13-895, 13-1138

IN THE

Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, *et al.*,

Appellants,

—v.—

ALABAMA, *et al.*,

Appellees.

ALABAMA DEMOCRATIC CONFERENCE, *et al.*,

Appellants,

—v.—

ALABAMA, *et al.*,

Appellees.

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

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE[1]

The Brennan Center for Justice at NYU School of Law is a not-for-profit, non-partisan public policy and law institute that focuses on issues of democracy and justice. It was founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society. Through the activities of its Democracy Program, the Brennan Center seeks to bring the ideal of representative self-government closer to reality, including by, among other things, working to preserve and protect the right to vote for every eligible citizen.

The consolidated cases before the Court pose important questions about the Equal Protection Clause, the Voting Rights Act, and use of race in redistricting. In the hope that it will be of assistance in analyzing the complex issues before the Court, the Brennan Center respectfully submits brief amicus curiae.

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[1] The appellants and appellees have filed blanket letters of consent to amicus briefs in support of either party or neither party. No counsel for a party authored this brief in whole or in part, and no person other than amicus or its counsel made a monetary contribution to the preparation or the submission of this brief. This brief does not purport to convey the position of N.Y.U. School of Law.

SUMMARY OF ARGUMENT

Alabama violated constitutional principles because it established a strict racial quota when drawing district lines without first undertaking any factual inquiry as to community or remedial needs.

While *Shaw v. Reno,* 509 U.S. 630 (1993), and the racial gerrymandering line of cases ordinarily require that courts engage in a complicated analysis to determine whether race was the primary consideration in a redistricting effort, that step is not necessary here because Alabama concedes that its overriding goal, as it equalized the population of districts across the state, was to make sure it maintained the same percentage of African Americans in each majority-minority district that previously existed. The only question then is whether those racial quotas were permissible to enable Alabama to meet an appropriate governmental interest. They were not.

Alabama's constitutional error was not its use of racial population targets in the redistricting process but rather its adoption of mechanistic racial population quotas without first undertaking an appropriate analysis to determine that those numbers were, in fact, related to permissible goals, like complying with the Voting Rights Act or adhering to traditional redistricting principles. Alabama claims that it was motivated by the need to comply with Section 5 of the Voting Rights Act. But instead of undertaking a particularized factual analysis, based on current circumstances, to determine what district lines and population targets were in fact needed to ensure that its plan did not

result in "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *Beer v. United States,* 425 U.S. 130, 141 (1976), as contemplated by Section 5, Alabama used racial population quotas as both the starting and ending point of its inquiry. This Court has long treated superficial racial quotas with skepticism in the affirmative-action context, and the same concerns apply here. Without a factual analysis, it is impossible to determine whether the state's use of race served the remedial and prophylactic goals of the Voting Rights Act or masked more invidious goals. A mechanistic quota, simply put, is not the sort of tool the Constitution permits states to use to ensure compliance with Section 5.

Moreover, Alabama fundamentally misconstrued and perverted the mandates of Section 5. Both the courts and the Department of Justice have long rejected mechanistic racial population quotas under Section 5 in favor of a more nuanced and multi-factor factual inquiry. Rather than advancing the goals of Section 5, mechanical quotas threaten to undermine them by enabling "packing" of minority voters and other techniques to undermine their ability to elect the representatives of their choice and failing to take into account changes in facts and circumstances. This Court's Section 2 jurisprudence, while not directly at issue in this case, supports the need for a nuanced factual inquiry when applying race-based remedies in the redistricting context.

Because Alabama did not engage in such a nuanced factual inquiry before applying its racial population quotas, its redistricting plan is constitutionally tainted and should be voided. Requiring Alabama to redraw its districts using a correct interpretation of Section 5 will serve not only the mandates of the Equal Protection Clause, but will advance and ensure accountability on sensitive issues at the intersection of race and politics that deserve the legislature's accurate and unfettered consideration and judgment.

ARGUMENT

I. Alabama's Racial Quotas, Adopted Without Any Factual Analysis, Are Constitutionally Suspect

Alabama's 2011 redistricting plans were born of a flawed premise: That the state's "new majority-black districts should reflect as closely as possible the percentage of black voters in the existing majority-black districts as of the 2010 Census" in order to avoid "retrogression" under Section 5 of the Voting Rights Act. *Alabama Legislative Black Caucus, et al., v. Alabama, et al.*, 989 F. Supp. 2d 1227, 1247 (M.D. Ala. 2013). This poorly constructed rule, adopted without any research or investigation (factual or legal)[2] into whether the numerical racial population numbers reflected current needs or realities, badly misconstrues the state's responsibilities under Section 5.

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[2] *See* Brief of Appellants Alabama Democratic Caucus ("ADC Br."), et al., *Alabama Democratic Caucus, et al., v. Alabama, et al.*, No. 13-113 (August, 13, 2014), at 5-12.

Instead of assessing the actual ability of African-American voters to elect representatives of their choice or considering other redistricting criteria or indicia of community, Alabama legislators required mapdrawers to use predetermined racial population quotas. In doing so, they forced the mapdrawers to take extraordinary steps, over the objections of minority lawmakers, to meet those goals. This kind of unthinking racial quota, divorced from any analysis as to remedial or prophylactic needs, is constitutionally suspect under any standard of review. *See Romer v. Evans,* 517 U.S. 618, 635 (1996) ("A status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests . . . is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.").

The problem in this case is not that Alabama considered race when it undertook its 2011 redistricting or that it drew majority-minority districts or even that race was a significant consideration guiding the shape that districts took. None of those things would have taken Alabama's maps beyond the constitutional pale if they were done to recognize natural communities or to remedy or prevent discrimination. In fact, it would be strange for a mapdrawer to fail to take into account the existence of racial and ethnic communities, especially where the daily experience of minority groups continues – progress notwithstanding – to be heavily impacted by race.[3] Those communities are

[3] In places like New York City, for example, it is not hard to find issues like de facto school segregation, stop-and-frisk policies,

real, and the redistricting process rightly takes them into account.

But this Court has cautioned it is possible to go too far in defining district lines by race. *See Miller v. Johnson,* 515 U.S. 900, 919 (1995) (finding that the "evidence was compelling 'that there are no tangible "communities of interest"' spanning the hundreds of miles" between distinct African-American communities that had been forced together). Minorities in a rural part of a state might have very different experiences, needs, and worldviews than members of the same minority group who live in heavily urbanized areas.

When a jurisdiction, like Alabama, adopts racial population targets without any investigation to make sure that the numeric goals actually reflect current realities and are actually tailored to serve an appropriate government interest, such as remedying or preventing discrimination, it offends the Constitution for at least three reasons. First, the jurisdiction engages in a naked form of racial stereotyping. Second, it risks failing to take into account the evolution of society, including changing voting patterns, communities, and polarization levels. Third, it risks compelling the packing of minorities into supermajority districts when such districts are no longer necessary to ensure fair representation and when such districts might even

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and instances of alleged excessive force by police that mean that members of distinct ethnic groups often have a strong sense of shared community forged along racial and ethnic lines. The same is true in other parts of the country.

undermine the interests of the communities they purport to benefit.

It is for similar reasons that this Court has consistently regarded racial quotas with deep suspicion. More than 35 years ago, for example, in *Bakke*, this Court held unconstitutional a medical school admissions policy that set aside a certain number of slots for members of minority groups, likening the numerical set-aside to a "prefer[ence] for members of one group 'for no other reason than race or ethnic origin.'" *Regents of Univ. of California v. Bakke,* 438 U.S. 265, 307 (1978). More recently, the Court struck down an affirmative-action program at the University of Michigan that automatically awarded points to applicants from certain minority groups. *Gratz v. Bollinger,* 539 U.S. 244 (2003). Although all prospective Michigan students also could receive points for other non-race based criteria, the Court found the Michigan program "problematic" because, as far as the race-related points were concerned, "[t]he only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups." *Id.* at 271-72.

While the Court's affirmative-action cases take place in a different context, their basic teaching that bare racial quotas are constitutionally suspect and thus need to be justified is applicable here. To overcome constitutional doubts about such racial classifications, it is not enough for the state to invoke a permissible governmental object. The state must also show that it engaged in a careful, deliberative

process to ensure that its race-based decision was actually calibrated serve its legitimate interest. *Romer v. Evans*, 517 U.S. at 635 (classification must bear a factual connection to the legitimate interest it purports to serve). Here, there is no question that Alabama engaged in no factual analysis whatsoever to determine whether its racial classification bore a factual connection to its interest in complying with the Voting Rights Act.

A requirement that the state engage in some sort of factual analysis before applying racial population targets is necessary to ensure that that those targets are in fact designed to achieve their stated purpose and not an invidious purpose. As the Court explained in *Shaw,* a "reapportionment plan would not be . . . tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw,* 509 U.S. at 655. There is no question, for example, that legislatures rightly would be barred by the Fourteenth Amendment from adopting a 99% population quota for African-American districts, though such districts conceivably might not result in retrogression.[4]

Although Alabama did not adopt a 99% quota, what it did is similarly troubling. It drew district lines without regard to the concerns of (and, in some cases, with opposition from) the very people it was purporting to protect and without any consideration

[4] Although it is conceivable that a 99% African-American district could pass muster under Section 5, such a district almost certainly would raise significant questions about packing and discriminatory purpose.

of whether the districts it drew would serve the interests of the Voting Rights Act. J.A. at 93. Absent an appropriate analysis that takes into account current facts on the ground, its racial population targets are simply unjustified racial quotas.

II. Alabama's Racial Quotas Cannot be Justified by the State's Interest in Complying With Section 5 of The Voting Rights Act

Alabama cannot overcome the constitutional suspicions that attach to its quotas by asserting that it only did what it did because it needed to obtain approval for its redistricting plans under Section 5 of the Voting Rights Act. J.A. at 29-31, 96-96.

To be sure, compliance with the Voting Rights Act has long been treated by courts as a compelling interest. *Shaw v. Reno,* 509 U.S. at 654 ("States certainly have a very strong interest in complying with federal antidiscrimination laws."). However, that does not mean covered jurisdictions have free rein to adopt superficial racial quotas unconnected with the facts on the ground and without regard for what Section 5 actually requires.

A. *The Justice Department and Courts Have Rejected Alabama's Approach*

Not surprisingly, both courts and the Department of Justice have rejected Alabama's cramped interpretation of Section 5. As explained in guidance to Section 5 compliance issued by the Justice Department in February 2011:

> In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, this determination requires a *functional analysis* of electoral behavior within the particular jurisdiction or election district.

Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7471 (Dep't. of Justice Feb. 9, 2011) (emphasis added).

This position is not a new one. As the court in recent litigation over Texas's newest maps explained, the Department's 2011 guidance is "consistent with the guidance DOJ has been issuing to assess retrogressive effect for the past two decades." *Texas v. United States,* 831 F. Supp. 2d 244, 265 & n.26 (D.D.C. 2011) (three-judge court), *vacated on other grounds*, 133 S. Ct. 2885 (2013). Indeed, in the Justice Department's 1987 guidance on application of Section 5, the Department noted that many covered jurisdictions had urged it to adopt a retrogression standard that could be "applied to submitted changes in a fairly mechanical way." *Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 52 Fed. Reg. 486-501 (Dep't. of Justice Jan. 6, 1987). But the Department declined to do so because a "Section 5 determination [that] is . . . based on the appraisal of a complex set of facts [does] not readily fit a precise formula for resolving the

preclearance issues." *Id.*; *see also Hearing Before the House and Senate Special Interim Comms. On Redistricting*, 76th Leg., Tape 2, p. 15 (Feb. 16, 2000) (statement of Gaye Tenoso) (cautioning the Texas Legislature "against using magic numbers, 65 percent say" to gauge whether a majority-minority district was effective).

This Court, likewise, has acknowledged the complexity of the retrogression analysis required by Section 5 and eschewed predetermined numeric population benchmarks. *See League of United Latin American Citizens v. Perry,* 548 U.S. 399, 428 (2006) (observing that "it may be possible for a citizen-age majority to lack real electoral opportunity" despite its numeric majority); *see also Georgia v. Ashcroft,* 539 U.S. 461, 498 (2003) (Souter, J., dissenting) (agreeing with the majority that "the simple fact of a decrease in black voting age population . . . in some districts is not alone dispositive about whether a proposed plan is retrogressive"). As the District Court for the District of Columbia explained, "[t]he legal standard [under Section 5] is not total population, voting age population, voting age citizen population or registration, but the ability to elect. The Supreme Court repeatedly has declined to elevate any of these factual measures to a magic parameter." *Georgia v. Ashcroft,* 195 F. Supp. 2d 25, 79 (D.D.C. 2002) (three-judge court), *vacated on other grounds,* 539 U.S. 461 (2003) (citing *Johnson v. De Gandy,* 512 U.S. 997, 1017 n.14) (1994).

More recently, federal courts in both Texas and Florida have rejected mechanical racial population quotas in the redistricting context. In

Texas, the three-judge court considering requests to preclear Texas's legislative and congressional maps firmly declined to adopt the bright-line test proposed by Texas, holding:

> [P]opulation demographics alone will not fully reveal whether minority citizens' ability to elect is or will be present in a voting district. Demographics alone cannot identify all districts where the effective exercise of the electoral franchise by minority citizens is present or may be diminished under a proposed plan within the meaning of Section 5.

Texas v. United States, 831 F. Supp. 2d at 262 (citing *LULAC v. Perry,* 548 U.S. at 428). The Florida Supreme Court construing analogous non-retrogression provisions in the Florida state constitution, likewise, concluded:

> Because a minority group's ability to elect a candidate of choice depends upon more than just population figures, we reject any argument that the minority population percentage in each district as of 2002 is somehow fixed to an absolute number under Florida's minority protection provision. . . . To hold otherwise would run the risk of permitting the Legislature to engage in racial gerrymandering to avoid diminishment.

In re Senate Joint Resolution of Legislative Apportionment 1176, 83 So.3d 597, 626-27 (Fla. 2012).

Consistent with this long understanding and practice, the Justice Department has precleared many plans in which the percentages of minorities in districts fell. *See* ADC Br. at 28-31. In the case before the Court, the district court majority below was simply wrong when it concluded that Alabama "chose the only option available" when it decided, without investigation, to keep the population of African-American districts at historic levels. J.A. at 181.

B. *Alabama's Racial Quotas Have Real Potential to Be Inconsistent With the Underlying Goals of Section 5*

In adopting its broad-brush racial quota untethered to any fact findings, Alabama turned a blind eye to at least three very real potential harms for minority communities and society at large.

1. Undermining Minority Political Gains

First, Alabama's superficial interpretation of Section 5 would permit states to use the guise of Voting Rights Act compliance to keep the populations of majority-minority districts fixed even as society continues to evolve. Thus, as population shifts, a jurisdiction that healed long-standing divisions and overcame discrimination might be required to draw increasingly awkward districts based unnecessarily on race.

The potential injury to minority communities is very real and goes beyond mere electoral outcomes. Where minority communities have been able to overcome or ameliorate the effects of discrimination to have their voices heard and their needs addressed, it would be remarkable to interpret Section 5 to mechanically require those gains to be undone simply to advance a quota.

Although it arises in a different context, the experience of Maverick County, Texas in the recent round of Texas redistricting illustrates how easily hard fought progress can be jeopardized. Maverick County is an isolated, overwhelmingly Hispanic county, located along the Texas-Mexico border, and "is among 'the poorest counties in the United States.'" *Texas v. United States,* 887 F. Supp. 2d 133, 209 (D.D.C. 2012) (appendix). Nonetheless, "despite their relative poverty, the citizens of Maverick County [had become] educated about the electoral process" and, through organization and a united front in voting, had found electoral dignity and "finally seen some . . . change come about." *Id.* at 209-210 (quoting trial testimony of Maverick County Judge David Saucedo). However, when it came time to draw congressional districts, Texas split the small county between two sprawling districts, making it harder for the county's Hispanic community to organize effectively to fight for things like four-year universities and veterans clinics. *Id.*

By mechanically prioritizing fulfilling the quota over all else, Alabama's quotas risk compelling similar stark results under the guise of enforcing the

Voting Rights Act. That would both fail to recognize progress and might undermine it.

2. Risk of a False Retrogression Choice

Redistricting quotas also create a tension between majority-minority districts and "ability to elect" districts that are independently protected under Section 5 even if they are not majority-minority districts.

Although much of the argument in this case centers on Alabama's treatment of the state's majority African-American districts, it is important to bear in mind that Section 5 is not limited to majority-minority districts. Rather, a district, even if it has a minority citizen voting-age population of less than 50%, may be protected by Section 5 from retrogression if minorities in the district have proven the "ability to elect" candidates of their choice. In many places in the country, courts have found that African Americans have the ability to elect when they constitute as little as 38.37% of the population. *Pender Cnty. v. Bartlett*, 649 S.E. 2d 364, 367 (N.C. 2007) ("Past election results in North Carolina demonstrate that a legislative voting district with a total African–American population of at least 41.54 percent, or an African–American voting age population of at least 38.37 percent, creates an opportunity to elect African–American candidates."); *see also Texas v. United States,* 831 F. Supp. 2d at 263 & n.24 (noting that even Texas's proposed bright-line "ability to elect" standard assumed African Americans in that state have the ability to elect when they make up 40% of a district's citizen voting age population).

The mechanical quotas advocated by Alabama risk creating a false choice between preserving such less than 50% ability to elect districts and cannibalizing their minority population to make sure majority-minority districts have a demographic supermajority, whether needed or not. In other words, Alabama's quota approach absurdly forces legislatures into having to consider retrogression in order to meet the quota. It would be hard to find a situation more at odds with the very purpose of Section 5.

Alabama's approach, in fact, may invite calculated efforts by legislators to short circuit the healthy and natural emergence of such minority influence just as it starts to become a reality. That is precisely what parties challenging South Carolina's 2011 legislative maps contend happened in that state. As one African-American state representative in South Carolina recounted in sworn testimony:

> As the conversation turned to redistricting, Rep. Viers told me that race was a very important part of the Republican redistricting strategy. Rep. Viers said that Republicans were going to get rid of white Democrats by eliminating districts where white and black voters vote together to elect a Democrat. He said the long-term goal was a future where a voter who sees a 'D' by a candidate's name knows that the candidate is an African-American candidate. . . . Then he chuckled and said, 'Well now, South Carolina will

> soon be black and white. Isn't that brilliant?'

Affidavit of the Honorable Mia Butler Garrick para. 16, *Backus v. South Carolina,* Case No. 3:11-cv-03120 (D.S.C. Feb. 22, 2012) (Doc. 147). It is hard to imagine more demeaning treatment of a community.

3. Creation of Non-Performing Districts

With existing Section 5 ability to elect districts, Alabama's approach also opens the door to a third, opposite danger – namely that districts created using quotas might underperform and no longer allow minorities to elect their community's candidates of choice, even if on paper the district's demographics look the same (or better). This is because election results are influenced by many things other than racial demographics. While districts might appear from a superficial demographic perspective as if they would allow minorities to elect candidates of their choice, a host of issues, including "minority voter registration and minority voter turnout," could impact the real-world likelihood that redrawn districts actually preserve minority electoral gains. *Texas v. United States*, 831 F. Supp. 2d at 264. For that very reason, the three-judge panel considering preclearance of Texas's 2011 legislative and congressional maps found that Texas fell short when it relied on a demographics-only approach to determine whether a district provided minorities with the "ability to elect." *Id.* Rather, as the district court admonished, "Given its history, Texas cannot overlook education and employment levels affecting minority electoral participation and remnants of historic discrimination that may

continue to affect voting in some areas of the State." *Id*. As the court explained, many factors are relevant to the "complex" retrogression analysis:

> We conclude that the type of factors relevant to this complex inquiry may include the number of registered minority voters in redrawn districts; population shifts between or among redrawn districts that diminish or enhance the ability of a significant, organized group of minority voters to elect their candidate of choice; an assessment of voter turnout in a proposed district; to the extent discernible, consideration of future election patterns with respect to a minority preferred candidate.

Id. at 264-65.

The 2011 Texas preclearance case is instructive both on why a demographics-only approach does not work and why there is an inherent risk of manipulation in that approach. In one Texas congressional district, the court found that mapdrawers had "tried to make the district more Republican – and consequently, less dependable for minority-preferred candidates – without changing the district's Hispanic population levels." *Texas v. United States,* 871 F. Supp. 2d 133, 155 (D.D.C. 2012), *vacated and remanded on other grounds,* 133 S. Ct. 2885 (2013). To do this, the Texas mapdrawers had engaged in a sleight of hand that "replaced many of the district's active Hispanic voters with low-turnout voters in an effort to strengthen that voting

power of [the district's] Anglo citizens." *Id.* The result was "enough to 'nudge' a district that was an ability [to elect] district, but barely so, to a non-performing one." *Id.* Viewing the maps with the more nuanced analysis that Section 5 requires, the court found several examples of retrogression that would not have been captured by the mechanical approach used by Texas:

> Several districts in the proposed plans show that population statistics alone rarely gauge the strength of minority voting power with accuracy. For example, . . . Congressional District 23 and House District 117 were selectively drawn to include areas with high minority populations but low voter turnout, while excluding high minority, high turnout areas. Such districts might pass a retrogression analysis under Texas's population demographics test . . . , even though they were engineered to decrease minority voting power.

Texas v. United States, 887 F. Supp. 2d at 140 n.5.

In this case, the flaw was not that Alabama adopted a numeric racial population target, or even that it was a rigid one, but that it did so in a vacuum without any kind of investigation or consideration of community concerns, electoral representation, or performance factors which would more carefully safeguard the hard fought gains of minority communities. What Alabama did was a cartoon version and mockery of what Section 5 actually requires.

C. *Invalidating the Tainted Maps Will Promote Legislative Accountability*

By adopting racial quotas based on an erroneous interpretation of federal law, Alabama prevented its legislature from considering the full range of options before it. Acknowledging that African Americans in many places may no longer need supermajority districts would have allowed the Alabama legislature greater flexibility in giving force to other "traditional redistricting principles" such as keeping school districts, towns, and other natural and political boundaries together – issues that the record reflects were important to the very African-American community that the quotas in this case ostensibly were designed to serve. *See* Brief of Appellants Alabama Legislative Black Caucus, et al., *Alabama Legislative Black Caucus, et al. v. Alabama, et al.*, No 13-895 (August 13, 2014), at 16.

Invalidating the redistricting map and instructing Alabama to draw new districts without the use of rigid artificial racial quotas would further accountability. It would allow Alabama officials to draw constitutionally permissible districts without the distorting influence of an incorrect assumption about the requirements of federal law. In the same way, this Court analogously has reversed and remanded cases where state Supreme Courts have construed a state constitution in harmony with what it erroneously believes a parallel federal constitutional provision requires. *See, e.g., Pennsylvania v. Labron,* 518 U.S. 938 (1996) (per curiam); *Ohio v. Johnson*, 467 U.S. 497, n. 7 (1984);

South Dakota v. Neville, 459 U.S. 553 (1983); *Michigan v. Long*, 463 U.S. 1032 (1983).

Redistricting requires important and sensitive decisions concerning the intersection of race, partisan politics, and constitutional law. The weighty issues involved deserve the legislature's accurate and unfettered consideration and judgment. The Alabama lawmakers should be permitted to make these decisions with an accurate understanding of their lawful options and obligations under federal statutory and constitutional law.

Vacating and remanding to the Alabama legislators would also serve as a prophylactic measure against the invocation of federal law as a pretext for improperly motivated decisions regarding race and partisan politics. This would further benefit the democratic process by allowing Alabama voters to pass judgment on their representatives with a correct understanding of the allocation of responsibility. Voters should be allowed to understand the actual constraints and options facing their elected representatives, particularly on such a critical democratic issue as redistricting. Alabama officials should be accountable to informed voters, and not able to falsely blame federal law for their decisions.

III. The Court's Section 2 Jurisprudence Shows How a Factual Analysis Helps Avoid the Pitfalls of Alabama's Approach

Both the Constitution and Section 5 require a factual analysis before adopting racial population targets in a redistricting context.

Although this Court has had limited opportunity to elaborate on the contours of that analysis under Section 5, it has set forth a detailed inquiry for determining when majority-minority districts are required as a remedy for vote dilution under Section 2 of the Voting Rights Act. While the legal standards under Section 2 and Section 5 are different, the Court's careful, fact-driven approach in Section 2 cases shows how a nuanced factual inquiry can be used to assess race discrimination issues in the redistricting context while avoiding the constitutional morass in which it finds itself.

In Section 2 cases, this Court laid out three necessary factual preconditions for the need to create new majority-minority districts:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority's preferred candidate.

Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986). These factors – now commonly known as the "*Gingles* factors" – are not the end of the inquiry. *Id.* at 79. If they are satisfied, the trier of fact then still must

"consider the 'totality of circumstances' and determine, based 'upon a searching practical evaluation of the "past and present reality,"' whether the political process is equally open to minority voters." *Id.* (citations omitted). Justice Brennan, writing for the Court in *Gingles,* explained, "This determination is peculiarly dependent on the facts of each case and requires 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." *Id.* The factors the Court found relevant under the "totality of circumstances" included findings of "racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice," which "acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and elect candidates of their choice." *Id.* at 80.

Throughout its Section 2 jurisprudence the Court has stressed that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Voinovich v. Quilter,* 507 U.S. 146, 158 (1993). A nuanced factual inquiry ensures that the Voting Rights Act is sensitive to changed factual circumstances and that its remedies will not be invoked inappropriately. Indeed, in *Johnson v. De Gandy,* this Court expressly rejected Florida's argument that a jurisdiction enjoyed a "safe harbor" from review if it created minority-controlled seats in proportion to a minority group's share of the total population because such a rule would "promote and

perpetuate efforts to devise majority-minority districts even in circumstances where they may not be necessary to achieve equal political and electoral opportunity." 512 U.S. 997, 1019-20 (1994). Instead, the Court explained:

> If the lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.

Id. at 1020.

What distinguishes Section 2 vote dilution cases from Alabama's vision of Section 5 is that the former is fact based. As society and circumstances change, so will the degree to which Section 2 comes into play. If, for example, the day comes when a community in Alabama (or elsewhere) no longer experiences racially polarized voting, then the need to draw a majority-minority district also will cease.

Likewise, if a minority community becomes spread out because of an end to residential segregation, then it may become impossible to draw a compact district in which a minority community comprises more than 50% of the population. In other words, Section 2, as interpreted by this Court, has a number of built-in safeguards that ensure that consideration of race in redistricting has a case-by-case application and expiration date. This is in keeping with what this Court has stressed is the role of such districts as "remedial devices." *De Grandy*, 512 U.S. at 1020.

Although Section 2 is not at issue in this case, this Court's jurisprudence on Section 2 is instructive on what more carefully constructed efforts to comply with Section 5 could look like. Regardless of the details of the factual inquiry needed to determine what district lines and racial population targets were needed to prevent "retrogression" under Section 5, the Constitution required that Alabama undertake such an inquiry. Alabama did not do so, and so it should be required to redraw its maps using an appropriate analysis.

CONCLUSION

For the above reasons, the decision of the three-judge court for the United States District Court for Middle District of Alabama should be reversed and remanded.

Respectfully submitted,

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