No. 21A375

In the Supreme Court of the United States

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

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR ADMINISTRATIVE STAY AND STAY OR INJUNCTIVE RELIEF PENDING APPEAL TO THE SUPREME COURT OF THE UNITED STATES

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REPLY

Imagine the Alabama Legislature had enlisted an expert to help it determine what Section 2 of the Voting Rights Act required and what the Constitution prohibited. Imagine further that the expert used advanced computing technology to generate millions of possible plans, without considering race. The expert even generated possible plans from scratch, without regard to existing district lines, to give the Legislature the full range of neutrally drawn possibilities. Not one of the millions of plans contained two majority-black districts. But the Legislature drew two majority-black districts anyway—an "out-out-outlier" among the millions of randomly drawn maps. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2518 (2019) (Kagan, J., dissenting).

The only inference to be drawn from these hypothetical facts would be that Alabama's black population could not be placed into two "reasonably configured" majority-minority congressional districts. *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017). And the Legislature's hypothetical choice to create two majority-black districts anyway would be the strongest circumstantial evidence that race was—unconstitutionally—"the criterion that … could not be compromised." *Shaw v. Hunt* ("*Shaw II*"), 517 U.S. 899, 907 (1996).

Now consider what actually happened here. Section 2 plaintiffs admit that it is hard to draw two majority-black districts in Alabama, so they must be drawn on purpose by making race a non-negotiable redistricting criterion. Plaintiffs propose eleven illustrative plans, every one of which creates two majority-black districts in exactly the same way: Eliminate a Mobile-anchored district that has existed for

decades and split Gulf-area residents along racial lines, connecting black voters in urban Mobile with black voters in rural counties stretching more than 200 miles to the east.

According to the court below, the Section 2 plaintiffs' eleven illustrative plans (and the State's hypothetical "out-out-outlier" plan) are what the Voting Rights Act requires. As for the millions of race-neutral maps with only one majority-black district, they would all be Voting Rights Act violations. Without a second majority-black district, elections are not "equally open" to black voters, according to the court. Sure, it might be "hard"—if not impossible—"to draw two majority-black districts by" observing only race-neutral districting criteria, but that just "shows the importance" of prioritizing race "on purpose." App.349 (Tr. 685:23-25). If the Voting Rights Act makes race a "nonnegotiable" criterion in redistricting, so be it, reasoned the court. App.57, 204. Or as Plaintiffs say, it's no problem for a plan to prioritize race at step one so long as it is ultimately "consistent with" traditional districting criteria. *See, e.g.*, *Caster* Resp. 16, 23.

A stay, and ultimately reversal, of the district court's order is necessary. Section 2 does not permit—let alone require—that race be prioritized at step one in redistricting. A Section 2 plaintiff cannot presume the answer to the Section 2 question by showing two majority-black districts could be drawn *so long as* one prioritizes race above traditional districting principles. A Section 2 plaintiff must show that two majority-black districts could be *neutrally* drawn. Indeed, it is inconceivable that a Section 2 plaintiff's proposed district could be deemed "reasonably configured" if it could

not be neutrally drawn using only traditional districting principles. *Cooper*, 137 S. Ct. at 1470. Section 2's touchstone is equal opportunity for minority voters, not the sort of race-prioritized "electoral advantage" demanded by the backwards approach here. *See Bartlett v. Strickland*, 556 U.S. 1, 20 (2009). The same VRA that "does not deprive the States of their authority to establish non-discriminatory voting rules," *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2343 (2021), does not *require* States to draw discriminatory district lines.

Nevertheless, the district court presses on. With less than two months to go before absentee voting begins (and critical deadlines before that), the court has begun the process of retaining a special master and a map drawer to create new districts that will divide Alabamians by race. Each day the order remains in effect creates more confusion for voters, candidates, and the election officials trying to ensure a fair and orderly election. The Court should immediately stay the district court's order, consider these redistricting appeals on the merits, and reverse.

ARGUMENT

I. This Court Is Likely To Note Probable Jurisdiction And Reverse The Three-Judge Court.

A. The district court's fundamental error is legal, not factual.

1. This Court can issue a stay based on the lower court's fundamental legal error. Whatever factual errors the court below made,[1] they are well downstream of

[1] To be sure, the State believes the district court clearly erred in several of its factual determinations, any of which could be further briefed on the merits. But the focus of the State's stay motion—aside from whether the court should have entered an injunction on the eve of an election—is the district court's fundamental misunderstanding of Section 2.

the court's fundamental error of law. The district court interpreted Section 2 in a way that will require legislatures to first "prioritize[] race" and—only "[a]fter that"—apply race-neutral traditional districting principles. App.58, 204; *see also* App.149, 151 (experts "prioritized race only to the extent necessary to answer the essential question [of whether it is …] possible to draw a second, reasonably compact majority-Black district," and "did not prioritize it to any greater extent"). The court endorsed a map-drawing process in which Plaintiffs considered traditional districting criteria only "after" two districts hit a target of 50-percent black voting-age population. App.247; App.249-50 ("As soon as [Plaintiffs] determined the answer to [whether BVAP exceeded 50 percent in their proposed majority-minority district], they assigned greater weight to other traditional redistricting criteria."). The court's misconception of Section 2 contravenes this Court's precedents and the Constitution.[2]

Plaintiffs believe that the district court's error is reviewed only for clear error. *Caster* Resp. 14-15; *see also Milligan* Resp. 18. They are wrong. *Cf. Gamble v. United States*, 139 S. Ct. 1960, 1988 (2019) (Thomas, J., concurring) ("Calls for such deference grow loudest when the decision 'at issue is least defensible.'"). While a court's "*finding* of vote dilution" gets deference, legal errors do not. *Thornburg v. Gingles*,

[2] The *Caster* Plaintiffs' description of the error is not quite right. They describe the State as contesting that Plaintiffs "intentionally sought to draw an illustrative district that contained the requisite 'large and geographically compact' minority group rather than stumbling into that showing by accident." *Caster* Resp. 2. The error has nothing to do with what Plaintiffs *intended*. Of course, Plaintiffs *intended* to state a Section 2 claim. The error is what Plaintiffs had to make "non-negotiable" (race), and what other criteria had "to yield" (race-neutral criteria), in attempting to state their claim. App.205, 250.

478 U.S. 30, 79 (1986) (emphasis added). Nothing "inhibits" this Court from "correct[ing] errors of law." *Id.* Legal errors that "infect a so-called mixed finding of law and fact" and even fact findings "predicated on a misunderstanding of the governing rule of law" are reversible without deference to the district court. *Id.* at 79 (internal quotation marks omitted); *see also, e.g.*, *Abbott v. Perez*, 138 S. Ct. 2305, 2326 (2018) ("While a district court's finding of fact on the question of discriminatory intent is reviewed for clear error, whether the court applied the correct burden of proof is a question subject to plenary review."); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (considering whether "the District Court misapplied controlling law"); *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 262 (2015) ("[E]ach of these determinations reflects an error about relevant law[, a]nd each error likely affected the District Court's conclusions ….").

Applied here, the district court misunderstood the governing law and, consequently, misapplied Section 2. That is legal error, deference to which would "endanger[] the rule of law." *Gingles*, 478 U.S. at 79. Of course, this Court has the power to correct such errors—as well as any fact findings based on them—by applying "plenary review." *Abbott*, 138 S. Ct. at 2326.

B. To state a Section 2 claim, nothing *requires* a plaintiff to prioritize race on purpose when drawing proposed remedial districts.

The district court's invalidation of Alabama's congressional districts was premised on a legal error: that the Voting Rights Act *requires* the creation of districts that would not otherwise be neutrally drawn. The court declared that Section 2 can't mean that litigants must "set about drawing illustrative remedial plans using only race-

neutral districting principles and hope to happen upon a plan that includes an additional majority-minority district." App.254; *see also Caster* Resp. 18-19 ("The first *Gingles* precondition does not require Plaintiffs' experts to blindly stumble around Alabama's map, hoping they might just happen to run into a new majority-Black district."); *Milligan* Resp. 7 ("Nothing in this Court's precedents requires plaintiffs' experts to undertake the *Gingles* 1 inquiry in a race-blind manner."); *but see Gonzalez v. City of Aurora*, 535 F.3d 594, 598-600 (7th Cir. 2008) (Easterbrook, C.J.) (articulating the opposite rule). But a plaintiff cannot establish that a potential district can be "reasonably configured" for purposes of *Gingles*'s first precondition, *Cooper*, 137 S. Ct. at 1470, if the district cannot be drawn without prioritizing race first while other criteria "yield." *See* Stay Application 18-28; *see, e.g.*, *infra*, Part I.E (listing examples of ways in which Plaintiffs' experts explained they prioritized race first at the expense of other criteria here). The whole point of the *Gingles* analysis is for plaintiffs to prove that race must be prioritized, not to assume as much from the start.

1. Plaintiffs repeat that error here. They contend that they "satisfied the first *Gingles* precondition by showing that it is possible to draw an additional majority-Black district in Alabama consistent with traditional districting principles," *Caster* Resp. 2, even if they had to prioritize race. They assert that it *cannot* be the case that "illustrative plans that considered race cannot satisfy the first *Gingles* precondition." *Caster* Resp. 16; *see Milligan* Resp. 32. But Plaintiffs did not merely "consider race." They made race non-negotiable, requiring other race-neutral factors "to yield."

App.204-05. As millions of simulations showed, their illustrative plans would not have been neutrally drawn and were not neutrally drawn. *See infra*, Part I.E.

Plaintiffs cannot pretend it's all okay because their proposals—which prioritized race "on purpose" so as not to resemble the millions of neutrally drawn maps—are still "consistent with" traditional redistricting criteria. *Caster* Resp.16, 23. Elsewhere, they argue they can't be said to have "prioritized race" because their plans comport with traditional criteria. *Milligan* Resp. 4, 27-28. By that logic, if a public college categorically excludes all applicants of one race at step one, it's all okay so long as the admissions office later abides by race-neutral criteria such as grades or test scores for those who make it to step two. Even if the college rejects the first two million applicants based on race alone, that race-based exclusion would be okay under Plaintiffs' theory because the applicants who ultimately receive admissions offers have grades or test scores "consistent with" the college's race-neutral admissions standards. According to Plaintiffs' logic, all that is required for race not to have "predominated" is that the resulting admittees don't "offend" any of the school's race-neutral standards. *Caster* Resp. 30. Such mental gymnastics offends both the Constitution and the English language. If, as here, a racial "quota operated as a filter through which all line-drawing decisions had to pass," then as a matter of law and language, race "predominates." *Harris v. McCrory*, 159 F. Supp. 3d 600, 612 (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017).

2. Separately, Plaintiffs contend that the district court's error is essentially unreviewable because "*the record forecloses* a finding that race predominated in the

plaintiffs' preparation of their illustrative remedial plans." App.254 (emphasis added). The court stated that it "found" race did not "predominate" because Plaintiffs' experts were not overly concerned with race *after* they hit their racial targets of two majority-black districts: "Beyond ensuring crossing that 50 percent line, there was no further consideration of race in choosing blocks within the split [voting tabulation districts]." App.58, 245-47 (alteration in original); App.312 (Tr. 577:16-20) ("[A]fter … what I took to be nonnegotiable principles of population balance and seeking two majority-black districts, *after that*, I took contiguity as a requirement and compactness…." (emphasis added)). The court added that it found testimony that experts "focused on race **only** to the extent that was necessary to be sure that [they] maintained two districts with [BVAP] of greater than 50%" to be "highly credible." App.246. But it is this finding and this testimony, "highly credible" or not, that betrays the court's *legal* error.

This is a textbook example of legal error infecting all the subsequent findings of fact. *See Gingles*, 478 U.S. at 79. The court's self-described fact findings about predominance (and likewise its findings about the subversion of traditional redistricting criteria to race) are "predicated on a misunderstanding of the governing rule of law." *Id.* The court's re-definition of the relevant legal standards infected every aspect of its preliminary injunction.

Specifically, the Court must correct the district court's mistaken belief that a Legislature can (and must) "prioritize[]" race and only "after that" consider other criteria, all while being careful not to allow race to unconstitutionally "predominate."

See, e.g., App.204-05, 249-50. In the district court's view, race must be the animating factor in redistricting just enough (but not too much). According to the court, Plaintiffs' experts struck that balance: Making race "nonnegotiable" at the beginning was not so bad; after all, they eventually considered race-neutral factors (after they hit their race-based target of two majority-black districts). App.57-58 ("I did sometimes look at race of those blocks, but really, only to make sure that I was creating two districts over 50 percent."). Because they could have prioritized race *more*—but didn't—that step-one prioritization of race was forgivable, in the court's view. *See, e.g.*, App.205 (erroneously suggesting that an expert would "maximize the number of majority-Black districts, or the BVAP in any particular majority-Black district…if race were her predominant consideration"); *see Caster* Resp. 20.

The district court's re-definition of "predominance" is legally indefensible. This is not a case where a map drawer was merely "conscious of race." *Id.* at 29. This is the case where race made all the difference; it was necessarily the "non-negotiable" factor. That is "predominance," as this Court said in *Shaw II* and again in *Bethune-Hill*: "Race may predominate even when a reapportionment plan respects traditional principles … if '[r]ace was the criterion that … *could not be compromised*,' and race-neutral considerations 'came into play *only after* the race-based decision had been made.'" *Bethune-Hill*, 137 S. Ct. at 798 (quoting *Shaw II*, 517 U.S. at 907) (emphasis added). For a plaintiff to state an Equal Protection claim against a State's redistricting plan, that plan need not even "conflict" with traditional redistricting criteria for

race to predominate; it need only "depart" or "deviate" from those neutral principles. *Id.* at 799.

Applying this Court's legal standards, this is the easy case. It necessarily follows from *Shaw II* and *Bethune-Hill* that where, as here, proposed plans would not have been neutrally drawn, then the district court has *required* a new congressional map that the Alabama Legislature could not have drawn in the first instance. This case does not require the Court to decide the precise amount of racial consideration Section 2 permits; it is enough that race was admittedly the criterion that "could not be compromised" in the creation of redistricting plans with two majority-black districts in Alabama and that race-neutral considerations therefore had to "yield." *Bethune-Hill*, 137 S. Ct. at 798; App.205 (describing Plaintiffs as not allowing "a minimum level of compliance" with the criterion to create two majority-black districts "to yield to other considerations"); *see also Harris*, 159 F. Supp. 3d at 612 (describing racial "quota operat[ing] as a filter through which all line-drawing decisions had to pass"). Plaintiffs said so themselves. *See infra*, Part I.E. And if that is so, then the VRA cannot constitutionally *require* such districts.

C. To establish vote dilution, plans must be neutrally drawn, or Section 2 is unconstitutional as applied to single-member districts.

1. Plaintiffs still have no answer to the fundamental problem in their case: There wasn't just "some consideration of race," in Plaintiffs' words. *Caster* Resp. 17. To produce maps with two majority-black districts, Plaintiffs had to ("on purpose") make race the primary, non-negotiable criterion, meaning other race-neutral criteria had "to yield." App.204-05. That alone is evidence that Plaintiffs' vote dilution claims

fail. Alabama's population is not sufficiently numerous or compact to create a neutrally drawn second majority-black district.

As then-Chief Judge Easterbrook explained in *Gonzalez*, the proper baseline for determining vote dilution is a "neutrally" drawn plan. This Court has never permitted litigants to use Section 2 to justify "transparent gerrymandering that boosts one group's chances at the expense of another," 535 F.3d at 598, especially before the *Gingles* preconditions have even been met. Section 2, consistent with the Equal Protection Clause, must *correct* racial gerrymanders, not *impose* them. *See* 52 U.S.C. §10301(a) (prohibiting the "denial or abridgement of the right of any citizen of the United States to vote on account of race or color").

2. If Plaintiffs are right that to state a Section 2 claim they *must* be permitted to prioritize race first and cause race-neutral criteria to yield, then Section 2 as conceived in *Gingles* is unconstitutional.[3]

For this argument, the *Caster* Plaintiffs fault the State for relying on racial gerrymandering cases. Resp. 18. They fail to appreciate that however this Court interprets Section 2, it must be consistent with the constitutional limitations on State Legislatures. It cannot be that Section 2 requires something that this Court has

[3] Plaintiffs wrongly suggest that the State's arguments are limited to *Gingles* I. *Caster* Resp. 26-27; *Milligan* Resp. 19. As is clear from the State's stay application, the State's arguments are three-fold: First, *Gingles* I cannot possibly permit what Plaintiffs did here. Stay Application18-28. Even if *Gingles* I permitted it, the statute's instruction to consider the "totality of the circumstances" cannot possibly permit what Plaintiffs did here. *Id.* at 28-29. And even if either *Gingles* I or the statutory text permitted it, the Constitution cannot possibly permit what Plaintiffs did here. *Id.* at 29-36.

previously declared unconstitutional when done by a State Legislature. If that were so, then legislatures could never simultaneously comply with both Section 2 and the Equal Protection Clause in the normal legislative process; they would always become subject to suit, and then have their districts redrawn at the direction of a district court. *But see Brnovich*, 141 S. Ct. at 2341 (rejecting test that would "transfer much of the authority to regulate [districting] from the States to the federal courts").[4]

3. Finally, contrary to Plaintiffs' arguments, of course there are competing plausible interpretations of Section 2. *Caster* Resp. 27-28.[5] Following *Gingles*, a Plaintiff can claim elections are not "equally open" if the Legislature could increase the number of majority-minority districts after meeting various preconditions. Others

[4] Plaintiffs surmise that the State's racial gerrymander can always be forgiven by VRA compliance because this Court has "long assumed that complying with the VRA is a compelling interest." *Cooper*, 137 S. Ct. at 1469; *see Caster* Resp. 34-35. Plaintiffs blind themselves to reality. With increasing frequency, States' attempts to navigate the labyrinth of VRA compliance are rejected as unconstitutional. *See, e.g.*, *Cooper*, 137 S. Ct. at 1468 (racial gerrymander where Senators "repeatedly told their colleagues that District 1 had to be majority-minority, so as to comply with the VRA"); *Abbott*, 138 S. Ct. at 2334 (racial gerrymander despite Texas arguing it had "good reasons to believe" racial manipulation was necessary to satisfy Section 2) (internal quotation marks omitted); *Ala. Legis. Black Caucus*, 575 U.S. at 277 (racial gerrymander where Alabama's interpretation of VRA was too "mechanical"); *Shaw II*, 517 U.S. at 911 (racial gerrymander because VRA did not actually require additional majority-minority district, and that new district "as drawn, [was] not a remedy narrowly tailored to the State's professed interest in avoiding [Section] 2 liability"); *Miller v. Johnson*, 515 U.S. 900, 921 (1995) (racial gerrymander because "compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws").

[5] Moreover, Plaintiffs' assertion that "not once during the proceedings below did Alabama identify a 'plausible interpretation' of Section 2 that it wanted the district court to adopt" is simply not true. *Caster* Resp. 28. In the opening pages of its post-trial briefing (among other places), the State set out for the district court the interpretation it advocates here. *See Caster v. Merrill*, No. 2:21-cv-1536, ECF 96 at 7-9.

have questioned whether that is what "equally open" means. *See Holder v. Hall*, 512 U.S. 874, 893 (1994) (Thomas, J., concurring in judgment); *see also Brnovich*, 141 S. Ct. at 2341. So at best, there is an ambiguity in the statute. At worst, the statute has been distorted beyond any possible meaning. Either way, the decision by the court below cannot constitutionally hold. There is no better indication that elections are "equally open" to all Alabamians when the number of black-majority districts in Alabama's current congressional plan matches or exceeds the number of black-majority districts in millions of neutrally drawn simulations.

* * *

To be sure, a map drawer may be "aware" of race. *Shaw v. Reno* ("*Shaw I*"), 509 U.S. 630, 646 (1993). And a Section 2 plaintiff will necessarily be "aware" that its proposed remedial districts exceed 50% BVAP. But "awareness" of a district's composition is not synonymous with *prioritization* of race as a non-negotiable principle. By making race non-negotiable from the start, Plaintiffs guaranteed that traditional districting principles would "yield" to race. App.204-05. They presumed the answer to the *Gingles* inquiry. The district court's endorsement of that approach is reversible legal error.

D. Plaintiffs cannot transform the court's legal error into a factual one.

1. Plaintiffs are also now running away from basic facts that the district court already accepted. The *Milligan* Plaintiffs repeatedly assert that statements that they "prioritized race" are "false." Resp. 19; *see id.* at 1, 26. But the district court literally said they "prioritized race," going on to conclude that it was okay for Plaintiffs to

make race nonnegotiable "on purpose" to state their VRA claim, and only "[a]fter that" consider traditional criteria. *See* Stay Application 17 n.8 (quoting every time the district court described Plaintiffs' experts as prioritizing race); App.58, App.312 (Tr. 577:17-20); App.349 (Tr. 685:23-25). The *Milligan* Plaintiffs' claim is particularly baffling considering that they directly quote one of the several instances in which the district court referred to them as "prioritiz[ing] race." Resp. 29 ("As the panel explained, the experts 'prioritized race only as necessary.'"). That Plaintiffs prioritized race is not in dispute because Plaintiffs themselves (and the court) established it.[6]

First, Plaintiffs established what a likely redistricting plan would look like had race not been a non-negotiable target:

- The *Milligan* Plaintiffs' expert, Dr. Moon Duchin, testified that she "generated 2 million districting plans for Alabama, which I think we'll agree is quite a few. And we found some with one majority-black district, but never found a second with a majority-black district in 2 million attempts. But, again, that's without taking race into account in any way in the generation process." App.346 (Tr. 682:3-14).[7]

[6] Plaintiffs' real disagreement is whether they prioritized race *just enough* versus *too much*. Echoing the district court, they say they didn't "prioritize[] race" because they could have prioritized race more or because they did not "prioritize[] race above everything else." *Caster* Resp. 19-20; *Milligan* Resp. 5. For the reasons already explained, such an approach to the VRA—if the VRA is to stay within the Constitution's guardrails—is unadministrable and inconsistent with this Court's precedents. Stay Application 27-28.

[7] Tellingly, the *Milligan* Plaintiffs now object that the two million "simulated maps are not a part of the record." Resp. 29-30. Plaintiffs cannot erase Dr. Duchin's own testimony about her personal observations of her two million simulations from the record. It is plain as day: in two million attempts, "never" was there a plan with two majority-black districts. *See* App.346 (Tr. 682:3-14) (responding to question whether she ran "the algorithm without [a] strong preference for two-majority-black districts" by stating: "In fact, I have a publication where I do that in Alabama. And in that paper, we generated 2 million districting plans for Alabama, which I think we'll agree is quite a few. And we found some with one majority-black district, but never found

- Dr. Duchin described her 2 million maps study as "showing that it is hard to draw two majority-black districts by accident," adding that "shows the importance of doing so on purpose." App.349 (Tr. 685:23-25).

- Another of the *Milligan* Plaintiffs' experts, Dr. Kosuke Imai, generated 30,000 possible redistricting plans for Alabama, unconstrained by Alabama's existing district lines. He found *none* with two naturally occurring majority-black districts. App.279 (Tr. 268:23-269:6).[8]

- Dr. Imai also found that a drawn-from-scratch, race-blind plan with even *one* majority-black district would be an outlier. *Milligan v. Merrill*, 2:21-cv-1530, ECF 88-1 at 10, Fig.1; *see also* Tr. 232:25-233:25. Indeed, Dr. Imai agreed that if two districts were drawn with black voting-age population percentages of 50.01%, he would "conclude that race predominated in their drawing" based on the set of criteria considered by his race-blind simulations. Tr. 236:14-18.

- One of the lead plaintiffs, Mr. Milligan, testified that he is the Executive Director of a voting rights group called Alabama Forward. Tr. 127:5-7. Before Alabama passed its 2021 plan, his team, which had map-making training, worked on possible plans using professional mapping software, Maptitude. Tr. 133:1-4. And yet when they tried to draw a map with two majority-black (or even two majority-minority) districts, they "weren't able to do so successfully." Tr.133:6-7.

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a second with a majority-black district in 2 million attempts. But, again, that's without taking race into account in any way in the generation process.").

[8] The *Milligan* Plaintiffs state that this expert's simulations were "designed to assess the role of race in *the State*'s Plan." Resp. 31. As was extensively briefed in the court below, the simulations did not simulate the Legislature's map-drawing process because they started from a blank slate while the Legislature indisputably started with existing district lines, as most States do. *See* Tr. 291:1-14. Having failed to consider the criteria that the Legislature considered, the simulations told the district court nothing about the Legislature's intent for purposes of an Equal Protection Clause claim. They do, however, say much about Plaintiffs' illustrative plans because their plans—like the 30,000 simulations—cast aside existing district lines. To paraphrase the Milligan Plaintiffs, Dr. Imai's results "alone shows that [Plaintiffs' illustrative plans] used race as a predominant factor." *Milligan v. Merrill*, 21-cv-1530, ECF 69 at 27.

Second, Plaintiffs explained how they therefore had to consider race *first* to hit their target of two black-majority districts; traditional criteria were necessarily considered *second*:

- Describing her approach, Dr. Duchin stated, "[A]fter … what I took to be nonnegotiable principles of population balance and seeking two majority-black districts, *after that*, I took contiguity as a requirement and compactness as paramount." App.312 (Tr. 577:17-20) (emphasis added).

- Describing her approach, Dr. Duchin stated, "I took, for example, county integrity to take precedence over the level of BVAP *once that level was past 50 percent.*" App.313 (Tr.577:20-23) (emphasis added).

- When Dr. Duchin was asked whether "an express goal of [hers was] to keep the Black Belt counties in majority-black districts to the extent she could." Answer: "Yes." Then when asked whether that was "part of the reason why [her] compactness scores for CD 1 and CD 2 were lower"? Answer: "That's right." App.334 (Tr. 664:17-24).

- When Dr. Duchin was asked whether she split small voting districts (known as "VTDs" or "precincts") on the basis of race? Answer: "I did sometimes look at race of those blocks, *but really, only to make sure that I was creating two districts over 50 percent*. Beyond ensuring crossing that 50 percent line, there was no further consideration of race in choosing blocks within the split VTDs." App.308 (Tr. 573:3:8) (emphasis added).

- When Dr. Duchin was asked whether it would be "fair to say that the principle of splitting fewer counties was subordinated to the principle of getting two majority-black districts in Alabama?" Answer: "It's true that I regard the federal requirements of population balance and minority electoral opportunity to be *nonnegotiable* and, therefore, higher ranked." Tr. 635:1-6 (emphasis added).

- When Dr. Duchin was asked whether she thought "one reason that there are nine splits in counties in [her] plan as opposed to six splits in counties [in the enacted plan] … was because of the weight [she] gave to the criteria of ensuring two majority-black congressional districts?" Answer: "*There's no question.* And I have consistently acknowledged that I took minority electoral opportunity to be a nonnegotiable principle sought in these plans." App.327 (Tr. 647:12-20) (emphasis added).

- When Dr. Duchin was asked whether she considered looking at Alabama's "core retention score[s]" (*i.e.*, what portion of an existing district is retained in

a new district) "to get a sense of what might reasonably be considered to be core retention?" Answer: "I did not …. I would not be able to achieve corresponding statistics while creating a second majority-black district." Tr. 694:19-695:1.[9]

- When the *Caster* Plaintiffs' expert, Mr. Bill Cooper, was asked about splitting Mobile County and whether there was a way to draw a map with equal population and two majority-minority districts "without splitting Mobile County?" Answer: "[T]rue, no way. More problematic. Maybe there would be a way, but you would also have to split other counties. So I think this is the best compromise. Split Mobile County." Tr. 494:19-495:1.

- As summarized by the district court, the *Milligan* and *Caster* Plaintiffs' experts "carefully considered traditional redistricting criteria when [they] drew their illustrative plans. [They] were candid that [they] prioritized race only to the extent necessary to answer the essential question asked of [them] as a *Gingles* I expert ('Is it possible to draw a second, reasonably compact majority-Black district?'), and clearly explained, with concrete examples, that [they] did not prioritize it to any greater extent." App.149; *see also* App.151.

- According to the district court, Dr. Duchin made "two majority-Black districts" a "'non-negotiable' … criterion." And "Dr. Duchin did not allow a minimum level of compliance with that criterion to yield to other considerations." App.205.

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[9] The district court concluded that the Legislature's race-neutral concern for core retention ought to be discarded because "core disruption … is to be expected" when one draws a second majority-minority district and States could be unfairly "immuniz[ed]" from Section 2 liability so long as they have a "longstanding, well-established map." App.172-73. The court ignored that core retention is a well-established traditional redistricting criterion. *See, e.g.*, *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (recognizing that "preserving the cores of prior districts" is a legitimate state interest); *Cooper*, 137 S. Ct. at 1492 (Alito, J., concurring in part) ("When a new census requires redistricting, it is common practice to start with the plan used in the prior map and to change the boundaries of the prior districts," thereby "minimiz[ing] the risk that the new plan will be overturned"). The court also ignored that Plaintiffs' expert stated she could have considered core retention to some degree, yet inexplicably chose to abandon it wholesale. Tr. 672:3-16. A plan with a "long pedigree" like Alabama's should not be presumed unlawful and cast aside. *Brnovich*, 141 S. Ct. at 2340; *cf. League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 424, 435 (2006) (finding Section 2 violation when Texas did *not* retain the core of existing district just as the Latino population "was becoming … cohesive").

2. Now before this Court, and despite all of the above, Plaintiffs assert that no line-drawing decisions were based on race. *Caster* Resp. 20, 30, 32-33.[10] But Plaintiffs cannot explain away that compactness scores for proposed Districts 1 and 2 were lower because of racial considerations; their expert testified under oath that they were. App.334 (Tr. 644:17-24). Plaintiffs cannot explain away that the *Milligan* Plaintiffs' illustrative plans contained more county splits in certain districts due to race; their expert testified under oath that "[t]here was no question" it was. App.327 (Tr. 647:12-20). Plaintiffs cannot explain away that they chose to split small voting districts because of race; their expert testified under oath that she did. App.308 (Tr. 573:3:8).

More fundamentally, Plaintiffs cannot seriously dispute that race is the only explanation for the complete reconfiguration of Alabama's districts. Every single illustrative plan submitted by Plaintiffs separates white and black voters in the same way: splitting Mobile County for the first time in the State's history and doing so along racial lines. It blinks reality to assert—many times over—that this was done simply to keep communities of interest together. "[T]he cores in existing districts are the clearest expression of the legislature's intent to group persons on a 'community of interest' basis." *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 649 (D.S.C.

[10] The *Caster* Plaintiffs' assertion that the State's expert "could not identify any 'line drawing decision' made by Mr. Cooper based on race" is misleading. *Caster* Resp. 30. The testimony quoted was about what the State's expert included in his expert report. Immediately before that testimony, the State's expert explained that the *Caster* Plaintiffs' maps, just like every other map, split Mobile County along racial lines. Tr. 975.

2002). Those cores have been the same in Alabama for decades. Indeed, decades ago, a federal court *rejected* a congressional map that would have split the Mobile area because it would have "distort[ed] … Districts 1 and 2" and instead selected a plan that "better preserves the communities of interests in those two districts." *Wesch v. Hunt*, 785 F. Supp. 1491, 1497 (S.D. Ala. 1992); *see also* App.365-76 (Tr. 1665-76) (testimony by former Congressman Bradley Byrne explaining the communities of interest that have long united Mobile and Baldwin counties, particularly the "unique problems" faced by communities along the Gulf Coast and the different business, agricultural, and military priorities between that region (District 1) and the Wiregrass region (District 2) that would make it difficult for a representative "to become an expert on two different regions altogether, two different communities of interest"). Plaintiffs' illustrative maps seek to undo what the federal courts previously required, and they seek to do so by racially sorting Alabama's voters, pure and simple.[11]

And for all the ink spilled by Plaintiffs about the Black Belt as a community of interest, they misrepresent the record. The *Caster* Plaintiffs assert that they "proved

[11] Plaintiffs resort to arguments about Alabama's State Board of Education map, which divides Mobile County. *Milligan* Resp. 5, 24, 35; *Caster* Resp. 5, 7, 25. The board plan is an 8-district plan (not a 7-district plan), and it is distinct from the congressional plans with members serving "very different" roles than members of Congress. *See Milligan* Resp. 24; Tr. 1680:14-1682:3 (former SBOE member and congressman explaining significant differences). The reason for the SBOE split—in 2011—was to comply with Section 5 of the VRA. *See Caster v. Merrill*, No. 2:21-cv-1536, ECF 76-26 (the 2001 SBOE map), ECF 48 at 16-17 (showing BVAP for SBOE District 5 following 2000 and 2010 censuses); ECF 80-23 (preclearance submission for 2011 SBOE Plan); Tr. 1753:6-14 (explaining that District 5 "lost a lot of population" between 2000 and 2010, which required "significant changes" to the district). It remained similarly configured in 2021 given the Legislature's adherence to the principle of core retention.

that the minority communities within their proposed CD 2 have very similar interests and needs." *Caster* Resp. 25. The district court never made that finding. While the court noted that the Black Belt is a community of interest, Plaintiffs' proposals go beyond simply keeping that community together. They necessarily sacrifice other communities of interest to stitch together several distinct communities, including black Alabamians in urban Mobile, Montgomery, and western Alabama with black Alabamians in the rural countryside along the State's eastern border. *See* Stay Application 32-33. Even one of the lead Plaintiffs couldn't explain how black voters in Mobile share the same interests as black voters in rural counties more than 200 miles away. When asked about the faraway counties that would make up part of his new majority-black district, Mr. Caster testified, "I don't know anything about them, so I can't say that I am in … that community [of] interest with them or not." Tr. 1640-41. Mr. Caster's confusion is consistent with Plaintiffs' expert's own testimony. Dr. Duchin did not testify that she was uniting these areas out of any special concern for keeping together the Black Belt's "community of interest." Rather, her primary concern was placing Black Belt counties "*in majority-black districts*." App.318 (Tr. 598:21-599:1) (emphasis added). She was simply placing black Alabamians with more black Alabamians. So much for this Court's admonition that "[t]he recognition of nonracial communities of interest reflects the principle that a State may not assum[e] from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls." *LULAC*, 548 U.S. at 433 (internal quotation marks omitted).

Contrary to Plaintiffs' view, no traditional districting principle justifies conjoining disparate communities of interest simply because they contain large percentages of people of the same race. *Id.* ("[T]here is no basis to believe a district that combines two far-flung segments of a racial group with disparate interests provides the opportunity that § 2 requires or that the first *Gingles* condition contemplates.").

E. Plaintiffs have no answer for the millions of race-neutral maps, so they tell this Court to disregard them.

In light of Plaintiffs' experts' own evidence and testimony, there is also no basis for Plaintiffs' statement that millions of neutrally drawn simulations—none of which yielded two majority-black districts—"tell us nothing about whether Plaintiffs' illustrative plans respect traditional redistricting principles." *Caster* Resp. 22 (emphasis omitted). The simulations would have told the Alabama Legislature everything. The Legislature would not have drawn two majority-minority districts without placing race first and its own race-neutral districting criteria second. Plaintiffs themselves said so.

1. None of Plaintiffs' arguments here can rewrite what they said below. For example, Plaintiffs assert that their experts' millions of maps are irrelevant because they took account of some traditional redistricting criteria but not others. *Milligan* Resp. 30. But what Dr. Duchin did (and did not) consider makes her millions of maps all the more compelling. She established that even if one were to draw on a blank slate, without considering existing district lines, a neutrally drawn map would not include two black-majority districts. But imposing *more* race-neutral constraints would not change that undisputed outcome. *More* race-neutral constraints—for

example, keeping Mobile County whole and the Gulf Coast region unified (as it has been for decades)—makes it even *less* likely that two majority-black districts would be drawn.

2. Plaintiffs also emphasize that the millions of maps involved 2010 Census data. *Caster* Resp. 21; *Milligan* Resp. 6, 30. That also fails to explain away Dr. Duchin's findings (and doesn't apply to others' failed attempts to draw two majority-black districts, *supra*, Part I.E). It is indisputable that between the 2010 and 2020 Census, the total black population in Alabama shifted a negligible 0.36 percentage points. *See Caster v. Merrill*, No. 2:21-cv-1536, ECF 48 at 6 (showing change from 26.8% of population to 27.16%). And various counties in central Alabama with high percentages of black population, counties implicated in Plaintiffs' redraw, *lost* population over that decade. *See* U.S. Census Bureau, 2020 Census Demographic Data Map Viewer, Population Change, https://arcg.is/0eWzy8 (last visited Feb. 2, 2022) (showing decreased population for Barbour, Bullock, Butler, Choctaw, Crenshaw, Dallas, Greene, Hale, Lowndes, Macon, Marengo, Montgomery, Perry, Pickens, Sumter, Wilcox, Clarke, Conecuh, Escambia, Monroe, and Washington counties). In short, there are no demographic changes between 2010 and 2020 that explain Plaintiffs' unprecedented changes to Alabama's existing district geography.[12]

[12] As *amici* have explained, achieving proportional representation would be atypical given that existing geography. *See* Br. for U.S. Representatives from Alabama as *Amici Curiae*, 4-7. Plaintiffs' own expert explained that outside of Alabama's four largest (and far-apart) cities, less than 10 percent of black Alabamians (111,201 individuals) are dispersed across the width of the State in the 11 relatively small, rural Black Belt counties identified by their expert. *See Caster v. Merrill*, No. 2:21-cv-1536, ECF 48 at 7, 12 (Cooper Report) ("about half of Alabama's Black population (49.53%)

3. Additionally, Plaintiffs now contend—despite all of the above statements by their experts—that Dr. Duchin ultimately opined that it was "certainly possible" for a randomly generated map to produce "literally thousands" of plans with two majority-Black districts. *Caster* Resp. 21; *Milligan* Resp. 7, 31. They omit that she went on to clarify that it was "certainly possible" to draw such maps *assuming race was a* "*nonnegotiable*." App.349 (Tr. 685:7-10) (describing "the world of possibility" to "include[] my demonstrative maps, which could be arrived at through a random process" that uses race as a criterion); App.312 (Tr.577:17-20). She testified that she could not conceive "of a way to talk about the traditional [redistricting] principles as a package that is race blind." App.347 (Tr. 683:19-21).[13]

One can defer to Dr. Duchin's testimony about what might be "possible" under those race-conscious circumstances all one wants; it doesn't matter. Whatever Plaintiffs' expert thought was "possible" when making race non-negotiable is irrelevant. What would transpire had Plaintiffs' expert *not* made race a "nonnegotiable" is the

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is concentrated in the urban counties" while "[t]he rural Black Belt counties (excluding urban Black Belt Montgomery) account for 8.68% of the statewide Black population"). With congressional districts at ideal population of 717,514 people, even if one were to put all black Alabamians from those rural Black Belt counties into one district, they would make up only 15.5% of that district's population (or 34% if Montgomery were included). That dispersal illustrates why Plaintiffs' illustrative plans must stretch hundreds of miles to connect disparate populations of black Alabamians. *See* App.324 (Tr. 644:17-24) (agreeing that reduced compactness in CD 1 and CD 2 explained by racial target). In Alabama, it was inevitable that traditional race-neutral principles would have "to yield" or bend or break "as necessary" to hit Plaintiffs' unnatural two majority-minority district target. App.58, 204-05.

[13] Similarly, Mr. Cooper testified that he understood race to be a "traditional districting principle." Mr. Cooper testified that he complied with the Guidelines "within the constraints of creating second majority-black districts." App.291 (Tr. 478:11-479:2).

question.[14] And Plaintiffs' experts already answered it. *Supra*, Part I.E. Again, the VRA does not guarantee "political feast" for any group. *Johnson v. DeGrandy*, 512 U.S. 997, 1017 (1994). It guarantees that elections are "equally open," 52 U.S.C. §10301(b), and neutrally drawn maps are the only plausible evidence of that requirement.

4. Finally, as noted above, Dr. Duchin was not the only expert to draw numerous maps. Dr. Imai, too, produced 30,000 maps, none of which had two majority-black districts. Though his simulations could not shed light on the Legislature's intent because the Legislature began with the preexisting lines while Dr. Imai's algorithm assumed a map drawn on a blank slate, *see supra*, n.8, his results do simulate Plaintiffs' experts' blank-slate approach. In the *Milligan* Plaintiffs' words, Dr. Imai's results "alone shows that [Plaintiffs' illustrative plans] used race as a predominant factor." *Milligan v. Merrill*, No. 21-cv-1530, ECF 69 at 27.

II. The Equities Warrant A Stay.

The equities require a stay. Plaintiffs belittle the harm to the State, its voters, and potential candidates as "administrative inconvenience." *Caster* Resp. 36;

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[14] Moreover, what is eventually "possible" through a random process also cannot be the legal test here. For example, if a racially gerrymandered map were "possible" to draw only after millions of attempts—such that it can be described only as an out-and-out outlier when compared to maps drawn with traditional redistricting criteria—then that could be strong evidence of a constitutional violation. *Bethune-Hill*, 137 S. Ct. at 798. And of course, as any trained mathematician would know, almost anything can be arrived at through "a random process" that goes on long enough. *See* Arthur R. Miller, *Copyright Protection for Computer Programs, Databases and Computer-Generated Works: Is Anything New Since CONTU?*, 106 Harv. L. Rev. 977, 1042 (1993) ("We all have heard about the proverbial roomful of monkeys striking the keys of typewriters . . . with one of the monkeys eventually 'producing' Shakespeare's *Hamlet*.").

Milligan Resp. 36. To be clear, this case is not akin to one involving harm to the State's "'fiscal and administrative burdens.'" *Caster* Resp. 37. The harm extends not just to the State but also to the State's voters and its candidates, all of whom have indisputable interests—with their own constitutional dimensions—in being properly registered, getting the right ballots, and knowing who their candidates or potential constituents will be. *See* Stay Application 36-40.

In concluding otherwise, Plaintiffs have misunderstood (or simply ignored) the unrebutted, sworn testimony before the district court. Alabama's Director of Elections explained that "[t]here are substantial obstacles to changing the Congressional districts at this late date…." *Milligan v. Merrill*, No. 2:21-cv-1530-AMM, ECF 82-7 at 2. Among the most pressing is that new congressional lines would require reassigning millions of registered voters to new precincts and districts: "If Congressional districts change, local officials will have to start over in the process of assigning voters to new Congressional districts, making the already shortened time for the assignment process," due to Census delays, "even shorter," and "potentially increasing the likelihood of mistaken reassignments." *Id.* at 5-6.; *see also id.* at 2-3. This is a "laborious" process that can take three to four months, particularly in the 45 of the State's 67 counties where the process is performed manually. *Id.* at 3-4. The reassignment must be complete before various pre-election deadlines so that voters can receive the right ballots and absentee voting can commence on March 30. *Id.* at 2-6; *see also* 52 U.S.C. § 20302(a)(8)(A) (requiring transmittal of absentee ballots to certain voters no later than April 9 for general election). The State and its citizens obviously have a

paramount interest in ensuring that voters receive the correct ballots.[15]

The district court, and now Plaintiffs, gave the State's interest short shrift in part based on their novel view that the State should have begun preparing backup maps as soon as Plaintiffs threatened litigation. In the words of the district court, Defendants have known "that persons and organizations such as the *Milligan* plaintiffs and *Caster* plaintiffs would likely assert a Section Two challenge" to any map that didn't set nonnegotiable racial targets for two districts. App. 202. But it is often the case that "the losers in the redistricting process … seek to obtain in court what they could not achieve in the political arena." *Cooper*, 137 S. Ct. at 1490 (Alito, J., concurring in the judgment in part and dissenting in part). The State's failure to predraft racially gerrymandered maps can't count against it in the balance of equities.

The March 30 start to absentee voting—and all the preceding requirements to meet that deadline—are "imminent" and the "State's election machinery is already in progress." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). That alone is reason enough to grant the stay. And the equities tilt even further in Defendants' favor because the district court's order would require the State to hold elections using racially segregated districts.

[15] Puzzlingly, the district court apparently misread the Director's affidavit, suggesting that the "next election" did not mean "the upcoming one." App.133. This makes no sense. Voters will vote in new congressional districts starting this March and it is, understandably, Alabama's goal that voters be given the correct ballots at that election, in addition to subsequent ones.

CONCLUSION

For the foregoing reasons, Defendants respectfully ask the Court to enter an administrative stay and then a stay pending appeal.

Respectfully submitted,

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