Nos. 21-1086 & 21-1087

IN THE
Supreme Court of the United States

JOHN H. MERRILL, *et al.*,
Appellants,
v.
EVAN MILLIGAN, *et al.*,
Appellees.

JOHN H. MERRILL, *et al.*,
Petitioners,
v.
MARCUS CASTER, *et al.*,
Respondents.

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

BRIEF OF ALABAMA CENTER FOR LAW AND LIBERTY AS AMICUS CURIAE IN SUPPORT OF APPELLANTS AND PETITIONERS

JOHN J. PARK, JR.
P.O. Box 3073
Gainesville, GA 30503
(678) 608-1920
jackparklaw@gmail.com

MATTHEW J. CLARK*
**Counsel of Record*
ALABAMA CENTER FOR LAW AND LIBERTY
2213 Morris Ave., Fl. 1
Birmingham, AL 35203
(256) 510-1828
matt@alabamalawandliberty.org

Counsel for *Amicus Curiae*

QUESTION PRESENTED

Alabama's congressional districts have looked largely the same for decades. Since 1992, one of Alabama's seven districts has been a majority-black district. In 2021, Alabama enacted a congressional redistricting plan that retained the cores of those districts, including the State's one majority-black congressional district. A federal district court subsequently ordered Alabama to upend its longstanding districts and create a second majority-black district, holding that § 2 of the Voting Rights Act required the redraw. Because Plaintiffs showed that it was possible to draw such a district—albeit by ignoring preexisting district lines, dividing the Gulf Coast region between two districts on the basis of race, and otherwise putting racial considerations before race-neutral redistricting criteria—the court held that the additional district must be drawn. The question presented is:

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutions and Statutes

Other Authority

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Alabama Center for Law and Liberty ("ACLL") is a conservative nonprofit public-interest firm located in Birmingham, AL, dedicated to the defense of limited government, free markets, and strong families. ACLL has an interest in this case because adherence to the constitutional framework governing voting rights is essential to limited government. ACLL believes that the Constitution and the Voting Rights Act prohibit discrimination on the basis of race and that the lower court's decision turned that principle on its head.

SUMMARY OF THE ARGUMENT

Appellants and Petitioners (hereinafter "Appellants") argue persuasively that under this Court's precedents, the district court badly misinterpreted Section 2 of the Voting Rights Act. They also persuasively argue that the district court's reading of the Act is unconstitutional. However, if the Court finds that the district court properly interpreted its precedents but is nevertheless troubled by the result, then it should take another look at the governing precedent to determine whether

---

[1] Pursuant to Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

it was correctly decided. The purpose of this brief is to explore that issue.

Section 2 of the Voting Rights Act prohibits the States from imposing a "voter qualification," "prerequisite to voting," or a "standard, practice, or procedure" in a way that abridges a minority's right to vote. As Appellants note, the plain text of the statute does not apply to single-member district plans. Rather, especially understood in its context, it applies only to state actions that impede minorities' access to the ballot box. Construing the Voting Rights Act to reach voter-dilution claims stretches the statute beyond what it says. This not only violates the law, but it also had the very unfortunate side-effects of requiring Alabama to create congressional districts based on racial gerrymandering. Not only does this presume that all minorities think alike, but it also deepens racial divides even further. The whole point of the Reconstruction Amendments was to end discrimination on the basis of race; therefore the Voting Rights Act cannot reasonably be construed to defeat that end.

So what accounts for the district court's shocking decision below? As Justice Thomas has observed astutely for years, the problem in misinterpreting the Voting Rights Act comes back to this Court's precedents. Specifically, in *Thornburg v. Gingles*, 478 U.S. 30 (1986), this Court construed Section 2 of the Voting Rights Act to apply to voter-dilution claims. Not only did this decision stretch the statute beyond what it says, but it also produced two very unfortunate side effects. First, it requires the Court

to evaluate these claims not upon judicially manageable standards but upon political theory, which courts are ill-equipped to do. Second, it requires the creation of racially gerrymandered districts—something the Framers of the Reconstruction Amendments would have found shocking indeed.

Not only is *Gingles* plainly irreconcilable with the text of the Voting Rights Act and the Constitution (which ACLL believes should end the inquiry), but it should also be overruled in light of the factors articulated in *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018). The Justices were deeply fractured in *Gingles* and have remained so through today, creating significant doubt as to that precedent's reasoning and workability. Moreover, the Court's recent decision that political gerrymandering is not justiciable substantially erodes *Gingles*'s underpinnings, since *Gingles* requires the courts to make the same kinds of nonjusticiable decisions that political gerrymandering cases require. Finally, reliance interests also favor overruling *Gingles*, because the irreconcilable tension between the Equal Protection Clause and *Gingles* does not create a coherent system on which the States can rely.

At the application stage, Chief Justice Roberts noted that *Gingles* was the problem and that the Court should consider overruling it at the merits stage. ACLL agrees with Chief Justice Roberts. If, as the Chief Justice and the district court found, there is no way around *Gingles*, then it should be overruled.

ARGUMENT

I. Section 2 of the Voting Rights Act Does Not Apply to Voter Dilution Claims.

A. Section 2 Applies Only to Practices That Affect Minorities' Access to the Ballot Box

Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, provides:

> **(a)** No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [52 U.S.C. § 10303(f)(2)], as provided in subsection (b).
>
> **(b)** A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity

> than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

As Justices Thomas and Scalia have observed, "the size of a governing body," such as a congressional district, "is not a 'standard, practice or procedure' within the terms of the Act." *Holder v. Hall*, 512 U.S. 874, 892 (1994) (Thomas, J., joined by Scalia, J., concurring in judgment). Properly understood, "those terms reach only state enactments that limit citizens' access to the ballot." *Id.* at 893. The plain language of the statute applies only to "'voting qualifications,'" "'prerequisites to voting,'" or "'standards, practices, or procedures.'" *Id.* at 915 (quoting 52 U.S.C. § 10301(a)). "Voting qualifications" and "prerequisites to voting" apply only to "conditions or tests applied to regulate citizens' access to the ballot," such as "any form of testing or requirement imposed as a condition on registration or on the process of voting on election day." *Id.*

Divorced from its context, the phrase "standard, practice, or procedure" may seem more susceptible to interpretation than the prior terms. *Id.* However,

three observations must be made here. First, it is still difficult to construe the plain meaning of these words to cover how a state legislature would create congressional districts. *See id.* (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (providing that statutory analysis should begin with the statutory language itself)); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012) ("The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means."). "Standard," when used in law, essentially means, "a level of quality, achievement, etc., that is considered acceptable or desirable."[2] "Practice" means "the usual way of doing something."[3] "Procedure" essentially means "a series of steps followed in a regular definite order" or "a traditional or established way of doing something."[4] It is difficult to take the ordinary meaning of these words and apply them to drawing congressional maps. While Justice Thomas is correct that these terms are not as precise as the others in Section 2(a), neither do they plainly apply to drawing congressional districts.

Second, if the plain words appear to apply, then their context must be considered. *See Holder*, 512 U.S. at 893 (Thomas, J., concurring in judgment) (citing *United Sav. Ass'n of Tex. v. Timbers of Inwood*

---

[2] *Standard*, Merriam-Webster, https://www.merriam-webster.com/dictionary/standard (last visited Apr. 28, 2022).

[3] *Practice*, Merriam-Webster, https://www.merriam-webster.com/dictionary/practice (last visited Apr. 28, 2022).

[4] *Procedure*, Merriam-Webster, https://www.merriam-webster.com/dictionary/procedure (last visited Apr. 28, 2022).

Forest Assoc's, Ltd., 484 U.S. 365, 371 (1988)); *see also* Scalia & Garner, *supra*, at 56 (noting that terms must be given their ordinary meaning *in context*). Because the surrounding words focus on "conditions or tests applied to regulate citizens' access to the ballot box," the context dictates that the words in question "must be understood as referring to any standard, practice, or procedure ***with respect to voting.***" *Id.* at 915 (emphasis in original). Thus, Section 2(a) refers "only to practices that affect minority citizens' access to the ballot." *Id.*

Third, one may object that because Section 2(b) imposes the test for how to determine whether a violation of Section 2(a) has occurred, all that matters is Section 2(b). But again, context matters. "While Section 2(a) defines and explicitly limits the type of voting practice that may be challenged under the Act, § 2(b) provides only 'the test for determining the legality of such practice.'" *Id.* at 924 (quoting *Chisom v. Roemer*, 501 U.S. 380, 391 (1991)). Therefore, "there is no reason to think that § 2(b) could serve to expand the scope of the prohibition in § 2(a)[.]" *Id.*

B. Applying Section 2 to Voter Dilution Claims Violates the Constitution, Requires the Court to Make Political Choices, and Deepens Racial Divides.

As this case demonstrates, the consequences of misinterpreting Section 2 have been disastrous. By reading Section 2 to require Alabama to draw two majority-minority congressional districts, the lower

court required Alabama to discriminate on the basis of race—which is exactly what the Fourteenth Amendment, Fifteenth Amendment, and Voting Rights Act were designed to prevent. As Justice Harlan put it years ago, "[o]ur Constitution is color-blind." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Instead of upholding the color-blind standard that Justice Harlan championed, the lower court held that the Voting Rights Act *requires* some level of race-based discrimination. "The way to stop discrimination on the basis of race is to stop discrimination on the basis of race." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).[5]

Additionally, as Justice Thomas has observed, applying Section 2 to voter-dilution claims in the creation of congressional districts requires the judiciary to engage in political theory rather than adjudication. *Holder*, 512 U.S. at 895-903 (Thomas, J., concurring in judgment). "[T]alk of 'debasement' or 'dilution' is circular talk. One cannot speak of 'debasement' or 'dilution' of the value of a vote unless there is first a defined standard or reference to what a vote should be worth." *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting). Consequently, "[i]n order to decide whether an

[5] Granted, if Alabama drew the congressional districts with the intent to discriminate on the basis of race, then there is no doubt that such a disgusting act would violate the Equal Protection Clause. But if there was no intentional discrimination (which is redundant, since discrimination involves intent), then ordering Alabama to discriminate on the basis of race violates the law rather than upholding it.

electoral system has made it harder for minority voters to elect candidates they prefer, a court must have an idea in mind of hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system." *Gingles*, 478 U.S. at 88 (O'Conner, J., concurring in judgment). So which is better: multimember districts, or single-member districts? "Under one system, Negroes have *some* influence in the election of *all* officers; under the other, minority groups have *more* influence in the selection of *fewer* officers. *Allen v. State Bd. of Elections*, 393 U.S. 544, 586 (1969) (Harlan, J., concurring in part and dissenting in part). The Court has picked single-member districts, but "there is no principle inherent in our constitutional system, or even in the history of the Nation's electoral practices, that makes single-member districts the 'proper' mechanism for electing representatives to governmental bodies or for giving 'undiluted' effect to the votes of a numerical minority.'" *Holder*, 512 U.S. at 897 (Thomas, J., concurring in judgment).

Finally, the "worst aspect" of interpreting Section 2 to apply to voter-dilution claims is "the implicit assumption that members of racial and ethnic groups must all think alike on important matters of public policy and must have their own 'minority preferred' representatives holding seats in elected bodies if they are to be considered represented at all." *Id.* at 903. Not only is it insulting to people to presume that they all think alike because of their skin color, but it also requires the federal courts to divide "the country into electoral districts along racial lines – an enterprise of segregating the races into political homelands that

amounts, in truth, to nothing short of a system of 'political apartheid.'" *Id.* at 905 (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)). "The assumptions upon which our vote dilution decisions have been based should be repugnant to any nation that strives for the ideal of a color-blind Constitution." *Id.* at 905-06. Moreover, the Court's "drive to segregate political districts by race can only serve to deepen racial divisions by destroying any need for voters or candidates to build bridges between racial groups or to form voting coalitions." *Id.* at 907.

II. *Gingles* Should Be Overruled.

In light of what Section 2 actually says and means, Justice Thomas was correct to argue that a "systematic reexamination of our interpretation of the Act is required." *Holder*, 512 U.S. at 914 (Thomas, J., concurring in judgment). While it may be better to wait for another day for the reexamination of the entire system, the Court may have to wrestle with one precedent in particular: *Thornburg v. Gingles*, 478 U.S. 30 (1986). Appellants make a compelling argument that a proper interpretation of *Gingles* and its progeny requires reversal of the district court's decision. However, as Chief Justice Roberts noted at the application stage, it may be difficult to get around *Gingles*, raising the question of whether it should be overruled now that the case has reached the merits stage. *Merrill v. Milligan*, 142 S.Ct. 879, 882-83 (2022) (Roberts, C.J., dissenting). If the Court likewise finds that *Gingles* is the problem, then it should consider overruling

Gingles. ACLL will address this issue thoroughly in case the Court finds it necessary to examine it.

A. The Issues with *Gingles*

In *Gingles*, the Court devised a framework that has guided the redistricting process. It first set up a three-part test for identifying when a majority-minority district should be drawn. That test considers whether a minority group can show that : (1) it is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) it votes in a "politically cohesive" way; and (3) "the white majority votes sufficiently as a bloc to enable it … usually to defeat the minority's preferred candidate." 478 U.S. at 49-52. After that test has been satisfied, the court must then evaluate the totality of the circumstances In that evaluation, the

Notwithstanding its widespread use since 1986, the *Gingles* test is not without its difficulties. First, as the Court's racial gerrymandering jurisprudence shows, not every majority that can be cobbled together complies with the Constitution. Second, the line between "packing" and "cracking" cannot be predicted in advance. That line is identified only when a reviewing court decides that a State did or did not dilute the votes of minority voters, whether it tried to do so or not. Finally, the three-judge court below abused its powers when it told the State to draw a map "that includes either two majority-Black district, or two districts in which Black votes otherwise have an opportunity to elect a

representative of their choice, or a combination of two such districts." Milligan Stay Appendix at 5.[6]

B. *Gingles* Was Wrongly Decided.

As Justice Thomas's concurrence in *Holder* illustrates, voter-dilution claims cannot be justified under the text of Section 2. Nevertheless, in *Gingles*, the Court construed Section 2 to cover voter dilution claims. The Court held that in order to prove a voter-dilution claim, three preconditions must be met. "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." *Gingles*, 478 U.S. at 50. "Second, the minority group must be able to show that it is politically cohesive." *Id.* at 51. "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." *Id.* at 51 (citation omitted).

The decision was authored by Justice Brennan and joined by Justices Marshall, Blackmun, Stevens, and mostly by Justice White. In forming the *Gingles* elements, the Court drew very heavily on the

---

[6] In *Bartlett v. Strickland*, 556 U.S. 1 (2009), the plurality of the Court held that the Voting Rights Act does not require a State to draw a district in which minority voters do not constitute a majority. The three-judge court's suggestion that the State do something that it cannot be required to do is to cut by half.

legislative history of Section 2's most recent amendment to understand its meaning. *See Gingles*, 478 U.S. at 43-51. What it did not do, however, was engage in the disciplined textual analysis that Justice Thomas did in his *Holder* concurrence.

Justice O'Connor, joined by Chief Justice Burger and Justices Powell and Rehnquist – the conservative-leaning bloc of the Court at the time – concurred in the judgment only. *Gingles*, 478 U.S. at 83 (O'Conner, J., concurring in judgment). Their main criticism of the main opinion is that the test implicitly created "a right to a form of proportional representation," which is exactly what the text of the statute rejected. *Id.* at 85. Drawing on the legislative history of the Act, Justice O'Conner reasoned that, in light of the previous precedents of which Congress appeared to be taking note, she would hold that "a court should consider all relevant factors bearing on whether the minority group had less opportunity than the other members of the electorate to participate in the political process *and* elect representatives of their choice." *Id.* at 99 (internal quotation marks omitted). While Justice O'Conner's test was more conservative than Justice Brennan's, Justice O'Conner and her colleagues likewise failed to note that the plain language of Section 2(a) dictates the scope and meaning of the test prescribed in Section 2(b).

As demonstrated thoroughly in Part I, *supra*, the statute's text and context cannot be reconciled with *Gingles*'s holding. If Congress limited Section 2 to cases where minorities were trying to gain access to

the ballot box, then it cannot be extended to cover voter-dilution claims in how a state exercises its constitutional duty to create congressional districts.[7] Unfortunately, both Justice Brennan and Justice O'Conner's opinions missed this threshold issue. *Gingles*'s chief flaw appears to be an undue reliance on legislative history and not enough reliance on the statute's text. The textualists' war against abusing legislative history in this way is well-documented. *See, e.g.*, Antonin Scalia, *A Matter of Interpretation* 16-37 (new ed. 2018); Scalia & Garner, *supra*, at 369-90. And over time, the textualists prevailed. As Justice Kagan famously said, "We're all textualists now." Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YouTube (Nov. 25, 2015) https://www.youtube.com/watch?v=dpEtszFT0Tg; *see also* Diarmuid F. O'Scannlain, *"We're All Textualists Now": The Legacy of Justice Scalia*, 91 St. John's L. Rev. 303 (2017). Under today's textualist dominance of statutory interpretation, it is far more likely that the Court today would adopt Justice Thomas's reading of Section 2 from *Holder* than it is that it would affirm Justice Brennan or O'Conner's tests from *Gingles*.

Finally, some Justices ask not only whether a decision is "wrong" but "egregiously wrong" to warrant reconsideration. *See, e.g.*, *Ramos v. Louisiana*, 140 S.Ct. 1390, 1414 (2020) (Kavanaugh,

---

[7] Again, this is a different matter than where the state intentionally discriminates against minorities in how it draws a congressional map, which the Equal Protection Clause certainly prohibits.

J., concurring in part). As Justice Thomas's concurrence in *Holder* demonstrates, *Gingles*'s misinterpretation of Section 2 requires race-based segregation, which was the chief evil that the Fourteenth Amendment, Fifteenth Amendment, and Voting Rights Act were created to remedy. Between that and requiring the Court to engage in political calculus instead of adjudication, *Gingles* has been "a disastrous misadventure in judicial policy-making." *Holder*, 512 U.S. at 893 (Thomas, J., concurring in judgment). Thus, between segregation and judicial policymaking, *Gingles* was egregiously wrong and should be revisited.

C. The Court's Duty Is to Choose the Law Over *Stare Decisis*.

Before getting into the factors the Court has recently employed in reevaluating precedent, ACLL believes that "[w]hen faced with a demonstrably erroneous precedent," the rule is simple: the Court "should not follow it." *Gamble v. United States*, 139 S.Ct. 1960, 1984 (2019) (Thomas, J., concurring). The Constitution itself and the laws of the United States made in pursuance thereof are "the supreme law of the land." U.S. Const., art. VI, cl. 2. Consequently, if the Court is faced with a precedent that clearly conflicts with what the Constitution or a statute says, ACLL submits that it is the Court's duty to decline to follow the precedent and instead follow the Constitution or statute. *See generally Gamble*, 139 S.Ct. at 1981-89 (Thomas, J., concurring). ACLL will proceed to discuss the factors that the Court traditionally considers in revisiting precedent, but it

would be remiss if it did not make this threshold point for the Court's consideration.

D. The *Janus* Factors Favor Overruling *Gingles*.

If the Court does not believe that demonstrable error alone is enough to warrant overturning precedent, then it should look to the factors it articulated recently in *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018). Those factors are: (1) the quality of the precedent's reasoning, (2) the workability of the precedent in question, (3) whether legal or factual developments have eroded the decision's underpinnings and left it as an outlier, and (4) reliance interests. *Id.* at 2479-84.

1. The Quality of Gingles's *Reasoning*

As Justices Thomas and Scalia aptly demonstrated, *Gingles* disregarded the cardinal rule of statutory interpretation: "The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." Scalia & Garner, *supra*, at 56. Furthermore, the Justices split 5-4 about the holding and reasoning of the case. When the Court is that closely split, it "may leave the decision more vulnerable to challenge and more likely to be overruled." Bryan Garner et al., *The Law of Judicial Precedent* 190 (2016). That is not to say that decisions are always less authoritative if the Court is closely split. *See id.* at 187. However, because *Gingles* achieved only a narrow victory while discarding the

cardinal rule of statutory interpretation, the first *Janus* factor weighs in favor of overruling it.

2. Gingles's *Workability*

As to the workability of the precedent, *Gingles* has been "a disastrous misadventure in judicial policy-making." *Holder*, 512 U.S. at 893 (Thomas, J., concurring in judgment). As argued above, it requires the judiciary to engage in race-based discrimination based on political theories rather than manageable judicial standards that hurt rather than help racial divides. *See* Part I, *supra*. Furthermore, subsequent decisions illustrate that *Gingles* has been difficult to apply in practice. For instance, in *Holder*, the Court was split five ways on how to apply *Gingles*. *See Holder*, 512 U.S. at 876-82, 885 (opinion of Kennedy, J., joined by Rehnquist, C.J., and O'Conner, J.); *id.* at 882-84 (opinion of Kennedy, J., joined by Rehnquist, C.J.); *id.* at 885-91 (O'Conner, J., concurring in part and concurring in judgment); *id.* at 891-946 (Thomas, J., joined by Scalia, J., concurring in judgment); *id.* at 946-55 (Blackmun, J., dissenting). A fractured Court attempted to apply *Gingles* again in *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) in a vote line that was hardly easy to follow. *LULAC*, 548 U.S. at 408. As of 2009, the Court appeared to fall into three camps as to how to apply *Gingles*. *Bartlett v. Strickland*, 556 U.S. 1, 6 (2009) (opinion of Kennedy, J., joined by Roberts, C.J., and Alito, J.); *id.* at 26 (Thomas, J., joined by Scalia, J.); *id.* at 26 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ.). Thus, as the Chief Justice noted in his application-stage dissent, *Gingles* makes the voter-

dilution doctrine as "'an area of the law notorious for its many unsolved puzzles[.]'" *Merrill*, 142 S.Ct. at 883 (Roberts, C.J., dissenting) (quoting Jowei Chen & Nicholas O. Stephanopoulos, *The Race-Blind Future of Voting Rights*, 130 Yale L.J. 862, 871 (2021)).

That is not to say that every case in which *Gingles* arose was subject to such a fractured decision. *See, e.g.*, *Growe v. Emison*, 507 U.S. 25 (1993); *Voinovich v. Quilter*, 507 U.S. 146 (1993). However, when the Court decides the harder cases applying *Gingles*, the reasoning tends to be more fractured. With three or four different approaches in the harder cases, the voter-dilution doctrine wobbles along like a shopping cart with wheels that do not cooperate with each other.

Furthermore, as the Chief Justice observed in his dissent at the application stage, perhaps the biggest problem with *Gingles'*s workability is that it defeats the purpose for which the Voting Rights Act was enacted. *Merrill*, 142 U.S. at 883 (Roberts, C.J., dissenting) (quoting *Johnson v. DeGrandy*, 512 U.S. 997, 1028 (1994) (Kennedy, J., concurring in part and concurring in judgment)). Whatever factors go into workability, if a precedent defeats the primary purpose of the law that it is supposed to interpret, then the precedent does not work.[8] Consequently, the

[8] In fairness to the *Gingles* Court, as the Chief Justice noted, the language of Section 2(b) has been described as "'famously elliptical[.]'" *Merrill*, 142 S.Ct. at 883 (Roberts, C.J., dissenting) (quoting *Gonzalez v. City of Aurora*, 535 F.3d 594, 597 (7th Cir. 2008) (Easterbrook, J., for the court)). However, Justice Thomas correctly explained in *Holder* that Section 2(b) is constrained by

workability factor suggests that it should be revisited.

3. Whether Gingles's *Underpinnings Have Been Eroded and Left It as an Outlier*

Third, a decision is an outlier if further developments in the law have eroded the decision's underpinnings. *Janus*, 138 S.Ct. at 2482. Two types of erosion are worth noting here. First, this Court recently held that political gerrymandering is a nonjusticiable political question because the judiciary lacks manageable standards to assess those cases. *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019). Thus, it is time for the Court to look again at Justice Thomas's criticism that voter-dilution claims necessarily require the Court to engage in political theory. The Court held in *Rucho* that it was not proper for a Court to do that. If that is true, then *Gingles* must fall as well. Second, as this Court has noted, the South has changed. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009). The South has largely turned from its former ways that necessitated the Voting Rights Act in the first place. Thus, major factual and legal changes have eroded *Gingles*'s underpinnings.

Furthermore, *Gingles* stands as an outlier because it requires racial discrimination among a body of law whose whole purpose is to prohibit it. As the district

---

Section 2(a), so Section 2(b) cannot expand the scope of Section 2(a). *Holder*, 512 U.S. at 915 (Thomas, J., concurring in judgment).

court itself noted, "while 'the Equal Protection Clause restricts the consideration of race in the districting process, compliance with the Voting Rights Act of 1965 … pulls in the opposite direction. It often insists that districts be created precisely because of race.'" Stay App. 33 (quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018)). When a statute that was designed to *end* racial discrimination is interpreted to *require* racial discrimination, then something is very wrong. *Gingles* and its progeny stand as an outlier to the demands of the Fourteenth and Fifteenth Amendments, as well as the Voting Rights Act itself.

4. Special Justification and Reliance Interests

It has been said that when the first three *Janus* factors are met, so is the "special justification" needed to overrule a precedent. *Janus*, 138 S.Ct. at 2486. They also tend to outweigh any contrary reliance interests. *Id.*

As to reliance concerns, because of the dueling nature of the Equal Protection Clause and this Court's interpretation of the Voting Rights Act, it is difficult for the states to know how to rely on this Court's precedents. Indeed, one of the State's central claims in this application is that construing the Voting Rights Act to require such racial gerrymandering is unconstitutional. As this Court observed recently, attempting to follow *Gingles* and its progeny automatically triggers strict scrutiny, but it is presumed that the State has a compelling interest in following the Voting Rights Act. *Cooper v.*

Harris, 137 S.Ct. 1455, 1464 (2017). So, in every case, the State has to walk the narrowly-tailored line. It is a fine line to walk between violating the Equal Protection Clause and the Voting Rights Act.

Furthermore, as the Chief Justice noted in his application-stage dissent, *Gingles* and its progeny have failed to produce any "'authoritative resolution of the basic questions one would need to answer to make sense of the results test.'" *Merrill*, 142 S.Ct. at 883 (Roberts, C.J., dissenting) (quoting Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. Pa. L. Rev. 377, 389 (2012)). The virtue of having settled precedent (when such precedent is not clearly irreconcilable with the Constitution or a statute) is that it provides a final answer on a matter over which reasonable minds could differ. But as to this issue, there is no final answer. If there is no final answer, then there can be no reasonable reliance. Thus, reliance interests also tip in favor of revisiting *Gingles*.

III. Alabama Has Changed.

The 1982 Senate Factors drive the analysis of vote dilution claims in the wrong direction. They inexorably lead to a focus on the past and on social and historical conditions that are unrelated to voter registration and turnout.

Without a doubt, the Thirteenth, Fourteenth, and Fifteenth Amendments represent the best of our Constitution. America was founded on the beliefs

that "all men are created equal" and that they are "endowed by their Creator with certain unalienable Rights …." *The Declaration of Independence* para. 2 (U.S. 1776). Unfortunately, while the Founding generation was making progress towards applying these ideals, it did not apply these ideals towards everyone regardless of race. But after the Civil War, these three amendments supplied what was lacking at the Founding.

Yet many places in the United States, especially in the South, continued to fail to honor the Constitution's requirements. Consequently, corrective action from Congress, including the Voting Rights Act, was necessary. Throughout this brief, ACLL does not intend in any way to downplay the importance of the Voting Rights Act or the role it played in producing necessary change.

However, as this Court has recognized, "[t]hings have changed in the South." *Nw. Austin*, 557 U.S. at 202. While nobody disputes that any intentional act to discriminate against people on the basis of color or race would violate the Fourteenth Amendment, Fifteenth Amendment, and the Voting Rights Act, this Court has declared part of the Voting Rights Act unconstitutional because the conditions that justified its passage are no longer present. *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013); *see also id.* at 557 (Thomas, J., concurring). Thus, while ACLL is absolutely in favor of invalidating congressional districts that were designed from an intent to discriminate on the basis of race, it believes that it is

no longer necessary to view every racially neutral policy through the lens of racial discrimination.

In this case, the record reflects that the map was initially drawn without regard to race. In fact, the map was so racially neutral that one Milligan Plaintiffs' expert, Dr. Imai did not generate two majority-black districts in 30,000 simulations, Supplemental Joint Appendix 58-59, 72, and Joint Appendix 571-72, and another Milligan Plaintiffs expert, Dr. Duchin, could not draw a second majority-black district after two million simulations. Joint Appendix 710. Dr. Duchin was able to identify such a district only after intentionally putting race first in her search criteria, explaining "that is hard to draw two majority-black districts by accident shows the importance of doing so on purpose." Joint Appendix 714. Just as "[o]ur Constitution is color-blind," *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting), so is Alabama's map for congressional districts. Because there is no discrimination on the basis of race, Alabama's congressional map should not have been invalidated.

Moreover, Alabama's voter registration and turnout now cannot be compared with those in 1965. Since 1994, the number of African-American registered voters increased from 479,415 to 883,976 as of March 31, 2020, an increase of 84%.[9] In

[9] See Press Release, Secretary Merrill Responds to Inaccurate Montgomery Advertiser Op-Ed (Apr. 28, 2020), https://www.sos.alabama.gov/newsroom/secretary-merrill-responds-inaccurate-montgomery-advertiser-op-ed-0

addition, 96% of all eligible African-Americans in Alabama are registered to vote.[10]

CONCLUSION

The Constitution and the Voting Rights Act require one simple thing: stop discriminating on the basis of race. That's exactly the opposite of what the district court did here. For the reasons stated by Appellants and those advanced in this brief, this Court should reverse the judgment of the district court.

Respectfully submitted,

JOHN J. PARK, JR.
P.O. Box 3073
Gainesville, GA 30503
(678) 608-1920
jackparklaw@gmail.com

MATTHEW J. CLARK*
**Counsel of Record*
ALABAMA CENTER FOR
LAW AND LIBERTY
2213 Morris Ave., Fl. 1
Birmingham, AL 35203
(256) 510-1828
matt@
alabamalawandliberty.org

Counsel for *Amicus Curiae*

[10] *Id.*