

No. 18-10151

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**GREATER BIRMINGHAM MINISTRIES, *et al.*,**  
*Plaintiffs-Appellants,*

v.

**JOHN MERRILL, in his official capacity as the Alabama Secretary of State,**  
*Defendant-Appellee.*

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On Appeal from the United States District Court  
for the Northern District of Alabama, No. 2:15-cv-02193-LSC

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**BRIEF OF AMICUS CURIAE SOUTHERN POVERTY LAW CENTER,  
ALABAMA LEGISLATIVE BLACK CAUCUS, LEAGUE OF WOMEN  
VOTERS OF ALABAMA, ADELANTE ALABAMA WORKER CENTER,  
ALABAMA ARISE, CENTRAL ALABAMA FAIR HOUSING CENTER,  
LOW INCOME HOUSING COALITION OF ALABAMA, AND  
MONTGOMERY PRIDE UNITED  
IN SUPPORT OF PLAINTIFFS-APPELLANTS  
GREATER BIRMINGHAM MINISTRIES, *ET AL.***

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February 28, 2018

*Counsel for Amici*

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE  
DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and related Eleventh  
Circuit

No. 18-10151, *Greater Birmingham Ministries v. Merrill*

7. The Central Alabama Fair Housing Center
8. Chestnut, Prince ó Alabama House of Representatives, the Alabama Legislative Black Caucus
9. Clarke, Adline ó Alabama House of Representatives, the Alabama Legislative Black Caucus
10. Coleman, Merika ó Alabama House of Representatives, the Alabama Legislative Black Caucus
11. Daniels, Anthony ó Alabama House of Representatives, the Alabama Legislative Black Caucus
12. Drummond, Barbara ó Alabama House of Representatives, the Alabama Legislative Black Caucus
13. England, Chris ó Alabama House of Representatives, the Alabama Legislative Black Caucus
14. Forte, Berry ó Alabama House of Representatives, the Alabama Legislative Black Caucus
15. Givan, Juandalynn ó Alabama House of Representatives, the Alabama Legislative Black Caucus
16. Grimsley, Dexter ó Alabama House of Representatives, the Alabama Legislative Black Caucus

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17. Hall, Laura ó Alabama House of Representatives, the Alabama Legislative Black Caucus
18. Hollis, Rolanda ó Alabama House of Representatives, the Alabama Legislative Black Caucus
19. Holmes, Alvin ó Alabama House of Representatives, the Alabama Legislative Black Caucus
20. Howard, Ralph ó Alabama House of Representatives, the Alabama Legislative Black Caucus
21. Jackson, Thomas ó Alabama House of Representatives, the Alabama Legislative Black Caucus
22. Knight, John F., Jr. ó Alabama House of Representatives, the Alabama Legislative Black Caucus
23. Lawrence, Kelvin ó Alabama House of Representatives, the Alabama Legislative Black Caucus
24. The League of Women Voters of Alabama
25. The Low Income Housing Coalition of Alabama
26. McCampbell, A.J. ó Alabama House of Representatives, the Alabama Legislative Black Caucus
27. McClammy, Thad ó Alabama House of Representatives, the Alabama Legislative Black Caucus

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28. Montgomery PRIDE United
29. Moore, Mary ó Alabama House of Representatives, the Alabama Legislative Black Caucus
30. Rogers, John W. ó Alabama House of Representatives, the Alabama Legislative Black Caucus
31. Scott, Rod ó Alabama House of Representatives, the Alabama Legislative Black Caucus
32. The Southern Poverty Law Center
33. Warren, Pebblin ó Alabama House of Representatives, the Alabama Legislative Black Caucus
34. Coleman-Madison, Linda ó Alabama Senate, the Alabama Legislative Black Caucus
35. Dunn, Priscilla ó Alabama Senate, the Alabama Legislative Black Caucus
36. Figures, Vivian ó Alabama Senate, the Alabama Legislative Black Caucus
37. Sanders, Hank ó Alabama Senate, the Alabama Legislative Black Caucus
38. Singleton, Bobby D. ó Alabama Senate, the Alabama Legislative Black Caucus
39. Smitherman, Rodger M. ó Alabama Senate, the Alabama Legislative Black Caucus

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**B. Corporate Disclosure Statement**

Counsel for *Amici* further certify that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

/s/ Samuel Brooke

Samuel Brooke



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rammed through the 2011 Regular Session over the opposition of every ALBC member. ALBC has been actively engaged in litigation seeking to enforce the voting rights of Alabamians of color, including *Alabama Legislative Black Caucus v. Alabama* and *Lewis v. Bentley*.

statewide organization dedicated to increasing affordable housing resources for Alabamians living in poverty. Voting access needs to be improved in Alabama, especially for people living in poverty. Whenever possible, barriers to voting

entity made a monetary contribution specifically for the preparation or submission of this brief.

## **SUMMARY OF ARGUMENT**

Alabama has a long and often violent history of suppressing and denying the votes of people of color. Alabama embraced slavery from



Relying on the erroneous conclusion that anyone can obtain and use a photo ID, the court must consider the political context in which it operates, which cannot be separated from the troubling history of race-based vote denial. The District Court failed to consider that the historical policy of government-sanctioned subordination of people of color — albeit now couched as a race-neutral measure to ensure electoral integrity — on voters of color.

Accordingly, *Amici* request that the court grant summary judgment and to compel a trial on the merits.

## ARGUMENT AND CITATIONS OF AUTHORITY

### I. Photo ID Law Has a Substantial, Discriminatory Impact on Voters of Color.

The District Court erred by concluding that the testimony on

believes a registered voter may obtain a photo ID. *GBM*, 2018 WL 348009, at \*12  
\*õ]K\_p"vjg"gpf."Ft0"Ukumkpøu"guvk o cvg"fqgu not matter . . . it is so easy to get a photo  
ID in Alabama, *no one* ku" rtgxgpvgf" htq o " xqvkpi0ö+ (emphasis original).

**A. Thousands of Formerly-Incarcerated Alabamians Are Eligible to Register to Vote, but Lack Photo ID.**

Thousands of people who were formerly incarcerated in Alabama are now able to register to vote, but will face significant obstacles to doing so because of a law enacted to a recent lawsuit challenging the law, the Alabama legislature clarified and defined

proposition for people just leaving prison or with a prior felony conviction. If the

credit. *See generally* Rebecca Vallas et al.,

*Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records*, Ctr. For Am. Progress (2014), <https://goo.gl/43af4K>. A criminal record is thus a direct cause and consequence of poverty, one that disproportionately affects the Black community. Poverty, in turn, creates additional barriers to obtaining compliant photo ID.

**B. Marginalized Voters Including, *Inter Alia*, Low-Income Voters, Transgender Voters, and Voters Experiencing Homelessness.**

Social science research has established a common-sense proposition: the more barriers to voting that exist, the less likely even eligible voters will choose to vote. *See, e.g.*, William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62(1) *Am. Pol. Sci. Rev.* 25, 25-42 (1968). Photo ID laws generally discourage people from voting because would-be voters, particularly low-income voters, often mistakenly believe that they do not possess an accepted photo ID. Baker Inst. for Pub. Policy, *The Texas Voter ID Law and the 2014 Election: A* 1 (2015), <https://goo.gl/GgHLNu>.

The impact of a photo ID law like Alabama's extends beyond disparate possession of photographic identification. One study of the 2000 to 2006 general

*Effect of Voter Identification Laws on Turnout* 19 (Cal. Instit. of Tech., Soc. Sci., Working Paper No. 1267, 2007). Likewise, a survey of registered voters in Wisconsin who did not vote in the 2016 presidential election found that 77% of those prevented from voting had voted in the 2012 election, and most people who said they did not vote because they lacked ID actually possessed a qualifying ID. Press Release, Kenneth Mayer,

Bureau, Quick Facts: Alabama, <https://www.census.gov/quickfacts/AL> (last visited Feb. 8, 2018). Vjg"eqttgncvkqp"dgy y ggp"tceg"cpf"rqxgtv{"ecp"dg"vtcegf"vq"vjg"uvcvgøu"

These disparities are more pronounced in traditionally-disenfranchised communities. While 27% of transgender respondents lacked ID that accurately reflected their gender, people of color, youth, students, those with low incomes, and respondents with disabilities were more likely than other respondents to lack updated identification documents or records. *Id* at 4. Black respondents lacked updated documents or records at the second highest rate among racial and ethnic groups in the NTDS (37%). *Id*.

Transgender persons attempting





persons because, for a variety of reasons, election officials in their community may not understand or accept transgender identity or

Secretary of State's website. *Id.* at 18-19. These provisions require access to resources many individuals experiencing homelessness necessarily lack such as a residential address, access to a computer, and access to the Internet.

Although state-specific data is lacking, Black Americans are overrepresented in the national population of individuals experiencing homelessness. Marian Moser Jones, *Does Race Matter in Addressing Homelessness? A Review of t.*

and issued fewer than 300 voter IDs annually. *Id.* It has made fewer than 10 home visits. *Id.*

Moreover, access to both a computer and the Internet are integral to requesting a home visit by the Mobile ID unit. *Id.* at \*7-8. Based on the 2015 C o g t k e c p " E q o o w p k v { " U w t x g { " \* ð C E U ö + " q p g - y e a r estimates, 27.1% of Black and 23.6% of Hispanic households do not have a computer, and 41.8% of Black households and 41.2% of Hispanic households do not have a high-speed Internet subscription. *Id.* at \*11. This compares to 16.2% of white households that do not have a computer and 27.7% of white households without a high-speed Internet subscription. *Id.* Even if a voter can request a visit, she must request a date at least two weeks in advance, and cannot request a time. The M q d k n g " K F " w p k v ø u "

visits, and the unit is not operating to the benefit

Summary judgment is often inappropriate in Section 2 cases because the Supreme Court and Eleventh Circuit have held that the Equal Protection Clause does not require the government to justify its actions based on a social and historical context in which a particular measure is challenged. *Thornburg v. Gingles*, 488 U.S. 149, 164 (1988) (quoting *Washington v. Glucksberg*, 527 U.S. 26, 48 (2000)).

q o kvvgf+ " \*tgxgtukpi " uw o oct{ " lwfi o gpv" kp" Ugevkqp" 4" ecug" dgecwug" ðeqwtvu" ctg" tgswwktgf" vq" ÷eqpukfgt" cmn" tngxcpv" gxkfgpeg.ø" eqpfwev" c" ÷ugctejkpi" practical gxcnwcvkqp" qh" vjg" rcuv" cpf" rtgugpv" tgcnk{ ø" qh" vjg" ejcmgpi gf" gngevqtcn" u{ uvgo. " cpf" ÷itcfwcm{ " ftcy" ]" \_" vqigvjgt" c" rkevwtg" 0" 0" 0" of the political process through circumstantial evidence.] TJETBT/F7 14.04 Tf1 0 0 1 204.65 449.71 Tm[00

such as education, employment, and health, which hinder their ability to participate in the political process. *Thornburg v. Gingles*, 488 U.S. 149, 164 (1988) (quoting *Washington v. Glucksberg*, 527 U.S. 26, 48 (2000)).

effectively the political process. *Thornburg v. Gingles*, 488 U.S. 149, 164 (1988) (quoting *Washington v. Glucksberg*, 527 U.S. 26, 48 (2000)).

a(m)134allenged easur *Thornburg Gingles* , 48 .S. , 4 196) (endorsing analysis set out in Senate Report to 192 amendments to Section 2).

Cncdc o cøu" j kuvqt{ "qh" fgp{ kpi "Dncem" C o gtkecpu" vjg" xqv" ku" cu" qnf" cu" vjg" uvcvg" itself. The document creating the state in 1845 only granted suffrage to white males.

citizens. Ala. Const. of 1819, art. III, § 5 (1819). Following Reconstruction, Alabama legislators met with the explicit purpose of rolling back the Reconstruction-era gains of Black Americans without attracting federal attention. Wayne Flynt, *Alabama's Lost Cause*, 53 Ala. L. Rev. 67, 68 (2001). The delegates segregated Alabama schools, abolished the state Board of Education, and limited the taxation powers of state, county, and municipal governments to reduce funding for public schools and other state services relied upon by Black Americans. *Id.*

With the passage of the 1895 Alabama Constitution came new measures to more subtly disenfranchise Black Americans, including gerrymandering and gubernatorial appointments to formerly elected offices. *Id.* at 69. And an 1893 election law permitted voter registration only in the month of May, listed candidates alphabetically without party identification, and required voters to present voter identification. *Id.* These measures had a pervasive racial impact because Black voters were more likely to be illiterate, a consequence of racial disparities in the provision and quality of education in Alabama. *See, e.g., United States v. Bd. of* *Education*, 435 U.S. 110 (1978).

The 1901 Alabama Constitution, which governs Alabama to this day, was ratified as prerequisites to voting a \$1.50 annual poll tax, an English literacy test, and ownership of either 40 acres or property worth at least \$300. Amy Erickson,

*Selma to Selma: Modern Day Voter Discrimination in Alabama*, 35 Law & Ineq. 75, 78-79 (2017), <https://goo.gl/ENbeH1>. As legislators explicitly stated, [d]isfranchising blacks and maintaining white supremacy were the central purposes of the 1901 Constitution. *Knigh t v. Alabama*, 458 F.Supp.2d 1273, 1284 (N.D. Ala. 2004), *aff'd*, 476 F.3d 1219 (11th Cir. 2007). Before these measures were ratified, there were 181,000 registered Black male voters; post-ratification, that number shrunk to fewer than 5,000. Erickson, *supra*, at 79; *Bolden v. City of Mobile*, 542 F. Supp. 1050, 1063-64 (S.D. Ala. 1982) [The disfranchising constitution of 1901 . . . [was] promoted as good government reform].

Even though most of the white supremacist provisions of the 1901 Constitution have been struck down by federal courts, Alabama has refused to adopt a new constitution. William H. Stewart, *The Tortured History of Efforts to Revise the Alabama Constitution of 1901*, 53 Ala. L. Rev. 295 (2001). Remarkably, the constitutional provisions restricting the voting rights of Black Americans





*Law Can Take Effect*, The Gadsden Times, June 26, 2013, <https://goo.gl/494f9Z>.

Shortly thereafter, the Governor and the Secretary of the Alabama Law Enforcement Agency (ALEA)



secure standing under the Establishment Clause. Expressive harm is an extension of the long-guvcndnkujgf" rtkpek rng"vjcv"vjg"öegpvtcn" ocpfcvg"Jqh"vjg"Gswcn" Rtqvgevkqp" Encwug\_ "ku" tcekc"pgwvtcnkv{"kp" iqxgtp o gpvcn" fgekukqp o cmkpi"ö" *Miller v. Johnson*, 515 U.S. 900, 904 (1995) (citing, *inter alia*, *Brown v. Board of Education*, 347 U.S. 483 (1954)). *Brown v. Board* held that *de jure* racial school ugitgicvkqp" ycu" wpeqpukvwvkqp cn" ögxgp" vjqwij" vjg" rj {ukecn" hceknkvkgu" cpf" qvjgt" ÷tangibleø hcevqtu" oc {" dg" gswcn"0"0"0"0ö" 569" W0U0" cv 6;50" öVq" ugrctcvg" vjgo" htqo" others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts cpf" okpfu" kp" c" yc {" wpnkmgn {" gxgt" vq" dg" wpfqpg"ö" *Id.* at 494; *accord Stout v. Gardendale Bd. of Educ.*, No. 17-12338,

Pqtvj " Ectqnkpcøu" tgfkuvtkevki " rncp." cmngikpi " vje plan was so irregular on its face that it was clearly designed to differentiate electors on the basis of race. *Id.* Even though the resulting plan did not dilute the voting strength of any voters, the Supreme Court found the redistricting plan violated the Equal Protection Clause dgecwug"õutate legislation that expressly distinguishes among citizens on account of race ô whether it contains cp" gzrnkev" fkuvkpevkqp" qt" ku" ÷unexplainable on grounds

uw dqt f k p c v k q p 0 ö " L g h h t g { " U 0 " J g n o t g k e j . " *Putting Down: Expressive Subordination and Equal Protection*, 59 UCLA L. Rev. Discourse 112, 118 (2012) 0 " ö ] R \_ q n k e k g u "

and actions that subordinate a distinct group, even if only expressively or symbolically, help exclude that group from full and equal participation in the political process by reinforcing a sense that the group is subordinate both within the group and among those " r c t v k e k r c v k p i " k p " k v u " u w d q t f k p c v k q p 0 ö " *Id.* at 122.

Expressive subordination can be more harmful to its victims than c " n c y ø u tangible consequences. For example, in *Loving v. Virginia*, 388 U.S. 1 (1966), the Court found an anti-miscegenation law unconstitutionally harmful because of its ö g p f q t u g o g p v " q h " y j k v g " u w r t g o c e { 0 ö " *Id.* at 1, 7. *Loving v. Virginia* and *Brown v. Board* exemplify the anti-subordination principle of equal protection. Michael C. Dorf, *Same-Sex Marriage, Second-* , 97 Va. L. Rev. 1267, 1272-73, 1293 (2011) (citing Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 Harv. L. Rev. 1470, 1472-73 (2004)); see also *Palmer v. Thompson*, 403 U.S. 217, 235-37 (1971) (Douglas, J., dissenting).

Y j k n g " C n c d c o c ø u " r j q v q " K F " n c y " k u " h c e k c m n { " p g w w t c n . " c reasonable factfinder could conclude. " d c u g f " q p " C n c d c o c ø u history and the circumstances surrounding the d k n n ø u " r c u u c i g . " that it was enacted to send a message to voters 127.58er

Decl. at 60-127, *GBM*, 2018 WL 348009 No. 2:15-cv-02193 . The 1901 Constitution that continues to govern Alabama embodies the fundamental principle that the Alabama Constitution is a part of the Federal Constitution. Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State. *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (quoting John B. Knox, president of the 1901 convention). The primary function of maintaining the 1901 Constitution is to inflict expressive harm on Black and now Latino people. This policy of marginalizing people of color has not been repudiated. Pursuant to this constitutional policy, Alabama maintained a system of *de jure* disfranchisement of its Black citizens that lasted until well after passage of the VRA. *Underwood*, 471 U.S. at 229-30; *accord Knight*, 458 F. Supp. 2d at 1284;

payment of a poll tax as a suffrage requirement failed in the legislature. Ex. I  
Kousser Decl. at 60-61, *GBM*, 2018 WL 348009 No. 2:15-cv-02193 . But  
legislators who supported the photo ID law also fought





## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C), I hereby certify that:

1. the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,500 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. Local Rule 32-4; and
2. the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief is in 14-point proportionally spaced Times New Roman typeface.

Dated: February 28, 2018

/s/ Samuel Brooke  
Samuel Brooke typeface

**CERTIFICATE OF SERVICE**

I certify that on February 28, 2018, the foregoing document was filed with the Clerk of Court using the CM/ECF system, which will send notification of filing to all counsel of record.

I also certify that on this same date, pursuant to 11th Cir. R. 31-3, seven copies of the foregoing document were sent to the Clerk of the Court by first-class mail, postage prepaid.

/s/ Samuel Brooke

Samuel Brooke