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 the United States District Court for the Northern District of Alabama and on Writ of Certiorari Before Judgment to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF

Plaintiffs would have this Court preside over a "'beauty contest[]'" for Alabama's congressional redistricting plan. *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality op.). They tout compactness, their preferred communities of interest, and core retention (or lack thereof) in their plans. But the contest is rigged. Race is a non-negotiable criterion; only plans with two or more majority-minority districts may compete. A race-neutral plan resulting in one majority-minority district? Disqualified.

Plaintiffs now highlight their expert's "literally thousands" of two-majority-minority redistricting plans, Milligan Br.22, but neglect to mention that those plans resulted from a simulation pre-programmed to generate *only* plans with two or more majority-minority districts. In Plaintiffs' view, so long as expert demographers can passably draw two such districts and lawyers can artfully describe them, anything less than two majority-minority districts is "dilution." Their version of §2 flouts the text of the statute, has no basis in this Court's precedent, and would exceed constitutional limitations.

At best, Plaintiffs have shown it is *possible* to draw two majority-minority congressional districts in Alabama (by prioritizing race first and race-neutral criteria second). But what is possible is not the question for a federal court. The question is instead whether Alabama's "race-neutral alternative that did not add a [second] majority-black district … den[ies] black voters equal political opportunity." *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1250-51 (2022).

It does not. Because black Alabamians live throughout the State but make up only 27% of its population, most (if not all) race-neutral congressional redistricting plans will yield at most one majority-black district. Plaintiffs' own experts proved this 2 million times over. Unsurprisingly, Alabama's enacted plan includes only one such district. Because that plan resembles a race-neutral plan, black voters in the State "have the same opportunity to elect their candidate as any other political group with the same relative voting strength." *Bartlett v. Strickland*, 556 U.S. 1, 20 (2009) (plurality op.). The plan is "equally open" to voters of every race. 52 U.S.C. §10301(b).

Plaintiffs and the United States decry using a race-neutral redistricting plan as the benchmark for an "equally open" plan, yet they fail to articulate any other workable standard. They hint at others—including already-rejected theories of maximization or proportionality—that would redefine equal openness to require a race-based thumb on the scale when weighing alternative plans. But the constitutional "dangers" that come with those theories are "not to be courted." *Johnson v. De Grandy*, 512 U.S. 997, 1016 (1994).

That it is *possible* to draw an additional majority-minority district by prioritizing race first and traditional criteria second is not proof of discrimination in redistricting. If the first *Gingles* precondition is to be of any use in identifying plans that might discriminate against a racial group, a plaintiff's illustrative map must not discriminate *in favor* of that group. And here, there is no question that race made the difference in Plaintiffs' proposed maps. Millions of race-neutral maps returned no plans with two majority-

black districts. Nevertheless, the *Caster* Plaintiffs' expert drew several such maps by treating "race" as "a traditional redistricting principle" just like "compactness or contiguity." Tr. 478-79.[1] Likewise, the *Milligan* Plaintiffs' expert programmed her map-drawing algorithm to produce maps with two majority-black districts "on purpose" because "it is hard to draw two majority-black districts by accident." JA714. Thus, the district court found that non-racial "considerations" had to "yield" to "non-negotiable" racial targets. MSA214.

Plaintiffs now distance themselves from the maps they offered as proof of a supposed VRA violation. In Plaintiffs' view, their racially gerrymandered plans are irrelevant because the remedy those plans unlock need not resemble those plans at all—Alabama could enact non-majority-minority crossover districts instead. But it makes no sense to allow Plaintiffs to use maps the State cannot constitutionally draw to force the State to draw maps the VRA does not require. That approach would "extend[] racial considerations even further into the districting process," requiring legislatures and courts to consider race twice over—first, to see how many gerrymandered majority-minority districts are possible, and second, to "rely[] on a combination of race and party to presume an effective majority" in crossover districts. *Bartlett*, 556 U.S. at 22-23. That "perilous enterprise" is no more attractive today than it was in *Bartlett*. *Id.* at 22.

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[1] "Tr." refers to transcripts of the preliminary injunction hearing. *See Milligan*, ECF 105. "MSA" refers to the booklet-form *Milligan* Stay Appendix.

In sum, "[t]he purpose of the Voting Rights Act is to prevent discrimination … and to foster our transformation to a society that is no longer fixated on race." *Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003). Plaintiffs' approach demands racial discrimination and guarantees more of it. If §2 is to apply to single-member districts, only a race-neutral benchmark furthers the VRA's goals and its "equal openness … touchstone." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2338 (2021). Because Alabama's neutrally drawn Plan is "equally open" to all voters, it complies with §2.

ARGUMENT

I. The VRA Operates As A Prohibition On Voting Rules Abridging Or Denying Voting Rights "On Account Of Race," Not An Affirmative Obligation To Redistrict "On Account Of Race."

Plaintiffs misinterpret §2 to impose a strict-liability regime upon any State with a history of discrimination (which, according to Plaintiffs, could include every State) and racially polarized voting (which, according to Plaintiffs' expert, "has only been found to exist where whites tend to vote for Republicans," Tr. 766:15-19). On Plaintiffs' theory, those States' redistricting plans would be subject to judicial revision for failure to affirmatively confer maximum political advantage to particular voters based on race. Redistricting based on "racially neutral policy" is not good enough; only express racial sorting that hits Plaintiffs' preferred targets and optimizes political success for

Plaintiffs' preferred racial groups will do. Milligan Br.53; *see also* Caster Br.24-25.

Plaintiffs' conception of §2 is wrong. The VRA operates as a *prohibition* on certain voting rules made "on account of race." 52 U.S.C. §10301(a). It "does not deprive the States of their authority to establish nondiscriminatory voting rules." *Brnovich*, 141 S. Ct. at 2343. Nor does it require States to consider race at all times, for all lines, in all places. "Section 2 requires an electoral process 'equally open' to all, not a process that favors one group over another." *Gonzalez v. City of Aurora*, 535 F.3d 594, 598 (7th Cir. 2008) (Easterbrook, C.J.).

A. "Equally open" districting is districting without discrimination "on account of race."

1. Section 2 is a prohibition on certain state action. It bars voting rules (1) "imposed or applied by any State or political subdivision" (2) "in a manner which results in a denial or abridgment of the right … to vote" (3) "on account of race." 52 U.S.C. §10301(a). To establish a violation, §2 requires proof that the State's "political processes … are not equally open" to members of a racial 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." *Id.* §10301(b).

Putting both subparagraphs together, to have "*less* opportunity" than others "on account of race" requires a showing that the State has imposed some "obstacle[]" or "burden[]" on one race but not others. *Brnovich*, 141 S. Ct. at 2337-38. In other words, the

State must act "on account of race" to violate §2. A State's voting rule cannot "result[] in the abridgment or denial" of voting rights "on account of race" by mere *inaction* by the State—for example, by enacting a redistricting plan *without* accounting for the racial makeup of each district. There is no §2 requirement that a State's policy of race-neutral redistricting be rejected and replaced with a race-conscious one, lest §2 be interpreted to require what its text forbids: racial preferencing in redistricting.

This is the easy §2 case. The State acted on account of long-recognized and indisputably legitimate interests by enacting a map drawn with traditional districting principles, including core retention. Merrill Br.12-18. The State took no action "on account of race." Even assuming §2 applies to single-member redistricting schemes, *but see id.* at 50-53, §2 is not triggered in such circumstances. Rather, neutrally drawn redistricting plans are "neutral voting regulations with long pedigrees that are reasonable means of pursuing legitimate interests." *Brnovich*, 141 S. Ct. at 2341. Alabama has taken no action "on account of race," let alone any action "result[ing] in a denial or abridgment" of voting rights. 52 U.S.C. §10301(a).

2. Plaintiffs' and the United States' rejoinder is that when Congress amended §2 in 1982 it intended to "explicitly reject[] an intentional discrimination requirement." Milligan Br.2; *see also id.* at 57; Caster Br.42-43; US Br.20-21. Setting aside that legislative history should not "muddy the meaning of clear statutory language," *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (cleaned up), §2's history only confirms that intent remains relevant.

Indeed, the House bill that would have made intent "irrelevant" did not prevail. *Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002, 1010 (1984) (Rehnquist, J., dissenting). Instead, "[t]he House and Senate compromised." *Brnovich*, 141 S. Ct. at 2332. The statute ultimately retained the requirement that vote discrimination occur "on account of race," 52 U.S.C. §10301(a), and incorporated into §2(b) language "taken almost verbatim from *White* [*v. Regester*, 412 U.S. 755 (1973)]." *Brnovich*, 141 S. Ct. at 2332-33.

White relied on circumstantial evidence to determine whether plaintiffs had proven purposeful racial discrimination. *See White*, 412 U.S. at 764 (analyzing whether plaintiffs could prove "invidious discrimination"); *accord, e.g.*, *Kirksey v. Bd. of Sup'rs of Hinds Cnty.*, 554 F.2d 139, 148 (5th Cir. 1977) (The "plaintiffs in *White v. Regester* were successful … because they established the requisite intent or purpose in the form of the existent denial of access to the political process."); *see also Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971) (holding evidence insufficient to prove multimember districts "were conceived or operated as purposeful devices to further racial or economic discrimination"). The "equally open" portion of the "totality of circumstances" test grafted from *White* onto §2 thus does not render intent irrelevant; rather, it remains "important to consider the reason for the [challenged] rule." *Brnovich*, 141 S. Ct. at 2340; *see also id.* at 2361 (Kagan, J., dissenting) (§2 claim fails if law is "needed to achieve a government's legitimate goals").

Insofar as Congress "explicitly rejected" any standard when it amended §2 (Milligan Br.2), it repudiated a standard *of proof* that would have "requir[ed]

direct evidence of discriminatory purpose" or a "smoking gun." Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendment to the Voting Rights Act: A Legislative History*, 40 Wash. & Lee L. Rev. 1347, 1404 (1983). To the extent members of Congress believed *Bolden* required a congressional response, the amendment confirmed that no smoking gun was needed to prove a §2 violation. Circumstantial evidence, including "consideration of effects," *Bartlett*, 556 U.S. at 10, was sufficient.

The 1982 amendment therefore did not change the VRA's substantive scope: prohibiting *state-imposed* impediments or obstacles to voting, which are necessarily intentional acts. The State must still act "on account of race," 52 U.S.C. §10301(a), *i.e.*, *because of* race. The amendment merely clarified—consistent with *White*—that a plaintiff could offer circumstantial evidence to help prove that state action violated §2 if, for example, voting was not "equally open" to all, or some groups had "less opportunity" than others.

The United States responds that this understanding of §2 leaves "no room to examine [minority] voters' electoral preferences or prospects of success." US Br.21. But that approach would transform the statute. Section 2 is a *prohibition* on *state action*; it imposes no affirmative obligation, as the United States would have it, to "guarantee a political feast" for some races at the expense of others. *See De Grandy*, 512 U.S. at 1017.

3. Plaintiffs dispute Alabama's interpretation of "equally open" but offer no affirmative theory of the text's meaning. Instead, they assert that the so-called

"Senate Factors" are the "roadmap for determining a minority group's equal access to the political process." Caster Br.28; *see* Milligan Br.37-41.

The statutory text controls, not a list of amorphous, non-exhaustive factors in a committee majority report that this Court has said "*might* be probative of a §2 violation," *Thornburg v. Gingles*, 478 U.S. 30, 36 (1986) (emphasis added). *See Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 599 (2011) ("Congress's 'authoritative statement is the statutory text, not the legislative history.'"). Even the 1982 Senate Report acknowledged that the listed factors were not "comprehensive" or "exclusive"—let alone interchangeable with the statutory text. *Gingles*, 478 U.S. at 45.

The text of §2 asks whether the State has taken some action that makes voting in one district versus another "not equally open," in that members of a racial group have "less opportunity" than other voters. 52 U.S.C. §10301(b). That is a far more focused inquiry than generalized discussions of racial disparities in "the unemployment rate," "the child poverty rate," "median household income," "health insurance," "infant mortality rate," or "food stamps." MSA196. Indeed, even the Senate Report acknowledged that a VRA plaintiff must establish "unequal access to *the electoral process*." *Gingles*, 478 U.S. at 46 (emphasis added). Alleged racial disparities on social or economic measures do not come close to showing that a *redistricting plan* has made voting "not equally open." 52 U.S.C. §10301(b).

B. "Equally open" requires a race-neutral benchmark.

1. Assessing whether voting is "equally open" among voters or whether one group has "less opportunity" than others, *id.*, requires Plaintiffs to identify a benchmark or some sort of comparator. Merrill Br.42-47. Tens of thousands of words later, Plaintiffs have not done so.

Plaintiffs mostly ignore this Court's decision in *Brnovich*. But the Court there reaffirmed the importance of an appropriate "benchmark" for assessing whether a voting rule is "equally open": "Because every voting rule imposes a burden of some sort, it is useful to have benchmarks with which the burdens imposed by a challenged rule can be compared." 141 S. Ct. at 2338. In every VRA challenge, the question is, "equally open compared to what?" *See Wis. Legislature*, 142 S. Ct. at 1250-51. Or "less opportunity" compared to what? *See id.* (asking whether "race-neutral alternative that did not add [another] majority-black district would deny black voters equal political opportunity").

The crux of Plaintiffs' claims is that Alabama violated §2 and "diluted" their votes by not affirmatively drawing a second majority-black district. The only way for a court to analyze that claim—short of demanding maximization of majority-minority districts or proportionality—is to compare Alabama's enacted plan to a race-neutral benchmark to determine whether the enacted plan is not "equally open" to all or results in "less opportunity" for certain racial groups. Merrill Br.42-47.

Plaintiffs attack the use of a race-neutral benchmark as the "antithesis of the totality test that the statute contemplates." Milligan Br.43. As discussed above, however, the "totality" test ultimately examines whether a reasonable inference can be drawn that the challenged state action denied or abridged voting rights "on account of race." *See White*, 412 U.S. at 764; *supra* §I.A. It necessarily follows that the statute requires a baseline comparator capable of revealing discrimination.

The only viable comparator is a race-neutral one. Simply noting "that lines could have been drawn elsewhere" will not do. *De Grandy*, 512 U.S. at 1015. A benchmark plan that is itself drawn based on racial considerations reveals nothing about whether the *State's* plan discriminates on account of race.

The *Caster* Plaintiffs and the United States assert that numerous computer-created "simulations" would be necessary to show what a race-neutral benchmark would look like. Caster Br.39; US Br.9, 28-29. Not so. A State's own longstanding redistricting plan—especially where that plan is court-approved and/or DOJ-precleared—can itself operate as the race-neutral benchmark for evaluating whether a new plan is discriminatory. But here, Plaintiffs have already created millions of simulations showing that a race-neutral districting process would invariably result in no more than one majority-black district in Alabama, which is highly pertinent to whether a plan with only one such district is "equally open" or instead results in "less opportunity" for black voters.

Indeed, the evidence here is unambiguous. Millions of race-neutral simulations confirmed that a second majority-black district cannot be drawn in Alabama without elevating race above non-racial traditional districting criteria. *See* Merrill Br.54-56. Plaintiffs discount Dr. Duchin's 2-million-map study because it "used 2010 census data" and "did not consider communities of interest, political subdivisions or other traditional districting factors." Milligan Br.22. But it was Dr. Duchin, not the State, who first testified to the relevance of the study, declaring that her 2 million race-neutral simulations "show[ed] that it is hard to draw two majority-black districts by accident"—that is, according to traditional, race-neutral districting criteria. JA714.

Plaintiffs also attempt to downplay Dr. Imai's 30,000 race-neutral maps—all of which used 2020 census data and adhered to numerous traditional districting principles—because Dr. Imai's maps "did not include communities of interest." Milligan Br.22-23. But unless "communities of interest" is just a euphemism for purported "ties among Black residents," Caster Br.36, absence of this additional constraint cannot explain why *none* of Dr. Imai's 30,000 maps had two majority-black districts.

As Plaintiffs' own experts recognized, any plausible race-neutral benchmark would include at most one majority-black district. The State's decision not to intentionally gerrymander its map to draw two such districts thus in no way shows—or even suggests—that the enacted Plan resulted in "less opportunity" or unequal openness "on account of race."

2. Further supporting a race-neutral benchmark is the fact that Plaintiffs offer no plausible alternative, despite bearing the burden to do so. *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993) (Section 2 places "the initial burden of proving an apportionment's invalidity squarely on the plaintiff's shoulders."). For example, Plaintiffs extensively laud the Senate Factors, Milligan Br.28-29, Caster Br.28, 59, but those provide no meaningful or objective guidance about when §2 would require a State to draw an additional majority-minority district.

The *Caster* Plaintiffs revert to proportionality—a benchmark the statute itself rejects—pressing for a congressional map that "reflect[s] the voting power of the state's growing Black population." Caster Br.29. But single-member districting schemes rarely lead to proportionate representation for *any* political minority, *see* Merrill Br.40; *see also* Alabama Representatives' Amicus Br.4-6, meaning it will typically be "necessary to depart from traditional principles" to achieve proportionality, *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017). That sort of "racial balancing has 'no logical stopping point'"; "[a]s the districts' demographics shift, so too will [Plaintiffs'] definition of [vote dilution]." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731 (2007) (plurality op.). Section 2 thus properly disclaims a proportionality benchmark. *See* 52 U.S.C. §10301(b).

The *Milligan* Plaintiffs end up even further afield, advocating "a race conscious 'comparison' between minorities' relative opportunities under 'the status quo' and 'a hypothetical alternative.'" Milligan Br.43

(quoting *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000)). But the question whether *more* majority-minority districts could be drawn in "a hypothetical alternative" is just a dressed-up version of maximization. *See, e.g.*, *De Grandy*, 512 U.S. at 1017; *Miller v. Johnson*, 515 U.S. 900, 925 (1995). A comparator that shows only whether more majority-minority districts could conceivably be drawn is not a comparator that addresses the question at the heart of §2: whether the enacted map "den[ies] black voters equal political opportunity." *Wis. Legislature*, 142 S. Ct. at 1250-51.

II. Plaintiffs Misconstrue This Court's Decision In *Gingles*.

Unable to show that Alabama's enacted Plan violates the text of §2, Plaintiffs substitute this Court's decision in *Gingles* for the statutory text. Their arguments misconstrue that decision several times over.

A. *Gingles* is a judicially created threshold inquiry, not the ultimate standard for assessing a §2 violation.

Plaintiffs first suggest that meeting the preconditions this Court established in *Gingles* is interchangeable with the statutory showing required of a VRA plaintiff. Milligan Br.24 (arguing that *Gingles* "identifies situations" where districts are not "equally open"); *id.* at 26. But this Court has never equated *Gingles*'s threshold inquiry with *proving* a §2 violation. Quite the opposite. *Gingles* is a judge-made gatekeeping rule for §2 claims involving redistricting—meeting those "preconditions" is no substitute for the statutory requirement that plaintiffs show voting is "not equally

open." *Wis. Legislature*, 142 S. Ct. at 1248-49.[2] Particularly in the single-member-districting context, "[w]hen the question … comes down to the reasonableness of drawing a series of district lines in one combination of places rather than another, … factfinders cannot rest uncritically on assumptions about the force of the *Gingles* factors in pointing to dilution." *De Grandy*, 512 U.S. at 1013.

Indeed, this Court has emphasized that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Voinovich*, 507 U.S. at 158. In *Gingles* itself, which involved a challenge to multimember legislative districts in North Carolina, it made sense for the Court to speak of a minority group being "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. The multimember scheme could be measured against a benchmark: single-member districts, "the smallest political unit from which representatives" could have been "elected." *Id.* at 50 n.17. But §2 claims have evolved to challenge the lines of single-member districts, and the *Gingles* preconditions must account for the different nature of that type of claim. Unlike multimember

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[2] In practice, some lower courts, including the district court here, have effectively treated the *Gingles* preconditions as the entire §2 inquiry; this Court should expressly reject such an approach. *See, e.g.*, MSA187 ("[I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of §2 under the totality of the circumstances[.]"); *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1024 n.21 (2d Cir. 1995) (same); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.,* 4 F.3d 1103, 1135 (3d Cir. 1993) (same).

districts, single-member districts cannot be further subdivided. *See id.* And the State must have sufficient leeway to adopt districts using "traditional districting principles such as maintaining communities of interest and traditional boundaries," *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 433 (2006) (quoting *Abrams v. Johnson*, 521 U.S. 74, 92 (1997) (in turn quoting *Vera*, 517 U.S. at 977 (plurality op.))), without unknowingly running afoul of §2. *See Brnovich*, 141 S. Ct. at 2343.

B. Illustrative maps drawn on account of race cannot satisfy the first *Gingles* precondition.

1. Tracking §2's race-neutral "equal openness … touchstone," *id.* at 2338, the first *Gingles* precondition helps suss out whether redistricting is sufficiently suspect to trigger §2's prohibition of denials or abridgments of voting rights on account of race. Initially adopted for multimember-districting challenges, the first *Gingles* precondition asks whether a minority group is "sufficiently large and compact to constitute a majority in a reasonably configured district." *Wis. Legislature*, 142 S. Ct. at 1248.

For the same reasons §2 requires a race-neutral benchmark, only illustrative maps drawn using nonracial traditional districting criteria can satisfy *Gingles*'s first precondition. After all, comparing an enacted map's districts to racially gerrymandered districts that discriminate in favor of one racial group cannot possibly reveal whether the enacted districts are themselves racially gerrymandered. Any deviation between the enacted map and such a comparator

would show, at most, that the enacted map does not adhere to the comparator's race-based line-drawing. If such a map were considered "reasonably configured," *Wis. Legislature*, 142 S. Ct. at 1248, then *Gingles* would convert §2 from a law that prevents racial gerrymanders into a law that compels them.

Smoking out potential discrimination by comparing an enacted map against race-neutral ones is the exact process endorsed in the academic literature cited in *Gingles*, 478 U.S. at 46 n.11. *See, e.g.*, Richard L. Engstrom & John K. Wildgen, *Pruning Thorns from the Thicket: An Empirical Test of the Existence of Racial Gerrymandering*, 2 Legis. Stud. Q. 465, 465 (1977) (urging comparison of "the degree of vote dilution within a challenged set of districts with the degree of vote dilution that could be expected to result from impartial districting criteria … ascertained through randomly generated computer-drawn districting plans"); James U. Blacksher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?* 34 Hastings L.J. 1, 64 n.330 (1982) (arguing 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"). Plaintiffs thus blink reality in declaring that *Gingles* eschews a race-neutral baseline.

Plaintiffs assert that *Bartlett* requires racially gerrymandered illustrative maps because otherwise claimants could not satisfy *Bartlett*'s majority-minority threshold. *See, e.g.*, Milligan Br.21; Caster Br.31.

But *Bartlett* embraced a "majority-minority rule" not to greenlight racial gerrymandering but to "*avoid*[] serious constitutional concerns under the Equal Protection Clause." *Bartlett*, 556 U.S. at 21 (emphasis added). The rule limits the reach of §2 as applied to redistricting, and confirms that *Gingles* requires a threshold showing that "the minority population in the potential election district is greater than 50 percent." *Id.* at 19-20. But nothing in *Bartlett* suggests that the "potential election district" may itself be drawn through a process in which race predominates over neutral districting criteria.

Plaintiffs' position would not only compel States to draw race-based lines in every redistricting, it would inject into §2 claims the same administrability flaws that plague political gerrymandering claims. As the Court explained in *Vieth v. Jubelirer*, because "partisan districting is a lawful and common practice … there is almost always room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation," in turn rendering partisan-gerrymandering claims judicially unmanageable. 541 U.S. 267, 286 (2004). "[N]ot so for claims of racial gerrymandering" because "the purpose of segregating voters on the basis of race is not a lawful one, and is much more rarely encountered." *Id.* But if §2 compels some inarticulable amount of racial "prioritiz[ation]" to which non-racial objectives must "yield," MSA214, then the line between lawful and unlawful racial districting becomes as indiscernible as the line between lawful and unlawful political districting.

It is not hard to see the administrability problems of allowing plaintiffs to satisfy *Gingles* with maps

drawn based on racial considerations. How much can race be used? What if a map drawn to hit a 50% racial target can satisfy some, but not all, race-neutral districting criteria? How much compactness or core retention can be traded off to reach a 50% minority population? The uncertainty and circularity of a rule that would allow racially gerrymandered maps to satisfy the first *Gingles* precondition would raise exactly the same types of administrability concerns that apply to partisan gerrymandering claims. Plaintiffs' and the United States' approach to *Gingles* fails to "meet[] the need for a limited and precise standard that is judicially discernible and manageable." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2502 (2019).

2. If the Court concludes, as it should, that the first *Gingles* precondition requires a plaintiff to offer race-neutral illustrative maps, this case is over; there is no question Plaintiffs' illustrative plans "prioritize[d] race" over traditional districting criteria. MSA214. The district court explicitly found as much. *Id.* Plaintiffs' experts treated "race" itself as "a traditional redistricting principle," Tr. 478-79; *see also* JA678 (creating two majority-black districts was "a non-negotiable principle"), and thus found themselves free to subordinate race-neutral principles to race because "tradeoffs between traditional districting criteria are necessary." MSA159. One expert even conceded that she relied on race to draw lines and split precincts—"but really," she explained, "only to make sure that [she] was creating two districts over 50 percent." JA630. This is like an archer saying she did not consider the bullseye except to ensure she was aiming

at it. Traditional non-racial "considerations" undoubtedly "yield[ed]" to race. MSA214.

Accordingly, contra the *Caster* Plaintiffs, this case is just "like *Cooper*, where the mapdrawer admitted that he 'could not respect' certain principles because race was 'more important.'" Caster Br.33 (quoting *Cooper v. Harris*, 137 S. Ct. 1455, 1469 (2017)). Certain principles had to "yield" to or "tradeoff" with race because race was "more important."

Plaintiffs parrot the district court's error that race did not predominate in their plans because they didn't "prioritize[] race above everything else." Milligan Br.46 (quoting MSA214); Caster Br.33 (same). Under that reasoning, their plans could have hit racial targets by sacrificing population equality or contiguity, as long as not "everything else" took a back seat to race. That view of "predominance" is foreign to this Court's jurisprudence. *See Cooper*, 137 S. Ct at 1469 (finding predominance though mapdrawer only "sometimes could not respect county or precinct lines" when creating "a majority-minority district"). When such legal errors "infect a so-called mixed finding of law and fact," the decision is "predicated on a misunderstanding of the governing rule of law" and is thus reversible without deference to the district court. *Gingles*, 478 U.S. at 79.

C. Plaintiffs' arguments about "communities of interest" and compactness cannot justify their race-based illustrative maps.

Plaintiffs assert that their racially gerrymandered illustrative plans "take into account traditional

districting principles such as maintaining communities of interest and traditional boundaries," *LULAC*, 548 U.S. at 433, because the district court found their mapdrawers "'highly credible' and their methods 'highly reliable.'" Caster Br.20 (quoting MSA156-60); *see also* Milligan Br.14. But there is no dispute that Plaintiffs' plans do not maintain the community of interest in the Gulf; the traditional boundaries of Mobile County (which the State has never split); or the cores of preexisting districts (an express Guidelines principle that all agreed was a priority of the 2021 Plan). Nor is there a dispute that the sprawling, racially sorted Districts 1 and 2 proposed by Plaintiffs would be less compact than the enacted districts they would replace. Even so, the district court found that Plaintiffs' illustrative plans satisfied the first *Gingles* precondition.

The district court's faulty reasoning underscores the indeterminacy of its approach. Consider first that Plaintiffs' plans do not maintain "the Gulf Coast community of interest." MSA180. The district court excused this flaw because the plans "respect" a *different* community of interest "at least as much as the Plan does." MSA178. But it is difficult to imagine a more political (and less justiciable) question than which "communities of interest" the body politic ought to preference; weighing them against each other "is no business of the courts." *Banerian v. Benson*, No. 1:22-cv-54, 2022 WL 676001, at *3 (W.D. Mich. Mar. 4, 2022) (Kethledge, J.). Plaintiffs correctly note that "[r]edistricting inevitably requires tradeoffs among many overlapping communities of interest." Caster Br.37. But the Constitution does not "afford [federal

courts] any basis to review" the Alabama Legislature's "trade-offs between 'communities of interest,'" which "involve legislative judgments, not judicial ones." *Banerian*, 2022 WL 676001, at *3. "Any judicial decision on what is 'fair' in this context would be an 'unmoored determination' of the sort characteristic of a political question beyond the competence of the federal courts." *Rucho*, 139 S. Ct. at 2500. Thus, it cannot be that Plaintiffs' illustrative plans "maintain[] communities of interest," *LULAC*, 548 U.S. at 433, by trading one for another.

Similarly, though "preserving the cores of prior districts" is a "legitimate objective[]," *Karcher v. Daggett*, 462 U.S. 725, 740 (1983), the district court discarded it because taking that principle into account would purportedly "immuniz[e] states from liability under Section Two so long as they have a longstanding, well-established map, even in the face of a significant demographic shift." MSA182. But the court identified no "significant demographic shift" that would result in a springing §2 violation in which Alabama's longstanding districting scheme suddenly became unlawful. And, in all events, "a challenged rule['s] … long pedigree" should militate in its favor. *Brnovich*, 141 S. Ct. at 2339.

Finally, although racial tradeoffs caused Plaintiffs' illustrative versions of Districts 1 and 2 to sprawl across the State, the districts were good enough for the district court because they "were comparable to or better than the least compact districts in both the Plan and the 2011 Congressional map." MSA167; *see also* US Br.16; Milligan Br.47. But this is an apples-to-oranges comparison. The State's least compact

district, District 4, is large because it lacks any of the State's most populous counties, meaning it has to stretch farther to cover roughly 717,000 people. Enacted District 1, on the other hand, has two of the four most populous counties in the State—Mobile (pop. 414,809) and Baldwin (pop. 231,767)[3]—tucked away together in the State's southwest corner. *See* SJA47. No district anchored by such densely populated counties would naturally stretch as far as Plaintiffs' districts do. The district court's suggestion that the racially gerrymandered illustrative plans have comparable compactness to the enacted Plan does not withstand scrutiny.

D. *Stare decisis* is irrelevant to the resolution of this case.

No one has asked "the Court to rewrite the *Gingles* framework." Milligan Br.41-42; *see also* Caster Br.43-44; US Br.14 (misdescribing Alabama's arguments as asking Court to "jettison the [*Gingles*] standard"). For starters, Plaintiffs' *stare decisis* arguments regarding *Gingles* and its preconditions are irrelevant to assessing the meaning of the statute—that is, whether districts have been drawn "on account of race" in a way that makes them "not equally open" for all. Again, the *Gingles* preconditions have always been understood as applying in addition to—*not* in lieu of—the underlying statutory elements of §2. *See supra* §II.A.

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[3] U.S. Census Bureau, Alabama: 2020 Census, Aug. 25, 2021, https://www.census.gov/library/stories/state-by-state/alabama-population-change-between-census-decade.html.

What's more, despite their appeals to *stare decisis*, Plaintiffs fail identify a single instance in which this Court applied §2 to invalidate a neutrally drawn single-member-districting plan for its failure to create an additional race-based district. Rather, much of the Court's §2 jurisprudence in the single-member-districting context has involved the Court *rejecting* attempts to use §2 to justify additional race-based districts. *See, e.g.*, *Vera*, 517 U.S. at 976-82 (plurality op.); *Shaw v. Hunt*, 517 U.S. 899, 915-18 (1996) (*Shaw II*); *Cooper*, 137 S. Ct. at 1469-72; *Abbott v. Perez*, 138 S. Ct. 2305, 2334-35 (2018); *Wis. Legislature*, 142 S. Ct. at 1249-51. *Stare decisis* is no reason for reading §2 to require "that States engage in presumptively unconstitutional race-based districting." *Miller*, 515 U.S. at 927.

Plaintiffs' *stare decisis* arguments also ignore the ongoing confusion created by *Gingles*'s extension to single-member districts. Remarkably, Plaintiffs assert that *Gingles* is "straightforward" and that "courts have correctly applied it without difficulty for decades." Milligan Br.43; *see* Caster Br.52. To the contrary, the "Court's case law in this area is notoriously unclear and confusing." *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring). "*Gingles* and its progeny have engendered considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim." *Id.* at 883 (Roberts, C.J., dissenting); *see Gingles*, 478 U.S. at 97 (O'Connor, J., concurring in judgment) (characterizing majority as "inconsistent with … §2's disclaimer of a right to proportional representation"). There is little precedential weight to be placed on a decision that, when

applied by lower courts to single-member-districting schemes, almost always results in reversal. *Compare, e.g.*, *Growe v. Emison*, 507 U.S. 25, 41 (1993); *Voinovich*, 507 U.S. at 162; *De Grandy*, 512 U.S. at 1017; *LULAC*, 548 U.S. at 425-44; *Bartlett*, 556 U.S. 1; *Abbott*, 138 S. Ct. at 2330-34; *Wis. Legislature*, 142 S. Ct. at 1250-51, *with LULAC*, 548 U.S. at 444-46.

This confusion is unsurprising. Since *Gingles* expanded from multimember-districting claims to single-member-districting claims, courts have been forced to analyze specific district *lines* rather than the general *form* of an "electoral mechanism," *Gingles*, 478 U.S. at 71. Unlike multimember districts, a single-member district cannot be further subdivided; it can only be redrawn. *Cf. id.* at 51 n.17. And notably, *Gingles* itself acknowledged it had "no occasion to consider whether the standards [it] appl[ied] to respondents' claim" regarding "multimember districts" were "fully pertinent to other sorts of vote dilution claims, such as a claim alleging the splitting of a large and geographically cohesive minority between two or more … single-member districts." *Id.* at 46 n.12.

At bottom, *Gingles* arose in the materially different context of multimember districting; expressly reserved judgment on whether its holding would apply to other types of redistricting challenges; has long been criticized for its unclear standards; and has led to serious countervailing constitutional concerns. This Court should provide much-needed guidance about the scope of §2 and *Gingles*'s continued viability, but

stare decisis is irrelevant to the disposition of this case.[4]

III. Plaintiffs' New Attempt To Decouple Remedy From Their Theory Of Liability Is Unavailing.

Perhaps realizing their demand for a racially gerrymandered map is difficult to square with a statute that "prevent[s] discrimination," *Ashcroft*, 539 U.S. at 490, Plaintiffs now distance themselves from the illustrative maps they proffered by disclaiming any relation between their theory of liability and a remedy. Backtracking from their claims below,[5] Plaintiffs now contend Alabama has no obligation to draw a second majority-black district. *See* Milligan Br.44; Caster Br.26. And thus, Plaintiffs insist, there is no problem with establishing liability through illustrative maps drawn to hit racial targets because the State will be relieved of racial target practice on the backend when drawing a remedial map. This shell game merely underscores the weakness of Plaintiffs' position.

According to Plaintiffs, they may prove §2 liability with racially gerrymandered illustrative maps that a State could never implement. *Compare Hays v. Louisiana*, 936 F. Supp. 360, 369 (W.D. La. 1996) (rejecting Louisiana's congressional districting plan with two

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[4] For similar reasons, the Court could finally conclude that stretching §2 to cover single-member-districting schemes has proved unadministrable such that there is no reason to continue misreading the statute's text. *See* Merrill Br.50-53.

[5] *See Caster*, ECF 3 at 31 (prayer for relief requesting "a second majority-Black congressional district"); *Milligan*, ECF 1 at 53 ("two majority-minority districts").

majority-black districts because "by demanding a maximization of majority-minority districts the Justice Department impermissibly encouraged—nay, mandated—racial gerrymandering"), *with Robinson v. Ardoin*, No. 22-cv-211, 2022 WL 2012389, at *28 (M.D. La. June 6, 2022) (rejecting Louisiana's congressional districting plan under §2 for "fail[ing] to create a second majority-Black district"), *cert. granted before judgment sub nom. Ardoin v. Robinson*, 142 S. Ct. 2892 (2022). Even though the State's decision not to implement Plaintiffs' illustrative maps must, on Plaintiffs' theory, give rise to an inference of racial discrimination (or else what *prima facie* showing have Plaintiffs made?), apparently the State is not supposed to take these maps seriously. After all, "plaintiffs' plans are not the same as state-enacted remedies." Milligan Br.44. According to Plaintiffs, the State need not even adopt a majority-black district. It can simply "remedy the §2 violation here with majority-white crossover districts." Milligan Br.22 (emphasis deleted); *id.* at 44; Caster Br.53-54; *see also* US Br.27.

That purported concession does not alleviate the constitutional flaws of Plaintiffs' claims; it makes them worse. As this Court has emphasized, "[i]f §2 were interpreted to require crossover districts throughout the Nation, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *Bartlett*, 556 U.S. at 21 (internal quotation marks omitted).

Plaintiffs attempt to escape this reality by claiming that "no racial target applies to remedial districts." Caster Br.55. But under Plaintiffs' view, the

remedial crossover districts would still need to ensure the likely election of the so-called "preferred representatives" of black voters. *Id.* The only difference is that a crossover district would require even *more* complex race-based calculus to ensure it performs as intended. Hitting this moving racial target entails "predicting many political variables and tying them to race-based assumptions." *Bartlett*, 556 U.S. at 17. Accordingly, for legislatures and local governments to know whether §2 might be triggered, they would need to first draw racially gerrymandered majority-minority districts (to see if a plaintiff might satisfy *Gingles*) and then construct extraordinarily precise gerrymanders to produce just-right majority-white crossover districts. This new tack only exacerbates the constitutional flaws of Plaintiffs' position. *See, e.g.*, *Bethune-Hill*, 137 S. Ct. at 798.

Plaintiffs and the United States compound these problems by endorsing the "Singleton Plan" as "one option" to remedy the State's alleged cracking of the Black Belt. Milligan Br.44-45; US Br.27. Though that plan purports to create two "opportunity districts," those districts would not comprise the supposed "community of interest" spanning "Mobile, Montgomery, and the larger Black Belt"—to the contrary, the Singleton Plan makes no effort to rescue black Mobilians from being "submerge[d] … into districts where they are consistently outvoted," Caster Br.11, 25. It instead creates an "opportunity district" by combining much of the Black Belt with Tuscaloosa County. *See* US Br.11a. But even if Plaintiffs' theory of harm to black Mobilians were valid, the State could not remedy it "by creating an entirely new district" benefiting black

Alabamians in "different communities of interest." *LULAC*, 548 U.S. at 441; *see also id.* at 437 ("[T]he right to an undiluted vote does not belong to the 'minority as a group,' but rather to 'its individual members.'"). That Plaintiffs and the United States would endorse a remedy that "fail[s] to account for the differences between people of the same race" further highlights the constitutional problems with their argument. *Id.* at 434.

This Court "has long assumed" that efforts to comply with §2 are a "compelling interest" that can satisfy strict scrutiny, *Cooper*, 137 S. Ct. at 1464, but it is doubtful a State could avail itself of that assumption when racially calibrating crossover districts. Because the VRA never *requires* the creation of racially gerrymandered crossover districts, *see Bartlett*, 556 U.S. at 15-17, a State may not point to the VRA as a "compelling interest" justifying their imposition, *contra, e.g.*, Caster Br.56; US Br.26. Plaintiffs cannot rehabilitate their radical theory of §2 liability with an even more radical theory of §2 remedy that stacks one racial gerrymander atop another.

IV. Section 2 Cannot Constitutionally Require States To Replace Race-Neutral Redistricting Plans With Racial Gerrymanders.

Plaintiffs repeatedly misstate the constitutional concerns in this case. They say Alabama "assert[s] that any race-consciousness in redistricting is unconstitutional." Milligan Br.41; *see also, e.g.*, *id.* at 52; Caster Br.54. The United States (at 31) similarly misstates Alabama's argument: "that Section 2 as applied

to single-member districting violates the Constitution."

The question here is emphatically *not* whether legislators may ever be conscious of race in redistricting, or whether §2 violates the Constitution in all applications. The question is instead whether the VRA can, as Plaintiffs argue, constitutionally *require* that race play a decisive role in *every* redistricting. In particular: Where, as here, a State has chosen to redistrict based on race-neutral traditional districting principles, can §2 constitutionally mandate that the State go back to the drawing board and adjust district lines solely to hit a certain racial target? No. A statute that requires States to substitute neutrally drawn maps with racial gerrymanders would not satisfy strict scrutiny and would exceed any enforcement authority granted by the Reconstruction Amendments.

A. No "compelling interest" justifies Plaintiffs' proposed racial gerrymanders.

Racial gerrymanders are not *per se* equal-protection violations. But they "can be sustained" only where they are "narrowly tailored to serve a compelling governmental interest." *Miller*, 515 U.S. at 904.

This makes sense. Any time the government intentionally draws district lines to help one racial group elect its so-called "candidate of choice," it will necessarily diminish the electoral prospects of voters of other races (as well as voters of the preferred race who prefer different candidates). *Accord, e.g.*, *Gonzalez*, 535 F.3d at 598 ("There is a serious problem with any proposal to employ black or Asian or white citizens of some other ethnic background as 'fill' in

districts carefully drawn to ensure three 70%-Latino wards…."). Such racial engineering raises profound constitutional harms, for "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class," *Miller*, 515 U.S. at 911 (internal quotation marks omitted). Thus, any race-based remedial measures for *redistricting* must target "identified discrimination" in *redistricting*; "generalized" claims of "past discrimination" will not do. *Shaw II*, 517 U.S. at 909-10; *see also, e.g.*, *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (requiring "the most exact connection between justification and [racial] classification").

Plaintiffs fail to show how drawing an additional majority-black district constitutes a "narrowly tailored" remedy for the various harms they allege. And more fundamentally, they fail to demonstrate a harm warranting such drastic remedy in the first place. Plaintiffs' asserted harms are either unfounded, unconnected to redistricting, or both. They do not come close to justifying a race-based redraw of Alabama's legislatively enacted districts.

For example, Plaintiffs assert that white Alabamians "have discriminated against [black Alabamians] for centuries." Caster Br.25; *see also id.* at 47 (accusing Gulf Coast population of having "heritage in slaveholding European colonies") (cleaned up). Of course, individual people cannot do anything "for centuries"; Plaintiffs' narrative reduces individual Alabamians to members of competing racial monoliths and presumes that broad-brush claims about past discrimination

can justify current laws that "favor[] one [race] over another." *Gonzalez*, 535 F.3d at 598. "[B]ut under our Constitution there can be no such thing as either a creditor or a debtor race." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part).

Plaintiffs further assert that HB1 "perpetuates … discrimination" by resembling the last decade's congressional map. Milligan Br.36; *see also* Caster Br.25. This argument ignores that Alabama's current congressional plan is a product of a 1992 federal court order, *see Wesch v. Hunt*, 785 F. Supp. 1491 (S.D. Ala. 1992), *aff'd sub nom.*, *Camp v. Wesch*, 504 U.S. 902 (1992), and subsequent plans that were precleared by the Department of Justice under §5 of the VRA. Alabama has retained the general arrangement of these districts without incident. *See* Merrill Br.11-12.[6] Enacting a 2021 plan that retains the core of those earlier plans perpetuates court-approved and federally precleared plans, not discrimination.

Plaintiffs also insinuate that Alabama's court-drawn 1992 congressional map is a product of racial animus because the plan was endorsed by State Senator Larry Dixon, who nearly 20 years *later* would "plot[] to depress Black turnout." Milligan Br.9. That is, Plaintiffs suggest that one state legislator's conduct from decades in the future somehow tainted his endorsement of a map in 1992, and that

[6] Indeed, the congressional plan following the 2000 census was sponsored by Senator Hank Sanders, a prominent black Democrat, and enacted by a majority-Democrat legislature. *See* Tr. 63:3-64:4, 1217:17-24.

discriminatory taint then carried forward another thirty years to the present. This back-to-the-future theory of "cat's paw" causation "has no application to legislative bodies," *Brnovich*, 141 S. Ct. at 2350, and is self-evidently a poor way to "identif[y] discrimination," *Shaw II*, 517 U.S. at 909.

Plaintiffs offer additional, scattershot theories of discrimination, but, as explained below, none supplies a "compelling governmental interest" that can justify Plaintiffs' demand for race-based districting. *Miller*, 515 U.S. at 904.

1. HB1 does not "crack" the Black Belt.

The *Milligan* Plaintiffs contend that the enacted Plan perpetuates discrimination because "[i]n five of the six redistricting cycles from 1960 onward, Alabama has violated either the VRA or the Constitution by cracking the Black Belt." Milligan Br.38. But no evidence, much less any factual finding, bears this out.

Plaintiffs' primary "evidence" of supposed cracking comes not from the record, but from a string of miscited cases, *id.* at 7, that do not remotely demonstrate a half-century-long discriminatory "cracking" of black communities. In *Burton*, for instance, the court lauded the Alabama Legislature for "provid[ing] an apportionment plan that is fair to all the people of Alabama." *Burton v. Hobbie*, 561 F. Supp. 1029, 1030 (M.D. Ala. 1983). In other cases, courts held that Alabama's attempts to *comply* with §5 of the VRA had resulted in unconstitutional racial gerrymanders. *Ala. Legis. Black Caucus v. Alabama*, 231 F. Supp. 3d 1026, 1033-34 (M.D. Ala 2017). Attempting to comply with federal voting-rights law is a far cry from

"'unremitting and ingenious defiance of the Constitution' to exclude Black Americans." Caster Br.4.

Likewise, Plaintiffs' repeated reliance on *United States v. McGregor*, 824 F. Supp. 2d 1339 (M.D. Ala. 2011), is misplaced. *See* Milligan Br.7, 38; Caster Br.1, 10, 12. *McGregor* is not a voting-rights case—it addresses whether "the government ha[d] proven … requisites for the admissibility" of statements at trial. 824 F. Supp. 2d at 1343. And while the court's analysis relied in part on grotesque statements by state legislators, those cherry-picked quotations do not demonstrate that HB1 "cracks" the Black Belt.

Finally, the *Milligan* Plaintiffs allege that "[s]ince 1875, Alabama has cracked the Black Belt across four or more districts." Milligan Br.7. But Alabama's current plan places the 18 Black Belt counties into just *three* districts—just like each of Plaintiffs' illustrative plans. Merrill Br.60 n.11.[7] And these 18 counties have been divided among at least three congressional districts since before the Civil War,[8] which profoundly undermines any suggestion that the 2021 Plan nefariously "cracks" a region that naturally belongs in fewer districts.

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[7] Thus, the district court never "found that Plaintiffs' illustrative plans respect the Black Belt … while HB1 does not." Milligan Br.32. Rather, the court found only that Plaintiffs' illustrative plans "respect [the Black Belt] at least as much as [HB1] does." MSA178.

[8] *See Singleton v. Merrill*, No. 2:21-cv-1291 (N.D. Ala.), ECF 57-7 at 6-43.

2. Plaintiffs' contrived "community of interest" does not support an inference of discrimination.

The *Caster* Plaintiffs purport to identify discrimination by highlighting the plight of "the community of interest among residents of Mobile, Montgomery, and the greater Black Belt." Caster Br.18, 36. They assert that the district court "found strong ties among Black residents in this area along several dimensions." *Id.* at 36 (citing MSA173-81).

The primary problem with this contention is that this supposed "community of interest" does not exist. The district court concluded only that the Black Belt—*not* "Mobile, Montgomery, *and* the greater Black Belt"—constituted a community of interest. *See* MSA173-81. That such far-apart locales could together comprise a singular community of interest would surely surprise named plaintiff Dr. Marcus Caster, who lives just north of Mobile and testified that he "do[es]n't know anything about" Alabamians living in the eastern Black Belt counties. JA801. Moreover, "ties among Black residents" are wholly insufficient to constitute the sorts of "*nonracial* communities of interest" legislatures may consider in redistricting. *LULAC*, 548 U.S. at 433 (emphasis added).

The *Caster* Plaintiffs contend that Alabama "recognized this same community," spanning from Mobile to Montgomery, when it drew one of its eight State Board of Education (SBOE) districts containing both locales. Caster Br.36. The comparison fails for at least three reasons. First, there are fewer congressional districts than SBOE districts, meaning the plans

necessarily diverge when deciding which communities can be districted together. Second, and relatedly, the reason for the current SBOE plan is the Legislature's retention of the cores of the 2011 SBOE districts, which themselves were drawn to comply with Section 5 of the VRA. *See Caster*, ECF 76-26 (2001 SBOE map); ECF 48 at 16-17 (showing BVAP for SBOE District 5 following 2000 and 2010 censuses); ECF 80-23 (preclearance submission for 2011 SBOE Plan); Tr. 1753:6-14 (declining population between 2000 and 2010 required "significant changes" to District 5). The resulting 8 SBOE districts in 2021 remained similarly configured to those enacted in 2011, just like Alabama's 7 congressional districts maintained their cores. Third, Plaintiffs ignore the obvious differences between the work of the SBOE and that of Congress. *See* Tr. 1680:14-1682:3 (former SBOE member and congressman explaining significant differences).

The *Milligan* Plaintiffs, for their part, introduce a new theory on appeal—that Alabama "fragment[ed]" the Black Belt and "the majority-Black City of Montgomery … while prioritizing keeping the majority-White people of 'French and Spanish colonial heritage' in Baldwin and Mobile together." Milligan Br.39. In this telling, "Alabama's 'inconsistent treatment' of Black and White communities" is evidence of a §2 violation. *Id*.

No evidence supports Plaintiffs' caricature of the Gulf as a "white" community of interest. As the *Milligan* Plaintiffs themselves recount elsewhere, "regardless of race, people in Mobile County and the Black Belt work at and benefit from Mobile's port." Milligan Br.34-35; *accord* Coastal Alabama Partnership

Amicus Br.4 ("The people of this community share those interests regardless of their partisan political affiliations or the color of their skin."). And there is nothing "inconsistent" with keeping the two adjacent Gulf counties together in a compact district rather than splitting them (and Mobile County) to form a sprawling district stretching from the southwest corner of the State up to Montgomery before dipping southeast again toward the Georgia border. Finally, the reason the City of Montgomery is split is to preserve the core of court-ordered District 7. No similar interest warrants splitting Mobile County for the first time in the State's history. Plaintiffs' community-of-interest arguments fail to identify discrimination sufficient to justify a race-based §2 remedy.

3. Racially polarized voting is not legally actionable.

Plaintiffs and the United States argue that any constitutional concerns here are minimal because *Gingles* "limits Section 2's race-conscious remedies to circumstances where a plaintiff has proved that pervasive racial politics would otherwise deny minority voters equal electoral opportunities"—a necessary "response to the unfortunate reality of continued racial bloc voting." US Br.10; *see* Caster Br.58-59. But racial bloc voting reveals nothing about "racial[] motivat[ion]," Caster Br.58, and in no way approximates "deni[al] or abridg[ment] … by any State" of "the right … to vote" "on account of race," U.S. Const. amend. XV §1.

Racially polarized voting is not state action and thus implicates neither §2 nor the Reconstruction

Amendments. *See, e.g.*, *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) ("[S]tate action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'"). Were it otherwise, even statewide senate or gubernatorial elections would become suspect if voters of different races tended to prefer different candidates.[9]

Even granting the unsupported assumption that individual voting practices are "imposed or applied by any State," 52 U.S.C. §10301(a), racial voting patterns are a poor proxy for racial discrimination. According to Plaintiffs' own expert, analysis of racial bloc voting is "never getting at intent" and "provides no evidence about why people vote the way they do." Tr. 762:20-763:1. And experts' inability to define racial polarization further compounds the phenomenon's evidentiary uselessness. Tr. 734:3-5. (Plaintiffs' expert agreeing that "there really is no bright line for racially-polarized voting"); *see also* Christopher S. Elmendorf et al., *Racially Polarized Voting*, 83 U. Chi. L. Rev. 587, 681 (2016) (anti-discrimination law based on racially polarized voting "cannot be made constraining without also becoming absurd").

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[9] Moreover, political parties' attempts to appeal to minority voters can increase racially polarized voting. *See, e.g.*, UCLA Social Scientists Amicus Br.13 (noting "Democratic political elites make campaign appeals to Latinos"); Quint Forgey & Myah Ward, *Biden apologizes for controversial 'you ain't black' comment*, Politico, May 22, 2020, https://www.politico.com/news/2020/05/22/joe-biden-breakfast-club-interview-274490.

And even if racially polarized voting constituted a legally cognizable harm, the response of divvying up districts by race would not be an appropriate "remedy" at all—much less a "narrowly tailored" one. *Miller*, 515 U.S. at 904. To the contrary, responding to racially polarized voting with more racially gerrymandered districts would only "balkanize us into competing racial factions" and "carry us further from the goal of a political system in which race no longer matters." *Id.* at 912.

4. The Senate Factors cannot show discrimination in districting.

Finally, Plaintiffs reference various Senate Factors purporting to show racial disparities in "employment, healthcare, utilities, public transportation, affordable childcare, and housing." Caster Br.11, 61; *see also* Milligan Br.39. They claim these "effects of discrimination" are "indicative of racially exclusionary political systems." Caster Br.61. Like their other theories of harm, Plaintiffs' reliance on the Senate Factors fails to identify an interest compelling enough to justify race-based remedies.

"While the States … may take remedial action when they possess evidence of past or present discrimination, they must identify that discrimination, public or private, *with some specificity* before they may use race-conscious relief." *Shaw II*, 517 U.S. at 909 (emphasis added) (internal quotation marks omitted). Plaintiffs allege racial disparities in "the unemployment rate," "the child poverty rate," "median household income," "health insurance," and "food stamps." MSA196. They even contend that congressional

representatives' decisions not to vote for the Build Back Better Act or a Medicaid expansion support their §2 claim. JA771-75.

Plaintiffs fail to link these disparities (and political decisions) to any identified discrimination. At most, this evidence could be consistent with "generalized assertion[s] of past discrimination," but such claims are "not adequate" because they "provide[] no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Shaw II*, 517 U.S. at 909. Indeed, "'[r]elief' for such an ill-defined wrong could extend until the percentage of [majority-minority districts] mirrored the percentage of minorities in the population as a whole." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989). And "it would leave our equal protection jurisprudence at the mercy of elected government officials evaluating the evanescent views of a handful of social scientists." *Parents Involved*, 551 U.S. at 766 (Thomas, J., concurring). Because "alleviat[ing] the effects of societal discrimination is not a compelling interest," *Shaw II*, 517 U.S. at 909-10, Plaintiffs' reliance on racial disparities under the amorphous Senate Factors cannot justify race-based redistricting.

B. A statute that requires States to replace neutrally drawn plans with racially gerrymandered plans would exceed Congress's constitutional authority.

Plaintiffs' interpretation of §2 drags the statute beyond its Fifteenth Amendment moorings. To be sure, "Congress may enforce the Fifteenth Amendment by legislation that extends beyond the

Amendment's text so long as the 'end [is] legitimate' and the 'means … are appropriate.'" Milligan Br.56 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (in turn quoting *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819)). "But this case is about a part of the sentence that [Plaintiffs] do[] not emphasize—the part that asks whether a legislative means is 'consist[ent] with the letter and spirit of the constitution.'" *Shelby County v. Holder*, 570 U.S. 529, 555 (2013) (quoting *McCulloch*, *supra*).

Prophylactic legislation must be supported "by a relevant history and pattern of constitutional violations." *Tennessee v. Lane*, 541 U.S. 509, 521 (2004). No evidence before the 97th Congress would have supported a statute that required State and local governments nationwide to replace race-neutral redistricting plans with racially gerrymandered plans designed to guarantee race-based electoral results. *See, e.g.*, S. Rep. No. 97-417, at 171 (1982) ("[T]he 420-page, 1981 report of the Commission on voting rights violations contained no information whatsoever about conditions outside the covered jurisdictions."). Section 2 does not support a sweeping prophylaxis that presumes discrimination—and requires States to favor some racial groups over others—any time race-neutral districting does not guarantee optimal outcomes for favored racial groups.

Plaintiffs' revisionist interpretation would "strike down an unidentified (and unidentifiable) number of election laws" while leaving these laws' "connection … with actual violations of the Fifteenth Amendment … entirely to speculation." S. Rep. No. 97-417, at 172. Worse still, it would replace laws that do not

discriminate on account of race with laws that do. The most straightforward way to resolve this case is to hold that the statute Congress enacted does not encompass Plaintiffs' sweeping theory of liability. *See supra* §I. But if the statute actually means what Plaintiffs claim, it would far exceed Congress's enforcement power under the Fifteenth Amendment.

CONCLUSION

The Court should reverse the decision below.

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