alabama State House, the Reapportionment Committee's website, and on the Secretary of State's website. Individual notice of Reapportionment Committee meetings will be sent by email to any citizen or organization who requests individual notice and provides the necessary information to the Reapportionment Committee staff. Persons or organizations who want to receive this information should contact the Reapportionment Office.

V. PUBLIC ACCESS

1. The Reapportionment Committee seeks active and informed public participation in all activities of the Committee and the widest range of public information and citizen input into its deliberations. Public access to the Reapportionment Office computer system is available every Friday from 8:30 a.m. to 4:30 p.m. Please contact the Reapportionment Office to schedule an appointment.

2. A redistricting plan may be presented to the Reapportionment Committee by any individual citizen or organization by written presentation at a public meeting or by submission in writing to the Committee. All plans submitted to the Reapportionment Committee will be made part of the public record and made available in the same manner as other public records of the Committee.

3. Any proposed redistricting plan drafted into legislation must be offered by a member of the Legislature for introduction into the legislative process.

4. A redistricting plan developed outside the Legislature or a redistricting plan developed without Reapportionment Office assistance which is to be presented for consideration by the Reapportionment Committee must:

a. Be clearly depicted on maps which follow 2020 Census geographic boundaries;

b. Be accompanied by a statistical sheet listing total population for each district and listing the census geography making up each proposed district;

c. Stand as a complete statewide plan for redistricting.

d. Comply with the guidelines adopted by the Reapportionment Committee.

5. Electronic Submissions

a. Electronic submissions of redistricting plans will be accepted by the Reapportionment Committee.

b. Plans submitted electronically must also be accompanied by the paper materials referenced in this section.

c. See the Appendix for the technical documentation for the electronic submission of redistricting plans.

6. Census Data and Redistricting Materials

a. Census population data and census maps will be made available through the Reapportionment Office at a cost determined by the Permanent Legislative Committee on Reapportionment.

b. Summary population data at the precinct level and a statewide work maps will be made available to the public through the Reapportionment Office at a cost determined by the Permanent Legislative Committee on Reapportionment.

c. All such fees shall be deposited in the state treasury to the credit of the general fund and shall be used to cover the expenses of the Legislature.

Appendix.

ELECTRONIC SUBMISSION OF REDISTRICTING PLANS

REAPPORTIONMENT COMMITTEE - STATE OF ALABAMA

The Legislative Reapportionment Computer System supports the electronic submission of redistricting plans. The electronic submission of these plans must be via email or a flash drive. The software used by the Reapportionment Office is Maptitude.

The electronic file should be in DOJ format (Block, district # or district #, Block). This should be a two column, comma delimited file containing the FIPS code for each block, and the district number. Maptitude has an automated plan import that creates a new plan from the block/district assignment list.

Web services that can be accessed directly with a URL and ArcView Shapefiles can be viewed as overlays. A new plan would have to be built using this overlay as a guide to assign units into a blank Maptitude plan. In order to analyze the plans with our attribute data, edit, and report on, a new plan will have to be built in Maptitude.

In order for plans to be analyzed with our attribute data, to be able to edit, report on, and produce maps in the most efficient, accurate and time saving procedure, electronic submissions are REQUIRED to be in DOJ format.

Example: (DOJ FORMAT BLOCK, DISTRICT #)

SSCCCTTTTTTBBBBDDDD

SS is the 2 digit state FIPS code

CCC is the 3 digit county FIPS code

TTTTTT is the 6 digit census tract code

BBBB is the 4 digit census block code

DDDD is the district number, right adjusted

Contact Information:

Legislative Reapportionment Office

Room 317, State House

11 South Union Street

Montgomery, Alabama 36130

(334) 261-0706

For questions relating to reapportionment and redistricting, please contact:

Donna Overton Loftin, Supervisor

Legislative Reapportionment Office

donna.overton@alsenate.gov

Please Note: The above e-mail address is to be used only for the purposes of obtaining information regarding redistricting. Political messages, including those relative to specific legislation or other political matters, cannot be answered or disseminated via this email to members of the Legislature. Members of the Permanent Legislative Committee on Reapportionment may be contacted through information contained on their Member pages of the Official Website of the Alabama Legislature, legislature.state.al.us/aliswww/default.aspx.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BOBBY SINGLETON, *et al.*, **Plaintiffs,** **v.** **WES ALLEN, *in his official capacity as Alabama Secretary of State, et al.*,** **Defendants.**	)	**Case No.: 2:21-cv-1291-AMM** **THREE-JUDGE COURT**

EVAN MILLIGAN, *et al.*, **Plaintiffs,** **v.** **WES ALLEN, *in his official capacity as Alabama Secretary of State, et al.*,** **Defendants.**	)	**Case No.: 2:21-cv-1530-AMM** **THREE-JUDGE COURT**

MARCUS CASTER, *et al.*, **Plaintiffs,** **v.** **WES ALLEN, *in his official capacity as Secretary of State of Alabama, et al.*,** **Defendants.**	)	**Case No.: 2:21-cv-1536-AMM**

Before MARCUS, Circuit Judge, MANASCO and MOORER, District Judges.

BY THE COURT:

ORDER

On January 24, 2022, this Court preliminarily enjoined the Secretary of State from conducting elections using the 2021 congressional districting plan enacted by the Alabama Legislature ("the 2021 Plan") upon finding that the 2021 Plan likely violated Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. *See Singleton* Doc. 88; *Milligan* Doc. 107; *Caster* Doc. 101. Specifically, we found that the *Milligan* and *Caster* Plaintiffs were "substantially likely to establish each part of the controlling Supreme Court test, including: (1) that Black Alabamians are sufficiently numerous to constitute a voting-age majority in a second congressional district . . .; (2) that Alabama's Black population in the challenged districts is sufficiently geographically compact to constitute a voting-age majority in a second reasonably configured district . . .; (3) that voting in the challenged districts is intensely racially polarized . . .; and (4) that under the totality of the circumstances, including the factors that the Supreme Court has instructed us to consider, Black voters have less opportunity than other Alabamians to elect candidates of their choice to Congress." *Milligan* Doc. 107 at 4–5.

This Court gave the Alabama Legislature the first opportunity to enact a remedial plan, but we notified the parties of our intent to appoint Mr. Richard Allen

as a Special Master and Dr. Nathaniel Persily as a cartographer in the event the Court was required to order its own remedial districting plan. *See Singleton* Doc. 101; *Milligan* Doc. 129; *Caster* Doc. 119. The parties were afforded an opportunity to object to these appointments; no party did so. Accordingly, on February 7, 2022, the Court appointed Mr. Allen and Dr. Persily to serve as Special Master and cartographer, respectively. *Singleton* Doc. 102; *Milligan* Doc. 130; *Caster* Doc. 120. That same day, and before either Mr. Allen or Dr. Persily had conducted any work, the Supreme Court stayed this Court's preliminary injunction.

On June 8, 2023, the Supreme Court affirmed our preliminary injunction in all respects, *Allen v. Milligan*, 143 S. Ct. 1487, 1498 (2023), and on June 12, the Supreme Court lifted the stay, *Allen v. Milligan*, 143 S. Ct. 2607 (2023). The Defendants then requested that the Court allow the Alabama Legislature an opportunity to enact a remedial plan before imposing court-ordered discovery and conducting a remedial hearing. Recognizing that "[r]edistricting is never easy," *Abbot v. Perez*, 138 S. Ct. 2305, 2314 (2018), and is "primarily and foremost a state legislative responsibility," *Wesch v. Hunt*, 785 F. Supp. 1491, 1497 (S.D. Ala. 1992), *aff'd sub nom. Camp v. Wesch*, 504 U.S. 902 (1992), *and aff'd sub nom. Figures v. Hunt*, 507 U.S. 901 (1993), this Court delayed commencing remedial proceedings for thirty days to afford the Legislature that opportunity.

On July 21, 2023, the Legislature approved and Governor Ivey signed into law a new congressional districting map ("the 2023 Plan"). All Plaintiffs timely objected to the 2023 Plan as insufficiently remediating the likely Section 2 violation found by this Court and affirmed by the Supreme Court. *See Singleton* Doc. 147 (objecting to the 2023 Plan on constitutional grounds only); *Milligan* Doc. 200 (objecting to the 2023 Plan on constitutional grounds and statutory grounds); *Caster* Doc. 179 (objecting to the 2023 Plan on statutory grounds only).

On July 24, 2023, Dr. Persily withdrew as a cartographer. *See Singleton* Doc. 141; *Milligan* Doc. 187; *Caster* Doc. 166. After taking submissions for proposed cartographers from the parties, *see Singleton* Docs. 141, 150, 151; *Milligan Docs*. 187, 197, 198; *Caster Docs*. 166, 174, 175, the Court notified the parties of its intent to appoint Mr. David R. Ely as a cartographer to assist the Special Master in the performance of his duties and responsibilities, *see Singleton* Doc. 155; *Milligan* Doc. 204; *Caster* Doc. 185. The Court gave the parties an opportunity to object, *see Singleton* Doc. 155; *Milligan* Doc. 204; *Caster* Doc. 185; no party objected to Mr. Ely's appointment.

On August 8, 2023, this Court appointed Mr. Ely to assist the Special Master as a cartographer. *See Singleton* Doc. 166; *Milligan* Doc. 226; *Caster* Doc. 196. In the same order, we notified the parties that Mr. Allen had requested the Court to appoint a law firm to assist him in the performance of his duties, and that the Court

had chosen Mr. Michael Scodro and Mayer Brown LLP, his firm, to do so. The parties were given an opportunity to object to the appointment of Mr. Scodro and Mayer Brown LLP; again, no party did so.

On August 10, 2023, pursuant to Federal Rule of Civil Procedure 53(a)(2), Mr. Allen, Mr. Ely, and Mr. Scodro each filed affidavits attesting that they were aware of no grounds for their disqualification under 28 U.S.C. § 455. *See Singleton* Docs. 172, 173, 174; *Milligan* Docs. 239, 240, 241; *Caster* Docs. 204, 205, 206. Still again, no party objected. Finally, on August 14, Mr. Scodro and Mayer Brown LLP were appointed to assist Mr. Allen in the performance of his duties as Special Master. *Singleton* Doc. 183; *Milligan* Doc. 264; *Caster* Doc. 218.

On August 14, this Court conducted a remedial hearing to consider the *Milligan* and *Caster* Plaintiffs' objections to the 2023 Plan. The following day, on August 15, this Court conducted a preliminary injunction hearing to consider the *Singleton* Plaintiffs' request to preliminarily enjoin the 2023 Plan. Following those hearings, on September 5, 2023, this Court concluded that the 2023 Plan did not remedy the likely Section 2 violation found by this Court and affirmed by the Supreme Court. We, therefore, preliminarily enjoined Secretary Allen from using the 2023 Plan in Alabama's upcoming 2024 congressional elections.

"Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well settled that 'reapportionment is

primarily the duty and responsibility of the State.'" *Miller v. Johnson*, 515 U.S. 900, 915 (1995) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). However, "when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the unwelcome obligation of the federal court to devise and impose a reapportionment plan pending later legislative action." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (opinion of White, J.) (quotation marks and citation omitted).

Accordingly, this Court **ORDERS** as follows:

1. The Special Master and his team shall file with the Court three (3) proposed remedial plans to remedy the likely Section Two violation identified in this Court's injunction issued on September 5, 2023. Each plan should include color maps with inset maps sufficient to clearly show the boundaries that divide political subdivisions in the state, along with demographic data for each proposed map (including population deviations of each district, Black voting-age population of each district, and any other relevant criteria). The Special Master and his team shall file a Report and Recommendation ("R&R") along with these proposed plans that explains in some detail the choices made in each proposed plan, the differences between the proposed plans, and why each plan remedies the likely vote dilution found by this Court. Specifically, the R&R should discuss the facts and legal analysis supporting the proposed districts' compliance with the U.S. Constitution,

the Voting Rights Act, traditional redistricting criteria, and the other criteria listed below. The proposed plans and an accompanying R&R shall be filed on the *Singleton*, *Milligan*, and *Caster* docket sheets no later than the close of business **MONDAY, SEPTEMBER 25, 2023**. However, if the Special Master is able to complete his task before that date, we encourage him to file those plans and an accompanying R&R as expeditiously as possible, consistent with the need for thoughtful and deliberate analysis.

2. Each of the three proposed plans shall:

a. Completely remedy the likely Section 2 violation identified in this Court's order of September 5, 2023. Each map shall remediate the essential problem found in the 2023 Plan – the unlawful dilution of the Black vote in Alabama's congressional redistricting regime. To that end, each proposed map shall "include[] either an additional majority-Black congressional district, or an additional district in which Black voters otherwise have an opportunity to elect a representative of their choice." *Milligan* Doc. 107 at 5.

b. Comply with the U.S. Constitution and the Voting Rights Act.

c. Comply with the one-person, one-vote principle guaranteed by the Equal Protection Clause of the Fourteenth Amendment, based on data from the 2020 Census. Any remedy shall ensure that one person's "vote in a

congressional election" is as "nearly as is practicable . . . worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964). When a State designs a districting plan, the Supreme Court has "explained that the 'as nearly as is practicable' standard does not require that congressional districts be drawn with 'precise mathematical equality,' but instead that the State justify population differences between districts that could have been avoided by 'a good-faith effort to achieve absolute equality.'" *Tennant v. Jefferson Cnty. Comm'n*, 567 U.S. 758, 759 (2012) (citation omitted). But court-ordered plans must comply even more strictly with the principle of one-person, one-vote "in the absence of significant state policies or other acceptable considerations that require adoption of a plan with so great a variance." *Chapman*, 420 U.S at 24. To that end, the Special Master and his team must ensure that "there are no *de minimis* population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, § 2 without justification." *Karcher v. Daggett*, 462 U.S. 725, 734 (1983). Any "showing required to justify population deviations [shall be] proportional to the size of the deviations." *Larios v. Cox*, 300 F. Supp. 2d 1320, 1356 (N.D. Ga.) (three-judge court), *aff'd*, 542 U.S. 947 (2004).

d. Respect traditional redistricting principles to the extent reasonably practicable. Ordinarily, these principles "[i]nclud[e] compactness,

contiguity, respect for political subdivisions or communities defined by actual shared interests, incumbency protection, and political affiliation." *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 272 (2015) (quotation marks and citations omitted). That said, the Alabama Legislature has substantially more discretion than does this Court in drawing a remedial map: state legislatures may consider political circumstances that courts may not. *See, e.g.*, *Upham v. Seamon*, 456 U.S. 37, 42 (1982) (per curiam); *Connor v. Finch*, 431 U.S. 407, 414–15 (1977); *Wyche v. Madison Parish Police Jury*, 635 F.2d 1151, 1160 (5th Cir. 1981). In other words, "in the process of adopting reapportionment plans, the courts are 'forbidden to take into account the purely political considerations that might be appropriate for legislative bodies,'" such as incumbency protection and political affiliation. *Larios v. Cox*, 306 F. Supp. 2d 1214, 1218 (N.D. Ga. 2004) (three-judge court) (quoting *Wyche*, 635 F.2d at 1160). Thus, consistent with these limitations, the Special Master shall consider traditional redistricting criteria, such as compactness, contiguity, respect for political subdivisions, and maintenance of communities of interest.

3. The Special Master and his team may consider, as background, among other things, the eleven illustrative plans submitted by the *Milligan* and *Caster* Plaintiffs; the remedial maps submitted by the *Singleton* Plaintiffs (known as the

"Whole County Plans"); and the 2021 Plan and the 2023 Plan, which were both found to likely violate Section 2. They may also consider the Reapportionment Committee Redistricting Guidelines, which were adopted by the reapportionment committee in drawing both the 2021 Plan and the 2023 Plan, and which this Court approved of in its preliminary injunction order, and the findings adopted by the Alabama Legislature in fashioning the 2023 Plan. Finally, the Special Master and his team may consider all the record evidence received in the first preliminary injunction hearing conducted by this Court in January 2022, as well as the record evidence received by this Court at the remedial hearing conducted on August 14, 2023, and the record evidence received by this Court at the preliminary injunction hearing conducted on August 15, 2023.

4. The Special Master and his team shall not engage in any *ex parte* communications with any of the parties or their counsel, but they may engage in *ex parte* communications with the Court as the need may arise.

5. Pursuant to Federal Rule of Civil Procedure 53(c)(1), the Special Master is authorized to issue appropriate orders as may be reasonably necessary for him to accomplish his task within the time constraints imposed by this Order, and the time exigencies surrounding these proceedings. He is directed to invite submissions and comments from the parties and other interested persons, hold a hearing as may be necessary to reasonably assist him in developing and presenting

three remedial plans to this Court, and take such testimony as he may deem necessary.

6. The Special Master and his team shall maintain orderly files consisting of all documents submitted to them by the parties and any written orders, findings, and recommendations. All other materials relating to their work shall be preserved until relieved of this obligation by the Court. The Special Master and his team should preserve all datasets used in the formulation of redistricting plans, and any drafts considered but not recommended to the Court in their native format.

7. To facilitate the work of the Special Master and his team:

a. Defendants are **ORDERED** to notify the Special Master, Mr. Ely, and the Special Master's team in writing, no later than **12:00 pm Central Daylight Time on September 6, 2023**, whether they have a Maptitude license to make available to the Special Master and his team for their use in this case, or whether it will be necessary for them to acquire one for that purpose (the cost of which ultimately will be taxed to Defendants).

b. Defendants are **ORDERED** to provide the Special Master, Mr. Ely, and the Special Master's team, no later than **12:00 pm Central Daylight Time on September 6, 2023**: (i) the block equivalency files for the 2023 Plan, the 2021 Plan, and the 2021 Plan's predecessor (the plan described in the preliminary injunction order of January 24, 2022, as "the 2011 congressional

map"); (ii) shapefiles for Alabama's municipalities and current voting districts (precincts); and (iii) a shapefile reflecting the location of the current residence of each of Alabama's current members of the United States House of Representatives.

c. The *Milligan*, and *Caster* Plaintiffs are **ORDERED** to provide the Special Master, Mr. Ely, and the Special Master's team, no later than **12:00 pm Central Daylight Time on September 6, 2023**: (i) the block equivalency files for the remedial maps offered by the *Milligan* Plaintiffs in connection with their claims under the Voting Rights Act (the plans that are referred to in the preliminary injunction order of January 24, 2022, as the "Duchin plans" and the "Hatcher plan"); and (ii) the block equivalency files for the remedial maps offered by the *Caster* Plaintiffs in connection with their claim (the plans that are referred to in the preliminary injunction order of January 24, 2022, as the "Cooper plans").

8. All reasonable costs and expenses incurred by the Special Master and his team, including reasonable compensation for those persons and any assistants they have retained, shall (subject to the approval of this Court) be paid by the State of Alabama. The Special Master and his team shall take special care to protect against unreasonable expenses. The Special Master and his team are authorized to

hire research and technical assistants and to purchase any software reasonably necessary to perform the duties and responsibilities of the Special Master.

9. After the Special Master has filed three proposed maps and an accompanying R&R in each of the *Singleton*, *Milligan* and *Caster* docket sheets, and has promptly served a copy on each party, pursuant to Federal Rule of Civil Procedure 53(e), the parties and all interested persons shall have three (3) days from the date the proposed maps and R&R are entered to file any written objections with this Court.

10. If a hearing on objections is necessary, the Court has provisionally reserved **TUESDAY, OCTOBER 3, 2023**, commencing at 9:00 am Central Daylight Time, for an **IN-PERSON** public hearing in the Special Proceedings Courtroom of the Hugo L. Black United States Courthouse in Birmingham, Alabama.

DONE and **ORDERED** this 5th day of September 2023.

STANLEY MARCUS
UNITED STATES CIRCUIT JUDGE

ANNA M. MANASCO
UNITED STATES DISTRICT JUDGE

TERRY F. MOORER
UNITED STATES DISTRICT JUDGE

No. 23-12923-D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MARCUS CASTER, et al.,
Plaintiffs-Appellees,

v.

HON. WES ALLEN, in his Official Capacity as the Secretary of State of Alabama,
Defendant-Appellant.

On Interlocutory Appeal from the United States
District Court for the Northern District of Alabama
No. 2:21-cv-1536-AMM

APPENDIX TO TIME SENSITIVE MOTION FOR STAY PENDING APPEAL: VOLUME 2 OF 3

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARCUS CASTER, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No.: 2:21-cv-1536-AMM**
	)	
WES ALLEN, *in his official capacity as Alabama Secretary of State, et al.*,	)	
	)	
	)	
Defendants.	)	

ORDER

This redistricting case is one of three cases currently pending in the Northern District of Alabama that allege that Alabama's congressional electoral maps are racially gerrymandered in violation of the United States Constitution and/or dilute the votes of Black Alabamians in violation of the Voting Rights Act of 1965, 52 U.S.C. § 10301: *Singleton v. Allen*, Case No. 2:21-cv-1291-AMM (challenges the map on constitutional grounds only), *Milligan v. Allen*, Case No. 2:21-cv-1530-AMM (challenges the map on constitutional and statutory grounds), and this case, which challenges the map on statutory grounds only.

These cases have returned to this Court after the Supreme Court of the United States affirmed in all respects a preliminary injunction this Court entered on January 24, 2022. *See Allen v. Milligan*, 143 S. Ct. 1487, 1501 (2023); *Caster* Doc. 101. *Singleton* and

Milligan are before a three-judge court that includes the undersigned judge, and *Caster* is before the undersigned sitting alone, for remedial proceedings. The map this Court enjoined (the "2021 Plan") included one majority-Black district: District 7. District 7 became a majority-Black district in 1992 when a federal court drew it that way in a ruling that was summarily affirmed by the Supreme Court. *Wesch v. Hunt*, 785 F. Supp. 1491, 1497–1500 (S.D. Ala. 1992), *aff'd sub nom. Camp v. Wesch*, 504 U.S. 902 (1992), and *aff'd sub nom*. *Figures v. Hunt*, 507 U.S. 901 (1993).

After a hearing, this Court concluded that the 2021 Plan likely violated Section Two and thus enjoined the State from using that plan in the 2022 election. *Caster* Doc. 101; *Allen*, 143 S. Ct. at 1501. Based on controlling precedent, this Court held that "the appropriate remedy is a congressional redistricting plan that includes either an additional majority-Black congressional district, or an additional district in which Black voters otherwise have an opportunity to elect a representative of their choice." *Caster* Doc. 101 at 6, 15. The Court observed that "[a]s the Legislature consider[ed remedial] plans, it should be mindful of the practical reality, based on the ample evidence of intensely racially polarized voting adduced during the preliminary injunction proceedings, that any remedial plan will need to include two districts in which Black voters either comprise a voting-age majority or something quite close to it." *Caster* Doc. 101 at 6.

On June 8, 2023, the Supreme Court affirmed the preliminary injunction. *See Allen*, 143 S. Ct. at 1501. The State then requested that this Court allow the Legislature

approximately five weeks — until July 21, 2023 — to enact a new plan. *Caster* Doc. 154 at 2. On July 21, 2023, the Legislature enacted and Governor Ivey signed into law a new congressional map (the "2023 Plan"). Just like the 2021 Plan enjoined by this Court, the 2023 Plan includes only one majority-Black district: District 7. *See Caster* Doc. 165.

The *Caster* Plaintiffs timely objected to the 2023 Plan and requested another preliminary injunction barring Alabama Secretary of State Wes Allen from conducting congressional elections according to Alabama's 2023 redistricting plan for its seven seats in the United States House of Representatives. *Caster* Doc. 179.

The remedial proceedings are highly time-sensitive because of state-law deadlines applicable to Alabama's next congressional election. This Court has the benefit of an extensive record that includes not only the materials submitted during the preliminary injunction proceedings, but also briefs as well as expert reports, deposition transcripts, and other evidence submitted during this remedial phase. *See Caster* Docs. 179, 191, 195, Aug. 14 Tr. At 92-93. The Court also has the benefit of a remedial hearing.

On July 31, 2023, the three-judge court in *Singleton* and *Milligan* and this Court held a status conference to discuss the remedial hearing. At that conference, all counsel agreed that all evidence admitted in any case, including evidence adduced in the original preliminary injunction proceedings conducted, was admitted in all three cases unless counsel raised a specific objection. *See Caster* Doc. 182. Accordingly, the Court has considered all evidence adduced in *Singleton*, *Milligan* and *Caster*.

The Court adopts the recitation of the evidence, legal analysis, findings of fact and conclusions of law explained in the injunction, memorandum opinion and order entered contemporaneously in *Milligan* (attached to this Order as Exhibit A), including that Court's assessments of the credibility of expert witnesses, as though they were set forth in full herein. The Court concludes that the *Caster* plaintiffs are substantially likely to establish that (1) the 2023 Plan does not remedy the likely Section Two violation the Court found and the Supreme Court affirmed, and (2) in the alternative, the *Caster* Plaintiffs have carried their burden to establish that the 2023 Plan likely violates Section Two.

Accordingly, under Federal Rule of Civil Procedure 65(d) the Court **PRELIMINARILY ENJOINS** Secretary Allen from conducting any elections according to the 2023 Plan, and the Special Master and cartographer are **DIRECTED** to commence work on a remedial map forthwith. Instructions will follow by separate order.

Compliance with the preliminary injunction in *Milligan* constitutes compliance with this preliminary injunction.

DONE and **ORDERED** this 5th day of September, 2023.

ANNA M. MANASCO
UNITED STATES DISTRICT JUDGE

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BOBBY SINGLETON, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No.: 2:21-cv-1291-AMM**
	)	
WES ALLEN, *in his official capacity as Alabama Secretary of State*, *et al.*,	)	**THREE-JUDGE COURT**
	)	
Defendants.	)	

EVAN MILLIGAN, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No.: 2:21-cv-1530-AMM**
	)	
WES ALLEN, *in his official capacity as Alabama Secretary of State*, *et al.*,	)	**THREE-JUDGE COURT**
	)	
Defendants.	)	

Before MARCUS, Circuit Judge, MANASCO and MOORER, District Judges.

PER CURIAM:

INJUNCTION, OPINION, AND ORDER

These congressional redistricting cases have returned to this Court after the Supreme Court of the United States affirmed in all respects a preliminary injunction this Court entered on January 24, 2022. *See Allen v. Milligan*, 143 S. Ct. 1487, 1498, 1502 (2023).

These cases allege that Alabama's congressional electoral map is racially gerrymandered in violation of the United States Constitution and/or dilutes the votes of Black Alabamians in violation of Section Two of the Voting Rights Act of 1965, 52 U.S.C. § 10301 ("Section Two"). *See Singleton v. Allen*, No. 2:21-cv-1291-AMM (asserting only constitutional challenges); *Milligan v. Allen*, No. 2:21-cv-1530-AMM (asserting both constitutional and statutory challenges); *Caster v. Allen*, No. 2:21-cv-1536-AMM (asserting only statutory challenges).

Milligan is now before this three-judge Court, and *Caster* is before Judge Manasco alone, for remedial proceedings.[1] The map this Court enjoined ("the 2021 Plan") included one majority-Black district: District 7. District 7 became a majority-Black district in 1992 when a federal court drew it that way in a ruling that was summarily affirmed by the Supreme Court. *Wesch v. Hunt*, 785 F. Supp. 1491, 1497–1500 (S.D. Ala. 1992) (three-judge court), *aff'd sub nom. Camp v. Wesch*, 504 U.S. 902 (1992), *and aff'd sub nom. Figures v. Hunt*, 507 U.S. 901 (1993).

After an extensive seven-day hearing, this Court concluded that the 2021 Plan likely violated Section Two and thus enjoined the State from using that plan in the 2022 election. *See Milligan* Doc. 107; *Allen*, 143 S. Ct. at 1502.[2]

---

[1] *Singleton* remains before this three-judge Court but is not a part of the Section Two remedial proceedings. *See infra* at Part I.C.5.

[2] When we cite an order or other filing that appears in more than one of these cases, for the reader's ease we cite only the document filed in the *Milligan* case.

Based on controlling precedent, we held that "the appropriate remedy is a congressional redistricting plan that includes either an additional majority-Black congressional district, or an additional district in which Black voters otherwise have an opportunity to elect a representative of their choice." *Milligan* Doc. 107 at 5.[3] We observed that "[a]s the Legislature consider[ed remedial] plans, it should be mindful of the practical reality, based on the ample evidence of intensely racially polarized voting adduced during the preliminary injunction proceedings, that any remedial plan will need to include two districts in which Black voters either comprise a voting-age majority or something quite close to it." *Id.* at 6.

Because federal law dictates that the Alabama Legislature should have the first opportunity to draw a remedial plan, we gave the Legislature that opportunity. *See id*. The Secretary of State and legislative defendants ("the Legislators" and collectively, "the State") appealed. *Allen*, 143 S. Ct. at 1502.

On June 8, 2023, the Supreme Court affirmed the preliminary injunction. *See id*. The Supreme Court "s[aw] no reason to disturb th[is] Court's careful factual findings, which are subject to clear error review and have gone unchallenged by Alabama in any event." *Id.* at 1506. Likewise, the Supreme Court concluded there was no "basis to upset th[is] Court's legal conclusions" because we "faithfully

[3] Page number pincites in this order are to the CM/ECF page number that appears in the top right-hand corner of each page, if such a page number is available.

applied [Supreme Court] precedents and correctly determined that, under existing law, [the 2021 Plan] violated" Section Two. *Id*.

The State then requested that this Court allow the Legislature approximately five weeks — until July 21, 2023 — to enact a new plan. *Milligan* Doc. 166. All parties understood the urgency of remedial proceedings: the State previously advised this Court that because of pressing state-law deadlines, Secretary Allen needs a final congressional districting map by "early October" for the 2024 election. *Milligan* Doc. 147 at 3.[4] In the light of that urgency, and to balance the deference given to the Legislature to reapportion the state with the limitations set by *Purcell v. Gonzalez*, 549 U.S. 1, 4–8 (2006), we delayed remedial proceedings to accommodate the Legislature's efforts, entered a scheduling order, and alerted the parties that any remedial hearing would commence on the date they proposed: August 14, 2023. *Milligan* Doc. 168.

On July 21, 2023, the Legislature enacted and Governor Ivey signed into law a new congressional map ("the 2023 Plan"). Just like the 2021 Plan enjoined by this Court, the 2023 Plan includes only one majority-Black district: District 7. *Milligan* Doc. 186-1 at 2.

All Plaintiffs timely objected to the 2023 Plan and requested another

[4] In a later filing, the State advised the Court that Secretary Allen needs a final map by October 1, 2023. *Milligan* Doc. 162 at 7.

injunction. *See Singleton* Doc. 147; *Milligan* Doc. 200; *Caster* Doc. 179. The *Milligan* and *Caster* Plaintiffs argue that the 2023 Plan did not cure the unlawful vote dilution we found because it did not create a second district in which Black voters have an opportunity to elect a candidate of their choice (an "opportunity district"). *Milligan* Doc. 200 at 16–23; *Caster* Doc. 179 at 8–11. Separately, the *Milligan* and *Singleton* Plaintiffs argue that the 2023 Plan runs afoul of the U.S. Constitution. The *Milligan* Plaintiffs contend that the State intentionally discriminated against Black Alabamians in drawing the 2023 Plan, in violation of the Equal Protection Clause of the Fourteenth Amendment. *Milligan* Doc. 200 at 23–26. And the *Singleton* Plaintiffs argue that the 2023 Plan is an impermissible racial gerrymander — indeed, just the latest in a string of racially gerrymandered plans the State has enacted, dating back to 1992. *Singleton* Doc. 147 at 13–27.

The record before us thus includes not only the evidentiary materials submitted during the preliminary injunction proceedings, but also expert reports, deposition transcripts, and other evidence submitted during this remedial phase. *See Singleton* Docs. 147, 162, 165; *Milligan* Docs. 200, 220, 225; *Caster* Docs. 179, 191, 195; Aug. 14 Tr. 92–93; Aug. 15 Tr. 24–25. We also have the benefit of the parties' briefs, a hearing, three *amicus* briefs, and a statement of interest filed by the Attorney General of the United States. *Milligan* Docs. 199, 234, 236, 260.

The State concedes that the 2023 Plan does not include an additional

opportunity district. Indeed, the State has explained that its position is that notwithstanding our order and the Supreme Court's affirmance, the Legislature was not required to include an additional opportunity district in the 2023 Plan. Aug. 14 Tr. 159–64.

That concession controls this case. Because the 2023 Plan does not include an additional opportunity district, we conclude that the 2023 Plan does not remedy the likely Section Two violation that we found and the Supreme Court affirmed. We also conclude that under the controlling Supreme Court test, the *Milligan* Plaintiffs are substantially likely to establish that the 2023 Plan violates Section Two. As we explain below, our conclusions rest on facts the State does not dispute.

Because the record establishes the other requirements for relief — that the Plaintiffs will suffer irreparable injury if an injunction does not issue, the threatened injury to the Plaintiffs outweighs the damage an injunction may cause the State, and an injunction is not adverse to the public interest — under Federal Rule of Civil Procedure 65(d) we **PRELIMINARILY ENJOIN** Secretary Allen from conducting any elections with the 2023 Plan.

Under the Voting Rights Act, the statutory framework, and binding precedent, the appropriate remedy is, as we already said, a congressional districting plan that includes either an additional majority-Black district, or an additional district in which Black voters otherwise have an opportunity to elect a representative of their

choice. *See, e.g.*, *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (plurality opinion); *Cooper v. Harris*, 581 U.S. 285, 306, (2017). We discern no basis in federal law to accept a map the State admits falls short of this required remedy.

"Redistricting is primarily the duty and responsibility of the State," *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (internal quotation marks omitted), but this Court "ha[s] its own duty to cure" districts drawn in violation of federal law, *North Carolina v. Covington*, 138 S. Ct. 2548, 2553 (2018). We are three years into a ten-year redistricting cycle, and the Legislature has had ample opportunity to draw a lawful map.

Based on the evidence before us, including testimony from the Legislators, we have no reason to believe that allowing the Legislature still another opportunity to draw yet another map will yield a map that includes an additional opportunity district. Moreover, counsel for the State has informed the Court that, even if the Court were to grant the Legislature yet another opportunity to draw a map, it would be practically impossible for the Legislature to reconvene and do so in advance of the 2024 election cycle. Accordingly, the Special Master and cartographer are **DIRECTED** to commence work forthwith on a remedial map. Instructions shall follow by separate order.

Because we grant relief on statutory grounds, and "[a] fundamental and longstanding principle of judicial restraint requires that [we] avoid reaching

constitutional questions in advance of the necessity of deciding them," *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988); *see also League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 442 (2006) ("*LULAC*"); *Thornburg v. Gingles*, 478 U.S. 30, 38 (1986), we again **RESERVE RULING** on the constitutional issues raised by the *Singleton* and the *Milligan* Plaintiffs, including the *Singleton* Plaintiffs' motion for a preliminary injunction.

***

We have reached these conclusions only after conducting an exhaustive analysis of an extensive record under well-developed legal standards, as Supreme Court precedent instructs. We do not take lightly federal intrusion into a process ordinarily reserved for the State Legislature. But we have now said twice that this Voting Rights Act case is not close. And we are deeply troubled that the State enacted a map that the State readily admits does not provide the remedy we said federal law requires.

We are disturbed by the evidence that the State delayed remedial proceedings but ultimately did not even nurture the ambition to provide the required remedy. And we are struck by the extraordinary circumstance we face. We are not aware of any other case in which a state legislature — faced with a federal court order declaring that its electoral plan unlawfully dilutes minority votes and requiring a plan that provides an additional opportunity district — responded with a plan that the state

concedes does not provide that district. The law requires the creation of an additional district that affords Black Alabamians, like everyone else, a fair and reasonable opportunity to elect candidates of their choice. The 2023 Plan plainly fails to do so.

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I. BACKGROUND

A. Procedural Posture

1. Liability Proceedings

On September 27, 2021, after the results of the 2020 census were released, the *Singleton* Plaintiffs filed a complaint against John Merrill, the former Secretary of State of Alabama.[5] *Singleton* Doc. 1. The *Singleton* Plaintiffs asserted that holding the 2022 election under Alabama's old congressional map ("the 2011 Plan") would violate the Equal Protection Clause of the Fourteenth Amendment because the districts were malapportioned and racially gerrymandered. *Id*. The Chief Judge of the Eleventh Circuit convened a three-judge court to adjudicate *Singleton*. *Singleton* Doc. 13.

On November 3, 2021, the Legislature passed the 2021 Plan. The next day, Governor Ivey signed the 2021 Plan into law, and the *Singleton* Plaintiffs amended their complaint to stake their claims on the 2021 Plan, asserting a racial gerrymandering claim under the Equal Protection Clause of the Fourteenth Amendment and an intentional discrimination claim under the Fourteenth and Fifteenth Amendments. *Singleton* Doc. 15 at 38–48. "The *Singleton* plaintiffs are registered voters in Alabama's Second, Sixth, and Seventh Congressional Districts

[5] On January 16, 2023, Wes Allen became the Secretary of State of Alabama. Pursuant to Federal Rule of Civil Procedure 25(d), Secretary Allen was substituted for former Secretary Merrill as a defendant in these cases. *Milligan* Doc. 161.

under the [2021] Plan; the lead plaintiff, Bobby Singleton, is a Black Senator in the Legislature." *Singleton* Doc. 88 at 10.

On the same day the *Singleton* Plaintiffs filed their amended complaint, the *Caster* Plaintiffs filed a lawsuit against Secretary Merrill. *Caster* Doc. 3. *Caster* is pending before Judge Manasco sitting alone. The *Caster* Plaintiffs challenged the 2021 Plan only under Section Two and asserted a single claim of vote dilution. *Id.* at 29–31. "The *Caster* plaintiffs are citizens of Alabama's First, Second, and Seventh Congressional Districts under the [2021] Plan." *Caster* Doc. 101 at 20.

On November 16, 2021, the *Milligan* Plaintiffs filed suit against Secretary Merrill and the Legislators, who serve as co-chairs of the Legislature's Committee on Reapportionment ("the Committee").[6] *Milligan* Doc. 1. The *Milligan* Plaintiffs asserted a vote dilution claim under Section Two, a racial gerrymandering claim under the Fourteenth Amendment, and an intentional discrimination claim under the Fourteenth Amendment. *Id.* at 48–52. "The *Milligan* plaintiffs are Black registered voters in Alabama's First, Second, and Seventh Congressional Districts and two organizational plaintiffs — Greater Birmingham Ministries and the Alabama State Conference of the National Association for the Advancement of Colored People,

[6] Former Senator Jim McClendon then served as co-chair of the Committee. Senator Steve Livingston has since become co-chair of the Committee. *See Milligan* Doc. 173. Pursuant to Federal Rule of Civil Procedure 25(d), Senator Livingston was substituted as a defendant in these cases. *Milligan* Doc. 269.

Inc. ('NAACP') — with members who are registered voters in those Congressional districts and the Third Congressional District." *Milligan* Doc. 107 at 12–13. The Chief Judge of the Eleventh Circuit convened a three-judge court to hear *Milligan* that includes the same three judges who comprise the *Singleton* Court. *Milligan* Doc. 23.

The Legislators intervened as defendants in *Singleton* and *Caster*. *See Singleton* Doc. 32; *Caster* Doc. 69.

Each set of Plaintiffs requested that this Court enjoin Alabama from using the 2021 Plan for the 2022 election. *Singleton* Doc. 1 at 47; *Milligan* Doc. 1 at 52; *Caster* Doc. 3 at 30–31; *see also Singleton* Doc. 57; *Milligan* Doc. 69; *Caster* Doc. 56. The *Singleton* Court consolidated *Singleton* and *Milligan* "for the limited purposes" of preliminary injunction proceedings; set a hearing for January 4, 2022; and set prehearing deadlines. *Milligan* Doc. 40. The *Caster* Court then set a preliminary injunction hearing for January 4, 2022 and set the same prehearing deadlines that were set in *Singleton* and *Milligan*. *Caster* Doc. 40. All parties agreed to a consolidated preliminary injunction proceeding which permitted consideration of evidence in a combined fashion.

A preliminary injunction hearing commenced on January 4 and concluded on January 12, 2022. *Allen*, 143 S. Ct. at 1502. During the hearing, this Court "received live testimony from 17 witnesses, reviewed more than 1000 pages of briefing and

upwards of 350 exhibits, and considered arguments from the 43 different lawyers who had appeared in the litigation." *Id*.

We evaluated the *Milligan* and *Caster* Plaintiffs' statutory claims using the three-part test developed by the Supreme Court in *Gingles*, 478 U.S. 30. And we preliminarily enjoined Alabama from using the 2021 Plan. *Milligan* Doc. 107. We held that under controlling precedent, "the appropriate remedy is a congressional redistricting plan that includes either an additional majority-Black congressional district, or an additional district in which Black voters otherwise have an opportunity to elect a representative of their choice." *Id.* at 5. Because we issued an injunction on statutory grounds, we declined to decide the constitutional claims of the *Singleton* and *Milligan* Plaintiffs. *Id.* at 214–17.

Because "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt," we gave the Legislature the first opportunity to draw a new map. *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978) (White, J.); *Milligan* Doc. 107 at 6. The State appealed, and the Supreme Court stayed the injunction. *Allen*, 143 S. Ct. at 1502; *Merrill v. Milligan*, 142 S. Ct. 879 (2022).

On February 8, 2022, the *Singleton* Plaintiffs moved this Court for an expedited ruling on their constitutional claims. *Singleton* Doc. 104. All other parties opposed that motion, *see Singleton* Doc. 109; *Milligan* Doc. 135; *Caster* Doc. 127,

and we denied it on the ground that we should not decide any constitutional claims prematurely, *Singleton* Doc. 114.

On April 14, 2022, we held a status conference. *See Milligan* Doc. 143. Mindful that under Alabama law, the last date candidates may qualify with major political parties to participate in the 2024 primary election is November 10, 2023, *see* Ala. Code § 17-13-5(a), we directed the State to identify the latest date by which the Secretary of State must have a final congressional districting map to hold the 2024 election, *Milligan* Doc. 145. The State advised us that the Secretary needs the map "by early October." *Milligan* Doc. 147 at 3.

On November 21, 2022, this Court ordered the parties to meet and confer and file a joint report of their positions on discovery, scheduling, and next steps. *Milligan* Doc. 153. The parties timely filed a joint report and proposed a scheduling order, which we entered. *Milligan* Docs. 156, 157.

On February 8, 2023, we held another status conference. *See Milligan* Doc. 153. We again directed the State to identify the latest date by which the Secretary required a map to hold the 2024 election. *Milligan* Doc. 161. The State responded that a new plan would need to be approved by October 1, 2023, to provide time for the Secretary to reassign voters, print and distribute ballots, and otherwise conduct the election. *Milligan* Doc. 162 at 7.

On June 8, 2023, the Supreme Court affirmed the preliminary injunction in all

respects. *See generally Allen*, 143 S. Ct. 1487. The Supreme Court then vacated its stay. *Allen v. Milligan*, 143 S. Ct. 2607 (2023).

2. Remedial Proceedings

After the Supreme Court's ruling, this Court immediately set a status conference. *Milligan* Doc. 165. Before the conference, the State advised us that "the . . . Legislature intend[ed] to enact a new congressional redistricting plan that will repeal and replace the 2021 Plan" and requested that we delay remedial proceedings until July 21, 2023. *Milligan* Doc. 166 at 2.

During the conference, the parties indicated substantial agreement on the appropriate next steps. *Milligan* Doc. 168 at 4. We delayed remedial proceedings until July 21, 2023 to accommodate the Legislature's efforts; entered a briefing schedule for any objections if the Legislature enacted a new map; and alerted the parties that if a remedial hearing became necessary, it would commence on the date they suggested: August 14, 2023. *Id*. at 4–7.

On June 27, 2023, Governor Ivey issued a proclamation that a special session of the Legislature would convene to consider the congressional districting map. *Milligan* Doc. 173-1. That same day, the Committee met, elected its co-chairs, and held its first public hearing to receive comments on potential plans. *Milligan* Doc. 173 ¶ 2.

On July 13, 2023, the Committee met and re-adopted its previous redistricting

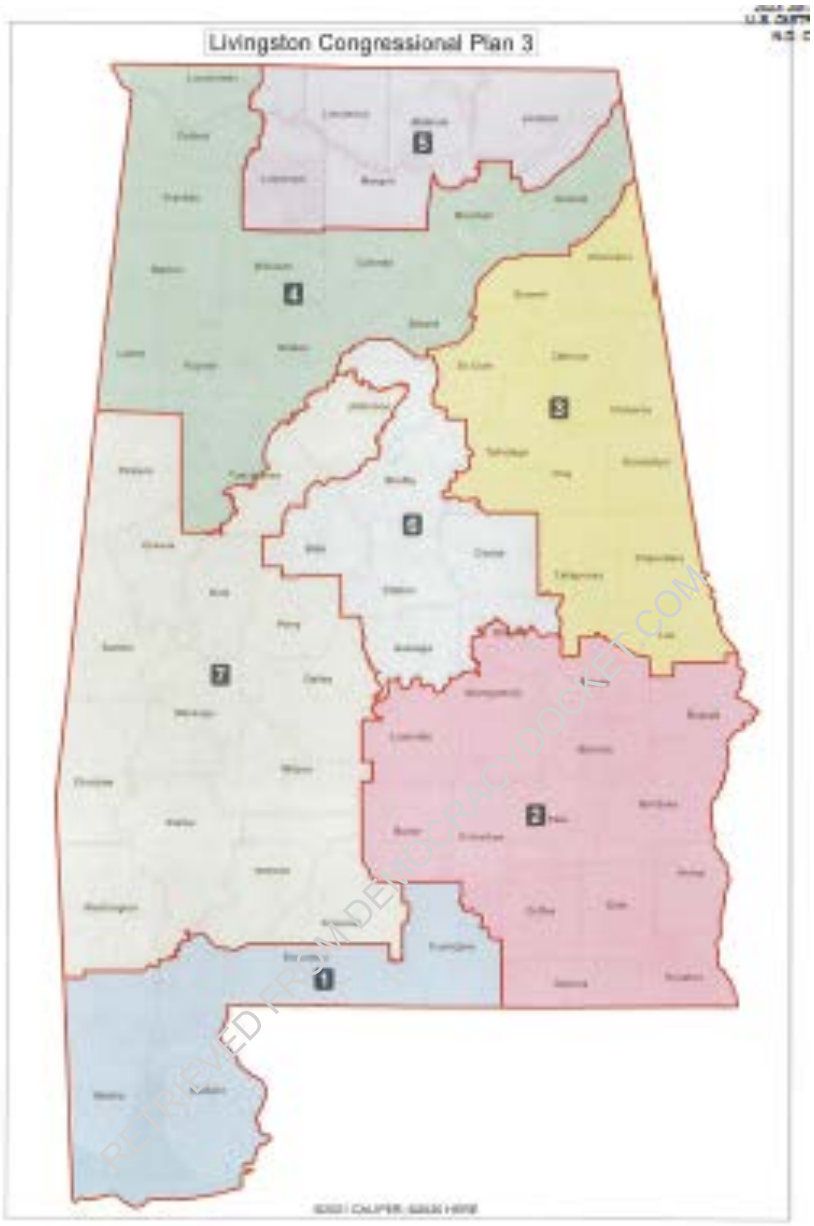
guidelines ("the guidelines"). *Milligan* Doc. 180 ¶ 1; *Milligan* Doc. 107 app. A; *Milligan* Doc. 88-23. That day, the Committee held a second public hearing to receive comments on proposed remedial plans. *Milligan* Doc. 180 ¶ 1.

The special session of the Legislature commenced on July 17, 2023. *See Milligan* Doc. 173-1. On July 20, 2023, the Alabama House of Representatives passed a congressional districting plan titled the "Community of Interest Plan." *Milligan* Doc. 251 ¶¶ 16, 22. That same day, the Alabama Senate passed a different plan, titled the "Opportunity Plan." *Id.* ¶¶ 19, 22. The next day, a six-person bicameral Conference Committee passed the 2023 Plan, which was a modified version of the Opportunity Plan. *Id.* ¶ 23. Later that day, the Legislature enacted the 2023 Plan. *Milligan* Doc. 186.

Although neither the 2021 Plan, nor the Community of Interest Plan, nor the Opportunity Plan was accompanied by any legislative findings, when the Legislature enacted the 2023 Plan, it was accompanied by eight pages of legislative findings. We append the legislative findings to this order as Appendix A.

Governor Ivey signed the 2023 Plan into law the same day. *Milligan* Doc. 251 ¶ 26; Ala. Code § 17-14-70. It appears below. The 2023 Plan keeps Mobile and Baldwin counties together in District 1 and combines much of the Black Belt in Districts 2 and 7.[7]

[7] The parties previously stipulated that the Black Belt "is named for the region's



fertile black soil. The region has a substantial Black population because of the many enslaved people brought there to work in the antebellum period. All the counties in the Black Belt are majority- or near majority-BVAP," where "BVAP" means Black share of the voting-age population. *Milligan* Doc. 53 ¶ 60. They further stipulated that the Black Belt includes eighteen "core counties" (Barbour, Bullock, Butler, Choctaw, Crenshaw, Dallas, Greene, Hale, Lowndes, Macon, Marengo, Montgomery, Perry, Pickens, Pike, Russell, Sumter, and Wilcox), and that five other counties (Clarke, Conecuh, Escambia, Monroe, and Washington) are "sometimes included." *Id.* ¶ 61.

Milligan Doc. 186-1 at 1.

The 2023 Plan, like the 2021 Plan enjoined by this Court, has only one majority-Black district. *Compare Milligan* Doc. 186-1 at 2, *with Milligan* Doc. 107 at 2–3. In the 2023 Plan, the Black share of the voting-age population ("BVAP") in District 7 is 50.65% (it was 55.3% in the 2021 Plan). *Compare Milligan* Doc. 186-1 at 2, *with Milligan* Doc. 53 ¶ 57. The district with the next largest BVAP is District 2. *Milligan* Doc. 251 ¶ 3. In District 2, Black Alabamians account for 39.93% of the voting age population (it was 30.6% in the 2021 Plan). *Compare Milligan* Doc. 186-1 at 2, *with Milligan* Doc. 53 ¶ 128.

On July 26, 2023, the parties jointly proposed a scheduling order for remedial proceedings. *Milligan* Doc. 193. We adopted it. *Milligan* Doc. 194.

On July 27, 2023, the *Singleton* Plaintiffs objected to the 2023 Plan. *Singleton* Doc. 147. The *Singleton* Plaintiffs assert that the 2023 Plan violates the Fourteenth Amendment because the districts are racially gerrymandered. *Id.* at 16–22. The *Singleton* Plaintiffs request that the Court enjoin Secretary Allen from using the 2023 Plan and order a remedy, such as their own plan, which plan they say is race-neutral, honors traditional districting principles, and gives Black voters an opportunity to elect candidates of their choice in two districts. *Id.* at 27–28.

Also on July 27, 2023, the United States filed a Statement of Interest "to assist th[is] Court in evaluating whether the 2023 Plan fully cures the likely Section 2

violation in the 2021 Plan." *Milligan* Doc. 199 at 20. "The United States expresses no view on any factual disputes," "nor on any legal questions other than those related to applying Section 2 to the proposed remedy in this case." *Id.* at 5. The United States asserts that if this Court "conclude[s] that the 2023 Plan fails to completely remedy the likely Section 2 violation in the 2021 Plan, it must assume the responsibility of devising and implementing a legally acceptable plan." *Id.* at 19.

The *Milligan* and *Caster* Plaintiffs also timely objected to the 2023 Plan. *Milligan* Doc. 200; *Caster* Doc. 179. The *Milligan* Plaintiffs assert that the 2023 Plan offers no greater opportunity for Black Alabamians to elect a candidate of their choice than the 2021 Plan offered. *Milligan* Doc. 200 at 16–23. The *Milligan* Plaintiffs further say that the events giving rise to the 2023 Plan raise constitutional concerns because evidence suggests that the 2023 Plan was drawn to discriminate against Black Alabamians. *Id.* at 23–26. The *Milligan* Plaintiffs also ask us to enjoin Secretary Allen from conducting the 2024 election based on the 2023 Plan and order the Court-appointed Special Master to devise a new plan. *Id.* at 26.

The *Caster* Plaintiffs likewise assert that the 2023 Plan does not remedy the Section Two violation because it fails to create an additional district in which Black voters have an opportunity to elect a candidate of their choice. *Caster* Doc. 179 at 7–11. The *Caster* Plaintiffs also request that the Court enjoin the 2023 Plan and proceed to a court-driven remedial process to ensure relief for the 2024 election. *Id.*

at 3, 11.

The Court held a status conference on July 31, 2023. *See Milligan* Doc. 194 at 3. Before that conference, the parties indicated substantial disagreement about the nature of remedial proceedings. *See Milligan* Docs. 188, 195, 196, 201. During the conference, the Court and the parties discussed (1) a motion filed by the *Milligan* and *Caster* Plaintiffs to clarify the role of the *Singleton* Plaintiffs, *Milligan* Doc. 188; *see also Milligan* Docs. 195, 196, 201; (2) the *Singleton* Plaintiffs' motion for a preliminary injunction, *Singleton* Doc. 147; and (3) next steps.

After that conference, the Court clarified that remedial proceedings would be limited to whether the 2023 Plan complies with the order of this Court, affirmed by the Supreme Court, and Section Two. *Milligan* Doc. 203 at 4. The Court further clarified that because the scope of the remedial hearing would be limited, the constitutional claims of the *Singleton* Plaintiffs would not be at issue. *Id.* at 5. The Court then set a remedial hearing in *Milligan* and *Caster* for August 14, 2023, *id.* at 3, and a preliminary injunction hearing in *Singleton* to commence immediately after the remedial hearing, *id.* at 6.

On August 3, 2023, the State moved for clarification of the scope of remedial proceedings. *Milligan* Doc. 205. All Plaintiffs responded. *Milligan* Doc. 210; *Caster* Doc. 190; *Singleton* Doc. 160. Also on August 3, 2023, Congresswoman Terri Sewell (who represents District 7) and members of the Congressional Black Caucus

of the United States Congress sought leave to file an *amici curiae* brief in support of the Plaintiffs, which we granted, *Milligan* Docs. 208, 232, 236. Congresswoman Sewell and members of the Congressional Black Caucus assert that the 2023 Plan is an insufficient remedy for the likely Section Two violation found by this Court. *Milligan* Doc. 236 at 5. They too assert that this Court "should enjoin [the 2023 Plan] and direct the Special Master to redraw a map that complies with the Voting Rights Act." *Id.* at 10.

On August 4, 2023, the State responded to the Plaintiffs' objections to the 2023 Plan. *See Milligan* Doc. 220. The State defends the 2023 Plan as prioritizing "to the fullest extent possible" three communities of interest: the Black Belt, the Gulf Coast, and the Wiregrass.[8] *Id.* at 9. The State further asserts that the 2023 Plan fairly applies traditional districting "principles of compactness, county lines, and communities of interest," and because the *Caster* and *Milligan* Plaintiffs' "alternative plans would violate the traditional redistricting principles given effect in the 2023 Plan, [their] § 2 claims fail." *Id.* at 9–10.

On August 6, 2023, we again clarified the scope of the remedial proceedings

[8] We already have described the Black Belt. *See supra* at n.7. When the State refers to the "Gulf Coast," it refers to Mobile and Baldwin counties. *See Milligan* Doc. 220-11 at 5. When the State refers to the "Wiregrass," it refers to an area in the southeast part of the state that includes Barbour, Coffee, Covington, Crenshaw, Dale, Geneva, Henry, Houston, and Pike counties. *See id.* at 8.

in *Milligan* and *Caster*. *Milligan* Doc. 222. We explained that the purpose of those remedial proceedings would be to determine whether the 2023 Plan remedies the likely Section Two violation found by this Court and affirmed by the Supreme Court. *Id*. at 8–9. We reiterated that the remedial proceedings would not relitigate the findings made in connection with the previous liability determination. *Id*. at 11.

On August 7, 2023, all Plaintiffs replied in support of their objections to the 2023 Plan. *See Milligan* Doc. 225; *Caster* Doc. 195. The replies share a common premise: that any alleged reliance by the Legislature on traditional districting principles does not absolve the Legislature of its obligation to cure the Section Two violation found by this Court and affirmed by the Supreme Court. *See Milligan* Doc. 225 at 12; *Caster* Doc. 195 at 7–8.

On August 9, 2023, the National Republican Redistricting Trust ("the Trust") moved for leave to file an *amicus curiae* brief in support of the 2023 Plan, which the Court granted. *See Milligan* Docs. 230, 232, 234. The Trust asserts that the "2023 Plan adheres to traditional districting principles better than any of the Plaintiffs' plans, maintaining communities of interest that the 2021 Plan did not." *Milligan* Doc. 234 at 7. The Trust urges this Court to reject the Plaintiffs' remedial plans. *Id.* at 25.

Later that day, the *Milligan* and *Caster* Plaintiffs moved *in limine* to exclude testimony from certain experts and "any and all evidence, references to evidence,

testimony, or argument relating to the 2023 Plan's maintenance of communities of interest." *Milligan* Doc. 233 at 1. The State responded. *Milligan* Doc. 245.

On August 11, 2023, certain state and local elected officials in Alabama moved for leave to file an *amici curiae* brief in support of the Plaintiffs, which the Court granted. *See Milligan* Docs. 255, 258, 260. The elected officials join in full the *Milligan* Plaintiffs' objections and assert that this Court should enjoin Secretary Allen from using the 2023 Plan on the same grounds that we enjoined the 2021 Plan. *Milligan* Doc. 260 at 5, 14–15.

We held a remedial hearing in *Milligan* and *Caster* on August 14, 2023. *See Milligan* Doc. 203. Based on the agreement of all parties, the Court considered all evidence admitted in either *Milligan* or *Caster*, including evidence admitted during the preliminary injunction hearing, in both cases unless counsel raised a specific objection. *Id.* at 4; *Caster* Doc. 182; Aug. 14 Tr. 61. After the hearing, we directed the parties to submit proposed findings of fact and conclusions of law on August 19, 2023, and they did so. *See Milligan* Docs. 267, 268; *Caster* Docs. 220, 221.

B. Factual and Legal Background

1. Constitutional and Statutory Provisions for Race In Redistricting

Article I, § 2, of the United States Constitution requires that Members of the House of Representatives "be apportioned among the several States . . . according to their respective Numbers" and "chosen every second Year by the People of the

several States." U.S. CONST. art. I, § 2. Each state's population is counted every ten years in a national census, and state legislatures rely on census data to apportion each state's congressional seats into districts.

Redistricting must comply with federal law. *Bartlett*, 556 U.S. at 7 (plurality opinion); *Reynolds v. Sims,* 377 U.S. 533, 554–60 (1964). At present, these cases concern a federal statutory requirement — Section Two, which 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.

52 U.S.C. § 10301.

A state violates Section Two "if its districting plan provides 'less opportunity' for racial minorities [than for other members of the electorate] 'to elect representatives of their choice.'" *Abbott*, 138 S. Ct. at 2315 (internal quotation marks

omitted) (quoting *LULAC*, 548 U.S. at 425).

"The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. "Such a risk is greatest where minority and majority voters consistently prefer different candidates and where minority voters are submerged in a majority voting population that regularly defeats their choices." *Allen*, 143 S. Ct. at 1503 (internal quotation marks omitted) (alterations accepted).

"[A] plaintiff may allege a § 2 violation in a single-member district if the manipulation of districting lines fragments [or cracks] politically cohesive minority voters among several districts or packs them into one district or a small number of districts, and thereby dilutes the voting strength of members of the minority population." *Shaw v. Hunt*, 517 U.S. 899, 914 (1996) ("*Shaw II*").

"For the past forty years," federal courts "have evaluated claims brought under § 2 using the three-part framework developed in [*Gingles*]." *Allen*, 143 S. Ct. at 1502–03. To prove a Section Two violation under *Gingles*, "plaintiffs must satisfy three preconditions." *Id.* at 1503 (internal quotation marks omitted). "First, the minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district." *Id.* (internal quotation marks

omitted). "A district will be reasonably configured . . . if it comports with traditional districting criteria, such as being contiguous and reasonably compact." *Id.* "Second, the minority group must be able to show that it is politically cohesive." *Id.* (internal quotation marks omitted). "And third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." *Id.* (internal quotation marks omitted).

"Finally, a plaintiff who demonstrates the three preconditions must also show, under the totality of circumstances, that the political process is not equally open to minority voters." *Id.* (internal quotation marks omitted). "Courts use factors drawn from a report of the Senate Judiciary Committee accompanying the 1982 amendments to the [Voting Rights Act] (the Senate [F]actors) to make the totality-of-the-circumstances determination." *Georgia State Conf. of NAACP v. Fayette County Bd. of Comm'rs*, 775 F.3d 1336, 1342 (11th Cir. 2015); *accord Johnson v. De Grandy*, 512 U.S. 997, 1010 n.9 (1994); *infra* at Part IV.B.4.

The Senate Factors include:

> (1) the history of voting-related discrimination in the State or political subdivision; (2) the extent to which voting in the elections of the State or political subdivision is racially polarized; (3) the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; (4) the exclusion of members of the minority group from candidate slating processes; (5) the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health,

> which hinder their ability to participate effectively in the political process; (6) the use of overt or subtle racial appeals in political campaigns; and (7) the extent to which members of the minority group have been elected to public office in the jurisdiction.

De Grandy, 512 U.S. at 1010 n.9 (quoting *Gingles*, 478 U.S. at 44–45) (numerals added). Further, the Senate Factors include (8) "evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and (9) that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous may have probative value." *Id.* (quoting *Gingles*, 478 U.S. at 45) (numeral added).

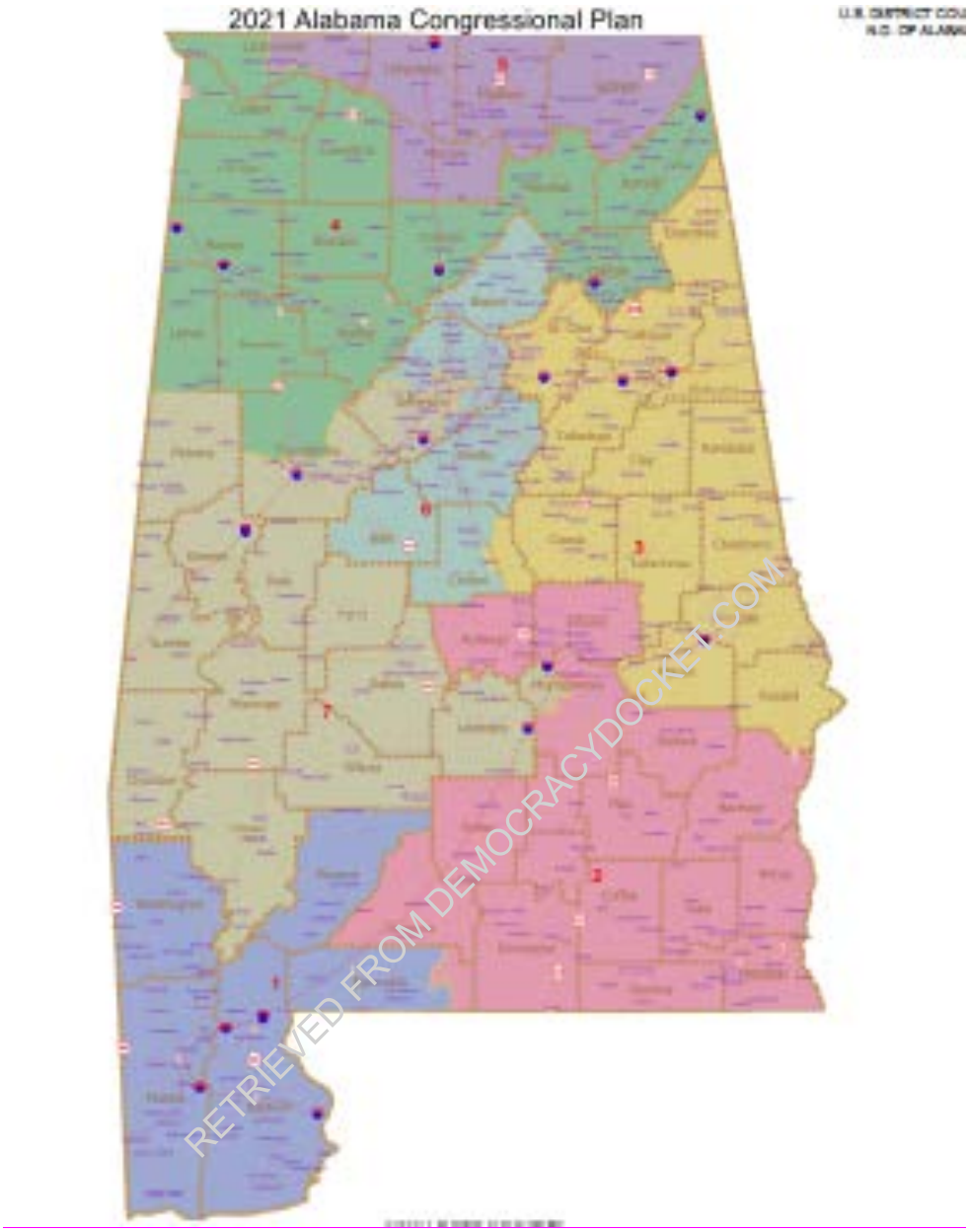
The Senate Factors are not exhaustive. "Another relevant consideration is whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area." *LULAC*, 548 U.S. at 426; *accord De Grandy*, 512 U.S. at 1000. When a plaintiff alleges vote dilution "based on a statewide plan," the proportionality analysis ordinarily is statewide. *LULAC*, 548 U.S. at 437–38. Although proportionality may be a "relevant consideration" under the controlling Supreme Court test, it cannot be dispositive. Section Two does not "establish[] a right to have members of a protected class elected in numbers equal to their proportion in the population," 52 U.S.C. § 10301, and the Supreme Court has described at length the legislative history of that proportionality disclaimer. *See Allen*, 143 S. Ct. at 1500–01.

Because "the Equal Protection Clause restricts consideration of race and the

[Voting Rights Act] demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to competing hazards of liability." *Abbott*, 138 S. Ct. at 2315 (internal quotation marks omitted). "In an effort to harmonize these conflicting demands, [the Supreme Court has] assumed that compliance with the [Voting Rights Act] may justify the consideration of race in a way that would not otherwise be allowed." *Id.*; *accord Cooper*, 581 U.S. at 292.

2. Congressional Redistricting in Alabama

Since 1973, Alabama has been apportioned seven seats in the United States House of Representatives. *Milligan* Doc. 53 ¶ 28. In all House elections held after the 1970 census and the 1980 census, Alabama elected all-white delegations. *Id.* ¶ 44. After the 1990 census, the Legislature failed to enact a congressional redistricting plan. *See Wesch*, 785 F. Supp. at 1494–95. Litigation ensued, and a federal court ultimately ordered elections held according to a plan that created one majority-Black district (District 7). *Wesch v. Folsom*, 6 F.3d 1465, 1467–68 (11th Cir. 1993); *Wesch*, 785 F. Supp. at 1498, 1581 app. A. In the 1992 election held using the court-ordered map, District 7 elected Alabama's first Black Congressman in over 90 years. *Milligan* Doc. 53 ¶ 44. District 7 remains majority-Black and in every election since 1992 has elected a Black Democrat. *Id.* ¶¶ 44, 47, 49, 58. After 2020 census data was released, Mr. Randy Hinaman prepared the 2021 Plan:



Milligan Doc. 70-2 at 40; *Milligan* Doc. 88-19.

3. These Lawsuits

Three groups of plaintiffs sued to stop the State from conducting the 2022 elections with the 2021 Plan. *Allen*, 143 S. Ct. at 1502. As relevant here, we discuss the Section Two cases:

a. *Milligan*

The *Milligan* Plaintiffs alleged that Section Two now requires two majority-Black or Black-opportunity congressional districts in Alabama.[9] The *Milligan* Plaintiffs asserted that the 2021 Plan reflected the Legislature's "desire to use . . . race to maintain power by packing one-third of Black Alabamians into [District 7] and cracking the remaining Black community." *Milligan* Doc. 1 ¶ 4.

To satisfy the first *Gingles* requirement, that Black voters as a group are "sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district." *Cooper*, 581 U.S. at 301 (internal quotation marks omitted). The *Milligan* Plaintiffs relied on the testimony of expert witness Dr. Moon Duchin. We found Dr. Duchin highly credible. *Milligan* Doc. 107 at 148–50.

Dr. Duchin opined in her report that because 27.16% of Alabama residents identified as Black on the 2020 Decennial Census, Black Alabamians are sufficiently numerous to constitute a majority in more than one congressional district. *Milligan* Doc. 68-5 at 5. Dr. Duchin testified that the 2021 Plan "pack[ed] Black population

[9] When we use the phrase "opportunity district" or "Black-opportunity," we mean a district in which a "meaningful number" of non-Black voters often "join[] a politically cohesive black community to elect" the Black-preferred candidate. *Cooper*, 581 U.S. at 303. We distinguish an opportunity district from a majority-Black district, in which Black people comprise "50 percent or more of the voting population and . . . constitute a compact voting majority" in the district. *Bartlett*, 556 U.S. at 19 (plurality opinion). For additional discussion, see *infra* at Part III.

into District 7 at an elevated level of over 55% BVAP, then crack[ed] Black population in Mobile, Montgomery, and the rural Black Belt across Districts 1, 2, and 3, so that none of them has more than about 30% BVAP." *Id.* at 6 fig.1; Tr. 564.[10]

As for compactness, Dr. Duchin included in her report a map that reflects the geographic dispersion of Black residents across Alabama. *Milligan* Doc. 68-5 at 12 fig.3. She opined that it is possible to draw two contiguous and reasonably compact majority-Black congressional districts; and she offered four illustrative plans ("the Duchin plans"). *Id.* at 7 fig.2. Dr. Duchin offered extensive analysis in her report and testimony during the preliminary injunction hearing about how her plans satisfied the one-person-one-vote rule, included contiguous districts, respected existing political subdivisions, and attempted to minimize county splits. *Id.* at 8; Tr. 586–90, 599, 626; *Milligan* Doc. 92-1.

Dr. Duchin also offered exhaustive analysis and testimony about the compactness of the districts in her plans. She described how she computed compactness scores using three metrics that are commonly cited in professional redistricting analyses: the Polsby-Popper score, the Reock score, and the cut-edges

[10] When we cite to the transcript from the 2022 preliminary injunction hearing, pincites are to the numbered pages of the transcript, not the CM/ECF pagination. *See Milligan* Doc. 105.

score. *Milligan* Doc. 68-5 at 9; Tr. 590–94.[11] Dr. Duchin provided average compactness scores for each of her plans on each of these metrics, *Milligan* Doc. 68-5 at 9, and testified, among other things, that all four of her plans were "superior to" and "significantly more compact than" the 2021 Plan using an average Polsby-Popper metric, *id.*; Tr. 593.

Dr. Duchin also testified that her plans respected the Black Belt as a community of interest as defined in the Legislature's 2021 redistricting guidelines. *See Milligan* Doc. 68-5 at 13; *Milligan* Doc. 88-23 at 2–3. Dr. Duchin observed that in the 2021 Plan, eight of the eighteen core Black Belt counties are "partially or fully excluded from majority-Black districts," while "[e]ach of the 18 Black Belt counties is contained in majority-Black districts in at least some" of her alternative plans. *Milligan* Doc. 68-5 at 13; *see also* Tr. 666–68. Ultimately, Dr. Duchin opined that the districts in her plans were "reasonably" compact. Tr. 594.

To satisfy the second and third *Gingles* requirements, that Black voters are "politically cohesive," and that each challenged district's white majority votes "sufficiently as a bloc to usually defeat [Black voters'] preferred candidate," *Cooper*, 581 U.S. at 302 (internal quotation marks omitted), the *Milligan* Plaintiffs relied on a racial polarization analysis conducted by expert witness Dr. Baodong Liu. We

[11] For an explanation of these metrics, *see Milligan* Doc. 107 at 61–62 n.9.

found Dr. Liu credible. *See Milligan* Doc. 107 at 174–175.

The *Milligan* Plaintiffs asked Dr. Liu to opine (1) whether racially polarized voting occurs in Alabama, and (2) whether such voting has resulted in the defeat of Black-preferred candidates in Alabama congressional elections. *Milligan* Doc. 68-1 at 1. Dr. Liu studied thirteen elections and opined that he observed racially polarized voting in all of them, which resulted in the defeat of Black-preferred candidates in all of them except those in District 7. *Milligan* Doc. 68-1 at 9, 11, 18. At the preliminary injunction hearing, Dr. Liu emphasized the clarity and starkness of the pattern of racially polarized voting that he observed. *See* Tr. 1271–76. He testified that racially polarized voting in Alabama is "very clear." Tr. 1293.

The *Milligan* Plaintiffs next argued that the Senate Factors "confirm[ed]" the Section Two violation. *Milligan* Doc. 69 at 16. The *Milligan* Plaintiffs emphasized Senate Factors 2 and 7 — racially polarized voting and a lack of Black electoral success — because in *Gingles* the Supreme Court flagged them as the "most important" factors, and because the parties' stipulations of fact established that they were not in dispute. *See id.* (citing *Milligan* Doc. 53 ¶¶ 44, 121, 167–69). The *Milligan* Plaintiffs asserted that Factors 1, 3, and 5 also are present because "Alabama has an undisputed and ongoing history of discrimination against Black people in voting, education, employment, health, and other areas." *Id.* at 17–18. The *Milligan* Plaintiffs relied on numerous fact stipulations, which we laid out at length

in the preliminary injunction. *See Milligan* Doc. 107 at 73–78 (quoting *Milligan* Doc. 53 ¶¶ 130–54, 157–65).

In addition to the stipulated facts, the *Milligan* Plaintiffs relied on the expert testimony of Dr. Joseph Bagley, whom we found credible. *See Milligan* Doc. 69 at 17–18; *Milligan* Doc. 107 at 185–187. Dr. Bagley opined about Senate Factors 1, 5, 6, 7, and 8, and he considered Factor 3 in connection with his discussion of Factor 1. *Milligan* Doc. 68-2 at 3–31. He opined that those Factors are present in Alabama and together mean that the 2021 Plan would "result in impairment of black voters' ability to participate fully and equitably in the political process of electing candidates of their choice." Tr. 1177.

For all these reasons, the *Milligan* Plaintiffs asserted that they were likely to prevail on their claim of vote dilution under the totality of circumstances.

b. *Caster*

The *Caster* Plaintiffs likewise alleged that the 2021 Plan violated Section Two because it "strategically cracks and packs Alabama's Black communities." *Caster* Doc. 3 ¶ 1. The *Caster* Plaintiffs also requested a remedy that includes two majority-Black or Black-opportunity districts. *Id.* at 31; *Caster* Doc. 97 ¶¶ 494–505.

To satisfy the first *Gingles* requirement, the *Caster* Plaintiffs relied on the expert testimony of Mr. Bill Cooper. *Caster* Docs. 48, 56, 65. We found Mr. Cooper highly credible. *See Milligan* Doc. 107 at 150–52. Mr. Cooper first opined that Black

Alabamians are sufficiently numerous to constitute a majority in more than one congressional district; Mr. Cooper explained that according to 2020 census data, Alabama's Black population increased by 83,618 residents, which constitutes a 6.53% increase in Alabama's Black population since 2010, which is 34% of the state's entire population increase since then. *Caster* Doc. 48 at 6–7. Mr. Cooper explained that there was a loss of 33,051 white persons during this time frame, a 1.03% decrease. *Id.* at 6 fig.1.

Mr. Cooper also opined that it is possible to draw two contiguous and reasonably compact majority-Black congressional districts; and he offered seven illustrative plans ("the Cooper plans"). *Caster* Doc. 48 at 20–36; *Caster* Doc. 65 at 2–6. Mr. Cooper testified that when he began his work, he expected to be able to draw illustrative plans with two reasonably compact majority-Black congressional districts because, at the same time the Legislature enacted the 2021 Plan, the Legislature also enacted a redistricting plan for the State Board of Education, which plan included two majority-Black districts. *Caster* Doc. 48 at 15–20; Tr. 433–37. Mr. Cooper testified that the Board of Education plan has included two Black-opportunity districts since 1996, and that continuously for those twenty-five years, more than half of Black voters in Alabama have lived in one of those two districts. *Caster* Doc. 48 at 16; Tr. 435. Mr. Cooper explained that the Board of Education plan splits Mobile County into two districts (with one district connecting Mobile

County to Montgomery County, and another connecting Mobile County to Baldwin County). Tr. 435–36; *Caster* Doc. 48 at 17 fig.8.

Like Dr. Duchin, Mr. Cooper offered extensive analysis and testimony about how his plans satisfied the one-person-one-vote rule, included contiguous districts, respected existing political subdivisions, and attempted to minimize county splits. Tr. 441–44, 446–47; *Caster* Doc. 48 at 22; *Caster* Doc. 65 at 5–6.

Also like Dr. Duchin, Mr. Cooper offered exhaustive analysis and testimony about the compactness of the districts in his plans. Mr. Cooper testified that he considered geographic compactness by "eyeballing" as he drew his plans, obtaining readouts of the Reock and Polsby-Popper compactness scores from the software program he was using as he drew, and trying to "make sure that [his] score was sort of in the ballpark of" the score for the 2021 Plan, which he used as a "possible yardstick." Tr. 444–46. He testified that all his plans either were at least as compact as the 2021 Plan, or they scored "slightly lower" than the 2021 Plan; he opined that all of his plans are "certainly within the normal range if you look at districts around the country." Tr. 446, 458; *accord Caster* Doc. 48 at 35–37.

Mr. Cooper further testified that he considered communities of interest in two ways: first, he considered "political subdivisions like counties and towns and cities," and second, he has "some knowledge of historical boundaries" and the Black Belt, so he considered the Black Belt. Tr. 447.

To satisfy the second and third *Gingles* requirements, that Black voters are "politically cohesive," and that each challenged district's white majority votes "sufficiently as a bloc to usually defeat [Black voters'] preferred candidate." *Cooper*, 581 U.S. at 302 (internal quotation marks omitted), the *Caster* Plaintiffs relied on a racial polarization analysis conducted by Dr. Maxwell Palmer, whom we found credible. *See Milligan* Doc. 107 at 174–176.

Dr. Palmer analyzed the extent to which voting is racially polarized in Congressional Districts 1, 2, 3, 6, and 7 because he was told that the proposed Black-opportunity districts would include voters from those districts. *Caster* Doc. 49 ¶ 9; Tr. 704. He examined how voters in those districts voted in the 2012, 2014, 2016, 2018, and 2020 general elections, as well as the 2017 special election for the United States Senate, and statewide elections for President, the United States Senate, Governor, Lieutenant Governor, Secretary of State, Attorney General, and several other offices. *Caster* Doc. 49 ¶¶ 6–7, 10; *see also* Tr. 707–13 (explaining how he used precinct-level data and analyzed the results on a district-by-district basis).

Dr. Palmer opined that "Black voters are extremely cohesive," *Caster* Doc. 49 ¶ 16, "[w]hite voters are highly cohesive," *id.* ¶ 17, and "[i]n every election, Black voters have a clear candidate of choice, and [w]hite voters are strongly opposed to this candidate," *id.* ¶ 18. He concluded that "[o]n average, Black voters supported their candidates of choice with 92.3% of the vote[,]" and "[o]n average, [w]hite

voters supported Black-preferred candidates with 15.4% of the vote, and in no election did this estimate exceed 26%." *Id.* ¶¶ 16–17. In his testimony, he characterized this evidence of racially polarized voting as "very strong." Tr. 701.

The *Caster* Plaintiffs then analyzed the Senate Factors, and they relied on judicial authorities, stipulated facts, and the testimony of Dr. Bridgett King, whom we found credible, *Milligan* Doc. 107 at 185–87. *Caster* Doc. 56 at 19–38. Dr. King opined that racially polarized voting in Alabama is "severe and ongoing," and "significantly and adversely impact[s] the ability of Black Alabamians to participate equally in the state's political process." *Caster* Doc. 50 at 4.

For all these reasons, the *Caster* Plaintiffs asserted that they were likely to prevail on their claim of vote dilution under the totality of circumstances.

c. The State

The State, in turn argued that the Committee properly started with the prior map and adjusted boundaries only as necessary to comply with the one-person, one-vote rule and serve traditional districting criteria. *See Milligan* Doc. 78 at 16. The State asserted that "nothing" in the Voting Rights Act "requires Alabama to draw two majority-black districts with slim black majorities as opposed to one majority-black district with a slightly larger majority." *Id.* at 17. We first discuss the State's position in *Milligan* during the preliminary injunction proceedings, and we then discuss the State's position in *Caster*.

i. The State's Arguments in *Milligan*

The State argued in *Milligan* that "[n]othing in Section 2 supports Plaintiffs' extraordinary request that this Court impose districts with Plaintiffs' surgically targeted racial compositions while jettisoning numerous traditional districting criteria." *Id.* at 18. The State relied on the expert testimony of Mr. Thomas M. Bryan. After an exhaustive credibility determination, we assigned "very little weight" to Mr. Bryan's testimony and found it "unreliable." *Milligan* Doc. 107 at 152–156; *see also infra* at Part IV.B.2.a.

The State argued that the Duchin plans did not respect the communities of interest in Alabama's Gulf Coast and the Wiregrass region. *Milligan* Doc. 78 at 82–84. The State objected to the Duchin plans on the ground that they "break up the Gulf Coast and scramble it with the Wiregrass," "separate Mobile and Baldwin Counties for the first time in half a century," and "split Mobile County for the first time in the State's history." *Id.* at 85. The State asserted that the Duchin plans did not respect the Black Belt because they split it between two districts. *Id.* at 85–86 n.15.

Mr. Bryan opined about compactness. He first opined that in each Duchin plan "compactness [wa]s sacrificed." *Milligan* Doc. 74-1 at 3. He later acknowledged and opined, however, that "Dr. Duchin's plans perform generally better *on average* than the [2021 Plan], although some districts are significantly less compact than

Alabama's." *Id.* at 19 (emphasis in original). And Mr. Bryan testified that he has "no opinion on what is reasonable and what is not reasonable" compactness. Tr. 979.

As for communities of interest, Mr. Bryan opined that Mobile and Baldwin counties are "inseparable." Tr. 1006. And he testified that the Black Belt is a community of interest and ultimately conceded that the Duchin plans had fewer splits than the 2021 Plan in the Black Belt. Tr. 1063–65.

Mr. Bryan explained his overall opinion that Dr. Duchin was able to "achieve a black majority population in two districts" only by "sacrific[ing]" traditional districting criteria. Tr. 874. He explained further his concern about "cracking and packing of incumbents." Tr. 874.

The State also offered testimony about the Gulf Coast community of interest from former Congressman Bradley Byrne, who testified that he did not want Mobile County to be split because he worried it would "lose[] its influence" politically. Tr. 1744.

The State briefly asserted that the *Milligan* Plaintiffs could not establish *Gingles* II and III because their racial polarization analysis was selective. *See Milligan* Doc. 78 at 97. But at the preliminary injunction hearing, the State offered the testimony of Dr. M.V. Hood, whom we found credible, *see Milligan* Doc. 107 at 176–77, and Dr. Hood testified that he and Dr. Liu "both found evidence of" racially polarized voting in Alabama. Tr. 1421.

The State then asserted that the "balance" of the Senate Factors favors the State because things in Alabama have "changed dramatically." *Milligan* Doc. 78 at 101–02 (internal quotation marks omitted) (quoting *Shelby County v. Holder*, 570 U.S. 529, 547 (2013)). As for Factor 1, the State acknowledged Alabama's "sordid history" and assert that it "should never be forgotten," but said that Alabama has "[o]vercome [i]ts [h]istory." *Id.* at 102. As for Factor 5, the State disputed that Black Alabamians still "bear the effects of discrimination," and that those effects "hinder their ability to participate effectively in the political process." *Id.* at 112 (internal quotation marks omitted) (quoting *Gingles*, 478 U.S. at 37). As for Factor 6, the State argued that historical evidence of racial appeals in campaigns is not probative of current conditions. *Id.* at 113–14. As for Factor 7, the State argued that minorities "have achieved a great deal of electoral success in Alabama's districted races for State offices." *Id.* at 116. As for Factor 8, the State vehemently disputed that elected officials in Alabama are not responsive to the needs of the Black community. *Id.* at 117–19. And as for Factor 9, the State urged that a procedure is tenuous only if it "markedly departs from past practices" and argued that the 2021 Plan was not tenuous because it did not meaningfully depart from the 2011 Plan. *Id.* at 119–20 (quoting S. Rep. 97-417 at 29 n.117).

The State did not offer any expert testimony about the Senate Factors.

ii. The State's Arguments in *Caster*

The State took much the same position in *Caster* that it took in *Milligan*, and Mr. Bryan attacked the Cooper plans for many of the same reasons he attacked the Duchin plans. We recite only a few relevant points.

First, with respect to *Gingles* I. On cross examination, Mr. Bryan conceded that he did not evaluate and had no opinion about whether the Cooper plans respected contiguity, or "the extent to which Mr. Cooper's plan[s] split political subdivisions." Tr. 931–32. When Mr. Bryan testified about compactness, he explained that he relied on compactness scores alone and did not "analyze any of the specific contours of the districts." Tr. 971.

After Mr. Bryan offered that testimony, the *Caster* Plaintiffs recalled his earlier testimony about how the Cooper plans "draw lines that appear to [him] to be based on race" and asked him where he offered any analysis "of the way in which specific districts in Mr. Cooper's illustrative plans are configured outside of their objective compactness scores." Tr. 972–73. Mr. Bryan testified that it "appears [he] may not have written text about that." Tr. 973.

When Mr. Bryan was asked about his opinions about communities of interest, he acknowledged that he did not analyze the Cooper plans based on communities of interest. Tr. 979–80.

As for *Gingles* II and III, Dr. Hood testified at the hearing that he had not

identified any errors in Dr. Palmer's work that would affect his analyses or conclusions. *See Caster* Doc. 66-2 at 2–34; Tr. 1407–11, 1449–50, 1456, 1459–61. Dr. Hood also testified that he did not dispute Dr. Palmer's conclusions that (1) "black voters in the areas he examined vote for the same candidates cohesively," (2) "black Alabamians and white Alabamians in the areas he examined consistently preferred different candidates," and (3) "the candidates preferred by white voters in the areas that he looked at regularly defeat the candidates preferred by black voters." Tr. 1445. Dr. Hood testified that he and Dr. Palmer both found a "substantive pattern" of racially polarized voting. Tr. 1448.

4. Our Findings and Conclusions on Liability

"After reviewing th[e] extensive record," we "concluded in a 227-page opinion that the question whether [the 2021 Plan] likely violated § 2 was not a close one." *Allen*, 143 S. Ct. at 1502 (internal quotation marks omitted); *accord Milligan* Doc. 107 at 195; *Caster* Doc. 101 at 204. "It did." *Allen*, 143 S. Ct. at 1502; *accord Milligan* Doc. 107 at 195; *Caster* Doc. 101 at 204.

The parties developed such an extensive record and offered such fulsome legal arguments that it took us nearly ninety pages to describe their evidence and arguments. *See Milligan* Doc. 107 at 52–139. Our findings of fact and conclusions of law consumed eighty more pages. *See id.* at 139–210. They were exhaustive, and we do not repeat them here in full. We highlight those findings and conclusions that

are particularly relevant to our remedial task.

In our *Gingles* I analysis, we first found that the Plaintiffs "established that Black voters as a group are sufficiently large . . . to constitute a majority in a second majority-minority legislative district." *Id.* at 146 (internal quotation marks omitted). We then found that the Plaintiffs established that Black voters as a group are sufficiently geographically compact to constitute a majority in a second reasonably configured district. *Id.* at 147–74.

We began our compactness analysis with credibility determinations about the parties' expert witnesses. We found the testimony of Dr. Duchin and Mr. Cooper "highly credible," *id.* at 148–51, and we "assign[ed] very little weight to Mr. Bryan's testimony," *id.* at 152–56. We did not take lightly the decision not to credit Mr. Bryan. We based that decision on two evaluations — one that examined his credibility relative to that of Dr. Duchin and Mr. Cooper, and one that was not relative. *See id.* We expressed concern about instances in which Mr. Bryan "offered an opinion without a sufficient basis (or in some instances any basis)," enumerated seven examples, reviewed other "internal inconsistencies and vacillations," and described a demeanor that "reflected a lack of concern for whether [his] opinion was well-founded." *Id.* at 153–56.

We then reviewed "compactness scores" to assess whether the majority-Black congressional districts in the Duchin plans and the Cooper plans were "reasonably"

compact. *Id.* at 157–59. We determined that regardless of whether we relied strictly on the opinions of Dr. Duchin and Mr. Cooper about the reasonableness of the scores, or compared the scores for the illustrative plans to the scores for the 2021 Plan, the result was the same: the Plaintiffs' plans established that Black voters in Alabama could comprise a second reasonably configured majority-Black congressional district. *Id.* at 159.

Next, we considered the "eyeball" test for compactness. *See id.* at 159–62. Based on information in Dr. Duchin's report that the State did not dispute, we found that "there are areas of the state where much of Alabama's Black population is concentrated, and that many of these areas are in close proximity to each other." *Id.* at 161. We then found that the majority-Black districts in the Duchin plans and the Cooper plans appeared reasonably compact because we did not see "tentacles, appendages, bizarre shapes, or any other obvious irregularities that would make it difficult to find that any District 2 could be considered reasonably compact." *Id.* at 162.

Next, we discussed whether the Duchin plans and the Cooper plans "reflect reasonable compactness when our inquiry takes into account, as it must, traditional districting principles such as maintaining communities of interest and traditional boundaries." *Id.* (internal quotation marks omitted); *accord id.* at 162–74. We found that the Duchin plans and the Cooper plans respected existing political subdivisions

"at least as well as the [2021] Plan," and in some instances better than the 2021 Plan. *See id.* at 163–64.

We then turned to communities of interest. Before making findings, we reiterated the rule "that a Section Two district that is **reasonably** compact and regular, taking into account traditional districting principles, need not also defeat a rival compact district in a beauty contest." *Id.* at 165 (emphasis in original) (internal quotation marks omitted) (alterations accepted) (quoting *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion)). We were "careful to avoid the beauty contest that a great deal of testimony and argument seemed designed to try to win." *Id.*

We found that the Black Belt is an important community of interest, and that it was split among four congressional districts in the 2021 Plan: "Districts 1, 2, and 3, where the *Milligan* plaintiffs assert that their votes are diluted, and District 7, which the *Milligan* plaintiffs assert is packed." *Id.* at 167. In the Duchin plans and the Cooper plans, the "overwhelming majority of the Black Belt" was in "just two districts." *Id.* at 168. We noted that Mr. Bryan conceded that the Duchin plans and Cooper plans performed better than the 2021 Plan for the Black Belt. *Id.*

We then found that "[t]ogether with our finding that the Duchin plans and the Cooper plans respect existing political subdivisions, our finding that [they] respect the Black Belt supports a conclusion that [they] establish reasonable compactness." *Id.* at 169.

Although "we need not consider how . . . Districts 2 and 7 might perform in a beauty contest against other plans that also respect communities of interest," we nevertheless discussed the State's argument that the Duchin plans and Cooper plans ignored the Gulf Coast community of interest. *Id.* at 169–71. We found the "record about the Gulf Coast community of interest . . . less compelling," and that the State "overstate[d] the point." *Id.* at 169–70. Only two witnesses testified about the Gulf Coast. We discounted Mr. Bryan, and we found that the other witness did not support the State's "overdrawn argument that there can be no legitimate reason to split Mobile and Baldwin Counties consistent with traditional redistricting criteria." *Id.* at 170. We noted that the Legislature split Mobile and Baldwin Counties in its districting plan for the State Board of Education. *Id.* at 171.

We found that the State "d[id] not give either the *Milligan* Plaintiffs or the *Caster* Plaintiffs enough credit for the attention Dr. Duchin and Mr. Cooper paid to traditional redistricting criteria." *Id.* at 173. We found that their illustrative plans satisfied the reasonable compactness requirement for *Gingles* I.

Our findings about *Gingles* II and III were comparatively brief because the underlying facts were not in dispute. *See id.* at 174–78. We credited the testimony of Doctors Liu (the *Milligan* Plaintiffs' expert), Palmer (the *Caster* Plaintiffs' expert), and Hood (the State's expert). *See id.* All three experts found evidence of racially polarized voting in Alabama. Based on their testimony, we found that Black

voters in Alabama "are politically cohesive," that the challenged districts' "white majority votes sufficiently as a bloc to usually defeat Black voters' preferred candidate," *id.* at 174 (internal quotation marks omitted) (alterations accepted), and that "voting in Alabama, and in the districts at issue in this litigation, is racially polarized" for purposes of *Gingles* II and III, *id.* at 177–78.

We then discussed the Senate Factors. We found that Senate Factors 2 (racially polarized voting) and 7 (the extent to which Black Alabamians have been elected to public office) "weigh[] heavily in favor of" the Plaintiffs. *Id.* at 178–81. We found that Factors 1, 3, and 5 (all of which relate to Alabama's history of official discrimination against Black Alabamians) "weigh against" the State. *Id.* at 182–88. And we found that Factor 6 (racial appeals in political campaigns) "weighs in favor of" the Plaintiffs but "to a lesser degree" than Senate Factors 2, 7, 1, 3, and 5. *Id.* at 188–92. We made no findings about Factors 8 and 9, *id.* at 192–93, and we found that no Factor weighed in favor of the State. *Id.* at 195.

Finally, we discussed proportionality. We explained our understanding that under the Voting Rights Act and binding Supreme Court precedent, it is relevant, but not dispositive. *Id.* at 193. We rejected the State's argument that the Plaintiffs' arguments were "naked attempts to extract from Section 2 a non-existent right to proportional . . . racial representation in Congress." *Id.* at 195 (internal quotation marks omitted). And we stated that we did not resolve the motion for preliminary

injunctive relief "solely (or even in the main) by conducting a proportionality analysis" because, consistent with precedent, we conducted a thorough *Gingles* analysis and considered proportionality only as "part and parcel of the totality of the circumstances." *Id.*

Ultimately, we explained five reasons why we did not regard the liability question as "a close one":

> (1) We have considered a record that is extensive by any measure, and particularly extensive for a preliminary injunction proceeding, and the *Milligan* plaintiffs have adduced substantial evidence in support of their claim. (2) There is no serious dispute that the plaintiffs have established numerosity for purposes of *Gingles* I, nor that they have established sharply racially polarized voting for purposes of *Gingles* II and III, leaving only conclusions about reasonable compactness and the totality of the circumstances dependent upon our findings. (3) In our analysis of compactness, we have credited the *Milligan* plaintiffs' principal expert witness, Dr. Duchin, after a careful review of her reports and observation of her live testimony (which included the first cross-examination of her that occurred in this case). (4) Separately, we have discounted the testimony of Defendants' principal expert witness, Mr. Bryan, after a careful review of his reports and observation of his live testimony (which included the first cross-examination of him that occurred in this case). (5) If the *Milligan* record were insufficient on any issue (and it is not), the *Caster* record, which is equally fulsome, would fill in the gaps: the *Caster* record (which by the parties' agreement also is admitted in *Milligan*), compels the same conclusion that we have reached in *Milligan*, both to this three-judge court and to Judge Manasco sitting alone.

Id. at 195–96. "Put differently," we said, "because of the posture of these consolidated cases, the record before us has not only once, but twice, established that the [2021] Plan substantially likely violates Section Two." *Id.* at 196.

5. Supreme Court Affirmance

The Supreme Court affirmed the preliminary injunction in a 5-4 decision. We discuss that decision in three parts. We first discuss the part of the opinion that is binding precedent because it was joined by a majority of the Justices ("the Opinion of the Supreme Court"); we then discuss the portion of the Chief Justice's opinion that is the opinion of four Justices; we then discuss Justice Kavanaugh's concurrence.

a. Controlling Precedent

The Supreme Court began by directly stating the ruling:

> In January 2022, a three-judge District Court sitting in Alabama preliminarily enjoined the State from using the districting plan it had recently adopted for the 2022 congressional elections, finding that the plan likely violated Section 2 of the Voting Rights Act. This Court stayed the District Court's order pending further review. After conducting that review, we now affirm.

Allen, 143 S. Ct. at 1498 (internal citations omitted). Next, the Supreme Court recited relevant portions of the history of the Voting Rights Act, redistricting in Alabama, and these cases. *Id.* at 1498–1502. The Supreme Court then reiterated its ruling: "The District Court found that plaintiffs demonstrated a reasonable likelihood of success on their claim that [the 2021 Plan] violates § 2. We affirm that determination." *Id.* at 1502.

Next, the Supreme Court restated the controlling legal standards, as set forth in *Gingles* and applied by federal courts "[f]or the past forty years." *Id.* at 1502–04.

The majority opinion then again restated the ruling: "[a]s noted, the District Court concluded that plaintiffs' § 2 claim was likely to succeed under *Gingles*. Based on our review of the record, we agree." *Id.* at 1504 (internal citations omitted).

The Supreme Court then reviewed our analysis of each *Gingles* requirement. *Id.* at 1504–06. The Supreme Court agreed with our analysis as to each requirement. It did not hold, suggest, or even hint that any aspect of our *Gingles* analysis was erroneous. *See id.*

"With respect to the first *Gingles* precondition," the Supreme Court held that we "correctly found that black voters could constitute a majority in a second district that was reasonably configured." *Id.* at 1504 (internal quotation marks omitted). The Supreme Court ruled that "[t]he plaintiffs adduced eleven illustrative maps—that is, example districting maps that Alabama could enact—each of which contained two majority-black districts that comported with traditional districting criteria." *Id.*

The Supreme Court then considered the Duchin plans. It observed that we "explained that the maps submitted by [Dr. Duchin] performed generally better on average than did [the 2021 Plan]." *Id.* (internal quotation marks omitted) (alterations accepted). Likewise, the Supreme Court considered the Cooper plans. The Supreme Court observed that Mr. Cooper "produced districts roughly as compact as the existing plan." *Id.* And that "none of plaintiffs' maps contained any tentacles, appendages, bizarre shapes, or any other obvious irregularities that would make it

difficult to find them sufficiently compact." *Id.* (internal quotation marks omitted).

Next, the Supreme Court held that the "Plaintiffs' maps also satisfied other traditional districting criteria. They contained equal populations, were contiguous, and respected existing political subdivisions . . . . Indeed, some of plaintiffs' proposed maps split the same number of county lines as (or even *fewer* county lines than) the State's map." *Id*. (emphasis in original). Accordingly, the Supreme Court "agree[d] with" us that "plaintiffs' illustrative maps strongly suggested that Black voters in Alabama could constitute a majority in a second, reasonably configured, district." *Id.* (internal quotation marks omitted) (alterations accepted).

Next, the Supreme Court turned to the State's argument "that plaintiffs' maps were not reasonably configured because they failed to keep together a traditional community of interest within Alabama." *Id.* The Supreme Court recited the State's definition of "community of interest," as well as its argument that "the Gulf Coast region . . . is such a community of interest, and that plaintiffs' maps erred by separating it into two different districts." *Id.*

The Supreme Court "d[id] not find the State's argument persuasive." *Id.* at 1505. The Supreme Court reasoned that "[o]nly two witnesses testified that the Gulf Coast was a community of interest," that "testimony provided by one of those witnesses was partial, selectively informed, and poorly supported," and that "[t]he other witness, meanwhile, justified keeping the Gulf Coast together simply to

preserve political advantage." *Id.* (internal quotation marks omitted) (alterations accepted). The Supreme Court concluded that we "understandably found this testimony insufficient to sustain Alabama's overdrawn argument that there can be no legitimate reason to split the Gulf Coast region." *Id.* (internal quotation marks omitted).

Next, the Supreme Court considered an alternative basis for its agreement with our *Gingles* I analysis: that "[e]ven if the Gulf Coast did constitute a community of interest . . . [we] found that plaintiffs' maps would still be reasonably configured because they joined together a different community of interest called the Black Belt." *Id.* The Supreme Court then described the reasons why the Black Belt is a community of interest — its "high proportion of black voters, who share a rural geography, concentrated poverty, unequal access to government services, . . . lack of adequate healthcare, and a lineal connection to the many enslaved people brought there to work in the antebellum period." *Id.* (internal quotation marks omitted).

The Supreme Court agreed with us again, ruling that we "concluded—correctly, under [Supreme Court] precedent—that [we] did not have to conduct a beauty contest between plaintiffs' maps and the State's. There would be a split community of interest in both." *Id.* (internal quotation marks omitted) (alterations accepted) (quoting *Vera*, 517 U.S. at 977 (plurality opinion)).

The Supreme Court then rejected the State's argument that the 2021 Plan

satisfied Section Two because it performed better than Plaintiffs' illustrative plans on a core retention metric — "a term that refers to the proportion of districts that remain when a State transitions from one districting plan to another." *Id.* The Supreme Court rejected that metric on the ground that the Supreme Court "has never held that a State's adherence to a previously used districting plan can defeat a § 2 claim" because "[i]f that were the rule, a State could immunize from challenge a new racially discriminatory redistricting plan simply by claiming that it resembled an old racially discriminatory plan." *Id.* "That is not the law," the Supreme Court made clear: Section Two "does not permit a State to provide some voters less opportunity . . . to participate in the political process just because the State has done it before." *Id.* (internal quotation marks omitted).

The Supreme Court next discussed the second and third *Gingles* requirements. The Supreme Court accepted our determination that "there was no serious dispute that Black voters are politically cohesive, nor that the challenged districts' white majority votes sufficiently as a bloc to usually defeat Black voters' preferred candidate." *Id.* (internal quotation marks omitted). The Supreme Court recited the relevant racial polarization statistics and noted that the State's expert "conceded that the candidates preferred by white voters in the areas that he looked at regularly defeat the candidates preferred by Black voters." *Id.* (internal quotation marks omitted).

In the last step of its review of our analysis, the Supreme Court concluded that

the Plaintiffs "had carried their burden at the totality of circumstances stage." *Id.* at 1505–06. The Supreme Court upheld our findings that "elections in Alabama were racially polarized; that Black Alabamians enjoy virtually zero success in statewide elections; that political campaigns in Alabama had been characterized by overt or subtle racial appeals; and that Alabama's extensive history of repugnant racial and voting-related discrimination is undeniable and well documented." *Id.* at 1506 (internal quotation marks omitted).

The Supreme Court concluded its review of our analysis by again stating its ruling: "We see no reason to disturb the District Court's careful factual findings, which are subject to clear error review and have gone unchallenged by Alabama in any event. Nor is there a basis to upset the District Court's legal conclusions. The Court faithfully applied our precedents and correctly determined that, under existing law, [the 2021 Plan] violated § 2." *Id.* (internal quotation marks and citation omitted).

We have carefully reviewed the Opinion of the Supreme Court and discern no basis to conclude that any aspect of our Section Two analysis was erroneous.

Next, the Supreme Court turned to arguments by the State urging the Supreme Court to "remake [its] § 2 jurisprudence anew," which the Supreme Court described as "[t]he heart of these cases." *Id.* The Supreme Court explained that the "centerpiece of the State's effort is what it calls the 'race-neutral benchmark.'" *Id.* The Supreme

Court then described the benchmark, found the argument "compelling neither in theory nor in practice," and discussed problems with the argument. *Id.* at 1507–10.

Of special importance to these remedial proceedings, the Supreme Court rejected the State's assertion that "existing § 2 jurisprudence inevitably demands racial proportionality in districting, contrary to" Section Two. *Id.* at 1508. "[P]roperly applied," the Supreme Court explained, "the *Gingles* framework itself imposes meaningful constraints on proportionality, as [Supreme Court] decisions have frequently demonstrated." *Id.* The Supreme Court then discussed three cases to illustrate how *Gingles* constrains rather than requires proportionality: *Shaw v. Reno,* 509 U.S. 630, 633–34 (1993); *Miller* v. *Johnson*, 515 U.S. 900, 906, 910–11 (1995); and *Vera*, 517 U.S. at 957 (plurality opinion). *Allen*, 143 S. Ct. at 1508–09.

"Forcing proportional representation is unlawful," the Supreme Court reiterated, and Section Two "never requires adoption of districts that violate traditional redistricting principles." *Id.* at 1509–10 (internal quotation marks omitted) (alterations accepted). Rather, its "exacting requirements . . . limit judicial intervention to those instances of intensive racial politics where the excessive role of race in the electoral process . . . denies minority voters equal opportunity to participate." *Id.* at 1510 (internal quotation marks omitted) (alterations accepted).

In Part III-B-1 of the opinion, the Supreme Court then discussed "how the race-neutral benchmark would operate in practice." *Id.* Justice Kavanaugh did not

join Part III-B-1. *See id.* at 1497. Part III-B-1 is the only part of the Chief Justice's opinion that Justice Kavanaugh did not join. *See id.* We discuss it separately in the next segment of our analysis. *See infra* at Part I.B.5.b.

Finally, the Supreme Court rejected the State's arguments that the Supreme Court "should outright stop applying § 2 in cases like these" because it does not apply to single-member redistricting and is unconstitutional as we applied it. *Allen*, 143 S. Ct. at 1514. The Supreme Court observed that it has "applied § 2 to States' districting maps in an unbroken line of decisions stretching four decades" and has "unanimously held that § 2 and *Gingles* certainly . . . apply to claims challenging single-member districts.'" *Id.* at 1515 (internal quotation marks omitted) (alterations accepted) (quoting *Growe v. Emison*, 507 U.S. 25, 40 (1993)). The Supreme Court reasoned that adopting the State's approach would require it to abandon this precedent. The Supreme Court explained its refusal to do so: "Congress is undoubtedly aware of our construing § 2 to apply to districting challenges. It can change that if it likes. But until and unless it does, statutory *stare decisis* counsels our staying the course." *Id.*

The Supreme Court then rejected as foreclosed by longstanding precedent the State's argument that Section Two is unconstitutional as we applied it. *Id.* at 1516–17. The Court affirmed our judgments in *Caster* and *Milligan*. *Id.* at 1517.

b. Part III-B-1 of the Chief Justice's Opinion

In Part III-B-1, the Chief Justice, in an opinion joined by three other Justices, explained why the State's race-neutral benchmark approach would "fare[] poorly" in practice.[12] *Id.* at 1510 (Roberts, C.J.). The four justices explained that Alabama's benchmark would "change existing law" by "prohibiting the illustrative maps that plaintiffs submit to satisfy the first *Gingles* precondition from being based on race." *Id.* (internal quotation marks omitted). The four justices then explained why they saw "no reason to impose such a new rule." *Id.* The four justices acknowledged that the "line between racial predominance and racial consciousness can be difficult to discern," and explained their view that "it was not breached here." *Id.* at 1510–11.

We have considered Part III-B-1 carefully, and we do not discern anything about it that undermines our conclusion that the 2023 Plan does not remedy the Section Two violation that we found and the Supreme Court affirmed.

c. Justice Kavanaugh's Concurrence

Justice Kavanaugh "agree[d] with the [Supreme] Court that Alabama's redistricting plan violates § 2 of the Voting Rights Act." *Allen*, 143 S. Ct. at 1517

[12] We distinguish Part III-B-1, the opinion of four justices, from a "plurality opinion." "A plurality opinion is one that doesn't garner enough appellate judges' votes to constitute a majority, but has received the greatest number of votes of any of the opinions filed, among those opinions supporting the mandate." Bryan A. Garner, et al, The Law of Judicial Precedent 195 (2016) (internal quotation marks and footnote omitted) (alterations accepted). All the other parts of the Chief Justice's opinion garnered five votes.

(Kavanaugh, J., concurring). He "wr[o]te separately to emphasize four points." *Id.* (Kavanaugh, J., concurring). *First,* Justice Kavanaugh emphasized that "the upshot of Alabama's argument is that the Court should overrule *Gingles*," "[b]ut the *stare decisis* standard for this Court to overrule a statutory precedent, as distinct from a constitutional precedent, is comparatively strict." *Id.* (Kavanaugh, J., concurring). Justice Kavanaugh observed that "[i]n the past 37 years . . . Congress and the President have not disturbed *Gingles*, even as they have made other changes to the Voting Rights Act." *Id.* (Kavanaugh, J., concurring).

"*Second*," Justice Kavanaugh emphasized, "Alabama contends that *Gingles* inevitably requires a proportional number of majority-minority districts, which in turn contravenes the proportionality disclaimer" in Section Two, but "Alabama's premise is wrong." *Id.* at 1517–18 (Kavanaugh, J., concurring). "*Gingles* does not mandate a proportional number of majority-minority districts." *Id.* at 1518 (Kavanaugh, J., concurring). Rather, "*Gingles* requires the creation of a majority-minority district only when, among other things, (i) a State's redistricting map cracks or packs a large and 'geographically compact' minority population and (ii) a plaintiff's proposed alternative map and proposed majority-minority district are 'reasonably configured'—namely, by respecting compactness principles and other traditional districting criteria such as county, city, and town lines." *Id.* (Kavanaugh, J., concurring).

Justice Kavanaugh explained further that if "*Gingles* demanded a proportional number of majority-minority districts, States would be forced to group together geographically dispersed minority voters into unusually shaped districts, without concern for traditional districting criteria such as county, city, and town lines," but "*Gingles* and [the Supreme] Court's later decisions have flatly rejected that approach." *Id.* (Kavanaugh, J., concurring).

"*Third*," Justice Kavanaugh explained, "Alabama argues that courts should rely on race-blind computer simulations of redistricting maps to assess whether a State's plan abridges the right to vote on account of race," but as the Supreme Court "has long recognized—and as all Members of [the Supreme] Court . . . agree[d in *Allen*]—the text of § 2 establishes an effects test, not an intent test." *Id.* (Kavanaugh, J., concurring).

"*Fourth*," Justice Kavanaugh emphasized, "Alabama asserts that § 2, as construed by *Gingles* to require race-based redistricting in certain circumstances, exceeds Congress's remedial or preventive authority," but "the constitutional argument presented by Alabama is not persuasive in light of the Court's precedents." *Id.* at 1519 (Kavanaugh, J., concurring).

Justice Kavanaugh reiterated that he "vote[d] to affirm" and "concur[red] in all but Part III–B–1 of the Court's opinion." *Id.* (Kavanaugh, J., concurring).

***

The State argues that Part III-B-1 tells us that only a plurality of Justices "concluded that at least some of the plans drawn by Bill Cooper did not breach the line between racial consciousness and racial predominance." *Milligan* Doc. 267 ¶ 39 (internal quotation marks omitted) (alterations accepted). The State overreads Part III-B-1 as leaving open for relitigation the question whether the Plaintiffs submitted at least one illustrative remedial plan in which race did not play an improper role.

The affirmance tells us that a majority of the Supreme Court concluded that the Plaintiffs satisfied their burden under *Gingles* I. This necessarily reflects a conclusion that the Plaintiffs submitted at least one illustrative map in which race did not play an improper role. Justice Kavanaugh's concurrence is to the same effect — Justice Kavanaugh did not suggest, let alone say, that he "vote[d] to affirm" despite finding that the Plaintiffs submitted no illustrative map that properly considered race. What Part III-B-1 tells us — and no more — is that only four Justices agreed with every statement in that Part.

C. Remedial Proceedings

We first discuss the Plaintiffs' objections to the 2023 Plan and the State's defense. We then discuss the parties' stipulations of fact and the remedial hearing.

1. The *Milligan* Plaintiffs' Objections

The *Milligan* Plaintiffs object to the 2023 Plan on the ground that it "ignores this Court's preliminary injunction order and instead perpetuates the Voting Rights

Act violation that was the very reason that the Legislature redrew the map." *Milligan* Doc. 200 at 6. The *Milligan* Plaintiffs assert that the 2023 Plan does not remedy the Section Two violation we found because it does not include an additional opportunity district. *Id.* They argue that District 2 is not an opportunity district because the performance analyses prepared by Dr. Liu and the State indicate that "Black-preferred candidates in the new CD2 will continue to lose 100% of biracial elections . . . by 10%-points on average." *Id.* at 6–7 (citing *Milligan* Doc. 200-2 at 4 tbl.2).

The *Milligan* Plaintiffs make three arguments to support their objection. *First*, the *Milligan* Plaintiffs argue that the 2023 Plan fails to remedy the Section Two violation we found because the 2023 Plan itself violates Section Two and dilutes Black votes. *Id.* at 16–19. The *Milligan* Plaintiffs contend that the 2023 Plan "fails th[e] § 2 remedial analysis for the same reasons its 2021 Plan did," because it "permit[s] the white majority voting as a bloc in the new CD2 to easily and consistently defeat Black-preferred candidates." *Id.* at 17.

The *Milligan* Plaintiffs first rely on the State's evidence to make their point. The Alabama Performance Analysis "found that *not once* in seven elections from 2018 to 2020 would Black voters' candidates overcome white bloc voting to win in CD2." *Id.* at 18. And Dr. Liu's[13] analysis of 11 biracial elections in District 2

[13] The *Milligan* Plaintiffs relied on testimony from Dr. Liu during the preliminary

between 2014 and 2022 "shows zero Black electoral successes, with an average margin of defeat of over 10 percentage points," *id.*, because "voting is highly racially polarized," *Milligan* Doc. 200-2 at 1. Thus, the *Milligan* Plaintiffs say, "the new CD2 offers no more opportunity than did the old CD2." *Milligan* Doc. 200 at 19.

Second, the *Milligan* Plaintiffs argue that the legislative findings that accompany the 2023 Plan perpetuate the Section Two violation and contradict conclusions that we and the Supreme Court drew based on the evidence. *See id.* at 20–23. The *Milligan* Plaintiffs offer evidence to rebut the State's suggestion that there can be no legitimate reason to split Mobile and Baldwin counties: (1) a declaration by Alabama Representative Sam Jones, the first Black Mayor of Mobile, who "explains the many economic, cultural, religious, and social ties between much of Mobile and the Black Belt, in contrast to Baldwin County, which shares 'little of these cultural or community ties' with Mobile," *id.* at 22 (quoting *Milligan* Doc. 200-9 ¶ 15); and (2) an expert report prepared by Dr. Bagley,[14] who contrasts the "'intimate historical and socioeconomic ties' that the 'City of Mobile and the northern portion of Mobile County, including Prichard, have . . . with the Black Belt,'" with the "'ahistorical' effort to treat the Wiregrass or 'Mobile and Baldwin

injunction proceedings, and we found him credible. *Milligan* Doc. 107 at 174–75.

[14] The *Milligan* Plaintiffs relied on expert testimony from Dr. Bagley about the Senate Factors during the preliminary injunction proceedings, and we found him credible. *See Milligan* Doc. 107 at 78–81 and 185–87.

Counties as an inviolable'" community of interest, *id.* (quoting *Milligan* Doc. 200-15 at 1).

Further, the *Milligan* Plaintiffs urge that under binding precedent, we cannot defer to a redistricting policy of a state if it perpetuates vote dilution. *See id.* at 20 (citing *Allen*, 143 S. Ct. at 1505, and *LULAC*, 548 U.S. at 440–41).

The *Milligan* Plaintiffs assail the legislative findings on the grounds that they "contradict the Committee's own recently readopted guidelines, were never the subject of debate or public scrutiny, ignored input from Black Alabamians and legislators, and simply parroted attorney arguments already rejected by this Court and the Supreme Court." *Id.* at 20. The *Milligan* Plaintiffs observe that although the legislative findings prioritize as "non-negotiable" rules that there cannot be "more than six splits of county lines" and that the Black Belt, Gulf Coast, and Wiregrass be kept together "to the fullest extent possible," the guidelines prioritize compliance with Section Two over those rules. *Id.* at 20–21 (citing *Milligan* Doc. 200-4, Section 1, Findings 3(d), 3(e), 3(g)(4)(d), and *Milligan* Doc. 107 at 31) (internal quotation marks omitted). The *Milligan* Plaintiffs also observe that the guidelines did not set an "arbitrary ceiling" on the number of county splits and that the legislative findings "redefine[] 'community of interest.'" *Id.* at 21.

The *Milligan* Plaintiffs argue that the State ignores the Supreme Court's finding that the Duchin and Cooper plans "comported with traditional districting

criteria" even though they split Mobile and Baldwin counties. *Id.* at 21 (internal quotation marks omitted). And the *Milligan* Plaintiffs argue that in any event, the 2023 Plan does not satisfy the legislative finding that the specified communities must be kept together "to the fullest extent possible" because only the Gulf Coast is kept together, while the Black Belt remains split in a way that dilutes Black votes in District 2. *Id.* at 22 (internal quotation marks omitted).

Third, the *Milligan* Plaintiffs argue that the 2023 Plan raises constitutional concerns because it "may be" the product of intentional discrimination. *Id.* at 23–26. The *Milligan* Plaintiffs rest this argument on the "deliberate failure to remedy the identified [Section Two] violations"; white legislators' efforts to "cut out Black members on the Reapportionment Committee" from meaningful deliberation on the Committee's maps; public statements by legislators about their efforts to draw the 2023 Plan to maintain the Republican majority in the United States House of Representatives and convince one Supreme Court Justice to "see something different"; and the established availability of "less discriminatory alternative maps." *Id.* at 24–25 (internal quotation marks omitted).

The *Milligan* Plaintiffs ask that the Court enjoin Secretary Allen from using the 2023 Plan and direct the Special Master to draw a remedial map. *Id.* at 26.

2. The *Caster* Plaintiffs' Objections

The *Caster* Plaintiffs assert that "Alabama is in open defiance of the federal

courts." *Caster* Doc. 179 at 2. They argue that the 2023 Plan "does not even come close to giving Black voters an additional opportunity to elect a candidate of their choice" because, like the 2021 Plan, it contains just one majority-Black district and "fails to provide an opportunity for Black voters to elect their preferred candidates in a second congressional district." *Id.* at 2, 8–9.

The *Caster* Plaintiffs rely on a performance analysis Dr. Palmer[15] prepared to examine District 2 in the 2023 Plan. *See id.* at 9–10; *Caster* Doc. 179-2. Dr. Palmer analyzed 17 statewide elections between 2016 and 2022 to evaluate the performance of Black-preferred candidates in District 2; he found "strong evidence of racially polarized voting" and concluded that Black-preferred candidates would have been defeated in 16 out of 17 races (approximately 94% of the time) in the new District 2. *Caster* Doc. 179-2 at 3, 6.

The *Caster* Plaintiffs urge us to ignore as irrelevant the discussion in the legislative findings about communities of interest. They contend that we and the Supreme Court already have found the State's arguments about communities of interest "'insufficient to sustain' Alabama's failure to provide an additional minority opportunity district." *Caster* Doc. 179 at 10 (quoting *Allen*, 143 S. Ct. at 1504–05).

If we consider the legislative findings, the *Caster* Plaintiffs identify a

[15] The *Caster* Plaintiffs relied on testimony from Dr. Palmer during the preliminary injunction proceedings, and we found him credible. *See Milligan* Doc. 174–76.

"glaringly absent" omission: "*any* discussion of the extent to which [the 2023 Plan] provides Black voters an opportunity to elect in a second congressional district." *Id.* at 11 (emphasis in original). According to the *Caster* Plaintiffs, the failure of the Legislature to explain how the 2023 Plan "*actually complies* with" Section Two is telling. *Id.* (emphasis in original).

The *Caster* Plaintiffs, like the *Milligan* Plaintiffs, ask us to enjoin Secretary Allen from using the 2023 Plan and "proceed to a judicial remedial process to ensure . . . relief in time for the 2024 election." *Id.*

3. The State's Defense of the 2023 Plan

At its core, the State's position is that even though the 2023 Plan does not contain an additional opportunity district, the Plaintiffs' objections fail under *Allen* because the 2023 Plan "cures the purported discrimination identified by Plaintiffs" by "prioritiz[ing] the Black Belt to the fullest extent possible . . . while still managing to preserve long-recognized communities of interest in the Gulf and Wiregrass." *Milligan* Doc. 220 at 9. The State contends that the "2023 Plan improves on the 2021 Plan and all of Plaintiffs' alternative plans by unifying the Black Belt while also respecting the Gulf and Wiregrass communities of interest." *Id.* at 27.

According to the State, "Plaintiffs cannot produce an alternative map with a second majority-Black district without splitting at least two of those communities of interest," so their Section Two challenge fails. *Id.* at 9. The State leans heavily on

the statement in *Allen* that Section Two "never require[s] adoption of districts that violate traditional redistricting principles." 143 S. Ct. at 1510 (internal quotation marks omitted).

The State argues that it is not in "defiance" of a court order because "[t]here are many ways for a State to satisfy § 2's demand of 'equally open' districts." *Milligan* Doc. 220 at 9. The State contends that the Plaintiffs "now argue that § 2 requires this Court to adopt a plan that divides communities of interest in the Gulf and Wiregrass to advance racial quotas in districting, but *Allen* forecloses that position." *Id*. at 10.

The State makes four arguments in defense of the 2023 Plan. *First*, the State argues that the 2023 Plan remedies the Section Two violation we found because the 2023 Plan complies with Section Two. *Id.* at 29. The State begins with the premise that it "completely remedies a Section 2 violation . . . by enacting *any* new redistricting legislation that complies with Section 2." *Id.* (emphasis in original). The State then reasons that the Plaintiffs must prove that the 2023 Plan is not "equally open." *Id.* at 31 (internal quotation marks omitted). The State argues that our "assessment," *id.* at 32, that "any remedial plan will need to include two districts in which Black voters either comprise a voting-age majority or something quite close to it," *Milligan* Doc. 107 at 6, was "'based on the [2021] Legislature's redistricting guidelines'" and "'choices that the [2021] Plan made,' all of which came *before*" the

2023 Plan, *Milligan* Doc. 220 at 32 (emphasis in original) (quoting *Milligan* Doc. 7 at 149, 151).

The States cites *Dillard v. Crenshaw County*, 831 F.2d 246, 250 (11th Cir. 1987), to say that we cannot focus exclusively on evidence about the 2021 Plan to evaluate whether the 2023 Plan is a sufficient remedy. *Milligan* Doc. 220 at 34–35 ("The evidence showing a violation in an *existing* election scheme may not be completely coextensive with a *proposed* alternative." (emphasis in original)).

The State contends that the 2023 Plan remedied the discriminatory effects of the 2021 Plan by applying traditional redistricting principles "as fairly" to majority-Black communities in the Black Belt and Montgomery "as to the Gulf and the Wiregrass." *Id.* at 33. The State claims that the 2023 Plan is "entitled to the presumption of legality" and "the presumption of good faith," and is governing law unless it is found to violate federal law. *Id.* at 36–37.

Second, the State asserts that the 2023 Plan complies with Section Two, and Plaintiffs cannot produce a reasonably configured alternative map. *See id.* at 37–60. The State urges that neither we nor the Supreme Court "ever said that § 2 requires the State to subordinate 'nonracial communities of interest' in the Gulf and Wiregrass to Plaintiffs' racial goals." *Id.* at 38. The State contends that the Plaintiffs cannot satisfy *Gingles* I because they did not offer a plan that "meet[s] or beat[s]" the 2023 Plan "on the traditional principles of compactness, maintaining

communities of interest, and maintaining political subdivisions that are adhered to in the State's plan." *Id.* at 38–39 (internal quotation marks omitted). "The focus now is on the 2023 Plan," the State says, and the Plaintiffs cannot lawfully surpass it. *Id.* at 40–41.

As for communities of interest, the State asserts that the 2023 Plan "resolves the concerns about communities of interest that Plaintiffs said was 'the heart' of their challenge to the 2021 Plan." *Id.* at 41. The State says that the Supreme Court's ruling that it was "not persuaded that the Gulf was a community of interest" would "surprise Alabamians and has been answered by the legislative record for the 2023 Plan." *Id.* at 41–42. The State claims that its argument on this issue is beyond dispute because the 2023 Plan "answers Plaintiffs' call to unify the Black Belt into two districts, without sacrificing indisputable communities of interest in the Gulf and Wiregrass regions." *Id.* at 42. The State contends that "[t]here can be no dispute that the 2023 Plan's stated goal of keeping the Gulf Coast together and the Wiregrass region together is a legitimate one, and § 2 does not (and cannot) require the State to disregard that legitimate race-neutral purpose in redistricting." *Id.* at 43. And the State contends, quoting the principal dissent in *Allen*, that the Gulf Coast is "indisputably a community of interest." *Id.* at 44 (internal quotation marks omitted) (alterations accepted).

The State offers two bodies of evidence to support its assertions about

communities of interest: (1) the legislative findings that accompanied the 2023 Plan, and (2) evidence about the Gulf Coast and the Wiregrass that the Legislature considered in 2023. *Id.* at 44–50. Based on this evidence, the State concludes that this is "no longer a case in which there would be a split community of interest in both the State's plan and Plaintiffs' alternatives," and "Plaintiffs will not be able to show that there is a plan on par with the 2023 Plan that also creates an additional reasonably configured majority-Black district." *Id.* at 51 (internal quotation marks omitted) (alterations accepted).

As for compactness and county splits, the State asserts that "each of Plaintiffs' alternative maps fails to match the 2023 Plan on compactness, county splits, or both." *Id.* at 56. The State argues that "a Plaintiff cannot advocate for a less compact plan for exclusively racial reasons." *Id.* at 57. The State urges us to disregard our previous finding that the Plaintiffs adduced maps that respected the guidelines because "evidence about the 2021 Plan based on its 2021 principles does not shine light on whether the 2023 Plan has discriminatory effects." *Id.*

The State relies on the expert report of Mr. Sean Trende, who "assessed the 2023 Plan and each of Plaintiffs' alternative plans based on the three compactness measures Dr. Duchin used in her earlier report." *Id.* Mr. Trende concluded that "the 2023 Plan measures as more compact" on all three scores "than Duchin Plans A, C, and D" and all the Cooper plans. *Id.*; *see also Milligan* Doc. 220-12 at 6–11. Mr.

Trende concedes that on two of the measures (Polsby-Popper and Cut Edges), the Duchin Plan B ties or beats the 2023 Plan, and on one of the measures (Cut Edges), a map that the *Milligan* and *Caster* Plaintiffs submitted to the Committee during the 2023 legislative process ("the VRA Plan")[16] ties the 2023 Plan. *See Milligan* Doc. 220 at 57. The State argues that Duchin Plan B and the VRA Plan "still fail under *Allen* because they have more county splits" (seven) than the 2023 Plan has (six). *Id.* at 58.

The State claims that if "Plaintiffs' underperforming plans could be used to replace a 2023 Plan that more fully and fairly applies legitimate principles across the State, the result will be . . . affirmative action in redistricting," which would be unconstitutional. *Id.* at 59–60.

Third, the State urges us to reject the Plaintiffs' understanding of an opportunity district on constitutional avoidance grounds. *See id.* at 60–68. The State begins with the undisputed premise that under Section Two, a remedial district need not be majority-Black. *Id.* at 60. The State then argues that nothing in *Allen* could "justify . . . replacing the 2023 Plan with Plaintiffs' preferred alternatives that elevate

[16] The *Milligan* and *Caster* Plaintiffs do not offer the VRA Plan in this litigation as a remedial map for purposes of satisfying *Gingles* I or for any other purpose. *See* Aug. 14 Tr. 123. It is in the record only because they proposed it to the Committee and the State's expert witness, Mr. Bryan, prepared a report that includes statements about it. *See Milligan* Doc. 220-10 at 53, *discussed infra* at Part IV.B.2.a.

the Black Belt's demographics over its historical boundaries." *Id.* at 61. The State then argues that "*all* race-based government action must satisfy strict scrutiny," that "[f]orcing proportional representation is not a compelling governmental interest," and that "sacrificing neutral [redistricting] principles to race is unlawful." *Id*. at 63 (emphasis in original) (internal quotation marks omitted).

The State argues that Plaintiffs' interpretation of Section Two contravenes "two equal protection principles: the principle that race can never be used as a negative or operate as a stereotype and the principle that race-based action can't extend indefinitely into the future." *Id.* at 64–67. The State says that the Plaintiffs' position "depends on stereotypes about how minority citizens vote as groups . . . and not on identified instances of past discrimination." *Id.* at 68.

In their *fourth* argument, the State contends that we should reject the *Milligan* Plaintiffs' intentional discrimination argument as cursory and because there is an "obvious alternative explanation for the 2023 Plan: respect for communities of interest." *Id.* at 68–71 (internal quotation marks omitted). And the State says the *Milligan* Plaintiffs "rely on the complaints of Democrats in the Legislature." *Id.* at 70.

The State submitted with its brief numerous exhibits, including the 2023 Plan, transcripts of the Committee's public hearings, a supplemental report prepared by Mr. Bryan, Mr. Trende's report, and materials from the legislative process about two

of the three communities of interest they urge us to consider: the Gulf Coast and the Wiregrass. *See Milligan* Docs. 220-1–220-19.

The State cites Mr. Bryan's 2023 report four times, and three of those are in reference to the VRA Plan. *See Milligan* Doc. 220 at 21 (in the "Background" section of the brief, to describe how the VRA Plan treats Houston County); *id.* (also in the "Background" section of the brief, to say that in the VRA Plan, the BVAP for District 2 is 50%, and the BVAP for District 7 is 54%); *id.* at 58 (in the constitutional avoidance argument, to assert that the VRA Plan splits counties "along racial lines, in service of hitting a racial target"). The fourth citation was as evidence that District 2 in the 2023 Plan has a BVAP of 39.93%, which is a stipulated fact. *See id.* at 28; *Milligan* Doc. 251 ¶ 4.

Nowhere does the State argue (or even suggest) that District 2 in the 2023 Plan is (or could be) an opportunity district.

4. The Plaintiffs' Replies

a. The *Milligan* Plaintiffs

The *Milligan* Plaintiffs reply that it is "undisputed and dispositive" that the 2023 Plan "offers no new opportunity district." *Milligan* Doc. 225 at 2. The *Milligan* Plaintiffs accuse the State of ignoring the finding by us and the Supreme Court that they already have satisfied *Gingles* I, and of "try[ing] to justify the 2023 Plan through newly contrived [legislative] 'findings' that perpetuate the [Section Two] violation

and contradict their own guidelines." *Id.*

The *Milligan* Plaintiffs assert that the State "cannot . . . cite a single case in which a court has ruled that a remedial plan that fails to meaningfully increase the effective opportunity of minority voters to elect their preferred representatives is a valid [Section Two] remedy." *Id.* at 2–3.

The *Milligan* Plaintiffs distinguish their claim of vote dilution, for which they say the remedy is an additional opportunity district, from a racial gerrymandering claim, for which the remedy is "merely to undo a specific, identified racial split regardless of electoral outcomes." *Id.* at 4. The *Milligan* Plaintiffs say that the State's arguments about unifying the Black Belt fail to appreciate this distinction. *Id.*

The *Milligan* Plaintiffs resist the State's reliance on *Dillard* to reset the *Gingles* analysis. *Id.* at 5. They say the State misreads *Dillard*, which involved a complete reconfiguration of the electoral mechanism from an at-large system to a single-member system with an at-large chair. *See id.* (citing *Dillard*, 831 F.2d at 250). In that context, the *Milligan* Plaintiffs say, it "makes sense" for a court to "compare the differences between the new and old" maps with the understanding that "evidence showing a violation in an existing [at-large] election scheme may not be completely coextensive with a proposed alternative election system." *Id.* at 6 (internal quotation marks omitted). According to the *Milligan* Plaintiffs, that understanding does not foreclose, in a vote dilution case without an entirely new

electoral mechanism, focusing the question on "whether the new map continues to dilute Black votes as the old map did or whether the new map creates an 'opportunity in the real sense of that term.'" *Id.* (quoting *LULAC*, 548 U.S. at 429).

The *Milligan* Plaintiffs urge that if we reset the *Gingles* analysis, we will necessarily allow "infinite bites at the apple[:] Alabama would be permitted to simply designate new 'significant' communities of interest and anoint them *post hoc*, point to them as evidence of newfound compliance, and relitigate the merits again and again—all while refusing to remedy persistent vote dilution." *Id.*

The *Milligan* Plaintiffs argue that the State's defense of the 2023 Plan invites the very beauty contest that we must avoid, and that federal law does not require a Section Two plaintiff to "meet or beat each and every one of [a State's] selected and curated districting principles" on remedy. *Id.* at 8. If that were the rule, the *Milligan* Plaintiffs say they would be required to "play a continuous game of whack-a-mole that would delay or prevent meaningful relief." *Id.*

The *Milligan* Plaintiffs point out that the guidelines the Legislature used in 2023 were the exact same guidelines the Legislature used in 2021. *Id*. at 9. And the *Milligan* Plaintiffs say that if we pay as much attention to the legislative findings that accompanied the 2023 Plan as the State urges us to, we will run afoul of the rule that legislative intent is not relevant in a Section Two analysis. *Id.*

Finally, the *Milligan* Plaintiffs say that the State badly misreads *Allen* as

"authoriz[ing] states to reverse engineer redistricting factors that entrench vote dilution." *Id.* at 11. The *Milligan* Plaintiffs argue that *Allen* "specifically *rejected* this theory when it held that a state may not deploy purportedly neutral redistricting criteria to provide some voters less opportunity . . . to participate in the political process." *Id.* (emphasis in original) (internal quotation marks omitted).

b. The *Caster* Plaintiffs

The *Caster* Plaintiffs reply that "Alabama is fighting a battle it has already lost[]" and that "[s]o committed is the State to maintaining a racially dilutive map that it turns a deaf ear to the express rulings of this Court and the Supreme Court." *Caster* Doc. 195 at 2. The *Caster* Plaintiffs urge us "not [to] countenance Alabama's repeated contravention" of our instructions. *Id.*

The *Caster* Plaintiffs make three arguments on reply. *First*, they argue that Section Two liability can be remedied "only by a plan that cures the established vote dilution." *Id.* at 3. They urge that the liability and remedy inquiries are inextricably intertwined, such that whether a map "is a Section 2 *remedy* is . . . a measure of whether it addresses the State's Section 2 *liability*." *Id.* (emphasis in original).

The *Caster* Plaintiffs attack the State's attempt to "completely reset[] the State's liability such that Plaintiffs must run the *Gingles* gauntlet anew" as unprecedented. *Id.* at 4. The *Caster* Plaintiffs assert that *Covington*, 138 S. Ct. at 2553, forecloses the State's position, and they make the same argument about

Dillard that the *Milligan* Plaintiffs make. *See Caster* Doc. 195 at 4–6.

The *Caster* Plaintiffs criticize the State's argument about legislative deference to the 2023 Plan as overdrawn, arguing that "deference does not mean that the Court abdicates its responsibility to determine whether the remedial plan in fact remedies the violation." *Id.* at 8.

The *Caster* Plaintiffs expressly disclaim a beauty contest: "Plaintiffs do not ask the Court to reject the 2023 Plan in favor of a plan it finds preferable. They ask the Court to strike down the 2023 Plan because they have provided unrefuted evidence that it fails to provide the appropriate remedy this Court found was necessary to cure the Section 2 violation." *Id.* at 9 (internal quotation marks omitted).

Second, the *Caster* Plaintiffs assert that the State misreads the Supreme Court's affirmance of the preliminary injunction. *Id.* at 10–12. The *Caster* Plaintiffs argue that *Allen* did not require a "'meet or beat' standard for illustrative maps" and did not adopt a standard that "would allow the remedial process to continue ad infinitum—so long as one party could produce a new map that improved compactness scores or county splits." *Id.* at 10–11.

The *Caster* Plaintiffs reply to the State's argument about affirmative action in redistricting by directing us to the statement in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 143 S. Ct. 2141, 2162 (2023), that "remediating specific, identified instances of past discrimination that violated the

Constitution or a statute" is a "compelling interest[] that permit[s] resort to race-based government action"; and the holding in *Allen,* 143 S. Ct. at 1516–17, that for the last forty years, "[the Supreme] Court and the lower federal courts have repeatedly applied" Section Two "and, under certain circumstances, have authorized race-based redistricting as a remedy" for discriminatory redistricting maps. *Caster* Doc. 195 at 12.

Third, the *Caster* Plaintiffs argue that the State concedes that the 2023 Plan does not provide Black voters an additional opportunity district. *Caster* Doc. 195 at 13–14. The *Caster* Plaintiffs urge us that this fact is dispositive. *See id.*

Ultimately, the *Caster* Plaintiffs contend that "[i]f there were any doubt that Section 2 remains essential to the protection of voting rights in America, Alabama's brazen refusal to provide an equal opportunity for Black voters in opposition to multiple federal court opinions—six decades after the passage of the Voting Rights Act—silences it, resoundingly." *Id.* at 15.

5. The Parties' Motions for Clarification

While the parties were preparing their briefs, the *Milligan* and *Caster* Plaintiffs, as well as the State, each filed motions for clarification regarding the upcoming hearing. *See Milligan* Docs. 188, 205. The *Milligan* and *Caster* Plaintiffs sought to clarify the role of the *Singleton* Plaintiffs, *Milligan* Doc. 188 at 2, while the State asked for a ruling on whether the Court would "foreclose consideration" of

evidence it intended to offer in support of their *Gingles* I argument, *Milligan* Doc. 205 at 4–5. The State advised us that it would offer evidence "on whether race would now predominate in Plaintiffs' alternative approaches, as illuminated by new arguments in Plaintiffs' objections and their plan presented to the 2023 Reapportionment Committee." *Id.* at 5. And the State alerted us that it would not offer any evidence "challenging the demographic or election numbers in the performance reports" offered by the Plaintiffs (*i.e.*, the Palmer and Liu Reports). *Id.* at 6 (internal quotation marks omitted).

In response, the *Milligan* Plaintiffs asserted that "the sole objective of this remedial hearing is answering whether Alabama's new map remedies the likely [Section Two] violation." *Milligan* Doc. 210 at 1. "As such," the *Milligan* Plaintiffs continued, the State is "bar[red] . . . from relitigating factual and legal issues that this Court and the Supreme Court resolved at the preliminary injunction liability stage—including whether Mobile-Baldwin is an inviolable community of interest that may never be split, whether the legislature's prioritizing particular communities of interest immunizes the 2021 Plan from Section 2 liability, and whether Plaintiffs' illustrative maps are reasonably configured." *Id.* at 2. The *Milligan* Plaintiffs asserted that "the undisputed evidence proves that [the 2023 Plan] does not satisfy the preliminary injunction." *Id.* at 2–3.

The *Caster* Plaintiffs responded similarly. The *Caster* Plaintiffs argued that

"the question of Alabama's liability is not an open one for purposes of these preliminary injunction proceedings," because "[t]hat is precisely what the Supreme Court decided when it affirmed this Court's preliminary injunction just a few months ago." *Caster* Doc. 190 at 2 & Part I. "Rather," the *Caster* Plaintiffs argued, "the question before the Court is whether the 2023 Plan actually remedies the State's likely violation." *Id.* at 2, 7–8. The *Caster* Plaintiffs asserted that to answer that question, we needed only to determine "whether the 2023 Plan remedies the vote dilution identified during the liability phase by providing Black Alabamians with an additional opportunity district." *Id.* at 8. Likewise, the *Caster* Plaintiffs asserted that we should exclude as irrelevant the State's evidence that the 2023 Plan respects communities of interest. *Id.* at 12–13. The *Caster* Plaintiffs argued that on remedy, Section Two is not "a counting exercise of how many communities of interest can be kept whole." *Id.* at 12. They urged that the Gulf Coast evidence was merely an attempt to relitigate our findings about that community, which should occur only during a trial on the merits, not during the remedial phase of preliminary injunction proceedings. *Id.* at 13–14.

We issued orders clarifying that the scope of the remedial hearing would be limited to "the essential question whether the 2023 Plan complies with the order of this Court, affirmed by the Supreme Court, and with Section Two." *Milligan* Doc. 203 at 4; *see also Milligan* Doc. 222 at 9. We cited the rules that "any proposal to

remedy a Section Two violation must itself conform with Section Two," and that "[t]o find a violation of Section 2, there must be evidence that the remedial plan denies equal access to the political process." *Milligan* Doc. 222 at 10 (alterations accepted) (quoting *Dillard*, 831 F.2d at 249–50).

Accordingly, we ruled that "[a]lthough the parties may rely on evidence adduced in the original preliminary injunction proceedings conducted in January 2022 to establish their assertions that the 2023 Plan is or is not a sufficient remedy for the Section Two violation found by this Court and affirmed by the Supreme Court, th[e] remedial hearing w[ould] not relitigate the issue of that likely Section Two violation." *Milligan* Doc. 203 at 4. We reasoned that this limitation "follow[ed] applicable binding Supreme Court precedent and [wa]s consistent with the nature of remedial proceedings in other redistricting cases." *Id.* (citing *Covington*, 138 S. Ct. at 2348; and *Jacksonville Branch of the NAACP v. City of Jacksonville*, No. 3:22-cv-493-MMM-LLL, 2022 WL 17751416, 2022 U.S. Dist. LEXIS 227920 (M.D. Fla. Dec. 19, 2022)). We specifically noted that "[i]f the Defendants seek to answer the Plaintiffs' objections that the 2023 Plan does not fully remediate the likely Section Two violation by offering evidence about 'communities of interest,' 'compactness,' and 'county splits,' they may do so." *Milligan* Doc. 222 at 10. But we reserved ruling on the admissibility of any particular exhibits that the parties intended to offer at the hearing. *Id.* at 10–11.

We explained that "it would be unprecedented for this Court to relitigate the likely Section Two violation during these remedial proceedings," and that we "w[ould] not do so" because "[w]e are not at square one in these cases." *Milligan* Doc. 203 at 4. We observed that "this manner of proceeding [wa]s consistent with the [State's] request that the Court conduct remedial proceedings at this time and delay any final trial on the merits . . . until after the 2024 election." *Id.* at 5. And we explained why we would not require Plaintiffs to amend or supplement complaints, as the State suggested. *See id.* at 6–7.

6. The Plaintiffs' Motion *in Limine*

The *Milligan* and *Caster* Plaintiffs also jointly filed a motion *in limine* in advance of the remedial hearing to exclude "the expert testimony of Mr. Thomas Bryan and Mr. Sean Trende, as well as any and all evidence, references to evidence, testimony, or argument relating to the 2023 Plan's maintenance of communities of interest." *Milligan* Doc. 233 at 1. The Plaintiffs asserted that because of the limited scope of the hearing, this evidence was irrelevant and immaterial. *See id.* at 3–12.

As for Mr. Trende, the Plaintiffs asserted that his "analysis—which compares Plaintiffs' illustrative plans, a plan Plaintiffs proposed to the Legislature, and the State's 2021 and 2023 Plans under compactness metrics, county splits, and the degree to which they split three identified communities of interest—sheds no light on whether the 2023 Plan remedies this Court's finding of vote dilution." *Id.* at 4

(internal quotation marks omitted). And the Plaintiffs asserted that "Mr. Bryan's analysis of a smaller subset of the same plans concerning the number of county splits and . . . the size and type of population that were impacted by them to offer opinions about whether there is evidence that race predominated in the design of the plans, similarly tilts at windmills." *Id.* (internal quotation marks omitted).

The Plaintiffs further asserted that those experts' "statistics regarding the 2023 Plan" are irrelevant in light of the State's "conce[ssion] that the Black-preferred candidates would have lost" in District 2 in "every single election studied by their own expert." *Id*. They urged us that "[t]he topics on which Mr. Trende and Mr. Bryan seek to testify have already been decided by this Court and affirmed by the Supreme Court." *Id*.

Similarly, the Plaintiffs asserted that the State's evidence about communities of interest is irrelevant. *Id.* at 7–12. The Plaintiffs argued that this evidence does not tend to make any fact of consequence more or less probable because it does not tell us anything about whether the State remedied the vote dilution we found. Put differently, the Plaintiffs say this evidence tells us nothing about whether the 2023 Plan includes an additional opportunity district. *Id*. And because the State concedes that District 2 is not an opportunity district, the Plaintiffs assert the evidence about communities of interest is not relevant at all. *Id.* at 11–12.

Separately, the Plaintiffs attacked the reliability of Mr. Bryan's testimony. *Id.*

at 5–7.

In response to the motion, the State argued that its evidence is relevant to the question whether the 2023 Plan violates Section Two. *Milligan* Doc. 245 at 2–7. More particularly, the State argued that the evidence is relevant to the question whether the Plaintiffs can establish that the 2023 Plan violates Section Two "under the same *Gingles* standard applied at the merits stage." *Id.* at 5 (internal quotation marks omitted). The State reasoned that "[n]o findings have been made (nor could have been made) regarding the 2023 Plan's compliance with § 2." *Id.* at 6. The State defended the reliability of Mr. Bryan's analysis. *Id.* at 7–9.

D. Stipulated Facts

After they filed their briefs, the parties stipulated to the following facts for the remedial hearing. *See Milligan* Doc. 251; *Caster* Doc. 213. We recite their stipulations verbatim.

I. Demographics of 2023 Plan

1. The 2023 Plan contains one district that exceeds 50% Black Voting Age Population ("BVAP").

2. According to 2020 Census data, CD 7 in the 2023 Plan has a BVAP of 50.65% Any-Part Black.

3. Under the 2023 Plan, the district with the next-highest BVAP is CD 2.

4. According to 2020 Census data, CD 2 in the 2023 Plan has a BVAP of 39.93% Any-Part Black.

Population Summary

Thursday, July 20, 2023 7:14 PM

District	Population	Deviation	% Devn.	[% White]	[% Black]	[% AP_Wht]	[% AP_Blk]	[% 18+_Blk]	[% 18+_AP_Blk]
1	717,754	0	0.00%	65.36%	25.07%	70.31%	26.46%	23.8%	24.63%
2	717,755	1	0.00%	50.86%	39.93%	54.97%	41.63%	38.83%	39.93%
3	717,754	0	0.00%	70.79%	20.39%	75.16%	21.76%	19.93%	20.7%
4	717,754	0	0.00%	81.53%	6.93%	86.55%	7.9%	6.74%	7.22%
5	717,754	0	0.00%	69.02%	17.59%	75.72%	19.29%	17.33%	18.33%
6	717,754	0	0.00%	70.23%	19.36%	75.03%	20.51%	18.58%	19.26%
7	717,754	0	0.00%	40.89%	51.32%	44.15%	52.59%	49.68%	50.65%

II. General Election Voting Patterns in the 2023 Plan

5. Under the 2023 Plan, Black Alabamians in CD 2 and CD 7 have consistently preferred Democratic candidates in the general election contests Plaintiffs' experts analyzed for the 2016, 2018, 2020, and 2022 general elections, as well as the 2017 special election for U.S. Senate. In those same elections, white Alabamians in CD 2 and CD 7 consistently preferred Republican candidates over (Black-preferred) Democratic candidates. In CD 2, white-preferred candidates (who are Republicans) almost always defeated Black-preferred candidates (who are Democrats). In CD 2, white candidates (who were Republicans) always defeated Black candidates (who were Democrats).

III. Performance of CD 2 in the 2023 Plan

6. The *Caster* Plaintiffs' expert Dr. Maxwell Palmer analyzed the 2023 Plan using 17 contested statewide elections between 2016 and 2022. That analysis showed:

a. Under the 2023 Plan, the average two-party vote-share for Black-preferred candidates in CD 2 is 44.5%.

b. Under the 2023 Plan, the Black-preferred candidate in CD 2 would have been elected in 1 out of the 17 contests analyzed.

Table 4: Vote Share of Black-Preferred Candidates — SB 5 Plan

		CD 2	CD 7
2022	U.S. Senator*	38.6%	
	Governor*	37.5%	
	Attorney General*	39.1%	
	Sec. of State*	39.2%	
	Supreme Ct., Place 5*	39.7%	
2020	U.S. President	45.4%	61.4%
	U.S. Senator	47.7%	63.2%
2018	Governor	45.1%	63.7%
	Lt. Governor*	45.7%	62.7%
	Attorney General	48.3%	64.5%
	Sec. of State	45.8%	62.6%
	State Auditor*	46.6%	62.9%
	Supreme Ct., Chief	48.1%	65.5%
	Supreme Ct., Place 4	46.1%	63.2%
2017	U.S. Senator	55.8%	72.0%
2016	U.S. President	44.2%	60.3%
	U.S. Senator	43.9%	59.1%

* Indicates that the Black candidate of choice was Black.

7. The *Milligan* Plaintiffs' expert Dr. Baodong Liu completed a performance analysis of the 2023 Plan using 11 statewide biracial elections between 2014 and 2022. That analysis showed:

a. Under the 2023 Plan, the average two-party vote-share for Black-preferred candidates in CD 2 is 42.2%.

b. Under the 2023 Plan, the Black-preferred candidate in CD 2 would have been elected in 0 out of the 11 contests analyzed.

Table 1: RPV in the 11 Biracial Elections based on the Livingston Plan, CD2

Election	Black Pref-Cand	White Pref-Cand	% vote cast for BPC in Livingston Plan	Black Support for Black Cand (95% CI)	White Support for Black Cand (95% CI)	BPC Won in Livingston Plan?	RPV?
2022 Governor	Yolanda Flowers	Kay Ivey	37.8%	94.0% (90-96)	4.9% (4-6)	No	Yes
2022 US Senate	Will Boyd	Katie Britt	38.8%	93.5% (89-96)	6.0% (4-9)	No	Yes
2022 Attorney General	Wendell Major	Steve Marshall	39.3%	94.3% (91-97)	6.3% (5-8)	No	Yes
2022 Secretary of State	Pamela Laffitte	Wes Allen	39.4%	94.2% (90-97)	6.0% (4-9)	No	Yes
2022 Supreme Court, Place 5	Anita Kelly	Bradley Byrne	39.9%	94.2% (91-97)	6.6% (5-10)	No	Yes
2018 Lt Governor	Will Boyd	Will Ainsworth	46.0%	93.6% (91-96)	6.3% (5-10)	No	Yes
2018 State Auditor	Miranda Joseph	Jim Zigler	46.9%	94.2% (90-97)	8.2 (6-13)	No	Yes
2018 Public Service Commission, Place 1	Cara McClure	Jeremy Oden	46.9%	95.7% (93-97)	6.5% (5-10)	No	Yes
2014 Secretary of State	Lula Albert-Kaigler	John Merrill	43.6%	91.5% (88-94)	6.2% (5-8)	No	Yes
2014 Lt Governor	James Fields	Kay Ivey	43.4%	91.3% (88-93)	6.3% (4-9)	No	Yes
2014 State Auditor	Miranda Joseph	Jim Zigler	41.7%	88.0% (81-91)	9.1% (6-14)	No	Yes

8. Dr. Liu also analyzed the 2020 presidential election between Biden-Harris and Trump-Pence. His analysis of both the 2020 presidential election and the 11 biracial elections between 2014 and 2022 showed:

a. Under the 2023 Plan, the average two-party vote-share for Black-preferred candidates in CD 2 is 42.3%.

b. Under the 2023 Plan, the Black-preferred candidate in CD 2 would have been elected in 0 out of the 12 contests analyzed.

9. The Alabama Legislature analyzed the 2023 Plan in seven election contests: 2018 Attorney General, 2018 Governor, 2018 Lieutenant Governor, 2018 Auditor, 2018 Secretary of State, 2020 Presidential, and 2020 Senate. That analysis showed:

a. Under the 2023 Plan, the average two-party vote-share for Black-preferred candidates in CD 2 is 46.6%.

b. Under the 2023 Plan, the Black-preferred candidate in CD 2 would have been elected in 0 out of the 7 contests analyzed.

Democrat CD	2018 AG	2018 GOV	2018 LTGOV	2018 AUD	2018 SOS	2020 PRES	2020 SEN	Average
1	39.2%	38.5%	36.7%	37.6%	36.9%	34.8%	38.2%	**37.4%**
2	48.5%	45.3%	46.0%	46.8%	46.0%	45.6%	48.0%	**46.6%**
3	33.3%	32.6%	31.2%	31.8%	31.5%	29.3%	31.9%	**31.6%**
4	24.8%	24.8%	21.7%	22.6%	21.7%	18.6%	21.9%	**22.3%**
5	39.2%	38.6%	36.8%	38.0%	37.4%	36.2%	39.5%	**37.9%**
6	35.6%	36.2%	32.8%	33.7%	33.2%	33.4%	35.9%	**34.4%**
7	64.7%	64.0%	62.9%	63.2%	62.9%	61.6%	63.4%	**63.2%**

Republican CD	2018 AG	2018 GOV	2018 LTGOV	2018 AUD	2018 SOS	2020 PRES	2020 SEN	Average
1	60.8%	61.5%	63.3%	62.4%	63.1%	65.2%	61.8%	**62.6%**
2	51.5%	54.7%	54.0%	53.2%	54.0%	54.4%	52.0%	**53.4%**
3	66.7%	67.4%	68.8%	68.2%	68.5%	70.7%	68.1%	**68.4%**
4	75.2%	75.2%	78.3%	77.4%	78.3%	81.4%	78.1%	**77.7%**
5	60.8%	61.4%	63.2%	62.0%	62.6%	63.8%	60.5%	**62.1%**
6	64.4%	63.8%	67.2%	66.3%	66.8%	66.6%	64.1%	**65.6%**
7	35.3%	36.0%	37.1%	36.8%	37.1%	38.4%	36.6%	**36.8%**

IV. The 2023 Special Session

10. On June 27, 2023, Governor Kay Ivey called a special legislative session to begin on July 17, 2023 at 2:00 p.m. Her proclamation limited the Legislature to addressing: "***Redistricting***: The Legislature may consider legislation

pertaining to the reapportionment of the State, based on the 2020 federal census, into districts for electing members of the United States House of Representatives."

11. For the special session, Representative Chris Pringle and Senator Steve Livingston were the Co-Chairs of the Permanent Legislative Committee on Reapportionment ("the Committee"). The Committee had 22 members, including 7 Black legislators, who are all Democrats, and 15 white legislators, who are all Republicans.

12. Before the Special Session, the Committee held pre-session hearings on June 27 and July 13 to receive input from the public on redistricting plans.

13. At the Committee public hearing on July 13, Representative Pringle moved to re-adopt the 2021 Legislative Redistricting Guidelines ("Guidelines").

14. The Committee voted to re-adopt the 2021 Guidelines.

15. The only plans proposed or available for public comment during the two pre-session hearings were the "VRA Plaintiffs' Remedial Plan" from the *Milligan* and *Caster* Plaintiffs and the plans put forward by Senator Singleton and, Senator Hatcher.

16. On July 17, the first day of the Special Session, Representative Pringle introduced a plan he designated as the "Community of Interest" ("COI") plan.

17. The COI plan had a BVAP of 42.45% in Congressional District 2 ("CD2"), and Representative Pringle said it maintained the core of existing congressional districts.

18. The COI plan passed out of the Committee on July 17 along party and racial lines, with all Democratic and all Black members voting against it. Under the COI plan, the Committee's performance analysis showed that Black-preferred candidates would have won two of the four analyzed-statewide races from 2020 and 2022.

COMMMUNITY OF INTEREST PLAN

Year	Race	CD2		CD7	
		% Dem.	% Rep.	% Dem.	% Rep.
2020	Pres.	47.53	51.56	61.94	37.28
2020	U.S. Senate	50.23	49.77	64.19	35.81
2018	Gov.	47.77	52.23	63.89	36.11
2018	A.G.	50.97	49.03	64.34	35.66

19. The "Opportunity Plan" (or "Livingston 1") was also introduced on July 17. Senator Livingston was the sponsor of the Opportunity Plan.

20. The Opportunity Plan had a BVAP of 38.31% in CD2.

21. Neither the COI Plan nor Opportunity Plan were presented at the public hearings on June 27 or July 13.

22. On July 20, the House passed the Representative Pringle sponsored COI Plan, and the Senate passed the Opportunity Plan. The votes were along party lines with all Democratic house members voting against the COI plan. The house vote was also almost entirely along racial lines, with all Black house members, except one, voting against the COI plan. All Democratic and all Black senators voted against the Opportunity Plan.

23. Afterwards, on Friday, July 21, a six-person bicameral Conference Committee passed Senate Bill 5 ("SB5"), which [is] a modified-version of the Livingston plan ("Livingston 3" plan or the "2023 Plan").

24. The 2023 Plan was approved along party and racial lines, with the two Democratic and Black Conference Committee members (Representative England and Representative Smitherman) voting against it, out of six total members including Representative Pringle and Senator Livingston.

25. Representative England, one of the two Democratic and Black legislators on the Conference Committee, stated that the

2023 Plan was noncompliant with the Court's preliminary-injunction order and that the Court would reject it.

26. On July 21, SB5 was passed by both houses of the legislature and signed by Governor Ivey.

27. In the 2023 Plan enacted in SB5, the Black voting-age population ("BVAP") is 39.9%.

28. The map contains one district, District 7, in which the BVAP exceeds 50%.

29. SB5 passed along party lines and almost entirely along racial lines. Out of all Black legislators, one Republican Black House member voted for SB5, and the remaining Black House members voted against.

30. SB5 includes findings regarding the 2023 Plan. The findings purport to identify three specific communities of interest (the Black Belt, the Wiregrass, and the Gulf Coast).

V. Communities of Interest

31. The Black Belt is a community of interest.

32. The Black Belt includes the 18 core counties of Barbour, Bullock, Butler, Choctaw, Crenshaw, Dallas, Greene, Hale, Lowndes, Macon, Marengo, Montgomery, Perry, Pickens, Pike, Russell, Sumter, and Wilcox. In addition, Clarke, Conecuh, Escambia, Monroe, and Washington counties are sometimes but not always included within the definition of the Black Belt.

33. The 2023 Plan divides the 18 core Black Belt counties into two congressional districts (CD-2 and CD-7) and does not split any Black Belt counties.

34. The 2023 Plan keeps Montgomery County whole in District 2.

35. The 2023 Plan places Baldwin and Mobile Counties together in one congressional district.

36. Baldwin and Mobile Counties have been together in one congressional district since redistricting in 1972.

37. Alabama splits Mobile and Baldwin Counties in its current State Board of Education districts, as well as those in the 2011 redistricting cycle.

E. The Remedial Hearing

Before the remedial hearing, the *Milligan* and *Caster* parties agreed to present their evidence on paper, rather than calling witnesses to testify live. *See, e.g.*, *Milligan* Doc. 233 at 1; Aug. 14 Tr. 92. Accordingly, no witnesses testified live at the hearing on August 14. Three events at the hearing further developed the record before us: (1) the attorneys made arguments and answered our questions; (2) we received exhibits into evidence and reserved ruling on some objections (see *infra* at Part VII), and (3) the parties presented for the first time certain deposition transcripts that were filed the night before the hearing, *see Milligan* Doc. 261.[17] We first discuss the deposition transcripts, and we then discuss the attorney arguments.

1. The Deposition Testimony

The *Milligan* Plaintiffs filed transcripts reflecting deposition testimony of seven witnesses: (1) Randy Hinaman, the State's longstanding cartographer, *Milligan* Doc. 261-1; (2) Brad Kimbro, a past Chairman of the Dothan Area

[17] The depositions were taken after the briefing on the Plaintiffs' objections to the 2023 Plan was complete. *See Milligan* Doc. 261. The State did not raise a timeliness objection, and we discern no timeliness problem.

Chamber of Commerce, *Milligan* Doc. 261-2, who also prepared a declaration the State submitted, *Milligan* Doc. 220-18; (3) Lee Lawson, current President & CEO of the Baldwin County Economic Development Alliance, *Milligan* Doc. 261-3, who also prepared a declaration, *Milligan* Doc. 220-13; (4) Senator Livingston, *Milligan* Doc. 261-4; (5) Representative Pringle, *Milligan* Doc. 261-5; (6) Mike Schmitz, a former mayor of Dothan, *Milligan* Doc. 261-6, who also prepared a declaration, *Milligan* Doc. 220-17; and (7) Jeff Williams, a banker in Dothan, *Milligan* Doc. 261-7, who also prepared a declaration, *Milligan* Doc. 227-1.

During the remedial hearing, the *Milligan* Plaintiffs played video clips from the depositions of Mr. Hinaman, Senator Livingston, and Representative Pringle. (The Court later reviewed all seven depositions in their entirety.)

Mr. Hinaman testified that his understanding of the preliminary injunction was that the Legislature "needed to draw two districts that would give African Americans an opportunity to elect a candidate of their choice." *Milligan* Doc. 261-1 at 20, 22.[18] Mr. Hinaman testified that he drew the Community of Interest Plan that the Alabama House of Representatives passed. *Id.* at 23. He testified that of the maps that were sponsored by a member of either the Alabama House or the Alabama Senate, the Community of Interest Plan is the only one he drew. *Id.* at 24.

[18] When we cite a deposition transcript, pincites are to the numbered pages of the transcript, not the CM/ECF pagination.

Mr. Hinaman testified that he did not know who drew the Opportunity Plan, which the Alabama Senate passed. *Id.* at 31–32. He testified that he "believe[d] it was given to Donna Loftin, who is . . . supervisor of the reapportionment office, on a thumb drive." *Id.* at 32. Mr. Hinaman testified that he had no understanding of how the Opportunity Plan was drawn or why he did not draw it. *Id.* 32–34.

Mr. Hinaman testified that he had "numerous discussions with members of congress" and their staff during the special session. *Id.* at 45. Mr. Hinaman testified about the performance analyses he considered and that he was "more interested in performance than the raw BVAP number" because "not all 42 or 43 or 41 or 39 percent districts perform the same." *Id.* at 65–66.

When Mr. Hinaman was asked about the legislative findings, he testified that he had not seen them before his deposition, that no one told him about them, and that he was not instructed about them as he was preparing maps. *Id.* at 94.

Senator Livingston testified that he was "familiar" that the preliminary injunction ruled that a remedial map should include "two districts in which Black voters either comprise a voting-age majority or something quite close to it," but that his deposition was the first time he had read that part of the injunction. *Milligan* Doc. 261-4 at 51–52. Senator Livingston testified that he was "personally not paying attention to race" as maps were drawn or shown to him. *Id.* at 56.

When Senator Livingston was asked why he changed his focus from the

Community of Interest Plan to other plans, he said it was because "[t]he Committee moved, and [he] was going to be left behind." *Id.* at 66. He testified that the Committee members "had received some additional information they thought they should go in the direction of compactness, communities of interest, and making sure that . . . congressmen or women are not paired against each other," but he did not know the source of that information. *Id.* at 67–68.

Senator Livingston testified that a political consultant drew the Opportunity Plan, and Senator Roberts delivered it to the reapportionment office. *Id.* at 70. Senator Livingston testified that he did not have "any belief one way or another about where [the Opportunity Plan] would provide a fair opportunity to black voters to elect a preferred candidate in the second district." *Id.* at 71. Senator Livingston testified that Black-preferred candidates "have an opportunity to win" in District 2 even if they actually won zero elections. *Id.* at 96–97.

When Senator Livingston was asked who prepared the legislative findings, he identified the Alabama Solicitor General and testified that he did not "have any understanding of why those findings were included in the bill." *Id.* at 101–02.

Representative Pringle testified that he was familiar with the guidance from the Court about the required remedy for the Section Two violation. *Milligan* Doc. 261-5 at 17–18. Representative Pringle testified that he understood "opportunity to elect" to mean "a district which they have the ability to elect or defeat somebody of

their choosing," although he "ha[d] no magic number on that." *Id.* at 19–20. Representative Pringle twice testified that his "overriding principle" is "what the United States Supreme Court told us to do." *Id.* at 22– 23.

Representative Pringle testified that during the special session, he spoke with the Speaker of the United States House of Representatives, Mr. Kevin McCarthy. *Id.* He testified that Speaker McCarthy "was not asking us to do anything other than just keep in mind that he has a very tight majority." *Id.* at 22. Representative Pringle testified that like Mr. Hinaman, he had conversations with members of Alabama's congressional delegation and their staff. *Id.* at 23–24.

Representative Pringle testified that the only map drawer that he retained in connection with the special session was Mr. Hinaman. *Id.* at 25. Representative Pringle also testified that the Alabama Solicitor General "worked as a map drawer at some point in time." *Id.* at 26–28. Like Senator Livingston, Representative Pringle testified that the Opportunity Plan was drawn by a political consultant and brought to the Committee by Senator Roberts. *Id.* at 72.

Unlike Senator Livingston, Representative Pringle testified that he did not know who drafted the legislative findings. *Id.* at 90. He testified that he did not know they would be in the bill; the Committee did not solicit anyone to draft them; he did not know why they were included; he had never seen a redistricting bill contain such findings; and he had not analyzed them. *Id.* at 91–94.

Representative Pringle testified repeatedly that he thought that his plan (the Community of Interest Plan) was a better plan because it complied with court orders, but that he could not get it passed in the Senate. *See, e.g.*, *id.* at 99–102.

In heated testimony, Representative Pringle recounted that when he learned his plan would not pass the Senate, he told Senator Livingston that the plan that passed could not have a House bill number or Representative Pringle's name on it. *Id.* at 101–02. When asked why he did not want his name on the plan that passed, Representative Pringle answered that his plan "was a better plan" "[i]n terms of its compliance with the Voting Rights Act." *Id.* at 102.

Representative Pringle was asked about a newspaper article that he read that reported one of his colleagues' public comments about the 2023 Plan. *See id.* at 109–10. Neither he nor his counsel objected to the question, nor to him being shown the article that he testified he had seen before. *Id.* The article reported that the Alabama Speaker of the House had commented: "If you think about where we were, the Supreme Court ruling was five to four. So there's just one judge that needed to see something different. And I think the movement that we have and what we've come to compromise on today gives us a good shot . . . ." *Id.* at 109.

When Representative Pringle was asked whether he "agree[d] that the legislature is attempting to get a justice to see something differently," he answered that he was not, that he was "trying to comply with what the Supreme Court ruled,"

but that he did not "want to speak on behalf of 140 members of the legislature." *Id.* at 109–10. Representative Pringle also testified that his colleague had never expressed that sentiment to him privately. *Id.* at 110.

2. Arguments and Concessions

During the opening statements at the remedial hearing, the *Milligan* Plaintiffs emphasized that there is "only one" question now before us: whether the 2023 Plan "remed[ies] the prior vote dilution, and does it provide black voters with an additional opportunity to elect the candidates of their choice." Aug. 14 Tr. 10. Nevertheless, the *Milligan* Plaintiffs walked us through their *Gingles* analysis, in case we perform one. *See* Aug. 14 Tr. 10–23. The *Milligan* Plaintiffs asserted that we previously found and the Supreme Court affirmed that they satisfied *Gingles* I. Aug. 14 Tr. 10–11. The *Milligan* Plaintiffs said that we can rely on that finding even though the Legislature enacted the 2023 Plan because *Gingles* I does not "look at the compactness of plaintiffs' map," but "looks at the compactness of the minority community," which we found and the Supreme Court affirmed. Aug. 14 Tr. 10–11. And the *Milligan* Plaintiffs assert that it is undisputed that they satisfy *Gingles* II and III because "there is serious racially polarized voting" in Alabama. Aug. 14 Tr. 11.

The *Milligan* Plaintiffs further urged that the key elements of the performance analysis are undisputed: "there is no dispute that the 2023 plan does not lead to the election of a . . . second African-American candidate of choice," Aug. 14 Tr. 11, and

that the 2023 Plan, "like the old plan, also results in vote dilution" because "black candidates would lose every election" in District 2, Aug. 14 Tr. 12.

The *Milligan* Plaintiffs accused the State of "rehash[ing] the arguments that both this Court and the Supreme Court have already rejected," mainly that "there could be no legitimate reason to split Mobile and Baldwin counties," "the Court should compare its allegedly neutral treatment of various communities in the 2023 plan to the treatment of the same alleged communities in" the illustrative plans, and "the use of race in devising a remedy is improper." Aug. 14 Tr. 12–13.

The *Milligan* Plaintiffs said that if we reexamine any aspect of our *Gingles* analysis, we should come out differently than we did previously on Senate Factor 9 (which asks whether the State's justification for its redistricting plan is tenuous). Aug. 14 Tr. 14–22. We made no finding about Factor 9 when we issued the preliminary injunction, but the *Milligan* Plaintiffs said that the depositions of Mr. Hinaman, Senator Livingston, and Representative Pringle support a finding now. *See* Aug. 14 Tr. 14–22.

During their opening statement, the *Caster* Plaintiffs argued that the State was in "defiance of the Court's clear instructions," because "[t]here is no dispute that the 2023 Plan . . . once again limits the state's black citizens to a single opportunity district." Aug. 14 Tr. 27–28. Based on stipulated facts alone, the *Caster* Plaintiffs urged this Court to enjoin the 2023 Plan because it "perpetuat[es] the same Section

2 violation as the map struck down by this Court last year." Aug. 14 Tr. 28.

The *Caster* Plaintiffs argued that we should understand the State's argument that we are back at square one in these cases as part and parcel of their continued defiance of federal court orders. Aug. 14 Tr. 29. The *Caster* Plaintiffs further argued that we should reject the State's argument that the 2023 Plan remedies the "cracking" of the Black Belt because the 2023 Plan merely "reshuffled Black Belt counties to give the illusion of a remedy." Aug. 14 Tr. 29–30. The *Caster* Plaintiffs reasoned that "Alabama gets no brownie points for uniting black voters and the Black Belt community of interest in a district in which they have no electoral power and in a map that continues to dilute the black vote." Aug. 14 Tr. 30. Finally, the *Caster* Plaintiffs urged us to ignore all the new evidence about communities of interest, because "Section 2 is not a claim for better respect for communities of interest. It is a claim regarding minority vote dilution." Aug. 14 Tr. 30.

In the State's opening statement, it asserted that if the Plaintiffs cannot establish that the 2023 Plan violates federal law, then the 2023 Plan is "governing law." Aug. 14 Tr. 33. The State assailed the Plaintiffs' suggestion that the question is limited to the issue of whether the 2023 Plan includes an additional opportunity district as a "tool for demanding proportionality," which is unlawful. Aug. 14 Tr. 36.

The State asserted that the Plaintiffs must come forward with new *Gingles* I evidence because under *Allen*, it "simply cannot be the case" that the Duchin plans

and Cooper plans are "up to the task." Aug. 14 Tr. 36. The State's principal argument was that those plans were configured to compete with the 2021 Plan on traditional districting principles such as compactness and respect for communities of interest, and they cannot outdo the 2023 Plan on those metrics. Aug. 14 Tr. 36–39. According to the State, the 2023 Plan "answers the plaintiffs' challenge" with respect to the Black Belt because it "take[s] out . . . those purportedly discriminatory components of the 2021 plan." Aug. 14 Tr. 39–41. Because "[t]hat cracking is gone," the State said, "the 2023 plan does not produce discriminatory effects." Aug. 14 Tr. 41.

Much of the State's opening statement cautioned against an additional opportunity district on proportionality grounds and against "abandon[ing]" legitimate traditional districting principles. *See* Aug. 14 Tr. 39–47. According to the State, "now proportionality is all that you are hearing about." Aug. 14 Tr. 47–48.

After opening statements, we took up the Plaintiffs' motion *in limine*. The Plaintiffs emphasized that even if they are required to reprove compactness for *Gingles* I, they could rely on evidence from the preliminary injunction proceeding (and our findings) to do so, because all the law requires is a determination that the minority population is reasonably compact and that an additional opportunity district can be reasonably configured. The Plaintiffs emphasized that under this reasonableness standard, they need not outperform the 2023 Plan in a beauty contest by submitting yet another illustrative plan. Aug. 14 Tr. 50–51, 58–59. According to

the Plaintiffs, "nothing can change the fact that" Black voters in Alabama "as a community are reasonably compact, and you can draw a reasonably configured district around them." Aug. 14 Tr. 54. Indeed, the Plaintiffs say, "[t]he only thing that can substantially change" where Black voters are in Alabama for purposes of *Gingles* I "would be a new census." Aug. 14 Tr. 55.

The Plaintiffs suggested that the State confused the compactness standards for a Section Two case, which focus on the compactness of the minority population, with the compactness standards for a racial gerrymandering case, which focus on the compactness of the challenged district. Aug. 14 Tr. 55, 57.

The State based its response to the motion *in limine* on arguments about the appropriate exercise of judicial power. *See* Aug. 14 Tr. 63. On the State's reasoning, the Plaintiffs "have to relitigate and prove" the *Gingles* analysis because the Court cannot "just transcribe the findings from an old law onto a new law." Aug. 14 Tr. 61, 63. Significantly, the State conceded that the Plaintiffs have met their burden in these remedial proceedings on the second and third *Gingles* requirements and the Senate Factors. Aug. 14 Tr. 64–65. So, according to the State, the only question the Court need answer is whether the Plaintiffs are required to reprove *Gingles* I. *See* Aug. 14 Tr. 64–66. The State said they must, because "it is [the State's] reading of *Allen* that reasonably configured is not determined based on whatever a hired expert map drawer comes in and says, like, this is reasonable enough. It has to be tethered

. . . to objective factors to a standard or rule that a Legislature can look at ex ante . . . ." Aug. 14 Tr. 67.

The State answered several questions about whether the Plaintiffs now must offer a new illustrative map that outperforms the 2023 Plan with respect to compactness and communities of interest. In one such exchange, we asked whether the State was "essentially arguing [that] whatever the state does, we can just say they shot a bullet, and we have now drawn a bull's eye where that bullet hit, and so it's good?" Aug. 14 Tr. 72. We followed up: "It's just some veneer to justify whatever the state wanted to do that was short of the [Voting Rights Act?]" Aug. 14 Tr. 72. The State responded that precedent "makes clear that the state does have a legitimate interest in promoting these three principles of compactness, counties, and communities of interest." Aug. 14 Tr. 72.

Again, we asked the State whether the Duchin plans and Cooper plans were subject to attack now even though we found (and the Supreme Court affirmed) that the additional opportunity districts they illustrated were reasonably configured. Aug. 14 Tr. 67. The State answered that because the comparator is now the 2023 Plan, the Duchin plans and Cooper plans could be attacked once again, this time for failing to outperform the 2023 Plan even though we found they outperformed the 2021 Plan. Aug. 14 Tr. 67–70.

We further asked the State whether "our statement that the appropriate remedy

for the . . . likely violation that we found would be an additional opportunity district ha[s] any relevance to what we're doing now?" Aug. 14 Tr. 75. "I don't think so," the State said. Aug. 14 Tr. 75. We pressed the point: "it is the state's position that the Legislature could . . . enact a new map that was consistent with those findings and conclusions [by this Court and the Supreme Court] without adding a second opportunity district?" Aug. 14 Tr. 75. "Yes," the State replied. Aug. 14 Tr. 75.

Moreover, the *Caster* Plaintiffs argued (in connection with the State's isolation of the dispute to *Gingles* I) that under applicable law, the *Gingles* I inquiry already has occurred. According to the *Caster* Plaintiffs, "[n]either the size of the black population nor its location throughout the state is a moving target[]" between 2021 and 2023. Aug. 14 Tr. 88. Likewise, they say, "[n]othing about the 2023 map, nothing about the evidence that the defendants can now present . . . can go back in time" to undermine maps drawn "two years ago." Aug. 14 Tr. 88. They add that "[n]othing about the tradition of Alabama's redistricting criteria has changed[]" since 2021, and that "[i]f anything, it is Alabama that has broken with its own tradition . . . in creating these brand new findings out of nowhere, unbeknownst to the actual committee chairs who were in charge of the process." Aug. 14 Tr. 89.

We carried the motion *in limine* with the case and received exhibits into evidence (we rule on remaining objections *infra* at Part VII).

We then asked for the State's position if we were to order (again) that an

additional opportunity district is required, and the State replied that such an order would be unlawful under *Allen* because it would require the State to adopt a map that violates traditional principles. Aug. 14 Tr. 157. When asked "at what point the federal court . . . ha[s] the ability to comment on whether the appropriate remedy includes an additional opportunity district" — "[o]n liability," "[o]n remedy," "[b]oth," "or [n]ever" — the State said there is not "any prohibition on the Court commenting on what it thinks an appropriate remedy would be." Aug. 14 Tr. 157–58.

The State then answered questions regarding its argument about traditional districting principles and the 2023 Plan. The Court asked the State whether it "acknowledge[d] any point during the ten-year [census] cycle where the [Legislature's] ability to redefine the principles cuts off and the Court's ability to order an additional opportunity district attaches." Aug. 14 Tr. 159. The State responded that that "sounds a lot like a preclearance regime." Aug. 14 Tr. 159.

Ultimately, the State offered a practical limitation on the Legislature's ability to redefine traditional districting principles: if the Court rules that "there is a problem with this map," then the State's "time has run out," and "we will have a court drawn map for the 2024 election barring appellate review." Aug. 14 Tr. 159–60.

We continued to try to understand how, in the State's view, a court making a liability finding has any remedial authority. We asked: "[W]hen we made the

liability finding, is it the state's position that at that time this Court had no authority to comment on what the appropriate remedy would be because at that time the Legislature was free to redefine traditional districting principles?" Aug. 14 Tr. 160. "Of course, the Court could comment on it[,]" the State responded. Aug. 14 Tr. 160.

Next, we queried the State whether Representative Pringle's testimony about the legislative findings should affect the weight we assign the findings. Aug. 14 Tr. 161–62. The State said no, because Representative Pringle is only one legislator out of 140, there is a presumption of regularity that attaches to the 2023 Plan, and the findings simply describe what we could see for ourselves by looking at the map. Aug. 14 Tr. 162. The State admonished us that "it's somewhat troubling for a federal court to say that they know Alabama's communities of interest better than Alabama's representatives know them." Aug. 14 Tr. 163.

Ultimately, we asked the State whether it "deliberately chose to disregard [the Court's] instructions to draw two majority-black districts or one where minority candidates could be chosen." Aug. 14 Tr. 163. The State reiterated that District 2 is "as close as you are going to get to a second majority-black district without violating *Allen*" and the Constitution. Aug. 14 Tr. 164. Finally, we pressed the question this way: "Can you draw a map that maintains three communities of interest, splits six or fewer counties, but that most likely if not almost certainly fails to create an opportunity district and still comply with Section 2?" Aug. 14 Tr. 164. "Yes.

Absolutely," the State said. Aug. 14 Tr. 164; *see also* Aug. 14 Tr. 76.

F. The Preliminary Injunction Hearing

The next day, the Court heard argument on the *Singleton* Plaintiffs' motion for a preliminary injunction. The *Singleton* Plaintiffs walked the Court through the claim that the 2023 Plan "preserves" and "carries forward" a racial gerrymander that has persisted in Alabama's congressional districting plan since 1992, when the State enacted a plan guaranteeing Black voters a majority in District 7 pursuant to a stipulated injunction entered to resolve claims that Alabama had violated Section Two of the Voting Rights Act, *see Wesch*, 785 F. Supp. At 1493, *aff'd sub nom. Camp*, 504 U.S. 902, *and aff'd sub nom. Figures*, 507 U.S. 901. August 15 Tr. 8, 10–15. The State disputed that race predominated in the drawing of the 2023 Plan, but made clear that, if the Court disagreed, the State did not contest the *Singleton* Plaintiffs' argument that the 2023 Plan could not satisfy strict scrutiny. Aug. 15 Tr. 82. The Court received some exhibits into evidence and reserved ruling on some objections. Aug. 15 Tr. 25–31, 59–60. We heard live testimony from one of the Plaintiffs, Senator Singleton; the State had the opportunity to cross-examine him. Aug. 15 Tr. 32–58. And we took closing arguments. Aug. 15 Tr. 61–85.

II. STANDARD OF REVIEW

As the foregoing discussion previewed, the parties dispute the standard of review that applies to the Plaintiffs' objections. We first discuss the standard that

applies to requests for preliminary injunctive relief. We then discuss the parties' disagreement over the standard that applies in remedial proceedings, the proper standard we must apply, and the alternative.

A. Preliminary Injunctive Relief

"[A] preliminary injunction is an extraordinary remedy never awarded as of right." *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (internal quotation marks omitted). "A party seeking a preliminary injunction must establish that (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Vital Pharms., Inc. v. Alfieri*, 23 F.4th 1282, 1290–91 (11th Cir. 2022) (internal quotation marks and citation omitted).

B. The Limited Scope of the Parties' Disagreement

The Plaintiffs' position is that the liability phase of this litigation has concluded, and we are now in the remedial phase. On the Plaintiffs' logic, the enactment of the 2023 Plan does not require us to revisit any aspect of our liability findings underlying the preliminary injunction. The question now, they say, is only whether the 2023 Plan provides Black voters an additional opportunity district.

The State's position is that the enactment of the 2023 Plan reset this litigation

to square one, and the Plaintiffs must prove a new Section Two violation. "Only if the Legislature failed to enact a new plan," the State says, "would we move to a purely remedial process, rather than a preliminary injunction hearing related to a new law." *Milligan* Doc. 205 at 3; *Milligan* Doc. 172 at 45–46. On the State's logic, the Plaintiffs must reprove their entitlement to injunctive relief under *Gingles*, and some (but not all) of the evidence developed during the preliminary injunction proceedings may be relevant for this purpose.

As a practical matter, the parties' dispute is limited in scope: it concerns whether the Plaintiffs must submit additional illustrative maps to establish the compactness part of *Gingles* I, and the related question whether any such maps must "meet or beat" the 2023 Plan on traditional districting principles. This limitation necessarily follows from the fact that the State concedes for purposes of these proceedings that the Plaintiffs have established the numerosity component of *Gingles* I, all of *Gingles* II and III, and the Senate Factors. Aug. 14 Tr. 64–65.

The parties agree that in any event, the Plaintiffs carry the burden of proof and persuasion. *Milligan* Doc. 203 at 4.

C. The Remedial Standard We Apply

When, as here, a district court finds itself in a remedial posture, tasked with designing and implementing equitable relief, "the scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies."

Brown v. Plata, 563 U.S. 493, 538 (2011) (internal quotation marks omitted). But this power is not unlimited. The Supreme Court has long instructed that the "essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." *Swann v. Charlotte-Mecklenburg Bd. Of Ed.*, 402 U.S. 1, 15 (1971) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944)). The court "must tailor the scope of injunctive relief to fit the nature and extent of the . . . violation established." *Haitian Refugee Ctr. V. Smith*, 676 F.2d 1023, 1041 (5th Cir. 1982). In other words, the nature and scope of the review at the remedial phase is bound up with the nature of the violation the district court sets out to remedy. *See id.*; *Wright v. Sumter Cnty. Bd. Of Elections & Registration*, 979 F.3d 1282, 1302–03 (11th Cir. 2020) ("[A] district court's remedial proceedings bear directly on and are inextricably bound up in its liability findings.").

The Voting Rights Act context is no exception. Following a finding of liability under Section Two, the "[r]emedial posture impacts the nature of [a court's] review." *Covington v. North Carolina*, 283 F. Supp. 3d 410, 431 (M.D.N.C.), *aff'd in relevant part*, *rev'd in part*, 138 S. Ct. 2548 (2018). "In the remedial posture, courts must ensure that a proposed[19] remedial districting plan completely corrects—rather than

[19] We understand that the 2023 Plan is enacted, not merely proposed. *Covington* used "proposed" to describe a remedial plan that had been passed by both houses of the North Carolina General Assembly after the previous maps were ruled

perpetuates—the defects that rendered the original districts unconstitutional or unlawful." *Id.* Accordingly, the "issue before this Court is whether" the 2023 Plan, "in combination with the racial facts and history" of Alabama, completely corrects, or "fails to correct the original violation" of Section Two. *Dillard*, 831 F.2d at 248 (Johnson, J.).

When, as here, a jurisdiction enacts a remedial plan after a liability finding, "it [i]s correct for the court to ask whether the replacement system . . . would remedy the violation." *Harper v. City of Chicago Heights*, 223 F.3d 593, 599 (7th Cir. 2000) (citing *Harvell v. Blytheville Sch. Dist. # 5*, 71 F.3d 1382, 1386 (8th Cir. 1995)). In a Section Two case such as this, that challenges the State's drawing of single-member district lines in congressional reapportionment, the injury that gives rise to the violation is vote dilution — "that members of a protected class 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *Shaw II*, 517 U.S. at 914. At the remedy phase, the district court therefore properly asks whether the remedial plan "completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." *United States v. Dall. Cnty. Comm'n*, 850 F.2d 1433, 1438 (11th

unconstitutional. *See* 283 F. Supp. 3d at 413–14, 419; *see also infra* at 121–23.

Cir. 1988).

Evidence drawn from the liability phase and the Court's prior findings "form[] the 'backdrop' for the Court's determination of whether the Remedial Plan 'so far as possible eliminate[d] the discriminatory effects'" of the original plan. *Cf. Jacksonville Branch of NAACP*, 2022 WL 17751416, at *13, 2022 U.S. Dist. LEXIS 227920, at *33 (rejecting city's invitation to conduct analysis of its remedial plan "on a clean slate" because "the remedial posture impacts the nature of the review" (internal quotation marks omitted) (alterations accepted) (quoting *Covington*, 283 F. Supp. 3d at 431)). "[T]here [i]s no need for the court to view [the remedial plan] as if it had emerged from thin air." *Harper*, 223 F.3d at 599; *accord Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1115–16 (3d Cir. 1993)).

That said, a federal court cannot accept an unlawful map on the ground that it corrects a Section Two violation in an earlier plan. "[A]ny proposal to remedy a Section 2 violation must itself conform with Section 2." *Dillard*, 831 F.2d at 249. So if the 2023 Plan corrects the original violation of Section Two we found, but violates Section Two in a new way or otherwise is unlawful, we may not accept it.

Accordingly, we limit our analysis in the first instance to the question whether the 2023 Plan corrects the likely Section Two violation that we found and the Supreme Court affirmed: the dilution of Black votes in Alabama congressional districts. Because we find that the 2023 Plan perpetuates rather than corrects that

violation, *see infra* at Part IV.A, we enjoin it on that ground. If we had found that the 2023 Plan corrected that violation, we then would have considered any claims the Plaintiffs raised that the 2023 Plan violates federal law anew.

For seven separate and independent reasons, we reject the assertion that the Plaintiffs must reprove Section Two liability under *Gingles*.

First, the State has identified no controlling precedent, and we have found none, that instructs us to proceed in that manner. We said in one of our clarification orders that it would be unprecedented for us to relitigate the Section Two violation during remedial proceedings, *see Milligan* Doc. 203 at 4, and the State has not since identified any precedent that provides otherwise.

Second, the main precedent the State cites, *Dillard*, aligns with our approach. *See* 831 F.2d at 247–48. In *Dillard*, Calhoun County stipulated that its at-large system of electing commissioners diluted Black votes in violation of Section Two. *Id.* The County prepared a remedial plan that altered the electoral mechanism to elect commissioners using single-member districts and retained the position of an at-large chair. *Id.* at 248. The plaintiffs objected on the ground that the remedial plan did not correct the Section Two violation. *Id.* The district court agreed that under the totality of the circumstances, the use of at-large elections for the chairperson would dilute Black voting strength. *Id.* at 249.

The Eleventh Circuit reversed on the ground that the district court failed to

conduct a fact-specific inquiry into the proposed remedy. *Id.* at 249–50. The appeals court ruled that when the district court simply "transferred the historical record" from the liability phase of proceedings to the remedial phase, it "incompletely assessed the differences between the new and old proposals." *Id.* at 250. The appeals court observed that in the light of the new structure of the commission, the nature of the chairperson's duties and responsibilities, powers, and authority would necessarily differ from those of the commissioners in the old, unlawful system. *See id.* at 250–52. Accordingly, the appeals court held that the district court could not simply rely on the old evidence to establish a continuing violation. *Id.* at 250.

The State overreads *Dillard*. The reason that new factual findings were necessary in *Dillard* was because, as the Eleventh Circuit observed, "procedures that are discriminatory in the context of one election scheme are not necessarily discriminatory under another scheme." *Id.* at 250. If the new system diluted votes, the method by which that could or would occur might be different, so the court needed to assess it. *See id.* at 250–52. Those concerns are not salient here: there is no difference in electoral mechanism. In 2023, the State just placed district lines in different locations than it did in 2021.

Accordingly, we do not read *Dillard* to support the *Gingles* reset that the State requests. When the entire electoral mechanism changes, it makes little sense not to examine the new system. But this reality does not establish an inviolable requirement

that every court faced with a remedial task in a redistricting case must begin its review of a remedial map with a blank slate.

Even if we are wrong that this case is unlike *Dillard*, what the State urges us to do is not what the Eleventh Circuit said or did in *Dillard*. After the appeals court held that the "transcription [of old evidence] does not end the evaluation," it said that it "must evaluate the new system in part measured by the historical record, in part measured by difference from the old system, and in part measured by prediction," and it faulted the district court for "incompletely assess[ing] the differences between the new and old proposals." *Id.* at 249–50.

We discern no dispute among the parties that a proper performance analysis of the 2023 Plan evaluates it "in part measured by the historical record, in part measured by difference from the old system, and in part measured by prediction." *Id.* at 250; *see Milligan* Doc. 251 at 2–6. Indeed, every performance analysis that we have — the State's, the *Milligan* Plaintiffs', and the *Caster* Plaintiffs' — does just that. *Milligan* Doc. 251 at 2–6. This understanding of a performance analysis is consistent with the analytical approach that the United States urges us to take in its Statement of Interest. *Milligan* Doc. 199 at 9–15.

Accordingly, we understand *Dillard* as guiding us to determine whether District 2 in the 2023 Plan performs as an additional opportunity district, not as directing us to reset the *Gingles* liability determination to ground zero.

Third, *Covington*, cited by both the State and the Plaintiffs, aligns with our approach. In *Covington*, the North Carolina General Assembly redrew its state legislative electoral maps after a three-judge court enjoined the previous maps as unconstitutional in a ruling that the Supreme Court summarily affirmed. 283 F. Supp. 3d at 413–14, 419. The plaintiffs objected to the remedial map, and the legislative defendants raised jurisdictional objections, including that "the enactment of the [remedial p]lans rendered th[e] action moot." *Id.* at 419, 423–24.

The district court rejected the mootness challenge on the ground that after finding a map unlawful, a district court "has a duty to ensure that any remedy so far as possible eliminate[s] the discriminatory effects of the past as well as bar[s] like discrimination in the future." *Id.* at 424 (internal quotation marks omitted) (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)). The district court cited circuit precedent for the proposition that "federal courts *must* review a state's proposed remedial districting plan to ensure it completely remedies the identified constitutional violation and is not otherwise legally unacceptable." *Id.* (emphasis in original) (collecting cases, including Section Two cases).

Further, the district court emphasized that its injunction was the only reason the General Assembly redrew the districts that it did. *Id.* at 425. (In *Covington*, the State itself was a party to the case.) The court reasoned that "[i]t is axiomatic that this Court has the inherent authority to enforce its own orders," so the case could not

be moot. *Id.* (also describing the court's "strong interest in ensuring that the legislature complied with, but did not exceed, the authority conferred by" the injunction). The Supreme Court affirmed this ruling by the district court. *Covington*, 138 S. Ct. at 2553 (concluding that the plaintiffs' claims "did not become moot simply because the General Assembly drew new district lines around them").

We do not decide the constitutional issues before us and the State has not formally raised a mootness challenge, but those distinctions do not make *Covington* irrelevant.[20] Both parties have cited it, *see Caster* Docs. 191, 195; *Milligan* Docs. 220, 225, and we understand it to mean that on remedy, we must (1) ensure that any remedial plan corrects the violation that we found, and (2) reject any proposed remedy that is otherwise unlawful. We do not discern anything in *Covington* to

[20] Notwithstanding that the issue was never formally presented to us by motion, federal courts have an "independent obligation to ensure that jurisdiction exists before federal judicial power is exercised over the merits" of a case, *see Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1275 (11th Cir. 2000), so we have carefully considered the mootness issue. It is clear to us that under *Covington* this case is not moot. Just as the district court in *Covington* (1) "ha[d] a duty to ensure that any remedy so far as possible eliminate[s] the discriminatory effects of the past as well as bar[s] like discrimination in the future," and (2) "ha[d] the inherent authority to enforce its own orders," 283 F. Supp. 3d at 424–25, so too do we (1) have a duty to ensure that the State's proposed remedy completely cures the Section Two violation we have already found, and (2) have the inherent authority to enforce our preliminary injunction order. Moreover, we are acutely aware of the fact that Black Alabamians will be forced, if we do not address the matter, to continue to vote under a map that we have found likely violates Section Two. That constitutes a live and ongoing injury.

suggest that if we do those two things, we fall short of our remedial task.

None of the other cases the State has cited compel a different conclusion. For instance, in *McGhee v. Granville County*, the County responded to a Section Two liability determination by drawing a remedial plan that switched the underlying electoral mechanism from an at-large method to single-member districts in which Black voters would have an increased opportunity to elect candidates of their choice. 860 F.2d 110, 113 (4th Cir. 1988). The district court rejected the remedial plan as failing to completely remedy the violation, but the Fourth Circuit reversed, holding that the district court was bound to accept this remedial plan because once "a vote dilution violation is established, the appropriate remedy is to restructure the districting system to eradicate, to the maximum extent possible *by that means*, the dilution proximately caused by that system." *Id.* at 118 (emphasis in original). The district court was not free to try to eradicate the dilution by altering other "electoral laws, practices, and structures" not actually challenged by the claim; instead, the district court had to evaluate the extent to which the remedial plan eradicated the dilution in the light of the electoral mechanism utilized by the State. *Id.* (internal quotation marks omitted).

The Fourth Circuit in *McGhee* did not hold that *Gingles* I compels a district court to accept a remedial map that provides *less* than a genuine opportunity for minority voters to elect a candidate of their choice. *See id.* To the contrary, the court

emphasized that the "appropriate remedy" for a vote dilution claim is to "restructure the districting system to eradicate . . . the dilution proximately caused by that system" "to the maximum extent possible," within the bounds of "the size, compactness, and cohesion elements of the dilution concept." *Id.*

Fourth, consistent with the foregoing discussion and our understanding of our task, district courts regularly isolate the initial remedial determination to the question whether a replacement map corrects a violation found in an earlier map. *See, e.g.*, *United States v. Osceola County*, 474 F. Supp. 2d 1254, 1256 (M.D. Fla. 2006); *GRACE, Inc. v. City of Miami*, --- F. Supp. 3d ---, No. 1:22-CV-24066, 2023 WL 4853635, at *7, 2023 U.S. Dist. LEXIS 134162, at *19–20 (S.D. Fla. July 30, 2023).

One three-judge court — in a ruling affirmed by the Supreme Court — has gone so far as to describe its task as "determining the meaning of the Voting Rights Act at the remedial stage of a case in which defendants are proven violators of the law." *Jeffers v. Clinton*, 756 F. Supp. 1195, 1199 (E.D. Ark. 1990), *aff'd*, 498 U.S. 1019 (1991). We do not go that far: no part of our ruling rests on assigning lawbreaker status to the State. *Id.* We are ever mindful that we "must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus," and we generally presume the good faith of the Legislature. *Abbott*, 138 S. Ct. at 2324 (internal quotation marks omitted). And the Supreme Court has specifically held that the "allocation of the burden of proof [to the plaintiffs] and the presumption of

legislative good faith are not changed by a finding of past discrimination." *Id.* This is because "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Id.* (internal quotation marks omitted) (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 75 (1980) (plurality opinion)).

As we explain below, *see infra* at Part IV, we have afforded the 2023 Plan the deference to which it is entitled, we have applied the presumption of good faith, and we have measured it against the evidentiary record by performing the legal analysis that we understand binding precedent to require. Put simply, the 2023 Plan has received a fair shot. (Indeed, we have substantially relaxed the Federal Rules of Evidence to allow the State to submit, and we have admitted, virtually all of the materials that it believes support its defense of the 2023 Plan. *Infra* at Part VII; Aug. 14 Tr. 91–142.)

Fifth, resetting the *Gingles* analysis to ground zero following the enactment of the 2023 Plan is inconsistent with our understanding of this Court's judicial power. At the remedial hearing, we queried the State about the relevance for these remedial proceedings of our statement in the preliminary injunction that the appropriate remedy was an additional opportunity district. *See supra* at Part I.E.2. According to the State, the statement has no legal force, Aug. 14 Tr. 74 — there is not any "prohibition on the Court commenting on what it thinks an appropriate

remedy would be," Aug. 14 Tr. 158, but such comments are limited to the context of the 2021 Plan, meaningless when the Legislature undertakes to enact a remedial map, and irrelevant when a court assesses that map. The State did not use the word "advisory," but in substance its argument was that the "comment" had no force or field of application and was merely our (erroneous) advice to the Legislature.

The State's view cannot be squared with this Court's judicial power in at least two ways. As an initial matter, it artificially divorces remedial proceedings in equity from liability proceedings in equity. As we already observed, federal courts must tailor injunctions to the specific violation that the injunction is meant to remedy; the idea is that the equitable powers of a federal court are among its broadest and must be exercised with great restraint, care, and particularity. *See, e.g.*, *Haitian Refugee Ctr.,* 676 F.2d at 1041 ("Although a federal court has broad equitable powers to remedy constitutional violations, it must tailor the scope of injunctive relief to fit the nature and extent of the constitutional violation established.").

In this way, a liability determination shapes the evaluation of potential remedies, and the determination of an appropriate remedy necessarily is informed by the nature of the conduct enjoined. *Id.*; *see also Covington*, 581 U.S. at 488 (citing *NAACP v. Hampton Cnty. Election Comm'n*, 470 U.S. 166, 183 n.36 (1985)). Again, redistricting cases are no exception. *See, e.g.*, *Dillard*, 831 F.2d at 248. We cannot reconcile these basic principles with the State's suggestion that after an exhaustive

liability determination, we cannot make a relevant or meaningful statement about the proper remedy.

Separately, the State's view is inconsistent with the Article III judicial power because it allows the State to constrain (indeed, to manipulate) the Court's authority to grant equitable relief. The State agrees that if the Legislature had passed no map, it would have fallen to us to draw a map. But the State argues that because the Legislature enacted a map, we have no authority to enjoin it on the ground that it does not provide what we said is the legally required remedy. Rather, the State says, we must perform a new liability analysis from ground zero. The State acknowledges that if we find liability, Alabama's 2024 congressional elections will occur according to a court-ordered map, but that's only because time will have run out for the Legislature to enact another remedial map before that election. Aug. 14 Tr. 159–60.

Put differently, the State's view is that so long as the Legislature enacts a remedial map, we have no authority to craft a remedy without first repeating the entire liability analysis. But at the end of each liability determination, the argument goes, we have no authority to order a remedy if the Legislature plans and has time to enact a new map. In essence, the State creates an endless paradox that only it can break, thereby depriving Plaintiffs of the ability to effectively challenge and the courts of the ability to remedy. It cannot be that the equitable authority of a federal district court to order full relief for violations of federal law is always entirely at the

mercy of a State electoral and legislative calendar.

Sixth, we discern no limiting principle to the State's argument that we should reset the liability analysis to ground zero, and this causes us grave concern that accepting the argument would frustrate the purpose of Section Two. As the Plaintiffs have rightly pointed out and we have described, the State's view of remedial proceedings puts redistricting litigation in an infinity loop restricted only by the State's electoral calendar and terminated only by a new census. *See Milligan* Doc. 210 at 6. These are practical limitations, not principled ones. The State has not identified, and we cannot identify, any limiting principle to a rule whereby redistricting litigation is reset to ground zero every time a legislature enacts a remedial plan following a liability determination. This is a significant reason not to accept such a rule; it would make it exceedingly difficult, if not impossible, for a district court ever to effectuate relief under Section Two.

It is as though we are three years into a ten-year baseball series. We've played the first game. The Plaintiffs won game one. The State had the opportunity to challenge some of the calls that the umpires made, and the replay officials affirmed those calls. Now, instead of playing game two, the State says that it has changed some circumstances that were important in game one, so we need to replay game one. If we agree, we will only ever play game one; we will play it over and over again, until the ten years end, with the State changing the circumstances every time

to try to win a replay. We will never proceed to game two unless, after one of the replays, there is simply no time for the State to change the circumstances. Nothing about this litigation is a game, but to us the analogy otherwise illustrates how poorly the State's position fits with any reasonable effort to timely and finally dispose of redistricting litigation.

Seventh, the State's argument that we must reset the *Gingles* analysis to ground zero ignores the simple truth that the 2023 Plan exists only because this Court held — and the Supreme Court affirmed — that the 2021 Plan likely violated Section Two. If the State originally had enacted the 2023 Plan instead of the 2021 Plan, we would have analyzed the Plaintiffs' attacks on the 2023 Plan under *Gingles*. But that's not what happened, so we won't proceed as though it did.

Further, we reject the State's argument that by limiting our initial remedial determination to the question of whether the 2023 Plan provides an additional opportunity district, we violate the proportionality disclaimer in Section Two. The State argues that we have staked the fate of the 2023 Plan on whether it provides proportional representation, which is unlawful. *See Milligan* Doc. 220 at 60–68.

The State is swinging at a straw man: the Plaintiffs' analysis did not and does not rest on proportionality grounds, and neither does ours. As an initial matter, we did not enjoin the 2021 Plan on the ground that it failed to provide proportional representation. We performed a thorough *Gingles* analysis and expressly

acknowledged a limited, non-dispositive role for evidence and arguments about proportionality. *See Milligan* Doc. 107 at 193–95. The Supreme Court affirmed our analysis, which we presume it would not have done were the analysis infected with a proportionality error. *See Allen*, 143 S. Ct. at 1502. Our remedial analysis cannot go back in time and taint our earlier ruling.

Likewise, the Plaintiffs do not urge us to enjoin the 2023 Plan on the ground that it fails to provide proportional representation. They urge us to enjoin it on the ground that it fails to provide the required remedy because District 2 is not an opportunity district. *See Milligan* Doc. 200 at 6–7; *Caster* Doc. 179 at 2–3. Federal law does not equate the provision of an additional opportunity district as a remedy for vote dilution with an entitlement to proportional representation; decades of jurisprudence so ensures. *Allen*, 143 S. Ct. at 1508–10. Any suggestion that the Plaintiffs urge us to reject the 2023 Plan because it fails to provide proportional representation blinks reality.

And as we explain below, we do not enjoin the 2023 Plan on the ground that it fails to provide proportional representation. We enjoin it on two separate, independent, and alternative grounds, neither of which raises a proportionality problem. *See infra* at Parts IV.A & IV.B.

For all these reasons, it is not a proportionality fault that we limit our initial determination to whether the 2023 Plan provides the remedy the law requires.

D. In the Alternative

Out of an abundance of caution, we have carefully considered the possibility that the foregoing analysis on the standard of review is wrong. We have concluded that even if it is, after a fresh and new *Gingles* analysis the 2023 Plan still meets the same fate. As we explain in Part IV.B below, even if we reexamine *Gingles* I, II, and III, and all the Senate Factors, relying only on (1) relevant evidence from the preliminary injunction proceedings, (2) relevant and admissible evidence from the remedial proceedings, and (3) stipulations and concessions, we reach the same conclusion with respect to the 2023 Plan that we reached for the 2021 Plan: it likely violates Section Two by diluting Black votes.

III. APPLICABLE LAW

"This Court cannot authorize an element of an election proposal that will not with certitude *completely* remedy the Section 2 violation." *Dillard*, 831 F.2d at 252 (emphasis in original); *accord, e.g.*, *Covington*, 283 F. Supp. 3d at 431. The requirement of a complete remedy means that we cannot accept a remedial plan that (1) perpetuates the vote dilution we found, *see, e.g.*, *Covington*, 283 F. Supp. 3d at 431; or (2) only partially remedies it, *see, e.g.*, *White v. Alabama*, 74 F.3d 1058, 1069–70 (11th Cir. 1996).

The law does not require that a remedial district guarantee Black voters' electoral success. "The circumstance that a group does not win elections does not

resolve the issue of vote dilution." *LULAC*, 548 U.S. at 428. Rather, the law requires that a remedial district guarantee Black voters an equal opportunity to achieve electoral success. "[T]he ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *De Grandy*, 512 U.S. at 1014 n.11.

Thus, as we said in the preliminary injunction, controlling precedent makes clear that the appropriate remedy for the vote dilution we found is an additional district in which Black voters either comprise a voting-age majority or otherwise have an opportunity to elect a representative of their choice. And as the Supreme Court explained in *Abbott*, this requirement is not new: "In a series of cases tracing back to [*Gingles*], [the Supreme Court has] interpreted [the Section Two] standard to mean that, under certain circumstance, States **must draw** 'opportunity' districts in which minority groups form 'effective majorit[ies].'" 138 S. Ct. at 2315 (emphasis added) (quoting *LULAC,* 548 U.S. at 426).

Our ruling was consistent with others in which district courts required additional opportunity districts to remedy a vote-dilution violation of Section Two. *See, e.g.*, *Perez v. Texas*, No. 11-CA-360-OLG-JES-XR, 2012 WL 13124275, at *5, 2012 U.S. Dist. LEXIS 190609 (W.D. Tex. Mar. 19, 2012) (on remand from the Supreme Court, ordering the "creation of a new Latino district" to satisfy Section Two); *League of United Latin Am. Citizens v. Perry*, 457 F. Supp. 2d 716, 719 (E.D.

Tex. 2006) (ordering, on remand from the Supreme Court, a remedial plan that restored an effective opportunity district); *accord, e.g.*, *Baldus v. Members of Wis. Gov't Accountability Bd.*, 862 F. Supp. 2d 860, 863 (E.D. Wis. 2012) (rejecting a state's remedial plan and adopting a Section Two plaintiff's remedial proposal that increased a remedial district's minority population to ensure an "effective majority-minority" district).

We have reviewed the relevant jurisprudence for guidance about how to determine whether the 2023 Plan includes an additional opportunity district. The State appears to have charted new waters: we found no other Section Two case in which a State conceded on remedy that a plan enacted after a liability finding did not include the additional opportunity district that the court said was required.

In any event, we discern from the case law two rules that guide our determination whether the 2023 Plan in fact includes an additional opportunity district. *First*, we need a performance analysis (sometimes called a functional analysis) to tell us whether a purportedly remedial district completely remedies the vote dilution found in the prior plan. A performance analysis predicts how a district will function based on statistical information about, among other things, demographics of the voting-age population in the district, patterns of racially polarized voting and bloc voting, and the interaction of those factors. *See generally Milligan* Doc. 199.

Appellate courts commonly rely on performance analyses to review district court decisions about remedial plans. *See, e.g.*, *LULAC*, 548 U.S. at 427 (reviewing a district court's evaluation of a proposed remedial district on the basis of a performance analysis that included evidence of the minority share of the population, racially polarized voting in past elections, and projected election results in the new district); *Dall. Cnty. Comm'n*, 850 F.2d at 1440 (rejecting a remedial plan because a performance analysis demonstrated that racially polarized voting would prevent the election of Black-preferred candidates in the proposed remedial district).

District courts also commonly rely on performance analyses to evaluate remedial plans in the first instance. *See, e.g.*, *Osceola County*, 474 F. Supp. 2d at 1256 (rejecting a remedial proposal that, "given the high degree of historically polarized voting," failed to remedy the VRA violation); *League of United Latin Am. Citizens*, 457 F. Supp. 2d at 721 (ordering remedial plan with three new "effective Latino opportunity districts" and basing determination that districts would "perform" on population demographics and statewide election data).

Second, the Supreme Court has not dictated a baseline level at which a district must perform to be considered an "opportunity" district. Nor has other precedent set algorithmic criteria for us to use to determine whether an alleged opportunity district will perform. But precedent does clearly tell us what criteria establish that a putative opportunity district will not perform. When a performance analysis shows that a

cohesive majority will "often, if not always, prevent" minority voters from electing the candidate of their choice in the purportedly remedial district, there is a "denial of opportunity in the real sense of that term." *LULAC*, 548 U.S. at 427, 429. And when voting is racially polarized to such a "high degree" that electoral success in the alleged opportunity district is "completely out of the reach" of a minority community, the district is not an opportunity district. *Osceola County*, 474 F. Supp. 2d at 1256.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Our findings and conclusions proceed in two parts. We first consider whether, under the precedent we just described, the 2023 Plan completely remedies the likely Section Two violation that we found and the Supreme Court affirmed. We then consider whether, starting from square one, the Plaintiffs have established that the 2023 Plan likely violates Section Two.

A. The 2023 Plan Does Not Completely Remedy the Likely Section Two Violation We Found and the Supreme Court Affirmed.

The record establishes quite clearly that the 2023 Plan does not completely remedy the likely Section Two violation that we found and the Supreme Court affirmed. The 2021 Plan included one majority-Black congressional district, District 7. This Court concluded that the Plaintiffs were substantially likely to establish that the 2021 Plan violated Section Two by diluting Black votes. *See Milligan* Doc. 107. We determined that under binding precedent, the necessary remedy was either an

additional majority-Black district or an additional Black-opportunity district. *Id.* at 5–6. We observed that as a "practical reality," because voting in Alabama is intensely racially polarized, any such district would need to include a Black "voting-age majority or something quite close to it." *Id.* at 6.

We explicitly explained that the need for two opportunity districts hinged on the evidence of racially polarized voting in Alabama — which the State concedes at this stage — and that our *Gingles* I analysis served only to determine whether it was reasonably practicable, based on the size and geography of the minority population, to create a reasonably configured map with two majority-minority districts.

The Supreme Court affirmed that order in all respects; it neither "disturb[ed]" our fact findings nor "upset" our legal conclusions. *Allen*, 143 S. Ct. at 1502, 1506. The Supreme Court did not issue any instructions for us to follow when the cases returned to our Court or warn us that we misstated the appropriate remedy. We discern nothing in the majority opinion to hold (or even to suggest) that we misunderstood what Section Two requires. We have carefully reviewed the portion of the Chief Justice's opinion that received only four votes, as well as Justice Kavanaugh's concurrence, and we discern nothing in either of those writings that adjusts our understanding of what Section Two requires in these cases. We do not understand either of those writings as undermining any aspect of the Supreme Court's affirmance; if they did, the Court would not have affirmed the injunction.

We simply see no indication in *Allen* that we misapplied Section Two.

Because there is no dispute that the 2023 Plan does not have two majority-Black districts, *Milligan* Doc. 251 ¶ 1, the dispositive question is whether the 2023 Plan contains an additional Black-opportunity district. We find that it does not, for two separate and independent reasons.

First, we find that the 2023 Plan does not include an additional opportunity district because the State itself concedes that the 2023 Plan does not include an additional opportunity district. *See id.* ¶¶ 5–9; Aug. 14 Tr. 163–64. Indeed, the State's position is that the Legislature was not required to include an additional opportunity district in the 2023 Plan. Aug. 14 Tr. 157–61, 163–64.

Second, we find that the 2023 Plan does not include an additional opportunity district because stipulated evidence establishes that fact. District 2 has the second-highest Black voting-age population after District 7, and District 2 is the district the Plaintiffs challenge. *See Milligan* Doc. 200 at 6–7; *Milligan* Doc. 251 ¶ 3. District 2 (with a Black voting-age population of 39.93%) is, according to the State, "as close as you are going to get" to a second majority-Black district. Aug. 14 Tr. 164.

Based on (1) expert opinions offered by the *Milligan* and *Caster* Plaintiffs and (2) the Legislature's own performance analysis, the parties stipulated that in District 2 in the 2023 Plan, white-preferred candidates have "almost always defeated Black-preferred candidates." *Milligan* Doc. 251 ¶ 5; *see also Milligan* Docs. 200-2, 200-3;

Caster Doc. 179-2.

Standing alone, this stipulation supports a finding that the new District 2 is not an opportunity district. Because voting is so intensely racially polarized in District 2, a Black-voting age population of 39.93% is insufficient to give Black voters a fair and reasonable opportunity to elect a representative of their choice: it will either never happen, or it will happen so very rarely that it cannot fairly be described as realistic, let alone reasonable.

The evidence fully supports the parties' stipulation. The *Milligan* Plaintiffs' expert, Dr. Liu, examined the effectiveness of Districts 2 and 7 of the 2023 Plan in eleven biracial elections between 2014 and 2022. *Milligan* Doc. 200-2 at 1. Dr. Liu opined that in District 2, "[a]ll Black-preferred-candidates . . . in the 11 biracial elections were defeated." *Id.* at 2. Dr. Liu further opined that the District 2 races were not close: the average two-party vote share for the Black preferred candidates in District 2 was approximately 42%. *Id.* at 3; *Milligan* Doc. 251 ¶ 7. Accordingly, Dr. Liu concluded that "voting is highly racially polarized in [Districts 2] and [7] in the [2023] Plan," and the new District 2 "produces the same results for Black Preferred Candidates" that the 2021 Plan produced. *Milligan* Doc. 200-2 at 1.

The *Caster* Plaintiffs' expert, Dr. Palmer, reached the same conclusion using a different analysis. Dr. Palmer analyzed the 2023 Plan using seventeen contested statewide elections between 2016 and 2022. *Milligan* Doc. 251 ¶ 6; *Caster* Doc. 179-

2. Dr. Palmer opined that "Black voters have a clear candidate of choice in each contest, and White voters are strongly opposed to this candidate." *Caster* Doc. 179-2 ¶¶ 8, 11–12. Dr. Palmer further opined that "Black-preferred candidates are almost never able to win elections in" District 2 because "[t]he Black-preferred candidate was defeated in 16 of the 17 elections [he] analyzed." *Id.* ¶¶ 8, 11–12, 18, 20; *accord Milligan* Doc. 251 ¶ 6. Dr. Palmer observed that Black preferred candidates regularly lost by a substantial margin: the two-party vote share for the Black preferred candidates in District 2 was 44.5%. *Caster* Doc. 179-2 ¶ 18; *see also Milligan* Doc. 213 ¶ 6. Accordingly, Dr. Palmer opined that the new District 2 does not allow Black voters to elect a candidate of their choice. *Caster* Doc. 179-2 ¶ 20.

We credited both Dr. Liu and Dr. Palmer in the preliminary injunction proceedings, *see Milligan* Doc. 107 at 174–76, and we credit them now for the same reasons we credited them then. Both experts used the same methodology to develop their opinions for these remedial proceedings that they used to develop their opinions on liability. *See Milligan* Doc. 200-2 at 2; *Caster* Doc. 179-2 ¶ 9 & n.1. And the State has not suggested that we should discredit either expert, or that we should discount their opinions for any reason.

Indeed, the Legislature's analysis of the 2023 Plan materially matches Dr. Liu's and Dr. Palmer's. The Legislature analyzed the 2023 Plan in seven election contests. *Milligan* Doc. 251 ¶ 9. The Legislature's analysis found that "[u]nder the

2023 Plan, the Black-preferred candidate in [District] 2 would have been elected in 0 out of the 7 contests analyzed." *Id*. And it showed that the losses were by a substantial margin: "Under the 2023 Plan," the Legislature's analysis found, "the average two-party vote-share for Black preferred candidates in [District] 2 is 46.6%." *Id*.

All the performance analyses support the same conclusion: the 2023 Plan provides no greater opportunity for Black Alabamians to elect a candidate of their choice than the 2021 Plan provided. District 2 is the closest the 2023 Plan comes to a second Black-opportunity district, and District 2 is not a Black-opportunity district. Accordingly, the 2023 Plan perpetuates, rather than completely remedies, the likely Section Two violation found by this Court.

B. Alternatively: Even If the Plaintiffs Must Re-Establish Every Element of *Gingles* Anew, They Have Carried that Burden and Established that the 2023 Plan Likely Violates Section Two.

Even if we reset the *Gingles* analysis to ground zero, the result is the same because the Plaintiffs have established that the 2023 Plan likely violates Section Two. We discuss each step of the *Gingles* analysis in turn.

1. *Gingles* I - Numerosity

The numerosity part of *Gingles* I considers whether Black voters as a group are "sufficiently large . . . to constitute a majority" in a second majority-Black congressional district in Alabama. *Cooper*, 581 U.S. at 301 (internal quotation marks

omitted). This issue was undisputed during the preliminary injunction proceedings, *Milligan* Doc. 107 at 146, and the State offers no evidence to challenge our previous finding. Accordingly, we again find that Black voters, as a group, are "sufficiently large . . . to constitute a majority" in a second majority-Black congressional district in Alabama. *Cooper*, 581 U.S. at 301 (internal quotation marks omitted).

2. *Gingles* I - Compactness

We next consider whether the *Milligan* and *Caster* Plaintiffs have established that Black voters as a group are sufficiently geographically compact to constitute a majority in a second reasonably configured congressional district. We proceed in three steps: *first*, we explain our credibility determinations about the parties' expert witnesses; *second*, we explain why the State's premise that reasonable compactness necessarily requires the Plaintiffs' proposed plans to "meet or beat" the 2023 Plan on all available compactness metrics is wrong; and *third*, we consider the parties' arguments about geographic compactness on the State's own terms.

a. Credibility Determinations

In the preliminary injunction, we found Dr. Duchin and Mr. Cooper "highly credible." *Milligan* Doc. 107 at 148–52. The State has not adduced any evidence or made any argument during remedial proceedings to disturb those findings. We also found credible Dr. Bagley, who earlier testified about the Senate Factors and now opines about communities of interest. *Id.* at 185–87. Likewise, the State has not

adduced any evidence or made any argument during remedial proceedings to disturb our original credibility determination about Dr. Bagley. Accordingly, we find credible each of Plaintiffs' *Gingles* I experts.

Although we "assign[ed] very little weight to Mr. Bryan's testimony" in the preliminary injunction and explained at great length why we found it unreliable, *id.* at 152–56, the State again relies on Mr. Bryan as an expert on "race predominance," this time through an unsworn report where he "assessed how county 'splits differ by demographic characteristics when it comes to the division of counties' in Plaintiffs' alternative[]'" plans. *See Milligan* Doc. 267 ¶ 156 (quoting *Milligan* Doc. 220-10 at 22). When we read the State's defense of the 2023 Plan, it is as though our credibility determination never occurred: the State repeatedly cites Mr. Bryan's opinions but makes no effort to rehabilitate his credibility. *See generally Milligan* Doc. 220.

Likewise, when we read Mr. Bryan's 2023 report, it is as though our credibility determination never occurred. Mr. Bryan makes no attempt to rehabilitate his own credibility or engage any of the many reasons we assigned little weight to his testimony and found it unreliable. *See generally Milligan* Doc. 220-10. Mr. Bryan even cites this case as one of two cases in which he has testified, without mentioning that we did not credit his testimony. *See id.* at 4. The district court in the other case found "his methodology to be poorly supported" and that his "conclusions carried little, if any, probative value on the question of racial predominance."

Robinson v. Ardoin, 605 F. Supp. 3d 759, 824 (M.D. La. 2022).

When we read the State's response to the Plaintiffs' motion to exclude Mr. Bryan's 2023 report as unreliable, it is again as though our credibility determination never occurred. The State does not acknowledge it or suggest that any of the problems we identified have been remedied (or at least not repeated). *See generally Milligan* Doc. 245.

Against this backdrop, it is especially remarkable that (1) the State did not call Mr. Bryan to testify live at the remedial hearing, and (2) Mr. Bryan's report is not sworn. *See Milligan* Doc. 220-10. "[C]ross-examination is the greatest legal engine ever invented for the discovery of truth." *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987) (internal quotation marks omitted) (quoting 5 J. Wigmore, Evidence § 1367 at 29 (3d ed. 1940)). Cross-examination strikes us as especially important because this Court already has found this expert witness' testimony incredible and unreliable. It strikes us as even more valuable when, as here, a witness has not reduced his opinions to sworn testimony.

Standing alone, these circumstances preclude us from assigning any weight to Mr. Bryan's 2023 opinion. But these circumstances don't stand alone: even if we were to evaluate Mr. Bryan's 2023 opinion without reference to our earlier credibility determination, we would not admit it or assign any weight to it.

As the Supreme Court made clear in *Daubert v. Merrell Down*

Pharmaceuticals, Inc., 509 U.S. 579 (1993), Federal Rule of Evidence 702 requires this Court to "perform the critical 'gatekeeping' function concerning the admissibility" of expert evidence. *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (*en banc*) (quoting *Daubert*, 509 U.S. at 589 n.7). That gatekeeping function involves a "rigorous three-part inquiry" into whether:

> (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

Id. (quoting *City of Tuscaloosa v. Harcos Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998)). "The burden of establishing qualification, reliability, and helpfulness rests on the proponent of the expert opinion." *Id.*

The State has not met its burden on at least two of these three requirements. *First*, as explained above, this Court ruled that Mr. Bryan was not a credible witness in January 2021. *Milligan* Doc. 107 at 152. *Second*, Mr. Bryan's report is not reliable. For that, the Court "assess[es] 'whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue.'" *Frazier*, 387 F.3d at 1261–62 (quoting *Daubert*, 509 U.S. at 592–93). There are two parts to the methodology question: relevance and reliability. *See Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310–12 (11th Cir. 1999). Under the relevance part, "the

court must ensure that the proposed expert testimony is relevant to the task at hand, . . . i.e., that it logically advances a material aspect of the proposing party's case." *Id.* at 1312 (internal quotation marks omitted). "[T]he evidence must have a valid scientific connection to the disputed facts in the case." *Id.*

Under the reliability part, courts consider "four noninclusive factors," namely "(1) whether the theory or technique can be tested; (2) whether it has been subjected to peer review; (3) whether the technique has a high known or potential rate of error; and (4) whether the theory has attained general acceptance within the scientific community." *Id.* The "primary focus" should "be solely on principles and methodology, not on the conclusions that they generate," so "the proponent of the testimony does not have the burden of proving that it is scientifically correct, but that by a preponderance of the evidence, it is reliable." *Id.* (internal quotation marks omitted). As explained below, Mr. Bryan's report is neither relevant nor reliable.

Mr. Bryan's 2023 opinion is that "race predominated in the drawing of both the [Districts 2] and [7] in the [VRA Plan] and the Cooper Plans." *Milligan* Doc. 220-10 ¶ 7. That opinion rests on what Mr. Bryan calls a "[g]eographic [s]plits [a]nalysis of [c]ounties." *Id.* at 22. *First*, as to reliability, "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the

opinion proffered." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

The Plaintiffs attack Mr. Bryan's 2023 opinion as *ipse dixit*, and we agree. Mr. Bryan's report does not explain how his opinion about race predominance is connected to the geographic splits methodology that he used, or even why an evaluation of race predominance ordinarily might be based on geographic splits analysis. *See Milligan* Doc. 220-10 at 22–26. Mr. Bryan simply presents the results of his geographic splits analysis and then states in one sentence a cursory conclusion about race predominance. *Id.* The State's response does nothing to solve this problem. *See Milligan* Doc. 245 at 7–10.

Second, as to helpfulness, the Plaintiffs have not offered the VRA Plan as an illustrative plan for *Gingles* I, so we have no need for Mr. Bryan's opinion about that plan. The Plaintiffs did offer the Cooper plans, but we also have no need for his opinion about those: we presume the preliminary injunction would not have been affirmed if there were an open question whether race played an improper role in the preparation of all of them, given that the State squarely presented this argument to the Supreme Court. And even if we were to accept Mr. Bryan's opinion about the Cooper plans (which we don't), the State stakes no part of its defense of the 2023 Plan on arguments about that opinion: the State cites Mr. Bryan's opinion only once in the argument section of its brief, and that is to make an argument about the VRA Plan. *Milligan* Doc. 220 at 58. Accordingly, nothing in Mr. Bryan's report is helpful

to this Court's decision whether the Plaintiffs have established that the 2023 Plan likely violates Section Two.

Because we again do not credit Mr. Bryan and we find his 2023 opinion unreliable and unhelpful, we **GRANT IN PART** the Plaintiffs' motion *in limine* and **EXCLUDE** his opinion from our analysis. *See* Fed. R. Evid. 702; *Daubert*, 509 U.S. at 589–92. For those same reasons, even if we were to receive Mr. Bryan's opinion into evidence, we would assign it no weight.

We turn next to Mr. Trende's opinion. *See Milligan* Doc. 220-12. The State relies on Mr. Trende to "assess[] the 2023 Plan and each of Plaintiffs' alternative plans based on the three compactness measures Dr. Duchin used in her earlier report." *Milligan* Doc. 220 at 57–58. Mr. Trende is a Senior Elections Analyst at Real Clear Politics, he is a doctoral candidate at Ohio State University, and he has a master's degree in applied statistics. *Milligan* Doc. 220-12 at 2–4.

The Plaintiffs do not contest Mr. Trende's qualifications to testify as an expert. And because he uses the same common statistical measures of compactness that Dr. Duchin used, the Plaintiffs do not contest the reliability of his methods. Accordingly, we admit Mr. Trende's report for the limited and alternative purpose of conducting a new *Gingles* analysis. We explain the weight we assign it in that analysis below.

b. The "Meet or Beat" Requirement

We now pause to correct a fundamental misunderstanding in the State's view of step one of the *Gingles* analysis. Our task is not, as the State repeatedly suggests, to compare the Plaintiffs' illustrative plans with the 2023 Plan to determine which plan would prevail in a "beauty contest." *Allen*, 143 S. Ct. at 1505 (internal quotation marks omitted) (alterations accepted). As the Supreme Court affirmed in this very case, "[t]he District Court . . . did not have to conduct a beauty contest between plaintiffs' maps and the State's." *Id.* (internal quotation marks omitted) (alterations accepted); *see also Vera*, 517 U.S. at 977 (plurality opinion) ("A § 2 district that is *reasonably* compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries" is not required "to defeat rival compact districts designed by [the State] in endless 'beauty contests.'" (emphasis in original)).

Nevertheless, the State frames the "focus" of these proceedings as "whether Plaintiffs can produce an alternative map that equals the 2023 Plan on the traditional principles that *Allen* reaffirmed were the basis of the § 2 analysis." *Milligan* Doc. 220 at 33. But neither *Allen* nor any other case law stands for that proposition. Our preliminary injunction order — affirmed by the Supreme Court — explained that "[c]ritically, our task is not to decide whether the majority-Black districts in the Duchin plans and Cooper plans are 'better than' or 'preferable' to a majority-Black

district drawn a different way. Rather, the rule is that '[a] § 2 district that is **reasonably** compact and regular, taking into account traditional districting principles,' need not also 'defeat [a] rival compact district[]' in a 'beauty contest[].'" *Milligan* Doc. 107 at 165 (emphasis in original) (quoting *Vera*, 517 U.S. at 977–78 (plurality opinion)).

Instead of the "meet-or-beat" requirement the State propounds, the essential question under *Gingles* I is and has always been whether the minority group is "sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district." *Cooper*, 581 U.S. at 301 (internal quotation marks omitted). This standard does not require that an illustrative plan outperform the 2023 Plan by a prescribed distance on a prescribed number of prescribed metrics. An illustrative plan may be reasonably configured even if it does not outperform the 2023 Plan on every (or any particular) metric. The standard does not require the Plaintiffs to offer the *best* map; it requires them to offer a reasonable one. Indeed, requiring a plaintiff to meet or beat an enacted plan on every redistricting principle a State selects would allow the State to immunize from challenge a racially discriminatory redistricting plan simply by claiming that it best satisfied a particular principle the State defined as non-negotiable.

Accordingly, that the 2023 Plan preserves communities of interest differently from the Plaintiffs' illustrative maps, or splits counties differently from the

illustrative maps, does not automatically make the illustrative maps unreasonable. As Mr. Cooper testified, different maps will necessarily prioritize traditional districting criteria in different ways. This is why the maps offered by a Section Two plaintiff are only ever *illustrative*; states are free to prioritize the districting criteria as they wish when they enact a remedial map, so long as they satisfy Section Two. The State has essentially conceded that it failed to do so here, maintaining that it can skirt Section Two by excelling at whatever traditional districting criteria the Legislature deems most pertinent in a redistricting cycle.

The bottom line is that the Plaintiffs' illustrative maps can still be "reasonably configured" even if they do not outperform the 2023 Plan on every (or any particular) metric. The premise that forms the backbone of the State's defense of the 2023 Plan therefore fails.

More fundamentally, even if we were to find that the 2023 Plan respects communities of interest better or is more compact than the 2021 Plan — that the 2023 Plan "beats" the 2021 Plan — that would not cure the likely violation we found because the violation was not that the 2021 Plan did not respect communities of interest, or that it was not compact enough. We found that the 2021 Plan likely diluted Black votes. The State cannot avoid the mandate of Section Two by improving its map on metrics **other than compliance with Section Two**. Otherwise, it could forever escape remediating a Section Two violation by making each

remedial map slightly more compact, or slightly better for communities of interest, than the predecessor map. That is not the law: a Section Two remedy must be tailored to the specific finding of Section Two liability.

In any event, we do not find that the 2023 Plan respects communities of interest or county lines better than the Plaintiffs' illustrative maps. *See* infra at Part IV.B.2.d.

c. Geographic Compactness Scores

We next turn, as we did in the preliminary injunction, to the question whether the compactness scores for the Duchin plans and the Cooper plans indicate that the majority-Black congressional districts in those plans are reasonably compact. In the preliminary injunction, we based our reasonableness finding about the scores on (1) the testimony of "eminently qualified experts in redistricting," and (2) "the relative compactness of the districts in the [illustrative] plans compared to that of the districts in the [2021] Plan." *See Milligan* Doc. 107 at 157.

The enactment of the 2023 Plan has not changed any aspect of Dr. Duchin and Mr. Cooper's testimony that the compactness scores of the districts in their plans are reasonable. *See id.* (citing such testimony at Tr. 446, 471, 492–493, 590, 594). Because that testimony was not relative — it opined about the Duchin plans and Cooper plans standing alone, not compared to any other plan — the enactment of a new plan did not affect it.

Neither does Dr. Trende's opinion affect the testimony of Dr. Duchin and Mr. Cooper about reasonableness. When we originally analyzed that testimony, we concluded that because Mr. Bryan "offered no opinion on what is reasonable and what is not reasonable in terms of compactness," "the corollary of our decision to credit Dr. Duchin and Mr. Cooper is a finding that the Black population in the majority-Black districts in the Duchin plans and the Cooper plans is reasonably compact." *Id.* at 157–58 (internal quotation marks omitted). Like Mr. Bryan then, Mr. Trende now offers no opinion on what is reasonable or what is not reasonable in terms of compactness. *See Milligan* Doc. 220-12 at 6–11 ("Analysis of Maps"). Accordingly, the State still has adduced no evidence to question, let alone disprove, the Plaintiffs' evidence that the Black population in the majority-Black districts in the illustrative plans is reasonably compact.

When we examine the relative compactness of the districts in the Duchin plans and the Cooper plans compared to that of the districts in the 2023 Plan, the result remains the same. Mr. Trende acknowledges that on an average Polsby-Popper metric, Duchin plan 2 is "marginally more compact" than the 2023 Plan, and that on a cut edges metric, Duchin plan 2 outperforms the 2023 Plan. *Id.* at 10. (Nevertheless, Mr. Trende opines that the 2023 Plan outperforms all illustrative plans when all three metrics are taken in account. *Id.*) And Mr. Trende does not opine that any of the Duchin plans or Cooper plans that received lower statistical scores

received unreasonably lower scores or unreasonable scores. *See id.*at 8–10.

"[A]s far as compactness scores go, all the indicators [again] point in the same direction. Regardless how we study this question, the answer is the same each time. We find that based on statistical scores of geographic compactness, each set of Section Two plaintiffs has submitted remedial plans that strongly suggest that Black voters in Alabama are sufficiently numerous and reasonably compact to comprise a second majority-Black congressional district." *Milligan* Doc. 107 at 159.

d. Reasonable Compactness and Traditional Redistricting Principles

As we said in the preliminary injunction, "[c]ompactness is about more than geography." *Id.* If it is not possible to draw an additional opportunity district that is reasonably configured, Section Two does not require such a district. In the preliminary injunction, we began our analysis on this issue with two visual assessments: one of the Black population in Alabama, and one of the majority-Black districts in the Duchin and Cooper plans. *See id.* at 160–62.

Our first visual assessment led us to conclude that "[j]ust by looking at the population map [of the Black population in Alabama], we can see why Dr. Duchin and Mr. Cooper expected that they could easily draw two reasonably configured majority-Black districts." *Id.* at 161. The State suggests no reason why we should reconsider that finding now. And the enactment of the 2023 Plan does not change the map we visually assessed, or the conclusion that we drew from it.

Our second visual assessment led us to conclude that we "d[id] not see tentacles, appendages, bizarre shapes, or any other obvious irregularities [in the Duchin or Cooper plans] that would make it difficult to find that any District 2 could be considered reasonably compact." *Id.* at 162. The enactment of the 2023 Plan does not change the maps that we visually assessed, nor the conclusion that we drew from them.

In the preliminary injunction, "we next turn[ed] to the question whether the Duchin plans and the Cooper plans reflect reasonable compactness when our inquiry takes into account, as it must, 'traditional districting principles such as maintaining communities of interest and traditional boundaries.'" *Id.* (quoting *LULAC*, 548 U.S. at 433). We follow the same analytic path now.

This step of the analysis is at the heart of the State's assertion that the 2023 Plan moved the needle on *Gingles* I. The State argues that "the lesson from *Allen* is that Section 2 requires Alabama to avoid discriminatory effects in how it treats communities of interest, even if that means sacrificing core retention," and that neither we nor the Supreme Court have "ever said that [Section Two] requires the State to subordinate 'nonracial communities of interest' in the Gulf and Wiregrass to Plaintiffs' racial goals." *Milligan* Doc. 267 ¶¶ 215–16 (quoting *LULAC*, 548 U.S. at 433). The State contends that the Plaintiffs cannot "show that there is a reasonably configured alternative remedy that would also maintain communities of interest in

the Black Belt, Gulf, and Wiregrass, on par with the 2023 Plan." *Milligan* Doc. 220 at 37 (internal quotation marks omitted).

At its core, the State's position is that no Duchin plan or Cooper plan can "meet or beat" the 2023 Plan with respect to these three communities of interest and county splits. The State leans heavily on additional evidence about these communities of interest, the rule that Section Two "never require[s] adoption of districts that violate traditional redistricting principles," *Allen*, 143 S. Ct. at 1510 (internal quotation marks omitted), and the legislative findings that accompany the 2023 Plan.

The State contends that "this is no longer a case in which there would be a split community of interest" in both the Plaintiffs' plans and the enacted plan, because in the 2023 Plan, the "Black Belt, Gulf, and Wiregrass communities are maintained to the maximum extent possible." *Milligan* Doc. 220 at 51 (internal quotation marks omitted) (alterations accepted). The State asserts that the 2023 Plan "rectifies what Plaintiffs said was wrong with the 2021 Plan" because it "puts all 18 counties that make up the Black Belt entirely within Districts 2 and 7" and keeps Montgomery whole in District 2. *Id.* at 42–43.

For their part, the *Milligan* Plaintiffs say that the 2023 Plan changed nothing. They attack the legislative findings about traditional districting principles — more particularly, the legislative findings about communities of interest, county splits, and

protection of incumbents — as perpetuating the vote dilution we found because these findings were "tailored to disqualify" the Plaintiffs' illustrative plans. *Milligan* Doc. 200 at 20. The *Milligan* Plaintiffs accuse the State of "ignor[ing] that the Supreme Court recognized" that the Duchin plans and Cooper plans "comported with traditional districting criteria, even though they split Mobile and Baldwin counties"; they say that the record continues to support that conclusion; and they cite a declaration from the first Black Mayor of Mobile and a supplemental report prepared by Dr. Bagley. *Id.* at 21–22 (internal quotation marks omitted). The *Milligan* Plaintiffs assert that the 2023 Plan keeps together only the Gulf Coast while perpetuating vote dilution in the Black Belt and splitting the Wiregrass between Districts 1 and 2. *Id.* at 22–23.

Before we explain our findings and conclusions on these issues, we repeat the foundational observations that we made in the preliminary injunction: (1) these issues were "fervently disputed," (2) the State continues to insist that "there is no legitimate reason to separate Mobile County and Baldwin County," (3) our task is not to decide whether the majority-Black districts in the Duchin plans and Cooper plans are "better than" any other possible majority-Black district, and (4) "we are careful to avoid the beauty contest that a great deal of testimony and argument seemed designed to try to win." *Milligan* Doc. 107 at 164–65.

i. Communities of Interest

As we previously found and the Supreme Court affirmed, the Black Belt "stands out to us as quite clearly a community of interest of substantial significance," but the State "overstate[s] the point" about the Gulf Coast. *See Milligan* Doc. 107 at 165–71; *accord Allen*, 143 S. Ct. at 1505. The evidence about the Gulf Coast is now more substantial than it was before, but it is still considerably weaker than the record on the Black Belt, which rests on extensive stipulated facts and includes extensive expert testimony, and which spanned a range of demographic, cultural, historical, and political issues. *See Milligan* Doc. 107 at 165–67.

As the Supreme Court recognized, in the preliminary injunction we found that, "[n]amed for its fertile soil, the Black Belt contains a high proportion of black voters, who share a rural geography, concentrated poverty, unequal access to government services, . . . lack of adequate healthcare, and a lineal connection to the many enslaved people brought there to work in the antebellum period." *Allen*, 143 S. Ct. at 1505 (internal quotation marks omitted).

We now have the additional benefit of Dr. Bagley's testimony about the Black Belt, Gulf Coast, and Wiregrass. *See Milligan* Doc. 200-15. We credit his testimony and find his opinions helpful, particularly (1) his opinion further describing the shared experience of Black Alabamians in the Black Belt; and (2) his opinion that "treating Mobile and Baldwin Counties as an inviolable" community of interest is

"ahistorical" in light of the connections between Mobile and the Black Belt. *See id.* at 1.

Dr. Bagley's testimony further describes the shared experiences of Alabamians in the Black Belt, which are "not only related to the fertility of the soil and the current poverty" there, but "are also characterized by" many shared racial experiences, including "Indian Removal, chattel slavery, cotton production, Reconstruction and Redemption, sharecropping, convict leasing, white supremacy, lynching, disenfranchisement, the birth of Historically Black Colleges and Universities . . . , struggles for civil and voting rights, Black political and economic organization, backlash in the form of violence and economic reprisal, repressive forms of taxation, [and] white flight," to name a few. *Id.* at 2.

Dr. Bagley opines that "many of these characteristics" also apply to "metropolitan Mobile," which Dr. Bagley describes as "Black Mobile." *Id.* at 2–3. Dr. Bagley explains that the Port of Mobile (a cornerstone of the State's arguments about the Gulf Coast community of interest) "historically saw the importation and exportation of human chattel, up to the illegal importation of enslaved individuals by the crew of the Clotilda in 1860," as well as "the export of the cotton grown by the enslaved people in the Black Belt." *Id.* at 2. And Dr. Bagley explains that Black Alabamians living in modern Mobile share experiences of "concentrated poverty" and a "lack of access to healthcare" with Alabamians in the Black Belt, such that

Black Alabamians in Mobile have more in common with people in the Black Belt than they do with people in whiter Baldwin County. *Id.* at 3–4.

Further, Dr. Bagley opines that treating Mobile and Baldwin Counties as an inseparable community of interest is "ahistorical." *Id.* at 1, 4–7. His testimony is that the State overstates the evidence of "alleged connections" between Mobile and Baldwin Counties and fails to acknowledge the reality that "Black Mobile is geographically compact and impacted by poverty relative to Baldwin County, which is, by contrast, affluent and white." *Id.* at 4.

The State does little to diminish Dr. Bagley's testimony. *See Milligan* Doc. 220 at 44–49. *First,* the State disputes only a few of the many details he discusses, none of which undermines his substantive point. *See id. Second*, without engaging Dr. Bagley's testimony about the connections between the Black Belt and Mobile, or his testimony that treating the Gulf Coast as "inviolable" is "ahistorical," the State reiterates its previous argument that the Gulf Coast is "indisputably" a community of interest that Plaintiffs would split along racial lines. *Id.* at 39–40. *Third,* without engaging Dr. Bagley's point about the shared racial experiences of Alabamians living in the Black Belt (or the stipulated facts), the State asserts that the 2023 Plan successfully unites the Black Belt as a "nonracial community of interest." *Id.* at 38. And *fourth,* the State urges us to assign Dr. Bagley's opinion little weight because a "paid expert cannot supersede legislative findings, especially where, as here, the

expert's opinions are based on a selective retelling of facts." *Id.* at 48–49. We discuss each argument in turn.

First, the State's effort to refute specific details of Dr. Bagley's testimony about the Black Belt is unpersuasive. Dr. Bagley's report is well-supported and factually dense. *See Milligan* Doc. 200-15. Even if we accept *arguendo* the State's isolated factual attacks, *see Milligan* Doc. 220 at 44–49, neither the basis for nor the force of the report is materially diminished.

Second, the State continues to insist that the Gulf Coast is "indisputably" a community of interest that cannot be separated, especially "along racial lines," but the record does not bear this out, particularly in the light of the State's failure to acknowledge, let alone rebut, much of Dr. Bagley's testimony. The State says nothing about Dr. Bagley's testimony that treating Mobile and Baldwin Counties as inseparable is ahistorical because those Counties were in separate congressional districts for almost all the period between 1876 and the 1970s. *Milligan* Doc. 200-15 at 7. The State ignores his testimony that Black Alabamians living in poverty in Mobile don't have very much in common with white, affluent Alabamians living in Baldwin County. The State ignores his testimony that those Black Alabamians have more in common (both historically and to the present day) with Black Alabamians living in the Black Belt. Put simply, even if we accept all the new evidence about the Gulf Coast, it fails to establish that the Gulf Coast cannot be separated under any

circumstance, let alone to avoid or remedy vote dilution.

Third, Dr. Bagley's report further disproves what the parties' fact stipulations already had precluded: the State's assertion that the Black Belt is merely one of three "nonracial" communities of interest that the 2023 Plan keeps together as much as possible. *Milligan* Doc. 220 at 38. The Plaintiffs have supported their claims with arguments and evidence about the cracking of Black voting strength in the Black Belt. *See, e.g.*, *Milligan* Doc. 69 at 19, 29–30; *Caster* Doc. 56 at 7, 9–10. Extensive stipulations of fact and extensive expert testimony have described a wide range of demographic, cultural, historical, and political characteristics of the Black Belt, many of which relate to race. *See Milligan* Doc. 107 at 165–67.

On remedy, the Plaintiffs argue that the new District 2 perpetuates rather than remedies the dilution we found in the Black Belt. *Milligan* Doc. 200 at 19. And Dr. Bagley's testimony is that many of the shared experiences of Alabamians living in the Black Belt are steeped in race. *Milligan* Doc. 200-15 at 1–4. The State's failure to rebut Dr. Bagley's testimony undermines its insistence that the Black Belt is no longer at the heart of this case and is merely one of three nonracial communities of interest maintained in the 2023 Plan.

We already faulted the State once for pressing an overly simplistic view of the Black Belt. In the preliminary injunction, we relied on the substantial body of evidence about the Black Belt (much of it undisputed) to reject the State's assertion

that the Plaintiffs' "attempt to unite much of the Black Belt as a community of interest in a remedial District 2 is 'merely a blunt proxy for skin color.'" *Milligan* Doc. 107 at 168 (quoting *Milligan* Doc. 78 at 86). As we explained, "[t]he Black Belt is overwhelmingly Black, but it blinks reality to say that it is a 'blunt proxy' for race – on the record before us, the reasons why it is a community of interest have many, many more dimensions than skin color." *Id.* at 169. The State's assertion that the Black Belt is a "nonracial" community of interest now swings the pendulum to the opposite, equally inaccurate, end of the spectrum.

Fourth, the State argues that as between Dr. Bagley's testimony about communities of interest and the legislative findings about communities of interest, we are required by law to defer to the legislative findings. *Milligan* Doc. 220 at 48–49. But the State ignores the Plaintiffs' argument that no deference is owed to a legislature's redistricting policies that perpetuate rather than remedy vote dilution. *Compare Milligan* Doc. 200 at 20 (*Milligan* Plaintiffs' objection to deference, citing discussions of core retention in *Allen* and incumbency protection and partisan political goals in *LULAC*), *with Milligan* Doc. 220 (State's filing, making no response).

We regard it as beyond question that if we conclude that the 2023 Plan perpetuates vote dilution, we may not defer to the legislative findings in that Plan. Ordinarily, that rule would not matter for our present task: because the point of a

Gingles I analysis is to determine whether a challenged plan dilutes votes, we would not refuse deference to legislative findings for *Gingles* I purposes on the ground that the findings perpetuate vote dilution. It would be circular reasoning for us to assume the truth of our conclusion as a premise of our analysis.

This is not the ordinary case: we found that the Plaintiffs established that the 2021 Plan likely violated Section Two by diluting Black votes, and the State has conceded that District 2 in the 2023 Plan is not a Black-opportunity district. In this circumstance, we discern no basis in federal law for us to defer to the legislative findings.

The *Milligan* Plaintiffs impugn the findings on numerous other grounds — namely, that they were "after the fact 'findings' tailored to disqualify" the Plaintiffs' illustrative plans; "contradict" the guidelines; "were never the subject of debate or public scrutiny"; "ignored input from Black Alabamians and legislators"; and "simply parroted attorney arguments already rejected by this Court and the Supreme Court." *Milligan* Doc. 200 at 20. And the *Milligan* Plaintiffs urge us to reject the findings' attempt to "enshrine as 'non-negotiable' certain supposed 'traditional redistricting principles'" about communities of interest and county splits. *Id.* Ultimately, the *Milligan* Plaintiffs suggest that the legislative findings are not what they purport to be: the result of the deliberative legislative process. The testimony and evidence were that the findings were drafted by the Alabama Solicitor General,

were adopted without review or debate by the Legislature or even really knowing why they were placed there, and included only at counsel's instigation.

We have reviewed the legislative findings carefully and make three observations about them for present purposes. *First*, although the northern half of Alabama is home to numerous universities, a substantial military installation, various engines of economic growth, and two significant metropolitan areas (Huntsville and Birmingham), the legislative findings identify no communities of interest in that half of the state. *See* App. A. *Second*, the legislative findings, unlike the guidelines, give no indication that the Legislature considered whether the 2023 Plan dilutes minority voting strength. The guidelines set that as a priority consideration, but the legislative findings do not mention it and set other items as "non-negotiable" priorities (*i.e.*, keeping together communities of interest and not pairing incumbents).[21] The only reason why the 2023 Plan exists is because we enjoined the 2021 Plan on the ground that it likely diluted minority voting strength. And *third*, there is a substantial difference between the definition of "community of interest" in the legislative findings and that definition in the guidelines: the legislative findings stripped race out of the list of "similarities" that are included in

[21] To facilitate the reader's opportunity to make this comparison conveniently, we attach the guidelines to this order as Appendix B. *Compare* App. B at 1, *with* App. A at 2.

the guidelines definition. *Compare* App. A at 4, *with* App. B. In a case involving extensive expert testimony about a racial minority's shared experience of a long and sordid history of race discrimination, this deletion caught our eye. We further observe that the legislative findings explicitly invoke the "French and Spanish colonial heritage" of the Gulf Coast region while remaining silent on the heritage of the Black Belt. App. A at 6.

In any event, we do not decline to defer to the legislative findings on the grounds the *Milligan* Plaintiffs suggest. We decline to defer to them because the State (1) concedes that District 2 in the 2023 Plan is not an opportunity district, and (2) fails to respond to the Plaintiffs' (valid) point that we cannot readily defer to the legislative findings if we find that they perpetuate vote dilution.

Ultimately, we find that the new evidence about the Gulf Coast does not establish that the Gulf Coast is the community of interest of primary importance, nor that the Gulf Coast is more important than the Black Belt, nor that there can be no legitimate reason to separate Mobile and Baldwin Counties.

And we repeat our earlier finding that the Legislature has repeatedly split Mobile and Baldwin Counties in creating maps for the State Board of Education districts in Alabama, and the Legislature did so at the same time it drew the 2021 Plan. *Milligan* Doc. 107 at 171 (citing *Caster* Doc. 48 ¶¶ 32–41).

We further find that the new evidence about the Gulf Coast does not establish

that separating the Gulf Coast to avoid diluting Black votes in the Black Belt violates traditional districting principles. At most, while the State has developed evidence that better substantiates its argument that the Gulf Coast is or could be a community of interest, the State has not adduced evidence that the Gulf Coast is an inseparable one.

We specifically reject the State's argument that the 2023 Plan "rectifies what Plaintiffs said was wrong with the 2021 Plan" by "unifying the Black Belt while also respecting the Gulf and Wiregrass communities of interest." *Milligan* Doc. 220 at 27, 42; *accord* Aug. 14 Tr. 39 (arguing that the 2023 Plan "cures the cracking" of the Black Belt); July 31, 2023 Tr. 32 (arguing that "now there are three communities of interest that are at issue," the State "cracked none of them," and the Plaintiffs "cracked two of them"). On this reasoning, the State says that "there is no longer any need to split the Gulf" to respect the Black Belt, because the 2023 Plan keeps the Gulf Coast together and splits the Black Belt into only two districts. *Milligan* Doc. 267 at ¶ 225.

The problem with this argument is the faulty premise that splitting the Black Belt into only two districts remedies the cracking problem found in the 2021 Plan. "Cracking" does not mean "divided," and the finding of vote dilution in the 2021 Plan rested on a thorough analysis, not the bare fact that the 2021 Plan divided the Black Belt into three districts. *See, e.g.*, *Milligan* Doc. 107 at 55, 147–74. As the

Supreme Court has explained, "cracking" refers to "the dispersal of blacks into districts in which they constitute an ineffective minority of voters." *Bartlett*, 556 U.S. at 14 (plurality opinion) (quoting *Gingles*, 478 U.S. at 46 n.11).

The Plaintiffs have established — and the State concedes — that in the new District 2, Black voters remain an ineffective minority of voters. *Milligan* Doc. 251 ¶¶ 5–9. This evidence — and concession — undermines the State's assertion that the 2023 Plan remedies the cracking of Black voting strength in the Black Belt simply by splitting the Black Belt into fewer districts. In turn, it explains the reason why there remains a need to split the Gulf Coast: splitting the Black Belt as the 2023 Plan does dilutes Black voting strength, while splitting the Gulf Coast precipitates no such racially discriminatory harm.

The long and the short of it is that the new evidence the State has offered on the Gulf Coast at most may show that the Black Belt and the Gulf Coast are geographically overlapping communities of interest that tend to pull in different directions. These communities of interest are not airtight. At best, the Defendants have established that there are two relevant communities of interest and the Plaintiffs' illustrative maps and the 2023 Plan each preserve a different community, suggesting a wash when measured against this metric. In other words, "[t]here would be a split community of interest in both." *Allen*, 143 S. Ct. at 1505. Thus, positing that there are two communities of interest does not undermine in any way the

determination we already made that the eleven illustrative maps presented in the preliminary injunction are reasonably configured and are altogether consonant with traditional redistricting criteria.

In our view, the evidence about the community of interest in the Wiregrass is sparse in comparison to the extensive evidence about the Black Belt and the somewhat new evidence about the Gulf Coast. The basis for a community of interest in the Wiregrass — essentially in the southeastern corner of the State — is rural geography, a university (Troy), and a military installation (Fort Novosel). These few commonalities do not remotely approach the hundreds of years of shared and very similar demographic, cultural, historical, and political experiences of Alabamians living in the Black Belt. And they are considerably weaker than the common coastal influence and historical traditions for Alabamians living in the Gulf Coast. Not to mention that these commonalities could apply to other regions in Alabama that the State fails to mention as possible communities of interest.

Further, there is substantial overlap between the Black Belt and the Wiregrass. Three of the nine Wiregrass Counties (Barbour, Crenshaw, and Pike) are also in the Black Belt. Accordingly, any districting plan must make tradeoffs with these communities to meet equal population and contiguity requirements.

Finally, a careful review of the testimony about the Wiregrass reveals that the State makes the same error with its Wiregrass argument that we (and the Supreme

Court) previously identified in its Gulf Coast argument. To support its assertions about the community of interest in the Wiregrass, the State relies on three witnesses: a former Mayor of Dothan, a past Chairman of the Dothan Area Chamber of Commerce, and a commercial banker in Dothan. *See Milligan* Doc. 261-2 (Kimbro deposition); *Milligan* Doc. 220-18 (Kimbro declaration); *Milligan* Doc. 261-6 (Schmitz deposition); *Milligan* Doc. 220-17 (Schmitz declaration); *Milligan* Doc. 261-7 (Williams deposition); *Milligan* Doc. 227-1 (Williams declaration). Much of their testimony focuses on the loss of political influence and efficacy that may occur if the Wiregrass region is not mostly kept together in a single congressional district. *See Milligan* Docs. 220-17 ¶¶ 3–5, 7, 9 (Schmitz Declaration); 220-18 ¶¶ 5–9 (Kimbro Declaration); 224-1 ¶¶ 11–13 (Williams Declaration). But as we earlier found with respect to the Gulf Coast, testimony about keeping a community of interest together "simply to preserve political advantage" cannot support an argument that the community is inseparable. *See Allen*, 143 S. Ct. at 1505 (internal quotation marks omitted) (alterations accepted). Accordingly, we assign very little weight to the argument and evidence about a community of interest in the Wiregrass.

We do not reject only the State's **factual** argument — that the Plaintiffs' illustrative plans are not reasonably compact because they violate traditional redistricting principles related to communities of interest. More broadly, we also reject the State's legal argument that communities of interest somehow are a

dispositive factor in our analysis such that we must accept a remedial map that purports to respect communities of interest, but does not cure the vote dilution we found in the 2021 Plan.

Throughout remedial proceedings, the State has used arguments about communities of interest as the foundation of its defense of the 2023 Plan. The State starts with the premise that "[t]here are many ways for a plan to comply with" Section Two, *Milligan* Doc. 267 ¶ 179, *see also* Aug. 14 Tr. 46; cites the rule that Section Two "never require[s] adoption of districts that violate traditional redistricting principles," *Milligan* Doc. 220 at 8, 10, 14, 34, 39, 60 (internal quotation marks omitted); says that the Legislature knows Alabama's communities of interest better than federal courts, Aug. 14 Tr. 163; and extrapolates from these truths that any illustrative plan that splits an area the State defines as a community of interest does not satisfy *Gingles* because it "violates" communities of interest, *Milligan* Doc. 267 ¶¶ 158, 208; *see also Milligan* Doc. 220 at 40, 59. The State's position is that if it can prove that the 2023 Plan serves communities of interest better than the Plaintiffs' illustrative plans, the 2023 Plan survives a Section Two challenge on that ground regardless of whether it includes one or two Black-opportunity districts.

Indeed, on the State's reasoning, because the 2023 Plan better serves communities of interest than do the Plaintiffs' illustrative plans, an order requiring an additional Black-opportunity district to cure vote dilution is unlawful. Aug. 14

Tr. 157. The State maintains that this is true even if we find (as we do) that the 2023 Plan perpetuates rather than remedies the vote dilution that we and the Supreme Court found in the 2021 Plan. Aug. 14 Tr. 157–60. Put differently, the State asserts that communities of interest are the ultimate trump card: because the 2023 Plan best serves communities of interest in southern Alabama, we must not enjoin it even if we find that it perpetuates vote dilution. *See* Aug. 14 Tr. 157–60.

We cannot reconcile the State's position with any of the authorities that control our analysis. We cannot reconcile it with the text or purpose of Section Two, nor with the Supreme Court's ruling in this case, nor with other controlling Supreme Court precedents. We discuss each authority in turn.

First, we cannot reconcile the State's position that communities of interest work as a trump card with the text or purpose of Section Two. As the Supreme Court explained in this case, the Voting Rights Act "'create[d] stringent new remedies for voting discrimination,' attempting to forever 'banish the blight of racial discrimination in voting.'" *Allen*, 143 S. Ct. at 1499 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)). To that end, for more than forty years, Section Two has expressly provided that a violation is established based on the "totality of circumstances." *Id.* at 1507 (internal quotation marks omitted) (quoting 52 U.S.C. § 10301(b)). Subsection (b) of Section Two of the Voting Rights Act provides, in pertinent part:

> 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.

52 U.S.C. § 10301(b).

Section Two does not mention, let alone elevate or emphasize, communities of interest as a particular circumstance. *See id.* If communities of interest really are (or even could be) **the** dispositive circumstance in a Section Two analysis (liability or remedy), the statute would not direct a reviewing court's attention to the totality of circumstances without saying a word about communities of interest.

Second, we cannot reconcile the State's position that communities of interest work as a trump card with the Supreme Court's ruling in this case. The Supreme Court "d[id] not find the State's argument persuasive" on communities of interest for two reasons: the evidence did not support the "overdrawn" assertion that "there can be no legitimate reason to split" the Gulf Coast, and even if the Gulf Coast is a community of interest, splitting it is not a fatal flaw in the Plaintiffs' illustrative plans because those plans better respect a different community of interest, the Black Belt. *See Allen*, 143 S. Ct. at 1505 (internal citations omitted). The Supreme Court then continued its analysis of the "totality of circumstances" and affirmed our preliminary injunction on the ground that the 2021 Plan likely violated Section Two. *Id.* at 1506.

Nothing in the Court's ruling says, let alone suggests, that a remedial plan would cure vote dilution if only the evidence were better on the Gulf Coast and the Black Belt were not split quite so much. The Supreme Court specifically ruled that we "did not have to conduct a beauty contest between plaintiffs' maps and the State's," and the Supreme Court emphasized the importance of considering the "totality" of circumstances. *Id.* at 1505–07 (internal quotation marks omitted) (alterations accepted). Indeed, the Supreme Court rejected the State's proposed "race-neutral benchmark" in part because that approach "suggest[ed] there is only one circumstance that matters," and "[t]hat single-minded view of § 2 cannot be squared with the [statute's] demand that courts employ a more refined approach." *Id.* at 1506–08 (internal quotation marks omitted) (alterations accepted).

Third, we cannot reconcile the State's position with other Supreme Court precedents. Our research has produced no Section Two precedent that rises and falls on how well a plan respects any particular community of interest.

Further, as Section Two precedents have tested the idea that one circumstance is particularly important in the *Gingles* analysis, the Supreme Court has time and again rejected the idea that any circumstance can be the circumstance that allows a plan to dilute votes. *See, e.g.*, *id.* at 1505 (rejecting argument that core retention metric is dispositive and reasoning that Section Two "does not permit a State to provide some voters less opportunity . . . to participate in the political process just

because the State has done it before" (internal quotation marks omitted)); *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1250 (2022) (per curiam) (faulting district court for "focus[ing] exclusively on proportionality" instead of "totality of circumstances analysis"); *LULAC*, 548 U.S. at 440–41 (rejecting argument that incumbency protection can justify exclusion of voters from a district when exclusion has racially discriminatory effects). Indeed, we have been unable to locate any case where the Supreme Court has prioritized one traditional districting criterion above all others.

For each and all these reasons, we reject the State's argument that because the 2023 Plan best serves communities of interest in southern Alabama, we cannot enjoin it even if we find that it perpetuates racially discriminatory vote dilution.

ii. County Splits

In the preliminary injunction, we found that the Plaintiffs' illustrative plans "reflect reasonable compactness" because they respected county lines. *See Milligan* Doc. 107 at 162–63. When it affirmed this finding, the Supreme Court observed that "some of plaintiffs' proposed maps split the same number of county lines as (or even *fewer* county lines than) the State's map." *Allen*, 143 S. Ct. at 1504 (emphasis in original).

By way of reference: the only applicable guideline when the 2021 Plan was passed was that "the Legislature shall try to minimize the number of counties in each

district"; the 2021 Plan split six counties; and no illustrative plan splits more than nine counties. *See Milligan* Doc. 107 at 32, 61, 88–89.

When the Legislature passed the 2023 Plan, it enacted a "finding" that "the congressional districting plan shall contain no more than six splits of county lines, which is the minimum necessary to achieve minimal population deviation among the districts. Two splits within one county is considered two splits of county lines." App. A at 3. Like the 2021 Plan, the 2023 Plan splits six counties.

The State now argues that because of the Legislature's finding, we must discard any illustrative map that contains more than six county splits. *Milligan* Doc. 220 at 58–59. Based on the report of the State's expert, Mr. Trende, this ceiling would disqualify five of the Plaintiffs' illustrative maps: Cooper Plans 2 and 6, which split seven counties; Duchin Plan B, which splits seven counties; and Duchin Plans A and C, which split nine counties. *See Caster* Doc. 48 at 22; *Milligan* Doc. 220 at 58; *Milligan* Doc. 220-12 at 12. Most notably, this ceiling would disqualify Duchin Plan B, which is the only illustrative plan that the State concedes ties or beats the 2023 Plan on statistical measures of compactness (Polsby-Popper and Cut Edges). *See Milligan* Doc. 220 at 57–58. So when looking at the county splits metric alone, even on the State's analysis, six of the Plaintiffs' illustrative maps satisfy the ceiling the Legislature imposed: Cooper Plans 1, 3, 4, 5, and 7, and Duchin Plan D. Mr. Trende's chart shows this clearly:

Number of County Splits, by Map	
Map	County Splits
Illustrative 7	5
Duchin 4	6
Illustrative 1	6
Illustrative 3	6
Illustrative 4	6
Illustrative 5	6
2021 Map	6
2023 Map	6
Duchin 2	7
Illustrative 2	7
Illustrative 6	7
Ps Remedial	7
Duchin 1	9
Duchin 3	9

Milligan Doc. 220-12 at 12.

But the State would not have us look at the county splits metric alone. As we understand the State's argument about the legislative finding capping county splits at the stated minimum, the finding operates like the ace of spades: after ten of the eleven illustrative plans lose in a compactness beauty contest, the finding trumps the last illustrative plan left (Duchin Plan B). On the State's reasoning, the Plaintiffs have no plays left because the Legislature has decreed that the cap on county splits is "non-negotiable." App. A at 3.

But we already have refused to conduct the compactness beauty contest, so the legislative finding cannot work that way. If it guides our analysis, it must function differently. For all the same reasons we refused to conduct a compactness

beauty contest, this legislative finding cannot demand that we conduct a county-split beauty contest. *See supra* at Part IV.B.2.b.

Nevertheless, in an abundance of caution, we measure all the illustrative maps against the legislative finding. As explained above, if we limit our analysis to the illustrative plans that comply with the finding, we consider six plans: Duchin Plan D and Cooper Plans 1, 3, 4, 5, and 7. *See Milligan* Doc. 220-12 at 12.

We first discuss Cooper Plan 7, because it is the only illustrative plan that outperforms the 2023 Plan on county splits. (Duchin Plan D and Cooper Plans 1, 3, 4, and 5 tie the 2023 Plan. *See id.*) Even if we were to indulge the idea that the legislative finding capping county splits works as an ace, it could not trump Cooper Plan 7. The State attacks Cooper Plan 7 on the ground that it does not minimize population deviation. *Milligan* Doc. 220 at 58 n.13.

The State's argument about Cooper Plan 7 is an unwelcome surprise. We found in the preliminary injunction that all the illustrative maps "equalize population across districts." *Milligan* Doc. 107 at 162–63. We based that finding on the agreement of the parties and the evidence. *See id.* (citing *Milligan* Doc. 68-5 at 8, 13; *Caster* Doc. 48 at 21–34; *Caster* Doc. 65 at 2–6; Tr. 930). And the Supreme Court affirmed that finding. *Allen*, 143 S. Ct. at 1504 (finding that the Plaintiffs' maps "contained equal populations, were contiguous, and respected existing political subdivisions, such as counties, cities, and towns").

We returned to Cooper Plan 7 to confirm that it minimizes population deviation. *See Caster* Doc. 65 at 5 fig.2. The least populated congressional district in Cooper Plan 7 includes 717,752 people; the most populated congressional district in Cooper Plan 7 includes 717,755 people. *Id.* We summarily reject the State's cursory, unsupported suggestion in a footnote that a deviation of three humans (or 0.00000418%) precludes a finding that Cooper Plan 7 equalizes population across districts and disqualifies Cooper Plan 7 as a reasonably configured illustrative map under *Gingles* I.

Thus, even if we were to conduct the "meet or beat" beauty contest that the State asks us to, the undisputed evidence shows that the Plaintiffs have submitted at least one illustrative map that beats the 2023 Plan with respect to county splits. We also find that the Plaintiffs have submitted at least five illustrative maps (Duchin Plan D and Cooper Plans 1, 3, 4, and 5) that meet the 2023 Plan on this metric by splitting the same number of counties — six.

***

Accordingly, we again find that the Plaintiffs have established that an additional Black-opportunity district can be reasonably configured without violating traditional districting principles relating to communities of interest and county splits. This finding does not run afoul of the Supreme Court's caution that Section Two never requires the adoption of districts that violate traditional redistricting principles.

It simply rejects as unsupported the State's assertion that the Plaintiffs' illustrative plans violate traditional redistricting principles relating to communities of interest and county splits.

3. *Gingles* II & III – Racially Polarized Voting

During the preliminary injunction proceedings, "there [wa]s no serious dispute that Black voters are politically cohesive nor that the challenged districts' white majority votes sufficiently as a bloc to usually defeat Black voters' preferred candidate." *Milligan* Doc. 107 at 174 (internal quotation marks omitted); *accord Allen*, 143 S. Ct. at 1505.

At the remedial hearing, the State stipulated that *Gingles* II and III are again satisfied. Aug. 14 Tr. 64–65 ("We will have no problem stipulating for these proceedings solely that they have met II and III.").

The evidence fully supports the State's stipulation: Dr. Liu opined "that voting is highly racially polarized in" District 2 and District 7 of the 2023 Plan "and that this racial polarization . . . produces the same results for Black Preferred Candidates in both [Districts 2] and [7] as the results in the 2021" Plan. *Milligan* Doc. 200-2 at 1. Dr. Palmer's opinion is materially identical. *Caster* Doc. 179-2 ¶¶ 11–14, 16–20.

4. The Senate Factors

During the preliminary injunction proceedings, we found that Senate Factors 1, 2, 3, 5, 6, and 7 weighed in favor of the Plaintiffs. *Milligan* Doc. 107 at 178–92.

We adopt those findings here. We made no finding about Senate Factors 8 and 9. *Id.* at 192–93.

During the remedial hearing, the State conceded that it has put forth no new evidence about the Senate Factors and the Plaintiffs have "met their burden" on the Factors for purposes of remedial proceedings. Aug. 14 Tr. 65.

The *Milligan* and *Caster* Plaintiffs now urge us, if we reset the *Gingles* analysis, to consider evidence adduced since we issued the preliminary injunction that bears on Factors 8 and 9. Aug. 14 Tr. 147–48. The State concedes that the evidence relevant to an analysis of these Factors is "exceedingly broad." Aug. 15 Tr. 79. We consider each remaining Senate Factor in turn, and we limit our discussion to new evidence.

a. Senate Factor 8

Senate Factor 8: "[W]hether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group." *Gingles*, 478 U.S. at 37.

Senate Factor 8 considers "the political responsiveness of" elected officials. *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1573 (11th Cir. 1984) (emphasis omitted). The Plaintiffs' argument is that the political responsiveness of elected officials to this litigation — more particularly, to the Supreme Court's affirmance of the preliminary injunction — weighs in favor of the Plaintiffs. Based on our review of undisputed evidence, we cannot help but find that the circumstances

surrounding the enactment of the 2023 Plan reflect "a significant lack of responsiveness on the part of elected officials to the particularized needs" of Black voters in Alabama. *Gingles*, 478 U.S. at 37. Our finding rests on three undisputed facts.

First, the process by which the Legislature considered potential remedies for the vote dilution that Black Alabamians experienced precludes a finding of responsiveness. The 2023 Plan was neither proposed nor available for comment during the two public hearings held by the Committee. *Milligan* Doc. 251 ¶ 15. Likewise, neither of the plans that originally passed the Alabama House (Representative Pringle's plan, the Community of Interest Plan), and the Alabama Senate (Senator Livingston's plan), was proposed or available for comment during the Committee's public hearings. *See id.* ¶¶ 15–21.

The 2023 Plan was passed by the Conference Committee on the last day of the Special Session. *Id.* ¶ 23. Representative Pringle did not see the bill that became the 2023 Plan, including its legislative findings and the State's performance analysis showing that Black voters would consistently lose in the new District 2, until that morning. *See Milligan* Doc. 261-5 at 92, 97. He first saw those documents that morning, and the 2023 Plan was Alabama law by that evening. As Representative Pringle testified, "[i]t all happened so fast." *Id.* at 105.

The availability of the 2023 Plan is noteworthy not only because of its late

timing, but also because of its apparently mysterious provenance: its original source and cartographer were unknown to one of the Committee chairs, Senator Livingston, when he voted on it. *See Milligan* Doc. 238-2 at 3. To this day, the record before us does not make clear who prepared the 2023 Plan.

Representative Pringle testified about his frustration that his plan did not carry the day, and his reason is important: he thought his plan was the better plan for compliance with Section Two (based in part on a performance analysis that he considered), his plan was initially expected to pass both the House and the Senate, and he either did not understand or did not agree with the reason why support for it unraveled in the Senate the day it passed the House. *See Milligan* Doc. 261-5 at 22–23, 31–32, 41–42, 69–70, 75–76, 80–81, 98–102.

Representative Pringle testified that he was not a part of the discussions that led his Senate colleagues to reject his plan because those occurred behind closed doors. *Id.* at 28, 101. Although Representative Pringle ultimately voted for the 2023 Plan, he testified (testily) that he told Senator Livingston that he did not want his name or an Alabama House bill number on it. *Id*. at 101–02. When asked why the Alabama Senate insisted on leaving District 2 at a 39.93% Black voting-age population in the 2023 Plan, Representative Pringle directed the question to Senator Livingston or the Alabama Solicitor General. *Id.* When asked specifically about a media comment from Representative Ledbetter (the Speaker of the Alabama House)

that the 2023 Plan gives the State "a good shot" at getting "just one judge" on the Supreme Court "to see something different," Representative Pringle testified that he was not "attempting to get a justice to see something differently," but he did not "want to speak on behalf of 140" Legislators. *Id.* at 109–10.

For his part, Senator Livingston testified that his focus shifted from Representative Pringle's plan to a new plan after other senators "received some additional information" which caused them to "go in [a different] direction" focused on "compactness, communities of interest, and making sure that" incumbents are not paired. *Milligan* Doc. 261–4 at 67–68. According to Senator Livingston, this "information" was a "large hiccup" — it was the reason why "the committee moved" and "changed focus" away from Representative Pringle's plan. *Id.* at 65–68. But Senator Livingston testified that he did not know what this "information" was, where it had come from, or even who received it. *Id.* Senator Livingston recalled that he first learned of the "information" in a "committee conversation," but he did not recall who told him about it and had no "idea at all" of its source. *Id.* at 68.

Second, the unprecedented legislative findings that accompany the 2023 Plan preclude a finding of responsiveness. *See* App. A. This is for two reasons. As an initial matter, as we have already previewed, a careful side-by-side review of the legislative findings and the guidelines (which were the same in 2021 and 2023) reveal that the findings excluded the statement in the guidelines that "[a] redistricting

plan shall have neither the purpose nor the effect of diluting minority voting strength." *Compare* App. B at 1, *with* App. A. at 2. Although the findings eliminated the requirement of nondilution, they prioritized as "non-negotiable" the principles that the 2023 Plan would "keep together communities of interest" and "not pair incumbent[s]." App. A at 3. Under this circumstance, we cannot find that the legislative findings support an inference that when the Legislature passed the 2023 Plan, it was trying to respond to the need that we identified for Black Alabamians not to have their voting strength diluted.

Separately, the undisputed testimony of members of the Legislature counsels against an inference in favor of the State based on the findings. Representative Pringle and Senator Livingston both testified that the Alabama Solicitor General drafted the findings, and they did not know why the findings were included in the 2023 Plan. *Milligan* Doc. 261-4 at 102 (Senator Livingston); *Milligan* Doc. 261-5 at 91 (Representative Pringle); *Milligan* Doc. 238-2 at 6 (joint interrogatory responses). Representative Pringle testified that he had not seen another redistricting bill contain similar (or any) findings. *Milligan* Doc. 261-5 at 91. And of the three members of the Legislature who testified during remedial proceedings, none had a role in drafting the findings. *Milligan* Doc. 261-4 at 101–03 (Senator Livingston); *Milligan* Doc. 261-5 at 90–91 (Representative Pringle); Aug. 15 Tr. 58 (Senator Singleton). In the light of this testimony, which we reiterate is not disputed (or even questioned),

we cannot conclude that the findings weigh in favor of the 2023 Plan.

If we had any lingering doubt about whether the 2023 Plan reflects an attempt to respond to the needs of Black Alabamians that have been established in this litigation, that doubt was eliminated at the remedial hearing when the State explained that in its view, the Legislature could remedy the vote dilution we found without providing the remedy we said was required: an additional opportunity district. *See* Aug. 14 Tr. 163–64. For purposes of Factor 8, we are focused not on the tenuousness of the policy underlying that position, but on how clearly it illustrates the lack of political will to respond to the needs of Black voters in Alabama in the way that we ordered. We infer from the Legislature's decision not to create an additional opportunity district that the Legislature was unwilling to respond to the well-documented needs of Black Alabamians in that way.

Lest a straw man arise on appeal: we say clearly that in our analysis, we did not deprive the Legislature of the presumption of good faith. *See, e.g.*, *Abbott*, 138 S. Ct. at 2324. We simply find that on the undisputed evidence, Factor 8, like the other Factors, weighs in favor of the Plaintiffs.

b. Senate Factor 9

Senate Factor 9: Whether the policy underlying the 2023 Plan "is tenuous." *Gingles*, 478 U.S. at 37.

We again make no finding about Senate Factor 9.

C. We Reject the State's Remaining Argument that Including an Additional Opportunity District in a Remedial Plan To Satisfy Section Two Is Unconstitutional Affirmative Action in Redistricting.

The State asserts that the Plaintiffs' illustrative plans "sacrifice communities of interest, compactness, and county splits to hit predetermined racial targets"; that if those "underperforming plans could be used to replace a 2023 Plan that more fully and fairly applies legitimate principles across the State, the result will be court-ordered enforcement of a map that violates the 2023 Plan's traditional redistricting principles in favor of race"; and that this would be "affirmative action in redistricting" that would be unconstitutional. *Milligan* Doc. 220 at 59–60; *see also id.* at 60–68.

As an initial matter, it is premature (and entirely unfounded) for the State to assail any plan we might order as a remedy as "violat[ing] the 2023 Plan's traditional redistricting principles in favor of race." *Milligan* Doc. 220 at 59. Moreover, we have rejected based on the evidence before us every premise of the State's argument: that the Plaintiffs' plans "sacrifice" traditional redistricting principles, that their illustrative plans are "underperforming," and that the 2023 Plan "more fully and fairly applies legitimate principles across the State." *See supra* Parts IV.A & IV.B. We also have rejected the faulty premise that by accepting the Plaintiffs' illustrative plans for *Gingles* purposes, we improperly held that the Plaintiffs are entitled to

"proportional . . . racial representation in Congress." *Milligan* Doc. 107 at 195 (internal quotation marks omitted).

This mistaken premise explains why affirmative action cases, like the principal case on which the State relies, *Harvard*, 143 S. Ct. 2141, are fundamentally unlike this case. In the *Harvard* case, the Supreme Court held that Harvard and the University of North Carolina's use of race in their admissions programs violated the Equal Protection Clause and Title VI of the Civil Rights Act of 1964. *Id.* at 2175. Based on the record before it, the Supreme Court found that the admissions programs were impermissibly aimed at achieving "proportional representation" of minority students among the overall student-body population, and that the universities had "promis[ed] to terminate their use of race only when some rough percentage of various racial groups is admitted." *Id.* at 2172. Based on these findings, the Court concluded that the admissions programs lacked any "logical end point" because they "'effectively assure that race will always be relevant and that the ultimate goal of eliminating' race as a criterion 'will never be achieved.'" *Id.* (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989)).

In contrast, the Voting Rights Act and the *Gingles* analysis developed to guide application of the statute "do[] not mandate a proportional number of majority-minority districts." *Allen*, 143 S. Ct. at 1518 (Kavanaugh, J., concurring). Section Two expressly disclaims any "right to have members of a protected class elected in

numbers equal to their proportion in the population." 52 U.S.C. § 10301(b). And "properly applied, the *Gingles* framework itself imposes meaningful constraints on proportionality, as [Supreme Court] decisions have frequently demonstrated." *Id.* at 1508 (majority opinion). So unlike affirmative action in the admissions programs the Supreme Court analyzed in *Harvard*, which was expressly aimed at achieving balanced racial *outcomes* in the makeup of the universities' student bodies, the Voting Rights Act guarantees only "equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *De Grandy*, 512 U.S. at 1014 n.11. The Voting Rights Act does not provide a leg up for Black voters — it merely prevents them from being kept down with regard to what is arguably the most "fundamental political right," in that it is "preservative of all rights" — the right to vote. *See Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1315 (11th Cir. 2019).

But a faulty premise and prematurity are not the only problems with the State's argument: it would fly in the face of forty years of Supreme Court precedent — including precedent *in this case* — for us to hold that it is unconstitutional to order a remedial districting plan to include an additional minority-opportunity district to satisfy Section Two. In the Supreme Court, the State argued that the Fifteenth Amendment "does not authorize race-based redistricting as a remedy for § 2 violations." *Allen*, 143 S. Ct. at 1516. The Supreme Court rejected this argument

in two sentences: "But for the last four decades, this Court and the lower federal courts have repeatedly applied the effects test of § 2 as interpreted in *Gingles* and, under certain circumstances, have authorized race-based redistricting as a remedy for state districting maps that violate § 2. In light of that precedent . . . we are not persuaded by Alabama's arguments that § 2 as interpreted in *Gingles* exceeds the remedial authority of Congress." *Id.* at 1516–17 (internal citations omitted).

D. The Record Establishes the Elements of Preliminary Injunctive Relief

We find that the Plaintiffs have established the elements of their request for preliminary injunctive relief. We discuss each element in turn.

For the reasons we have discussed, *see supra* Parts IV.A & IV.B, we find that the Plaintiffs are substantially likely to succeed on the merits of their claims that (1) the 2023 Plan does not completely remedy the likely Section Two violation that we found and the Supreme Court affirmed in the 2021 Plan; and (2) the 2023 Plan likely violates Section Two as well because it continues to dilute the votes of Black Alabamians.

We further find that the Plaintiffs will suffer irreparable harm if they must vote in the 2024 congressional elections based on a likely unlawful redistricting plan. "Courts routinely deem restrictions on fundamental voting rights irreparable injury. And discriminatory voting procedures in particular are the kind of serious violation of the Constitution and the Voting Rights Act for which courts have granted

immediate relief." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (internal quotation marks omitted) (citing *Obama for Am. v. Husted,* 697 F.3d 423, 436 (6th Cir. 2012); *Alternative Political Parties v. Hooks,* 121 F.3d 876 (3d Cir. 1997); and *Williams v. Salerno,* 792 F.2d 323, 326 (2d Cir. 1986)) (quoting *United States v. City of Cambridge*, 799 F.2d 137, 140 (4th Cir. 1986).

"Voting is the beating heart of democracy," and a "fundamental political right, because it is preservative of all rights." *Democratic Exec. Comm. of Fla.*, 915 F.3d at 1315 (internal quotation marks omitted) (alterations accepted). And "once the election occurs, there can be no do-over and no redress" for voters whose rights were violated and votes were diluted. *League of Women Voters of N.C.*, 769 F.3d at 247.

The Plaintiffs already suffered this irreparable injury once in this census cycle, when they voted under the unlawful 2021 Plan. The State has made no argument that if the Plaintiffs were again required to cast votes under an unlawful districting plan, that injury would not be irreparable. Accordingly, we find that the Plaintiffs will suffer an irreparable harm absent injunctive relief.

We observe that absent relief now, the Plaintiffs will suffer this irreparable injury until 2026, which is more than halfway through this census cycle. Weighed against the harm that the State will suffer — having to conduct elections according to a court-ordered districting plan — the irreparable harm to the Plaintiffs' voting

rights unquestionably is greater.

We next find that a preliminary injunction is in the public interest. The State makes no argument that if we find that the 2023 Plan perpetuates the vote dilution we found, or that the 2023 Plan likely violates Section Two anew, we should decline to enjoin it. Nevertheless, we examine applicable precedent.

The principal Supreme Court precedent is older than the Voting Rights Act. In *Reynolds*, which involved a constitutional challenge to an apportionment plan, the Court explained "once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." 377 U.S. at 585. "However," the Court acknowledged, "under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid." *Id.* The Court explained that "[i]n awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles." *Id.*

More recently, the Supreme Court has held that district courts should apply a

necessity standard when deciding whether to award or withhold immediate relief. In *Upham v. Seamon*, the Court explained: "[W]e have authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements. Necessity has been the motivating factor in these situations." 456 U.S. 37, 44 (1982) (per curiam) (internal citations omitted).

We conclude that under these precedents, we should not withhold relief. Alabama's congressional elections are not close, let alone imminent. The general election is more than fourteen months away. The qualifying deadline to participate in the primary elections for the major political parties is more than two months away. Ala. Code § 17-13-5(a). And this Order issues well ahead of the "early October" deadline by which the Secretary has twice told us he needs a final congressional electoral map. *See* Milligan Doc. 147 at 3; *Milligan* Doc. 162 at 7.

V. REMEDY

Having found that the 2023 Plan perpetuates rather than corrects the Section Two violation we found, we look to Section Two and controlling precedent for instructions about how to proceed. In the Senate Report that accompanied the 1982 amendments to Section Two that added the proportionality disclaimer, the Senate Judiciary Committee explained that it did not "prescribe[e] in the statute mechanistic rules for formulating remedies in cases which necessarily depend upon widely varied

proof and local circumstances." S. Rep. No. 97-417 at 31, 97th Cong., 2d Sess. 26, *reprinted in* 1982 U.S. Code Cong. & Adm. News 177, 208.

Rather, that committee relied on "[t]he basic principle of equity that the remedy fashioned must be commensurate with the right that has been violated," and explained its expectation that courts would "exercise [our] traditional equitable powers to fashion . . . relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." *Id.*

That committee cited the seminal Supreme Court decision about racially discriminatory voting laws, *Louisiana*, 380 U.S. at 154. S. Rep. No. 97-417 at 31 n.121. In *Louisiana*, the Supreme Court explained that upon finding such discrimination, federal courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." 380 U.S. at 154.

The Supreme Court has since held that a district court does not abuse its discretion by ordering a Special Master to draw a remedial map to ensure that a plan can be implemented as part of an orderly process in advance of elections, where the State was given an opportunity to enact a compliant map but failed to do so. *See Covington*, 138 S. Ct. at 2553–54 (rejecting State's argument that district court needed to "giv[e] the General Assembly—which 'stood ready and willing to

promptly carry out its sovereign duty'—another chance at a remedial map," and affirming appointment of Special Master because the district court had "determined that 'providing the General Assembly with a second bite at the apple' risked 'further draw[ing] out these proceedings and potentially interfer[ing] with the 2018 election cycle'" (internal citations omitted)).

Because we enjoin the use of the 2023 Plan, a new congressional districting plan must be devised and implemented in advance of Alabama's upcoming congressional elections. The State has conceded that it would be practically impossible for the Legislature to reconvene in time to enact a new plan for use in the upcoming election. Aug. 14 Tr. 167. Accordingly, we find that there is no need to "provid[e] the [Legislature] with a second bite at the apple" or other good cause to further delay remedial proceedings. *See Covington*, 138 S. Ct. at 2554.

We will therefore undertake our "duty to cure" violative districts "through an orderly process in advance of elections" by directing the Special Master and his team to draw remedial maps. *Id.* (citing *Purcell*, 549 U.S. at 4–5). We have previously appointed Mr. Richard Allen as a Special Master and provided him a team, including a cartographer, David R. Ely, and Michael Scodro and his law firm, Mayer Brown LLP to prepare and recommend to the Court a remedial map or maps for the Court to order Secretary of State Allen to use in Alabama's upcoming congressional elections. *See Milligan* Docs. 102, 166, 183. The procedural history preceding these

appointments has already been catalogued at length in our prior orders. *See Milligan* Docs. 166, 183. Specific instructions for the Special Master and his team will follow by separate order.

VI. CONSTITUTIONAL OBJECTIONS TO THE 2023 PLAN

In the light of our decision to enjoin the use of the 2023 Plan 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 any constitutional issues at this time. More particularly, we **RESERVE RULING** on (1) the constitutional objections to the 2023 Plan raised by the *Singleton* and the *Milligan* Plaintiffs, and (2) the motion of the *Singleton* Plaintiffs for preliminary injunctive relief on constitutional grounds, *Singleton* Doc. 147.

This restraint is consistent with our prior practice, *see Milligan* Doc. 107, and the longstanding canon of constitutional avoidance, *see Lyng*, 485 U.S. at 445 (collecting cases dating back to *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring)). Where, as here, a decision on the constitutional issue would not entitle a plaintiff "to relief beyond that to which they [are] entitled on their statutory claims," a "constitutional decision would [be] unnecessary and therefore inappropriate." *Id.* at 446. This principle has particular salience when a court considers (as we do here) a request for equitable relief, *see id.*, and is commonly applied by three-judge courts in redistricting cases, *see, e.g.*,

LULAC, 548 U.S. at 442; *Gingles*, 478 U.S. at 38.

VII. EVIDENTIARY RULINGS

During the remedial hearing, the Court accepted into evidence many exhibits. *See generally* Aug. 14 Tr. 91–142. Most were stipulated, although some were stipulated only for a limited purpose. *Id.* We have since excluded one exhibit: the State's Exhibit J, Mr. Bryan's 2023 Report. *See supra* at Part IV.B.2.a.

At the hearing we reserved ruling on the motion *in limine* and on some objections to certain of the State's exhibits. *See* Aug. 14 Tr. 91, 105–142. Most of the objections we reserved on were relevance objections raised in connection with the motion *in limine*. *See id.* at 108–30 (discussing such objections to State Exhibits C2, D, E, F2, G, H, I, L, M, N, O, P, Q, R, and S).

As we discussed in Parts II.B and II.C, we conclude that our remedial task is confined to a determination whether the 2023 Plan completely remedies the vote dilution we found in the 2021 Plan and is not otherwise unlawful, but we consider in the alternative whether under *Gingles* and the totality of the circumstances the Plaintiffs have established that the 2023 Plan likely violates Section Two. *See supra at* Parts II.B, II.C, IV.A & IV.B.

Accordingly, the motion *in limine* is **GRANTED IN PART AND DENIED IN PART**, and all of the Plaintiffs' relevance objections raised in connection with the motion *in limine* are **OVERRULED** to the extent that we consider the evidence

as appropriate in our alternative holding.

After considerable deliberation, we dispose of the remaining objections this way:

- Objections to State Exhibits A, B2, B3, C2, D, N, and P are **OVERRULED**. These exhibits are admitted to establish what was said at public hearings held by the Committee and what materials were considered by the Committee, but not for the truth of any matter asserted therein.
- Objections to State Exhibits E, F2, G, H, I, L, M, O, Q, R, and S are **OVERRULED**. These exhibits are admitted.
- Objections to the *Milligan* Plaintiffs' Exhibits M13, M32, M38, and M47 are **SUSTAINED**. These exhibits are excluded.

DONE and **ORDERED** this 5th day of September, 2023.

STANLEY MARCUS
UNITED STATES CIRCUIT JUDGE

ANNA M. MANASCO
UNITED STATES DISTRICT JUDGE

TERRY F. MOORER
UNITED STATES DISTRICT JUDGE

APPENDIX A

SB5 ENROLLED

ACT #2023 - 563

XBT977-3

By Senator Livingston

RFD: Conference Committee on SB5

First Read: 17-Jul-23

2023 Second Special Session

SB5 Enrolled

Enrolled, An Act,

To amend Section 17-14-70, Code of Alabama 1975, to provide for the reapportionment and redistricting of the state's United States Congressional districts for the purpose of electing members at the General Election in 2024 and thereafter, until the release of the next federal census; and to add Section 17-40-70.1 to the Code of Alabama 1975, to provide legislative findings.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. Section 17-14-70.1 is added to the Code of Alabama 1975, to read as follows.

§17-14-70.1

The Legislature finds and declares the following:

(1) The Legislature adheres to traditional redistricting principles when adopting congressional districts. Such principles are the product of history, tradition, bipartisan consensus, and legal precedent. The Supreme Court of the United States recently clarified that Section 2 of the Voting Rights Act "never requires adoption of districts that violate traditional redistricting principles."

(2) The Legislature's intent in adopting the congressional plan in this act described in Section 17-14-70.1 is to comply with federal law, including the U.S. Constitution and the Voting Rights Act of 1965, as amended.

(3) The Legislature's intent is also to promote the following traditional redistricting principles, which are

given effect in the plan created by this act:

a. Districts shall be based on total population as reported by the federal decennial census and shall have minimal population deviation.

b. Districts shall be composed of contiguous geography, meaning that every part of every district is contiguous with every other part of the same district.

c. Districts shall be composed of reasonably compact geography.

d. The congressional districting plan shall contain no more than six splits of county lines, which is the minimum number necessary to achieve minimal population deviation among the districts. Two splits within one county is considered two splits of county lines.

e. The congressional districting plan shall keep together communities of interest, as further provided for in subdivision (4).

f. The congressional districting plan shall not pair incumbent members of Congress within the same district.

g. The principles described in this subdivision are non-negotiable for the Legislature. To the extent the following principles can be given effect consistent with the principles above, the congressional districting plan shall also do all of the following:

1. Preserve the cores of existing districts.

2. Minimize the number of counties in each district.

3. Minimize splits of neighborhoods and other political subdivisions in addition to minimizing the splits of counties

and communities of interest.

(4)a. A community of interest is a defined area of the state that may be characterized by, among other commonalities, shared economic interests, geographic features, transportation infrastructure, broadcast and print media, educational institutions, and historical or cultural factors.

b. The discernment, weighing, and balancing of the varied factors that contribute to communities of interest is an intensely political process best carried out by elected representatives of the people.

c. If it is necessary to divide a community of interest between congressional districts to promote other traditional districting principles like compactness, contiguity, or equal population, division into two districts is preferable to division into three or more districts. Because each community of interest is different, the division of one community among multiple districts may be more or less significant to the community than the division of another community.

d. The Legislature declares that at least the three following regions are communities of interest that shall be kept together to the fullest extent possible in this congressional redistricting plan: the Black Belt, the Gulf Coast, and the Wiregrass.

e.1. Alabama's Black Belt region is a community of interest composed of the following 18 core counties: Barbour, Bullock, Butler, Choctaw, Crenshaw, Dallas, Greene, Hale, Lowndes, Macon, Marengo, Montgomery, Perry, Pickens, Pike, Russell, Sumter, and Wilcox. Moreover, the following five

SB5 Enrolled

counties are sometimes considered part of the Black Belt: Clarke, Conecuh, Escambia, Monroe, and Washington.

2. The Black Belt is characterized by its rural geography, fertile soil, and relative poverty, which have shaped its unique history and culture.

3. The Black Belt region spans the width of Alabama from the Mississippi boarder to the Georgia border.

4. Because the Black Belt counties cannot be combined within one district without causing other districts to violate the principle of equal population among districts, the 18 core Black Belt counties shall be placed into two reasonably compact districts, the fewest number of districts in which this community of interest can be placed. Moreover, of the five other counties sometimes considered part of the Black Belt, four of those counties are included within the two Black Belt districts — Districts 2 and 7.

f.1. Alabama's Gulf Coast region is a community of interest composed of Mobile and Baldwin Counties.

2. Owing to Mobile Bay and the Gulf of Mexico coastline, these counties also comprise a well-known and well-defined community with a long history and unique interests. Over the past half-century, Baldwin and Mobile Counties have grown even more alike as the tourism industry has grown and the development of highways and bay-crossing bridges have made it easier to commute between the two counties.

3. The Gulf Coast community has a shared interest in tourism, which is a multi-billion-dollar industry and a

significant and unique economic driver for the region.

4. Unlike other regions in the state, the Gulf Coast community is home to major fishing, port, and ship-building industries. Mobile has a Navy shipyard and the only deep-water port in the state. The port is essential for the international export of goods produced in Alabama.

5. The Port of Mobile is the economic hub for the Gulf counties. Its maintenance and further development are critical for the Gulf counties in particular but also for many other parts of the state. The Port of Mobile handles over 55 million tons of international and domestic cargo for exporters and importers, delivering eighty-five billion dollars ($85,000,000,000) in economic value to the state each year. Activity at the port's public and private terminals directly and indirectly generates nearly 313,000 jobs each year.

6. Among the over 21,000 direct jobs generated by the Port of Mobile, about 42% of the direct jobholders reside in the City of Mobile, another 39% reside in Mobile County but outside of the City of Mobile, and another 13% reside in Baldwin County.

7. The University of South Alabama serves the Gulf Coast community of interest both through its flagship campus in Mobile and its campus in Baldwin County.

8. Federal appropriations have been critical to ensuring the port's continued growth and maintenance. In 2020, the Army Corps of Engineers allocated over two hundred seventy-four million dollars ($274,000,000) for the Port of Mobile to allow the dredging and expansion of the port.

Federal appropriations have also been critical for expanding bridge projects to further benefit the shared interests of the region.

9. The Gulf Coast community has a distinct culture stemming from its French and Spanish colonial heritage. That heritage is reflected in the celebration of shared social occasions, such as Mardi Gras, which began in Mobile. This shared culture is reflected in Section 1-3-8(c), Code of Alabama 1975, which provides that "Mardi Gras shall be deemed a holiday in Mobile and Baldwin Counties and all state offices shall be closed in those counties on Mardi Gras." Mardi Gras is observed as a state holiday only in Mobile and Baldwin Counties.

10. Mobile and Baldwin Counties also work together as part of the South Alabama Regional Planning Commission, a regional planning commission recognized by the state for more than 50 years. The local governments of Mobile, Baldwin, and Escambia Counties, as well as 29 municipalities within those counties, work together through the commission with the Congressional Representative from District 1 to carry out comprehensive economic development planning for the region in conjunction with the U.S. Economic Development Administration. Under Section 11-85-51(b), factors the Governor considers when creating such a regional planning commission include "community of interest and homogeneity; geographic features and natural boundaries; patterns of communication and transportation; patterns of urban development; total population and population density; [and] similarity of social

and economic problems."

g.1. Alabama's Wiregrass region is a community of interest composed of the following nine counties: Barbour, Coffee, Covington, Crenshaw, Dale, Geneva, Henry, Houston, and Pike.

2. The Wiregrass region is characterized by rural geography, agriculture, and a major military base. The Wiregrass region is home to Troy University's flagship campus in Troy and its campus in Dothan.

3. All of the Wiregrass counties are included in District 2, with the exception of Covington County, which is placed in District 1 so that the maximum number of Black Belt counties can be included within just two districts.

Section 2. Section 17-14-70, Code of Alabama 1975, is amended to read as follows:

"§17-14-70

(a) The State of Alabama is divided into seven congressional districts as provided in subsection (b).

(b) The numbers and boundaries of the districts are designated and established by the map prepared by the Permanent Legislative Committee on Reapportionment and identified and labeled as ~~Pringle Congressional Plan 1~~ Livingston Congressional Plan 3-2023, including the corresponding boundary description provided by the census tracts, blocks, and counties, and are incorporated by reference as part of this section.

(c) The Legislature shall post for viewing on its public website the map referenced in subsection (b), including

the corresponding boundary description provided by the census tracts, blocks, and counties, and any alternative map, including the corresponding boundary description provided by the census tracts, blocks, and counties, introduced by any member of the Legislature during the legislative session in which this section is added or amended.

(d) Upon enactment of ~~Act 2021-555, adding~~the act amending this section and adopting the map identified in subsection (b), the Clerk of the House of Representatives or the Secretary of the Senate, as appropriate, shall transmit the map and the corresponding boundary description provided by the census tracts, blocks, and counties identified in subsection (b) for certification and posting on the public website of the Secretary of State.

(e) The boundary descriptions provided by the certified map referenced in subsection (b) shall prevail over the boundary descriptions provided by the census tracts, blocks, and counties generated for the map."

Section 3. The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, that declaration shall not affect the part which remains.

Section 4. This act shall be effective for the election of members of the state's U.S. Congressional districts at the General Election of 2024 and thereafter, until the state's U.S. Congressional districts are reapportioned and redistricted after the 2030 decennial census.

Section 5. This act shall become effective immediately upon its passage and approval by the Governor, or upon its

otherwise becoming law.

SB5 Enrolled

President and Presiding Officer of the Senate

Speaker of the House of Representatives

SB5
Senate 19-Jul-23
I hereby certify that the within Act originated in and passed the Senate, as amended.

Senate 21-Jul-23
I hereby certify that the within Act originated in and passed the Senate, as amended by Conference Committee Report.

Patrick Harris,
Secretary.

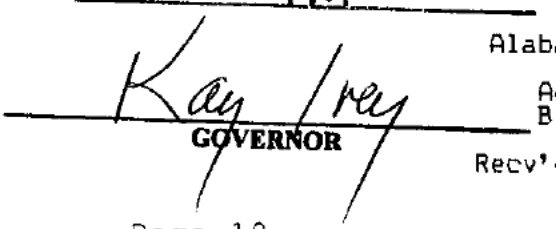
House of Representatives
Amended and passed: 21-Jul-23

House of Representatives
Passed 21-Jul-23, as amended by Conference Committee Report.

By: Senator Livingston

APPROVED July 21, 2023

TIME 5:28 PM



GOVERNOR

Alabama Secretary Of State

Act Num....: 2023-563
Bill Num...: S-5

Recv'd 07/21/23 05:41pmSLF

SOR
Livingston
PONSORS

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App. 445

SENATE ACTION

I hereby certify that the Resolution as required in Section C of Act No. 81-889 was adopted and is attached to the Bill, SB _____.

yeas_____nays_____abstain_____

PATRICK HARRIS,
Secretary

I hereby certify that the notice & proof is attached to the Bill, SB _____ as required in the General Acts of Alabama, 1975 Act No. 919.

PATRICK HARRIS,
Secretary

CONFERENCE COMMITTEE

Senate Conferees _____

_____

_____

HOUSE ACTION

DATE: 7-19 2023

RD 1 RFD SG

REPORT OF STANDING COMMITTEE

This bill having been referred by the House to its standing committee on State Government was acted upon by such committee in session, and returned therefrom to the House with the recommendation that it be Passed w/amend(s) _____ w/sub ✓.

This 20 day of July, 2023.

Chris Sells, Chairperson

DATE: 7-20 2023

RF w sub RD 2 CAL

DATE: 20

RE-REFERRED ☐ RE-COMMITTED ☐

Committee _____

I hereby certify that the Resolution as required in Section C of Act No. 81-889 was adopted and is attached to the Bill, SB _____.

YEAS_____ NAYS_____

JOHN TREADWELL,
Clerk

FURTHER HOUSE ACTION (OVER)

APPENDIX B

REAPPORTIONMENT COMMITTEE REDISTRICTING GUIDELINES

May 5, 2021

I. POPULATION

The total Alabama state population, and the population of defined subunits thereof, as reported by the 2020 Census, shall be the permissible data base used for the development, evaluation, and analysis of proposed redistricting plans. It is the intention of this provision to exclude from use any census data, for the purpose of determining compliance with the one person, one vote requirement, other than that provided by the United States Census Bureau.

II. CRITERIA FOR REDISTRICTING

a. Districts shall comply with the United States Constitution, including the requirement that they equalize total population.

b. Congressional districts shall have minimal population deviation.

c. Legislative and state board of education districts shall be drawn to achieve substantial equality of population among the districts and shall not exceed an overall population deviation range of ±5%.

d. A redistricting plan considered by the Reapportionment Committee shall comply with the one person, one vote principle of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

e. The Reapportionment Committee shall not approve a redistricting plan that does not comply with these population requirements.

f. Districts shall be drawn in compliance with the Voting Rights Act of 1965, as amended. A redistricting plan shall have neither the purpose nor the effect of diluting minority voting strength, and shall comply with Section 2 of the Voting Rights Act and the United States Constitution.

g. No district will be drawn in a manner that subordinates race-neutral districting criteria to considerations of race, color, or membership in a language-minority group, except that race, color, or membership in a language-minority group may predominate over race-neutral districting criteria to comply with Section 2 of the Voting Rights Act, provided there is a strong basis in evidence in support of such a race-based choice. A strong basis in evidence exists when there is good reason to believe that race must be used in order to satisfy the Voting Rights Act.

h. Districts will be composed of contiguous and reasonably compact geography.

i. The following requirements of the Alabama Constitution shall be complied with:

(i) Sovereignty resides in the people of Alabama, and all districts should be drawn to reflect the democratic will of all the people concerning how their governments should be restructured.

(ii) Districts shall be drawn on the basis of total population, except that voting age population may be considered, as necessary to comply with Section 2 of the Voting Rights Act or other federal or state law.

(iii) The number of Alabama Senate districts is set by statute at 35 and, under the Alabama Constitution, may not exceed 35.

(iv) The number of Alabama Senate districts shall be not less than one-fourth or more than one-third of the number of House districts.

(v) The number of Alabama House districts is set by statute at 105 and, under the Alabama Constitution, may not exceed 106.

(vi) The number of Alabama House districts shall not be less than 67.

(vii) All districts will be single-member districts.

(viii) Every part of every district shall be contiguous with every other part of the district.

j. The following redistricting policies are embedded in the political values, traditions, customs, and usages of the State of Alabama and shall be observed to the extent that they do not violate or subordinate the foregoing policies prescribed by the Constitution and laws of the United States and of the State of Alabama:

(i) Contests between incumbents will be avoided whenever possible.

(ii) Contiguity by water is allowed, but point-to-point contiguity and long-lasso contiguity is not.

(iii) Districts shall respect communities of interest, neighborhoods, and political subdivisions to the extent practicable and in compliance with paragraphs a through i. A community of interest is defined as an area with recognized similarities of interests, including but not limited to ethnic, racial, economic, tribal, social, geographic, or historical identities. The term communities of interest may, in certain circumstances, include political subdivisions such as counties, voting

precincts, municipalities, tribal lands and reservations, or school districts. The discernment, weighing, and balancing of the varied factors that contribute to communities of interest is an intensely political process best carried out by elected representatives of the people.

(iv) The Legislature shall try to minimize the number of counties in each district.

(v) The Legislature shall try to preserve the cores of existing districts.

(vi) In establishing legislative districts, the Reapportionment Committee shall give due consideration to all the criteria herein. However, priority is to be given to the compelling State interests requiring equality of population among districts and compliance with the Voting Rights Act of 1965, as amended, should the requirements of those criteria conflict with any other criteria.

g. The criteria identified in paragraphs j(i)-(vi) are not listed in order of precedence, and in each instance where they conflict, the Legislature shall at its discretion determine which takes priority.

III. PLANS PRODUCED BY LEGISLATORS

1. The confidentiality of any Legislator developing plans or portions thereof will be respected. The Reapportionment Office staff will not release any information on any Legislator's work without written permission of the Legislator developing the plan, subject to paragraph two below.

2. A proposed redistricting plan will become public information upon its introduction as a bill in the legislative process, or upon presentation for consideration by the Reapportionment Committee.

3. Access to the Legislative Reapportionment Office Computer System, census population data, and redistricting work maps will be available to all members of the Legislature upon request. Reapportionment Office staff will provide technical assistance to all Legislators who wish to develop proposals.

4. In accordance with Rule 23 of the Joint Rules of the Alabama Legislature "[a]ll amendments or revisions to redistricting plans, following introduction as a bill, shall be drafted by the Reapportionment Office." Amendments or revisions must be part of a whole plan. Partial plans are not allowed.

5. In accordance with Rule 24 of the Joint Rules of the Alabama Legislature, "[d]rafts of all redistricting plans which are for introduction at any session of the Legislature, and which are not prepared by the Reapportionment Office, shall be presented to the Reapportionment Office for review of proper form and for entry into the Legislative Data System at least ten (10) days prior to introduction."

IV. REAPPORTIONMENT COMMITTEE MEETINGS AND PUBLIC HEARINGS

1. All meetings of the Reapportionment Committee and its sub-committees will be open to the public and all plans presented at committee meetings will be made available to the public.

2. Minutes of all Reapportionment Committee meetings shall be taken and maintained as part of the public record. Copies of all minutes shall be made available to the public.

3. Transcripts of any public hearings shall be made and maintained as part of the public record, and shall be available to the public.

4. All interested persons are encouraged to appear before the Reapportionment Committee and to give their comments and input regarding legislative redistricting. Reasonable opportunity will be given to such persons, consistent with the criteria herein established, to present plans or amendments redistricting plans to the Reapportionment Committee, if desired, unless such plans or amendments fail to meet the minimal criteria herein established.

5. Notice of all Reapportionment Committee meetings will be posted on monitors throughout the Alabama State House, the Reapportionment Committee's website, and on the Secretary of State's website. Individual notice of Reapportionment Committee meetings will be sent by email to any citizen or organization who requests individual notice and provides the necessary information to the Reapportionment Committee staff. Persons or organizations who want to receive this information should contact the Reapportionment Office.

V. PUBLIC ACCESS

1. The Reapportionment Committee seeks active and informed public participation in all activities of the Committee and the widest range of public information and citizen input into its deliberations. Public access to the Reapportionment Office computer system is available every Friday from 8:30 a.m. to 4:30 p.m. Please contact the Reapportionment Office to schedule an appointment.

2. A redistricting plan may be presented to the Reapportionment Committee by any individual citizen or organization by written presentation at a public meeting or by submission in writing to the Committee. All plans submitted to the Reapportionment Committee will be made part of the public record and made available in the same manner as other public records of the Committee.

3. Any proposed redistricting plan drafted into legislation must be offered by a member of the Legislature for introduction into the legislative process.

4. A redistricting plan developed outside the Legislature or a redistricting plan developed without Reapportionment Office assistance which is to be presented for consideration by the Reapportionment Committee must:

a. Be clearly depicted on maps which follow 2020 Census geographic boundaries;

b. Be accompanied by a statistical sheet listing total population for each district and listing the census geography making up each proposed district;

c. Stand as a complete statewide plan for redistricting.

d. Comply with the guidelines adopted by the Reapportionment Committee.

5. Electronic Submissions

a. Electronic submissions of redistricting plans will be accepted by the Reapportionment Committee.

b. Plans submitted electronically must also be accompanied by the paper materials referenced in this section.

c. See the Appendix for the technical documentation for the electronic submission of redistricting plans.

6. Census Data and Redistricting Materials

a. Census population data and census maps will be made available through the Reapportionment Office at a cost determined by the Permanent Legislative Committee on Reapportionment.

b. Summary population data at the precinct level and a statewide work maps will be made available to the public through the Reapportionment Office at a cost determined by the Permanent Legislative Committee on Reapportionment.

c. All such fees shall be deposited in the state treasury to the credit of the general fund and shall be used to cover the expenses of the Legislature.

Appendix.

ELECTRONIC SUBMISSION OF REDISTRICTING PLANS

REAPPORTIONMENT COMMITTEE - STATE OF ALABAMA

The Legislative Reapportionment Computer System supports the electronic submission of redistricting plans. The electronic submission of these plans must be via email or a flash drive. The software used by the Reapportionment Office is Maptitude.

The electronic file should be in DOJ format (Block, district # or district #, Block). This should be a two column, comma delimited file containing the FIPS code for each block, and the district number. Maptitude has an automated plan import that creates a new plan from the block/district assignment list.

Web services that can be accessed directly with a URL and ArcView Shapefiles can be viewed as overlays. A new plan would have to be built using this overlay as a guide to assign units into a blank Maptitude plan. In order to analyze the plans with our attribute data, edit, and report on, a new plan will have to be built in Maptitude.

In order for plans to be analyzed with our attribute data, to be able to edit, report on, and produce maps in the most efficient, accurate and time saving procedure, electronic submissions are REQUIRED to be in DOJ format.

Example: (DOJ FORMAT BLOCK, DISTRICT #)

SSCCCTTTTTTBBBBDDDD

SS is the 2 digit state FIPS code

CCC is the 3 digit county FIPS code

TTTTTT is the 6 digit census tract code

BBBB is the 4 digit census block code

DDDD is the district number, right adjusted

Contact Information:

Legislative Reapportionment Office

Room 317, State House

11 South Union Street

Montgomery, Alabama 36130

(334) 261-0706

For questions relating to reapportionment and redistricting, please contact:

Donna Overton Loftin, Supervisor

Legislative Reapportionment Office

donna.overton@alsenate.gov

Please Note: The above e-mail address is to be used only for the purposes of obtaining information regarding redistricting. Political messages, including those relative to specific legislation or other political matters, cannot be answered or disseminated via this email to members of the Legislature. Members of the Permanent Legislative Committee on Reapportionment may be contacted through information contained on their Member pages of the Official Website of the Alabama Legislature, legislature.state.al.us/aliswww/default.aspx.

No. 23-12923-D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MARCUS CASTER, et al.,
Plaintiffs-Appellees,

v.

HON. WES ALLEN, in his Official Capacity as the Secretary of State of Alabama,
Defendant-Appellant.

On Interlocutory Appeal from the United States
District Court for the Northern District of Alabama
No. 2:21-cv-1536-AMM

APPENDIX TO TIME SENSITIVE MOTION FOR STAY PENDING APPEAL: VOLUME 3 OF 3

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Volume 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BOBBY SINGLETON, et al., Plaintiffs, vs. WES ALLEN, in his official capacity as Alabama Secretary of State, et al., Defendants.	*	2:21-cv-1291-AMM August 14, 2023 Birmingham, Alabama 9:00 a.m.
EVAN MILLIGAN, et al., Plaintiffs, vs. WES ALLEN, in his official capacity as Alabama Secretary of State, et al., Defendants.	*	2:21-cv-1530-AMM
MARCUS CASTER, et al., Plaintiffs, vs. WES ALLEN, in his official capacity as Alabama Secretary of State, et al., Defendants.	*	2:21-cv-1536-AMM

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE ANNA M. MANASCO,
THE HONORABLE TERRY F. MOORER,
THE HONORABLE STANLEY MARCUS

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Proceedings recorded by OFFICIAL COURT REPORTER, Qualified pursuant to 28 U.S.C. 753(a) & Guide to Judiciary Policies and Procedures Vol. VI, Chapter III, D.2. Transcript produced by computerized stenotype.

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COURT REPORTER: Christina K. Decker, RMR, CRR

PROCEEDINGS:

JUDGE MARCUS: Good morning to all of you folks, and welcome.

It's a whole lot more pleasurable to see you in person, I can assure you, than on a Zoom screen.

We regret very much, Ms. Khanna, that you have been unable to come, but we wish you a speedy recovery. We're delighted you are with us online.

Can you hear us okay?

MS. KHANNA: I can, Your Honor. Can you hear me?

JUDGE MARCUS: Just fine. Thank you.

With that, I would like to begin by asking the parties if you would be kind enough to state your appearances on the record.

This is in the Milligan and Caster cases. We will proceed with Singleton upon the completion of this case.

With that, if counsel for Milligan would be kind enough to state your appearances.

MR. ROSS: Yes, Your Honor. Deuel Ross for the Milligan plaintiffs.

MR. ROSBOROUGH: Good morning, Your Honor. Davin Rosborough for the Milligan plaintiffs.

JUDGE MARCUS: And for Caster.

MR. POSIMATO: Good morning, Your Honor. It's Joe Posimato on behalf of the Caster plaintiffs.

MR. ROUCO: Good morning, Your Honor. Richard Rouco on behalf of the Caster plaintiffs.

MS. KHANNA: Good morning, Your Honor. Abha Khanna also on behalf of the Caster plaintiffs.

JUDGE MARCUS: Good morning to all of you.

And for the defendants?

MR. LACOUR: Good morning, Your Honor. Edmund LaCour on behalf of the Secretary of State Wes Allen.

MR. DAVIS: Jim Davis on behalf of the Secretary of State Wes Allen.

MR. SMITH: Good morning, Your Honor. Brent Smith on behalf of Secretary of State Wes Allen.

JUDGE MARCUS: And good morning to all of you folks.

I'm sorry. Mr. Walker.

MR. WALKER: Dorman Walker on behalf of the defendant intervenors.

JUDGE MARCUS: Are you able to see us okay from where you are?

MR. WALKER: Yes, sir, I can.

JUDGE MARCUS: Thank you. I think we missed one attorney on the right.

MR. JACKSON: Good morning, Your Honor. Sidney Jackson for the Milligan plaintiffs.

JUDGE MARCUS: Good morning. Any other lawyers of record that want to state their appearances?

MR. DUNN: David Dunn also for the Milligan plaintiffs.

MR. ROSS: Your Honor, we also have Nicki Lawsen and Tanner Lockhead, Amanda Allen, and Brittany Carter also for the Milligan plaintiffs, and our clients are here, as well.

JUDGE MARCUS: Welcome to all of you.

And, Mr. LaCour, Mr. Davis, anyone else you wanted to introduce before we begin?

MR. DAVIS: That's all for us, Judge.

JUDGE MARCUS: Thank you.

We set this case down for a hearing this morning. We wanted to give each side the opportunity to make an opening statement, and we will give each of the parties a half hour. You need not take all of it to make an opening statement.

But before we did that, we had one outstanding motion pending that was the motion in limine filed by the -- by the plaintiffs.

With that, did you want to address that motion at this point, Mr. Ross? Ms. Khanna? Or did you want to go to opening statement first?

MS. KHANNA: We would prefer to go to opening statement first, Your Honor. But I leave it to Mr. Ross if he wanted to argue the motion in limine specifically.

MR. ROSS: Your Honor, we would rather do the opening statements first, and then answer questions about the motion in

limine.

JUDGE MARCUS: Okay. The only reason -- Mr. LaCour, Mr. Davis, Mr. Walker, what's your view? Did you want us to tackle the in limine motion first, or go to opening first?

MR. LACOUR: Your Honor, I think -- you have seen the briefing on the objections and on the motion in limine. There is a tremendous amount of overlap, we think. So we want to start with opening statements and delve into some of those issues about what is or is not relevant and what the Court is or is not doing today. We think that makes sense.

THE COURT: All right. We will proceed with opening statements. And then we will go forward with the motion in limine. And then we will proceed to the presentation, Mr. Ross, you want to make on behalf of the Milligan plaintiffs, and, Ms. Khanna, and your colleagues on behalf of Caster, and whatever the State will be presenting, Mr. LaCour.

So that with, we will turn to Mr. Ross. Did you want to begin?

MR. POSIMATO: Your Honor, both the Caster and Milligan plaintiffs are prepared to start first. We defer to the Court on whether it makes sense for Ms. Khanna to go first since she is on Zoom, or whether you prefer to hear from Mr. Ross first.

JUDGE MARCUS: Why don't we go forward with Mr. Ross?

MR. ROSS: Thank you, Your Honor.

May it please the Court. 18 months ago, this Court ruled that the 2021 plan likely dilutes the votes of black voters in Alabama. The appropriate remedy this Court said is a plan that includes either an additional majority-minority district or an additional district in which black voters have an opportunity to elect candidates of their choice.

The Supreme Court affirmed that decision in full.

At this Court's invitation, the Alabama Legislature has proposed a new remedial map. And so today, there's only one question before this Court: Does the new 2023 plan remedy the prior vote dilution, and does it provide black voters with an additional opportunity to elect the candidates of their choice. The answer is that it does not.

No party disputes this fact.

The viability of the 2023 plan is not considered on a clean slate the way Alabama would have it. Rather, the Court evaluates the 2023 plan in part measured by the historical record that is the record of the violation this Court has already found, and in part measured by prediction, and in part measured by the difference between the old plan and the new plan.

First, looking at the historical record as affirmed by the Supreme Court, plaintiffs have satisfied the first *Gingles* precondition. The first *Gingles* precondition does not look at the compactness of plaintiffs' map. It looks at the

compactness of the minority community. And as the Supreme Court found, black voters and this Court found, as well, geographic -- or black voters are geographically compact, and they are sufficiently numerous to constitute a second majority-minority district.

Plaintiffs also satisfied the second and third *Gingles* preconditions. Alabama does not dispute that black voters are -- that there is serious racially polarized voting in the state, and that black voters have not been able to elect the candidate of their choice in a second congressional district.

Today, as in 2022, black voters enjoy virtually zero success in state-wide elections. Alabama's political campaigns feature racial appeals. Alabama has an extensive and ongoing history of repugnant racial discrimination, and this history of discrimination includes abandoning racist laws when they're enjoined by courts, and then replacing them with facially race-neutral laws that maintain the status quo.

Second, when measured by predictions, there is no dispute that the 2023 plan does not lead to the election of a majority -- second African-American candidate of choice. According to Alabama's own analysis, the black-preferred candidate would have lost all seven elections that the State analyzed between 2018 and 2022. And defendants do not dispute the analysis plaintiffs' expert Dr. Liu that black candidates would have lost all 11 biracial elections that took place over

the last 10 years.

Third, the 2023 plan, like the old plan, also results in vote dilution. Both plans contain only one opportunity district. In the new District 2, black candidates would lose every election, just as in the old District 2, black candidates have lost every election.

Unfortunately, rather than address its failure to correct the violation that this Court found, Alabama rehashes the arguments that both this Court and the Supreme Court have already rejected.

First, these courts rejected Alabama's overdrawn argument there could be no legitimate reason to split Mobile and Baldwin counties, and yet Alabama wants to relitigate its prioritization of Mobile and Baldwin overdrawing an effective opportunity district.

Second, the Supreme Court made clear the Section 2 does not set up a beauty contest between plaintiffs' illustrative plans, and the State's enacted plan. And yet Alabama insists that the Court should compare its allegedly neutral treatment of various communities in the 2023 plan to the treatment of the same alleged communities in the illustrative plan. But the Court rejected the notion that plaintiffs' or Alabama's plans are measured against some idealized allegedly neutral application of Alabama's preferred redistricting criteria.

Third, the Supreme Court made clear that the use of race

in redistricting is permissible to remedy a Section 2 violation. The majority of the court said the very reason plaintiffs educe a map of first step of *Gingles* is precisely because of its racial composition.

The majority also said that Section 2 requires remedies, and those instances like here where intensive racial politics already play an excessive role in denying black voters the opportunity to elect the candidate of their choice. And yet Alabama is again arguing that the use of race in devising a remedy is improper.

At bottom, Alabama is arguing that this Court should ignore the Supreme Court's rulings, ignore this Court's preliminary injunction order, and ignore the undisputed fact that the 2023 plan does not result in a new opportunity district for black voters.

Instead, Alabama wants to focus on the Legislature's intent in enacting the 2023 plan, but as the Supreme Court unanimously found, Section 2 is not about intent. It's about results and effect.

Plaintiffs' only burden then is to show that under the 2023 plan, black voters still lack an opportunity to elect a candidate of their choice in a second district. Plaintiffs have met that burden. And Alabama does not dispute that fact.

For that reason, plaintiffs are not required to go any further to sustain their objections.

Still as this Court knows, Senate Factor 2 -- or, excuse me -- Senate Factor 9 under the *Gingles* analysis asks whether the policy underlying the State's justification for its redistricting plan is tenuous. This Court declined to rule on tenuousness in 2022, and this Court doesn't have to resolve this issue now here. Nonetheless, there is substantial evidence that the Legislature was engaged in gamesmanship rather than a good faith effort to comply with this Court's order.

Before the special session, the chairs of the redistricting committee Senator Livingston and Representative Pringle were well aware of the import of this Court's order. I am going to play some clips from depositions that were taken last week. I am going to begin here with Senator Livingston, the chair of the Senate Redistricting Committee on his understanding of the Court's order:

(Video played:)

"SENATOR LIVINGSTON: I understand that the courts have ordered us to provide two opportunity districts minority -- majority-minority opportunity districts."

MR. ROSS: That's Senator Livingston, the chair of the redistricting committee and a defendant in this case.

And here is Representative Pringle, the chair of the House Redistricting Committee.

(Video played:)

"MR. PRINGLE: At play in your consideration of these new maps during the 2023 redistricting cycle."

JUDGE MARCUS: Let me stop for a moment. Was that video as well as audio?

MR. ROSS: Yes. Yes. Can you not hear the audio, Your Honor?

JUDGE MARCUS: I can hear the audio.

MR. ROSS: Okay. Oh, I believe Representative Pringle is in the corner there, and he is reading our exhibit, which is a copy of the opinion.

JUDGE MARCUS: Thank you.

MR. ROSS: Start from the beginning, please.

(Video played:)

Q "What role, if any, did this passage from the preliminary injunction order play in your consideration of these new maps during the 2023 redistricting cycle?

A That we were charged with drawing a map that would provide an opportunity for the black voters to elect a candidate of their choosing.

Q Did you have an understanding of what was required in order for that opportunity to comply with the opportunity as it's expressed in this paragraph?

A An opportunity for blacks to elect a candidate of their choosing.

Q Okay. So as you were considering plans, did you have an

understanding of what it means for black voters to have an opportunity to elect a representative of their choice?
A I would say -- ask me that again, please.
Q Sure. Tell me what you understand what it means to provide black voters with an opportunity to elect a black candidate of their choice.
A You know, a district which they have the ability to elect or defeat somebody of their choosing. I have no magic number on that.
Q Sure. Does it turn on the ability to elect for you?
A Yes. Ability."

MR. ROSS: Your Honor, Mr. Hinaman, who is also the State's cartographer and drew the 2021 plan, also testified to his understanding of the Court's order and what the redistricting chairs initially asked him to do after the Supreme Court ruling.

If you could play Mr. Hinaman's testimony.

(Video played:)

Q "In light of Mr. Walker and Mr. LaCour, did you discuss the Court's order with anyone else?
A Obviously the two chairs.
Q What did you discuss with them?
A Just essentially what I said earlier, that we needed to address the Court's concerns and work to draw a map that was -- provided an opportunity for African-Americans to elect a

candidate of their choice in two districts.
Q You mentioned that from your perspective an opportunity district is one in which black voters have an opportunity to elect a representative of their choice, correct?
A Yes, sir.
Q And you mentioned that a big indicator of that is shown in a performance analysis or an election analysis, correct?
A Yes, sir."

MR. ROSS: Okay. And so, again, the plaintiff -- excuse me -- the defendants were very well understood what their task was. And yet despite their understanding, Alabama never set out to draw a second opportunity district.

Mr. Hinaman testified that he was never instructed to draw a second majority-black district. And the 2023 plan was enacted without actually providing that opportunity. Instead, the map was drafted largely in secret without incorporating the input from black legislators in the state.

Although it's unclear who exactly drew the 2023 plan, it is clear who had substantial input. Here, again, is Representative Pringle testifying.

(Video played:)

Q "During this stage?
A For me?
Q For you -- is there anyone else besides Mr. Hinaman that served as a map drawer or a consultant during this stage?

A For me?
Q For you or for the committee?
A No. Eddie LaCour worked as a map drawer at some point in time.
Q Okay. And what did he do as a map drawer?
A Drew maps.
Q And in that respect, Mr. LaCour primarily served as a map drawer or an attorney?
A Initially as an attorney.
Q What about after that?
A I lost contact with Mr. LaCour at the very beginning of the special session and never saw or communicated with him again. He was upstairs meeting with the senators in a different room working with them to draw what ultimately became the Livingston plan.
Q Understood."

MR. ROSS: So in passing the 2023 plan, defendants knew that they were flouting this Court's order to devise a plan that contained a second opportunity district.

And Representative Pringle was very clear that he was unhappy about the 2023 plan. He would have preferred that the Legislature enact the plan that was first passed by the House.

And while plaintiffs believe that that plan also would have not satisfied Section 2, the State's performance analysis of the House's plan showed that black-preferred candidates

would at least rarely be able to win elections in a second district.

Here is Representative Pringle explaining his view of the House plan, as compared to the enacted plan in -- that's at issue now.

(Video played:)

Q "What's the significance of the 39.9 percent BVAP in SB-5; just that it passed?

A That's what the Senate came up with, and they were not going to allow us to pass the House plan.

Q And do you know why they chose that number?

A You're going to have to talk to Senator Livingston and Eddie LaCour.

Q Did they mention anything to you?

A No.

Q Let's go ahead and --

A Let me -- no. Let me rephrase that.

Senator Livingston came to me towards the end and said, we're going to take your plan and substitute my bill and pass your plan with my mapping. And I said, no, we're not. If you want to pass a Senate plan, you are going to pass a Senate plan on the Senate bill number, and you are not going to put my name on it. You're not -- it is not going to be a House bill number. It's going to be a Senate bill number if that's what we are going to pass.

Q Why didn't you want your name on it?
A Because I thought my plan was a better plan.
Q In terms of its compliance with the Voting Rights Act?
A Exactly.
Q Representative Pringle, these --"

MR. ROSS: Finally, the findings in new redistricting criteria included in SB-5 are also unprecedented. Neither the cartographer Mr. Hinaman, Representative Pringle, or Senator Livingston had ever seen a redistricting bill that included legislative findings about communities of interest or any findings about redistricting guidelines.

Indeed, a week before the Legislature enacted the 2023 plan, the redistricting committee readopted the exact same guidelines that were used in 2021. And Mr. Hinaman testified that he drew his plans for the Legislature based on those 2021 and 2023 committee guidelines. And Alabama admits that under the 2021 and 2023 committee guidelines, it would have allowed the State to draw a second majority-black district.

But SB-5 includes newly invented findings that limit the number of county splits to six, that change the definition of communities of interest, that identify the Black Belts, the Wiregrass, and the Gulf as specifically prioritized communities. And SB-5 also bars splitting those prioritized communities into more than two districts.

But it appears that SB-5's findings did not come from the

Legislature itself, but from the lawyers in this case. Thus, the apparent purpose of SB-5's findings were simply to facilitate the defendants' relitigation of *Gingles I* at this hearing.

Here again, Your Honor, is Representative Pringle, the chair of the House Redistricting Committee.

(Video played:)

Q "Representative Pringle, these are the suggestive findings; is that right?

A That's what was written in the bill, yes.

Q Okay. And do you know who drafted the statement of legislative intent in findings here?

A No, sir.

Q Did you know that these would be put in the bill?

A No, sir.

Q Did the redistricting committee solicit anyone to draft these findings?

A No, sir.

Q Do you know why they're in here?

A No.

Q As -- remind me. Have you ever seen another district bill contained similar language like this, these findings?

A Not to my knowledge, no."

MR. ROSS: And here again, Your Honor, is Senator Livingston, the chair of the Senate Redistricting Committee.

(Video played:)

Q "Are you generally familiar with the fact that there are what are titled legislative findings that take up about, you know, five or so pages in the bill?

A Yes, sir.

Q Okay. And do you recall in your responses to the interrogatories that when you were asked to identify each individual and/or entity who participated in the drafting of the statement of legislative intent accompanying the congressional districting map, you said on information believed Eddie LaCour. Do you recall that?

A Yes, sir.

Q When -- are these sections of the bill what you were referring to in that answer?

A Yes, sir.

Q Okay."

MR. ROSS: Your Honors, Alabama should not be rewarded for its bad faith.

Ultimately Section 2, though, is a results test. Plaintiffs simply present this evidence to give the Court context about the gamesmanship that was going on by Alabama Legislature and by the defendants in this case.

The 2023 plan has the same results as the 2021 plan. That is what's important. It does not create a new opportunity for black voters to elect their candidates of choice in a second

district, and, therefore, plaintiffs respectfully request that the Court enjoin the 2023 plan and order the special master to begin the process of devising a complete and proper remedy.

Thank you.

JUDGE MARCUS: Thank you much, counsel.

Who will be proceeding for the Caster plaintiffs? Ms. Khanna or --

MS. KHANNA: Your Honor, with the Court's permission, I will give the opening statement for the Caster plaintiffs.

THE COURT: Thank you. Of course. And you may proceed.

MS. KHANNA: Good morning, Your Honors. May it please the Court. Abha Khanna for the Caster plaintiffs. And I would like the thank the Court again for the accommodation to allow me to present via Zoom while I'm in quarantine. I am very disappointed that I could not make it there in person today.

18 months ago, this Court found Alabama liable under Section 2 of the Voting Rights Act for diluting the voting power of its black citizens through a congressional plan that provided black voters just a single district in which they had the opportunity to elect their candidates of choice. The same district that Alabama was forced to draw 30 years ago after a different Voting Rights Act lawsuit.

This Court's conclusion on what the law requires was neither cursory nor groundbreaking. To the contrary, it was

meticulous and methodical, following step by step the well-established legal standard for adjudicating claims under Section 2.

First, the Court found that it was beyond dispute that black voters in Alabama were sufficiently numerous to comprise a majority of eligible voters in an additional district. In so doing, this Court rejected the State's odious suggestion advanced through its expert Mr. Thomas Bryan to narrow the count of black citizens to only a subset of individuals that the State deemed black enough to warrant protection under the Voting Rights Act.

Second, the Court found extreme polarization throughout the state. This, too, was beyond dispute. Black and white voters in Alabama consistently and cohesively vote for opposing candidates. And absent a majority-black district or something close to it, white voters will vote as a bloc to defeat black-preferred candidates in virtually any election. So intense is the racial polarization in Alabama that even the state's own expert agreed with this Court's finding.

Third, this Court analyzed each and every Senate Factor relevant to this case to determine that the totality of circumstances weighed decidedly in favor of finding Section 2 liability. Specifically, it found that the pattern of racial polarization in Alabama is clear, stark, and intense; that black Alabamians enjoy virtually zero success in statewide

elections; and no black candidate for Congress has ever been elected from a majority white district.

Alabama's extensive history of repugnant racial and voting-related discrimination is undeniable and well documented. And that despite defendants' contention that Alabama has come a long way, the last few decades of Alabama's discriminatory voting laws, racial animus among state actors, and racial disparities across nearly every dimension make clear that that history is alive and well in the present, that recent and prominent political campaigns, including by congressional candidates have been characterized by a racial appeals, and that white voters enjoy a disproportionate advantage in congressional representation while black voters experience a disproportionate disadvantage in stark contrast to their respective shares of the population.

Finally, this Court rejected the State's contention that plaintiffs' illustrative plans are unconstitutional racial gerrymanders. It further rejected Alabama's throw everything at the wall to see what sticks legal strategy seeking to undermine the very constitutionality of Section 2 and the ability of individual plaintiffs to bring Section 2 claims to court in the first place.

In short, this Court did exactly what district courts are charged with doing. It applied well-established law to the well-developed factual record. And in so doing, it found that

the question of whether Alabama's congressional plan likely violates Section 2 of the Voting Rights Act is not even close.

Alabama refused to accept this Court's ruling and sought and achieved a stay before the U.S. Supreme Court. As a result, the congressional plan enjoined by this Court as a violation of federal law, remained in place for the 2022 elections. And as expected, black-preferred candidates lost in every district, save District 7, the state's only majority-black district.

On the merits, Alabama turned to the Supreme Court with the same arguments that it advanced before this Court. And once again, lost on each and every one of them. The Supreme Court upheld this Court's findings on plaintiffs' satisfaction of the *Gingles* preconditions and the totality of circumstances.

The Supreme Court saw no reason to disturb this Court's careful factual findings and spot-on legal conclusions. And the Court firmly and decidedly rejected Alabama's attempts to upend the Section 2 legal standard, to paint plaintiffs' illustrative maps as racial gerrymanders, and cut the legs out from Section 2 altogether.

In short, the Supreme Court reaffirmed the well-established legal standard applied by this Court and this Court's detailed findings and conclusions based on that standard.

And so after three federal judges and a majority of

Supreme Court justices rejected the State's Section 2 defense, the ball flipped back in Alabama's court. This Court rightly afforded Alabama a reasonable opportunity to remedy its violation.

And the Court didn't leave state officials in the dark about what that remedy required. It held as a matter of law that under the statutory framework, Supreme Court precedent, and Eleventh Circuit precedent, the appropriate remedy is a congressional redistricting plan that either includes an additional majority black congressional district or an additional district in which black voters otherwise have an opportunity to elect a representative of their choice.

And the Court recognized as a matter of fact the practical reality based on the ample evidence of intensely racially polarized voting that any remedial plan will need to include two districts in which black voters comprise a voting major majority or something quite close to it.

Alabama promised to take advantage of the opportunity afforded by this Court assuring both the Court and plaintiffs that the Legislature would make a good faith attempt to enact a remedial map that addresses this Court's findings. But in defiance of the Court's clear instructions, and in disregard of the state's black citizens, Alabama squandered that opportunity and refused to draw a remedy map at all.

After asking this Court to pause these proceedings for

weeks, to allow the Legislature to act, the state of Alabama once again enacted a congressional plan with just a single district in which black voters have an opportunity to elect their candidates of choice. That is the map before this Court today.

Let me be clear. There is no dispute that the 2023 plan enacted by the state of Alabama once again limits the state's black citizens to a single opportunity district. Alabama has stipulated that its new map includes just one majority black district. It has stipulated that the district with the next highest black population has a BVAP of just 39.9 percent. It has stipulated to the findings of plaintiffs' experts that black-preferred candidates will nearly always be defeated in that district.

In fact, it has stipulated to the Alabama Legislature's own analysis revealing that black-preferred candidates would lose each and every one of the elections the Legislature analyzed in the state's new congressional District 2.

Based on these stipulated facts alone, Your Honors, this Court can and must enjoin the 2023 map for perpetuating the same Section 2 violation as the map struck down by this Court last year.

In enacting the 2023 plan, Alabama acted in defiance of this Court's preliminary injunction order and the U.S. Supreme Court's opinion. And Alabama remains defiant in its continued

and baseless defense of that plan before this Court.

First, Alabama insists that after more than a year and a half of litigation, after it succeeded in staving off plaintiffs' relief for an entire election cycle, and after five weeks granted by this Court to allow the state to engage in a remedial map drawing process, we're now back at square one. According to Alabama, the enactment of a new map wipes the record clean and requires plaintiffs to reprove Section 2 liability from scratch.

But the Supreme Court has already rejected the state's position in *North Carolina vs. Covington*, where it explained that the passage of a remedial plan does not reset a court's liability finding.

Second, Alabama argues that it remedied its prior cracking of the Black Belt by dividing Black Belt counties into two districts instead of four. But Alabama cannot feign innocence on its warped interpretation of the term cracking.

Cracking in the Section 2 context refers to the dispersal of minority voters into districts where they have no opportunity to elect their preferred candidates even though they are sufficiently numerous and geographically compact enough to comprise a majority of voters in a reasonably configured district.

The 2021 plan cracked black voters in the Black Belt among three congressional districts to ensure that black voters in

Alabama would be limited to only one district in which they could elect their preferred candidate.

The 2023 plan reshuffled Black Belt counties to give the illusion of a remedy while once again ensuring that black voters of Alabama are limited to only one congressional district in which they can elect their preferred candidates. Alabama gets no brownie points for uniting black voters and the Black Belt community of interest in a district in which they have no electoral power and in a map that continues to dilute the black vote.

Third, Alabama attempts to introduce evidence about the ways the 2023 plan respects various communities of interest around the state. But in so doing, Alabama completely misses the point. Section 2 is not a claim for better respect for communities of interest. It is a claim regarding minority vote dilution.

The question of communities of interest arises when analyzing the extent to which plaintiffs' illustrative maps are consistent with the state's redistricting principles. This Court has already found, the Supreme Court has already affirmed that plaintiffs' illustrative maps in this case take account of communities of interest along with a host of other traditional criteria.

Neither Alabama's apparent preference for one particular community of interest, nor its attempt to reverse engineered

map drawing process to prioritize and immunize certain communities above all others can override its mandate to comply with Section 2.

Alabama asserts that it can erase its Section 2 liability by simply tidying up its map to better comport with traditional criteria. But, once again, this Court has already said and the Supreme Court has already affirmed that plaintiffs' illustrative plans need not beat out rival districts in an endless beauty contest.

Indeed, under Alabama's approach, plaintiffs and defendants could find themselves in a perpetual game of one-upmanship (sic), fixing this precinct line, increasing this compactness score, all while the other underlying vote dilution remains in place in election after election after election.

But the reason courts look to traditional districting principles when evaluating plaintiffs' maps is not to see which map can achieve the highest score on one or more measures. It is to understand whether plaintiffs' illustrative plans generally comport with the state's tradition of running districted elections. And whereas here, plaintiffs' illustrative districts are consistent with those traditions, they do not need to beat out every competing district to satisfy *Gingles I*.

And, finally, Alabama attempts to rehash its racial predominance argument, once again trotting out Thomas Bryan to

cast aspersions on plaintiffs' plans. That is a fight that Alabama has already fought and lost.

Ultimately, neither the 2023 plan nor Alabama's arguments to this Court reflect a serious -- to remedy a serious violation. Instead, they reflect the state's inability to stomach the idea of affording black voters equal access to the political process and its willful disregard of the legal process.

Alabama's counsel is essentially telling this Court with a straight face that you got it wrong. And not only that you got it wrong, Your Honors, but apparently the Supreme Court got it wrong. And even though Alabama is taking full advantage of the appellate process, it refuses to accept the judiciary's authority to say what the law requires and limit what the state can do under that law.

18 months ago, when appealing to the Supreme Court to stay this Court's injunction, defendants asserted that the Court's liability finding leaves Alabama with no real choice but to draw an additional congressional district in which black voters have an opportunity to elect their candidates of choice.

But now, all these months later, Alabama has chosen instead to thumb its nose at this Court, to thumb its nose at our nation's highest court, and to thumb its nose once again at its own black citizens. In choosing defiance over compliance, Alabama only doubles down on its Section 2 liability adding yet

another marker to its centuries and decades long pattern of electing barriers to racial equality at the ballot box.

Caster plaintiffs respectfully request that the Court put an end to Alabama's gamesmanship by enjoining the 2023 plan and proceeding to a judicial remedy process to ensure that plaintiffs obtain relief in time for the 2024 election.

Thank you, Your Honors.

JUDGE MARCUS: Thank you.

We'll turn to the defendants, Mr. LaCour, Mr. Davis. I am not sure how you're choosing to proceed.

MR. LACOUR: Thank you, Your Honors. Edmond LaCour on behalf --

JUDGE MARCUS: I take it just, so that I'm clear, you will be speaking on behalf of all of the defendants, correct?

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: Thank you.

MR. LACOUR: First, I would like to begin with the threshold issue of what we are doing here. This Court's preliminary injunction order and binding precedent of the Supreme Court and Eleventh Circuit make clear that the issue before this Court is whether the 2023 plan violates federal law. If plaintiffs cannot make that showing at least on preliminary basis, then the 2023 plan is governing law, and that is great evidence that this plan completely remedies the past likely violation in the 2021 plan.

This is the view the defendants have staked out since we informed the Court just a week after the Supreme Court's decision of the Legislature's intent to enact a new plan. Again, our view is the same one that this Court took in the preliminary injunction; namely, that the new legislative plan if forthcoming would be governing law unless challenged and found to violate federal law.

That is, of course, the Supreme Court's view articulated in *Wise vs. Lipscomb,* which, again, the Court quoted in the P.I. order. The Supreme Court made clear there is a critical difference between a legislatively enacted plan and a mere proposal or a court-drawn plan.

Even after a final judgment on the merits, a, quote, new legislative plan is the governing law unless it too is challenged and found to violate federal law. That comes out of *Wise*, and this comports with the Eleventh Circuit's *Dillard* decision, which made clear that a question in a proceeding like this one is whether there is, quote, a violation of Section 2, closed quote, and which requires, quote, evidence that the new plan violates Section 2. That's from page 250 of the *Dillard* opinion.

The Milligan plaintiffs agreed with us. In their objections from pages 16 to 20 of the ECF pagination, they argued that HB-5 fails to completely remedy the Section 2 violation because the plan itself violates Section 2. They

explain that, quote, in evaluating remedial proposal, the Court applies the same *Gingles* standard applied at the merit stage.

And they contended that, quote, in assessing a remedy, the Court should also examine the redistricting policies the Legislature relied upon to justify its new plan.

They were citing *Dillard*, and they were right to do so because *Dillard* lays all this out. Even after a final judgment on liability, when a new plan is put forward, the Court considers anew whether it violates Section 2. Courts cannot, in the words of *Dillard*, simply take the findings that made the original electoral system infirm and transcribe them to the new electoral system, from page 249 of the *Dillard* opinion.

Dillard continues, the evidence showing a violation in an existing election scheme may not be completely co-extensive with a proposed alternative. Thus, the *Dillard* court recognized that even, quote, at-large procedures that are discriminatory in the context of one scheme are not necessarily discriminatory under another scheme.

So too here. A congressional redistricting plan like the 2021 plan that had one majority-minority district may violate Section 2 in one context while a different plan like the 2023 plan may not violate Section 2 in another context even if it shares one component or one factor similar to the 2021 plan, which as we have heard from the plaintiffs today, they seem to think it's the only relevant factor, the number of

majority-minority districts in the plan.

But, of course, their arguments to this Court and to the Supreme Court were not that the 2021 plan violated Section 2 merely because of the number of majority-minority districts in it. You can read the briefs, and they made clear that Section 2 is not a tool for demanding proportionality. There's much more that has to be done.

And critical to the analysis that the Supreme Court laid out in *Allen* was *Gingles I*, and I think that is what is before the Court today, whether they have come forward with sufficient evidence to show that the 2023 plan likely violates Section 2. That is going to require them to come forward with *Gingles I* evidence.

Now, it might be that the 11 illustrative plans they had from 2021 will be up to the task, but we submit that in light of *Allen vs. Milligan* that that simply cannot be the case for a couple of reasons. As the *Allen* court made clear, this *Gingles I* inquiry is an exacting test, and it requires an intensely local appraisal of the electoral mechanism at issue. And here, that electoral mechanism is the 2023 plan, not the 2021 plan.

And this view of *Gingles I* is exactly what the Milligan plaintiffs had put in their Supreme Court brief. So today you heard from Mr. Ross that all that really matters is the compactness of the minority population in the state. That is not what they told the Supreme Court, and that's not what the

Supreme Court said.

At pages 26 through 27 of the read brief, they said, a *Gingles I* district is reasonably configured if it takes into account traditional districting principles. That was citing to *LULAC* and *Abrams vs. Johnson* to the *Gingles I* decisions from the Supreme Court. And then they listed the following objective factors of compactness, contiguity, respect for communities of interest, and political subdivisions.

So it is not just a matter of where the minority population lives in the state. *Gingles I* and again for decades has always required taking into account traditional districting principles. And for this inquiry to really be objective as the Milligan plaintiffs said it is, the traditional districting principles that the map that they're introducing must account for are the traditional districting principles embodied in the map that they are challenging. Again, that intensely local appraisal. Thus, this Court and the Supreme Court in the challenge to the 2021 map looked at the principles that were given effect in the 2021 map, not just what the Legislature or the redistricting committee said about the map, but what it actually did.

The *Abrams* Court, the Supreme Court considered the *Abrams* case over Georgia's congressional districts. They looked at Georgia's traditional districting principles, not California's traditional districting principles.

In the Eleventh Circuit in the *City of Rome* case that we cite in our briefs, looked at the City of Rome's redistricting principles when they were conducting their *Gingles* inquiry.

So for this challenge to the 2023 plan, the traditional principles that matter are those that are given effect in the 2023 plan.

Now, importantly, those are not the same principles as those given effect in the 2021 plan. As you all recall, that plan was a core retention map. Core retention came before communities of interest like the Black Belt. The core retention came before other principles like compactness. And plaintiffs argued that the 2021 plan violates Section 2, again not just because it didn't have two majority-black districts, but because it, quote, fragmented both the Black Belt, which this Court found to be a community of substantial significance, and the very important community comprising the majority black city of Montgomery while prioritizing keeping the majority white people of French and Spanish colonial heritage in Baldwin and Mobile together. That's from page 39 of the Milligan Supreme Court brief.

They argued that this was, quote, inconsistent treatment of black and white communities. Again, it's the definition of discrimination to have two similar things treating them dissimilarly. And Section 2 is trying to get at discriminatory maps, not just maps that fail to produce proportional

representation.

This wasn't a minor theme for the plaintiffs. As the Milligan plaintiffs said on page 5 of their Supreme Court brief, the very heart of their case was how Alabama had treated the Black Belt in its maps. The Supreme Court ultimately agreed making clear that core retention was not going to be a defense at the *Gingles I* stage that could justify splitting majority communities of interest like the Black Belt in Montgomery.

So with this new guidance, the 2023 plan answers the plaintiffs' challenge. Core retention takes a back seat to communities of interest like the Black Belt, takes a back seat to trying to make the districts more compact. It cures the cracking at issue in the 2021 plan.

Those 18 core counties that make up the core of the Black Belt that all the parties agreed upon are now found in just two congressional districts, a compact eastern Black Belt district, District 2, and a compact western Black Belt district, District 7 while ensuring that no county lines are needlessly split and ensuring that the districts are far more compact than they were in the past map.

Now, importantly here, every one of the plaintiffs' 11 plans splits those 18 core Black Belt counties into more than two districts. So in the past map, they argued that it was critical that the Black Belt be given priority not because they

were trying to hit racial goals, but it was a significant community of interest. They said based on the Legislature's definition of community of interest, the Black Belt fits the bill better than the Gulf. Therefore, you should prioritize keeping the Black Belt together over prioritizing the Gulf, and one way to do that is by splitting the Gulf.

Today, they're in front of you saying it's important to, I guess, split the Black Belt because it's going to help them hit racial goals, which is absolutely inconsistent with what the *Allen* court said. Where forcing proportionality over traditional principles is not just not required by Section 2, but it is unlawful. That's from page 1509 of the majority opinion.

But back to the 2023 map. Mr. Ross said that we had admitted that the guidelines would produce a two majority-minority district map.

We did not admit that, Your Honors. And in any event, what is relevant is not how the state describes its map in guidelines. What is relevant is what the map actually does. If we told you that county splits -- that minimizing county splits was very important, and then we passed a map that split 20 counties, you would look at what the map actually did. You wouldn't look at what they said it was supposed to do.

But, again, the result of the 2023 plan is to answer the plaintiffs' call, to take out those discriminatory components,

those purportedly discriminatory components of the 2021 plan. And they are gone. The Black Belt is no longer fragmented. Montgomery's sitting county have been made whole in a compact eastern Black Belt district.

To address the word cracking, which Ms. Khanna referenced before, not that is something we invented. Again, to quote from my friends the Milligan plaintiffs from their Supreme Court brief at page 29, they said that cracking occurs where, quote, a state has split minority neighborhoods that would have been grouped into a single district if the state had employed the same line drawing standards in minority neighborhoods as it used elsewhere.

That is what they alleged had happened when it came to communities of interest in the 2021 plan that we were fine splitting a majority black community of interest or two of them while we prioritize keeping majority white communities of interest together.

That cracking is gone. There's no serious allegation that anything like that is present in the 2023 plan coming from -- at least coming from the Section 2 plaintiffs here.

And as a result, the 2023 plan does not produce discriminatory effects on the account of race.

That conclusion is confirmed by the plaintiffs' refusal to try to shoulder their burden under *Gingles I*.

Now, what they say is that they've already done it because

they have maps that did as well as the 2021 plan. But, again, that is the wrong inquiry. The relevant traditional principles here are the ones used by a different Legislature to enact a different law that is being challenged at this point.

The inquiry, that objective inquiry that Mr. Ross referred to in his Supreme Court brief has to be tied to the state's map. If it's tied to some abstract standard of what a reasonable map might look like, then it's no standard at all. And because I don't think the Court is well-equipped to say that while the state's map splits only 6 counties, splitting 7, or splitting 8, or splitting 9, or splitting 12 is close enough.

We need standards in this space as the Supreme Court recognized; otherwise, Section 2 is going to be turned into a tool for enforcing proportionality. It's going to be turned into a tool that requires states to adopt districts that violate traditional principles like respecting county lines or respecting communities of interest in service of racial gerrymanders. That would be, in the Supreme Court's words, unlawful.

We think that this approach follows from the Supreme Court's decision. If you look at page 1504 and 1505 at the outset, this is where the Court is discussing why it was that the plaintiffs' illustrative plans satisfied *Gingles I* in their attack on the 2021 plan.

When it came to compactness, we pointed out that some of their districts were not relatively compact, and the Court came back and said, well, on average they have more plans that are compact than yours. When it came to county lines, some of their plans split seven or eight, but they had plans that split only six counties just like the 2021 plan, which the Supreme Court noted in the majority opinion, and Justice Kavanaugh gave special attention to in his concurrence to Footnote 2 saying it was important in this case that they had maps that split only six counties.

Then when it came to communities of interest, of course, we argued that the Gulf was being split in their plans, and the Court said that is not a problem because they do better for the Black Belt. So under either approach, there's going to be a community of interest treated better or worse in each of the plans.

And the Court went on to explain why it is that it is important that the plaintiffs were able to produce a map that meets this sort of standard. At 1507, the Court explained that deviation from a properly constructed map by the plaintiffs could show that it's not legitimate principles that explain the lack of proportionality, but it may be race that is explaining the lack of proportionality.

So if plaintiffs had only come forward with a map that split 12 counties, for example, and that was necessary to get

to their second majority-black district, well, then, the failure, that disparate effect of the redistricting scheme would not be on account of race. It would be on account of county lines, on account of respecting county lines. Just like if they could only come forward with a map that had to sacrifice contiguity or had to sacrifice equal population.

If you draw a congressional district of only 100,000 people in the state when everybody else has to live in a congressional district of 717,000, you can get another majority-black district. But the failure to do that is not a discriminatory effect on the account of race.

Similarly, the failure to split extra counties or split extra communities of interest or draw less compact districts is not discrimination on account of race. Those are discriminatory effects on account of legitimate principles that have been blessed by the Supreme Court in four different *Gingles I* opinions now. And that's why the Supreme Court said that in case after case they have rejected attempts to try to use Section 2 to force proportionality at the expense of these traditional redistricting principles of compactness, communities of interest, and counties.

And, finally, quoting from the Caster plaintiffs, they said, Section 2 never requires the state to adopt districts that violate traditional redistricting principles. We agree with that, not so sure the plaintiffs agree with that.

Turning to the Gulf -- there was a mention that this Court had rejected the idea that there was no legitimate reason to split the Gulf. Well, the legitimate reason -- again, legitimate race-neutral reason that they gave that this Court relied on was that it was important to do so to put the Black Belt together, more together, and one way to do that was to break into the Gulf and split the Gulf.

Today, they've abandoned that argument. Today, their only justification for splitting the Gulf is not to unite the Black Belt because the 2023 plan shows that it's possible to unite the Black Belt even better than every one of the 11 plans the plaintiffs showed you back in 2022.

The Black Belt can be united without breaking up the Gulf, without splitting up the Wiregrass as their plans would do, as well. And so for that reason, the legitimate reason they gave you, the traditional districting principle they cited to you of keeping together this community of interest in the Black Belt has fallen out. And all that's left is race. And, again, 1509 Supreme Court's opinion, it is unlawful to force proportionality at the expense of traditional districting principles.

There was talk about a risk of some sort of cycle of the plaintiffs coming forward with another map and the state coming forward with another map. I think that's a total straw man.

The opinions from the Supreme Court are clear that if

there's time, the Court should give the Legislature an attempt to try to remedy the violation. If there's not time, there's no need to do so. We had one shot. We have taken that shot. There's not going to be another plan between now and October 1st.

But at the same time, what the Supreme Court has also made clear even in cases like *Covington*, *Covington* was not decided against the state of North Carolina merely because they didn't like the new map or didn't completely change the lines sufficiently. That failure to change the lines was proof of another racial gerrymander, and that is important in intentional discrimination claim. If race has been used as a jury mechanism to move people around, you may need to use race to unpack that. We are dealing with an effects claim here though in Section 2. So that same rationale doesn't apply.

And in any event, there are many, many ways to satisfy Section 2, but what we do know from *Allen vs. Milligan* is that one way that you cannot satisfy Section 2 is by forcing proportionality at the expense of traditional districting principles.

That invites racial gerrymandering claims, which is not a hypothetical, as Your Honors know. And you will be hearing a racial gerrymandering claim preliminary injunction motion after this hearing has concluded.

Singleton plaintiffs' lawyer was there in front of the

Legislature threatening racial gerrymandering claims. And so the Legislature was put in a difficult position of trying to navigate these dueling threats of liability of Section 2 on one side and Equal Protection Clause on the other.

And as you could see in the last redistricting cycle when the Legislature was trying to comply with Section 5 in its state legislative maps, they used race too much. They were found liable for racial gerrymandering claims, which the Milligan put in front of the Court as proof that Alabama is still discriminating, and that this Court relied on actually to find through a bootstrapping mechanism. But the additional risk for the State is Section 3, the bail in provision of the Voting Rights Act, which says if you violate the 14th or 15th Amendment, there is risk of getting bailed in.

So the Legislature has to consider all these things in trying to chart a path between these dueling principles, and they had *Allen vs. Milligan* to guide them, which again made clear communities of interest, county lines, compactness, these are legitimate principles for a state to pursue in a map. Section 2 does not require them to be abandoned. And so that is why we have a map that now more fully and fairly applies those principles.

And plaintiffs had told the Supreme Court that Section 2 was not keyed solely to proportionality. Again, they focused on traditional districting principles. But now proportionality

is all that you are hearing about. We are the only parties here that are giving *Allen vs. Milligan* a serious reading. They are the ones who are defying the Supreme Court's opinion and demanding that the state adopt districts that violate traditional districting principles.

They had it right the first time when they told the Supreme Court what I have told you just a moment ago, the 1510 of that opinion. Section 2 never requires the state to adopt districts that violate traditional districting principles. Because the plaintiffs have not met their burden at *Gingles I*, they have not shown that this map fails to remedy the likely violation of the 2021 plan, and it should be the governing law going forward.

Thank you.

JUDGE MARCUS: Thank you, counsel.

We will proceed, then, to addressing the motion in limine the plaintiffs have filed.

Mr. Ross, who is going to argue that?

MR. ROSS: Mr. Rosborough is going to argue the motion in limine.

JUDGE MARCUS: Just let me ask sort of a preliminary question. Are we going to hear from both Milligan and Caster on the motion in limine, or just from Milligan?

MS. KHANNA: No, Your Honor. I think Mr. Rosborough can speak for all plaintiffs on this motion in limine.

Thank you.

JUDGE MARCUS: All right. Thank you.

MR. ROSBOROUGH: Good morning again, Your Honors.

I will just be brief here and answer any questions you have because I agree with Mr. LaCour that the briefing probably says most of what we need to say.

The plaintiffs filed this motion in limine because the only purpose as offered here of the expert reports and the purported community of interest witnesses are to relitigate the *Gingles I* issue that is law of the case already for the purposes of the preliminary injunction remedy.

As to the experts, both reports for Mr. Trende and Mr. Bryan are simply comparisons between the plaintiffs' illustrative plans and the state's plans.

Number one, as this Court has said, we are still in a remedial posture based on the Court's findings on the --

JUDGE MARCUS: I think what I would like you to address for me is: What is the nature of this remedial proceeding? It seems to me that's one of the central questions we have here today.

MR. ROSBOROUGH: Yes, Your Honor.

JUDGE MARCUS: As I hear the defendants' position, it's a whole lot broader than how you see it.

They say, if I have it right, that you are obliged to answer all of the *Gingles* factors and considerations here in

this remedial proceeding.

I hear you to say you have the burden of proof on only one; that is to say whether CD-2 effectively creates a fair and reasonable opportunity district.

Do I have that right, that distinction? Or is that overdrawn?

MR. ROSBOROUGH: I think, Your Honor, it's actually based on what the evidence is here. It's a distinction without a difference. Because I think where the point of distinction is, is the defendants' misunderstanding of the point of *Gingles I*. *Gingles I* focuses on whether -- and I think you have got the --

MR. ROSS: I can read it, Your Honor, if this is helpful. In *LULAC vs. Perry* at 433, the Supreme Court says, *Gingles I* refers to the compactness of the minority population, not the compactness of the contested district. Compactness does show a violation of equal protection, so a racial gerrymandering claim concerns the shape of the boundaries of district.

That differs from the Section 2 compactness inquiry which concerns a minority group's compactness. And so I believe -- just to finish up on the thought and then turn back it to Mr. Rosborough. The issue is are black voters geographically compact. Can you draw a reasonably configured district around them when looking at objective factors, not a beauty contest

between the map we drew and a map that we would potentially draw.

JUDGE MARCUS: Thank you.

Let me ask my question of you this way if I can, Mr. Rosborough: Is there something provisional about this map? This SB-5? Or is it the law?

MR. ROSBOROUGH: Your Honors, I believe that that depends on what the Court does here today. And I am not trying to avoid the Court's question. I think where we are --

JUDGE MARCUS: You understand why I ask?

MR. ROSBOROUGH: I'm sorry?

JUDGE MARCUS: You do understand what I am asking?

MR. ROSBOROUGH: Yes, Your Honor. SB-5 is the new law in Alabama.

But where we are today is an unfinished portion of the preliminary injunction proceeding. We have only been given a partial remedy, which was an injunction against the state's prior plan, but this Court also ordered the adoption of a plan that creates opportunities in the second district. And that -- and by prior precedent, the Court properly gave the state the chance to do that in accordance with its own -- its own principles.

This is what we're here about, though, Your Honor. Going forward, whatever happens, if the defendants choose to take -- go to trial with this, you know, that, then, yes, it is a focus

on SB-5, and some of this evidence that they're talking about here that they've put into play here may become relevant again if we go in trial in this case.

But here we are dealing with an unfinished portion of the remedy that this Court ordered. And so this has to be analyzed within that context. Defendants deferred the opportunity to go to trial until sometime after 2024. So this is about -- this is about, you know, a full analysis of whether this remedies the Voting Rights Act violation identified by the Court.

I think the plaintiffs' position is that all of the evidence that we've put forward remains relevant and decisive. The only thing that has changed about between 2021 and 2023 are the lines of certain districts. And so basically it's not that the other factors couldn't theoretically be relevant, but they're just not relevant here. The only -- *Gingles III* is really the only thing that is relevant here. Does -- based on the new lines, does white bloc voting continue to dominate and prevent black voters from electing preferred candidates in a second district.

JUDGE MARCUS: Let me sharpen the question this way: The Supreme Court said in *Gingles* vs. *Thornburg* that the plaintiff must do the following in order to establish by a preponderance of the evidence its burden that Section 2 is violated. First, you have got to come up with the numerosity requirement and create a reasonably configured map that

complies with all of these criteria, doesn't violate the principle of one person one vote, and so on.

Gingles II and *III* really look to racial polarization. And then there are these additional eight or nine factors. What's at dispute in this hearing in this case? *Gingles I* and/or *Gingles II* and/or *Gingles III* and/or the nine Senate Factors as you see it?

MR. ROSBOROUGH: I am going to let Mr. Ross address that.

JUDGE MARCUS: All right. Thank you.

MR. ROSS: The question was whether or not -- what's at issue at the remedial phase?

JUDGE MARCUS: At this hearing as we sit here today, do you have to do anything other than to show that SB-5 fails to create a fair and reasonable opportunity district?

MR. ROSS: Your Honor, because what's at issue here as Mr. Rosborough said a preliminary injunction the remedial proceedings, the defendants don't dispute that the minority community in Alabama remains geographically compact. They don't dispute that what the Supreme Court has said is that you look at objective factors, not the subjective factors that Mr. LaCour wrote into the legislative record.

What you look at is compactness, you look at contiguity, you look at political subdivisions, like cities and towns. That is what the Supreme Court looked at in this opinion. That

is what Justice Kavanaugh and the chief justice wrote about. It is objective criteria and not things like communities of interest.

Communities of interest are important, and obviously we argue that issue to the Supreme Court. But I think it's what's it's really clear about when Mr. LaCour was arguing, was he was talking about the intent of the Legislature, he was talking about disparate treatment of communities of interest. Those all go to the issue of intent. They don't go to the issue of the discriminatory effects.

JUDGE MARCUS: I think there is no dispute about that. What I am driving at with my question -- I may not have asked it clearly enough -- is this: As you see it, is *Gingles I* at issue in this proceeding at this time?

MR. ROSS: No, Your Honor, because nothing can change the fact that African-Americans are -- as a community are reasonably compact, and you can draw a reasonably configured district around them looking at objective criteria.

JUDGE MARCUS: So the only issue really boils down to the proofs on *Gingles II* and *III*, how racially polarized Alabama may be.

MR. ROSS: Primarily, Your Honor, because the state doesn't dispute any of the other factors. In fact, Your Honor, just going to that point, the state doesn't dispute *Gingles II* or *III*, either.

JUDGE MARCUS: No. They say *Gingles I* is at issue. You say, no, it isn't. The only thing at issue is *II* and *III*? Is that really what it boils down to?

MR. ROSS: That's what it boils down to, Your Honor. They have a misunderstanding. They are attempting to argue a racial gerrymandering claim at *Gingles I*. The Supreme Court has said that the inquiry in *Gingles I* is different from a racial gerrymandering inquiry. The inquiry is about the geographic compactness of African-American voters. The only thing that can substantially change where African-American voters are and whether you can draw a reasonably compact district throughout it, would be a new census, and we don't have that evidence here. We have Alabama's new made-up legislative findings that the chairs of the redistricting committee didn't even know existed, that they did not take into consideration when they drew the map.

And one other point I will make is that the Supreme Court has been very clear that there are objective redistricting criteria, and then there are state-created redistricting criteria that can be used and manipulated in a number of ways, and that this Court doesn't have to consider those factors --

JUDGE MARCUS: What falls into the category of objective criteria?

MR. ROSS: What the Supreme Court said in *Shaw vs. Reno* is compactness, contiguity, and -- excuse me -- political

subdivisions. And as the Supreme Court said in *Allen vs. Milligan*, that includes towns, counties, things like that.

And on the -- our maps meet or beat the state on all of those factors. That's what the Supreme Court held. That's what this Court held. We don't need look at Mr. LaCour's redistricting criteria.

JUDGE MARCUS: Are communities of interest an objective factor or criteria embodied in *Gingles I*?

MR. ROSS: They are a factor that's important in *Gingles I*, but it's important that communities of interest are overlapping.

JUDGE MARCUS: No. No. No. I accept all of that. I just want to use your terminology. In your view, is the criterion of communities of interest an objective factor or what you characterized as subjective?

MR. ROSS: I think --

JUDGE MARCUS: And does it make a difference?

MR. ROSS: I think the Supreme Court has talked about it in ways that varies. Sometimes -- they have made clear that it is -- it's part objective. It's part subjective. It's like asking a question about people, what is your community? Our clients who are here today have testified that their community includes Mobile, includes the Black Belt, includes Montgomery, and includes Dothan.

That is the way -- and plaintiffs' maps don't always

include all of those communities because they're not required to. They're required to show a reasonably configured district, and the remedy that my clients seek is one that brings that community together and fixes the vote dilution.

This is a Section 2 case. It is not a racial gerrymandering case. It is not about Alabama drew district lines one way, and they could have drawn them a different way. It is about that and its impact on African-American voters and their ability to actually elect candidates of their choice.

JUDGE MARCUS: I understand your point, and I take your point that drawing communities of interest are difficult. They tend to overlap. They pull and push in different directions. All I'm asking is whether that determination falls into the category of objective criterion that you mentioned or subjective. I wouldn't have asked --

MR. ROSS: Yes, Your Honor. I believe the Supreme Court has talked about it in both ways.

It's talked about, you know, if you are going to draw a district and you are going to consider things like communities of interest, then you look at factors like the economy, the history of the jurisdiction to determine whether or not that's a community of interest.

I don't think that the issue, though, Your Honor, is, you know, communities of interest -- in *Gingles I*, the community of interest that's relevant is the African-American community.

Are you drawing a reasonably compact district around that African-American community? Or are you drawing a district that goes from, you know, from Mobile to Huntsville, like the districts that the Supreme Court was concerned about in *Shaw*. We're not talking about that district.

This Court and the Supreme Court has already said that our districts are reasonably configured. When you look at all of the factors, you look at the objective factors, you look at the communities of interest factor, which has a subjective and an objective quality to it, those factors are met. Our districts are reasonably configured when you look at those things.

Again, it's not about the factors that Mr. LaCour uses in his legislative findings. It's not about, you know, whether we split the Wiregrass, which their plan splits, as well. It's not about whether our plans sufficiently, you know, measure up as compared to their plans in a beauty contest. That's not what *Gingles I* is about, and Alabama is trying to make it into a test that the Supreme Court has explicitly and repeatedly said it is not.

JUDGE MARCUS: You moved in limine to strike from the record as not relevant the tests -- there wasn't testimony. There was a report from Thomas Bryan, and there was a written report from Trende. Do you want to tell me why we should strike that?

MR. ROSS: So, Your Honor, their reports are simply

not relevant. They are trying to relitigate whether our *Gingles I* maps created reasonably configured districts. And they are trying to do it by conducting a beauty contest between the 2023 plan and our plan. But, again, *Gingles I* is not a beauty contest. It is not about how their map compares to our map on the some allegedly race-neutral criteria.

That is what Alabama argued in the Supreme Court. That is what they lost on. They tried to go to the Supreme Court and argue that there are these certain factors that if you look at them just the way Alabama wants to look at them, they win. If you look at them as compared to the community of interest that they prefer, they win.

The Supreme Court said that that is not the test. The Supreme Court said again as it has said for the last 50 years that the issue is the geographic compactness of African-American voters. And as I said the only thing substantively that could change between 2022 and 2023 would be a new census, and we have not had a new census.

We know that African-Americans are geographically compact. We don't need Mr. Trende to talk about how our map compares to their map. We don't need Mr. Bryan to testify about his view of racial gerrymandering which isn't well founded. None of that evidence is relevant to the question of black voters are geographically compact because the Supreme Court and this Court has already answered that question, and it is yes.

JUDGE MARCUS: Anything else you wanted to say, or Mr. Rosborough, on your motion in limine?

MR. ROSBOROUGH: (Shook head.)

JUDGE MARCUS: Thank you.

MR. ROSS: Thank you, Your Honor.

JUDGE MARCUS: Mr. LaCour?

Mr. LaCour, to set the backdrop, what would be helpful at least for me is for you to tell me in your own words how you characterized this remedial proceeding. What is it supposed to do?

MR. LACOUR: Your Honor, we characterize it like -- I believe this Court had characterized what it would look like when you entered the preliminary injunction order, which is a chance for them to show anew that this new law violates federal law.

Had we failed -- had the Legislature failed in the task of enacting a new law and repealing the old law, then we would have moved immediately to a remedial proceeding and the continuation of the preliminary injunction proceeding. But the old law that was preliminarily enjoined is no more. It is not on the books.

And so then the question for this Court if it's going to exercise judicial power is whether this new law also violates federal law or not, which requires a showing.

Now, they have --

JUDGE MARCUS: Let me ask the question this way so it will cut to the chase: Are we in the first inning of the first game of these proceedings today?

MR. LACOUR: Your Honor, the way I would put it, I think is consistent with what we said at the status conference eight days after *Allen* was decided. There is, of course, a lot of evidence that has already come in and --

JUDGE MARCUS: So I take it just on that point, everyone is in agreement that the corpus of evidence presented in round one is admissible in part of this record in round two. I take it you agree with that?

MR. LACOUR: The evidence, yes.

JUDGE MARCUS: Talking about the evidence presented at the seven-day hearing we held in January of 2022.

MR. LACOUR: Yes, Your Honor. There is no reason why you would turn a blind eye to that evidence. And *Dillard* says that some of it may very well be relevant, and we agree that some of it is certainly relevant.

But *Dillard* also says you can't just transcribe the findings from an old law onto a new law merely because they bear some passing resemblance.

JUDGE MARCUS: I understand that. But I'm trying to understand what that means in the context of this case.

MR. LACOUR: I think what --

JUDGE MARCUS: Are we in the first inning of the first

came of this proceeding as you see it? It's a simple question.

MR. LACOUR: Your Honor, I think we are -- I think this is essentially a preliminary injunction motion being filed by two sets of plaintiffs to challenge the 2023 law with a lot of evidence they already have admitted into the record from the earlier proceedings, and then the new evidence that they've come forward with, as well as the new evidence that we have come forward with. And then it basically boils down to how do you read reasonably configured and how do you read *Allen vs. Milligan*.

JUDGE MARCUS: Is that another way of saying, yes, we are in the first inning of the first game?

MR. LACOUR: If -- if that means we're in the first inning --

JUDGE MARCUS: I want you to tell me. I just want to understand what the position of the state of Alabama is. Are we at square one, or are we six pieces down the road?

MR. LACOUR: So I -- and perhaps this will help me answer the question. This is Doc 172 from the Milligan docket. This is the status conference that was held on, I believe, June 16th. And I think what Your Honor summed up near the end of that hearing, Judge Marcus, you said, quote, should there be a new map, and should there be a challenge to the new map, at which time we will afford the parties, of course, every opportunity to present whatever data, evidence, witnesses you

may deem appropriate going to any challenge that may be launched as to a new map that the Legislature will draw.

But then turning to the next page, 53, we consider what would happen if the Legislature failed in that task, and we were just continuing into a purely remedial proceeding --

JUDGE MARCUS: No. I understand -- Mr. LaCour, bear with me.

I understand that we don't just have ruling one, HB-1 likely violated Section 2, nothing intervening, and then we went right to drawing the map. I understand that the state adopted, after you asked us to hold our proceedings for 30 days, which we did, a new map.

Nevertheless, I still ask: Are we at square one for all purposes now with regard to SB-5? That is to say: Do they have to relitigate and prove by a preponderance in your view the first *Gingles* condition, the second *Gingles* condition, the third *Gingles* condition, and each of the Senate Factors? In your view, do they have to prove each of those things to prevail in this hearing at this time?

MR. LACOUR: Yes. I think that's consistent with the power that an Article III judge exercises.

JUDGE MARCUS: Let's just follow along to see if we can at least boil down what's in dispute.

I take it -- the Supreme Court summarized *Gingles I*, *II*, and *III*, and the Senate Factors.

Is there any dispute that they haven't sustained their burden as to *Gingles II* and *III*?

MR. LACOUR: Your Honor, we have not presented any evidence or argument to *Gingles II* or *III*.

JUDGE MARCUS: So that is not -- I just want to use my language, if you would.

MR. LACOUR: Yes.

JUDGE MARCUS: Do you concede that they have met their burden on *Gingles II* and *III*?

MR. LACOUR: If Your Honors think that the evidence that was put forward --

JUDGE MARCUS: I am not asking what we think. I am trying to get you to help me. I want to know what's in dispute before we actually get started with the presentation of evidence.

MR. LACOUR: Yes.

JUDGE MARCUS: Are *Gingles II* and *III* in dispute, or do you accept and concede they have met their burden on *II* and *III*?

MR. LACOUR: Your Honor, for purposes solely of this proceeding, we will concede *II* and *III*.

JUDGE MARCUS: Okay. You have reserved your right for a full permanent injunction hearing. You suggested that you would follow after the election in 2024. So I'm just asking about this proceeding at this time for these purposes.

Have they met their burden on *II* and *III*?

MR. LACOUR: We will have no problem stipulating for these proceedings solely that they have met *II* and *III*. We are not putting that at issue.

JUDGE MARCUS: Okay. Then we have the Senate Factors. There are eight or nine of them, depending on how you read them.

Is there any dispute, based on what we've seen in round one and what's been presented so far in round two on paper, that that's -- none of those factors are in dispute either?

MR. LACOUR: We have not put forward new evidence or arguments as to that Senate Factor.

JUDGE MARCUS: No dispute that they have met their burden on the eight or nine Senate Factors?

MR. LACOUR: For the purposes of this proceeding --

JUDGE MARCUS: Just for the purposes of this hearing, that's all I'm talking about.

MR. LACOUR: Yes.

JUDGE MARCUS: So in your view, the only question is *Gingles I*?

MR. LACOUR: *Gingles I* read in light of the whole protection clause, yes. I think there are serious constitutional avoidance questions that we have raised that would suggest, as well, that our reading of *Allen vs. Milligan* is the only constitutionally permissible reading --

JUDGE MARCUS: Help me with *Gingles I*, which is what the state says is in dispute.

The Supreme Court of the United States wrote the following, and I quote it, in *Allen vs. Milligan*: With respect to the first *Gingles* precondition, the district court correctly found that black voters could constitute a majority in a second district that, quote, was reasonably configured, end quote. The plaintiffs educed 11 illustrative maps that is example districting maps that Alabama could enact, each of which contained two majority-black districts that comported with traditional districting criteria.

Then they went through compactness and all of that. And then they say, we agree with the district court. Therefore, that the plaintiffs' illustrative maps strongly suggest that black voters in Alabama could constitute a majority in a second reasonably configured district. That determination was made by us in round one, affirmed by the Supreme Court after round one.

Is that in dispute? Can you challenge now in these proceedings the determination that black voters could constitute a majority in a second district that was reasonably configured?

MR. LACOUR: Your Honor, it's our position that in the context of the challenge to the 2021 plan, that issue is settled. We are not trying to relitigate liability under the 2021 plan. There's no point in doing that. That law has been

repealed.

We are here before you on the 2023 plan. And it is our reading of *Allen* that reasonably configured is not determined based on whatever a hired expert map drawer comes in and says, like, this is reasonable enough. It has to be tethered -- as Mr. Ross said in his brief, it has to be tethered to objective factors to a standard or rule that a Legislature can look at ex ante, that the Court can look at, as well.

JUDGE MARCUS: The reason I'm asking you -- the question is just to find out what is it we are going to hear from the parties today so we can frame the scope of these proceedings. And I ask it more particularly in the context of the motion in limine, because as I understand their motion in limine, they say, to take one example, Bryan's testimony -- or Bryan really wasn't testimony, it was a report -- should be barred as not being relevant because he cannot in this proceeding challenge the finding we made and the Supreme Court affirmed, which was that the 11 illustrative maps were reasonably configured.

Can he challenge that? Because I read him to be trying to. He says, if I got it right, what's wrong with the 11 illustrative maps is that race predominated, and here's a new study I did, and it yields that conclusion.

Is he free in this proceeding to attack the finding the Court made and the Supreme Court affirmed about 11 illustrative

maps that wouldn't have been reasonably configured if race had predominated?

MR. LACOUR: Your Honor, I think what he is doing is explaining why you would have a race predominate outcome if the 2023 plan is being replaced by one of their 11 illustrative plans or that the plan that they submitted to the Legislature in 2023. I mean, as he shows, the splits in those counties -- and they have three splits in District 2 alone -- each one of them is on racial lines. They get about 30 percent of the population of Houston County to put into District 2. But in the process, they pick up about 60 percent of the black population of Houston County. And that would suggest that the reason why they're violating the principle of not splitting more counties than you need to is for racial reasons and not for some other legitimate reason.

JUDGE MARCUS: Of course, the 11 maps were drawn at an earlier time for a different purpose with HB-1 in mind rather than SB-5.

MR. LACOUR: Correct. The intensely local appraisal was of that electoral mechanism in the Supreme Court's words. And by the same token, the intensely local appraisal today is on the 2023 plan, not on the 2021 plan, so...

JUDGE MARCUS: And help me if I have got it wrong. I'm trying to understand.

Bryan's testimony is relevant, admissible, and material

because it shows that the 11 illustrative maps really were tainted with race predominance, notwithstanding what we said at the first round and what the Supreme Court said. Does that overstate it or misstate it?

MR. LACOUR: Well, there are some things that have changed. And I will point you to footnote 5 of the *Allen* --

JUDGE MARCUS: Help me with the broad brush first, and then we will get into the details.

Broadly speaking, is it your view that Bryan's testimony is relevant and material because it shows those 11 maps are no good, those maps were tainted with an analysis that yielded a race predominate conclusion?

MR. LACOUR: I don't think you get into predominance for us to prevail. Our primarily argument --

JUDGE MARCUS: No. I am just trying to find out why Bryan's testimony is relevant. They say it's irrelevant.

MR. LACOUR: I do think it is --

JUDGE MARCUS: Because they say it's already been decided that there are 11 reasonably configured maps. Bryan says, wait a minute. Those maps are defective because, and then he explains his analysis based on race.

MR. LACOUR: Three things: First, is there's a new map. I don't think it's been proffered as a *Gingles I* map by the plaintiffs, but there's the 2023 VRA remedial map in the event they put it forward.

I think it's important for the Court to consider why it has the shape that it has. And Tom Bryan's report shines light on that, I think very important light on it.

Second, as I noted, our primary argument here is a statutory in *Gingles I*. Reasonably configured means in light of the principles in the challenged plan, not principles in the ether.

But third, under cases like United States -- not -- University of *Texas vs. Camenisch*, the Supreme Court said that preliminary injunction findings are not binding even when going on to a trial in the same case. It necessarily follows then that this if there is a whole new law and there's new evidence, that should come in, as well.

So there are three different reasons why his report could be relevant.

JUDGE MARCUS: What about Trende? Help me with him. They moved to strike Trende, as well.

MR. LACOUR: Yeah. I don't understand the basis for that, other than their view that reasonably configured means, as Mr. Ross was saying, reasonably configured for at least the next ten years.

We strongly dispute that. We don't think that provides much of an objective standard. We didn't don't think that's in any way consistent with *Allen vs. Milligan*.

Because as you can see from Trendy's report, and just from

looking at the maps if they are right about that, then you will be forcing the state to scrap a map that performs better on compactness, on county splits, on Black Belt, on the Gulf, and on the Wiregrass all in favor of another map that all it has going for it is race. That is unlawful under *Allen vs. Milligan*.

JUDGE MOORER: If the State's map, the 2023 map is defective, then even if the plaintiffs' illustrative maps don't cure it, then does it fall to us to then put together a remedy that does comport with the --

MR. LACOUR: Correct, Your Honor, but if they cannot satisfy their burden under *Gingles I*, they cannot show that the 2023 plan is defective.

And to return to this notion of objective factors versus communities of interest that you were hearing about a moment ago, on case after case after case the Court has mentioned communities of interest among those traditional districting principles that must be accounted for in a *Gingles I* plan, but -- and in the Milligan plaintiffs' brief, it's also listed there which what they have told the Supreme Court.

But even if you were just looking to the so-called objective factors that Mr. Ross mentioned a moment ago of compactness and county lines, Mr. Trendy's report shows that every one of those 11 plans, if you toss in the 12th plan, it's true, too, every one of them is going to be less compact or is

going to split more counties or both. So just on those objective factors, those plans are not suitable remedies for the 2023 plan.

Because again, you are going to have two principles coming into conflict: Keeping counties together or race, they are going to conflict, and race is going to be given preference, which is affirmative action in redistricting. It's not mere race consciousness, it is race predominance, and it's unlawful.

JUDGE MOORER: Mr. LaCour, isn't what you are essentially arguing is whatever the state does, we can just say they shot a bullet, and we have now drawn a bull's eye where that bullet hit, and so it's good? It's just some veneer to justify whatever the state wanted to do that was short of the VRA.

MR. LACOUR: No, Your Honor. I think that misreads VRA precedent, which makes clear that the state does have a legitimate interest in promoting these three principles of compactness, counties, and communities of interest.

And so the Court has given a green light to the state to say that this is something you're allowed to do. If the state had instead picked some other interest that was not a traditional interest and pursued that instead, like they did in the 2021 plan in core retention, then that's not going to cut it. But the Supreme Court's at least given us that much guidance when it comes to counties' compactness and communities

of interest.

And if you have a map like the 2023 map that applies those principles fairly, that doesn't have sort of the dissimilar treatment of similar communities of interest like the 2021 plan had, then you have a plan that is equally open. You have a plan that is not producing discriminatory results on account of the race. Even if it's true that requiring one person one vote in contiguity and county wholeness and compactness does not result in proportional representation, that doesn't mean there's a Section 2 violation.

Again, on account of race is still right there in the text, as is the proviso that says nothing in this law guarantees proportional representation. And so the Court explained 1508, 1509, and 1510 of the opinion in case after case, they have looked at traditional principles to turn back these attempts to force proportionality.

JUDGE MOORER: Isn't the idea that people can elect a candidate of choice just as important to achieve as not granting people's proportionate representation just ab initio? In other words, I think the law is clear that VRA doesn't require proportional representation, but isn't it equally clear that an equally compelling objective is to give groups of voters the opportunity to select a candidate of choice?

MR. LACOUR: Not if race is predominating over traditional principles. That is a racial gerrymander like the

racial gerrymandering claim we were promised we would face if we adopted one of the plaintiffs' plans. And that is under the Supreme Court's opinion at 1509 unlawful.

JUDGE MANASCO: Mr. LaCour, what is the state's position as to the motion in limine regarding the impact of our finding in connection with the preliminary injunction that the appropriate remedy would be an additional opportunity district?

MR. LACOUR: Your Honor, I think that that statement in the order -- again, the bottom line of the order was Secretary of State do not use the 2021 plan, and he is not going to use the 2021 plan again.

But I think that statement has to be read particularly in light of *Allen vs. Milligan* in the context of the 2021 plan and the way that it applied its principles, and the Court concluded that it was possible to find another map out there that was on par with the state on compactness, county lines, and communities of interest that created a second majority-minority district.

So if the Legislature went back and said, we still want to draw sprawling districts and we still want to split up communities of interest, then, yes, they would likely have had a different map that resulted from that that would have two majority-black districts. But the state was not bound by the 2021 Legislature's application of principles there. They weren't required to stick with core retention and give the

Black Belt or communities of interest more generally a back seat or give compactness a back seat. And so now we have a new context as *Dillard* said. There is a new context here. It is the 2023 plan. So...

JUDGE MANASCO: So does our statement that the appropriate remedy for the violation that we found or likely violation that we found would be an additional opportunity district have any relevance to what we're doing now?

MR. LACOUR: I don't think so, Your Honor.

JUDGE MANASCO: So the Legislature -- it is the state's position that the Legislature could comply with our previous findings and conclusions -- I understand the face of the order did not order the Legislature to do anything -- but their findings and conclusions in it that the Supreme Court affirmed that the Legislature could enact a new map that was consistent with those findings and conclusions without adding a second opportunity district?

MR. LACOUR: Yes, Your Honor.

JUDGE MANASCO: All right. So is it, with respect -- I'm taking my question back for the motion in limine, in particular.

Is it the state's position, with respect to the motion in limine, that we should not hear any evidence about whether there is or is not now a second opportunity district?

MR. LACOUR: We have not moved in limine to try to

exclude their evidence about whether there is or is not. So I don't think that issue is before the Court. I think they have the right, as Judge Marcus noted at the hearing, to put forth any evidence that they want that could go to the challenge to the map, evidence as to whether or not District 2 is going to, in their words, perform could be relevant to *Gingles II* and *Gingles III*. So we have not tried to keep that out.

JUDGE MANASCO: But, so to put a finer point on it, you are not trying to keep it out, but you are saying we should assign it no weight?

MR. LACOUR: I think you can assign it weight to say that they've satisfied *Gingles II* and *III*, but it's not going to do them much good under a proper reading of *Gingles I*.

JUDGE MANASCO: Thank you.

JUDGE MARCUS: Let me just follow up on my colleague's question. And help me with this.

I think I hear you to be saying -- and I do want you to correct me if I misunderstand -- that you can draw a map that maintains three communities of interest and splits six counties or less, but that very likely fails to create a fair and reasonable opportunity district and still prevail because they would not have met their burden of proof?

MR. LACOUR: Yes, Your Honor. Section 2 is not tied to proportional representation. It is tied to --

JUDGE MARCUS: I am not asking about -- I think

everyone agrees that you can't create a map for proportional representative purposes. The statute says that unambiguously. The case law has said it unambiguously, and we recognize it unambiguously.

I'm just asking: Could they prevail here if all they failed -- all they succeed in showing is that CD-2 does not likely create a fair and reasonable opportunity district.

MR. LACOUR: That's correct, Your Honor. All three preconditions must be met to make sure that Section 2 is not turned into a tool for forcing proportionality.

JUDGE MARCUS: Okay. It's a condition precedent. It doesn't matter about opportunity at all.

MR. LACOUR: Correct. If all their maps --

JUDGE MARCUS: If they flunk out on A, B, and C, it doesn't matter they prevail on D because you have already conceded *Gingles II* and *III* here?

MR. LACOUR: Correct.

JUDGE MARCUS: Help me understand that just a little bit further.

When I looked at the guidelines adopted by the Alabama Legislature in '21, which were considered as part of the backdrop that the reapportionment committees were going to consider in round two, it had a hierarchy of the order of priorities, including the Constitution, one person one vote, the Voting Rights Act, and so on and so forth, compactness,

contiguity.

Do communities of interest basically dominate the analysis? Can that, if you will, trump everything else?

MR. LACOUR: Your Honor, a couple of things to clear up, and then I will get to your question.

First, the guidelines were adopted by the reapportionment committee, not the entire Legislature.

JUDGE MARCUS: Yes.

MR. LACOUR: It didn't have all the members voting on that. And then so -- and then it's our position that *Gingles I*, that's what's relevant is not again how someone has described the map, but what the map actually does.

If it was enough for us to say this is what our guidelines require and then -- and your map doesn't follow your guidelines as we understand them, then the plaintiffs would have lost in 2021.

But they were able to actually look at what the map did. And so when the map said maintain communities of interest but split up the Black Belt, that was powerful evidence they had that they could satisfy *Gingles I*.

But, again, what was really relevant in 2021 was how the principles were embedded or embodied in the '21 plan. The same thing is true for 2023, is you have to look at the map itself, and one does. If it says don't split any more than six counties but splits nine, then it doesn't matter what they said

before. It matters what they did.

And what they did here was prioritize the Black Belt while still maintaining the Gulf and the Wiregrass to the extent the Wiregrass could be maintained without sacrificing the Black Belt, and then create far more compact districts across the state, as well.

JUDGE MARCUS: Any other questions?

JUDGE MANASCO: Not on the motion in limine.

JUDGE MARCUS: Thank you, counsel. I'm sorry. I didn't mean to cut you off.

MR. LACOUR: So I wanted to make sure --

JUDGE MARCUS: I'm talking about just the motion in limine that they have made.

MR. LACOUR: Yes. I suppose this might be relevant to the motion in limine. Just a couple of points the plaintiffs had made while up here.

One, for about the beauty contest, that beauty contest language both in this Court's opinion and the Supreme Court's opinion was in the context of the communities of interest discussion where you had two maps each of which gave priority to one community of interest and sacrificed one community of interest. So they were both on par when it came to communities of interest. And that's the beauty contest.

But if -- so it's not enough to say we like splitting these six counties better than the six counties you would

split. If they can match the state, then we are not going to have the beauty contest. But if they come forward with a map that splits eight or nine counties, or seven for that matter, they don't get into the beauty contest. That sort of language doesn't even apply.

Otherwise, you are going to be in a situation where the state is going to be trading out a map that better respects traditional principles in service of a racial gerrymander.

Finally, Mr. Ross said that race itself was a community of interest, I believe, or that black people are the relevant community. *LULAC* does not endorse that proposal. *LULAC* speaks of nonracial communities of interest.

If communities of interest were defined purely by race, then there would never be a successful racial gerrymandering claim, because every Legislature could say, oh, we're just trying to put the black community together, or we were just trying to put the white community together, and that's a traditional districting principle that we find important. And, of course, that's absurd proposition. The Court has spoken.

In cases like *LULAC* of nonracial communities of interest, that was the understanding this Court relied on when plaintiffs had said that their maps went across the state to put the Black Belt together.

If you look at footnote 5 of the Supreme Court's plurality opinion, the Court quoting Bill Cooper said that the

understanding of the Black Belt was not as a demographic community, but as a historical community with historical boundaries that go across the center of the state and that are predominantly rural and that include Montgomery.

Of course, neither Mobile nor Dothan are in the center of the state. Dothan is not a rural place. It is a not a huge city, but for the Wiregrass, it's pretty big. And Mobile, of course, is not rural, either.

So they can't be allowed to transform the concept of nonracial communities of interest into race being the sole determinant for a community of interest.

If there are no further questions...

JUDGE MARCUS: Thank you very much.

Mr. Ross, any reply?

MR. ROSS: Yes, Your Honor. And I believe Ms. Khanna also wants the opportunity to reply.

JUDGE MARCUS: Let me sort of ask you this question, and, Ms. Khanna, before you begin.

Mr. LaCour says if you can't get over the requirements of *Gingles I*, particularly these redistricting criteria of which he propounds three communities of interest, compactness, and county splits, you cannot meet your burden under Section 2, even if you otherwise can show that SB-5 does not create a reasonable opportunity. Did you want to reply to that?

MR. ROSS: I did, Your Honor. I first wanted to reply

to Mr. LaCour misquoting me. What I was saying is that *Gingles I*, as the Supreme Court has said, is about the reasonable compactness of the minority community. I wasn't saying that race as of itself was a consideration for the only consideration for communities of interest.

I was saying that as the Supreme Court said, as the Supreme Court says in Milligan, says in *LULAC*, and mentions again in a footnote in 7 of *LULAC* -- or, excuse me -- of the Milligan opinion. The whole point of the *Gingles* is whether or not you can draw a majority-minority district and you can draw one that's reasonably configured.

So it is not that I was saying race is the only issue at communities of interest. My point is that the *Gingles I* inquiry is about the geographic compactness of the African-American community in this case.

To answer your question more directly, Your Honor, the -- what Mr. LaCour is trying to do is exactly trying to turn this into the beauty contest that the Supreme Court and this Court said it is not.

If you look at page 1504 and 1505 of the Supreme Court's opinion, the Supreme Court never mentions Alabama's redistricting criteria as what they're measuring our plan against their plan. The only time the Supreme Court, to my knowledge, quotes the state's redistricting criteria is when it's quoting what a community of interest is as defined by

Alabama.

So what the Court actually looks to when it's talking about traditional redistricting criteria is compactness. It looks to whether or not our maps had tentacles, appendages, bizarre shapes. It looks at whether our maps were equal populations, were again contiguous, or whether they respected existing political subdivisions; that is, counties, cities, and towns. And what the Court found is that it did.

It did talk about sort of how our map compared to the state's map. But the point was that some of our illustrative plans only split six counties. Some -- which is the minimum that Mr. LaCour's rules, you know, would require, and that the one person one vote itself requires.

We also split -- showed that the -- our maps were contiguous. We don't grab populations over here and bring them over there. All of those issues have been resolved.

Alabama concedes *Gingles II* and *III*, Senate Factors 1 through 9. The only issue that they're trying to relitigate is this racial gerrymandering claim that is not at issue in the *Gingles I* consideration.

JUDGE MARCUS: Well, I think they say they're doing more than that. They say they drew three communities of interest that they say properly reflect their judgment about how these districts should be drawn.

Didn't you put in evidence on that issue yourself?

MR. ROSS: We did put in evidence that showed that the African-American community was reasonably compact, consistent with *Gingles I*, and some of that evidence included the fact that there were communities of interest that were overlapping between the Black Belt -- obviously, Montgomery is in the Black Belt -- between Mobile and Baldwin County that we weren't trying to connect disparate communities of interest.

And so our evidence at trial last year was that there is a community of interest that exists between Mobile and the Black Belt that that community of interest is being respected. Alabama's map from our perspective does not respect that community of interest.

Mr. LaCour continues to bring up the issue of our remedial map. I do want to make one point about that, which is relevant to our motion in limine.

JUDGE MARCUS: Before you did --

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: -- the point I was trying to get at is --

MR. ROSS: Yes.

JUDGE MARCUS: -- when you filed your objections to SB-5, you saw fit to put into the record or attempt to put into the record an expert report from Dr. Bagley. And among other things, Dr. Bagley, who you had presented on round one, said in an expert report, I don't really agree with the way those

communities of interest have been defined or drawn in SB-5. I quarrel with the Wiregrass. I think maybe they're not exactly right on the Gulf Coast, et cetera.

So having put that in, isn't it fair game for them to address why these are reasonable communities of interest?

MR. ROSS: Your Honor, as I said at the opening, we don't intend to put -- we don't think that that evidence is necessary or relevant to these remedial proceedings. The only reason why we presented that evidence is because we saw Mr. LaCour's legislative findings in SB-5.

And so to the extent that Court did want to consider those issues, we wanted to be prepared to address them. But to be very clear, we do not think that Dr. Bagley's report is relevant unless the Court wants to go down the path that Mr. LaCour going.

This is not a beauty contest between our communities of interest and their communities of interest. It is about whether or not the minority community is reasonably compact and can be placed in a reasonably configured district.

The Supreme Court has answered that question. This Court has answered that question. We don't need to go down that path again.

JUDGE MARCUS: Thank you very much.

MR. ROSS: Thank you, Your Honor.

JUDGE MARCUS: We are going to take a ten-minute

break. We want to give everyone a chance, and our court reporter.

One comment I wanted to make though, for you.

MR. ROSS: Your Honor, if I may make one more point.

JUDGE MARCUS: Absolutely. You may indeed.

MR. ROSS: And one other -- Ms. Khanna would like the opportunity to address the Court.

JUDGE MARCUS: Correct. Thank you.

MR. ROSS: And so, Your Honor, Mr. LaCour keeps saying that if race predominates in a plan, any plan, that it cannot survive under the Constitution. That's an incorrect reading of the law.

We don't think and the Supreme Court didn't think that race predominated in any of our illustrative districts. But as Mr. LaCour knows, because Alabama litigated a racial gerrymandering case in 2017, if race predominated and the reason why was to comply with the Voting Rights Act, that does not violate the Constitution.

The Supreme Court reaffirmed that both in *Milligan* at 1516 to 1517, where the Court said that you can use race to remedy a violation of Section 2. It said it in *Shaw* 2 at 909 to 910. And it said it in the Harvard case that Mr. LaCour wants to reference, which is at 221 -- excuse me -- 2162. Thank you, Your Honor.

JUDGE MARCUS: Thank you.

Ms. Khanna?

MS. KHANNA: Thank you, Your Honor. I just wanted to make a few points regarding the presentations that have been discussed. But if the Court would like to take a break first, I don't want to keep the court reporter or anybody past the point of --

JUDGE MARCUS: I think it would be wiser if we did that. So we will take a ten-minute break, and then we will come back and proceed, Ms. Khanna.

MS. KHANNA: Thank you, Your Honor.

(Recess.)

JUDGE MARCUS: When we broke, we were about to hear from Ms. Khanna.

You may proceed.

MS. KHANNA: Thank you, Your Honor. And I will keep my notes brief. I just wanted to respond to a few points that were discussed with Mr. LaCour on the various issues.

The *Gingles I* standard, which Mr. LaCour says is the only thing in dispute today, the *Gingles I* standard is an evidentiary standard. It is for plaintiffs to come to court to prove by preponderance of the evidence the demographic reality of the state of Alabama. We have to show that the black population in Alabama is large enough, it's numerous enough, and it's condensed and compact enough to create an additional majority-black district.

Neither the size of the black population nor its location throughout the state is a moving target. That has already been established.

What plaintiffs' illustrative plans have shown is just that. It's demonstrated the demographics based on census data, location, and a whole bunch of traditional districting criteria. Neither the size of the black population has changed, neither the location throughout the state has changed. And nor have plaintiffs' illustrative maps changed. Those same illustrative maps that this Court and the Supreme Court said proved what we had to prove, which was the size and location of the black population in Alabama.

Nothing about the 2023 map, nothing about the evidence that the defendants can now present to this Court can go back in time and inject race improperly into maps that were drawn by plaintiffs' experts two years ago.

Now, the inquiry into what -- what is *Gingles I* actually getting at, if we take -- if you were to start from scratch even, understanding that the record that we've already established is still before the Court, this Court need only look at the record that -- the evidence that is already in the record to see that nothing has undermined plaintiffs' *Gingles I* showing, nothing has abandoned this Court's *Gingles I* finding or the Supreme Court's *Gingles I* affirmance.

Gingles -- the plaintiffs' illustrative maps this Court

found and the Supreme Court found comported with traditional districting criteria. Nothing about the tradition of Alabama's redistricting criteria has changed. If anything, it is Alabama that has broken with its own tradition in enacting this 2023 plan in creating these brand new findings out of nowhere, unbeknownst to the actual committee chairs who were in charge of the process.

That has nothing to do with whether or not our maps that we brought to court were comporting with the state's tradition.

This Court -- the United States Supreme Court in *LULAC* said that there is no precise threshold for determining geographic compactness. There is no precise rule. It can't say every time you fall below this line or that line, it is or is not compact. Yet Mr. LaCour has come to this Court and basically said that's not true. It turns out six counties is the precise rule, or the Mobile/Baldwin community is the precise rule, or just counting communities is the precise rule.

If that had been the precise rule, the Supreme Court might have told us that. That is not the rule.

The reason that courts look at the enacted map, previous enacted maps, other redistricting maps is to figure out what does Alabama's tradition generally follow. And certainly, plaintiffs' illustrative maps follow Alabama's tradition of reasonably compact district -- really compact district.

I just want to take one moment and address the *Dillard*

case that Mr. LaCour has placed a lot of emphasis on. The *Dillard* case was a case in which the plaintiffs challenged an at-large voting mechanism as a violation of Section 2. They won on liability.

On remedy, the defendant came forward, defendant jurisdiction came forward, and with a new election plan, a brand new election plan that did include districted positions but also included an at-large elected chair, the Court in *Dillard*, the Eleventh Circuit in *Dillard* said that the district court was correct to incorporate the entire liability record into its findings upon the remedy. That had to be informed by the case which had already happened.

But what the district court could not do is assume that once you have an at-large election, all at-large elections are per se unlawful. The Supreme Court has been clear that there's no such rule. So you have to look at the actual election system.

And what did the *Dillard* court look at in looking at the new election system on remedy? They looked at how does it actually operate? How does it actually perform for minority voters. Right? And they said that turns out that the jurisdictions decision to create an at-large post that essentially has this -- a lot of weight and a lot of leadership is still a violation, because the way it operates is in conjunction with the entire liability evidence before -- in the

previous round shows that it is not a remedy. Let alone a complete remedy.

That is exactly where we are today. Right? The way that this purported remedy by the state of Alabama operates is exactly the same as the previous plan operates. The way it performs for minorities is exactly the same way as the way it performs the 2021 plan performed for minorities.

And like the Eleventh Circuit said in *Dillard*, if this incomplete remedy, this fake remedy is no remedy at all, we are in the exact same position where the 2023 plan is no remedy at all. It is a violation just as much as the 2021 plan, and this Court has all of the evidence before it in order to find that violation.

That's all for now, Your Honor, unless you have any other questions.

JUDGE MARCUS: No. Thank you.

Any questions?

JUDGE MANASCO: None.

JUDGE MOORER: No.

JUDGE MARCUS: Thanks very much.

Seeing nothing further on the motion in limine, this Court will reserve its ruling and carry the issue with the case.

We will go on to the presentation of evidence by the Milligan plaintiffs.

Mr. Ross, you may proceed.

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: You may put on what you will, and we will take up any objections, Mr. LaCour, that he has witness by witness, or exhibit by exhibit.

MR. ROSS: Yes, Your Honor. I'm sorry. Just give me one moment. I misplaced --

JUDGE MARCUS: Sure.

MR. ROSS: So, Your Honor, given that we don't intend to put on live evidence, as we stipulated with the defendants, we were intending to move into the record a number of exhibits. And we have not come to any agreement with the defendants, so I don't know if they will have any objections.

So first, Your Honor, plaintiffs would like to move -- excuse me. Oh.

JUDGE MARCUS: No, no. Please fire away.

MR. ROSS: Plaintiffs would like to move into evidence M1, which it the population summary of the Livingston Congressional Plan 3.

JUDGE MARCUS: Any objection?

MR. WALKER: No objection, Your Honor.

JUDGE MARCUS: Seeing none, M1 is received.

MR. ROSS: Plaintiffs would like to move -- actually, let me take a step back.

At the outset, we want to move into evidence all of the 2022 testimony and exhibits in Milligan and Caster related to

the Section 2 claim.

JUDGE MARCUS: Any objection?

MR. WALKER: No objection.

JUDGE MARCUS: Seeing none, received.

MR. ROSS: Thank you, Your Honor.

Next, we would move into evidence M2, which is Dr. Liu's remedial expert record.

JUDGE MARCUS: Any objection?

MR. WALKER: No objection, Your Honor. I might be able to simplify this by telling you the four that we do object to.

JUDGE MARCUS: That would be great. That would be great. As I see it, there are 49 and a demonstrative exhibit. Which ones do you object to of the 49?

MR. WALKER: There are four newspaper articles that are hearsay. Those are M38, M32, M31, and recently added M47.

MR. ROSS: Can you give me the numbers?

MR. WALKER: Okay. Sorry. M31, M32, M38, and M47. I can give you the ECF numbers if you want those.

JUDGE MARCUS: I may be confused. But on the list I have, I'm working, Mr. Walker, off of the Milligan plaintiff's amended exhibit list. If I have the right document, 47 is a transcript of the video of the August 9th deposition of Pringle.

MR. WALKER: Excuse me, Your Honor. That is the

deposition of Pringle. And within that Exhibit O and Exhibit Z, which are the two newspaper articles, Exhibit Z is also M32.

JUDGE MARCUS: So M32, is that O or is that Z? M32 is embodied in and was shown to the witness? Is that what happened?

MR. WALKER: It was shown to the witness -- yes, Your Honor.

JUDGE MARCUS: Did you want to respond?

MR. ROSS: Your Honor, that exact point, that it was shown to a witness during a deposition, and so the relevance of it or its admissibility all goes to whatever the witness said about it, not, you know, we're not trying to enter it for --

JUDGE MARCUS: You are not offering it for the truth of its content?

MR. ROSS: There are some of these news articles.

JUDGE MARCUS: We're talking about O and Z in particular. O is which one? M47 is the transcript of Pringle. Mr. Walker says in the course of deposing Pringle, you used or showed him two newspaper articles. One was O, one was Z. One of them, in fact, is your M32, perhaps the other one is M31. I'm not sure. Perhaps you can help us.

MR. WALKER: M32 was the article Alabama Legislature --

MR. ROSS: She can't hear you, the Court Reporter.

MR. WALKER: I'm sorry.

JUDGE MARCUS: That's all right. You take your time.

MR. WALKER: M32 is the article Alabama Legislature Passes Controversial Congressional Map.

And Exhibit O to the Pringle deposition, Mr. Ross, was the article that quoted Congressman Sewell. I can't think of the name of it. I don't have it right here. Alabama Ignores U.S. Constitution, I believe, was part of the title.

MR. ROSS: If I may respond.

JUDGE MANASCO: That was M13.

MR. ROSS: That's right.

Your Honor, if I may respond. If Mr. Walker is done.

So, Your Honor, I think we are trying to enter these into evidence for two reasons. First, is that some of the witnesses testified to these articles. They verified statements that were made in them. The other is that some of the statements were made by the defendants in this case. And so they are statements of party opponents.

JUDGE MARCUS: So that I'm clear, the objections are to M31, M32, M38, and O embodied in 47?

MR. WALKER: Which apparently, Your Honor, is M13. Am I correct?

JUDGE MARCUS: Which is M13.

Anything further on the issue?

MR. WALKER: Your Honor, I believe Mr. Ross wants those to come in under statement of opponent's party. And that

requires that the party manifested that it had adopted or believed the article to be true or the statement to be true, which was not the case.

MR. ROSS: Your Honor, as I said -- if the witness in the course of the deposition denied that they made a statement, then we're not -- obviously the defendants can rely on that in whatever proposed findings of fact that they have. But to the extent that, you know -- unfortunately, Your Honor, I am not looking at the deposition transcript right now, and I can't tell you exactly what they did or did not adopt, but I do think it's fair to allow this into evidence and let us deal with it in our proposed findings of fact.

JUDGE MARCUS: Just help me with one thing.

Of the four exhibits -- M13, 31, 32, and 38 -- how many were actually used to question the witnesses in their depositions?

MR. ROSS: My understanding, Your Honor, all of these exhibits were used to question a witness in a deposition -- the ones that -- the four that he's referenced.

MR. WALKER: Mr. Ross -- excuse me -- Your Honor, they were used to question either Senator Livingston or Representative Pringle. Mr. Ross is correct.

JUDGE MARCUS: So all of them were used for cross confrontation or on direct?

MR. WALKER: That's correct, Your Honor.

JUDGE MARCUS: We will receive it for the limited purpose that it's offered not for the truth of its content. You may proceed.

Having said that, I take it, Mr. Walker, we can go through these one by one and just clear up the record? You have no objection to the other exhibits?

MR. WALKER: No objection to the other exhibits, Your Honor. Thank you.

JUDGE MARCUS: All right, Mr. Ross. Why don't we just clean up the record?

MR. ROSS: Are you going to go through them?

JUDGE MARCUS: Yeah, I think so.

We resolved M2, which was the report of Dr. Liu.

There's no objection to M3, the Alabama Performance Analysis. Received.

M4, received. That's the text of SB-5.

M-5, an article from Jeff Poor and the Yellow Hammer News, received.

M6, a press release issued by the Permanent Legislative Committee on Reapportionment, June 21st, received.

M7, VRA plaintiffs --

MR. ROSS: Your Honor, we are not intending to offer M7 or M8 into evidence.

JUDGE MARCUS: Okay. M9 is a declaration from Representative Jones, July 27, '23. No objection. Received.

M10 you're offering?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: That's an article by Mike Cason in the AL.com July 22nd. Received.

M11, another article in Politico. You're offering that again so I'm clear?

MR. ROSS: Sorry, Your Honor. Just trying to confer at a distance with my colleagues.

JUDGE MARCUS: Sure. Take your time. That purports to be an article from Zach Montellaro, quote, Alabama's Redistricting Brawl Rehashes Bitter Fight.

MR. ROSS: Yes, Your Honor. We are entering into that evidence.

JUDGE MARCUS: All right. Without objection, we will receive that.

12, Associated Press Daily News July 24th. Are you offering that?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Without objection.

M13, we received for a limited purpose over Mr. Walker's objection.

M14, are you offering that?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Without objection, received.

M15, the remedial expert report of Dr. Bagley.

MR. ROSS: Your Honor, I think that that is subject to your motion in limine. As I said, if the Court grants their motion in limine, we are not intending to enter M15 into evidence.

JUDGE MARCUS: Got it.

MR. ROSS: And at the same --

JUDGE MARCUS: I'm sorry. Sure.

MR. ROSS: Never mind, Your Honor. We have already entered Representative Jones. I think we have the same concern.

JUDGE MARCUS: M16, Dr. Hood's performance analysis. I take it you're offering that?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Received without objection.

M17, Defendant Senator Livingston's responses to the plaintiffs' third set of interrogatories?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Without objection, received.

M18, Alabama Legislature's SB-5 population summary. You're offering that?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Received without objection.

M19, the expert report of Dr. Palmer?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Without objection, it's received.

M20, Defendant Pringle's response to the plaintiffs' third set of interrogatories. You're offering that?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Without objection, received.

M21, community of interest map plan.

MR. ROSS: Yes, Your Honor. Again, for the limited purpose of rebutting the defendants' testimony.

JUDGE MARCUS: Right. There was no objection to that one.

MR. ROSS: Yes.

JUDGE MARCUS: M22 and 23, those were Livingston 1 map and Livingston 2 map. You're offering both?

MR. ROSS: The same reservation for M22 and M23, which is that we're not intending to affirmatively put that forward except to the extent it's relevant to rebut some of the things the defendants are raising.

JUDGE MARCUS: So received for that purpose.

M25, the '21 Reapportionment Committee Redistricting Guidelines. May 5, '21.

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Without objection, we're receiving that.

M26, the Russell split plan map.

MR. ROSS: The same reservations for M26, M27, and M28 that we are entering it only to rebut any evidence the

defendants may put in.

JUDGE MARCUS: We will receive it for that limited purpose.

M29 is characterized as an e-mail. It doesn't say from whom or to whom.

MR. ROSS: My understanding, Your Honor, is that it's an e-mail that was produced by the defendants. There are Bates numbers there which are RCO49603 to 04, and it was used in a deposition. We are seeking to admit that into evidence.

JUDGE MARCUS: Without objection, received.

I take it you withdrew M30?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: M31, 32, 38, we've already ruled on. They were admitted for limited purposes.

MR. ROSS: M33, as well, Your Honor?

JUDGE MARCUS: There was no -- I saw no objection -- did I misapprehend that, Mr. Walker? Did you have an objection to M33? That's characterized, quote, talking point.

MR. WALKER: No. No. There was no objection to that, Your Honor.

JUDGE MARCUS: Received.

M34 is omitted.

M35, Proposed Amendment of Reapportionment Committee Guidelines.

MR. ROSS: Yes. Entering that into evidence, Your

Honor.

JUDGE MARCUS: Without objection, received.

M36, the July 12th Reapportionment Committee Agenda, you are offering that.

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Without objection, received.

37, you've withdrawn.

38, we've already ruled on.

M39?

MR. ROSS: 39 the same reservation, Your Honor, simply addressing the defendants' arguments.

JUDGE MARCUS: Received for that limited purpose.

M40, talking points. I'm not sure whose.

MR. ROSS: M40, M41, M42 were used in depositions. They are documents produced by the legislative defendants.

JUDGE MARCUS: And you are offering each of them?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Without objection, M40, 41, and 42 are received.

M43, the transcript of the August 9th deposition of Randy Hinaman.

MR. ROSS: I believe there might be a typo there, Your Honor. It should both be the transcript and the video of that deposition.

JUDGE MARCUS: Gotcha.

Seeing no objection, M43 is received.

M44 is the transcript and video August 11th deposition of Brad Kimbro.

MR. ROSS: Yes, Your Honor. And just to be clear, I think for M43 to M49, the same reservations that, you know, we think we can rest on our evidence. But to the extent it's relevant to rebut, anything the Court lets in on the motion in limine.

JUDGE MARCUS: We will receive them with that understanding and stipulation.

Having said that, feel free to present before this Court what you will.

MR. ROSS: We rest on the evidence that we've submitted both now and in 2022.

JUDGE MARCUS: Okay.

MR. ROSS: Thank you, Your Honor.

JUDGE MARCUS: And I take it, Ms. Khanna, that you're resting on the record, as well at this point?

MS. KHANNA: Yes, Your Honor. I just want to confirm that the Caster plaintiffs' remedial Exhibit 1, which I believe is at ECF 212 in the Caster docket our expert report of Dr. Palmer is admitted into the evidence.

MR. ROSS: That was admitted. It was one of our --

JUDGE MARCUS: It was. But I will receive it under the title of your case. Your Exhibit 1 the 2023 expert report

of Maxwell Palmer in support of Caster plaintiffs' objections. That is received.

MS. KHANNA: Yes, Your Honor.

JUDGE MARCUS: We have already received it, but we will receive it under your number, as well as the expert report from your expert is received.

MS. KHANNA: Thank you, Your Honor. I have no further argument unless the Court has any questions.

JUDGE MARCUS: No. I do have one clarification I wanted to make sure that I was right about. And we had discussed this earlier, and this is the way we proceeded in the first case -- the first time we heard it in round one.

And that is to say: Evidence admitted in support of or opposition of one was in support of, in opposition of all. Do I have that right?

MS. KHANNA: Yes, Your Honor.

JUDGE MARCUS: Mr. Ross?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Mr. LaCour?

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: Okay. The plaintiffs have rested their presentation, Mr. LaCour. We're happy to proceed with the state's case.

MR. LACOUR: Yes, Your Honor.

We, too, are just going to rest on paper evidence that has

been submitted to the Court either attached to our response to the Milligan and Caster filings or subsequently filed thereafter.

So we would move first to admit Exhibit A.

JUDGE MARCUS: Can I -- let's see what objections there are.

Which -- Mr. Ross, Ms. Khanna, can you tell me of these exhibits offered by the state you do object to we can maybe short circuit the time and admit everything else?

MR. ROSS: Your Honor, could we have a moment just to confer?

JUDGE MARCUS: You sure can.

MR. ROSS: I apologize.

Your Honor, I think it would be most prudent to just go by them one by one and lodge our objections.

JUDGE MARCUS: Sure. All right, Mr. LaCour, let's go forward.

MR. LACOUR: This is a transcript of the hearing before the Legislature's permanent legislative hearing on the reapportionment on June 27th, 2023. It's certified by a court reporter. We would move to admit this.

JUDGE MARCUS: Any objection?

MR. ROSS: We object, Your Honor. It's entirely hearsay. There's no one to come testify about it. No one was testifying under oath. It's similar to the evidence that this

Court previously rejected. They were hearing transcripts for the 1992 redistricting that this Court found were not admissible.

JUDGE MARCUS: Mr. LaCour?

MR. LACOUR: Yes, Your Honor. We think this is still admissible to show what evidence was in front of the Legislature as it was considering how to draw the 2023 plan. So and, again, this is also certified by a court reporter on top of all that.

JUDGE MARCUS: We will reserve on the issue.

MR. LACOUR: Okay. Thank you, Your Honor.

MR. ROSS: May I make one more point?

JUDGE MARCUS: Of course.

MR. ROSS: I would also object on relevance since this is solely about Section 2 not about the intent of the Legislature.

JUDGE MARCUS: Did you want to comment on that? He says it's inadmissible both because it's not relevant and because it's hearsay.

MR. LACOUR: Your Honor, we think it absolutely is relevant. We are not introducing this to argue that like whether or not it goes to the intent of Legislature. I think it does go to this notion that the goal for the Wiregrass were made up by the Legislature in 2023, which runs contrary to even Joseph Bagley's declaration.

JUDGE MARCUS: So you are offering it for the truth of its contents?

MR. LACOUR: Both for that, but also for evidence that the Legislature had it before it that it's certainly competent for the Legislature to consider this evidence even if people were not sworn and cross-examined. These sorts of things happen in Congress all the time.

JUDGE MARCUS: We will reserve on it.

It's the same issue on B, transcript dated July 30th?

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: Is there anything further you wanted to say about that one, Mr. LaCour?

MR. LACOUR: No, Your Honor. Other than that at the time we filed our response, we had only had a partial copy of the transcript.

JUDGE MARCUS: And now we have the full thing, right?

MR. ROSS: The full thing. Yes, Your Honor. We filed that on the docket.

JUDGE MARCUS: We will reserve on that. B2?

MR. LACOUR: Yes. B2 is the full transcript from that hearing, which has been filed with the Court now. So...

JUDGE MARCUS: Mr. Ross?

MR. ROSS: Same objection, Your Honor.

JUDGE MARCUS: We will reserve on B2. The objection again to the entire transcript is both relevance and hearsay.

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: C?

MR. LACOUR: Yes. So this is a document -- we would move to admit this. This is a document that was before -- well, there is a version of this document I think we have explained in a separate filing at C2 that was before the Legislature that had I think either a couple of pages towards the end of it that were not included in the filing that we had given, because we had ended up pulling that document off of the Internet. But in either instance, it was both in front of the Legislature, the C2 document and Exhibit C here -- everything we quoted from --

JUDGE MARCUS: So this goes to the community of interest in the Gulf Coast?

MR. LACOUR: It does go to the community of interest point. I also note that this is a government document that this Court can take judicial notice of.

JUDGE MARCUS: Any objection?

MR. ROSS: Your Honor, it may be a government document, but there's no one to come here and testify to where it came from, who produced it. There's no one to come and testify that the Legislature actually considered it or looked at it or that it was in the legislative record. It's simply Mr. LaCour's representations.

JUDGE MARCUS: Mr. LaCour?

MR. LACOUR: You can pull this document yourself off of a government website. That's good enough for judicial notice.

JUDGE MARCUS: His objection, if I understand it here, is a foundational objection.

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: Rather than an objection going to relevance or hearsay. Do I have that right, Mr. Ross?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: He just says you haven't laid the right foundation.

Let me ask you a question, Mr. Ross, just to cut to the chase. Mr. Ross, I have a question for you.

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Is there any doubt that this is what purports to be?

MR. ROSS: I don't know, Your Honor. They haven't laid a foundation. I don't know what document this is or where it came from.

JUDGE MARCUS: Anything on foundation you want to present?

MR. LACOUR: Your Honor, if you look at B2, which is the transcript, you will see towards the end of that transcript Mr. Walker moving to admit these documents into the legislative record.

MR. ROSS: Your Honor, if they want to swear in Mr. Walker, we are happy to cross-examine him.

JUDGE MARCUS: Let me just ask this question, Mr. LaCour: I take it Exhibit C was before the committee?

MR. LACOUR: Yes. C2.

JUDGE MARCUS: C.

MR. LACOUR: Which is nearly identical.

JUDGE MARCUS: I may be working off the wrong list. Is there a C2, as well?

MR. LACOUR: It comes near the end. So if you go to page 5 of our amended exhibit list.

JUDGE MARCUS: Okay. I've got it. So you're offering C and C2 on the same grounds?

MR. LACOUR: Yes, Your Honor. We find just offering C2 though. But they're both government documents you can pull off a government website to take judicial notice of. Whether you are --

JUDGE MARCUS: So then why not just offer C2 and make the record clean?

MR. LACOUR: We would be fine with that, Your Honor.

JUDGE MARCUS: All right. He's offering only C2, Mr. Ross. So we're clear. And you have objected on C2 on the same grounds of foundation?

MR. ROSS: Yes. Just to understand, Your Honor, C2 is a complete copy -- yes, same grounds.

JUDGE MARCUS: Okay. We will reserve on C2.

MR. LACOUR: Moving to D. This was also submitted to the legislative redistricting committee.

As you can see in B2 with the certified transcript, Mr. Walker admitted this into the record on July 13th, 2023, for the Legislature to consider, also note that Mr. Bagley quotes from Adline C. Clarke, who is quoted in this document talking about Mobile and Baldwin Counties being one political subdivision, which is a pretty good definition of community of interest.

JUDGE MARCUS: Just so I'm clear, D is an article by John Sharp in AL.com titled, Redistricting Alabama how south Alabama could be split up due to Baldwin's growth?

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: All right. I take it your objection is the same?

MR. ROSS: Double hearsay, Your Honor. I don't know -- and lack of foundation, the same objection. I don't know -- you know, no one is here to testify about this article, its relevance to the Legislature, anything that was said in it.

JUDGE MARCUS: So it's --

MS. KHANNA: Your Honor, if I can add to Mr. Deuel's objection on relevance grounds, as well, to this and the previous exhibit, these are -- consistent with our position, our legal position in motion in limine, I think all of these

documents attempting to shore up their understanding of communities of interest are not relevant to today's proceedings.

JUDGE MARCUS: I understand. We'll reserve on that for the same reason we reserved on the underlying motion in limine.

E?

MR. ROSS: Same objection running throughout, Your Honor.

JUDGE MARCUS: E through R? Mr. Ross, we can short circuit this. You are objecting to everything, E, F, G, H, I, J, K, L, M, N, O, P, Q, R?

MR. ROSS: I think, Your Honor, so if we can go perhaps E.

JUDGE MARCUS: Maybe we better take it --

MR. ROSS: E through I -- I think we would have the same objection. Looks like these have some sort of reports.

JUDGE MARCUS: Let's make a record on these things. Let's talk about E. What is E, and tell me the relevance it would have.

MR. LACOUR: Yes, Your Honor. Alabama Port Authority 2021 Economic Impact Study Report. This a government document of which this Court can take judicial notice. It explains the tremendous economic impact in terms of money generated, jobs created from the port.

I believe this is -- it's either this document or F, not to jump ahead, that also explains that of the 21,000 give or take direct jobs created by the port somewhere in the upper 30 percent, somewhere around 39 percent of people who hold those jobs are from Mobile City, about another 39 percent of them are from Mobile County, exclusive of Mobile City. Another 13 percent to about 2,700 people live in Baldwin County. So --

MR. ROSS: Your Honor, if I may --

JUDGE MARCUS: Allow him to finish, please.

MR. ROSS: Sorry.

MR. LACOUR: Yes. So we do think that goes to community of interest point. And again, this is something that was in front of the Legislature, as well.

So whether you are considering that like you would reading the Senate report from 1982 amendments to the Voting Rights Act, or you're considering it just for the truth of what's asserted inside because you can pull it off of a government website and has that ability, either way it tends to support the idea that there are unique important ties between Mobile and Baldwin Counties.

THE COURT: So if I understand it right, you're introducing or seeking to introduce E and F in support of the manner in which SB-5 drafted communities of interest?

MR. LACOUR: Your Honor, we do think it -- I would -- both for that purpose and simply for the argument that

plaintiffs' maps failed *Gingles I* because they do not maintain a community of interest in the Gulf.

JUDGE MARCUS: And your objection is relevance, hearsay, foundation, or all three?

MR. ROSS: All three, Your Honor. And I think one point on the government record, Your Honor, as you know, you can take judicial notice of the fact there was a government record, but you can't necessarily take judicial notice of the import or the reliability of everything that's in the report.

And so unless Mr. LaCour is going to bring a witness again to testify about this report, who looked at it, what it's about, obviously an expert could come as they did in some of our testimony and talk about similar reports, but they haven't brought an expert. They haven't brought anyone.

JUDGE MARCUS: Anything further on this point, Mr. LaCour?

MR. LACOUR: I'll just note the only thing that Mr. Bagley says about the port about these studies when he is talking about is there used to be the slave trade at the port. So I don't think there's any dispute that the port is a critical -- a critical part of the Gulf and a critical part of helping establish that community of interest there.

JUDGE MARCUS: We'll reserve on E and F.

MR. LACOUR: G is the BRATS schedule for Baylinc Mobile Fairhope. I don't exactly remember what the acronym

stands for there, but it involves Baldwin County. This is a government document and showing that there is public transportation that goes from Baldwin County to Mobile and back every day.

JUDGE MARCUS: Is that the bridge that you're talking about there?

MR. LACOUR: This is beyond that. There's actually government -- government run public transportation to move people between the two counties within the one community.

JUDGE MARCUS: Objection?

MR. ROSS: Same objections, Your Honor. Relevance.

JUDGE MARCUS: Anything --

MR. ROSS: Hearsay, foundation.

MR. LACOUR: If I could, I am going to grab my copy of the exhibits to make sure I'm describing them --

JUDGE MARCUS: Sure. Take your time.

MR. LACOUR: Exhibit H is --

JUDGE MARCUS: Again, so we're clear, I'm going to reserve on G, as well.

H.

MR. LACOUR: Yes. H, Baylinc connects Mobile Baldwin County transit systems dated November 5th, 2007. This is from the government website cityofmobile.org explaining that there is this connection of bus routes being run by local governments to make sure that people can cross from one county to the other

because there are close ties between these counties. This was introduced to the Legislature on July 13th, 2023.

JUDGE MARCUS: Objection?

MR. ROSS: Relevance, hearsay, foundation. We can't take Mr. LaCour's testimony about what was produced to the Legislature.

JUDGE MARCUS: We will reserve.

I.

MR. LACOUR: Yes, Your Honor. This is South Alabama Regional Planning Commission website information from the South Alabama Regional Planning Commission, which is creation of state government that binds together Mobile, Baldwin Counties, as well as Escambia County and all the -- the 29 municipalities within those three counties to work together to promote common interests among those local governments. And the document describes what the regional planning commission is that's existed since 1968, and when it was created by --

JUDGE MARCUS: What's the date on this?

MR. LACOUR: Your Honor, this was -- appears it was printed on July 10th, 2023.

JUDGE MARCUS: Any objection, and if so, basis?

MR. ROSS: Same objections, Your Honor, relevance, hearsay, foundation.

And I'm not sure if the regional planning commission -- excuse me -- website -- that's actually -- same objections,

Your Honor.

JUDGE MARCUS: Gotcha. We will reserve --

MR. ROSS: It's government document, but maybe Mr. LaCour --

JUDGE MARCUS: We will reserve on I.

J and L, we have already had argument on, and we will reserve on both of those. Those were the expert report of Mr. Bryan dated August 3rd, '23. L was the expert report of Trende dated August 4, '23. Anything further you wanted to say about Bryan? Let's stop on that one. Mr. LaCour?

MR. LACOUR: There we think this evidence is relevant, and so we have submitted it to the Court.

JUDGE MARCUS: Let me ask you a question that I have. Since we don't have Bryan present testifying under oath, for any of these experts to be admissible, Hornbook laws says you have to show A, by background, training, and experience that they're competent and qualified to opine; B, that the opinion being offered is methodologically sound and reliable; and C, that the expert opinions' report would assist the trier of fact.

Since we don't have him live, I want to just give you an opportunity perhaps, if you want, to flesh any of that out.

MR. LACOUR: Sure, Your Honor.

JUDGE MARCUS: A, qualification by background, training, and experience to opine about racial predominance,

which I take it is the thrust of his report.

B, the foundation, the methodological way he came to this opinion.

And C, how it would assist the trier.

MR. LACOUR: Yes, Your Honor. First, on qualifications, multiple pages explaining his qualifications when it comes to redistricting. There's been no assertion that his numbers are somehow off in any way.

He's explaining that there are -- these stark disparities where you see splits of counties in congressional plans including very remedial plan. You see very different demographics on either side of that line.

So when it comes to District 2, for example, in the remedial plan split -- three counties are split on the District 2 side of that line. For every one of those splits, you see a much higher percentage of Black Voting Age Population there than you do on the other side of that line.

That is the exact evidence that Mr. Williamson, an expert for the plaintiffs and their racial gerrymandering claim back in 2021 presented to suggest that there was evidence of gerrymandering or racial predominance in the 2021 plan.

JUDGE MARCUS: Let me ask a preliminary question, if I can, on qualifications.

Has Bryan ever testified and been received as a credible witness on racial predominance? I couldn't tell from the

materials you submitted.

MR. LACOUR: Your Honor, I think in terms of an expert and racial predominance.

JUDGE MARCUS: Yes. I mean on -- zeroing in on that issue.

MR. LACOUR: He has offered similar testimony in other -- in other cases. I believe the Louisiana case he had done similar analysis there.

I would need to see -- I don't have in front of me right now how things were ruled on.

JUDGE MARCUS: Help me on the foundation. Did he employ in your view -- and I went back to re-read Ryan Williamson's testimony in round one.

Did he employ the same methodology Williamson did as you see it?

MR. LACOUR: My recollection is a very similar analysis. I think Williamson may have done some additional -- may have done some additional analysis, or I think he looked at -- there were other -- there were other things he did that Mr. Bryan did not do.

But my recollection is there were these analyses of split political geographies. And we have here analysis of these splits in these counties, which I know that plaintiffs used very similar analysis -- plaintiffs' lawyers rather used very similar analysis in attacking the congressional map in South

Carolina. They submitted a brief to the Supreme Court just last week the ACLU and the NAACP accusing South Carolina of bleaching one of their districts.

MR. ROSS: Your Honor, objection. I'm not sure why we're talking about a totally different case and totally different --

JUDGE MARCUS: Your may proceed with your argument.

MR. LACOUR: They accused, on page 1 of the brief, South Carolina of bleaching a district because the County of Charleston was split, and 60 percent of the black population of Charleston County was moved into another district.

That's the almost the exact same number we have where --

JUDGE MARCUS: No, no. What I am getting at is -- I was asking a very simple question.

Did he employ the exact methodology employed by Ryan Williamson? Your answer is yes.

MR. LACOUR: I would need to look back more closely to say if it's exactly the same. But I think Your Honors are competent to look at these numbers and adjudge whether they should be given much weight or not.

It's simply more data about what is being done in the maps that would tend to show -- tend to make it more likely than not that there may be racial predominance concerns in these plans.

JUDGE MARCUS: I understand. Mr. Ross? I understand your objection and Ms. Khanna's objection initially is it is

not relevant. The issue has been already determined in round one, and it's not open for debate. We have heard that. We will ultimately rule on that.

But, two, assuming arguendo that we get over the relevance objection, I read somewhere along the way that one of you had foundational objections, and I will give you the opportunity to put that on the record, as well.

MR. ROSS: Yes, Your Honor. We had objections about the reliability of Mr. Bryan's evidence. It is -- you know, it's -- Mr. LaCour is standing up here and attempting to testify about the connection between his report and findings of racial predominance. Nowhere in Mr. Bryan's report does he actually make that connection. He simply says, black people are on one side of the line, white people are on another side of the line. And from there, you know, implies that there's racial predominance.

But as this Court knows, as the Supreme Court has said many times, you know, racial predominance is not that you may have been aware of race. It's not that, you know -- none of those factors are sort of dispositive. It's simply irrelevant in the first instance, and Mr. LaCour cannot make the connections that Mr. Bryan does not actually make in his report. It's unreliable and not useful.

JUDGE MARCUS: Just one moment, Mr. LaCour. I just want you to hear all of the objections so you can respond to

all of them at once.

MR. ROSS: Your Honor, if I may make this other point. This Court has already found that there were serious concerns with Mr. Bryan's testimony.

The *Robinson vs. Ardoin*, the -- I may be mispronouncing that -- the Louisiana case that Mr. Bryan also testified in, the Court had serious concerns about the liability of his opinion and also found -- gave his opinion little weight, and he didn't testify, let alone but he's not even appearing to give any testimony here about --

JUDGE MARCUS: Ms. Khanna, any additional arguments you wanted to make on the admissibility of Bryan's report?

MS. KHANNA: Just to make sure I heard Mr. Ross correctly. Was he just reading from the Louisiana opinion?

MR. ROSS: Yes. I can read the full sentence, Your Honor. It's on page --

MS. KHANNA: No, no. That's all right. I was going to do the same thing. I just wanted to make sure that's in the record.

MR. ROSS: Yes, Your Honor. It's on page 824 of the Louisiana opinion. The Louisiana opinion is at 605 F.Supp.3d, 759.

JUDGE MARCUS: Other arguments?

MS. KHANNA: I have nothing to add. No thank you, Your Honor. Nothing to add.

JUDGE MARCUS: You may respond if you wanted to since you are the proponent of the exhibit.

MR. LACOUR: Yes, Your Honor. Mr. Bryan's opinion was the definitive proof of predominance. It is merely some evidence of predominance. The reasons why are obvious.

If every time the split is producing racially disparate effect, again and again and again like in the remedial plan from the plaintiffs, then that is some evidence that race was afoot. It's -- I think this Court is savvy enough to understand that multiple courts have looked at analysis like that before and connected the dots.

JUDGE MARCUS: Gotcha. Anything further, Mr. Ross?

MR. ROSS: One more objection, Your Honor.

Mr. LaCour keeps referencing the remedial plans that plaintiffs -- that my client put in front of the Legislature. That plan is not in front of this Court. We have never offered it as an illustrative plan. We have never offered it as a remedy to Section 2 case to this Court. And so it's simply another reason why any testimony about the remedial plan isn't relevant at all and isn't admissible.

And one other thing, Your Honor. Although Mr. Bryan goes and examines plaintiffs' plan, he does not examine the state's own plan for racial predominance. He doesn't compare, as Mr. LaCour thinks is relevant in racial predominance analysis, how their plan splits black and white communities along racial

lines.

JUDGE MARCUS: Mr. LaCour?

MR. LACOUR: Your Honor, that's not true. If you look at pages 32 and 31, he does include the county split information for the state's 2023 plan.

JUDGE MARCUS: Can you help me just with the last point Mr. Ross made? He says, if I hear him right, that going beyond the illustrative maps, we have already talked about them, this VRA reapportionment map was not being offered by the plaintiffs in any event, so what possible relevance could it be to have Bryan comment about that? He says you're shooting blanks in the night if you are shooting at a map not offered.

MR. LACOUR: I'm happy they have confirmed they are not offering that plan. It's the only one that doesn't split the Black Belt into at least three, if not four districts. So I am glad we cleared that up.

JUDGE MARCUS: Is it relevant? Why would Bryan's testimony be relevant to a map that they have not submitted to this Court?

MR. LACOUR: Well, I think his testimony as to the seven other maps that he does analyze is still relevant.

JUDGE MARCUS: No, I am not talking about Cooper's maps. I'm not talking about Duchin's maps. I'm talking about -- let's call it the VRA map.

MR. LACOUR: Here's why I think it might be relevant

is if -- imagine if the Legislature had before it only two plans, the VRA remedial plan and the 2023 plan, and they had to choose how to best comply with the demands of federal law, Section 2, and the Equal Protection Clause, and they looked and said, well, this one only splits six counties, the 2023 plan only splits six counties, that one splits seven. The 2023 plan keeps together these communities of interest, that one doesn't, and the 2023 is more compact both on average, and its least compact district is more compact than the plaintiffs' plan, if they chose the plaintiffs' plan anyway, it would be an obvious racial gerrymander, and there would be additional evidence that it would be a racial gerrymander from the fact of how those counties split, so that additional unnecessary county split came about.

And I think that should inform the Court when we're dealing with these charges of defiance here. We had a difficult task complying with dueling commands of Section 2 and the racial gerrymandering jurisprudence of the Supreme Court. I think the evidence goes to that, as well.

JUDGE MARCUS: I got it. The next item. We will reserve on that.

That would be J, the report of Bryan.

K was the Alabama Act Number 2023-563. I take it that is SB-5.

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: Any objection?

MR. ROSS: No objection, Your Honor.

JUDGE MARCUS: K is received.

L is the other expert report that you have offered in this case. Is there an objection to L other than relevance, Mr. Ross?

MR. ROSS: No, Your Honor.

JUDGE MARCUS: All right. Is there anything you wanted to say further on that issue, or have we pretty much exhausted relevance on Trende?

MR. LACOUR: I think we have gone over it pretty well.

JUDGE MARCUS: Okay. So we will reserve on that.

MR. LACOUR: Next is M. This is the declaration of Lee Lawson that was submitted with our response to the plaintiffs' objections.

He works for a major -- it's the Baldwin County Economic Development Alliance. He's been working with them for 14 years in that role. He helps to foster business development in Baldwin County, which requires him to work closely with Baldwin and Mobile County government officials and other economic leaders in the area. So both as -- it's based on living in the area and based on his work in the area.

JUDGE MARCUS: Right. So just sharpening the focus, it goes to the community of interest?

MR. LACOUR: Yes.

JUDGE MARCUS: Okay. I take it the same objection for Lee Lawson, Mr. Ross?

MR. ROSS: Yes, Your Honor. The relevance objection from our motion in limine.

JUDGE MARCUS: We will reserve on that.

We will talk about M now, Kyle Hamrick, ALDOT says new bridge in Bayway are financially viable.

MR. LACOUR: Yes, Your Honor. This was before the Legislature for them to consider. And so I think it falls into the category of some of the other documents we have discussed before, although this is not a government document.

JUDGE MARCUS: This is again going to the community of interest?

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: Any objection other than relevance?

MR. ROSS: Hearsay and foundation, Your Honor.

JUDGE MARCUS: Did you want to respond to that?

MR. LACOUR: Your Honor, if you look at the B-2, the transcript of the hearing, certified transcript of the hearing, explains this was being admitted into the record for the Legislature to consider.

So, again, if you were reading the Senate report, you would have evidence there that was before the Senate when they were passing Section 2. Similarly, you have evidence here that was for the Legislature when they were --

JUDGE MARCUS: Just so I understand it, so Hamrick's statement is relevant because it was presented to the Alabama Legislature in 2023.

MR. LACOUR: Yes, sir.

JUDGE MARCUS: Okay.

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: Anything further on that, Mr. Ross, other than your objections relevance, foundation, and hearsay?

MR. ROSS: No more, Your Honor.

JUDGE MARCUS: All right. O. We will reserve on N. O, USA, a brief history, University of South Alabama.

MR. LACOUR: Yes, Your Honor. This is from the University of South Alabama's website. This goes to communities of interest, explains some history of the school and that it has campuses both in Mobile and Baldwin Counties.

JUDGE MARCUS: Objection?

MR. LACOUR: This was also in front of the Legislature.

JUDGE MARCUS: Right. Just so we're clear, this was presented to the Legislature here in round two in July of '23?

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: Thank you. Objection?

MR. ROSS: Relevance, hearsay, and foundation, Your Honor. The same objections.

JUDGE MARCUS: We will reserve on O.

P, About Us.

MR. ROSS: Your Honor, I just would note that that is also -- this is not a government document. It's a school's web page, so...

MR. LACOUR: It is a school that's an arm of the state. So I think it could be considered.

JUDGE MARCUS: Just tell me what it goes to, why it's relevant, and why it isn't otherwise inadmissible. It's hearsay, or for the lack of the foundation, the proponent of the statement is not here in court to testify.

MR. LACOUR: Talking about P now, Your Honor?

JUDGE MARCUS: Yes.

MR. LACOUR: So this was before the Legislature, goes to communities of interest, explaining that there are types of media in the Gulf, including this newspaper Lagniappe that services both Mobile and Baldwin Counties.

JUDGE MARCUS: Who presented it to the Legislature?

MR. LACOUR: Dorman Walker admitted it.

JUDGE MARCUS: Mr. Walker offered this exhibit?

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: And the Legislature received it in their work or their reapportionment committee, I take it?

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: I gotcha. We will reserve on P.

Q.

MR. LACOUR: Yes, Your Honor. Declaration of Mike Schmitz. This goes to communities of interest, focused mainly on the Wiregrass, who is the former mayor of Dothan and provided the sworn declaration.

JUDGE MARCUS: Same for Kimbro, right?

MR. ROSS: Yes, Your Honor. Same for Kimbro -- Schmitz and Kimbro, both Exhibits Q and R.

JUDGE MARCUS: Help me, though, Mr. Ross. Were these folks deposed?

MR. ROSS: They were deposed, but we're still objecting on relevance grounds, Your Honor.

Excuse me. So we are objecting to the declarations Q and R and S on relevance grounds per our motion in limine.

JUDGE MARCUS: What about the depositions?

MR. ROSS: The depositions we've -- if this evidence comes in, then the depositions would come in.

JUDGE MARCUS: Okay. So your view is it's all inadmissible on relevance grounds, but if it comes in, then it should all come in.

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Okay. Anything further on Q and R, Mr. LaCour?

MR. LACOUR: No, Your Honor. I think everything that was said about Q and R would also be true as to S, the declaration of Jeffrey Williams.

JUDGE MARCUS: That's S, right?

MR. ROSS: Your Honor, if I may say one more thing, just goes to Mr. LaCour's testimony or -- excuse me -- statements -- some of these declarants were people who actually did come and testify at the hearing. Those people who wanted to give sworn declarations give sworn declarations. Those who were unable or unwilling to do so did not.

And so I think it just goes to the fact that these transcripts could have come in, in other ways and yet...

JUDGE MARCUS: I understand. Who is Williams?

MR. LACOUR: Jeff Williams is the senior executive at a bank in Dothan. He's also a member of the Dothan Area Chamber of Commerce. He has evidence about the Wiregrass's community of interest.

JUDGE MARCUS: I take it your objection is the same? Relevance and hearsay? Mr. Ross, I'm talking about --

MR. ROSS: I'm sorry, Your Honor.

JUDGE MARCUS: Yeah. I'm talk about he's offered S, the declaration of Mr. Williams.

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: He offers it on the communities of interest and, in particular, the Wiregrass.

MR. ROSS: Yes, Your Honor. The same relevance objection.

JUDGE MARCUS: Okay. We will reserve on that.

MR. LACOUR: Just to be clear, Your Honor. I think you had said hearsay, as well. I don't think hearsay would apply, and I don't think Mr. Ross was raising a hearsay.

JUDGE MARCUS: I did not hear any hearsay objection to Defendants' Exhibit S. Singular objection, just relevance.

MR. ROSS: That's correct.

JUDGE MARCUS: T.

MR. LACOUR: These are the objections and responses to the Singleton first set of requests for admission.

JUDGE MARCUS: Any objection?

MR. ROSS: Your Honor, it's a different case. We're not -- there's no relevance.

JUDGE MARCUS: We can consider that when we get to Singleton, or does this have any bearing on this remedial proceeding, Mr. LaCour? Mr. Davis? We're talking about Exhibit T, which is the Defendant Secretary of State Wes Allen's objections and responses to Singleton's plaintiffs' first set of request for admissions.

Does it have any bearing on this case, or is that something we are going to take up separately?

MR. DAVIS: Your Honor, if it wouldn't inconvenience the Court, could we review that maybe during a break?

JUDGE MARCUS: Absolutely.

MR. DAVIS: That would remind me if it was just a mistake that was included on both lists, or whether there was a

separate purpose.

JUDGE MARCUS: Consider it done. We will take it up later. So we will reserve and give you a chance, Mr. LaCour, to address T.

U.

MR. LACOUR: Yes, Your Honor. This was a copy of Bradley Byrne's testimony offered in the Chestnut case that was presented into the legislative record in 2023 at the July 13th, 2023 hearing.

JUDGE MARCUS: It's already record, is it not?

MR. LACOUR: Yes, Your Honor. I think we are admitting it here to show that this was also something that was admitted or in front of the Legislature and the redistricting committee in July of 2023.

JUDGE MARCUS: Any objection?

MR. ROSS: Just I think same objection, Your Honor. Relevance, hearsay, and foundation.

If they want to bring Mr. Byrne to come and testify, again, they could have. I understand that the Caster plaintiffs did get an opportunity to cross-examine him. We've never had an opportunity to cross-examine him. And we have never waived our right -- or excuse me -- we did -- I'm sorry, Your Honor. We never had a chance to cross-examine him in that particular case on whatever issues he testified about there.

So I think to be clear, we know that it's already in the

case because the Caster plaintiffs introduced it earlier. We would not allow it to be introduced for the purposes of showing what the Legislature saw or didn't see or what they considered or didn't consider.

JUDGE MARCUS: Well, if it's in, it's in, counsel.

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: We are not in the metaphysical debate here. Either it went in or didn't.

MR. ROSS: I understand. It's in the record.

JUDGE MARCUS: So it's in the record. We will receive U.

MR. ROSS: Yes.

MR. LACOUR: I think the same would be true about Exhibit N, which is...

JUDGE MARCUS: I'm sorry. I thought we were up to V.

MR. LACOUR: I'm sorry. I may have skipped ahead. V, yes. This was testimony that Representative Byrne provided, preliminary injunction proceedings in this case. This was also provided to the redistricting committee on July 13th, 2023.

JUDGE MARCUS: And it's already been presented to this Court, has it not?

MR. LACOUR: Yes.

JUDGE MARCUS: Mr. Ross? Anything new on V? It's already in. The reason I'm making the point --

MR. ROSS: I understand, Your Honor.

JUDGE MARCUS: -- is just to be clear.

I have said this three times. I understand the record presented -- the record evidence presented on round one at the preliminary injunction hearing is part of these proceedings, too.

So I'm hard pressed to see an objection to V.

MR. ROSS: No, Your Honor. I think the distinction that I'm drawing which perhaps the Court -- I understand --

JUDGE MARCUS: You're going -- I think what you're really are arguing about the strength of the exhibit, its probative value rather than its admissibility.

MR. ROSS: I think that is absolutely correct, Your Honor. The evidence can come in. It's already in the record, its value, and what it says about the Legislature.

JUDGE MARCUS: Right. Mr. Davis?

MR. DAVIS: If it may help, Your Honor, it wasn't entirely clear to us if we intended to rely on something that was already in the record from the earlier proceedings.

JUDGE MARCUS: I understand.

MR. DAVIS: Whether the Court wished for us to refile. Out of an abundance of caution, we did so.

JUDGE MARCUS: V is received.

W.

MR. LACOUR: W is the testimony of Josiah Bonner in the Caster -- not the Caster -- in the Chestnut case, which I

believe is also -- was admitted as part of the record during the 2021-2022 proceedings. This is also -- this was also admitted to the legislative record at the July 28th -- July 13th, 2023, hearing.

JUDGE MARCUS: Refresh me. What does it go to, Bonner's testimony?

MR. LACOUR: The communities of interest in the Gulf. He's a former Congressman for District 1 and has served in other roles as a public official.

JUDGE MARCUS: Gotcha.

Mr. Ross, same?

MR. ROSS: Same concern, Your Honor, but no objection.

JUDGE MARCUS: We will receive W in evidence.

X, expert report of Dr. Imai.

MR. LACOUR: Yes, Your Honor, this is in the record already. As Mr. Davis referenced, we just wanted to be sure that we were putting forward everything.

JUDGE MARCUS: Gotcha. So it's clear. X is received.

MR. ROSS: Sorry, Your Honor. I want to be clear when we moved evidence into the record, we were moving only our Section 2 evidence, and we weren't intending to enter any evidence from Dr. Williamson or Dr. Imai.

JUDGE MARCUS: Okay. So is there an objection to X?

MR. ROSS: There's an objection to X and Y, Your Honor, for that reason. Relevance, Your Honor. It's simply

not relevant. That was examining the 2021 plan and whether it was a racial gerrymander or not.

JUDGE MARCUS: So it's relevant only to the issue, the Singleton issues of intent and equal protection?

MR. ROSS: Perhaps, Your Honor. But it was only looking at the 2021 plan, not even the 2023 plan.

JUDGE MARCUS: Mr. LaCour, any comment?

MR. LACOUR: Just interesting how this analysis only works one way and not the other.

But I do think Imai's analysis is probative. He showed that if you took -- he -- so you remember he ran three different sets of 10,000 maps race neutrally. The last set, which is in the rebuttal report, Exhibit Y, did a few things. He locked in one majority-minority district between 50 and 51 percent. He kept county splits to a minimum. He prioritized compactness. He avoided pairing incumbents. And then contrary to what the plaintiffs told the Supreme Court and what the Supreme Court actually ended up putting in their opinion, which was in error, he did prioritize two communities of interest -- the Gulf and the Black Belt. And when he ran those 10,000 maps that prioritized the Black Belt and the Gulf, the second highest BVAP district that he had came in on average around 36 percent and did not even get up to 40 percent, which we think is pretty good evidence that if you are actually prioritizing these neutral principles, the highest you are

going to get is probably right around 40 percent, which suggests that the Legislature's use of these principles was not tenuous in any way. This was indeed precisely what you would get.

JUDGE MARCUS: I have the thrust of the argument. Anything further, Mr. Ross, on this?

MR. ROSS: Your Honor, the Supreme Court, as you know, considered his arguments and rejected them.

JUDGE MARCUS: We will receive X and Y into evidence. Z.

MR. LACOUR: Yes, Your Honor. This was an exhibit that came into the record during the preliminary injunction proceedings. It's simply sort of helpful compendium of all the congressional redistricting maps the state has had from its inception until 2021.

JUDGE MARCUS: Comment, Mr. Ross?

MR. ROSS: If I may, one moment.

JUDGE MARCUS: Sure. Looks to me like it's a brief and motion in which --

MR. LACOUR: So this was the exhibit to the motion. It is not the motion itself.

JUDGE MARCUS: 7 is the exhibit to the motion itself.

MR. LACOUR: Yes. 57-7 is the exhibit we're admitting. We are not admitting the Singleton plaintiffs' renewed motion. We are simply admitting this exhibit, which

is, again, a copy of all the maps going back to 1822, at least, up until 2021.

JUDGE MARCUS: I understand.

Mr. Ross?

MR. ROSS: Your Honor, unless it's already in the record, we would object on relevance grounds. It's not clear to us if this is relevant. The Supreme Court rejected the argument that core retention is a principle that this Court --

JUDGE MARCUS: Was that ever received? I know it was appended to a motion, but I don't recall if that was received. The record will answer that question when we look at it.

Do you know?

MR. LACOUR: I do not know off the top of my head, but we can get that answer for you.

JUDGE MARCUS: We will reserve on Z.

C-2 we have already ruled on.

F-2?

MR. LACOUR: This is a slightly different version of the port authority. I believe it included a couple of extra pages at the end. This is the copy that was provided to the legislative districting committee.

JUDGE MARCUS: Right. And we have already reserved on that one, correct?

MR. LACOUR: Yes.

JUDGE MARCUS: So we will reserve on that, too.

Does that conclude your presentation?

MR. LACOUR: Your Honor, if we can have a moment to confer.

JUDGE MARCUS: You sure can.

MR. LACOUR: And get back to you.

JUDGE MARCUS: Mr. Ross, did you want to say anything about F-2?

MR. ROSS: No, Your Honor. I was just standing in case the Court --

JUDGE MARCUS: I understand.

MR. DAVIS: Your Honor, while Mr. LaCour is returning to the podium, as I see it, we have at least two issues that we need to think about and resolve and clarify for the Court after a break, which is whether we're submitting the Singleton request for admission responses for purposes of this case, and whether the exhibit, the historic maps, 57-7 was, in fact, received by this Court --

JUDGE MARCUS: Correct.

MR. DAVIS: -- in the earlier proceedings.

JUDGE MARCUS: Yes. And you can clear that up for us when we take a lunch break.

Mr. LaCour, any other evidence you wanted to put in on behalf of the defendants?

MR. LACOUR: I would just note that I was informed that we now have the full certified transcript of the

July 13th, 2023, hearing. That also includes the exhibits that were attached thereto, which I think should be enough to resolve the notion that we don't know whether the documents were really included.

JUDGE MARCUS: This was presented to the Legislature?

MR. LACOUR: Yes. July 13th.

JUDGE MARCUS: Do you want to put a number on that, and then we can reserve on that?

MR. LACOUR: Yes. We can call that B-3.

JUDGE MARCUS: B as in boy 3?

MR. LACOUR: B as in boy. B-2 was the full transcript but did not yet have the exhibits attached. And B-3.

JUDGE MARCUS: So B-3 is the entire transcript of the July 13th, 2023, legislative committee on reapportionment's hearing on that day.

MR. LACOUR: Yes, with exhibits that were introduced into the record.

JUDGE MARCUS: Okay. And I take it you have a variety of objections: Relevance, hearsay, in some instances, and foundation?

MR. ROSS: Same objections, yes, Your Honor. It can't be that Mr. LaCour testifies about these things.

JUDGE MARCUS: All right. We will consider that and take that under -- we will reserve on that issue.

Let me ask you one final question, Mr. LaCour, and I will

ask your colleagues in just a moment or two.

With the two issues Mr. Davis is going to come back with, you rest your case, correct?

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: You do not wish to call anybody live. Do I have that right?

MR. LACOUR: That's correct.

JUDGE MARCUS: Okay. The defendants have rested save for the two issues we will join issue on after we take a lunch break.

Let me turn to the plaintiffs by way of rebuttal. And ask you, Mr. Ross and Ms. Khanna, whether you have any rebuttal evidence or whether you will rest on the record as it now exists.

MR. ROSS: We rest on the record and our objections, Your Honor.

JUDGE MARCUS: Ms. Khanna?

MS. KHANNA: Same here, Your Honor.

JUDGE MARCUS: Just so I'm clear on this, Mr. Ross, Ms. Khanna, you don't wish to call any witnesses live either?

MR. ROSS: No, Your Honor.

MS. KHANNA: No, Your Honor.

JUDGE MARCUS: Okay. With that, we will break for lunch. When we come back, Mr. Davis, just enlighten us about those two exhibits, and we will go into closing argument.

We will give the plaintiffs one hour in the aggregate for closing argument. Mr. Ross, Ms. Khanna, you can break it up any way you see fit. We will give the state one hour for closing argument, as well.

If there's nothing further, we will be in recess until 1:45.

Thank you.

(Lunch recess.)

JUDGE MARCUS: Good afternoon.

Before we proceed with closing, I think there were two loose ends, Mr. Davis, you were going to help us with.

MR. DAVIS: There were, Judge. Exhibit T, which is our responses to request for admissions, we did not mean to move for admission in that document in the Milligan and Caster cases. We did one exhibit list for all three. So we are not moving to admit the responses to RFAs Exhibit T in this case.

JUDGE MARCUS: So you are not offering T?

MR. DAVIS: Correct.

JUDGE MARCUS: Okay. We can strike that out.

MR. DAVIS: Z, which is the historical maps, that is something we wish to be considered for both cases, but our records show that that was admitted when we were here -- when we were together for the preliminary injunction proceedings.

We show that as being admitted on the first day of those proceedings on -- that document, that collection of maps was

filed as Singleton Exhibit 22, which was admitted on page 17 of Volume 1 of the preliminary injunction record.

JUDGE MARCUS: Gotcha.

Anything further on that, then, Mr. Ross? Do you want to withdraw your objection to that one?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: So that's clear. We have received Z into evidence, and the other exhibit has been withdrawn.

MR. DAVIS: That's correct.

JUDGE MARCUS: Thank you.

With that, we will proceed to closing argument here. We are just going to have -- we are not going as we might normally have plaintiff argument, response, reply. We are just going to go -- given where we are and the timing issues, two closing arguments. You are going to break up your argument, I take it?

MR. ROSS: Yes, Your Honor. Ms. Khanna is going to do the closing. I may have a few statements or I may not.

JUDGE MARCUS: Perfect. Any way you folks want to handle it is fine.

Then, Mr. LaCour, I take it you are going to make the closing argument?

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: We gave in the aggregate each side one hour.

MR. LACOUR: Thank you. We anticipate we will need

much shorter than that.

JUDGE MARCUS: Ms. Khanna, thank you, and you may proceed.

MS. KHANNA: I, too, will be much shorter than an hour. I promise.

During the break, I was looking -- I -- can everybody hear me before I dive in?

JUDGE MARCUS: We hear you fine.

MS. KHANNA: During the break, I was looking through the briefing in preparation for today's hearing, and as the Court knows, we saw a lot of hundreds of pages of motions for clarification, responses to motions for clarification, replies to motions for clarification all trying to answer the question of what are we even fighting about today.

And I really appreciate this Court's efforts during the course of this hearing to drill down on that question. And I think we've gotten some real clarity on that.

So I think I just want to start out by making very clear to the Court what we're not fighting about, what is not in dispute.

Gingles II, are black voters politically cohesive in Alabama in development areas? Yes. That is not in dispute.

Gingles III, does the white majority vote as a bloc usually to defeat black-preferred candidates? Yes. That is not in dispute. It is not in dispute generally in Alabama. It

is not in dispute in the areas in the regions in question. And it is not in dispute in the 2023 plan. Most specifically, in the 2023 plans, Congressional District 2, there is no dispute that the white majority will usually, if not uniformly, vote as a bloc to defeat black-preferred candidates.

So Senate Factors. The Senate Factors are not in dispute. Let's just spell out for a second what that means. Senate Factor 1, the history of official voting-related discrimination in Alabama. That is not in dispute. This Court has already found, the evidence has already showed that that history is repugnant, it is well documented, and it is persistent.

Senate Factor 2, the extent to which voting in the elections of Alabama are racially polarized. Again, that's not in dispute. This Court has already found that racial polarization in Alabama is intense, and it is stark.

Senate Factor 3, the extent to which the state has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group. That is not in dispute. The Court has already made findings in favor of liability under Section 2 for Senate Factor 3.

Senate Factor 5, the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health which hinder their ability to participate effectively in the political process. That is not in dispute. This Court has already made findings that black

voters, black citizens in Alabama have marked disparities across every metric on socioeconomic scale and the fact that continues to hinder their access to the political process.

Senate Factor 6, the use of overt or subtle racial appeals in political campaigns. That's not in dispute. The Court has already made findings that Alabama candidates, including congressional candidates have used racial appeals to appeal to voters.

Senate Factor 7, the extent to which members of the minority group have been elected to public office in the jurisdiction, this Court has already made findings that the extent to which black candidates can achieve success at the statewide level is zero. That is not in dispute.

Now, Senate Factors 8 and 9, this Court did not make findings of fact on those issues during the preliminary injunction phase. And there is, perhaps, some more evidence in the record, depending on how the Court rules on the motion in limine. There has today been presented evidence on both of those issues. And I don't think it actually requires an extensive analysis to see how they kind of fall out today.

Senate Factor 8 is about the extent to which the state has been responsive to the needs of the minority group. I think we can look at responsiveness just by looking at the state of Alabama's response to this Court's ruling, looking at Alabama's response to the Section 2 lawsuit brought by black voters, won

by black voters, and their responsiveness was to give no response at all, and certainly no meaningful response on the rights at issue. Their response was that they will continue to do what they are going -- what they had always done, what has already been struck down, not because they are prioritizing the needs or even recognizing the rights of black voters, but because they are prioritizing their own policy preferences and their own communities.

And then Senate Factor 9 goes to the tenuousness of the justifications for the enacted plan. And as Mr. Ross presented during his opening statement, the new evidence in the record on the 2023 plan shows that the purposes of that plan is tenuous at best, or the state solicitor general as turned map maker to inject into the record, to inject into Alabama's history of redistricting some new found principles and new found ways of beefing up redistricting maps for the sake of a legal argument to continue to advance in court.

The Court definitely -- again, at its disposal is evidence to make additional findings on Senate Factors 8 or 9, although it certainly does not have to in order to resolve the issues here today.

So all that leaves for, again, what are we fighting about? What is in dispute is *Gingles I*, and even then, it's not all of *Gingles I*. There is no dispute on the numerosity part of *Gingles I*. No dispute that black voters in Alabama are

sufficiently numerous to form a majority and additional district.

I just marched through step by step the legal standard to show every element that is not in dispute and that has had -- that has evidence in the record and in many cases findings on the record.

I want to pause for a moment right here, because I heard Mr. LaCour say during his opening statement that all the plaintiffs have come to you -- all that is before this Court is the question of proportionality. And the only way to arrive at that conclusion is to disregard every single element of the test that we just walked through. Every single element of this test that this Court analyzed, meticulously studied, and went through the evidence the last time, all of that evidence remains in the record.

If -- it is perhaps just the state of Alabama who likes the beat the drum of proportionality. But the plaintiffs in this case have been clear that this is a totality, and that this is a comprehensive analysis, and that the evidence itself is comprehensive.

So let's turn to what appears to be in dispute, and that is the portion of *Gingles I* regarding compactness, specifically the compactness of the minority group.

As Mr. Ross noted during his earlier argument in *LULAC vs. Perry*, the Supreme Court made clear that the first *Gingles*

condition refers to the compactness of the minority population and not the compactness of the contested district.

So today, Alabama is basically saying one of two things to the Court: Either the black population in Alabama is less compact today than it was 18 months ago when this Court made its original findings, or even 2 months ago when the U.S. Supreme Court affirmed those findings; or this Court's finding of geographical compactness and the Supreme Court's affirmance of that finding was in error. And according to the state of Alabama, the 2023 plan is just evidence of that error.

As a procedural matter, Alabama is foreclosed from making that argument. This Court has made clear on multiple occasions that it is not relitigating the findings from the preliminary injunction order.

And as a substantive matter, the 2023 plan says absolutely nothing about plaintiffs' illustrative plans. It cannot undue the fact that those plans are reasonably configured and that this Court has found those plans to be reasonably configured. And it cannot go back in time to render a reasonable plan unreasonable.

To the extent that Mr. LaCour is focusing on the intent and the predominance of race and plaintiffs' illustrative maps, the Court doesn't need to reopen that can of worms here. There's no way that the intent of the map drawer, the considerations of the map drawer, the communities considered by

that map drawer could have changed between time one and time two. Those maps have remained the same.

The question before this Court during our last gathering on the preliminary injunction hearing was whether based on the Section 2 legal standard and the totality of circumstances Alabama's 2021 congressional plan, which has just a single district that affords black voters an opportunity to elect, provides black citizens an equal opportunity to participate in the political process. This Court answered that question no.

The question today before the Court is whether based on that same standard, Alabama's 2023 plan, again, with just one district that affords black voters an opportunity to elect, provides black citizens in Alabama an equal opportunity to participate in the political process. And, again, based on the same evidence, based on the undisputed facts, it does not.

Ultimately, Your Honor -- Your Honors, nothing has changed. The law hasn't changed. The Supreme Court said as much. It's not for lack of trying on behalf of Alabama. The legal standard has not changed since this Court ruled 18 months ago. It has not changed over the last 40 years.

The record hasn't changed. The record from the preliminary injunction proceedings remains the record today.

The opportunities for black voters have not changed. In under the 2021 plan, black voters had a single opportunity district, and today, black voters have a single opportunity

district. Just like they had a single opportunity district in 2012, in 2002, and in 1992, at that time for the first time.

Nothing has changed, Your Honor. And ultimately, it is time for the black voters of Alabama to see some thing to change. It is time for some kind of change so that black voters in Alabama are finally afforded an opportunity to elect their preferred candidate in an additional district to provide that equal access to the political process.

Unless there's any questions, Your Honor, I will conclude there.

JUDGE MARCUS: No. Thank you.

Mr. Ross?

MR. ROSS: Nothing to add, Your Honor.

JUDGE MARCUS: Thank you.

Mr. LaCour.

MR. LACOUR: Thank you, Your Honors.

The plaintiff said that the heart of their case was the cracking of the Black Belt. The state responded that cracking is no more. It's now the plaintiffs who are demanding that you order the cracking of the Black Belt because every one of their illustrative plans puts the Black Belt into at least three if not four districts to hit racial goals. That reading of Section 2 is unlawful because it's unconstitutional.

Now, to return to something that Ross said before the lunch break. The *Allen* court did not say that strict scrutiny

was satisfied in considering the 2021 plan. The Court has only ever assumed that Section 2 compliance could justify racial predominance.

And I believe in light of the *Safe Harbor* decision that came out two weeks after the *Allen* decision that it makes clear that there are only two circumstances where the Court has ever held that strict scrutiny is satisfied. That is in the context of safety, like prison riots, which is not at issue here, and context of remediating past identified to jury discrimination, also not at issue here when we're dealing with a disparate impact or an effects test.

The Court simply reaffirmed at the end that its concerns that Section 2 may impermissibly elevate race in the allocation of applicable power within the states remains. They simply held that the record did not bear out the concerns in this specific challenge to the 2021 plan on the record before the Court at that time.

So the question, then, is why weren't those concerns borne out on that record? And the answer is that the Court was not requiring the state to adopt a plan that would violate the 2021 plans' principles.

As in any disparate impact litigation, the plaintiffs need to come forward with some sort of alternative that advances legitimate interests whether you are dealing with the employment context or the fair housing context, or you're

dealing with the map drawing context. They have to come forward with an alternative that advances legitimate purposes as well as the challenged policy while still reducing the disparate effect.

That's essentially what *Gingles I* is doing. And because they were able to meet that test in the 2021 plan, we were essentially in a situation where you had equal maps. You had ones that all advanced legitimate purposes of the 2021 plan equally. And when you are in that context, you are dealing with race consciousness rather than race predominance.

But we're not in that context anymore with the 2023 plan.

Now you have a plan in front of you that is substantially different despite what Ms. Khanna said.

JUDGE MARCUS: Help me with this. We are sort of at this a few times. Were you not required to draw a new map that provided a fair and reasoned opportunity district?

MR. LACOUR: Your Honor, I think we were required to draw a new map that complies with the Section 2 of the Voting Rights Act and the Core Protection Clause of the United States Constitution.

JUDGE MARCUS: I understand that. And I think that's truly true stated at this a very high order of an abstraction. But what I would like to get to is combining the abstraction with where we are here, were you not required to draw a new map that provided a fair and reasonable opportunity?

MR. LACOUR: Your Honor, we were required to draw a map that was equally open and that did not have discriminatory effects on account of race. And so Section 2 demands, that's what we have to comply with particularly in light of *Allen vs. Milligan*.

JUDGE MARCUS: So help me. On round one, we found likely proof of liability, and then we said with regard to remedy that you had to afford a second district that provided an opportunity. Is that not a requirement? Was that just a statement of no moment? Does that have any bearing on where we are?

MR. LACOUR: Your Honor, the 2021 plan has been repealed. The 2023 plan has been enacted. And if it does not violate Section 2, then it is lawful and has remedied the violation, regardless of the -- whether it hits proportional representation or not.

JUDGE MARCUS: I am not asking about proportional representation. I'm asking about whether or not it provides a reasonable opportunity. In round one, we said you had to do that, or at least the failure of doing that was a likely violation.

Is it your view that you do not have to answer that question because of these other traditional districting criteria?

MR. LACOUR: I think this is as reasonable of an

opportunity as you can get without violating traditional districting principles in service of a racial gerrymander. And for that reason, we do think it complies with Section 2 of the Voting Rights Act.

JUDGE MARCUS: Thank you.

JUDGE MANASCO: Let me follow up to that --

JUDGE MARCUS: Go ahead.

JUDGE MANASCO: -- just a little bit.

So in our previous order, we considered the tension between Section 2 compliance and racial gerrymandering. And we indicated following our liability finding what an appropriate remedy would be, that it would be a map that includes an additional opportunity district.

I asked a question about that earlier with respect to the motion in limine, but now I'm asking a question with respect to the substance, not necessarily with respect to the evidence you think we ought to consider or ought not to.

What role did our statement about the additional opportunity district play in what was necessary to comply with our order?

MR. LACOUR: I think your statement made clear that if we were going to move forward with the exact same priority given to communities of interest, compactness, and county lines as we gave in 2021, that we would likely need to have two majority-black districts or something quite close to it. But I

don't think we were bound to stick to that same prioritization of those same legitimate principles, which the Supreme Court blessed in *Allen* and has blessed repeatedly as things that a state is allowed to do when it's doing the hard work of trying to draw congressional districting lines.

JUDGE MANASCO: All right. So where are we now? I take it that the state's position is that this is, although it's a remedial proceeding, sort of functionally very much like a preliminary injunction hearing, where if we were to grant the relief that the plaintiffs request, we would be entering an injunction against SB-5 instead of SB-1.

So indulge a hypothetical for a moment. If we were to say again there is a violation and what has to happen is an additional opportunity district, what would be the impact in this context of the statement about an additional opportunity district?

MR. LACOUR: Your Honor, I think our position would be that that would be a violation of *Allen vs. Milligan* Supreme Court's order because they have not satisfied *Gingles I*. And so you would be requiring us to adopt a map that violates traditional principles which the Supreme Court declared to be unlawful.

JUDGE MANASCO: Well, at what point does the federal court in your view have the ability to comment on whether the appropriate remedy includes an additional opportunity district?

On liability? On remedy? Both? Or never?

MR. LACOUR: I don't think there's any prohibition on the Court commenting on what it thinks an appropriate remedy would be, but I do think that that statement had to have been in the context of the 2021 plan and through traditional principles that were given effect in that plan, because again, this is again intensely local appraisal of -- it was an intensely local appraisal of that plan.

JUDGE MANASCO: You can appreciate the concern, though, that if all that's necessary to occur to avoid the additional opportunity district is to redefine the principles, that there never comes a moment where on the state's logic, which we're still in the hypothetical world -- there never comes a moment where the Court can say with force that there has to be an additional opportunity district, because all that's required is for the state to redefine the context every time.

MR. LACOUR: Your Honor, I would dispute that proposition. We couldn't rely on core retention. *Allen* made that clear. So if we said the new context is core retention, it is our number one priority, that would do us no good in a future challenge. But what we did rely on are those three principles that the Court has said are things that states can do and have always done.

JUDGE MANASCO: But for example, SB-5 pays attention

to the Wiregrass. We weren't talking about the Wiregrass in January of 2022.

Is there a point at which the context becomes somewhat fixed? We have a census every ten years. So the numerical features that -- the numerical demographics that we're dealing with are fixed at that point in time.

But is there some point -- does the state acknowledge any point during the ten-year cycle where the ability to redefine the principles cuts off and the Court's ability to order an additional opportunity district attaches?

MR. LACOUR: Your Honor, I think it sounds a lot like a preclearance regime, which I don't think Section 2 --

JUDGE MANASCO: No. In this world, we've made a liability finding. It's not -- I mean, it's not preclearance. There's been a liability finding as to HB-1.

I take it you are urging us to make a liability finding before we do anything, if we do, do anything with respect to HB-5.

My question is: If we have to make the liability finding every time and you say that until we make the liability finding we can never comment on the appropriate remedy because the context can be redefined, when in the cycle does the loop cut off?

MR. LACOUR: Your Honor, there are obviously timing issues that we discussed earlier today. If you find that there

is a problem with this map that it likely violates Section 2, as well, then our time has run out, and we will have a court drawn map for the 2024 election barring appellate review.

But so I think that would address that concern. But -- and this is how federal courts work when it comes to any law that is challenged and is enjoined. If the new law that is enacted that repeals the law whether it's dealing with the First Amendment concern or dealing with -- with any other area of the law that is touched with potential federal interest, it's incumbent on the plaintiff to show that the new law is also violative of federal law.

And if the new law looks identical or very, very close to the old law, that's an easy showing to make, the problem for the plaintiffs here is this is not the same map. This is --

JUDGE MANASCO: Let me ask it I guess a little more finely. With respect to HB-1 when we made the liability finding, is it the state's position that at that time this Court had no authority to comment on what the appropriate remedy would be because at that time the Legislature was free to redefine traditional districting principles?

MR. LACOUR: Of course, the Court could comment on it. And I think had the Legislature failed in its attempt to draw a new map, then we would have moved to a pure remedial proceeding, as Judge Marcus recognized on page 155 of Doc 172 in the Milligan case. But the Legislature did succeed in

passing a new map that comports with Section 2.

JUDGE MANASCO: I guess that brings me back to my original question. The Legislature has drawn a new map. So what was the import according to the state of the original comment about the additional opportunity district?

MR. LACOUR: I think let the Legislature know that if they were going forward with the exact same principles as they went forward with in 2021, which was refine splitting communities of interest, refine drawing really non-compact districts that might be harder to represent, then you are going to have to apply that in a way that ensures that there's not a dispersate effect on the minority population, which is going to require two majority black districts or something close to it. But I don't think we were locked in forever sticking with non-compact districts or sticking with an approach that violates or breaks up communities of interest.

Now, we couldn't say it's really important to keep together these communities of interest while splitting the Black Belt. I think that much was made clear by this Court and the Supreme Court. That's why we have a plan now that does better on the Black Belt than every single one of the plaintiffs' 11 plans. So now they are here asking you to split the Black Belt in order to hit racial goals. And the Supreme Court made clear that is unlawful, and it is unconstitutional.

JUDGE MANASCO: Let me ask you one more question about

the legislative findings with respect to SB-5.

Should Representative Pringle's testimony about his understanding and knowledge of the findings play any role in the amount of weight that we assign them?

MR. LACOUR: Your Honor, I don't think so for at least two reasons. One is he is one of 140 members of the Legislature. The Governor also had these in front of her when she signed the law.

Second is there's a presumption of regularity that attaches to any legislative enactment whether that's a congressional enactment or Legislature's enactment.

And then third, the findings essentially are describing the map. You can look at the map yourself, though, and you can see what the priorities are in that map when it comes to compactness, when it comes to county lines, and when it comes to parts of the state that were kept together.

So what really matters is how the principles were embodied in the plan and...

JUDGE MANASCO: So is there any impact to the state's defense of the map, SB-5, if we set the findings aside?

MR. LACOUR: Your Honor, we think we would still prevail. But at the same time, you do have an act of the Legislature that does define communities of interest in a way that is consonant with other evidence that's in the record.

Even Joseph Bagley in his report notes that multiple

historians have defined the Wiregrass to include the nine counties that the Legislature included in those legislative findings.

So I do think it's somewhat troubling for a federal court to say that they know Alabama's communities of interest better than Alabama's representatives know them.

But we don't need the findings to win. And we have got evidence to back up what was done in the 2023 map. So either way, plaintiffs' maps -- plaintiffs' maps would require us to violate traditional principles.

And keep in mind as well, even on those objective factors of compactness and county splits, the 2023 plan is more compact or splits fewer counties or both than every one of the 11 illustrative plans. So if you are just looking at those two factors alone, you are going to be forcing the state to adopt either a less compact plan, a plan that does not respect county lines as well as the 2023 plan, or a plan that fails on both of those metrics all again in service of forcing proportionality. And again, that is unlawful.

JUDGE MOORER: So, Mr. LaCour, what I hear you saying is the state of Alabama deliberately chose to disregard our instructions to draw two majority-black districts or one where minority candidates could be chosen.

MR. LACOUR: Your Honor, it's our position that the Legislature --

JUDGE MOORER: I am not asking you your position. Did they or did they not? Did they disregard it? Did they deliberately disregard it or not?

MR. LACOUR: Your Honor, District 2 I submit is as close as you are going to get to a second majority-black district without violating *Allen* -- the Supreme Court's decision in *Allen*, which is the supreme law of the land when it comes to interpreting Section 2. So I think this is as close as you could get without violating the Constitution, without violating *Allen vs. Milligan*. So I do think --

JUDGE MOORER: In the view of the state?

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: Let me ask the question one more time. Can you draw a map that maintains three communities of interest, splits six or fewer counties, but that most likely if not almost certainly fails to create an opportunity district and still comply with Section 2?

MR. LACOUR: Yes. Absolutely.

JUDGE MARCUS: Thank you.

MR. LACOUR: If there are no further questions.

JUDGE MARCUS: No. No. You have got time left which you may or may not use.

MR. LACOUR: I will just say that keep in mind again this Court found that the Black Belt was a substantial community of interest of great significance. Plaintiffs are

here now asking you to split the Black Belt among three or mother districts in service of racial proportionality. But the plaintiffs got it right the first time in their brief to the Supreme Court. Section 2 never requires that result. And for that reason, plaintiffs' challenge fails.

JUDGE MARCUS: Thank you very much.

I take it no one else has anything else to present to us in these proceedings. Mr. Ross?

MR. ROSS: I had a few words to respond, but I am happy to defer to Your Honor.

JUDGE MARCUS: Thank you. Did you have anything else to present by way --

MR. ROSS: No. Just argument, Your Honor.

JUDGE MARCUS: Ms. Khanna?

MS. KHANNA: No, Your Honor. I had a question, but no further evidence or anything.

JUDGE MARCUS: And, Mr. LaCour?

MR. LACOUR: That is all from us, Your Honor.

JUDGE MARCUS: All right. Your question, Ms. Khanna?

MS. KHANNA: This is at the risk of seeking out another clarification. I heard from Mr. LaCour just now he said, and I will quote from the transcript, Your Honor, there are obviously timing issues that we discussed earlier today. If you find that there is a problem with this map, that it likely violates Section 2, as well, then our time has run out,

and we will have a court drawn map for the 2024 election barring appellate review.

And I just wanted to seek some clarification if the state is able to provide about does that -- does that mean that we will not find ourselves in the same loop we found ourselves last time where the state might seek to stay any ruling in plaintiffs' favor to ensure that there's not a remedy in time for 2024, or are we all agreed among the things that are not in dispute is that there will be something in time for 2024 if this Court finds it is warranted?

JUDGE MARCUS: Did you want to respond, Mr. LaCour?

MR. LACOUR: Yes. We are not waiving the right to seek a stay on appeal or to seek appellate review. Our position is simply that if there's an order because that October 1st deadline that has been put forward by the Secretary of State, that --

JUDGE MARCUS: Of course, the Secretary of State, if my recollection is correct, put it in two slightly different iterations. At one point, he said early October. And at another point, he said the first. So I don't -- but I think the thrust of it is essentially the same.

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: That would be correct, would it not?

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: Okay.

MR. LACOUR: So we are not waiving the right to seek any sort of appellate review if need be, including stay application. We're simply making the point however that if this order -- if there is a preliminary injunction and it does go into effect, and it is not stayed, because of the time constraints with that October deadline as it currently stands, as a practical matter, I cannot see the Legislature coming back into session enacting another 2023 plan. So they have taken their shot under the current timing -- in light of the current timing restraints. That's the only point I was making.

JUDGE MARCUS: Thanks very much.

Thank you all for your efforts. We will adjourn in a moment.

We wanted to set a deadline for filing post findings of fact and conclusions of law. And we will direct the parties to submit proposed findings of fact and conclusions of law no later than 8:00 a.m. this Saturday, which is the 19th of August.

Let me ask my colleagues whether they had anything else they wanted to address.

Judge Manasco?

JUDGE MANASCO: Nothing from me.

JUDGE MARCUS: Judge Moorer?

JUDGE MOORER: No, sir.

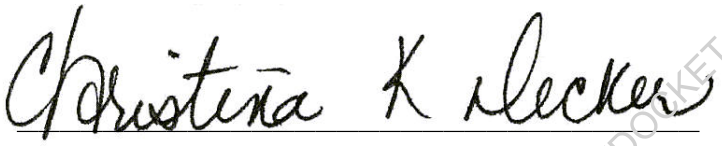
JUDGE MARCUS: This Court is adjourned.

Thank you all for your efforts.

(Whereupon, the above proceedings were concluded at 2:36 p.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.



08-14-2023

Christina K. Decker, RMR, CRR — Date

Federal Official Court Reporter

ACCR#: 255

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARCUS CASTER, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No.: 2:21-cv-1536-AMM**
	)	
WES ALLEN, *in his official capacity as Alabama Secretary of State*, *et al.*,	)	
	)	
	)	
Defendants.	)	

ORDER

This congressional redistricting case is before the court on a stay motion filed by Alabama Secretary of State Wes Allen, *Caster* Doc. 226; responses filed by the *Caster* Plaintiffs and the Plaintiffs in the related cases, *Caster* Doc. 235, *Milligan* Docs. 285, 287; and a reply filed by the Secretary, *Caster* Doc. 237.[1] For all the reasons explained in the order denying Secretary Allen's Emergency Motion for

[1] This case is one of three cases currently pending in the Northern District of Alabama that challenge Alabama's congressional electoral map. The other two cases are *Singleton v. Allen*, Case No. 2:21-cv-1291-AMM, and *Milligan v. Allen*, Case No. 2:21-cv-1530-AMM. *Singleton* and *Milligan* are pending before a three-judge court that includes the undersigned judge. All parties agreed during preliminary injunction proceedings that any evidence admitted in one case could be used in any of the three cases unless counsel raised a specific objection. *See Singleton* Doc. 72-1; *Caster* Doc. 74; Dec. 20, 2021 Tr. 14–17; Jan. 4, 2022 Tr. 29; *Milligan* Doc. 203 at 5–6; *Milligan* Doc. 272 at 26; *Caster* Doc. 182 at 5–6; Aug 14, 2023 Tr. 61. Accordingly, the court considered evidence adduced in all three cases.

Stay Pending Appeal in *Singleton* and *Milligan*, *see Milligan* Doc. 289, which order is attached hereto as Appendix A, the Secretary's motion is **DENIED**.

DONE and **ORDERED** this 11th day of September, 2023.

ANNA M. MANASCO
UNITED STATES DISTRICT JUDGE

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BOBBY SINGLETON, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No.: 2:21-cv-1291-AMM**
	)	
WES ALLEN, *in his official capacity as Alabama Secretary of State*, *et al.*,	)	**THREE-JUDGE COURT**
	)	
Defendants.	)	

EVAN MILLIGAN, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No.: 2:21-cv-1530-AMM**
	)	
WES ALLEN, *in his official capacity as Alabama Secretary of State*, *et al.*,	)	**THREE-JUDGE COURT**
	)	
Defendants.	)	

Before MARCUS, Circuit Judge, MANASCO and MOORER, District Judges.

PER CURIAM:

ORDER DENYING SECRETARY ALLEN'S EMERGENCY MOTION FOR STAY PENDING APPEAL

These congressional redistricting cases are before this Court on a stay motion filed by Alabama Secretary of State Wes Allen ("the Secretary"). *Milligan* Doc. 276.

I. PROCEDURAL POSTURE

These cases returned to this Court on June 8, 2023, after the Supreme Court affirmed a preliminary injunction we entered on January 24, 2022, that enjoined the Secretary from using Alabama's congressional districting plan ("the 2021 Plan"). *See Allen v. Milligan*, 143 S. Ct. 1487, 1498, 1502 (2023).

We immediately set a status conference. *Milligan* Doc. 165. Before the conference, the Secretary and the two legislative defendants (the co-chairs of the Alabama Legislature's Committee on Reapportionment, or "the Legislators") advised us that "the . . . Legislature intend[ed] to enact a new congressional redistricting plan that will repeal and replace the 2021 Plan" and requested that we delay remedial proceedings until July 21, 2023. *Milligan* Doc. 166 at 2. We delayed those proceedings until July 21, 2023, to accommodate the Legislature's efforts; entered a briefing schedule for any objections if the Legislature enacted a new map; and alerted the parties that if a remedial hearing became necessary, it would commence on the date they suggested: August 14, 2023. *Milligan* Doc. 168 at 4–6.

A special session of the Legislature commenced on July 17, 2023. *See Milligan* Doc. 173-1. On July 20, 2023, the Alabama House of Representatives passed a congressional districting plan titled the "Community of Interest Plan." *Milligan* Doc. 251 ¶¶ 16, 22. That same day, the Alabama Senate passed a different plan, titled the "Opportunity Plan." *Id.* ¶¶ 19, 22. The next day, a six-person

bicameral Conference Committee passed the 2023 Plan, which was a modified version of the Opportunity Plan. *Id.* ¶ 23. Later that day, the Legislature enacted the 2023 Plan and Governor Ivey signed it into law. *Milligan* Doc. 186; *Milligan* Doc. 251 ¶ 26; Ala. Code § 17-14-70. The 2023 Plan, like the 2021 Plan enjoined by this Court, has only one district that is majority-Black or Black-opportunity. *Compare Milligan* Doc. 186-1 at 2, *with Milligan* Doc. 107 at 2–3.

On July 26, 2023, the parties jointly proposed a scheduling order for remedial proceedings. *Milligan* Doc. 193. We adopted it. *Milligan* Doc. 194. Each set of Plaintiffs timely objected to the 2023 Plan. *Singleton* Doc. 147; *Milligan* Doc. 200; *Caster* Doc. 179. We held another conference on July 31, 2023 and set a remedial hearing in *Milligan* and *Caster* for August 14, 2023. *See Milligan* Doc. 194 at 3.

Before the remedial hearing, the parties filed motions, briefs, expert materials, depositions, other evidence, and fact stipulations. *See Milligan* Doc. 272 at 64–102. We held the remedial hearing on August 14 and received most exhibits into evidence. *See id.* at 195–97 (evidentiary rulings).

Based on the substantial record before us, on September 5, 2023, we enjoined the 2023 Plan on the ground that it failed to remedy the vote dilution we found (and the Supreme Court affirmed) in the 2021 Plan, and in the alternative on the ground that even if we were to conduct our analysis under *Thornburg v. Gingles*, 478 U.S. 30 (1986), from the ground up, the 2023 Plan still likely violates Section Two

because it dilutes the votes of Black Alabamians. *Milligan* Doc. 272. By separate order, we instructed the Special Master, cartographer, and Special Master's counsel we previously appointed to commence work on a remedial map. *Milligan* Doc. 273. We set a deadline of September 25, 2023, for a Report and Recommendation from the Special Master and his team to recommend three remedial maps. *See id.* at 7.

Later in the day on September 5, 2023, the Secretary — but not the Legislators — appealed our ruling and filed this "emergency" stay motion. *Milligan* Doc. 274; *Milligan* Doc. 275; *Milligan* Doc. 276.

In the motion, the Secretary advised us that regardless of whether we had yet ruled, he would seek a stay in the Supreme Court on September 7, 2023. *Milligan* Doc 276 at 1. We directed the Plaintiffs to respond not later than 10:00 am CDT on September 8, 2023, and they did. *Milligan* Docs. 285, 287; *Caster* Doc. 235. Later on September 8, 2023, the Secretary filed a reply. *Milligan* Doc. 288.

II. STANDARD OF REVIEW

"A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks and citations omitted). The Secretary bears the burden of establishing that "circumstances justify an exercise of th[e court's] discretion." *Id.* at 433–34. A stay pending appeal is "extraordinary relief" and it requires the moving

party to satisfy a "heavy burden." *Winston–Salem/Forsyth Cnty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, C.J., in chambers).

Under controlling precedent, we consider four factors to determine whether we should exercise our discretion to stay these cases pending the Secretary's appeal: (1) whether the Secretary "has made a strong showing that he is likely to succeed on the merits; (2) whether the [Secretary] will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 425–26 (citation omitted).

III. ANALYSIS

We have said before that "this is a straightforward Section Two case, not a legal unicorn." *Milligan* Doc. 120 at 3. This case remains straightforward. We are aware, however, of no other case — and the Secretary does not direct us to one — in which a state legislature, faced with a federal court order declaring that its electoral plan unlawfully dilutes minority votes and requiring a plan that provides an additional opportunity district, responded with a plan that the state concedes does not provide that district. Likewise, it is exceptionally unusual for a litigant who has presented his arguments to the Supreme Court once already — and lost — to assert that he is now "overwhelmingly likely" to prevail on those same arguments in that Court in this case. Like our first injunction, our second injunction rests on an

exhaustive application of settled law to a robust evidentiary record that includes extensive fact stipulations.

As an initial matter, there is no emergency. When these cases returned to us from the Supreme Court, we immediately set a status conference. At the Secretary's request, we then delayed remedial proceedings for approximately five weeks to accommodate the Legislature's efforts to enact a remedial map. And we entered the scheduling order that the parties, including the Secretary, jointly proposed. After the remedial hearing, we conducted not only the remedial analysis requested by the Plaintiffs, but also the full *Gingles* analysis requested by the Secretary. We ruled expeditiously, weeks in advance of the early October deadline that the Secretary twice told us he needed to make. We have eleven illustrative maps in hand already, and the Special Master and his team are hard at work to recommend a lawful map for us to order the Secretary to use on the timetable that he set. In our view, these proceedings are running on precisely the schedule agreed upon by all parties.

In any event, we find that every factor we must consider strongly counsels against entering a stay pending appeal. We discuss each factor in turn.

A. The Secretary failed to show a strong likelihood that he will prevail on the merits of his appeal.

We find that the Secretary failed to show a strong likelihood that he will succeed on the merits of his appeal. The Secretary has not even attempted to make the strong showing that the law requires. The Secretary's assertion that he is

"overwhelmingly" likely to prevail on appeal is as bare as it is bold: it comprises only three sentences crafted at the highest level of abstraction with virtually no citations. *See Milligan* Doc. 276 at 4. The Secretary simply says that his arguments were set forth in his earlier brief. *Id*. But that brief came before we entered our injunction on September 5, so it does not engage, let alone rebut, any of our findings of fact or conclusions of law. Quite simply, the brief does not help us understand why the Secretary believes he will prevail on a clear-error review of our findings.

In one of the three sentences, the Secretary asserted that he "has fundamental disagreements with" our conclusions, but he did not identify any fact or rule of law that he says we misapprehended, misapplied, or otherwise misjudged. *Id*. We consumed more than 200 pages trying to consider every argument the Secretary made about the 2023 Plan, and the Secretary has not pointed us to a single specific error or omission. If it were enough for a stay applicant merely to assert a "fundamental disagreement" with an injunction, stay motions would be routinely (perhaps invariably) granted. That is not the rule. The Secretary's assertions are too general, too conclusory, and too bare to carry his heavy burden to establish a strong likelihood that he will prevail on appeal.

In any event, we find that the Secretary is likely to lose on appeal. The Secretary has lost three times already, and one of those losses occurred on appeal. *See Milligan* Docs. 107, 272; *Allen*, 143 S. Ct. at 1498, 1502. We have twice

enjoined a plan that includes only one majority-Black or Black-opportunity district on the ground that it likely dilutes the votes of Black Alabamians in violation of Section Two of the Voting Rights Act. Our second injunction, like the first, rests on undisputed facts, extensive evidence, and settled law. *See Milligan* Doc. 107 at 139–225; *Milligan* Doc. 272 at 134–96. Most notably, the Secretary stipulated to the critical facts about intensely racially polarized voting in Alabama. *See Milligan* Doc. 272 at 89–92; 178; Aug. 14 Tr. 64–65.

The legal basis for our analysis is not novel. We applied the same standard that federal courts have routinely applied for forty years, since Section Two was amended in 1982. *See generally Allen*, 143 S. Ct. at 1499–1501 (explaining Voting Rights Act jurisprudence, 1982 statutory amendments, and *Gingles*). As the Supreme Court explained in this case, "*Gingles* effectuates the delicate legislative bargain that § 2 embodies. And statutory *stare decisis* counsels strongly in favor of not 'undo[ing] . . . the compromise that was reached between the House and Senate when § 2 was amended in 1982.'" *Allen*, 143 S. Ct. at 1515 n.10 (quoting *Brnovich* v. *Democratic Nat'l Comm.*, 141 S.Ct. 2321, 2341 (2021)).

And the evidentiary basis for our analysis is not slender. The injunction the Secretary asks us to stay rests on not one, but **four** evidentiary records: the records developed in *Milligan* and *Caster* before our first injunction, and the records developed in both cases before our second injunction. We have reviewed thousands

of pages of briefing, hundreds of exhibits, numerous expert reports (including rebuttal and supplemental reports), and extensive fact stipulations, and we have the benefit of nine total days of hearings and able argument by dozens of lawyers.

After conducting the legal analysis that controlling precedent requires, we did not regard the dispositive question underlying either injunction as a close call. *See Milligan* Doc. 107 at 195–96; *Milligan* Doc. 272 at 8, 46, 52–53, 134–39.

Because of the exceptional public importance of the Plaintiffs' claim that the Alabama Legislature diluted the franchise for Black Alabamians, we have again carefully revisited each finding of fact and conclusion of law with fresh eyes. We see no basis to depart from our original analysis, nor to delay relief. We reconsider each of the Secretary's main arguments: (1) that the 2023 Plan remedied the likely Section Two violation we found in the 2021 Plan because it better respects certain traditional districting criteria — namely, compactness, communities of interest, and county splits, and (2) that the Plaintiffs have failed to establish that the 2023 Plan likely violates Section Two because race predominated in the drawing of their illustrative maps.

We again reject the Secretary's argument that the 2023 Plan remedied the vote dilution we found because it outperforms the 2021 Plan and the Plaintiffs' eleven illustrative maps with respect to compactness, communities of interest in the Black Belt, Gulf Coast, and Wiregrass, and county splits. This is for three separate and

independent reasons. *First,* as we explained in the injunction the Secretary asks us to stay, how the 2023 Plan performs on select traditional districting criteria was not relevant to the question we were required to answer in the remedial stage of this litigation: does the 2023 Plan "completely correct[]—rather than perpetuate[]—the defects that rendered the [2021 Plan] . . . unlawful." *Covington v. North Carolina*, 283 F. Supp. 3d 410, 431 (M.D.N.C.), *aff'd in relevant part*, *rev'd in part*, 138 S. Ct. 2548 (2018). Because the original Section Two violation that we found was the dilution of Black votes, the question was whether the 2023 Plan cures that dilution by creating an additional district in which Black voters have a fair and reasonable opportunity to elect a candidate of their choice. *Milligan* Doc. 272 at 113–17.

The Secretary conceded the answer: the 2023 Plan does not include an additional opportunity district. *See Milligan* Doc. 251 ¶¶ 5–9; Aug. 14 Tr. 163–64. The stipulated evidence fully supports his concession. District 2 has the second-highest Black voting-age population in the 2023 Plan. Based on (1) the undisputed expert opinions offered by the *Milligan* and *Caster* Plaintiffs, and (2) the Legislature's own performance analysis, the parties stipulated that in District 2 in the 2023 Plan, white-preferred candidates have "almost always defeated Black-preferred candidates." *Milligan* Doc. 251 ¶ 5; *see also Milligan* Docs. 200-2, 200-3; *Caster* Doc. 179-2. In the face of intense racial polarization, the 2023 Plan provides no greater opportunity for Black Alabamians to elect a candidate of their choice than

the 2021 Plan provided. Nothing about the Secretary's evidence on traditional districting criteria changes this fatal flaw in the 2023 Plan.

Second, as we explained when we enjoined the 2023 Plan, even assuming that the Secretary's evidence about traditional districting criteria were relevant to the question before us — *i.e.*, that we were required at the remedial stage to relitigate *Gingles* I from the ground up to determine whether the Plaintiffs have established that it is possible based on the size and shape of the Black population in Alabama to create a reasonably configured second majority-Black district — the Plaintiffs are not required to produce a plan that "meets or beats" the 2023 Plan on any particular traditional districting criteria to satisfy *Gingles* I.

As we explained and the Supreme Court affirmed, we do "not have to conduct a beauty contest between plaintiffs' maps and the State's." *Allen*, 143 S. Ct. at 1505 (internal quotation marks omitted) (alterations accepted); *see also Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion) ("A § 2 district that is reasonably compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries" is not required "to defeat rival compact districts designed by [the State] in endless 'beauty contests.'"). The Secretary cannot avoid Section Two liability merely by devising a plan that excels at the traditional criteria the Legislature deems most pertinent.

Put differently, the State cannot avoid the mandate of Section Two by

improving its map on metrics other than compliance with Section Two. Otherwise, it could forever escape correcting a Section Two violation by making each remedial map slightly more compact, or slightly better for some communities of interest, than the predecessor map.

Indeed, in the injunction the Secretary asks us to stay, we explained at length why we rejected as irreconcilable with the text of Section Two his position that communities of interest can operate as a trump card to override the requirement to comply with Section Two. *Milligan* Doc. 272 at 169–73. Section Two directs our attention to the "totality of circumstances," and it does not mention, let alone elevate or emphasize, communities of interest as a particular circumstance. *See* 52 U.S.C. § 10301(b). Consistent with this direction, nothing in our ruling or the Supreme Court's affirmance suggests that a remedial plan would cure racially discriminatory vote dilution if only the evidence were better on the Gulf Coast and the Black Belt were not split quite so much.

Under controlling precedent, the Plaintiffs' burden under *Gingles* I is to establish that the Black population in Alabama is "sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district." *Cooper v. Harris*, 581 U.S. 285, 301 (2017) (internal quotation marks omitted). We have twice found and the Supreme Court has once affirmed that it is. The Secretary has offered no evidence that either the size or the geographic

concentration of the Black population in Alabama has meaningfully changed — or changed at all — between when we made our finding in 2021 and now.

Third, as we explained in our preliminary injunction, even if we were to apply the Secretary's "meet or beat" requirement and conduct a beauty contest, at least some of the Plaintiffs' illustrative maps perform as well as the 2023 Plan on the traditional districting criteria the Secretary prefers. As for communities of interest — which are at the heart of the State's assertion that the 2023 Plan moved the needle on *Gingles* I — we explained that although the evidence about the Gulf Coast is more substantial now than it was before, it is still considerably weaker than the record on the Black Belt, which rests on extensive stipulated facts and includes extensive expert testimony, and which spanned a substantial range of demographic, cultural, historical, and political issues. *See Milligan* Doc. 272 at 156–61. We found that the new evidence about the Gulf Coast does not establish that the Gulf Coast is the community of interest of primary importance, nor that the Gulf Coast is more important than the Black Belt, nor that there can be no legitimate reason to separate Mobile and Baldwin Counties. We pointed out in both of our preliminary injunction orders that the Legislature has repeatedly split Mobile and Baldwin Counties in creating maps for the State Board of Education districts in Alabama, and the Legislature did so at the same time it drew the 2021 Plan. *Milligan* Doc. 272 at 38, 50, 96, 164; *Milligan* Doc. 107 at 171 (citing *Caster* Doc. 48 ¶¶ 32–41).

Put simply, we found that the new evidence about the Gulf Coast does not establish that separating the Gulf Coast to avoid diluting Black votes in the Black Belt violates, sacrifices, or otherwise transgresses traditional districting principles. *Milligan* Doc. 272 at 156–167. At most, the Secretary's new evidence on the Gulf Coast may show that the Black Belt and the Gulf Coast are geographically overlapping communities of interest that are not airtight and tend to pull in different directions. At best then, the Secretary has established that there are two relevant communities of interest and the Plaintiffs' illustrative maps and the 2023 Plan each preserve a different community, suggesting a wash on this metric: "[t]here would be a split community of interest in both." *Allen*, 143 S. Ct. at 1505. Thus, positing that there are two communities of interest does not undermine our determination that the Plaintiffs' eleven illustrative maps are reasonably configured and altogether consonant with traditional districting criteria.

Further, we found that the Secretary's limited evidence offered about the community of interest in the Wiregrass does not move the needle. *Milligan* Doc. 272 at 167–68. The basis for a community of interest in the Wiregrass is rural geography, a university (Troy), and a military installation (Fort Novosel). These few commonalities do not remotely approach the hundreds of years of shared and very similar demographic, cultural, historical, and political experiences of Alabamians living in the Black Belt. And they are considerably weaker than the common coastal

influence and historical traditions for Alabamians living in the Gulf Coast. Moreover, there is substantial overlap between the Black Belt and the Wiregrass. Three of the nine Wiregrass Counties (Barbour, Crenshaw, and Pike) are also in the Black Belt. Accordingly, any districting plan must make tradeoffs with these communities to meet equal population and contiguity requirements.

As for county splits, we found that the Secretary failed to establish that the 2023 Plan respects county lines better than all the Plaintiffs' illustrative plans. *Id.* at 173–77. Based on the report of the Defendants' own expert, six of the illustrative maps split the same number of counties as the 2023 Plan and satisfy the six-split ceiling the Legislature imposed: Cooper Plans 1, 3, 4, 5, and 7, and Duchin Plan D. *Id.* at 173–75. One of these plans, Cooper 7, performs better than the 2023 Plan by splitting only five counties.

And we found that the Secretary had also failed to establish that the 2023 Plan performed better with regard to geographic compactness. As an initial matter, we noted that the Secretary had not introduced any evidence undermining Dr. Duchin and Mr. Cooper's testimony that the compactness scores of the districts in their illustrative plans are reasonable. *Id.* at 150. Because that testimony was not relative — it opined about the Duchin plans and Cooper plans standing alone, not compared to any other plan — we noted that the enactment of a new plan did not affect it. *Id.* Nor did Mr. Trende's opinion, which, like Mr. Thomas Bryan's opinion before,

"offer[ed] no opinion on what is reasonable or what is not reasonable in terms of compactness." *Id.* at 151. Further, when we examined the relative compactness of the districts in the Duchin plans and the Cooper plans compared to that of the districts in the 2023 Plan, the result remained the same. *Id.* Mr. Trende acknowledged that Duchin Plan B outperformed the 2023 Plan on key compactness metrics, including average Polsby-Popper and cut edges, and did not opine that any of the Duchin plans or Cooper plans that received lower statistical scores received scores that were unreasonably lower or unreasonable. *Id.* at 151–52.

For all these reasons, we again found that the Plaintiffs had established that an additional Black-opportunity district can be reasonably configured without violating traditional districting principles relating to communities of interest, county splits, and compactness. Our finding does not run afoul of the Supreme Court's caution that Section Two never requires the adoption of districts that violate traditional districting principles; it simply finds that the Plaintiffs' plans do not violate traditional districting principles.

We next turn to the Secretary's argument that race predominated in the drawing of the Plaintiffs' eleven illustrative maps. We and the Supreme Court already concluded that it did not. *See Milligan* Doc. 272 at 144–46. Our earlier preliminary injunction would not have been affirmed if there were an open question whether race played an improper role in the preparation of all of the Plaintiffs'

illustrative plans. The State already has presented this argument to the Supreme Court and lost.

In these remedial proceedings, the only new support the Secretary offered for this argument is an unsworn expert report from Mr. Bryan. In our first preliminary injunction, we "assign[ed] very little weight to Mr. Bryan's testimony" and detailed at great length the reasons why we found it unreliable. *Milligan* Doc. 107 at 152–56. We found his written proffer unreliable in the remedial phase and we refused to admit it. *Milligan* Doc. 272 at 141–46. We explained, among other things, that Mr. Bryan does not connect his *ipse dixit* opinion about race predominance to the "geographic splits" methodology that he used, or even explain why an evaluation of race predominance should be based on "geographic splits analysis." *See Milligan* Doc. 220-10 at 22–26. Instead, Mr. Bryan simply presents the results of his geographic splits analysis and then states in one sentence a cursory conclusion about race predominance. *Id.* We also found his report unhelpful because it opines about a plan that the Plaintiffs suggested to the Legislature but have not offered in this litigation, and we have no need for that opinion. *Milligan* Doc. 272 at 145–46.

We also rejected the Secretary's new argument that the *Milligan* and *Caster* Plaintiffs' interpretation of Section Two would require affirmative action in redistricting. *Milligan* Doc. 272 at 185–88. As an initial matter, it is premature, speculative, and entirely unfounded for him to assail any plan we might order as a

remedy as "violat[ing] the 2023 Plan's traditional redistricting principles in favor of race" because we have not yet adopted a remedial plan. *Milligan* Doc. 220 at 59. The Special Master has only just begun his work, we directly instructed him that any proposed plan he submits must "[c]omply with the U.S. Constitution and the Voting Rights Act," and we will carefully review any plan he recommends to ensure that this requirement is met. *Milligan* Doc. 273 at 7.

Beyond that, we also rejected the faulty premise that by accepting the Plaintiffs' illustrative plans for *Gingles* purposes, we improperly held that the Plaintiffs are entitled to "proportional . . . racial representation in Congress." *Milligan* Doc. 107 at 195 (internal quotation marks omitted); *accord Milligan* Doc. 272 at 128–29; 186–87. This faulty premise is the reason why affirmative action cases, like the *Harvard* case the State relies on, 143 S. Ct. 2141, are fundamentally different from this case. Section Two expressly disclaims any "right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b). And "properly applied, the *Gingles* framework itself imposes meaningful constraints on proportionality, as [Supreme Court] decisions have frequently demonstrated." *Allen*, 143 S. Ct. at 1508; *see also id.* at 1518 (Kavanaugh, J., concurring).

Unlike the affirmative action programs the Supreme Court struck down in *Harvard*, 143 S. Ct. 2141, which were expressly aimed at achieving balanced racial

outcomes in the makeup of the university student bodies, the Voting Rights Act guarantees only "equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994). The Voting Rights Act does not provide a leg up for Black voters — it merely prevents them from being kept down with regard to what is arguably the most "fundamental political right," in that it is "preservative of all rights" — the right to vote. *Democratic Exec. Comm. Of Fla. v. Lee*, 915 F.3d 1312, 1315 (11th Cir. 2019). For all these reasons, we again find that the Secretary is unlikely to prevail on his argument about race predominance.

B. The issuance of a stay will substantially injure the other parties in these proceedings — for the second time in this census cycle.

We further find that the issuance of a stay would substantially injure the other parties in these proceedings. In the injunction the Secretary asks us to stay, we found that the Plaintiffs will suffer irreparable harm if they must vote in the 2024 election based on a likely unlawful redistricting plan. *Milligan* Doc. 272 at 188–90. In his stay motion, the Secretary does not mention, let alone rebut, this finding. The Secretary does not even acknowledge the injury Plaintiffs will suffer from a stay.

"Courts routinely deem restrictions on fundamental voting rights irreparable injury. And discriminatory voting procedures in particular are the kind of serious violation of the Constitution and the Voting Rights Act for which courts have granted immediate relief." *League of Women Voters of N.C. v. North Carolina*, 769

F.3d 224, 247 (4th Cir. 2014) (internal quotation marks omitted) (citing *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012); *Alt. Political Parties v. Hooks*, 121 F.3d 876 (3d Cir. 1997); and *Williams v. Salerno*, 792 F.2d 323 (2d Cir. 1986)) (quoting *United States v. City of Cambridge*, 799 F.2d 137, 140 (4th Cir. 1986)).

"Voting is the beating heart of democracy." *Lee*, 915 F.3d at 1315. "And once the election occurs, there can be no do-over and no redress" for voters whose rights were violated. *League of Women Voters of N.C.*, 769 F.3d at 247.

The Plaintiffs already suffered irreparable injury once in this ten-year census cycle, when they voted under the unlawful 2021 Plan in 2022. The Secretary has made no argument that if the Plaintiffs were again required to cast votes in 2024 under an unlawful districting plan, that injury would not be irreparable. Accordingly, we find that the Plaintiffs will suffer irreparable harm absent injunctive relief.

Absent relief now, the Plaintiffs will suffer this irreparable injury until at least 2026, which is more than halfway through this census cycle. The Secretary offers no reason, let alone a compelling one, why Alabamians should have to wait that long to vote under a lawful congressional districting map. *See Milligan* Doc. 276. Having prevailed at every turn so far, the Plaintiffs are entitled to relief. Having lost at every turn so far, the Secretary cannot support a demand that Alabamians again cast their votes under an unlawful map while he tries for the fourth time to prevail.

C. The absence of a stay will not irreparably harm the Secretary.

We also find that the absence of a stay will not harm, let alone irreparably harm, the Secretary or the State of Alabama. The Secretary asserts that "[a]bsent a stay, the State will be compelled to cede its sovereign redistricting power to the Court so that Alabamians can be segregated into different districts based on race." *Id.* at 4. Every piece of this argument is wrong: we have not compelled the State to "cede" its authority; we have not ordered the State to "segregate" Alabamians; and we have not "segregated" Alabamians. *See id.*

As the Supreme Court has long explained, the State's redistricting power is subject to federal law. *Reynolds v. Sims*, 377 U.S. 533, 554–60 (1964). As the Supreme Court explained in this case, a longstanding federal statute, the Voting Rights Act, requires that the State not dilute the votes of Black Alabamians. *Allen*, 143 S. Ct. at 1502–03. And as we have explained, we have a "duty to cure" districts drawn in violation of federal law through an "orderly process in advance of elections," when the state legislature either won't or can't do so. *Milligan* Doc. 272 at 7 (quoting *Covington*, 138 S. Ct. at 2553).

Almost two years into this litigation, we are confident that neither our injunctions nor the Supreme Court's affirmance amount to an undue intrusion on the State's sovereignty. Nor do we suggest that federal judges know Alabama better than Alabama's elected leaders. It is, however, the ordinary business of an independent

judiciary to carefully apply controlling precedents and duly follow the law as enacted by Congress to ensure that the Secretary administers congressional elections according to a districting plan that does not dilute the votes of Black Alabamians. We reject the Secretary's suggestion that compliance with federal law is an onerous burden that comes at too great a cost to the State.[1]

Moreover, we emphatically reject the Secretary's claim that our order requires the State to "segregate[ ] [Alabamians] into different districts based on race." *Milligan* Doc. 276 at 4. We have rejected that argument twice already, and the Supreme Court has rejected it as well. *Milligan* Doc. 107 at 204–06; *Milligan* Doc. 272 at 185–88; *Allen*, 143 S. Ct. at 1504–06. Federal law has long acknowledged that state legislatures can in theory face "competing hazards of liability" when balancing the requirements of the Voting Rights Act with the requirements of the

[1] The Secretary cites one case in his opening brief, *Abbott v. Perez*, to argue that the harm suffered by a state counsels in favor of a stay. *See* 138 S. Ct. 2305, 2324 (2018). But in that case, the Supreme Court held that Texas' inability to enforce its districting plan would irreparably harm the state **to the extent** the plan was not unlawful. *See id.* ("**Unless that statute is unconstitutional**, th[e district court's injunction] would seriously and irreparably harm the State, and only an interlocutory appeal can protect that State interest." (emphasis added)). The Secretary invokes *Karcher v. Daggett* in his reply brief, *see Milligan* Doc. 288 at 2, but that case similarly held only that the prospect of using a court-ordered map would likely cause the state irreparable harm after Justice Brennan found there was a fair prospect that the Court would conclude that the state's districting plan had not violated the one-person, one-vote rule. *See* 455 U.S. 1303, 1306 (1982) (Brennan, J., in chambers). Here, we have determined that the 2023 Plan likely violates Section Two. The Secretary does not cite a single case in which a court has held that the harm suffered by a state in having to use a court-ordered map counsels in favor of a stay notwithstanding the fact that the state's plan violates (or likely violates) the law.

Constitution, *Abbott*, 138 S. Ct. at 2315 (quoting *Bush,* 517 U.S. at 977 (plurality opinion)), but we and the Supreme Court have explained at great length why those concerns are not borne out on this record in this case, *see Allen*, 143 S. Ct. at 1517.

The Voting Rights Act is a well-established antidiscrimination law. Nothing about our injunction applying it countenances, let alone demands, segregation, racial gerrymandering, or anything else improper. As we have found and the Supreme Court has affirmed, there are at least eleven maps illustrating how the required remedy lawfully can be provided. The Special Master is hard at work to recommend three lawful remedial maps to us. And we have not yet ordered the Secretary to use any specific map, so any suggestion that we are "segregat[ing]" voters based on race is unfounded and premature.

We observe that the Legislators have not appealed our injunction nor asked us for a stay. This detail is not material to our separate and independent rejection of the Secretary's arguments about Alabama's sovereignty, but we cannot help but notice that the Legislators apparently do not share the Secretary's concern about this "emergency." As a practical matter, the Legislators' silence undermines the Secretary's position. It is the Legislature's task to draw districts; the Secretary simply administers elections. As the Legislators explained when they moved to intervene as Defendants in *Singleton* and *Caster*, the Secretary does not represent their interest because "[h]e has no authority to conduct redistricting, and

consequently has no experience in redistricting. His relevant duties are to administer elections." *Singleton* Doc. 25 at 5; *Caster* Doc. 60 at 5. According to the Legislators, "[t]he Legislature, via its Reapportionment Committee, not the Secretary of State, is the real party in interest in this case." *Id.* We do not stake our decision to deny a stay on this observation — we simply explain why we do not assume that the Legislators have any emergent concern that this Court has improperly invaded their domain.

On reply, the Secretary argues that absent a stay, "the State will be precluded from enforcing a statute enacted by representatives of its people," and the "importance of the statutory and constitutional arguments presented by the State" supports a stay. *Milligan* Doc. 288 at 2. These reasons are meritless. We understand that the 2023 Plan is a statute. We concluded that it does not remedy the vote dilution we found and, in any event, likely violates Section Two. Under those circumstances, the Plan's status as a statute is not a reason to stay our injunction. Likewise, we understand the importance of the statutory and constitutional issues in this case. We and the Supreme Court rejected the State's arguments on those issues. Under that circumstance, the importance of the issues is no reason to stay our order.

D. A stay is not in Alabama's public interest.

Finally, we find that the public interest weighs decisively against a stay. We observe that the words "public interest" do not appear in the Secretary's stay motion, other than in his recitation of the applicable legal standard. *Milligan* Doc. 276 at 3.

The Secretary asserts that when the "government is the party opposing the . . . injunction, its interest and harm merge with the public interest." *Swain v. Junior*, 958 F.3d 1081, 1091 (11th Cir. 2020) (citing *Nken*, 556 U.S. at 435). We find that a stay would greatly disserve the public interest. Alabama's interest is in the conduct of lawful congressional elections. We have enjoined the use of the 2023 Plan on the same grounds we enjoined the use of the 2021 Plan, and our first injunction was affirmed in all respects. *See Allen*, 143 S. Ct. at 1487, 1498, 1502. The Plaintiffs — like all Alabamians — already have endured one congressional election in this census cycle that the Secretary administered under an unlawful map. We see no reason to allow that to happen again.

* * *

We repeat that we are deeply troubled that the State enacted a map that the Secretary readily admits does not provide the remedy we said federal law requires. And we are disturbed by the evidence that the State delayed remedial proceedings but did not even nurture the ambition to provide that required remedy. Under these circumstances, we cannot understand why it would be a reasonable exercise of our discretion to order a stay pending the Secretary's second appeal. The law requires the creation of an additional district that affords Black Alabamians, like everyone else, a fair and reasonable opportunity to elect candidates of their choice. Without further delay.

DONE and **ORDERED** this 11th day of September, 2023.

STANLEY MARCUS
UNITED STATES CIRCUIT JUDGE

ANNA M. MANASCO
UNITED STATES DISTRICT JUDGE

TERRY F. MOORER
UNITED STATES DISTRICT JUDGE