No. 21A375

IN THE

Supreme Court of the United States

JOHN H. MERRILL, in his official capacity as Secretary of State of Alabama, ET AL.,

Applicants,

v.

EVAN MILLIGAN, ET AL.,

Respondents.

RESPONDENTS' OPPOSITION TO EMERGENCY APPLICATION FOR STAY PENDING RESOLUTION OF DIRECT APPEAL TO THIS COURT

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TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

Defendants' stay application portrays this case as something it is not. In an effort to achieve an "attention-grabbing" lede, the stay request fails to provide this Court with an accurate picture. App. 254 (rejecting, in denying a stay below, Defendants' "attention-grabbing but unsupported claims" about the panel's decision). It does not faithfully describe the record. It ignores and misstates the findings of fact and credibility determinations. And it misrepresents the panel's conclusions of law. The panel did not hold that Alabama must "'prioritize[] race' over traditional race-neutral redistricting principles" and did not direct the Alabama Legislature to "sort[] and split[] voters across the State on the basis of race alone." Stay Br. 1. The panel instead recognized this as a fact-specific, "straightforward Section 2 case," App. 236, under this Court's "seminal § 2 vote-dilution case." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2337 (2021) (describing *Thornburg v. Gingles*, 478 U.S. 30 (1986)).

Rather than fairly address the record before the three-judge panel below—consisting of Circuit Judge Stanley Marcus and District Judges Anna Manasco and Terry Moorer—and the findings that it made, Defendants and their amici aim at an imaginary case in which Plaintiffs could only create illustrative maps with two majority-Black districts by drawing non-compact districts that disregard the State's traditional redistricting principles. No such facts exist here. Defendants' own expert conceded that the illustrative maps presented by Plaintiffs' expert are more compact than the State's own redistricting map, and the panel found that Plaintiffs'

illustrative maps comply with the State's redistricting principles as well as or better than the State's map. The illustrative maps are quite similar to Alabama's own State Board of Education districts. Whatever legal concerns may be at issue in the hypotheticals raised by Defendants and their amici, they are not present here, because the Plaintiffs' illustrative maps did not depart from the State's non-racial redistricting principles.

As in all redistricting cases, the record is important. The panel carefully analyzed an "extremely robust body of evidence" developed during a seven-day preliminary injunction hearing with live testimony from seventeen witnesses (eleven experts and six fact witnesses), including 350-plus exhibits, 1,000-plus pages of briefing, and 75 pages of joint stipulations of fact. App. 4, 201. The panel made "systematically detailed findings of fact (including [its] assessment of the credibility of all the expert witnesses) and carefully considered conclusions of law." App. 236.

For reasons explained across 225 pages, and another 35 pages denying a stay, the panel unanimously concluded that Plaintiff-Respondents—Evan Milligan, Shalela Dowdy, Letetia Jackson, Khadidah Stone, Greater Birmingham Ministries, and the Alabama State Conference of the NAACP ("Plaintiffs" or "*Milligan* Plaintiffs")—are "substantially" likely to prove that Alabama's 2021 congressional redistricting plan (the "Enacted Plan" or "Plan") violates Section 2 of the Voting Rights Act ("VRA"). *Id.* 4, 146-197. On this record, the panel "d[id] not regard the question whether the *Milligan* plaintiffs are substantially likely to prevail on the merits of their Section Two claim as a close one." *Id.* 3, 195.

The panel gave the Alabama Legislature fourteen days to draw a replacement map and explained that, based on Defendants' own recommendations and evidence from the hearing, that time frame was appropriate and sufficient. *Id.* at 261. And in denying a stay, it concluded that Defendants' arguments on the equities "either ignore, are inconsistent with, or do not satisfy the controlling legal standard, or they are simply wrong on the facts." *Id.* at 260.

Defendants do not contest that the panel correctly found the presence of two of the "most important" elements of liability for vote dilution under Section 2, *Gingles*, 478 U.S. at 48 n.15—namely, the second and third *Gingles* preconditions—that Black voters in Alabama are "politically cohesive," and that the majority votes "sufficiently as a bloc' to usually 'defeat the minority's preferred candidate.'" *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017) (quoting *Gingles*, 478 U.S. at 51). The first *Gingles* precondition ("*Gingles* 1") is the sole issue that Defendants address—and, again, as below, Defendants' "argument misstates both the law and the facts." App. 253.

Gingles 1 requires assessing whether Black Alabamians are " 'sufficiently large and geographically compact to constitute a majority' in some reasonably configured legislative district." *Cooper*, 137 S. Ct. at 1470 (quoting *Gingles*, 478 U.S. at 50). There is no reasonable dispute on that score. Plaintiffs presented *eleven* illustrative maps showing that it is possible, consistent with the state's redistricting criteria, to draw two majority-Black congressional districts. App. 59-61, 85-86. In offering these maps, as the panel explained in no uncertain terms, "*plaintiffs did not 'subordinate' or ignore traditional redistricting principles*." App. 253 (emphasis added).

The panel expressly found that Plaintiffs' expert, Dr. Moon Duchin, "carefully considered traditional redistricting criteria when she drew her illustrative plans," App. 149; that her redistricting plans comported with those criteria and were reasonably configured, App. 173, and that her testimony was "highly credible," App. 53, 148. As the panel found, several of Plaintiffs' illustrative plans perform as well as or better than the Defendants' Plan in respecting traditional redistricting criteria. App. 163-73. Defendants show no clear error in that finding. *Gingles*, 478 U.S. at 79. As the panel found, the districts in Plaintiffs' illustrative plans (1) "are at least as geographically compact as those in the [Enacted] Plan," (2) "outperform" or perform as well as the Enacted Plan in terms of "respecting existing political subdivisions, including counties, cities, and towns," and "protect[ing] important communities of interest," and (3) "protect incumbents where possible," with one illustrative plan pairing no incumbents. App. 173; *see also id.* at 56 n.8, 86, 171.

The stay application simply repeats Defendants' unsupported assertion below—where they likewise ignored all the contrary, detailed factual findings by the panel—claiming "it is impossible in Alabama to draw any map with two majority-minority districts consistent with traditional, race-neutral principles." Stay Br. 26 (internal quotation marks and citation omitted). *But see* App. 242 (highlighting, in denying the stay, twelve pages of findings of fact on this point that Defendants' stay request ignored). Indeed, Defendants' own expert agreed that, on compactness, Plaintiffs' plans "perform generally better on average than the enacted State of Alabama plans." App. 158. And Defendants' professed concern that a second majority-Black

congressional district may stretch "from Mobile to the Georgia border" or split Mobile County, Stay Br. 34, 37, ignores key facts: the State's Plan itself contains two congressional districts (District 4 and 5) that stretch across the state from the Mississippi to Georgia, App. 33, and that the State's map for its Board of Education districts also splits Mobile County, *id.* at 86. To put a fine point on it: there was consensus among the experts that plans with two majority Black districts satisfying compactness, and other state redistricting criteria as well as, or better than, the Plan.

Yet in their stay application, Defendants double down on the same two "attention-grabbing but unsupported" assertions that the panel rejected. *Id.* at 254. First, they claim—more than a dozen times—that Dr. Duchin stated that she "prioritized race" over other redistricting criteria. But they cite no such testimony, and for good reason: She said no such thing. The panel explained that Defendants had *claimed* that Dr. Duchin and Mr. William Cooper had "prioritize[d] race above all race-neutral traditional redistricting principles except for population balance." *Id.* at 204. But it expressly "rejected" Defendants' argument as based on a "flawed factual premise." *Id.* The panel explained, using Defendants' language in its injunction order, that Plaintiffs' experts did not "prioritize[] race above everything else." *Id.* Instead, they "used race only as necessary to answer the essential question asked of them as *Gingles* I experts: Is it possible to draw two reasonably compact majority-Black congressional districts?" *Id.* at 249; *see also id.* at 245-249 (reviewing the evidence on this point). In other words, they considered race only as necessary to answer the *Gingles* 1 inquiry that this Court's precedent requires Plaintiffs to address. *Gingles*, 478 U.S. at 50-51.

Indeed, in *Bartlett v. Strickland*, 556 U.S. 1, 18-19 (2009) (plurality op.), this Court specifically held that, to succeed on a Section 2 claim under *Gingles* 1, a plaintiff ***must*** draw illustrative maps with majority-Black districts. A Section 2 plaintiff's expert cannot be faulted for doing what this Court's precedent requires, as the panel explained in both its initial opinion and in denying the stay below. App. 204-05, 250-251. Based on extensive testimony from a witness the panel found to be highly credible, and a careful consideration of the maps in light of the state's redistricting principles, the panel found Dr. Duchin and Mr. Cooper did ***not*** permit race to predominate over the state's redistricting criteria. *Id.* at 245-49.

The second theme in the stay application is equally faulty. Citing a paper that is not in the record—because Defendants never introduced it—Defendants contend that Dr. Duchin used an algorithm to generate a large number of maps that did not featured two majority-Black districts. But the algorithm used in Dr. Duchin's paper did not incorporate all the State's own redistricting criteria, and the maps it produced were based on the *2010 Census* data (and therefore did not account for African-American population growth, and the drop the white population over the last decade).[1] As the panel found, Defendants' efforts to draw inferences about Dr. Duchin's illustrative maps—which are based on the 2020 census data and the State's traditional redistricting principles—through comparisons to computer simulations—which was based on the 2010 census and do not even purport to account for all the State's traditional redistricting principles—was simply "a bridge too far." App. 245.

[1] See Moon Duchin & Douglas M. Spencer, Models, Race, and the Law, 130 Yale L. J. Forum 744 (2021).

In fact, when asked about computer algorithms that could actually be relevant to this case in light of the 2020 census data and the State's own redistricting criteria, Dr. Duchin testified that she applied computer algorithms to the 2020 Census to find "literally thousands" of plans with two majority-Black districts, *id.* at 56, and that an algorithm relying on the state's non-racial redistricting criteria could indeed randomly generate her maps, Tr. 685. The panel, unlike the Defendants, acknowledged and gave weight to this testimony. *See* App. 245-250 (detailing numerous reasons why "[t]he testimony of the plaintiffs' experts, which we found was highly credible, supports our finding that race did not predominate in their preparation of illustrative remedial districts"). Defendants' citation to the work of another of Plaintiffs' experts, Stay Br. 9, also leaves out critical context that undermines their arguments. Dr. Kosuke Imai's algorithm did not incorporate all the traditional redistricting principles, like communities of interest, Tr. 221-22, and he did not analyze any of the illustrative maps proffered by Plaintiffs, Tr. 293; *see also* App. 136-37.

Defendants' argument also deviates from this Court's well-established precedent. To satisfy the *Gingles* 1 requirement, a Section 2 plaintiffs' expert must draw lines with an awareness of race, because their task is to determine "the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 430 (2006) (citation omitted); *accord Barlett*, 556 U.S. at 15. Nothing in this Court's precedents requires plaintiffs' experts to undertake the *Gingles* 1 inquiry in a race-blind manner. As the panel put

it, "The problem with [Defendants' argument] strikes us as obvious: a rule that rejects as unconstitutionally race-focused a remedial plan for attempting to satisfy the *Gingles* 1 numerosity requirement would preclude any plaintiff from ever stating a Section Two claim." App. 250-51.

Thus, Defendants' stay application fails to establish any error—let alone clear error—in the panel's fact finding or determination that Plaintiffs are substantially likely to succeed on the merits. "[O]nce a State's * * * apportionment scheme has been found to be [illegal], it would be the unusual case in which a court would be justified in not taking appropriate action to [e]nsure that no further elections are conducted under the invalid plan." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Thus, this Court has repeatedly denied stay requests in redistricting cases.[2]

As to the equities, there is no threat of "chaos." Stay Br. at 38. Alabama's redistricting plan was only recently enacted and has never been used in an election. The panel expressly found that no election is imminent—the May 24 primary is four months away and, at the earliest, overseas absentee ballots for that election will not mailed out for two months (March 30). App. 261. And the order tolls the congressional candidate filing deadline until February 11 to afford the Legislature fourteen days to draw a new plan. That is the exact timeframe that Defendants and their map-drawer

2 See Bethune-Hill v. Va. State Bd. of Elections, No. 3:14-CV-852, 2018 WL 11393922 (E.D. Va. Aug. 30, 2018), stay denied Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 914 (2019); Covington v. North Carolina, No. 1:15CV399, 2018 WL 604732 (M.D.N.C. Jan. 26, 2018), stay denied in part, granted in part 138 S. Ct. 974 (2018); Personhuballah v. Alcorn, 155 F. Supp. 3d 552 (E.D. Va. 2016), stay denied sub. nom. Wittman v. Personhuballah, 577 U.S. 1125 (2016); Harris v. McCrory, No. 1:13CV949, 2016 WL 6920368 (M.D.N.C. Feb. 9, 2016), stay denied, 577 U.S. 1129 (2016); Perez v. Texas, 891 F. Supp. 2d 808 (W.D. Tex. Sept. 7, 2012), stay denied sub. nom. LULAC v. Perry, 567 U.S. 966 (2012).

stated was adequate to draw and enact a new plan—three times as long as it took to enact the Plan. Tr. 1922-1923; Opp. App. 44a. Bluster from Defendants aside, the panel's decision merely carries out its "duty to cure" unlawful districts "through an orderly process in advance of elections." *North Carolina v. Covington*, 138 S. Ct. 2548, 2553 (2018). Potential administrative inconveniences for Defendants is not irreparable harm and cannot overcome the significant harm that the panel found Plaintiffs would suffer under the Plan. App. 260-263. Lastly, Defendants' complaints about the speed of this litigation are inconsistent with their purported concern about the timing of the injunction relative to upcoming elections.

Defendants have failed to meet their heavy burden to show an entitlement to a stay.

COUNTERSTATEMENT OF THE CASE

In May 2021, Alabama's Permanent Legislative Committee on Reapportionment ("the Committee") began the congressional redistricting process using population estimates from the Census Bureau. App. 30. As part of that work, the Committee enacted guidelines for the 2021 redistricting cycle (the "Guidelines"). *Id.* The Guidelines require "compl[iance] with the U.S. Constitution," "minimal population deviation," "compliance with the Voting Rights Act of 1965," and districts that are "contiguous and reasonably compact." App. 31. In addition, the Guidelines identify for consideration other factors based on traditional custom and usage in Alabama, including avoiding pairing incumbents in the same district, permitting contiguity by water, respecting communities of interest, minimizing county splits, and preserving the cores

of existing districts. App. 31-32. Communities of interest are defined as areas "with recognized similarities of interests, including but not limited to ethnic, racial, economic, tribal, social, geographic, or historical identities," and also, "in certain circumstances, include[s] political subdivisions such as counties, voting precincts, municipalities, tribal lands and reservations, or school districts." *Id.* Although all factors should be considered, the Guidelines provide that "priority is to be given to the compelling State interests requiring equality of population among districts and compliance with the Voting Rights Act of 1965, as amended, should the requirements of those criteria conflict with any other criteria." *Id.* at 32.

On October 28, 2021, the Governor called a Special Legislative Session on redistricting, and, six days later, both houses of the Legislature passed the Plan on November 3. *Id.* The Governor signed the Plan into law the next day. *Id.* at 33.

Thereafter, on November 16, the *Milligan* Plaintiffs—Respondents here—filed suit against Defendants Secretary of State John Merrill and the Co-Chairs of the Committee ("Defendants") asserting claims under Section 2 of the VRA and racial gerrymandering and intentional discrimination claims under the Fourteenth Amendment. *Id.* at 12-13. The case was assigned to a three-judge panel pursuant to 28 U.S.C. § 2284 because it raised constitutional claims, and the panel also had jurisdiction over the statutory claims in the case. The case was consolidated at the preliminary injunction stage with another matter already proceeding before the same three-judge court that raised only constitutional claims (the *Singleton* litigation). App. 1-2. A third suit raising only claims under Section 2 of the VRA (the *Caster* litigation) was

assigned to Judge Manasco, a member of the three-judge panel. *Id.* at 2. At the preliminary injunction hearing, the parties agreed that all evidence admitted in either the *Milligan*/*Singleton* case or the *Caster* case "was admitted in both cases unless counsel raised a specific objection." *Id.* at 19.

The panel "immediately expedited the preliminary injunction proceedings," although the hearing "was held in January 2022 instead of December 2021 at the request of the Defendants." *Id.* at 203. The "seven day preliminary injunction hearing," which took place from January 4 to 12, featured "live testimony from seventeen witnesses (eleven experts and six other fact witnesses)" and generated a "nearly 2,000 pages" of transcript. *Id.* at 4, 236.

On January 24, the panel issued a unanimous, 225-page Memorandum Opinion comprehensively addressing the record evidence and making extensive findings of fact and credibility determinations. The panel ultimately concluded that "the *Milligan* plaintiffs are substantially likely to establish that the Plan violates Section Two of the Voting Rights Act" because "the *Milligan* plaintiffs are substantially likely to establish each part of the controlling Supreme Court test" and that the *Milligan* plaintiffs have established the other requirements for preliminary injunctive relief." *Id.* at 4-5. The panel therefore preliminarily enjoining Secretary Merrill from conducting any congressional elections according to the Plan. *Id.* at 5.

With respect to the *Gingles* 1 precondition for liability under Section 2 of the VRA, the panel found that "[t]here is no serious dispute that the plaintiffs have established numerosity for purposes of *Gingles* I," *id.* at 196, and that "Black voters as

a group are sufficiently large and geographically compact to constitute a majority in a second congressional district," *id.* at 147 (cleaned up). The panel based its conclusion on Plaintiffs' collective submission of *eleven* different illustrative Congressional redistricting plans (four by the *Milligan* Plaintiffs and seven by the *Castor* Plaintiffs, *see id.* at 59-61, 85-86), each of which featured two compact majority-Black districts. In particular, the panel found that Plaintiffs' experts "carefully studied the Legislature's redistricting guidelines, considered many traditional redistricting principles, made careful decisions about how to prioritize particular principles when circumstances forced tradeoffs, and illustrated what different remedial plans might look like if the principles were prioritized in a different order." *Id.* at 173.

With respect to compactness, Alabama's own expert testified that the illustrative plans produced by the *Milligan* Plaintiffs' expert Dr. Moon Duchin "perform generally better on average than the enacted State of Alabama plans." *Id.* at 158. With respect to the state's criterion of respecting communities of interest, including existing political subdivisions, such as counties, cities, and towns, the panel found that Dr. Duchin's plans "perform at least as well as the Plan on this score, and some Duchin plans outperform the Plan." *Id.* at 163. The panel also found, and Defendants did not dispute, that Dr. Duchin's plans did a better job than the Plan of respecting an "important community of interest," by uniting "the overwhelming majority" of the counties making up Alabama's "Black Belt" in just two Congressional districts, as compared to the Enacted Plan, which split them "into four Congressional districts." *Id.* at 167-68. The panel rejected as a "straw man" the Defendants' contention that

treating the Black Belt as a community of interest was a mere "proxy" for race, crediting substantial evidence, including the statements of Defendants' expert and Defendants' counsel, "about the shared history and common economy (or lack thereof) in the Black Belt; the overwhelmingly rural, agrarian experience; the unusual and extreme poverty there; and major migrations and demographic shifts that impacted many Black Belt residents, just to name a few examples." *Id.* at 168-69.

The panel then found that "under the totality of the circumstances, including the [Senate Factors], Black voters have less opportunity than other Alabamians to elect candidates of their choice to Congress." App. 5; *see also id.* at 195 ("[E]very Senate Factor we were able to make a finding about, along with proportionality, weighs in favor of [Plaintiffs] * * * no Senate Factors or other circumstances we consider at this stage weigh in favor of Defendants.").

Given that the *Milligan* plaintiffs demonstrated they were substantially likely to prevail on their VRA claim, the panel turned to remedy.[3] It explained that "under the statutory framework, Supreme Court precedent, and Eleventh Circuit precedent, the appropriate remedy is a congressional redistricting plan that includes either 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 5. The panel gave the Alabama Legislature "the first opportunity to draw that

[3] The panel also concluded that "the *Caster* record (which by the parties' agreement also is admitted in *Milligan*), compels the same conclusion that we have reached in *Milligan*," and, therefore, the record established "not only once, but twice" a substantial likelihood that the Plan "violates Section Two." *Id.* at 196. Having found that a preliminary injunction was warranted on the VRA claims, it was unnecessary for the panel to rule on the constitutional claims in *Milligan* and *Singleton*. *Id.* at 7.

plan." *Id.* at 6. To give the Legislature time to do so, the panel stayed the January 28, 2022 candidate filing deadline until February 11, and gave the Legislature two weeks to enact a remedial plan, which "[b]ased on the evidentiary record," was a time frame for which the panel was "confident that the Legislature can accomplish its task." *Id.*

Defendants appealed to this Court and sought a stay pending appeal from the panel. The panel unanimously denied that request after carefully "assess[ing] for each argument whether [the panel's] view of the evidence on that argument is 'plausible in light of the entire record.'" App. 237 (citing *Brnovich*, 141 S. Ct. at 2349); *see* App. 234-67. Defendants claimed this is "the rare Section 2 case in which Plaintiffs have admitted that they cannot possibly draw a map with an additional majority-minority district unless traditional redistricting principles are subordinated to race." *Id.* at 235. The panel found that was simply untrue: "Plaintiffs made no such concession because they did not subordinate traditional redistricting principles to race." *Id.* at 235-36. Instead, the stay denial explains that this is "a straightforward Section Two case," involving "exhaustive application of settled law to **two** extensive evidentiary records," "controlling precedent," and an "extremely robust body of evidence" that showed "the plaintiffs have likely established a violation of Section Two of the Voting Rights Act." *Id.* at 236 (emphasis in original).

The panel articulated, in painstaking detail, why Defendants had not shown that they are likely to prevail on appeal on their argument that the Plaintiffs could not satisfy *Gingles* 1. *Id.* at 238-255. It again walked through its fact-finding underlying each step of the analysis—addressing numerosity (citing App. 146-47), the

credibility of plaintiffs' *Gingles* 1 experts (citing App. 148-56), geographical compactness (citing App. 157-62), and reasonable compactness considering more than mere geography, which itself included numerous layers of factfinding (citing App. 162-74).

Defendants challenged only one aspect of that analysis—whether they can "draw two majority-Black congressional districts 'without subordinating traditional districting principles to race.'" *Id.* at 240. The panel rejected the assertion on three grounds. First, Defendants argued that Plaintiffs had conceded this point, but the panel found that "that concession simply did not happen." App. 241. Instead, "the plaintiffs' experts explained at length how and to what extent they considered each traditional redistricting principle." *Id.* Second, Defendants failed to address—let alone demonstrate clear error in—the panel's "detailed findings of fact, based on all the evidence, about whether and to what extent the plaintiffs' experts considered each [traditional districting principle]." *Id. at* 241-42. Despite "the absence of even a passing mention of a reason why [its] findings were clear error," the panel acted "out of an abundance of caution" to "carefully revisit[] each finding of fact with fresh eyes to determine whether [it] could discern any basis to depart from [its] original analysis"—and "s[aw] none." *Id.* at 242. Third, the panel rejected Defendants' view of the evidence as to whether race predominated in the Plaintiffs' illustrative remedial plans. *Id.* at 244-250 (describing the evidence in detail). The panel found precisely the opposite and rejected Defendants' attempt to equate consideration of race in the *Gingles* 1 inquiry, which is required by law, with making race the predominant factor, which the panel found had not occurred. *Id.*

The panel was crystal clear that "[t]here is no basis, factual or legal, for Defendants' assertion that the preliminary injunction will require race to be used and allow it to predominate in redistricting 'at all times, in all places, and in all districts.' " *Id.* at 254. In the end, Defendants offered only "attention-grabbing but unsupported claims about [the panel's] *Gingles* I finding." *Id.* The panel then systematically considered and rejected Defendants' equitable arguments for a stay, highlighting similar precedents applying a fourteen-day timeline for a legislative remedy—nearly three times as long as it took the Legislature to pass the challenged map. *Id.* at 260-66.

Defendants essentially repeat their factually unsupported charges in the instant stay application, making no attempt to refute the panel's careful, record-based rejection of those claims.

ARGUMENT

A stay pending appeal is "extraordinary relief," and requires the stay applicant to satisfy a "heavy burden." *Winston–Salem/Forsyth Cnty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, C.J., in chambers). "[T]he applicant must meet a heavy burden of showing not only that the judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal." *Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) (quoting *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers)).

In determining whether to grant a stay pending appeal, this Court considers: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3)

whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The first two factors "are the most critical." *Id.*[4]

On direct appeals from three-judge courts, this Court "weigh[s] heavily the fact that the lower court refused to stay its order pending appeal, indicating that it was not sufficiently persuaded of the existence of potentially irreparable harm as a result of enforcement of its judgment in the interim." *Graves v. Barnes*, 405 U.S. 1201, 1203–04 (1972) (Powell, J., in chambers).

Defendants have not met their heavy burden; they cannot show that they are likely to prevail on the merits, and their application should be denied for this reason alone. Additionally, the certain injury that the panel found Plaintiffs and the public interest will suffer if the preliminary injunction is stayed far outweighs any administrative expense involved in holding elections—a primary in May, and a general election in November—under a new, legally compliant districting plan.

I. Defendants Have Not Demonstrated the Strong Likelihood of Success Required for the "Extraordinary Relief" of a Stay.

[4] Defendants also request that this Court treat its stay request as a jurisdictional statement and immediately note probable jurisdiction. This Court has regularly denied similar requests, including in one of the two cases cited by Defendants. *See Abbott v. Perez*, 138 S. Ct. 52 (2017) (cited at Stay Br. 3 n.1); *see also, e.g.*, *Rucho v. Common Cause*, 138 S. Ct. 974 (2018); *Benisek v. Lamone*, 138 S. Ct. 50 (2017); *North Carolina v. Covington*, 138 S. Ct. 974, (2018) (denying stay in part and granting stay in part without treating stay request as jurisdictional statement). The sole case Defendants offer in which this Court did so presented distinct circumstances. *See Perry v. Perez*, 565 U.S. 1090 (2011). There, the panel immediately imposed judicially drawn maps on the state. *Perry v. Perez*, 565 U.S. 388, 396 (2012) (per curiam). *Perry* commenced expedited review to timely decide the propriety of judicially drawn maps, not the propriety of the underlying injunction. *Id.* at 399. Defendants' further request that this Court immediately *vacate* the panel's injunction based on emergency stay briefing alone is unprecedented. Plaintiffs have not located any case in which this Court summarily vacated a redistricting order based solely on a stay application.

To merit a stay, Defendants must demonstrate that there is "a fair prospect that a majority of the Court will vote to reverse the judgment below." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). The "clearly-erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution," due to the "the trial court's particular familiarity with the indigenous political reality." *Gingles*, 478 U.S. at 79. Therefore, Defendants face an especially steep burden here, where the three-judge panel unanimously concluded, after considering extensive testimony and evidence, that the Plan would result in vote dilution in violation of Section 2. This Court "may not reverse [a district court] even if it is convinced that it would have weighed the evidence differently in the first instance," so long as "the district court's view of the evidence is plausible in light of the entire record." *Brnovich*, 141 S. Ct. at 2349.

To demonstrate vote dilution in violation of Section 2, a plaintiff must prove that: (1) the racial group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the racial group is "politically cohesive"; and (3) the majority "votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51; *see also Brnovich*, 141 S. Ct. at 2337 (*Gingles* remains the "seminal § 2 vote-dilution case"). "If all three *Gingles* requirements are established, the statutory text directs us to consider the 'totality of circumstances' "—including the nine "Senate Factors"—"to determine whether members of a racial group have less opportunity than do other members of the electorate." *LULAC*, 548 U.S. at 425-26 (internal quotations omitted).

Applying this settled precedent to the extensive record, the panel correctly concluded that the Plan is "substantially likely" to violate the VRA. App. 4. Defendants fail to show that the panel committed clear error in any of its detailed factual findings or in concluding that Plaintiffs demonstrated a likelihood of success on all three *Gingles* preconditions and the totality of circumstances. Defendants do not dispute that Plaintiffs satisfied the second and third *Gingles* preconditions. They concentrate their entire argument on whether Plaintiffs satisfied *Gingles* 1 in an impermissible manner, by—in Defendants' words—"prioritiz[ing] race." Stay Br. 1. But, as the panel twice unanimously found, this assertion is false. The experts did not make race a predominant factor, and Defendants' repeated say-so does not substitute for showing that this finding was implausible based on the record. Plaintiffs' experts simply addressed a question presented in this case: can a state map drawn using traditional districting principles include two relatively compact majority-Black districts? The experts explained that "yes," it could, without making race a predominant factor, and the panel found that showing credible.

A. Plaintiffs' Extensive Evidence Satisfied the *Gingles* Preconditions and Showed that the Totality of Circumstances Weighed in Their Favor.

As the panel found, after "conduct[ing] the fact-intensive analysis," the panel found that Plaintiffs "are substantially likely to succeed on the merits of their Section Two claims." App. 236. Plaintiffs' experts and Defendants' own expert found racially polarized voting, *id.* at 174-178, and Defendants stipulated to many of the facts relevant to the Senate Factors, *see, e.g.*, *id.* at 73-78. Although Defendants contest Plaintiffs' ability to satisfy *Gingles* 1, the panel found that there was "no serious dispute"

that Plaintiffs established sufficient "numerosity," and credited Plaintiffs' experts' testimony about compactness and traditional redistricting criteria while "discount[ing]" Defendants' expert's testimony. *Id.* at 196.

1. Consistent with the Second and Third *Gingles* Preconditions, Plaintiffs Presented Undisputed Evidence of Stark Racially Polarized in Alabama.

Defendants do not dispute that Plaintiffs showed that African-American Alabamians are politically cohesive and the white majority there engages in racial bloc voting, meeting the second and third preconditions—two of the "most important" elements of liability for vote dilution under Section 2. *Gingles*, 478 U.S. at 48 n.15.

The panel found "no serious dispute" about the existence of racially polarized voting in congressional elections, statewide elections, and Democratic and Republican primaries in Alabama. App. 174-78. Defendants' own expert, Dr. Trey Hood, agreed that voting is racially polarized. *Id.* at 176-77. And Defendants stipulated to Black voters' cohesion in recent elections. *See* Opp. App. 23a-25a.

The panel also credited the uncontested testimony of Plaintiffs' expert, Dr. Baodong Liu, who found racial bloc voting in the 2020 Democratic congressional primary, 2016 Republican presidential primary, and the 2008 Democratic presidential primary elections in Alabama and that race can better predict voting patterns than party. *See* App. 65 ("Dr. Liu is a credible expert witness."), 68-70, 179-80. Strikingly, for example, in the 2008 general elections, the majority of white Democrats voted against the Black Democratic candidates for President and U.S. Senate. Tr. 1278-79. That is, in Alabama, white Democrats "did not vote for black candidates in general

elections, even after the candidate had won the Democratic primary and the choice was to vote for a Republican or for no one." *Gingles*, 478 U.S. at 59.

Defendants' concession of racially polarized voting is significant because the VRA is designed to address the "special wrong" that results "when a minority group has 50 percent or more of the voting population and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district." *Bartlett*, 556 U.S. at 19.

2. Plaintiffs' Illustrative Maps Satisfy the First *Gingles* Precondition.

The panel also correctly concluded that Plaintiffs satisfied *Gingles* 1 by demonstrating that the Black population in Alabama was "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. This requirement is designed "to establish that the minority has the potential to elect a representative of its own choice in some single-member district. Without such a showing, there neither has been a wrong nor can [there] be a remedy." *Bartlett*, 556 U.S. at 15 (cleaned up).

To satisfy *Gingles* 1, this Court requires a plaintiff to apply the "objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area?" *Id.* at 18. Thus, a plaintiff must show that Black voters could be a majority in a compact district that "take[s] into account 'traditional districting principles such as maintaining communities of interest and traditional boundaries.'" *LULAC*, 548 U.S. at 433 (cleaned up). Alabama's Enacted Plan contained one majority-Black district, so a central question in the case was whether a

second compact majority-Black district could be drawn while respecting traditional districting principles. The *Milligan* and *Caster* Plaintiffs' experts, Dr. Moon Duchin and Mr. William Cooper, drew maps that demonstrated the answer is "yes"—it is possible to draw two majority-Black districts that are reasonably compact and comply with traditional districting principles.

The panel found Dr. Duchin "highly credible" and specifically "credit[ed] Dr. Duchin's testimony that she carefully considered traditional redistricting criteria when she drew her illustrative plans." App. 148-49. The panel "carefully observed her demeanor, particularly as she was cross-examined for the first time about her work on this case," found that "[s]he consistently defended her work with careful and deliberate explanations of the bases for her opinions," that "[h]er testimony was internally consistent and thorough," and that "her methods and conclusions are highly reliable." *Id.* at 150; *see also id.* at 150 ("we find Mr. Cooper's testimony highly credible"), 151 ("we particularly credit Mr. Cooper's testimony that he worked hard to give 'equal weighting' to all traditional redistricting criteria."), 151-52 ("During Mr. Cooper's live testimony, we carefully observed his demeanor, particularly as he was cross-examined for the first time about his work on this case"; [w]e find that his methods and conclusions are highly reliable").

In contrast, the panel found that the testimony of Defendants' *Gingles* 1 expert, Mr. Bryan, was "unreliable" and gave it "very little weight." *Id.* at 152, 156. His work was "considerably less thorough" and on "numerous" occasions, he "offered an opinion without a sufficient basis (or in some instances any basis)." *Id.* at 152-54 (setting out

seven examples of this occurring during his testimony). In addition, "internal inconsistencies and vacillations in Mr. Bryan's testimony undermine[d] Mr. Bryan's credibility as an expert witness." *Id.* at 155. The panel "carefully observed his demeanor" during his live testimony, "particularly as he was cross-examined for the first time about his work on this case," and found that, on more than one occasion in response to a "reasonable question about the basis for his opinions, he offered dogmatic and defensive answers that merely incanted his professional opinion and reflected a lack of concern for whether that opinion was well-founded." *Id.* at 156. In his testimony, "Mr. Bryan consistently had difficulty defending both his methods and his conclusions, and repeatedly offered opinions without a sufficient basis," and the panel "observed internal inconsistencies in his testimony on important issues." *Id.*

Defendants do not challenge here, and they conceded below that Dr. Duchin and Mr. Cooper drew multiple plans with two majority-Black districts using the more inclusive "any-part Black" definition—in which everyone who self-identifies as Black alone or Black and another race on the census is included in the definition of "Black." App. 147; *see Georgia v. Ashcroft*, 539 U.S. 461, 473 n.1 (2003) (applying the "any-part Black" category), and several illustrative plans had two majority-Black districts even under the most restrictive "single-race Black" measurement. App. 147. Defendants do not rebut the panel's findings that Plaintiffs' maps are compact. App. 173-74.

Defendants also mount no real challenge to the compactness of the Black population in the illustrative districts. Based on expert testimony, "statistics about Black population centers in the state," and its own visual assessment, the panel found that

"Black voters in Alabama are relatively geographically compact." App. 161. Plaintiffs' plans honored the Black community's compactness, and preserved this compactness without any "tentacles, appendages, bizarre shapes, or any other obvious irregularities." App. 162. Unlike in *LULAC*, 548 U.S. at 424, where this Court rejected a district that contained a "long, narrow strip" connecting two Latino communities that were 300 miles apart, here, Black communities are concentrated throughout the illustrative second majority-Black district from Mobile through the Black Belt. App. 160-62. Defendants also ignore Plaintiffs' experts and the panel's reliance on Alabama's Board of Education maps, in which the State created two majority-Black districts "at the very same time it drew the Plan" and that also "split Mobile and Baldwin Counties" and includes much of the Black Belt across the state. App. 171; *see also* App. 56.

Fig. 1: State 2021 Congressional Plan

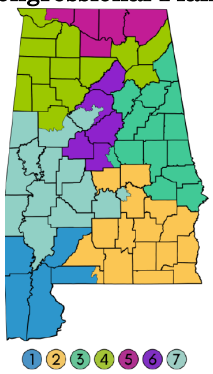
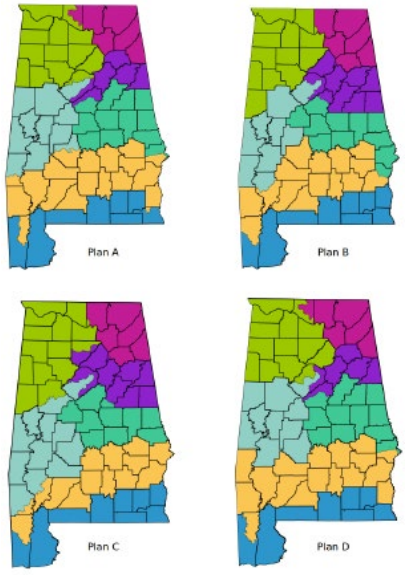


Fig. 2: State 2021 Board of Education Plan

Fig. 3: Duchin Illustrative Maps



3. The Parties' Stipulations and Unrebutted Expert Testimony Evince That the Totality of Circumstances Demonstrated a Section 2 Violation.

Finally, Defendants ignore that they stipulated to many of the facts that the panel relied upon to in its assessment of the totality of the circumstances, and that the testimony of their own experts supported other facts. App. 178-79, 181; Opp. App. 24a, 34a-36a. They disregard the State's history of racial discrimination, App. 73-78, 182-92, and the significant racial disparities in voter turnout and voter registration rates, with the 2020 election in Alabama revealing that 70.6% of Non-Hispanic white people and 61% of Black people were registered to vote, and a similar disparity in voter turnout. Opp. App. 45a. As the panel found, "Defendants do not dispute (or even mention) any of [the] extensive findings of fact about the totality of the circumstances," which "span nearly twenty pages," and "weigh in favor of a finding that the Plan violates Section Two." App. 256. Defendants have not made any effort to show that this finding was erroneous. *Id.*

* * *

The panel thus unanimously found that Plaintiffs had satisfied all three *Gingles* preconditions, and the totality of circumstances weighed in Plaintiffs' favor—these are the elements of a Section 2 vote dilution claim. That should be the end of the inquiry. Because Plaintiffs demonstrated persistent racial bloc voting, that a map can be drawn consistent with traditional districting principles that contains two reasonably compact majority-Black districts, and that the totality of circumstances favor

Plaintiffs, Alabama's Plan is substantially likely to violate the VRA.

B. Defendants' Assertion That Plaintiffs' Experts Impermissibly "Prioritized Race" Is Factually False and Legally Unsound.

Unable to demonstrate that the panel's findings on any of the *Gingles* factors or totality of circumstances are clear error, Defendants offer unsupported allegations that Plaintiffs' experts' showing was tainted because they allegedly "prioritized race" in drawing the maps and treated racial targets as "non-negotiable." Stay Br. 10, 23. They also argue that the fact that separate simulations created by Dr. Duchin and Dr. Imai did not contain two majority-Black districts shows that the only way one can draw a map with two majority-Black districts is to treat race as the predominant factor. And that, they claim would in turn raise constitutional concerns under the Equal Protection Clause. Stay Br. 23-24.

1. Race Did Not Predominate in Plaintiffs' Illustrative Maps.

As the panel specifically found, Defendants' argument—that Plaintiffs' experts improperly "prioritized race"—is both legally flawed and factually baseless. App. 204. As a legal matter, Defendants confuse the *consideration* of race in assessing whether an additional majority-Black district could be created consistent with compactness and traditional districting principles—which is what every expert, and every *court*, in a VRA case must do under this Court's precedent—with the State using race as the *predominant* factor and subordinating traditional districting principles in drawing a district. The "first *Gingles* factor is an inquiry into causation that necessarily classifies voters by their race." *Clark v. Calhoun Cnty.*, 88 F.3d 1393, 1407 (5th Cir. 1996) (Higginbotham, J.). It does not violate the Constitution for an expert, or a judge,

to merely *ask* whether an additional majority-Black district can be constructed; this Court requires that this question be answered in every vote dilution case. *See Bartlett*, 556 U.S. at 18; *Gingles*, 478 U.S. at 50.

As a factual matter, neither expert ever testified that they "prioritized" race in drafting their maps. Despite Defendants' mantra—repeated over 40 times—they never cite Dr. Duchin or Mr. Cooper saying as much. Rather, they cite only the panel's characterization of *Defendants'* charge, for a simple reason: neither of Plaintiffs' experts made such a statement.

The panel only used the term in describing and *rejecting* Defendants' characterization of Dr. Duchin and Mr. Cooper's testimony. The panel found that the opposite was true: Plaintiffs' experts "did not allow race to predominate in their preparation of illustrative remedial plans." App. 249. And it gave detailed reasons for that conclusion both in its decision, App. 1-225, and its order denying a stay, App. 234-67. Assessing their demeanor and creditability, the panel found that Dr. Duchin and Mr. Cooper's testimony "consistently and repeatedly refuted the accusation that when they prepared their illustrative plans, they prioritized race above everything else." App. 204-05; *see also id.* at 245-46.

The panel found that Dr. Duchin's plans used traditional districting criteria. And Defendants' own expert—Thomas Bryan—agreed, testifying that the illustrative plans Plaintiffs proffered met or exceeded the State's Enacted Plan on a number of traditional redistricting criteria. App. 124, 156, 158. Dr. Duchin drew districts that were reasonably compact: her maps met or exceeded the State's own Plan on at least

one metric of compactness. And her least compact districts had compactness scores that were comparable to or better than the least compact districts in the Plan as well as in Alabama's 2011 plan. *Id.* at 158. The panel also credited her plans for respecting "existing political subdivisions, such as counties, cities, and towns * * * at least as well as the Plan." *Id.* at 163. The panel recognized the Black Belt as a "community of interest of substantial significance," *id.* at 165, and found that Dr. Duchin respected this community of interest better than the Plan, *id.* at 168. The panel "considered in turn each traditional districting principle * * * and [ ] made detailed findings of fact, based on all the evidence, about whether and to what extent the plaintiffs' experts considered each one." App. 241-42.

Defendants object that Dr. Duchin impermissibly treated the goal of two majority-Black districts in her plans as "non-negotiable." Stay Br. 10. But what she said she understood to be "non-negotiable" was the one-person, one-vote requirement and compliance with the VRA. App. 308. The State's own Guidelines provide that "priority is to be given to the compelling State interests requiring equality of population among districts and compliance with the [VRA], as amended, should the requirements of those criteria conflict with any other criteria." App. 31-32.

More fundamentally, as explained above, Dr. Duchin's task as an expert was to determine whether a map with two reasonably compact majority-Black districts could be drawn—because that is the question *Gingles* 1 asks. *See* App. 204. Her maps are illustrative—neither the panel, nor the state are obligated to adopt them. And, as the panel stated, "a rule that rejects as unconstitutional a remedial plan for

attempting to satisfy *Gingles* I would preclude any plaintiff from ever stating a Section Two claim." *Id.* at 205. The *Gingles* 1 "inquiry into causation * * * necessarily classifies voters by their race." *Clark*, 88 F.3d at 1407 (Higginbotham, J.). To "penalize" VRA litigants for "attempting to make the very showing that *Gingles* * * * demand[s] would be to make it impossible, as a matter of law, for any plaintiff to bring a successful Section Two action." *Davis v. Chiles*, 139 F.3d, 1414, 1425-26 (11th Cir. 1998).[5]

As the panel explained, the experts "prioritized race only as necessary to answer the essential question asked of them as *Gingles I* experts: Is it possible to draw two reasonably compact majority-Black congressional districts?" App. 204. Once they confirmed the answer to that question, they "assigned greater weight to other traditional redistricting criteria." *Id.* at 205 In again rejecting this unfounded charge in its stay order, the panel explained that Dr. Duchin "made decisions 'that had the effect of reducing the Black Voting Age Population in one of the minority-majority [B]lack districts in order to satisfy other redistricting principles.'" *Id.* at 247 (citing Tr. 578).

2. Defendants' Overreliance on Unadmitted Simulated Maps is Unavailing.

Defendants make the equally unfounded and misguided contention that Dr. Duchin created two million maps without generating any that included two majority-Black districts. At the outset, Defendants fail to note that—because Defendants did not even seek to move her article into evidence—these simulated maps are not a part

5 Moreover, even in assessing racial gerrymandering by a State, this Court recognizes that racial targets are not per se unconstitutional when supported by a functional analysis and narrowly tailored to further the compelling government interest in complying with the VRA. See Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 801-02 (2017).

of the record, and that Defendants did not ask (and so Dr. Duchin did not identify) the data or redistricting criteria that the simulations relied upon. This is important because her article was published prior to the release of the 2020 census data, and thus was based entirely on ***2010 census*** *data*.[6] The simulations therefore do not account for the recent growth of Alabama's African-American population, its concentration in particular cities, counties, and communities of interest, such as the Black Belt, and the shrinking white population. *See* App. 85 (finding that, between the 2010 and the 2020 censuses, the Black population grew, and the white population shrank from 67.04% of the total population to 63.12%).

Equally importantly, the article is clear that the simulated maps were not created using Alabama's Guidelines, as *Gingles* contemplates, but with only a subset of generic districting principles. The article reveals that contiguity, population balance, and compactness were the only criteria used[7]—not communities of interest, not whole counties or cities, and not compliance with the VRA, all of which are central components of Alabama's Guidelines. App. 31-32. That a different decade's demographic data, run through an algorithm that did not use the Guidelines, did not generate a map with two majority-Black districts proves nothing of relevance to this case.

In fact, when Dr. Duchin performed her actual work in this case, she applied computer algorithms to the 2020 Census and found "literally thousands" of redistricting plans featuring two majority-Black districts. App. 56. Moreover, when directly asked, Dr. Duchin testified that a random algorithm using the Guideline's race-

6 See generally Duchin & Spencer, supra note 1.
7 Duchin & Spencer, supra note 1 at 763.

neutral criteria "certainly" could generate her illustrative maps. Tr. 685.

Defendants' cursory reference to Dr. Imai's "race-neutral" simulation—which was designed to assess the role of race in *the State's* Plan—fails for the same reason, as those simulations also are not based on all the State's own redistricting criteria. *See* Tr. 221, 292. Nor do Dr. Imai's simulations show anything at all about Dr. Duchin and Mr. Cooper's illustrative maps, which he did not examine. Tr. 293. Further, *unlike* Dr. Duchin and Mr. Cooper's illustrative maps, Dr. Imai did not seek to replicate the process that the State undertakes in drawing districts. Tr. 181-82. His simulations offer no support for Defendants' assertion that it is impossible to draw a map with two majority-Black districts using traditional districting criteria.

It was no error—let alone clear error—for the panel to find that Dr. Duchin and Mr. Cooper did not allow race to predominate, but rather relied on the Guidelines to answer the *Gingles* 1 inquiry. App. 204. And the panel also did not clearly err in concluding that Dr. Duchin did not try "to maximize the number of majority-Black districts, or the BVAP in any particular majority-Black district." *Id.* at 205.

3. The *Gingles* 1 Inquiry of Plaintiffs' Experts Does Not Raise Any Constitutional Concerns Under the Equal Protection Clause.

Defendants stray even further afield in suggesting that an expert's mere consideration of race in answering a Section 2 of the VRA inquiry somehow transgresses the Equal Protection Clause. Stay Br. 19-20. While Plaintiffs' experts were certainly aware of race in drawing their illustrative plans, the Constitution does not forbid redistricting "performed with consciousness of race," nor apply strict scrutiny to "all cases of [a State's] intentional creation of majority-minority districts." *Bush v. Vera*,

517 U.S. 952, 958-59 (1996). As the panel recognized, under Defendants' view, a VRA claim can only succeed if a plaintiff's expert generated maps without any awareness of race and produced new majority-minority districts by sheer happenstance. But this Court has never suggested that that is how the VRA works. *Cf. id.* at 977 ("A § 2 district that is *reasonably* compact and regular, taking into account traditional districting principles," need not also "defeat [a] rival compact district[]" in "endless beauty contests.") (emphasis in original) (cleaned up). And Defendants cite no case in which a court has rejected a Section 2 claim merely because a plaintiffs' expert considered race in crafting an illustrative map or required the map drawing process to be entirely race neutral. Rather, courts "*require* plaintiffs to show that it would be possible to design an electoral district, consistent with traditional districting principles, in which minority voters could successfully elect a minority candidate." *Davis*, 139 F.3d at 1425 (emphasis in original). If the Court were to "penalize" plaintiffs "for attempting to make the very showing that *Gingles* [] demand[s]," it would be "impossible, as a matter of law, for any plaintiff to bring a successful Section Two action." *Id.*

Moreover, the Equal Protection Clause does not apply to a private party's experts at all, but only to the State. That the expert considered race in assessing whether two majority-Black districts could be created consistent with compactness and traditional districting principles does not mean that the State must make race the *predominant* factor in drawing a remedial map. *See Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (8th Cir. 2006) (noting that the "ultimate end of the first *Gingles*

precondition is to prove that a solution is possible, and not necessarily to present the final solution to the problem"). Illustrative maps merely show that a remedy is possible, and they lack the force of law. Consistent with this understanding, every circuit to address this issue has rejected attempts to graft racial gerrymandering standard onto *Gingles* 1. *See, e.g.*, *Bone Shirt*, 461 F.3d at 1019; *Davis*, 139 F.3d at 1417-18; *Clark*, 88 F.3d at 1406-07; *Sanchez v. State of Colorado*, 97 F.3d a1303, 1327 (10th Cir. 1996); *Cane v. Worcester Cnty.*, 35 F.3d 921,926 n.6 (4th Cir. 1994); *Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 278 (2d Cir. 1995), *vacated sub nom. on other grounds City of Bridgeport v. Bridgeport Coal. for Fair Representation*, 512 U.S. 1283 (1994).

Here, the panel did not suggest that the Legislature must adopt one of the illustrative maps or even dictate that legislative remedial districts must have a certain Black population threshold or percentage. Rather, the panel only directed that the Legislature draw "two districts in which Black voters otherwise have an opportunity to elect a representative of their choice." App. 213. If supported by a functional analysis of voting patterns, the State may be able to draw one or both districts at levels where Black voters form less than a majority but remain, as a group, "large enough to elect the candidate of [their] choice with help from voters who are members of the majority and who cross over to support the [Black-]preferred candidate." *Bartlett*, 556 U.S. at 13; *see also id.* at 23 ("The option to draw such districts gives legislatures a choice that can lead to less racial isolation, not more.").

In short, Defendants identify no error at all—much less the clear error

required—in the panel's unanimous and carefully supported conclusion that plaintiffs were likely to succeed in making all the showings required under *Gingles* 1. Defendants' dispute with that conclusion rests not on any of the panel's findings, but on Defendants' false premise that Plaintiffs' experts impermissibly considered race in asking the very question the VRA requires Plaintiffs, and the panel itself, to answer.

C. Defendants' Challenge to the Constitutionality of the Panel's Interpretation of Section 2 Suffers from Factual and Legal Inaccuracies.

Defendants' contention that the Court should avoid endorsing the panel's findings because they would render Section 2 unconstitutional is unpersuasive.

First, Defendants argue that "Section 2 permits race-conscious districting only in the limited context" of drawing maps that also honor traditional districting principles. Stay Br. 30. But the panel expressly found that the illustrative maps honored traditional districting principles and did not use race to predominate over other factors. Defendants have made no showing that that critical finding is clearly erroneous.

Second, Defendants accuse the panel of "act[ing] on the implicit assumption that members of racial and ethnic groups must all think alike on important matters of public policy." Stay Br. 31. But that simply disregards the unchallenged findings of stark racial polarization in voting—findings with which Defendants' expert agreed, *see supra*, and the panel's findings that it is "common knowledge" that the Black Belt is an "important community of interest" with "many, many more dimensions than skin color"—like a "shared history," "common economy," "unusual and extreme poverty," and an "overwhelmingly rural," "agrarian" environment. App. 166-69.

Third, Defendants criticize Plaintiffs' second majority-Black district because,

by tracking the Black Belt (an undisputed community of interest), App. 169, it runs across the State. Stay Br. 34. But, per Figure 1 *supra*, the Enacted Plan's Districts 4 and 5 also stretch across the State, with the former stretching from the Mississippi to the Georgia border. Defendants also attack the illustrative maps for splitting Mobile County, but an array of expert and lay testimony showed that the western Black Belt and parts of Mobile County, in particular the City of Mobile, share a community of interest. App. 64, 91-92, 168-70. The panel also found that—while it is largely undisputed here that the Black Belt is an "important" community of interest, *id.* at 166—"the record about the Gulf Coast community of interest is less compelling." *See id.* at 170-71 (rejecting the "overdrawn" testimony of one lay witness about the Gulf Coast community of interest). As the panel noted, the Legislature itself recognizes this community of interest: it drew the 2021 State Board of Education map using the same guidelines as the Plan and, like the illustrative maps, the Board of Education map has two majority-Black districts and splits Mobile County. *Id.* at 171.

In sum, Defendants' "constitutional avoidance" argument is unavailing. As the panel recognized, this is a straightforward Section 2 case, where they applied well-established precedent to detailed findings. Nothing about applying the settled precedent in *Bartlett* and *Gingles* calls into question Section 2's constitutionality.[8]

II. Defendants Have Not Shown That The Equities Weigh In Favor Of A Stay.

In reviewing a stay application, the Court must also examine whether "the

[8] Indeed, even if race predominated in the illustrative maps, that would not necessarily be unconstitutional. Districts where race predominated may survive if the use of race was "narrowly tailored" to satisfy a "compelling interest" such as compliance with the VRA. See Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 800-01 (2017) (upholding a district drawn for a predominately racial purpose where it was narrowly tailored to satisfy the VRA).

applicant will be irreparably injured absent a stay," "whether issuance of the stay will substantially injure the other parties," and "where the public interest lies." *Nken*, 556 U.S. at 426. Each of these factors weighs against granting a stay here.

The panel made specific findings on the significant harm to the public interest and the irreparable injuries to Plaintiffs if the election process proceeds under a plan that violates the VRA. App. 199-204. Defendants simply ignore the panel's findings and argue instead that they will be irreparably harmed by enjoining the Plan in January of an election year. Yet Defendants describe only administrative inconvenience to a handful of candidates and election officials, all of which the panel correctly found do not constitute irreparable injury and are less weighty than the harm from not issuing (or staying) an injunction. *Id.* at 200-02.

Defendants' attempt to conjure up irreparable harm is completely unavailing. Under the panel's order the State has an opportunity to draw a remedial plan. If it does so, the State's only "injury" will be the short delay in the filing deadline, and potential administrative inconvenience to election officials and a few candidates. *See Covington v. North Carolina*, No. 1:15CV399, 2018 WL 604732, at *6 (M.D.N.C. Jan. 26, 2018) (denying a stay despite the "inconvenience" to "legislators having to adjust their personal, legislative, or campaign schedules"), *stay denied in relevant part,* 138 S. Ct. 974 (2018). As the panel pointed out, the primary is still over four months away, and the election itself over 10 months away. App. 261. No election has ever been held under the challenged Plan—so there is no risk of voter confusion. In short, Defendants' alleged injuries do not come close to being "irreparable."

The panel also found that Plaintiffs "will suffer an irreparable harm if they must vote in the 2022 congressional elections based on a redistricting plan that violates federal law." *Id.* at 197. Defendants' stay application does not argue that the panel's findings of irreparable injury to Plaintiffs is clearly erroneous—or wrong at all. As the panel found, without relief, "the *Milligan* plaintiffs will suffer this irreparable injury until 2024, which is nearly halfway through this census cycle," and that this harm is "greater" than Defendants' "administrative burden of drawing and implementing a new map, and upsetting candidates' campaigns." *Id.* at 198. Defendants' stay application is silent on this issue. Thus, the balance-of-the-harms factor also weighs against Defendants' stay request.

Finally, the panel found that "a preliminary injunction is in the public interest." *Id.* at 199. It specifically "reject[ed] Defendants' argument that such relief will harm the public interest because the timing of an injunction will precipitate political and administrative chaos." *Id.* Among other things, the panel found that "Alabama's 2022 congressional elections are not imminent," and that, even if they were, "it is not necessary that we allow those elections to proceed on the basis of an unlawful plan." *Id.* at 200. As the panel explained, Alabama's Director of Elections never testified that compliance with the order would make conducting the elections "undoable." *Id.* at 201. Defendants fail to point to any record evidence that would render clearly erroneous the panel's findings that neither "campaign expense" nor "potential [voter] confusion" make it necessary to conduct an election using maps that violate the VRA. *Id.* at 202; *see also id.* at 202-03 (discussing record). The reality is that "legislative

districts change frequently," including "after every decennial census." *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1955 (2019). And there is no risk of confusion since no one has ever voted under the recently enacted Plan.

In this Court, Defendants' conclusory reassertion that "chaos" will result from having to comply with the injunction and redraw the map fails to address—let alone rebut—the panel's detailed fact finding and careful legal analysis on this issue. The panel's remedy provided the Legislature fourteen days to redraw the map, which is the exact time that Defendants stated was needed to enact a new plan. Tr. 1922-1923.

In addition, the Legislature has shown it is capable of approving a redistricting plans on an expedited timeline. *See* App. 202 (the Legislature took "a mere five days" to enact the Plan). No record evidence supports Defendants' claims that a short delay of the candidate filing deadline will affect an election that remains months away. The panel below considered and rejected this argument twice.

In fact, this Court has declined to hold that a state is irreparably harmed by an order like the one here—wherein a three-judge panel enjoins state maps early in an election year and gives the State time to draw new maps that the State itself deemed sufficient. To the contrary, this Court has repeatedly denied a stay in cases nearly identical to this one. For example, in *Personhuballah v. Alcorn*, the panel ordered a new remedial map in January of an election year. 155 F. Supp. 3d 552 (E.D. Va. 2016). There, as here, the panel's remedial map required the State to increase the number of congressional districts where Black voters had the opportunity to elect candidates of their choice. *See id.* at 565 (creating a second, new Black opportunity

district). There, as here, the defendants argued that alleged "electoral chaos" and the fact that candidates had already spent campaign resources in the old districts warranted a stay. *See* Reply in Support of Application for Stay, *Wittman v. Personhuballah*, Nos. 15A-724 & 14-1504, 2016 WL 4120704, at *7 (U.S. Jan. 22, 2016). Nonetheless, this Court denied a stay. *Wittman v. Personhuballah*, 136 S. Ct. 998 (2016).[9]

Similarly, in *Harris v. McCrory*, a three-judge panel enjoined a state's congressional map in early February of an election year. 159 F. Supp. 3d 600 (M.D.N.C. 2016). Despite the State in *Harris* raising nearly all the same arguments as Defendants here, this Court denied the stay. *McCrory v. Harris*, 136 S. Ct. 1001 (2016). For instance, Defendants note that the State will issue absentee ballots in just over two months. Stay Br. 3. But in *Harris*, this Court denied a stay even though the state had issued absentee ballots nearly three weeks *before* the map was enjoined, and the state had already sent "thousands of ballots," many of which had "already been voted and returned." Emergency Application to Stay Final Judgment at 3, *McCrory v. Harris*, No. 15A809 (U.S. Feb. 9, 2016). Defendants here likewise claim a stay is needed because the primary will occur in about four months. Stay Br. 3. But in *Harris*, the panel enjoined the State's map less than two months before the primary date. Emergency Application to Stay Final Judgment at 15, *McCrory v. Harris*, No. 15A809 (U.S. Feb. 9, 2016). Finally, Defendants argue that they must print and transmit ballots by April 9. Stay Br. 37. But in *Harris*, the state had printed nearly four million ballots

[9] This Court later dismissed the Personhuballah appeal based on standing, but at the time of the stay request, at least one appellant likely had standing. Wittman v. Personhuballah, 578 U.S. 539, 544 (2016) (noting that Rep. Forbes' actions after argument eliminated his claim to standing).

before the court enjoined the maps. Emergency Application to Stay Final Judgment at 15, *McCrory v. Harris*, No. 15A809 (U.S. Feb. 9, 2016). Thus, this Court has denied stays where an order came much later in the election process.

North Carolina v. Covington also supports Plaintiffs' position. There, as here, a three-judge court in January of an election year adopted a special master's maps to remedy a racial gerrymander after giving the State a month to draft a new plan. 138 S. Ct. 2548, 2550 (2018). This Court largely denied the stay request, thereby allowing the court-ordered remedial plan—which, among other things, created a new Black opportunity district, 283 F. Supp. 3d 410, 456 (M.D.N.C. 2018)—to go forward for the May primary and November general election. No. 1:15CV399, 2018 WL 604732, at *6 (M.D.N.C. Jan. 26, 2018), *stay denied in relevant part*, 138 S. Ct. 974. The only portion of the order that this Court stayed were the "revision of House districts in Wake County and Mecklenburg County," 138 S. Ct. at 974, which the Court ultimately deemed improper because they were based on purported violations of state laws that the federal court lacked authority to address. 138 S. Ct. at 2554. *Covington* supports denying a stay where, as here, the panel ordered relief in January for a May primary and November election after applying well-settled federal law to detailed findings.

All the cases on which Defendants rely are inapposite. *Rucho v. Common Cause*, 138 S. Ct. 974 (2018) and *Gill v. Whitford*, 137 S. Ct. 2289 (2017) both involved lower court decisions holding that the state engaged in partisan gerrymandering—a claim that this Court had *never* found to be a basis for invalidating a state map, and that was later ruled nonjusticiable. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

The stay orders issued in *Abbott v. Perez*, 138 S. Ct. 49 (2017) and *Perry v. Perez*, 565 U.S. 1090 (2011) do not support Defendants' position. In that complex and long running litigation, this Court granted stays in 2011 and 2017 where it found the three-judge court exceeded its remedial authority. In 2012, however, the Court denied a stay in circumstances much more akin to the present case. The first stay request in *Perez* occurred in 2011, when the three-judge panel enjoined Texas's maps and immediately imposed new maps drawn by the panel, without giving the State a chance to first adopt a remedial map. *See Perry v. Perez*, 565 U.S. 388, 396 (2012) (holding that the panel failed defer to the unobjectionable aspects of an illegal plan). Here, however, the panel has provided the Legislature the opportunity to devise a remedial map consistent with the Guidelines.

This Court ***denied*** the second *Perez* stay request in 2012—an election year. As here, the three-judge panel preliminarily enjoined Texas's congressional and state house maps in late February 2012 to cure likely violations of Sections 2 and 5 of the VRA. No. 11-CA-360, 2012 WL 13124275, at *4 (W.D. Tex. Mar. 19, 2012) (three-judge court); No. SA-11-CV-360, 2012 WL 13124278, at *11 (W.D. Tex. Mar. 19, 2012) (three-judge court). The panel replaced Texas's plans with interim remedial maps for the upcoming May primary and November election. At that juncture, the panel and this Court denied a stay, leaving the remedial map in place. 891 F. Supp. 2d 808, 811 (W.D. Tex. 2012), *stay denied sub nom. LULAC v. Perry*, 567 U.S. 966 (2012).

Finally, in 2017, this Court granted a stay where the *Perez* panel afforded the State even less deference than it had in 2011. After Texas had enacted the 2012

remedial maps into law and Texas had used those plans for several elections, the panel struck down its own remedial maps and ordered the state legislature to devise new ones. *See* Emergency Application for Stay or Injunctive Relief Pending Appeal at 1-2, *Abbott v. Perez*, No. 17A225 (U.S. Aug. 25, 2017). Thus, this Court granted stays only when the panel exceeded its remedial authority and unduly "pre-empt[ed]" the State's redistricting efforts. *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978).

Here, by contrast, the panel has afforded the Legislature a "reasonable opportunity" to adopt a remedial map, before the panel will do so. *Id.* at 540. The decision below is consistent with the orders denying stays in *Covington*, 138 S. Ct. at 2552, *Harris*, 136 S. Ct. at 1001, and *Personhuballah*, 136 S. Ct. at 998. And, while the Legislature has been given the chance to devise relief, the panel has "its own duty" to cure illegal maps "through an orderly process in advance of elections." *Covington*, 138 S. Ct. at 2553. Defendants characterize the elections later this year as "imminent," *but see* App. 200-01, but it is no more imminent than the elections in the many cases in which this Court has denied stays.

Defendants also appear to contend that Plaintiffs were not diligent in bringing their challenge. Stay Br. 39-40. But "Defendants have known since at least 2018" that the 2021 Plan would be challenged in court. App. 202. Indeed, a map with two majority-Black districts was presented in the Legislature. *Id.* Plaintiffs filed suit on November 16—twelve days after the Plan's passage—and moved for preliminary relief a month later. That Plaintiffs did not challenge the 2011 maps under a different census's demographic data has no bearing on the matter. *See* App. 85 (describing 2020

census population changes). Defendants cite no authority for the remarkable claim that Plaintiffs should live under illegal maps in one cycle because of what happened in the past. "[T]he right to an undiluted vote does not belong to the minority as a group, but rather to its individual members." *LULAC*, 548 U.S. at 437 (internal quotations omitted). Plaintiffs cannot be penalized because others did not sue in the past.

As the panel below found, Defendants' position in this case is that it is "always [ ] too late or too soon" for Plaintiffs to challenge a redistricting plan. App. 201 (citations omitted). But, here, expedited discovery and a promptly scheduled hearing allowed the parties to develop a robust and detailed record, on the basis of which the panel thereafter issued a 225-page opinion. Plaintiffs and the panel did everything possible to ensure a prompt resolution of this dispute; the only delay (of a few weeks in the hearing date) was at the *State's* request. As the panel concluded, Defendants can alleviate their supposed harms by moving expeditiously to comply with the order. App. 204 ("We have proceeded with all deliberate speed so as not to deprive plaintiffs of an opportunity for a timely remedy, and now the state must do the same.").

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' application for a stay pending appeal.

Respectfully submitted,

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