Nos. 21-1086 & 21-1087

IN THE

Supreme Court of the United States

JOHN H. MERRILL, Alabama Secretary of State, ET AL.,

Appellants,

v.

EVAN MILLIGAN, ET AL.,

Appellees.

JOHN H. MERRILL, Alabama Secretary of State, ET AL.,

Petitioners,

v.

MARCUS CASTER, ET AL.,

Respondents.

APPELLEES' AND RESPONDENTS' JOINT MOTION TO MODIFY OR AMEND THE QUESTION PRESENTED

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RULE 29.6 DISCLOSURE STATEMENT

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Respondents in No. 21-1087 each represent that they do not have any parent entities and do not issue stock.

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INTRODUCTION

Pursuant to Supreme Court Rule 21, Appellees and Respondents (together, "Appellees") respectfully request that the Court modify or amend the question presented to reflect the issue before the Court. The current question presented asks whether the District Court "correctly found a violation of section 2 of the Voting Rights Act." Feb. 22, 2022 Dkt. Entry. But that issue was neither presented nor passed on below because the District Court ruled on a preliminary injunction motion. It did not make or consider any final determination on the issues presented in this case. The District Court therefore addressed only whether Appellees had demonstrated a substantial likelihood of success on their Section 2 claim, in addition to the other preliminary injunction factors. The District Court did not make any final adjudication of that claim.

The current question presented overlooks the context in which this case comes to the Court and the legal standard governing issuance of a preliminary injunction. That standard framed the District Court's preliminary injunction ruling, which is the basis for this Court's jurisdiction. *See* 28 U.S.C. § 1253. As a result, the District Court's application of that legal standard is the only issue properly before this Court in this appeal. Based on the stay application's focus on the first *Gingles* precondition to a Section 2 claim, Appellees respectfully suggest that the following question presented is appropriate:

> Did the District Court abuse its discretion in concluding that Plaintiffs demonstrated a substantial likelihood of success in satisfying the first *Gingles* precondition and entering a preliminary injunction on their section 2 of the Voting Rights Act claim?

BACKGROUND

On January 28, 2022, Appellants moved for a stay or injunctive relief pending appeal from a preliminary injunction entered by the District Court. Specifically, Appellants sought a stay of the preliminary injunction that issued based on the District Court's "conclu[sion] that the *Milligan* plaintiffs are substantially likely to establish that the Plan violates Section Two of the Voting Rights Act," "are substantially likely to establish each part of the controlling Supreme Court [*Gingles*] test," and "have established the other requirements for preliminary injunctive relief." *Milligan* Stay App. 4-5. In a footnote, Appellants' motion requested this Court convert the application into a jurisdictional statement and note probable jurisdiction. *Milligan* Stay Appl. 3 n.1.

The *Milligan* Appellees' response, filed on February 2, 2022, pointed out that both sides were collectively aware of only one case in which this Court treated a stay request as a jurisdictional statement and immediately noted probable jurisdiction. *Milligan* Stay Opp'n at 17 n.4 (citing *Perry* v. *Perez*, 565 U.S. 1090 (2011)). The circumstances in that case were distinct from the issues here because the Court was not asked to review the propriety of a preliminary injunction; it was asked to review the propriety of a three-judge District Court immediately imposing judicially drawn maps. *Id.*[1] And because this Court ordered immediate simultaneous briefing, the

[1] As the stay application in that case explained, a majority of the *Perry* three-judge district court had promulgated interim maps and "disregarded the Legislature's map *without any finding that the plaintiffs were likely to succeed in their constitutional and Section 2 challenges to the Legislature's map*." Stay Application at 3, *Perry*, 565 U.S. 1090 (No. 11A520) (emphasis added). The *Perry* stay application—

Perry appellants and appellees each proposed their own questions presented in their briefing.

On February 7, 2022, this Court treated Appellants' stay application as a jurisdictional statement in No. 21-1086 and noted probable jurisdiction; it treated Appellants' stay application as a petition for a writ of certiorari before judgment in No. 21-1087. No question presented had been proposed by Appellants or commented on by Appellees. On February 22, 2022, this Court *sua sponte* issued a docket entry stating that "The question presented in these cases is: Whether the District Courts in these cases correctly found a violation of section 2 of the Voting Rights Act, 52 U. S. C. §10301."

ARGUMENT

THIS COURT SHOULD MODIFY OR AMEND THE QUESTION PRESENTED TO REFLECT THE ISSUES UNDER REVIEW.

The unusual posture of this case resulted in the question presented being formulated by the Court without the usual input of the parties. It does not precisely state the issue decided by the District Court that is under review, and should therefore be modified or amended to accurately reflect the issue before the Court. *See* Stephen M. Shapiro et al., *Supreme Court Practice* ch. 6.25H (11th ed. 2019) (recognizing that the Supreme Court may, "on its own initiative or in response to a motion," issue an order "amending the grant of certiorari * * * to refine or restate the question to be addressed" (citing *Adarand Constructors, Inc.* v. *Mineta*, 532 U.S. 941,

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and the Court's ultimate decision in that case—thus did not address the legal standard for issuance of a preliminary injunction.

532 U.S. 967 (2001); *Atkins* v. *Virginia*, 533 U.S. 976, 534 U.S. 809 (2001); *Clay* v. *United States*, 536 U.S. 957, 536 U.S. 981 (2002))).

Appellants assert jurisdiction based on 28 U.S.C. § 1253, under which the Court's jurisdiction "is confined to orders granting or denying a preliminary injunction." *Goldstein* v. *Cox*, 396 U.S. 471, 478 (1970). "[W]hile the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is stringent, the standard of appellate review is simply whether the issuance of the injunction, in the light of the applicable standard, constituted an abuse of discretion." *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931-932 (1975). That is because "the extent of [the] appellate inquiry" is whether "the District Court abused its discretion by granting preliminary injunctive relief." *Id.* at 934.[2] As this Court has long recognized, this principle applies equally to appeals of preliminary injunctions issued by three-judge district courts. *See United Fuel Gas Co.* v. *Pub. Serv. Comm'n of West Virginia*, 278 U.S. 322, 326 (1929) ("An order of a court of three judges denying an interlocutory injunction will not be disturbed on appeal unless plainly the

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[2] *See also*, *e.g.*, *Ashcroft* v. *Am. Civil Liberties Union*, 542 U.S. 656, 664 (2004) ("This Court, like other appellate courts, has always applied the abuse of discretion standard on review of a preliminary injunction." (quoting *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 336 (1985) (O'Connor J., concurring))); *Synanon Found., Inc.* v. *California*, 444 U.S. 1307, 1307 (1979) ("[A] trial judge's determination of a preliminary injunction should be reversed by this Court or by other appellate courts in the federal system only when the judge's 'discretion was improvidently exercised.' " (citation omitted)); *United States* v. *Corrick*, 298 U.S. 435, 437-438 (1936) ("On appeal from the granting or refusal of an interlocutory injunction, our inquiry is limited to the question whether the court abused its discretion."); *Alabama* v. *United States*, 279 U.S. 229, 231 (1929) ("The duty of this court" on appeal from preliminary injunction "is not to decide the merits, but simply to determine whether the discretion of the court below has been abused.").

result of an improvident exercise of judicial discretion."); *Nat'l Fire Ins. Co. of Hartford* v. *Thompson*, 281 U.S. 331, 338 (1930) (same); *Chicago Great W. Ry. Co.* v. *Kendall*, 266 U.S. 94, 100-101 (1924) (same).

Brown v. *Chote*, 411 U.S. 452 (1973), exemplifies the need to modify or amend the question presented. In that case, a three-judge district court preliminarily enjoined a California candidate filing-fee requirement in response to a plaintiff's claim that it was unconstitutional. *Id.* at 452-453, 455. The state appealed the preliminary injunction ruling, and framed the questions presented in its jurisdictional statement to address the merits of the plaintiff's claim. Although the Court had noted probable jurisdiction, 409 U.S. 911 (1972), it found the State's framing of the questions presented was improper: "the State of California, for reasons not clear to us in light of the limited record, asked the Court to address itself to the ultimate merits of appellee's constitutional claim, a question which the District Court did not reach." 411 U.S. at 456. "In the present posture of the case, there is no occasion to consider any issues beyond those addressed by the District Court." *Id.* As this Court further explained:

> The issuance of the requested preliminary injunction was the only action taken by the District Court. In determining whether such relief was required, that court properly addressed itself to two relevant factors: first, the appellee's possibilities of success on the merits; and second, the possibility that irreparable injury would have resulted, absent interlocutory relief.

Id. In other words, "issuance of the injunction reflected the balance which that court reached in weighing these factors and was not in any sense intended as a final decision as to the constitutionality of the challenged statute." *Id.*

In a holding that applies with equal force here, the Court then emphasized that "[i]n reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion." *Id.* at 457 (citing *Alabama*, 279 U.S. 229; *Corrick*, 298 U.S. 435; *United Fuel Gas*, 278 U.S. 322; and *Nat'l Fire Ins. Co. of Hartford*, 281 U.S. 331).[3] That same standard equally applies to this Court's consideration of a district court's refusal to enjoin a state's elections rules. *See Benisek* v. *Lamone*, 138 S. Ct. 1942, 1945 (2018) (per curiam) (concluding, in reviewing denial of preliminary injunction to plaintiffs seeking to enjoin Maryland's 2011 congressional redistricting, that the "District Court's decision denying a preliminary injunction cannot be regarded as an abuse of discretion"). And this Court's holding in *Mitchell* v. *Penny Stores*, 284 U.S. 576 (1931) (per curiam), is to the same effect. In addressing a preliminary injunction issued by a three-judge district court, this Court explained that "the only question presented by the record upon this appeal is whether the District Court abused its discretion in granting an injunction until the case could be heard upon the merits." *Id.* at 576.

The question presented as articulated in the Court's February 22 docket entry addresses the standard on *final judgment* in the precise way this Court held was improper in *Brown*. That likely arose from the unusual circumstances of this case, which led to the Court *sua sponte* issuing a question presented without input from the parties. This Court's rules require an appellant's jurisdictional statement to

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[3] On the facts of that case, the Court held that it could not "conclude that the court's action was an abuse of discretion" and "affirm[ed] the action taken by the District Court in granting interim relief." *Id.*

follow the form of a petition for writ of certiorari, which means that it contains proposed questions presented. Sup. Ct. R. 14, 18.3. An appellee's response follows the form of a brief in opposition, which means that it includes "[a]ny objection to consideration of a question presented based on what occurred in the proceedings below." Sup. Ct. R. 15, 18.6. Because of the unique procedural posture in which this Court noted probable jurisdiction based on a stay application for No. 21-1086 and treated a stay application as a petition for writ of certiorari before judgment for No. 21-1087, the parties did not have the opportunity to propose, object to, or otherwise comment on any proposed questions presented.[4]

The question presented must be consistent with what "occurred in the proceedings below." Sup. Ct. R. 15. Based on expedited proceedings, the District Court addressed only whether the evidence presented at the evidentiary hearing satisfied the preliminary injunction standard—but not more than that. *Milligan* Stay App. 42-43. In the District Court, both sides' arguments, and the panel's decision, were framed exclusively in the context of that standard, including the likelihood-of-success factor and the balancing of the equities.

- "[T]he *Milligan* plaintiffs are **substantially likely** to prevail on their claim under the Voting Rights Act * * * ." *Id.* at 5 (emphasis added).

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[4] *See, e.g.*, *Chamber of Com. of U.S.* v. *Fed. Election Comm'n*, 539 U.S. 912 (2003) (noting probable jurisdiction and instructing parties "to address the questions presented in the jurisdictional statements"); *Communist Party of Indiana* v. *Whitcomb*, 414 U.S. 441, 446 n.6 (1974) (declining to address additional question where "[t]he only question presented in the jurisdictional statement is whether [the statute] [wa]s facially valid"); *Shaw* v. *Barr*, 506 U.S. 1019 (1992) (directing parties to answer question presented drawn from questions proposed by jurisdictional statement, 1992 WL 12012102, and appellees' response brief, 1992 WL 547226).

- "The *Milligan* plaintiffs first argue that they are **substantially likely** to succeed on their Section Two claim * * * ." *Id.* at 52 (emphasis added).
- Defendants argued "that the *Milligan* plaintiffs [were] **unlikely to prevail** on their Section Two claim." *Id.* at 102 (emphasis added).
- "Defendants assert that the Milligan plaintiffs are **unlikely to succeed** on their Section Two claim because the Duchin plans do not satisfy the first *Gingles* requirement." *Id.* (emphasis added).
- Defendants also argued that plaintiffs could not show **a likelihood of success** because "the remedial maps offered by the *Milligan* plaintiffs and the *Caster* plaintiffs are unconstitutional" in that "they discriminate on account of race and cannot satisfy strict scrutiny." *Id.* at 136. According to Defendants, "traditional criteria would lead a map-drawer to keep Mobile whole," the illustrative maps were "outliers," and the illustrative maps "cannot satisfy strict scrutiny." *Id.* at 136-137 (internal quotation marks omitted).
- On the equities for a preliminary injunction, Defendants argued that "a preliminary injunction would throw the current election into chaos and leave insufficient time for maps to be redrawn." *Id.* at 131 (internal quotation marks omitted).
- The District Court "first consider[ed] whether the *Milligan* plaintiffs have established that they are **substantially likely** to succeed on their Section Two claim. * * * [It] next discuss[ed] whether the *Milligan* plaintiffs have established the **remaining elements** of their request for preliminary injunctive relief." *Id.* at 139 (emphases added).
- The District Court concluded that "[t]he Milligan plaintiffs are **substantially likely** to establish a Section Two violation." *Id.* at 146 (emphasis altered).
- "Under controlling precedent, and based on this evidential foundation, the plaintiffs have **likely established** a violation of Section Two of the Voting Rights Act." *Id.* at 236 (emphasis added).
- "After we conducted the fact-intensive analysis that Supreme Court and Eleventh Circuit precedents instruct us to conduct, we did not and do not regard the question of whether the Milligan plaintiffs are **substantially likely** to succeed on the merits of their Section Two claims as a close one." *Id.* at 236 (emphasis added).

As this Court has recognized, parties are "not required to prove [their] case in full at a preliminary-injunction hearing" given their "limited purpose," the "haste * * * often necessary if those positions are to be preserved," and "procedures that are

less formal and evidence that is less complete than in a trial on the merits." *Univ. of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981). As a result, "[t]he propriety of preliminary relief and resolution of the merits are of course 'significantly different' issues." *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 721 n.10 (2007) (quoting *Univ. of Texas*, 451 U.S. at 393); *see also Pharm. Rsch. & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644, 660 (2003) (plurality op.) ("The question before us is whether the District Court abused its discretion when it entered the preliminary injunction. By no means will our answer to that question finally determine the validity of [the enjoined] Program." (internal citation omitted)). The question presented in this matter should accordingly reflect the governing abuse-of-discretion legal standard rather than be framed as a consideration of the merits of Plaintiffs-Appellees' claim.[5]

[5] That the November 2022 election is likely to have passed before the Court rules in this case does not change the standard of abuse-of-discretion for this Court's review of the preliminary injunction. The District Court's preliminary junction was not limited to the November 2022 elections. *See Milligan* Stay App. 5 ("[W]e PRELIMINARILY ENJOIN Secretary Merrill from conducting any congressional elections according to the [2021] Plan."). And, in any event, the issues raised are "capable of repetition, yet evading review." *Brown*, 411 U.S. at 457 & n.4 (internal quotation marks omitted); *see also Fed. Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007); *Norman* v. *Reed*, 502 U.S. 279, 287-288 (1992).

CONCLUSION

For the forgoing reasons, Appellees respectfully ask that this Court modify or amend the question presented.[6]

Respectfully submitted,

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