Nos. 21-1086, 21-1087

In the Supreme Court of the United States

JOHN H. MERRILL, *et al.*,
Appellants,
v.
EVAN MILLIGAN, *et al.*,
Appellees.

JOHN H. MERRILL, *et al.*,
Petitioners,
v.
MARCUS CASTER, *et al.*,
Respondents.

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

BRIEF FOR APPELLANTS

Dorman Walker
BALCH & BINGHAM LLP
105 Tallapoosa St., Ste. 200
P.O. Box 78 (36101)
Montgomery, AL 36104

Jeffrey M. Harris
Taylor A.R. Meehan
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209

Steve Marshall
Alabama Attorney General
Edmund G. LaCour Jr.
Solicitor General
Counsel of Record
A. Barrett Bowdre
Thomas A. Wilson
Deputy Solicitors General
OFFICE OF THE ATT'Y GEN.
501 Washington Ave.
Montgomery, AL 36130
(334) 242-7300
Edmund.LaCour@
AlabamaAG.gov

Additional Counsel Listed on Inside Cover

James W. Davis
Deputy Attorney General
Misty S. Fairbanks Messick
A. Reid Harris
Brenton M. Smith
Benjamin M. Seiss
Assistant Attorneys General
OFFICE OF THE ATT'Y GEN.
STATE OF ALABAMA
501 Washington Ave.
Montgomery, AL 36130

QUESTION PRESENTED

Alabama's congressional districts have looked largely the same for decades. Since 1992, one of Alabama's seven districts has been a majority-black district. In 2021, Alabama enacted a congressional redistricting plan that retained the cores of those districts, including the State's one majority-black congressional district. A federal court subsequently ordered Alabama to upend its longstanding districts and create a second majority-black district, holding that §2 of the Voting Rights Act required the redraw. Because Plaintiffs showed it was possible to draw such a district—albeit by ignoring preexisting district lines, dividing the Gulf Coast region between two districts on the basis of race, and otherwise putting racial considerations before race-neutral redistricting criteria—the court held that the additional district must be drawn. The question presented is:

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

PARTIES TO THE PROCEEDING

Appellants in No. 21-1086 and Petitioners in No. 21-1087 are Alabama Secretary of State John H. Merrill, and the Chairs of the Legislature's Redistricting Committee, State Senator Jim McClendon and State Representative Chris Pringle. They were defendants in the district court.

Appellees in No. 21-1086 are Evan Milligan, Shalela Dowdy, Letetia Jackson, Khadidah Stone, Greater Birmingham Ministries, and the Alabama State Conference of the NAACP. They were plaintiffs in the district court. Adia Winfrey was also a plaintiff, but she voluntarily dismissed her case.

Respondents in No. 21-1087 are Marcus Caster, Lakeisha Chestnut, Bobby Lee DeBose, Benjamin Jones, Rodney Allen Love, Manasseh Powell, Ronald Smith, and Wendell Thomas. They were plaintiffs in the district court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

Imagine the State of Alabama enacts a congressional redistricting plan that adds a second majority-black district, when for decades there was only one such district. The newly drawn plan bears little resemblance to past districting plans. The additional majority-black district stretches the width of the State, creating a dividing line between black voters and white voters in the Gulf Coast region and beyond. Suppose further that evidence shows the plan is an "out-out-out-outlier" among millions of maps that the Legislature could have drawn based on race-neutral traditional redistricting criteria. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2518 (2019) (Kagan, J., dissenting). This plan would no doubt be labeled an unconstitutional racial gerrymander, where race was "the criterion that … could not be compromised." *Shaw v. Hunt* ("*Shaw II*"), 517 U.S. 899, 907 (1996).

Now consider what actually happened here. In 2021, the State enacted a congressional redistricting plan that largely followed existing district lines. Like each of Alabama's plans since 1992, the new plan had one majority-black district. The plan was consistent with stated redistricting priorities: make race-neutral adjustments for small shifts in population over the last decade, but otherwise retain existing district lines.

A federal court deemed that plan unlawful. According to the court, §2 of the Voting Rights Act requires Alabama to trade its neutrally drawn districts, resembling decades of past redistricting plans, for the "out-out-out-outlier" plan described above, solely to draw a

second majority-black district. That logic puts §2 at loggerheads with the Constitution.

Section 2, to the extent it can be read to apply to single-member redistricting plans, operates as a prohibition. A State cannot abridge or deny voters' ability to cast their votes "on account of race." 52 U.S.C. §10301(a). Districts "not equally open" to all voters are forbidden. *Id*. §10301(b). But §2 cannot operate in the way that the court below conceived of it: imposing an affirmative obligation upon the States to ensure that wherever a majority-minority district can be drawn, at whatever sacrifice to race-neutral redistricting criteria, it must be drawn. That would require the States to prioritize race always in redistricting. That is not what §2 commands. And if it were, §2 would be unconstitutional, for districts that sort voters on the basis of race "are by their very nature odious." *Shaw v. Reno* ("*Shaw I*"), 509 U.S. 630, 643 (1993).

Alabama's congressional redistricting plan is lawful. The neutrally drawn districts are "equally open" to all voters under any conceivably constitutional version of §2. The decision below should be reversed.

OPINIONS BELOW

The opinion of the three-judge court in *Milligan* (MSA1-238[1]) is available at 2022 WL 265001. The

[1] "JA" refers to the Joint Appendix. "SJA" refers to the Supplemental Joint Appendix, comprising documents that contain maps and charts printed on 8.5" x 11" paper. "MSA" and "CSA" refer to the *Milligan* Stay Appendix and *Caster* Stay Appendix, respectively, earlier filed in booklet form. "App." refers to the appendix attached to this brief containing the text of relevant constitutional and statutory provisions.

district court's opinion in *Caster* (CSA1-247) is available at 2022 WL 264819.

JURISDICTION

The district court entered the preliminary injunctions at issue on January 24, 2022. The direct appeal to this Court in *Milligan* and the petition for a writ of certiorari before judgment in *Caster* were timely filed on January 25 and January 28, respectively. This Court noted probable jurisdiction in *Milligan* and granted the petition in *Caster*. The Court has jurisdiction under 28 U.S.C. §1253 and §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions—U.S. Const. amends. XIV, XV, and 52 U.S.C. §10301—are reproduced in the appendix immediately following this brief. *See* App.1a-2a.

STATEMENT

A. Constitutional and Statutory Background

1. Following the Civil War, Congress proposed and the States ratified the Fourteenth and Fifteenth Amendments. The Fourteenth Amendment guarantees that no State will "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1. The Fifteenth Amendment secures voting rights for all citizens, which "shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." *Id.* amend. XV, §1.

Ninety-five years later, invoking its authority to enforce the Fifteenth Amendment "by appropriate legislation," *id.* §2, Congress enacted the Voting Rights Act of 1965. The VRA was to achieve "an end to the denial of the right to vote based on race." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2330 (2021). It was "a remedial provision directed specifically at eradicating discriminatory practices that restricted blacks' ability to register and vote in the segregated South." *Holder v. Hall*, 512 U.S. 874, 893 (1994) (Thomas, J., concurring in judgment). Several of the VRA's sections "specifically forbade some of the practices that had been used to suppress black voting," such as "poll taxes" and white primaries. *Brnovich*, 141 S. Ct. at 2330-31; *see also League of United Latin Am. Citizens* (*LULAC*) *v. Perry*, 548 U.S. 399, 439-40 (2006); *Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994) ("ballot box stuffing, outright violence, discretionary registration, property requirements, the poll tax, the white primary; and other practices censurable when the object of their use is discriminatory").

Section 2 of the VRA more generally "addressed the denial or abridgement of the right to vote in any part of the country." *Brnovich*, 141 S. Ct. at 2331. As originally enacted, its language so closely tracked that of the Fifteenth Amendment that this Court interpreted §2 as being coextensive with the Fifteenth Amendment's guarantee. Consistent with the Fourteenth and Fifteenth Amendments, the Court required a §2 claimant to show "purposeful discrimination." *City of Mobile v. Bolden*, 446 U.S. 55, 61, 63 (1980) (plurality op.).

How a plaintiff could prove purposeful discrimination then became the subject of this Court's cases and ultimately the 1982 amendments to §2. First, in *White v. Regester*, involving the constitutionality of multimember districts in Texas, this Court etched an evidentiary framework for proving vote dilution. 412 U.S. 755 (1973). The Court explained that claimants must present evidence that they suffered "invidious discrimination." *Id.* at 764. To do so, the Court held, "it is not enough" to show a racial group "has not had legislative seats in proportion to its voting potential." *Id.* at 765-66. Rather, "[t]he plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.* at 766 (citing *Whitcomb v. Chavis*, 403 U.S. 124, 149-50 (1971)). In *White*, it was significant that the use of multimember districts at the time was well-understood "invidiously to cancel out or minimize the voting strength of racial groups." *Id.* at 765.

Then in *Mobile v. Bolden*, this Court considered whether the plaintiffs' evidence was sufficient to show that the at-large election process in Mobile, Alabama, violated the Fourteenth and Fifteenth Amendments and §2. 446 U.S. at 58 (plurality op.). The Court held that the evidence was insufficient. *Id.* at 80. The Court began by explaining that §2 was coextensive with the Fifteenth Amendment. *Id.* at 60-61. To prove a facially neutral law violated either §2 or the Fifteenth Amendment required proof that the law was "motivated by a

discriminatory purpose." *Id.* at 62. Similarly, with respect to the Fourteenth Amendment, the *Bolden* Court relied on *White* for the rule that "*illicit purpose must be proved.*" *Id.* at 67 (emphasis added). Distinguishing *White*, the Court explained that the *White* plaintiffs "'produce[d] evidence to support findings that the political processes leading to nomination and election were not equally open'" to those plaintiffs. *Id.* at 68-69 (quoting *White*, 412 U.S. at 766-67). Justice White, the author of *White*, dissented in *Bolden*, believing that "invidious discriminatory purpose" could be sufficiently "inferred from the totality of facts in this case." *Id.* at 94-95.

Following *White* and *Bolden*, Congress amended §2 to clarify plaintiffs' evidentiary burdens. The House initially passed language that would have prohibited "all discriminatory 'effects'" and made discriminatory intent "'irrelevant.'" *Brnovich*, 141 S. Ct. at 2332 (quoting *Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002, 1010 (1984) (Rehnquist, J., dissenting)); *see generally* Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendment to the Voting Rights Act: A Legislative History*, 40 Wash. & Lee L. Rev. 1347 (1983). The Senate put up "stiff resistance," *Brnovich*, 141 S. Ct. at 2332, and the chambers eventually reached a compromise that parallels *White*. The amended language asks whether a voting standard, practice, or procedure "results in a denial or abridgement" of individual voting rights "on account of race," and requires consideration of the "totality of circumstances" to decide whether there has been such a denial or abridgment:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or [language-minority status], as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. §10301.

2. The Court addressed the amended language in *Thornburg v. Gingles*, 478 U.S. 30 (1986), a challenge to a multimember districting scheme. The Court disclaimed that "[m]ultimember districts and at-large elections schemes" were *per se* illegal, but emphasized that they could potentially "minimize or cancel out the

voting strength of racial minorities in the voting population." *Id.* at 47-48 (cleaned up); *see Growe v. Emison*, 507 U.S. 25, 40 (1993) (collecting cases).

To assess possible dilution of minorities' voting rights in the challenged multimember district, *Gingles* compared that district with single-member districts that could have been drawn in its place. 478 U.S. at 48, 50-51. To prove a §2 violation, plaintiffs must prove the multimember scheme "operates to minimize or cancel out their ability to elect their preferred candidates," with proof that replacing the multimember district with single-member districts would provide minority voters "the ability … to elect representatives of their choice." *Id.* at 48, 50.

From this general requirement, the Court set forth three "preconditions" a §2 plaintiff must meet: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the minority group must be "politically cohesive," and (3) the majority must "vote[] sufficiently as a bloc to enable it … to defeat the minority's preferred candidate." *Id.* at 50-51. Satisfying those preconditions is necessary but not sufficient. *See Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248-49 (2022) (per curiam). The plaintiff must further show that the "totality of circumstances" establishes that districts are not "equally open" to voters of all races. *Brnovich*, 141 S. Ct. at 2341; *see Bartlett v. Strickland*, 556 U.S. 1, 11-12 (2009); *Gingles*, 478 U.S. at 36-37, 43-46.

3. Seven years after deciding *Gingles*, the Court for the first time applied §2 to "a single-member

districting scheme" for a "so-called 'vote fragmentation' claim." *See Growe*, 507 U.S. at 40; *Voinovich v. Quilter*, 507 U.S. 146, 157-158 (1993). Since then, the Court has "assumed" that a permissible basis for some consideration of race in drawing single-member districts "is complying with operative provisions of the Voting Rights Act" as applied by this Court to single-member districts. *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017).

But in matters of redistricting, this Court has emphasized time and again that §2 operates within the confines of the Equal Protection Clause. *Wis. Legislature*, 142 S. Ct. at 1248-50. In *Shaw v. Reno*, the Court recognized that "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality'" and are thus subject to strict scrutiny. *Shaw I*, 509 U.S. at 643. A "constitutional wrong occurs when race becomes the 'dominant and controlling' consideration" in redistricting. *Shaw II*, 517 U.S. at 905. Whenever "race is the predominant motive in creating districts," even when §2 is in play, "strict scrutiny applies." *Abrams v. Johnson*, 521 U.S. 74, 91 (1997).

B. Alabama's Past Congressional Plans

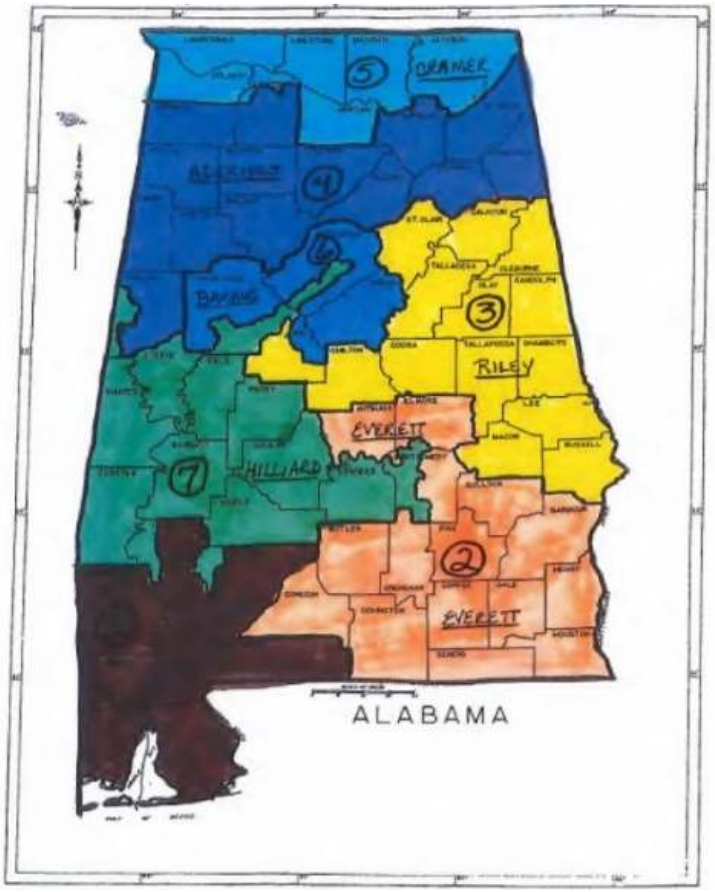
For nearly 50 years, Alabama's congressional districts have remained remarkably similar. SJA205-11. Following the 1970 census, Alabama's eight congressional districts dropped to seven. Ever since, District 1 has included Alabama's Gulf Coast region (anchored by Mobile and Baldwin Counties); District 2, the Wiregrass region (named for a wild grass that

grows there) and all or parts of Montgomery; District 3, the eastern-central parts of the State; District 4, the rural northwestern counties and the Sand Mountain area; District 5, the northernmost Tennessee Valley area; District 6, much of Jefferson County (which includes Birmingham); and District 7, the western-central parts of the State (including many Black Belt[2] counties and parts of Tuscaloosa and Jefferson Counties). *Id.* Shown below, Alabama's congressional maps have grouped these regions that way for decades. *See* SJA207.

[2] "Black Belt" refers to a geographic region spanning central Alabama that "is named for the region's fertile black soil." MSA38.

As part of redistricting litigation in the 1990s, a three-judge court ordered the State to reconfigure District 7 into a majority-black district. *See Wesch v. Hunt*, 785 F. Supp. 1491 (S.D. Ala. 1992), *aff'd sub nom.*, *Camp v. Wesch*, 504 U.S. 902 (1992). The court chose the plan depicted below (and at SJA208) because it "maintain[ed] the cores of existing Districts 1 and 2," and thus "better preserv[ed] the communities of interests in those two districts." *Id.* at 1495-97. The court rejected an alternative plan that would have split Mobile County. *See id.* at 1496.

1992 Congressional Map



After the 2000 and 2010 redistricting cycles, Alabama's congressional districts remained largely the same, with boundaries shifting primarily to equalize populations. Both plans, pictured below (and at SJA209-10), were precleared by the Department of Justice under §5 of the VRA. JA153-55, JA228. Neither plan was ever declared unlawful.

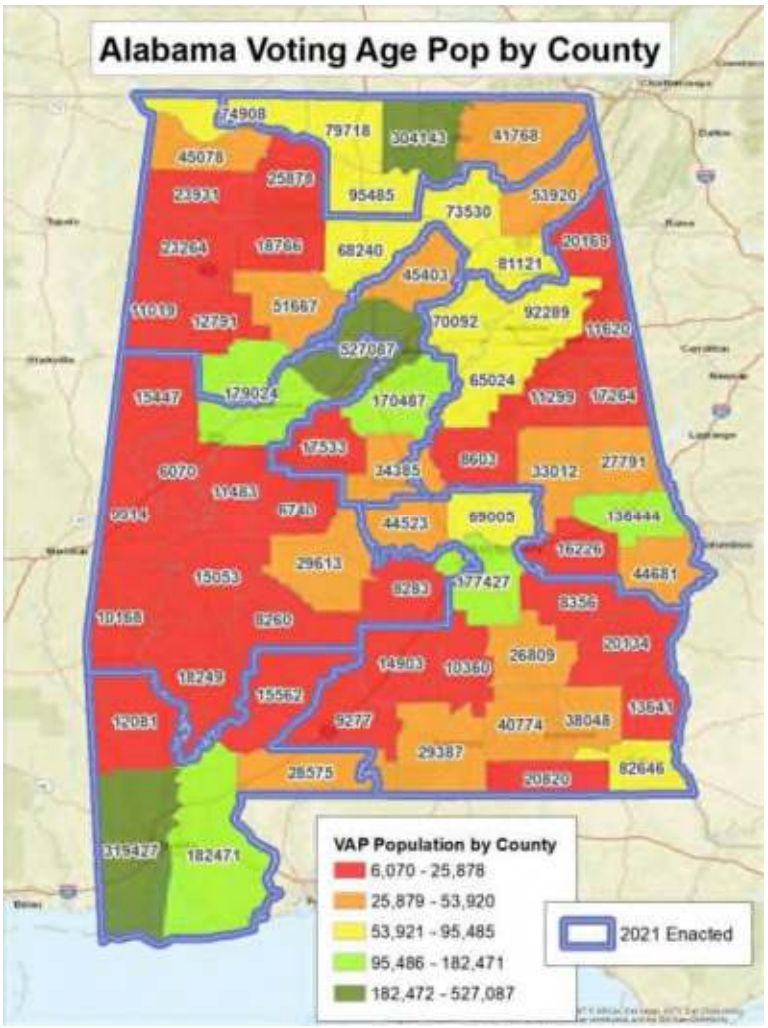
2002 Congressional Map

2011 Congressional Map

C. Alabama's 2021 Congressional Plan

1. The 2020 census revealed that Alabama would keep its seven congressional districts. The State's population grew by 5.1% to 5,024,279, *see* JA149, but that growth was not evenly distributed. Most growth was in and around Alabama's largest cities. Huntsville, now the State's most populous city, and the surrounding areas grew, as did the greater Birmingham area, including Shelby County. Baldwin County and

neighboring Mobile County grew as well. *See* U.S. Census Bureau, Alabama: 2020 Census, https://bit.ly/3KbhV17 (last visited Apr. 22, 2022). Shown below (and at SJA47), the State's voting-age population remains concentrated in those areas:



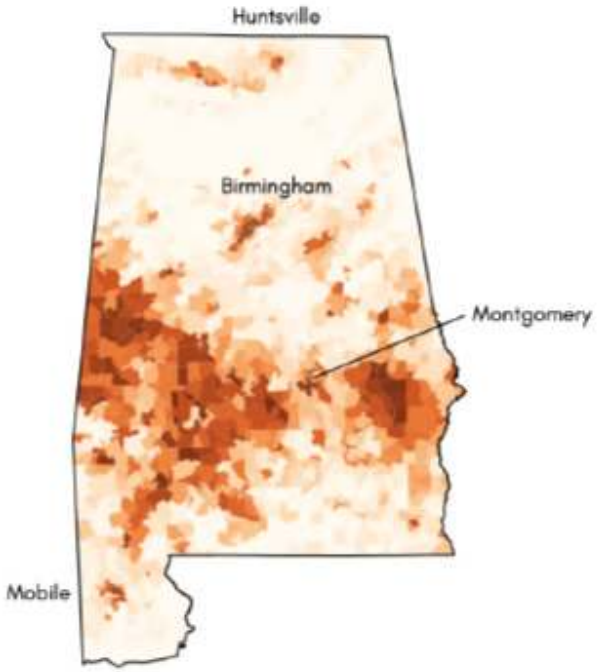
Meanwhile, the population in Alabama's less-populated rural areas generally plateaued or declined. In

particular, nearly all of Alabama's Black Belt counties lost population:

Black Belt County[3]	**Percent Change**	**Total Population**
Barbour	-8.1%	25,223
Bullock	-5.1%	10,357
Butler	-9.1%	19,051
Choctaw	-8.6%	12,665
Crenshaw	-5.1%	13,194
Dallas	-12.2%	38,462
Greene	-14.5%	7,730
Hale	-6.2%	14,785
Lowndes	-8.7%	12,665
Macon	-9.0%	19,532
Marengo	-8.1%	19,323
Montgomery	-0.2%	228,954
Perry	-19.6%	8,511
Pickens	-3.2%	19,123
Pike	+0.3%	33,009
Russell	+11.8%	59,183
Sumter	-10.3%	12,345
Wilcox	-9.2%	10,600
Clarke*	-10.6%	23,087
Conecuh*	-12.3%	11,597
Escambia*	-4.1%	36,757
Monroe*	-14.3%	19,772
Washington*	-12.5%	15,388

[3] U.S. Census Bureau, Alabama: 2020 Census, https://bit.ly/3KbhV17 (last visited Apr. 22, 2022). The parties stipulated that these counties are includable in the State's Black Belt and that those noted with asterisks are "sometimes included." MSA39.

Most Black Belt counties are majority black. SJA84; *see also* U.S. Census Bureau, Alabama: 2020 Census, https://bit.ly/3KbhV17 (last visited Apr. 22, 2022). But the actual number of black Alabamians in those counties remains smaller than the number of black Alabamians in Alabama's cities. For this reason, mapping the *proportion* of the black voting-age population in voting precincts across the State—as the *Milligan* Plaintiffs' expert did (reproduced below and at MSA170)—creates the illusion that the majority of the State's black population resides in the rural Black Belt counties, running east to west across the State:



Contrary to that illusion, the *number* of black voters in Huntsville, Birmingham, Montgomery, and Mobile well exceeds the number of black voters dispersed across the geographically larger Black Belt. MSA170.

"[A]bout half" of Alabama's black population—49.53%—"is concentrated in the urban counties of Jefferson (Black pop. 289,515), Mobile (Black pop. 152,471), Montgomery (Black pop. 134,029), and Madison (Black pop. 99,875)." SJA83. In contrast, "[t]he rural Black Belt counties (excluding urban Black Belt Montgomery)" account for just 8.68% of black Alabamians or roughly 118,000 individuals (by comparison, each of Alabama's 2021 congressional districts contains roughly 717,000 individuals).[4] Even if one were to include Montgomery and a handful of other counties the *Milligan* Plaintiffs' expert included in her definition of the Black Belt, SJA33, these counties include only about 300,000 black Alabamians. *See* MSA62.

Overall, between 2010 and 2020, Alabama's black population grew slightly from 1,281,118 to 1,364,736, increasing from 26.8% of the State's total population in 2010 to 27.16% in 2020. SJA82. The black voting-age population for 2020 was 25.9%. SJA85.

2. The Legislature's bipartisan Permanent Legislative Committee on Reapportionment began meeting in May 2021. MSA32. The Committee enacted redistricting guidelines that required compliance with State and federal law, including minimization of population deviations between districts and compliance with both §2 and the Equal Protection Clause. The guidelines provided that no district "be drawn in a manner that subordinates race-neutral districting

---

[4] *See* SJA83 (*Caster* Plaintiffs' expert defining Black Belt to include Barbour, Bullock, Dallas, Greene, Hale, Lowndes, Macon, Marengo, Montgomery, Perry, Sumter, and Wilcox Counties).

criteria to considerations of race." MSA228. The guidelines also included "redistricting policies," consistent with the State's "political values, traditions, customs, and usages." MSA33-34, 227-38. Those policies included "preserv[ing] the cores of existing districts" and minimizing incumbent pairings. MSA230-31.

Consistent with those guidelines, the Committee's mapdrawer used the 2011 congressional map as the starting point for the new map. JA270-71. He equalized population in each district without regard to race. JA274-75; SJA88; MSA34. The existing majority-black district, District 7, was below ideal population (717,754) and required roughly 50,000 more people. SJA43. Only after the map was complete did the mapdrawer "'turn[] race on.'" MSA34. District 7 remained a majority-minority district with 54.22% black voting-age population. *See* JA347.

The Committee made no further changes to the map, nor did the Legislature, *see* JA275-76; *Milligan*, ECF 70-2 at 109-10, which passed the Committee's proposed congressional plan on November 3, 2021. MSA34. The Governor signed the bill the following day. MSA34-35. The resulting map is reproduced below (and at MSA35 and SJA211):

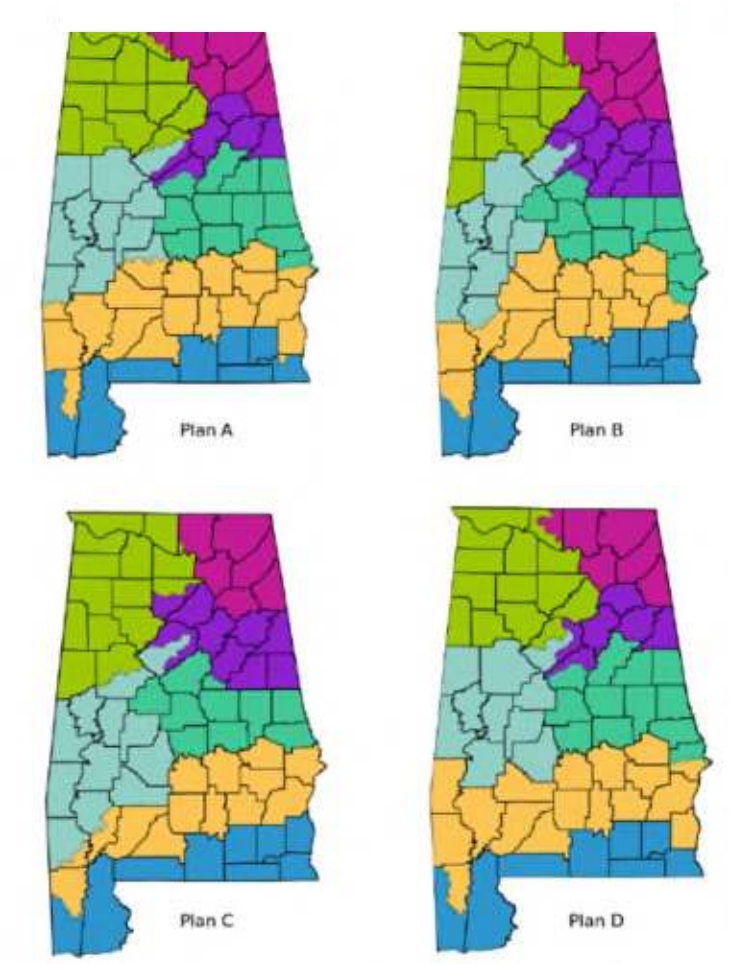

2021 Alabama Congressional Plan
1
2
3
4
5
6
7

D. Plaintiffs' Challenges

1. Three groups of plaintiffs filed lawsuits challenging Alabama's 2021 congressional map. Each sought a preliminary injunction barring Alabama from using the districts in the forthcoming elections. The *Singleton* Plaintiffs raised Equal Protection Clause claims. *Singleton v. Merrill*, No. 2:21-cv-1291 (N.D. Ala.), ECF 1, 15; MSA36-37. The *Milligan* Plaintiffs raised Equal Protection Clause and §2 claims. And the *Caster* Plaintiffs raised only a §2 claim. A three-judge court was convened for the *Singleton* and *Milligan* suits. *See* 28 U.S.C. §2284(a). The *Caster* suit remained pending before a single judge (also a member of the three-judge court) but was heard with *Singleton* and *Merrill* for the preliminary injunction proceedings. MSA17-18.

The *Milligan* and *Caster* Plaintiffs presented materially identical VRA claims: that §2 requires Alabama to add a second majority-black district. MSA38-43. Plaintiffs offered eleven illustrative plans from two experts: Bill Cooper and Moon Duchin. Their plans contained two majority-black districts, and all eleven added the second majority-black district in the same way: stretching Districts 1 and 2 across the width of the State and segregating white Alabamians in District 1 from black Alabamians in District 2 to make District 2 majority-black. Below are Dr. Duchin's four demonstration plans. District 1 is in dark blue and District 2 in yellow:

Dr. Duchin's Demonstration Plans



MSA62. Mr. Cooper's plans were similar. *See* SJA99-109, 149. The black voting-age population of proposed District 2 barely exceeds 50% in nearly all the demonstration plans. *See* MSA92-93; SJA30; SJA99-109, 151.

The demonstration plans diverge significantly from Alabama's existing districts. For the last 50 years, those of all races in Alabama's Gulf Coast region, anchored by Mobile and Baldwin Counties, were grouped together in District 1. This district respected the unique industry and culture of the region. Plaintiffs' proposed plans, in sharp contrast, split Mobile County for the first time in the State's history, moving black residents out of District 1 and joining them with black Alabamians in District 2 more than 250 miles away. *See* SJA27, 99-109, 149.

Former District 1 Congressman Bradley Byrne testified that the existing Gulf Coast district has a distinct shared culture based on its French and Spanish colonial heritage. Mobile and Baldwin Counties are also largely "built around the water," with major fishing, port, and ship-building industries. JA813-16; MSA122. Not so for the land-locked Wiregrass region in District 2, which revolves "around Dothan down at the southern end and Montgomery at the northern end"—nowhere near the Gulf. JA816. He added that the agricultural interests also differ between the districts. Farmers along the Gulf grow watermelons and pecans, while in the Wiregrass, it's "peanuts and cotton and cattle." JA816-17. And whereas District 1 benefits from Mobile's Navy shipyard, District 2's military focus is the Army helicopter base at Fort Rucker. *Id.* Based on these differences, Byrne expressed concern that effectively representing the "two very different communities of interest" would be difficult because the Representative would be pulled in so many directions. JA819.

Byrne's testimony underscores why Alabama has long valued preserving the cores of its existing districts. *See* MSA231; JA494. And the 2021 map reflects this interest, retaining more than 90% of six of the seven congressional districts, and 87.8% of the remaining district (District 6). SJA161. By contrast, Plaintiffs' proposed maps render the State's longstanding congressional districts largely unrecognizable. As the district court found: "[T]here is no question that the [State's] Plan retains more of the cores of the 2011 congressional map than do the Duchin plans or the Cooper plans." MSA182; *see* SJA164-73.

2. During the preliminary injunction hearing, Plaintiffs' experts revealed why their proposed maps looked the way they did: From the start, Plaintiffs set out to create two majority-black districts. And the only way they could accomplish that goal was to intentionally sort Alabamians by skin color.

Begin with the *Milligan* Plaintiffs' expert for their Equal Protection Clause claim, Dr. Kosuke Imai. *See* SJA52 (report); SJA68 (rebuttal report); JA538 (testimony). Dr. Imai sought to prove that the State's existing majority-minority district was a racial gerrymander. He created a set of maps "from scratch" (JA559) by programming a computer algorithm to draw simulated plans, limited by only a few constraints: the resulting maps had to be at least as geographically compact as the State's plan, have the same or fewer county splits, not pair incumbents, and result in a population deviation of +/- 0.5%. SJA58. He ran 30,000 simulations, but *none* of the plans contained two majority-black districts. SJA58-59, 72;

JA571-72. Thus, he showed that even if a mapdrawer were to draw Alabama's congressional districts without considering existing district lines, the mapdrawer would not draw two majority-black districts in 30,000 attempts.

Next, the *Milligan* Plaintiffs' expert, Dr. Duchin, testified about her study simulating 2 million race-neutral congressional plans for Alabama.[5] Not one of them contained two majority-black districts. JA710. As Dr. Duchin put it:

> In fact, I have a publication where I … generated 2 million districting plans for Alabama, which I think we'll agree is quite a few. And we found some with one majority-black district, but never found a second with a majority-black district in 2 million attempts. But, again, that's without taking race into account in any way in the generation process.

Id. According to Dr. Duchin, "that it is hard to draw two majority-black districts by accident shows the importance of doing so on purpose." JA714.

Similarly, Evan Milligan, one of the lead plaintiffs, testified that he and his team "attempted to make a

---

[5] Dr. Duchin's publication, Moon Duchin & Douglas M. Spencer, *Models, Race, and the Law*, 130 Yale L. J. Forum 744 (2021), is based on numbers from the 2010 census. As explained above, between 2010 and 2020, the change in Alabama's black population was negligible: shifting from 26.8% in 2010 to 27.16% in 2020. *See* SJA82. Given these minimal changes, it is not surprising that Dr. Duchin discussed the study in her expert testimony here, without qualification, to answer a question about race-neutral congressional maps in Alabama today.

congressional map" with "two districts that were majority black or majority non-white." JA511. Even with the benefit of map-drawing courses and software, they "weren't able to do so successfully." *Id.* Only after seeing maps prepared by the NAACP Legal Defense Fund—the entity representing Milligan in this litigation—did Milligan learn that creating two majority-minority districts in Alabama was mathematically possible. JA512.

Given Alabama's existing demographics and the reality that a race-neutral districting process would not produce two majority-minority districts, Plaintiffs' experts (in the words of the district court) "prioritized" race first in the creation of their demonstration plans such that other redistricting criteria had "to yield." MSA214. For example:

- Describing her approach, Dr. Duchin stated: "*[A]fter* … what I took to be nonnegotiable principles of population balance and seeking two majority-black districts, *after that*, I took contiguity as a requirement and compactness as paramount." JA634 (emphasis added). "I took, for example, county integrity to take precedence over the level of BVAP *once that level was past 50 percent*." JA635 (emphasis added).
- Asked whether "an express goal of [hers was] to keep the Black Belt counties in majority-black districts to the extent [she] could," Dr. Duchin answered: "Yes." Asked whether that was "part of the reason why [her] compactness scores for CD 1 and CD 2 were lower," she answered: "That's right." JA696.

- Asked whether she split small voting districts (known as "VTDs" or "precincts") on the basis of race, Dr. Duchin confirmed that she split them to hit a racial target: "I did sometimes look at race of those blocks, *but really, only to make sure that I was creating two districts over 50 percent*. Beyond ensuring crossing that 50 percent line, there was no further consideration of race in choosing blocks within the split VTDs." JA630 (emphasis added).

- Asked whether she thought "one reason that there are nine splits in counties in [her] plan as opposed to six splits in counties [in the enacted plan] … was because of the weight [she] gave to the criteria of ensuring two majority-black congressional districts," Dr. Duchin answered: "*There's no question.* And I have consistently acknowledged that I took minority electoral opportunity"—that is, the creation of two majority-black districts—"to be a *nonnegotiable* principle…." JA678. (emphasis added).

- Asked whether she considered looking at Alabama's "core retention score[s]" (*i.e.*, what portion of an existing district is retained in a new district), Dr. Duchin answered: "I did not …. I would not be able to achieve corresponding statistics while creating a second majority-black district." JA720.

- When Mr. Cooper was asked whether there was a way to create two majority-minority districts "without splitting Mobile County," he answered: "[N]o way. More problematic. Maybe there would be a way, but you would also have to split other counties. So I think this is the best compromise.

Split Mobile County." *Milligan*, ECF 105-1 at 222 (Tr. 494:19-495:1).[6]

Simply put, Plaintiffs' mapdrawers prioritized race to create two majority-black districts, which explains why their maps look the way they do. Indeed, Dr. Duchin described a hydraulic effect when it comes to balancing competing redistricting interests: She *could have* split fewer counties in her plans, but only if she had not "subordinated [that goal] to the principle of getting two majority-black districts." JA665. Likewise, she *could have* better retained the cores of existing districts, but doing so would mean that she could not create "two majority-black districts." JA648. Adding a second majority-black district was her "nonnegotiable principle." JA678.

E. The Decisions Below

Following the preliminary injunction hearing, the district court concluded that, under *Gingles*, it was substantially likely that the enacted map violated §2. MSA206. The court preliminarily enjoined Alabama from conducting congressional elections using the enacted plan. MSA5-6.

As for the first *Gingles* precondition, the court held that Plaintiffs sufficiently demonstrated that—by "prioritiz[ing] race" as necessary—they could draw two majority-black districts. MSA214. The court reasoned that the two majority-black districts proposed by Plaintiffs were "reasonably compact" when

[6] "Tr." refers to transcripts of the preliminary injunction hearing. *See Milligan*, ECF 105.

comparing the statewide compactness scores of those plans with the State's enacted plan. MSA167-68.

The court's analysis included "'eyeballing'" Plaintiffs' proposed plans based on the proportion of black Alabamians in different parts of the State. MSA169. Specifically, the court relied on Dr. Duchin's "visual assessment" (reproduced *supra* at p.15), showing the proportion of black voters in voting districts across Alabama. MSA169-71. Based on those *proportions*, as opposed to actual *numbers* of voters, the court concluded that "[j]ust by looking at the population map, we can see why Dr. Duchin and Mr. Cooper expected that they could easily draw two reasonably configured majority-Black districts." MSA171. The court added that another reason the experts' plans were reasonably configured is because they "provide a number of majority-Black districts that is roughly proportional to the Black percentage of the population." MSA183.

The court concluded that the second and third *Gingles* preconditions were also met, as well as the totality of the circumstances. MSA183-206; *see Cooper*, 137 S. Ct. at 1470 (requiring "politically cohesive" minority group and a "white majority [that] must vote sufficiently as a bloc to usually defeat the minority's preferred candidate"). In assessing the totality of the circumstances, the court again relied on proportionality, concluding that the *lack* of proportionality "weighs decidedly in favor of the plaintiffs" because black Alabamians constitute about 27% of the State's population while majority-black districts are only 14% of the congressional delegation. MSA205.

The court rejected the State's argument that the plans proposed by Plaintiffs would themselves be racial gerrymanders in violation of the Equal Protection Clause. The court described Plaintiffs' experts as "prioritiz[ing] race only for the purpose of determining and to the extent necessary to determine whether it was possible … to state a Section Two claim." MSA214. The court acknowledged that Plaintiffs' experts made their racial target of two majority-black districts a "'non-negotiable'" factor and agreed that Plaintiffs' experts "assigned greater weight to other traditional redistricting criteria" only *after* they hit that target. MSA214. But in the court's view, these factors did not raise constitutional problems because Plaintiffs did not "tr[y] to maximize the number of majority-Black districts, or the BVAP in any particular majority-Black district." MSA214-15.[7]

This Court subsequently stayed the district court's order, noted probable jurisdiction in *Milligan*, and granted Defendants' petition for a writ of certiorari before judgment in *Caster*.

SUMMARY OF ARGUMENT

The question here is whether the VRA requires Alabama to intentionally create a second majority-black congressional district. The only way Plaintiffs could propose adding such a district was by racially dividing Gulf Coast voters into two radically redrawn and sprawling districts. The court below declared that

[7] Having concluded that the enacted map violated §2, the district court declined to rule on the *Milligan* or *Singleton* Plaintiffs' equal protection claims. MSA224-26.

such racial segregation of Alabamians is what §2 demands. It does not.

I.A. Section 2 of the VRA guarantees that political processes are "equally open" to all voters. 52 U.S.C. §10301(b). Consistent with its Fifteenth Amendment origins, §2 prohibits discrimination "on account of race." *Id.* §10301(a). If single-member electoral districts can be deemed a standard, practice, or procedure within §2's reach, then "equally open" districts are those that impose no obstacle or impediment to voting. The concept of equal openness is not measured simply by disparate impact or lack of proportionality to a statewide minority population. And just because a majority-minority district *could* be drawn does not mean that it *must* be drawn. Rather, districts are "equally open" when they resemble neutrally drawn districting plans, consistent with the State's naturally occurring demographics and longstanding districting principles.

Separately, the preconditions announced by this Court in *Gingles* serve a gatekeeping function in redistricting challenges. *Gingles* requires plaintiffs to satisfy its three preconditions before a redistricting plan can trigger §2 scrutiny. But the preconditions are no substitute for the ultimate "totality of circumstances" analysis required to determine whether districts are "equally open." *Id.* §10301(b). And if *Gingles* is to continue serving its gatekeeping role, then the "reasonably configured" districts that plaintiffs proffer under *Gingles* to show that such districts can be drawn must be neutrally drawn. Race cannot predominate from step one in the *Gingles* analysis, or else *Gingles* is a useless tool for determining *whether* race-

conscious remedies are appropriate in the first place. Plaintiffs' comparator plans that themselves discriminate in favor of one racial group shed no light on whether the State's plan discriminates against that group.

I.B. Alabama's enacted congressional districts do not violate §2. Plaintiffs' own witnesses testified about millions of possible race-neutral plans that, like Alabama's plan, have no more than one majority-minority district. Plaintiffs were able to produce comparator plans with more majority-black districts only by starting with a "nonnegotiable" racial target and backfilling with other redistricting criteria *after* that target had been hit. These discriminatory plans cannot show that Alabama's plan is discriminatory, and the millions of neutrally drawn plans that Plaintiffs ignored confirm that it's not.

Plaintiffs' race-infused approach to §2 is fundamentally flawed because it is circular. From the start, Plaintiffs (and the district court) assumed the answer to the ultimate question—namely, that a second majority-black district needed to be drawn. But §2 operates as a prohibition against redistricting plans that discriminate "on account of race," *id.* §10301(a), not as an affirmative obligation for race-based redistricting to maximize or make proportional the number of majority-minority districts. It does not require a State to draw a majority-minority district any time such a district *could* be drawn—something that both §2's text and this Court's precedents expressly disclaim.

At best, Plaintiffs' race-predominant plans show that an additional district could be drawn if one were

to prioritize race first and race-neutral redistricting principles second. Even so, the district court used these flawed benchmarks to condemn the State's plan for failing to subordinate traditional redistricting criteria to the goal of creating a second majority-black district. The court thus converted §2 into a strict-liability regime—a State's neutrally drawn redistricting plan can violate §2 because it fails to draw additional majority-minority districts, whether or not "on account of race." Neither the text of §2 nor this Court's precedents permit—much less require—that divisive regime.

II. If the district court's application of §2 were correct, then §2 could not constitutionally apply to single-member districts. If §2 reaches so far as to invalidate a redistricting plan that resembles millions of race-neutral plans that reflect Alabama's geography and population distribution, then §2 is not "appropriate legislation" necessary to enforce the Fifteenth Amendment. U.S. Const. amend. XV, §2. Congress cannot enforce a prohibition on discrimination by mandating discrimination. Likewise, if §2 requires the racial gerrymander ordered by the district court, then there is no way to reconcile §2 with the Fourteenth Amendment's guarantee that all people are entitled to equal protection under the law. The Court can avoid this constitutionally dubious outcome by confirming that "equally open" districts are neutrally drawn districts, which definitionally do not abridge or deny any voter the ability to cast her ballot on account of race.

ARGUMENT

I. Alabama's Congressional Districts Do Not Violate §2.

A. Section 2 requires "equally open" political processes.

Congress enacted the VRA in the face of an "entrenched problem" that remained nearly a century after the Fifteenth Amendment's ratification. *Brnovich*, 141 S. Ct. at 2331. Despite the Fifteenth Amendment's express prohibition against "den[ying] or abridg[ing]" the right to vote "on account of race, color, or previous condition of servitude," U.S. Const. amend. XV, pernicious racism in the form of grandfather clauses, poll taxes, literacy tests, white primaries, and more persisted. *See Brnovich*, 141 S. Ct. at 2330. The VRA specifically forbade some of those practices by name. *Id.* at 2331. And §2 of the VRA generally prohibited any "voting qualification or prerequisite to voting, or standard, practice, or procedure … to deny or abridge the right of any citizen of the United States to vote on account of race or color." Pub. L. 89–110, 79 Stat. 437 (1965).

More than a decade after its enactment, Congress amended §2. The amendment was broadly understood as a response to this Court's precedents, *White* and *Bolden* chief among them. *See Brnovich*, 141 S. Ct. at 2332. Congress revised the beginning text of Section 2 as follows:

> "**(a)** No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political

> subdivision ~~to deny or abridge~~ **in a manner which results in a denial or abridgment of** the right of any citizen of the United States to vote on account of race or color…."

Compare 79 Stat. 437, *with* Pub. L. 97–205, 96 Stat. 134 (1982), codified at 52 U.S.C. §10301(a).

Congress clarified that disparate effects or results alone remained insufficient to prove a §2 violation. Echoing this Court's decision in *White*, Congress added subsection (b), which codifies a "totality of circumstances" inquiry to probe whether political processes were "equally open" on the basis of race or whether members of a group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. §10301(b).

Consistent with *White*, Congress also expressly rejected proportionality as a benchmark for "equal[] open[ness]," emphasizing that "nothing in this section establishes the right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.* As that new language confirmed, effects alone are not dispositive. That is consistent with the House's failed attempt to write intent out of the statute. *See Brooks*, 469 U.S. at 1010 (Rehnquist, J., dissenting).

The amendment thus clarified the evidentiary showing required of a §2 plaintiff, while retaining the statute's same substantive scope. Before and after the amendment, "invidious discrimination" is prohibited, *White*, 412 U.S. at 764, while "neutral voting regulations with long pedigrees that are reasonable means

of pursuing legitimate interests" are not, *Brnovich*, 141 S. Ct. at 2341. And even after 1982, nothing in §2 "deprive[s] the States of their authority to establish non-discriminatory voting rules." *Id.* at 2343.

What the amendment changed was *how* a plaintiff could go about proving such invidious discrimination. Invidious discrimination may be inferred based on proof that the political processes are "not equally open"—meaning voters of a minority group "have less opportunity than other members … to participate in the political process and to elect representatives of their choice." 52 U.S.C. §10301(b); *accord White*, 412 U.S. at 766. That "equally open" concept means "'without restrictions as to who may participate' or 'requiring no special status, identifications, or permit for entry or participation.'" *Brnovich*, 141 S. Ct. at 2337 (citations omitted). Section 2's reference to "opportunity" further "explain[s] the meaning of equal openness." *Id.* A process that is "equally open" is a process with "equal opportunity," and *vice versa*. *Id.* at 2337-38. They are not "separate requirements" and instead work together to "connote the absence of obstacles and burdens that block or seriously hinder voting" on account of race. *Id.*

The "totality of circumstances" inquiry must include whatever circumstances "have a bearing on whether a State makes voting 'equally open' to all and gives everyone an equal 'opportunity' to vote." *Id.* at 2341. So beyond the so-called "Senate Factors"

endorsed in *Gingles*,[8] there are several additional "important circumstances" to consider. *Brnovich*, 141 S. Ct. at 2338. Two relevant here are the "benchmark[]" by which one can assess the burden on voting rights and "the strength of the state interests served" by the enacted map. *Id.* at 2339.

Finally, both the text and this Court's precedents reject the proposition that a "disparate-impact model" of discrimination should apply to §2. There is no §2 "right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. §10301(b). Nor does §2 "impose a strict 'necessity requirement' that would force States to demonstrate that their legitimate interests can be accomplished only by means of the voting regulations in question." *Brnovich*, 141 S. Ct. at 2341; *id.* at 2345-46. Demanding that much of States "would have the effect of invalidating a great many neutral voting regulations with long pedigrees that are reasonable means of pursuing legitimate interests" and "would also transfer much of the authority to regulate election procedures from the States to the federal courts." *Id.* at 2341.

---

[8] The *Gingles* Court identified various factors from the 1982 Senate report, including any history of discrimination and "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." *Gingles*, 478 U.S. at 37 (quoting S. Rep. No. 97-417, at 28-29 (1982)).

1. "Equally open" redistricting.

Section 2 applies to "voting qualification[s] or prerequisite[s] to voting or standard[s], practice[s], or procedure[s]." 52 U.S.C. §10301(a). This Court has included districting plans in these categories, first applying §2 to multimember districts and later to single-member districts. *See Gingles*, 478 U.S. at 39-40; *Voinovich*, 507 U.S. at 157-58. Assuming §2 applies to single-member districts, *but see infra* §I.A.5, the overarching questions here are the same as those in any §2 case: Do districts keep voting "equally open" to voters of all races? Are the districts "'without restrictions as to who may participate' or 'requiring no special status, identifications, or permit for entry or participation'"? *Brnovich*, 141 S. Ct. at 2337 (citations omitted). Is there an "absence of obstacles and burdens that block or seriously hinder voting"? *Id.* at 2338.

Before a court reaches that inquiry in redistricting challenges, courts ordinarily require redistricting plaintiffs to satisfy three preconditions announced in *Thornburg v. Gingles*. *Gingles* involved a claim for vote dilution caused by a multimember districting scheme. At the time, such schemes were well-known devices of invidious discrimination. *See White*, 412 U.S. at 765. The Court announced that proof of three preconditions was necessary to state a §2 claim involving multimember districts. *Gingles*, 478 U.S. at 46 n.11, 50-51. The first requires a plaintiff to show it would have been possible to draw a reasonably configured single-member majority-minority district. *Id.*

Though single-member districts were once seen as the remedy to vote dilution resulting from

multimember districting schemes, *see White*, 412 U.S. at 769, "[b]y the early 1990s," many "at-large and multimember election systems had" been "dismantled and replaced," and "§ 2 moved into … attacking election systems that already used single-member districts … to try and create more and more 'safe' districts," Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 Ala. L. Rev. 903, 934 (2008). This Court then began applying the *Gingles* preconditions to single-member districts themselves. *See Growe*, 507 U.S. at 39-40.

Critically, "satisfying the *Gingles* preconditions is necessary but not sufficient to show a §2 violation." *Wis. Legislature*, 142 S. Ct. at 1248-49. As §2's text states, a violation lies only if the "totality of circumstances" shows that districts are "not equally open," *supra.* If courts are to continue applying §2 to scrutinize single-member districts, then those challenges must be grounded in that text and corresponding constitutional limitations.

2. Constitutional guardrails in redistricting.

Since courts began applying §2 to single-member districts, this Court has repeatedly intervened where a State's attempt to comply with *Gingles* exceeded the limits of the Equal Protection Clause. In these cases, the Court has established several important constitutional boundaries for what §2 can require.

a. *First*, race cannot predominate in redistricting, no matter what the reason. With respect to a State that considers race because it believed §2 "required" it, the "Court has long *assumed*" that such efforts to

comply with §2 are a "compelling interest" that can justify such "race-based sorting." *Cooper*, 137 S. Ct. at 1464 (emphasis added). But the Court has gone "without deciding" that §2 compliance is in fact such a compelling interest. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 801 (2017). And the mere invocation of the VRA does not give a State a free pass to use race. *See, e.g.*, *Cooper*, 137 S. Ct. at 1468 (racial gerrymander where Senators "repeatedly told their colleagues that District 1 had to be majority-minority, so as to comply with the VRA"); *Abbott v. Perez*, 138 S. Ct. 2305, 2334 (2018) (racial gerrymander despite Texas's argument it had "good reasons to believe" racial manipulation was necessary to satisfy §2); *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 277 (2015) (racial gerrymander where Alabama's interpretation of §5 of the VRA was too "mechanical"); *Shaw II*, 517 U.S. at 911 (racial gerrymander because VRA did not actually require additional majority-minority district and because new district "as drawn, [was] not a remedy narrowly tailored to the State's professed interest in avoiding § 2 liability"). To the contrary, "compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws." *Miller v. Johnson*, 515 U.S. 900, 921 (1995).

In practice, "the State must establish that it had 'good reasons' to think it would transgress the Act if it did *not* draw race-based district lines." *Cooper*, 137 S. Ct. at 1464. And even then, the State must "prove[] that its race-based sorting of voters is narrowly tailored to comply with the VRA." *Wis. Legislature*, 142

S. Ct. at 1248. Even a "district drawn in order to satisfy §2 must not subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid §2 liability." *Bush v. Vera*, 517 U.S. 952, 979 (1996) (plurality op.).

Ways in which race unconstitutionally predominates, even for remedial districts, are many. For instance, §2 cannot justify "bizarrely shaped" or "far from compact" districts. *Id.* And the Equal Protection Clause does not permit maps in which "[r]ace was the criterion that, in the State's view, could not be compromised" and race-neutral considerations "came into play only after the race-based decision had been made." *Shaw II*, 517 U.S. at 907; *accord Bethune-Hill*, 137 S. Ct. at 799. Likewise, when a State redistricts its citizens on the basis of race to hit a racial target, §2 cannot justify such racial predominance. *Cooper*, 137 S. Ct. at 1472.

b. *Second*, and consistent with this Court's rejection of race-based targets in redistricting, proportionality is not the test for §2 liability. Section 2 expressly *disclaims* that it "establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. §10301(b); *accord White*, 412 U.S. at 765-66. For good reason—using proportionality as the relevant benchmark would "promote and perpetuate efforts to devise majority-minority districts even in circumstances where they may not be necessary to achieve equal political and electoral opportunity." *De Grandy*, 512 U.S. at 1019-20. Finding a §2 violation based on a mere lack of proportionality would create "an irresistible inducement

to create [race-based] districts." *Id.* at 1020; *see also id.* at 1020 n.17.

The danger of that "irresistible inducement" is that the pursuit of proportionality will ordinarily devolve into the pursuit of a racial gerrymander. Single-member districting "usually results in less-than-proportionate representation for all political minorities." Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. Pa. L. Rev. 377, 401 (2012). Proportionality will often elude a mapdrawer who adheres to traditional redistricting criteria; absent racial calibrations, maps reflect real-world geography and demography inconsistent with proportionality. Voters are not dispersed "in an absolutely gray uniformity." *Vieth v. Jubelirer*, 541 U.S. 267, 343 (2004) (Souter, J., dissenting); *see Davis v. Bandemer*, 478 U.S. 109, 159 (1986) (O'Connor, J., concurring in judgment) (if there is a "preference for proportionality, the legitimacy of districting itself is called into question"). For this reason, demanding racial proportionality is liable to steamroll natural boundaries by stretching districts to grab voters with little in common other than race. Race unconstitutionally predominates in such circumstances. *See, e.g.*, *Miller*, 515 U.S. at 921 (rejecting map reflecting racially proportionate congressional representation in Georgia).

c. *Third*, and relatedly, maximization of majority-minority districts is not what §2 requires. Just because a majority-minority district *can* be drawn does not mean it *must* be drawn. *See Wis. Legislature*, 142 S. Ct. at 1249 (rejecting as constitutionally deficient the rationale that "there is now a sufficiently large

and compact population of black residents to" justify creation of an additional majority-black district). In *De Grandy*, for example, this Court considered whether a State was required to maximize the number of majority-minority districts once all three *Gingles* preconditions were met. 512 U.S. at 1007-09. The Court was unequivocal: "Failure to maximize cannot be the measure of §2." *Id.* at 1017. Defining dilution as a failure to maximize "causes its own dangers, and they are not to be courted." *Id.* at 1016.

Likewise in *Miller* and *Shaw II*, the Court refused to make maximization the rule even in jurisdictions then subject to §5 of the VRA. In *Miller*, the Department of Justice initially refused to preclear Georgia's proposed plan because Georgia did not maximize the number of majority-black congressional districts. *Miller*, 515 U.S. at 906-07. To obtain preclearance, Georgia revised its plan to contain the maximum three majority-black congressional districts. *Id.* at 907-09. This Court held that the plan violated the Equal Protection Clause. *Id.* at 925-27. Likewise in *Shaw II*, this Court declared that §5 did not allow North Carolina to maximize majority-minority districts—the Department of Justice's demands notwithstanding. 517 U.S. at 912-13.

De Grandy, *Miller*, and *Shaw II* all stand for the basic principle that the VRA does not "require States to create majority-minority districts wherever possible." *Miller*, 515 U.S. at 925. The Court has described such a distortion of the VRA as "beyond what Congress intended and we have upheld." *Id.* Indeed, compelling States to maximize the voting power of one racial group over others obviously raises "serious

constitutional concerns." *Id.* at 926; *accord De Grandy*, 512 U.S. at 1016.

* * *

Despite these constitutional guardrails, courts have forced §2 into conflict with the Constitution and left States caught in the middle. The decision below is a textbook example. The court concluded that an additional district could be drawn, so it must be drawn—even if doing so required making race the nonnegotiable "criterion" that "could not be compromised." *Shaw II*, 517 U.S. at 907. There is no reason that §2 and the Equal Protection Clause should leave States vulnerable to such "competing hazards of liability." *Bush*, 517 U.S. at 977 (plurality op.); *see also Abbott*, 138 S. Ct. at 2315; *Bethune-Hill*, 137 S. Ct. at 802. As a matter of statutory interpretation, there should be no tension between simultaneously complying with both.

3. The relevant benchmark for "equally open" electoral districts is a race-neutral redistricting plan.

a. Section 2's text requires political processes to be "equally open." 52 U.S.C. §10301(b). What has eluded federal courts in redistricting cases is the question, "equally open" compared to *what*? *See, e.g.*, *Gonzalez v. City of Aurora*, 535 F.3d 594, 598 (7th Cir. 2008) (Easterbrook, C.J.) ("Diluted relative to what benchmark?"); *see also Holder*, 512 U.S. at 896 (Thomas, J., concurring in judgment) ("The central difficulty in any vote dilution case, of course, is determining a point of comparison against which dilution can be measured."). In other words, when evaluating the "totality of circumstances," what is the relevant benchmark to

assess whether a redistricting plan "abridge[s] or deni[es]" the right to vote "on account of race"? 52 U.S.C. §10301; *see Brnovich*, 141 S. Ct. at 2338 ("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.").

A straightforward interpretation of §2's text, combined with the above constitutional limitations, answers that question. An "equally open" redistricting plan is one without "obstacles" or "burdens that block or seriously hinder voting" on account of race. *Brnovich*, 141 S. Ct. at 2338. Beyond that, nothing in §2's text "deprive[s] the States of their authority to establish non-discriminatory voting rules." *Id.* at 2343. The only way to understand these principles as applied to single-member districting is that a plan is "equally open" when it resembles neutrally drawn plans.

Described more fully below, it is thus necessary in any redistricting case for the plaintiff to establish as part of the "totality of circumstances" that the State's enacted districts diverge from neutrally drawn redistricting plans, taking account of any redistricting principles animating the State's enacted plan. *See, e.g.*, *Gonzalez*, 535 F.3d at 600 (Easterbrook, C.J.) (§2 benchmark is "neutrally drawn" districts, for "[t]he Voting Rights Act does not require" "serious gerrymandering"); *cf. Brnovich*, 141 S. Ct. at 2341. If the State's enacted map compares favorably to neutrally drawn plans, then for §2 purposes "there neither has been a wrong nor can be a remedy," *Growe*, 507 U.S. at 41, and "§2 simply does not speak to the matter," *Voinovich*, 507 U.S. at 155 (1993); *cf. Lawyer v. Dep't of Justice*, 521 U.S. 567, 582 (1997) (no voting-rights

violation in part because "unrefuted evidence show[ed] … District 21 is no different from what Florida's traditional districting principles could be expected to produce").

Only that race-neutral benchmark is consistent with the VRA's constitutional guardrails, *supra*. Under the Equal Protection Clause, race-based redistricting "is constitutionally suspect." *Shaw II*, 517 U.S. at 904. The VRA therefore cannot require the creation of additional majority-minority districts where doing so would require that race "predominate over … neutral districting principles," which themselves reflect "a valid expression of legislative policy." *Abrams*, 521 U.S. at 88. A §2 redistricting claim thus cannot measure a State's plan against a plaintiff's hypothetical *race-based* redistricting plan.

b. The totality-of-circumstances analysis requires a plaintiff to establish irregularities in the State's enacted plan that can be explained only by racial discrimination. For example, if a plaintiff can establish that an enacted plan eliminated an existing majority-minority district that would exist in neutrally drawn plans, and if the State can offer no race-neutral basis for doing so, then there is good reason to think that the State's plan discriminates "on account of race." 52 U.S.C. §10301(a); *cf. LULAC*, 548 U.S. at 427-29 (observing Texas dissolved existing majority-minority district and replaced it with a sprawling majority-minority district elsewhere). More broadly, if the State's enacted plan substantially deviates from plans that could have been generated through a race-neutral districting process, that could be evidence of "invidious discrimination" rendering the electoral processes "not

equally open" to all voters. *White*, 412 U.S. at 764-66; 52 U.S.C. §10301(b). Absent some permissible explanation by the State, deviations between a State's enacted plan and neutrally drawn plans may suggest that a State has dispersed minority voters in an unnatural way, departing from the State's naturally occurring demography and redistricting principles.

If, on the other hand, the State's enacted plan resembles neutrally drawn plans, then the plaintiff cannot prevail under §2. For example, if the plaintiff challenges a plan's lack of an additional majority-minority district but cannot show that the enacted plan produced fewer majority-minority districts than what would be expected from a race-neutral districting process, then the plaintiff cannot support a §2 claim; the enacted plan has "result[ed] in" what a race-neutral process would be expected to produce. 52 U.S.C. §10301(a). Likewise, if a plaintiff can show only that the State's enacted plan differs from other possible alternatives without further evidence that those differences occurred "on account of race," then the plaintiff has failed to state a claim under §2.[9]

Establishing that the State's enacted plan deviates from neutrally drawn plans on account of race—the benchmark for determining whether districts are "equally open"—is necessary proof in every §2 redistricting case. And where an enacted plan resembles neutrally drawn plans, the plaintiff cannot prove that

[9] Apart from §2, plaintiffs may still pursue constitutional claims for intentional discrimination under the Equal Protection Clause, which prohibits racial predominance in redistricting even if the State "could have drawn the same lines in accordance with traditional criteria." *Bethune-Hill*, 137 S. Ct. at 798.

the enacted plan is "not equally open" to all voters. Such a plan bears every indication that it was based on the State's naturally occurring geography and demography, thus imposing no "obstacle[]" or "burdens that block or seriously hinder voting" on account of race. *Brnovich*, 141 S. Ct. at 2338; *see also Holder*, 512 U.S. at 901 (Thomas, J., concurring in judgment) (noting that "[i]f a minority group is unable to control seats, that result may plausibly be attributed to the inescapable fact that, in a majoritarian system, numerical minorities lose elections"). If the rule were anything else, then §2 would subject even non-discriminatory redistricting plans to court-ordered discriminatory revisions.

c. Finally, the "totality of circumstances" inquiry must also include the State's interests in the enacted redistricting plan. *Brnovich*, 141 S. Ct. at 2339-40. Litigants cannot ignore the State's redistricting principles, such as a stated policy of retaining existing district lines. A State's redistricting policies are highly relevant to whether such a plan is merely a product of geography and the State's legitimate race-neutral interests, as opposed to a plan abridging or denying voting rights "on account of race." 52 U.S.C. §10301(a).

Just as the "long pedigree" or "widespread use" of a voting regulation are "circumstance[s] that must be taken into account" for challenges to time, place, and manner restrictions, *Brnovich*, 141 S. Ct. at 2339, so too must a court consider a redistricting plan's adherence to traditional districting criteria. Following a "common practice" like "start[ing] with the plan used in the prior map and … chang[ing] the boundaries of the prior districts only as needed to comply with the

one-person, one-vote mandate and to achieve other desired ends," *Cooper*, 137 S. Ct. at 1492 (Alito, J., concurring in judgment in part and dissenting in part), can further confirm that a State's enacted plan does not discriminate on account of race. Ignoring the State's "reason[s] for the" map would shortchange the "totality of circumstances" inquiry by failing to account for the State's race-neutral "interests" in crafting the particular districts. *See Brnovich*, 141 S. Ct. at 2339-40.

4. The first *Gingles* precondition separately requires plaintiffs to proffer race-neutral comparator maps.

Gingles is not a substitute for the statutorily required totality-of-circumstances analysis; instead, satisfying *Gingles* has been a necessary but not sufficient preliminary step in redistricting challenges. *See Wis. Legislature*, 142 S. Ct. at 1248-49. The three *Gingles* preconditions are meant to serve a gatekeeping role. But satisfying those preconditions does not relieve a plaintiff from separately establishing, as part of the totality-of-circumstances analysis required in every §2 case, that the State's enacted plan deviates from neutrally drawn plans on account of race, *supra*.

Relevant here, 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. But if *Gingles* is to serve any gatekeeping role, race cannot predominate in the districts a plaintiff proposes to satisfy that precondition. A "reasonably configured district" is a neutrally drawn district, not one

that prioritizes race first (*e.g.*, splitting counties to hit a racial target) and traditional race-neutral redistricting criteria second (*e.g.*, following natural borders or maintaining the cores of existing districts). After all, the whole point of the *Gingles* preconditions is to evaluate whether redistricting operated as an "allegedly dilutive electoral mechanism" on account of race. *Gingles*, 478 U.S. at 46; *see Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003) (recognizing that VRA's purpose "is to prevent discrimination in the exercise of the electoral franchise").

But as *Gingles* has evolved to apply to single-member districts, confusion has set in on this score. Plaintiffs here, for example, have argued that "[n]othing in this Court's precedents requires plaintiffs' experts to undertake the *Gingles* 1 inquiry in a race-blind manner." Milligan Stay Resp. 7; *see also* Caster Stay Resp. 18-19 ("The first *Gingles* precondition does not require Plaintiffs' experts to blindly stumble around Alabama's map, hoping they might just happen to run into a new majority-Black district."). This Court's precedents have thus been misread to permit §2 plaintiffs to draw maps in ways that States never could: hit a racial target first and apply traditional, race-neutral redistricting criteria second. *Cf. Cooper*, 137 S. Ct. at 1469 (finding North Carolina unconstitutionally subordinated traditional districting principles to race when application of those principles interfered with "'the more important thing'… to create a majority-minority district").

This Court's precedents plainly state that a hypothetical district must be "reasonably configured" for a plaintiff to pass step one of *Gingles*. *Wis. Legislature*,

142 S. Ct. at 1248. This Court has never conflated "reasonably configured" with racially gerrymandered. Just the opposite. For example, in *Shaw II*, this Court rejected North Carolina's argument that the VRA required the State to create a sprawling, remedial congressional district: "No one looking at District 12 could reasonably suggest that the district contains a 'geographically compact' population of any race. Therefore where that district sits, 'there neither has been a wrong nor can be a remedy.'" 517 U.S. at 916 (citation omitted). The Court rejected the argument that a State "may draw a majority-minority district anywhere," with race predominating, "even if the district is in no way coincident with the compact *Gingles* district." *Id.* at 916-17. The same goes for plaintiffs attempting to prove that §2 requires an additional, reasonably configured district. This Court has always relied on traditional districting principles to determine whether §2 plaintiffs have cleared that hurdle. *See, e.g.*, *Bush*, 517 U.S. at 979 (plurality op.) (§2 does "not require" remedial districts that "reach[] out to grab small and apparently isolated minority communities"); *LULAC*, 548 U.S. at 433 (*Gingles* 1 "inquiry should take into account 'traditional districting principles such as maintaining communities of interest and traditional boundaries'" (quoting *Abrams*, 521 U.S. at 92)).

In light of these precedents, a plaintiff's comparator map is not "reasonably configured" if it can be drawn only by prioritizing race first.[10] *Gingles* was

[10] Indeed, *Gingles* relied heavily on commentators who argued that "the relevant question should be whether the minority

designed to help identify racial gerrymanders, not show how they can be drawn. Satisfying *Gingles* with racially discriminatory maps would present a serious circularity problem for a test designed to "'smoke out,' as it were," racially discriminatory maps. *Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring). A plaintiff's comparator map that discriminates in favor of a racial group reveals nothing about whether a State's enacted map discriminates against that group.

5. In the alternative, §2 does not apply to single-member districts.

The Court can alternatively resolve this case by holding that §2 does not apply to challenges to single-member districts. The statute applies only to a "voting qualification," a "prerequisite to voting," or a "standard, practice, or procedure." 52 U.S.C. §10301(a). A "standard" has long been defined as "[t]hat which is

---

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." 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) (emphasis added) (cited repeatedly at *Gingles*, 478 U.S. at 47-51 as the Court set forth the *Gingles* preconditions); *see also* 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) (cited in *Gingles*, 478 U.S. at 46 n.11) (advocating an approach that "compar[es] 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, which is ascertained through randomly generated computer-drawn districting plans").

established by authority, custom, or general consent" or a "criterion." Webster's New International Dictionary 2455 (2d ed. 1948); *accord* Oxford English Dictionary online (2d ed. 1989) ("[a] rule, principle, or means of judgement or estimation; a criterion, measure"). A "practice" is a "repeated or customary action" or "custom." Webster's Second 1937; *accord* OED ("usual, customary, or constant action"). A "procedure" is the "[m]anner or method of proceeding in a process or course of action." Webster's Second 1972; *accord* OED ("course of action"). The meaning of these three terms is further constrained by §2's preceding terms "voting qualification" and "prerequisite to voting." *See Holder*, 512 U.S. at 917 (Thomas, J., concurring in judgment). In context, "standard, practice, or procedure" should thus be understood to mean "methods for conducting a part of the voting process that might similarly be used to interfere with a citizen's ability to cast his vote." *Id*. at 915-18.

These terms do not describe a single-member redistricting plan. When "standard, practice, or procedure" is construed to include geographic boundaries in such plans, courts become "immersed … in the hopeless project of weighing questions of political theory—questions judges must confront to establish a benchmark concept of an 'undiluted vote.'" *Id.* at 892. Single-member redistricting plans, moreover, in no way resemble the literacy tests, poll taxes, or other voting restrictions used to prevent minorities from voting. *Id.* at 892-93. Rather, single-member districts have traditionally been viewed as the *alternative* to multimember and at-large schemes. *See, e.g.*, *White*, 412 U.S. at 765 (affirming court "insofar as it invalidated the

multi-member districts … and ordered those districts to be redrawn into single member districts"). Single-member districts, assuming they include all voters and are equally populated, are definitionally "equally open" because they do not create an obstacle or impediment for any eligible voter to cast a vote. *Cf. Brnovich*, 141 S. Ct. at 2337-38.

Stare decisis is not "an inexorable command" requiring the continued misapplication of §2 to single-member districts. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020). As illustrated by the decision below, the application of §2 to redistricting has become "unworkable." *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009). As conceived by the district court, it is circular and unadministrable, *infra* §I.B.4. And attempts to comply with §2 have created independent constitutional violations. *See, e.g.*, *Cooper*, 137 S. Ct. at 1472; *cf. Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part) (considering "significant negative jurisprudential [and] real-world consequences" from mistaken precedent). Finally, in the redistricting context, the vast majority of this Court's cases have *rejected* §2 challenges to States' plans. *See, e.g.*, *Growe*, 507 U.S. at 41; *Voinovich*, 507 U.S. at 158; *De Grandy*, 512 U.S. at 1022; *Bartlett*, 556 U.S. at 25-26. As then-Chief Judge Easterbrook observed, cases in which this "Court has found a problem under §2 all involve transparent gerrymandering that boosts one group's chances at the expense of another's"—a wrong already prohibited by the Equal Protection Clause. *Gonzalez*, 535 F.3d at 598 (collecting cases); *see, e.g.*, *LULAC*, 548 U.S. at 428-29 (finding §2 violation based on the dissolution of an existing Latino opportunity district,

which could not be remedied by creating a gerrymandered district elsewhere). *Stare decisis* is thus no basis to perpetuate the atextual application of §2 to single-member districting plans.

B. Alabama's congressional districts are "equally open."

Under the principles discussed above, Alabama's enacted congressional map does not violate §2. The decision below rests on a legal error: that because an additional majority-black district *could* be drawn, it *must* be drawn. That runs headlong into the Constitution's redistricting guardrails, *supra* §I.A.2. It sets a racial target, subordinates traditional criteria to race, and is no different than mandating maximization of majority-minority districts. The Constitution permits none of this, and §2 does not compel it.

1. The State's congressional districts were drawn for race-neutral reasons.

Alabama's enacted districts abide by traditional redistricting principles, including "maintaining communities of interest and traditional boundaries." *Bush*, 517 U.S. at 977 (plurality op.). The enacted districts reflect past districts. *See supra* 16-18; SJA178. There was no major change to the existing lines. *Cf. LULAC*, 548 U.S. at 427-29. And the existing map, like past maps, honors traditional communities that have been districted together for decades.

These real-world circumstances, which led to the enacted districts, are integral to §2's "totality of circumstances" inquiry and demonstrate the enacted map's equal openness. The evidence shows that

Alabama's 2021 congressional map is a continuation of past redistricting plans, consistent with traditional, race-neutral criteria including retaining the core of each district while equalizing population. *See, e.g.*, MSA348 (plaintiffs' expert agreeing "that core retention seems to have been highly prioritized in the creation of the 2021 plan"). The line-drawing process was accomplished without regard to race; racial demographics were not even visible to Alabama's mapdrawer through the duration of the mapdrawing process. *See supra* p.17. Rather, the mapdrawer followed a set of bipartisan traditional districting principles and drew a "least changes" map retaining roughly 90% of the core of each existing district. *See supra* pp.17, 22.

Accounting for the State's race-neutral districting process and its legitimate interests in upholding traditional districting principles, the "totality of circumstances" shows that, even though Alabama did not draw its districts in the manner Plaintiffs would have preferred, any purported harm to Plaintiffs is not an abridgment or denial of their right to vote, let alone an abridgment or denial "on account of race." 52 U.S.C. §10301(a).

2. The State's enacted plan resembles millions of race-neutral comparators.

Plaintiffs' own evidence unequivocally shows that Alabama's congressional redistricting plan did not "result[] in" the abridgment or denial of Plaintiffs' votes, 52 U.S.C. §10301(a), when measured against race-neutral districts. Evidence regarding millions of race-neutral redistricting simulations created by

Plaintiffs' experts shows that a race-neutral districting process would never have produced two majority-minority districts. Plaintiffs thus cannot prove that the State's plan is "not equally open," as measured by neutrally drawn districts. *See supra* §I.A.3.

One of Plaintiffs' experts, Dr. Imai, generated 30,000 illustrative maps with sophisticated map-simulation software. SJA52-67; SJA68-73. Dr. Imai tuned his algorithm to ensure that 20,000 of these maps included at least one majority-minority district. SJA58-59, 70-71. And all of the maps purported to comply with certain traditional districting principles including population equality, incumbent protection, and minimizing county splits, while remaining agnostic to Alabama's existing district lines. SJA58-59. So programmed, these thousands of simulated maps reveal how many majority-minority districts are likely to result from a race-neutral, blank-slate districting process. The answer? No more than one. SJA58-59; SJA70. And *none* of Dr. Imai's 30,000 simulated maps—even the 20,000 programmed to intentionally include at least one majority-black district—resulted in two majority-black districts. JA571-72.

Another of Plaintiffs' experts, Dr. Duchin, reached the same result. Dr. Duchin testified about a study where she had generated 2 million race-neutral maps based on Alabama's naturally occurring geography and demography. JA710. As she testified, *not even one* map in her study contained a second majority-minority district. *Id.* Her conclusion? "[I]t is hard to draw two majority-black districts by accident" in Alabama. JA714.

In a similar vein, Plaintiff Evan Milligan had his team of trained mapdrawers try to draw a two-majority-minority-district plan. They were unable to create two majority-minority districts. JA511.

If "equally open" is to mean anything, it is that Alabama's districts—resembling millions of neutrally drawn plans—are "equally open" to all. In the State's plan, a citizen's "right … to vote" resembles the right any citizen would have under one of millions of race-neutral plans. It is hard to imagine a better race-neutral benchmark than the millions of maps created by Plaintiffs' own experts, not one of which contained two majority-black districts. Such evidence forecloses any argument that Alabama's enacted map "results in a denial or abridgement of the right … to vote on account of race." 52 U.S.C. §10301(a).

3. The district court erred by employing a race-based benchmark and disregarding the State's legitimate, race-neutral interests.

Three overriding errors infected the district court's conclusion that Alabama's congressional districts are "not equally open" to voters of all races. 52 U.S.C. §10301(b). First, discussed *infra* §I.B.4, the court began with a mistaken view of *Gingles* that allowed race-based comparator plans to serve as the "reasonably configured" alternative districting plans at *Gingles*'s first step. Next, *infra* §I.B.3.a, the court deployed those race-prioritized plans as benchmarks by which to judge the State's enacted plan, collapsing the "totality of circumstances" analysis with a (flawed) *Gingles* 1 analysis and ignoring the State's legitimate,

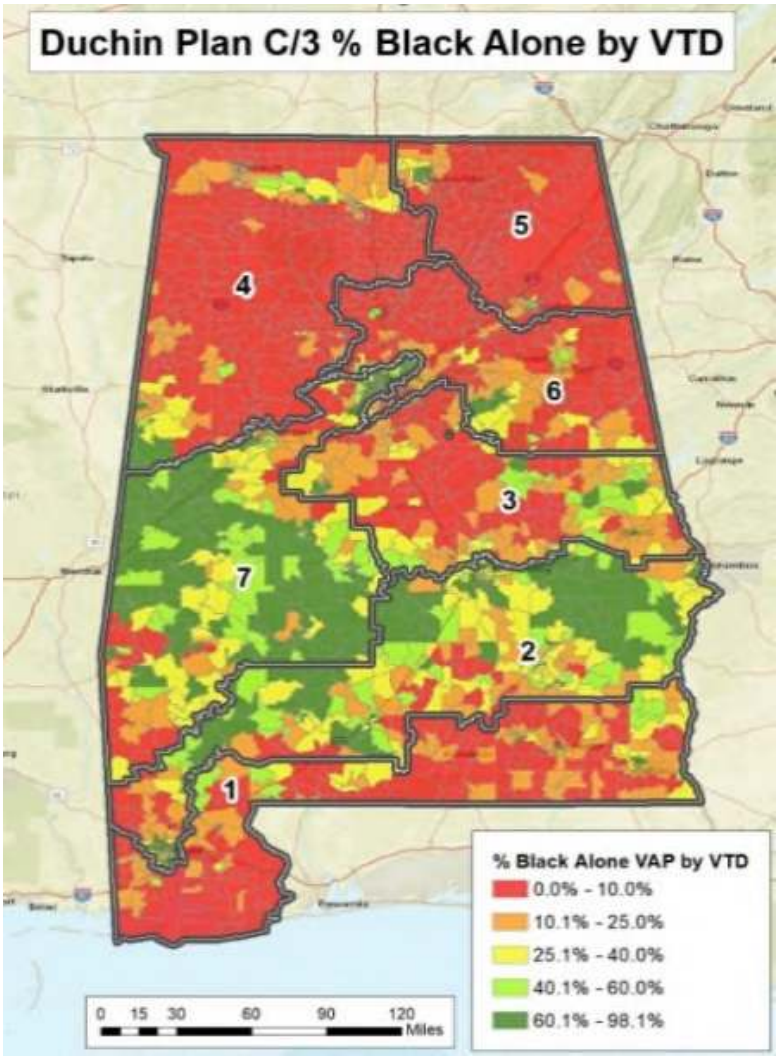
race-neutral interests. Finally, *infra* §I.B.3.b, the court's "totality of circumstances" analysis deployed proportionality as a reason for rejecting the enacted plan, even though this Court has cautioned against using proportionality in precisely that way.

a. The benchmarks against which the district court compared Alabama's enacted plan were a few hand-picked, race-based plans proffered by Plaintiffs' experts. Indeed, Plaintiffs' experts admitted that they began with a nonnegotiable racial target of two majority-minority districts. *See supra* pp.22-26. To hit their target, they drew their second majority-black district with extreme precision—barely exceeding their quota of 50% black voting-age population in the proposed plans. *See, e.g.*, MSA92-93. Along the way, they sacrificed the State's traditional districting principles as "necessary" to maintain "two districts with BVAPs of greater than 50%." MSA60. They split small precincts (or VTDs) on the basis of race: "I did sometimes look at race of those blocks, *but really, only to make sure that I was creating two districts over 50 percent*." JA630 (emphasis added). In many proposed plans, they split more counties than in the 2021 Map: "There's no question" more counties were split because the creation of two majority-black districts was "a nonnegotiable." JA656. Their newly created districts were necessarily less compact: "[A]fter … what I took to be nonnegotiable principles of population balance and seeking two majority-black districts, *after that*, I took contiguity as a requirement and compactness as paramount." JA634; *see also* JA696-97. And they paid little regard to existing district lines: "I would not be able to achieve corresponding statistics

[for core retention] while creating a second majority-black district." JA720.

That Plaintiffs sacrificed traditional districting criteria for the sake of racial preferences is most clearly revealed by the way in which every one of Plaintiffs' plans splits Alabama's distinctive Gulf Coast region into two districts along racial lines. Voters in Mobile and Baldwin Counties would be divided between two districts for the first time in 50 years, and Mobile County would be split between separate congressional districts for the first time in the State's history, *supra* p.21. Shown below, where once those of all races were grouped together in a single Gulf Coast district, unified by its unique industry and culture, Plaintiffs would divide Alabamians based on skin color into two sprawling districts. Every one of Plaintiffs' comparator plans does the same thing: Remove black residents from the Gulf Coast's existing District 1 and place them in a redrawn District 2 with voters on the other side of the State, solely on the basis of race. When Plaintiffs' plans are compared with a map showing the percentage of black voters in each voting

precinct, the race-focused nature of the plans is unmistakable:



SJA188; *see also* SJA184, 186, 190, 193, 195, 197, 199, 201, 203.

Yet the district court decided these plans were "reasonably configured," MSA171, and, paradoxically,

that the State's deviation from these race-based plans indicated racial discrimination.

b. The district court also failed to account for non-discriminatory redistricting principles that easily explain the State's plan. The district court brushed aside the significance of dismantling the Gulf Coast district, contrary to the State's longstanding interests in maintaining the Gulf Coast and respecting the existing district. *See* MSA180 ("[C]ompared to the record about the Black Belt, the record about the Gulf Coast community of interest is less compelling."). According to the district court, it was sufficient that the Black Belt was also a community of interest and that Plaintiffs' "plans respect it at least as much as the [State's] Plan, and likely more." MSA178.[11] That rationale is as limitless as it is flawed. A racial gerrymander cannot be absolved by touting one traditional districting criterion that is purportedly advanced by the racially gerrymandered plan at the expense of others. *See Bethune-Hill,* 137 S. Ct. at 797-98 (rejecting that "an actual conflict" need exist between the enacted plan and traditional redistricting criteria to prove a racial gerrymander); *cf. Shaw II*, 517 U.S. at 916-17 (observing that the mere ability to craft a sprawling district is

[11] In reality, Alabama's plan divides Black Belt counties among only three districts, doing just as well as, or better than, Plaintiffs' plans, none of which fits those counties into fewer than three districts. *Compare* JA155 (*Milligan* stipulation identifying 18 "core" Black Belt counties) *and* SJA84 (*Caster* expert identifying 12 Black Belt counties) *with* SJA211 (enacted plan), SJA27 (*Milligan* plans), *and* SJA99-109, 149 (*Caster* plans). The court's conclusion that the State's plan split the Black Belt "into four Congressional districts" was clearly erroneous. MSA177.

not a "strong basis in evidence for concluding that a §2 violation exists in the state").

What's more, the district court deliberately overrode the State's interest in retaining the cores of existing districts. *See, e.g.*, *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (recognizing that "preserving the cores of prior districts" is a legitimate state interest); *Cooper*, 137 S. Ct. at 1492 (Alito, J., concurring in judgment in part and dissenting in part) (noting that this "common practice … honors settled expectations and … minimizes the risk that the new plan will be overturned"). The district court first declared that "[t]he Legislature's redistricting guidelines do not establish that core retention must be the (or even a) priority." MSA182. But, of course, the Legislature's plan indisputably made core retention a priority. The enacted plan was the best evidence of "the policies and preferences of the State." *White v. Weiser*, 412 U.S. 783, 795 (1973).

The court then held that core retention is a dispensable principle because "a significant level of core disruption … is to be expected when the entire reason for the remedial map is to draw a second majority-minority district that was not there before." MSA182. In other words, these Plaintiffs could not be expected to put core retention before race because it would end their case. By discounting the State's legitimate interest in maintaining existing district lines and advancing other non-discriminatory redistricting principles, the court improperly relieved Plaintiffs of their burden to prove that the State's map discriminated "on account of race." 52 U.S.C. §10301(a).

c. Further contrary to §2's text, the district court evaluated the State's plan against maps Plaintiffs expressly designed to produce racial proportionality. Plaintiffs have continually argued that "Black Alabamians are disproportionately under-represented in [Alabama's p]lan, because they comprise 27% of the population of the state but have an opportunity to elect a representative of their choice in only 14% of the congressional districts." MSA104; *see also Caster* Stay App. Resp. 1 (arguing that "Alabama's new congressional redistricting plan provides Black voters the opportunity to elect just one of Alabama's seven congressional representatives, even though they comprise more than 27 percent of Alabama's voting-eligible population").[12] And the district court even praised Plaintiffs' plans as "provid[ing] a number of majority-Black districts that is roughly proportional to the Black percentage of the population." MSA183.

Section 2 (to say nothing of the Constitution) prohibits proportionality as a baseline. *See supra* §I.A.1-2. But the district court endorsed it anyway, using Plaintiffs' proportionality-pursuing comparator plans as the relevant benchmark and later finding that the lack of proportionality in Alabama's enacted plan "weighs decidedly in favor of the plaintiffs." MSA205.

---

[12] The notion that voters have "opportunity" to elect their candidates of choice only in districts where they constitute a majority illuminates the depths of Plaintiffs' confusion. Section 2 ensures that voting is "equally open" to all Alabamians in all districts. The statute is not "a device for regulating, rationing, and apportioning political power among racial and ethnic groups." *Holder*, 512 U.S. at 893 (Thomas, J., concurring in judgment).

The district court also converted this Court's observations about proportionality in *De Grandy* from a shield into a sword. The court observed that "'proportionality … is obviously an indication that minority voters have equal opportunity, in spite of racial polarization, to participate in the political process and to elect representatives of their choice.'" MSA203 (quoting *De Grandy*, 512 U.S. at 1020). Then followed the court's leap in logic: "We have no such indication [of proportionality] here," so Alabama's plan is suspect. *Id.* But the *absence* of proportionality is not ordinarily nefarious; it often simply reflects demographic realities. Indeed, as Dr. Duchin testified, even dramatic disproportionality may be "merely … a matter of … political geography." *Milligan*, ECF 105-3 at 76 (Tr. 612:3-17); *see also id.* (explaining that though "about a third of Massachusetts voters select a Republican in statewide contests … it's literally impossible to draw" even one of Massachusetts' nine congressional districts to favor Republicans due to "where people live"). Invalidating a State's redistricting plan for its lack of racial proportionality without evidence that the disproportionality occurred "on account of race" is to contradict the VRA's very text: "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. §10301(b).

Any discussion of proportionality must grapple with Alabama's geographic and demographic realities. *See Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring in judgment). Black voters are concentrated in the State's four largest cities: Huntsville, Birmingham, Montgomery, and Mobile. MSA170. None of

these geographically dispersed cities includes enough black Alabamians to constitute a majority of a single congressional district. *See id.*; *see also* SJA32. The next largest group of black voters is dispersed across the State's sprawling and sparsely populated Black Belt. MSA170; *see* SJA33 ("The Black Belt includes 8 of the 10 least populous counties in the state, each with under 13,000 residents."). All 18 Black Belt counties together, even including urban Montgomery, still have only about 300,000 black Alabamians—fewer than the majority of a congressional district. MSA62. That Alabama's plan includes only one majority-black district simply reflects where Alabamians reside and the State's race-neutral districting principles, not invidious discrimination.

4. The district court's application of *Gingles* misconstrues this Court's precedents.

The district court's finding of a likely §2 violation began with the observation that Plaintiffs were able to draw an additional majority-black district in their race-based comparator plans proffered to satisfy *Gingles* 1. That conclusion is riddled with legal error even within the four corners of *Gingles*. Plaintiffs cannot satisfy the first *Gingles* precondition by "prioritiz[ing] race" in creating a second majority-minority district while allowing other race-neutral criteria "to yield" to that racial target. MSA214-15. Yet Plaintiffs' race-based plans were not only deemed satisfactory for purposes of *Gingles*; they also became the benchmark used to invalidate Alabama's redistricting plan.

a. The takeaway for litigants and legislatures can be summarized as follows: where it is *possible* to draw an additional majority-black district, a State *must* draw the district, assuming the other *Gingles* preconditions show racially polarized voting some amount of the time. *See* 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…."). But if this is correct, then *Gingles* is a strict-liability rule that will invalidate districting plans—even neutrally drawn ones—that do not add majority-minority districts wherever possible.

This error is just the latest iteration of the theory that majority-minority districts must be maximized in redistricting plans—a claim that this Court rejected in *De Grandy*, 512 U.S. at 1016, *Miller*, 515 U.S. at 925-27, and *Shaw II*, 517 U.S. at 916-17. In each of those cases, this Court rejected the notion that plaintiffs can prove a VRA violation by showing a failure to maximize majority-minority districts. So too here. Starting from the premise that an additional district *must* be drawn if it *can* be drawn (even if only by prioritizing that two-district racial target above race-neutral criteria) raises the same constitutional problems. The district court's approach transforms §2 from a statute meant to stamp out race discrimination into a statute that requires it. *See Holder*, 512 U.S. at 905-06 (Thomas, J., concurring in judgment) (warning that "voting rights decisions are rapidly progressing toward a system that is indistinguishable in principle from a scheme under which members of different racial groups are divided into separate electoral

registers and allocated a proportion of political power on the basis of race").

b. Compounding that error here, the district court concluded that Plaintiffs satisfied *Gingles* 1 even though race predominated in their comparator maps. According to the district court, *Gingles* permits Plaintiffs (and thus requires States) to "prioritize[] race" as "necessary" to hit a racial target. MSA157, 159, 214. For example, the district court saw nothing wrong with a mapdrawer who splits tiny voting blocks (VTDs) on account of race just to be sure that she "was creating two districts over 50 percent" so long as she did not split VTDs after hitting that target. JA629-30.

Remarkably, the district court deemed Plaintiffs' race-based districts "reasonably configured" even though adding a second majority-black district would entail replacing existing Districts 1 and 2 with sprawling districts, each of which split the Gulf Coast region and stretch east to west across the width of the State. The court was satisfied that Plaintiffs' newly drawn majority-minority districts did not upset the *overall average* compactness scores of all districts combined. MSA166-68. But the district court asked the wrong questions. With respect to compactness, for example, the question is whether the newly drawn district, alone, is sufficiently compact or whether the minority population is so sprawling that any majority-minority district (reaching from Mississippi to Georgia) cannot be deemed "reasonably configured." *Cooper*, 137 S. Ct. at 1460; *see LULAC*, 548 U.S. at 433; *see, e.g.*, *Shaw II*, 517 U.S. at 916. And on that score, Plaintiffs' experts agreed with Alabama that

any second majority-minority district would be less compact than the district it would replace. JA696.

Relatedly, despite the district court's assurances, it is no comfort that Plaintiffs could have considered race *more* when they drew their comparator plans. *See, e.g.*, MSA60-61, 95 (noting that Plaintiffs' expert "testified that if he had wanted to assign race a greater role, he could have"). Considering race "just enough but not too much" does not bring a race-predominant plan within constitutional bounds. If that were acceptable, then the maps drawn in *Cooper*—ultimately declared unconstitutional by this Court—should have been acceptable too. North Carolina subordinated traditional districting principles to race only "sometimes," when it interfered with "'the more important thing' … to create a majority-minority district." 137 S. Ct. at 1469. Sound familiar? It was unconstitutional in *Cooper*, and it would be unconstitutional here. Plaintiffs do not get a free pass under *Gingles* to do what the legislature could not do in *Cooper*.

In short, the district court erred by holding that *Gingles* permitted racial prioritization at the outset while requiring traditional redistricting criteria "to yield" in Plaintiff's comparator plans. MSA214-15. It is not sufficient that a plaintiff's race-based comparator is sufficiently "consistent with" traditional districting principles. *See Bethune-Hill*, 137 S. Ct. at 798-99. By the district court's logic, race would not "predominate" if a public college categorically excluded all applicants of one race at step one, so long as the admissions office abided by race-neutral admissions criteria for those who made it to step two. The logic is self-refuting. If, as here, a racial "quota operated as a filter

through which all line-drawing decisions had to pass," then as a matter of law and language, race "predominates." *Harris v. McCrory*, 159 F. Supp. 3d 600, 612 (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017).

c. Ultimately, injecting race into the first step of *Gingles* makes the test a useless gatekeeper. It renders *Gingles* circular by allowing Plaintiffs to assume from the start that they warrant a §2 remedy. But a plaintiff cannot "prioritize[] race" at step one, and then, working backward, draw illustrative districts with that "non-negotiable" constraint (by "eyeballing," no less). MSA159, 214-15. If this is what *Gingles* permits, then it does nothing to identify "discrimination in the exercise of the electoral franchise." *Ashcroft*, 539 U.S. at 490.

For *Gingles* to serve its gatekeeping role, it must require plaintiffs to take a race-neutral approach in establishing that an additional reasonably configured district can be drawn. *See Bush*, 517 U.S. at 979 (plurality op.) ("§2 does not require a State to create" a remedial district that "reaches out to grab small and apparently isolated minority communities."); *Abrams*, 521 U.S. at 91. The problem for Plaintiffs is that, as their experts demonstrated, it is virtually impossible in Alabama to draw any congressional map with two majority-minority districts unless traditional principles yield to race-based line-drawing from the start. And the district court confirmed it, recognizing that Plaintiffs could create two majority-minority districts only by making race-neutral districting criteria "yield" to race. MSA214-15.

d. Finally, the district court's approach squashes any hope for "sound judicial and legislative administration." *Bartlett*, 556 U.S. at 17. Every redistricting cycle, legislatures will be forced to ask whether they have allowed their traditional race-neutral principles "to yield" enough—but not too much—to racial considerations, all in the name of complying with some amorphous gloss on *Gingles*. MSA214-15; *see also, e.g.*, MSA261 (district court suggesting that "*some* awareness of race *likely* is required to draw two majority-Black districts" but not so much that "race must predominate") (emphasis added)). That contravenes "[o]ne of the most obvious limitations" imposed by Article III: "that judicial action must be governed by *standard*, by *rule*." *Vieth*, 541 U.S. at 278 (plurality op.). Any application of "law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Id.* Thus, the district court's Goldilocks test must be rejected, lest it lead to redistricting litigation every cycle in numerous jurisdictions, "transfer[ring] much of the authority to regulate [districting] from the States to the federal courts." *Brnovich*, 141 S. Ct. at 2341.

At bottom, §2's "long record of puzzlement and consternation," *Vieth*, 541 U.S. at 283 (plurality op.), shows that litigants and courts need a workable, text-based benchmark. *Holder*, 512 U.S. at 881 (plurality op.) ("[W]here there is no objective and workable standard for choosing a reasonable benchmark … it follows that the voting practice cannot be challenged as dilutive under §2."); *see also id.* at 911-12 (Thomas, J., concurring in judgment) (warning that "merely political choices" might too "fall under suspicion of

having a dilutive effect on minority voting strength" and that courts "bent on creating roughly proportional representation for geographically compact minorities" will find it difficult "to find a principled reason for holding that a geographically dispersed minority cannot challenge districting itself as a dilutive electoral practice"). Proportionality isn't it. 52 U.S.C. §10301(b); *De Grandy*, 512 U.S. at 1016. Maximizing majority-minority districts isn't it, either. *De Grandy*, 512 U.S. at 1016-17; *Miller*, 515 U.S. at 925-27. Only "equally open" districts fit the bill, and that leaves but one baseline: race neutrality. *See supra* §I.A.3. A rule in which §2's inquiry focuses on possible "outcome[s] of a *race-neutral process* in which all districts are compact," *Gonzalez*, 535 F.3d at 598 (emphasis added), is the only "workable standard[]" for "sound judicial and legislative administration," *Bartlett*, 556 U.S. at 17 (plurality op.).

* * *

Section 2 does not guarantee "political feast" for any group. *De Grandy*, 512 U.S. at 1017. It guarantees that elections are "equally open." 52 U.S.C. §10301(b). Alabama's 2021 congressional districts honor §2's "equal openness" "touchstone," *Brnovich*, 141 S. Ct. at 2338, as confirmed by millions of neutrally drawn maps. Requiring Alabama to revise its neutrally drawn districts on the theory that wherever majority-minority districts *can* be drawn they *must* be drawn would misconstrue §2 and violate the Constitution.

II. If Section 2 Requires Replacing Neutrally Drawn Districts With Race-Based Districts, Then The Statute Is Unconstitutional As Applied To Single-Member Districts.

Section 2, as currently applied by many federal courts to single-member districting schemes, raises serious constitutional questions. The decision below well illustrates those concerns. The court endorsed a racial target. *But see Cooper*, 137 S. Ct. at 1472. It sanctioned Plaintiffs' decision to make race the criterion that "could not be compromised," with race-neutral criteria "c[oming] into play only after the race-based decision had been made." *Bethune-Hill*, 137 S. Ct. at 798 (internal quotation marks). It permitted race-neutral criteria "to yield" to race-based sorting, as necessary to hit a racial target. *But see Miller*, 515 U.S. at 925-27. It faulted the State for not radically changing districts that have existed for decades and demanded a racial gerrymander in their place. *But see LULAC*, 548 U.S. at 427-28. And it ultimately concluded that because another majority-black district *could* be drawn, it *must* be drawn. *But see De Grandy*, 512 U.S. at 1016-17; *Bush*, 517 U.S. at 979 (plurality op.). If §2 requires any of this, then it is unconstitutional as applied to single-member districts.

Requiring racial preferences in single-member districts exceeds any remedial measure the Fifteenth Amendment could authorize. And if these racial preferences are a necessary component of §2's equal openness "touchstone," *Brnovich*, 141 S. Ct. at 2338, then §2 also runs headlong into the Fourteenth Amendment's equal protection guarantee. The only way to avoid these serious constitutional questions is to

interpret §2 consonant with, not counter to, those Reconstruction Era amendments.

A. Section 2 must be interpreted consonant with the Fifteenth Amendment.

The Fifteenth Amendment bans racial discrimination in voting, *see Bolden*, 446 U.S. at 61 (collecting cases), and gives Congress the power "to enforce" it through "appropriate legislation," U.S. Const. amend. XV, §2. To "enforce" the amendment's non-discrimination mandate means "to put in force" or "cause to take effect." Noah Webster, American Dictionary of the English Language 447 (1865); *see also City of Boerne v. Flores*, 521 U.S. 507, 524 (1997). And "appropriate" legislation means "suitable" or "proper." Webster, *supra*, 68. As with all "express powers of Congress," any such legislation must have the proper fit with the underlying constitutional guarantee:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)). It must be "adapted to carry out the objects the [Reconstruction] amendments have in view, whatever tends to enforce submission to the prohibitions they contain." *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879); *see Civil Rights Cases*, 109 U.S. 3, 11 (1883) (Congress has power "[t]o enforce the prohibition"—"this is the whole of it").

As this Court has already explained, the right guaranteed by the Fifteenth Amendment—to vote free of discrimination—cannot simultaneously guarantee political "feast" for any one group, lest it jeopardize other constitutional guarantees. *De Grandy*, 512 U.S. at 1017; *see also, e.g.*, *Bolden*, 446 U.S. at 77 n.24 ("[T]he fact that there is a constitutional right to a system of jury selection that is not purposefully exclusionary does not entail a right to a jury of any particular racial composition."). For §2 to be "appropriate legislation" to "enforce" that guarantee, it must comply with the same limitations. *See Shelby County v. Holder*, 570 U.S. 529, 542 n.1 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009).

Accordingly, §2 cannot operate as an affirmative obligation to deploy racial preferences in redistricting, or for any voting practice. That is especially true in single-member redistricting, which is a zero-sum game; moving one individual into a district generally requires moving another out. *See Gonzalez*, 535 F.3d at 598 ("One cannot maximize Latino influence without minimizing some other group's influence."). Section 2 instead must operate as a prohibition on "invidious discrimination." *White*, 412 U.S. at 764.

The absence of racially discriminatory intent therefore must be a relevant consideration in any "appropriate" legislation to enforce the Fifteenth Amendment. That was well understood by the 1982 Congress, which is why the House's initial effort to make intent irrelevant under §2 failed. *See Brooks*, 469 U.S. at 1010 (Rehnquist, J., dissenting). The amended version of §2—which asks whether districts are "equally open" and requires a "totality of circumstances"

inquiry—can be understood only as prescribing a *means* to suss out whether it can be reasonably inferred that a voting rule was the product of "invidious discrimination." *White*, 412 U.S. at 764. Even as amended, disparate effects or lack of proportionality alone cannot be actionable discrimination, lest §2 exceed Congress's power under the Fifteenth Amendment. *Accord Brnovich*, 141 S. Ct. at 2341, 2345-46.

Section 2, as the district court applied it here, has gone even beyond disparate effects. Even though Alabama's race-neutral, least-changes congressional map bears no resemblance to the "defiance of the Constitution" that necessitated the VRA, *Katzenbach*, 383 U.S. at 309, the district court used §2 to require a racial gerrymander, unmoored from the Fifteenth Amendment's prohibition on intentional discrimination. Under this approach, a State with racially polarized voting can violate §2 by failing to create another majority-minority district wherever one is possible. The State remains liable unless and until it intentionally creates another majority-minority district by considering race first and everything else second.

Racially segregating Alabama's congressional districts is not "appropriate" enforcement of the Fifteenth Amendment. The district court's formulation of §2 renders the statute "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne*, 521 U.S. at 532. If the district court is right, then §2 as applied to single-member districts has exceeded Congress's remedial authority.

The Court can avoid this constitutionally dubious outcome by rejecting the district court's approach to §2. *See, e.g.*, *Bartlett*, 556 U.S. at 21 (plurality op.) (avoiding constitutional concerns); *Miller*, 515 U.S. at 927 (same); *Nw. Austin*, 557 U.S. at 197 (same). In particular, the Constitution compels clarifying that an enacted plan does not violate §2 unless it deviates from a race-neutral benchmark for reasons that can be explained only by race. Comparing a State's enacted plan against a race-neutral baseline accords with §2's constitutional authority, its text and purpose, and with this Court's precedent. It would prohibit plaintiffs from laundering their preferred racial gerrymanders through a statute designed to remedy racial discrimination. And it is the only plausible test of whether invidious discrimination—the object of the Fifteenth Amendment from which §2 springs—is at play in a State's redistricting plan.

B. Section 2 must be interpreted consonant with the Fourteenth Amendment.

Finally, this Court has "long assumed" that efforts to comply with §2 are a "compelling interest" that can justify "race-based sorting" despite the Fourteenth Amendment's prohibition of the same. *Cooper*, 137 S. Ct. at 1464. But §2 compliance should never run so far afield of the Fourteenth Amendment that a court finds itself asking whether §2 compliance was a "compelling interest" or "narrowly tailored" to survive Fourteenth Amendment scrutiny. Section 2, as constitutionally conceived, is a shield against racial discrimination. It is not a sword to perpetuate it.

1. "Racial classifications are antithetical to the Fourteenth Amendment, whose central purpose was to eliminate racial discrimination emanating from official sources in the States." *Shaw II*, 517 U.S. at 907 (internal quotation marks omitted). Racial gerrymanders under the auspices of §2 compliance serve no compelling interest that can justify a violation of that constitutional guarantee. "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Shaw I*, 509 U.S. at 657.

The only conceivable basis for permitting race-based districting is to remedy actual "identified discrimination." *Shaw II*, 517 U.S. at 909. Where such cases of "identified discrimination" in redistricting exist, the prohibitions of both the Fourteenth Amendment and §2 work in concert.

Generalized allegations of past discrimination or societal discrimination, however, are inadequate to justify race-based redistricting. *Id.* at 909-10. But §2's existing framework is largely devoted to such generalizations, not developing evidence of "identified discrimination" in redistricting. The Senate Factors, for example, highlight things like broad socioeconomic disparities or a State's history of past discrimination, *Gingles*, 478 U.S. at 36-37—precisely the sort of "generalized … past discrimination" that is "not a compelling interest" sufficient to justify a racial gerrymander, *Shaw II*, 517 U.S. at 909-10. Similarly, even Plaintiffs' experts concede racial polarization

"provides no evidence about why people vote the way they do," and that evidence of bloc voting does not "say[] anything about racial animus." *Milligan*, ECF No. 105-2 at 226-27 (Tr. 762:14-763:1, 763:13-16); *see also Nw. Austin*, 557 U.S. at 228 (Thomas, J., concurring in judgment) ("[R]acially polarized voting is not evidence of unconstitutional discrimination….").

2. Here, without any evidence of actual invidious discrimination, the district court invoked §2 to order Alabama to throw out its race-neutral congressional districts and draw new race-based ones. As discussed, the only way in which a second majority-black district can be created in Alabama is if traditional redistricting criteria "yield" to race. MSA214-15. According to the district court, §2 requires the State to split an enduring community of interest in Alabama's Gulf Coast and racially segregate its citizens between districts spanning the width of the State just to hit a predetermined, "non-negotiable" racial target. Such districts would "obviously [be] drawn for the purpose of separating voters by race," *Shaw I*, 509 U.S. at 645, and would subordinate the State's traditional communities of interest to Plaintiffs' own "predominant, overriding desire to create [two] majority-black districts," *Abrams*, 521 U.S. at 81 (internal quotation marks omitted).

The district court nonetheless reasoned that race could not predominate in a plan drawn for §2 compliance, so long as such a plan was otherwise consistent with traditional redistricting criteria. That is exactly opposite of what this Court recently held in *Bethune-Hill*, 137 S. Ct. at 799 (rejecting that an "actual conflict" must exist to prove a racial gerrymander). It is

also irreconcilable with *Cooper*, where this Court declared unconstitutional North Carolina's plan, even though it subordinated traditional districting principles to race only "sometimes" when those principles interfered with "'the more important thing' … to create a majority-minority district." 137 S. Ct. at 1469; *McCrory*, 159 F. Supp. 3d at 612 (race was "quota operated as a filter through which all line-drawing decisions had to pass"). Nor can the district court's view of racial predominance be squared with this Court's affirmance in *Silver v. Diaz*, where plaintiffs used "a race-sensitive computer program" to "prioritiz[e]" a second majority-minority district, "consider[ing] 'traditional criteria' *only after* considering race." 978 F. Supp. 96, 117, 122 (E.D.N.Y. 1997), *aff'd*, 522 U.S. 801 (1997) (emphasis added). Plaintiffs in this case engaged in that very behavior. It was unconstitutional in *Cooper* and *Diaz*, and it is unconstitutional here.

If the district court is correct that §2 can require race-neutral, traditional redistricting criteria to "yield" to a "nonnegotiable" racial target, then §2 as applied to single-member districts is unconstitutional. Section 2 cannot trump the Equal Protection Clause's guarantee that all citizens will be free from invidious discrimination. *See United States v. Wong Kim Ark*, 169 U.S. 649, 701 (1898) ("[S]tatutes enacted by congress … must yield to the paramount and supreme law of the constitution."). Rather, §2 and the Equal Protection Clause must act in concert. And where, as here, all of the evidence points to districts drawn not on account of race but instead on account of neutral redistricting principles, there can be no constitutional

basis to require a State to redraw those districts on account of race.

The Court can avoid these serious constitutional questions by reaffirming that litigants may not use §2 to justify "transparent gerrymandering that boosts one group's chances at the expense of another," *Gonzalez*, 535 F.3d at 598. Any such race-based redistricting, remedial or otherwise, "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw I*, 509 U.S. at 647. And it sends an "equally pernicious" message to elected representatives in those districts that "their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Id*. at 648. Section 2, consistent with the Equal Protection Clause, must remedy discrimination "on account of race," *see* 52 U.S.C. §10301(a), not impose it.

* * *

In the dissenting opinion in *Rucho*, members of this Court lamented the possibility that "today's mapmakers can generate thousands of possibilities at the touch of a key—and then choose the one giving their party maximum advantage (usually while still meeting traditional districting requirements)." 139 S. Ct. at 2513 (Kagan, J., dissenting). What Plaintiffs have done here would make the dissenters' nefarious mapmakers blush. Out of more than 2 million race-neutral Alabama redistricting plans, *zero* resulted in two majority-minority districts. Reading §2 to require that

Alabama enact a map with two majority-minority districts, then, is reading §2 to command that States embrace "out-out-out-outlier[s]," *id.* at 2518, on the basis of race alone. There is no power under the Constitution, by courts or by Congress, to command such a thing.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below and hold that Alabama's 2021 redistricting plan for its seven seats in the United States House of Representatives does not violate §2.

Respectfully submitted,

Dorman Walker
BALCH & BINGHAM LLP
105 Tallapoosa Street,
Ste. 200
P.O. Box 78 (36101)
Montgomery, AL 36104
(334) 269-3138
DWalker@Balch.com

Counsel for Sen. McClendon and Rep. Pringle

Jeffrey M. Harris
Taylor A.R. Meehan
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
jeff@consovoymccarthy.com

Counsel for Sec. Merrill

Steve Marshall
Alabama Attorney General
Edmund G. LaCour Jr.
Solicitor General
Counsel of Record
A. Barrett Bowdre
Thomas A. Wilson
Deputy Solicitors General
James W. Davis
Deputy Attorney General
Misty S. Fairbanks Messick
A. Reid Harris
Brenton M. Smith
Benjamin M. Seiss
Assistant Attorneys General

OFFICE OF THE ATT'Y GEN.
STATE OF ALABAMA
501 Washington Avenue
P.O. Box 300152
Montgomery, AL 36130-0152
(334) 242-7300
Edmund.LaCour@
AlabamaAG.gov

Counsel for Sec. Merrill

APRIL 25, 2022

APPENDIX

1. 52 U.S.C. §10301 provides:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

2. The Fourteenth Amendment of the United States Constitution provides in pertinent part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. The Fifteenth Amendment of the United States Constitution provides:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.