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 FOR CASTER 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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INTRODUCTION

Black voters are systematically disadvantaged in Alabama politics. Just a few years ago, a federal judge lamented that "political exclusion through racism remains a real and enduring problem in this State" and "remain[s] regrettably entrenched in the high echelons of state government." *United States v. McGregor*, 824 F. Supp. 2d 1339, 1347 (M.D. Ala. 2011). Meanwhile, the severe socioeconomic marginalization of Black Alabamians—the legacy of a centuries-long history of discrimination—has only intensified the divergent political interests of Black and white voters, whose voting behavior splits overwhelmingly along racial lines. In this environment, Black voters' preferred candidates almost never win elections unless a majority of the relevant electorate is Black.

Against this backdrop, Alabama enacted a seven-district congressional plan, HB1, that artificially divides a sizeable Black population in the southern half of the state among several districts. These Alabamians comprise a reasonably compact community and share political interests stemming from a common history and culture. But because of severe racially polarized voting and Alabama's racialized politics, HB1 prevents Black voters from electing their candidates of choice in all but one of the state's congressional districts, shutting off equal access to the political process.

After receiving live testimony from eight experts and five fact witnesses, analyzing a dozen briefs, and

reviewing hundreds of exhibits, three federal judges comprising two different courts issued identical 225-page decisions concluding that HB1 "substantially likely" violates §2 of the Voting Rights Act. MSA206.[1] The question of liability was not even "a close one." MSA205.

Lacking any evidentiary basis for its appeal, Alabama instead asks this Court to drastically upend §2 precedent. Alabama's suggestion that §2 plaintiffs should be required to prove a challenged practice can be explained only by racial discrimination contradicts §2's text, decades of settled precedent, and Congress's express purpose. This proposal, moreover, threatens to decimate minority representation across the country and render §2 a mere restatement of the Fourteenth and Fifteenth Amendments. Similarly, Alabama's argument that §2 does not apply to single-member districting plans would nullify statutory language and replace Congress's clear intent with one state's policy preferences. These radical efforts to dismantle settled §2 precedent cannot withstand the "enhanced" *stare decisis* protection this Court's prior statutory interpretations receive, which leaves it to Congress and the democratic process to "correct any mistake[s]" seen in the Court's interpretations. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015).

Alabama feverishly sounds the alarm of racial gerrymandering, but neither the record nor the law legitimates its concerns. After considering the

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[1] Record citation formats in this brief mirror those used in Alabama's opening brief. Brief of Appellants ("Br.") 2 n.1.

evidence, the district courts reasonably rejected Alabama's claim that race predominated in Plaintiffs' illustrative plans. Nor does the §2 standard itself contravene the Equal Protection Clause. As an *evidentiary* matter, §2 plaintiffs must provide illustrative maps showing that additional, compact majority-minority districts are possible; but as a *remedial* matter, §2 is far less prescriptive, providing states flexibility in how to draw compliant districts. *See Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 917 n.9 (1996). Section 2 does *not* require states to meet any strict racial threshold, and it will never require adoption of districts that violate traditional redistricting principles. Contrary to Alabama's contention, the mere consideration of race in remedying a §2 violation "does not lead inevitably" to equal-protection concerns. *Shaw v. Reno* (*Shaw I*), 509 U.S. 630, 646 (1993).

Finally, because vote dilution that denies minority voters an equal "opportunity . . . to participate in the political process[]" is "invidious[ly] discriminat[ory]," *White v. Regester*, 412 U.S. 755, 766–69 (1973), §2 remains firmly grounded in Congress's enforcement powers under the Fourteenth and Fifteenth Amendments. *Thornburg v. Gingles*, 478 U.S. 30 (1986), developed a comprehensive, fact-intensive method to identify and remedy schemes that produce this result. The standard is exacting: §2 plaintiffs must clear a gauntlet of quantitative and qualitative requirements considered alongside a jurisdiction's history and political reality. This precedent ensures that unlawful vote dilution is carefully and

appropriately redressed consistent with the requirements of the U.S. Constitution.

As uncomfortable as the political reality in Alabama might be—and as strong the temptation to shut our eyes to the tenacity of racial discrimination in voting—the courts must not blink. Three federal judges carefully considered the extensive evidentiary record before them, applied the law as written, and unanimously found that Alabama's cracking of Black voters has denied them equal access to the political process. Alabama provides no sound reason for this Court to disturb that conclusion. The decisions should be affirmed.

STATEMENT

A. Section 2 of the VRA

Congress enacted the VRA after centuries of "unremitting and ingenious defiance of the Constitution" to exclude Black Americans from our political system. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966). Its "broad remedial purpose" was "rid[ding] the country of racial discrimination in voting." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (quoting *Katzenbach*, 383 U.S. at 315). It sought "not only to correct an active history of discrimination" but "also to deal with the *accumulation* of discrimination." *Gingles*, 478 U.S. at 44 n.9 (emphasis added) (quoting S. Rep. No. 97-417, at 5 (1982) ("S. Rep.")).

In 1982, Congress amended §2 to clarify that it "reach[es] cases in which discriminatory intent is not identified." *Johnson v. De Grandy*, 512 U.S. 997, 1009

n.8 (1994). The series of events that prompted this amendment began a decade earlier with *White v. Regester*, where the Court affirmed a finding that certain at-large districts in Texas unconstitutionally diluted minority votes. 412 U.S. at 765–70. Such a claim, the Court explained, requires a showing "that the political processes leading to nomination and election [a]re not equally open to participation by the group in question—that its members ha[ve] less opportunity than d[o] other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.* at 766. The Court pointed to Texas's "history of official racial discrimination" and its effect on minority groups' socioeconomic wellbeing; the use of practices that "enhanced the opportunity for racial discrimination"; the lack of success among minority candidates; and the use of "racial campaign tactics." *Id.* at 766–69. In such an environment, minority voters suffer from "invidious discrimination" because they cannot participate in "the political process in a reliable and meaningful manner." *Id.* at 767–69.

Seven years later, the Court held in *City of Mobile v. Bolden* that claims under §2 required a showing that the challenged practice was "motivated by a discriminatory purpose." 446 U.S. 55, 58, 62 (1980) (plurality op.). The *Bolden* plurality, however, did not "question[] the vitality of *White*." *Id.* at 94 (White, J., dissenting).

Bolden prompted Congress to "substantially revise[] §2 to make clear that a violation could be proved by showing discriminatory effect alone."

Gingles, 478 U.S. at 35. Congress "repudiated" *Bolden*'s intent test "for three principal reasons." *Id.* at 44. First, it is "unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities." *Id.* (quoting S. Rep. at 36). Second, it "places an 'inordinately difficult' burden of proof on plaintiffs." *Id.* And third, it "asks the wrong question." *Id.* The "right" question is "whether 'as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice'" because it "perpetuate[s] the effects of past purposeful discrimination." *Id.* at 44 & n.9 (quoting S. Rep. at 28, 40).

As amended, §2 outlaws any voting "standard, practice, or procedure" that "*results in* a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. §10301(a) (emphasis added). While Congress retained the language "on account of race or color," that phrase does not "connote any required purpose of racial discrimination"; rather, it merely means "with *respect to* race or color." *Gingles*, 478 U.S. at 71 n.34 (quoting S. Rep. at 27–28 n.109) (emphasis added). After all, §2 was meant to eliminate all "discriminatory election systems or practices which operate, designedly or otherwise, to minimize or cancel out the voting strength and political effectiveness of minority groups." S. Rep. at 28.

The 1982 amendments also incorporated within §2 *White*'s definition of an invidiously discriminatory political system: one in which, "based on the totality

of circumstances, . . . the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of" a protected class "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 first addressed §2's amended language in *Gingles*, where it articulated three preconditions §2 plaintiffs in redistricting cases must satisfy.

First, plaintiffs must show that the minority group at issue is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50; *see also Bartlett v. Strickland*, 556 U.S. 1, 18 (2009) (plurality op.) (minority group must comprise "more than 50 percent of the voting-age population" of illustrative district).

Second, plaintiffs must show that the minority group "is politically cohesive." *Gingles*, 478 U.S. at 51.

Third, plaintiffs must show "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate[s]." *Id.*

Satisfaction of the *Gingles* preconditions is necessary but not sufficient to establish §2 liability. *Wis. Legis. v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (per curiam). Once the preconditions are satisfied, "the statutory text directs [courts] to consider the 'totality of circumstances' to determine

whether members of a racial group have less opportunity than do other members of the electorate." *LULAC v. Perry*, 548 U.S. 399, 425–26 (2006).

The totality-of-circumstances analysis is a "flexible, fact-intensive" inquiry. *Gingles*, 478 U.S. at 46. For guidance, "the Court has referred to the Senate Report on the 1982 amendments," which "identifies factors typically relevant to a § 2 claim." *LULAC*, 548 U.S. at 426. These "Senate Factors"—drawn primarily from *White*—include (1) a history of voting-related official discrimination; (2) racially polarized voting; (3) the use of voting practices that enhance the opportunity for discrimination; (4) exclusion from candidate slating; (5) ongoing effects of discrimination in socioeconomic areas that hinder participation in the political process; (6) racial appeals in campaigns; (7) minority representation in public office; (8) lack of responsiveness to minority needs from elected officials; and (9) tenuousness of the policy underlying the challenged practice. *Id.* "Another relevant consideration is whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area," *id.*, though §2 disclaims any right to proportionality, 52 U.S.C. §10301(b).

Considering these factors and other relevant evidence, courts must undertake "a searching practical evaluation of the past and present reality" in the area at issue, taking "a 'functional' view of the political process" to determine whether it is "equally

open." *Gingles*, 478 U.S. at 45 (quoting S. Rep. at 30 & n.120).

B. The Black Belt, Mobile, and Montgomery

Alabama's Black Belt "extends, roughly, from Russell and Barbour Counties in East Alabama, through Montgomery County, to an expanding area covering Pickens County to Washington County on the Mississippi line." JA299–300. The majority of its residents are Black "descendants of the enslaved who were forced to work that land before and during the Civil War." JA299.

The Black Belt's Black community was forged by centuries of oppression. In the first half of the Nineteenth Century, white settlers "flood[ed]" the area, bringing slaves to work the fields. JA300. After the Civil War, freed slaves in the area became "landless tenant farmers, beholden to their former masters." JA301. When white Alabamians gathered for a constitutional convention to "establish white supremacy in the State," JA362, they were particularly motivated to disenfranchise Black residents of the Black Belt, whose political empowerment threatened white economic interests, JA301. Thereafter, the Black Belt became the "seedbed" of both the Ku Klux Klan and Alabama's citizens' councils, which violently enforced limits on Black political, economic, and social participation. *Id.*

The Black Belt has witnessed pivotal moments in Black Alabamians' long campaign against discrimination. JA302. It is where Rosa Parks refused

to give up her seat, leading to the Montgomery bus boycott. It is where, on "Bloody Sunday," police brutally attacked demonstrators, sparking enactment of the VRA. JA301. And it is where, one week later, Klan members in "Bloody Lowndes" County murdered activist Viola Liuzzo. JA301–02. Many of today's Black Belt residents vividly remember—and were physically present for—these events. *See Caster v. Milligan*, No. 2:21-cv-1536 (N.D. Ala. Jan. 24, 2022), ECF 56-4 at 102–05 (Tr. 349:6–352:19); *Caster*, ECF 56-5 at 50 (Tr. 542:2–8); *Caster*, ECF 99-4 at 226 (Tr. 1345:7–20); MSA192–93.

Discrimination in the Black Belt is unfortunately not a thing of the past. In 2015, Governor Robert Bentley retaliated against the Alabama Legislative Black Caucus during a budget dispute by closing DMV offices throughout the Black Belt. JA377–78, 446–47. The U.S. Department of Transportation intervened, finding the closures unlawfully discriminatory. JA264–65. Just a few years earlier, Alabama state senators were recorded calling Black residents of Greene County "Aborigines" while trying to depress their turnout in an upcoming election. *McGregor*, 824 F. Supp. 2d at 1345.

As a result of longstanding discrimination, the Black Belt's Black residents face severe socioeconomic deficits. Just three years ago, a UN representative reported that many of the region's Black residents live in conditions "very uncommon in the First World." JA239. Many lack proper sewage, drinking water, and electrical systems, causing households to fall ill from E. coli and hookworm. JA240.

Over the last century, fear of violence and hope for better opportunities prompted many Black residents of the Black Belt to migrate to nearby Mobile. JA302–04. Today, Mobile and Montgomery serve as "anchor cities" for the Black Belt. JA522. Given these "family ties," JA288, Black residents of Mobile, Montgomery, and the larger Black Belt share "traditions" and a common "tone of [] life." JA518–19, 521. They also share similar political interests arising from common "socioeconomic concerns" distinct from their white neighbors'. JA521. For example, schools in these areas are overwhelmingly segregated, with a disproportionate number of failing schools attended predominantly by Black students. JA304, 445, 447–49, 517, 753, 769–70, 772. Compared to their white neighbors, Black residents of these areas encounter significant barriers to employment, healthcare, utilities, public transportation, affordable childcare, and housing. JA285, 289, 295–96, 430–45, 447–55, 475–82, 520–22, 769–77, 789–96; *see also Caster*, ECF 48-49, 48-51, 48-53. In Mobile specifically, Black residents are largely excluded from the benefits of Mobile Bay's economy. JA452–53. These persistent issues cause Black residents in these areas to share a sense of "frustration," "isolation from opportunity," and loss of "faith in the system." JA437, 520.

Together, Mobile, Montgomery, and the larger Black Belt make up a significant portion of Alabama's Black population. Over 300,000 Black Alabamians live in the Black Belt, and over 100,000 Black Alabamians live in Mobile. SJA33, 83. Black residents in these areas make up roughly one-third of the state's

Black population and well over half the population of a congressional district. *See* SJA82–83.

C. Alabama's Racialized Political System

Race still holds powerful sway in Alabama politics. Just a few years ago, state legislators—one of whom is now a county judge in southern Alabama—were recorded strategizing about "suppress[ing] Black voter turnout" by keeping an issue important to Black Alabamians off the ballot, JA419, while targeting Black voters "for mockery and racist abuse," *McGregor*, 824 F. Supp. 2d at 1345–46. These events compelled a federal judge to write that "political exclusion through racism remains a real and enduring problem in" Alabama and is "regrettably entrenched in the high echelons of state government." *Id.* at 1347.

Since *McGregor*, federal courts have identified additional discriminatory conduct by officials in the state. The Eleventh Circuit blocked the Gardendale City Board of Education's efforts to secede from the Jefferson County Board of Education because it was "motivated" by "a racially discriminatory purpose." *Stout ex rel. Stout v. Jefferson Cnty. Bd. of Educ.*, 882 F.3d 988, 1014 (11th Cir. 2018). A federal court struck down 12 Alabama legislative districts as racially gerrymandered. *Ala. Legis. Black Caucus v. Alabama*, 231 F. Supp. 3d 1026, 1348 (M.D. Ala. 2017). And courts have brought two jurisdictions into limited coverage under VRA §3's preclearance requirements. *Jones v. Jefferson Cnty. Bd. of Educ.*, No. 2:19-cv-1821-MHH, 2019 WL 7500528, at *5 (N.D. Ala. Dec. 16, 2019); *Allen v. City of Evergreen*, Civ. A. No. 13-

107-CG-M, 2014 WL 12607819, at *2–3 (S.D. Ala. Jan. 13, 2014).

Alabama political candidates continue to engage in race-based appeals. A longtime member of Alabama's congressional delegation has repeatedly asserted that there is an ongoing "war on whites." JA257, 455–57. The current governor was elected after making "the preservation of confederate monuments a centerpiece" of her campaign. JA420. The current Chief Justice of the Alabama Supreme Court recently campaigned on his work "tak[ing] on" racial justice organizations, JA257, 458–61, and warned of an impending "invasion" of minority immigrants, *Caster*, ECF 56-4 at 190–91 (Tr. 437:21–438:25). His predecessor publicly lamented the effect of the Reconstruction Amendments to the Constitution, JA256, and proclaimed that the antebellum period in the South was "great" because "families were united" and "our country had a direction" "even though we had slavery," telling an audience that "today we've got a problem" because of civil rights legislation. JA256, 338. Two years ago, a candidate for U.S. Senate in Alabama ran an ad depicting public figures of color burning in a fire, despite admittedly knowing of the state's "horrific" history of racist burnings and lynchings. JA258–59, 872–83.

These appeals have a serious impact on Alabama's voters. They "deepen the racial divides" in the electorate. JA461. And they make Black residents feel like "second class citizen[s]" in their own state. JA458.

Voter behavior in the state is also consistently and sharply divided by race. Alabamians vote along extremely polarized racial lines—particularly in the southern half of the state that covers Mobile, Montgomery, and the Black Belt, SJA119–22, and particularly when elections involve candidates of different races, SJA8–14. Recent research suggests that the congressional districts that cover Alabama's Black Belt are home to some of the highest levels of racially polarized voting in the country. *See* Shiro Kuriwaki, et al., *The Geography of Racially Polarized Voting: Calibrating Surveys at the District Level*, OSF Preprints 18–19 (Dec. 4, 2021), https://doi.org/10.31219/osf.io/mk9e6. Alabamians are also divided over issues inextricably linked with race, such as the preservation of Confederate monuments, criminal justice reform, and the extent to which racism persists in Alabama today. JA487–89, 493–94.

As a result of the sharp divides between white and Black voters, Black Alabamians and their preferred candidates are rarely elected to office outside majority-Black jurisdictions and districts. No Black person has been elected to statewide office in a quarter century. JA261. Only two Black candidates have *ever* been elected to statewide office, and both were first appointed to their positions before being reelected. *Id.* All but one of the Black members of the Alabama Legislature come from majority-Black districts. JA424. And since the end of Reconstruction, no Black candidate has ever been elected to Congress in a majority-white district. JA153.

D. Alabama's Congressional Districts

The current configuration of Alabama's congressional districts is based on the state's 1970-cycle plan. SJA205–11. Under this configuration, Districts 4 and 5 span the width of the state in the north, while the remaining districts divide the central and southern parts of the state. SJA205.

Alabama drew the 1970-cycle plan just a few years after the VRA's enactment, when jurisdictions were "mov[ing] from direct, over[t] impediments to the right to vote to more sophisticated devices that dilute minority voting strength." *De Grandy*, 512 U.S. at 1018 (quoting S. Rep. at 10). The plan splintered the Black Belt among Districts 1, 2, 3, and 7. SJA205. Under this plan and its successor, voters elected white candidates to every congressional seat in every election. JA153.

When Alabama failed to obtain preclearance of a new plan following the 1990 census, federal litigation ensued. *Wesch v. Hunt*, 785 F. Supp. 1491 (S.D. Ala.), *aff'd sub nom. Camp v. Wesch*, 504 U.S. 902 (1992). Ultimately, the parties stipulated that a district that was at least 65% Black should be drawn, *id.* at 1493–94, and the court ordered this configuration without determining whether §2 required it. *Id.* at 1498–99.[2]

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[2] Alabama claims that the *Wesch* court "rejected an alternative plan that would have split Mobile County," Br.60 n.11, but nothing in the court's order suggests it rejected that plan *because* it split Mobile County.

In every election since *Wesch*, District 7's residents have elected Black-preferred candidates in increasingly uncompetitive races. Between 1992 and 2000, the Black-preferred candidate in District 7 received no less than 69% of the vote, and between 2002 and 2012, no less than 72%. JA345–46; U.S. House of Reps., *Election Statistics: 1920 to Present*, https://history.house.gov/Institution/Election-Statistics/Election-Statistics/. For the last decade, Representative Terri Sewell has run opposed. JA347. Meanwhile, Black voters in each of neighboring Districts 1, 2, and 3 have comprised just below one-third of the voting-age population. *Chestnut v. Merrill*, No. 2:18-cv-907 (N.D. Ala. Dec. 4, 2019), ECF 113-1 at 15, 18. Consequently, they have had no opportunity to elect their candidates of choice, *see* SJA122–23; *Caster*, ECF 56-2 at 9–10, creating a shared sense of "lack of agency," JA515.

Alabama enacted HB1 on November 4, 2021. Once again, the only district where Black voters have any chance of electing their preferred candidate is District 7. SJA122–23. And once again, the Black community outside of District 7 in the southern half of the state is divided "relatively evenly" among Districts 1, 2, and 3, despite being "nearly enough . . . to comprise an entire congressional district." SJA90. Under HB1, less than one-third of Alabama's Black population resides in a majority-Black district. *Id.* By contrast, 91.8% of Alabama's white population resides in a majority-white district, where white-preferred candidates are guaranteed to defeat Black-preferred candidates. SJA90, 121–22.

HB1 stands in stark contrast to the 2021 State Board of Education ("SBOE") plan that the Legislature drew at the same time. The eight-district SBOE plan contains *two* majority-Black districts, with one covering much of the Black Belt by connecting Montgomery to the City of Mobile and splitting Mobile County. SJA93, 95.

Both HB1 and the SBOE plan were drawn using the same set of redistricting guidelines from the Legislature's Reapportionment Committee. MSA227–31. Those guidelines prioritized population equality, avoiding dilution of minority voting strength, contiguity, and compactness. MSA228–30. They separately called for avoiding incumbent pairings, respecting communities of interest, minimizing the number of counties in each district, and preserving cores of existing districts, but only "to the extent that they do not violate or subordinate" the prioritized principles above. MSA230–31.

E. Proceedings Below

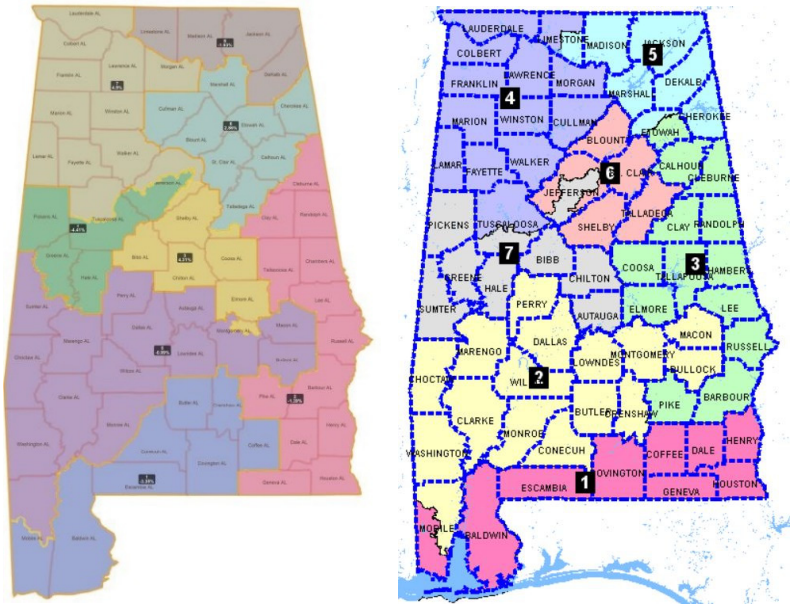
Hours after HB1 became law, Dr. Marcus Caster and seven other Black voters challenged it under §2. JA312. Their suit was consolidated for preliminary injunction proceedings with two other cases challenging HB1, including the *Milligan* case that is also before the Court.

1. Preliminary Injunction Proceedings

Over seven days, Plaintiffs collectively offered six expert and four fact witnesses in support of their §2 claims.

To satisfy the first *Gingles* precondition, Plaintiffs presented testimony from two experienced map-drawers, Mr. William Cooper (for the *Caster* plaintiffs) and Dr. Moon Duchin (*Milligan* Plaintiffs). Collectively, they offered 11 illustrative plans containing an additional majority-Black district, District 2. SJA25–27, 99–111, 148–51.

In these plans, illustrative District 2 unites the community of interest among residents of Mobile, Montgomery, and the greater Black Belt. *Id.* It closely resembles the majority-Black District 5 in Alabama's SBOE plan, created using the same redistricting guidelines as HB1. SJA91–96. The left figure below shows the 2021 SBOE plan, SJA95, while the right is one of Mr. Cooper's plans, SJA149.



To satisfy the second and third *Gingles* preconditions, Plaintiffs demonstrated that voting in Alabama is overwhelmingly racially polarized at the statewide level and in the southern half of the state where the districts at issue are located. Drs. Maxwell Palmer and Baodong Liu demonstrated that Black voters vote cohesively and that white Alabamians vote as a bloc and usually defeat Black-preferred candidates. SJA3–18, 117–24. Alabama's expert did not dispute these conclusions. JA780.

Finally, Plaintiffs offered expert and lay testimony showing that, under the totality of circumstances, HB1 provides Black voters in the southern half of the state unequal access to the political process. In so doing, they provided extensive evidence demonstrating all the relevant Senate Factors. *E.g.*, JA191–268, 359–426.

2. The District Courts' Decisions

After weighing the extensive record, the courts below (the single-judge court in *Caster* and the three-judge court in *Milligan*) issued identical 225-page orders granting a preliminary injunction. MSA1–227.

The courts first concluded that Plaintiffs satisfied the first precondition because their illustrative plans contained an additional, reasonably compact majority-Black district consistent with traditional redistricting principles. MSA154–83. The courts examined each principle—compactness, population equality, contiguity, maintenance of political subdivision boundaries, respect for communities of

interest, incumbency, and core retention—and explained in detail that the illustrative plans accounted for each. MSA155–83.

The courts found Mr. Cooper and Dr. Duchin "highly credible" and their methods "highly reliable." MSA156–60. By contrast, they found the testimony of Alabama's expert, Mr. Thomas Bryan—who attempted to demonstrate that Plaintiffs' illustrative plans were inconsistent with select traditional redistricting principles—not credible and unreliable. MSA160–66.

The courts rejected Alabama's argument that Plaintiffs' illustrative plans were racial gerrymanders, finding that the plans' compliance with traditional redistricting principles demonstrated that race was *not* the predominant factor. MSA213–15. And they explained that the limited racial considerations used to draw an illustrative plan under *Gingles* do not equate to racial predominance. MSA215–16.

As to the second and third preconditions, there was "no serious dispute that Black voters are 'politically cohesive,' nor that the challenged districts' white majority votes 'sufficiently as a bloc to usually defeat Black voters' preferred candidate.'" MSA183–87 (quoting *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017)).

Last, the courts found that, under the totality of circumstances, HB1 combines with social and historical circumstances to deny Black voters in

central and southern Alabama equal access to the political process. MSA187–88. They pointed to "recent" and "histor[ical]" voting-related discrimination in Alabama; a "clear, stark, and intense" "pattern of racially polarized voting"; "current socioeconomic disparities between Black Alabamians and white Alabamians," which "are inseparable from and (at least in part) the result of, the state's history of official discrimination"; the "virtually zero success" Black candidates have outside of majority-Black districts; and the existence of "racial campaign appeals" in Alabama politics. MSA188–202. Consistent with this Court's instruction that proportionality is a "relevant consideration" that may indicate "that minority voters have an equal opportunity, in spite of racial polarization, to participate in the political process," the courts found that there was "no such indication here." MSA203 (quoting *De Grandy*, 512 U.S. at 1020).

After reviewing all of the evidence before them, the courts concluded that the "question whether [Plaintiffs] are substantially likely to prevail on the merits of their Section Two claim" was not "a close one." MSA205. And after balancing the relevant equities, the courts concluded that preliminary relief was warranted. MSA206–13. They then denied Alabama's request to stay the injunction, MSA249–84, rejecting once again its "attention-grabbing but unsupported claims" that Plaintiffs' illustrative plans subordinated traditional redistricting principles to race. MSA271.

This Court stayed the district courts' injunction, noted probable jurisdiction in *Milligan*, and granted certiorari before judgment in *Caster*. *Merrill v. Milligan*, 142 S. Ct. 879 (2022).

SUMMARY OF ARGUMENT

The courts below did not clearly err in concluding that HB1 violates §2, and their faithful application of this Court's longstanding §2 precedent did not violate the Constitution.

I. The courts below did not clearly err in finding that HB1 violates §2.

A. As amended, §2 prohibits redistricting plans that, when "interact[ing] with social and historical conditions," cause "an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. A single-member redistricting plan violates §2 if it submerges a large, reasonably compact minority group into districts where its members have no opportunity to elect their preferred candidates, and if that dispersal results in "deny[ing] minority voters equal political opportunity" in electing representatives of their choice. *De Grandy*, 512 U.S. at 1014.

That is precisely what HB1 does. Black residents in Mobile, Montgomery, and the greater Black Belt share deep historical, cultural, and political connections. They could easily elect their preferred candidates in a compact congressional district drawn consistent with traditional redistricting criteria. But

instead, HB1 divides the Black voters within this well-established community of interest across several districts, and as a result, Black Alabamians have no chance to elect their preferred candidates outside of District 7. Given Alabama's racialized political system—shaped by the persistent political and socioeconomic marginalization caused by an ongoing history of discrimination—HB1 dilutes Black voting strength in this area, making the system "not equally open to participation" by Black voters. 52 U.S.C. §10301(b).

B. Plaintiffs satisfied the first *Gingles* precondition by presenting illustrative plans with an additional, reasonably compact majority-Black district.

Unable to establish clear error to the contrary, Alabama instead attacks Plaintiffs' illustrative plans based on select criteria unsupported by its own guidelines. For instance, Alabama insists that core retention trumps all other factors and that *one* specific community of interest must be prioritized over all others—arguments the district courts rightly rejected. And the computer-simulated plans on which Alabama relies applied *incomplete* criteria and thus shed no light on whether Plaintiffs' illustrative plans comply with the panoply of applicable traditional redistricting principles.

Nor does Alabama offer any basis for overturning the district courts' ultimate totality-of-circumstances conclusion. Alabama does not challenge *any* finding relating to the Senate Factors. Instead, it grossly mischaracterizes the decisions below, asserting that

the courts found a §2 violation *because* HB1 lacks proportionality—when the courts disclaimed any such approach—and suggesting that the courts' liability determination hinged on Plaintiffs' satisfaction of the first precondition alone—when that conclusion was instead based on all three preconditions and the totality of circumstances together.

II. The Court should decline Alabama's invitation to rewrite the text of the statute and overrule longstanding precedent by either dramatically altering §2's governing standard or else exempting single-member redistricting plans from §2 entirely. These proposals to overturn decades of §2 caselaw cannot withstand the "enhanced" *stare decisis* protection this Court's interpretations of §2 receive as longstanding statutory precedents. *Kimble*, 576 U.S. at 456. Congress is intimately familiar with the *Gingles* framework and this Court's application of §2 to single-member plans, and it has relied on those interpretations of §2 in amending other parts of the VRA. Responsibility for altering decades of §2 precedent lies with the democratic process, not judicial policymaking.

A. By arguing for a "race-neutral benchmark" and demanding §2 plaintiffs prove a challenged plan "can be explained only by racial discrimination," Br.44, Alabama seeks to reinstate *Bolden*'s intent test that Congress expressly rejected in the 1982 amendments. Such a rule "would run 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 (quoting 52 U.S.C. §10301(b)).

Reverting to an intent test would have a devastating impact on Black voting strength across the country, effectively immunizing discriminatory redistricting plans from §2 liability by allowing states to explain away discriminatory schemes with purportedly "race-neutral" justifications. Indeed, Alabama's proffered explanations for HB1 show just how easily states could defend racially dilutive redistricting plans. Prioritizing core retention, for instance, would permit states to dilute minority voting strength simply because they have long done so. Similarly, allowing states to escape liability whenever they can identify some community of interest that their plan groups together would render §2 meaningless.

Finally, adopting a purportedly "race-neutral" redistricting baseline would serve only to submerge long-oppressed minority groups into districts where they are consistently outvoted by the very majorities that have discriminated against them for centuries.

B. Alabama offers no reason why this Court should overturn its longstanding precedent applying §2 to single-member redistricting plans. Its argument defies §2's text, which plainly applies to practices and procedures that dilute voting strength—a broad category that does not distinguish between multi-member and single-member districts. And Alabama ignores Congress's endorsement, through subsequent

legislative action, of this Court's decisions applying §2 to single-member plans.

III. Faithful application of this Court's §2 precedent does not violate the Equal Protection Clause. In arguing otherwise, Alabama conflates the first *Gingles* precondition's requirement that *litigants* prove a minority group can constitute more than 50% of the voting-age population in a district, *Bartlett*, 556 U.S. at 18, with the remedial requirements §2 imposes on *states*. Because the former does not constitute state action, it cannot violate the Equal Protection Clause.

In contrast to *Bartlett*'s 50% evidentiary rule, the remedy for a §2 violation entails no "predetermined, 'non-negotiable' racial target." Br.77. A §2 remedy can be any plan that gives the minority group the *opportunity* "to elect its favored candidate." *Cooper*, 137 S. Ct. at 1472. Alabama offers no reason to conclude that a remedy in this case would compel contorted districts or a fixed racial percentage. The most it can show is that it would have to be aware of race to remedy HB1's racial vote dilution. But "awareness" of race in redistricting does not equate to "rac[ial] predomina[nce]." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Because Alabama offers no evidence that the remedy for a §2 violation would necessitate racial predominance, the decisions below present no equal-protection concerns.

IV. Under the Court's precedent, §2 falls comfortably within Congress's authority to enforce the Fourteenth and Fifteenth Amendments. Section 2 prohibits "invidiously discriminatory" redistricting

practices that deny minority groups equal access to participation in the political process. *White*, 412 U.S. at 756. While §2 plaintiffs need not prove intent, they must establish various indicia of a racially exclusionary political system, such as racially polarized voting, current effects of discrimination, barriers to minority-candidate success, and racialized political campaigns. As such, §2 remains closely tied to the constitutional prohibitions it enforces.

ARGUMENT

I. HB1 violates §2 of the VRA.

A. Section 2 prohibits redistricting practices that dilute minority voting strength.

In the redistricting context, §2 prohibits "vote dilution," *LULAC*, 548 U.S. at 427, which renders a political system "not equally open to participation by members of" a minority group, 52 U.S.C. §10301(b). "Dilution of racial minority group voting strength may be caused by the dispersal of [members of a minority group] into districts in which they constitute an ineffective minority of voters or from the concentration of [members of the group] into districts where they constitute an excessive majority." *Gingles*, 478 U.S. at 46 n.11. When the white majority "votes as a bloc against" the minority group's preferred candidates, a "fragmented minority group will be unable to muster sufficient votes in any district to carry its candidate to victory." *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993).

Section 2's prohibition of vote dilution neither requires maximization of minority voting strength nor demands proportionality. *De Grandy*, 512 U.S. at 1016–21. Only when a practice, "'interact[ing] with social and historical conditions,' impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters" will it violate §2. *Voinovich*, 507 U.S. at 153 (quoting *Gingles*, 478 U.S. at 47). When such interaction occurs, the concern is not merely the electoral defeat of the minority group's preferred candidates; it is the perpetuation of a political system where elected officials "ignore" the minority group's interests and needs "without fear of political consequences." *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). Minority groups subjected to such a political system suffer "invidious discrimination." *White*, 412 U.S. at 767. By amending §2 in 1982, Congress tasked courts with determining whether, under "the totality of circumstances," a challenged practice produces these discriminatory results. 52 U.S.C. §10301(b). And the Senate Factors provide a reliable roadmap for determining a minority group's equal access to the political process. *White*, 412 U.S. at 765–70.

Ultimately, §2 prohibits redistricting plans that perpetuate electoral racial exclusion by systematically "minimiz[ing] or cancel[ing] out" the votes of a sizeable minority group, *Gingles*, 478 U.S. at 48, and thus ensuring that its unique interests are ignored. Such schemes unfairly deny minority voters the opportunity to "pull, haul, and trade to find common political ground," *De Grandy*, 512 U.S. at 1020, foreclosing an equal "opportunity" to participate

in the political process, 52 U.S.C. §10301(b). To remedy that unequal access, §2 requires the creation of a district that gives the minority group a reasonable opportunity to elect its candidates of choice. *See Shaw II*, 517 U.S. at 917 n.9.

Here, rather than reflect the voting power of the state's growing Black population, HB1 limits Black electoral opportunity in the state to a single district and divides the rest of the politically cohesive and geographically compact Black community in the southern half of Alabama among several districts where its members' preferred candidates are guaranteed to lose. Within the context of Alabama's racialized politics and history of discrimination, the fragmentation of this sizable Black population denies Black voters an equal opportunity to elect members of Alabama's congressional delegation. As a result, HB1 violates §2.

B. The district courts' findings of vote dilution were not clearly erroneous.

1. This Court owes substantial deference to the district courts' findings.

Alabama's appeal faces a strong headwind. This Court reviews the district courts' finding that HB1 violates §2 using "the clearly-erroneous test of Rule 52(a)." *Gingles*, 478 U.S. at 79. It may reverse only if, "on the entire evidence," it "is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985) (quoting *United States v. U.S. Gypsum*

Co., 333 U.S. 364, 395 (1948)). Because the §2 inquiry is "peculiarly dependent upon the facts of each case" and "requires an 'intensely local appraisal of the design and impact' of the contested electoral mechanisms," the clearly-erroneous standard "preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law." *Gingles*, 478 U.S. at 79 (quoting *Rogers*, 458 U.S. at 621, 622).

Such deference is at its apogee where, as here, the trial court benefited from live testimony and made explicit credibility determinations. *See* MSA156–66; *Cooper*, 137 S. Ct. at 1474; *Anderson*, 470 U.S. at 575–76.

2. Plaintiffs' illustrative plans contain a second, reasonably compact majority-Black district.

The courts below properly concluded that Plaintiffs satisfied the first *Gingles* precondition. Plaintiffs collectively presented 11 illustrative maps containing an additional majority-Black district—District 2—that is "reasonably compact" and complies with "traditional districting principles." *LULAC*, 548 U.S. at 433. After making credibility determinations (unchallenged here), the district courts explained how Plaintiffs' illustrative plans comply with each relevant redistricting principle. MSA155–83. Specifically, they found that the illustrative plans overall—and District 2 within them—are reasonably compact, comply with "population deviation" requirements, are contiguous, "respect traditional

boundaries and subdivisions" at least as much as HB1, "protect important communities of interest," and avoid pairing incumbents. MSA183.

a. The fact that Plaintiffs' experts intentionally drew a second majority-Black district in their illustrative plans does not improperly "inject[] race into the first step of *Gingles*." Br.68. What Alabama misleadingly calls a "quota," *id.* at 57, was in reality Plaintiffs' satisfaction of the standard set by this Court's precedent: a showing that the minority population could comprise more than "50 percent" of a reasonably compact district. *Bartlett*, 556 U.S. at 18; *De Grandy*, 512 U.S. at 1008. Race will always be "a factor" when plaintiffs are tasked with demonstrating that a particular minority group is sizeable and compact enough to warrant §2 protection. *Davis v. Chiles*, 139 F.3d 1414, 1426 (11th Cir. 1998). Rejecting an illustrative plan because it is not "race-neutral," Br.68, would "penalize" §2 plaintiffs "for attempting to make the very showing that *Gingles*" demands and make it "impossible, as a matter of law, for any plaintiff to bring a successful Section Two action," *Davis*, 139 F.3d at 1425; *see also Robinson v. Ardoin*, 37 F.4th 208, 222 (5th Cir. 2022) ("[R]acial consciousness in the drawing of illustrative maps does not defeat a *Gingles* claim."), *cert. granted*, No. 21-1596 (2022).[3]

Alabama repeatedly cites Dr. Duchin's statement that she considered keeping District 2 majority-Black

[3] Section II below explains why the Court should reject Alabama's proposal to transform the §2 framework by requiring plaintiffs to offer entirely "race-neutral" illustrative plans.

"non-negotiable," Br.68, 77, but that singular statement cannot bear the weight that Alabama puts on it. As an initial matter, the extent to which *Dr. Duchin* considered race in drawing her illustrative plans says nothing of *Mr. Cooper's* plans, which Alabama's mapping expert barely examined. *See* MSA160 (finding Mr. Bryan's opinion that race predominated in Plaintiffs' plans *not* credible, in part because "he never reviewed the exhibits to Mr. Cooper's report" and ignored a plan Mr. Cooper developed "directly in response to" Mr. Bryan's criticisms). In any event, given Plaintiffs' task—"creating *more* than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice," *LULAC*, 548 U.S. at 430 (emphasis added) (quoting *De Grandy*, 512 U.S. at 1008)—it would have made no sense for their experts to consider plans that did *not* contain two majority-Black districts.

Alabama's other "evidence" of racial predominance is no more availing. It points to an image prepared by its discredited expert to assert that one of Dr. Duchin's illustrative plans "sacrificed traditional districting criteria for the sake of racial preferences." Br.58–59. But this figure—like similar figures Mr. Bryan prepared for other illustrative plans—conspicuously omits the boundaries of Alabama's political subdivisions (most notably, municipalities and precincts) that Plaintiffs' experts sought to respect. JA597–98. Indeed, Alabama's expert admitted that his figures did not show whether Mr. Cooper's illustrative plans violate city or precinct boundaries in the Mobile area, JA749–50, and that he could not

point to a *single* "line drawing decision[]" made by Mr. Cooper that was based on race, JA740.

Alabama badly mischaracterizes the decisions below by claiming that *the courts* concluded that "race predominated" in Plaintiffs' illustrative plans. Br.66. The courts did no such thing. Instead, they "*reject*[*ed*]" Alabama's arguments that "race predominated in the plaintiffs' preparation of their illustrative remedial districts" based on their careful evaluation of the record evidence. MSA260 (emphasis added). The district courts explained that Plaintiffs' experts did *not* "prioritize[] race above everything else," MSA214, but rather balanced consideration of race with all other redistricting principles, MSA158–60. This case is therefore nothing like *Cooper*, where the map-drawer admitted that he "could not respect" certain principles because race was "more important." 137 S. Ct. at 1469.

b. Alabama cannot otherwise demonstrate that Plaintiffs' illustrative plans (and District 2 in particular) violate "traditional districting principles." *LULAC*, 548 U.S. at 433. Alabama does not challenge most of the courts' findings on individual districting principles. *See Davis*, 139 F.3d at 1425 (rejecting racial predominance argument where defendant was "[un]able to identify a single traditional redistricting principle which [plaintiff's] subdistricting scheme would violate"). Specifically, it takes no issue with the district courts' conclusions that the illustrative plans comport with population equality, contiguity, and incumbent protection. MSA172, 181. It does not—and cannot—contest the courts' findings that Mr. Cooper's

plans "perform at least as well as" (and in some instances "better" than) HB1 in preserving political subdivisions. MSA173. And it offers nothing that calls into question Mr. Cooper's testimony that he split precincts only when needed to achieve perfect population equality, and that when he did so, he followed neutral boundaries such as municipal lines, thoroughfares, and census blocks. *Id.*

Alabama's arguments instead focus largely on core retention. *E.g.*, Br.61. But Alabama's own redistricting guidelines did "not establish that core retention must be the (or even a) priority." MSA182. And, as the district courts explained, making core retention dispositive would "turn the law upside-down, immunizing states from liability" no matter how discriminatory or dilutive the challenged plan might be. *Id.* After all, as Alabama's expert agreed, *Caster*, ECF 99-3 at 159–60 (Tr. 947:6–948:1), deviation from existing district cores is to be expected where *Gingles* requires plaintiffs to draw an additional majority-Black district "that was not there before," MSA182. Here too, Alabama seeks to "penalize" Plaintiffs for making the very showing that *Gingles* "demand[s]." *Davis*, 139 F.3d at 1425; *see also Robinson*, 37 F.4th at 221 (finding core retention analysis "has little value in evaluating whether the plaintiffs satisfied [§2's] compactness requirement").

As for compactness, Alabama falsely claims that the district courts focused on the illustrative plans' overall average compactness scores rather than District 2's specifically. Br.66. But the courts explicitly analyzed compactness "disaggregated to the

district level" and concluded that District 2 in each plan was reasonably compact. MSA167–68. And while Alabama argues that District 2 in the illustrative plans is "less compact than the district it would replace," Br.67, that does not inform whether the illustrative district is "*reasonably* compact." *De Grandy*, 512 U.S. at 1008 (emphasis added); *see also Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality op.) ("[a] §2 district that is *reasonably* compact and regular" need not "defeat [a] rival compact district[]" in a "beauty contest[]"). As the courts below noted, MSA167–68, Alabama's own expert offered *no* opinion that Plaintiffs' plans as a whole, or District 2 within them, were not reasonably compact. JA744.

The mere fact that District 2 in some of the illustrative plans covers "the width of the state" does not render it "[un]reasonably configured." Br.66. In fact, HB1 includes a different district—District 4—that "spans the width of the state," JA856, as did Districts 4 *and* 5 in each of the state's six prior congressional plans, SJA205–10. Alabama cannot create a double standard for majority-Black districts, faulting them for following the same rules as the enacted majority-white districts. In any event, Alabama's singular focus on district size cannot be squared with *LULAC*. There, the Court was careful to note that it was the "geographical distance separating" the two minority communities "*coupled with* the disparate needs and interests of these populations—*not either factor alone*—" that rendered a district "noncompact." *LULAC*, 548 U.S. at 435 (emphases added). Here, where there is no dispute that illustrative District 2's Black residents share

similar interests and needs, *supra* at 11, size alone does not render the district noncompact.

Finally, Alabama cannot demonstrate that the illustrative plans fail to respect communities of interest. Plaintiffs' illustrative District 2 connects Mobile, Montgomery, and the greater Black Belt to unite a historical, cultural, and political community of interest. Plaintiffs offered substantial expert and lay testimony to identify and describe this community, *id.*, and the courts below found strong ties among Black residents in this area along several dimensions, MSA173–81. Indeed, *Alabama itself* recognized this same community in drawing an SBOE district that closely resembles Plaintiffs' illustrative District 2. *Supra* at 18.[4]

Alabama does not dispute that the illustrative plans respect this community of interest. Instead, it complains that the plans split an economic community of interest around Mobile Bay. Br.58. But Alabama offers nothing to explain how its prioritization of this one community could justify denying Black voters an equal opportunity to elect their candidates of choice—particularly where Black residents have long been excluded from the benefits that community provides

[4] Alabama's argument that HB1 connects the Black Belt "just as well as, or better than" the illustrative plans is wrong. Br.60 n.11. HB1 excludes eight of the 18 Black Belt counties from the sole district that offers Black residents an opportunity to elect their preferred candidates. MSA177. In contrast, Plaintiffs' illustrative plans place the "overwhelming majority of the Black Belt in just two districts," *id.*, both of which would provide Black voters an opportunity to elect their preferred candidates.

white residents. JA452–53. Regardless, "there is more than one way to draw a district so that it can reasonably be described as meaningfully adhering to traditional principles." *Chen v. City of Houston*, 206 F.3d 502, 519 (5th Cir. 2000). Redistricting inevitably requires tradeoffs among many overlapping communities of interest. *See* JA614–16. Alabama's subjective desire to preserve one particular community of interest around Mobile Bay does nothing to undermine Plaintiffs' satisfaction of the first precondition. Plaintiffs' illustrative plans may prioritize different communities of interest, but they respect communities of interest generally to at least the same extent as HB1.

c. Contrary to Alabama's assertion, the fact that the simulation maps produced by the *Milligan* Plaintiffs' experts did not contain two majority-Black districts does not demonstrate that race predominated in Plaintiffs' illustrative plans. Br.22–23. Indeed, the simulations prepared by Drs. Duchin and Kosuke Imai shed *no* light on the role race played in creating the illustrative plans because they excluded key redistricting principles that Plaintiffs' experts used. *See Caster*, ECF 103 at 2 (Alabama conceding Dr. Duchin's plans were generated using "only a few" principles); SJA58 (same for Dr. Imai's analysis). Because these simulations—which were created for a different purpose and used different population data—did not account for all the relevant principles the illustrative plans considered, Alabama is offering an apples-to-oranges comparison. *See Robinson*, 37 F.4th at 220 ("discount[ing]" simulation analysis "for whatever purpose it could serve in showing the

compactness (or lack thereof) among the black voting population" where it "did not incorporate" relevant traditional redistricting principles).

Most notably, the simulations did not consider communities of interest. This redistricting principle "was fervently disputed" below, with all parties devoting "significant time and argument to it." MSA174. "[I]t is apparent" that Plaintiffs' illustrative plans "respect th[e] important community of interest" among residents of Mobile, Montgomery, and the greater Black Belt, who share history, culture, and socioeconomic concerns. MSA177–78. As the simulations on which Alabama relies did not consider communities of interest *at all*, it is unsurprising they do not reproduce Plaintiffs' illustrative plans.

At most, the simulated plans indicate that race was among myriad factors considered in drawing the illustrative plans. That Plaintiffs' experts *considered* race "is unremarkable," MSA261, since map-drawers are "always . . . *aware* of race when" drawing "district lines," *Shaw I*, 509 U.S. at 646. As the courts below explained, "although the simulation results suggest that some awareness of race likely is required to draw two majority-Black districts, they do not establish that race must predominate to achieve that result." MSA261. That Plaintiffs' experts were aware of race when drawing a second majority-Black district does not mean race predominated over factors the simulated plans are ill-equipped to consider.

These issues only exemplify the fundamental problem with Alabama's suggestion that simulations

should be used to create a §2 safe harbor. Whether compact and cohesive racial communities have been denied equal access to the political process—the key §2 question—plainly cannot be answered by a program blind to those communities. Allowing this type of misleading comparison to defeat §2 claims would erect insurmountable barriers for plaintiffs, the very scenario Congress sought to avoid. *Gingles*, 478 U.S. at 44. And it would provide cover for plans that clearly dilute minority voting strength—as evidenced by Alabama's neglect of the community encompassed by District 2 in Plaintiffs' illustrative plans.

To be sure, simulation analyses can have useful application in other redistricting contexts. For example, if a state *disclaims* a specific consideration, like an effort to benefit one political party over another, simulations that exclude that criterion can test the veracity of that claim. That is the limit of Dr. Imai's race-blind simulations here—testing Alabama's assertion that race had no role in HB1's creation. But Plaintiffs' experts made no such assertion as to their illustrative plans. *E.g.*, JA595.

Because the simulations did *not* take into account the principles Plaintiffs' experts used to create their illustrative plans, they cannot show whether the community of Black Alabamians that reside in illustrative District 2 is "reasonably compact." *LULAC*, 548 U.S. at 433.

3. Under the totality of circumstances, HB1 results in unequal access to the political process.

After concluding Plaintiffs satisfied each of the *Gingles* preconditions,[5] the courts below reached the heart of the §2 inquiry. Carefully considering all relevant facts in the record, they determined that HB1 denies Black voters an equal opportunity to participate in the process of electing congressional representatives. MSA187–206. This finding was not clearly erroneous.

Alabama does not question any of the district courts' conclusions regarding the Senate Factors. It studiously ignores the extensive findings about Alabama's historical and present-day voting-related discrimination, racially polarized voting, socioeconomic disparities, racial appeals in campaigns, and severe underrepresentation of Black Alabamians in elected office. MSA183–202. Instead, it shadowboxes against its own mischaracterizations of the district courts' decisions.

According to Alabama, the district courts concluded that HB1 violates §2 *because* it lacks proportionality. Br.63. Not so. The courts reaffirmed that §2 does not "establish[] a right to have members of a protected class elected in numbers equal to their proportion in the population." MSA203. And they explained that proportionality is merely one "relevant consideration in the totality of the circumstances

[5] Alabama does not challenge the district courts' findings on the second and third preconditions.

analysis," as it may indicate "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." *Id.* (quoting *De Grandy*, 512 U.S. at 1020).

The courts thus examined proportionality not as an indicator of discrimination, *contra* Br.63, but as potential evidence that HB1 was *free* from liability, MSA52. Even then, the courts considered it as just one of many factors, explaining, "We do not resolve the [Plaintiffs'] motion for a preliminary injunction solely (or even in the main) by conducting a proportionality analysis." MSA205. Their finding on this issue led merely to "the limited and obvious conclusion" that Alabama cannot use the number of Black-opportunity districts in HB1 as evidence of equal opportunity. *Id.*

Finally, contrary to Alabama's repeated mischaracterizations, the district courts did not conclude that "because an additional majority-black district *could* be drawn, it *must* be drawn." Br.53. As always, the first *Gingles* precondition was only one part of the district courts' inquiry, which led ultimately to a totality-of-circumstances analysis. The courts concluded that an additional Black-opportunity district must be drawn not only because it could be, but *also* because Alabama's severely polarized voting and the totality of circumstances demonstrate that "social and historical conditions" interact in the state to impair Black voters' ability "to elect [their] candidate of choice on an equal basis with other voters." *Voinovich*, 507 U.S. at 153 (quoting *Gingles*, 478 U.S. at 47); *see* MSA183–206. Alabama's myopic

focus on only a single thread of the §2 inquiry causes it to disregard the sum of the district courts' reasoned analysis. *See Gingles*, 478 U.S. at 55 (rejecting argument because it "isolate[d] a single line in the [lower] court's opinion and identifie[d] it as the court's complete test").

II. The Court should not rewrite §2 or reverse its longstanding precedent.

A. The Court should not rewrite §2 to add an intent requirement.

Lacking support in the record or governing law, Alabama asks this Court to rewrite §2 by requiring plaintiffs to prove a challenged plan "can be explained only by racial discrimination." Br.44. This proposal would nullify Congress's express purpose in enacting the 1982 amendments, defy §2's text, and overturn four decades of precedent.

1. Alabama's proposal is utterly incompatible with the 1982 amendments, which "repudiated" *Bolden*'s intent test and made "clear that a violation could be proved by showing discriminatory effect alone." *Gingles*, 478 U.S. at 35, 44. Section 2's text precludes Alabama's approach by prohibiting any "standard, practice, or procedure . . . which *results* in" a denial or abridgement of the right to vote, and by mandating a "totality of circumstances" analysis. 52 U.S.C. §10301 (emphasis added). Congress amended §2 in the wake of *Bolden* because it found that a mandatory intent test requires divisive charges of racism against officials and fellow citizens, places a nearly

insurmountable burden on §2 litigants, and ultimately "asks the wrong question" by focusing on motives rather than the actual impact on minority electoral opportunity. *Gingles*, 478 U.S. at 44. Alabama's proposal would have precisely these effects.

2. Adopting Alabama's proposal would also require overturning this Court's foundational precedent interpreting §2. If §2 liability hinges on whether the challenged plan can be explained only by racial discrimination, there is no reason to engage in the "searching practical evaluation of the 'past and present reality'" this Court has required to "assess the impact of the contested structure or practice on minority electoral opportunities." *Gingles*, 478 U.S. at 44–45 (quoting S. Rep. at 30). Nor would courts ever consider how the challenged plan "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.

That interpretation of the VRA enjoys "enhanced" *stare decisis* protection. *Kimble*, 576 U.S. at 456; *see also id.* (enhanced *stare decisis* protection of statutory precedents applies "even when a decision has announced a 'judicially created doctrine' designed to implement a federal statute"). Because "Congress remains free to alter" statutory precedents, *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014), this Court leaves "the updating or correction of erroneous statutory precedents to the legislative process," *Ramos v. Louisiana*, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring); *see*

also Amy C. Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317, 320, 349 (2005) (explaining the Court's "nearly sacrosanct" treatment of its statutory precedents as "rest[ing] on discomfort with Congress's delegating policymaking authority to the courts").

Decades of interbranch dialogue clarifying the VRA's meaning support the Court's existing precedent. When this Court held that §2 claims require proof of discriminatory intent, *Bolden*, 446 U.S. at 61, 63, Congress immediately amended §2 to make "clear that a violation could be proved by showing discriminatory effect alone." *Gingles*, 478 U.S. at 35. By contrast, Congress stayed conspicuously silent after this Court's adoption and continued application of the *Gingles* standard, despite later amending *other* parts of the VRA in response to *other* decisions by this Court. *See, e.g.*, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109-246, §§2(b)(6), 5, 120 Stat. 577, 578, 580–81 (2006) (amending VRA §5 in response to *Georgia v. Ashcroft*, 539 U.S. 461 (2003), and *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000), which "misconstrued Congress's original intent in enacting" the VRA). By leaving §2 untouched in its 1992 and 2006 amendments to the VRA, Congress "adopt[ed]" the Court's "interpretation" of §2 in *Gingles*. *Ankenbrandt v. Richards*, 504 U.S. 689, 701 (1992) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).

Rather than taking its "objections across the street" to Congress, which "can correct any mistake it sees," *Kimble*, 576 U.S. at 456, Alabama asks the Court to overturn this well-settled statutory precedent. The Court should decline the invitation.

3. Alabama fails to provide any convincing reason why the Court should ignore Congress's adoption of *Gingles* and rewrite §2 for itself. Faithful application of that precedent does not render the first precondition "a useless gatekeeper," as Alabama claims. Br.68. Often, a minority group's size or geographical dispersal makes it impossible to draw an additional majority-minority district consistent with traditional principles. *E.g.*, *Abbott v. Perez*, 138 S. Ct. 2305, 2331 (2018) (noting "the geography and demographics of south and west Texas" precluded creating additional majority-minority district); *Bartlett*, 556 U.S. at 8 (no §2 violation where state "no longer could draw a geographically compact majority-minority district"); *LULAC*, 548 U.S. at 424, 429–35 (§2 did not justify district combining two "farflung" communities with "divergent needs and interests"). And Alabama once again ignores that the first precondition is merely the first step in a comprehensive, fact- and context-specific inquiry. *Supra* at 41–42. Satisfaction of the first precondition does not alone compel the creation of a remedial district.

Requiring Plaintiffs to prove that a plan "can be explained only by racial discrimination," Br.44, as Alabama urges, would not only subvert the text and purpose of the 1982 amendments, it also would allow

states to knowingly submerge minority groups into districts in which they have no opportunity to elect their preferred candidates. This is precisely the sort of less detectable—but no less invidious—discrimination §2 was meant to stamp out. *De Grandy*, 512 U.S. at 1018. Under Alabama's proposed test, a plan is lawful so long as it can be explained by *some* "non-discriminatory redistricting principle[]," Br.60, even if the resulting redistricting scheme provides minority voters "less opportunity than other members of the electorate to . . . elect representatives of their choice," 52 U.S.C. §10301(b). But because redistricting requires countless tradeoffs, a state will almost *always* be able to identify *some* neutral explanation for even the most discriminatory plans.

The dangers of requiring plaintiffs to prove that a redistricting plan "can be explained only by racial discrimination," Br.44, are well illustrated by the purported "race-neutral" justifications Alabama itself offers for HB1's dilutive scheme. It first contends that HB1 serves the state's interest in core retention. Br.60. But "core retention" in this context equates to calcification—and perpetuation—of previous dilutive plans and their discriminatory impacts on minority voters. Alabama, for example, maintained materially identical district configurations from the 1970s until VRA litigation in the 1990s resulted in the state's only minority-opportunity district. If Alabama were entitled to rely on core retention to explain away a dilutive redistricting scheme, it could very well have maintained *all* majority-white districts even today on that basis. In short, core retention would allow

Alabama to knowingly cancel out Black political influence simply because it has always done so.

Alabama also offers its preferred community of interest around Mobile Bay as a justification for an otherwise dilutive redistricting plan. But even if a "non-discriminatory redistricting principle[]" can "explain" HB1, Br.60, protecting *this* community of interest comes at an indefensible cost for minority voters. In the context of this case, it means prioritizing a white economic community of interest with a "heritage" in slave-holding European "colon[ies]," Br.21, at the expense of a long-ignored community of interest comprised of Black Alabamians who have been subjected to centuries of discrimination. If a state's choice to prioritize a favored community of interest could immunize redistricting plans from challenge, Alabama and other states would have carte blanche to ignore minority communities any time they can credibly identify some *other* competing community of interest.

Even worse, allowing such a manipulable rationale to justify vote dilution would embolden states to eliminate their *existing* majority-minority districts. Alabama admits as much. Br.44 (arguing that §2 applies only when state cannot proffer a race-neutral justification for eliminating majority-minority district). But "the need for" §2's "'totality' review springs from the demonstrated ingenuity of state and local governments in hobbling minority voting power, a point recognized by Congress when it amended the statute in 1982." *De Grandy*, 512 U.S. at 1018 (citation

omitted). Alabama's proposal would not only encourage such "ingenuity," but endorse it.

4. Finally, adopting a "race-neutral" baseline would deprive minority groups of crucial protection in political systems where an enduring legacy of discrimination has left them in segregated communities with distinct political interests. Minority groups constitute, by definition, less than a majority of a state's population. "Race-neutral" redistricting will invite states to turn a blind eye to those already marginalized groups and leave their members submerged within districts in which the politically hostile majority group consistently outvotes them. That is a recipe for white-dominated state governments and congressional delegations, Black disenfranchisement, and racial apartheid.

With the VRA, Congress acted to protect politically vulnerable minority groups against continuing political subjugation by the majority, explicitly protecting their right to an equal opportunity to elect their candidates of choice. In turn, this Court's existing §2 precedent—which calls for objective measurements and a probing inquiry into the history and ongoing effects of discrimination—establishes a workable regime for identifying defective political processes that deny a minority group equal access to the political process. To consign those minority groups to whatever districts a "race-blind" map-drawer happens to draw ensures *precisely* the sort of dilution that Congress enacted the VRA to remedy.

B. The Court should not exempt single-member redistricting plans from §2.

Alabama's alternative contention that "§2 does not apply to single-member districts," Br.50, similarly cannot be squared with settled precedent, §2's text, or Congress's unequivocal intent.

1. This Court has long held that single-member redistricting plans fall within the universe of voting "standards, practices, and procedures" subject to §2. 52 U.S.C. §10301(a); *see Wis. Legis.*, 142 S. Ct. at 1248; *LULAC*, 548 U.S. at 423; *Bartlett*, 556 U.S. at 7; *De Grandy*, 512 U.S. at 1006; *Voinovich*, 507 U.S. at 157–58; *Growe v. Emison*, 507 U.S. 25, 40–41 (1993). These interpretations, too, are entitled to "enhanced" *stare decisis* protection. *Kimble*, 576 U.S. at 456. This Court began applying §2 to single-member redistricting plans in 1993, *Growe*, 707 U.S. at 40—and even invalidated such a plan, *LULAC*, 548 U.S. at 423—yet Congress stayed conspicuously silent, despite making other amendments to the VRA in 2006.

2. Alabama's assertion that §2 does not apply to single-member plans is also wrong as a textual matter. Even the definitions for "practice" and "procedure" found in the dictionaries on which Alabama relies make clear that a single-member redistricting plan is *both*: It is a voting "practice" because it sets forth the "operation" by which voters select specific representatives, Webster's New International Dictionary 1937 (2d ed. 1948); Oxford English Dictionary 271 (2d ed. 1989), and it is a

"procedure" because it establishes the "[m]anner" in which they do so, Webster's Second 1972; OED 543.

The fact that "voting qualification" and "prerequisite to voting" precede "practice" and "procedure" in §2 does not suggest that they apply only to processes that can interfere with the "cast[ing]" of a ballot. Br.51. Section 2 separately regulates any "voting qualification *or* prerequisite to voting *or* standard, practice, or procedure." 52 U.S.C. §10301(a) (emphases added). To determine the scope of "standard[s], practic[es], or procedure[s]," one must look not to the separate categories of regulated conduct that precede those terms but instead to what those terms themselves qualify: schemes that can "den[y] or abridge[]" the "right . . . to vote." *Id.* Because vote dilution caused by single-member redistricting plans "abridg[es]" the right to vote, *Bossier Par. Sch. Bd.*, 528 U.S. at 329, §2 regulates those practices.

There can be "no question" that §2 applies to *all* schemes that "minimize a racial minority's ability to influence the outcome of an election," *Chisom*, 501 U.S. at 390, and "that Congress intended the 1982 amendment to cover [vote-dilution] claims" specifically, *Holder v. Hall*, 512 U.S. 874, 963 (1994) (op. of Stevens, J.). Alabama does not contend otherwise, yet it would inexplicably limit §2 to vote-dilution claims challenging only "multimember and at-large schemes." Br.51. This proposed limitation undermines Alabama's own textual argument—after all, multimember and at-large districting schemes are not ballot-casting processes either. It is also an

entirely arbitrary bifurcation with no basis in the law, legislative history, or logic.

No meaningful difference exists between the vote dilution a minority group experiences from submergence in a multimember district and "submerg[ence] . . . in a larger white voting population" within a single-member district. *Growe*, 507 U.S. at 40. For this reason, the Court has rejected similar efforts to restrict §2's application, explaining it is "difficult to believe that Congress, in an express effort to broaden the protection afforded by the Voting Rights Act [in 1982], withdrew, without comment, an important category of elections from that protection" by limiting §2 vote-dilution claims to those attacking multimember districts. *Chisom*, 501 U.S. at 404.

3. Having neither text nor history on its side, Alabama advances a policy argument, asserting that courts should elect *not* to adjudicate §2 challenges to single-member redistricting plans because it requires them to engage with "questions of political theory." Br.51. But whether §2 should be changed to relieve courts of their obligation to adjudicate such claims is a question for "Congress, which has ample power to amend the statute." *Holder*, 512 U.S. at 957 (op. of Stevens, J.). That §2 sometimes asks "courts to resolve difficult questions" is not a reason to engage in judicial legislating. *Id.* at 966.

III. This Court's longstanding §2 precedent does not violate the Equal Protection Clause.

The animating force behind many of Alabama's arguments is its contention that §2, as interpreted in *Gingles*, requires states to engage in racial gerrymandering in violation of the Equal Protection Clause. *E.g.*, Br.75–79. This is wrong: It overstates the limited consideration of race that §2 requires states to undertake and misunderstands the Court's racial-gerrymandering precedent.

Section 2 does not require Alabama to redraw its districts to "hit a predetermined, 'non-negotiable' racial target." Br.77. This argument conflates the evidentiary showing that the first *Gingles* precondition requires *litigants* to undertake with the more flexible remedial requirements that §2 imposes on *states*.

The first precondition's requirement that a minority group be able to form a voting-age majority in a compact district is an evidentiary requirement this Court adopted to provide "straightforward guidance to courts and" map-drawers about when further §2 analysis is warranted. *Bartlett*, 556 U.S. at 18. It serves as a bright-line bar to §2 relief where the relevant minority group does not even "possess the *potential* to elect representatives in the absence of the challenged structure or practice." *Gingles*, 478 U.S. at 50 n.17.

To meet this requirement, §2 plaintiffs normally retain experts to create illustrative plans of compact

district configurations in which the relevant minority group forms a majority of the voting-eligible population. In so doing, those experts are just offering evidence in support of a private lawsuit. They are not engaged in state action, so their actions cannot possibly violate the Equal Protection Clause. *See Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

Even where §2 claims succeed, states are not held to *Gingles*'s evidentiary requirement in enacting a remedial plan. *Shaw II*, 517 U.S. at 917 n.9 (§2 plaintiffs have no "right to be placed in a majority-minority district once a violation of the statute is shown"). Rather, states "retain broad discretion in drawing districts to comply with the mandate of § 2." *Id.* That will not necessarily require the creation of a majority-minority district: "[Section] 2 allows states to choose their own method of complying with the" VRA, which "may include drawing crossover districts." *Bartlett*, 556 U.S. at 23; *see also Cooper*, 137 S. Ct. at 1472 (criticizing legislature for its "mistake[n]" reasoning that §2 "cannot be *satisfied* by crossover districts (for groups in fact meeting *Gingles*' size condition)").

Thus, even where a majority-minority district is possible, a state may draw a remedial district without any predetermined racial percentage so long as it creates a reasonable opportunity for "the minority group to elect its favored candidates." *Cooper*, 137 S. Ct. at 1472; *see also Bartlett*, 556 U.S. at 24;

Voinovich, 507 U.S. at 155–56.[6] The limited consideration of race involved in crafting such a remedial district "does not amount to a warrant for 'racial quotas.'" *North Carolina v. Covington*, 138 S. Ct. 2548, 2554 (2018).

Alabama's contention that §2 compels an equal-protection violation is therefore unfounded. Consideration of race in redistricting receives heightened scrutiny under the Equal Protection Clause only where race is "the *predominant* factor motivating the legislature's decision to place a significant number of voters within or without a particular district," such that "the legislature subordinated traditional race-neutral districting principles." *Miller*, 515 U.S. at 916 (emphasis added). While §2 may require a state to give *some* consideration to race, "[t]his Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances." *Shaw I*, 509 U.S. at 642. "Redistricting legislatures will . . . almost always be

[6] In some cases, extreme racial polarization might mean that "as a practical reality," it is difficult to avoid diluting minority voting rights without creating a district in which the minority group makes up a majority or near-majority of the district's electorate. MSA222–23. But the focus remains on whether the remedial district gives minority voters a reasonable opportunity to elect their preferred candidates, not whether it contains any particular racial composition. *Cf. Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 279 (2015) (holding that §5 requires "maintain[ing] the minority's present ability to elect the candidate of its choice" rather than particular "minority percentages"). Where providing that opportunity requires a majority-minority district, that is a consequence of the particular political system, not §2's requirements.

aware of racial demographics; but it does not follow that race predominates in the redistricting process." *Miller*, 515 U.S. at 916; *see also Shaw I*, 509 U.S. at 646.[7]

Given this Court's consistent distinction between racial *consciousness* and racial *predominance*, Alabama's invocation of racial-gerrymandering precedent is misplaced. Section 2 never requires a state to draw a bizarrely shaped district like those in *Miller* and *Shaw* because the first *Gingles* precondition mandates that only minority groups who can form majorities in *compact* districts have §2 rights. Nor, as explained above, does §2 require a state to subordinate traditional criteria to reach some predetermined "racial target," *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 800 (2017); *Cooper*, 137 S. Ct. at 1472, because no racial target applies to remedial districts.

All §2 requires is that districts be drawn that give compact, politically cohesive minority groups a reasonable opportunity to elect their preferred representatives. Consideration of race in that context does not raise the same pernicious stereotyping concerns that motivate racial-gerrymandering

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[7] Alabama argues that HB1 is "race-neutral" because Randy Hinaman, the Legislature's map-drawer, did not look at racial demographics in his redistricting software while he drew HB1. Br.54. But Mr. Hinaman is intimately familiar with Alabama's racial demographics: He drew at least two of Alabama's prior congressional plans, including the one adopted by the *Wesch* court, which was intentionally crafted to create Alabama's first majority-Black district. MSA31–34.

claims—a racist *assumption* that members of a minority group "share the same political interests, and will prefer the same candidates at the polls," *Shaw I*, 509 U.S. at 647—because §2 plaintiffs will necessarily have *proved* such cohesion, as Plaintiffs did here.

Finally, even if the limited consideration of race required to remedy §2 violations did trigger strict scrutiny, the Court should find that compliance with §2 is a compelling state interest. For decades, the Court has rightly assumed that states have a compelling interest in complying with the VRA. *E.g.*, *Cooper*, 137 S. Ct. at 1464; *Shaw II*, 517 U.S. at 915; *Miller*, 515 U.S. at 921; *see also LULAC*, 548 U.S. at 518 (Scalia, J., concurring in the judgment in part and dissenting in part) ("I would hold that compliance with § 5 of the Voting Rights Act can be" a compelling state interest). As explained in the next section, §2 was *and is* essential to eliminating racial apartheid and integrating political systems that, for a century after the Civil War, almost entirely excluded Black Americans from the franchise and political office.

Where a plaintiff has proved a §2 claim, the limited consideration of race necessary to provide a remedy will be narrowly tailored to serving the compelling interest of eliminating racial vote dilution. A §2 remedy need only provide the minority group at issue a reasonable opportunity to elect its candidates of choice—nothing more, nothing less. The state need not consider race except as might be necessary to craft a compliant district—no racial quota or duty to maximize minority voting strength applies. *See, e.g.*,

Shaw II, 517 U.S. at 917 n.9; *Bartlett*, 556 U.S. at 23; *Cooper*, 137 S. Ct. at 1472.

Allowing states to consider race where necessary to comply with §2 ensures that the promise of the Reconstruction Amendments is not thwarted, as it was in the century before the VRA's enactment. The Court should not interpret the Fourteenth Amendment as containing the seeds of its own destruction.

IV. Section 2's prohibition of vote dilution falls within Congress's authority to enforce the Fourteenth and Fifteenth Amendments.

Section 2 falls well within Congress's authority to enforce the Fourteenth and Fifteenth Amendments. The Reconstruction Amendments were designed to prohibit discrimination and provide members of minority groups equal access to the political process. *See Oregon v. Mitchell*, 400 U.S. 112, 127 (1970). Congress has broad power to enforce these amendments by "appropriate" legislation. U.S. Const. amend. XIV, §5; *id.* amend. XV, §2. And this Court's decisions "foreclose any argument that Congress may not, pursuant to [the Fifteenth Amendment], outlaw voting practices that are discriminatory in effect." *City of Rome v. United States*, 446 U.S. 156, 173 (1980).

While legislation enacted pursuant to Congress's authority to enforce the *Fourteenth* Amendment must exhibit "congruence and proportionality" between injury and remedy, *City of Boerne v. Flores*, 521 U.S.

507, 520 (1997), Congress's enforcement of the *Fifteenth* Amendment need only be a "rational means [of] effectuat[ing]" the Amendment. *Katzenbach*, 383 U.S. at 324; *see City of Rome*, 446 U.S. at 177; *Shelby County v. Holder*, 570 U.S. 529, 550–51 (2013). This differing limitation on Congress's enforcement authority stems from the "blight of racial discrimination in voting," the "ingenious" ways jurisdictions have violated minority voting rights, *Katzenbach*, 383 U.S. at 308–09, and how "inordinately difficult" it is to prove intentional discrimination in the voting context, *Gingles*, 478 U.S. at 44 (quoting S. Rep. at 36).

Even if this Court were to take the drastic step of extending *City of Boerne*'s standard to the Fifteenth Amendment, §2 is a congruent and proportional mechanism for enforcing that amendment's broad mandate. The Fourteenth and Fifteenth Amendments were enacted to put an end to political systems that systematically discriminate against racial minorities and to ensure equal access to the political system. As the Court has explained, vote dilution that results in the "political processes leading to nomination and election" not being "equally open to participation by the group in question" is "invidiously discriminatory" and unconstitutional. *White*, 412 U.S. at 756, 766–69. Such political processes can be invidiously discriminatory in several different ways, all of which prompt constitutional concerns: Intentional discrimination, accumulation of past discrimination, or a racially motivated electorate can all result in minority groups being denied equal opportunity for political participation. When any or all of these occur,

minority voters are denied equal political opportunity "on account of race," U.S. Const. amend. XV, and they are deprived of equal protection. Consideration of the various Senate Factors—drawn directly from this Court's explanation of unconstitutional redistricting practices in *White*—guides courts in determining if that has occurred. *Supra* at 28.

Moreover, "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power," *City of Boerne*, 521 U.S. at 518, and §2's totality-of-circumstances test is calibrated to smoke out and extinguish instances of likely intentional discrimination. In particular, the combination of "[e]vidence of bloc voting along racial lines" and a lack of minority success "bear[s] heavily on the issue of purposeful discrimination." *Rogers*, 458 U.S. at 623.

Legally significant racially polarized voting raises the serious risk of at least two different kinds of constitutional violations. First, a state, aware of the dilutive effect racially polarized voting has on a minority group, might adopt a plan that intentionally entrenches power in the white majority at the expense of minority political opportunity. Second, the electorate itself might be engaged in race-based decisionmaking that, combined with a dilutive voting scheme, denies minority voters equal access to the political system on account of race. When a state certifies such racially discriminatory electoral schemes, it engages in unconstitutional action. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) ("It is plain that the electorate as a

whole . . . could not order city action violative of the Equal Protection Clause, and the City may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic." (citation omitted)). Section 2 identifies and prohibits voting practices, including redistricting plans, that involve these constitutional violations.

Under §2, courts "distinguish[] between situations in which racial politics play an excessive role in the electoral process, and communities in which they do not." S. Rep. at 33. Its test considers a range of evidence—including the state's past and present discriminatory practices, racially polarized voting leading to minority candidates' electoral defeat, socioeconomic disparities stemming from a history of discrimination, racially tinged political campaigns, and the tenuousness of a state's justification for its given map—all of which serve to identify political systems that invidiously deny minority voters the opportunity to "pull, haul, and trade to find common political ground." *De Grandy*, 512 U.S. at 1020. "The presence or absence of each [*Gingles* and Senate] factor therefore serves as a piece of evidence pointing either towards or away from an ultimate conclusion that an electoral system is or is not operating to dilute a minority group's voting strength on account of race." *Nipper v. Smith*, 39 F.3d 1494, 1526 (11th Cir. 1994) (en banc) (op. of Tjoflat, C.J.). Congress was entitled to make the totality of those indications dispositive as a means of enforcing the Fourteenth and Fifteenth Amendments.

In amending §2, Congress eliminated the "inordinately difficult" evidentiary burden to demonstrate intentional discrimination. *Gingles*, 478 U.S. at 44. But even without an intent requirement, §2 plaintiffs must prove the existence of circumstances where minority voters have "less opportunity than d[o] other residents" to "participate in the political processes and to elect legislators of their choice." *White*, 412 U.S. at 766. By requiring plaintiffs to prove pervasive racially polarized voting, contemporary effects of discrimination, barriers to minority-candidate success, and other factors indicative of racially exclusionary political systems, §2 remains closely tethered to the constitutional prohibitions it enforces.

CONCLUSION

The Court should affirm.

Respectfully submitted,

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