Nos. 21-1086 and 21-1087

In the Supreme Court of the United States

JOHN H. MERRILL,
ALABAMA SECRETARY OF STATE, ET AL., APPELLANTS
v.
EVAN MILLIGAN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

JOHN H. MERRILL,
ALABAMA SECRETARY OF STATE, ET AL., PETITIONERS
v.
MARCUS CASTER, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEES AND RESPONDENTS

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QUESTION PRESENTED

Whether the State of Alabama's 2021 redistricting plan for its seven seats in the United States House of Representatives violated Section 2 of the Voting Rights Act, 52 U.S.C. 10301.

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INTEREST OF THE UNITED STATES

These cases involve challenges to Alabama's 2021 congressional redistricting plan under Section 2 of the Voting Rights Act of 1965 (VRA or Act), Pub. L. No. 89-110, 79 Stat. 437 (52 U.S.C. 10301). The United States has authority to enforce the VRA, 52 U.S.C. 10308(d),

and thus has a substantial interest in the proper interpretation of Section 2.

STATEMENT

A. Legal Background

1. The right to vote is "a fundamental political right" because it is "preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). In 1870, the Nation sought to expand that fundamental right by adopting the Fifteenth Amendment, which provides that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," and confers on Congress "power to enforce" the Amendment "by appropriate legislation."

"Despite the ratification of the Fifteenth Amendment, the right of African-Americans to vote was heavily suppressed for nearly a century." *Brnovich* v. *Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2330 (2021). In 1965, Congress responded by enacting the "landmark" VRA, which aimed "to achieve at long last" an "end to the denial of the right to vote based on race." *Ibid.* As originally enacted, Section 2 of the Act prohibited voting practices or procedures that "deny or abridge the right of any citizen of the United States to vote on account of race or color." *Id.* at 2331 (citation omitted).

2. In *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), a plurality of this Court held that Section 2 "simply restated the prohibitions already contained in the Fifteenth Amendment." *Id.* at 61. The plurality then read the Fifteenth Amendment to reach only "purposefully discriminatory" government actions. *Id.* at 65.

In 1982, Congress rewrote Section 2 to "repudiate" *Bolden*'s interpretation of the statute. *Brnovich*, 141 S. Ct. at 2332. Congress replaced "the phrase 'to deny

or abridge the right . . . to vote on account of race or color,'" with the phrase "'in a manner which *results in* a denial or abridgement of the right . . . to vote on account of race or color.'" *Ibid.* (citation omitted). Thus, while Section 2 continues to encompass claims based on discriminatory intent, "[u]nder the amended statute, proof of intent is no longer required." *Chisom* v. *Roemer*, 501 U.S. 380, 394 (1991); see *id.* at 394 n.21. Instead, a violation of Section 2 can be established by "proof of discriminatory results alone." *Id.* at 404.

Congress specified which discriminatory "results" violate Section 2. 52 U.S.C. 10301(a). A violation is established "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in [a] State or political subdivision are not equally open to participation by members of a class of citizens protected by" Section 2, "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b). Congress derived that standard from *White* v. *Regester*, 412 U.S. 755 (1973), a pre-*Bolden* case holding that certain districting practices, when employed in areas where race played a pervasive role in the political process, unconstitutionally "operated to dilute the voting strength of racial and ethnic minorities." *Id.* at 759; see *id.* at 765-770; S. Rep. No. 417, 97th Cong., 2d Sess. 28 (1982) (Senate Report).

Finally, Congress clarified that although "[t]he extent to which members of a protected class have been elected to office" is "one circumstance which may be considered," Section 2 does not "establish[] a right to have members of a protected class elected in numbers

equal to their proportion in the population." 52 U.S.C. 10301(b); see Senate Report 30-31.

3. This Court construed the amended Section 2 in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). The Court explained that the "essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Id.* at 47. The Court then addressed Section 2's application to a claim that a districting scheme—there, a multimember district—"dilutes the[] votes" of minorities by "submerging them in a white majority." *Id.* at 46.

The Court identified three "necessary preconditions" for such a claim. *Gingles*, 478 U.S. at 50. First, "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Ibid.* Second, "the minority group must be able to show that it is politically cohesive." *Id.* at 51. Third, "the minority [group] must be able to demonstrate that the white majority votes sufficiently as a bloc" to allow it "usually to defeat the minority's preferred candidate." *Ibid.*

If those preconditions are satisfied, a court must determine whether, in "the totality of the circumstances," the districting scheme leaves minority voters with "less opportunity than white voters to elect representatives of their choice." *Gingles*, 478 U.S. at 80. In conducting that analysis, courts may consider the factors identified in the Senate Report accompanying the 1982 amendments, including "the history of voting-related discrimination in the" jurisdiction, "the extent to which voting in the" jurisdiction "is racially polarized," the "extent to which minority group members bear the effects of past

discrimination," the "extent to which members of the minority group have been elected to public office," and whether the "policy underlying" the contested scheme "is tenuous." *Id.* at 44-45. "[O]ther factors may also be relevant and may be considered." *Id.* at 45.

4. In *Growe* v. *Emison*, 507 U.S. 25 (1993), this Court held that the *Gingles* framework applies when a plaintiff challenges a "single-member districting scheme." *Id.* at 40. And over the intervening decades, the Court has applied the *Gingles* framework to a "steady stream of § 2 vote-dilution cases," most involving single-member districting. *Brnovich*, 141 S. Ct. at 2333; see *id.* at 2333 n.5 (collecting cases).

B. The Present Controversy

1. "Since 1973, Alabama has been apportioned seven seats in the United States House of Representatives." 21A375 Appl. App. (MSA) 30. "In all the congressional elections held under the maps drawn after the 1970 census and the 1980 census, Alabama elected all-white delegations." *Ibid.* In response to a Section 2 claim following the 1990 census, a court adopted a map that created one majority-minority district (District 7). MSA 30-31. That district then "elected Alabama's first Black Congressman" since Reconstruction. MSA 31.

Following the 2000 and 2010 censuses, Alabama enacted congressional maps that retained District 7 as the sole majority-minority district. MSA 32. After the 2020 census, the State adopted a similar map (the Plan). MSA 32-35; see App., *infra*, 2a (reproducing Plan). Although Black Alabamians account for 27% of the State's voting-age population, the Plan includes only one majority-minority district. MSA 38. The Plan also splits the high concentration of Black voters in Alabama's Black Belt region—named for its "fertile black

soil"—across four districts. MSA 38-39 (citation omitted).

2. Three sets of plaintiffs challenged the Plan. A three-judge district court heard *Milligan* (involving Section 2 and constitutional claims) and *Singleton* (involving only constitutional claims); one of the judges heard *Caster* (involving only Section 2 claims) as a single-judge district court. MSA 2; see 28 U.S.C. 2284(a). After a joint evidentiary hearing, the three-judge court granted a preliminary injunction on the Section 2 claim in *Milligan*, MSA 1-227, and the judge hearing *Caster* adopted the *Milligan* opinion and granted the same relief, 21A376 Appl. App. 1-8. The three-judge court reserved ruling on the constitutional claims in *Milligan* and *Singleton*. MSA 224-226.*

a. The district court first found that plaintiffs had established the three *Gingles* preconditions. MSA 154-187. As to the first, it was undisputed that Alabama's Black population is "sufficiently large" to constitute a majority in a second majority-minority district, and the court found the population sufficiently "geographically compact" to be a majority in a reasonably configured district. MSA 154-155 (citations omitted); see MSA 155-183. In reaching that conclusion, the court reviewed 11 illustrative maps containing two majority-minority districts submitted by plaintiffs' experts. MSA 166-168; see App., *infra*, 3a-10a (reproducing maps). The court found that the districts in those maps were not "any less compact" than those in the Plan and respected traditional districting criteria at least as well, including by placing "the overwhelming majority of the Black Belt in just two districts" rather than splitting that "important

* For simplicity, the remainder of this brief focuses on the three-judge court's opinion and refers to that court as the "district court."

community of interest" across four districts. MSA 171-182; see MSA 166-183.

As to the second and third *Gingles* preconditions, the district court found "no serious dispute that Black voters are 'politically cohesive,' nor that the" white majority in the challenged districts "votes 'sufficiently as a bloc to usually defeat Black voters' preferred candidate.'" MSA 183-184 (brackets and citation omitted).

b. The district court then found that the totality of circumstances established a likely Section 2 violation. MSA 187-206. The court gave particular weight to the "veritable mountain of undisputed evidence" that "racially polarized voting" in Alabama "is clear, stark, and intense." MSA 188-189. The court also emphasized that almost no Black candidates are elected outside majority-minority districts and that "Alabama's extensive history of repugnant racial and voting-related discrimination" continued to minimize Black electoral opportunities. MSA 191-192. The court ultimately did not consider it "close" whether plaintiffs are "substantially likely to prevail on the merits of their Section Two claim." MSA 205.

c. The district court rejected Alabama's remaining arguments, including that plaintiffs' illustrative maps unconstitutionally discriminated based on race. MSA 213-216. The court found that race did not predominate in drawing the maps, as would be required to trigger strict scrutiny. MSA 214. And the court held that a second majority-minority district would in any event be narrowly tailored to the State's compelling interest in complying with Section 2. MSA 215-216.

d. The district court ordered Alabama to draw a map that remedied the likely Section 2 violation. MSA 6-7.

The court emphasized that the State did not have to adopt any of plaintiffs' illustrative maps. MSA 221-223.

3. Alabama sought stays of the preliminary injunctions pending appeal, which this Court granted. In a concurring opinion, Justice Kavanaugh emphasized that the stays were "not a ruling on the merits," but instead reflected the principle that "courts ordinarily should not enjoin state election laws in the period close to an election." 142 S. Ct. 879.

SUMMARY OF ARGUMENT

The district court correctly interpreted and applied Section 2, and its decision should be affirmed.

A. In *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), this Court set forth the framework that has governed Section 2 vote-dilution cases for more than 35 years. That time-tested framework faithfully implements Section 2's text. It authorizes relief only where race permeates a jurisdiction's political process and denies minorities equal electoral opportunities. It is also self-limiting, requiring race-conscious districting only when and to the extent necessary to respond to the "regrettable reality" of racial bloc voting that would otherwise shut minority voters out of the political process. Senate Report 34.

The district court correctly applied *Gingles*. It is essentially undisputed that voting in Alabama is so starkly racially polarized that Black voters have no meaningful chance of electing their preferred candidates unless they constitute a majority or near-majority in a district. There is likewise no dispute that Alabama's Black voting-age population is sufficiently large to be a majority in a second district. And the court correctly found that the population is compact enough to allow a second district to be reasonably configured; indeed, the court found that plaintiffs had drawn many

illustrative maps that actually perform as well or better than the Plan on key districting metrics.

B. Alabama disputes virtually none of the district court's factual findings and little of the court's application of Section 2 precedent. The State instead principally seeks (Br. 76-77) to replace the "existing framework" governing Section 2 claims with a categorical rule that courts must uphold any "race-neutral" districting scheme—by which the State appears to mean any reasonably configured map drawn without considering race. That proposal flatly contradicts the text and history of Section 2. Congress deliberately chose to reject the intent standard adopted in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), focusing instead on minority voters' opportunity to elect representatives of their choice. The State's position, however, does not include any inquiry into whether minority voters actually have that opportunity. That approach flouts this Court's Section 2 precedent and would undo decades of progress. Under the State's reading, for example, Section 2 would likely not require even *one* majority-minority district in Alabama.

Evidence that a State's districting plan was drawn in a race-blind manner and computer simulations of the sort Alabama invokes (Br. 1, 54-56) can be considered in Section 2's "totality of circumstances" inquiry. 52 U.S.C. 10301(b). But text, history, and precedent make clear that such evidence is not dispositive. And Alabama's demand that every Section 2 plaintiff make some ill-defined showing with computer simulations is not merely unjustified, but also unworkable.

C. In the alternative, Alabama asserts that Section 2 does not apply to single-member districting at all. That argument, too, is inconsistent with Section 2's text and history and contrary to decades of precedent.

D. Finally, Alabama errs in asserting that Section 2 is unconstitutional as applied to single-member districting. Section 2's "nationwide ban on racial discrimination in voting," *Shelby County* v. *Holder*, 570 U.S. 529, 557 (2013), is a valid exercise of Congress's power to enforce the Fifteenth Amendment. The *Gingles* framework limits Section 2's race-conscious remedies to circumstances where a plaintiff has proved that pervasive racial politics would otherwise deny minority voters equal electoral opportunities. That measured response to the unfortunate reality of continued racial bloc voting does not violate the Fourteenth Amendment. And there is no other basis for striking down one of the most effective prohibitions on discrimination in voting that Congress has ever enacted.

ARGUMENT

ALABAMA'S 2021 CONGRESSIONAL REDISTRICTING PLAN VIOLATES SECTION 2 OF THE VRA

Section 2 authorizes relief only when racial politics permeate a jurisdiction's electoral process and deprive minority voters of an equal opportunity to elect candidates of their choice. Those conditions exist in Alabama, as the district court found based on an extensive factual record. The State barely disputes that determination, instead asking this Court to overturn decades of Section 2 precedent or hold the statute unconstitutional in its paradigmatic application. The Court should reject those sweeping and destabilizing proposals and affirm the decision below.

A. The District Court Correctly Interpreted And Applied Section 2

Section 2 prohibits voting practices or procedures that "result[] in a denial or abridgement of the right

* * * to vote on account of race." 52 U.S.C. 10301(a). "A violation of [Section 2] is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members" of a racial-minority group "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b). This Court properly interpreted that text in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), and the district court correctly applied that longstanding interpretation here.

1. The Gingles *framework faithfully implements Section 2's text, history, and purpose*

a. When Congress adopted and President Reagan signed the 1982 amendments to Section 2, they codified the vote-dilution standard adopted by this Court in *White* v. *Regester*, 412 U.S. 755 (1973), and *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971). Senate Report 17, 19-23, 27-31; see *Brnovich* v. *Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2331 (2021). That was "not an easy test" for plaintiffs to meet. Senate Report 31. In *Whitcomb*, the Court rejected claims by minority plaintiffs who sought to be represented proportionally or asserted vote dilution as a "mere euphemism for political defeat at the polls." 403 U.S. at 153. In *White*, by contrast, the plaintiffs presented much more: evidence that, because of the pervasive influence of race, "the political processes leading to nomination and election were not equally open to participation by" them—that is, "that [they] had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S. at 766.

By codifying the *White* standard in the "results" test, Congress ensured that Section 2 would apply only to "instances of intensive racial politics," where race "play[s] an excessive role in the electoral process" and thereby "den[ies] minority voters equal opportunity to participate meaningfully in elections." Senate Report 33-34. Congress explained that the results test would not be met in "most communities," but would allow relief in those jurisdictions "where racial politics do dominate the electoral process." *Id.* at 33. And Congress emphasized that the test "*makes no assumptions*" about "the role of racial political considerations in a particular community," but instead requires plaintiffs to "prove" that they have been "denied fair access to the political process" by "racial bloc voting." *Id.* at 34.

b. The framework adopted in *Gingles* faithfully implements "the text and purpose of § 2" in defining the elements of a vote-dilution claim. *Bartlett* v. *Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion).

The first two *Gingles* preconditions require that a minority group be (1) "sufficiently large and compact to constitute a majority in a reasonably configured district" and (2) "politically cohesive." *Wisconsin Legislature* v. *Wisconsin Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (per curiam). Those "showings are needed to establish that the minority [group] has the *potential* to elect a representative of its own choice in some single-member district." *Growe* v. *Emison*, 507 U.S. 25, 40 (1993) (emphasis added). "The basis for this requirement [i]s simple: If no districts were possible in which minority voters had prospects of electoral success," the challenged districting scheme "could hardly be said to thwart minority voting power under § 2." *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 495

(2006) (*LULAC*) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

The first two preconditions thus implement Section 2's text by ensuring that minority voters' lesser opportunity "to participate in the political process and to elect representatives of their choice" actually "results" from the challenged districting scheme. 52 U.S.C. 10301(a) and (b). Relief is not available if the lack of electoral success instead results from other factors, such as "geography and demographics," *Abbott* v. *Perez*, 138 S. Ct. 2305, 2331 (2018), or differing political preferences within the minority group.

The third *Gingles* precondition—that "a majority group must vote sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidate," *Wisconsin Legislature*, 142 S. Ct. at 1248—ensures that Section 2 allows relief only when a minority group suffers unequal electoral opportunity "on account of race." 52 U.S.C. 10301(a). Only when racially polarized voting by the majority consistently prevents the election of a cohesive minority group's preferred candidates do members of that group have "less opportunity than other members of the electorate"—whose preferences are not canceled out by racially polarized voting—"to elect representatives of their choice." 52 U.S.C. 10301(b). And, as this Court has emphasized, Section 2 "does not assume the existence of racial bloc voting; plaintiffs must prove it." *Gingles*, 478 U.S. at 46.

Finally, the *Gingles* framework's ultimate "totality of circumstances" inquiry comes directly from the statutory text. 52 U.S.C. 10301(b). While the preconditions screen for racial bloc voting and ensure that "another reasonably compact [majority-minority] district can be drawn," the textually required totality inquiry deter-

mines whether "the absence of that additional district constitutes impermissible vote dilution." *LULAC*, 548 U.S. at 437. In keeping with the ordinary meaning of the statutory language, the Court has explained that the factors enumerated in the Senate Report are "relevant to the totality analysis." *Wisconsin Legislature*, 142 S. Ct. at 1249. At the same time, courts may consider any other "relevant" factor. *Gingles*, 478 U.S. at 45.

c. Decades of experience have shown that Section 2, as implemented by the *Gingles* framework, works as Congress designed by screening out meritless claims and providing relief only for the "special wrong" that occurs when a districting plan combines with "racially polarized bloc voting" to deny a cohesive minority group an otherwise-available opportunity to elect its candidates of choice. *Strickland*, 556 U.S. at 19 (plurality opinion).

To be sure, the "general terms of the statutory standard" in Section 2 "require judicial interpretation," *LULAC*, 548 U.S. at 426, and some lower courts have at times exhibited "uncertainty regarding the nature and contours of a vote dilution claim," 142 S. Ct. at 883 (Roberts, C.J., dissenting from grant of stays). But this Court has not hesitated to reject Section 2 claims when plaintiffs fail to satisfy the *Gingles* preconditions or the ultimate totality-of-circumstances standard. See, *e.g.*, *Abbott*, 138 S. Ct. at 2331 (first precondition); *Growe*, 507 U.S. at 41-42 (second and third preconditions); *Voinovich* v. *Quilter*, 507 U.S. 146, 158 (1993) (third precondition); *Johnson* v. *De Grandy*, 512 U.S. 997, 1009 (1994) (totality). If the Court had any concern that lower courts have sometimes failed to heed the limitations incorporated into the *Gingles* framework, the answer would be to reinforce those limitations—not to jettison the standard. Cf., *e.g.*, *Evenwel* v. *Abbott*, 578 U.S.

54, 63-75 (2016) (reaffirming the one-person, one-vote rule while clarifying its contours).

As interpreted by this Court, moreover, Section 2 is self-limiting: It authorizes race-conscious districting remedies only if and to the extent required to respond to the "regrettable reality" of racially dominated politics. Senate Report 34. Section 2 vote-dilution cases have already declined sharply, dropping by half since the 1980 redistricting cycle. See Ellen D. Katz et al., *The Evolution of Section 2: Numbers and Trends*, Fig. 7 (2022), https://voting.law.umich.edu/findings/. And plaintiffs' success rate has fallen by over 40% even among that smaller set of cases. *Ibid.*

In time, the preconditions for successful Section 2 claims may become even rarer. "[A]s residential segregation (hopefully) decreases, minorities will find it harder to satisfy *Gingles*'s first prong." Travis Crum, *Reconstructing Racially Polarized Voting*, 70 Duke L.J. 261, 279 (2020) (footnote omitted). And "[w]hen people cease to vote along racial lines," plaintiffs will be unable to satisfy the second and third preconditions. Heather K. Gerken, *A Third Way for the Voting Rights Act*, 106 Colum. L. Rev. 708, 745 (2006). For now, however, "racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions; and § 2 must be interpreted to ensure that continued progress." *Strickland*, 556 U.S. at 25 (plurality opinion).

2. The district court correctly applied the Gingles *framework*

The decision below illustrates Section 2's limited but essential role. After a seven-day hearing featuring tes-

timony from 17 witnesses, the district court issued a 227-page opinion that meticulously applied the *Gingles* framework. That decision was correct, and it highlights the propriety of this Court's longstanding interpretation of Section 2.

a. With respect to the first *Gingles* precondition, Alabama did not dispute that its Black population is "sufficiently large" to be a majority in a second district. *Wisconsin Legislature*, 142 S. Ct. at 1248. Plaintiffs also submitted 11 maps illustrating ways to draw a "reasonably compact" second majority-minority district. *LULAC*, 548 U.S. at 430 (citation omitted). The district court did not assume, as Alabama now asserts, that just "because an additional majority-black district *could* be drawn, it *must* be drawn." Br. 53; see Br. 40, 65, 70-71. To the contrary, the court made detailed findings of fact establishing that the illustrative districts are reasonably compact and respect traditional districting principles, including preserving important communities of interest. MSA 155-183.

Even a brief review of the illustrative plans (App., *infra*, 3a-10a) confirms those factual findings—and Alabama does not challenge them. The plans lack the "bizarre shapes" or other "obvious irregularities," MSA 171, that this Court has found problematic in prior redistricting cases, see, *e.g.*, *Shaw* v. *Reno*, 509 U.S. 630, 635 (1993). Indeed, the four maps submitted by the *Milligan* plaintiffs' expert were "'significantly more compact'" than the Plan, and the "least compact districts" in those plans "were 'comparable to or better than the least compact districts' in both the Plan and the 2011 Congressional map." MSA 167 (citations omitted). Plaintiffs' illustrative maps likewise "perform at least

as well as the Plan" in respecting "existing political subdivisions, such as counties, cities, and towns." MSA 172.

Alabama notes (Br. 1, 66, 77) that some districts on the illustrative maps span the width of the State. But so does District 4 in the Plan. App., *infra*, 2a. Alabama also observes (Br. 1, 58, 66, 77) that the illustrative maps separate part of Mobile County from Baldwin County. But so does the eight-district map for the Alabama Board of Education, which the legislature enacted at the same time as the Plan based on the same redistricting criteria. MSA 180-181. Finally, Alabama emphasizes (Br. 47-48, 57-58, 61) that the Plan retains more district cores than the illustrative maps. But that will be true in virtually all cases because Section 2 plaintiffs must draw a new majority-minority district "that was not there before." MSA 182. This Court has never listed core retention as a redistricting principle that must be considered in the compactness analysis, see, *e.g.*, *LULAC*, 548 U.S. at 433, and for good reason: If a State's prior districting choices failed to comply with Section 2, prioritizing core retention could lock in the statutory violation.

Even if Alabama's critiques of plaintiffs' illustrative maps had greater force, the question posed by the first *Gingles* precondition is not whether the plaintiffs' illustrative district can "defeat rival compact districts" in a "'beauty contest[].'" *Bush* v. *Vera*, 517 U.S. 952, 977 (1996) (plurality opinion). Instead, it is whether the minority population could be a majority in a "reasonably compact" district. *Abbott*, 138 S. Ct. at 2331 (citation omitted). Plaintiffs' maps easily satisfy that standard.

b. As to the second and third *Gingles* preconditions, Alabama does not dispute that Black voters in the relevant areas of the State are "politically cohesive" or that

the white majority "vote[s] sufficiently as a bloc to enable it to usually defeat" Black voters' "preferred candidate[s]" in those areas. *Wisconsin Legislature*, 142 S. Ct. at 1248. Indeed, Alabama's expert agreed that voting in all the relevant districts is "clearly and intensely racially polarized," with Black voters supporting the same candidates with roughly 90% frequency and white voters typically supporting those candidates with only about 15% frequency. MSA 184-185.

c. In assessing the totality of circumstances, the district court found a "pattern of racially polarized voting that is clear, stark, and intense"; that "'Black candidates have never won election to Congress'" in white-majority districts; and that the "'overwhelming majority of African-American representatives in the Alabama Legislature come from majority-minority districts.'" MSA 188, 190-191 (citations omitted). Alabama does not challenge those findings, which speak directly to Black voters' "opportunity * * * to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b).

Alabama likewise does not dispute the State's "extensive history of repugnant racial and voting-related discrimination"; the "substantial and undeniable" disparities between Black and white Alabamians that result in part from "the state's history of official discrimination"; and the evidence that some "political campaigns (more particularly, congressional campaigns) in Alabama are characterized by overt or subtle racial appeals." MSA 192, 195-196, 201-202. Those findings underscore that this case exemplifies the "intensive racial politics" that Congress amended Section 2 to address. Senate Report 34. And the findings confirm that the district court did not—as the State incorrectly asserts

(*e.g.*, Br. 53)—reflexively order the creation of a second majority-minority district simply because such a district could be created.

Contrary to Alabama's assertions (Br. 57, 62-64), the district court did not disregard Section 2's admonition that minority groups are not entitled "to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. 10301(b). The court expressly acknowledged this Court's instruction that a minority group's representation in numbers roughly proportional to its share of the population provides "an indication that minority voters have an equal opportunity, in spite of racial polarization, to participate in the political process and to elect representatives of their choice." MSA 203 (quoting *De Grandy*, 512 U.S. at 1020). Here, however, Black Alabamians are roughly 27% of the voting-age population but "have meaningful influence in" just 14% of congressional districts. MSA 204 (citation omitted). White Alabamians, in contrast, "comprise only 63% of the population"—a 10% drop from their share when the State's first majority-minority district was created—but control "86% of congressional districts." *Ibid.*; see MSA 92.

B. This Court Should Reject Alabama's Novel Interpretation Of Section 2

Rather than contesting the district court's factual findings or seriously disputing its application of this Court's Section 2 precedents, Alabama mounts (Br. 76) a frontal assault on "§2's existing framework." The State asserts (Br. 43-46) that a districting scheme automatically complies with Section 2 so long as it is "race neutral"—by which the State appears to mean that the map accords with traditional districting principles without considering race. The State relatedly contends (Br.

47-50) that Section 2 plaintiffs submitting illustrative maps to satisfy the first *Gingles* precondition may not intentionally create majority-minority districts. Those arguments contradict Section 2's text, history, and purpose, and they would upend decades of this Court's precedent. Both as an original matter and especially given the "special force" of *stare decisis* "in the area of statutory interpretation," *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989), this Court should reject Alabama's proposed overhaul of Section 2.

1. Section 2 requires more than an absence of intentional discrimination

a. The most obvious problem with Alabama's position is that it contradicts Section 2's text. Alabama emphasizes parts of that text, noting (Br. 36-47) that Section 2 prohibits abridgment of voting rights "on account of race" and requires electoral processes to be "equally open to participation" by all. 52 U.S.C. 10301(a) and (b). The State reads that language to require "the plaintiff to establish as part of the 'totality of circumstances' that the State's enacted districts diverge from neutrally drawn redistricting plans," such that the State's plan "can be explained only by racial discrimination." Br. 43-44; see Br. 29-31, 42-47, 53-64. But that ignores the rest of the statute Congress wrote.

The current version of Section 2 does not simply prohibit intentional racial discrimination, as *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), construed its predecessor to do. Instead, Congress amended Section 2 to reject *Bolden* by specifying that a violation is also established if minority voters have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b).

In focusing solely on "race neutrality," Alabama negates the 1982 amendments by effectively reinstating the *Bolden* standard that Congress emphatically rejected. And despite the amended statute's textual focus on minority voters' opportunity to elect candidates of their choice, Alabama's proposed approach leaves no room to examine those voters' electoral preferences or prospects of success. That is a fatal error: An opportunity-to-elect standard that does not actually consider minority voters' opportunity to elect is "Hamlet without the prince." *Cooper* v. *Harris*, 137 S. Ct. 1455, 1473 n.6 (2017) (citation omitted).

Alabama's position also defies decades of this Court's precedent. Although there has been debate about the precise contours of the "balance Congress struck" in the 1982 amendments, *Gingles*, 478 U.S. at 84 (O'Connor, J., concurring in the judgment), the Court has *always* recognized that Section 2 "demands consideration of race," *Abbott*, 138 S. Ct. at 2315; see, *e.g.*, *De Grandy*, 512 U.S. at 1020 (describing Section 2's "quintessentially race-conscious calculus"). The Court recently reaffirmed that a "race-neutral" map could violate Section 2 if it "den[ied] black voters equal political opportunity." *Wisconsin Legislature*, 142 S. Ct. at 1250-1251. And one long-accepted remedy for a Section 2 violation is "drawing a majority-minority district," which requires race-conscious districting. *Cooper*, 137 S. Ct. at 1464, 1470. Interpreting Section 2 to foreclose consideration of race would be "at war with [this Court's] § 2 jurisprudence." *Id.* at 1472.

b. Alabama's position contradicts the statutory text and this Court's precedents in another way. By demanding (Br. 45) as "necessary proof in every §2 redistricting case" that plaintiffs "[e]stablish[] that the

State's enacted plan deviates from neutrally drawn plans on account of race," the State would in many cases reduce the statutorily mandated "totality of circumstances" inquiry, 52 U.S.C. 10301(b), to a total of one circumstance. But the Court has reversed decisions that "improperly reduced *Gingles*' totality-of-circumstances analysis to a single factor," *Wisconsin Legislature*, 142 S. Ct. at 1250, noting that "[a]n inflexible rule" runs "counter to the textual command of §2, that the presence or absence of a violation be assessed 'based on the totality of circumstances,'" *De Grandy*, 512 U.S. at 1018 (citation omitted).

Evidence of the presence or absence of race neutrality can be considered as part of the totality analysis. For example, such evidence—including inferences drawn from computer simulations of the kind that Alabama invokes, see pp. 28-29, *infra*—might support a contention that "the policy underlying" the enacted map is not "tenuous." *LULAC*, 548 U.S. at 426 (citation omitted); see Senate Report 29. Such evidence might also support a defendant's argument that geography, population distribution, or other factors aside from race account for a minority group's inability to elect candidates of its choice. But to "bestow on" that evidence the "determinative weight" that Alabama assigns to it would be "the antithesis of the totality test that the statute contemplates." *LULAC*, 548 U.S. at 506-507 (opinion of Roberts, C.J.).

c. No decision of this Court has applied anything like the approach the State proposes. Indeed, the State appears to acknowledge (Br. 76) that its position would upend this Court's "existing framework." For all the reasons explained above, the Court's settled framework is faithful to the statutory text, history, and purpose. At

a minimum, however, "[t]he principle of *stare decisis* has special force in respect to statutory interpretation" decisions, and Alabama does not even attempt to provide the "special justification" that is necessary to overrule this Court's statutory precedents. *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 266, 274 (2014) (citations and internal quotation marks omitted); see, *e.g.*, *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring in part). This Court has previously rejected proposals to "revise and reformulate the *Gingles* threshold inquiry that has been the baseline of [its] § 2 jurisprudence." *Strickland*, 556 U.S. at 16 (plurality opinion). It should do so again here.

The case for adhering to this Court's longstanding construction is especially strong in this context. For decades, the *Gingles* framework has been the defining feature of this Court's interpretation of Section 2—a central provision of a landmark statute. See *Brnovich*, 141 S. Ct. at 2333 n.5 (collecting cases). Congress has retained Section 2 without change throughout that time, even as it amended the VRA in other ways in response to this Court's decisions. See, *e.g.*, *Shelby County* v. *Holder*, 570 U.S. 529, 549 (2013) (discussing 2006 amendments). Indeed, the House Report accompanying the VRA amendments enacted in 2006 expressly stated that Congress "[did] not intend to disturb Section 2 or the settled jurisprudence established by the Supreme Court in [*Gingles*]" and its progeny. H.R. Rep. No. 478, 109th Cong., 2d Sess. 71-72 (2006) (House Report). No basis exists to sharply circumscribe Section 2 as the State proposes.

2. Race-neutral illustrative plans are not required to satisfy the first Gingles *precondition*

Alabama relatedly contends (Br. 47-50, 64-70) that Section 2 plaintiffs submitting illustrative maps to satisfy the first *Gingles* precondition cannot intentionally draw majority-minority districts. That argument is similarly flawed and contrary to this Court's precedent.

a. To demonstrate that a minority group is "sufficiently large and compact to constitute a majority in a[n additional] reasonably configured district," *Wisconsin Legislature*, 142 S. Ct. at 1248, plaintiffs typically submit illustrative maps prepared by experts. Unsurprisingly, experts asked to determine whether it is possible to draw another majority-minority district consider race, because that is inherent in the task this Court's precedent assigns them.

Alabama's contention that plaintiffs' illustrative maps must be "race-blind," such that any additional majority-minority district appears "by accident," Br. 48, 55 (citations omitted), is irreconcilable with the first *Gingles* precondition. Nothing in this Court's Section 2 precedents suggests, let alone requires, that plaintiffs must ignore race when trying to show that a racial minority group can constitute a majority in an additional reasonably configured district. Nor would such a requirement make any sense.

b. Alabama's principal response (*e.g.*, Br. 50) is that allowing experts to intentionally draw majority-minority districts to satisfy the first *Gingles* precondition would authorize "racial gerrymanders" that violate the Equal Protection Clause. That argument rests on two fundamental errors.

i. First, the State misapprehends the standard for racial gerrymandering. Such a constitutional violation

occurs when (i) "racial considerations predominate[] over others" in districting, and (ii) the State's justification cannot "withstand strict scrutiny." *Cooper*, 137 S. Ct. at 1464. But the Court has long made clear that "race consciousness" does not alone trigger strict scrutiny or amount to "impermissible race discrimination." *Shaw*, 509 U.S. at 646. Nor could it. A state "legislature always is *aware* of race when it draws district lines," *ibid.*, but strict scrutiny applies only if race predominates over other considerations. And predominance occurs only where "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Miller* v. *Johnson*, 515 U.S. 900, 913 (1995).

Thus, the intentional creation of a majority-minority district does not, by itself, establish predominance. *Vera*, 517 U.S. at 958-959 (plurality opinion). If a State relies on multiple criteria and race does not overwhelm the line-drawing process, then race will not necessarily predominate. See, *e.g.*, *Bethune-Hill* v. *Virginia State Bd. of Elections*, 137 S. Ct. 788, 800 (2017) (declining to find racial predominance in districts where the legislature employed a 55% Black voting-age-population target and instead remanding for a predominance assessment). Here, for example, the district court found that race did *not* predominate in the drawing of plaintiffs' illustrative maps when considering all factors motivating the district lines. MSA 204-205; see MSA 234-235. That finding "warrants significant deference on appeal to this Court." *Cooper*, 137 S. Ct. at 1464.

Even if there were a finding of racial predominance, moreover, that would not mean that a State would violate the Equal Protection Clause if it adopted a plaintiff's illustrative map. This Court's "precedents hold

that a State can satisfy strict scrutiny if it proves that its race-based sorting of voters is narrowly tailored to comply with the VRA." *Wisconsin Legislature*, 142 S. Ct. at 1248. The Court has relied on that understanding in finding that a portion of a State's districting plan satisfied strict scrutiny. *Bethune-Hill*, 137 S. Ct. at 800-801. And Alabama's own redistricting criteria recognize that race "may predominate over race-neutral districting criteria * * * when there is good reason to believe that race must be used in order to satisfy" the VRA. MSA 33.

Alabama now insists (Br. 75) that compliance with the VRA is not a compelling interest. But like much of the State's presentation, that argument ignores that Section 2 authorizes a remedy for vote dilution only as a last resort—when a plaintiff proves (among other things) that racial bloc voting by the majority denies minorities equal electoral opportunities. By definition, then, any race-conscious districting occurs only when racial conditions have denied minority voters opportunities they would otherwise enjoy. Cf. Senate Report 34 ("To suggest that it is the results test, carefully applied by the courts, which is responsible for those instances of intensive racial politics, is like saying that it is the doctor's thermometer which causes high fever.").

As Chief Justice Rehnquist explained for the Court, "[a] State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions." *Shaw* v. *Hunt*, 517 U.S. 899, 909 (1996) (*Shaw II*). Section 2 targets "vote dilution as a consequence of racial bloc voting," which is a concrete manifestation of racial discrimination. *Vera*, 517 U.S. at 982 (plurality opinion). And by limiting relief to proven cases of racial bloc

voting that—in the totality of circumstances—denies equal electoral opportunities, the *Gingles* framework ensures compliance with this Court's requirement that States "identify that discrimination, public or private, with some specificity before they may use race-conscious relief." *Shaw II*, 517 U.S. at 909 (citation omitted).

ii. Second, Alabama's position rests on the faulty premise—made explicit on the first page of its brief—that Section 2 "requires" a defendant to adopt the illustrative plan offered by the plaintiff to satisfy the first *Gingles* precondition. Br. 1-2; see, *e.g.*, Br. 28, 30-31, 42, 47-50, 53, 65. But "[i]llustrative maps are just that—illustrative." *Robinson* v. *Ardoin*, 37 F.4th 208, 223 (5th Cir. 2022) (per curiam), cert. granted, No. 21-1596 (June 28, 2022). Even if a Section 2 violation is proven, the defendant need not adopt one of those maps; instead, it has wide latitude to adopt any map that remedies the violation. See MSA 221-223.

In fact, a Section 2 remedy may not require a majority-minority district at all. Section 2 may be satisfied by "'crossover'" districts, "in which members of the majority help a 'large enough' minority to elect its candidate of choice." *Cooper*, 137 S. Ct. at 1470 (citation omitted). Here, for example, the *Singleton* plaintiffs have put forward a plan that would create two asserted crossover districts without splitting a single county. MSA 37; see App., *infra*, 11a (reproducing that plan).

Of course, if a State could show that no remedy for an alleged Section 2 violation would be consistent with the Constitution, that would be a reason to deny relief. But given States' broad remedial flexibility, there is no sound reason to inject a full-blown Equal Protection Clause analysis into the first *Gingles* precondition. And

doing so would undermine that precondition's function as a relatively straightforward threshold screen that provides "clear lines for courts and legislatures alike." *Strickland*, 556 U.S. at 17 (plurality opinion).

3. Computer simulations are neither necessary nor sufficient to establish a Section 2 violation

In urging that Section 2 imposes a "race-neutrality" standard—and that plaintiffs fail to meet it—Alabama relies heavily (Br. 1, 54-56) on computer simulations. As noted above, the results of such simulations can be considered as part of the totality-of-circumstances analysis. But because the absence of intentional discrimination is not the statutory standard, such simulations are neither necessary nor sufficient to establish a Section 2 violation. See pp. 20-22, *supra*. The Court should reject the State's invitation to give dispositive significance to that novel and untested form of evidence.

As a threshold matter, computer simulations are expensive and technically complicated. Only a small cadre of university researchers have the resources and expertise to run such simulations. See, *e.g.*, Jowei Chen & Nicholas O. Stephanopoulos, *The Race-Blind Future of Voting Rights*, 130 Yale L.J. 862, 882-884 (2021). A standard that demanded reliance on such simulations in every Section 2 case could pose insuperable burdens for plaintiffs and defendants alike—particularly in litigation involving local governments, which is more common than challenges to statewide bodies. Katz Fig. 10.

In addition, although some courts have explored simulations as a thought experiment, see, *e.g.*, *Gonzalez* v. *City of Aurora*, 535 F.3d 594, 598-600 (7th Cir. 2008), the concept is untested in practice. Alabama does not even attempt to answer the thorny questions that would arise if courts tried to construct an administrable legal

standard based on complex simulations reflecting contestable inputs that at best imperfectly capture the considerations that inform real-world districting. Cf. *Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2505-2506 (2019). For example: How many simulations must an expert run? What algorithm should be used? How many simulation results must show the number of majority-minority districts as plaintiffs propose? Is one enough? Must it occur "at least 50% of the time"? *Gonzalez*, 535 F.3d at 600. Alabama does not say, and nothing in Section 2 supplies the answers.

This case illustrates the problem. Alabama relies (Br. 23, 55) on an extra-record study in which a simulation yielded no maps with two majority-minority districts. But as the State acknowledges (Br. 23 n.5), that study used 2010 (not 2020) census data, and only considered three redistricting criteria (not including maintaining communities of interest such as the Black Belt). Moon Duchin & Douglas M. Spencer, *Models, Race, and the Law*, 130 Yale L.J. F. 744, 763 (2021). Alabama also highlights (Br. 22-23, 55) the 30,000 simulated maps generated by one of plaintiffs' experts, none of which included two majority-minority districts. But that simulation sought to incorporate only some of the State's official redistricting criteria (again excluding maintaining communities of interest). And the simulation results that were designed to be race-neutral did not produce any map with even *one* majority-minority district. Supp. J.A. 61. Under that simulation and Alabama's proposed race-neutrality standard, Black voters in Alabama could lose their only majority-minority district—with the result that the State's stark racial bloc voting would wholly deprive those voters of the opportunity to elect their preferred candidates.

C. Section 2 Applies To Single-Member Districting

In the alternative, Alabama asserts (Br. 50-53) that Section 2 is inapplicable to single-member districting. Like the State's principal submission, that contention is both wrong as a matter of first principles and contrary to decades of precedent.

1. Section 2 applies to any "voting qualification or prerequisite to voting or standard, practice, or procedure." 52 U.S.C. 10301(a). Alabama acknowledges that a "'procedure'" includes "the 'manner or method of proceeding in a process or course of action.'" Br. 51 (brackets and citation omitted). As a matter of ordinary language, the "manner or method of proceeding" in voting includes determining the districts in which voters cast their ballots. Accordingly, as this Court held in interpreting the parallel text of VRA Section 5, "changes in the composition of the electorate that may vote for candidates for a given office" constitute "changes in election procedures." *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 502-503 (1992) (interpreting "standard, practice, or procedure" in 52 U.S.C. 10304(b)).

Congress and this Court have repeatedly recognized that Section 2 applies to districting. The *White* standard codified in the 1982 amendments addressed a challenge to "multimember districts." 412 U.S. at 759. *Gingles* applied Section 2 to multimember districts. 478 U.S. at 46-51. And the Court applied *Gingles*'s construction of Section 2 to "a single-member districting scheme," recognizing in a unanimous opinion by Justice Scalia that the "reasons for the" *Gingles* preconditions "[c]ertainly * * * apply" to single-member districting. *Growe*, 507 U.S. at 40; see *Voinovich*, 507 U.S. at 153.

Congress acted against the backdrop of that settled judicial construction when it amended the VRA in 2006.

As noted above, Congress preserved Section 2 without change, and the House Report stated that Congress was maintaining "the settled jurisprudence established by the Supreme Court in *Thornburg v.* [*Gingles*], *Growe v. Emison*, and *Voinovich v. Quilter*." House Report 71-72 (footnotes omitted). Principles of statutory *stare decisis* thus strongly support the Court's continuing application of Section 2 to single-member districts.

2. Alabama's perfunctory discussion of *stare decisis* (Br. 52-53) does not acknowledge the enhanced precedential force of statutory-interpretation decisions, and the cursory rationales the State offers for overruling decades of precedent fall far short of the necessary special justification. Alabama also fails to offer any textual basis for its apparent position that Section 2 applies to multimember but not single-member districting.

The State instead relies principally (Br. 51-52) on Justice Thomas's separate opinion in *Holder* v. *Hall*, 512 U.S. 874 (1994). But unlike the State, Justice Thomas would have held Section 2 entirely inapplicable to vote-dilution claims, even in multimember districts. *Id.* at 892. That interpretation is inconsistent with Section 2's text, which incorporates—almost verbatim—the vote-dilution standard from *White*. As Justice Thomas acknowledged, moreover, his interpretation would have required "overruling the interpretation of § 2 set out in *Gingles*," *id.* at 944, which this Court has repeatedly applied to vote-dilution claims over the ensuing three decades, *Brnovich*, 141 S. Ct. at 2333 n.5.

D. Section 2 Is Constitutional As Applied To Single-Member Districting

Finally, Alabama claims (Br. 71-79) that Section 2 as applied to single-member districting violates the Constitution. That sweeping argument is outside the

question this Court directed the parties to address, which asks whether Alabama's redistricting plan "violated section 2." 142 S. Ct. 1357. The argument is also profoundly mistaken.

1. The Fifteenth Amendment provides that Congress "shall have power to enforce" the Amendment "by appropriate legislation." Congress is "chiefly responsible for implementing the rights created" by the Amendment, and it "may use any rational means to" do so. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324, 326 (1966); accord *Shelby County*, 570 U.S. at 555-556; Ala. Br. 72. Congress's enforcement power is not limited to "abrogating only those state laws that the judicial branch [is] prepared to adjudge unconstitutional." *Katzenbach* v. *Morgan*, 384 U.S. 641, 649 (1966). "[L]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if * * * it prohibits conduct which is not itself unconstitutional." *Lopez* v. *Monterey County*, 525 U.S. 266, 282-283 (1999) (citation omitted).

Thus, while Alabama asserts (Br. 73) that the "absence of racially discriminatory intent" must "be a relevant consideration" in determining whether Section 2 falls within Congress's Fifteenth Amendment enforcement power, the State stops short of contending that Congress can forbid only *purposeful* racial discrimination. Any such argument would fail given this Court's holding that Congress may "outlaw voting practices that are discriminatory *in effect*." *City of Rome* v. *United States*, 446 U.S. 156, 173 (1980) (emphasis added); see *Mississippi Republican Exec. Comm.* v. *Brooks*, 469 U.S. 1002 (1984) (summarily affirming decision upholding the constitutionality of Section 2's results test in a redistricting case).

Alabama instead contends (Br. 74) that Section 2 as applied here exceeds Congress's Fifteenth Amendment enforcement power because it "require[s] a racial gerrymander." As shown above, however, the district court did not construe Section 2 to require any such result. See p. 25, *supra*. The court instead held that Section 2 requires relief only where a plaintiff satisfies the *Gingles* preconditions *and* the totality-of-circumstances test. MSA 139-193. That rigorous standard is well within Congress's power to "use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *South Carolina*, 383 U.S. at 324; cf. *Shelby County*, 570 U.S. at 556 (invalidating VRA provision after finding that Congress's justification was "irrational"); *id.* at 557 ("Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2.").

2. Alabama also asserts (Br. 75-80) that compliance with Section 2 here could compel it to violate the Equal Protection Clause. But as shown above, that is wrong. See pp. 24-28, *supra*. Consideration of race in districting does not trigger strict scrutiny unless race predominates over other considerations and functions as "the legislature's dominant and controlling rationale in drawing its district lines." *Miller*, 515 U.S. at 913. And even if strict scrutiny applies, majority-minority districts drawn to comply with "a proper interpretation of" Section 2 are the least restrictive means of furthering the exceptionally compelling interest in eliminating the discriminatory effects of past and present racial distortion of the political process. *Cooper*, 137 S. Ct. at 1472. It would be extraordinary to hold that the Fourteenth Amendment, which itself empowers Congress to combat racial discrimination, disables Congress from

adopting Section 2's limited measures to "ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions." *Strickland*, 556 U.S. at 25 (plurality opinion).

The consequences of holding Section 2 unconstitutional as applied to single-member districting would be striking. If Alabama's position were accepted, the State could not only deny Black voters a second congressional district where they would have an opportunity to elect their preferred candidates, but also could eliminate the only such district that exists today. See p. 29, *supra*. Indeed, under Alabama's understanding of the Equal Protection Clause, the State arguably could be *required* to dismantle that district, which was created in response to a Section 2 claim and reflects race-conscious districting. MSA 30-31, 171.

Eliminating that district would almost certainly return Alabama to an all-white congressional delegation, as "'no Black candidate has ever won in a majority-white congressional district' in Alabama." MSA 75 (citation omitted). Similar results would likely follow in other States that have long relied on majority-minority districts created to comply with Section 2. See, *e.g.*, *Robinson*, 37 F.4th at 223 (discussing evidence that computer simulations were "unable to produce any black-majority districts" in Louisiana); Chen & Stephanopoulos 922 (recognizing similarly "dramatic implications" in other States). In practice, then, substantial minority populations in multiple States would likely lose their ability to elect representatives to Congress. And a similar pattern could play out in state legislatures, unwinding decades of racial progress. The Constitution does not compel that devastating setback to our Nation's effort to achieve equal electoral opportunities.

CONCLUSION

The preliminary injunctions should be affirmed.

Respectfully submitted.

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JULY 2022

APPENDIX

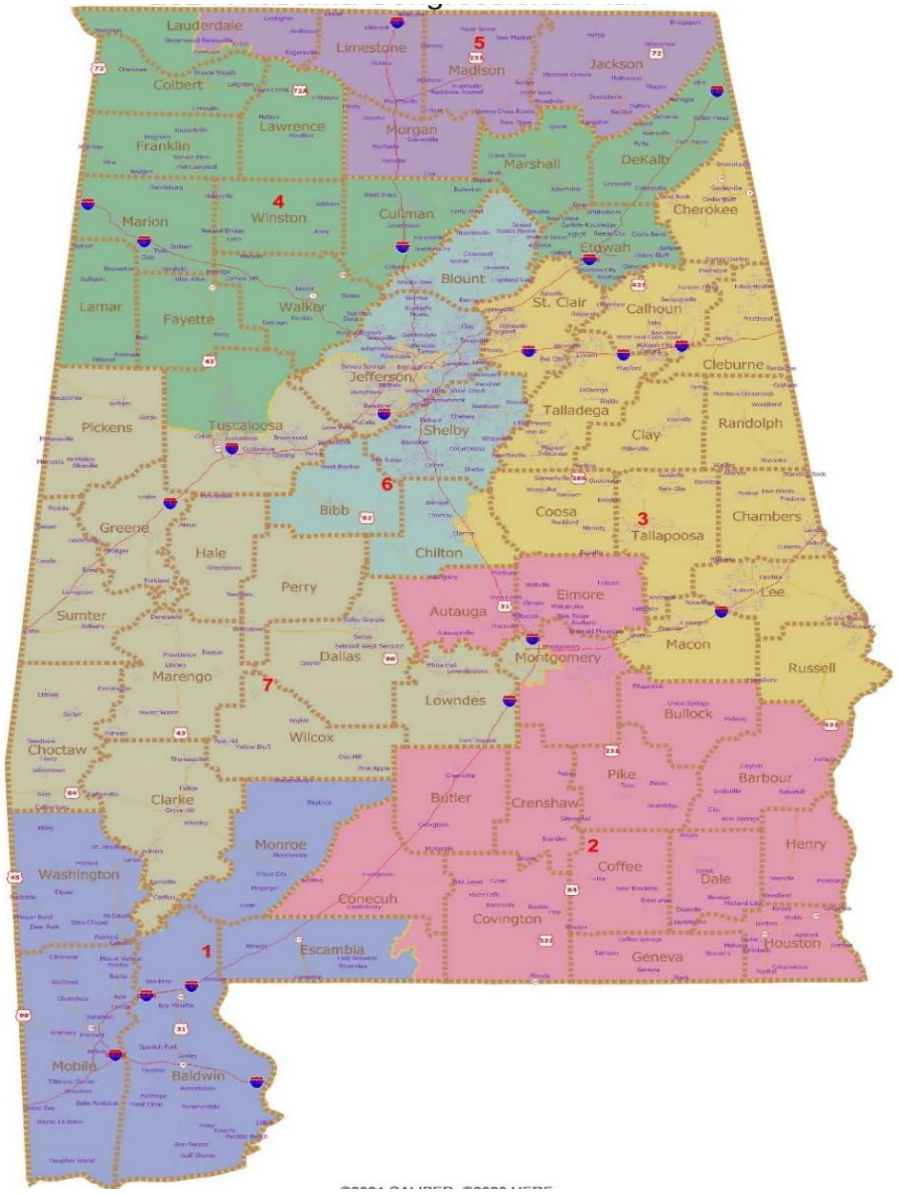
52 U.S.C. 10301 provides:

Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

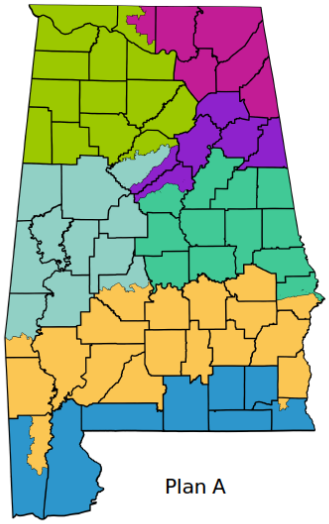
(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

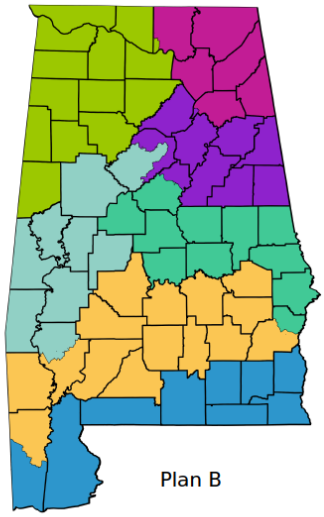
(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

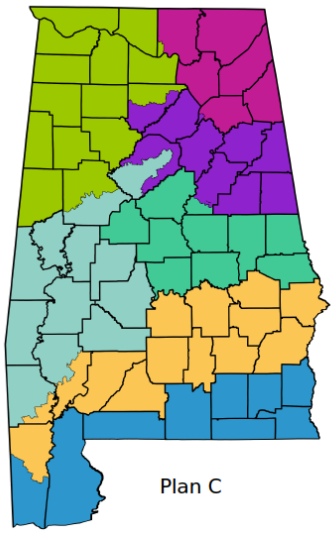
2021 Alabama Congressional Plan
(21A375 Appl. App. 35)

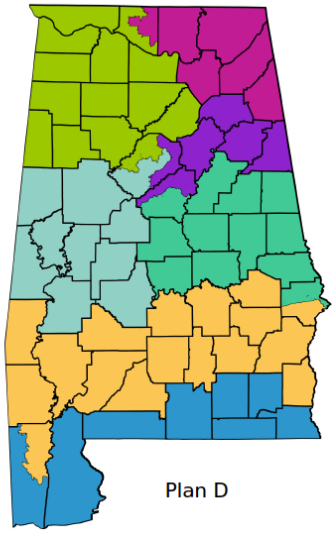


Illustrative Plans Submitted by *Milligan* Plaintiffs
(21A375 Appl. App. 62)

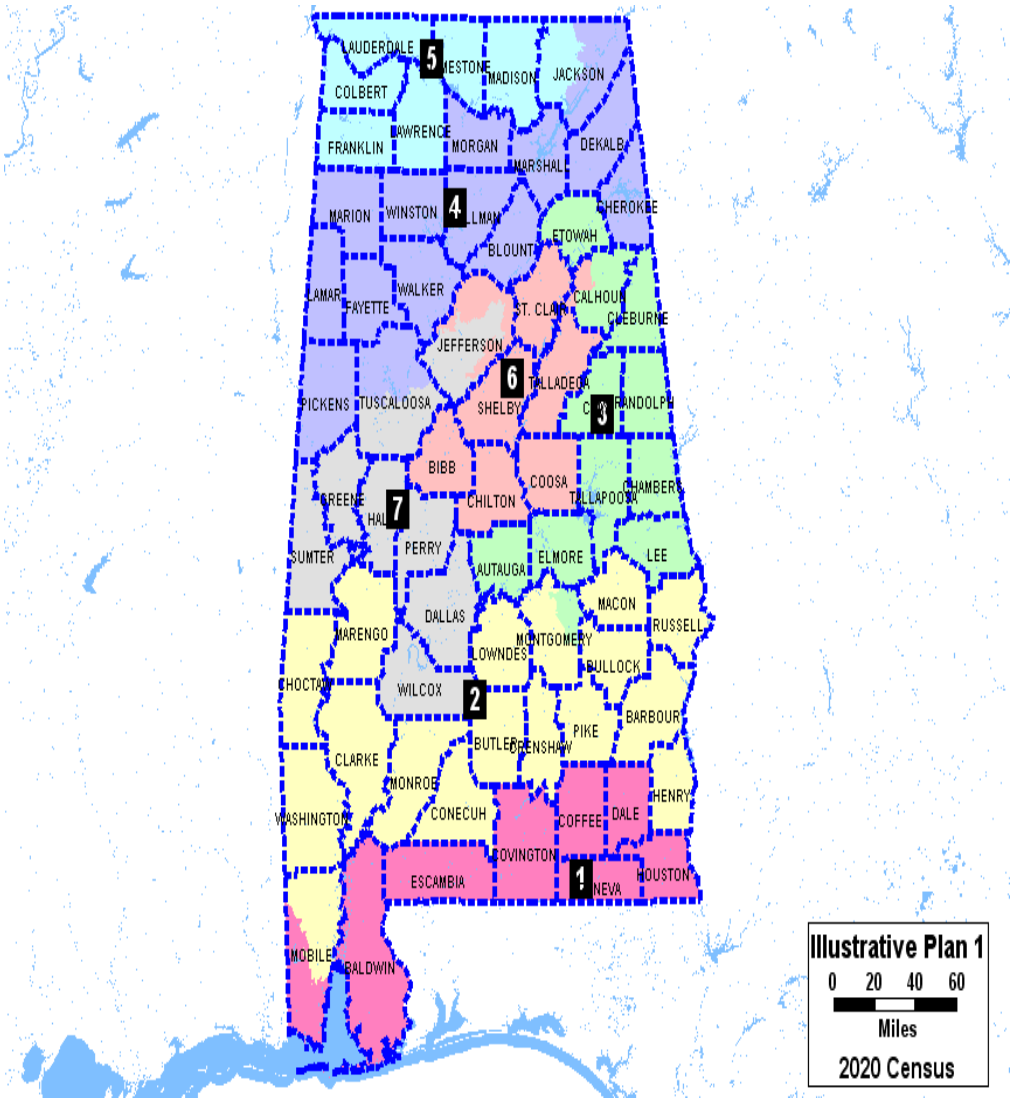




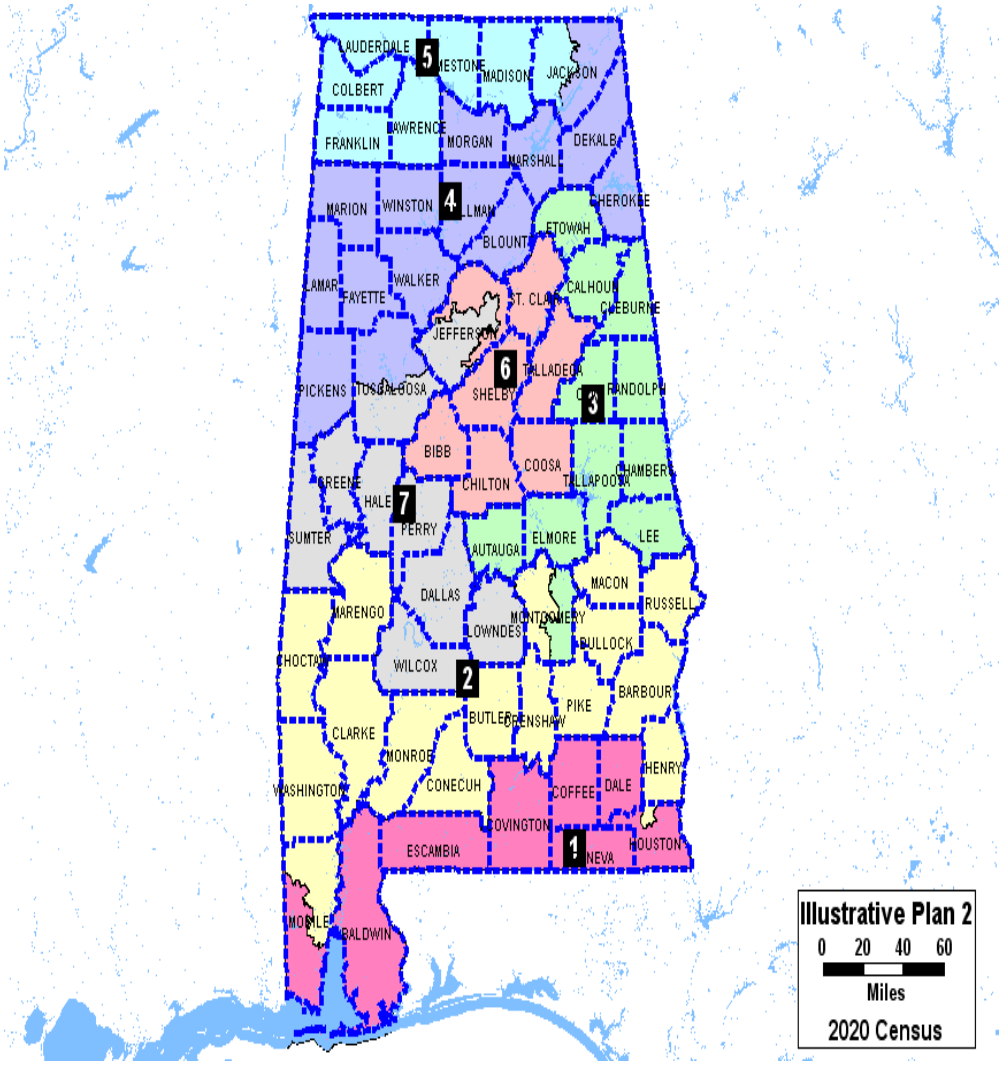




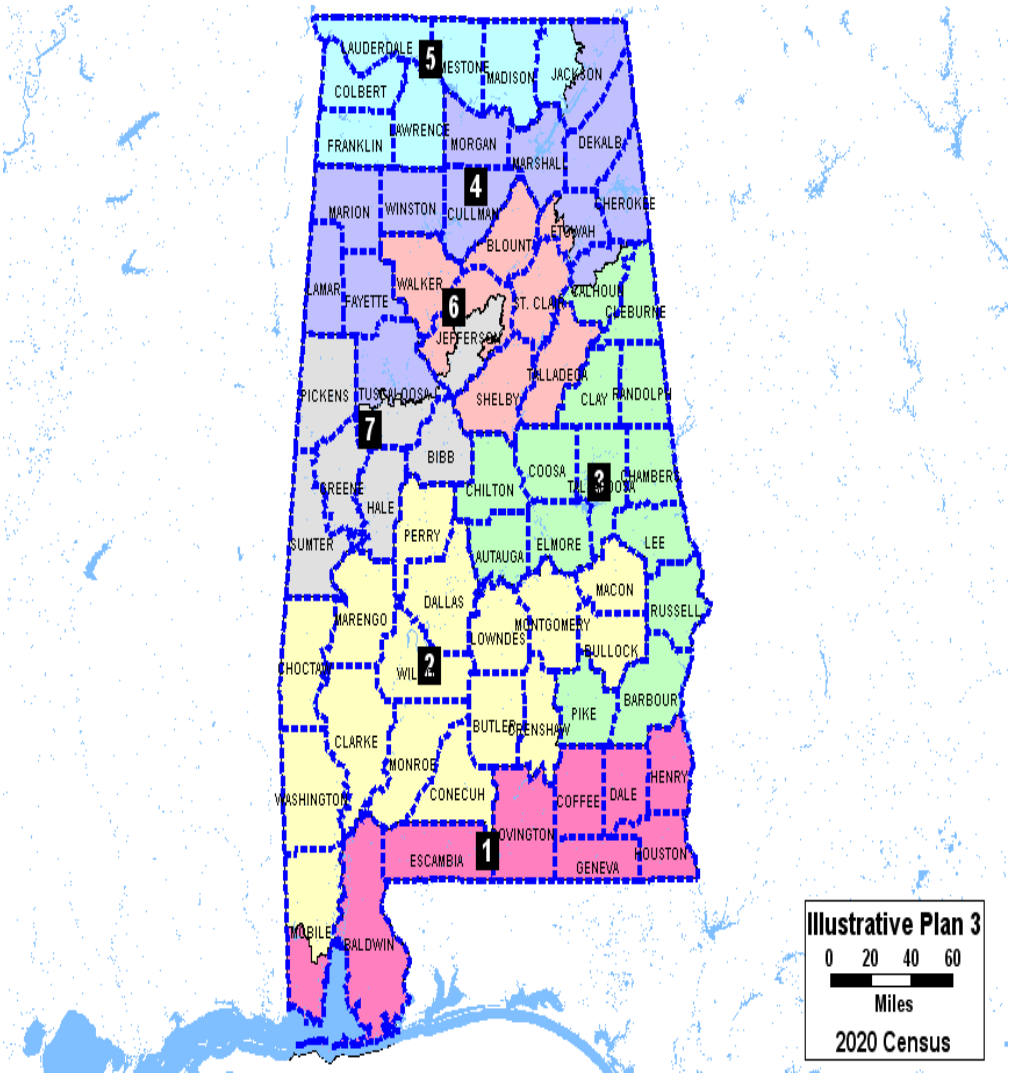
Illustrative Plan 1 Submitted by *Caster* Plaintiffs
(Supp. J.A. 99)



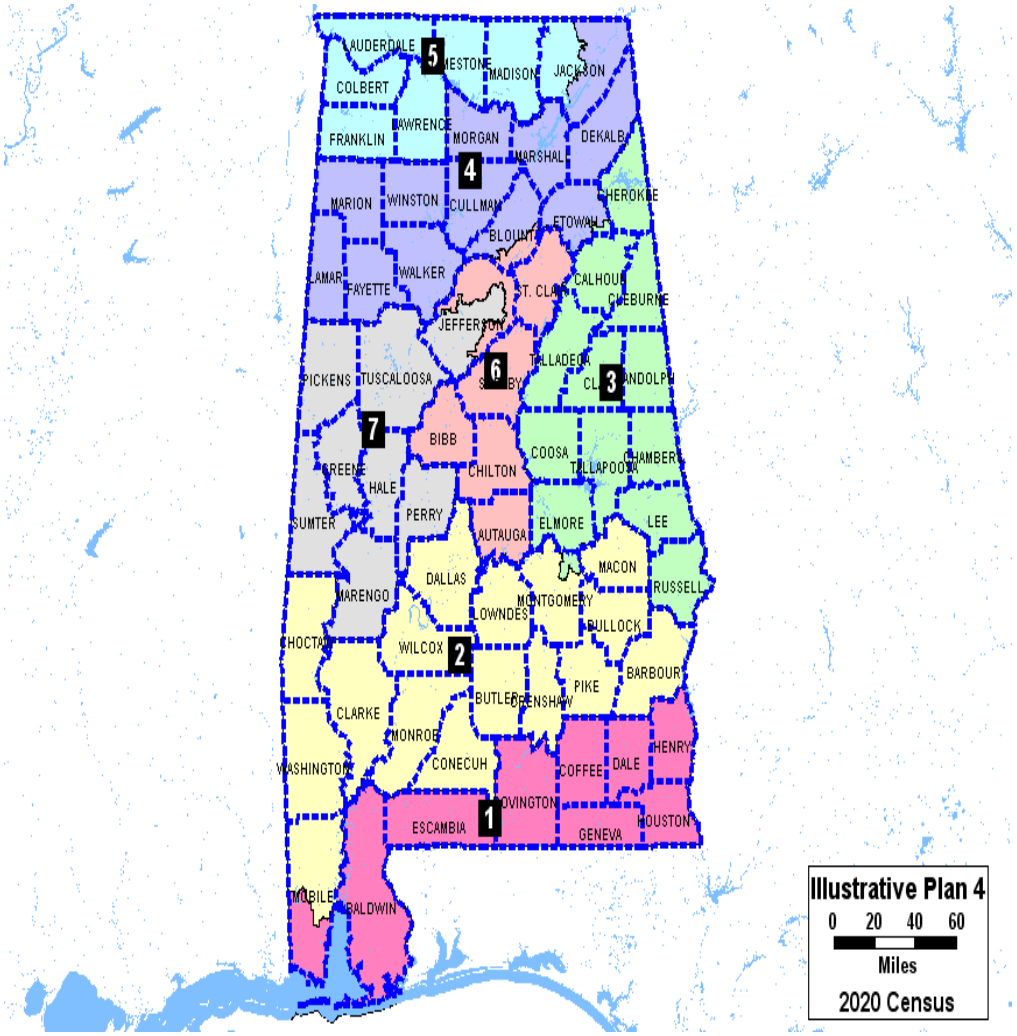
Illustrative Plan 2 Submitted by *Caster* Plaintiffs
(Supp. J.A. 101)



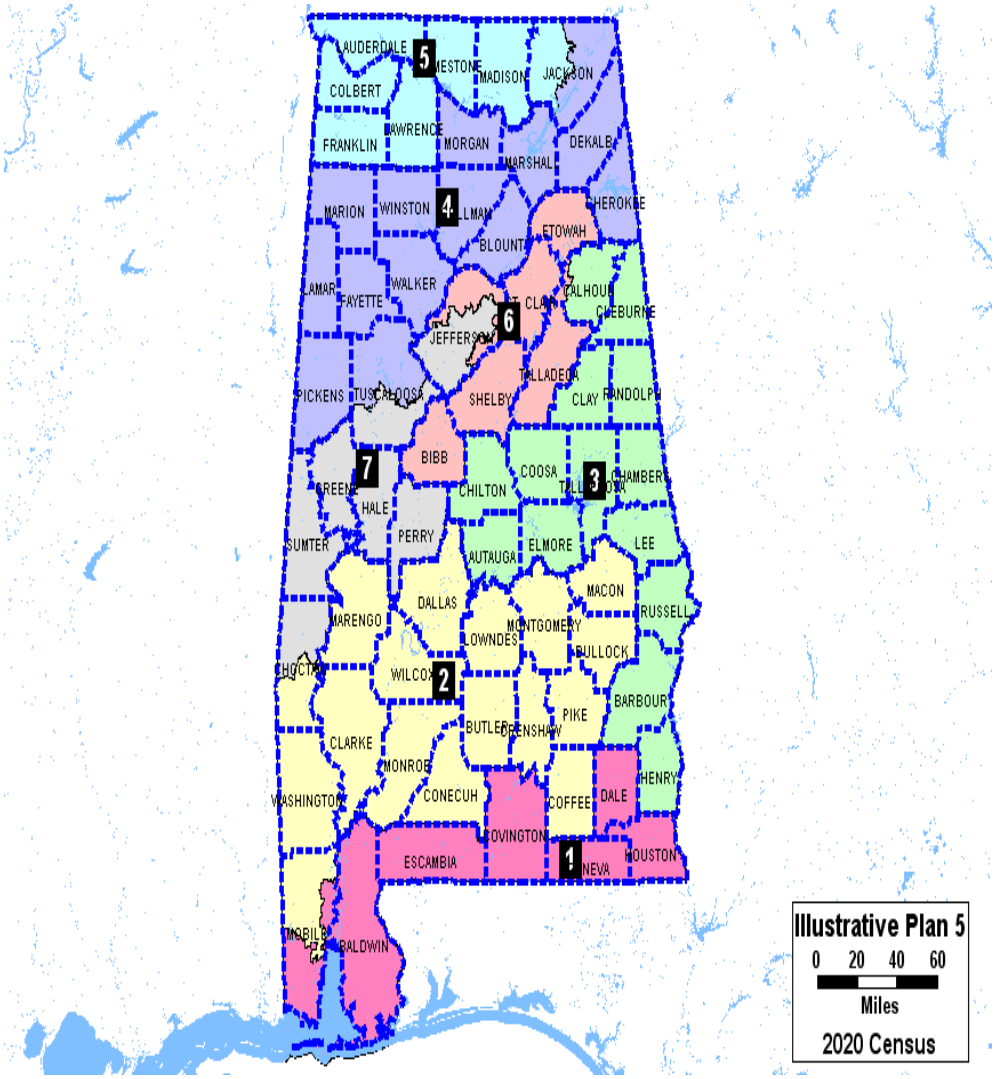
Illustrative Plan 3 Submitted by *Caster* Plaintiffs
(Supp. J.A. 103)



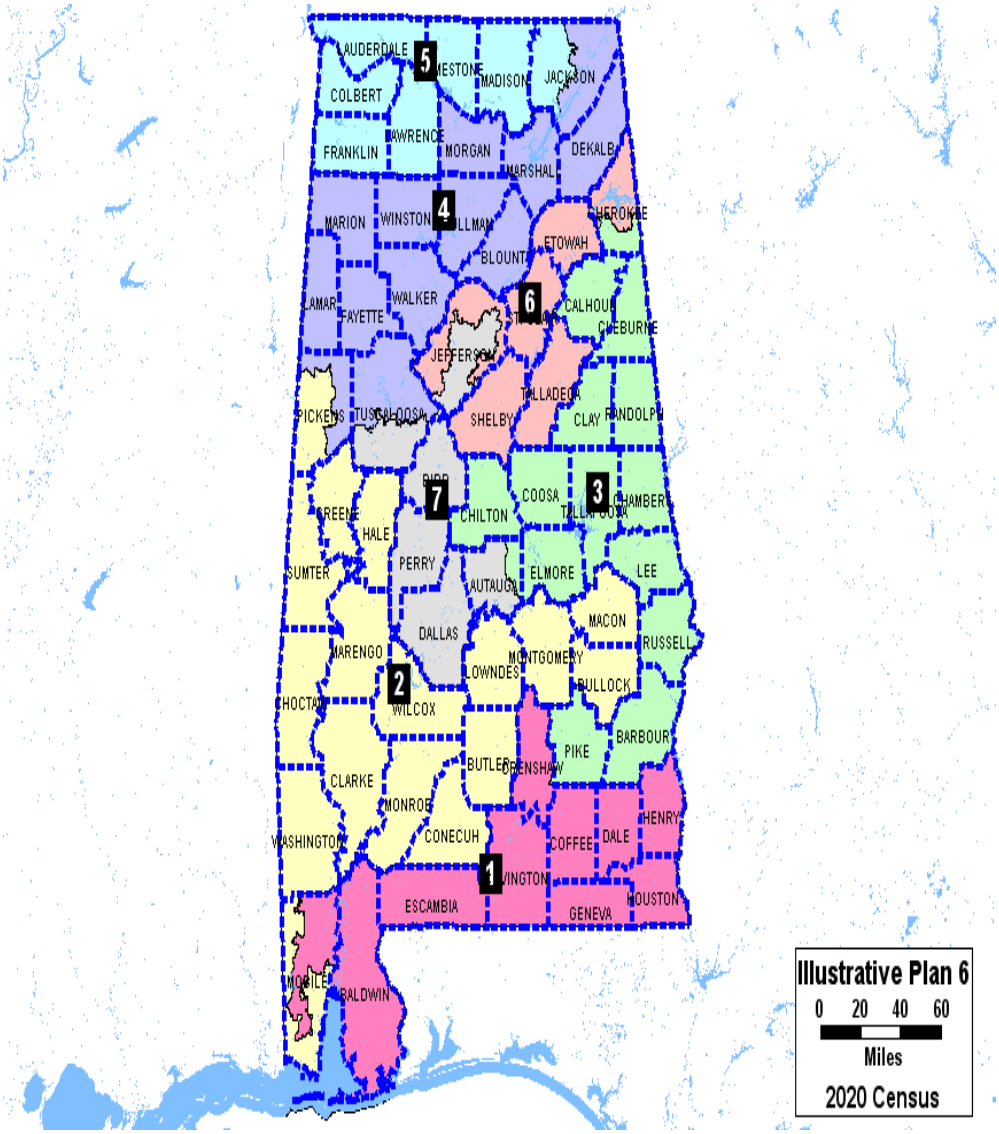
Illustrative Plan 4 Submitted by *Caster* Plaintiffs
(Supp. J.A. 105)



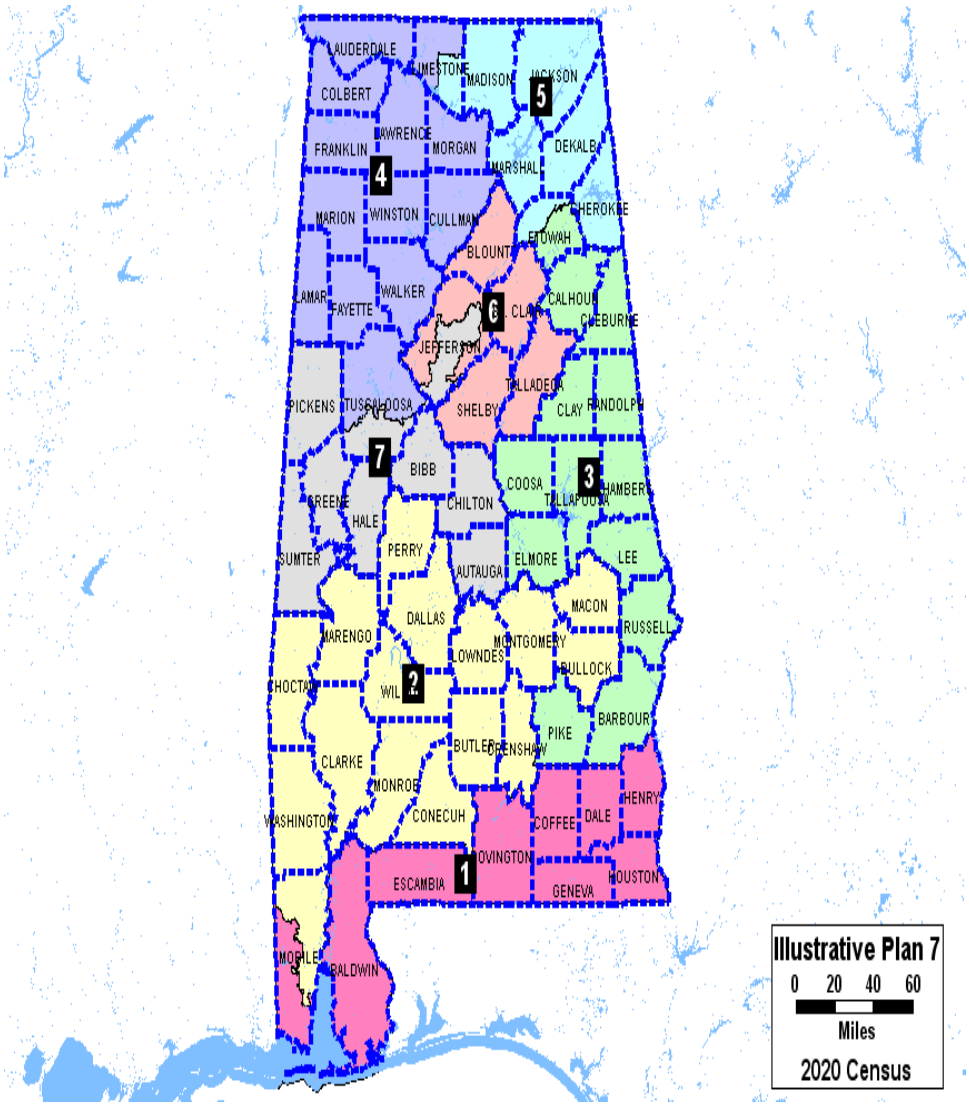
Illustrative Plan 5 Submitted by *Caster* Plaintiffs
(Supp. J.A. 107)



Illustrative Plan 6 Submitted by *Caster* Plaintiffs
(Supp. J.A. 109)



Illustrative Plan 7 Submitted by *Caster* Plaintiffs
(Supp. J.A. 149)



Whole-County Plan Submitted by *Singleton* Plaintiffs
(N.D. Ala. No. 21-cv-1291, Doc. 1, at 27)

District	Pop 2020	% DEV	% WH 18 +	% BL 18 +	% LT 18 +	% WH RV	% BL RV	% LT RV	% Biden	% Trump
1	720903	0.44%	67.90%	23.73%	3.25%	71.93%	24.62%	0.98%	34.69%	65.31%
2	709514	-1.16%	66.01%	25.38%	3.90%	70.05%	26.15%	1.26%	33.12%	66.88%
3	715486	-0.32%	75.21%	16.64%	4.13%	79.99%	16.84%	1.11%	27.29%	72.71%
4	712593	-0.78%	84.22%	5.70%	6.15%	90.92%	5.90%	1.73%	16.05%	83.95%
5	727208	1.30%	72.17%	17.14%	4.98%	77.32%	17.65%	1.72%	36.77%	63.23%
6	720310	0.36%	51.37%	40.55%	4.13%	54.17%	42.10%	0.95%	56.02%	43.98%
7	718527	0.11%	47.24%	45.82%	3.26%	47.52%	49.91%	0.58%	54.40%	45.60%
Totals	5024279		66.25%	25.06%	4.26%	70.29%	26.16%	1.19%	57.09%	42.91%