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 VOTING RIGHTS PRACTITIONERS AS AMICI CURIAE IN SUPPORT OF APPELLEES AND RESPONDENTS

EDWARD WILLIAMS
AYANA D. WILLIAMS
SONIKA R. DATA
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

DEBO P. ADEGBILE
Counsel of Record
SAMUEL E. WEITZMAN
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich St.
New York, NY 10007
(212) 295-6717
debo.adegbile@wilmerhale.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

STATUTORY PROVISIONS

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

INTEREST OF AMICI CURIAE

Amici—Neil Bradley, Arkie Byrd, J. Gerald Hebert, Larry T. Menefee, and William P. Quigley—are longstanding practitioners of election law, both inside and outside of government.[1] Each has decades of experience litigating voting rights cases, including, as relevant here, under Section 2 of the Voting Rights Act of 1965. By virtue of their substantial Voting Rights Act litigation experience, all have extensive familiarity with the applicable constitutional and statutory provisions. Additionally, all can speak firsthand to the workability and efficacy of existing Section 2 doctrine in both the trial and appellate courts.

SUMMARY OF ARGUMENT

During the oral argument and in the opinion that followed in *Shelby County* v. *Holder*, 570 U.S. 529 (2013), this Court made clear that Section 2 of the Voting Rights Act of 1965 would remain available and effective as a means of guaranteeing a meaningful right to vote. Alabama now asks this Court to break with that commitment.

During oral arguments in *Shelby County*, Justice Kennedy asked the advocates whether litigation under Section 2 of the Voting Rights Act of 1965 was a sufficiently "effective remedy" to combat racial voter suppression and dilution, such that preclearance under

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[1] The parties have consented to the filing of this brief in letters on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no entity or person, other than *amici curiae* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* submit this brief solely in their capacities as private citizens.

Section 5 was no longer "utterly necessary." Oral Arg. Tr. 25, 37, No. 12-96 (U.S. Feb. 27, 2013). In posing this question, he noted that Section 2 plaintiffs could obtain preliminary injunctions and thus prevent illegal maps and procedures from remaining in place while cases wound through the courts. *See id.* at 37. The implication was that there was not "much difference" between the two provisions in terms of efficacy, and that Section 2's availability rendered Section 5 unnecessary.[2] *Id.* When this Court invalidated Section 4(b)'s coverage formula, it made the same suggestion, assuring the Nation that there was no reason to worry so long as Section 2 remained on the books: "Both the Federal Government and individuals have sued to enforce § 2, and injunctive relief is available in appropriate cases to block voting laws from going into effect. Section 2 is permanent, applies nationwide, and is not at issue in

[2] Subsequent events have confirmed precisely how essential Section 5 was in deterring and defeating attempts to worsen the position of minority voters. *See, e.g.*, U.S. Comm'n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States* 60-82 (2018) ("USCCR Rep't"), https://www.usccr.gov/files/pubs/2018/Minority_Voting_Access_2018.pdf; Leadership Conf. Educ. Fund, *Democracy Diverted: Polling Place Closures and the Right to Vote* 10 (2019), http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf; Sample, *The Decade of Democracy's Demise*, 69 Am. Univ. L. Rev. 1559, 1599-1601 (2020). But as the law stands, Section 2 is an imperfect—but vital—tool in detecting and combatting the enduring problem of racial voter suppression and dilution. It is now the best federal law method of protecting the effective exercise of the franchise post-*Shelby County*.

this case." *Shelby County*, 570 U.S. at 537 (internal citations omitted).[3]

Now, however, Appellants-Petitioners and their *amici* paint Section 2 as unworkable, unfair, and unconstitutional. These assertions are both unfounded and unmoored from the text, history, purpose, and real-world application of the Voting Rights Act. Section 2—as interpreted by *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), and its progeny—is workable, balanced, and consistent with the U.S. Constitution. Significantly, plaintiffs who have willingly assumed the arduous burdens of Section 2 litigation have achieved meaningful successes in jurisdictions nationwide. Post-*Shelby County*, Section 2 is the Nation's best hope for fostering equal political opportunity.

ARGUMENT

I. SECTION 2 IMPLEMENTS THE RECONSTRUCTION AMENDMENTS

The Voting Rights Act's historical background is one "that all Americans should remember," and bears noting. *Brnovich* v. *Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2341 (2021). Standing alone, the Reconstruction Amendments did not transform this Nation from a whites-only regime to a genuine multiracial democracy.

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[3] Petitioners in *Shelby County* likewise defended Section 2 as "an adequate remedy in covered jurisdictions," as "an effective—and in some ways superior—remedy" for vote dilution, and as "provid[ing] *greater* protection against vote dilution than Section 5." Pet'rs' Reply Br. 21-22, *Shelby County* v. *Holder*, No. 12-96 (U.S. Feb. 19, 2013), http://blackfreedom.proquest.com/wp-content/uploads/2020/09/shelby17.pdf. All other citations to briefs herein refer to filings in the consolidated cases at bar.

See South Carolina v. *Katzenbach*, 383 U.S. 301, 308-315 (1966). It took the Voting Rights Act to bring America closer to the promise of political equality. The VRA's framers "were well aware" of the Fifteenth Amendment's "failure to effectively protect black voting rights almost from the time it was ratified in 1870," and they "were determined that the Second Reconstruction should not fall victim once more to the same reactionary impulse that had emasculated the First Reconstruction." Davidson & Grofman, *The Voting Rights Act and the Second Reconstruction*, in *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965–1990*, at 378, 379 (1994) ("Davidson & Grofman").

Through the Act's various provisions, Congress sought "to rid the country of racial discrimination in voting." *South Carolina*, 383 U.S. at 315. As this Court has acknowledged, "racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions; and § 2 must be interpreted to ensure that continued progress." *Bartlett* v. *Strickland*, 556 U.S. 1, 25 (2009) (opinion of Kennedy, J., joined by Roberts, C.J. and Alito, J.). Section 2, as amended,[4] "forbids any 'standard, practice, or procedure' that 'results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.'" *Shelby County*, 570 U.S. at 537

[4] "When Congress revised Section 2 in 1982, it eliminated the discriminatory intent requirement and permitted a finding of liability based on discriminatory effect. In so doing, Congress relied on its Reconstruction Amendment enforcement authority to enact prophylactic legislation." Crum, *Deregulated Redistricting*, 107 Cornell L. Rev. 359, 381 (2022).

(quoting 52 U.S.C. § 10301(a)). Section 2 is violated "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [racial minority group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

This Court has long recognized that Section 2 forbids not only instruments of outright vote denial, but also methods of districting-based vote dilution. *See, e.g.*, *Wisconsin Legis.* v. *Wisconsin Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (per curiam) (citing *Thornburg* v. *Gingles*, 478 U.S. 30, 46-51 (1986). Specifically, the phrase "standard, practice, or procedure" is a term of art used in both Section 2 and Section 5. *See* 52 U.S.C. §§ 10301(a), 10303(f)(2). This Court has repeatedly held that "standard, practice, or procedure," as used in both Sections, encompasses vote dilution claims, and Congress has ratified that understanding on multiple occasions. *See Holder* v. *Hall*, 512 U.S. 874, 885-886 (1994) (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 957-966 (separate opinion of Stevens, J., joined by Blackmun, Souter, and Ginsburg, JJ.). "Congress is treated as having adopted that interpretation, and this Court is bound thereby." *United States* v. *Board of Comm'rs of Sheffield*, 435 U.S. 110, 134 (1978).

Congress endorsed this construction of Section 2's scope yet again in 2006. It not only left Section 2's language unchanged, but also approvingly cited "the section 2 litigation filed to prevent dilutive techniques from adversely affecting minority voters" as evidence that Section 5 preclearance was still necessary. *See*

Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(8), 120 Stat. 577, 578.[5] Here, too, Congress declared—in a manner comporting with bicameralism and presentment—its definitive understanding: namely, that Section 2's text properly extends to vote dilution.

This interpretation also reflects the understanding—enunciated by this Court just a year before the Act's initial passage—that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964). As such, Section 2 implements the Fifteenth Amendment, by providing a mechanism for achieving equality of political opportunity.

II. SECTION 2 IS THE KEY REMAINING REMEDIAL PROVISION OF THE VOTING RIGHTS ACT

If Alabama is successful in this case, minority litigants will have no meaningful opportunity to challenge demonstrably discriminatory practices that abridge their right to vote or dilute the power of their votes. Gutting Section 2 would frustrate Congress's clearly stated purpose for enacting the Voting Rights Act in 1965 and reauthorizing it in 1970, 1975, 1982, 1992, and 2006. The most recent reauthorization in 2006 took place after 21 hearings and included over 15,000 pages

[5] This Court often relies upon enacted Congressional findings of fact when interpreting the scope of remedial statutes. *See, e.g.*, *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2383 (2020); *Mims* v. *Arrow Fin. Servs., LLC*, 565 U.S. 368, 372 (2012).

of record evidence describing continued discrimination in voting. *See* USCCR Rep't 37-41, *supra* note 2. It was clear to Congress in 2006 that "without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens [would] be deprived of the opportunity to exercise their right to vote, or [would] have their votes diluted, undermining the significant gains made by minorities in the last 40 years." *Shelby County*, 570 U.S. at 566 (Ginsburg, J., dissenting, joined by Breyer, Sotomayor, and Kagan, JJ.) (quotation marks omitted). Prior to this Court's decision in *Shelby County*, Sections 2 and 5 of the Voting Rights Act worked in tandem to provide mechanisms for challenging enacted discriminatory election practices nationwide and, in jurisdictions with a history of discrimination, for preventing certain discriminatory measures before enactment, respectively.

In *Shelby County*, this Court invalidated Section 5 with the understanding that the continued availability of Section 2 would prevent continued voter discrimination. This dynamic is reflected in both the oral argument and the opinion. Counsel for Shelby County assured the Court that Section 2 was an "effective remedy" against discriminatory practices such that the preclearance provisions were no longer necessary. *Shelby County* Oral Arg. Tr. 26. Though General Verrilli responded that "Section 2 cannot do the work of Section 5," *id.* at 36, this Court ultimately held that Section 2 would be just as effective on its own: "Both the Federal Government and individuals have sued to enforce § 2, and injunctive relief is available in appropriate cases to block voting laws from going into effect," *Shelby County*, 570 U.S. at 537 (internal citations omitted). The Court went further to say: "Section 2 is *permanent*, applies nationwide, and is not at issue in this case." *Id.*

(emphasis added). Section 2 is now at issue and Alabama seeks to cripple it. There is no warrant to erode the minority protection principle embodied in Section 2, and doing so could only be read as a retreat from a Constitutionally-compliant and Constitution-enhancing federal law.

Without the protections of Section 2, racial and language minority citizens are at risk for vote dilution or deprivation of the right altogether. As recently as 2018, the U.S. Civil Rights Commission catalogued discriminatory practices that affected the right to vote and concluded that there were "indicia of ongoing discrimination in voting in the formerly covered jurisdictions and in other states." USCCR Rep't 60. This is not ancient history. In 2016, Latino voters in Kern County, California challenged a redistricting plan that was found to be "not equally open to participation by Latino voters." *Luna* v. *County of Kern*, 291 F. Supp. 3d 1088, 1144 (E.D. Cal. 2018). The district lines were found to dilute the political power of Latino voters and struck down by a federal court, but only after remaining in effect for years while the litigation proceeded. *See id.*; USCCR Rep't 229. Likewise, in 2021, voters in Georgia challenged the post-2020 Census State legislature maps. Although the district court ultimately denied relief on *Purcell* grounds in the wake of this Court's order denying preliminary relief in the consolidated cases at bar, it did so only after finding that the plaintiffs had shown a substantial likelihood of success on the merits of their Section 2 claim. *See Alpha Phi Alpha Fraternity Inc.* v. *Raffensperger*, — F. Supp. 3d —, 2022 WL 633312, at *70 (N.D. Ga. Feb. 28, 2022). These examples, others catalogued by the Commission, and the various maps successfully challenged in the district courts following the 2020 redistricting cycle—only

to be stayed pending resolution of this case—show the continued necessity of Section 2.[6]

Undoubtedly, Section 2 litigation has practical disadvantages compared to Section 5 preclearance. Section 2 litigation is labor-intensive, almost prohibitively expensive, and only provides an after-the-fact remedy. *See, e.g.*, *Shelby County* Oral Arg. Tr. 38 ("[Section 2] suits are extremely expensive and they typically result in after-the-fact litigation."); USCCR Rep't 96 (describing litigation experts who "testified that [Section 2] litigation is exceedingly time-consuming and expensive"); Campaign Legal Ctr. Blog, *More Observations on Shelby County, Alabama, and the Supreme Court* (Mar. 1, 2013), http://www.campaignlegalcenter.org/news/blog/more-observations-shelby-county-alabama-and-supreme-court (noting that, out of the "the hundreds of Section 2 cases that have been filed over the years," the number of preliminary injunctions granted is "quite small, likely putting the percentage at less than 5%, and possibly quite lower"); Faulk, *Big Costs, Heavy Hitters in ACLU Suit Against Yakima*, Yakima Herald-Republic (Aug. 10, 2014), https://www.yakimaherald.com/big-costs-heavy-hitters-in-aclu-suit-against-yakima/article_3cbcce20-ee9d-11e4-bfba-f3e05bd949ca.html (explaining that, over the course of a Section 2 case, the City of Yakima produced over 340,000 pages of documents and more than 50 people were deposed). Indeed, Congress recognized those inefficiencies in 2006 and "found Section 2 litigation to be more difficult, expensive, and

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[6] *See, e.g.*, *Robinson* v. *Ardoin*, — F. Supp. 3d —, 2022 WL 2012389 (M.D. La. 2022), *stay denied*, 37 F.4th 208 (5th Cir. 2022), *stayed pending appeal*, — S. Ct. —, No. 21-1596, 2022 WL 2312680 (U.S. June 28, 2022) (Mem.).

time-consuming than Section 5 procedures." USCCR Rep't 225.

Despite these challenges, Section 2 has unquestionably facilitated more equal access to the ballot across the country. Its continued availability is key to—and the last remaining hope for—fulfillment of the Fifteenth Amendment's promise. Section 2 must remain meaningfully available to determined litigants who seek to enjoin a particularly offensive practice that dilutes their right to vote. With this litigation, some of Alabama's *amici* seek to invalidate Section 2 altogether.[7] Alabama now contends that the standard established by this Court in *Gingles* and applied by courts around the country for forty years is somehow not sufficiently administrable. *Milligan* Cert. Reply Br. 15 n.6. This is contradicted by the evidence, by this Court's precedents, and by the long experience of Article III judges and litigants.

III. *GINGLES* IS WORKABLE

Federal courts have consistently interpreted and applied Section 2 in post-1982 challenges of at-large and single-member election systems. Plaintiffs do not succeed inevitably in Section 2 litigation, and rightly so.[8] But while the *outcomes* of these cases have not skewed uniformly in one direction or another, the *method* of de-

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[7] *See, e.g.*, America First Legal Found. Amicus Br. 5-23.

[8] Contrary to some *amici*'s assertions, "legislative policy determinations" have been regularly "sustained" by courts in Section 2 cases. *Contra* American Legis. Exch. Council Amicus Br. 9. Furthermore, the "dozens of cases [filed] pursuant to § 2" in recent years, *id.* at 11, testify less to issues with *Gingles*' clarity and more to the consequences of preclearance's post-*Shelby County* demise.

ciding them has coalesced into a well-developed, even-handed jurisprudential inquiry. *Gingles* offers attainable—but not automatic—criteria for proving that a particular districting arrangement "operate[s] to impair minority voters' ability to elect representatives of their choice." 478 U.S. at 50. Accordingly, this Court ought not accept the invitation to radically revise the doctrine for establishing vote dilution-based Section 2 violations.[9]

A. The *Gingles* Preconditions Are Workable

The *Gingles* preconditions and the totality-of-the-circumstances inquiry are reasonably "limited and precise standard[s]" that give sufficiently clear guideposts to legislatures, litigants, and courts alike. *Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2502 (2019). To be sure, they "'cannot be applied mechanically,'" *Johnson* v. *De Grandy*, 512 U.S. 997, 1007 (1994), but this is a virtue, not a vice.[10] *Gingles* does not indulge "impermissible racial stereotypes," *Shaw* v. *Reno*, 509 U.S.

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[9] *Contra, e.g.*, Project on Fair Representation Amicus Br. 13-15; Sen. John Braun et al. Amicus Br. 14-24; Lawyers Democracy Fund Amicus Br. 10-16; Republican Nat'l Comm. Amicus Br. 17-20.

[10] Nor is this trait unique to Section 2. American jurisprudence abounds with doctrines that resist "mechanical" application yet are regularly applied effectively. Examples include specific personal jurisdiction, the Rule of Reason, fair use, public rights, *Erie*, the *Mathews* test, the *Arlington Heights* factors, and entire fairness review of corporate transactions. "There is no question that the Voting Rights Act has required the courts to resolve difficult questions, but that is no reason to deviate from an interpretation that Congress has thrice approved." *Holder*, 512 U.S. at 966 (separate opinion of Stevens, J., joined by Blackmun, Souter, and Ginsburg, JJ.).

630, 647 (1993), or adopt strict "racial quota[s]," *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 279 (1978). To the contrary, *Gingles* commands "an intensely local appraisal of the design and impact of the contested electoral mechanisms," including "a searching practical evaluation of the past and present reality." *Gingles*, 478 U.S. at 79 (quotation marks and citations omitted). It guarantees that race is taken into consideration "[no] more than is 'reasonably necessary'" to effectuate the Act's purpose of ensuring equality of political opportunity. *Bush* v. *Vera*, 517 U.S. 952, 979 (1996) (opinion of O'Connor, J., joined by Rehnquist, C.J. and Kennedy, J.).

To begin, a plaintiff must demonstrate "the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *De Grandy*, 512 U.S. at 1008. To do so, a plaintiff must satisfy "an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area?" *Bartlett*, 556 U.S. at 18; *see also id.* at 19 (noting that every federal appeals court to consider the issue has "interpreted the first *Gingles* factor to require a majority-minority standard"). The relevant geographic area is a hypothetical alternative district that is "'reasonably configured,'" *Cooper* v. *Harris*, 137 S. Ct. 1455, 1470 (2017), and in which the minority population is "geographically compact," *Abbott* v. *Perez*, 138 S. Ct. 2305, 2330 (2018), with due consideration of "traditional districting principles such as maintaining communities of interest and traditional boundaries," *Abrams* v. *Johnson*, 521 U.S. 74, 92 (1997). The "'ultimate end' of the first *Gingles* factor is simply 'to prove that a solution is possible, and not necessarily to present the final solution to the problem.'" *Pope* v. *County of Albany*, 687 F.3d 565, 576 (2d Cir.

2012) (quoting *Bone Shirt* v. *Hazeltine*, 461 F.3d 1011, 1019 (8th Cir. 2006)).

If the inquiry ended here and States were forced to enact the *Gingles* step one map, Appellants-Petitioners and certain *amici* might be justified in asserting that *Gingles* results in unconstitutional racial gerrymandering.[11] But, of course, *Gingles* demands far more of plaintiffs. The second and third preconditions require proof that the minority group is "politically cohesive," *Gingles*, 478 U.S. at 51, and that the majority group "vote[s] sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidate," *Wisconsin Legis.*, 142 S. Ct. at 1248. These inquiries—

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[11] *See, e.g.*, Appellants-Pet'rs Br. 71-80; Alabama Ctr. for Law & Liberty Amicus Br. 20. Additionally, in their opening merits brief, Appellants-Petitioners claim that "*Gingles* relied heavily on commentators who argued that 'the relevant question should be whether the minority population is so concentrated that, if districts were drawn pursuant to accepted nonracial criteria, there is a reasonable possibility that at least one district would give the racial minority a voting majority.'" Appellants-Pet'rs Br. 49-50 n.10 (quoting Blacksher & Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden*: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 Hastings L.J. 1, 56 n.330 (1982)). Appellants-Petitioners apparently regard the quoted language as supporting an approach contrary to existing doctrine and practice. Yet litigants *already* must ensure that their hypothetical districts respect "traditional districting principles such as maintaining communities of interest and traditional boundaries." *Abrams*, 521 U.S. at 92; *see also Shaw*, 509 U.S. at 647. Just as it is possible to "be aware of racial demographics" without allowing race to "predominate[] in the redistricting process," *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995), so too is it possible to draw a map that comports with traditional districting principles while also complying with *Gingles* step one's requirement of showing "that a solution is possible," *Pope*, 687 F.3d at 576.

generally treated together under the rubric of "racially polarized voting"[12]—entail using at least one of three "generally accepted statistical techniques—homogenous precinct analysis, ecological regression, and ecological inference." *Wright* v. *Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1290 (11th Cir. 2020); *see also Luna*, 291 F. Supp. 3d at 1118 (discussing these methodologies); *Benavidez* v. *City of Irving*, 638 F. Supp. 2d 709, 723 (N.D. Tex. 2009) (same). Under this political cohesion test, the focus consciously moves beyond race to look to a demonstration of actual voting behavior. A large but non-cohesive collection of people of a particular racial minority group cannot avail themselves of Section 2.

Thus, the second and third preconditions are robust safeguards against the use of "impermissible racial stereotypes." *Shaw*, 509 U.S. at 647. Section 2, as interpreted by *Gingles* and its progeny, does *not* presume "that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." *Id.* Instead, *Gingles*' second and third preconditions assess how people *actually* vote in the locality at issue. They require litigants and courts to scour the facts on the ground, as evidenced by statistical analyses of recent elections. They ensure that "a court [does] not presume bloc voting within even a single minority group." *Growe* v. *Emison*, 507 U.S. 25, 41 (1993). *Gingles* is thus inherently "grounded in current condi-

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[12] *E.g.*, *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 427 (2006) ("*LULAC*"); *Abrams*, 521 U.S. at 92.

tions." *Shelby County*, 570 U.S. at 554.[13] And where "the record simply 'contains no statistical evidence' of minority political cohesion … or of majority bloc voting," courts have not hesitated to rule in defendants' favor. *Growe*, 507 U.S. at 41; *see, e.g.*, *McConchie* v. *Scholz*, — F. Supp. 3d —, 2021 WL 6197318, at *6 (N.D. Ill. Dec. 30, 2021) (per curiam); *Kumar* v. *Frisco Indep. Sch. Dist.*, 476 F. Supp. 3d 439, 513-514 (E.D. Tex. 2020); *Hinds Cnty. Republican Party* v. *Hinds County*, 432 F. Supp. 3d 684, 697-700 (S.D. Miss. 2020); *York* v. *City of Gabriel*, 89 F. Supp. 3d 843, 858 (M.D. La. 2015); *Rios-Andino* v. *Orange County*, 51 F. Supp. 3d 1215, 1225-1226 (M.D. Fla. 2014); *Jeffers* v. *Beebe*, 895 F. Supp. 2d 920, 935 (E.D. Ark. 2012); *Radogno* v. *Illinois State Bd. of Elections*, 836 F. Supp. 2d 759, 773 (N.D. Ill. 2011), *aff'd*, 568 U.S. 801 (2012); *Cottier* v. *City of Martin*, 604 F.3d 553, 562 (8th Cir. 2010) (en banc).

B. The Totality-of-the-Circumstances Inquiry Buttresses The *Gingles* Preconditions

Even after satisfying the *Gingles* preconditions, the plaintiff "must then go on to prove that, under the totality of the circumstances, the district lines dilute the votes of the members of the minority group." *Abbott*, 138 S. Ct. at 2331. Although most unsuccessful Section 2 cases fail at the preconditions stage, plaintiffs can—and do—lose under the totality of the circumstances. *See, e.g.*, *Fusilier* v. *Landry*, 963 F.3d 447, 462-463 (5th Cir. 2020); *Flores* v. *Town of Islip*, 382 F. Supp. 3d 197, 245 (E.D.N.Y. 2019); *Lopez* v. *Abbott*, 339 F.

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[13] *Contra* National Republican Redistricting Tr. Amicus Br. 4-11.

Supp. 3d 589, 619 (S.D. Tex. 2018); *Fairley* v. *Hattiesburg*, 122 F. Supp. 3d 553, 580-581 (S.D. Miss. 2015), *aff'd*, 662 F. App'x 291 (5th Cir. 2016); *Solomon* v. *Liberty Cnty. Comm'rs*, 221 F.3d 1218, 1221-1224 (11th Cir. 2000) (en banc); *Jenkins* v. *Manning*, 116 F.3d 685, 700 (3d Cir. 1997) (Greenberg, J., joined by Alito, J.).

As such, consistent with the Dole Proviso[14]—and contrary to certain *amici*'s pronouncements—*Gingles* does not "mandate proportional representation"[15] or "require[] … proportionality of outcomes."[16] If that were so, then in every case where Plaintiffs satisfied the first *Gingles* precondition, the map would be invalidated—yet the case law is to the contrary.

This Court has held repeatedly that "whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area" is one "relevant consideration" among many. *LULAC*, 548 U.S. at 426 (citing *De Grandy*, 512 U.S. at 1000). At most, it provides "*some* evidence." *Id.* at 437 (emphasis added). But, as this Court has stressed and lower courts have reiterated, proportionality is not dispositive. *See, e.g.*, *Gingles*, 478 U.S. at 46; *Gonzalez* v. *City of Aurora*, 535 F.3d 594, 598 (7th Cir. 2008); *Black Pol. Task Force* v. *Galvin*, 300 F. Supp. 2d 291, 310 (D.

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[14] "*Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b).

[15] State of Louisiana et al. Amicus Br. 4.

[16] Republican Nat'l Comm. Amicus Br. 6.

Mass. 2004); *Jenkins*, 116 F.3d at 692. The actual practice of the lower courts reinforces that conclusion.

The totality-of-the-circumstances inquiry provides another buffer against potential adoption of "impermissible racial stereotypes." *Shaw*, 509 U.S. at 647. Rather than treating satisfaction of the preconditions as sufficient to justify relief, a court must undergo "a searching practical evaluation of the past and present reality." *Gingles*, 478 U.S. at 79 (quotation marks and citations omitted). In addition to contesting the enumerated Senate Factors, a defendant may also "attempt to rebut the plaintiff's claim by introducing evidence of objective, non-racial factors under the totality of the circumstances standard," including potential evidence that partisanship alone can explain evidence of racial polarization. *Nipper* v. *Smith*, 39 F.3d 1494, 1513 (11th Cir. 1994) (en banc).[17] This fact-intensive inquiry

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[17] One *amicus* has suggested that evidence of partisan polarization should be considered as rebuttal evidence to the *Gingles* preconditions. *See* National Republican Redistricting Tr. Amicus Br. 18-20. However, nearly every circuit to consider the issue has agreed that "the approach most faithful to the Supreme Court's case law is one that treats causation as irrelevant in the inquiry into the three *Gingles* preconditions, but relevant in the totality of circumstances inquiry." *United States* v. *Charleston County*, 365 F.3d 341, 347-348 (4th Cir. 2004) (quotation marks and citation omitted); *see Holloway* v. *City of Virginia Beach*, 531 F. Supp. 3d 1015, 1078 (E.D. Va. 2021) (noting that the Second, Fourth, Seventh, Tenth, and Eleventh Circuits have adopted the majority view; the Fifth Circuit stands alone in holding otherwise) (subsequent history omitted). As Judge Wilkinson has explained, addressing partisanship's potential causal role as part of the *Gingles* preconditions "would convert the threshold test into precisely the wide-ranging, fact-intensive examination it is meant to precede." *Charleston County*, 365 F.3d at 348.

ensures that evidence-based proof, not mindless stereotyping, is the basis for relief.

Thus, *Gingles* is not an anachronistic doctrine too unwieldy to apply or too one-sided to retain. *Gingles* is workable—and vital.

IV. *GINGLES* IS EFFECTIVE

For decades, the Voting Rights Act has been a stalwart safeguard against racial discrimination in voting, and Section 2 has been an essential part of that defense. In turn, where plaintiffs achieve a successful outcome, often what follows is the opportunity for minority citizens of a voting age population to elect their preferred candidate and an increase in civic engagement amongst minority communities.

From the outset—but especially following the 1982 amendments—Section 2 has been transformative. "Hundreds" of "cities, counties, and other kinds of jurisdictions shifted from at-large elections [to single-member districts] in the 1980s." Davidson & Grofman 383. "[T]his widespread shift in local election structures … stemmed from the Voting Rights Act, especially section 2." *Id.* at 385. Following the 1982 VRA amendments, "numerous suits attacking local at-large elections were filed," the "vast bulk" of which "were brought by minority plaintiffs." *Id.* By comparison, "section 2 litigation brought solely by the Department of Justice played only a minor role in effecting changes in local election systems." *Id.* In turn, the "replacement of at-large elections led to remarkable gains in black officeholding that far outstripped gains in the jurisdictions that remained at large." *Id.* at 383. In States such as Texas, "Hispanic representation also showed noteworthy gains." *Id.* at 384.

Nor has Section 2's coverage been confined to uprooting at-large election systems. Since 1993—when this Court confirmed that *Gingles* applies with equal force to single-member districting schemes—Section 2 has been used to thwart attempts to crack and pack minority voters into districts that undermine their ability to elect representatives of their choice, including in the consolidated cases at bar. *See De Grandy*, 512 U.S. at 1006-1007 (discussing *Voinovich* v. *Quilter*, 507 U.S. 146 (1993); *Growe*, 507 U.S. 25); *see also, e.g.*, *LULAC*, 548 U.S. 399; *Luna*, 291 F. Supp. 3d 1088; *Baldus* v. *Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840 (E.D. Wis. 2012) (per curiam); *Black Pol. Task Force*, 300 F. Supp. 2d 291; *Arbor Hill Concerned Citizens Neighborhood Ass'n* v. *County of Albany*, 281 F. Supp. 2d 436 (N.D.N.Y. 2003); *Corbett* v. *Sullivan*, 202 F. Supp. 2d 972 (E.D. Mo. 2002).[18]

Altogether, the increases in the number of minority officials elected have been dramatic. For example, from 1973 to 2005, the number of Latino elected officials in Texas nearly quadrupled. Perales et al., *Voting Rights in Texas: 1982-2006*, 17 S. Cal. Rev. L. & Soc. Just. 713, 717 (2008) ("Perales et al."). Between 1970 and 2001, the number of Black elected officials in Texas increased from 29 to 475, including the first two Black

[18] Additionally, some cases have involved hybrid districting schemes using a mix of at-large and single-member districts. *See, e.g.*, *Patino* v. *City of Pasadena*, 230 F. Supp. 3d 667 (S.D. Tex. 2017); *United States* v. *City of Euclid*, 580 F. Supp. 2d 584 (N.D. Ohio 2008); *Jamison* v. *Tupelo*, 471 F. Supp. 2d 706 (N.D. Miss. 2007).

members of Congress from the State.[19] *Id.* Texas voting rights plaintiffs have secured a successful outcome in more Section 2 cases than any other State—prevailing in or settling more than 150 cases through 2008. *Id.* at 744. As a result, 197 jurisdictions in Texas altered their discriminatory voting systems. *Id.*

South Carolina's electoral landscape has also been transformed because of the vigorous enforcement of the Voting Rights Act. At the time of the Act's passage, South Carolina had not had a Black elected official since Reconstruction despite Black citizens comprising one-third of its population. Ruoff & Buhl, *Voting Rights In South Carolina: 1982-2006*, 17 Rev. L. & Soc. Just. 643, 649 (2008) (Ruoff & Buhl). During the 1980s, county councils in numerous South Carolina jurisdictions—including Abbeville, Barnwell, Darlington, Fairfield, Georgetown, Laurens, Richland, and Saluda counties—entered consent decrees, changing their at-large districts to single-member districts. *See* Burton et al., *South Carolina*, *in Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965–1990*, at 191, 228 (Chandler Davidson & Bernard Grofman eds., 1994). By the early 2000s, robust Voting Rights Act enforcement had eliminated enough obstacles for 540 Black elected officials to take office. *See* Ruoff & Buhl 649. Today, implementation of Section 2 remains essential in States like South Carolina where "substantial evidence [shows] that th[e] disturbing fact" of racially polarized

[19] It is worth noting that these strides were accomplished with the combined efforts of Sections 2 and 5. However, with *Shelby County* rendering Section 5 inoperable, Section 2 has become even more essential to defeat laws that make it disproportionately more difficult for minority voters to participate in the political process.

voting "has seen little change" in recent decades. *Colleton Cnty. Council* v. *McConnell*, 201 F. Supp. 2d 618, 641 (D.S.C. 2002).

The South has not been alone in experiencing this transformation, either. Successful Section 2 vote dilution cases have been brought in jurisdictions across the country, from New York's Westchester County to California's Central Valley;[20] in Massachusetts, Michigan, Missouri, and Montana;[21] and in Washington, Wisconsin, and Wyoming.[22] In other words, Section 2 does not "treat[] States differently from one another." *Shelby County*, 570 U.S. at 553.

Nor are these successes confined to the past, as evidenced by the number of cases from recent years cited herein. Even as this Nation has made measurable progress towards political, economic, and social equality, America remains riven with racial disparities in terms

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[20] *See, e.g.*, *New Rochelle Voter Def. Fund* v. *City of New Rochelle*, 308 F. Supp. 2d 152 (S.D.N.Y. 2003); *Luna*, 291 F. Supp. 3d 1088.

[21] *See, e.g.*, *Black Pol. Task Force*, 300 F. Supp. 2d 291; *United States* v. *City of Eastpointe*, 378 F. Supp. 3d 589 (E.D. Mich. 2019); *Missouri State Conf. of NAACP* v. *Ferguson-Florissant Sch. Dist.*, 894 F.3d 924 (8th Cir. 2018); *United States* v. *Blaine County*, 363 F.3d 897 (9th Cir. 2004).

[22] *See, e.g.*, *Montes* v. *City of Yakima*, 40 F. Supp. 3d 1377 (E.D. Wash. 2014); *Baldus*, 849 F. Supp. 2d 840; *Large* v. *Fremont County*, 670 F.3d 1133 (10th Cir. 2012).

of income,[23] wealth,[24] healthcare access,[25] and other metrics of quality of life.[26] *De facto* residential[27] and

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[23] *See, e.g.*, Bayer & Charles, *Divergent Paths: A New Perspective on Earnings Differences Between Black and White Men Since 1940*, 133 Q.J. Econ. 1459, 1459 (2018) ("After narrowing from 1940 to the mid-1970s, the median black-white level earnings gap has since grown as large as it was in 1950."); Wilson & Rogers III, *Black-White Wage Gaps Expand With Rising Wage Inequality* 1, Econ. Pol'y Inst. (2016), https://files.epi.org/pdf/101972.pdf ("As of 2015, relative to the average hourly wages of white men with the same education, experience, metro status, and region of residence, black men make 22.0 percent less, and black women make 34.2 percent less."); Pérez et al., *The Economic State of Latinos in America: The American Dream Deferred* vi, McKinsey & Co. (2021), https://www.mckinsey.com/featured-insights/sustainable-inclusive-growth/the-economic-state-of-latinos-in-america-the-american-dream-deferred (both native-born and foreign-born Latinos "earn significantly less on average than White workers in the same occupations").

[24] *See, e.g.*, Aladangady & Forde, *Wealth Inequality and the Racial Wealth Gap*, Fed. Res. (Oct. 22, 2021), https://www.federalreserve.gov/econres/notes/feds-notes/wealth-inequality-and-the-racial-wealth-gap-20211022.htm (reporting that "the average Black and Hispanic or Latino households earn about half as much as the average White household and own only about 15 to 20 percent as much net wealth," and that "this wealth gap has widened notably over the past few decades").

[25] *See, e.g.*, Rabin, *Racial Inequities Persist in Health Care Despite Expanded Insurance*, N.Y. Times (Aug. 17, 2021), https://www.nytimes.com/2021/08/17/health/racial-disparities-health-care.html.

[26] Indeed, the *Gingles* framework provides for consideration of these disparities in connection with Senate Factor 5.

educational[28] segregation is nearly as widespread now as it was a generation or two ago. And racial voter suppression and dilution remain clear and present threats, especially following the demise of preclearance. These social ills require a real, sustainable solution: change through our electoral process—an electoral process that Section 2 as it exists today makes more equitable.

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[27] *See, e.g.*, Best & Mejía, *The Lasting Legacy of Redlining*, FiveThirtyEight (Feb. 9, 2022), https://projects.fivethirtyeight.com/redlining/ (study examining 138 cities where the Home Owners' Loan Corporation conducted redlining "found that nearly all formerly redlined zones in the country are still disproportionately Black, Latino or Asian compared with their surrounding metropolitan area, while two-thirds of greenlined zones—neighborhoods that HOLC deemed 'best' for mortgage lending—are still overwhelmingly white"); Suddath, *U.S. Residential Segregation Is Likely to Get Worse: New Study*, Bloomberg (July 8, 2021), https://www.bloomberg.com/news/newsletters/2021-07-08/u-s-residential-segregation-is-likely-to-get-worse-new-study ("81% of metropolitan areas with more than 200,000 people were more racially segregated in 2019 than they were in 1990.").

[28] *See, e.g.*, Pendharkar, *An Expansive Look at School Segregation Shows It's Getting Worse*, Educ. Week (June 3, 2022), https://www.edweek.org/leadership/an-expansive-look-at-school-segregation-shows-its-getting-worse/2022/06 ("School segregation has increased in the last 30 years, especially in the 100 largest districts that enroll about 40 percent of the nation's K-12 population."); Orfield et al., *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future* 11, UCLA Civil Rights Project (May 15, 2014), https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf ("The reality is that segregation has been increasing since l990, for almost a quarter century, and that today black students are substantially more segregated than they were in l970.").

The efficacy of *Gingles* is in part attributable to the fact that the inquiries it demands are fact-sensitive. In other words, *Gingles* accounts for racial progress made in this country without ignoring continued threats to democracy. The recent cases "represent ongoing and recurring attempts to discriminate against minority voters" nationwide. Perales et al. 744. Of equal importance, however, the numerous cases cited herein also indicate Section 2's ability to thwart such attempts.

Following preclearance's demise in *Shelby County*, Section 2 has become the last, best hope to "eliminate second-class citizenship wherever present." *United States* v. *County Bd. of Elections of Monroe Cnty.*, 248 F. Supp. 316, 317 (W.D.N.Y. 1965). The successful cases demonstrate Section 2's efficacy in effectuating Congress' aspiration that the Voting Rights Act "rid the country of racial discrimination in voting." *South Carolina*, 383 U.S. at 315.

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Section 2, the vital federal tool for ensuring equal political opportunity, must endure as an available and effective protection. What was once considered a "permanent" tool to combat the disproportionate marginalization of minority voters is now characterized as unmanageable, imbalanced, and unlawful. *Amici* can attest otherwise. After decades of litigating cases under the VRA, *amici* can attest to the workability, fairness, and constitutionality of Section 2.

CONCLUSION

The Court should affirm the lower court's judgment.

Respectfully submitted.

EDWARD WILLIAMS
AYANA D. WILLIAMS
SONIKA R. DATA
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

DEBO P. ADEGBILE
Counsel of Record
SAMUEL E. WEITZMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich St.
New York, NY 10007
(212) 295-6717
debo.adegbile@wilmerhale.com

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