Nos. 21-1086 & 21-1087

IN THE

Supreme Court of the United States

JOHN H. MERRILL, *et al.*,

Appellants,

v.

EVAN MILLIGAN, *et al.*,

Appellees.

JOHN H. MERRILL, *et al.*,

Petitioners,

v.

MARCUS CASTER, *et al.*,

Respondents.

On Appeal from and Writ of Certiorari to the
United States District Court
for the Northern District of Alabama

BRIEF OF *AMICUS CURIAE* CAMPAIGN LEGAL CENTER IN SUPPORT OF APPELLEES AND RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Campaign Legal Center ("CLC") is a leading nonpartisan election law nonprofit. CLC develops policy on a range of democracy issues. CLC aims to protect Americans' voting rights and secure equal access for historically disenfranchised racial minorities under the Constitution and the Voting Rights Act ("VRA"). CLC regularly litigates Section 2 vote dilution cases. CLC's attorneys have decades of expertise with the VRA. CLC has an interest in ensuring that Section 2, a critical tool in *enforcing* the Fourteenth Amendment's equal protection guarantee, is not undermined by the distorted arguments Appellants advance here.

SUMMARY OF ARGUMENT

Section 2 presents a limited but necessary constraint on jurisdictions, requiring that redistricting plans may not "abridge[]" minority voters' equal "opportunity … to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301. Since the Court adopted the framework for Section 2 vote dilution claims in *Thornburg v. Gingles*, 478 U.S. 30 (1984), it has developed several additional rules limiting the scope of liability while expanding the available remedies. These standards make it harder for plaintiffs to

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[1] Under Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae*, their members, or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. Appellants and Appellees have consented to this filing.

establish a Section 2 violation but easier for jurisdictions to devise a resolution once established.

Appellants, however, contort these settled rules to put them at odds with each other. They argue that the threshold evidentiary step requiring *plaintiffs* to present illustrative districts in which minority voters could control electoral outcomes somehow makes *jurisdictions* focus too much on race when remedying a proven Section 2 violation.

The statute demands nothing of the sort for three reasons. *First*, Section 2 plaintiffs' obligation to provide illustrative maps containing majority-minority districts—mandated by the Court's decisions as an evidentiary precondition—is a limit on liability rather than an imposition on states. It is one requirement among several that plaintiffs must satisfy, and it does not create problems under the Equal Protection Clause. *Second*, states are in no way constrained to resolve a Section 2 violation with an illustrative plan that plaintiffs introduce in evidence. They instead have broad discretion to timely remedy the violation. The *Singleton* Plaintiffs offer one example. *Amicus* offers two more in this brief—maps that remedy the Section 2 violation while better respecting Alabama's redistricting criteria than does the enacted plan. *Third*, many Section 2 violations can be corrected through remedies that have nothing to do with redistricting or race. To make their sweeping attack on Section 2, Appellants simply ignore the many other contexts in which claims arise and disregard that lower courts and opinions of this Court have endorsed alternative remedies to Section 2

violations.

Accepting Appellants' flawed understanding of Section 2 would contradict the statute's text and longstanding practice, and require effectively "overruling a sizable number of this Court's precedents." *Holder v. Hall*, 512 U.S. 874, 965 (1994) (Stevens, J., dissenting) (collecting cases). This includes not just *Thornburg v. Gingles*—the "seminal § 2 vote-dilution case," *Brnovich v. DNC*, 141 S. Ct. 2321, 2337 (2021)—but numerous recent cases reaffirming the contours of Section 2 and its relationship with the Equal Protection Clause. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017). Appellants' invitation to reimagine Section 2 undermines this indispensable "apparatus chosen by Congress to effectuate this Nation's commitment 'to confront its conscience and fulfill the guarantee of the Constitution' with respect to equality in voting," which—far from a violation of the Constitution—is "necessary and appropriate to ensure full protection of the Fourteenth and Fifteenth Amendments rights." *Bush v. Vera*, 517 U.S. 952, 992 (1996) (O'Connor, J., concurring) (quotations omitted).

Not even a decade ago, this Court reinforced that Section 2 would keep the promise of the VRA alive by providing a "permanent, ... nationwide" protection that "is available in appropriate cases to block voting laws from going into effect." *Shelby County v. Holder*, 570 U.S. 529, 537 (2013). Now, the Court should make good on that promise by rejecting Appellants' attempt to put an end to the VRA.

ARGUMENT

Appellants distort this Court's Section 2 jurisprudence to advance their argument on appeal. Two stages in a Section 2 vote dilution case involve generating alternative maps. The first is one of Section 2's evidentiary preconditions, often called "*Gingles* 1": plaintiffs must identify an alternative illustrative map in which a sufficiently numerous and compact group of minority voters could constitute a majority of voters in a reasonable district. *Gingles* 1 *limits* Section 2 liability to circumstances in which minority voters are so packed or cracked among existing districts that a different configuration would allow them, *without a single vote* from non-minority voters, to elect additional candidates of their choice in more districts than the enacted map allows. When combined with a showing that there is a large degree of racial polarization in voting in the jurisdiction, the presentation of such a demonstration district is a red flag that minority voters may be underrepresented, whether intentionally or not. But the liability determination begins, not ends, with that showing; plaintiffs must meet an exacting test to demonstrate a violation.

The second stage involving alternative maps is the remedy. If liability is established, the *jurisdiction* has the first chance to offer a solution. Often, this solution is a remedial map of alternative single-member districts. But the government has substantial flexibility to resolve most Section 2 violations through other means as well—including cumulative or ranked-choice voting systems that involve zero consideration

of race.

The Court's carefully calibrated standards for proving Section 2 liability and adopting a remedy provide an already limited, but nonetheless crucial, means of addressing racial vote dilution. And they have worked in this case. CLC shows below, *see infra* Part II, that Alabama could have avoided liability—and can remedy the finding of liability—by drawing two crossover districts that offend none of the districting priorities it trumpets in its brief. Indeed, it can do so while *improving* on those priorities. The Court should reject Appellants' invitation to upend its Section 2 precedent.

I. *Gingles* 1 requires an illustrative map that is consistent with constitutional consideration of race.

To establish a Section 2 vote dilution claim, plaintiffs must present convincing evidence that the three liability preconditions are satisfied and that the challenged practice is discriminatory under the totality of circumstances. *Wisc. Legis. v. Wisc. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022). The first precondition, *Gingles* 1, is the only element at issue here. *Gingles* 1 is a bright-line requirement interpreted from Section 2's text that poses no constitutional concerns.

A. *Gingles* 1 identifies the potential of racial vote dilution and nothing more.

The first *Gingles* precondition, if satisfied, raises an inference of vote dilution in the State's plan by demonstrating an objective, potential alternative

district. Section 2 prohibits voting practices that "result in a denial or abridgment of the right of any citizen … to vote," such that they have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" because of their "race or color, [or language-minority status]." 52 U.S.C. § 10301.

To assess whether a minority voter has an equal "opportunity . . . to elect" their preferred candidate, 52 U.S.C. § 10301(b), that opportunity must be measured "in relation to" the majority group's opportunity. *Gingles*, 478 U.S. at 50 n.17. This Court has interpreted Section 2's text strictly, reasoning that the phrase "to elect" requires a showing that minority voters "based on their own votes and without assistance from others" would have additional opportunity to elect candidates if different—though similarly compact—district configurations had been drawn. *Bartlett v. Strickland*, 556 U.S. 1, 15 (2009) (plurality opinion).

When the illustrative map "create[s] more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice," *LULAC v. Perry*, 548 U.S. 399, 430 (2006), a plaintiff satisfies the threshold step of showing the *possibility* of "a wrong" and corresponding potential for "a remedy," *Bartlett*, 556 U.S. at 15.

Appellants' assertion that *Gingles* 1 "mandat[es] maximization of majority-minority districts," Br. at 53, is unfounded. To start, this Court in *Cooper v.*

Harris explicitly rejected interpreting Section 2 to require that "whenever a legislature *can* draw a majority-minority district, it *must* do so—even if a crossover district would also allow the minority group to elect its favored candidates." 137 S. Ct. at 1472. Regardless, far from a maximization mandate, this Court has instead limited Section 2 based on *Gingles* 1 in several respects.

First, this Court has routinely rejected arguments that Section 2 requires drawing a minority-opportunity district where *Gingles* 1's compactness standards are not met. *See, e.g.*, *LULAC v. Perry*, 548 U.S. 399, 434-45 (2006); *Abrams v. Johnson*, 521 U.S. 74, 91-95 (1997); *Shaw v. Hunt*, 517 U.S. 899, 916-18 (1996) ("*Shaw II*"); *Bush*, 517 U.S. at 976-81. Lower courts follow suit.[2]

Second, the Court has further limited the scope of Section 2 by considering whether rough racial proportionality already exists—a factor that can count against plaintiffs. *See Johnson v. De Grandy*, 512 U.S. 997, 1014 (1994); *see id.* at 1025 (O'Connor, J., concurring). "[A]ny theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large." *Gingles*, 478 U.S. at 84 (O'Connor,

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[2] *See e.g.*, *Backus v. South Carolina*, 857 F. Supp. 2d 553, 567 (D.S.C.), *aff'd*, 568 U.S. 801 (2012); *Broward Citizens for Fair Districts v. Broward Cty.*, No. 12-cv-60317, 2012 WL 1110053, at *5 (S.D. Fla. Apr. 3, 2012); *Hall v. Virginia*, 385 F.3d 421, 430 (4th Cir. 2004); *Balderas v. Texas*, No. 6:01-cv-158, 2001 WL 36403750, at *5 (E.D. Tex. Nov. 14, 2001).

J., concurring). Crucially, though, this baseline of proportionality across an electorate often functions as a *limit* on how many minority-opportunity districts are available, and never as a remedial command. *De Grandy*, 512 U.S. at 1014 n.11. The baseline anchors Section 2 only to relative "*opportunit[ies]* . . . to elect"—not to any "right to have members of a protected class *elected* in numbers equal to their proportion in the population." 52 U.S.C. § 10301; *contra, e.g.*, Br. at 39-40.

Proportionality, then, "is *always* relevant evidence in determining vote dilution, but is *never* itself dispositive." *De Grandy*, 512 U.S. at 1025 (O'Connor, J., concurring). And courts have interpreted this relevant consideration to restrict drawing more minority-opportunity districts where the illustrative maps show that the minority group already has opportunity to elect candidates commensurate with its voting strength. *See id.* at 1017-20 (majority opinion); *see also, e.g.*, *Baird v. Consol. City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992) (rejecting Section 2 claim based on finding rough proportionality); *Fairley v. Hattiesburg Mississippi*, 662 F. App'x 291, 301 (5th Cir. 2016) (same). Alabama is case in point that *Gingles* 1 mandates neither proportionality nor majority-minority district maximization. Across the State, "Black Alabamians are sufficiently numerous to constitute majorities of *three* out of seven congressional districts," yet all agree that because of the *Gingles* 1 constraint, no more than *two* districts may be drawn to remedy the Section 2 vote dilution. MSA56 (emphasis added).

Moreover, Appellants' suggestion that the *Gingles* 1 standard makes establishing Section 2 liability too easy, Br. at 65, also disregards the numerous additional requirements that often cause plaintiffs to lose despite having met *Gingles* 1. *See, e.g.*, *Growe v. Emison*, 507 U.S. 25, 41-42 (1993) (plaintiff failed to establish *Gingles* 2); *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) (*Gingles* 3); *De Grandy*, 512 U.S. at 1008-09 (totality of circumstances); *Anne Harding v. Cty. of Dallas*, 948 F.3d 302, 309 (5th Cir. 2020) (*Gingles* 2); *Hall v. Louisiana*, 108 F. Supp. 3d 419, 429, 434-37 (M.D. La. 2015) (*Gingles* 3); *Afr. Am. Voting Rts. Legal Def. Fund, Inc. v. Villa*, 54 F.3d 1345, 1352, 1355-56 (8th Cir. 1995) (totality of circumstances). The district court's decision in this case would have been much shorter than 234 pages if *Gingles* 1 were the ballgame.

Overall, *Gingles* 1 serves a narrow function: it solicits an undiluted illustrative map to determine whether a racial vote dilution injury *might* exist. At the same time, it provides "determinable constraint[] on the dilution inquiry" by holding plaintiffs to bright-line requirements and reinforcing that Section 2 is not a proportional representation mandate. *Holder*, 512 U.S. at 888 (O'Connor, J., concurring) (citation and quotations omitted).

B. The Equal Protection Clause does not apply to illustrative maps offered to satisfy *Gingles* 1.

Overlooking that *Gingles* 1 is a mandatory precondition interpreted from Section 2's text that limits liability, Appellants seek to use it as a reason

to curtail the statute. They argue that because plaintiffs complying with *Gingles* 1's evidentiary requirements must illustrate districts meeting a court-required racial population threshold, Section 2 affronts the Equal Protection Clause. Br. at 8, 47-50. Because, on Appellants' theory, race may never "predominate in redistricting, no matter what the reason," *id.* at 37, plaintiffs satisfy *Gingles* 1 only by proffering randomly generated illustrative plans that may somehow satisfy *Bartlett*'s and *LULAC*'s numerosity and compactness requirements. Br. at 48. Otherwise, they say, Section 2 would permit "plaintiffs to draw maps in ways that States never could." *Id*. Appellants betray a fundamental misunderstanding of this Court's precedent and of the separate endeavors of plaintiffs offering an illustrative plan and states enacting a remedial map.

First, Appellants' position is irreconcilable with this Court's racial gerrymandering doctrine. Appellants ground their argument in *Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw I*"), but they distort the Court's holding and the subsequent development of its doctrine. In *Shaw I*, the Court held that "a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race" is justified under the Equal Protection Clause only if it "is narrowly tailored to further a compelling governmental interest." *Id.* at 658. Contrary to Appellants' insistence that this holding means redistricting must be wholly race-blind, the *Shaw* doctrine does not forbid redistricting "performed with consciousness of race," nor demand strict scrutiny in

"all cases of [a State's] intentional creation of majority-minority districts." *Bush*, 517 U.S. at 958-59 (plurality opinion). It instead requires strict scrutiny only in those narrow circumstances in which "race was the *predominant* factor motivating the [redistricting] decision." *Cooper*, 137 S. Ct. at 1463-64 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)) (emphasis added).

Even when race is the predominant consideration motivating a redistricting plan, that just means that the plan is subject to strict scrutiny. *Bush*, 517 U.S. at 958. And a redistricting plan designed to comply with Section 2 can and often does satisfy strict scrutiny. That is so when the plan is "narrowly tailored" to satisfy the "compelling interest" of complying with the VRA. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 800-01 (2017). What's more, a state need not wait for the remedial phase of a Section 2 suit to reduce vote dilution. Redistricting may be conducted in a race-conscious manner when the mapmaker has a "strong basis in evidence" for believing racial considerations are necessary to avoid vote dilution—"even if a court does not find that the actions were necessary." *Id.* at 801. Appellants' conclusion that a Section 2 plaintiff is prohibited from considering race in devising its illustrative plan because a "State[] never could," Br. at 48, is based on a false legal premise.

Second, it is unremarkable that the Equal Protection Clause permits the government to be conscious of a protected class in fashioning a remedy for discrimination *against that class*. To the contrary,

it is a necessary part of anti-discrimination law.

In other race discrimination contexts, this Court has long-recognized the necessity of appropriately race-conscious remedies. *See, e.g.*, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Davis v. Bd. of Sch. Comm'rs of Mobile Cty.*, 402 U.S. 33 (1971); *United States v. Montgomery Cty. Bd. of Educ.*, 395 U.S. 225 (1969). In *Swann*, for example, the Court unanimously held that the Constitution does not require remedying racial discrimination "on a 'color blind' basis," 402 U.S. at 19, explaining instead that "[a]wareness of [] racial" demographics "is likely to be a useful starting point in shaping a remedy to correct" discrimination, *id.* at 25.

Similarly, in sex discrimination cases under Title IX, courts routinely permit universities to calibrate athletic opportunities on the basis of sex to eliminate sex-based imbalances. *See, e.g.*, *Neal v. Bd. of Trustees of Calif. State Univs.*, 198 F.3d 763, 772-73 (9th Cir. 1999); *Kelley v. Board of Trustees*, 35 F.3d 265, 272 (7th Cir. 1994); *Miami University Wrestling Club v. Miami University*, 302 F.3d 608, 613-14 (6th Cir. 2002).

The same is true in religious discrimination cases, where the Court necessarily considers the protected faith to remedy faith-based discrimination. *See, e.g.*, *Holt v. Hobbs*, 574 U.S. 352, 361-63 (2015); *Wisconsin v. Yoder*, 406 U.S. 205, 235 (1972). The VRA is no different. Considering race to remedy or prevent racial vote dilution abides the generally accepted principle that remedying or avoiding discrimination often requires considering the protected

characteristic.

Appellants' argument is that plaintiffs cannot proffer *evidence* of racial discrimination mandated by *Gingles* 1 because to do so makes judges see race. This is a remarkable perversion of the Fourteenth Amendment, which, it bears reminding, was ratified in response to the Civil War, slavery, and political suppression of, among others, Black Alabamians. The Reconstruction Republican Congress would not recognize the version of the Fourteenth Amendment that Appellants advocate today.

Third, whatever the proper standard of scrutiny for reviewing the *government's* consideration of race in redistricting, that standard does not apply to a plaintiff's *Gingles* 1 evidentiary showing. Without question, "the prohibitions of the [fourteenth] amendment" apply only to state action. *C.R. Cases*, 109 U.S. 3, 13 (1883); *accord United States v. Morrison*, 529 U.S. 598, 621 (2000). The "Equal Protection Clause prohibits *a State* without sufficient justification, from 'separat[ing] its citizens into different voting districts on the basis of race.'" *Bethune-Hill*, 137 S. Ct. at 797 (quoting *Miller,* 515 U.S., at 911) (emphasis added); *accord Cooper*, 137 S. Ct. at 1463.

Section 2 plaintiffs mounting their evidence are not operating as a state actor; they are not bound by Equal Protection Clause constraints when proposing illustrative maps that need not become government action. Recognizing this, every circuit court met with a *Shaw* objection to a plaintiff's illustrative plan has dismissed the argument for conflating a plaintiff's

burden under *Gingles* with the government's obligations under *Shaw*.[3] Regardless, even if illustrative plans were subject to equal protection restraints, the panel below did not clearly err in concluding that race did not predominate in drawing the *Gingles* 1 districts here. MSA183.

In sum, doctrinally, practically, and based on the record, the *Gingles* 1 requirement serves its "gatekeeping role" to limit Section 2 claims, Br. at 47, without needing to be reimagined under *Shaw* jurisprudence. A plaintiff's illustrative plans merely establish the undiluted baseline against which a challenged plan is measured and, as described below, does not mandate the ultimate remedy.

II. The flexible remedies available for Section 2 violations relieve Appellants' equal protection concerns.

The *Gingles* 1 evidentiary requirement and the need to devise a remedy upon finding a Section 2 violation are distinct steps legally, functionally, and in their objectives. In conflating the two, Appellants dramatically expand the Court's equal protection

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[3] *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); *Cane v. Worcester Cty.*, 35 F.3d 921, 926 n.6 (4th Cir. 1994); *Clark v. Calhoun Cty.*, 88 F.3d 1393, 1406-07 (5th Cir. 1996); *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 934-35 (8th Cir. 2018); *Sanchez v. Colorado*, 97 F.3d 1303, 1329 (10th Cir. 1996); *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (8th Cir. 2006); *Davis v. Chiles*, 139 F.3d 1414, 1425 (11th Cir. 1998).

jurisprudence and discard decades of Section 2 precedent. They also invent new limits on their own remedial authority by implying that Appellees' *Gingles* 1 illustrative plans will necessarily become law. This is not how redistricting litigation works.

Rather than accepting Appellants' imaginative but wrong depiction of the doctrine, the Court should reinforce a basic rule: while this Court's bright-line *Gingles* 1 requirement explicitly prompts considering race to prove liability, that consideration is neither constitutionally suspect nor an undue imposition on the government. Whatever consideration of race is done to draw illustrative maps says nothing about the range of possible remedies the jurisdiction may implement to simultaneously avoid vote dilution and impermissible race-based districting.

Below, *Amicus* describes these principles and provides a sample of potential remedial plans—among "thousands" of available undiluted maps, MSA56—that correct the Section 2 violations here. Additionally, in many other cases, Section 2 provides jurisdictions significant latitude to adopt alternative voting systems as remedies that cannot be framed as race conscious. Appellants simply disregard these numerous remedial options, which heed the Court's equal protection guidance, enable jurisdictions to satisfy their designated policy priorities, and remove the avoidable dilution of voters of color in redistricting.

A. Illustrative *Gingles* 1 maps are not the same as a remedial map.

Once Section 2 plaintiffs establish vote dilution

by proving the three *Gingles* preconditions and the totality-of-circumstances considerations, the court proceeds to the subsequent remedy phase.

Though the *Gingles* 1 liability requirement and the remedy phase operate separately, these stages are related in three respects. First, this Court has held that proving *Gingles* 1 is a necessary precondition: unless minorities have "the potential to elect a representative of [their] own choice in some [alternative] single-member district … there neither has been a wrong nor can be a remedy." *Growe*, 507 U.S. at 40-41. Second, an illustrative plan *can*—but certainly not *must*—become the remedial plan, depending on the flexible decision-making of the jurisdiction and the factual circumstances of the case. *See, e.g.*, *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (8th Cir. 2006). Third, where a Section 2 violation cannot be remedied without offending equal protection safeguards, including through adopting an illustrative plan, a court may then be "precluded from finding an ongoing section 2 violation." *Wright v. Sumter Cty. Bd. of Elections & Registration*, 979 F.3d 1282, 1303 (11th Cir. 2020) (citation and quotations omitted); *accord Houston Lawyers' Ass'n v. Att'y Gen. of Texas*, 501 U.S. 419, 426 (1991) (reasoning that the inability to fashion a remedy may "preclude a finding that vote dilution has occurred under the 'totality of the circumstances' in a particular case").[4]

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[4] But these circumstances will be rare because this Court has interpreted *Gingles* 1 to require illustrative maps that also "take into account 'traditional districting principles such as

Apart from these discrete touchpoints, the *Gingles* 1 illustrative plan requirement and the remedial map phase diverge significantly in their functions and legal frameworks. For numerosity, *Bartlett* recognized that "Section 2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts." 556 U.S. at 23. The consideration of compactness also differs at the two phases. An illustrative plan accounts for "the compactness of the minority population," while a challenged remedial plan analyzes compactness in "the contours of district lines to determine whether race was the predominant factor in drawing those lines." *LULAC*, 548 U.S. at 433 (citations omitted).

In short, the maps produced at the two stages simply answer different questions: *Gingles* 1 indicates that it is *possible* to avoid vote dilution present in an enacted redistricting plan, while a proposed remedial plan generates the solution to that established violation. The panel below recognized these differences, noting that finding Section 2 liability "would not be a determination that the *Milligan* plaintiffs are entitled to a map of their choice, or to one of the remedial maps submitted to establish the first *Gingles* requirement[.]" MSA53-54.[5]

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maintaining communities of interest and traditional boundaries.'" *LULAC*, 548 U.S. at 433 (citation omitted).

[5] Although at times the district court used a shorthand to refer to illustrative *Gingles* 1 maps as "remedial maps," the panel clearly understood the differences between the two stages. *See, e.g.*, MSA50, 52-54, 94-96, 174, 179-80, 183, 215-16, 221-23.

B. Appellants manufacture limits on their remedial authority.

Disregarding these well-settled principles, Appellants insist that the *Gingles* 1 requirement somehow ties states' hands at the remedy phase by forcing states into a "virtually impossible" situation where "traditional [redistricting] principles yield to race-based line-drawing from the start." Br. at 68. Upon manufacturing this dilemma, Appellants then contend that Section 2 therefore "runs headlong into the Fourteenth Amendment's equal protection guarantee." *Id.* at 71. Manipulating the VRA and the Equal Protection Clause in this manner undermines decades of precedent calibrating the bounds of Section 2 and the *Shaw v. Reno* doctrine. *See supra* Part I.B. But it also contorts this Court's core equitable redistricting principles beyond recognition.

For fifty years, the Court in redistricting litigation has consistently ruled that a violating jurisdiction should have the first opportunity to, in good faith, fashion a remedy. *See North Carolina v. Covington*, 138 S. Ct. 2548, 2554 (2018) (per curiam); *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). It has also reinforced that, in doing so, the jurisdiction maintains "'broad discretion' to comply [with Section 2] as it reasonably s[ees] fit." *Abbott v. Perez*, 138 S. Ct. 2305, 2333 (2018) (quoting *LULAC*, 548 U.S. at 429). As such, devising an appropriate remedy necessarily involves a fact-intensive, "functional analysis" that varies case to case. *Id.* at 2335 (quoting *Bethune-Hill*, 137 S. Ct. at 801).

The narrow limits on jurisdiction's flexible

remedial discretion are (1) the remedy must actually "cure any constitutional or statutory defect," *Upham v. Seamon*, 456 U.S. 37, 43 (1982), and (2) the jurisdiction must resolve the violation in "a timely fashion after having had an adequate opportunity to do so," *id.* at 41. Past that, a jurisdiction exercising its broad authority to first develop a Section 2 remedy is encouraged—not only as a matter of federalism but also to give flexibility to Section 2-violating jurisdictions—to avoid a potential later equal protection challenge.

The option to adopt crossover districts as Section 2 remedies provides jurisdictions greater flexibility at the remedial stage—and when enacting maps in the first place—than plaintiffs have in producing illustrative maps under *Gingles* 1. Crossover districts have a cohesive group of minority voters who "are numerous enough and their candidate attracts sufficient crossover votes from white voters" to elect minority-preferred candidates despite lacking a numerical majority in the district. *Voinovich*, 507 U.S. at 154; *accord Cooper*, 137 S. Ct. at 1470. "States that wish to draw crossover districts" to comply with Section 2 in the first place "are free to do so," *Bartlett*, 556 U.S. at 23-24, and states that needlessly eliminate performing crossover districts in the name of Section 2 violate equal protection mandates. *Cooper*, 137 S. Ct. at 1472. Thus, "draw[ing] 'opportunity' districts in which minority groups form 'effective majorit[ies]'" through forming coalitions suffices to avoid both constitutional and Section 2 defects. *Abbott*, 138 S. Ct. at 2315 (citation omitted); *see also Lawyer v. Dep't of Just.*, 521 U.S. 567, 581-82

(1997) (approving crossover districts remedy). As the district court repeatedly recognized here, crossover districts are available solutions in Alabama that give the State remedial flexibility. MSA6-8, 32, 38 n.7, 211.

In fact, equal protection concerns may arise where the jurisdiction fails to exercise this careful discretion to consider crossover districts and instead inflexibly acts as if it must hit certain racial population quotas in a Section 2 district. *Cooper*, 137 S. Ct. at 1468-69; *Bethune-Hill*, 137 S. Ct. at 800.[6] But even then, jurisdictions complying with the VRA have considerable leeway; as noted *supra* Part I.B., the "strong basis (or 'good reasons') standard" developed under the *Shaw v. Reno* doctrine "gives States 'breathing room' to adopt reasonable [Section 2] compliance measures that may prove, in perfect hindsight, not to have been needed." *Cooper*, 137 S. Ct. at 1464 (quotation omitted); *see also id.* at 1491-92 (Alito, J., dissenting) (emphasizing "the high evidentiary standard that our cases require challengers to meet in order to prove racial predominance").

Accordingly, Appellants' effort to set aside precedent and conflate *Gingles* 1 with the remedial redistricting phase should be rejected. The available options for Alabama to enact a sufficient remedy are numerous.

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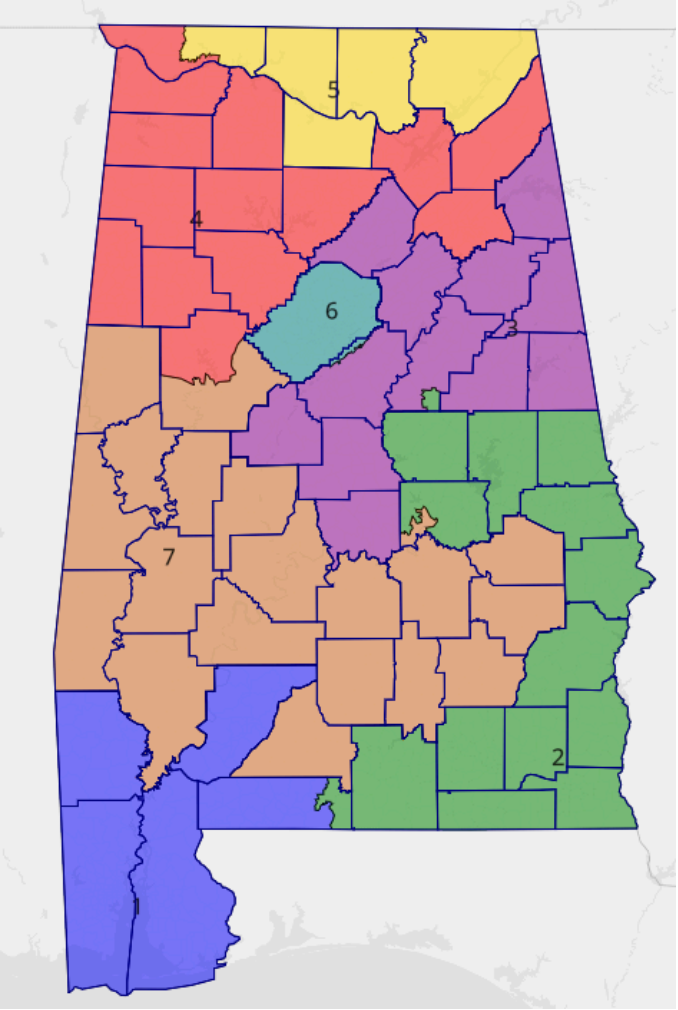
[6] Alabama rejecting the *Singleton* Plaintiffs' proposed plan in favor of pursuing a majority-Black district is such an instance.

C. Alabama has numerous remedial options.

Alabama has several available remedial options. Below are two maps that *Amicus* offers to illustrate the ease with which Alabama can fashion a remedial plan that meets the State's priority criteria (better than the enacted plan) while resolving the Section 2 violations here. These maps do so without predominantly considering race in drawing district lines, but rather by adhering to county boundaries and undisputed non-racial communities of interest.

[IMAGE ON NEXT PAGE]

CLC Remedial Map 1[7]



[7] An interactive version of CLC Remedial Map 1, with metrics showing its performance on various criteria, is available at https://davesredistricting.org/join/9135080b-26bf-48f2-b5ea-a14dae4993c2.

CLC Remedial Map 1 meets all of Alabama's baseline redistricting criteria. Its population deviation is zero.[8] All districts are contiguous. The districts are reasonably compact, with Reock (0.3869) and Polsby-Popper (0.2266) scores performing as good as the enacted plan, *see* MSA63 n.9; SJA29, and the map contains no problematic "tentacles, appendages, bizarre shapes, or any other obvious irregularities." MSA171. It minimizes county, municipality, and precinct splits, dividing the same number of counties (six) and one fewer precinct compared to the enacted plan. *See* SJA28. And the map reduces unnecessary changes to the enacted plan by, for example, leaving Districts 1, 4, and 5 entirely unchanged. MSA35; SJA177.[9]

Critically, CLC Remedial Map 1 keeps together key communities of interest in Alabama. Contrary to the enacted plan, CLC Remedial Map 1 preserves the Black Belt—a "community of interest of substantial

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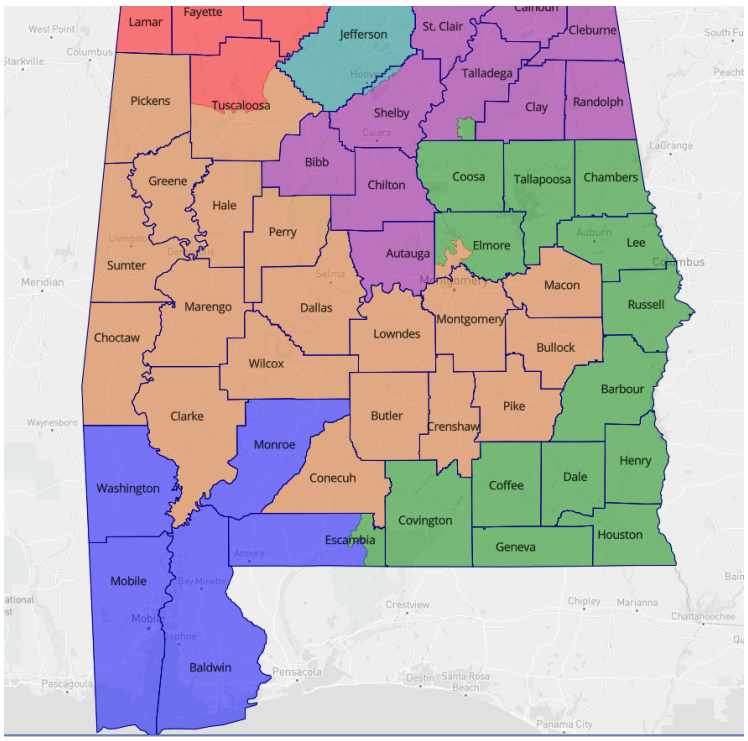
[8] The closest to zero that is possible in Alabama is for six districts to have a zero deviation and one district to have a plus-one deviation.

[9] Although incumbency protection, and the related "core retention" of prior districts, are stated criteria in Alabama, the court below rightly gave those considerations less than dispositive weight. *See, e.g.*, MSA181. This is because these policies can be manipulated "to give an electoral advantage" at the cost of other neutral factors, *Cox v. Larios*, 542 U.S. 947, 949 (2004) (Stevens, J., concurring), and can be used improperly to worsen, instead of relieve, racial vote dilution. *See LULAC*, 548 U.S. at 441. Thus, incumbency protection and core retention must give ground to the more important obligation to remedy Section 2 vote dilution, which Alabama's criteria list itself recognizes. MSA33-34.

significance," MSA175—in District 7 by combining sixteen Black Belt counties from Sumter to Macon while avoiding divisions in other areas. MSA39. It likewise keeps Montgomery and Jefferson Counties whole, whereas the enacted plan splits the cities of Birmingham and Montgomery in half and largely along racial lines. MSA57; SJA28.

CLC Remedial Map 1 also retains what Appellants designate as other priority communities of interest in the Gulf Coast and Wiregrass regions in southern Alabama, *see* Br. at 9, 21, even though the district court found the record identifying these communities "less compelling." MSA180. Identical to the enacted plan, CLC Remedial Map 1 keeps Mobile, Baldwin, Washington, Monroe, and almost all of Escambia County together in District 1. District 2 in CLC Remedial Map 1 also clusters the Wiregrass counties—Houston, Covington, Coffee, Dale, Geneva, and Henry—but diverges from the enacted plan in southeast Alabama to avoid District 2 senselessly dividing the Black Belt and Montgomery to the northwest. And its configuration of District 6 is far better at satisfying Alabama's districting criteria than the enacted plan's treatment of Jefferson County.

CLC Remedial Map 1: Black Belt, Gulf Coast, and Wiregrass Closeup (District 1: Blue, District 2: Green, District 7: Brown)



In CLC Remedial Map 1, Districts 6 (in teal) and 7 (in brown) would provide Black voters an equal opportunity to elect their candidates of choice. Black voters constitute 41.2% (District 6) and 51.4% (District 7) of the citizen voting-age population in the districts.[10] Recent election results show that the

[10] The citizen voting-age population data are based upon the Census Bureau's 2016-2020 American Community Survey

Black-preferred candidates for the most recent eight elections for statewide office would have carried each district.[11]

This configuration is far from the only available option. An alternative, CLC Remedial Map 2,[12] shown below, also satisfies Alabama's redistricting criteria but would enable the State to make other policy tradeoffs while complying with Section 2.

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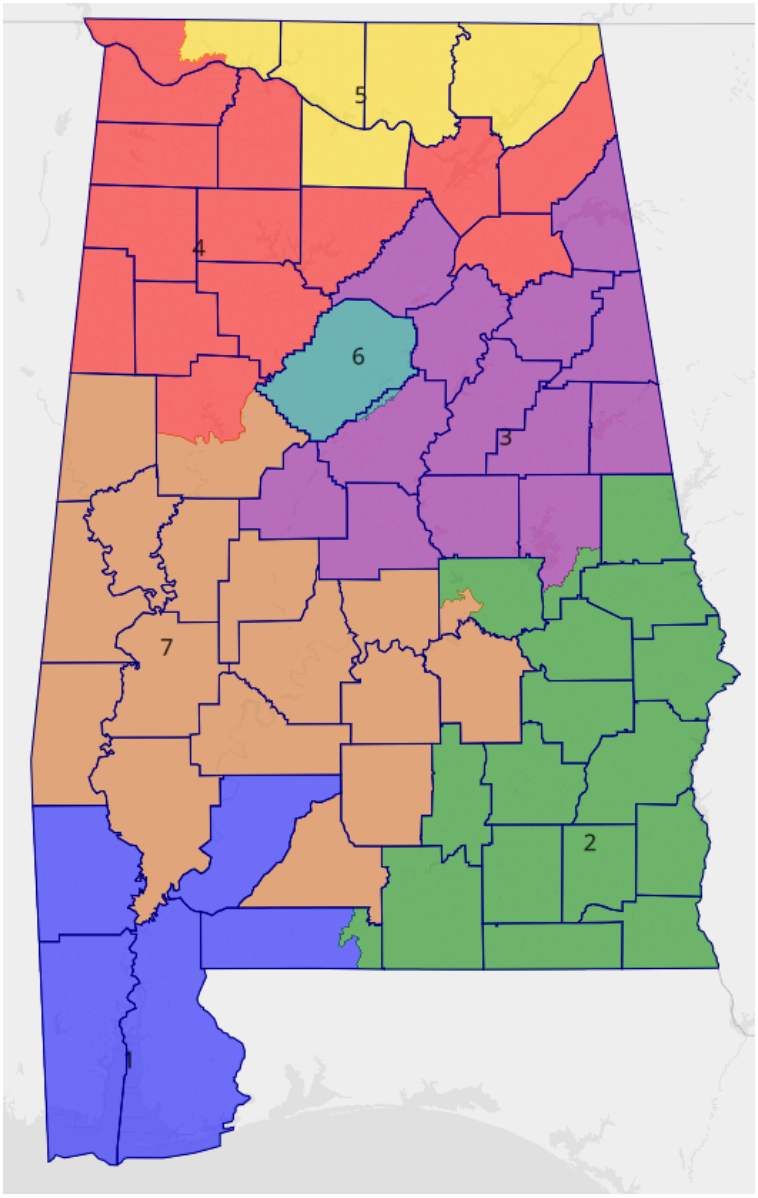
estimates. The Black voting-age population according to the 2020 Census is 39.6% and 49.4% respectively.

[11] The Black-preferred candidates would have carried District 6 with the following vote shares: 2020 President (54.2%), 2020 Senator (57.0%), 2018 Governor (57.3%), 2018 Attorney General (56.6%), 2018 Lieutenant Governor (54.5%), 2017 Senator (66.6%), 2016 President (49.7%), and 2016 Senator (50.2%). The Black-preferred candidates would have carried District 7 with the following vote shares: 2020 President (56.9%), 2020 Senator (59.2%), 2018 Governor (58.2%), 2018 Attorney General (60.1%), 2018 Lieutenant Governor (57.8%), 2017 Senator (66.9%), 2016 President (55.2%), and 2016 Senator (55.0%).

[12] An interactive version of CLC Remedial Map 2, with metrics showing its performance on various criteria, is available at https://davesredistricting.org/join/2c01747b-1661-441f-92d8-c4d84848b680.

CLC Remedial Map 2



CLC Remedial Map 2 likewise meets baseline redistricting criteria of population parity and district contiguity. Its districts are reasonably compact, again with Reock (0.4129) and Polsby-Popper (0.2516) scores that perform better than the enacted plan. SJA29. CLC Remedial Map 2 also minimizes county, municipality, and precinct splits, splitting one fewer precinct than the enacted plan and again just six counties. And even more so than CLC Remedial Map 1, this potential remedy makes the minimum possible adjustments to Alabama's enacted plan to resolve the Section 2 violations while meeting other criteria.[13] For example, Districts 1 (covering the Gulf Coast region), 4, and 5 are entirely unchanged between CLC Remedial Map 2 and the enacted plan, and Districts 2 and 3 are closely analogous in both. SJA177.[14] The similarity is illustrated by a comparison to the enacted plan, shown below.

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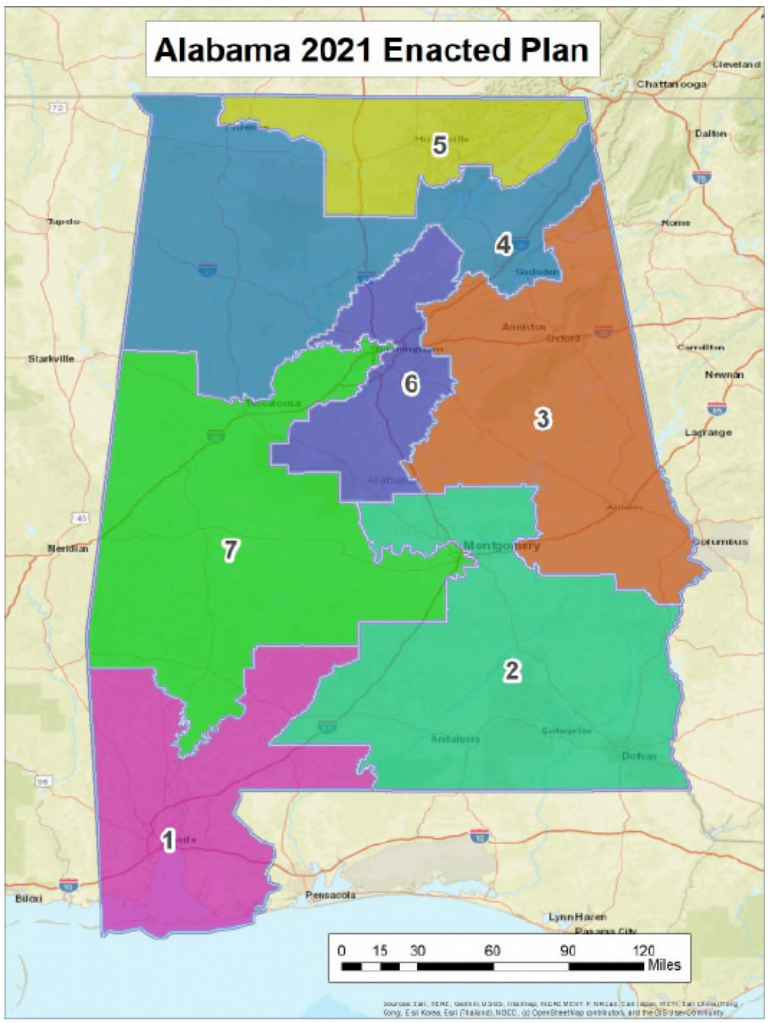
[13] District 6 (in teal) and District 7 (in brown) are again the Black-opportunity districts. District 6 is unchanged from Map 1. District 7's Black citizen voting-age population is 48.3% and its Black voting-age population is 46.2%. The Black-preferred candidates would have carried District 7 with the following vote shares: 2020 President (54.1%), 2020 Senator (56.4%), 2018 Governor (55.8%), 2018 Attorney General (57.5%), 2018 Lieutenant Governor (55.1%), 2017 Senator (64.8%), 2016 President (52.1%), and 2016 Senator (52.1%).

[14] Map 2 keeps slightly fewer Black Belt counties together than Map 1 (shifting Bullock and Macon Counties to District 2), but as a tradeoff creates a more compact configuration of District 2.

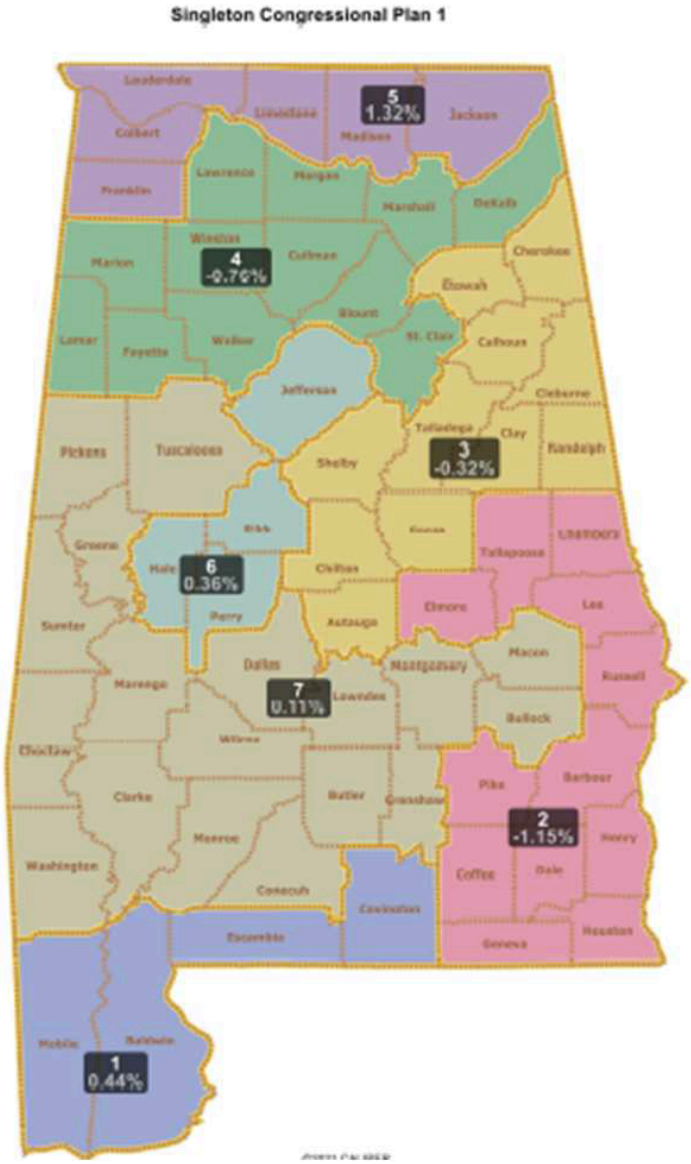


District 7 in CLC Remedial Map 2 diverges to be even more compact: unlike in the enacted plan, this version of District 7 resolves the Section 2 violation while keeping Montgomery whole; eliminating the unexplained appendage that extends through

Jefferson County to grab half of Birmingham; and retaining more of the Black Belt by including Butler, Conecuh, and Montgomery Counties in the district.

Maps already in the record are also available remedial options. For example, the Singleton Plan, shown below, that was presented as a remedy for the presently unresolved equal protection claim in a related case would be a sensible solution that is entirely anchored to respecting county lines. MSA36-37.

[IMAGE ON NEXT PAGE]



This whole-county remedy would remove the

Section 2 vote dilution without any of the district line rejiggering that the Court has typically deemed hallmarks of a *Shaw* violation. *See, e.g.*, *Cooper*, 137 S. Ct. at 1470-71; *see also infra* Part II.D. And devising such a map imposes little burden on Alabama, given that the Singleton Plan was "draw[n] … in part of an afternoon." MSA224.

The CLC remedial maps, as well as the Singleton Plan, demonstrate how crossover districts can be used to correct a vote dilution violation, even though such districts are not available for *Gingles* 1 illustrative plans. Indeed, Appellants stipulated that districts with Black voting-age population figures such as these, specifically those in the district makeup in the Singleton Plan, would elect Black-preferred candidates and therefore resolve the Section 2 violations. *See, e.g.*, *Milligan*, Doc 82-5 at 7-14; *Singleton*, Doc. 47 at 6. In both the CLC and Singleton plans, preservation of county lines, reduction of precinct splits, compactness, and retaining communities of interest predominate. There is no conceivable argument that race does.

The Court has endorsed precisely this type of crossover districting to avoid a Section 2 problem in the first place, *Bartlett*, 556 U.S. at 23; to draw lines in a manner compliant with the Equal Protection Clause, *Cooper*, 137 S. Ct. at 1472; and to remedy an established Section 2 violation, *see Lawyer*, 521 U.S. at 581-82 (approving district with 36.2% Black voting-age population that "offers to any candidate, without regard to race, the opportunity to seek and be elected to office"). This is in part because adding voters to

potential remedial crossover districts is not done "on the basis of race," *Miller*, 515 U.S. at 911, but for the "legitimate political explanation" that including other socially and politically cohesive voters would avoid the dilution of the minority voters already in the core of the district. *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001). Thus, in remedying Section 2 dilution with crossover districts, "legislatures [are given] a choice that can lead to less racial isolation, not more." *Bartlett*, 556 U.S. at 23. Such districts "diminish the significance and influence of race by encouraging minority and majority voters to work together toward a common goal," *id.*, consistent with minority voters' "obligation to pull, haul, and trade to find common political ground" and "hasten the waning of racism in American politics." *De Grandy*, 512 U.S. at 1020.

Appellants' contention that this Court's Section 2 jurisprudence forces them to improperly consider race attacks a strawman. Consistent with reality, this Court should reject the State's arguments.

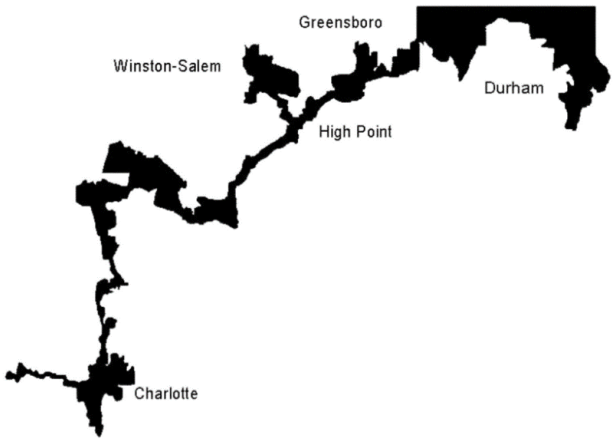
D. The presented illustrative maps are not racial gerrymanders.

Even if Alabama limited itself to adopting one of the illustrative maps as the eventual remedial plan here, no equal protection problems would arise. As the district court noted, the eleven presented illustrative plans respected traditional redistricting principles throughout the process and did not permit race to predominate. MSA213-14, 258-59. In fact, the panel concluded that the illustrative plans "considered many traditional redistricting principles" and respected them "at least as much as" Alabama's

enacted plan. MSA259. These determinations "as to whether racial considerations predominated in drawing district lines … are subject to review only for clear error" and "warrant[] significant deference on appeal." *Cooper*, 137 S. Ct. at 1464-65 (citation omitted).

In any event, the districts that this Court has struck down as racial gerrymanders bear no resemblance to what the plaintiffs proffered in their illustrative maps in this case. In *Shaw I*, for example, the Court rejected North Carolina District 12 as a racial gerrymander, describing it as "160 miles long and, for much of its length, no wider than the [interstate] corridor" that "winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas until it gobbles in enough enclaves of black neighborhoods." 509 U.S. at 635-36. Later, the Court in *Cooper* rejected a modern iteration of the same district ruled unconstitutional in *Shaw I*, because it similarly went block-by-block adding Black voters and subtracting white voters in a way the Court held was only explainable by race. 137 S. Ct. at 1474-76. Both maps are shown below.

Congressional Map Invalidated in *Shaw I*



Congressional Map Invalidated in *Cooper*

Congressional District 12 (Enacted 2011)

In *Miller*, the Court struck down Georgia's "monstrosity" district that was anchored in the "lightly populated, but heavily black" central part of the State but then extended "links by narrow corridors [to] the black neighborhoods in Augusta, Savannah and southern DeKalb County" near Atlanta. 515 U.S. at 909. These lines, the Court ruled, were only explained by a desire to maximize the racial composition in the district. *Id.* The Court reached a similar conclusion in *Bush*, holding unconstitutional a Texas district that "deliberately exclude[d]" white voters by "extend[ing] fingers" into "outermost" areas to "pick [] up" minority voters and appeared "like a jigsaw puzzle ... in which it might be impossible to get the pieces apart." 517 U.S. at 965, 973.

Congressional Map Invalidated in *Miller*

Congressional Map Invalidated in *Bush*

In all these cases, the state attempted to use a contrived fear of VRA liability as justification for drawing districts blatantly along racial lines that were "so bizarre on its face that it discloses a racial design." *Miller*, 515 U.S. at 900, 914.

Here, the illustrative plans fell within "a normal range for congressional districts nationwide," gave

"equal weighting to all traditional redistricting criteria," and "reflect[ed] the geographic dispersion of Black residents across Alabama." *See* MSA159, 166, 169; SJA27, 99-109 (displaying the illustrative plans submitted by Dr. Moon Duchin and Mr. William Cooper, respectively). Even if these plans were subject to equal protection scrutiny, they are not constitutionally suspect.

E. Appellants' arguments overlook alternative Section 2 remedies.

If accepted, Appellants arguments attacking *Gingles* 1 by expanding the *Shaw* doctrine could have far-reaching implications beyond Section 2 congressional redistricting cases. The outcome of this case could affect the ability of jurisdictions and voters to apply a broad range of remedies for vote dilution that have nothing to do with single-member districts. Appellants ignore that lower federal courts and opinions of this Court have endorsed such alternative remedies as race-neutral options to resolve Section 2 violations.

Section 2 applies to elections in every state and political subdivision, reaching beyond congressional redistricting to elections for school board, county office, state legislatures, and more. Given this scope of application, it is unsurprising that jurisdictions and courts have developed a broad range of remedial options to fix vote dilution apart from redrawing single-member districts.

Neither Section 2's text nor this Court's precedent limits jurisdictions' remedial authority to only single-member districts. To be sure, "single-member

districting schemes" are often used "both as a benchmark for measuring undiluted minority voting strength and as a remedial mechanism for guaranteeing minorities undiluted voting power." *Holder*, 512 U.S. at 897 (Thomas, J., concurring). But "there is no principle inherent in our constitutional system, or even in the history of the Nation's electoral practices, that makes single-member districts the proper mechanism for electing representatives to governmental bodies or for giving undiluted effect to the votes of a numerical minority." *Id.* (quotations omitted). Instead, jurisdictions and courts can adopt "some other method [of voting] that would result in a plan that satisfies the Voting Rights Act" apart from single-member districts. *Branch v. Smith*, 538 U.S. 254, 310 (2003) (O'Connor, J., concurring in part and dissenting in part with Thomas, J.).

In numerous VRA cases not involving congressional redistricting, *see id.* at 266-67 (majority opinion), jurisdictions and lower courts have devised creative and constitutional solutions to vote dilution problems.[15] As of 2010, at least 100 local jurisdictions across the country had at some point switched to alternative methods of elections and many did so "in response to vote dilution litigation under the" VRA. Richard L. Engstrom, *Cumulative and Limited Voting: Minority Electoral Opportunities and More*, 30

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[15] *See, e.g.*, *White v. State of Ala.,* 867 F. Supp. 1519, 1546 (M.D. Ala. 1994), *vacated on other grounds,* 74 F.3d 1058 (11th Cir. 1996); *Dillard v. Town of Louisville*, 730 F. Supp. 1546, 1548 (M.D. Ala. 1990); *Dillard v. Chilton Cty. Bd. of Educ.*, 699 F. Supp. 870, 875 (M.D. Ala. 1988), *aff'd sub nom. Dillard v. Chilton Cty. Comm'n*, 868 F.2d 1274 (11th Cir. 1989).

St. Louis U. Pub. L. Rev. 97, 98 (2010). Crucially, alternative election systems can be used to avoid even the appearance of race-conscious remedies because such systems are, by definition, race neutral. *See* Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems As Voting Rights Remedies*, 33 Harv. C.R.-C.L. L. Rev. 333, 339 (1998).

The most common alternative election methods that are adopted to resolve Section 2 vote dilution concerns include cumulative voting, limited voting, and ranked-choice voting systems. Engstrom, *supra*, at 98. In a cumulative voting system, all voters have a certain number of votes that they can distribute among a number of candidates for an election or concentrate them on one candidate. *Id.* For limited voting, a voter casts a number of votes which are less than the number of candidates. *Id.* Finally, in a ranked-choice voting system, voters cast their votes for candidates in order of preference. Benjamin P. Lempert, *Ranked-Choice Voting As Reprieve from the Court-Ordered Map,* 119 Mich. L. Rev. 1785, 1790-91 (2021). In each system, the ability of cohesive minority voters to elect their candidates of choice is enhanced because they can more effectively coalesce and vote as a bloc to elect the same preferred candidates. *See* Mulroy, *supra*, at 339. Because alternative methods of election do not require districting, jurisdictions may implement these systems without fearing any legitimate challenge that race played an excessive role in remedying an alleged or proven Section 2 vote dilution violation. *Id.*

In part because of these benefits, federal courts have repeatedly approved adopting alternative election methods as remedies for minority vote dilution. For example, some jurisdictions have adopted ranked-choice voting as a remedy for a dilutive at-large city council elections system. *See, e.g.*, *United States v. City of Eastpointe,* No. 4:17-cv-10079, 2019 WL 2647355, at *1 (E.D. Mich. June 26, 2019) (consent decree). Others have opted for cumulative voting to remedy the dilutive conditions that were present in elections for local boards or county commissions. *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 449 (S.D.N.Y. 2010); *Chilton Cty. Bd. of Educ.*, 699 F. Supp. at 876; *cf. Harper v. City of Chicago Heights*, 223 F.3d 593, 602 (7th Cir. 2000) (remanding to devise new remedy but discussing "virtues" of cumulative voting). And some have enacted limited voting for other local elections. *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 770 (N.D. Ohio 2009) (school board); *Dillard v. Town of Cuba*, 708 F. Supp. 1244, 1246 (M.D. Ala. 1988) (city council); *McGhee v. Granville Cty., N.C.*, 860 F.2d 110, 120 (4th Cir. 1988) (county board).

Thus, Appellants' argument that Section 2 plaintiffs cannot challenge dilutive single-member districting schemes because a remedy must be other race-conscious districts, Br. at 43, is both legally misguided and descriptively wrong. Only by oversimplifying Section 2 claims to one context—congressional redistricting—can Appellants then advocate for their preferred curtailment of the statute across the board. But to the extent the Court's precedents favor Section 2 remedies that "do not

classify voters on the basis of race," *Shaw*, 509 U.S. at 649, adopting alternative election systems will do just that and Appellants have no answer to this reality.

These alternative remedy options further prove that maps produced at the *liability* stage of a Section 2 vote dilution case do not tie jurisdictions' hands at the *remedial* phase. It is at that phase that excessive and unjustified race-conscious actions are prohibited, but the existing Section 2 framework leaves jurisdictions with ample room to eliminate vote dilution without incurring constitutional liability.

CONCLUSION

The Court should affirm the decision below.

July 18, 2022

Respectfully submitted,

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