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 Writ of Certiorari Before Judgment to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES AND RESPONDENTS

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QUESTION PRESENTED

Whether the district court correctly found a violation of § 2 of the Voting Rights Act, 52 U.S.C. § 10301.

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INTEREST OF *AMICUS CURIAE*

The American Bar Association (ABA) respectfully submits this brief supporting Appellees and Respondents.[1] The ABA is the largest voluntary professional membership organization and leading organization of legal professionals in the United States. Its members span all fifty states and include attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public-defender offices, as well as judges, legislators, law professors and law students.[2]

As the legal profession's national voice, the ABA has a special responsibility for ensuring protection of constitutional rights, fostering the rule of law, and promoting full and equal access to our nation's electoral processes. To that end, the ABA has adopted numerous policies opposing discrimination against minorities and supporting the Voting Rights Act (VRA).

In 1981, for example, the ABA's Standing Committee on Election Law held a symposium during the congressional hearings on VRA reauthorization. In

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[1] Letters from all parties providing blanket consent for the filing of amicus briefs in these cases are on file with the Clerk's office. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. And no inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief.

its report recommending reauthorization, the Committee noted that the Act has "not only enhanced the political posture of minority groups, but it has also advanced the very ideals that make our country's governmental system unique in political history." *ABA 1981 Report with Recommendation* #105. In 2005, the ABA reiterated its commitment to the VRA by adopting a policy supporting the 25-year extension of the Act. *ABA 2005 Report with Recommendation* #108. The ABA reaffirmed that policy in 2006 during the congressional debates on VRA reauthorization. *ABA 2006 Report with Recommendation.* And following the Court's decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), the ABA urged Congress to legislate a coverage formula for § 5 preclearance or enact other remedial amendments in order to, *inter alia*, strengthen the litigation remedy available under § 2. *ABA 2013 Report with Recommendation.* In addition, the ABA has participated as *amicus curiae* in cases before this Court, arguing in favor of the VRA's constitutionality. *See Shelby County*, 570 U.S. 529; *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

Given its long support of minority voting rights and the VRA, the ABA has a special interest in this case. Racial discrimination still exists in the electoral process. And § 2 provides a vital means of ensuring equal minority voting participation. Appellants'/petitioners' (hereinafter "Alabama") proposed framework here would undermine § 2's core protections and destabilize voting-rights law—results antithetical to the interests of the ABA and its members.

INTRODUCTION

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live," because "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Recognizing that racial discrimination was thwarting the equal opportunity to exercise this precious right, Congress passed the VRA. The VRA's core protections, § 2 and § 5, countered discriminatory voting practices and thus "effectuate[d] this Nation's commitment to confront its conscience and fulfill the guarantee of the Constitution with respect to equality in voting." *Bush v. Vera*, 517 U.S. 952, 992 (1996) (O'Connor, J., concurring).

But especially after this Court's decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), invalidating § 5's coverage formula, § 2 stands as a vital safeguard against the systematic dilution of minority representation. That safeguard is critical because "racial discrimination and racially polarized voting are not ancient history." *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009); *see* Elmendorf & Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 Colum. L. Rev. 2143, 2146 (2015) (documenting post-*Shelby County* districting maneuvers that would reduce minority representation).

Alabama's purportedly race-blind approach threatens to eviscerate § 2's protection against minority vote dilution. One recent study shows that adopting Alabama's position could allow states to dismantle substantial numbers of majority-minority and minority-opportunity districts, and would also

likely mean that "most section 2 suits seeking the formation of new opportunity districts would fail." Chen & Stephanopoulos, *The Race-Blind Future of Voting Rights,* 130 Yale L.J. 862, 922-23 (2021). The result would be a major restriction of minority voting rights nationwide.

This result would run counter to the ABA's longstanding interest in equal electoral opportunity. It would also undermine the ABA's core value of promoting democracy and the rule of law. A basic tenet of our democracy is that all individuals have an equal voice in electing those who enact and enforce the laws governing our conduct. For decades, the VRA has ensured that all Americans—regardless of race—will have that equal voice. But adopting Alabama's position in this case will result in the denial of an equal voice to large numbers of Americans. That denial will both infringe individual rights and create systemic risks for our democracy. As elaborated below, the ABA urges the Court to avoid this result and reaffirm its longstanding interpretation of § 2, which protects representational rights while respecting legitimate state interests.

SUMMARY OF ARGUMENT

Section 2 is a key means of ensuring that all Americans have an equal opportunity to exercise the fundamental right to vote. Adopting Alabama's proposed framework in this case would threaten to eviscerate § 2 and thereby undermine equality in voting nationwide. That result would do lasting harm to minority voting rights, democracy, and the rule of law. It would also be enormously disruptive for the ABA's many voting-rights litigators. The following

legal arguments demonstrate that these consequences are unwarranted.

I. A. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), this Court developed a clear framework for proving § 2 vote-dilution claims. Litigants, governments, lower courts, and this Court have all applied that framework over the ensuing 36 years. That framework is sound, and Congress has never altered it.

B. Alabama nonetheless asks this Court to radically transform—and effectively overrule—*Gingles*. Rather than applying the *Gingles* test, Alabama would have courts ask one primary question: Is the state's enacted plan substantially different from a random sample of computer-generated plans drawn according to race-neutral principles?

Alabama's proposed test is flawed. It contradicts basic statutory-interpretation principles by imposing a standard that Congress could not have plausibly envisioned in 1982. It seeks to address nonexistent constitutional problems. It would raise the same administrability concerns that this Court found untenable in the partisan-gerrymandering context only three years ago. And it would require this Court to disregard statutory *stare decisis* principles.

C. In the alternative, Alabama presses an even more radical statutory argument: that § 2 does not apply to single-member districting plans at all. That argument disregards § 2's text, which covers *all* "standard[s], practice[s], or procedure[s]" that "result[] in a denial or abridgement of the right" to vote on account of race. 52 U.S.C. § 10301(a). Alabama's argument likewise disregards § 2's history, which Alabama admits shows that the provision covers

multi-member districting plans. And if § 2's terms cover multi-member districting plans, they must cover single-member districting plans as well. Finally, even if Alabama's argument had merit, statutory *stare decisis* would compel this Court to reject it.

II. Alabama also argues that § 2, as it has long been interpreted, is unconstitutional. Alabama's arguments break with fundamental constitutional principles.

A. Section 2 is a constitutional exercise of Congress's power to enforce the Fifteenth Amendment. That power encompasses "'the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth and Fifteenth Amendments] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Tennessee v. Lane*, 541 U.S. 509, 518 (2004).[3] Section 2 falls well within this authority. Its test closely tracks the factors bearing on a showing of unconstitutional discrimination, and Congress made ample findings supporting the need for § 2.

B. Complying with § 2 does not require governments to violate the Fourteenth Amendment. In most cases, drawing a § 2-compliant map will only require governments to *consider* race—not to make race the predominant districting factor. Accordingly, strict scrutiny will not normally apply. And even in the rare cases where strict scrutiny is triggered, governments can satisfy that standard by showing that

[3] Internal quotation marks are omitted unless otherwise stated.

their use of race is narrowly tailored to the compelling interest of complying with § 2.

ARGUMENT

I. ALABAMA'S NOVEL CONCEPTION OF § 2 IS INCORRECT

In the nearly four decades since this Court decided *Thornburg v. Gingles*, 478 U.S. 30 (1986), litigants, governments, lower courts, and this Court have repeatedly applied its test to assess vote dilution under § 2. Alabama asks the Court to upend *Gingles*, but it offers no persuasive reason for that seismic change in a fundamental guarantee of equal voting rights—whose protection is critical to ensuring fair electoral processes and the rule of law.

A. The *Gingles* Test Has Long Provided A Workable Framework

1. In 1982, Congress amended § 2 to enact the legal standard that still exists today. *See* Pub. L. No. 97-205 (codified at 52 U.S.C. § 10301). Four years later, this Court construed the amended § 2 in *Gingles*, establishing a framework that has governed § 2 vote-dilution claims ever since. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2337 (2021) (*Gingles* is the "seminal § 2 vote-dilution case").

Under *Gingles*, a plaintiff must initially satisfy three "necessary preconditions." 478 U.S. at 50. "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* Second, the minority group must show that it "is politically cohesive." *Id.* at 51. "Third, the minority [group] must be able to demonstrate that

the white majority votes sufficiently as a bloc to enable it … usually to defeat the minority's preferred candidate." *Id.*

If a plaintiff can establish these three preconditions, it must then demonstrate that the "totality of the circumstances" supports a finding of vote dilution. *Id.* at 79. Those circumstances—derived from the 1982 Senate Report—include the jurisdiction's history of voting-related racial discrimination, the extent of racially polarized voting, and minority representation in public office. *See id.* at 36-37, 44-45.

Contrary to Alabama's suggestion, *Gingles* has never functioned as "a strict-liability rule that will invalidate districting plans … that do not add majority-minority districts wherever possible." Br. 65. In fact, this Court recently deemed the argument that "whenever a legislature *can* draw a majority-minority district, it *must* do so" to be "at war with our § 2 jurisprudence." *Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017). Rather than a strict-liability rule, *Gingles* establishes a multi-step test, with additional showings required at each step. *See, e.g.*, *id.* at 1470 (finding "no evidence that a § 2 plaintiff could demonstrate the third *Gingles* prerequisite—effective white-bloc voting"); *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 435, 442, 446 (2006) (finding *Gingles* test satisfied for certain districts but not others); *Johnson v. De Grandy*, 512 U.S. 997, 1013 (1994) (noting "the error of treating the three *Gingles* conditions as exhausting the enquiry required by § 2" and rejecting claim based on totality of circumstances); *Growe v. Emison*, 507 U.S. 25, 41-42 (1993) (rejecting claim for lack of minority political cohesiveness).

2. In the 36 years since *Gingles*, litigants and courts have applied its framework in countless cases. One empirical analysis published 20 years after *Gingles* documents hundreds of cases applying it. *See* Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. Mich. J. L. Reform 643 (2006). That analysis shows that in 169 decisions applying the *Gingles* preconditions, 101 found those preconditions not satisfied and 68 found them satisfied. *Id.* at 660. An updated version of this analysis from 2021 found that 439 § 2 cases have resulted in publicly available opinions since 1982, and that plaintiffs' success rate in vote-dilution cases has hovered between 35%-43% over the last three decades.[4] Similarly, a 2008 study shows that "judges [had] moved sharply away from the view that satisfaction of the *Gingles* preconditions was essentially sufficient to establish liability." Cox & Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. Chi. L. Rev. 1493, 1526 (2008); *see, e.g.*, *Solomon v. Liberty Cnty. Comm'rs*, 221 F.3d 1218, 1235 (11th Cir. 2000) (no § 2 violation even though plaintiffs had proved *Gingles* preconditions). Nothing in the case law suggests that *Gingles* is unworkable or yields one-sided results.

The experience of the voting-rights bar confirms *Gingles*'s administrability. One voting-rights scholar and litigator has explained that "plaintiffs [have long] used the Court's roadmap [in *Gingles*]" to bring

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[4] *See* The Evolution of Section 2: Numbers and Trends, Michigan Law Voting Rights Initiative, https://voting.law.umich.edu/findings/.

§ 2 cases and that litigators have worked effectively "with a range of academic experts" to satisfy the *Gingles* test. Karlan, *Answering Questions, Questioning Answers, and the Roles of Empiricism in the Law of Democracy*, 65 Stan. L. Rev. 1269, 1275 (2013). Another has written that "[l]itigators on both sides and courts have substantial experience in applying the [*Gingles*] Senate Factors over the last three decades." Ho, *Voting Rights Litigation After* Shelby County: *Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. Leg. & Pub. Pol'y 675, 691 (2014). And other voting-rights scholars have emphasized that "[t]he *Gingles* factors provide[] an easily administrable means of implementing Section 2's opportunity-to-elect standard." *See, e.g.*, Crum, *Reconstructing Racially Polarized Voting*, 70 Duke L.J. 261, 285 (2021).

This Court's cases confirm that *Gingles* is workable. This Court has repeatedly applied *Gingles* without apparent difficulty.[5] And it has called *Gingles*'s first precondition—a principal target of Alabama's arguments here, *see* Br. 47-50—an "objective, numerical test" that "provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2." *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009).

When applying that first precondition, litigants and courts proffer and assess illustrative alternative maps seeking to demonstrate that it is possible to

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[5] *See, e.g.*, *Abbott v. Perez*, 138 S. Ct. 2305, 2331-2334 (2018); *Cooper*, 137 S. Ct. at 1470-72; *LULAC*, 548 U.S. at 427-431; *De Grandy*, 512 U.S. at 1008-1016; *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993); *Growe*, 507 U.S. at 40-41.

draw additional majority-minority districts while adhering to traditional districting principles. *See, e.g.*, *Fairley v. Hattiesburg*, 584 F.3d 660, 669 (5th Cir. 2009) ("[T]o establish the first *Gingles* precondition, plaintiffs typically have been required to propose hypothetical redistricting schemes and present them to the district court in the form of illustrative plans").[6] "[N]either the plaintiff nor the court is bound by the precise lines drawn in these illustrative redistricting maps," *Luna*, 291 F. Supp. 3d at 1106, so "the plaintiff's plan need not be an ultimate solution," *Fairley*, 584 F.3d at 671 n.14. Rather, the illustrative plans are used only to "show that a remedy may feasibly be developed." *Luna*, 291 F. Supp. 3d at 1106; *see, e.g.*, *Sanchez v. Colorado*, 97 F.3d 1303, 1314 (10th Cir. 1996).

The experts who draw illustrative plans will invariably consider the racial makeup of the electorate. The very purpose of these plans is to show the possibility of drawing additional majority-minority districts while adhering to traditional districting principles. Given that purpose, the mapmaker will necessarily need to adjust district lines in part based on where minority voters reside. *See Davis*, 139 F.3d at 1426 (race must be "a factor in [plaintiffs' experts'] process of designing" illustrative plans because *Gingles* "*require[s]* plaintiffs to show that it is possible to draw [additional] majority-minority voting districts"); *Clark v. Calhoun Cnty.*, 88 F.3d 1393, 1407 (5th Cir. 1996) ("[The] first *Gin-*

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[6] *See also, e.g.*, *Davis v. Chiles*, 139 F.3d 1414, 1425 (11th Cir. 1998); *Luna v. Cnty. of Kern*, 291 F. Supp. 3d 1088, 1106 (E.D. Cal. 2018).

gles factor … necessarily classifies voters by their race"). This approach is not "racially discriminatory," Br. 50—it simply involves *consideration* of race, along with traditional districting principles, as a means of showing an available remedy. Nor does this approach render *Gingles*'s first precondition "a useless gatekeeper." Br. 68. In many cases, plaintiffs will be unable to draw an additional majority-minority district that also complies with traditional districting principles—for instance, "because of the dispersion of the minority population." *Bush v. Vera*, 517 U.S. 952, 979 (1996). And when that is so, *Gingles*'s first precondition ensures that a claim cannot proceed. *See, e.g.*, *LULAC*, 548 U.S. at 433-35 (rejecting § 2 challenge at *Gingles* step one); *Abrams v. Johnson*, 521 U.S. 74, 91 (1997).

Thus, *Gingles* provides a workable standard for § 2 vote-dilution claims, and litigators and courts are deeply familiar with applying it. That standard has effectively balanced governments' legitimate districting interests with the VRA's core purpose of ensuring equal minority voting rights. In applying the *Gingles* standard, race will inevitably be considered as one among many districting factors. Congress surely knows all this. And yet, in the years since *Gingles*, Congress has never amended § 2 to alter the *Gingles* test. *See, e.g.*, *Canada Packers, Ltd. v. Atchison, Topeka & Sante Fe Ry. Co.*, 385 U.S. 182, 184 (1966) ("[W]e shall not disturb the construction previously given the statute by this Court" where "Congress, which could easily change the rule, has not yet seen fit to intervene"). This Court should "decline to depart from the uniform interpretation of § 2 that has guided federal courts[, litigants,] and

state and local officials for more than [30] years." *Bartlett*, 556 U.S. at 19. And it should reaffirm § 2's status as an essential safeguard of minority voting rights—a cause the ABA has long championed through its steadfast support for the VRA.

B. Alabama's Proposed Transformation Of *Gingles* Is Unsound

Alabama asks the Court to transform—and effectively overrule—*Gingles*. First, at *Gingles* step one, Alabama would have plaintiffs submit "comparator map[s]" that do not account for race. Br. 49; *see id.* at 56 (attacking district court's reliance on "race-based comparator plans"). Second, Alabama would convert the "totality-of-the-circumstances" inquiry into a one-circumstance inquiry that asks whether "the State's enacted map compares favorably to neutrally drawn plans." Br. 43. To prove a § 2 violation under Alabama's new test, plaintiffs would need to submit computer-generated districting simulations and show that the state's enacted plan "substantially deviates from plans that could have been generated through a race-neutral districting process." Br. 44; *see id.* at 54-56.

As explained above, Alabama's test would gut § 2's protection of equal minority voting opportunities and allow states to dismantle large numbers of majority-minority and minority-opportunity districts. For that reason, Alabama's test is at odds with the VRA, racial equality, and democratic values. And Alabama offers no sound legal reason to adopt its test and the harmful consequences it would produce. Rather, Alabama's proposal suffers from several serious legal flaws—each of which should independently compel its rejection.

1. a. Alabama's new test is inconsistent with § 2 as amended by the 1982 Congress. When Congress amended § 2 in 1982, it would not have envisioned courts evaluating § 2 claims based on Alabama's rigid "race-neutral benchmark." Br. 44. To the contrary, Congress amended § 2 "to establish as the relevant legal standard the 'results test,' applied by this Court in *White v. Regester*, 412 U.S. 755 (1973)," *Gingles*, 478 U.S. at 35, which itself looked to certain racial dynamics as part of its "totality of the circumstances" analysis, *White*, 412 U.S. at 769; *see id.* at 766 (examining "the history of official racial discrimination in Texas"). Likewise, "the Senate Report espouses a flexible, fact-intensive test for § 2 violations" that considers racial dynamics in multiple ways. *Gingles*, 478 U.S. at 46. For instance, Congress sought to require plaintiffs to prove "the existence of racial bloc voting," *id.*, and emphasized the relevance of "the history of voting-related discrimination in the State or political subdivision," *id.* at 44. Accordingly, Congress knew that when applying § 2, litigants, governments, and courts would be attuned to race—they would not merely conduct a colorblind comparison of the enacted map to a set of neutrally drawn alternative maps.

Alabama's "race-neutral benchmark" theory appears to stem from two sources that postdate § 2's amendment by decades. First is *Gonzalez v. City of Aurora*, 535 F.3d 594 (7th Cir. 2008), which posited that "computers can use census data" to "generate a hundred or a thousand different maps," and if these randomly generated maps "look something like the actual map" in their racial characteristics, then "[it] could confidently conclude that [the actual] map did

not dilute the effectiveness of the [minority] vote." *Id.* at 599-600. Second is even more recent academic work relying on large computer-simulated samples of maps drawn according to neutral districting principles. "This technique was still in its infancy when [the Seventh Circuit] referred to it in 2008," but it "ripened to full maturity" in "the ensuing decade." Chen & Stephanopoulos, *The Race-Blind Future of Voting Rights*, 130 Yale L.J. 862, 866 (2021).[7] "[T]he most obvious (and perhaps the only possible) way" to satisfy Alabama's test would be through use of these computerized map simulations. *Id.* at 877.

But such computerized map-simulation technology did not exist when Congress amended § 2 in 1982. The theoretical "*possibility* of producing random computer-simulated district maps was first flagged" in the 1960s. *Id.* at 882; *see* Vickrey, *On the Prevention of Gerrymandering*, 76 Pol. Sci. Q. 105, 106-07 (1961). But "[t]he early excitement about randomized redistricting … soon dissipated" because the technology lacked sufficient sophistication. Chen & Stephanopoulos, 130 Yale L.J. at 883. In particular, computer algorithms could not operationalize all relevant districting criteria or "assemble districts from the small building blocks … that real mapmakers tend to use." *Id.* So while creating randomized computer-simulated district maps seemed initially promising, "progress was essentially halted by computing technology that was insufficiently advanced to permit nuanced and helpful guidance for actual redis-

[7] *See also* Altman & McDonald, *The Promise and Perils of Computers in Redistricting*, 5 Duke J. of Const. L. & Pub. Pol'y 69, 80 (2010); Amicus Br. of Eric S. Lander at 31, *Rucho v. Common Cause*, No. 18-422 (U.S. 2019).

tricting problems." Liu et al., *PEAR: A Massively Parallel Evolutionary Computation Approach for Political Redistricting Optimization and Analysis*, 30 Swarm & Evolutionary Computation 78, 79 (2016).

It is only "over the last ten years" that "mapmaking methods have advanced in leaps and bounds," making it "now feasible to generate district maps randomly based on" the necessary neutral criteria. Chen & Stephanopoulos, 130 Yale L.J. at 878; *see id.* at 884-85. And such techniques have been used in voting-rights litigation—almost exclusively in the partisan-gerrymandering context—since only around 2016. *See id.* at 887 (citing cases).

Thus, the computer technology necessary to apply Alabama's test did not exist at the relevant time—when Congress amended the statute in 1982. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019). And the 1982 Congress would not have imposed a test for liability that plaintiffs could not meet. Alabama's proposed test thus impermissibly asks the Court to "invest old statutory terms with new meanings." *Id.*

Gingles did cite commentators who proposed race-neutral benchmarks in their academic work. Br. 49-50 n.10. But those commentators did not *implement* their approaches with sufficient sophistication or reliability to be useful to litigants or courts. *See* Chen & Stephanopoulos, 130 Yale L.J. at 888 & nn.138-39 (noting that these studies were "limited to basic criteria like contiguity and population equality"). In any event, *Gingles* never cited this aspect of the commentators' work; rather, it cited those commentators to support propositions relevant to the

three *Gingles* preconditions—for instance, that "commentators agree that racial bloc voting is a key element of a vote dilution claim." 478 U.S. at 55 (citing Blacksher & Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden, 34 Hastings L.J. 1 (1982); Engstrom & Wildgen, *Pruning Thorns from the Thicket: An Empirical Test of the Existence of Racial Gerrymandering*, 2 Legis. Stud. Q. 465 (1977)).

b. Alabama cannot derive its race-neutral-benchmark approach from statutory text or precedent.

Alabama argues that an "equally open," 52 U.S.C. § 10301(b), redistricting plan is one that "resembles neutrally drawn plans," Br. 43. But nothing in that statutory phrase favors Alabama's approach over *Gingles*'s framework. The Senate Report explains that "the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality,' and on a 'functional view' of the political process." *Gingles*, 478 U.S. at 45 (quoting S. Rep. No. 97-417, at 30 (1982)). *Gingles*'s "flexible, fact-intensive test for § 2 violations," *id.* at 46, therefore tracks Congress's intended meaning of "equally open." In contrast, Alabama's reliance on one dispositive factor would short-circuit a "searching practical evaluation of the 'past and present reality.'" *Id.* at 45.

Alabama also contends (Br. 47-48) that a race-neutral-benchmark test accords with this Court's requirement that plaintiffs show at *Gingles* step one that a minority group is "sufficiently large and compact to constitute a majority in a *reasonably configured* district." *Wis. Legislature v. Wis. Elections*

Comm'n, 142 S. Ct. 1245, 1248 (2022) (emphasis added). Yet this Court has never equated "reasonably configured" with racially neutral. Rather, the Court asks only whether the proposed district accords with "traditional districting principles such as maintaining communities of interest and traditional boundaries." *LULAC*, 548 U.S. at 433. And here, appellees' illustrative districts fulfilled that requirement, as the district court found. Appendix to Emergency Application for Stay (App.) 159-174.

2. Alabama next argues that its approach is necessary to respect certain "constitutional guardrails." Br. 42-43. But Alabama seeks to solve a problem that does not exist, because the *Gingles* framework complies with all constitutional "guardrails."

Alabama first asserts that "race cannot predominate in redistricting, no matter what the reason." Br. 37. That is incorrect: a state may employ race as the predominant districting factor if it can satisfy strict scrutiny by showing that its use of race was "narrowly tailored to achieve a compelling interest." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 800-01 (2017). And as Alabama admits, Br. 37-38, this Court has "long assumed" (correctly, *see infra* § II) that complying with § 2 is such an interest. *See Cooper*, 137 S. Ct. at 1464; *see, e.g.*, *Bethune-Hill*, 137 S. Ct. at 801 (upholding district drawn for predominantly racial purpose where narrowly tailored to satisfying VRA).

In any event, complying with § 2 as interpreted by *Gingles* will generally not trigger strict scrutiny. As an initial matter, a plaintiff's submission of an illustrative map that accounts for race involves no

state action at all and "need not be an ultimate solution" for a court or government. *Fairley*, 584 F.3d at 671 n.14. But even when a court or government draws districts "with consciousness of race," that action does not trigger strict scrutiny. *Bush*, 517 U.S. at 958-59; *see id.* at 962 ("[T]he decision to create a majority-minority district [is not] objectionable in and of itself"). Rather, strict scrutiny applies only where a state "subordinate[s] other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to 'racial considerations.'" *Cooper*, 137 S. Ct. at 1464. Subordination of those other factors is what makes race the *predominant* factor. *Id.* at 1463-64. And applying *Gingles* requires no such subordination of other factors—to the contrary, satisfying *Gingles* step one requires that the relevant district *respect* "traditional districting principles." *LULAC*, 548 U.S. at 433.

Alabama argues that the district court's decision requires the state to draw a map that "would no doubt be labeled an unconstitutional racial gerrymander, where race [is] the criterion that … could not be compromised." Br. 1. But in fact, the district court found that Alabama could draw a second "reasonably compact majority-Black congressional district[]" *without* "prioritiz[ing] race above everything else." App. 214. All Alabama would need to do, the court reasoned, was consider race "for the purpose of determining" whether a second reasonably compact majority-Black district was possible, and then "[a]s soon as [it] determined the answer to that question, [it could] assign[] greater weight to other traditional districting criteria." *Id.* And the court rejected Alabama's argument that appellees' experts used "race

[as their] predominant consideration" when drawing illustrative maps. *Id.* at 215. The limited consideration of race contemplated by the district court therefore does not trigger strict scrutiny. *Id.* at 214. And even if it did, the district court further found that this consideration of race would satisfy that standard. *Id.* at 215-16.

Alabama next observes that to avoid constitutional concerns, proportionality—meaning that "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," *LULAC*, 548 U.S. at 426—cannot be "the test for § 2 liability." Br. 39.[8] But nothing in *Gingles* mandates proportionality. Proportionality "is a relevant fact"—though not a "dispositive" one—"in the totality of circumstances to be analyzed." *De Grandy*, 512 U.S. at 1000. And that is precisely how the district court here regarded proportionality. App. 203-05.

3. Not only do Alabama's statutory and constitutional claims lack merit, but unlike *Gingles*'s time-tested framework, Alabama's novel race-neutral benchmark would confuse litigants and lower courts, while generating multiple difficult questions.

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[8] This type of proportionality "is distinct from the subject of the proportional representation clause of § 2, which provides 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.'" *De Grandy*, 512 U.S. at 1014 n.11 (emphasis added) (quoting 52 U.S.C. § 10301(b)). Section 2's "proviso speaks to the success of minority candidates, as distinct from the political or electoral power of minority voters." *Id.*

As noted, Alabama would have courts decide whether "the State's enacted plan substantially deviates from plans that could have been generated through a race-neutral districting process." Br. 44. But this test would force courts and litigants to grapple with a host of difficult inquiries: How many race-neutral comparator plans must a plaintiff offer? What districting criteria must those plans include? When does an enacted plan deviate "substantially" from the comparator plans? Would an enacted plan violate § 2, for instance, if it had fewer majority-minority districts than 50% of the comparator plans? Or would the threshold be 75%? 90%?

In *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), this Court recently rejected a test in the partisan-gerrymandering context because of similar concerns. Under that proposed test, courts would "line up all the possible maps drawn" with "a State's own districting criteria," and "[d]istance from the 'median' map would indicate whether a particular districting plan harms supporters of one party to an unconstitutional extent." *Id.* at 2505. The Court concluded that this test raised "unanswerable question[s]," *id.*: "Would twenty percent away from the median map be okay? Forty percent? Sixty percent? Why or why not?" *Id.* Indeed, the Court emphasized that "[t]here is no way" to "give[] content" to a standard that rests on "substantial deviation from a median map," *id.* at 2506—the same basic standard that Alabama proposes here. Rather than adopt a new § 2 standard that the Court found unworkable in a similar context only three years ago, the Court should adhere to *Gingles*.

4. Alabama's alteration of *Gingles* defies *stare decisis*. Alabama would replace the current understanding of § 2 with a test that requires proof that "the State's enacted plan substantially deviates from plans that could have been generated through a race-neutral districting process." Br. 44. Because adopting that new test would mean that "today's Court" is not "stand[ing] by yesterday's decisions," *stare decisis* considerations must apply. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015).

"*[S]tare decisis* carries enhanced force when a decision, like [*Gingles*], interprets a statute." *Id.* at 456. That is because in a statutory case, "unlike in a constitutional case, critics of [the Court's] ruling can take their objections across the street, and Congress can correct any mistake it sees." *Id.* Here, the *Gingles* interpretation has been settled law for 36 years without congressional revision. And throughout multiple redistricting cycles, litigants and governments have relied on *Gingles* as the test to balance governments' districting prerogatives and minorities' voting rights.

To jettison *Gingles*, then, this Court would need a "special justification"—"over and above the belief that the precedent was wrongly decided." *Id.* Alabama offers no such justification here. *Gingles* has not "proved unworkable." *Id.* at 459. Nor have its "statutory and doctrinal underpinnings … eroded over time," *Id.* at 458: Congress has taken no "further action" to undermine *Gingles*, *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989), and this Court's recent § 2 precedent only confirms *Gingles*'s continued applicability to vote-dilution cases, *Brnovich*, 141 S. Ct. at 2337 (noting that "[o]ur many

… vote dilution cases have largely followed the path that *Gingles* charted" and distinguishing vote dilution from "§ 2 time, place, or manner case[s]"). Instead of presenting a special justification, Alabama simply argues that its test better interprets "§2's text" and applicable "constitutional limitations." Br. 43. But those are arguments that the Court "got something wrong," and especially in a statutory case, "even a good argument to that effect" is insufficient. *Kimble*, 576 U.S. at 455.

C. Section 2 Applies To Single-Member Districts

Alabama also argues "[i]n the alternative" that "§ 2 does not apply to single-member districts" at all. Br. 50. That argument disregards § 2's text and history, and adopting it would require the Court to overrule numerous precedents. It would also strip plaintiffs of any statutory avenue to challenge minority vote dilution in single-member districting plans—a result that would dramatically undermine minority voting rights nationwide.

1. Section 2 applies to "voting qualification[s] or prerequisite[s] to voting or standard[s], practice[s], or procedure[s]" that "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). A "practice" is a "customary action or procedure." *Practice*, Black's Law Dictionary (11th ed. 2019). Drawing district lines is a voting-related "practice" because it is a "customary action or procedure" that legislatures engage in every decade after the new census. *See, e.g.*, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 824 (2015) (referring to "the practice of gerrymander-

ing"). And the *practice* of "manipulat[ing] district lines" is "the usual device for diluting minority voter power"—whether through "[d]ividing the minority group among various districts" or "concentrat[ing]" it within "districts where [a minority group] constitute[s] an excessive majority." *Voinovich*, 507 U.S. at 153-54.

Alabama contends that the phrase "standard, practice, or procedure" is "constrained by § 2's preceding terms 'voting qualification' and 'prerequisite to voting.'" Br. 51. But the text uses the word "or" to cover three *separate* categories: (1) "qualification[s]"; (2) "prerequisite[s] to voting"; (3) "standard[s], practice[s], or procedure[s]." And the "ordinary use" of the word "or" is "almost always disjunctive," meaning that "the words it connects are to be given separate meanings." *Loughrin v. United States*, 573 U.S. 351, 357 (2014). So no textual basis exists for construing the first two "entirely distinct" categories to limit the third. *Id.*.

Alabama's textual argument is also internally inconsistent. Alabama appears to concede that § 2 applies to *multi-member* districting plans, acknowledging that "such schemes were well-known devices of invidious discrimination" when Congress amended § 2. Br. 36 (citing *White*, 412 U.S. at 765). Yet Alabama's argument that districting plans are not "standards, practices, or procedures" would apply equally to multi-member districting plans and single-member districting plans alike. So under its own logic, § 2 would not even cover multi-member districting plans—a result it recognizes is untenable.

Section 2's history confirms its application to districting plans. Like the 1982 amendment, the 1965 VRA used the phrase "voting qualification or prerequisite to voting, or standard, practice, or procedure." 42 U.S.C. § 1973 (1964 ed., Supp. I). This Court emphasized that Congress intended that language to have "the broadest possible scope," *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969), and it expressly held that the language applied to districting plans, *Georgia v. United States*, 411 U.S. 526, 531-32 (1973). When Congress amended § 2 in 1982, it used the same "standard, practice, or procedure" language that the Court had already interpreted to cover districting plans. By doing so, Congress ratified that prior interpretation. *See Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 349 (2005) ("congressional ratification" where relevant language "reenact[ed] … without change" and prior "judicial consensus" exists). And the 1982 Senate Report specifically references "single-member districts" as being used to "prevent an effective minority vote." S. Rep. No. 97-417, at 6.

Alabama next contends that applying § 2 to single-member districts immerses courts "in the hopeless project of weighing questions of political theory." Br. 51. But as shown, this Court and lower courts have routinely applied *Gingles* to evaluate whether single-member districting plans comply with § 2. And no part of that test asks courts to delve into political theory.

2. *Stare decisis* provides a further dispositive basis for rejecting Alabama's argument that § 2 does not apply to single-member districts.

For the last 29 years, this Court and lower courts have applied § 2 to single-member districting plans. In *Growe v. Emison*, 507 U.S. 25 (1993), this Court first held that § 2 bars vote dilution in single-member districting plans, explaining that "the reasons for the three *Gingles* prerequisites continue to apply" to such plans. *Id.* at 40. Since *Growe*, this Court has applied *Gingles* to single-member districting plans on numerous occasions. *See supra* § I.A.

Statutory *stare decisis* considerations strongly favor adherence to this Court's longstanding § 2 precedent. That this Court has rejected some § 2 challenges to single-member districting plans does not cast doubt on its application in that context. *Contra* Br. 52. The Court has validated some other such challenges, *see LULAC*, 548 U.S. at 435, and still others have succeeded in the lower courts, *see, e.g.*, *Rural W. Tenn. African-American Affairs Council v. Sundquist*, 209 F.3d 835 (6th Cir. 2000), *cert. denied*, 531 U.S. 944 (2000). If anything, the fact that § 2 challenges to single-member districting plans have produced a mix of results shows that the standards applicable to those challenges *are* workable and neutral.

II. SECTION 2 IS CONSTITUTIONAL

Alabama contends that § 2 "is unconstitutional as applied to single-member districts" to the extent it may "require[] replacing neutrally drawn districts with race-based districts." Br. 71. Alabama raises both Fifteenth and Fourteenth Amendment challenges. But as the ABA has long advocated, the VRA's core protections are fully consistent with the Constitution and necessary to combat racial discrim-

ination in voting, which still exists today. In fact, § 2 furthers the aims of the Fourteenth and Fifteenth Amendments; it does not violate those provisions. The ABA accordingly urges the Court to reject Alabama's constitutional challenges and uphold § 2's promise of an equal opportunity to vote for all Americans, regardless of race.

A. Section 2 Is Consistent With The Fifteenth Amendment

1. Congress's power "to enforce the substantive guarantees" of the Fourteenth and Fifteenth Amendments encompasses "the authority both to remedy and to deter violation of rights guaranteed [by those amendments] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Tennessee v. Lane*, 541 U.S. 509, 518 (2004). Congress may therefore "enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727-28 (2003). In so doing, Congress may "proscrib[e] practices that are discriminatory in effect, if not in intent, to carry out the [Fourteenth and Fifteenth Amendments'] basic objectives." *Lane*, 541 U.S. at 520. Such legislation is valid at least so long as "it exhibits 'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Id.* (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).[9]

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[9] The Court has never held that *Boerne*'s "congruence and proportionality" standard applies to Congress's enforcement of the Fifteenth Amendment, and in previously upholding the

Congress's enforcement authority is at its apex when addressing racial discrimination in voting. The Court has long "acknowledge[d] the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination." *City of Boerne*, 521 U.S. at 526. And the Court has frequently concluded that "measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendment, despite the burdens those measures placed on States." *Id.* at 518 (citing *Katzenbach*, 383 U.S. 301; *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Oregon v. Mitchell*, 400 U.S. 112 (1970)).

2. Section 2's prohibition against vote dilution in single-member districting plans falls well within Congress's power to enforce the Fifteenth Amendment. To start, the *Gingles* test relies on the same basic factors used to show the intentional discrimination that the Fifteenth Amendment explicitly prohibits. To satisfy *Gingles*, a plaintiff must prove racial bloc voting in the relevant jurisdiction—a sign that the "jurisdiction's politics is characterized by racial polarization" and thus potential discrimination. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 Wm. & Mary L. Rev. 725, 741 (1998). And *Gingles*'s "totality of the circumstances" test includes factors

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VRA, the Court explained that "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966). Section 2 would satisfy the "congruence and proportionality" standard even assuming it applies.

such as "the history of voting-related *discrimination* in the State or political subdivision." 478 U.S. at 44 (emphasis added).

Gingles substantially resembles the test this Court adopted to discern unconstitutional intentional vote dilution in *Rogers v. Lodge*, 458 U.S. 613 (1982). *Rogers*, issued only days after Congress enacted § 2, first looked to three factors similar to *Gingles*'s preconditions: "blacks have always made up a substantial majority of the population in [the relevant county]"; "[t]here was also overwhelming evidence of bloc voting along racial lines"; and "no black [person] had ever been elected to the … County Commission." *Id.* at 623-24. Then, noting that these factors are "insufficient in themselves to prove purposeful discrimination," *id.* at 624, *Rogers* proceeded to examine factors similar to those in the *Gingles* "totality-of-circumstances" test—*e.g.*, "the impact of past discrimination on the ability of blacks to participate effectively in the political process" and evidence that elected officials "have been unresponsive and insensitive to the needs of the black community." *Id.* at 624-27. Based on this analysis, the Court affirmed the district court's finding that although the districting plan was "neutral in origin," it "has been maintained for the purpose of denying blacks equal access to the political processes in the county." *Id.* at 626-27.

Thus, a comparison of *Rogers* and *Gingles* reveals no significant daylight between the standard for § 2 vote dilution and this Court's standard for *unconstitutional* vote dilution. And even if § 2 "prohibit[s] a somewhat broader swath of conduct" than the Fif-

teenth Amendment, it is still constitutional. *Hibbs*, 538 U.S. at 737.

Section 2's constitutionality is reinforced by Congress's "[e]mpirical findings … of persistent abuses of the electoral process, and the apparent failure of [an] intent test to rectify those abuses." *Jones v. City of Lubbock*, 727 F.2d 364, 375 n.6 (5th Cir. 1984). "After listening to over 100 witnesses and at least 27 days of testimony in the Senate alone," Congress found that an intent test stifled "efforts to overcome discriminatory barriers" in voting and suffered from numerous practical problems that rendered the test ineffective. *United States v. Blaine Cnty.*, 363 F.3d 897, 908 (9th Cir. 2004). For instance, "those who enacted ancient voting requirements could not be subpoenaed from their graves, and present-day legislators were protected from testifying about their motives by legislative immunity." *Id.* (citing S. Rep. No. 97-417, at 36-37). Congress thus determined that "the difficulties faced by plaintiffs forced to prove discriminatory intent through case-by-case adjudication create a substantial risk that intentional discrimination barred by the Fourteenth and Fifteenth Amendments will go undetected unless the results test proposed by section 2 is adopted." S. Rep. No. 97-417, at 40; *see United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1557 (11th Cir. 1984).

3. Alabama's contrary arguments are unfounded. Alabama contends that to be constitutional, the § 2 test must make "[t]he absence of racially discriminatory intent" a "relevant consideration." Br. 73. But Congress may "enact prophylactic legislation proscribing practices that are discriminatory in effect, if

not in intent, to carry out the [Fifteenth Amendment's] basic objectives." *Lane*, 541 U.S. at 520. In any event, as just shown, *Gingles* relies on considerations often used to prove discriminatory intent.

Alabama also argues that § 2 exceeds Congress's authority to the extent it requires states to "create another majority-minority district wherever one is possible." Br. 74. But that argument rests on a flawed premise because this Court's precedent rejects such a requirement. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017).

B. Section 2 Is Consistent With The Fourteenth Amendment

Alabama argues that § 2, as interpreted by the district court, violates the Fourteenth Amendment. Br. 78. Yet much of Alabama's Fourteenth Amendment argument rests on already-discussed errors. Alabama asserts, for instance, that complying with § 2 requires states to enact "[r]acial gerrymanders." Br. 76. In fact, it requires states only to take race *into account* when drawing district lines, which does not trigger strict scrutiny.

Alabama further contends that a state's consideration of race to comply with § 2 could not satisfy strict scrutiny (to the extent it applies), because "§ 2's existing framework is largely devoted to" "[g]eneralized allegations of past discrimination." Br. 76. But the *Gingles* test turns on evidence that a state's *current* plan denies minority voters an effective opportunity to elect their chosen candidates. As Justice O'Connor explained in addressing a similar argument: "[T]he States have a compelling interest in complying with the results test as this Court has

interpreted it" because Congress reasonably "believed that without the results test, nothing could be done about overwhelming evidence of unequal access to the electoral system" and "the sad reality that there still are some communities in our Nation where racial politics do dominate the electoral process." *Bush v. Vera*, 517 U.S. 952, 992 (1996).

Justice O'Connor's admonition rang true then and is no less true today. That is why the ABA has made clear—repeatedly throughout the last 40 years—that the VRA is necessary to prevent a regression to "the sad reality" of racial discrimination in voting. Yet adopting Alabama's position here would threaten precisely such a regression. This Court should therefore reject Alabama's position, adhere to the Court's longstanding interpretation of § 2, and reaffirm the VRA's promise of equal voting opportunity for all Americans.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted.

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