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 UNITED STATES REPRESENTATIVES FROM ALABAMA AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS/PETITIONERS

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QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE*

Amici are five of the seven United States House of Representatives members from Alabama, including Representatives Jerry Carl Jr. (First District), Barry Moore (Second District), Mike Rogers (Third District), Robert Aderholt (Fourth District), and Gary Palmer (Sixth District). All are running for reelection in 2022 and thus have a significant interest in ensuring that the boundaries of the congressional districts in Alabama are drawn properly.

This case presents an important issue of interpreting and applying Section 2 of the Voting Right Act in a way that complies with the Equal Protection Clause. *Amici* have a strong interest in the administration of a nondiscriminatory election system that allows all Alabama citizens to participate equally and that promotes democratic representation and stability. *Amici* are concerned that the remedy pursued by the respondents and ordered by the district court will not only disrupt Alabama's system of representation but also jeopardize the State's districting process.[1]

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[1] All parties have consented to the filing of this brief. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The NRCC made a monetary contribution intended to fund the preparation and submission of this brief.

SUMMARY OF THE ARGUMENT

1. The population of the United States is about 13% black, but no State is majority black. Republican voters compose about 35% of the Massachusetts electorate, but it is considered mathematically impossible to draw even one of its nine House districts as majority Republican. Over 20% of Floridians are at least 65 years old, yet those citizens do not form a majority in any of the State's 27 House districts. And none of these examples is surprising, because "[t]here is no caste here." *Plessy* v. *Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Americans of all backgrounds live among other Americans. This geographic dispersion means that proportionality between population and district dominance is not the norm in the districting process. To achieve unnatural proportionality, the process cannot be neutral. Something else must be given priority.

In the district court's view, Alabama's process required a new overlay: racial segregation. The State's process had, for years, produced one majority-minority district. The plaintiffs' own expert had run two million neutral maps, not one of which led to two majority-minority districts. MSA 364. Most led to *zero* such districts. But the district court fixated on the fact that "Black Alabamians comprise approximately 27% of the State's population, and Alabama has seven congressional seats." MSA 5. So, the district court emphasized, "Black Alabamians" *could* "constitute a voting-age majority in a second congressional district." MSA 5. The plaintiffs' experts therefore "prioritized race" (MSA 157, 214) to determine whether the traditional, neutral factors could be manipulated to "divvy[] [Alabamians] up by race." *LULAC* v. *Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in

part, concurring in judgment in part, and dissenting in part).

2. To accept this racial manipulation, the district court had to disregard neutral districting criteria, particularly core retention. For decades, Alabama has followed the traditional principle that the core of legislative districts should be retained. Core retention promotes democratic representation by ensuring that constituents can develop meaningful relationships with those who speak for them, including *amici*. These lasting relationships foster government by the consent of the people. Core retention leads to representatives who are better equipped to understand, promote, and respond to the unique needs, cultures, and histories of their districts. And core retention is a neutral principle.

Yet the district court embraced the plaintiffs' "significant level of core disruption" because "the entire reason for the remedial map is to draw a second majority-minority district." MSA 182. While Alabama's enacted map kept 94% of the State's population in their existing districts, the proposed remedial maps moved nearly half the population to new districts. None of those maps retained as much population as the Alabama legislature's *least retentive* district did. As the district court recognized, that is because the plaintiffs' maps are all premised on racial segregation, unlike Alabama's map that prioritized neutral and important principles like core retention.

3. The district court's subordination of neutral principles to race defies the Voting Rights Act, this Court's precedents, and the Fourteenth Amendment. Section 2 does not "create a right to proportional representation." *Thornburg* v. *Gingles*, 478 U.S. 30, 84

(1986) (O'Connor, J., concurring in judgment). It protects equal access to "the political process" and expressly *not* "a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b). Section 2 should not be read to require states to adopt "proportional" maps that would never exist under neutral criteria, for such maps would themselves violate the statute and the Constitution. This Court has repeatedly upheld maps that did *not* provide proportional representation—and struck down proportional maps that hinged on race. Ordering a State "to engage in race-based redistricting and create a minimum number of districts in which minorities constitute a voting majority" "tend[s] to entrench the very practices and stereotypes the Equal Protection Clause is set against." *Johnson* v. *De Grandy*, 512 U.S. 997, 1029 (1994) (Kennedy, J., concurring in part and in judgment).

ARGUMENT

I. The district court's assumption of proportional representation was error.

The district court's analysis assumes that because 27% of Alabama's population is black, two of its seven congressional districts (28%) should be majority black. MSA 4–5, 205–06. The court thus adopted the views of the plaintiffs' experts, who worked backwards from that assumption and made that racial division a "nonnegotiable principle" before drawing remedial maps. MSA 60, 262. This assumption of proportional representation turns out to be far less defensible than it appears. That is because, as the plaintiffs' own expert elsewhere explained, "the representational baseline for single-member districts is strongly

dictated by the specific political geography of each time and place." M. Duchin et al., Locating the Representational Baseline: Republicans in Massachusetts, 18 Election L.J. 388, 392 (2019).

As noted, many examples prove the point. The plaintiffs' expert has discussed Massachusetts, where Republican voters are 35% of the population but, because of their uniform distribution throughout the state, "1/3 of the vote prov[es] insufficient to secure any representation." *Id.* at 389 (emphasis omitted); see also *Milligan* D. Ct. Dkt. 105-2, Tr. 612:5–7 (testifying that "it's not only unlikely, it is on the nose mathematically impossible to draw a congressional district in Massachusetts that would have Republican majority"); cf. *Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2499 (2019) (noting that in 1840, the Whigs in Alabama "garnered 43 percent of the statewide vote, yet did not receive a single seat" in the House of Representatives).

Likewise, even though the population of the United States is about 13% black, no U.S. Senate district (*i.e.*, a State) is majority black.[2] Twenty-one percent of Floridians are at least 65 years old, but they do not have a majority in any of the State's 27 U.S. House districts—even in District 11, the U.S. congressional district with the highest percentage of citizens 65 and older.[3] At the extreme, take a hypothetical ten-district

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[2] See Quick Facts, U.S. Census Bureau, https://perma.cc/2WDD-UE5L (last visited Jan. 31, 2022).

[3] See Quick Facts: Florida, U.S. Census Bureau, https://www.census.gov/quickfacts/FL (last visited Mar. 25, 2022) (providing data for Floridian population); Florida 11th Congressional District Demographics, BiggestUSCities.com (Mar. 1, 2022), https://www.biggestuscities.com/demographics/fl/11th-congressional-district (providing data for Eleventh District);

state with 100 voters per district, in which a group constituting only 50% of the population (500 voters) could form a majority in nine districts if their geographic dispersion was such that those districts each contained 51 group members. The point is that political geography matters.

What is true nationally is true in Alabama. Fifty-three of Alabama's 67 counties are majority white, including five counties among the 18 in the Black Belt, which "is named for the region's fertile black soil" and "has a substantial Black population." MSA 38–39. Black Alabamians live in majority-white places like Mobile (Mobile County, 35.3% black) and Dothan (Houston County, 26.5% black).[4] Thus, as a matter of political geography, Alabama's longstanding single majority-minority district comes as no surprise. It is a consequence not of nefarious motives, but of intermingling of residents regardless of race.

As the plaintiffs' expert has argued elsewhere, "Any meaningful claim of gerrymandering must be demonstrated against the backdrop of valid alternative districting plans, under the constraints of law, physical geography, and political geography that are actually present in a jurisdiction." Duchin et al., *supra*, at 399. But here, the plaintiffs took a different route. Overcoming fundamental facts about Alabama's political geography required the plaintiffs to do just what the law forbids: draw maps based on race.

G. Giroux, Rich, Poor, Young, Old: Congressional Districts at a Glance, Bloomberg Government (Sep. 15, 2017, 4:37 PM), https://about.bgov.com/news/rich-poor-young-old-congressional-districts-glance/ (same).

[4] See Alabama: 2020 Census, U.S. Census Bureau, https://www.census.gov/library/stories/state-by-state/alabama-population-change-between-census-decade.html (Oct. 8, 2021).

The plaintiffs' expert had drawn two million neutral maps "without taking race into account in any way." MSA 364. None of them produced two majority-minority districts. *Ibid.* The median number of majority-minority districts in the maps was *zero*. M. Duchin & D. Spencer, Models, Race, and the Law, 130 Yale L.J.F. 744, 764 (2021).

As the expert explained, proportional outcomes do not "come for free," and "representation doesn't kick in until you're fairly segregated."[5] So she and the plaintiffs' other experts set about to segregate Alabama. Concluding "that it is hard to draw two majority-black districts by accident," the plaintiffs' expert decided that it was "importan[t]" to "do[] so on purpose." MSA 367. Only after she operationalized the new model—with the "nonnegotiable principle" being segregation based on race—could she produce maps with two majority-minority districts. MSA 60, 262; see MSA 322 ("I needed to make sure that the districts I was creating would be over 50 percent black."); MSA 297 ("None" of the "30,000 simulated plans included two" majority-black districts "because [the plaintiffs' other expert] didn't tell the algorithm to create a second.").

The district court agreed that "some awareness of race likely is required to draw two majority-Black districts." MSA 261. And one reason that the court found that the plaintiffs presented reasonably compact maps is because the maps "provide a number of majority-Black districts that is roughly proportional." MSA 183, 259. The district court excused the plaintiffs'

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[5] Harvard University, Political Geography: The Mathematics of Redistricting, A Lecture by Moon Duchin, YouTube, at 17:58, 44:52 (Nov. 26, 2018), https://youtu.be/pi_i3ZMvtTo.

race-based drawing because "[b]eyond ensuring crossing that 50 percent line, there was no further consideration of race." MSA 262–63; see also MSA 61, 265–66 (similar). In other words, once segregated by race, citizens were treated equally. Cf. *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting) ("separate but equal"). As discussed in Part III below, that violates the law. Proportional representation based on race is not the norm in districting.

II. The district court's dismissal of core retention was error.

As it elevated race and unnatural proportional representation, the district court devalued neutral, traditional districting principles. And it especially and expressly devalued one: core retention. Core retention means that maps are drawn so that, in the main, districts do not change from election to election. Most citizens, living in the district "cores," stay in the same district. This principle is a longstanding one, and it is race neutral. It is important to democratic representation, for it more closely connects citizens with their representatives (like *amici*). Yet the district court tossed it aside: "a significant level of core disruption" "is to be expected when the entire reason for the remedial map is to draw a second majority-minority district that was not there before." MSA 182. That puts the cart before the horse: neutral districting principles must be considered *before* finding a VRA violation. And it ignores the compelling reasons for states to retain district cores.

Alabama has followed the essential districting principle of core retention for decades. The bipartisan guidelines in this cycle directed that "[t]he Legislature shall try to preserve the cores of existing districts."

MSA 231. The congressional map produced by the legislature closely mirrors the last three congressional maps, from 1992, 2002, and 2011. As part of redistricting litigation in the 1990s, a three-judge court ordered a congressional plan containing a majority-black District 7. See *Wesch* v. *Hunt*, 785 F. Supp. 1491 (S.D. Ala. 1992); *Wesch* v. *Folsom*, 6 F.3d 1465 (CA11 1993). The court picked what became the 1992 plan in part because it "maintain[ed] the cores of existing Districts 1 and 2." *Hunt*, 785 F. Supp. at 1496–97.

The 2002 congressional map—enacted by a majority-Democratic legislature and precleared by the Department of Justice—retained the core of the 1992 plan. Likewise, the 2011 congressional map—precleared by the Department of Justice under President Obama—maintained the cores of the prior maps. And the 2021 congressional map continued adherence to the core retention principle. Randy Hinaman, the legislature's map-drawer, used the "cores of the existing districts" as the "starting point in drafting the 2021 congressional map." JA 270.

There are good reasons for core retention. The foundation of our democratic republic is that representatives speak for the citizens they represent. In this way, we hear "the public voice pronounced by the representatives of the people." The Federalist No. 10 (Madison). So states have a legitimate interest in "promot[ing] 'constituency-representative relations'" by "maintaining existing relationships between incumbent congressmen and their constituents." *White* v. *Weiser*, 412 U.S. 783, 791–92 (1973). This "common practice" "honors settled expectations." *Cooper* v. *Harris*, 137 S. Ct. 1455, 1492 (2017) (Alito, J., concurring in judgment in part and dissenting in part);

accord Karcher v. *Daggett*, 462 U.S. 725, 740 (1983) ("preserving the cores of prior districts" is a "legitimate objective[]").

Maintaining the core of each district permits representatives like *amici* to build stronger relationships with their constituents. The "location and shape of districts" dictate "the political complexion of the area." *Gaffney* v. *Cummings*, 412 U.S. 735, 753 (1973). Representatives "have the responsibility to learn the needs of their constituents and represent their constituents." J. Fromer, An Exercise in Line-Drawing: Deriving and Measuring Fairness in Redistricting, 93 Geo. L.J. 1547, 1581 (2005). "Long-term representatives have a chance to learn about and understand the unique problems of their districts and to pursue legislation that remedies those problems." N. Persily, In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders, 116 Harv. L. Rev. 649, 671 (2002). Citizens come to trust their representatives, who help them navigate government bureaucracies and deal with local issues. See generally B. Cain, J. Ferejohn, & M. Fiorina, The Personal Vote: Constituency Service and Electoral Independence (1987).

Moreover, "the cores in existing districts are the clearest expression of the legislature's intent to group persons on a 'community of interest' basis." *Colleton Cnty. Council* v. *McConnell*, 201 F. Supp. 2d 618, 649 (D.S.C. 2002). And "because the cores are drawn with other traditional districting principles in mind, they will necessarily incorporate the state's other recognized interests in maintaining political boundaries, such as county and municipal lines." *Ibid.*

Disregarding core retention can lower public familiarity with candidates and representatives, leading to abstention and voter disengagement. See generally D. Hayes & S. McKee, The Participatory Effects of Redistricting, 53 Am. J. Pol. Sci. 1006 (2009) (analyzing data sets demonstrating voter abstention following boundary realignment); J. Winburn & M. Wagner, Carving Voters Out: Redistricting's Influence on Political Information, Turnout, and Voting Behavior, 63 Pol. Rsch. Q. 373 (2010) (similar, with more data sets). These voter depression "effects are strongest among African Americans," who suffer a significant drop off in voter participation when drawn into a new district. D. Hayes & S. McKee, The Intersection of Redistricting, Race, and Participation, 56 Am. J. Pol. Sci. 115, 115 (2012). After voters are redrawn into a new district, their ability to recall candidate names is much lower; those in rural communities are especially affected. See Winburn & Wagner, *supra*, at 382.

In sum, representatives can be expected to better represent their citizens' views when they are equipped to understand their communities, and not left to worry about their represented community changing with each new electoral cycle. And with stronger relationships, they can provide better service to constituents. State legislatures best understand the importance of these relationships, which should not be upended every time new maps are drawn. That risks depressing the representative relationships that foster democratic accountability and service. And it would "lead[] to ineffective governance." Fromer, *supra*, at 1581.

For an example, take Gulf Coast counties Mobile and Baldwin, which the State has long placed in the

same congressional district (District 1) because of the unique circumstances facing coastal communities with a substantial industrial base. One *amicus* here, Congressman Carl, represents those communities. As State Representative Adline Clarke, a black Democrat from Mobile recently explained, "I consider Mobile and Baldwin counties one political subdivision and would prefer that these two Gulf Counties remain in the same congressional district because government, business and industry in the two counties work well together—with our congressman—for the common good of the two counties."[6] This makes sense given that the people in District 1 share a history and culture, with heavy French and Spanish influence, the origination of Mardi Gras, and other shared experiences as the only two coastal counties in the State. See *Barnhard* v. *Ingallis*, 275 So. 3d 1112, 1117 n.1 (Ala. 2018). Keeping those communities in the same district promotes democratic accountability.

Despite the importance of this longstanding districting principle of core retention, the plaintiffs here ignored it. Their experts admitted that they did not even attempt to incorporate core retention into their algorithms. See MSA 359 ("That was not a consideration."). They found it "mathematically impossible" to achieve their primary objection—race-based quotas—without "a significant level of core displacement." MSA 337.

Unsurprisingly, the maps presented by plaintiffs' experts eviscerated the district cores. The legislature's map retained 94% of the State's population in the

[6] J. Sharp, Redistricting Alabama: How South Alabama could be split up due to Baldwin County's growth, AL.com (Sep. 20, 2021), https://perma.cc/8PME-JA5W.

same districts; the plaintiffs' maps were mostly in the 50–60% range. *Milligan* D. Ct. Dkt. 82-4, at 11–15. The disparities for retention of black voters were similar. *Ibid.* None of the plaintiffs' initial ten proposed maps retained as much of the previous district as the legislature's *least retentive* district did. *Id.* at 33–43.

For its part, the district court acknowledged that the plaintiffs' maps were far inferior to the State's in terms of core retention. MSA 182; cf. *Brnovich* v. *Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2346 (2021) (noting that "the Court of Appeals' preferred alternative would have obvious disadvantages"). Yet the court reasoned that "a significant level of core disruption" "is to be expected when the entire reason for the remedial map is to draw a second majority-minority district." MSA 182. But there is no warrant for a remedial map if the State's existing map complies with neutral districting principles. Section 2 "does not deprive the States of their authority to" rely on traditional, "non-discriminatory" districting principles like core retention. *Brnovich*, 141 S. Ct. at 2343. "[S]trong state interests" like core retention can "save" even an "otherwise discriminatory" map. *Id.* at 2360 (Kagan, J., dissenting). And in all events, a remedial map cannot "subordinate[] traditional districting principles to race." *Miller* v. *Johnson*, 515 U.S. 900, 919 (1995).

The district court believed that core retention could *never* be assigned "great weight" because that "would turn the law upside-down, immunizing states from liability under Section Two so long as they have a longstanding, well-established map, even in the face of a significant demographic shift." MSA 182. Put aside that no significant demographic shift has occurred in Alabama: the share of the state's population that is

black has increased by less than two percentage points in 30 years. MSA 282. Two other problems exist with the district court's reasoning.

First, prioritizing traditional principles over racial segregation keeps the law right-side up. Section 2 is premised on Congress's authority under the Fourteenth and Fifteenth Amendment, which operate only against *intentional* discrimination. See *Washington* v. *Davis*, 426 U.S. 229, 242 (1976); *City of Mobile* v. *Bolden*, 446 U.S. 55, 60–62 (1980) (plurality opinion). Holding unlawful a duly enacted map that adheres to neutral principles like core retention is a dubious extension of Section 2 beyond its constitutional moorings. And as discussed more below, the district court's "*command* that [Alabama] engage in presumptively unconstitutional race-based districting brings" Section 2 into extreme "tension with the Fourteenth Amendment." *Miller*, 515 U.S. at 927 (emphasis added). "Congress' exercise of its Fifteenth Amendment authority even when otherwise proper still must 'consist with the letter and spirit of the constitution.'" *Id.* at 926–27 (quoting *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326 (1966)); cf. *City of Boerne* v. *Flores*, 521 U.S. 507, 532–33 (1997) (observing that the VRA's Section 5 restrictions were "placed only on jurisdictions with a history of intentional racial discrimination in voting" to prevent "the mischief and wrong which the Fourteenth Amendment was designed to protect against" (cleaned up)).

The district court's hypothesized example is distinct from cases in which this Court "has found a problem under § 2," all of which "involve transparent gerrymandering that boosts one group's chances at the expense of another's." *Gonzalez* v. *City of Aurora*, 535

F.3d 594, 598 (CA7 2008) (Easterbrook, J.) (citing *Shaw* v. *Reno*, 509 U.S. 630 (1993); *Miller*, 515 U.S. 900; *LULAC*, 548 U.S. 399). Alabama's adherence to longstanding, neutral districting principles that all agree would never lead to another majority-minority district is much different. Imposing liability for Alabama's approach "would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *Bartlett* v. *Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion).

For that reason, this Court has refused to find liability under Section 2 in similar cases. In *Abrams* v. *Johnson*, for example, the Court emphasized "Georgia's traditional redistricting principles" that included preserving "district cores, four traditional 'corner districts' in the corners of the State, [and] political subdivisions such as counties and cities." 521 U.S. 74, 84 (1997). The Court agreed with the district court's decision not to order the "creat[ion of] a second majority-black district" because "doing so would require it to 'subordinate Georgia's traditional districting policies and consider race predominately, to the exclusion of both constitutional norms and common sense.'" *Ibid.* (quoting *Johnson* v. *Miller*, 922 F. Supp. 1556, 1566 (S.D. Ga. 1995)).

Second, recognizing the importance of core retention does not "immunize" maps. Sometimes, it could *help* Section 2 plaintiffs. In *LULAC*, for example, a system like Alabama's of promoting core preservation would have favored the plaintiffs' preferred outcome. There, "Webb County, which [was] 94% Latino, had previously resided entirely within District 23; under the new plan, nearly 100,000 people were shifted into neighboring District 28." 548 U.S. at 424. And District 23 saw its "Latino share of the citizen

voting-age population" drop from 57% to 46%. *Ibid.* Disruption of the district core could provide evidence of an unlawful race-based gerrymander, for it shows that the legislature disregarded traditional districting principles. Here, by contrast, the *plaintiffs* proposed disrupting the district cores to discriminate based on race instead.

Core retention improves the democratic relationship between citizen and representative. It is an important, neutral principle that state legislatures validly prioritize. The district court disregarded this traditional principle, replacing it with racial discrimination based on a concept of "proportional representation" with no basis in Section 2's text or the Constitution. Not only does this holding disserve democratic accountability, it threatens the constitutionality of Section 2 as applied here.

III. The district court's order contradicts Section 2, this Court's precedents, and the Constitution.

This Court has construed Section 2 to extend to "dispersal of a group's members into districts in which they constitute an ineffective minority of voters." *Cooper*, 137 S. Ct. at 1464 (cleaned up); but see *Holder* v. *Hall*, 512 U.S. 874, 922–23 (1994) (Thomas, J., concurring in judgment). Under this Court's decision in *Gingles*, three threshold requirements for Section 2 liability "must be shown: (1) The minority group must be sufficiently large and compact to constitute a majority in a reasonably configured district, (2) the minority group must be politically cohesive, and (3) a majority group must vote sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidate." *Wisconsin Legislature* v.

Wisconsin Elections Comm'n, 142 S. Ct. 1245, 1248 (2022). "If the preconditions are established, a court considers the totality of circumstances to determine whether the political process is equally open to minority voters." *Ibid.* (cleaned up).

The district court's application of *Gingles* defies the text of Section 2 and this Court's precedents. And it furthers the very race-based decision-making that the Constitution prohibits.

A. Section 2 does not require proportional representation.

"[T]he Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life." *Gregory* v. *Ashcroft*, 539 U.S. 461, 490–91 (2003). The VRA seeks "a society that is no longer fixated on race." *Id.* at 490. But the district court's conclusion depends on a fixation with race. Not once in two million map simulations did the plaintiffs' expert happen on a scheme with two majority-minority districts. Only when race became the "nonnegotiable principle" could such a map be made. MSA 60, 262. Using those maps would violate Section 2, and the VRA should not be interpreted in such a self-defeating way.

Section 2 does not guarantee equality through proportional representation. "[T]he ultimate right of § 2 is equality of opportunity." *De Grandy*, 512 U.S. at 1014 n.11. Section 2 is violated only if "the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens." 52 U.S.C. § 10301(b). Section 2 is not violated

when neutral traditional districting principles, like core retention, guide districting decisions.

Here, Alabama's adopted maps preserve core retention, follow other traditional districting criteria, and avoid racial discrimination. Two million efforts at similarly neutral maps show that Alabama elections are equally open based on neutral criteria. So the plaintiffs can prevail on their Section 2 claim only if the statute guarantees proportional representation, rather than protection against state action that abridges the right to compete on an equal footing in the electoral process. But Section 2's text "makes clear" that it is "not a guarantee of electoral success for minority-preferred candidates of whatever race." *De Grandy*, 512 U.S. at 1014 n.11; see also *Brnovich*, 141 S. Ct. at 2342 n.14 (noting the statutory disclaimer as "a signal that § 2 imposes something other than a pure disparate-impact regime"); *Rucho*, 139 S. Ct. at 2502 ("[A] racial gerrymandering claim does not ask for a fair share of political power and influence . . . . It asks instead for the elimination of a racial classification.")

To be sure, this Court in *De Grandy* examined proportionality as potentially relevant in the "totality of the circumstances" analysis after the three *Gingles* preconditions have been met. But the Court also cautioned that "the degree of probative value assigned to disproportionality, in a case where it is shown, will vary not only with the degree of disproportionality but with other factors as well." 512 U.S. at 1021 n.17. "[L]ocal conditions" matter. *Ibid.* (cleaned up). Here, application of neutral factors to Alabama's political geography yielded, two million times over, no more proportional representation. And the race-based maps proposed by the plaintiffs destroyed the district cores, undermining democratic representation. The district

court "improperly reduced *Gingles*' totality-of-circumstances analysis to a single factor": "proportionality." *Wisconsin Legislature*, 142 S. Ct. at 1250.

Just as bad, the district court focused on race not only in the totality of the circumstances analysis but also before considering the *Gingles* threshold conditions. The *Gingles* conditions presume "traditional districting principles such as maintaining communities of interest and traditional boundaries." *Abrams*, 521 U.S. at 92 (cleaned up). Starting with segregation distorts the *Gingles* analysis by favoring a race-based plan over either the existing plan or other neutral ones. Considering race before core retention and other traditional principles makes the "prohibited assumption" "from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls." *LULAC*, 548 U.S. at 433 (cleaned up); see also *Miller*, 515 U.S. at 919 (warning that "traditional districting principles" cannot be "subordinated to racial objectives").

If neutral maps cannot (or rarely) produce a sufficiently numerous, compact minority group, the *Gingles* conditions cannot be satisfied. This proper approach to applying *Gingles*—which the district court rejected—is the only one consistent with both the text of Section 2 and this Court's precedents. As Judge Easterbrook has explained, "neither [Section] 2 nor *Gingles* nor any later decision of the Supreme Court speaks of *maximizing* the influence of any racial or ethnic group." *Gonzalez*, 535 F.3d at 598. "Section 2 requires an electoral process 'equally open' to all, not a process that favors one group over another." *Ibid.* This makes sense, because a court "cannot maximize [one group's] influence without minimizing some other

group's influence. A map drawn to advantage [one racial group's] candidates at the expense of [another racial group's] candidates violates [Section] 2 as surely as a map drawn to maximize the influence of those groups at the expense of [the original ethnic group]." *Ibid.* The key, then, is to ask whether a racial group's population is "concentrated in a way that *neutrally drawn compact districts* would produce" more majority-minority districts. *Id.* at 600 (emphasis added); see generally J. Chen & N. Stephanopoulos, The Race-Blind Future of Voting, 130 Yale L.J. 862 (2021). Here, the plaintiffs' own analysis showed that neutral maps would *never* produce more majority-minority districts.

For similar reasons, the district court's analysis would trap states in an endless cycle of Section 2 violations. Again, the central question under Section 2 is "whether members of a racial group have less opportunity than do other members of the electorate." *LULAC*, 548 U.S. at 425–26. If a map can exist only by racial discrimination, necessarily it discriminates against members of a group. The very relief given to one set of plaintiffs—racially based districts that would never exist under neutral principles—would itself create a new Section 2 violation as to another plaintiff class, whose voting strength would be diminished by the remedial plan. Had a legislative mapmaker started off making racial segregation a "nonnegotiable principle," there is little doubt what fate the resulting map would meet on a Section 2 challenge. *E.g.*, *Miller*, 515 U.S. at 919 ("This statement from a state official is powerful evidence that the legislature subordinated traditional districting principles to race"); *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring) ("Race cannot be the

predominant factor in redistricting"). So telling Alabama to adopt such a map is telling it to violate the very law the new map would supposedly remedy (and the Constitution too). Section 2 should not be read to lead to so absurd a result. Not only does its text forbid this result, "few devices could be better designed to exacerbate racial tensions than the consciously segregated districting system" required by the district court's approach. *Holder*, 512 U.S. at 907 (Thomas, J., concurring in judgment).

B. Precedent does not require proportional representation.

This Court's precedents confirm that there are no race-based districting criteria that states may employ to achieve proportional representation. The Court has explained that to establish a racial gerrymandering claim, "a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles" like core retention "to racial considerations." *Miller*, 515 U.S. at 916 (cleaned up). "Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can defeat a claim that a district has been gerrymandered on racial lines." *Ibid.* (cleaned up). Nowhere has the Court suggested that there are legitimate or traditional race-based principles to which states may point as a defense.

In *Miller*, this Court invalidated congressional maps drawn in Georgia that sought proportional representation. At the insistence of the Department of Justice, the state legislature had drawn three of 11 districts as majority-minority to mirror the State's black population (27%). *Id.* at 906–07, 927–28. The Court rejected those maps because, as the State had

all but conceded, "race was the predominant factor in drawing" the new majority-minority district. *Id.* at 918. "[E]very objective districting factor that could realistically be subordinated to racial tinkering in fact suffered that fate." *Id.* at 919 (cleaned up). Even where "the boundaries" of the new district "follow[ed]" existing divisions like precinct lines, those choices were themselves the product of "design[] . . . along racial lines." *Ibid.* (cleaned up).

The Court rejected this racial gerrymander, specifically holding that "there was no reasonable basis to believe that Georgia's earlier [non-proportional] plans violated" the VRA. *Id.* at 923. "The State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan . . . discriminates on the basis of race or color." *Id.* at 924. Because engaging in "presumptively unconstitutional race-based districting" would have brought Section 2 "into tension with the Fourteenth Amendment," the Court rejected the State's maps, even though those maps provided proportional representation. *Id.* at 927. As the Court explained, "It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids." *Id.* at 927–28.

This Court thus remanded the case, and after the state legislature failed to act, the district court drew maps with only one majority-minority district (9%)—representation far below black Georgians' 27% share of the population. *Abrams*, 521 U.S. at 78; see *id.* at 103 (Breyer, J., dissenting). "The absence of a second,

if not a third, majority-black district" was "the principal point of contention." *Id.* at 78 (majority opinion). Yet this Court upheld the district court's maps, which focused on "Georgia's traditional redistricting principles" like core retention. *Id.* at 84. The district court had "considered the possibility of creating a second majority-black district but decided doing so would require it to subordinate Georgia's traditional districting policies and consider race predominantly, to the exclusion of both constitutional norms and common sense." *Ibid.* (cleaned up). This Court agreed and explained "that the black population was not sufficiently compact" for even "a *second* majority-black district." *Id.* at 91 (emphasis added). Thus, even getting to two majority-minority districts (18%) by focusing on race would have violated the Equal Protection Clause, and the Court rejected the use of DOJ's proposed "plan as the basis for a remedy [that] would validate the very maneuvers that were a major cause of the unconstitutional districting" at issue in *Miller*. *Id.* at 86; see *id.* at 109 (Breyer, J., dissenting) ("The majority means that a two-district plan would be unlawful—that it would violate the Constitution").

This Court's teachings in *Miller* and *Abrams* show the error of the district court's analysis, which prioritized race over traditional districting principles in pursuit of proportional representation. Not only is the degree of disproportionality in this case well below the disproportionality permitted in *Abrams*, the district court's overarching focus on race makes the same mistake made by the state legislature (at DOJ's insistence) in *Miller*. The district court's decision thus conflicts with this Court's precedents.

C. The Fourteenth Amendment prohibits maps drawn based on race.

A State cannot constitutionally be forced to adopt a plan that is premised on and would never exist absent unequal treatment based on race. "[T]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause." *Bartlett*, 556 U.S. at 21 (cleaned up). "[S]ystematically dividing the country into electoral districts along racial lines" is "nothing short of a system of 'political apartheid.'" *Holder*, 512 U.S. at 905 (Thomas, J., concurring in judgment) (quoting *Reno*, 509 U.S. at 647). The Court has time and again recognized that any "maps that sort voters on the basis of race 'are by their very nature odious.'" *Wisconsin Legislature*, 142 S. Ct. at 1248 (quoting *Reno,* 509 U.S. at 643). "[The sorting of persons with an intent to divide by reason of race raises the most serious constitutional questions." *De Grandy*, 512 U.S. at 1029 (Kennedy, J., concurring in part and in judgment).

This Court has applied strict scrutiny when the government discriminates based on "racial classifications." *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (plurality opinion) (collecting cases). Racial gerrymanders must be narrowly tailored to achieving a "compelling state interest." *Shaw* v. *Hunt,* 517 U.S. 899, 908 (1996). Without narrow tailoring, "[s]uch laws cannot be upheld." *Wisconsin Legislature*, 142 S. Ct. at 1248 (cleaned up).

Proportional representation is not a compelling state interest. See *Gingles*, 478 U.S. at 84 (O'Connor, J., concurring in judgment) ("Congress did not intend to create a right to proportional representation"). This

Court has "assume[d], without deciding, that the State's interest in complying with the Voting Rights Act [is] compelling." *Bethune-Hill* v. *Virginia State Bd. of Elections*, 137 S. Ct. 788, 801 (2017). But "the purpose of the Voting Rights Act [is] to eliminate the negative effects of past discrimination." *Gingles*, 478 U.S. at 65. And "[a] State's interest in remedying the effects of past or present racial discrimination" will only "rise to the level of a compelling state interest" if the State "satisf[ies] two conditions," *Hunt*, 517 U.S. at 909. *First*, "the discrimination must be 'identified discrimination.'" *Ibid.* Any mere "generalized assertion of past discrimination in a particular industry or region is not adequate." *Ibid.* Likewise, "an effort to alleviate the effects of societal discrimination is not a compelling interest." *Id.* at 909–10. *Second*, a legislature "must have had a strong basis in evidence to conclude that remedial action was necessary, *before* it" acts based on race. *Id.* at 910 (cleaned up).

Here, the plaintiffs cannot show either condition leading to a compelling interest, much less narrow tailoring. They cannot identify any relevant discrimination, because two million neutral maps produced the same (or less) representation. They cannot establish that race, rather than neutral principles like core retention, was the "predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Cooper*, 1137 S. Ct. at 1463. And they cannot show that a "strong basis in evidence" justifies their maps. *Id.* at 1464. The only discrimination here is by the plaintiffs, whose proposed "racial tinkering" and prioritization of "mechanical racial targets above all other districting criteria" provides strong "evidence that race motivated

the drawing" of *their* proposed remedial plans. *Miller*, 515 U.S. at 919 (cleaned up) (first quote); *Alabama Legislative Black Caucus* v. *Alabama*, 575 U.S. 254, 267 (2015) (second and third quotes).

Interpreting Section 2 to sanction the plaintiffs' approach would challenge its constitutionality. As discussed, Section 2 is grounded in the constitutional prohibitions on intentional discrimination. Imposing liability on a State that drew race-neutral maps disconnects Section 2 from its constitutional authority. Given that the standard American electoral "rule usually results in less-than-proportionate representation for all political minorities," "there is scant basis for suspecting an official intent to discriminate from the mere fact that an electoral system results in a minority community enjoying a less-than-proportionate share of political representation." C. Elmendorf, Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes, 160 U. Pa. L. Rev. 377, 401 (2012). That is especially true when the State's map is closely tied to longstanding district cores. Requiring a state to depart from that neutral map and *instead* intentionally discriminate based on race would be a strange way indeed to enforce the Constitution's prohibition on purposeful race discrimination. This constitutional quandary is yet another reason to reject the district court's approach.

"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 551 U.S. at 748. This Court should not countenance the district court's substitution of a race-neutral plan for one premised on segregation.

CONCLUSION

"Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Bartlett*, 556 U.S. at 21 (quoting *Reno*, 509 U.S. at 657). By prioritizing race to pursue segregated maps, the district court flouted both Section 2 and the Constitution. The judgments below should be reversed.

Respectfully submitted,

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