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U.S. DISTRICT COURT
N.D. OF ALABAMA

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

EVAN MILLIGAN, et al., *Plaintiffs*, v. WES ALLEN, et al., *Defendants*.	No. 2:21-cv-01530-AMM
MARCUS CASTER, et al., *Plaintiffs*, v. WES ALLEN, et al., *Defendants*.	No. 2:21-cv-01536-AMM

MILLIGAN AND _CASTER_ PLAINTIFFS'
REPLY BRIEF IN SUPPORT OF ITS MOTION IN LIMINE

Alabama's response to Plaintiffs' motion in limine only bolsters Plaintiffs' argument that the State's communities of interest evidence and expert analysis is irrelevant to this remedial proceeding and should therefore be excluded under the Federal Rules of Evidence. Defendants cannot escape the remedial context of this hearing or evade the preliminary injunction order by skipping ahead to trial. As the Court already established, while the State will eventually have the "right" to a trial on the merits at a "future date if necessary"—"based on Defendants' agreement"—

that trial "shall not occur before the 2024 congressional elections." *Id.* at 6. Defendants' evidence must be excluded or deferred to a later stage because the law of the case bars Defendants from challenging findings that have already established liability at the preliminary-injunction phase.

Notwithstanding Defendants' selectively plucked quotations and semantic gymnastics, they identify no Section 2 case in which the plaintiffs were required to relitigate a state's liability during a remedial phase. To the contrary, the cases they cite undermine their position. In *McGhee v. Granville County*, the Fourth Circuit explained that while the legislature must have "the first opportunity to devise an acceptable remedial plan, "the court's ensuing review and remedial powers are largely dictated by the legislative body's response. If the legislative body fails to respond *or responds with a legally unacceptable remedy*," the Court must step in. 860 F.2d 110, 115 (4th Cir. 1988) (emphasis added). In other words, the Court must evaluate the legal acceptability of the new plan "in part measured by the historical record, in part measured by difference from the old system, and in part measured by prediction," not on a tabula rasa. *See Dillard v. Crenshaw Cnty.*, 831 F.2d 246, 250 (11th Cir. 1987).

Similarly, in *Harvell v. Blytheville School District No. 5*, 126 F.3d 1038, 1040–41 (8th Cir. 1997), the Eighth Circuit found a new plan insufficient to remedy a Section 2 violation because the "inability of black voters to affect the at-large

elections under the [new plan] [was] no different from what it was under the previous electoral scheme." *Id.* So too in *United States v. Dallas County Commission*, 850 F.2d 1433, 1440 (11th Cir. 1988). There, the Eleventh Circuit rejected a proposed remedial plan because it "perpetuate[d] rather than ameliorate[d] the inequities" in "black citizens' access to the political process." *Id.* In doing so, the court evaluated the remedial proposal through the lens of its previous findings of "racially polarized voting," the "complete absence of black officials elected," and the "history of pervasive racial discrimination" and its present effects. *Id.*

Defendants also miss the point when they cite *Jeffers* for the principle that if "the 2023 Plan 'would have been upheld at the liability stage of the case, [it] must be upheld now." Defs.' Opp. 2 (quoting *Jeffers v. Clinton*, 756 F. Supp. 1195, 1199 (E.D. Ark. 1990), *aff'd mem.*, 498 U.S. 1019 (1991)). Yes, the Court must evaluate whether the new plan continues to unfairly dilute the voting power of Black Alabamians under Section 2, but it does not start from square one. Rather, as the *Jeffers* Court recognized, "the point is precisely that the [remedial districts] would have been held unlawful at the liability stage of this case, simply because they" failed to provide Black voters additional effective opportunity districts. *Id.*

Because the only question in Section 2 remedial proceedings is whether the state has cured the violation, Alabama cites to no court, and Plaintiffs are aware of none, that has ever allowed a defendant to relitigate a plaintiff's satisfaction of the

first *Gingles* precondition at this remedial stage. *Cf., e.g.*, *League of United Latin Am. Citizens v. Perry*, 457 F. Supp. 2d 716, 719 (E.D. Tex. 2006) (three-judge court) (examining past election returns and minority voter population to devise a remedial plan with an "effective Latino opportunity district").

Accordingly, Defendants' communities of interest evidence and expert analysis are irrelevant under the Federal Rules of Evidence. None of that evidence—which is directed only at rehashing this Court's previous findings—bears on the question Alabama expressly does not dispute: The 2023 Plan fails to remedy the Section 2 violation because it does not provide Black Alabamians an additional district in which they have the opportunity to elect a candidate of their choice.

As to Mr. Bryan's racial predominance opinions, they lack sufficient indicia of reliability to make them relevant at *any* stage of the case. Defendants defend his analysis by comparing it to *Milligan* Plaintiffs' expert Dr. Ryan Williamson's testimony during the preliminary injunction hearing. Defs.' Br. 9. But Dr. Williamson used multiple modes of analysis and offered explanations for *why* he performed his analysis and *how* that led to his conclusions. *See generally* Williamson Report at 3–5, 8–9, *Milligan* ECF No. 68-3 (examining county splits, the race of voters moved in and out of a district, and other evidence, together, to argue racial predominance). In contrast, Mr. Bryan's opinions leap from running numbers to ultimate opinions without any indicated connection between the two. Nowhere does

Mr. Bryan explain why he chose to perform the analysis he did, why those analyses are probative of racial predominance, or why—based on the data he computed—they led to his conclusion of a probability of racial predominance. This is precisely the type of *ipse dixit* opinion that previously led this Court to find Mr. Bryan's testimony unreliable. *See Allen v. Milligan*, 143 S. Ct. 1487, 1511 (2023) (explaining that this Court did not err in finding Mr. Bryan's testimony regarding racial predominance "exceedingly thin").

Plaintiffs respectfully request this Court enter an order prohibiting Defendants' introduction of irrelevant and unreliable evidence.

Respectfully submitted this 11th day of August 2023.

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