No. 23A241

In the Supreme Court of the United States

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

v.

MARCUS CASTER, ET AL.,
Respondents.

ON EMERGENCY APPLICATION FOR STAY PENDING PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR NATIONAL REPUBLICAN REDISTRICTING TRUST AS *AMICUS CURIAE* IN SUPPORT OF APPLICANT

CHRISTOPHER E. MILLS
Counsel of Record
Spero Law LLC
557 East Bay Street #22251
Charleston, SC 29413
(843) 606-0640
cmills@spero.law

Counsel for *Amicus Curiae*

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The National Republican Redistricting Trust ("NRRT") is the central Republican organization tasked with coordinating and collaborating with national, state, and local groups on the fifty-state congressional and state legislative redistricting effort. NRRT's mission is threefold.*

First, it aims to ensure that redistricting faithfully follows all federal constitutional and statutory mandates. Under Article I, § 4 of the U.S. Constitution, the State Legislatures are primarily entrusted with the responsibility of redrawing the States' congressional districts. *See Growe v. Emison*, 507 U.S. 25, 34 (1993). Every citizen should have an equal voice, and laws must be followed to protect the constitutional rights of individual voters, not political parties or other groups.

Second, NRRT believes redistricting should be conducted primarily by applying the traditional redistricting criteria States have applied for centuries. This means districts should be sufficiently compact and preserve communities of interest by respecting municipal and county boundaries, avoiding the forced combination of disparate populations as much as possible. Such sensible districts follow the principle that legislators represent individuals living within identifiable communities. Legislators do not represent political parties, and we do not have a system of statewide proportional representation in any State. Article I, § 4 of the U.S. Constitution tells courts that any change in our community-based system of districts

* In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, made a monetary contribution to its preparation or submission.

is exclusively a matter for deliberation and decision by our political branches—the State Legislatures and Congress.

Third, NRRT believes redistricting should make sense to voters. Each American should be able to look at their district and understand why it was drawn the way it was.

To advance these principles, NRRT regularly files *amicus* briefs in redistricting cases, including two briefs during this Court's prior consideration of this case and a brief in the district court's post-remand proceedings.

SUMMARY OF THE ARGUMENT

"Forcing proportional representation is unlawful and inconsistent with this Court's approach to implementing § 2." *Allen v. Milligan*, 143 S. Ct. 1487, 1509 (2023). That was the "simple" "point" emphasized by this Court a few months ago. *Id.* That point—and the corollary point that "§ 2 never requires adoption of districts that violate traditional redistricting principles" (*id.* at 1510 (cleaned up))—is "ma[d]e clear" by "the Court's precedents." *Id.* at 1518 (Kavanaugh, J., concurring in part). Alabama "could not create" districts that "flout[] traditional criteria." *Id.* at 1509 (majority op.).

With this guidance in hand, Alabama drew new maps in good faith. The State repealed its prior law and adopted a new one. Yet in the district court, the Plaintiffs then demanded what this Court said is "never require[d]" under the Voting Rights Act: proportional representation via remedial plans that subordinate traditional redistricting criteria to race. The district court acceded to this demand, treating

Alabama's new enacted maps as part of some remedial phase for a trial that has never happened about a law that no longer exists. Calling "the dispositive question" "whether the 2023 Plan contains an additional Black-opportunity district," App. 136, the court enjoined the new plan after a single-day hearing. For a "remedy," it ordered its own maps with an overtly racial goal: "an additional majority-Black congressional district, or an additional district in which Black voters otherwise have an opportunity to elect a representative of their choice." *Id.* at 224.

Every aspect of this process flouts this Court's precedents. First, the Voting Rights Act does not require proportionality, much less super-proportionality. Nor does the VRA require districts that contain less than a majority of a minority group on some sort of crossover opportunity voting theory. This Court has repeatedly rejected reading § 2 to require such remedies. Alabama's 2023 Plan adheres to traditional districting principles better than any of the Plaintiffs' plans, maintaining communities of interest that the 2021 Plan did not. To reject this new Plan—with scant consideration of its merits—turns the Court's VRA precedents on their head.

Second, any suggestion that Alabama is "defying" this Court's opinion in *Allen* by passing a new law that follows traditional districting principles rather than racial proportionality makes no sense. To the contrary, the Plaintiffs' plans, which "[f]orc[e] proportional representation," defy that opinion and a long line of precedents. *Allen*, 143 S. Ct. at 1509. And the Plaintiffs affirmatively told this Court last time around that the district court "did not order Alabama to enact Plaintiffs' plans or even to create a second majority-Black district." Brief for *Milligan* Appellees 2, *Allen*, No. 21-

1086 (U.S. July 11, 2022), https://tinyurl.com/2x45zehh. Now, the district court asserts that "[it] said" a second district "is the legally required remedy," App. 126, and the Plaintiffs claim defiance. The notion that Alabama "defied" an appellate affirmance of a preliminary injunction by passing a new law misunderstands: (1) the tentative nature of every preliminary injunction, (2) the parameters of this preliminary injunction, which merely enjoined enforcement of the old plan and did not require *any* new plan, (3) the limited scope of an appellate holding that a preliminary injunction was not an abuse of discretion, (4) *Allen*'s limitation to § 2 liability standards, and (5) how challenges to new laws are supposed to work—and who bears the burden on such challenges.

Hinging liability on plans that underperform the State's own map on traditional criteria would turn § 2 into a pure proportionality regime in most cases. And forcing the State to adopt unlawful, race-based districts as a preliminary "remedy" to a non-existent law without adequate consideration of the operative law flouts Article III principles. An emergency stay is necessary.

ARGUMENT

I. *Allen* does not authorize novel, unlawful remedies.

In the district court's view, § 2 plaintiffs can succeed under *Gingles* even if their proposed plans do not "meet-or-beat" the State's plan on "*any*" traditional "metric." App. 148 (emphasis added); *see id.* at 633 ("[T]he Plaintiffs are not required to produce a plan that 'meets or beats' the 2023 Plan on any particular traditional districting criteria."). This holding led the court to dismiss the relevance of the fact that the State's Plan preserves communities of interest better than any of the Plaintiffs' plans.

Combining this holding with the realities of computerized mapmaking and the district court's dismissal of the State's redistricting guidelines would transform § 2 into a mandatory proportionality regime. That result contradicts this Court's precedents, including *Allen*.

As Justice Kavanaugh explained in *Allen*, this Court's decisions "have flatly rejected" requiring states to enact "a proportional number of majority-minority districts" by "group[ing] together geographically dispersed minority voters into unusually shaped districts, without concern for traditional districting criteria." 143 S. Ct. at 1518 (opinion concurring in part). Analyzing these precedents, the majority in *Allen* agreed that § 2 "never require[s] adoption of districts that violate traditional redistricting principles" *Id.* at 1510; *see id.* at 1508–10 (collecting cases showing that "the *Gingles* framework itself imposes meaningful constraints on proportionality, as our decisions have frequently demonstrated").

"To ensure that *Gingles* does not improperly morph into a proportionality mandate, courts must rigorously apply" its preconditions. *Id.* at 1518 n.2 (Kavanaugh, J., concurring in part). "[F]or example, it is important that" any remedial map follow traditional districting principles "at least as well as Alabama's redistricting plan." *Id.* Otherwise, § 2 liability would often "turn almost entirely on just one circumstance—disparate impact." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2341 (2021).[1]

[1] Even if § 2 *were* a disparate-impact regime, plaintiffs who failed to produce a map that advanced legitimate redistricting criteria as well as the State's map could not prove that the State's law was "not needed to achieve a government's legitimate goals." *Brnovich*, 141 S. Ct. at 2361 (Kagan, J., dissenting).

If § 2 plaintiffs do not have to show that *any* of their maps adhere to traditional districting principles as well as the state's single map, the state will practically always lose. In *Allen*, the Court quoted academic commentary suggesting that "the universe of all possible connected, population-balanced districting plans that satisfy the state's requirements . . . is likely in the range of googols." *Allen*, 143 S. Ct. at 1514. Especially if one combines that statement with the court below's dismissal of any traditional requirements that the plaintiffs' map flunk as "particular principle[s] the State defined as non-negotiable," App. 148,[2] little is left of *Gingles*. Its preconditions can practically always be satisfied. And states will almost always lose, substituting permanent judicial redistricting for rule by the people's representatives.

That cannot be the law. This Court has "repeatedly observed" that redistricting "'is primarily the duty and responsibility of the States,' not the federal courts," and "the *Gingles* factors help ensure that remains the case." *Allen*, 143 S. Ct. at 1510 (brackets omitted) (quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018)). To protect this balance, a plaintiff must show that its proposed maps outperform the state's map when it comes to traditional districting criteria.

Here, given the nature of Alabama's population and geographic dispersion—only 11 of 67 counties are majority black—it would be surprising to see proportional representation *without* a violation of traditional districting principles. It is therefore unsurprising that the Plaintiffs' proposed remedial plans significantly underperform the State's 2023 Plan when it comes to traditional districting principles, particularly

[2] *See also* App. 633 ("The Secretary cannot avoid Section Two liability merely by devising a plan that excels at the traditional criteria the Legislature deems most pertinent.").

keeping communities of interest together. Under the Court's precedents, reiterated in *Allen*, one of the Plaintiffs' super-proportional remedial plans cannot be substituted for a state plan that adheres to traditional districting principles.

A. Section 2 does not require proportional or super-proportional representation.

The Plaintiffs' proposed remedial plans cannot be substituted for the State's 2023 Plan because § 2 does not guarantee equality through proportional representation. "[T]he ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority candidates." *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994). Section 2 is violated only if "the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens." 52 U.S.C. § 10301(b). Section 2 specifically disclaims that it "establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.*; *see also Brnovich*, 141 S. Ct. at 2342 n.14 (noting this disclaimer as "a signal that § 2 imposes something other than a pure disparate-impact regime").

Thus, "[f]ailure to maximize [minority representation] cannot be the measure of § 2." *De Grandy*, 512 U.S. at 1017. In *De Grandy*, the Court examined proportionality only as potentially relevant in the "totality of circumstances" analysis. *Id.* at 1011. But the Court cautioned that "the degree of probative value assigned to disproportionality, in a case where it is shown, will vary not only with the degree of disproportionality but with other factors as well." *Id.* at 1021 n.17. "[L]ocal conditions" matter. *Id.* (cleaned up). And even purported proportionality is not "a safe harbor for any districting scheme." *Id.* at 1018. The "totality-of-circumstances

analysis" cannot be "reduced" to the "single factor" of "proportionality." *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 142 S. Ct. 1245, 1250 (2022). In particular, as *Allen* reiterated, proportionality cannot be substituted for traditional districting principles.

Miller v. Johnson provides a good example of how this analysis works in practice. There, the Court explained that to establish a racial gerrymandering claim, "a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." 515 U.S. 900, 916 (1995) (cleaned up). "Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can defeat a claim that a district has been gerrymandered on racial lines." *Id.* (cleaned up).

In *Miller*, the Court invalidated congressional maps drawn in Georgia that sought proportional representation. At the insistence of the U.S. Department of Justice, the state legislature had drawn three of 11 districts as majority-minority to mirror the State's black population (27%). *Id.* at 906–07, 927–28. The Court rejected those maps because, as the State had all but conceded, "race was the predominant factor in drawing" the new majority-minority district. *Id.* at 918. "[E]very objective districting factor that could realistically be subordinated to racial tinkering in fact suffered that fate." *Id.* at 919 (cleaned up). Even where "the boundaries" of the new district "follow[ed]" existing divisions like precinct lines, those choices were themselves the product of "design[] . . . along racial lines." *Id.* (cleaned up).

The Court rejected this racial gerrymander, specifically holding that "there was no reasonable basis to believe that Georgia's earlier [non-proportional] plans violated" the VRA. *Id.* at 923. "The State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan . . . discriminates on the basis of race or color." *Id.* at 924. Because engaging in "presumptively unconstitutional race-based districting" would have brought the VRA "into tension with the Fourteenth Amendment," the Court rejected the State's maps, even though those maps provided proportional representation. *Id.* at 927. As the Court explained, "It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids." *Id.* at 927–28.

The Court thus remanded the case, and after the state legislature failed to act, the district court drew maps with only one majority-minority district (9%)—meaning representation that fell far below black Georgians' 27% share of the population. *Abrams v. Johnson*, 521 U.S. 74, 78 (1997); *see id.* at 103 (Breyer, J., dissenting). "The absence of a second, if not a third, majority-black district" was "the principal point of contention" in the second appeal to this Court. *Id.* at 78 (majority opinion). Yet the Court upheld the district court's maps, which focused on "Georgia's traditional redistricting principles." *Id.* at 84. The district court had "considered the possibility of creating a second majority-black district but decided doing so would require it to

subordinate Georgia's traditional districting policies and consider race predominantly." *Id.* (cleaned up).

This Court agreed with that conclusion, explaining "that the black population was not sufficiently compact" for even "a *second* majority-black district." *Id.* at 91 (emphasis added)). Thus, even getting to two majority-minority districts (18%) by focusing on race would have violated the Equal Protection Clause, and the Court rejected the use of DOJ's proposed "plan as the basis for a remedy [that] would validate the very maneuvers that were a major cause of the unconstitutional districting" at issue in *Miller*. *Id.* at 86; *see id.* at 109 (Breyer, J., dissenting) ("The majority means that a two-district plan would be unlawful—that it would violate the Constitution.").

In *Allen*, this Court highlighted *Miller* and several other precedents, including *Shaw v. Reno* and *Bush v. Vera*, in explaining that "traditional districting criteria limit[s] any tendency of the VRA to compel proportionality." 143 S. Ct. at 1509. Here, nearly every county in Alabama is majority white; only 11 of 67 are majority black. The share of any black voting-age population in Alabama (the most Plaintiff-favorable metric) is 25.9%—lower than the Plaintiffs' and the district court's rounded 27% figure (which the court below used to justify its conclusion in the previous preliminary injunction proceeding that 28.57% representation would be proportional). *See Singleton v. Merrill*, 582 F. Supp. 3d 924, 1025 (N.D. Ala. 2022). This corrected BVAP shows that the Plaintiffs are seeking super-proportional representation. *Amicus* is unaware of any case since the enactment of the Voting

Rights Act in which a federal court's mandate of a maximization plan providing for super-proportional representation was affirmed by this Court.[3]

Tellingly, the "race-neutral plan" demanded by the Plaintiffs on their racial gerrymandering claim was a "decrease [in] the BVAP in District 7 to around 50%" and a redrawn District 2 "with [a] BVAP[]" of "almost 40% as opposed to the current 30%." *Milligan* D. Ct. Dkt. 69, at 31. That is exactly what the State's 2023 Plan provides: by the parties' stipulations, District 7 "has a BVAP of 50.65%," and District 2 "has a BVAP of 39.93%." App. 88. Neither the Plaintiffs nor the district court explained why a § 2 remedy would look so different—or how judicially-imposed intentional discrimination to overcome the Plaintiffs' own race-neutral ideal could coexist with the Equal Protection Clause. On that point, even as two sets of Plaintiffs here demanded super-proportional remedies, the *Singleton* Plaintiffs doubted whether that plan "could satisfy strict scrutiny under the Constitution because of the way it splits Mobile and Jefferson County along racial lines." *Milligan* D. Ct. Dkt. 220-1, at 71–72; *see Singleton* D. Ct. Dkt. 147, at 1 (arguing that the 2023 Plan's one majority-minority district makes it "a racial gerrymander that violates the Fourteenth Amendment").

[3] *See United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 165 (1977) (suggesting that super-proportional plans would exclude the majority "from participation in the political processes" and amount to "discrimination violative of the Fourteenth Amendment"); *see also id.* at 173 (Brennan, J., concurring in part) ("[W]hat is presented as an instance of benign race assignment in fact may prove to be otherwise," which "suggest[s] the need for careful consideration of the operation of any racial device, even one cloaked in preferential garb. And if judicial detection of truly benign policies proves impossible or excessively crude, that alone might warrant invalidating any race-drawn line."). As this Court recently reiterated: "Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies without regard to any differences of race, of color, or of nationality—it is universal in its application." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2161–62 (2023) (cleaned up).

The way to avoid these lose-lose situations for states is for them to be able to rely on neutral principles. Under *Allen* and the established precedents discussed above, a federal court may not mandate even a proportional representation plan in derogation of traditional districting principles. This Court has warned that if a state uses different "line-drawing standards in minority neighborhoods as it used elsewhere in the jurisdiction, the inconsistent treatment might be significant evidence of a § 2 violation, even in the face of proportionality." *De Grandy*, 512 U.S. at 1015. As to Alabama's 2021 Plan, the Plaintiffs repeatedly argued that the neutral districting principle was keeping communities together, and "HB1 fragments two significant majority-Black communities of interest—the Black Belt and the City of Montgomery—while maintaining in a single district the majority-White, 'French and Spanish'-ethnic population of Baldwin and Mobile Counties." Brief for *Milligan* Appellees, *supra*, at 20–21.

Yet now, faced with the 2023 Plan that keeps the Black Belt together better than the Plaintiffs' plans *and* maintains communities in the Gulf Coast and Wiregrass, the Plaintiffs demand the inconsistent treatment they had decried by calling for a split of the latter communities. Using the myopic goal of proportionality to excuse this violation of traditional districting principles "would be in derogation of the statutory text and its considered purpose, . . . and of the ideal that the Voting Rights Act of 1965 attempts to foster": "equal political and electoral opportunity." *De Grandy*, 512 U.S. at 1018, 1020.

The district court did not explain how its approach to *Gingles* would not impose liability writ large on state plans. Instead, echoing this Court, the district court said that it "did not have to conduct a beauty contest between plaintiffs' maps and the State's." App. 147 (quoting *Allen*, 143 S. Ct. at 1505). Put aside that beauty contests are more administrable than *Gingles*. *See Merrill v. Milligan*, 142 S. Ct. 879, 882–83 (2022) (Roberts, C.J., dissenting) (collecting authorities and noting "the wide range of uncertainties arising under *Gingles*").[4] This Court made the "beauty contest" comment about maps that "both" had "a split community of interest." *Allen*, 143 S. Ct. at 1505. That is no longer the case. *See* Application 29–31 & n.51. More generally, it is one thing to say, as the three-Justice plurality "precedent" quoted by *Allen* (143 S. Ct. at 1505) did, that *states* "may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless 'beauty contests.'" *Bush v. Vera*, 517 U.S. 952, 977 (1996). It is something quite different to say that the state can be liable based on plaintiffs' plans that underperform on traditional criteria.

Underscoring the problems with this plaintiffs-always-win approach, the Plaintiffs' counsel recently insisted in another redistricting case pending before this Court that "splitting" counties and "disregarding communities of interest" proves a "subordinat[ion]" of "traditional districting principles" to a "racial target." Appellees' Brief 26, *Alexander v. S.C. Conf. of the NAACP*, No. 22-807 (U.S. Aug. 11, 2023). They attacked South Carolina's plan because its split of Charleston County purportedly

[4] "The eyeball test," for instance, is a creature of *Gingles*, not beauty contests. *Alpha Phi Alpha Fraternity, Inc. v. Raffensperger*, No. 1:21-cv-5337, 2023 WL 5674599, at *11 (N.D. Ga. July 17, 2023) (citing *Allen*, 143 S. Ct. at 1528 n.10); *see also Singleton*, 582 F. Supp. 3d at 1010.

"exil[es]" "residents—particularly in heavily Black North Charleston—from their economically integrated coastal community," placing "Black Charlestonians" in "a district anchored more than 100 miles away in Columbia." *Id.* at 16–17. Yet here, the Plaintiffs *demand* that Alabama divide the coastal community of Mobile County to place thousands of black residents—"Black Mobile," per the Plaintiffs' expert (App. 158)—in a district anchored more than 160 miles away in Montgomery. And the court below accepted that demand, on the rationale that "there remains a need to split the Gulf Coast" to increase "Black voting strength." *Id.* at 166. The logic of the decision below puts states in an impossible position.

In sum, under *Allen* and this Court's longstanding precedents, the Plaintiffs' super-proportionality-focused plans may not be substituted for the State's Plan that better satisfies traditional districting principles.

B. Section 2 does not require the creation of opportunity districts.

The Plaintiffs and the district court previously suggested plans that "include two districts in which Black voters either comprise a voting-age majority *or something quite close to it*." App. 3 (emphasis added). Under established precedent, a remedy of a district that is less than majority black is also unavailable. In *Bartlett v. Strickland*, this Court held "that § 2 does not require crossover districts"—*i.e.*, "one[s] in which minority voters make up less than a majority of the voting-age population." 556 U.S. 1, 13, 23 (2009) (plurality opinion). That is because § 2 "requires a showing that minorities 'have less opportunity than other members of the electorate to . . . elect representatives of their choice,'" and in crossover districts, minorities "have no better or worse opportunity to elect a candidate than does any other group of voters with

the same relative voting strength." *Id.* at 14. If such districts could be judicially imposed, courts would be placed "in the untenable position of predicting many political variables and tying them to race-based assumptions." *Id.* at 17. But courts are inherently ill-equipped to "make decisions based on highly political judgments of th[ese] sort[s]." *Id.* at 17 (cleaned up); *accord Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019) (explaining that "how close does the split need to be for the district to be considered competitive" is an unanswerable political question). Plus, "[i]f § 2 were interpreted to require crossover districts," "it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *Bartlett*, 556 U.S. at 21 (cleaned up).

Of course, "§ 2 allows States to choose their own method of complying with the Voting Rights Act," and "that may include drawing crossover districts." *Id.* at 23. But "there is no support for the claim that § 2 can require the creation of crossover districts in the first instance" by a federal court. *Id.* at 24; *accord Caster* D. Ct. Dkt. 179, at 7 ("Plaintiffs are not aware of any case in which a court has approved a Section 2 remedial district with less than a majority-minority voting-age population."). Nor may a state attempt compliance with § 2 of the Voting Rights Act by using a crossover district when a crossover district violates the state's own criteria.

In sum, none of the Plaintiffs' plans provides an appropriate § 2 remedy against the State's superior 2023 Plan, and the district court had no warrant to order a judicially-created remedial plan.

II. Alabama must have a full opportunity to defend its 2023 Plan.

The district court considered itself "deeply troubled that the State enacted a map that the State readily admits does not provide the remedy we said federal law requires," adding that it was "disturbed" that Alabama did not have "the ambition to provide the required remedy." App. 8. The court even said that it was "not aware of any other case in which a state legislature—faced with a federal court order . . . requiring a plan that provides an additional opportunity district—responded with a plan that" "does not provide that district." *Id.* at 8–9. Likewise, the Plaintiffs have proclaimed that Alabama is somehow "defying" the Supreme Court's opinion by declining to adopt a proportional representation plan. *See Caster* D. Ct. Dkt. 179, at 1 ("Alabama is in open defiance of the federal courts.").

All this is quite wrong. Far from being contrary to *Allen*, Alabama's 2023 Plan faithfully follows it—and the Plaintiffs' plans disregard it. As shown, Alabama's 2023 Plan is consistent with a long line of this Court's precedents holding that states must not subordinate traditional districting principles to race. The Plaintiffs' remedial plans, on the other hand, perform worse when it comes to those traditional principles because they prioritize super-proportional racial representation. Only the Plaintiffs' plans depend on splitting up communities of interest into sprawling districts. It is *their* prioritization of proportional representation over neutral districting principles that not only defies this Court but also contradicts their prior arguments.

More fundamentally, this criticism of Alabama ignores the limited nature of initial proceedings like the preliminary injunction affirmed by this Court. The Plaintiffs have never proved that any map violates § 2 on the merits. Alabama has never had

an opportunity to defend any map at trial. The district court never ordered the State to adopt a new map, much less one with an additional majority-minority district. Yet after the State chose to repeal its 2021 Plan and adopt a new plan—as was its prerogative, and without being "required" to do so by any court order—the court below forged ahead with an abbreviated "remedial" proceeding for a tentative injunction against a law that no longer exists. This approach impermissibly relieved the Plaintiffs of their burden in challenging the new plan and deprived Alabama of its right to defend its duly enacted laws.

A. Preliminary proceedings do not decide a case.

Neither the court below nor this Court has held that Alabama's 2021 Plan violated § 2. That is because the prior proceedings merely involved a preliminary injunction. As this Court explained its holding, "the District Court concluded that plaintiffs' § 2 claim was likely to succeed under *Gingles*," and "[b]ased on our review of the record, we agree." *Allen*, 143 S. Ct. at 1504. This holding does not establish that the 2021 Plan was unlawful. And the entirely different 2023 Plan could not somehow "defy" a non-existent holding.

"At the preliminary injunction stage, the court is called upon to assess the probability of the plaintiff's ultimate success on the merits." *Sole v. Wyner*, 551 U.S. 74, 84 (2007). It is "only the parties' opening engagement," and any "provisional relief granted" is "tentative" "in view of the continuation of the litigation to definitively resolve the controversy." *Id.* "[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

The scope of an appellate affirmance of a preliminary injunction—like *Allen*—is similarly circumscribed. The issue before an appellate court considering a preliminary injunction is merely "whether the District Court had abused its discretion in issuing a preliminary injunction," an inquiry that is "significantly different" from "a final resolution of the merits." *Id.* at 393. Because of the limited "extent of [the] appellate inquiry," *Allen* necessarily "intimate[d] no view as to the ultimate merits of [the Plaintiffs'] contentions." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 934 (1975) (cleaned up). To read the Court's decision otherwise is to assign it authority it does not have.

If anything, *Allen* was even narrower than a typical decision of a preliminary injunction appeal. That is because this Court limited its consideration to one preliminary injunction factor: likelihood of success. And the Court merely "affirmed" the court below's determination "that plaintiffs demonstrated a reasonable likelihood of success on their claim that HB1 violates § 2" and thus its preliminary injunction prohibiting "Alabama from using HB1 in forthcoming elections." 143 S. Ct. at 1502.

Allen decided nothing more. It did not decide that the State *must* draw two majority-minority districts. The district court repeatedly noted its own prior statement that "as a practical reality, the evidence of racially polarized voting adduced during the preliminary injunction proceedings suggests that any remedial plan will need to include two districts in which Black voters either comprise a voting-age majority or something quite close to it." *Singleton*, 582 F. Supp. 3d at 1033; *see* App. 135. According to the district court, that suggestion meant "the remedy" of "an

additional opportunity district" "was required." *Id.* at 184; *see id.* at 6, 8, 99, 108–09, 126, 132 (all asserting that the court already required an additional district). Not only does that confuse dicta with judicial orders, but this Court's opinion was to the opposite effect. And the question of an appropriate remedy was simply not before this Court. *Allen* focused on the *Gingles* factors and § 2 standards for liability, not any remedial question.

The State's briefs in this Court did not address the district court's "suggestion" of a remedial majority-minority district. As noted, the *Milligan* Plaintiffs affirmatively told this Court that the district court "did not order Alabama to enact Plaintiffs' plans or even to create a second majority-Black district." Brief for *Milligan* Appellees, *supra*, at 2; *see also* Oral Arg. Trans. 70:14–16, *Allen*, Nos. 21-1086, 21-1087 (U.S. Oct. 4, 2022) (*Milligan* counsel: "[W]hat plaintiffs are really looking for is not any sort of guarantee of a second majority-minority district."), https://tinyurl.com/j6bmnk8w.

In light of these statements, it beggars belief for the district court and the Plaintiffs to now suggest that anything short of two majority-minority districts is "defying" any court. This Court did not consider that issue, and the Plaintiffs told the Court that the State need *not* draw two majority-minority districts. No one could pretend that *Allen* somehow held—either in its "result" or in "those portions of the opinion necessary to that result"—that the State had to do what the Plaintiffs told this Court it did not have to do. *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 67 (1996); *cf. Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) ("Questions which merely lurk in the record, neither brought to the attention of the court nor

ruled upon, are not to be considered as having been so decided as to constitute precedents." (cleaned up)); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (where an issue was neither "raised in briefs or argument nor discussed in the opinion of the [c]ourt," there is no "binding precedent on th[e] point"). The district court says that "[t]he Supreme Court did not . . . warn us that we misstated the appropriate remedy," App. 135, but silence is not an affirmance of an issue not before the Court—and, as explained below, that was a suggestion in dicta in the district court's prior order.

Thus, neither the State nor the district court was "bound" to require two majority-minority districts. *Seminole*, 517 U.S. at 67. This Court made no such holding (as the issue was not raised or presented), it made no final determination on the merits of *any* issue here, and it *rejected* the proposition that § 2 requires proportionality. The State did not "defy" this Court; those who insist on two majority-minority districts are defying this Court's repeated admonitions that § 2 is not a proportionality regime.

B. A new law is not a "remedy" subject to summary adjudication.

Based on its misunderstanding about the judicial process and power, the district court held an abbreviated "remedial" hearing about the preliminary injunction against enforcement of a non-existent law. Then it simply ordered the State to use a court-invented law. That approach misallocates the burden of proof and deprives the State of its right to defend its duly enacted laws.

"The States do not derive their reapportionment authority from the Voting Rights Act, but rather from independent provisions of state and federal law." *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) (cleaned up). "Districting involves myriad

considerations—compactness, contiguity, political subdivisions, natural geographic boundaries, county lines, pairing of incumbents, communities of interest, and population equality." *Allen*, 143 S. Ct. at 1513. And "the federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements." *Voinovich*, 507 U.S. at 156. The "burden of proving an apportionment's invalidity squarely on the plaintiff's shoulders." *Id.* at 155. Conversely, a state is never required "to prove the []validity of its own apportionment scheme." *Id.* at 156. "Of course, the federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law." *Id.*

Here, the preliminary injunction had nothing to do with the State's 2023 Plan, which was not even enacted yet. The district court had "PRELIMINARILY ENJOIN[ED] Secretary Merrill from conducting any congressional elections according to the [2021] Plan." *Singleton*, 582 F. Supp. 3d at 936. That injunction was stayed by this Court, and since the stay was lifted, no one contends that a congressional election has been held under the 2021 Plan. The preliminary injunction contained no other *order* requiring the State to do anything about a new plan. The State chose to enact a new map.

There was simply no "required remedy" in the preliminary injunction for the new law "to provide," as the district court now says over and over. App. 8. This new law, then, cannot be characterized as a "remedy" for a non-existent order. The judicial authority under Article III "amounts to little more than the negative power to disregard an [unlawful] enactment." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140

S. Ct. 2335, 2351 n.8 (2020) (plurality opinion) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)). Now that the 2021 Plan has been repealed, any injunction as to that Plan's enforcement is simply inoperative.

The district court's objection to this conclusion underscores its confusion about the nature of Article III's judicial power. According to the district court, requiring Plaintiffs to show that a new law is unlawful would "create[] an endless paradox that only [the State] can break, thereby depriving Plaintiffs of the ability to effectively challenge and the courts of the ability to remedy." App. 126. But challenges to an "old rule" are often "moot." *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1526 (2020). "[W]here the plaintiff may have some residual claim under the new framework," any prior judgment should be vacated, and "the parties may, if necessary, amend their pleadings or develop the record more fully." *Id.*

Here, of course, there was no final judgment to vacate. And if a state passes a new law that is unlawful, federal courts may intervene in a proper case or controversy if the plaintiff proves his case. If a state "simply re-enacted the same district lines," *Caster* D. Ct. Dkt. 190, at 8, a preliminary injunction would likely not be long in issuing. But federal courts do not sit as permanent "councils of revision." *United States v. Rutherford*, 442 U.S. 544, 555 (1979); *see 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"). They decide cases or

controversies, and the 2023 Plan presents a new controversy. This is not "manipulat[ion]," App. 126; it is black-letter Article III law.[5]

Of more concern is what happened here: the court below used a preliminary proceeding against one law to prejudge a new law in an even more abbreviated preliminary proceeding, forcing the State to adopt a court-imposed map without ever allowing it the full opportunity to defend *any* of its plans. Even though the Plaintiffs have the burdens of production and persuasion, the district court did not require the Plaintiffs to prove much at all about the 2023 Plan. Though one section of its lengthy opinion purports to "reset the *Gingles* analysis to ground zero" (after claiming that a reset would be "inconsistent with our understanding of this Court's judicial power"), that section does no such thing. App. 124, 139. It judges the State's experts based on its prior "credibility determination[s]," complaining that the State "makes no effort to rehabilitate [one expert's] credibility." *Id.* at 141. It complains that "[t]he State does not acknowledge . . . or suggest that any of the problems we identified have been remedied." *Id.* at 142. It refuses to "defer to the legislative findings" because of its prior finding of likely liability, even while acknowledging that "assum[ing] the truth of our conclusion as a premise of our analysis" was "circular reasoning." *Id.* at 161–62; *see id.* at 164. The court's only justification for all this? "This is not an ordinary

[5] The Eleventh Circuit recently stayed a similar decision treating a new map as "remedial" and thus declining to "consider[] [it] anew." *Grace, Inc. v. Miami*, No. 1:22-cv-24066, 2023 WL 4853635, at *8 (S.D. Fla. July 30, 2023); *see Grace, Inc. v. Miami*, No. 23-12472, 2023 WL 5286232, at *2 (11th Cir. Aug. 4, 2023). This Court declined to vacate that stay. *Grace, Inc. v. Miami*, No. 23A116, 2023 WL 5284458, at *1 (U.S. Aug. 17, 2023).

case." *Id.* at 162. But standards and burdens of proving liability apply across Article III cases.

In no other area of law would such contortions be sanctioned in enjoining a state's duly enacted law. As the district court conceded, if it approached the challenge to the 2023 Plan in an "ordinary" way, its reasoning would be "circular" and unsupportable. *Id.* The district court's "departure from the statutorily required allocation of burdens" "was error." *Voinovich*, 507 U.S. at 156. Alabama is due a full opportunity to defend its enacted law, which follows this Court's opinion in *Allen*.

CONCLUSION

The application should be granted.

Respectfully submitted,

CHRISTOPHER E. MILLS
Counsel of Record
Spero Law LLC
557 East Bay Street #22251
Charleston, SC 29413
(843) 606-0640
cmills@spero.law

Counsel for *Amicus Curiae*

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