No. 23A231

IN THE

Supreme Court of the United States

WES ALLEN, in his official capacity as Secretary of State of Alabama,

Applicant,

v.

EVAN MILLIGAN, ET AL.,

Respondents.

MILLIGAN RESPONDENTS' OPPOSITION TO EMERGENCY APPLICATION FOR STAY PENDING RESOLUTION OF DIRECT APPEAL TO THIS COURT

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Applicant is Wes Allen, in his official capacity as Alabama Secretary of State. Applicant was the defendant before the United States District Court for the Northern District of Alabama.

Respondents are Evan Milligan, Shalela Dowdy, Letitia Jackson, Khadidah Stone, Greater Birmingham Ministries, and the Alabama State Conference of the NAACP. Respondents were plaintiffs in the district court.

The proceedings below were *Evan Milligan, et al. v. Wes Allen, et al.*, No. 2:21-cv-1530 (N.D. Ala.). The district court issued a preliminary injunction on September 5, 2023, and it denied the defendants' motion for stay pending appeal on September 11, 2023.

Related cases include:

1. *Marcus Caster, et al. v. Wes Allen, et al.*, No. 2:21-cv-1536 (N.D. Ala.). The district court issued a preliminary injunction on September 5, 2023, and it denied the defendants' motion for stay pending appeal on September 11, 2023. Defendants filed an application for stay pending appeal in this Court on September 11, 2023 (No. 23A241).

2. *Bobby Singleton, et al. v. Wes Allen, et al.,* No. 2:21-cv-1291 (N.D. Ala.). During the remedial proceedings from which this application arises, *Singleton* asserted only an Equal Protection Clause claim, which the district court declined to consider.

RULE 29.6 STATEMENT

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

Respectfully submitted,

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

Notwithstanding the Secretary of State's efforts to obscure the matter, the issue before the Court is simple. The district court found—and this Court affirmed—that Alabama likely violated § 2 of the Voting Rights Act by failing to create a second congressional district in which Black voters had an opportunity to elect candidates of their choice. Remedying that violation requires creating a second district in which Black Alabamians would have that opportunity. Yet the Alabama Legislature never even attempted to do this. The Secretary's concession that the Legislature's 2023 Plan lacks such a district begins and ends this appeal. The Secretary is not entitled to a stay to implement a congressional map that openly defies the clear rulings of the district court and this Court.

The three-judge court ruled unanimously that Defendants had not provided the remedy its injunction required, and that there is no basis for a stay. Moreover, in its nearly 200-page opinion, the district court further found that, even considering a full analysis anew, the 2023 Plan likely violates §2. The court again found that Plaintiffs have demonstrated that Black Alabamians are sufficiently numerous and compact to comprise a second reasonably configured majority-minority district. All other elements of a § 2 violation were undisputed. In affirming that Plaintiffs were entitled to injunctive relief, this Court has already recognized that Plaintiffs had satisfied all elements required for a § 2 violation under existing doctrine. Applying

the test established in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), and *Bartlett* v. *Strickland*, 556 U.S. 1 (2009), the Court explained: "the District Court correctly found that black voters could constitute a majority in a second district that was 'reasonably configured"; 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 candidates'"; nor was there a basis to disturb the finding that Plaintiffs carried their burden on the totality of circumstances. *Allen* v. *Milligan*, 599 U.S. 1, 19-23 (2023) (citation omitted). These facts all remain true.

Yet the Secretary now unabashedly seeks to defy the district court's order and this Court's ruling. The Secretary argues that new "legislative findings"—drafted by the Alabama Solicitor General to prioritize certain "communities of interest" in the 2023 Plan—trumps the State's obligation to remedy a § 2 violation. According to the Secretary, the 2023 Plan is sufficient because—unlike the 2021 Plan—it organizes the Black Belt in two districts and satisfies the new "findings" retrofitted to justify the new map. But the 2021 Plan violated § 2 not merely because it split the Black Belt four ways, but because it failed to provide a second opportunity district. Moreover, the Secretary ignores the district court's finding that "that the Black Belt and the Gulf Coast are geographically overlapping communities of interest." App.636. This overlapping community of the Black Belt and Gulf Coast has animated all Plaintiffs' illustrative maps showing that the State could draw a "reasonably configured" additional majority-Black district. The 2023 Plan continues to divide this overlapping community of interest, *id.*; whereas Plaintiffs' illustrative maps and

Alabama itself in its 2021 Board of Education map both preserve this shared community, *Singleton* v. *Merrill*, 582 F. Supp. 3d 924, 978 (N.D. Ala 2022). The Secretary's bold and persistent assertion that Plaintiffs' maps were *not* reasonably configured simply reflects his disagreement with this Court's ruling to the contrary. That is no basis for a stay.

Likewise, this Court already considered and rejected the Secretary's argument that the 2023 Plan was necessary to prevent unconstitutional racial gerrymandering. Plaintiffs' illustrative plans were "reasonably configured," even though—as this Court's precedent requires—the "very reason a plaintiff adduces a map at the first step of *Gingles* is *because of* its racial composition—that is, because it creates an additional majority-minority district that does not then exist." *Milligan*, 599 U.S. at 34 n.7 (emphasis in original). And, to be clear, the maps the district court ultimately orders need not follow any of the Plaintiff's illustrative maps; unlike Plaintiffs' burden at *Gingles* step one, a remedy for the likely § 2 violation need not even include a second majority-Black district. Rather the ultimate (and as-yet nonexistent) remedial plan need do only what the plain text of § 2, and this Court's precedent, require: provide a fair "'opportunity'" for minority voters to "'participate in the political process and . . . elect representatives of choice.'" *Milligan*, 599 U.S. at 25 (quoting 52 U.S.C. § 10301(b)).

The Secretary, and legislative defendants, are free to make whatever arguments they wish to the Special Master about their preferred redistricting criteria for formulating the final remedial map. What the Secretary cannot do is pretend this

motion is something other than what it is: a request to defy this Court's decision by implementing a "remedy" that cures nothing and prevents Black voters from having an opportunity to elect candidates of their choice in a second congressional district.[1]

The Court should deny Alabama's application for stay pending appeal and summarily affirm the district court's decision below.

COUNTERSTATEMENT OF THE CASE

A. This Court affirms the district court's finding that Alabama likely violated § 2, requiring a remedial plan.

In November 2021, the Alabama Legislature passed a new seven-district congressional redistricting plan (the "2021 Plan"). Three sets of Plaintiffs filed suit. The *Milligan* plaintiffs alleged that the 2021 Plan diluted the votes of Black Alabamians in violation of § 2 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10301, and the Fourteenth Amendment. App.14. The 2021 Plan placed Black voters into six supermajority-white districts and limited Black voters' opportunity to elect

[1] The *Singleton* plaintiffs are not parties in this Court under Rule 12.6, and their brief should be treated as an amicus. This was their role in the prior appeal. *See* Brief Amicus Curiae of Singleton Plaintiffs, Case No. 21-1086. "*Singleton* remains before th[e] three-judge Court *but is not a part* of the Section Two remedial proceedings." App.2 (emphasis added). On remand, the district court severed its prior limited consolidation of *Singleton* and *Milligan*, and heard the *Singleton* preliminary injunction motion on a different day entirely separate from the *Milligan* and *Caster* cases. App.111. The court then granted relief solely on the § 2 claims in *Milligan* and *Caster*, and it denied relief on the constitutional claims in *Singleton*. App.8. The Secretary has not (and could not) appeal from the district court's denial of relief in *Singleton*. *See Mathias v. WorldCom Technologies, Inc.*, 535 U.S. 682, 684 (2002) ("a party may not appeal from a favorable judgment"). And the *Singleton* plaintiffs have no more interest in this appeal than the other non-parties who have proposed their favored remedial plan to the Special Master. And the *Singleton* plaintiffs' advocacy for their favored map is irrelevant to the § 2 claims before this Court and, at this point, is "premature, speculative, and entirely unfounded." App.639.

candidates of their choice to a single majority-Black district. App.3-5. The *Caster* Plaintiffs challenged the 2021 Plan under § 2; the *Singleton* Plaintiffs challenged it only under the Constitution. *Id.* All plaintiffs moved to preliminary enjoin the 2021 Plan. *Id.*

After an extensive hearing, the district court granted the motion, finding that the *Milligan* and *Caster* Plaintiffs were substantially likely to succeed on their "straightforward" VRA claims. App.16. In its January 2022 order, the court did not require a new majority-Black district. Instead, the court stated 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." *Id.*

This Court affirmed that injunction. *Allen v. Milligan*, 599 U.S. 1 (2023). The district court had "faithfully applied" precedent and "correctly determined that . . . [the 2021 Plan] violated § 2." *Id.* at 1506. The "heart" of Alabama's appeal, this Court noted, was "not about the law as it exists," but "about Alabama's attempt to remake our § 2 jurisprudence anew." *Id.* at 1506. That attempt was "compelling neither in theory nor in practice." *Id.* at 1507. This Court rejected Alabama's arguments that the application of § 2 "inevitably demands racial proportionality in districting," *id.* at 1508, and that illustrative maps will flunk *Gingles* 1 if they fail to maintain the Secretary's own preferred "Gulf Coast" community of interest. *Id.* at 1504-05.

B. Defendants delay remedial proceedings and defy the district court's order for an appropriate § 2 remedy.

The district court acted promptly on remand, "immediately set[ting] a status conference" to begin remedial proceedings. App.18. At Defendants' request, the court delayed those proceedings, granting the Legislature nearly five weeks to enact a new map. *Id.*

The Legislature worked in secret to draw its new plan. App.180. The Alabama House of Representatives first passed the "Community of Interest Plan" (the "COI" Plan). App.19. This plan split the Wiregrass[2] and the Black Belt's 18 core counties into two districts, combined Baldwin and Mobile Counties in one district, and increased the Black voting age population ("BVAP") in district 2 ("CD-2") from about 30% to 42.45%. *Id.* Alabama's expert, Dr. Trey Hood, analyzed the COI Plan, and, based on limited and selective data, found that candidates preferred by Black voters would have won CD-2 in two of four analyzed elections in 2020 and 2018. App.94.

While Plaintiffs assert that the COI plan's CD-2 as fails as an opportunity district, the Alabama Senate passed a worse plan, which further reduced the BVAP in CD-2. Specifically, under the Senate's plan, the BVAP in CD-2 was only 38.3%. *Id.* Under the Senate's plan, CD-2 was plainly not an opportunity district for Black voters: Black-preferred candidates lost CD-2 in every election Dr. Hood analyzed. *Id.*

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[2] Alabama's new legislative findings define the "Wiregrass" as Barbour, Coffee, Covington, Crenshaw, Dale, Geneva, Henry, Houston, and Pike counties. App.24. As the district court correctly observed, "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." App.167.

Representative Pringle, the House Reapportionment Committee chair, refused to put his name or a House Bill number on the Senate's plan. App.97-98. He testified that he knew that the preliminary injunction required two "opportunity" districts. *Id.*

A bicameral conference committee adopted the 2023 Plan, a modified version of the Senate's plan with a 39.93% BVAP in CD-2. App.19. The Legislature then enacted it. *Id.*

The 2023 Plan was enacted over alternatives plans that were supported by Black Alabamians and would have remedied the likely § 2 violation. For example, the *Milligan* and *Caster* Plaintiffs proposed a remedial plan where CD-2 would be an opportunity district for Black voters and have a 50.08% BVAP ("VRA Plan"). Opp. App.017. The VRA Plan, just like the State's 2023 Plan, also kept the 18 counties of the Black Belt in two districts. *Id.* Importantly, the VRA Plan also maintained the "overlapping community of interest" between the City of Mobile and the Black Belt. *Id.* Unrefuted testimony from Representative Samuel Jones (a former Mayor of Mobile and former Mobile County Commissioner) and Dr. Joseph Bagley (Plaintiffs' expert who the district court credited in the 2022 and 2023 proceedings) explained the socioeconomic, historical, and cultural connections between these communities. Opp. App.002-005, Opp. App.008-011. Dr. Bagley summarized various Black legislators' statements during the legislative session about the close relationship between the City of Mobile and Black Belt. Opp. App.010-011. For example, one representative explained to the Legislature that "pockets of poverty" in metropolitan

Mobile meant that its residents "had more in common with people in the Black Belt than with the [higher income] residents of Baldwin." Opp. App.010.

In adopting the 2023 Plan, the Legislature also included eight pages of new legislative "findings," retrofitted purportedly to assert that these findings informed the Legislature's map-drawing process. App.19. But never had an Alabama redistricting bill included such findings. App.183. And, just one week earlier, the joint Senate and House Reapportionment Committee had readopted the same state guidelines that had informed the 2021 Plan and Plaintiffs' illustrative plans. App.18-19. Unlike the committee guidelines, however, the new legislative findings "eliminated the requirement of nondilution," App.163; and reverse engineered the "non-negotiable" criteria of "no more than six splits of county lines," keeping together three specific "communities of interest"; and "not pair[ing] incumbent[s]," *id.* The new findings also made several dramatic changes to the "community of interest" definition. They removed shared "ethnic, racial, tribal, [and] social" identities as relevant, while adding shared "transportation infrastructure, broadcast and print media, [and] educational institutions."

These new legislative findings also, for the first time in Alabama's history, named three areas of southern Alabama—the "Black Belt, the Gulf Coast, and the Wiregrass"—as the only "non-negotiable" communities of interest in the *entire state*. App.201. While the findings provided only one sentence to describe the Black Belt and three sentences on the Wiregrass, there were several pages of findings linking Mobile and Baldwin as the "Gulf Coast" community, including a reference to the

"French and Spanish" ethnic and racial identity of its residents, App.202-204. By contrast, the Legislature made no reference to the shared historical and socioeconomic connections in the overlapping community of interest of the Black Belt and Mobile County, which had been presented to the legislature, Opp. App.002-005, Opp. App.008-011, and which the district court had relied on in its prior opinion, *see Merrill*, 582 F. Supp. 3d at 966, 980, 1015. The legislature provided no other explanation for privileging a "Gulf Coast" community of interest (linking Mobile and Baldwin County) over the shared community of the Black Belt and the City of Mobile. This despite the Legislature itself drawing Board of Education maps in 2021 that respect the latter community while dividing Mobile and Baldwin. App.274-75.

The source of these eleventh-hour, reverse engineered findings was a mystery to the House Redistricting Committee chair, Representative Pringle. He testified that he did not know who drafted the findings; nor did he know why the findings were in the bill; nor had he never seen a redistricting bill contain similar findings. App.100 Senator Livingston, the Senate Redistricting Committee chair, however, admitted that the Alabama Solicitor General, counsel for the State in this proceeding, and not legislators, had authored the findings. App.99.

C. Defendants admit their defiance of the district court's injunction.

The *Milligan* Plaintiffs objected to 2023 Plan because it failed to establish a second opportunity district. App.65. Defendants did not claim otherwise, arguing instead that the 2023 Plan began the case "anew," and required Plaintiffs to relitigate the entire case. App.71.

The district court held a hearing on August 14, where the parties presented argument, introduced evidence, and showed video deposition clips. Defendants again admitted that the 2023 Plan defied the district court's injunction, which this Court had affirmed. App.346-47. In Defendants view, the 2023 Plan's findings undid the district court's ruling, affirmed by this Court, that Plaintiffs' illustrative maps were reasonably configured and therefore satisfied *Gingles* 1's compactness requirement. App.104-05.

Defendants did not dispute that Plaintiffs satisfied *Gingles* 1's numerosity requirement, and Defendants conceded that Plaintiffs had satisfied their burden on *Gingles* 2 and 3 and the totality of circumstances. App.106. But they maintained that Plaintiffs' illustrative maps no longer proved that Black voters were sufficiently numerous and compact to create a "reasonably configured" second district.

D. The district court enjoins Defendants efforts to perpetuate vote dilution.

Three weeks after the hearing, the three-judge district court unanimously issued a detailed 200-page opinion and order enjoining the 2023 Plan. App.134.

The court first determined that the 2023 Plan was insufficient because it fails to "completely remed[y]" the likely § 2 violation—a threshold inquiry in these *remedial* proceedings. App.134. That failure, the court found, was a sufficient basis to enjoin the 2023 Plan. Nonetheless, the court went on to consider in the alternative "whether, starting from square one, the Plaintiffs have established that the 2023 Plan likely violates Section Two." App.134. The court unanimously found that Plaintiffs satisfied that burden. On the only issue Defendants disputed, the district court found

that Plaintiffs had already shown (*and this Court affirmed*) that Black voters were sufficiently compact to create a second reasonably configured majority-minority district. App.139, 148. As Plaintiffs argued below, "the only thing that can substantially change" the *Gingles* 1 compactness analysis of where Black Alabamians live "would be a new census." App.106 (quotation and alterations omitted).

1. The Court began by identifying Defendants' position: "that notwithstanding [the court's] order and the Supreme Court's affirmance, the Legislature was not required to include an additional opportunity district in the 2023 Plan." App.6. After "conducting an exhaustive analysis of the extensive record under well-developed legal standards," the court was "struck by the extraordinary circumstance" it faced: "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." App.8-9. In other words, "the State delayed remedial proceedings but ultimately did not even nurture the ambition to provide the required remedy." App.8.

But even setting aside Defendants' concession, the district court independently found that the 2023 Plan lacks a second opportunity district for Black voters, disqualifying it as a remedy for the VRA violation. App.136. Defendants conceded that candidates preferred by Black voters would have lost all but one election. And so, the court found, that the 2023 Plan's CD-2 "cannot fairly be described as realistic, let alone reasonable" opportunity district, as the injunction required. App.137–38.

Listing "seven separate and independent reasons," the district "reject[ed] the assertion that the Plaintiffs must reprove Section Two liability under *Gingles*" when a proposed remedial plan fails to completely remedy a likely § 2 violation. App.117. First, the Secretary identified no precedent requiring that the analysis begin from scratch. Second, the court ruled that "the main precedent the State cites, *Dillard v. Crenshaw County*, aligns with [the district court's] approach" of evaluating the 2023 Plan. (citing 831 F.2d 246, 247–48 (11th Cir. 1987)). Third, *North Carolina* v. *Covington*, 138 S. Ct. 2548 (2018) (per curiam) also supported the court's approach. App.120. Fourth, the court concluded that district courts "regularly isolate the initial remedial determination to the question whether a replacement map corrects a violation found in an earlier map." App.123-24 (collecting cases). Fifth, equity required the court to evaluate whether the 2023 Plan remedied the violation and complied with the initial injunction. App.124-27. Sixth, 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," which "would make it exceedingly difficult, if not impossible, for a district court ever to effectuate relief under Section Two." App.127-28. Finally, the "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 [the district court] held—and the Supreme Court affirmed—that the 2021 Plan likely violated Section Two." App.128-29.

The court therefore found that the 2023 Plan's failure to provide a second opportunity district, as required by the injunction, was sufficient, standing alone, to enjoin the 2023 Plan.

2. The court nonetheless also conducted a *Gingles* analysis from "ground zero" and unanimously found that the 2023 Plan—like its predecessor—likely violates the VRA. App.139. Because Defendants conceded every other factor, the district court's *Gingles* analysis focused on Defendants' argument that Plaintiffs had not satisfied G*ingles* 1. App.147-78.

The district court first explained why neither the 2023 Plan nor its findings altered the *Gingles* 1 analysis.[3] The "essential question" under *Gingles* 1 "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.'" App.148 (quoting *Cooper v. Harris*, 581 U.S. 285, 301 (2017)). The district court, affirmed by this Court, already found that Plaintiffs' illustrative maps showed that Alabama's minority population satisfies that criterion. App.47.

The court then rejected the "backbone" of Defendants' argument—that Plaintiffs had to "meet or beat" the 2023 Plan on the State's own preferred districting criteria. App.147-50. The Court explained that *Gingles 1* "does not require the Plaintiffs to offer the best map; it requires them to offer a reasonable one." App.148.

[3] Much like the first hearing, the district court once again "assigned very little weight" to the testimony of Defendants' expert, Mr. Thomas Bryan. *Id.* (alterations adopted). As the court put it: "Mr. Bryan ma[de] no attempt to rehabilitate his own credibility or engage any of the many reasons we assigned little weight to his testimony" to begin with. *Id.* It was "as though [the court's] credibility determination never occurred." *Id.* The court deemed Mr. Bryan's opinion *ipse dixit* and excluded it. App.141-46.

It reasoned that Alabama's unprecedented theory, which lacks any support in the text of § 2, "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." *Id.*. As this Court affirmed in this case, "[t]he district court . . . did not have to conduct a beauty contest between plaintiffs' maps and the State's." *Milligan*, 143 S. Ct. at 1505 (cleaned up).

Even so, acceptance of Defendants' "meet or beat" theory would not have altered the *Gingles* analysis. The court separately concluded that Plaintiffs' illustrative maps were no less compact or respectful of communities of interest and political subdivisions than the 2023 Plan, and remained "reasonably configured." On compactness, the district court explained that the 2023 Plan had "not changed any aspect of Dr. Duchin and Mr. Cooper's testimony that the compactness scores of the districts in their plans are reasonable." App.150. That testimony, which the court found "highly credible," established that the illustrative plans were objectively reasonably compact, not just that they were reasonably compact as compared to the 2021 Plan. App.140. Defendants' expert, Mr. Trende, did not refute this testimony, App.151, and in fact conceded that one illustrative plan, Duchin Plan B, outperforms the 2023 Plan. *Id.*

With respect to communities of interest, the district court found that, "[a]t best," the illustrative maps and the 2023 Plan both split a community of interest and were therefore "a wash when measured against this metric." App.166 (quoting *Milligan*, 143 S. Ct. at 1505). Relying on testimony that it credited from

Representative Jones and Dr. Bagley, the district court found that the Black Belt and the City Mobile were an "overlapping community of interest" with longstanding socioeconomic, historical, and cultural connections. *Id*. Unlike Plaintiffs' plans, which respected the Black Belt and its connection to Mobile, the 2023 Plan severed this Mobile-Black Belt community of interest. App.95-96.

Defendants' belated decision to preserve the Wiregrass (a community united only by rural geography, a military installation, and a university) and the Gulf Coast (an "overstate[d]" community of interest) did not compel a different result. App.156, 166-68. The court reiterated that Plaintiffs' illustrative maps need not respect the same communities of interest as the 2023 Plan because this Court had just rejected precisely this sort of "beauty contest." App.147 (citing *Milligan*, 143 S. Ct. at 1505).

As for political subdivisions, Plaintiffs' illustrative plans likewise remained reasonably configured even under Defendants' flawed "meet or beat" theory. Five of Plaintiffs' illustrative plans *did* "meet" Defendants' new six-split test, and one illustrative map split *fewer* counties (five) than the 2023 Plan. App.176-77.

3. Defendants conceded that the district court did not need to re-do the totality-of-circumstances analysis. Nonetheless, the district court found that, the "circumstances surrounding the enactment of the 2023 Plan" provided further evidence that elected officials in Alabama had been unresponsive to the particular needs of the Black community in their refusal to remedy the identified likely vote dilution. App.179–80.

The 2023 Plan's "mysterious provenance" was one sign of unresponsiveness. App.181. Before the 2023 Plan's enactment, the Legislature never released it for public comment. App.180. Indeed, the question of who even drew the 2023 Plan remained unanswered. *Id.* And the justifications for the State's new legislative findings remained unknown. *Id.*

The district court then found that the legislative findings revealed that political self-interest, rather than redressing the dilution of Black voters' influence, had driven the legislative process. App.182. The 2023 Plan's legislative findings eliminated non-dilution as a legislative priority, and instead prioritized the protection of incumbents and specific communities of interest. App.183. Moreover, the Alabama Solicitor General, the Defendants' lawyer, not the Legislature, drafted these unprecedented findings. *Id.* The court found notable that neither Redistricting Committee chair played a role in drafting the findings. *Id.* The "Legislature's decision not to create an additional opportunity district" demonstrated that it was "unwilling to respond to the well-documented needs of Black Alabamians." App.184.

* * *

Having found all *Gingles* preconditions and that the Senate Factors favored Plaintiffs, the district court enjoined the 2023 Plan and, by separate order, instructed a Special Master to begin work on a remedial map. App.223.

E. The district court rejects the Secretary's request for a stay.

The Secretary—but not the Legislative Defendants—appealed the district court's ruling and filed an "emergency" stay motion. The district court unanimously

denied it, in another carefully reasoned 26-page ruling. The district court emphasized that it was aware "of no 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." App.627.

Moreover, the Secretary did "not even attempt[] to make the strong showing [of "likelihood of success] that the law requires" for a stay. App.628. The argument contained "three sentences crafted at the highest level of abstraction" and did not "engage, let alone rebut, any of [the district court's] findings of fact or conclusions of law." App.629. The Secretary's equitable contentions were found to be equally meritless. The court found it "deeply troubl[ing]" that Alabama would defy a court order and enact a map that the State "admits does not provide the remedy [the district court] said federal law requires." App.647. Recognizing that Alabamians "already [] endured one congressional election . . . under an unlawful map[,]" the district court found no reason that should be allowed to happen again.[4] *Id.*

The Secretary—but again not the Legislators—then moved for relief in this Court.

ARGUMENT

[4] While not "not material to [the court's] separate and independent rejection" of the Secretary's stay motion, the district court also observed that the "Legislators apparently do not share the Secretary's concern" about the need for an "emergency" stay to protect state sovereignty. App.645. The "Legislators' silence undermine[d]" the Secretary's claims of irreparable harm since it is the "Legislature's task to draw districts; the Secretary simply administers elections." *Id.*

A stay pending appeal is "extraordinary relief" and requires the applicant 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). Because a stay is "an intrusion into the ordinary processes of administration and judicial review," *Nken* v. *Holder*, 556 U.S. 418, 427 (2009) (quotation omitted), an applicant bears the "especially heavy burden" of proving that this extraordinary relief is warranted. *Packwood* v. *S. Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers).

In determining whether to grant a stay pending appeal, this Court considers: (1) whether the applicant has made a "strong showing" on the likelihood of success on the merits; (2) whether the applicant will be "irreparably injured absent a stay;" (3) whether issuance of the stay will "substantially injure" Plaintiffs; and (4) "where the public interest lies." *Nken*, 556 U.S. at 434 (quoting *Hilton* v. *Braunskill*, 481 U.S. 770, 776 (1987)). The first and second factors "are the most critical." *Id.* On direct appeal, this Court "weigh[s] heavily the fact that the lower court refused to stay its order pending appeal"; that the "case received careful attention by the three-judge court, the members of which were 'on the scene' and more familiar with the situation than the Justices of this Court; and [that] the opinions attest to a conscientious application of principles enunciated by this Court." *Graves* v. *Barnes*, 405 U.S. 1201, 1203-04 (1972) (Powell, J., in chambers) (refusing to stay a remedial plan in a vote dilution case); *see also Va. House of Delegates* v. *Bethune-Hill*, 139 S. Ct. 914 (2019) (declining to stay an injunction against the use of a state's plan); *McCrory* v. *Harris*, 577 U.S. 1129 (2016) (same); *Wittman* v. *Personhuballah*, 577 U.S. 1125 (2016)

(same); *see also League of United Latin Am. Citizens* v. *Perry*, 567 U.S. 966 (2012) (declining to stay an injunction adopting a remedial plan in a § 2 case).

I. The Secretary has not come close to demonstrating a strong likelihood of success on appeal.

The Secretary cannot show that "a majority of the Court will vote to reverse the judgment below." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam). He offers no basis to find that the district court's careful factual findings are clearly erroneous—indeed, he does not even try to make that required Rule 52(a) showing. *See Gingles*, 478 U.S. at 79 (explaining that the clear-error standard "preserves the benefit of the trial court's particular familiarity with the indigenous political reality"). Instead, the Secretary's stay application is a bald attempt to take another run at "attempt[ing] to remake [this Court's] § 2 jurisprudence anew." *Milligan*, 599 U.S. at 23.

A likelihood of success would require the Secretary to identify legal errors or clearly erroneous factual findings in each of the two independent grounds that the district court cited for its decision. First, he would need to show reversible error in the district court's conclusion that the 2023 Plan fails to comply with the initial injunction's requirement to draw a second opportunity district, which this Court affirmed. In addition, he would need to show that the court committed reversible error in its application of *Gingles* to the 2023 Plan, which the court independently found likely violates § 2. The Secretary's stay application satisfies neither showing.

The Secretary's arguments for a stay largely recycle arguments this Court has already rejected. *See* Stay Br. 26-27 (wrongly claiming that the district court ordered

racial proportionality); *id.* at 27-39 (alleging that the illustrative plans are not "reasonably configured" and run afoul of the Constitution). Disagreement with this Court's ruling is not a valid reason to defy it—and certainly not a basis for a grant of an emergency stay application.

A. The District Court Properly Determined that the 2023 Plan Defied its Injunction, Perpetuating the Likely § 2 Violation.

The Secretary lacks any reasonable likelihood of prevailing on appeal. The district court conducted an analysis of the 2023 Plan exactly as required by precedent. The Secretary does not contest the district court's finding that the 2023 Plan failed to create an additional opportunity district, in defiance of the court's injunction. *See* Stay Br. 17.

The simple fact is that the Legislature failed even to try to comply with the district court's order—and the Secretary now seeks to argue that it need not have done so. But there is "no other case—and the Secretary does not direct [this Court] 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." App.627. The State's response recalls instead our unfortunate history of States resisting civil rights remedies through "laws and practices which, though neutral on their face, serve to maintain the status quo." *Rogers* v. *Lodge*, 458 U.S. 613, 625 (1982); *see, e.g.*, *Covington*, 138 S. Ct. at 2551-53 (rejecting a state legislature's attempt to replace one discriminatory map with another discriminatory map); *United States* v. *Virginia*, 518 U.S. 515, 554-56 (1996)

(rejecting a state's request to replace one sex-segregated school with a comparable segregated school system); *Louisiana* v. *United States*, 380 U.S. 145, 154-56 (1965) (rejecting a state legislature's attempt to replace a discriminatory literacy test with a similar test); *see also Morse* v. *Republican Party of Va.*, 517 U.S. 186, 211-13 (1996) (plurality) (describing states' reenactment of slightly different versions of white primary laws which acted to perpetuate discrimination); *Dillard* v. *Crenshaw Cty.*, 640 F. Supp. 1347, 1359-60 (M.D. Ala. 1986) (describing Alabama's similar defiance).

The district court "applied the same standard that federal courts have routinely applied for forty years." App.630. After concluding that a state map violates § 2 by failing to afford sufficient opportunity to minority voters, courts have the "power" and "duty" to devise a remedy that "eliminate[s] the discriminatory effects of the past" and "bar[s] like discrimination in the future." *Louisiana*, 380 U.S. at 154. To begin, federal courts "should, if possible, afford 'a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than devise and order into effect its own plan.'" *Lawyer* v. *Dep't. of Just.*, 521 U.S. 567, 576 (1997) (quotation and alteration omitted). But when the legislature draws a new map, the case does not become moot. *See Covington*, 138 S. Ct. at 2552-53. Instead, the court retains jurisdiction to determine whether the new legislative plan complies with the injunction and redresses the violation. *See id.*

In § 2 cases, the central question is whether the new map "*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." *Dillard*, 831

F.2d at 250 (emphases in original) (quoting S. Rep. No. 97-417, at 31 (1982)); *accord* *Louisiana*, 380 U.S. at 154. If the court finds that the new map remedies the violation, the case ends. If, as here, however, a court finds that the new map perpetuates the earlier violation, it has the "duty to cure" that violation "through an orderly process in advance of elections." *Covington*, 138 S. Ct. at 2553. In redistricting, this often involves a special master drawing a plan. *Id.* at 2553-54.

The fact that the district court correctly adopted this well-settled framework for remedying vote dilution *alone* compels affirmance of the decision below, and denial of the extraordinary request for a stay. The Secretary does not even dispute that the 2023 Plan failed to "completely remedy" the vote dilution found by the district court and affirmed by this Court. Nor could he. The "special wrong" of vote dilution occurs where a minority group "could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district" and is instead "cracked by assigning some voters elsewhere." *Bartlett*, 556 U.S. at 18-19 (plurality).

Unsurprisingly, the remedy for vote dilution has always been the creation of *additional* opportunity districts where minority voters have a genuine opportunity to elect candidates of their choice. *See, e.g.*, *Perry* v. *Perez*, 565 U.S. 388 (2012), *on remand* No. 11-CA-360-OLG-JES-XR, 2012 WL 13124275, at *5 (W.D. Tex. Mar. 19, 2012) (three-judge court) (ordering the "creation of a new Latino district"); *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 496 (2006), *on remand* 457 F. Supp. 2d 716, 719 (E.D. Tex. 2006) ("*LULAC*"); *Gingles*, 478 U.S. at 50-51; *Rogers*, 458 U.S. at 615-16, 627-28; *White* v. *Regester*, 412 U.S. 755, 765-66, 769 (1973).

So too here. The only appropriate cure in this vote dilution case is a plan that remedies the dilution by including "an additional district in which Black voters . . . have an opportunity to elect a representative of their choice." App.131. To determine if the 2023 Plan contained such a district, the district court evaluated the degree of racially polarized voting, past election data, and racial demographics in CD-2 of the 2023 Plan. App.137-39; *cf. also LULAC*, 548 U.S. at 428-29 (reviewing past election performance and the minority citizen population to evaluate whether a district provided an "effective opportunity"). The district court did not err in finding that the 2023 Plan does not contain a new opportunity district since Black-preferred candidates almost never won elections in CD-2; indeed, Defendants did not contend otherwise. App. 136-39. *cf. also Abbott v. Perez,* 138 S. Ct. 2305, 2332 (2018) (concluding that § 2 illustrative districts that rarely, or never, performed for minorities failed *Gingles* 1)

The Secretary argues that the new plan need not remedy the vote dilution that was the predicate for the VRA violation, because enactment of a new plan starts the clock afresh, as if there were no finding of prior vote dilution requiring a remedy. But the mere fact that the Legislature is the body that enacts a new map in the first instance does not permit the Secretary to sidestep Alabama's duty to comply with court orders. *See, e.g.*, *Covington*, 138 S. Ct. at 2553 (affirming a court's rejection of a legislative remedial plan that had failed to cure the constitutional violation). While § 2 remedial plans should defer to "legislative policies underlying [the challenged]

plan," this is only true "to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act." *Perry*, 565 U.S. at 393 (citation omitted).

"The only reason why the 2023 Plan exists is because [the district court] enjoined the 2021 Plan on the ground that it likely diluted minority voting strength." App.163. Yet the Secretary's argument is that, despite refusing to cure the violation, the 2023 Plan must be upheld because the State has belatedly chosen to prioritize the "non-racial" and "non-negotiable" policies of protecting incumbents and certain asserted communities of interest, Stay Br. 36-37; even though those new state policies did not exist at the time of the 2021 Plan, or even at the beginning of the remedial process that resulted in the 2023 Plan. App.153-54.

Left unchecked, the Secretary's desired process could (and, as this case illustrates, *would*) allow the State to "create[] 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." App.126. *See Covington*, 138 S. Ct. at 2553-54 (rejecting a state's similar attempt at a "second bite at the apple" that "risked further drawing out" proceedings) (cleaned up) (citation omitted).

The district court correctly determined that the 2023 Plan did not comply with the injunction because it failed to provide a second opportunity district. App.116-17.

2. The Secretary's cited cases do not support his theory that the State's enactment of the 2023 Plan restarts proceedings from scratch.

The Secretary first taps *Wise* v. *Lipscomb*, 437 U.S. 535, 540 (1978), and *Abbott*, 138 S. Ct. at 2334 for this notion. Stay Br. 23. But neither *Wise* nor *Abbott* help the

Secretary. *Wise* involved a challenge to a federal court's attempt to preempt city-mandated at-large elections in favor of a judicial preference for single-member districts. 437 U.S. at 539-40. It said nothing about the process of conducting remedial proceedings except that—as the district court did here—courts should "whenever practicable" afford legislators the first opportunity to remedy an unlawful plan. *Id.* at 540. The Court's aside that enacted legislation becomes "governing law unless it, too, is challenged and found to violate" federal law likewise offers no help to the Secretary. *Id.* No one disputes that the 2023 Plan became "governing law" when enacted. And Plaintiffs did in fact challenge the 2023 Plan as violative of the federal court's valid injunction. Further, based on undisputed facts, the court found that Plaintiffs had proven that the 2023 Plan likely violated § 2 and enjoined it. That is not, as the Secretary would have it, "in the manner of the original sin, condemn[ing] governmental action that is not itself unlawful," Stay Br. 24 (quoting *Abbott*, 138 S. Ct. at 2324). It is simply requiring a remedy for a violation of rights.

Abbott is also inapposite. In *Abbott*, the district court had incorrectly concluded that, because a prior state map was enacted with discriminatory intent, the State bore the burden of proving that the new map had fully cleansed this discriminatory taint. 138 S. Ct. at 2324-25. In contrast, the district court here unequivocally placed the burden on Plaintiffs to prove that the new 2023 Plan perpetuated the § 2 violation, App.113, App.466, and presumed that the Legislature acted in good faith to enact the 2023 Plan, App.124. The court found that Plaintiffs had met their burden of proving *both* that the 2023 Plan lacked the second opportunity district required to satisfy the

injunction, App.134-38, *and*, after applying the *Gingles* test, that the 2023 Plan itself violated § 2, App.139-84.[5]

Remarkably, the Secretary claims that "[a]t no point did the district court meaningfully interact" with his argument that the 2023 Plan called for a new *Gingles* inquiry. Stay Br. 23. But the court engaged in detail with the Secretary's arguments and explained why "[f]or seven separate and independent reasons," it "reject[ed] the assertion that the Plaintiffs must reprove Section Two liability under *Gingles*." App.117; *see supra* at 12 (summarizing each of the seven reasons).

Given its detailed analysis, the district court did not "misconceiv[e] the task before it," Stay Br. 22; the Secretary does. When a State violates § 2 by failing to provide a second opportunity district, the remedy is to provide the second opportunity district. The Secretary's only response is a strained attempt (at 25-26) to distinguish *Covington*. But the clear lesson of *Covington* is that a new legislative plan must *actually remedy* the harm, otherwise it falls to courts to devise a remedy. 138 S. Ct. at 2553. So too here. At this phase, Plaintiffs were only required to show that the 2023 Plan failed to remedy the vote dilution. The court properly found that Plaintiffs

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[5] The Secretary's compendium of cites (at 23 n.45) likewise fail to advance his theory. These cases stand only for two unobjectionable propositions that (1) courts may not assume that a new plan perpetuates the discriminatory effects of a prior plan, *Dillard*, 831 F.3d 249-50, and (2) that courts may not "substitute their judgment of a more equitable remedy for that of a legislative body" once lawmakers have in fact *remedied* the prior violations, *McGhee v. Granville Cnty.*, 860 F.2d 110, 115 (4th Cir. 1988), *Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 407 (5th Cir. 1991); *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 750 (N.D. Ohio 2009); *Jeffers v. Clinton*, 756 F. Supp. 1195, 1199 (E.D. Ark. 1990) (three-judge court), *aff'd mem.* 498 U.S. 1019 (1991).

met that burden and were entitled to relief. The Secretary's legal challenge to this "framing" fails.

B. The District Court did not clearly err in finding that the 2023 Plan Likely Violates the Voting Rights Act under a "straightforward" *Gingles* analysis.

Even if five justices concluded that the district court erred by asking, at the remedial phase, whether the 2023 Plan remedied the prior violation, a stay would not be warranted. The district court ruled in the alternative that the 2023 Plan independently likely violates § 2, and therefore the Secretary must identify a reversible legal error in the court's *Gingles* analysis.[6] But the Secretary identifies no clear error in the district court's finding of vote dilution. Below, Defendants did not even attempt to discredit Plaintiffs' experts or argue that the district court "should discount their opinions for any reason." App.138. And the Secretary's legal arguments are wrong, barred by this Court's prior ruling, or both. Plaintiffs' *Gingles* showing is the same today that it was in the prior appeal. Nothing about the new plan alters Plaintiffs' critical showing that Black voters could comprise an additional, "reasonably configured" majority-Black district.

Once again, the district court evaluated the § 2 vote dilution claim "using the three-part framework developed in [*Gingles*]." *Milligan*, 599 U.S. at 17-19. At this stage, the only *Gingles* element that Defendants even contested was whether Plaintiffs' illustrative maps showing a second majority-minority district were

[6] The Secretary does not dispute that Plaintiffs satisfy *Gingles* 1's numerosity requirement, App.139, and he concedes for purposes of the remedial proceedings that Plaintiffs satisfied *Gingles* 2 and 3, and "met their burden" on the Senate Factors. App.178.

"reasonably configured" under *Gingles* 1. Defendants did not dispute that Plaintiffs satisfied *Gingles* 1's numerosity requirement and conceded for purposes of these proceedings that Plaintiffs "met their burden" on *Gingles* 2 and 3 (racial polarization), and the totality-of-circumstances test. App.178.

This Court has already determined that Plaintiffs' eleven illustrative maps satisfied the "reasonably configured" requirement. *Milligan*, 599 U.S. at 20-22. Plaintiffs did not need to present "new 'reasonably configured' illustrative plans." Stay Br. 19-20. Whether a district is "reasonably configured turns on "the compactness of the minority population, not to the compactness of the contested district." *LULAC*, 548 U.S. at 433 (citation omitted). The compactness of the Black population in Alabama under the 2020 census has not changed since this Court's prior ruling, nor could it. And so, Plaintiffs' illustrative maps did not change either. They were reasonably configured before, and they remain reasonably configured today. That Defendants were required to adopt a new plan does not alter the character or relevance of Plaintiffs' maps. The district court's detailed finding that Plaintiffs' maps are reasonably configured was not clearly erroneous. *See supra* at 13-15.

Moreover, the Secretary's new legal theory that § 2 plaintiffs must present "at least one illustrative plan on par with the 2023 Plan" under the *State's* preferred "neutral" criteria, Stay Br. 28, finds no support in precedent. In fact, this directly contradicts this Court's ruling in June that the district court "did not have to conduct a beauty contest between plaintiffs' maps and the State's [2023 Plan]." *Milligan*, 599 U.S. at 21 (quotation omitted) (alteration accepted); *see also Bush* v. *Vera*, 517 U.S.

952, 977 (1996) (plurality opinion). As the district court concluded, "[t]he 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." App. 149. The district court rejected the Secretary's attempt to argue that Plaintiffs' plans must "meet or beat" the 2023 Plan on each of the traditional redistricting criteria of compactness and respect for political subdivisions and communities of interest. App.147-50. Nonetheless, the district court again found that—whether applying an objective reasonableness standard or the Secretary's "meet-or-beat" rule—Plaintiffs' plans still satisfied the relevant districting criteria. App.150-52; *see also supra* at 14-15 (summarizing the court's findings that Plaintiffs' plans had the same or better compactness scores than the 2023 Plan and split the same or fewer counties than the 2023 Plan).

The crux of the Secretary's argument is that Plaintiffs' illustrative plans fail because they do not maintain three communities of interest in the same way that the State now purports to prioritize them. Stay Br. 30-32. According to the Secretary, the 2023 Plan provides Black Alabamians the greatest electoral opportunity possible without further dividing the "nonracial communities" of the Wiregrass, the Gulf Coast, and the Black Belt first recognized in new legislative findings appended to the 2023 Plan. Stay Br. 30-31.

But, as the district court found, the record does not support the Secretary's claim that these communities are nonracial or inviolable. App.156-57, 166-68. First, the Secretary's preference for "nonracial" communities frays under the State's desire

to prioritize the Gulf for its "French and Spanish"—that is, white European—"colonial heritage." App.163-64. Indeed, because this case involves "extensive expert testimony about a racial minority's shared experience of a long and sordid history of race discrimination," Alabama's deletion of race and ethnicity from the definition of communities of interest "caught [the district court's eye"; particularly because 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.164. Second, as described *supra* at 7-8, the testimony of Plaintiffs' expert—again credited by the district court—invalidates the State's "ahistorical" justifications for refusing to split the Wiregrass and Gulf Port counties. App.66-67. The 2023 Plan itself splits the Wiregrass and recognizes the Black Belt and Wiregrass as overlapping communities. App.155. And the Legislature split Mobile and Baldwin counties "in separate congressional districts for almost all the period between 1876 and the 1970s," App.159—with Mobile County previously being connected to the Black Belt, App.66. As recently as in the 2021 Board of Education plan the Legislature chose to connect the City of Mobile to the western Black Belt counties (including Montgomery County) while separating Mobile and Baldwin Counties. App.164. Alabama cannot ignore this history or reverse it by naming only three specific communities in the whole state in legislative "findings." Third, as explained *supra* at 7, the district court found that Plaintiffs' plans connected the "geographically overlapping communities of interest" of the City of Mobile and the Black Belt in a second majority-minority district. App.166. The court cited the testimony of experts,

App.66-67, and Mobile's former mayor, App.66. It found, and the Secretary does not dispute, that Alabamians in the City of Mobile "share experiences of 'concentrated poverty' and a 'lack of access to healthcare' with Alabamians in the Black Belt." App.157. The court had before it the detailed testimony of Representative Jones that the people of the Black Belt and City of Mobile have historical and familial connections, and share industries, churches, colleges, transportation, entertainment, and other interests. Opp. App.002-005. The district court found that Plaintiffs' maps and the 2023 Plan were "a wash when measured" compared on communities of interest because—just as during the prior appeal—"'[t]here would be a split community of interest in both.'" *See* App.166 (quoting *Milligan*, 599 U.S. at 21).

And Plaintiffs prevail can even under the Secretary's (incorrect) "meet or beat" standard for communities of interest. As explained supra at 7, Plaintiffs submitted the "VRA Plan" to the Legislature. The 2023 legislative findings state that, "[i]f it is necessary to divide a community of interest," a "division into two districts is preferable to division into three or more districts." App.201. The VRA plan "meets" the 2023 Plan and the State's "preference" by placing the whole of all 18 core counties of the Black Belt in two districts and splitting the State's preferred communities of the Wiregrass and Gulf Coast between only two districts. Opp. App.017.

More fundamentally, nothing in the law justifies treating state-selected communities of interest as a "trump card" that overrides compliance with § 2 or nullifies Plaintiffs' showing that Black Alabamians are geographically compact enough to comprise a reasonably configured second opportunity district. To the

contrary, a rule that made certain retrofitted, attorney-identified communities of interest or map-drawing requirements inviolable would radically rewrite the § 2 inquiry, which "for more than forty years . . . has expressly provided that a violation is established based on the 'totality of circumstances.'" App.170; *see also Milligan*, 599 U.S. at 10-11. The text of the statute does not even mention communities of interest much less elevates them as a trump card over all other districting principles or VRA compliance. *See* 52 U.S.C. §§ 10301(a)-(b). And this Court *just* rejected the suggestion that there is no valid reason for illustrative maps to split the State's preferred community of interest (especially where, as here, the State itself split this community as recently as its 2021 in its Board of Education plan). App.171-72.

The Secretary seems to take issue with the proposition that a state cannot erect at the remedial phase facially neutral districting criteria to shield an unlawful map from § 2 liability. Stay Br. 26 (criticizing the district court for not deferring to the 2023 Plan because it perpetuates the likely vote dilution of the 2021 Plan, instead of remedying the § 2 violation). But this Court has repeatedly rejected purportedly neutral state interests in partisan goals, incumbent protection, *see, e.g.*, *LULAC*, 548 U.S. at 440-41, core retention, and preserving certain communities of interest, *Milligan*, 599 U.S. at 21-22, where, as here, a state has invoked these purported interests to immunize a map that dilutes minority voting strength.

So too here. The Secretary "fail[ed] to respond to the Plaintiffs' valid point that [the district court] cannot readily defer to the legislative findings if . . . they perpetuate vote dilution." App.164. The Secretary cannot disregard a court order

simply by asserting that the 2023 Plan is immunized by reverse-engineered "findings" written by his own attorney. *See* App.163-64 (observing that the legislative findings have peculiarly specific contours); *see also* App.198-207 (the legislative findings).

There is no basis for this Court to depart from its prior affirmance of the district court's finding that Plaintiffs' maps "contained two majority-black districts that comported with traditional districting criteria." *Milligan*, 599 U.S. at 20.

C. The Rule of Law Requires that this Court Not Permit the Secretary to Circumvent the District Court's Order or this Court's Own Recent Ruling.

The Secretary presents three legal challenges to the district court's *Gingles* 1 analysis: that (1) Plaintiffs' illustrative plans improperly rely on race and fail to "meet or beat" the 2023 Plan along the State's preferred "nonracial" districting criteria, Stay Br. 27-34; that (2) the district court's application of § 2 requires proportionality by mandating the creation "on predominantly racial lines" of a second majority-black district in violation of traditional redistricting principles, *id.* at 26-27; and that (3) the district court's application of § 2 is unconstitutional, *id.* at 34-39.

These arguments sound familiar because they are. When Alabama was last before this Court it argued that (1) the district court had "misread" Supreme Court precedent "to permit § 2 plaintiffs to draw maps in ways that States never could" by "hit[ting] a racial target first and apply[ing] traditional, race-neutral districting criteria second," Appellant Br. at 43; (2) the district court's application of *Gingles* and § 2 requires racial proportionality in redistricting "and is no different than mandating maximization of majority-minority districts," *id.* at 53; and (3) the *Gingles* framework

and application of § 2 to redistricting is unconstitutional, *id.* at 77-78. This Court rejected each of those assertions. *See Milligan*, 599 U.S. at 17-23.

The Secretary's new spins on his old, failed theories cannot and do not warrant a stay now.

i. The Law-of-the-Case doctrine forecloses the Secretary from relitigating the very same legal arguments that this Court rejected just a few months ago.

This Court has already rejected the Secretary's recycled arguments. And the law of the case requires it to reject them again. Law of the case reflects the "sound policy that when an issue is once litigated and decided, that should be the end of the matter." *United States* v. *U.S. Smelting, Refin. & Mining Co.*, 339 U.S. 186, 198 (1950). "[T]he findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal." *Heathcoat* v. *Potts*, 905 F.2d 367, 370 (11th Cir. 1990) (quotation omitted). This rule of judicial restraint gives finality to issues previously decided. *Id.*

The equitable underpinnings of law of the case apply forcefully here. The Secretary seeks to relitigate old issues as a justification for refusing to comply with the district court's order, as already affirmed by Court. The district court explained in clear terms what was required to remedy the vote dilution it found in 2022: "an additional district in which Black voters . . . have an opportunity to elect a representative of their choice." App.224. Even though this Court affirmed the district court's order in full, Alabama refused even to try to comply with that order and enact the required remedy. Instead, the Legislature ignored the injunction, backed a plan

drawn by an unknown mapdrawer, adopted reverse-engineered "findings" drafted by the Alabama Solicitor General, then claimed that these unprecedented "findings" compelled the dilutive 2023 Plan. App.181-84.

Alabama's open defiance of this Court should be condemned, not rewarded with a stay.

ii. This Court has already held that the district court's preliminary injunction and the Gingles test do not require proportionality.

The Secretary cannot prevail on his argument that the district court misconstrued *Gingles* to compel proportionality at the expense of traditional districting principles. Stay Br. 26-27. The Secretary predicts that, without a stay, the district court will "impose a race-segregated court-drawn plan." Stay Br. 26.

The Secretary is wrong.

First, this Court has already held that the "*Gingles* framework itself imposes meaningful constraints on proportionality." *Milligan*, 599 U.S. at 26. *Gingles* 1 requires § 2 plaintiffs to draw "reasonably configured" illustrative majority-minority districts that "comport[] with traditional districting criteria, such as being contiguous and reasonably compact." *Id.* at 18. The requirement that § 2 plaintiffs comply with these "objective factors" can "defeat a claim that a district has been gerrymandered on racial lines." *Shaw* v. *Reno*, 509 U.S. 630, 647 (1993). Based on these objective factors, Plaintiffs' eleven plans are "example districting maps that *Alabama could enact*" where "black voters could constitute a majority in a second district that was 'reasonably configured.'" *Milligan*, 599 U.S. at 19. "The very reason a plaintiff adduces a map at the first step of *Gingles* is precisely *because of* its racial

composition—that is, because it creates an additional majority-minority district that does not then exist." *Id.* at 34 n.7 (emphasis in original). Plaintiffs' plans did not allow race to predominate. *Id.* at 30-31 (plurality). And so, there remains any number of remedies that will not lead to illegal gerrymandering.

In fact, and second, the district court has yet to impose any remedial plan. The parties and various non-parties have submitted a dozen plans with majority-minority districts, majority-white opportunity districts, and a mix of both. Thus, as the district court explained, "it is premature, speculative, and entirely unfounded for [the Secretary] to assail any plan [the district court] might order as a remedy as 'violat[ing] the 2023 Plan's traditional redistricting principles in favor of race' because [the district court] ha[s] not yet adopted a remedial plan." App.639-40. The district court has instructed the special master that his plan must comply with the Constitution, and the district court has assured the parties that it "will carefully review any plan he recommends to ensure that this requirement is met." App.640. This Court has jurisdiction under § 1253 to review the district court's order enjoining use of the 2023 Plan.[7] *Abbott*, 138 S. Ct. at 2319. But it has no jurisdiction to review a remedial plan that does not yet even exist. *See Gunn* v. *Univ. Comm. to End the War in Vietnam*, 399 U.S. 383, 387 (1970) (no § 1253 jurisdiction because "there was no order of any kind" to review).

[7] To the extent that the Secretary seeks to show irreparable harm, the argument also fails. Irreparable harm must be "actual and imminent." *Swain* v. *Junior*, 961 F.3d 1276, 1292 (11th Cir. 2020). Speculation about a forthcoming plan is neither.

Third, the Secretary's "constitutional avoidance" arguments also fail, because there is nothing here to avoid. This Court has already recognized that, "under certain circumstances," federal courts "have authorized race-based redistricting as a remedy for state districting maps that violate § 2." *Milligan*, 599 U.S. at 41. This Court has "long recognized '[t]he distinction between being aware of racial considerations and being motivated by them.'" *Covington*, 138 S. Ct. at 2554 (citation omitted).

Strict scrutiny applies only if "race is the predominate factor motivating" a plan adopted by the state or ordered by the court. *Wisconsin Legislature* v. *Wisconsin Elections Comm'n*, 595 U.S. 398, 401 (2022). Even then, a state's plan can "satisfy strict scrutiny if it proves that its race-based sorting of voters is narrowly tailored to comply with the VRA." *Id.* at 401. This is because "remediating specific, identified instances of past discrimination that violated the Constitution or a statute" is one "compelling interest[] that permit[s] resort to race-based government action." *Students for Fair Admissions, Inc.* v. *President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2162 (2023) ("*SFFA*") (citing *Shaw* v. *Hunt*, 517 U.S. 899, 909-10 (1996)); *cf. also LULAC*, 548 U.S. at 518-19 (Scalia, J., dissenting, joined by Roberts, C.J., Thomas, and Alito JJ.) (§ 5 of the VRA compliance is a "compelling state interest").

The Secretary's arguments about racial gerrymandering in an unknown remedial plan (Stay Br. 34) are "premature, speculative, and entirely unfounded." App.639. The Secretary has no basis for presuming that the district court will choose a plan where race predominates or, even if it does select such a plan, that that plan will not be narrowly tailored. *Cf., e.g.*, *Abbott*, 138 S. Ct. at 2332 (upholding a

majority-minority district where there was "good reason[]" to believe that the VRA required it); *Bethune-Hill* v. *Va. State Bd. of Elections*, 580 U.S. 178, 193-96 (2017) (same).

Finally, the Secretary attempts to evade this defect by arguing (Stay Br. 36-38) that race will predominate in *any* remedial plan because the plan will *necessarily* use "race as a negative" and involve "racial stereotyping. *Id.* at 37-38. Not so. The district court did not use race as a negative in its *Gingles* analysis because it did not, as the Secretary claims (Stay Br. 37), "reject[] 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." The district court concluded that the 2023 Plan deprived Black Alabamians of an equal opportunity to elect candidates of their choice because, due to racially polarized voting, the Secretary conceded that the preferred candidate of over 90% of Black voters would *never* win in the 2023 Plan's CD-2. App.92. Nor are the district court's findings premised on racial stereotyping. The district court did not *assume* "that members of racial minorities 'always (or even consistently) express some characteristic minority viewpoint on any issue.'" Stay Br. 37 (quoting *SFFA*, 143 S. Ct. at 2165). Plaintiffs *proved (and the Secretary does not dispute)* that Black Alabamians are politically cohesive, App.35-36, 40-41, 46, and voting in Alabama is racially polarized, App.35-36, 40-41, 46.

iii. This Court has already affirmed that § 2 is constitutional and, under certain circumstances, can require race-based remedial redistricting.

The Secretary is also wrong in asserting that § 2 "has no logical endpoint" because courts could require additional majority-black districts "[s]o long as black

voters press some characteristic minority viewpoint consistently." Stay Br. 38 (quotation omitted). At the outset, this is a new argument that, in and of itself, cannot form the basis of a stay before we respond to the argument on the merits. It does not add the urgency of the Secretary's claims, nor is it a defense to a violation of the order.

In any event, the *Gingles* standard itself incorporates a host of safeguards that account for *current conditions*, which function as a "de facto sunset date" for § 2. Travis Crum, *Reconstructing Racially Polarized Voting*, 70 Duke L.J. 261, 287 (2020). For example, *Gingles* 1 is assessed using decennial census data that reflect current population demographics and requires a plaintiff to adduce illustrative plans that reasonably comply with traditional districting criteria. *Milligan*, 599 U.S. at 27. But as "residential segregation decreases—as it has 'sharply' done since the 1970s—satisfying traditional districting criteria such as the compactness requirement 'becomes more difficult.'" *Id.* at 28-29 (quoting Crum, 70 Duke L.J. at 279 & n.105). "[Section] 2 litigation in recent years has rarely been successful for just that reason." *Milligan*, 599 U.S. at 29 (noting that the paucity of § 2 successes nationwide due to minorities' failure to satisfy the *Gingles* 1 test).

Similarly, the "genius" of *Gingles* 2 and 3 requirements that plaintiffs prove that racial polarization has caused *recent* defeats of minority-preferred candidates is that "[e]lection practices are vulnerable to section 2 only if a jurisdiction's politics is characterized by racial polarization." Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 Wm. & Mary L. Rev. 725, 741 (1998). As "minorities become physically and politically integrated into the

dominant society, their ability and need to bring claims under section 2 will subside[,]" *id.*, and "section 2 will become a paper tiger." Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-in Approach*, 106 Colum. L. Rev. 708, 745 (2006); *see also Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994) ("minority voters are not immune from the obligation to pull, haul, and trade to find common political ground"). As discrimination becomes more infrequent, the Senate Factors may also become harder to prove. *See* Karlan, 39 Wm. & Mary L. Rev. at 741.

The district court did not need more than "just a few paragraphs" to reject the Secretary's refurbished contention that its § 2 analysis "subordinate[d] neutral districting principles to the race-based goal of enacting a second majority-black district." Stay Br. 34 (citing App.185-88). Indeed, one sentence might have sufficed: The Supreme Court has already rejected these arguments. *See This That & The Other Gift & Tobacco, Inc.* v. *Cobb Cnty.*, 439 F.3d 1275, 1283 (11th Cir. 2006).

D. The Secretary has no interest in enforcing an unlawful map, but the public interest plainly favor remedying vote dilution.

The balance of harms and public interest both strongly counsel against granting a stay. "[I]rreparable harm likely would flow" to Plaintiffs and thousands of other Black voters from a stay. *Lucas* v. *Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers). Plaintiffs have a "strong interest in exercising the 'fundamental political right' to vote" *Purcell* v. *Gonzalez*, 549 U.S. 1, 4 (2006) (quoting *Dunn* v. *Blumstein*, 405 U.S. 330, 336 (1972). "Permitting the election to go forward would place the burdens of inertia and litigation delay on those whom the [VRA] was intended to protect, despite their obvious diligence in seeking an adjudication of their

rights prior to the election." *Lucas*, 486 U.S. at 1305. "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." App.642.

The public interest also counsels against a stay. The Secretary asserts that the 2023 Plan is a "declaration of public interest." Stay Br. 40. But the district court made unchallenged findings that the Legislature's refusal to draw a second opportunity district demonstrated its "unwilling to respond to the well-documented needs of Black Alabamians." App.420. That is, Alabama's flagrant disregard of court orders and "significant lack of responsiveness" to a sizeable portion of the electorate harms the strong public interest in protecting the right to vote and the rule of law. App.415-20. The Secretary's "deeply troubl[ing]" stay application runs counter to the interests of our courts, our nation, and all Alabamians. App.647.

CONCLUSION

For the foregoing reasons, this Court should deny the Secretary's application for a stay.