No. 23A231

In The Supreme Court of the United States

WES ALLEN,
IN HIS OFFICIAL CAPACITY AS THE ALABAMA SECRETARY OF STATE,
Applicant,

v.

EVAN MILLIGAN, ET AL.,
Respondents.

BRIEF OF *AMICI CURIAE*
MEMBERS OF THE ALABAMA CONGRESSIONAL DELEGATION
IN SUPPORT OF APPLICANT

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September 19, 2023 *Counsel for Amicus Curiae*

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RULE 29.6 STATEMENT

Amici Curiae, Jerry Carl, Barry Moore, Mike Rogers, Robert Aderholt, Dale Strong, and Gary Palmer, do not constitute a corporation for purposes of Rule 29.6.

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Jerry Carl, Barry Moore, Mike Rogers, Robert Aderholt, Dale Strong, and Gary Palmer, all Members of Congress representing districts in Alabama, submit this Amicus Brief in support of the Appellant. *Amici* have a vital interest in redistricting generally and this appeal specifically. As Members of the U.S. House of Representatives, the way congressional districts are drawn impacts Amici's constituents, their campaigns, and the character of federal elections in Alabama. More importantly, Amici represent the very districts at issue, and any change to these districts will affect their ability to represent their constituencies. The district court's imposition of a preliminary injunction, and any subsequent decision from this Court, will have widespread implication for Amici.

[1] No counsel for any party authored this brief in whole or in part. The National Republican Congressional Committee provided funding for this brief, but no other entity or person, other than Amici or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The district court's reversible error in this Section 2 case has commanded this Court's attention for the second time in as many years. This time, the district court started by bungling its own subject-matter jurisdiction when it examined a new redistricting law, passed by the Alabama Legislature, as if it were a court-ordered remedial map. In so doing, the court below took the entirety of its conclusions about the 2021 Plan, bolted them to the 2023 Plan, and then called it a day without actually assessing whether the 2023 Plan survived Section 2 scrutiny by, among other things, conducting a *Gingles* analysis. Not only does this mean that the district court ordered a remedy without determining whether the 2023 Plan violated Section 2, it also flipped the presumption of legislative good faith on its head.

More errors followed. All the evidence before the district court demonstrated that this case is about *partisan* gerrymandering—*not* racial gerrymandering—which means that the Plaintiffs' claims never belonged in federal court. *See Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2508 (2019). Specifically, Alabamians elect Republicans because the Democratic Party has failed to persuade Alabamians to vote for Democrats. That these partisan voting trends correlate with some racial voting trends isn't enough. Section 2 requires causation (vote-dilution "on account of race," 52 U.S.C. § 10301(a)) rather than correlation, and the district court's failure to grasp this point led it to flout Section 2's text, as well as precedent not only from this Court but also from most of the Circuits that have addressed the issue. Reversal is warranted.

ARGUMENT

I. BECAUSE ALABAMA'S 2023 PLAN WAS NEVER FOUND TO VIOLATE SECTION 2, THE DISTRICT COURT HAD NO JURISDICTION TO ORDER A REMEDIAL MAP.

The district court's first, and most fundamental, error strikes at the heart of its own power to adjudicate the Plaintiffs' Section 2 claims. A court may not issue a remedy before determining whether a litigant has a right to that remedy. But that is exactly what the district court did when it ordered a remedial map without assessing whether the 2023 Plan violated the Voting Rights Act. Even more, the district court added federalism insult to subject-matter jurisdiction injury by inverting the presumption of good faith that must be afforded to the Alabama Legislature.

At a previous stage in this very case, this Court instructed the district court to "conduct 'an intensely local appraisal' of the electoral mechanism at issue, as well as a 'searching practical evaluation of the 'past and present reality.'" *Allen* v. *Milligan*, 143 S. Ct. 1487, 1503 (2023) (quoting *Thornburg* v. *Gingles*, 478 U.S. 30, 79 (1986)). This means that the district court had an obligation to examine the 2023 Plan closely and individually, and then compare it to a "reasonably configured" illustrative plan. *Id*. Only then would the district court have the moment to assess whether "[d]eviation from that [illustrative] map" demonstrates that the 2023 Plan "has a disparate effect on account of race." *Id*. at 1507.

The district court elided this Court's mandate. Doing so was error and requires correction.

A. The district court overstepped its Article III authority by failing to conduct a local assessment of the 2023 Plan.

For nearly thirty years, the Court has made crystal clear that every challenged legislative act, especially those establishing voting-district boundaries, must be assessed on their own terms. Indeed, "the burden of proof lies with the challenger, not the State," *Abbott* v. *Perez*, 138 S. Ct. 2305, 2324 (2018) (citing *Reno* v. Bossier Par. *School Bd.*, 520 U.S. 471, 481 (1997)), and "the good faith of [the] state legislature *must* be presumed." *Id.* (quoting *Miller* v. *Johnson*, 515 U.S. 900, 915 (1995)) (emphasis added). For this reason, a finding of earlier alleged bad acts cannot be used to circumvent the intensely local Section 2 assessment. *Id.* "[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Id.* (quoting *Mobile* v. *Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion)).

To be certain, the past is relevant. But because it is only "one evidentiary source,"[2] it cannot be dispositive. And as a matter of fundamental fairness, the past can never be used to by-pass answering the necessary questions that this Court has established for determining whether Section 2 liability arises. In other words, the question remains whether the legislative act subject to challenge—here, the 2023 Plan—violates the Voting Rights Act in its own right. *See Abbott*, 138 S. Ct., at 2324.

The district court skirted its obligation to answer the Section 2 liability question. Instead, it reasoned that the 2023 Plan was enacted to remedy the 2021

[2] *Id.* (citing *Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977)); *see also Covington* v. *North Carolina*, 283 F. Supp. 3d 410, 431 (M.D.N.C. 2018), *aff'd in relevant part*, *North Carolina* v. *Covington*, 138 S. Ct. 2548 (2018).

Plan, which the district court had enjoined. And its expectation that the 2023 Plan must absolve the taint of the 2021 Plan meant that it declined to assess whether the 2023 Plan itself transgressed the Voting Rights Act. App. 116-129. Indeed, the district court chose not to conduct a new *Gingles* Analysis for the 2023 Plan, and instead used arguments, expert testimony, and illustrative plans keyed into the 2021 Plan to reject the 2023 Plan. *Id*.

That was error. The 2023 Plan is a new map, and the Legislature enacted it on its own accord—not because the district court ordered it to do so. For that reason, the district court had an obligation to assess the 2023 Plan on its own merits, and not to transpose its earlier indictment of the 2021 Plan onto a wholly different legislative enactment.

Article III authority "amounts to little more than the negative power to disregard an [unlawful] enactment." *Barr* v. *Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2351 n.8 (2020) (plurality opinion) (quoting *Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923)). Once the State enacted the 2023 Plan, the injunction directed to the 2021 Plan lost all legal effect. Challenges to an "old rule" become "moot" when a new rule takes its place. *See New York State Rifle & Pistol Ass'n, Inc.* v. *City of New York*, 140 S. Ct. 1525, 1526 (2020). And although a "plaintiff may have some residual claim under the new framework," any earlier order should be vacated and so that the parties, "if necessary," can "amend their pleadings or develop the record more fully" in connection with the new, separate legislative enactment. *Id.* (quoting *Lewis* v. *Cont'l Bank Corp.*, 494 U. S. 472, 482-483 (1990)).

Simply put, because the State passed a new law, the district court had to assess that new law from the ground up. Article III does not allow federal courts to sit as permanent "councils of revision." *United States* v. *Rutherford*, 442 U.S. 544, 555 (1979); *see also United States* v. *Richardson*, 418 U.S. 166, 189 (1974) (Powell, J., concurring) (explaining that under the Council of Revision, "every law passed by the legislature automatically would have been previewed by the Judiciary before the law could take effect"). Courts decide cases or controversies, and until the 2023 Plan was enacted, it did not, and could not, give rise to a case or controversy that the district court had any power to adjudicate. The 2023 Plan was not a subject of any complaint, it was not ordered as a remedy to any final judgment, and it was not examined in a way that provided the adversarial assessment necessary for the district court to issue a remedy. Simply put, the district court lacked jurisdiction to rule as it did on the 2023 Plan.

B. The district court improperly inverted the presumption of constitutionality afforded to the Legislature.

The district court did not merely transgress its Article III power when it tossed the 2023 Plan without conducting a new Voting Rights Act analysis. It also dispensed with the presumption of constitutionality and good faith to which the Alabama Legislature was entitled. In other words, the district court presumed racial discrimination and asked the State to disprove it. And by burdening the State to prove Section 2 compliance, rather than placing the burden on the Plaintiffs to prove their Section 2 claims, the district court aggravated its error.

The district court's analysis shows that it presumed that the 2023 Plan was unconstitutional. Rather than begin with the *Gingles* preconditions, the district court queried whether "the 2023 Plan *completely remedies* the likely Section Two violation that [it] found . . . ." App.134 (emphasis added). After concluding that the 2023 Plan did not do so, the district court enjoined it because it contained one, and not two, majority-minority districts. App.135. By construing the 2023 Plan as a remedial map and conditioning its imprimatur on hitting a majority-minority-district quota, the district court inverted the burden of proof. That error demands reversal.

II. PARTISAN POLITICS, NOT RACE, HAS DRIVEN THE VOTING PATTERNS OF ALABAMIANS, AND THAT DOOMS THE PLAINTIFFS' SECTION 2 CLAIMS.

Beyond skipping the *Gingles* preconditions, the district court also disregarded a critical aspect of the totality-of-circumstances analysis: Senate Factor 2—i.e., "the extent to which voting in the elections of the state or political subdivision is racially polarized." S. Rep. No. 97-417, at 29. Unlike *Gingles* Steps 2 and 3 (where a court must ask *how* Black and White voters cast their ballots), Senate Factor 2 looks at *why* voters cast their ballots for certain candidates. That is to say, "what appears to be bloc voting on account of race [which is the inevitable result of satisfying the three *Gingles* preconditions], may, instead, be the result of political or personal affiliation of different racial groups with different candidates." *Solomon* v. *Liberty Cnty. Comm'rs*, 221 F.3d 1218, 1225 (11th Cir. 2000).

In other words, causation matters. The district court, however, declined to independently analyze whether Alabama's voting trends are polarized "on account of race," or instead on account of the State's partisan (i.e., Republican) culture. In

deciding that it must be the former, the district court avoided considering the colossal evidentiary proof that Democrats have consistently lost in Alabama not because they are Black, but because the Democratic Party has failed to appeal to Alabama voters for quite some time.

A. Section 2's totality-of-circumstances analysis requires a showing that racially polarized voting occurs on account of (rather than in correlation with) race.

Section 2 forbids "denial or abridgement of the right of any citizen of the United States to vote *on account of race or color*." 52 U.S.C. § 10301(a) (emphasis added). The totality-of-circumstances analysis in subsection (b) requires courts to assess the "equa[l] open[ness]" of a state's political process, and whether minority voters have "less opportunity" to "participate in the political process and to elect representatives of their choice." *Id.* § 10301(b). Moreover, Section 2's "on account of race" language mirrors and gives effect to the nearly identical language found in the Fifteenth Amendment. *See Mobile*, 446 U.S., at 60–61; *see also* U.S. Const. amend. XV, § 1.

It is "a cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute." *NLRB* v. *SW Gen., Inc.*, 580 U.S. 288, 304 (2017) (citation omitted). And so, the phrase "on account of race" must be construed as a prerequisite to a finding of Section 2 liability. Race—not party preference or some other variable—must cause the purported injury if Section 2 liability is to arise. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2337 (2021).

Congress enacted Section 2 to address the specific problem of discrimination against racial minorities in state voting processes. *See Mobile*, 446 U.S., at 60–61. Although Section 2 was later amended to eliminate the intent requirement, the class of individuals protected by the statute—minority voters whose rights have been abridged or denied "on account of race or color"—has not changed. After Section 2(a) clearly established *whose* rights the statute was intended to protect, the 1982 amendment (codified as Section 2(b)) explained *how* a violation of those rights could be established: the totality-of-circumstances test.

Section 2(b) requires the Plaintiffs to prove that "political processes . . . are not equally open to participation by members of a class of citizens protected by subsection (a)." 52 U.S.C. § 10301(b). In other words, the statute requires that minority voters prove that they have been impacted *because of their race or color*. And the statute is crystal clear about how the Plaintiffs must carry this burden. They must do so by showing that they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id*.

Voters, including minority voters, may have "less opportunity" to elect the representative they would prefer for any number of non-race-related reasons. The most obvious is partisanship; because of how voting works, if a person of one political persuasion lives in an area with an overabundance of voters who associate with a different political party, that former necessarily has "less opportunity" to elect his or her candidate of choice. Democrats who live in Wyoming (the most Republican state)

and Republicans who live in Vermont (the most Democratic state) experience this with every election.

If this is why a racial group has not successfully elected their candidate of choice (i.e., if that racial group prefers Democrat candidates in an overwhelmingly Republican state), their inability to elect their candidates of choice is *not* "on account of [their] race." And if it is not, then Section 2 provides no remedy. The Voting Rights Act was never intended to guarantee the success of one political party given the coincidence that a minority group prefers that political party. *See Frank* v. *Walker*, 768 F.3d 744, 754 (7th Cir. 2014); *see also Gingles*, 478 U.S., at 83 (White, J., concurring) ("Justice Brennan states . . . that the crucial factor in identifying polarized voting is the race of the voter and that the race of the candidate is irrelevant. Under this test, there is polarized voting if most white voters vote for different candidates than the majority of the blacks, regardless of the race of the candidates. I do not agree.").

B. The Court's post-*Gingles* jurisprudence has clarified that correlation alone cannot establish a Section 2 violation.

In *Thornburg* v. *Gingles*, this Court's splintered opinion appeared to create a conditional guarantee of proportional representation while diminishing the effect of the "on account of race or color" qualifier in Section 2. 478 U.S. at 63. The second and third preconditions that emanated from that decision focus solely on the political cohesiveness of a given minority group and their White counterparts, but they do not require the reviewing court to investigate the necessary cause of any disparate effect on racial minorities. *Id*. In fact, the Justice Brennan's plurality opinion expressly

disclaimed causation as relevant for purposes of the preconditions (even though Senate Factor 2 plainly requires it). *See id.* ("[T]he reasons black and white voters vote differently have no relevance to the central inquiry of § 2."). Others disagreed. *See id.* at 83 (White, J., concurring) (disagreeing with Justice Brennan on this point).

Despite Justice Brennan's preferred *Gingles* free-for-all, the Court soon began clarifying that not all voting laws affecting a minority community give rise to Section 2 liability. *See, e.g., Chisom* v. *Roemer*, 501 U.S. 380, 383–84 (1991) (noting that the 1982 Voting Rights Act amendments "make clear that *certain* practices and procedures that result in the denial or abridgment of the right to vote are forbidden" (emphasis removed)). Most recently, the Court reviewed a Section 2 challenge to Arizona's precinct-voting rule and ballot-harvesting restrictions in *Brnovich*, 141 S. Ct., at 2330. The *Brnovich* majority confirmed that the Court's "statutory interpretation cases almost always start with a careful consideration of the text, and there is no reason to do otherwise" when analyzing Section 2. *Id.* at 2337. The Court then quoted the "on account of race or color" language in Section 2(a), and it noted that it "need not decide what this text would mean if it stood alone because §2(b), which was added to win Senate approval, explains what must be shown to establish a §2 violation." *Id.* This confirms that Section 2(b)'s totality-of-the-circumstances test must be read *in pari materia* with Section 2(a)'s condition that Section 2 liability does not arise unless an injury occurs on account of the voter's race.

The test that the *Brnovich* Court set forth recognizes the primacy of causation. The Court first explained that "equal opportunity helps to explain the meaning of

equal openness" in Section 2(b), which confirms that Section 2 is directed to ensuring equality of access, but not equality of electoral outcomes. *Id*. at 2338. It then identified five factors pertinent to the analysis, including the overall size of the burden imposed by the challenged law and the size of any disparities in the law's impact on racial minority groups. *Id*. at 2339–40. The Court noted that, "[t]o the extent that minority and non-minority groups differ with respect to employment, wealth, and education, even neutral regulations, no matter how crafted, may well result in some predictable disparities in rates of voting." *Id*. at 2339. But it remains true that if the effect of a voting law merely correlates with race, it does not necessarily mean that the law operates "on account of race." The *Brnovich* factors show that Section 2 hinges on something more than mere raw disparate impact, especially since a disparate impact might be no more than a mere coincidence tied to partisan preferences.

C. The Circuit Courts agree that causation matters.

In addition to this Court's clarifying precedents, the Courts of Appeal are in virtual lockstep with each other that correlation is not causation, and the latter is needed for Section 2 liability to arise. Race, not some other variable, must be the cause of electoral failure for purposes of a Section 2 claim.

In *SCLC* v. *Sessions*, for example, the Eleventh Circuit held that "any evidence that explain[s] election results [i]s relevant," especially where there is "ample evidence . . . to support the court's conclusion that factors other than race, *such as party politics* and availability of qualified candidates, are driving the election results." 56 F.3d 1281, 1293–94 (11th Cir. 1995) (emphasis added). The Court reaffirmed this

principle in *Solomon* v. *Liberty County Commissioners:* "what appears to be bloc voting on account of race may, instead, be the result of political or personal affiliation of different racial groups with different candidates." 221 F.3d, at 1225. And in *Greater Birmingham Ministries* v. *Secretary of Ala.* (a Section 2 challenge to Alabama's voter ID law), the Eleventh Circuit again emphasized that causation rather than correlation is what matters for Section 2 purposes. 992 F.3d 1299, 1329 (11th Cir. 2021). In that case, the court determined that "minority voters in Alabama are slightly more likely than white voters not to have compliant IDs," but it nevertheless held that "the plain language of Section 2(a) requires more" than this showing of disparate impact. *Id*. at 1330.

The First, Second, Seventh, and Ninth Circuits have also adopted this same causation-not-correlation approach.[3] Meanwhile, in upholding a Virginia voter ID law against a Section 2 challenge, the Fourth Circuit joined its sister courts in holding that a demonstration of disparate impact alone is insufficient when a plaintiff fails to establish the necessary causal link. *See Lee* v. *Va. State Bd. of Elections*, 843 F.3d

[3] *See Gonzalez* v. *Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc) ("Although proving a violation of § 2 does not require a showing of discriminatory intent, only discriminatory results, proof of 'causal connection between the challenged voting practice and a prohibited discriminatory result' is crucial." (citations omitted)); *Goosby* v. *Town Bd. of Town of Hempstead*, 180 F.3d 476, 493 (2d Cir. 1999) ("We . . . ratify the approach taken by the district court to consider the political partisanship argument under the 'totality of circumstances' analysis"); *Milwaukee Branch of the NAACP* v. *Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997) (explaining that the reasons why candidates preferred by black voters lost should be considered in the totality-of-circumstances inquiry); *Vecinos De Barrio Uno* v. *City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995) (holding that non-racial reasons for divergent voting patterns should be considered under the totality-of-circumstances test).

592, 601 (4th Cir. 2016) ("We conclude that § 2 does not sweep away all election rules that result in a disparity in the convenience of voting."). Similarly, the Sixth Circuit—in upholding Ohio's twenty-nine-day early-voting period against a Section 2 challenge—held that Section 2 plaintiffs must demonstrate that the specific law they are challenging, "as opposed to non-state created circumstances[,] *actually makes voting harder*" for minority voters. *Ohio Democratic Party* v. *Husted*, 834 F.3d 620, 631 (6th Cir. 2016) (emphasis in original).

D. The district court ignored judicially recognized evidence that racially polarized voting in Alabama is driven by partisan politics.

Contrary to the Court's jurisprudence and that of various Courts of Appeal, the district court ignored substantial evidence recognized by a sister court showing that racially polarized voting in Alabama arises from non-racial factors such as ideology and partisanship. Specifically, in *Alabama State Conference of the NAACP* v. *Alabama*, the Middle District of Alabama observed that the State is "one of the most Republican [jurisdictions] in the entire South," a fact that "has made it virtually impossible for Democrats—of any race—to win statewide in Alabama in the past two decades." 612 F. Supp. 3d 1232, 1291 (M.D. Ala. 2020). It noted that all Black candidates for statewide office since 2000 have run as Democrats and lost, while two Black-preferred (White) Democrat candidates during that same period have won three races (Sue Bell Cobb for Supreme Court Justice, and Doug Jones for U.S. Senate). *Id.* The court further commented that White Democratic primary voters in Alabama appear to give equal support to Black Democratic candidates in appellate

judicial elections. *Id*. The only logical conclusion is that Black candidates are not penalized at all by their race. *Id*. (citing *League of United Latin Am. Citizens, Council No. 4434* v. *Clements*, 999 F.2d 831, 879 (5th Cir. 1993) and *Lopez* v. *Abbott*, 339 F. Supp. 3d 589, 613 (S.D. Tex. 2018).

The court then explored the true cause behind racially polarized voting. It first observed that the Alabama Democratic Party is significantly weaker than its Republican counterpart. "One need look no further than the past four general elections, in which Democrats put up candidates for only twelve out of forty-six statewide offices, and the failure of any Democratic candidate to qualify to run in the March 3, 2020 primary for six open appellate judicial seats, to see that the Alabama Democratic Party is on life support." *Id.* at 1293. Indeed, the fractured state of the Alabama Democratic Party led to a state-court action in which one faction of the party sued the other for party control. *See* Verified Complaint, *Ala. Democratic Party, et al.* v. *Gilbert, et al.*, No. CV-2019-000531.00 (Circuit Court of Montgomery Cty., Ala. Oct. 30, 2019). Considering that reality, the Middle District of Alabama found that, "without a viable party behind them, Democratic candidates of any race have an uphill battle." *Id*.

The court next observed that straight-ticket voting in Alabama "only exacerbates the phenomenon of partisan-driven election results." *Alabama State Conference of the NAACP*, 612 F. Supp. 3d, at 1296. Indeed, "[m]any voters are driven to the polls because of races at the top of the ticket, then end up voting for down-ballot candidates of the same party as their preferred top-of-the-ticket candidates." *Id.* The

court noted that, between 2008 and 2014, "about a quarter of total ballots cast in Alabama were straight-ticket Democrat, and another quarter of total ballots in Alabama cast were straight-ticket Republican." *Id.* It also found that "the most recent numbers show that straight-ticket voting is even more prevalent today and decisively in the Republican party column." *Id.*

Beyond the fissured state of the Alabama Democratic Party and the robust practice of straight-ticket voting, the court also found that voters in Alabama grasp the political stances of each party (and are thus largely motivated by the ideological contrast between them). Specifically, "because voters must approve constitutional amendments on a statewide basis, the results of voting on those amendments provide a snapshot into Alabamians ideology." *Id.* at 1300. And voters in Alabama consistently support Republican Party issues like (1) the pro-life movement, (2) the right to work, (3) the Second Amendment, and (4) traditional notions of marriage and the family. *Id.* at 1301. Relatedly, the court found that tort reform played a key role in the transition from an all-Democrat to an all-Republican Supreme Court of Alabama. *Id.* at 1302. It concluded that voters in Alabama were turned off by Democrat-backed excessive jury verdicts that gave the State a national reputation as "tort hell" in the 1980s and 1990s. *Id.* (citing *BMW of N. America, Inc. v. Gore*, 517 U.S. 559 (1996)).

At bottom, the court concluded that voters overwhelmingly expressed their conservative bona fides at the ballot box. *Id.* And for that reason, the court in

Alabama State Conference of the NAACP concluded that party, not race, drives election results in Alabama. *Id*. at 1306.

The district court here, however, declined to recognize any of these findings. In its decision on the 2021 Plan, it retorted: "read in context, that finding does not stand for the broad proposition that racially polarized voting in Alabama is simply party politics. Accordingly, we cannot independently reach the same conclusion that the *Alabama State Conference of the NAACP* court reached, and we cannot assign the weight to its conclusion that Defendants urge us to assign." *Singleton* v. *Merrill*, 582 F. Supp. 3d 924, 1019 (N.D. Ala. 2022). This was a plainly erroneous conclusion and contrary to a correct application of Section 2.

III. THE DISTRICT COURT'S ERROR HAS RESULTED IN A COURT-ORDERED PARTISAN GERRYMANDER.

The above shows that the district court willfully turned a blind eye to the fact that "what appears to be bloc voting on account of race may, instead, be the result of political or personal affiliation of different racial groups with different candidates." *Solomon*, 221 F.3d, at 1225. This was improper since, as Justice O'Connor explained in her *Gingles* concurrence, Section 2 was not designed to proscribe redistricting schemes where there is "an underlying divergence in the interests of minority and white voters" that does not arise because of race. 478 U.S. at 100 (O'Connor, J., concurring in the judgment).

Had the district court considered the well-supported explanation that Black-preferred candidates in Alabama lose because they are running as Democrats in a Red State, it would have caught on that the Plaintiffs are actually interested in

expanding the political power of the Alabama Democratic Party through a Section 2 lawsuit. By acquiescing in this partisan power-grab, the district court exceeded its subject-matter jurisdiction and trampled the First Amendment rights of Republican voters and candidates in Alabama.

A. Ignoring non-racial explanations for racially polarized voting allows litigants to mask nonjusticiable partisan gripes as Section 2 vote-dilution claims.

Under Article III, courts may only decide cases "historically viewed as capable of resolution through the judicial process." *Rucho*, 139 S. Ct., at 2493–94. Cases that lack judicially manageable standards constitute nonjusticiable political questions. *Id.* at 2494. For this reason, this Court recognizes only three types of redistricting claims as justiciable: (1) one-person, one-vote challenges; (2) racial gerrymandering claims; and (3) vote-dilution claims under Section 2 of the Voting Rights Act. *Id*. at 2495–96; *Gingles*, 478 U.S., at 70–71. Because there are no judicially manageable standards to adjudicate partisan-gerrymandering claims, and because partisanship is expected to happen in redistricting, partisan-gerrymandering claims are not justiciable. *Gaffney* v. *Cummings*, 412 U.S. 735, 753 (1973). Were it otherwise, courts would "risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Rucho*, 139 S. Ct., at 2498.

The problem with adjudicating partisan-gerrymandering claims is that they presume "that groups with a certain level of political support should enjoy a commensurate level of political power and influence." *Id*. at 2499. But federal courts lack both the authority and competence to apportion political power. *Id*. They cannot

"vindicate[e] generalized partisan preferences." *Id.* at 2501. In other words, the lack the ability or the authority to "allocate political power and influence." *Id.* at 2508.

A necessary corollary to these premises is that federal courts have the responsibility *not* to confuse partisan gerrymandering with race-based claims—no matter the guise under which the plaintiffs may bring them. And the district court failed to live up to this duty. It accepted without any scrutiny the Plaintiffs' argument that the 2023 Plan pre-determines racial gains and losses, when in reality the map reflects the partisan reality of Alabama. Black voters in Alabama are cohesive because they vote for Democrats, and under the 2023 Plan, Democrats will likely not win elected positions because Alabama voters overwhelmingly favor Republican candidates. Using the Voting Rights Act to allocate political power proportionally means that the partisan wolf has arrived in the garb of a racial sheep. *Cf. Morrison* v. *Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). This Court has a duty to stop this subterfuge in its tracks.

B. The district court's failure to require a showing of causation resulted in an application of Section 2 that abridges the First Amendment rights of non-Democrat Alabamians.

By enjoining the 2023 Plan, district court has not only allowed a partisan-gerrymandering claim to proceed. It has also invited the Plaintiffs to wield Section 2 as a cudgel against any state law that fails to advance the institutional interests of the Alabama Democratic Party. The Plaintiffs have prevailed on the district court their theory that Black cohesion for Democrat candidates prevents the State from enacting measures that hurt that party because racial and partisan preferences are

(in their view) inseparable. But as discussed above, the inability of Democratic candidates to win elections results from the decline of the Democratic Party in Alabama. It is not about race, and it hasn't been for years. *See Alabama State Conference of the NAACP* 612 F. Supp. 3d, at 1292–96.

The district court should have disentangled the threads linking the race of Alabama voters to their preference for a certain party's candidates. Had it done so, it would been compelled to conclude that the 2023 Plan does not dilute minority votes "on account of race." By leaving intertwined those threads, the district court allowed the Voting Rights Act to shield the Democratic Party from fair competition with their partisan opponents (and, by extension, unfairly enshrined the Democratic Party's ideas above those held by Republicans and others). This partisan protectionism violates core First Amendment rights, especially the principle against viewpoint discrimination. *See Colo. Republican Fed. Campaign Comm.* v. *FEC*, 518 U.S. 604, 616 (1996) ("The independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees." (citations omitted)); *Speech First, Inc.* v. *Cartwright*, 32 F.4th 1110, 1127 (2022) ("In prohibiting only one perspective, [the government] targets 'particular views taken by' students, and thereby chooses winners and losers in the marketplace of ideas—which it may not do" (citations omitted)).

This means that, by applying Section 2 without considering the cause of racially polarized voting in Alabama, the district court provoked an avoidable

question about the Voting Rights Act's consonance with the First Amendment. Because "[i]t is a long-standing rule of statutory interpretation that federal courts should not construe a statute to create a constitutional question unless there is a clear statement from Congress endorsing this understanding," the district court was wrong to do so. *Johnson* v. *Governor of Fla.*, 405 F.3d 1214, 1229 (11th Cir. 2005). Court must "first address whether one interpretation presents grave constitutional questions whereas another interpretation would not, and then examine whether the latter interpretation is clearly contrary to Congressional intent." *Id.* The district court's failure to conduct this analysis warrants reversal.

As explained in Part II, *supra,* Congress intended that Section 2 claims must include proof of causation. 52 U.S.C. § 10301(a)). Applying Section 2 in the way Congress intended it would have avoided the constitutional conflict that the district court has triggered. That the district court opted for the path of greatest constitutional resistance justifies the grant of the State's emergency request.

CONCLUSION

For all these reasons, the Court should grant applications.

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Respectfully submitted,

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