Nos. 21-1086, 21-1087

IN THE
Supreme Court of the United States

JOHN H. MERRILL, *et al.*,
Appellants,
v.

EVAN MILLIGAN, *et al.*,
Appellees.

JOHN H. MERRILL, *et al.*,
Petitioners,
v.

MARCUS CASTER, *et al.*,
Respondents.

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

BRIEF OF *AMICUS CURIAE* THE BRENNAN CENTER FOR JUSTICE IN SUPPORT OF APPELLEES/RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Named for the late Associate Justice William J. Brennan, Jr., the Brennan Center for Justice at New York University School of Law[2] is a not-for-profit, nonpartisan think tank and public interest law institute that seeks to improve systems of democracy and justice. Through its Democracy Program, the Brennan Center seeks to bring the idea of representative self-government closer to reality, including by working to ensure fair and non-discriminatory redistricting practices and to protect the right of all Americans to vote. The Brennan Center has focused extensively on protecting minority voting rights, including by authoring numerous reports relating to redistricting and voting rights and participating as counsel or *amicus* in a number of federal and state cases involving voting, election issues, and redistricting. The Brennan Center has submitted *amicus curiae* briefs in a number of Supreme Court cases involving redistricting and/or the Voting Rights Act, including *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021); *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254 (2015); *Shelby County v.*

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole; no party's counsel authored, in whole or in part, this brief; and no person or entity other than *amicus* and its counsel contributed monetarily to preparing or submitting this brief. Consistent with Rule 37.2, the parties to this action have granted blanket consent to the filing of *amicus curiae* briefs in these cases.

[2] This brief does not purport to convey the position of New York University School of Law.

Holder, 570 U.S. 529 (2013); *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009); and *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2005).

SUMMARY OF THE ARGUMENT

Section 2 of the Voting Rights Act plays a narrow but critical role in redistricting. Far from inviting the permanent or excessive use of race in redistricting, Section 2 surgically targets a set of carefully defined circumstances in which mapmakers, as in Alabama, ignored clear and reasonable alternatives that give minority voters the ability to engage in the "pull, haul, and trade" at the heart of the democratic process and instead, design racially polarized districts where minority voters are submerged and effectively shut out of the political process. *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994). Conversely, where mapmakers do not choose a discriminatory map over non-discriminatory alternatives, Section 2 offers no recourse.

Proving liability under Section 2 is demanding. Under the framework for analyzing Section 2 claims established by this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), courts must engage in a rigorous, locality-specific, and highly fact-intensive inquiry before imposing liability. The *Gingles* framework not only helps identify districts where a mapmaker's discretionary design choices cause minority voters to be shut out from the democratic processes, but also insulates from judicial intervention districts where minority voters are *not* so excluded. If, for example, voting in a region is not (or over time ceases to be) racially polarized and minority voters

can effectively advocate for their interests by forming coalitions with other groups—as is increasingly the case in much of the country—there will be no liability. Similarly, where there is no history of discrimination or persistent disparities that exacerbate disadvantages faced by minority voters, a Section 2 claim will fail under the framework's totality of the circumstances inquiry.

Importantly, contrary to Appellants' assertions, *Gingles* and its progeny do not unconstitutionally require mapmakers to make race the predominant factor when drawing districts to remedy Section 2 liability. This Court's precedents are clear that mapmakers retain broad flexibility and discretion in how they draw Section 2-compliant maps. Although Section 2 requires mapmakers to factor in the existence and severity of racially polarized voting when designing maps, the law is agnostic about the method that mapmakers employ to prevent or remedy vote dilution. The only prohibition is that a mapmaker may not favor district maps that severely disadvantage minority voters if there are reasonable alternatives that would not have that same discriminatory effect.

In this case, although Alabama could have met its Section 2 obligations by creating a second Black majority district, it was not required to do so. Though racially polarized voting in Alabama is pronounced, the State had a variety of options short of creating a majority-minority district that would have ensured that Black voters stood on equal footing with their white counterparts. Instead, Alabama bypassed those options in favor of districts that render minority voters politically powerless.

The district court properly found liability under Section 2 and ordered Alabama to redraw its congressional map while affording the state legislature broad discretion in shaping that remedy in the first instance. The decision below should be affirmed.

STATUTORY BACKGROUND

Since its passage in 1965, the Voting Rights Act ("VRA") has effectuated Congress' "firm intention" to "banish the blight of racial discrimination in voting" and ensure that the Fifteenth Amendment's guarantee—that the "right . . . to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude," U.S. Const. amend. XV—becomes a reality throughout the United States. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1996); *see also Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2330–31 (2021).

In the first two decades after its passage, the VRA was used sparingly in connection with redistricting. Instead, minority voters relied primarily on the text of the Fifteenth Amendment itself and on the "one person, one vote" principle derived from the Fourteenth Amendment, rather than the statutory rights established by the VRA, to challenge the configuration of legislative and congressional districts that were drawn to dilute their votes and thereby prevent them from effectively participating in the democratic process. *See generally*, *e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Chapman v. Meier*, 420 U.S. 1 (1975); *Connor v. Finch*, 431 U.S. 407 (1977); *cf. City of Mobile v. Bolden*, 446 U.S. 55, 60–61 (1980) (plurality opinion) (noting that the original

text of Section 2 "simply restated the prohibitions already contained in the Fifteenth Amendment").

This Court's approach to these vote dilution cases closely tracked its broader Fourteenth (and Fifteenth) Amendment jurisprudence during this time, focusing on the effect of a particular district map on minority voters. This Court explained that the relevant inquiry was whether "the political processes leading to nomination and election were not equally open to participation by the group in question—that [is, whether] its members had less opportunity than did other residents in the district to participate in the political process and elect legislators of their choice." *White v. Regester*, 412 U.S. 755, 766 (1973) (citing *Whitcomb v. Chavis*, 403 U.S. 124, 149–50 (1971)).

As the Court's jurisprudence interpreting the Reconstruction Amendments evolved, *see*, *e.g.*, *Washington v. Davis*, 426 U.S. 229 (1976), so too did its interpretation of Section 2. In 1980, a plurality of this Court imposed an intent requirement on litigants seeking to challenge any voting scheme that "is racially neutral on its face." *Bolden*, 466 U.S. at 62 (plurality opinion). To succeed, Justice Stewart asserted, a claim under Section 2, like a claim directly under the Constitution, required a showing of purposeful discrimination. *Id.* at 61–63.

Congress responded almost immediately by amending Section 2 to make clear that a statutory violation under the VRA did not require proof of discriminatory intent. *See* Voting Rights Act Amendment of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as 52 U.S.C. § 10301(a)). Recognizing that discriminatory motives were often deeply woven into the design and application of longstanding elec-

toral systems and rules, Congress found that "[t]he intent test places an unacceptably difficult burden on Plaintiffs" and "diverts the judicial inquiry away from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives." S. Rep. No. 97-417, at 16–17 (1982).

To help root out situations where disguised, often invidious, discriminatory motives may be at play, the amended statute made clear that it prohibited any "voting qualification or prerequisite to voting or standard, practice or procedure . . . which *results in* a denial or abridgment of the right . . . to vote on account of race or color." 52 U.S.C. § 10301(a) (emphasis added). But, the 1982 amendments did not establish a pure results-only test. Rather, through the addition of what is now Section 2(b), the amendments incorporated the "results-plus" standard in *White*, which states that a violation of Section 2:

> is established if, based on the totality of the circumstances, it is shown that the political processes leading to the nomination or election in a 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 elect representatives of their choice.

52 U.S.C. § 10301(b). *Compare id. with White*, 412 U.S. at 766. Under this standard, courts must not

only look at disparate impact, but also undertake a searching examination of the political realities on the ground and consider the degree to which a state's discretionary choices about the design of electoral systems take advantage of those conditions to perpetuate racial discrimination. In doing so, Section 2 helps identify systems and practices that, although facially race-neutral, may be rooted, at least in part, in discriminatory desires to politically disadvantage minority voters.

In the context of redistricting, the 1982 amendments expressly gave minority voters the right to challenge legislative maps that have been drawn in a manner that protects the dominance of the majority (white) population and locks minority voters out of meaningful access to political power through the democratic process. *See* S. Rep. No. 97-417, at 33–34, 40 (1982).

This Court first applied the amended Section 2 in *Thornburg v. Gingles*, 478 U.S. 30 (1986), where it held that North Carolina's choice to use at-large, multimember districts, though facially neutral, violated Section 2 because it had the effect of locking Black voters out of power when the reasonable alternative of single-member districts would not. In subsequent cases, courts extended the use of the multipart framework developed in *Gingles* to analyze whether choices about the configuration of single-member legislative districts similarly bypassed reasonable alternatives and deprived minority voters of the opportunity to participate as equals in the political process.

In the decades since the 1982 amendments passed, Section 2 and the *Gingles* framework have helped transform American politics by giving minori-

ty voters the necessary tools to ensure that they have meaningful access to the political process. H.R. Rep. No. 109-478, at 11 (2006) ("Section 2 has been instrumental in paving the way for minority voters to more fully participate in the political process across the country."). In 1990, during the first round of redistricting after the passage of the 1982 amendments, minority representation in the U.S. House of Representatives increased by 60 percent. Michael Li & Laura Royden, *Minority Representation: No Conflict with Fair Maps*, Brennan Center for Justice, at 7 (Sept. 5, 2017), https://www.brennancenter.org/our-work/research-reports/minority-representation-no-conflict-fair-maps. The effect of the amendments was especially profound in Southern states; in five states, redistricting following the 1990 census saw the election of the first minority members to Congress since Reconstruction, finally breaking the dominance of white Democrats. *See id.*; *see also* Michael Barone & Grant Ujifusa, *The Almanac of American Politics 1994* (12th ed., 1993).

The genius of Section 2, however, is not only in where it applies, but also where it does not. As the country's politics become less racialized, the need for Section 2 in redistricting will naturally fade as the rigorous preconditions needed to establish Section 2 liability cease to exist. Though this has already happened in much of the country, in other parts of the country, Section 2 remains an irreplaceable tool for ensuring that mapmakers' discretionary choices do not shut minority voters out of a seat at the table. The *Gingles* framework establishes a nuanced test for rooting out racial discrimination in redistricting in the narrow circumstances where there is constitu-

tionally-offensive line-drawing. It is essential that it remain robust.

ARGUMENT

A. The *Gingles* Framework Gives Effect to Congress' Prohibition in Section 2 Against Actual Discrimination in Redistricting.

When mapmakers sit down to craft legislative districts, they have available to them hundreds or thousands (or more) of plausible alternatives. For the most part, Congress has left the decision about which map to adopt to states and localities. However, Section 2 of the VRA places a narrow, but essential, limitation on a mapmaker's discretion by guarding against the possibility that they will choose a racially discriminatory map over equally feasible, non-discriminatory alternatives.

Although Section 2 constrains a mapmaker's choices, it is, by careful design, a narrow intervention. The Court's *Gingles* framework limits the application of Section 2 to situations in which a jurisdiction's purportedly race-neutral redistricting rules, or a mapmaker's discretionary choices in applying those rules, take advantage of racially polarized voting and a legacy of purposeful discrimination to produce districts that make it impossible for politically cohesive minority voters to participate equally in the electoral process and to elect candidates of their choice. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986); *see also Bartlett v. Strickland*, 556 U.S. 1, 18–19 (2009) (Kennedy, J.). By contrast, where a mapmak-

er's choices are not the cause of minority voters' political ineffectiveness, Section 2 offers no recourse.

Mapmakers can violate Section 2 in one of two ways: (1) by dividing a sizeable and politically-cohesive group of minority voters into districts dominated by a hostile majority that will not engage in coalition building across racial lines; or (2) by concentrating minority voters into a small number of districts in which they form a supermajority, thereby depriving that group of any reasonable opportunity for electoral success in neighboring districts. *See Voinovich v. Quilter*, 507 U.S. 146, 153 (1993). *Compare e.g.*, *Baldus v. Members of Wis. Gov. Accountability Bd.*, 849 F. Supp. 2d 840, 854–57 (E.D. Wis. 2012) (finding liability under Section 2 where Milwaukee's Latino population was divided into two legislative districts, effectively diluting its voting power), *with Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 980, 1052 (D.S.D. 2004) (finding liability under Section 2 where South Dakota's Native American population was packed into a single, majority-minority district).

Both kinds of violations require a showing of racially polarized voting, which exists only when white and minority voters cast ballots along racial lines with such regularity that race plays an outsized, and usually determinative, role in electoral politics. *See* H.R. Rep. No. 109-478, at 34 (2006) ("Racially polarized voting occurs when voting blocs within the minority and white communities cast ballots along racial lines and is the clearest and strongest evidence the Committee has before it of the continued resistance [*sic*] within covered jurisdictions to fully ac-

cept minority citizens and their preferred candidates into the electoral process.").

In communities where racially polarized voting exists, such voting often interacts with a legacy of racial discrimination and significant, ongoing racial disparities to leave minority voters unable to exert pressure on candidates and representatives through ordinary democratic channels. Indeed, racialized politics also frequently disincentivizes non-minority elected officials from responding to minority voters' needs or representing their views because they do not need the support of minority voters and may face political consequences from white voters if they are seen as being too sensitive to minority interests.

On the other hand, in areas where racialized voting does not exist, a sizeable, cohesive bloc of minority voters has the same opportunity to exert political pressure as any other large bloc of voters. Indeed, any large group of cohesive voters in a position to be the deciding difference in an election, whether minority or not, will be an attractive source of votes that a rational candidate or party trying to form a winning coalition ignores at their own peril. Fortunately for American democracy, in most communities around the country, minority voters are able to engage in precisely this kind of cross-racial coalition building to bring their needs and concerns to the fore and to work to elect candidates who will address those needs and concerns. *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994).

But, these democratic processes do not work as they should in every part of the country. In Alabama, continued high levels of racially polarized voting, coupled with design choices that divide deeply-

rooted Black communities, upend the expectation that minority voters will be able to participate effectively in the political process. Even if Black voters make up a sizable share of a district, as they do in multiple congressional districts in Alabama, their votes simply will not translate into meaningful representation because candidates and representatives have a perverse incentive to cut those voters out of the political process entirely. *See N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016) ("Racially polarized voting is not, in and of itself, evidence of [intentional] racial discrimination. But it does provide an incentive for intentional discrimination in the regulation of elections."). Indeed, "[i]t is the political cohesiveness of the minority groups that provides the political payoff for legislators who seek to dilute or limit the minority vote." *Id.* In these circumstances (and only these circumstances), Section 2 requires courts to consider whether mapmakers ignored reasonable alternatives or deliberately drew lines to produce dilutive outcomes.

Though racially polarized voting lies at the heart of the Section 2 inquiry, it is not the end of the assessment. Section 2 also requires a rigorous, locality-specific, and highly fact-intensive examination of the totality of the circumstances to determine whether racially polarized voting is so severe that it results in actual discrimination against minority voters that cannot be remedied without judicial intervention. *See* 52 U.S.C. § 10301(b).

The multi-part test that this Court articulated in *Gingles* provides a robust structure to help courts

systematically evaluate when a district map violates Section 2's mandate. These conditions will be satisfied only in the small class of cases where "racial politics do dominate the electoral process" and where "racial bloc voting and other factors," including a history of discrimination, result in a district map that effectively "den[ies] minority voters equal opportunity to participate meaningfully in elections." *See* S. Rep. No. 97-417, at 33–34 (1982); *see also id.* at 40 (noting that Section 2 is designed to prevent mapmakers from taking advantage of racially polarized voting and disparities in political, social, and economic outcomes that "perpetuate the effects of past purposeful discrimination").

The *Gingles* inquiry does not, as Appellants suggest, promote racial balkanization or mandate the creation of purely race-based districts. *See* Appellants' Br. at § 2. In fact, it does the opposite: Section 2, as interpreted and applied by this Court in *Gingles* and its progeny, provides a critical safeguard to *prevent* a mapmaker from designing or using facially neutral rules to draw districts in a manner that further entrenches racial polarization and prolongs the nation's troubled history of racial politics. And, it does so by requiring courts to engage in a searching, multi-part inquiry that considers both the actual consequences of the district map and the full range of available, reasonable alternatives that would "provide greater electoral opportunity to minority voters." *Holder v. Hall*, 512 U.S. 874, 887 (1994) (O'Connor, J., concurring).

Far from being a permanent mandate to draw districts based on race whenever a minority group is

large enough, Section 2 provides a targeted remedy in a narrow, and comparatively rare, set of circumstances. It is triggered only in those circumstances where line-drawing choices, even if not intentionally discriminatory, interact with current circumstances on the ground to make healthy, normal politics impossible and where the record shows that ready alternatives would not have that effect. Under Section 2, the central inquiry is whether a state's deliberate mapping choices take advantage of racial polarization to make it impossible for minority voters to engage in the normal "pull, haul, and trade" of politics. *De Grandy*, 512 U.S. at 1020. Only if mapmakers ignored reasonable alternatives to configure districts in a way that disadvantages minority voters and impedes a healthy and robust democratic process will there be liability. And, if circumstances change over time, so will Section 2's application.

The *Gingles* framework therefore tackles the deliberate choices, whether invidious or not, that perpetuate the legacy of the discrimination that Congress sought to eradicate when enacting Section 2, while preserving the mapmaker's considerable flexibility in determining how to draw Section 2-compliant districts.

1. The *Gingles* Factors Provide Structure to Section 2's "Totality of the Circumstances" Test.

By its terms, Section 2 requires courts to engage in a highly fact-intensive "totality of the circumstances" analysis to determine whether a district map improperly dilutes the votes of minority voters.

Though the Senate Report accompanying the 1982 amendments set forth some of the factors that may be relevant to a claim of vote dilution, both the statutory text itself and this Court's earlier precedents provided little guidance to lower courts as to how to apply Section 2 to evaluate vote-dilution claims. *See Gingles*, at 478 U.S. at 43–46; *see also generally*, *White*, 412 U.S. at 765–70.

In *Gingles*, the Court interpreted the amended Section 2 for the first time and provided structure to guide lower courts' application of its "totality of the circumstances" test in redistricting cases.[3] There, this Court identified three preconditions that were necessary, but not in and of themselves sufficient, to show that a district map improperly diluted a minority group's voting power in violation of Section 2.

First, plaintiffs challenging a district map must show that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. To meet this standard, it must be possible to create an electoral district where the "minority population in the potential election district is greater than 50 percent." *Bartlett*, 556 U.S. at 19–20 (Kennedy, J.); *see also De Grandy*, 512 U.S. at 1008 (noting that the first *Gingles* condition is satisfied if plaintiffs can show that it is possible to create "more than the ex-

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[3] *Gingles*' articulation of a multi-factor test comports with this Court's approach in other circumstances in which the relevant standard requires case-specific considerations of a totality of the circumstances. *See*, *e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 452–54 (2011) (describing the various factors this Court considers to determine whether speech is public or private); *Harris v. Forklift System*, *Inc.*, 510 U.S. 17, 23 (1993) (same in the Title VII context).

isting number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice"). *Second*, the minority group must be "politically cohesive" and generally share common beliefs, ideals, and principles such that the group votes as a bloc. *Gingles*, 478 U.S. at 51; *see also Growe v. Emison*, 507 U.S. 25, 40–41 (1993). *Third*, plaintiffs must show that the white majority similarly votes "sufficiently as a bloc to enable it—in the absence of special circumstances . . .—usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51. *Finally*, even if these three preconditions are satisfied, the plaintiffs must still demonstrate, based on a totality of the circumstances, that minority voters do not have an equal opportunity to participate in the political process.

Where any one of the three *Gingles* conditions is not met—or if these conditions change over time as communities become less racially polarized or as broader social, economic, and political racial disparities ease—liability will not exist. *See Voinovich*, 507 U.S. at 158 (rejecting a Section 2 claim in the absence of evidence that the white majority voted as a bloc); *Wright v. Sumter Cnty. Bd. of Elections and Regristration*, 979 F.3d 1282, 1308 (11th Cir. 2020) ("We do not suggest . . . that Section 2 allows a protected group to bring a vote dilution claim in perpetuity and irrespective of its numerical advantage.").

Indeed, the *Gingles* factors are calibrated to identify circumstances in which "racial politics [so] dominate the electoral process" that an otherwise race-neutral district map, when combined with the effects of polarized voting and other factors, could effectively deprive minority voters of access to political power through the ordinary push and pull of the

democratic process. *See* S. Rep. No. 97-417, at 33 (1982). If Section 2 plaintiffs carry their burden and satisfy these three factors, *Gingles* directs lower courts to then conduct a searching, totality-of-the-circumstances inquiry to determine if the challenged map, in fact, dilutes a minority group's vote and violates Section 2. *De Grandy*, 512 U.S. at 1011–12; *see also Wis. Legisl. v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1250 (2022) ("[N]o single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength."); *Uno v. City of Holyoke*, 72 F.3d 973, 983–84 (1st Cir. 1995) ("[P]laintiffs . . . must prove that . . . racial politics . . . significantly diminished opportunities for minority participation in elective government.").

2. States Have Broad Flexibility in How They Draw Section 2-Compliant Maps.

Appellants misunderstand what Section 2 requires as a remedy. The *Gingles* framework does not automatically require mapmakers to draw majority-minority districts; nor does it compel a mapmaker to draw districts that prioritize race to the exclusion of other considerations.

Rather, as this Court has repeatedly held, there is no arbitrary number when it comes to determining whether a group of politically cohesive minority voters has the ability to elect its preferred candidates. *See*, *e.g.*, *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 275–76 (2015) (noting that the VRA does not require an electoral district to maintain a "particular numerical minority percentage," as long as "minority voters retain the ability to elect their pre-

ferred candidate"); *Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017) (same); *see also*, *e.g.*, *Hall v. Virginia*, 385 F.3d 421, 431 (4th Cir. 2004) (finding no liability where Black voters could reasonably join with other voters to elect a candidate of their choice). Likewise, this Court has repeatedly emphasized that Section 2 does not insulate minority voters from "the obligation to pull, haul, and trade to find common political ground" and build coalitions to elect the candidates of their choice. *De Grandy*, 512 U.S. at 1020.

While mapmakers must consider the existence and severity of racially polarized voting when creating maps and avoid drawing districts that result in a wholesale sidelining of minority voters, they have flexibility to find a solution that addresses vote dilution while also maximizing the state's other legitimate policy objectives.[4] *See Clark v. Calhoun Cnty.*, 88 F.3d 1393, 1408 (5th Cir. 1996) ("Redistricting to remedy found violations of § 2 of the Voting Rights Act by definition employs race. . . . The limit is that the remedy must use race at the expense of tradi-

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[4] The requirement that a mapmaker consider race at the remedial phase is entirely consistent with this Court's equal protection jurisprudence. *See*, *e.g.*, *N.C. State Bd. of Ed. v. Swann*, 402 U.S. 43, 45–46 (1971) (permitting consideration of race when drawing school district boundaries and assigning students to particular schools in light of persistent segregation in public education and a history of discrimination); *United States v. Paradise*, 480 U.S. 149, 166–67 (1987) ("It is well established that government bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimidiscrimination."); *cf. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No.* 1, 551 U.S. 701, 702–03 (2007) (holding that a race-conscious remedy was improper where there was no indication of constitutionally-offensive discrimination).

tional political concerns no more than is reasonably necessary to remedy the found wrong." (citing, *inter alia*, *Bush v. Vera*, 517 U.S. 952, 993–94 (1996) (O'Connor, J., concurring))).

For example, mapmakers could choose to eliminate vote dilution by drawing an influence or coalition district, rather than a majority-minority district, in order to keep a city or town together or avoid having a district cross a mountain range. Likewise, if mapmakers wished, they could adopt a number of other race-neutral solutions, including cumulative voting and limited voting, to ensure that minority voters have an equal opportunity to elect candidates of their choice. *See*, *e.g.*, *United States v. Village of Port Chester*, 704 F. Supp. 2d 411, 477, 449–53 (S.D.N.Y. 2010) (finding that a system of cumulative voting, where each voter would be allocated "the same number of votes as there are seats up for election and would be free to allocate them however he or she chooses," was an appropriate remedy under Section 2); *United States v. Euclid Cnty. Sch. Bd.*, 632 F. Supp. 2d 740, 755–57, 770–71 (N.D. Ohio 2009) (finding that a system of limited voting, where "each voter would be able to vote for a single candidate in [a given] election[], even though multiple seats would be vacant" was an appropriate remedy under Section 2). The only constraint Section 2 imposes is to prevent mapmakers from choosing a district configuration that deprives a minority group of the opportunity to elect candidates or build coalitions when there are feasible alternatives that would not have this discriminatory effect.

In arguing that Section 2 is at tension with the Constitution's requirement that race not predominate in the drawing of districts, Appellants conflate

demonstration plans introduced to satisfy the first *Gingles* factor with the ultimate remedy. While it is true that this Court's precedents require plaintiffs to submit a demonstration plan with a majority-minority district in order to establish liability, this Court's precedents also make clear that such a plan in no way limits the state's available remedies. Because "reapportionment is primarily the duty and responsibility of the State," states and localities are ordinarily permitted to redraw district maps to address a Section 2 violation in the first instance.[5] *Chapman*, 420 U.S. at 27 (noting that a court will not step in unless the state legislature fails to enact a constitutionally-acceptable plan); *see also, e.g.*, *Bone Shirt*, 336 F. Supp. 2d at 1052–53 (giving the state government the first opportunity to propose a remedy for a Section 2 violation); *Pope v. Cnty. of Albany*, 94 F. Supp. 3d 302, 351 (N.D.N.Y. 2015) (same). As the party responsible for redrawing the

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[5] Federal courts will only step in to compel adoption of a specific redistricting plan if the legislature has consciously failed to correct the Section 2 violation or if "the imminence of a state election makes it impractical for them to do so." *Wise v. Lipscomb*, 437 U.S. 535, 539–40 (1978). Even then, a judicially-mandated redistricting plan remains in place only until the mapmaker takes legislative action to draw a Section 2-compliant map. *Id.*; *see also Bone Shirt v. Hazeltine*, 387 F. Supp. 2d 1035, 1038 (D.S.D. 2005), *aff'd* 461 F.3d 1011 (8th Cir. 2006) (adopting Plaintiffs' proposed plan only after the legislature declined to submit a new district plan). *Wright v. Sumter County Bd. of Elec. And Reg.*, No. 1:14-cv-42-WLS, 2020 WL 499615, at *3 (M.D. Ga. Jan. 29, 2020), *aff'd* 979 F.3d 1282 (11th Cir. 2020) (ordering the adoption of a specific redistricting plan where the "Court has twice sought the legislatures' involvement" and the parties agreed that "this Court should not defer to the legislature.").

map in the first instance, Alabama has broad flexibility to remedy vote dilution in any number of ways without drawing a Black-majority district.

In sum, far from requiring a mapmaker to draw districts to meet a numeric target, Section 2 only bars a mapmaker from ignoring feasible nondiscriminatory alternatives so as to draw district lines in a way that submerges a minority group into a hostile majority—and even then, only in circumstances in which racial polarization is so severe that the minority group is incapable of forming a coalition with voters from other racial or ethnic groups and, therefore, is effectively shut out of the political process. *De Grandy*, 512 U.S. at 1020; *see also Gingles*, 478 U.S. at 48, 51 (noting that Section 2 is only violated where an electoral map operates to "minimize or cancel out [a minority group's] ability to elect their preferred candidate" and distinguishing between "the usual predictability of a majority's success" and the "mere loss of an occasional election").

B. The *Gingles* Framework Ensures that Race Is Used Appropriately in Redistricting.

The *Gingles* framework performs the dual function of identifying constitutionally-offensive line-drawing while, at the same time, carefully guarding against the improper use of race in redistricting.[6]

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[6] To the extent the Court perceives any tension between the demands of Section 2 and the requirements of the Constitution (although there is none), this Court could refine this framework, as it has done in the past, to narrow the conditions that give rise to a claim. *See*, *e.g.*, *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 432 (2006) (expanding the com-

1. *First*, the requirement that the minority group be "sufficiently large and geographically compact to constitute a majority in a single-member district" ensures that courts will not order district maps to be redrawn unless a non-dilutive alternative can be created without running afoul of race-neutral redistricting principles. *Gingles*, 478 U.S. at 50; *see also Rodriguez v. Harris Cnty.*, 964 F. Supp. 2d 686, 725 (S.D. Tex. 2013); *cf. Shaw v. Reno*, 509 U.S. 630, 641–42 (1993). "Because the very concept of vote dilution implies . . . the existence of an undiluted practice" or district map, a Section 2 plaintiff has to show that it is possible to draw a district map where

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pactness requirement for Section 2 compliance); *Johnson v. De Grandy*, 512 U.S. 997, 1014 (1994) (finding that the number of political effective districts in an area is relevant to a dilution claim). But, this Court should reject Appellants' invitation to prioritize state redistricting rules over the requirements of federal law. While this Court has held that a Section 2 remedy must be drawn with consideration of a state's neutral districting rules, it has never held, as the Appellants would have it hold, that those rules have absolute priority over federal law. Indeed, it would be inappropriate to do so both because state law by definition cannot override congressionally-enacted legislation and because many supposedly neutral mapping rules may themselves be rooted in past discriminatory practices. In many places in the South, for example, cities and school districts, which states, when drawing districts, frequently choose to keep whole, are anything but neutral in their shapes and instead reflect past racial discrimination. *See*, *e.g.*, Kevin M. Kruse, *White Flight: Atlanta and the Making of Modern Conservatism* 37–38 (2005) (discussing Atlanta's annexation of surrounding suburbs to increase the white share of its population). While a Section 2 remedy must respect a state's districting criteria, it is not wholly bound by them when excessively rigid adherence would frustrate Congress' intent in enacting Section 2 to eradicate the legacy of racial discrimination.

the relevant minority group could form a majority of the voting population in a single-member district. *Rodriguez*, 964 F. Supp. 2d at 725; *see also Bartlett*, 556 U.S. at 18–19 (Kennedy, J.); *Pope v. Cnty. of Albany*, 687 F.3d 565, 576 (2d Cir. 2012) (stating that, to satisfy the first *Gingles* factor, a plaintiff has to "prove that a solution is possible" (quoting *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (8th Cir. 2006))).

In other words, to satisfy the first *Gingles* factor, a Section 2 plaintiff must show that the mapmaker had a reasonable alternative that is broadly consistent with race-neutral redistricting principles.[7] *See*, *e.g.*, *Gonzalez v. Harris Cnty.*, 601 F. App'x 255, 258 (5th Cir. 2015) (denying liability where plaintiffs failed to show that a compact district could be drawn with consideration of traditional redistricting principles); *Rodriguez*, 964 F. Supp. 2d at 725 (citing *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997)). To carry their burden on this factor, Section 2 plaintiffs may "postulate," and a fact-finder may consider, various alternative district maps that were drawn with race in mind that can serve "as the benchmark undiluted practice." *Rodriguez*, 964 F. Supp. 2d at 725.

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[7] Indeed, the bright-line requirement this Court imposed in *Bartlett v. Strickland*, 556 U.S. 1 (2009), that requires plaintiffs to demonstrate that it is possible to draw alternative districts where minority voters can form a majority is best viewed as a maximalist assurance of redressability. That is, Plaintiffs must show that a remedy is available that would allow minority voters to participate in the political process and elect candidates of choice, even if localized politics are polarized to an extreme degree.

Contrary to Appellants' assertions, the fact that a plaintiff must show that a "solution is possible" does not mean the plaintiff must, at this stage in the inquiry, "present the final solution to the problem." *Pope*, 687 F.3d at 576 (quoting *Bone Shirt*, 461 F.3d at 1019). A fact-finder's consideration of these alternative maps at the liability phase does not mean that the mapmaker will be required to adopt one of these proposals; nor does it signal that the court, in crafting a remedy once liability has been established, improperly prioritized race. *See*, *e.g.*, *Bone Shirt*, 336 F. Supp. 3d at 987–95, 1053 (considering proposed alternative maps in connection with the first *Gingles* factor, but leaving the remedy to the state legislature in the first instance); *Pope*, 94 F. Supp. 3d at 332, 351 (relying in part on *Pope v. Cnty. of Albany*, No. 1:11-cv-0736-LEK-CFH, 2014 WL 316703, at *12 (N.D.N.Y. Jan. 28, 2014) (granting in part and denying in part plaintiffs' motion for summary judgment)) (same).

2. *Second*, the requirement that the minority group be "politically cohesive" limits Section 2 liability to circumstances in which the minority group in fact acts as a political community that ordinarily would be able to form coalitions and exercise political power through the democratic process. *Gingles*, 478 U.S. at 51, 56; *see also De Grandy*, 512 U.S. at 1020. This requirement ensures that district maps will not be upended—and that minority voters are not placed into a district—because of a shallow or reflexive assumption that voters from the same racial or ethnic group think or vote alike. *Growe*, 507 U.S. at 41–42 ("Section 2 does not assume the existence of racial bloc voting; plaintiffs must prove it." (quoting *Gingles*, 478 U.S. at 46)); *Rodriguez*, 964 F. Supp. 2d at

756 ("[The second factor] contemplates that a specified group of voters shares common beliefs, ideals, principles, agendas, concerns, and the like such that it generally unites behind . . . particular candidates and issues."). If members of a minority group are sufficiently diverse that they generally do not share a single preferred candidate, agenda, or set of concerns, it cannot be said that the challenged district map "thwarts distinctive minority interests" and prevents them from electing representatives of their choice. *Gingles*, 478 U.S. at 51; *see also Luna v. Cnty. of Kern*, 291 F. Supp. 3d 1088, 1117–18 (E.D. Cal. 2018) ("If the minority group does not have a preferred candidate, it cannot be said that the jurisdiction's electoral scheme thwarts the minority group's interest."). Conversely, where a minority group is relatively politically homogenous—and generally unites behind a single candidate or set of issues—the *Gingles* inquiry ensures that the minority group is not effectively barred from participation in the democratic process because of the way district lines are drawn.

3. *Third*, the requirement that the "white majority [also] vote[] sufficiently as a bloc" further limits Section 2 liability to those circumstances in which a minority's "submergence in a white [majority] district impedes its ability to elect its chosen representative." *Gingles*, 478 U.S. at 51; *see also Cousin v. Sundquist*, 145 F.3d 818, 825–26 (6th Cir. 1998) (finding that the third factor is not met where the minority group's favored candidate was also the winning candidate). Crucially, this factor requires a fact-finder to distinguish between "the mere loss of an occasional election" and circumstances in which racial polarization is so severe that the white majori-

ty's electoral success is nearly inevitable. *Gingles*, 478 U.S. at 51. If the minority group in question is able to build a coalition with voters from other racial or ethnic groups in order to elect its candidate of choice, even if it does not constitute a majority of a given district, this third condition is not satisfied. *See Abrams v. Johnson*, 521 U.S. 74, 92–95 (1997) (finding no Section 2 liability where there was a significant degree of cross-over voting and so, no need for a majority-minority district); *Rodriguez*, 964 F. Supp. 2d at 757 (noting that the correct test is whether, "as a practical matter," bloc voting effectively minimizes or cancels "minority voters' ability to elect representatives of their choice"). Like the cohesion inquiry, the polarization inquiry focuses the fact-finder's attention on those narrow circumstances in which "racial politics do dominate the electoral process," S. Rep. No. 97-417, at 33 (1982), and minority voters cannot form successful coalitions in order to elect representatives of their choice.

Courts around the country have consistently applied the second and third *Gingles* factors with rigor, focusing on the specific circumstances of a given district and actual voting patterns of various racial and ethnic groups over time. In doing so, courts have relied on a variety of statistical methodologies to ensure that a mapmaker is required to create a majority-minority district only where there is no feasible alternative.[8] *See generally*, *e.g.*, *Cousin*, 145 F.3d at

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[8] The Court should resist relying on simulated, algorithmic mapping in order to establish a race-blind benchmark for undiluted redistricting outcomes within a given state because these methods are unlikely to be responsive to the Section 2 inquiry. *See generally*, *e.g.*, Moon Duchin & Douglas M. Spencer, *Re-*

818 (reversing in part because of the district court's failure to meaningfully engage with the statistical evidence on the record); *Luna*, 291 F. Supp. 3d 1088 (discussing the various statistical methodologies presented on the record in finding the third condition satisfied); *United States v. City of Euclid*, 580 F. Supp. 2d 584 (N.D. Ohio 2008) (same).

4. *Finally*, as *Gingles* itself makes clear, even if all three preconditions are satisfied, the fact-finder must still engage in a qualitative, "totality of the circumstances" inquiry—as required by the statutory text—to determine whether the localized political environment actually results in disparate outcomes for minority voters. *Gingles*, 478 U.S. at 79; *see also*, *e.g.*, *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1390 (8th Cir. 1995) (noting that, even after

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sponse, *Models, Race, and the Law*, 130 Yale L.J.F. 744 (2021). In their brief, Appellants repeatedly assert that the 2 million race-blind congressional plans created by the Milligan Plaintiffs' expert failed to produce a map with two majority-Black districts. Appellants' Br. at 23. But, this argument misses the point. As discussed above, Section 2 does not mandate the creation of majority-minority districts. Rather, the focus of the Section 2 inquiry is equality of opportunity, and the more salient question when determining liability would be how many of these 2 million simulated plans actually allocate Black voters into districts in which they have the opportunity to form coalitions, participate in the political process, and elect candidates of choice. The problem, of course, is that modeling such opportunity based on a comprehensive analysis of recent election data is far more challenging than modeling the incidence of majority-minority districts. Appellants further muddy the waters by conflating a plaintiff's burden to proffer a demonstrative plan with the ultimate remedy. *See id.* at § 1.B. In effect, Appellants rely on a metric that is ill-suited as a benchmark and compound the issue by using that inapposite metric to assess evidence that is intended to show redressability.

the *Gingles* factors have been satisfied, plaintiffs "must still show that the challenged electoral scheme provides minority voters with less opportunity than other members of the electorate . . ." based on a totality of the circumstances); *Pope*, 94 F. Supp. 3d at 341 (considering the totality of the circumstances after determining that the *Gingles* factors have been satisfied).

In doing so, *Gingles* and its progeny give courts around the country an effective framework to evaluate claims for vote dilution and to identify those circumstances in which the challenged district map actually discriminates against minority voters in a way that runs afoul of Section 2, and of the VRA's broader purpose of "banish[ing] the blight of racial discrimination in voting." *Katzenbach*, 383 U.S. at 308. At the same time, the *Gingles* framework carefully guards against any temptation to draw race-based districts simply for the sake of creating race-based districts.

CONCLUSION

For the reasons set forth above, the judgment of the court below should be affirmed.

Respectfully submitted,

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