IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALABAMA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; SHERMAN NORFLEET; CLARENCE MUHAMMAD; CURTIS TRAVIS; and JOHN HARRIS,

Plaintiffs,

v.

STATE OF ALABAMA; and JOHN H. MERRILL, in his official capacity as Alabama Secretary of State,

Defendants.

Civil Action No. 2:16-cv-00731-WKW-CSC

PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

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INTRODUCTION

Defendants' Motion to Dismiss fails to cite any authority where a federal court has granted a motion to dismiss in a judicial vote-dilution case under the Voting Rights Act.[1] Defendants' Motion is therefore, baseless. Indeed, the three cases most heavily relied on by Defendants were decided after lengthy bench trials and based on extensive evidentiary records. This case deserves a similar evidentiary airing.

Defendants try to avoid the development of an evidentiary record by arguing that the Complaint does not allege a "proper" remedy. At this stage, however, the only required "threshold" remedy averment is that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district," that African Americans are "politically cohesive," and that the white population votes "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986). The Complaint meets this threshold. (Compl. ¶¶ 40–45.) Defendants' Motion rests on the unprecedented argument that the "linkage" of a judge to her district should become a prima facie requirement for a panel of appellate judges. Their argument is doubly flawed. First, Defendants' "linkage" argument not only distorts Supreme Court precedent but misconstrues Eleventh Circuit case law, which evaluates "linkage" only for trial judges. No case has ever required any level of "linkage" for a panel of appellate judges.

Second, even if this Court were to decide that linkage applies here, linkage is "merely one factor to be considered" in determining whether, under the totality of the circumstances, African Americans can participate equally in the political process and elect judges of their choice. *Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, 501 U.S. 419, 427 (1991); *Nipper v.*

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[1] *See* Defs.' Mot. to Dismiss (Doc. No. 17) (hereinafter, "Mot.") at 7–8.

Smith, 39 F.3d 1494, 1541 (11th Cir. 1994). Accordingly, no court has ever granted a motion to dismiss based on a "linkage" argument. The totality of the circumstances assessment mandates a full evidentiary record.

Tellingly, Defendants fail to discuss in any meaningful way the key Supreme Court case that applies the Voting Rights Act to judicial elections, *Chisom v. Roemer*, 501 U.S. 380 (1991). The reason for Defendants' omission is obvious: *Chisom* requires that this Court deny Defendants' Motion to Dismiss. In fact, courts have routinely upheld the creation of new voting districts as an appropriate remedy in Voting Rights Act cases, based on a full evidentiary record and after a trial on the merits.[2]

This lawsuit seeks to enforce the Voting Rights Act under circumstances where an at-large voting system has diluted the African American vote to the point where – despite having over twenty-six percent of the voting age population – there has *never* been an African American elected to the appellate bench in this State without first having been appointed by the Governor, and where appointed African Americans survived statewide election to the Alabama Supreme Court only twice in the 184 years since Alabama began electing appellate judges in 1832. No African American has *ever* been elected to either the Alabama Court of Civil Appeals or the Alabama Court of Criminal Appeals since their creation in 1969. As pleaded in the Complaint, racially polarized voting, together with the totality of the circumstances of Alabama's unfortunate history of racial discrimination, which has prevented African Americans from participating equally in the political process, has produced this result. As also pleaded, it is

[2] *See Martin v. Mabus*, 700 F. Supp. 327, 332 (S.D. Miss. 1988) ("The Court therefore finds that having single-member subdistricts for election purposes within the subject chancery, circuit, and county court districts is the most plausible remedy for the Section 2 violation."); *Clark v. Roemer*, 777 F. Supp. 445, 468 (M.D. La. 1990) ("[T]he subdistrict approach suggested by plaintiffs, . . . represents the only proposal which will actually remedy the violations of Section 2 (short of devising an entirely different system).").

possible for the Court to draw one or more majority-minority districts from which judges may be elected to these courts. This is all Plaintiffs are required to plead to survive Defendants' Motion.

HISTORICAL FACTS AND THE LIMITS OF JUDICIAL NOTICE

Defendants erroneously ask this Court to take "judicial notice" of their version of Alabama history. Mot. at 2–5 ("Facts"). That request should be rejected for two reasons. First, as explained in the Argument below, the only relevant "facts" for purposes of Defendants' Motion are the facts alleged in the Complaint, which must be accepted as true at this stage. Second, even if this Court could go beyond the facts as pleaded at the motion to dismiss stage, the "facts" Defendants proffer are not susceptible to judicial notice.

A court may take judicial notice of appropriate adjudicative facts, Fed. R. Evid. 201, but "as a matter of evidence law, [this is] a highly limited process." *Dippin' Dots, Inc. v. Frosty Bites Distribution, LLC*, 369 F.3d 1197, 1204–05 (11th Cir. 2004). This is because taking of judicial notice "bypasses the safeguards which are involved with the usual process of proving facts by competent evidence in district court." *Id.* While scientific facts (when does the sun rise or set) or even matters of history (who was president in 1958) can be subject to judicial notice, *Shahar v. Bowers*, 120 F.3d 211, 214 (11th Cir. 1997) (en banc), "the fact must be one that only an unreasonable person would insist on disputing," *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994). *See* Fed. R. Evid. 201(b)(2) (court may judicially notice a fact "whose accuracy cannot reasonably be questioned"). Facts reported in newspaper accounts, press releases or even findings of fact made by other courts are not suitable for judicial notice. *See Shahar*, 120 F.3d at 214 (facts in newspaper not appropriate for judicial notice), *Jones*, 29 F.3d at 1553 (another court's factual findings not appropriate for judicial notice).

Defendants ask this Court to dangerously extend the doctrine of judicial notice beyond recognition. While bare facts such as the text of the state's constitution may be subject to judicial notice, that is not what Defendants request. Defendants would have the Court take judicial notice of Defendants' own biased narrative interpretation of history. But these "facts" are not beyond reasonable dispute and, under Circuit case law, are not subject to judicial notice. Defendants' attempt to introduce facts at the motion to dismiss stage further explains why a robust development of the factual record is critical in this case. Accordingly, this Court should reject Defendants' request to bypass the essential process of proving facts by competent evidence.

Although the historical narrative invoked by Defendants has no place in the adjudication of a motion to dismiss, for the purpose of historical balance, Plaintiffs discuss below the relevant history as outlined in the Complaint, to demonstrate further that Defendants' version of "history" is not entitled to judicial notice. Plaintiffs are well-prepared to prove these facts (and more) at trial.

A BRIEF HISTORY OF RACIAL POLITICS AND THE SELECTION OF JUDGES IN ALABAMA

Defendants' assertions that Alabama has maintained the same method of selecting appellate judges for 148 years and that the selection process has not been tainted by purposeful racial discrimination are incorrect. The several constitutions of Alabama have prescribed the way general elections are to be conducted; but for most of Alabama's history, members of the state Supreme Court have been effectively chosen by the political parties, first by party conventions, then by all-white Democratic primary elections. The Republican Party dominated judicial selections only for six years following ratification of the 1868 Constitution. Only one African American, Roddy Thomas of Dallas County, was made a judge by the Reconstruction

Republicans. After the Conservative and Democratic Party (called "Bourbons"), the party of white supremacy, gained control of state government in the 1874 elections, party rules were manipulated to ensure that black Alabamians would have no influence in selecting judges.[3] Disfranchisement of African Americans was the primary purpose of the 1901 Constitution that remains in effect today.[4] "The statewide white primary was created in 1903 to add yet another barrier to black political participation."[5]

Disfranchisement of all but a handful of African Americans (and many poor whites) freed factions in the white population to compete with each other.[6] But all the competition was carried out within the Democratic Party. Unity over white supremacy was considered essential by all white factions, and the conservative Bourbon faction successfully invoked white solidarity throughout the first six decades of the twentieth century to control party primaries, including the election of Alabama Supreme Court justices.[7]

Passage of a numbered place law for judicial elections in 1927, and repeal of the double-vote primary in 1931,[8] cemented Bourbon control of the all-white primary and assured the justices would be chosen by the conservative party elites. "Alabama Supreme Court justices

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[3] Robert J. Norrell, *Law in a White Man's Democracy: A History of the Alabama State Judiciary*, 32 CUMB. L. REV. 135, 137–41 (2002) (hereinafter, "Norrell").

[4] *Id.* at 140–41; accord *Hunter v. Underwood*, 471 U.S. 222, 229 (1985).

[5] Norrell at 141.

[6] J. Mills Thornton III, *Alabama Politics, J. Thomas Heflin, and the Expulsion Movement of 1929*, THE ALABAMA REVIEW 83 (April 1968) (hereinafter, "Thornton").

[7] *Id.* at 85 ("Only by breaking clear of, or taking over entirely, the Democratic Party and striking out as a self-consciously revolutionary force could North Alabamians hope to disturb the political status quo. The remaining Bourbons, aware of this fact, sought constantly to emphasize the necessity for white solidarity and party unity. It was particularly important to prevent the Republican Party from becoming a socially acceptable alternative to Democracy. But any organization that tended to give structure and purpose to North Alabama frustrations was characterized by the Bourbons as dangerous.").

[8] 1931 Ala. Act 56 § 24.

were in a sense immune to politics until well after the middle of the century."[9] Thirty-nine justices served on the Alabama Supreme Court between 1900 and 1969. Eighteen (over fifty percent) first gained that office through appointment; as late as 1969, "only two of seven sitting justices had first reached the court through election."[10]

In 1961, in response to the Civil Rights Movement and federal efforts to restore voting rights of Black citizens, the Legislature made numbered places a requirement for all at-large elections of multi-member offices. "Thus, the numbered post mechanism, which originated in the 1920s to protect Conservative power against a minority challenge by the Prohibitionists and the KKK, had acquired in the context of civil-rights challenges in the early 1960s, a specific racial intent."[11]

Most relevant to the instant action is Amendment 328 of the Alabama Constitution, which governs the election of appellate judges today. In 1973, under the leadership of Chief Justice and former Alabama Bar President Howell Heflin and Lee County Senator C.C. "Bo" Torbert, the Legislature passed, and the voters approved, a radical revision of the Judicial Article in the Alabama Constitution that unified and shifted control of the state's judicial system from the Legislature to the Supreme Court. But the method of electing appellate judges was left unchanged for reasons that are directly related to Alabama's history of official racial discrimination. "Although judicial reform did not directly raise issues of racial injustice identified with civil rights, it nonetheless presented a similar threat to the established political

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[9] Tony A. Freyer and Paul M. Pruitt, Jr., *Reaction and Reform: Transforming the Judiciary Under Alabama's Constitution, 1901-1975*, 53 ALA. L. REV. 77 (2001) (hereinafter, "Freyer").

[10] *Id.*

[11] Norrell at 158.

power structure and social order."[12]

Heflin and Torbert understood that the success of the new judicial article required "revers[ing] the 1957 defeat by separating reform issues from racial struggle."[13] And this meant neutering the racial demagoguery of Governor Wallace, who had just defeated progressive Governor Albert Brewer in the viciously racist 1970 Democratic primary runoff.[14] Heflin managed to get Wallace to omit judicial reform from his highly publicized battle with the federal courts over school desegregation and enforcement of the Voting Rights Act.[15] But the price Heflin had to pay was squelching the recommendation to adopt a merit system of selecting judges made by the citizens' advisory committee he had created and the constitutional reform commission Governor Brewer had appointed.[16] "Torbert's original proposal to amend the constitution did not alter the existing system of judicial election. The constitutional commission was inclined to disagree, but Wallace insisted upon preserving that element of the old system."[17] The system is designed to suppress the ability of black Alabamians to elect justices and appeals judges of their choice. Entrenched opposition to blacks' voting rights tainted the enactment and ratification of Amendment 328, just as it has tainted the judicial selection process from Reconstruction to the present.

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[12] Freyer at 78.

[13] Tony A. Freyer, Paul M. Pruitt, Jr., and R. Volney Riser, *Clement Clay Torbert and Alabama Reform*, 63 ALA. L. REV. 867, 876 (2012) (hereinafter, "Riser"). at 875, 877.

[14] *Id.* at 881.

[15] *Id.* at 882.

[16] Freyer at 124, 130–31.

[17] Riser at 884.

LEGAL STANDARD

Defendants have moved to dismiss Plaintiffs' Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Under this standard, the Complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *Tampa Bay Water v. HDR Eng'g, Inc.*, 731 F.3d 1171, 1187 (11th Cir. 2013) ("As is by now well-established, a complaint need only 'contain a short and plain statement of the claim' accompanied by 'enough facts to make a claim for relief plausible on its face.'" (quoting *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324–25 (11th Cir. 2012))). Facial plausibility exists when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The Complaint need not set out "detailed factual allegations," *Twombly*, 550 U.S. at 555, but it must set forth facts that suggest "more than a sheer possibility that a defendant has acted unlawfully," *Iqbal*, 556 U.S. at 678. When evaluating Defendants' Motion to Dismiss, the Court must accordingly construe Plaintiffs' allegations in the light most favorable to Plaintiffs – not Defendants – and accept any facts alleged in Plaintiffs' Complaint as true. *Resnick*, 693 F.3d at 1321–22.

ARGUMENT

I. PLAINTIFFS HAVE STATED AN ACTIONABLE SECTION 2 CLAIM.

Defendants' primary argument is that Plaintiffs' complaint does not state a cause of action because "there is no proper remedy for the kind of claim Plaintiffs have made." (Mot. at 8–9.) Defendants' argument is contravened by Supreme Court Section 2[18] jurisprudence, which (1) applies Section 2 to judicial elections, and specifically to appellate judge elections; and

[18] "Section 2," as referenced in this Opposition, is defined as Section 2 of the Voting Rights Act, 52 U.S.C. § 10301.

(2) sets the elements for a Section 2 cause of action, which Plaintiffs have easily met in their detailed Complaint.

That Defendants have relied wholly upon cases decided *after trial* illustrates the paucity of support for their position. None of the cases relied on by Defendants was decided at the motion to dismiss stage. Defendants present no cogent reason for this case to mark such a startling departure from this precedent. Indeed, there is no precedent for this Court to rule – without taking into consideration the totality of the circumstances, including the characteristics of Alabama's election process for judges, and Alabama's history of discrimination – that there is no possible remedy to right the alleged wrong. No case relied upon by Defendants stands for so broad a proposition.

Moreover, the proposition Defendants seek to extract from those cases – the importance of a state's interest in the "linkage" between the mode of election of judges and the district from which the judge is elected – was discussed solely in the context of *trial* judges. Those same cases expressly distinguished the "linkage interest" relevant to the election of trial judges from the lack of such "linkage" when dealing, as is the case here, with the election of judges to a judicial panel.

As Plaintiffs allege, Alabama's statewide judicial election system denies African Americans an equal opportunity to participate in the political process and to elect representatives of their choice. Plaintiffs must be given the opportunity to prove these claims at trial. While Defendants – based on an improper application of the principle of judicial notice – apparently take issue with Plaintiffs' factual averments, a motion to dismiss is not the proper vehicle to resolve that dispute.

A. Section 2 of the Voting Rights Act applies to judicial elections.

Section 2 of the Voting Rights Act prohibits electoral systems that "result[] in a denial or abridgement" of a citizen's voting rights on "account of race or color." 52 U.S.C. § 10301(a).[19] Commonly known as the "results test," there are two basic claims that have been recognized under Section 2: (1) claims involving racially discriminatory prerequisites to voting, and (2) claims of minority vote dilution. *See, e.g.*, *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1228 n.26 (11th Cir. 2005). This case concerns a vote-dilution claim. A vote-dilution claim occurs where a minority group has "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(a).

In *Chisom v. Roemer*, a case involving the election of Louisiana's appellate judges, the United States Supreme Court held that judicial elections are subject to Section 2 of the Voting Rights Act. *See Chisom v. Roemer*, 501 U.S. 380, 384 (1991) ("We hold that the coverage provided by [Section 2, as amended in 1982] is coextensive with the coverage provided by the Act prior to 1982 and that judicial elections are embraced within that coverage."). In so holding, the Court dispelled the notion that judicial elections receive special sanctuary from the Voting

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[19] 52 U.S.C. § 10301 provides in full:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Rights Act's reach. *Id.* at 400–01 ("The fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office."). For purposes of the Voting Rights Act, the Supreme Court explained that elected judges are elected "representatives" just like other officials because they submit themselves to popular elections; they "vie for popular support"; and, to some extent, they "engage in policymaking." *Id*. at 399–401; *see also id.* at 399 n.27. The Court concluded that Congress never intended to withdraw this "important category of elections" from the Voting Rights Act's coverage. *Id*. at 404.

Acceptance of Defendants' argument that, *as a matter of law*, there can never be a "proper remedy" under Section 2 for a vote-dilution claim involving judges is tantamount to reading *Chisom* out of existence.

B. Plaintiffs have pleaded a Section 2 claim that is plausible on its face.

The elements of a Section 2 vote-dilution claim are set forth in *Gingles.* First, the Supreme Court held that plaintiffs must satisfy three preconditions: (1) that the affected minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that "the minority group is politically cohesive," i.e., members of the minority group generally vote as a bloc; and (3) that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50–51.

If the *Gingles* preconditions are met, a court then considers whether, on the totality of the circumstances, minorities have been denied an equal opportunity to participate in the political process and to elect representatives of their choice. *Johnson v. DeGrandy*, 512 U.S. 997, 1009–

12 (1994); *NAACP v. Fordice*, 252 F.3d 361, 365–66 (5th Cir. 2001). A court's analysis of the totality of the circumstances is a "fact-intensive" inquiry that balances plaintiffs' interests in correcting the electoral scheme and the state's interest in maintaining it. *Johnson v. Hamrick*, 196 F.3d 1216, 1224 (11th Cir. 1999) (noting that the totality-of-circumstances inquiry involves "unusually complex, fact-intensive questions for the district court to answer").

For purposes of their Motion, Defendants do not contest that Plaintiffs have alleged the requirements set forth in *Gingles* (*see* Mot. at 8), nor could they. Plaintiffs have specifically pleaded each of the *Gingles* conditions in their Complaint as follows:

- Alabama's African-American population and voting-age population are sufficiently numerous and geographically compact to form a majority of the total population and voting-age population in at least one properly-apportioned, constitutional single-member Supreme Court district in a nine-district plan. (Compl. ¶ 41.)

- Alternatively, Alabama's African-American population and voting-age population are sufficiently numerous and geographically compact to form a majority of the total population and voting-age population in at least one properly-apportioned, constitutional single-member Supreme Court district in an eight-district plan. (Compl. ¶ 42.)

- Alabama's African-American population and voting-age population are sufficiently numerous and geographically compact to form a majority of the total population and voting-age population in at least one properly-apportioned, constitutional single-member Court of Criminal Appeals/Court of Civil Appeals district in a five-district plan. (Compl. ¶ 43.)

- Alabama's African-American voters are politically cohesive. They vote overwhelmingly for different candidates than those supported by white voters. (Compl. ¶ 44.)

- Alabama's white electorate votes as a bloc in support of different candidates than those supported by African-American voters. Bloc voting by white members of the electorate consistently defeats the candidates preferred by African-American voters. (Compl. ¶ 45.)

(*See also* Compl. ¶¶ 25–28 (providing population data).)

Similarly, Plaintiffs have adequately pleaded facts to show that, under the totality of the circumstances, Alabama's system for electing judges to its Supreme Court, Court of Criminal Appeals, and Court of Civil Appeals denies African Americans an equal opportunity to elect candidates of their choice to these courts. The Complaint alleges (among other things):

- A history of state-sponsored voting discrimination in Alabama (Compl. ¶ 47);
- Purposeful switching from local government single-member districts to at-large elections to prevent African-American citizens from electing candidates of their choice (Compl. ¶ 48);
- The general laws of Alabama were manipulated intentionally during the 1950s and 1960s to dilute African-American voting strength (Compl. ¶ 48); and
- Alabama has used a majority-vote requirement in primary elections, staggered terms, and numbered-place requirements, at-large elections, and large election districts to enhance the opportunity for discrimination against African Americans in the election of appellate judges (Compl. ¶ 51).

Because these allegations must be accepted as true for purposes of Defendants' Motion, and because, on their face, these allegations present a plausible basis for Plaintiffs' Voting Rights Act claim, including remedy, Defendants' Motion to Dismiss must be denied.

II. DEFENDANTS' LINKAGE INTEREST DOES NOT BAR PLAINTIFFS' SECTION 2 CLAIM AS A MATTER OF LAW.

Defendants' primary argument attacks Plaintiffs' proposed remedy. They argue that at the pleading stage, plaintiffs in a vote-dilution case must propose the specifics of a final remedy that is not merely plausible, but would be accepted after full trial on the merits. In making this argument, Defendants seize on language in *Davis v. Chiles*, 139 F.3d 1414 (11th Cir. 1998) and *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) to assert that allegations of a "proper" remedy are necessary to Plaintiffs' prima facie case. (Mot. at 9, 11.) But Defendants' interpretation of the case law is wrong.

A. **The State's "linkage interest" does not render the proposed remedy *per se* invalid because the propriety of the remedy is assessed by the Court during the totality-of-the-circumstances phase.**

Gingles sets forth the prima facie elements of a vote-dilution claim. (*See supra* at 11.) And while element one of *Gingles* – whether the minority group is "sufficiently large and geographically compact" – cuts to the issue of remedy at the pleading stage, it merely requires plaintiffs to show whether a minority-majority district is possible, not necessarily appropriate. *The propriety of the remedy comes at the totality-of-circumstances phase of the analysis*. *See Davis v. Chiles*, 139 F.3d 1414, 1419–20 (11th Cir. 1998) ("In assessing a plaintiff's proposed remedy, a court must look to the totality of the circumstances, weighing both the state's interest in maintaining its election system and the plaintiff's interest in adoption of his suggested remedial plan."). Rather than undercut this rule of law, the authorities cited by Defendants, both *Davis* and *Nipper*, demonstrate agreement with it. Both cases analyzed the proposed remedies as part of a detailed analysis of the facts developed after a full trial. And in both, the Eleventh Circuit undertook a thorough analysis of the factors specific to the judicial offices in question, the election and/or appointment systems at issue, and the evidence adduced at trial before ruling on the appropriateness of the remedies requested. Never has the Eleventh Circuit – or any court – ruled that, as a matter of law, single-member districts are inapplicable to appellate judicial-election cases.

And to the extent Defendants challenge this conclusion, the Supreme Court has foreclosed any reason for doubt. Defendants state that Plaintiffs have failed to allege a prima facie remedy due to the State's "linkage" interest. But contrary to Defendants' argument, the Supreme Court has already recognized that a state's linkage interest does *not* render Section 2 vote-dilution claims *per se* invalid. In *Houston Lawyers' Association v. Attorney General of*

Texas, decided the same day as *Chisom*, the Supreme Court dealt with the applicability of Section 2 to trial judges. 501 U.S. at 421 ("In these cases we consider whether the [Voting Rights Act] applies to the election of trial judges in Texas."). The Court made it clear that a state's linkage interest is but *one factor* among many to be considered by this Court: a state's "interest in maintaining its at-large, district-wide electoral scheme" for trial judges "does not automatically, and in every case, outweigh proof of racial vote dilution"; it is "merely one factor to be considered in evaluating the totality of circumstances." *Id.* at 426–27. In other words, the facts may ultimately show that a state's linkage interest prevails over a vote-dilution claim or they may not; but the state's interest – by itself – does not dictate "whether such a challenge may be brought." *Id.* at 428; *see also Chisom*, 501 U.S. at 403 (explaining that despite the difficulty in applying the totality-of-circumstances standard, there can be no "judicially created limitation on [its] coverage"). Critically for the instant case, *Houston Lawyers'* recognized the linkage interest only for *single-member offices*, like trial judges, because of their unique ability to act unilaterally in favor of one party or another. *Houston Lawyers'*, 501 U.S. at 426–28. *Chisom*, which addressed a panel of appellate judges, recognized no such interest.

B. <u>Weighing the "linkage interest" is fact-intensive</u>.

Under the Supreme Court's guidance, the Eleventh Circuit has engaged in painstaking factual review of the relationship of any proposed remedy to the state's interests at stake, before ruling on the appropriateness of any remedy.[20] The totality-of-circumstances test involves

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[20] In *Davis v. Chiles*, the Eleventh Circuit acknowledged that its prior decisions may have incorrectly drifted from the Supreme Court's directions. There, the court questioned the outcomes of *Nipper v. Smith* and *Southern Christian Leadership Conference of Alabama v. Sessions* – where on both occasions, *after weighing the facts presented at trial*, the court ruled that the state's specific linkage interests precluded the specific remedies sought by plaintiffs. "We recognize that this doctrinal development appears to conflict with the Supreme Court's initial pronouncements . . . in *Chisom* and *Houston Lawyers'*." *Davis*, 139 F.3d at 1423–24. Here, not only do Defendants rely on *Nipper* and *SCLC*, but they seek to use these cases to create a *per se* linkage defense to Plaintiffs' vote-dilution claim. *Davis*'s caution strongly advises against this radical extension of the law.

"unusually complex, fact-intensive questions for the district court to answer." *Hamrick*, 196 F.3d at 1224 (internal quotes and citations omitted). Such questions are not conducive for disposition on motion to dismiss. *See Metts v. Murphy*, 363 F.3d 8, 11 (1st Cir. 2004) ("It is no accident that most cases under section 2 have been decided on summary judgment or after verdict, and not on a motion to dismiss."). Indeed, "the ultimate conclusion about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." *Johnson v. DeGrandy*, 512 U.S. 997, 1011 (1994); *see also Georgia State Conference of NAACP v. Fayette Cty. Bd. Of Comm'rs*, 775 F.3d 1336, 1348 (11th Cir. 2015) (describing the legal tests in Voting Rights Act cases as "fact-driven").

In short, the balancing of the State's "linkage interest" is not appropriate for a motion to dismiss. And none of the cases relied upon by Defendants – not *Davis*, not *Nipper*, not *SCLC* – have concluded differently. Despite ruling in favor of the state's linkage interest in the context of trial judges' elections, in each of the cases the Eleventh Circuit engaged in a rigorous examination of proofs adduced at trial. *See, e.g.*, *Davis*, 139 F.3d. at 1419 (applying totality-of-circumstances balancing); *S. Christian Leadership Conference of Ala. v. Sessions*, 56 F.3d 1282, 1293 (11th Cir. 1995) (engaging in heavy factual review while noting that the state's interest in maintaining its electoral system is but a factor for the court to consider); *Nipper*, 39 F.3d at 1498 ("Voting rights cases are inherently fact-intensive . . .").[21] No court has ever held that a state's linkage interest *per se* invalidates a vote-dilution claim. There is no basis for this Court to do so here.

C. **<u>The "linkage interest" is different and either diminished or inapplicable when appellate judges are at issue.</u>**

[21] Indeed, the Eleventh Circuit evaluated each case only after a completed bench trial on the merits. *See, e.g.*, *Davis,* 139 F.3d. at 1418 (noting bench trial); *SCLC*, 56 F.3d at 1290 (describing bench trial where "both sides offered voluminous statistical evidence and expert testimony"); *Nipper*, 39 F.3d at 1497 (noting bench trial).

All of the cases relied upon by Defendants for its argument on "linkage interest" dealt with vote dilution challenges to the election of trial judges.[22] No court has ever held that a state's interest in maintaining an election system for *appellate* judges precludes a remedy in a Section 2 case. To the contrary, the same courts that have rejected Section 2 claims relating to trial courts based on the state's "linkage interest" have specifically acknowledged that the state's interest may be weaker in cases involving appellate judges. The instant case, then, in particular, invites this Court to conduct "an intensely local appraisal of [the appellate-election system's] design and impact." *Nipper*, 39 F.3d at 1498.

The Eleventh Circuit first set out the role of a state's linkage interest in a portion of the court's opinion in *Nipper*,[23] which presented a challenge to Florida's at-large election of trial judges. Although the court found racially polarized voting legally significant, it concluded from the trial record that there was no feasible remedy available. *Id.* at 1543–47. It explained that sub-districting was not a viable option, in large part because such a remedy would not maintain the state's interest in judicial accountability through linking a trial court judge's territorial jurisdiction and electoral base. *Id.* at 1543–44. The fear was the same the Supreme Court addressed in *Houston Lawyers'* – that a system of single-member sub-districts could put pressure on trial judges who could act unilaterally to favor constituents in litigation against non-constituents. *Id.* at 1545. And to minimize the potential for trial judges to pursue an agenda on

[22] Defendants also discuss *White v. Alabama*, 74 F.3d 1058 (11th Cir. 1996), which involved challenges to Alabama appellate judges elections. (Mot. at 16–17.) But the issue on appeal in that case was the viability of a settlement agreement. Neither the state's interests in its judicial model nor territorial linkage were discussed in that case.

[23] Although the *Nipper* case was heard en banc, the portions of the opinion interpreting the role and application of a state's linkage interest, *see generally id*. at 1541–46, was not joined by a majority of the court. These portions achieved support of only two of the eleven sitting judges.

behalf of a group of constituents, Florida linked trial court judges' jurisdiction and elective base. *Id.* at 1544–45 n.77.

Significantly, the Eleventh Circuit emphasized that this was a concern particular to trial court judges who act alone in exercising their power and conduct their decision-making process independently, and specifically distinguished trial court judges from appellate judges:

> This case concerns the election of trial court judges, *not the members of a multimember appellate court*. Traditional legislative-style "logrolling" would not be appropriate even on a court that decides cases as a group, but there might be more to be said for some form of "representation" on a collegial court (like a state supreme court) than on a single-judge trial court.

Id. at 1535 n.78 (emphasis added).

It reasoned that "[a]lthough the circuit and county courts have multiple members, like most trial courts they do not operate as collegial bodies; rather, the judges exercise independent judicial authority, engaging in coordinated decision-making only for the handling of administrative matters." *Id.* at 1498. In contrast, collegial bodies, such as the appellate courts, were fundamentally different in that they made decisions as a group where "all citizens continue to elect at least one person involved in the decision-making process and are, therefore, guaranteed a voice in most decisions." *Id.* at 1543–44.

Subsequently, the Eleventh Circuit addressed at-large election of Alabama's trial court judges in *SCLC*. Based on the trial record, the court affirmed that no Section 2 violation was shown and went on to further find that there would have been no remedy available. *SCLC*, 56 F.3d at 1294–97. However, as in *Nipper*, the court's remedy analysis was premised on concerns particular to trial court judges. It described Alabama's desire to "[l]ink[] a trial court judge's territorial jurisdiction and electoral base" to "preserve judicial accountability." *Id.* at 1296; *see also id.* at 1297 ("In linking the size of judicial electoral units and the trial court's territorial

jurisdiction, Alabama has attempted to balance the desire for accountability of judges to their electorate along with the need to maintain judicial independence."). The court also explained that trial judges are "lone decision makers" lacking input from the colleagues elected by the rest of the citizenry of the jurisdiction. *Id.* at 1297.

In a subsequent challenge to at-large elections of Florida trial judges, election systems in certain circuits were found by the district court to be in violation of Section 2. However, reluctantly following *Nipper* and *SCLC*,[24] the court found Florida's interests in maintaining its judicial election system and territorial linkage between the trial judges' jurisdictions and their electoral districts outweighed any proposed remedy. Once again, the court emphasized the difference of the state's interest relating to trial judges as opposed to that relating to appellate judges, explaining that there is the risk of unaccountability when "a lone decision maker, a trial judge, who would lack input from the colleagues elected by the rest of the citizenry of the jurisdiction" and the state's response in "[t]erritorial linkage between a trial judge's jurisdiction and electoral base [that] serves Florida's interest in judicial accountability." *Davis*, 139 F.3d at 1421–22.

The Fifth Circuit is in accord: "Unlike legislators or even appellate judges, who make decisions in groups, each district judge holds a single-member office and acts alone. When collegial bodies are involved, all citizens continue to elect at least one person involved in making a particular decision." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 873 (5th Cir. 1993). Thus, while there may be concerns about sub-districting for trial judges, sub-districting is, in fact, considered a way to enhance minority participation for multimember offices like appellate judges. *Id.* ("While sub-districting for multimember offices

[24] (*See supra*, note 20.)

can enhance minority influence because members from minority sub-districts participate in and influence all of the decisions of the larger body, sub-districting for single-member district court judgeships would leave minority voters with no electoral influence over the majority of judges in each county.").

In any event, Plaintiffs need not prove as a matter of law that the state has no "linkage interest" when it comes to a Section 2 challenge to the election of appellate judges. The case law demonstrates, however, that (1) the analysis is intensely fact-driven; (2) there is no precedent applying the "linkage interest" as a matter of law to preclude a remedy in a Section 2 case relating to appellate judges; and (3) any "linkage interest" relating to appellate courts is either diminished or inapplicable.[25] Because Defendants' Motion is predicated, wholesale, on premises to the contrary (*see* Mot. at 22–32), it must be denied.

D. <u>Defendants' challenge to Plaintiffs' plausibility of the "totality of the circumstances" claim is merely a dispute of fact.</u>

As noted in Plaintiffs' Counter-Statement of Facts, Defendants assume – and ask this Court to assume – facts not in the record in this case regarding the State's interests, and further request that the Court conclude, at the motion to dismiss stage, that the facts pleaded in Plaintiffs' Complaint are outweighed by the State's interests. (Mot. at 40.) This is an improper argument at this stage. This Court must accept the facts as stated in the Complaint as true, *Resnick*, 693 F.3d at 1321–22, no matter how strongly Defendants disagree with them.

As demonstrated repeatedly above, the issues of totality of the circumstances and the appropriateness of any remedy are extraordinarily fact-intensive. Indeed, in *Davis*, the Eleventh

[25] In *Davis v. Chiles*, the Eleventh Circuit acknowledged that its prior decisions in *Nipper* and *SCLC* as to *trial judges* may have drifted too far from the Supreme Court's directions, and applying the same reasoning to *appellate judges* where the linkage interest is weaker would push such a ruling even further off course. "We recognize that this doctrinal development appears to conflict with the Supreme Court's initial pronouncements . . . in *Chisom* and *Houston Lawyers'*." *Davis*, 139 F.3d at 1423–24.

Circuit assessed whether the requested remedy was "appropriate" only after the district court "conducted further hearings specifically directed at the efficacy and propriety of [plaintiff's] proposed remedy" under the totality-of-circumstances standard. *Davis*, 139 F.3d at 1419.

III. DEFENDANTS' CONSTITUTIONAL-AVOIDANCE ARGUMENT IS UNAVAILING.

As one of their last-ditch arguments on remedy, Defendants ask the Court to grant their motion to avoid certain "constitutional concerns." (Mot. at 32.) Defendants claim that reading Section 2 to allow Plaintiffs' districting remedy will invite constitutional questions creating friction between the Voting Rights Act and the Constitution. To avoid these constitutional problems, they say, it is best to interpret Section 2 as foreclosing Plaintiffs' remedy. *Id.*

Defendants' argument is unavailing. The doctrine of constitutional avoidance is a canon of statutory construction. *See Clark v. Martinez*, 543 U.S. 371, 381 (2005). The doctrine is used for "choosing between competing plausible interpretations of statutory text." *Id.* Where one interpretation raises serious constitutional concerns, a court should construe the statute consistent with the alternative. *Id*.

Defendants' constitutional-avoidance argument assumes this case presents an issue of statutory interpretation. It does not. The Supreme Court has already interpreted Section 2 as applicable to judicial-election schemes, and the Supreme Court and several lower courts have recognized that districting is a permissible, Section 2 remedy. *See Chisom*, 501 U.S. at 384; *Gingles*, 478 U.S. at 50–51; *Martin*, 700 F. Supp. at 332; *Clark*, 777 F. Supp. at 468. This case does not ask this Court to engage in statutory interpretation, but rather, ultimately asks whether Plaintiffs have proven their case factually under the *Gingles* framework. Defendants' constitutional-avoidance argument has no place here. There is no statute for this Court to interpret or construe, only one to apply.

Nevertheless, Defendants' constitutional concerns are easily debunked. Defendants appear to worry that granting Plaintiffs' proposed remedy may offend the Equal Protection Clause. (Mot. at 33–35.) They say that drawing district lines for judicial elections will result in racial gerrymandering and white-and-black voter submersion. The Eleventh Circuit soundly rejected the first part of this argument in *Davis*. *See Davis*, 139 F.3d at 1425–26. As explained by the Eleventh Circuit, *Gingles* requires that an affected minority be "sufficiently geographically compact" to comprise a minority-majority district. *Id.* (discussing *Gingles*, 478 U.S. at 50-51). Accordingly, there can be no unconventional line drawing for a bona fide Section 2 claim; there can only be districting that is compact, contiguous, and consistent with "traditional districting principles." *Id*. That is all Plaintiffs propose here. Districting in this traditional sense does not constitute racial gerrymandering nor does it violate the Equal Protection Clause. *Id*. at 1426 (calling district court's decision to the contrary "clear error").

Moreover, Defendants' assertion as to voter submersion is equally unfounded. Defendants ignore the context of the instant case. Voter submersion *already exists in Alabama*; the votes of Alabama's African Americans have been diluted and submerged by the State's at-large appellate elections for over 140 years. *See generally* Compl. ¶¶ 18–59. Congress, through its enactment of Section 2, has a compelling interest in curing this instance of vote dilution. Indeed in *Bush v. Vera*, a majority of the Supreme Court held that compliance with Section 2 is a compelling state interest consistent with the Equal Protection Clause. *See Bush v. Vera*, 517 U.S. 952, 992 (1996) (O'Connor, J., concurring); *id*. at 1034–35 (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting); *id*. at 1064–65 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting). Defendants point to no case law where a judicial remedy to a Section 2 claim violated the Fourteenth Amendment. Their Equal Protection concern is therefore specious.

Also baseless is Defendants' assertion that Plaintiffs' remedy would raise problems under the Due Process clause. (Mot. at 33–34.) Defendants seem to argue that electoral districts may induce judicial bias, creating a situation where an appellate judge will favor his or her electoral base to the detriment of an appellate-litigant's Due Process rights. Defendants offer no support for this highly speculative assertion. Traditionally, the Due Process clause factors into judicial bias only "when the judge has a financial interest in the outcome of the case" or "when the judge is presiding over certain types of criminal contempt proceedings." *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 890 (2009) (Roberts, C.J., dissenting). Neither circumstance is present here. To justify their concern, Defendants cite one case, *Caperton v. A.T. Massey*, "an exceptional case" about judicial-campaign contributions. *Caperton*, 556 U.S. at 884. But *Caperton* has nothing to do with the Voting Rights Act, Section 2, or judicial districting, and even the Supreme Court characterized its decision as addressing an "extraordinary situation." *Id.* at 887. "[M]ost matters relating to judicial [bias]" on the other hand, "[do] not rise to a constitutional level." *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948). Far removed from this principle and even *Caperton*, Defendants' Due Process concern is abstract, highly speculative, and has no basis in law.

Finally, Defendants suggest that interpreting Section 2 to allow Plaintiffs' remedy would raise questions about Section 2 as a valid exercise of Congress's enforcement powers under the Reconstruction Amendments. (Mot. at 35.) As already discussed, Section 2 permits districting as a remedy (*see supra* at 21), and Section 2 has long been considered a valid exercise of Congressional power. *See, e.g.*, *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1556–63 (11th Cir.1984); *Hamrick*, 196 F.3d at 1219; *Mixon*, 193 F.3d at 399. Section 2 is both "congruen[t] and proportiona[l]" to the aim of remedying violations of both the Fourteenth and

Fifteenth Amendments. *City of Bourne v. Flores*, 521 U.S. 507, 518–20 (1997) (distinguishing the Voting Rights Act from the Religious Freedom Restoration Act, acknowledging that courts have generally considered the former as a proper exercise of congressional power)[26]; *see also U.S. v. Blaine County*, 157 F. Supp. 2d 1145, 1152 (D. Mont. 2001) ("[Section 2] satisfies the congruence and proportionality requirements for a valid exercise of § 5 power"). Granting Plaintiffs the opportunity to prove their proposed remedy – which is consistent with a litany of precedents – will not change that. *See, e.g.*, *Chisom*, 501 U.S. at 384.

In sum, Defendants' constitutional-avoidance argument fails. Not only has the Supreme Court and Eleventh Circuit already interpreted Section 2 to allow Plaintiffs to prove their proposed remedy, making the canon inapplicable here, but Defendants have raised no bona fide constitutional concerns that the Court must legitimately avoid. The argument should be rejected.

IV. PLAINTIFFS HAVE ADEQUATELY PLEADED STANDING.

The allegations in the Complaint make clear that both the Individual Plaintiffs and Alabama State Conference of the National Association for the Advancement of Colored People ("Alabama NAACP") have standing. Under the test established in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), standing is adequately pleaded where plaintiffs allege: (1) an "injury in fact" to the plaintiffs; (2) a "causal connection between the injury and the conduct complained of"; and (3) a "likel[ihood] . . . that the injury will be redressed by a favorable decision." *Id.* at 560–61 (internal citations omitted). When reviewing a complaint, the "allegations of injury are to be liberally construed." *Little v. KPMG LLP*, 575 F.3d 533, 540 (5th Cir. 2009). Indeed, the Court "must accept as true all material allegations of the

[26] It should be noted that since *Flores*, the Supreme Court invalidated a single section of the Voting Rights Act, namely Section 4(b), which set forth a coverage formula used to determine which states and political subdivisions were subject to preclearance, in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

complaint, and must construe the complaint in favor of [plaintiff]." *Warth v. Seldin*, 422 U.S. 490, 501–02 (1975); *Little*, 575 F.3d at 536.

Plaintiffs' allegations as to standing pass this test easily. It is axiomatic that "voters who allege facts showing disadvantage to themselves as individuals" as a result of a state's election practices "have standing to sue." *Baker v. Carr*, 369 U.S. 186, 206–08 (1962) ("A citizen's right to vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution."). Moreover, as courts have repeatedly held, at-large electoral schemes such as those challenged in this case operate to injure minority voters. *See Gingles*, 478 U.S. at 47 ("This Court has long recognized that multimember districts and at-large voting schemes may 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.'").

A. <u>The Individual Plaintiffs have standing</u>.

Plaintiffs satisfy all three elements of the *Lujan* standing test: they suffered an injury caused by Defendants' conduct, which can be remedied under federal law. As set forth in detail in the Complaint, the Individual Plaintiffs are individual, registered voters who are members of a protected class. (Compl. ¶¶ 12–15.) The Individual Plaintiffs are residents in Perry, Jefferson, Tuscaloosa, and Lee counties. (Compl. ¶¶ 12–15.) The Individual Plaintiffs allege that they are registered voters and members of a protected class whose electoral strength is, and has been, submerged or deprived by the white majority in at-large, statewide elections for the Alabama Supreme Court and the Alabama Courts of Criminal and Civil Appeals. (Compl. ¶¶ 12–15, 62–64.) Thus, the Individual Plaintiffs have alleged a "disadvantage to themselves as individuals" as a result of Alabama's at-large election procedures for these multi-member courts. Plaintiffs need not plead any additional facts to

demonstrate standing in a Voting Rights Act case challenging voter dilution based on race in statewide elections.

Ignoring these allegations, Defendants argue that Individual Plaintiffs "do not . . . identify particular judicial candidates of their *personal* choice whom they were unable to elect on account of race, or that they personally have suffered vote dilution because of the challenged courts' members are elected statewide." (Mot. at 41.) This is yet another baseless pleading requirement invented by the Defendants without any basis in the law. In support of their standing argument, Defendants cite *United States v. Hays*, 515 U.S. 737, 745–46 (1995). But *Hays* is inapposite. In *Hays*, the Supreme Court held that the plaintiffs did not have standing to bring their claim because they did not reside in the districts at issue. *Hays*, 515 U.S. at 739 ("[A]ppellees do not live in the district that is the primary focus of their racial gerrymandering claim, and they have not otherwise demonstrated that they, personally, have been subjected to a racial classification. For that reason, we conclude that appellees lack standing to bring this lawsuit."). Here, Plaintiffs have pleaded that they live in Alabama, which is the challenged locale, and that they reside in several different and distinct counties across the state. *Hays* thus has no relevance or application here.

Finally, Defendants argue that the Individual Plaintiffs "fail to allege facts demonstrating that sub-districting will enable them to elect candidates of choice." (Mot. at 41.) Defendants' argument fails, however, because there is no case that makes this a pleading requirement. In fact, the seminal case of *Gingles* provides strict standards that offer guidelines not only for proving injury in vote-dilution claims (i.e., the preconditions and the totality of circumstances tests), but also for redressing vote dilution. Plaintiffs have pleaded the necessary preconditions to establish an injury, as well as the redressability for that injury. (*See* Compl. ¶¶ 18–24, 40–45, 61–64.)

More fundamentally, even if such allegations were required at this stage of the litigation – they are not – Individual Plaintiffs met that burden here because "general allegations" are presumed to "embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted). The Individual Plaintiffs allege that they are registered voters and residents of Alabama, that they "are politically cohesive," and that they are minority voters. *See Gingles*, 478 U.S. at 47. The Individual Plaintiffs have properly pleaded standing.

B. <u>The Alabama NAACP has standing</u>.

The NAACP has a long and storied history of championing civil rights and voting rights of African Americans in Alabama. *See, e.g.*, *NAACP v. Hunt,* 891 F.2d 1555 (11th Cir. Ala. 1990); *NAACP v. Evergreen*, 693 F.2d 1367 (11th Cir. Ala. 1982); *Alabama NAACP State Conference of Branches v. Wallace*, 269 F. Supp. 346 (M.D. Ala. 1967); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958). So too has the Alabama NAACP established representational standing on behalf of its members in this case. An organization may assert standing on behalf of its members if (1) the members have standing to sue in their own right, (2) the interests the organization seeks to protect are germane to the organization's purpose, and (3) neither the claim nor the relief requires the participation of each individual plaintiff. *Hunt v. Washington*, 432 U.S. 333, 343 (1977); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.* 528 U.S. 167, 181 (2000). It is also well settled that a "member" of an association "would have standing to sue" in his or her "own right" when that member "resides in the district" where the Voting Rights Act violation occurs. *Hays*, 515 U.S. at 744–45. Plaintiffs need not plead organizational standing; associational standing alone is sufficient. *See Warth*, 422 U.S. at 511 ("[E]ven in the absence of injury to itself, an association may have standing solely as the representative of its

members."). Despite Defendants' claims to the contrary, the Alabama NAACP meets each and every one of these standing requirements. Plaintiffs have pleaded that:

> The Alabama NAACP . . . works to ensure the political, educational, social, and economic equality of African Americans and all other Americans. Two central goals of the Alabama NAACP are to eliminate racial discrimination in the democratic process, and to enforce federal laws and constitutional provisions securing voting rights. Toward those ends, the Alabama NAACP has participated in lawsuits to protect the right to vote, regularly engages in efforts to register and educate African-American voters, and encourages African Americans to engage in the political process by turning out to vote on Election Day.

(Compl. ¶ 11.) Challenging the dilution of African American voters in Alabama's judicial election system is central to the Alabama NAACP's purpose. Its mission includes promoting voting rights and helping its members to participate equally in American democracy.

The participation of the Alabama NAACP's Members is not required. Defendants claim that "[t]he Complaint makes no attempt to identify such members or applicable interests, nor does it seek to demonstrate that it can proceed in this suit without its members' participation." (Mot. at 42.) Yet, Defendants ignore the fact that for decades, voting rights and community organizations have prosecuted Section 2 suits, and all have done so under organizational or associational standing. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *City of Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987); *Mixon v. Ohio*, 193 F.3d 389, 393 n.1 (6th Cir.1999) (citing *Hunt*); *NAACP v. Fordice*, 105 F.3d 655 (5th Cir. 1996).

The relief requested here is prospective and applicable to all voters whose rights have been injured by Alabama's at-large voting system for electing its justices to the Alabama Supreme Court and Courts of Civil and Criminal Appeals. Therefore, the participation of

individual members of the Alabama NAACP is not necessary to obtain relief. The Alabama NAACP has standing to bring this case.

V. SOVEREIGN IMMUNITY DOES NOT PROTECT THE STATE FROM PLAINTIFFS' SECTION 2 CLAIM.

As a defense *asserted for the State of Alabama only*, Defendants raise the argument of sovereign immunity.[27] They argue that the State has not consented to Section 2 suits by private litigants, nor has Congress clearly abrogated the State's immunity in this context. (Mot. at 42–44.) Thus, they argue, the State should be dismissed from this lawsuit. Defendants' contention is wrong and foreclosed by the case law.

While the Eleventh Amendment generally grants states sovereign-immunity protection, that protection is "not absolute." *Hall v. Louisiana*, 983 F. Supp. 2d 820, 829 (M.D. La. 2013) (citing *Union Pac. R.R. Co. v. La. Pub. Serv. Comm'n*, 662 F.3d 336, 340 (5th Cir. 2011)). Courts have recognized that Congress may abrogate state sovereign immunity in accordance with the enforcement provisions of the Reconstruction Amendments: "Congress may abrogate a State's immunity when enacting appropriate legislation under the enforcement provision, § 5, of the Fourteenth Amendment," and by extension, § 2 of the Fifteenth Amendment. *Mixon v. Ohio*, 193 F.3d 389, 399 (6th Cir. 1999). The Voting Rights Act is a valid exercise of Congressional power under the Reconstruction Amendments. (*See supra* at 23.)

Cutting straight against Defendants' argument, courts both inside and outside this Circuit have held that Congress validly abrogated state sovereign immunity for private suits brought pursuant to Section 2. *See Hall*, 983 F. Supp. at 829–30 ("[T]he Court notes that Congress has abrogated the states' sovereign immunity for claims arising under the Voting Rights Act"); *Terrebonne Parish NAACP v. Jindal*, 154 F. Supp. 3d 354, 359 (M.D. La. 2015) ("Congress has

[27] Defendants do not raise their sovereign-immunity argument for Secretary of State John H. Merrill.

abrogated state sovereign immunity for claims arising under the Voting Rights Act."); *Mixon*, 193 F.3d at 398 ("With respect to whether Congress intended to abrogate the States' sovereign immunity under the Voting Rights Act, we believe the language and the purpose of the statute indicate an affirmative response.").

By passing Section 2, which "specifically prohibits 'any State or political subdivision' from discriminating against voters on the basis of race," Congress expressly intended to abrogate state sovereign immunity for private Section 2 suits. *See Mixon*, 193 F.3d at 398 (quoting Section 2). Defendants have pointed to no case law holding to the contrary. The Court should thus reject Defendants' sovereign immunity argument.

CONCLUSION

For the reasons discussed above, the Court should deny Defendants' Motion to Dismiss in its entirety. To the extent that the Court agrees with Defendants, Plaintiffs request leave to amend their Complaint.

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Certificate of Service

I certify that on November 16, 2016, I filed the foregoing document electronically via the Court's CM/ECF system, which will send a copy to all counsel of record.

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