No. 21-1086

IN THE
Supreme Court of the United States

JOHN H. MERRILL, Alabama Secretary of State, *et al.*,

Appellants,

v.

EVAN MILLIGAN, *et al.*,

Appellees.

On Appeal from the United States District Court for the Northern District of Alabama

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INTRODUCTION

The three-judge court below issued a preliminary injunction based on unanimous findings that Alabama's enacted plan ("HB1") violates the rights of *Milligan* Plaintiffs-Appellees ("Plaintiffs") under § 2 of the Voting Rights Act ("VRA"). The court found extreme racial polarization in voting in Alabama, persistent discrimination against Black citizens in voting and other areas, and a pattern of splitting two of the State's principal majority-Black communities of interest—the Black Belt and the City of Montgomery. While "cracking" those majority-Black communities, Alabama prioritized keeping together White people of "French and Spanish colonial heritage" in Baldwin and Mobile Counties, Br. 21—despite what the court found was weak evidence that Baldwin and Mobile residents share common interests.

Given these findings, the court concluded that HB1 denies Black Alabamians an equal opportunity "to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). It also found that Alabama could draw a second opportunity district consistent with the traditional districting principles of compactness, contiguity, and respect for communities of interest and political subdivisions. Applying this Court's well-settled precedent to these facts, the court correctly held that Plaintiffs are likely to succeed on their claim that HB1 violates § 2, and ordered Defendants-Appellants Secretary Merrill, Representative Pringle and Senator McClendon ("Defendants") to create a second opportunity district.

Lacking any basis to challenge the court's factual findings or legal conclusions under existing law, Defendants seek to rewrite the statute and overturn decades of settled precedent. Defendants' primary contentions are, first, that this Court's § 2 precedent

should be overruled so that the Court can forbid any race consciousness in the redistricting process, and second, that § 2 violations should require proof that a state's map "can be explained only by racial discrimination," a test indistinguishable from an intentional discrimination requirement. Br. 44. But this Court's precedents already prevent undue consideration of race in redistricting, precluding § 2 liability based on a state's mere failure to maximize the number of majority-minority districts. And in amending § 2 in 1982, Congress explicitly rejected an intentional discrimination requirement and instead adopted a fact-intensive "totality of circumstances" standard to determine whether a districting plan results in racial discrimination.

Defendants do not, and cannot, show clear error in the court's findings that Plaintiffs' illustrative plans comply with traditional districting criteria as well as or better than HB1, and that race did not predominate in those plans. Instead, Defendants argue that race should play no role whatsoever in meeting the threshold evidentiary requirement in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). But *Gingles* expressly requires a showing that an additional *majority-minority* district can be drawn. And that requirement poses no constitutional problems, because the Equal Protection Clause restrains only state actors, not private plaintiffs, and does not prohibit all consideration of race.

Indeed, the court did not order Alabama to enact Plaintiffs' plans or even to create a second majority-Black district. Rather, it afforded Alabama the opportunity to devise any remedy that would, for the first time, provide Black Alabamians an equal opportunity to elect their preferred candidates in a second congressional district.

This Court should affirm that order. That is what the statute requires on these facts, and the Constitution does not bar its implementation.

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. The Voting Rights Act

Alabama's history of discrimination is indelibly connected to the VRA's passage and subsequent amendments.

1. After the Civil War, Alabama continued to severely restrict the rights of Black citizens. JA193-195. [1] The Fourteenth and Fifteenth Amendments were designed to invalidate such laws and to protect Black men's right to vote. JA194. In response, White Democrats "unleashed a campaign of violence," regaining control of Alabama's government from Black voters and their allies in 1874, JA194-195, and adopting the still-active 1901 State Constitution to "establish[] white supremacy." JA196. Even in places where Black people could register to vote, Alabama used gerrymandered districts and at-large schemes to prevent them from electing their preferred candidates. *See, e.g.*, JA194-195.

For decades, Black Alabamians advocated to regain the franchise, but faced intransigence and violence.

[1] JA refers to the Joint Appendix. SJA refers to the Supplemental Joint Appendix, which includes maps and charts printed on 8.5x11 paper. MSA refers to the *Milligan* Stay Appendix.

See, e.g., JA198-205, 366-368. A century of violent voter suppression culminated in "Bloody Sunday," when Alabama state troopers relentlessly beat unarmed citizens in Selma who were protesting Black voters' disenfranchisement. MSA80.

2. In response to these and other efforts to disenfranchise Black voters, Congress passed the VRA, JA210, to "rid the country of racial discrimination in voting." *South Carolina* v. *Katzenbach,* 383 U.S. 301, 315 (1966). The VRA targets "subtle, as well as *** obvious" discrimination that causes "a dilution of [minority] voting power." *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 565-566, 569 (1969). Congress knew that, in places where minorities could freely vote, Alabama and others had used gerrymandering, *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), or other schemes to "invidiously *** cancel out or minimize the voting strength of racial groups." *White* v. *Regester*, 412 U.S. 755, 765 (1973).

In 1980, a plurality of this Court held that vote dilution claims violate § 2 "only if motivated by a discriminatory purpose." *City of Mobile* v. *Bolden*, 446 U.S. 55, 60-62 (1980). Two years later, Congress amended § 2 to reject *Bolden*'s intent test in favor of *White*'s "results test." *See Gingles*, 478 U.S. 30 at 44 n.8.

Congress "repudiated" the intent test because it is "'unnecessarily divisive'" and "places an 'inordinately difficult' burden of proof on plaintiffs." *Id*. at 42-44 & n.8 (quoting S. Rep. No. 97-417, at 36 (1982)). Instead, Congress directed courts to ask whether the "totality of circumstances" show that the political process is "not equally open" to minority voters who have "less opportunity than did other[s] *** to elect legislators of their choice." *White*, 412 U.S. at 766, 769; *see* S. Rep. No. 97-417 at 68.

Section 2, as amended, forbids any "voting qualification or prerequisite to voting or standard, practice, or procedure *** which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race." 52 U.S.C. § 10301(a). It is violated where "the totality of circumstances" reveal that "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [a protected group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

The 1982 amendments reflect a congressional compromise concerning proportionate representation. The amended § 2 instructs that "[t]he extent to which members of a protected class have been elected to office" is one factor in assessing liability, but disavows any right to proportionate representation. *Id*. Thus, although § 2 does not require proof of intentional discrimination, it also is not a "freewheeling disparate impact regime." *Brnovich* v. *Democratic Nat'l Comm*., 141 S. Ct. 2321, 2341 (2021). Congress tailored § 2 to require a remedy only where Black voters are denied an equal opportunity to elect candidates of choice, and where a remedy is possible that comports with traditional redistricting principles. *Wis. Legislature* v. *Wis. Elections Comm'n* ("*Wisconsin*"), 142 S. Ct. 1245, 1248-51 (2022) (per curiam).

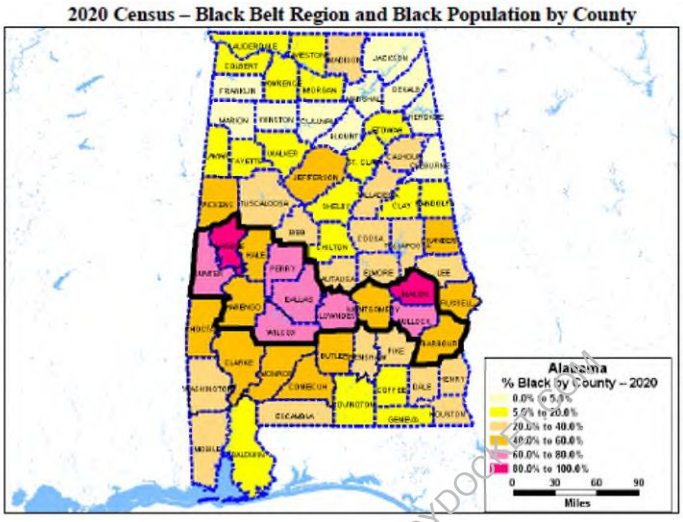
B. Alabama's Past Efforts at Discriminatorily Cracking the Black Belt

At the heart of this case is Alabama's treatment of the Black Belt, a largely rural area that encompasses 18 counties (including Montgomery) and "is named for the region's fertile black soil." MSA38-39. It "has a substantial Black population because of the many

enslaved people brought there to work in the antebellum period," and today, "[a]ll the counties in the Black Belt are majority- or near majority-[Black voting-age population (BVAP)]." MSA39.

The district court found that the Black Belt "quite clearly" qualifies "as a community of interest of substantial significance," MSA165, a fact of "common knowledge" in Alabama, MSA175-76; *accord Ala. Legis. Black Caucus* v. *Alabama* ("*ALBC II*"), 231 F. Supp. 3d 1026, 1222 (M.D. Ala. 2017) ("all parties have recognized [the Black Belt] as a community of interest"). The court also found that "the reasons why [the Black Belt] is a community of interest have many, many more dimensions than skin color," including its "shared history and common economy" the "overwhelmingly rural, agrarian experience; the unusual and extreme poverty there; and major migrations and demographic shifts that impacted many Black Belt residents[.]" MSA178. The Black Belt's "extreme poverty conditions," including the lack of proper sewage, drinking water, and electricity, are "very uncommon in the First World." MSA195-196.

Figure 1: The Black Belt



MSA175.

For over 50 years, Alabama officials have consistently discriminated against Black Belt voters. *E.g.*, *ALBC II*, 231 F. Supp. 3d at 1033-34 (enjoining state-enacted districts largely located in the Black Belt as unconstitutional racial gerrymanders); *United States* v. *McGregor*, 824 F. Supp. 2d 1339, 1345 (M.D. Ala. 2011) (prominent state legislators conspired to suppress Black turnout in a Black Belt county, calling Black voters "Aborigines" and "illiterates"); *Burton* v. *Hobbie*, 561 F. Supp. 1029, 1035 (M.D. Ala. 1983) (state "unnecessar[il]y fragment[ed]" Black Belt counties); *Sims* v. *Amos*, 336 F. Supp. 924, 936 (M.D. Ala.) (per curiam), *aff'd*, 409 U.S. 942 (1972) (similar); *Sims* v. *Baggett*, 247 F. Supp. 96, 109 (M.D. Ala. 1965) (similar).

This discrimination extended to congressional plans. Since 1875, Alabama has cracked the Black Belt across four or more districts. *Singleton*, Doc. 57-

7 at 19-37.[2] From 1875 to 1917 and 1933 to 1970, Alabama separated Mobile and Baldwin counties. *Id*. The 1950 map placed Mobile with six Black Belt counties in District 1, separating Mobile from Baldwin. *Id*. at 34. By 1960, District 1 had a "substantial" (about 39%)[3] Black population. JA208. In 1960, however, rather than redistrict after losing a representative in reapportionment, Alabama elected all representatives at-large statewide. JA209. For the 1962 at-large elections, a prominent politician pushed the Legislature to add anti-single shot voting rules to prevent the election of "a scallowag or a Negro" to Congress and, ultimately, the Alabama Supreme Court imposed anti-single shot rules. JA204-205, 208-209. In 1964, Alabama returned to single-member districts. JA209. The 1964 and 1965 maps divided the Black Belt across five districts. *Singleton*, Doc. 57-7 at 35-36. Both maps placed Mobile with five Black Belt counties (Choctaw, Clarke, Monroe, Washington, Wilcox) in District 1 (37% Black).[4] *Id.* Yet, for the 1972 and 1980 maps, just as Black voters began registering in higher numbers, Alabama dropped District 1's Black population to 32.7%[5] by combining majority-white Mobile, Baldwin,

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[2] *Singleton* v. *Merrill*, No. 2:21-cv-01291-AMM (N.D. Ala.) ("*Singleton*").

[3] U.S. Bureau of the Census, *Congressional District Data Book: Districts of the 87th Congress*, 4 (1961), *available at* https://hdl.handle.net/2027/umn.31951d02729681r.

[4] U.S. Bureau of the Census, *1960 Census – Population, Supplementary Reports: Negro Population, by County 1960 and 1950*, 3 (1966), *available at* https://www2.census.gov/library/publications/decennial/1960/pc-s1-supplementary-reports/pc-s1-52.pdf.

[5] U.S. Bureau of the Census, *Congressional District Data Book: 93d Congress*, 6 (1973), *available at* https://hdl.handle.net/2027/umn.31951t00247776d.

and Escambia Counties in District 1 while removing a Black Belt county (Choctaw) from it. *Id*. at 37-39; *see also* JA149, 155-156.

In significant part because of the Legislature's persistent cracking of the Black Belt, Alabama had an all-White congressional delegation from 1877 to 1992. MSA31; JA126.

C. Alabama's Recent History of Discriminatorily Cracking the Black Belt

1992 Map. In 1992, Earl Hillard became Alabama's first Black member of Congress. His election resulted from § 2 litigation, which for the first time established a majority-Black district, District 7. *Wesch* v. *Hunt*, 785 F. Supp. 1491, 1498-99 (S.D. Ala.) (per curiam), *aff'd sub nom. Camp* v. *Wesch*, 504 U.S. 902 (1992); *see* MSA30-31. The Department of Justice had denied § 5 preclearance to Alabama's enacted plan because it cracked the Black Belt in a deliberate effort "on the part of state political leadership to limit black voting potential ***." JA218. In *Wesch,* intervenors proposed two majority-Black districts, splitting 31 counties, but voluntarily withdrew their proposal. 785 F. Supp. at 1496. All parties sought a plan with one supermajority (65%) Black district. *Id*. at 1498. One such plan, the "Pierce plan," originated with Senator Larry Dixon. *Id*. at 1495. In the 1990s, Dixon sponsored voting bills that he claimed would undermine Alabama's "Black power structure" and, in 2010, he called Black voters "illiterate[s]" while plotting to depress Black turnout. JA219 & n.39. Because it paired no incumbents, the *Wesch* court adopted the Pierce Plan with a 63.58% BVAP in District 7. 785 F. Supp. at 1496. The court ordered this map without evaluating its origins, its impact on the Black Belt, or whether § 2 required District 7's high BVAP. *Id*. at 1498-99. Since 1992,

Black candidates have won in majority-Black District 7, but *no* Black Alabamian has won in any other congressional district, all of which have been supermajority-White. MSA75-76.

For the 2000, 2010, and 2020 cycles, Black legislators advocated for a second opportunity district, JA221, 227, but Alabama largely retained the 1992 map's district lines and racial makeup. MSA34. As Defendants admit, HB1 is "remarkably similar" to the 2011 plan. Br. 9.

2021 Map. In May 2021, Alabama's Legislative Permanent Committee on Reapportionment adopted redistricting guidelines (the "Guidelines") for drawing maps for Congress, the State Legislature and the Board of Education ("BOE"). MSA32-33; JA84-86. The Guidelines require compliance with the Constitution's one-person-one-vote principle and § 2. MSA33-34. They require districts to be "contiguous and reasonably compact," and recognize that "considerations of race *** may predominate over race-neutral criteria to comply with [§ 2]" if "there is a strong basis in evidence in support of a race-based choice." MSA33. The Guidelines contain secondary policies to be observed only "to the extent that they do not violate" the Constitution, the VRA, and the contiguity, compactness, and population-deviation criteria. *Id.* These secondary policies include avoiding pairing incumbents; respecting communities of interest and political subdivisions; minimizing county splits; and preserving the core of current districts. MSA33-34. Alabama's Guidelines define "communities of interest" to include any "area with recognized similarities of interests, including but not limited to ethnic, racial, economic, tribal, social, geographic, or historical identities." MSA33.

Randy Hinaman, who previously drafted the 1992 and 2011 congressional maps, drafted HB1's maps.

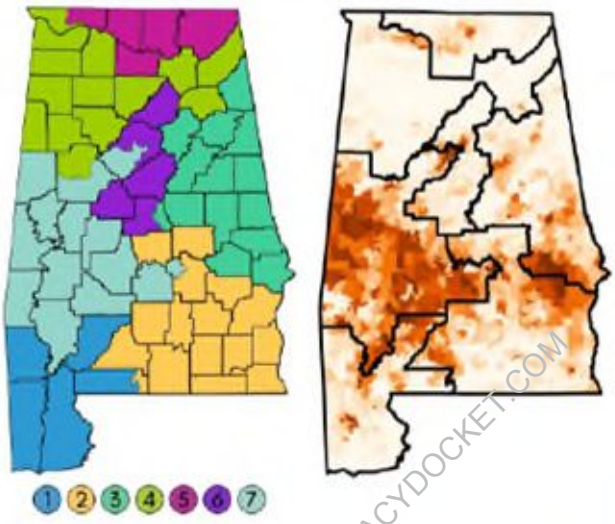
MSA34. Hinaman has a deep knowledge of the racial makeup of Alabama's localities. *Milligan*, Doc. 70-2 at 26-27, 35, 161-164;[6] JA278-279. He acknowledged that the Black Belt is a community of interest, JA279, and that the 2011 map cracked it across multiple districts, including splitting the majority-Black County and City of Montgomery into three districts, JA270-272.

From 1990 to 2020, Alabama's White total population fell from 73.6% to 63.12%, while the Black total population increased from 25.26% to 27.1%. MSA92, 282. Yet Hinaman preserved the prior racial balance in each district, including the majority-Black District 7, in HB1. *Milligan*, Doc. 70-2 at 118. Neither the Legislature nor Hinaman analyzed racial voting patterns to assess whether District 7's high level of BVAP was necessary in 2021 to elect a Black-preferred candidate, JA274-276; nor did they examine whether two compact majority-Black or "crossover" districts (i.e., majority-White districts where Black-preferred candidates can win) could be drawn, *see Milligan*, Doc. 70-2 at 49-50.

The Legislature enacted Hinaman's map as HB1. MSA6-7, 34-45. All Black legislators, except one, voted against it. JA179-180. Governor Ivey approved HB1 on November 4, 2021. MSA12.

[6] *Milligan* v. *Merrill*, No. 2:21-cv-01530-AMM (N.D. Ala.) ("*Milligan*").

Figure 2: HB1 - The 2021 Enacted Map



SJA26 (darker shading in the map on the right reflects voting precincts with a higher BVAP share).

HB1's District 7 is packed with a 59.4% Black registered voter population and 55.3% BVAP. SJA75. Every other district has below 31% Black registered voters and BVAP. *Id*. HB1 continues to split the Black Belt across four districts. MSA177. HB1 also splits the County and City of Montgomery across two districts. JA157; SJA28.

Singleton Plan. Senator Bobby Singleton, who represents part of the Black Belt, offered a map that split *zero* counties, contained the Black Belt largely in two districts, kept Montgomery County whole, kept Baldwin and Mobile Counties together, and had Black registered voter populations of 42.3% in District 6 and 49.9% in District 7. MSA36-37. Defendants opposed Singleton's plan because it lacked a majority-Black district. JA93-95; *Milligan*, Doc. 88-24 at 4-5. Yet Defendants' racial polarization expert testified that, under the Singleton Plan, Black-preferred candidates

would usually win District 7 and have even chances in District 6. *Milligan*, Doc. 82-5 at 7-14. Defendants stipulated that Black-preferred candidates would have garnered the most votes in 12 recent statewide general elections in Singleton Districts 6 and 7. *Singleton*, Doc. 47 at 6.

Below, no party alleged that race predominated in the Singleton Plan. Defendants' redistricting expert conceded that any other whole county plan would be "ridiculous looking" and "will all virtually fail if you hold them to any [traditional districting] criteria." *Milligan*, Doc. 105-3 at 298-299, 301.

Figure 3: Singleton Plan

Singleton, Doc. 15 at 31.

The Senate voted along racial lines to reject the Singleton Plan. JA95-96.

D. The Proceedings Below

1. The *Milligan* Plaintiffs sued, alleging vote dilution under § 2 and racial gerrymandering and intentional discrimination under the Fourteenth Amendment. MSA 14-15. A three-judge court (Judges Marcus, Manasco, and Moorer) consolidated *Milligan* with *Singleton* v. *Merrill*, a separate racial gerrymandering

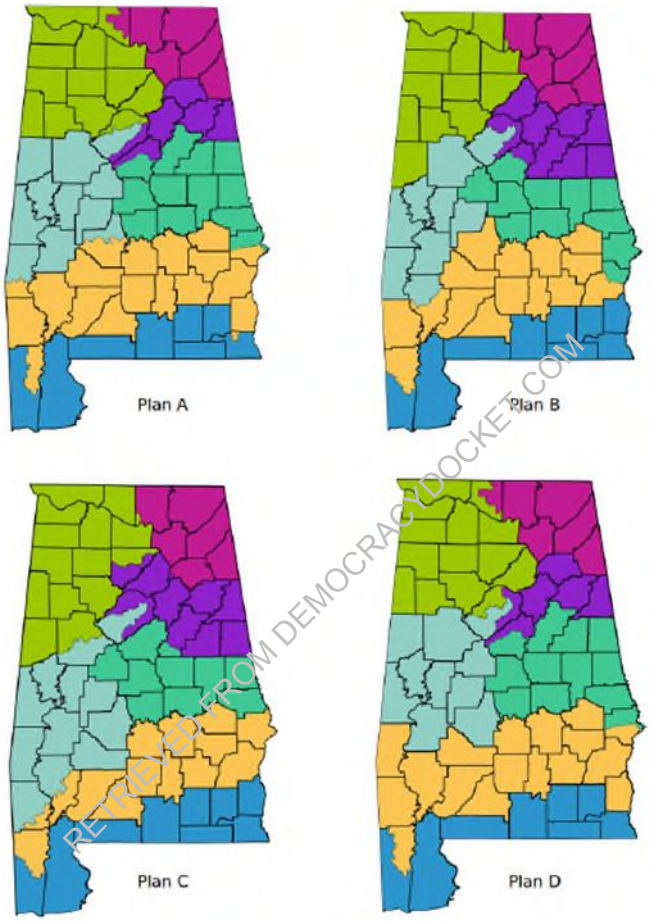
challenge. MSA1, 15-17. A third suit, *Caster* v. *Merrill*, raised only § 2 claims and was heard simultaneously before Judge Manasco. MSA13.

The parties presented eleven expert and six fact witnesses at a seven-day preliminary injunction hearing. MSA4. Based on unanimous findings of fact, the court concluded that Plaintiffs "are substantially likely" to establish that HB1 violates § 2. MSA4-5. It did not address Plaintiffs' constitutional claims. *Id*.

2. The court first examined the *Gingles* preconditions, i.e., whether (1) Black voters are "sufficiently large and geographically compact to constitute a majority" in a "reasonably configured" district; (2) Black voters are "politically cohesive"; and (3) the majority votes "sufficiently as a bloc" to "usually 'defeat the minority's preferred candidate.'" *Cooper* v. *Harris*, 137 S. Ct. 1455, 1470 (2017) (citation omitted). The court found that Plaintiffs' evidence satisfied each precondition. MSA154-187.

On *Gingles* 1, the court found Dr. Moon Duchin, Plaintiffs' expert, "highly credible," accepting her testimony that Black voters are "sufficiently large 'and geographically compact' to constitute a majority in a second congressional district. MSA155-156. Duchin presented illustrative districts that were "significantly more [geographically] compact" than HB1. MSA167. The court also found that Duchin's plans better respected political subdivisions and communities of interest than HB1. MSA172-181. All of Duchin's plans split the Black Belt less than HB1. MSA172-173. No Duchin plans split the County or City of Montgomery. MSA66.

Figure 4: Duchin Illustrative Plans



SJA27.

The court also found that Plaintiffs' illustrative plans were similar to the State BOE map, which likewise split Mobile and Baldwin Counties to connect the City of Mobile to the western Black Belt. MSA180-181. The same Legislature that adopted HB1 enacted the BOE map based on the same Guidelines. MSA93-94, 180-181.

Figure 5: 2021 Enacted BOE Plan

SJA95.

The court found that HB1 cracks majority-Black communities of interest. Plaintiffs' *and* Defendants' expert and lay witnesses agreed that the Black Belt is a community of interest. *See, e.g.*, MSA178. Yet, HB1 splits the Black Belt into four districts. MSA177.

The court credited the similar testimony of *Caster* plaintiffs' expert, William Cooper, who developed seven illustrative plans. MSA158-160. Each of the eleven Duchin and Cooper plans contained an additional majority-Black district, MSA166-168, as required under *Bartlett* v. *Strickland*, 556 U.S. 1, 18-19 (2009) (plurality).

The court found that each district in the *Milligan* and *Caster* Plaintiffs' illustrative plans was reasonably configured and respected communities of interest and other traditional redistricting principles. MSA5, 146-178. It expressly found that Plaintiffs' experts did not "prioritize race above everything else" in drawing their plans. MSA265-266.

The court found that Thomas Bryan, Defendants' sole *Gingles* 1 expert, was "unreliable." MSA165-166. It explained that Bryan considered only "three or four" of the redistricting criteria in Alabama's Guidelines (compactness, communities of interest, core retention, and incumbent protection). MSA160. And even among those criteria, the court found his analysis flawed. With respect to communities of interest, Bryan failed to review non-racial data, relevant testimony, or the illustrative plans' respect for the Black Belt vis-à-vis HB1. MSA161-165. And he relied on Wikipedia to assert that Baldwin and Mobile Counties are a community of interest. *Milligan*, Doc. 105-3 at 1072.

On *Gingles* 2 and 3, the court credited Dr. Baodong Liu, Plaintiffs' expert, who testified that "'Black support for [B]lack candidates was almost universal' and 'overwhelmingly in the 90[%] range" in Alabama. MSA184. It also credited Liu's findings that, in general elections, White voters' support for Black candidates never topped 12.6%. MSA69, 184-185. Indeed, in some general elections, like the 2008 U.S. Senate and presidential elections, majorities of White Democrats voted for White Republican candidates over Black Democrats. SJA14.

Defendants' racial polarization expert, Dr. M.V. Hood, either "agree[d] with or [did] not dispute the critical findings of Drs. Liu and Palmer," the *Caster* expert. MSA186. The court thus found "no serious dispute that Black voters are 'politically cohesive,' nor

that the challenged districts' white majority votes 'sufficiently as a bloc to usually defeat [Black voters'] preferred candidate.'" MSA183.

3. *Gingles* next requires courts to examine "several factors enumerated in the Senate Report on the 1982 amendments to the VRA, as well as 'whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area.'" *Wisconsin*, 142 S. Ct. at 1248-49 (citation omitted). Based on these factors, the court concluded that Plaintiffs are substantially likely to demonstrate that "Black voters have less opportunity than other Alabamians to elect candidates of their choice to Congress." MSA5.

The parties' joint stipulations provided much of the support for these findings. MSA76-85. Specifically, the court found recent racial discrimination by the State in voting, education, employment, and other areas (Senate Factors 1, 3 and 5), which cause unequal opportunities for minority voter participation. MSA191-198. It identified stark racial polarization (Factor 2), MSA188-190, which results in Black candidates' lack of success in congressional and statewide elections (Factor 7), MSA190-191. It also found recent racial campaign appeals (Factor 6), MSA198-202, which can drive racially polarized voting. The court concluded that Defendants relied on "lawyer argument" instead of any competing evidence. MSA195.

The court also found that Black Alabamians have the opportunity to elect their preferred candidates in only one of seven (14%) congressional seats but constitute 27% of Alabama's VAP. MSA203-204. Even with a second opportunity district, Whites, who are 63% of Alabama's VAP, would constitute majorities in 71.5% of districts. MSA204. The court did not rule "solely (or

even in the main)" based on proportionality and gave it only "limited" weight. MSA205.

Ultimately, the court found that all the Senate Factors, on which it made findings favored Plaintiffs. MSA205. It also found that each equitable factor weighed in favor of preliminary relief. MSA4-5.

4. The court provided Alabama an opportunity to enact a remedial plan that included a second district in which Black voters would have an opportunity to elect a representative of their choice and did not require either district to be majority-Black. MSA6.

Defendants sought a stay, which the court denied. MSA250-284. It explained that Defendants "mischaracterize[d]" its order, promoting "the erroneous claim that the plaintiffs' illustrative remedial plans subordinate all other considerations to race." MSA273. In fact, "plaintiffs considered race only to the limited extent that such considerations are proper, ordinary, and required in light of [§ 2's] numerosity requirement." MSA276. It found no evidence that "race must predominate" to "draw two majority-Black districts." MSA261.

Defendants then sought and received a stay from this Court. *Merrill* v. *Milligan,* 142 S. Ct. 879 (2022).

SUMMARY OF ARGUMENT

I. In *Gingles*, the "seminal vote dilution case," *Brnovich*, 141 S. Ct. at 2337, this Court required more than disparate impact alone to demonstrate a § 2 violation and established two stages of proof.

A. First, plaintiffs must draw an illustrative map with an additional majority-minority district consistent with traditional districting principles (*Gingles* 1) and show that racially polarized voting has denied

minority voters an equal opportunity to elect their preferred candidates (*Gingles* 2 and 3).

B. Next, plaintiffs must establish, based on the "totality of circumstances," that the political process in the jurisdiction is "not equally open" to minority voters, 52 U.S.C. § 10301(b), through evidence that is "relevant to the issue of intentional discrimination," but not dispositive. *Rogers* v. *Lodge*, 458 U.S. 613, 623-624 (1982). Section 2 permits courts to consider "[t]he extent to which members of a protected class have been elected to office," but disavows a right to proportionate representation. 52 U.S.C. § 10301(b).

II. The district court did not clearly err in finding, and instead correctly found that plaintiffs were likely to succeed on their § 2 claim.

A. As to *Gingles* 1, the court found that Plaintiffs' illustrative plans, containing two majority-Black districts, comply with objective traditional redistricting criteria (compactness, contiguity, and respect for political subdivisions and communities of interest) as well or better than HB1. MSA146-174. The court credited expert and lay testimony that Black Belt voters share a community of interest and that Plaintiffs' illustrative plans respect this community of "substantial significance" better than HB1. MSA175. Under *Gingles* 2 and 3, the court found, and Defendants did not dispute, that extreme racially polarized voting denies Black voters the opportunity to elect candidates of their choice in six of Alabama's seven districts.

B. The totality of circumstances further established that Black voters were denied an equal opportunity to elect their preferred candidates. Contrary to traditional redistricting criteria and Alabama's own Guidelines, HB1 fragments two significant majority-Black

communities of interest—the Black Belt and the City of Montgomery—while maintaining in a single district the majority-White, "French and Spanish"-ethnic population of Baldwin and Mobile Counties. *See supra* 11-12. The court also found a recent history of State-sponsored discrimination in voting, employment and other areas that make it more difficult for Black people to turn out, vote, and sponsor candidates, MSA192-198, and racial campaign appeals that contributed to racial polarization. MSA198-202. The court gave only "limited" weight to Alabama's lack of a proportionate number of majority-Black congressional districts. MSA205.

III. Defendants' arguments are contrary to § 2's text and purpose, and to this Court's precedent interpreting the statute.

A. Defendants' invitation to rewrite the *Gingles* framework contravenes the "enhanced" stare decisis applied in statutory cases. *Kimble* v. *Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). Since *Gingles*, Congress has twice amended the VRA without altering the standard. Because Congress "spurned multiple opportunities to reverse" a statutory decision, this Court demands a "super-special justification" to change course. *Id.* at 456, 458. Defendants cannot clear that high hurdle.

B. Defendants' proposal that Plaintiffs must employ "race-neutral comparator maps" to satisfy *Gingles* 1, Br. 47, directly contradicts *Bartlett*, 556 U.S. at 18-19, which *requires* plaintiffs to draw an illustrative *majority-minority* district. The requirement that such plans adhere to "traditional districting principles," *League of United Latin Am. Citizens* v. *Perry* ("*LULAC*"), 548 U.S. 399, 433 (2006) (citation omitted),

appropriately limits the role that race plays in illustrative maps.

Considering race in satisfying *Gingles* 1 does not violate the Equal Protection Clause, which "prohibits only state action," not the "private conduct" of plaintiffs attempting to meet an evidentiary standard. *United States* v. *Morrison*, 529 U.S. 598, 621 (2000) (citation omitted). Nor are legislatures or courts bound by a plaintiff's illustrative plans in fashioning remedies. The decision below made clear that Alabama could remedy the § 2 violation here with *majority-white* crossover districts. Nonetheless, even with respect to illustrative plans, mere *awareness* of race is not tantamount to racial *predominance*, which involves the *subordination* of traditional redistricting principles. *North Carolina* v. *Covington*, 138 S. Ct. 2548, 2554 (2018) (per curiam).

C. In any event, the court correctly found that race did not predominate in Plaintiffs' districts. Dr. Duchin testified that she prioritized compactness and other factors over race in devising her illustrative plans, and the court credited that testimony.

D. Defendants' contention that two simulations demonstrate that race predominated in Plaintiffs' illustrative plans are without merit, and rest on mischaracterizations of the evidence. Dr. Duchin ran a simulation with 2020 census data and found "literally thousands" of plans that contain two majority-Black districts. MSA316-17. Defendants ignore that testimony and instead cite a different Duchin simulation, not in evidence, that used 2010 census data (when the White population was substantially higher), and did not consider communities of interest, political subdivisions or other traditional redistricting factors. Defendants next point to Dr. Kosuke Imai's study. But Imai's study also did not include communities of

interest and, in any event, he testified that, because HB1 splits Montgomery County, HB1 is an "outlier" as compared to *all* his simulated plans. These simulations do not show clear error in the court's finding that race was not predominant in Plaintiffs' illustrative plans.

E. The court also correctly found, in the alternative, that even if strict scrutiny applied, the limited consideration of race in Plaintiffs' illustrative plans was narrowly tailored because Plaintiffs' experts considered "race only as necessary to answer the essential question" posed by *Gingles* 1—*i.e.*, whether it is possible to draw an additional majority-Black congressional district. MSA214.

F. Defendants' contention that § 2 is not violated unless a State's maps are "explainable only by racial discrimination" is contrary to § 2's text and this Court's jurisprudence. It would resurrect the intent test from *Bolden* that Congress specifically rejected in amending the VRA in 1982.

IV. Section 2 applies to single-member redistricting plans and provides an appropriate means of enforcing the Constitution.

A. Section 2(b) contemplates a violation when any "standard, practice, or procedure" results in minority voters having "less opportunity *** to elect representatives of their choice," which certainly occurs under a dilutive single-member redistricting plan. 52 U.S.C. § 10301. This "language was taken almost verbatim" from vote dilution cases and reflects Congress's "focus on the issue of vote dilution." *Brnovich*, 141 S. Ct. at 2332-33.

B. Defendants do not dispute that Congress may "prohibit[] a somewhat broader swath of conduct, including that which is not itself forbidden by the

[Fourteenth and Fifteenth] Amendment[s]," so long as Congress "had evidence of a pattern of constitutional violations." *Nev. Dep't of Hum. Res.* v. *Hibbs*, 538 U.S. 721, 727-729 (2003) (citation omitted). Congress had that evidence here. When Congress amended § 2 to include a results standard in 1982, it heard "extensive" evidence of "Fifteenth Amendment violations," including "many examples of *** unconstitutional vote dilution" that "called out for legislative redress." *Brnovich*, 141 S. Ct. at 2333.

Contrary to Defendants' assertion, Congress did not impose an affirmative obligation to draw majority-minority districts wherever they can be drawn. Section 2 requires a remedy only where, as here, evidence shows a state's redistricting plan, in combination with racial polarization and other factors evincing discrimination, denies minority voters an equal opportunity to elect their preferred candidates, *and* the creation of an additional majority-minority district is consistent with traditional redistricting principles.

ARGUMENT

I. THE STATUTORILY DERIVED *GINGLES* FRAMEWORK IMPOSES OBJECTIVE CRITERIA THAT BAR DISCRIMINATION WITHOUT REQUIRING PROPORTIONALITY.

The *Gingles* framework identifies situations where systemic racial polarization and discrimination in voting result in "the political processes *** not [being] equally open" to minorities. *Gingles*, 478 U.S. at 98 (quoting 52 U.S.C. § 10301(b)). *Gingles* also established important limitations to ensure that § 2 does not create liability merely because a plan has a disparate impact or otherwise fails to maximize the

number of majority-minority districts. *See Wisconsin*, 142 S. Ct. at 1248-49.

Section 2(a) "applies to a broad range of voting rules, practices, and procedures;" establishes that "an 'abridgement' of the right to vote does not require outright denial of the right;" and "does not demand proof of discriminatory purpose." *Brnovich*, 141 S. Ct. at 2341.

Section 2(b) explains how to prove a violation. Its text, including the phrase "not equally open," 52 U.S.C. § 10301(b), is "patterned after the language used *** in *White* v. *Regester*, 412 U.S. 755 (1973), and *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971)"—two vote dilution cases. *Chisom* v. *Roemer*, 501 U.S. 380, 398 (1991). Section 2(b) establishes a framework for proving that a plan is "not equally open" because it offers "less opportunity" to minorities "to elect representatives of their choice" as compared to "other members of the electorate," 52 U.S.C. § 10301(b); *Abbott* v. *Perez*, 138 S. Ct. 2305, 2315 (2018).

A minority group's lack of proportionate representation is relevant, but not dispositive. 52 U.S.C. § 10301(b). *Gingles*' highly structured framework first demands proof of three objective "preconditions," namely, that: (1) a minority group is "sufficiently large and compact to constitute a majority in a reasonably configured district," (2) the minority group is "politically cohesive," and (3) the majority votes "sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidate." *Wisconsin*, 142 S. Ct. at 1248 (citation omitted). If "the preconditions are established, a court considers the totality of circumstances to determine whether the political process is equally open to minority voters." *Id*. (quotation omitted). The "totality" includes at least nine factors and other relevant circumstances indicating state-created

or state-facilitated discrimination. *See LULAC*, 548 U.S. at 439-41.

A. The Preconditions Require Proof that a Reasonably Compact Majority-Minority District Can Be Drawn and that Racial Polarization Causes Minorities' Electoral Losses.

The preconditions screen marginal cases and "help courts determine which claims could meet the totality-of-the-circumstances standard for a § 2 violation." *Bartlett*, 556 U.S. at 21. They implement Congress's directive that the political process must be "equally open" to voters of color, without mandating proportionate representation. 52 U.S.C. § 10301(b).

1. *Gingles* 1 demonstrates "the compactness of the minority population, not the compactness of the contested district." *LULAC*, 548 U.S. at 433 (citation omitted). *Gingles* 1 also requires plaintiffs to compare a challenged practice to a "reasonable alternative voting practice" that increases minorities' opportunities. *Reno* v. *Bossier Par. Sch. Bd.*, 520 U.S. 471, 480 (1997). Unless minorities have "the potential to elect a representative of [their] own choice in some [alternative] single-member district *** there neither has been a wrong nor can be a remedy." *Growe* v. *Emison*, 507 U.S. 25, 40-41 (1993).

To satisfy *Gingles* 1, plaintiffs must prove that Black voters as a group are "sufficiently large and compact to constitute a majority in a reasonably configured district." *Wisconsin*, 142 S. Ct. at 1248. A *Gingles* 1 district is "reasonably configured," *id*., if it "take[s] into account 'traditional districting principles.'" *LULAC*, 548 U.S. at 433 (quoting *Abrams* v. *Johnson*, 521 U.S. 74, 91-92 (1997)). Compliance with these "objective factors" (compactness, contiguity, and respect for

communities of interest and political subdivisions) "may serve to defeat a claim that a district has been gerrymandered on racial lines." *Shaw* v. *Reno*, 509 U.S. 630, 646-647 (1993).

Less weight is given to more "malleable" state-created policies, *Bethune-Hill* v. *Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017), like core retention and incumbent protection, that can increase the risk of discrimination, *LULAC*, 548 U.S. at 440-441.

Gingles 1's compactness requirement serves an important gatekeeping role, foreclosing claims where one cannot draw a sufficiently compact additional majority-minority district. *See*, *e.g.*, *Bush* v. *Vera*, 517 U.S. 952, 979 (1996) (plurality) (district that "reache[d] out to grab small and apparently isolated minority communities" not compact); *Stabler* v. *Thurston Cnty*, 129 F.3d 105, 1025 (8th Cir. 1997).

2. The second and third preconditions examine racial polarization and limit § 2 to cases of systemic exclusion. *Gingles* 2 asks whether "minority political cohesion" is enough to establish the group's "potential to elect a representative of its own choice" in an alternative district. *Growe*, 507 U.S. at 40-41. *Gingles* 3 asks whether there is sufficient white bloc voting to "generally minimize or cancel, black voters' ability to elect representatives of their choice" under the challenged plan. *Gingles*, 478 U.S. at 56, 57 (citation omitted).

Whether racially polarized voting denies minorities an opportunity to elect representatives of their choice is the "theoretical basis" for all vote dilution claims. *Id.* at 48. Racially polarized voting allows a plan to dilute "racial minority group voting strength *** by the dispersal of blacks into districts in which they constitute an ineffective minority of voters." *Voinovich* v. *Quilter*, 507 U.S. 146, 154 (1993) (cleaned up).

If an existing plan gives minorities a reasonable opportunity to elect their preferred candidates, there is no violation—even if a district could be drawn that would more reliably elect minorities preferred candidates, *see Cooper*, 137 S. Ct. at 1472 (rejecting "mistake[n]" reasoning that § 2 "cannot be *satisfied by* [compact] crossover districts").

Section 2 claims regularly fail where low racial polarization permits Black-preferred candidates to usually prevail in existing maps. *See, e.g., Abrams*, 521 U.S. at 93; *Cottier* v. *City of Martin*, 604 F.3d 553, 560 (8th Cir. 2010) (en banc); *Johnson* v. *Hamrick*, 296 F.3d 1065, 1076-77 (11th Cir. 2002).

B. The Totality-of-Circumstances Inquiry Requires Proof of Factors That Are Indicative of Unconstitutional Discrimination.

After establishing these preconditions, a plaintiff must show, "based on the totality of circumstances," that minorities "have less opportunity *** to elect representatives of their choice." 52 U.S.C. § 10301(b). While "[t]he extent to which members of a protected class have been elected to office in the State *** may be considered," liability may not be based solely on disparate impact. *Id*.

This totality-of-circumstances analysis relies on the non-exhaustive list of nine factors, adapted from *White*, 412 U.S. at 766-767, in the Senate Report accompanying the 1982 VRA amendments (the "Senate Factors"): (1) "the history of voting-related discrimination in the State;" (2) the "extent" of racially polarized voting in the State's elections; (3) the use of practices "that tend to enhance the opportunity for [voting-related] discrimination"; (4) minorities' exclusion from "candidate slating processes"; (5) "the extent to which minority group members bear the effects of past

discrimination in areas such as education, employment, and health"; (6) "overt or subtle racial appeals in political campaigns"; (7) "the extent to which members of the minority group have been elected to public office in the jurisdiction"; (8) lack of responsiveness by public officials to minorities' needs; and (9) whether the State's justification for using the "the contested practice *** is tenuous." *Gingles*, 478 U.S. at 44-45.

Because these factors originated in challenges to unconstitutional vote dilution, *see Brnovich*, 141 S. Ct. at 2333, they are also "relevant to the issue of intentional discrimination," *Rogers*, 458 U.S. at 623-624. Evidence of a decisionmaker's history of discrimination (Senate Factors 1, 3 and 5); racial statements (Factor 6); discriminatory impact (Factors 2 and 7); and whether the decision is tenuous (Factor 9) all also constitute circumstantial evidence of racially discriminatory intent. *See generally Village of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-267 (1977); *accord Flowers* v. *Mississippi*, 139 S. Ct. 2228, 2243 (2019).

Other circumstances, including the "cracking" of minority communities, can provide "significant evidence" of a § 2 violation. *De Grandy*, 512 U.S. at 1015. "Cracking" occurs where "a State has split *** minority neighborhoods that would have been grouped into a single district *** if the State had employed the same line-drawing standards in minority neighborhoods as it used elsewhere." *Id.*

While Congress amended § 2 to "repudiate" an intentional discrimination test, *Brnovich*, 141 S. Ct. at 2332, the "totality" analysis can smoke out unconstitutional discrimination, *e.g., LULAC*, 548 U.S. at 440 (applying this analysis to conclude that a plan "b[ore] the mark of intentional discrimination").

The "totality" review further ensures that § 2 liability depends on more than "a mere lack of proportional representation." *Gingles*, 478 U.S. at 98 (O'Connor, concurring in judgment with Burger, C.J., Powell & Rehnquist, JJ.) (explaining that § 2 requires proof of "both a history of disproportionate results and strong indicia of lack of political power and the denial of fair representation") (cleaned up). Courts routinely reject claims where plaintiffs fail to adduce sufficient proof under the totality of circumstances. *See*, *e.g.*, *Fusilier* v. *Landry*, 963 F.3d 447, 462-463 (5th Cir. 2020); *Old Person* v. *Brown*, 312 F.3d 1036, 1042, 1049 (9th Cir. 2002); *NAACP* v. *Fordice*, 252 F.3d 361, 374 (5th Cir. 2001).

II. THE DISTRICT COURT'S FACTUAL FINDINGS ON THE *GINGLES* PRECONDITIONS AND TOTALITY OF CIRCUMSTANCES ESTABLISH THAT HB1 VIOLATES SECTION 2.

Applying *Gingles*, the district court correctly concluded that Plaintiffs satisfied the preconditions, and that the totality of circumstances demonstrated that HB1 denies Black Alabamians an equal opportunity to elect representatives of their choice. MSA251. Because the question whether the political process is not "equally open" is "peculiarly dependent upon the facts" and "requires an intensely local appraisal of the design and impact" of the challenged plan, this Court reviews only for clear error. *Gingles*, 478 U.S. at 79 (cleaned up). "If the district court's view of the evidence is plausible in light of the entire record, an appellate court may not reverse even if it is convinced that it would have weighed the evidence differently in the first instance." *Brnovich*, 141 S. Ct. at 2349. Credibility determinations garner "singular deference." *Cooper*, 137 S. Ct. at 1465 (citation omitted).

Defendants' brief never mentions or attempts to meet this standard. Nor could they. The court did not clearly err in finding (and, in fact, correctly found) that Plaintiffs were likely to succeed on their § 2 claim.

A. The District Court Did Not Clearly Err in Finding Plaintiffs Satisfied the *Gingles* Preconditions.

1. It Was Not Clear Error to Find Plaintiffs' Illustrative Plans Satisfied *Gingles* 1.

First, the court correctly found that the four illustrative plans developed by Plaintiffs' expert, Dr. Duchin, comply with the objective traditional criteria of compactness, contiguity, and respect for political subdivisions and communities of interest, MSA172-181. The court also did not clearly err in finding that Plaintiffs' experts "carefully studied" Alabama's Guidelines, relied on them in ranking districting criteria, and that Plaintiffs' plans are consistent with the Guidelines to the extent those guidelines do not entrench VRA violations. MSA182-183.

Additionally, as *Bartlett* requires, 556 U.S. at 18-19, the court found that Duchin's four illustrative plans contained two districts with a greater than 50% BVAP. MSA155-156. It made similar findings about the seven plans created by *Caster* Plaintiffs' expert. *Id*. Those findings are well-supported by the record.

Contiguity. Defendants did not dispute that Plaintiffs' maps respect contiguity. MSA172.

Compactness. The court found, and Defendants' expert did not dispute, that the districts in Duchin's illustrative plans, both on average and individually, measure "comparable to or better than" HB1's districts on compactness. MSA167.

Because *Gingles* 1 analyzes "the compactness of the minority population," *LULAC*, 548 U.S. at 433 (citation omitted), the court also found that Alabama's Black population centers are "relatively geographically compact." MSA170-171; *see also* Figure 2, *supra*. Excluding Montgomery from the Black Belt, Defendants assert that Black Alabamians largely live in "geographically dispersed cities." Br. 15-16, 63-64. But Defendants stipulated that Montgomery *is* in the Black Belt. JA345. Thus, the court did not err in finding that the Black Belt includes 300,000 Black people, nearly half the ideal district's population. MSA170. The court also correctly found that, given the "close proximity" of Birmingham, Mobile and Montgomery to the Black Belt (as well as their shared communities of interest, *infra* 33-34), a mapmaker "could easily draw two reasonably configured majority-Black districts." MSA170-171; *see Perez*, 138 S. Ct. at 2331-32 (finding that a majority-minority district that connected two communities along 300 miles of highway was sufficiently compact); *LULAC*, 548 U.S. at 435 ("rural and urban communities" with shared interests in "reasonably close proximity" can form a "compact district").

Political subdivisions. Like HB1, Duchin Plan D splits counties six times. MSA172. Her three other plans split counties between seven and nine times. *Id.*

Communities of interest. The court found that Plaintiffs' illustrative plans respect the Black Belt—a "community of interest of substantial significance," while HB1 does not. MSA175. It credited expert and lay testimony that Black Belt voters share concentrated poverty, unequal access to government services, and lack of adequate healthcare. MSA175; *see Lawyer* v. *Dep't of Just.*, 521 U.S. 567, 581 (1997) (affirming that a "community of interest" existed where

its members shared a "depressed economic condition" and "interests that reflect it"). The court found that Plaintiffs' illustrative plans contain most of the Black Belt's 18 core counties in two districts, whereas HB1 splits it into four districts. MSA177. HB1 places part of the Black Belt in supermajority-Black District 7, and cracks the remainder across three other districts, all of which contain BVAPs below 31%. MSA57, 177.

Plaintiffs' plans also better respected other communities of interest. Alabama's Guidelines provide that counties and towns may, "in certain circumstances," constitute "communities of interest." MSA48. Significantly then, the court found that Duchin's Plan B "split[] fewer localities" (32 localities) than HB1 (36 localities). MSA173; SJA28. Duchin Plan B splits only two majority-Black cities versus the five majority-Black cities split by HB1. SJA28. And, unlike HB1, no Duchin plan splits the majority-Black County or City of Montgomery. *Id.*

The County and City of Montgomery are an important community of interest. Plaintiff Evan Milligan testified that people there attend the same churches, colleges, schools, and entertainment venues, often work in state government or on local military bases and share a culture and language. JA516-520; *see Vera*, 517 U.S. at 964 (recognizing communities of interest share "media, public transport infrastructure, and institutions"). He also testified about Montgomery County's close relationship to other Black Belt counties and Mobile. JA518-522; *see, e.g.,* MSA98-99 (Mr. Jones' similar testimony). Ex-Congressman Bradley Byrne, Defendants' witness, agreed that Montgomerians share economic and employment interests. JA810, 812-813, 824.

The court rejected Defendants' claims that the illustrative plans did not reasonably protect the alleged community of interest in Mobile and Baldwin Counties. It found the evidence of a Mobile/Baldwin community of interest "less compelling" than the evidence showing the Black Belt was a community of "substantial significance." MSA180, 175. The court rejected the testimony of Mr. Bryan, Defendants' expert, about the Mobile/Baldwin community (derived in part from Wikipedia) because "his analysis was partial, selectively informed, and poorly supported." MSA180. It found that Alabama's other witness, ex-Congressman Byrne, focused on the "political advantages" of keeping Baldwin and Mobile Counties together rather than on any alleged community of interest. *Id*. For example, Byrne lamented that splitting Mobile County might cause it to lose "influence" by precluding a Mobilian from being elected to Congress. MSA123. Yet, he admitted that no representatives currently live in Montgomery, which has a larger population than Mobile. *Id*.

The court found that Plaintiffs' plans resemble Alabama's own 2011 and 2021 BOE maps, which also split Mobile and Baldwin counties and connect Mobile to the Black Belt. MSA180-181; *compare* Figure 4 *with* Figure 5, *supra*. Alabama's decision to connect Mobile and the Black Belt in the BOE maps reinforces Plaintiffs' evidence about Mobile and the Black Belt's shared interests. *See, e.g.*, MSA66-67, 99. Mr. Milligan testified that the cities of Mobile and Prichard in Mobile County are "anchor cities" for the western Black Belt. JA522; *see also Brown* v. *Bd. of Sch. Comm'rs of Mobile Cnty*., 542 F. Supp. 1078, 1087 (S.D. Ala. 1982) (quoting a 19th-century politician who identified Mobile as a "large town[] in the 'black belt'"). Plaintiff Shalela Dowdy testified that, regardless of race,

people in Mobile County and the Black Belt work at and benefit from Mobile's port, *Milligan*, Doc. 105-1 at 378-379, share concerns about the region's poor internet access and lack of quality education and healthcare services, *id.* at 372-375, 414-415, and celebrate Mardi Gras together, *id.* at 414. Plaintiff Marcus Caster gave similar testimony. JA792-793. The court also credited expert testimony about "major migrations" between the Black Belt and Mobile, MSA178, JA302-305, and the important freeway linking them, MSA179-180.

Core retention and incumbent protection. These factors are not among the traditional objective redistricting criteria. *Shaw*, 509 U.S. at 646-647. They favor the status quo and can therefore provide a pretext for continued discrimination. *See, e.g.*, *Covington*, 138 S. Ct. at 2551-53 (policy of core preservation perpetuated a racial gerrymander); *LULAC*, 548 U.S. at 440-441 (incumbent protection caused § 2 violation). Perhaps for that reason, Alabama's Guidelines make incumbent protection and core retention "decidedly lower level criterion" and "expressly leave room for other principles to be assigned greater weight." MSA181-183.

Defendants suggest that so long as HB1 preserves the core of prior districts (particularly, the single majority-minority district) it does not violate § 2. Br. 22, 53-54, 61. But § 5 "retrogression is not the inquiry in § 2 dilution cases." *Reno* v. *Bossier Par. Sch. Bd.* (*Bossier II*), 528 U.S. 320, 334 (2000) (cleaned up). While § 5 required a court to compare minorities' electoral opportunities under a new plan to their opportunities under the prior plan, § 2 demands a comparison between the current plan and hypothetical alternatives. *Id.* "[I]f the status quo *** abridges the right to vote

relative to what the right to vote *ought to be*, the status quo itself must be changed." *Id.* (cleaned up).

Rather than "colonial heritage," Br. 21, the cores of HB1's districts date back only to the Civil Rights era. In 1970, just as Black people began to vote en masse, Alabama's maps conspicuously began to separate Mobile from the Black Belt and prioritize keeping majority-White Mobile and Baldwin Counties together. *Supra* 8. For fifty years, despite the shrinking White population, Alabama's districts were manipulated to maintain BVAPs in six of its seven districts around 30%. *Supra* 5-11. Far from "race-neutral," Defendants' focus on core retention perpetuates this discrimination.

Incumbent protection also favors the status quo and some incumbents live only a few highway exits from one another. JA702. Regardless, the court found that the *Caster* expert drew a plan that paired no incumbents. *Id*. And Duchin's plans could be adjusted to do the same. MSA66.

In sum, the court credited Plaintiffs' witnesses over Defendants' witnesses and found strong support for finding that the illustrative plans reasonably comply with traditional districting criteria and Alabama's Guidelines. The court found the testimony of Defendants' expert so fraught with "inconsistencies," "vacillations," speculation, and "defensive[ness]," MSA164-66, that it left Duchin's testimony effectively unrefuted. MSA160-166. It "can virtually never be clear error" for a trial court to credit the testimony of one witness over another. *Anderson* v. *City of Bessemer*, 470 U.S. 564, 376 (1985) (citation omitted).

2. It Was Not Clear Error to Find Plaintiffs Satisfied *Gingles* 2 and 3.

The court correctly found that the second and third *Gingles* preconditions were satisfied by evidence that "voting in Alabama is clearly and intensely racially polarized," which Defendants' expert conceded. MSA184-185. Defendants do not dispute these findings.

Black support for Black-preferred candidates is "overwhelmingly in the 90[%] range," and White voters' support for Black candidates never topped 12.6%. MSA69-70, 184-185. Outside of majority-Black District 7, Black-preferred candidates were defeated in all the examined biracial congressional and statewide elections. *Id*. The court found racial polarization in Republican and Democratic primaries and noted the "veritable mountain of undisputed evidence" that all Alabama elections are racially polarized. MSA189; *see also* MSA189-190; *cf. Gingles*, 478 U.S. at 71 n.33 (noting that "racial hostility may often fuel racial bloc voting").

B. The District Court Did Not Clearly Err in Finding the Totality of Circumstances Indicated that Alabama's Electoral Processes are "Not Equally Open" to Black Voters.

The record also amply supports the district court's findings that, based on the totality of circumstances, Black voters face increased barriers that create a political process that is "not equally open." The court's conclusions and other undisputed evidence of disparate treatment suggest intentional discrimination.

The court found, and Defendants stipulated, that Alabama has an enduring history of voting discrimination (Factor 1). In 2010, for example, prominent state

legislators (including Senator Dixon, the 1992 map's architect) sought to suppress Black turnout, while privately denigrating Black voters as "Aborigines." MSA193-194. A federal court found that these "racist sentiments *** remain regrettably entrenched in the high echelons of [Alabama] government." *McGregor*, 824 F. Supp. 2d at 1347. In 2017, Black voters successfully challenged 12 discriminatory state legislative districts. MSA194. And in the last three years, Black voters have twice successfully settled § 2 challenges to state-created voting systems. MSA193.

A central part of Alabama's persistent discrimination against Black voters involves its treatment of the Black Belt. In five of the six redistricting cycles from 1960 onward, Alabama has violated either the VRA or the Constitution by cracking the Black Belt, MSA76-77; *supra* 5-11. Alabama's longstanding disparate treatment of the Black Belt "necessarily inform[s] [the] assessment of" HB1. *Flowers*, 139 S. Ct. at 2246. HB1 continued this discriminatory pattern. The court found that HB1 unnecessarily fragments the Black Belt into four different districts. MSA177. In one of those districts there are far more Black registered voters (59%), SJA75, than needed to elect a Black-preferred candidate, MSA72. In the other three, Black people are fewer than 31% of the registered voter or voting-age population, SJA75, ensuring that, given Alabama's extremely racially polarized voting, Black voters have no opportunity to elect their preferred candidates. MSA177. HB1 also splits the majority-Black County and City of Montgomery. MSA66.

By contrast, Alabama prioritized preserving a majority-White and European-ethnic group in Baldwin and Mobile Counties. Br. 21. But the court found both that the evidence of a Baldwin/Mobile community of interest was "less compelling" than evidence related

to the Black Belt, and that Alabama has split Baldwin and Mobile in other statewide maps. MSA180-181.

Thus, Alabama violated its own Guidelines by fragmenting both the Black Belt, which the court found to be a community of "substantial significance," MSA175, and the "very important" community comprising the majority-Black City of Montgomery, Alabama's capital, MSA123; while prioritizing keeping the majority-White people of "French and Spanish colonial heritage" in Baldwin and Mobile together, Br. 21, despite weak evidence it was a community of interest. MSA180-181. Alabama's "inconsistent treatment" of Black and White communities is "significant evidence" of a § 2 violation. *Johnson* v. *De Grandy*, 512 U.S. 997, 1015 (1994); *Busbee* v. *Smith*, 549 F. Supp. 494, 517 (D.D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1983). Alabama's race-based selective application of its Guidelines "bears the mark of intentional discrimination." *LULAC*, 548 U.S. at 440; *cf. also Ala. Legis. Black Caucus* v. *Alabama*, 575 U.S. 254, 273 (2015) ("*ALBC I*").

Next, the court credited expert testimony about current disparities in education, economics, housing and health (Factor 5) connected to Alabama's history of discrimination. MSA194-198. Plaintiffs' experts testified about the relationship between current racial disparities and the State's recent history of discrimination in employment, education, transportation, and other areas. JA233-234. The court found "that these disparities hinder Black Alabamians' opportunity to participate in the political process today." MSA197. Census data from 2020 shows that Black voter registration (61%) and turnout (54.8%) were substantially below White registration (70.6%) and turnout (63%). *Milligan* Stay Opp'n Booklet 44a. Defendants offered no rebuttal. MSA195.

The court also found racial appeals in congressional campaigns from 2017 onward (Factor 6), including the former Chief Justice of Alabama's Supreme Court praising the antebellum period; charges by the current District 5 Congressman about a "war on whites"; and ex-Congressman Byrne's campaign video targeting prominent minority politicians, showing them beside images of the 9/11 attacks. MSA198-202.

Finally, the court noted the disparity between "the number of majority-minority voting districts" and "minority members' share of the relevant population." *De Grandy*, 512 U.S. at 1014 n.11. Black Alabamians are nearly 27% of the population but have meaningful influence in only 14% of congressional seats. MSA203-204.

Both the statute, 52 U.S.C. § 10301(b), and precedent acknowledge that proportionality "provides some evidence" that political processes "are not equally open to participation," but is never determinative. *LULAC*, 548 U.S. at 437 (citation omitted). Disproportionality is also "relevant" "to allegation[s] of intentional discrimination." *De Grandy*, 512 U.S. at 1028 (Kennedy, J., concurring). Together with other factors, disproportionality "can constitute powerful evidence of vote dilution." *Gingles*, 478 U.S. at 99 (O'Connor, J., concurring).

Defendants misquote the court to portray it as having given dispositive weight to proportionality. Br. 27, 57, 62-63. But the court expressly said otherwise: it "d[id] not resolve" this case "solely (or even in the main)" based on proportionality. MSA205. Rather, the court drew the "limited" conclusion that proportionality was one of many factors "weigh[ing] decidedly"—i.e., clearly—in Plaintiffs' favor. *Id*.

Defendants stipulated to many of the critical facts the court relied upon in its totality analysis, and "did not offer any expert testimony about the Senate Factors." MSA129. The record strongly supports the court's finding that Plaintiffs are likely to prevail under § 2.

III. DEFENDANTS' OBJECTIONS ARE CONTRARY TO SECTION 2'S TEXT AND THIS COURT'S PRECEDENT.

Because Defendants cannot prevail under existing law, they advance radical arguments that would overturn decades of precedent, contravene § 2's text, and call into question redistricting practices nationwide. Among other things, Defendants assert that any race-consciousness in redistricting is unconstitutional, Br. 42-47; that Plaintiffs must satisfy *Gingles* 1 without considering race, Br. 47-50; that two simulations demonstrate that race predominated in Plaintiffs' Illustrative Plans; and that § 2 is met only by proving a jurisdiction's plan "can be explained only by race," Br. 75; *see also id.* 44—resurrecting *Bolden*'s "intent" standard that Congress overrode in the 1982 amendments to the statute. None of Defendants' arguments have merit.

A. The Court Should Respect Statutory Stare Decisis.

Defendants ask the Court to rewrite the *Gingles* framework. But that invitation runs headlong into the "enhanced" stare decisis protection applied in statutory cases. *Kimble*, 576 U.S. at 456; *accord Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring).

Statutory stare decisis carries "special force," *Halliburton Co.* v. *Erica P. John Fund*, 573 U.S. 258, 274 (2014), because, "unlike in a constitutional case,"

"Congress can correct any mistake it sees." *Kimble*, 576 U.S. at 456. An opinion interpreting a statute is a "ball[] tossed into Congress's court, for acceptance or not as that branch elects." *Id.* Where, as here, Congress "acquiesce[s]" to this Court's interpretation by leaving a holding undisturbed, *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008), its action "enhance[s] even the usual precedential force" of statutory stare decisis. *Shepard* v. *United States*, 544 U.S. 13, 23 (2005).

Congress twice amended the VRA after *Gingles*: first in 1992 and again in 2006, with overwhelming bipartisan majorities. *See* Fannie Lou Hammer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577. But the post-*Gingles* Congress deliberately left § 2 untouched. While Congress may sometimes struggle to "find[] room in a crowded legislative docket" to correct judicial misinterpretations, *Ramos*, 140 S. Ct. at 1413 (Kavanaugh, J., concurring), Congress has closely monitored the VRA. In 2006, for instance, Congress amended the VRA to reject this Court's decisions in two recent cases. *See ALBC I*, 575 U.S. at 276.

Where, as here, "Congress has spurned multiple opportunities to reverse" a statutory decision, this Court demands a "super-special justification" to change course. *Kimble*, 576 U.S. at 456, 458. Defendants cannot clear that high hurdle.

B. The *Gingles* 1 Inquiry, Which Requires Some Race Consciousness, Raises No Constitutional Concerns.

Defendants first argue that a plaintiff must employ race-blind "comparator maps" to satisfy *Gingles* 1's

compactness inquiry, Br. 47, and that any plan that considers race is likely unconstitutional, Br. 37-39.

1. Nothing in § 2's text or the Constitution compels or even suggests this result. Rather, § 2 assesses whether racial minorities "have less opportunity than other[s][.]" 52 U.S.C. § 10301. This necessarily entails a race conscious "comparison" between minorities' relative opportunities under "the status quo" and "a hypothetical alternative," *Bossier II*, 528 U.S. at 334, that reasonably complies with traditional districting criteria. *LULAC*, 548 U.S. at 433.

Defendants ask this Court to give its race-blind comparator test determinative weight. Br. 37-50. But "to bestow" any factor "such precedence in the § 2 inquiry" would be "the antithesis of the totality test that the statute contemplates." *LULAC*, 548 at 399 (Roberts, C.J., concurring in part and dissenting in part with Alito, J.).

Beyond ignoring statutory text, Defendants' proposal would sow confusion. The existing standard is straightforward. And courts have correctly applied it without difficulty for decades. Defendants' proposition, however, runs counter to *Bartlett*'s "objective, numerical [*Gingles* 1] test" that requires plaintiffs to draw an *additional illustrative majority-minority* district. 556 U.S. at 17. There is no way to do that without considering race. *Clark* v. *Calhoun Cnty.*, 88 F.3d 1393, 1406-07 (5th Cir. 1996).

Yet, *Gingles* 1 simultaneously limits race's role by requiring that plaintiffs' illustrative plans "reasonably" adhere to "traditional districting principles" of compactness, contiguity, and respect for communities of interest and political subdivisions. *LULAC*, 548 U.S. at 433 (citation omitted). These are the same "objective factors" that tend to "defeat a claim that a

[state-enacted] district has been gerrymandered on racial lines." *Shaw*, 509 U.S. at 647.

The limited consideration of race that *Gingles* 1 requires does not violate the Equal Protection Clause. That clause "prohibits only state action[,]" not the "private conduct" of plaintiffs attempting to meet a statute's evidentiary standard. *United States* v. *Morrison*, 529 U.S. 598, 621 (2000) (citation omitted). Plaintiffs are private parties, and their illustrative plans "are just that—illustrative." *Robinson* v. *Ardoin*, 37 F. 4th 208 (5th Cir. 2022) (per curiam). A court need not impose them and "[t]he Legislature need not enact any of them." *Id*. Accordingly, the maps themselves do not even trigger equal protection scrutiny.

2. Defendants assert that this Court should require race-blind *Gingles* 1 plans because, otherwise, states will be caught between drawing unconstitutional racial gerrymanders or committing § 2 violations. Br. 47-50, 60-61. But § 2 plaintiffs' plans are not the same as state-enacted remedies. While *Gingles* 1 requires a plaintiff to draw majority-minority districts, at the remedial stage, "§ 2 allows States to choose their own method of complying with the [VRA]," including "drawing [majority-White] crossover districts," *Bartlett,* 556 U.S. at 23, or other alternative remedies, such as cumulative voting, *see*, *e.g.*, *Branch* v. *Smith*, 538 U.S. 254, 309-310 (2003) (O'Connor, J., concurring in part and dissenting in part with Thomas, J.).

Here, the district court gave Alabama the option to adopt its own plan that created two crossover (rather than majority-minority) districts. MSA6; *cf. Lawyer*, 521 U.S. at 575 (approving a remedial crossover district where "all candidates, regardless of race," would have "'a fair chance to win and the usual risk of defeat'"). The Singleton Plan, which splits no counties,

keeps Mobile and Baldwin together, and raised no racial predominance concerns, is one option. *Supra* 12-13.

"[T]he fine-tuning of the [illustrative plan] can be left to the remedial stage of the litigation." *Barnett* v. *City of Chicago*, 141 F.3d 699, 702 (7th Cir. 1998). Only if at that stage, "race *** predomina[tes]" in a plan adopted by *the state* or ordered by *the court*, does strict scrutiny apply. *Wisconsin*, 142 S. Ct. at 1248.

Even for state action, "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race." *Easley* v. *Cromartie*, 532 U.S. 234, 253-254 (2001) (citation omitted). Rather, "this Court has long recognized the distinction between being aware of racial considerations and being motivated by them." *Covington*, 138 S. Ct. at 2554 (cleaned up). "Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process." *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995); *see also LULAC*, 548 U.S. at 513 (Scalia, J., concurring in part and dissenting in part) (agreeing with this proposition).

Strict scrutiny applies only where a legislature "subordinate[s] traditional race-neutral districting principles *** to racial considerations." *Miller*, 515 U.S. at 916. Strict scrutiny is *not* triggered where a state's map "recognize[s] communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests." *Id*. at 920 (cleaned up). Nor does a state's decision to create majority-minority districts per se prove racial predominance. *See Bethune-Hill,* 137 S. Ct. at 800 (requiring a "holistic" analysis). That a state is "aware of the racial composition" of a district when designing it "does not lead inevitably to impermissible race

discrimination." *United States* v. *Hays*, 515 U.S. 737, 745-746 (1995). The distinction between race consciousness and predominance ensures that the *Shaw* doctrine "does not throw into doubt the vast majority of the Nation's 435 congressional districts *** even though race may have been considered in the redistricting process." *Miller*, 515 at 928-929 (O'Connor, J., concurring). Indeed, Alabama's own Guidelines relied on this distinction to expressly allow the Legislature to consider race in redistricting. JA158-159.

C. The District Court Did Not Clearly Err in Finding No Racial Predominance in Plaintiffs' Illustrative Districts.

Based on live testimony and credibility determinations, the court credited Plaintiffs' experts, Duchin and Cooper, who "consistently and repeatedly refuted the accusation that when they prepared their illustrative plans, they prioritized race above everything else." MSA214-15, MSA265-66. Unlike *Gingles* 1, racial gerrymandering claims rest on a holistic analysis of the specific contested district. *Bethune-Hill*, 137 S. Ct. at 799-800. But Defendants offer little district-specific evidence of racial predominance in Plaintiffs' illustrative second majority-minority district (District 2), much less evidence that would demonstrate clear error.

Defendants allege that Duchin saw drawing a second majority-minority district as a nonnegotiable objective and therefore made race predominant. Br. 30, 57. But, as the district court found, Duchin allowed compactness to trump race. MSA60-61. The court found that Plaintiffs' illustrative districts contained no "tentacles, appendages, bizarre shapes, or any other obvious irregularities." MSA171. It also found, and Defendants' expert did not dispute, that, Duchin's

illustrative District 2 had compactness scores "comparable" or "superior" to HB1's and the 2011 map's districts. MSA167. *See Lawyer*, 521 U.S. at 580-581 (finding no racial predominance in a remedial district that "d[id] not stand out as different from numerous other" state-enacted districts). Duchin sought to "show[] great respect for the additional districting principles." JA627. She "prioritized" the goal of protecting the Black Belt and cities as communities of interest. JA646; *see also* JA699-700 (testifying that her decision-making focused on "primarily geographical," not racial, communities). Her plans outperformed HB1 on this factor. MSA172-174. The court did not err therefore in crediting Duchin's testimony that a second majority-Black district was "non-negotiable" only to the extent that was the question *Gingles 1* tasked her to answer. MSA214, 266.

Duchin likewise testified that traditional districting criteria predominated over race when it came to splitting precincts. Her priorities in splitting precincts were, first, population equality and, second, compactness and, only then, "sometimes look[ing] at race." MSA262-263. This is not racial predominance. *See Covington*, 138 S. Ct. at 2554 (rejecting objections to a mapmaker's consideration of racial data in drawing remedial plans); *Hays*, 515 U.S. at 745-746.

Defendants further allege that race predominated in Plaintiffs' illustrative majority-Black District 2 because, by respecting the Black Belt community of interest, it runs across the State. Br. 66. But in HB1, two of Alabama's districts (4 and 5) also stretch across the State, Figure 2, and the court correctly found that illustrative District 2's shape compared favorably to the BOE districts. MSA180-181.

D. Defendants Misrepresent the Record in Contending That Simulations Show Race Predominated in Plaintiffs' Illustrative Plans.

Defendants argue that two simulations run by Plaintiffs' experts that did not result in a second majority-Black district show that such a district cannot be drawn without making race predominant. But this argument rests on extreme misrepresentations of the simulations and their import.

First, Defendants ignore that Duchin found "literally thousands" of maps with two majority-Black districts using randomized simulations based on the 2020 census. MSA316-317. Duchin constructed this simulation to answer whether "there is a possibility of creating more than the existing number of reasonably compact [majority-minority] districts," *Perez*, 138 S. Ct. at 2331 (cleaned up), with a "strong preference" for compactness and contiguity, and 1% population deviation using 2020 data. JA708-709.

Defendants, however, focus on a study[7] that was not entered into evidence and therefore cannot be relied upon. *See FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215, 235 (1990). The simulation in that extra-record paper proves nothing anyway, for two reasons. First, it was based on *2010 census data,* not 2020 data. *E.g.*, Duchin & Spencer, *supra* n.7 at 750, 777, 781. Between the 2010 and 2020 censuses, White people's portion of Alabama's total population shrank from 67% to 63%. MSA92; SJA82. Second, the 2010 simulation did not account for communities of interest, political subdivisions, municipalities, or other key

[7] *See* Moon Duchin & Douglas M. Spencer, *Models, Race, and the Law*, 130 Yale L.J. Forum 744, 763-774 (2021).

traditional factors, nor Alabama's Guidelines. *See* Duchin & Spencer, *supra* n.7 at 763 (considering only compactness, contiguity, and population deviation). That a different decade's data, run through a program that omitted key traditional districting criteria, did not create maps with two majority-Black districts has no bearing on racial predominance or HB1's discriminatory results. Nonetheless, Duchin testified that her 2010 simulations may have included a "majority-black district and a second that was 49.999[%]" BVAP, which would "closely resemble" her plans. MSA367.

Defendants also point to Imai's simulations. Br. 55. But those simulations also fails to show that race predominated in Plaintiffs' illustrative plans. JA568, 580. Imai's simulations did not consider communities of interest, municipal boundaries, or Alabama's Guidelines. SJA58. For this reason, below, *Milligan*, Doc. 102 at 79-80, Defendants "vehemently contest[ed] the opinions of Dr[.] Imai," MSA226, and called his analysis "fundamentally flawed," MSA145. Yet on appeal, Defendants rest their attack of Plaintiffs' plans on this purportedly flawed analysis. Br. 22-23, 55. Imai testified that his simulations reveal nothing about Plaintiffs' plans or whether Plaintiffs' plans could be generated by simulations that included communities of interest or other traditional factors. JA548-552.

Defendants' assertion that HB1 "resembles millions of race-neutral comparators" is false. Br. 54. There is no evidence that HB1 resembles *any* simulations. Duchin's passing comments about the 2010 study do not support Alabama's broad claims. Rather, Duchin testified that she found thousands of randomly simulated plans with two majority-Black districts. Imai testified that, in splitting the City of Montgomery, HB1 resembled *none* of his race-blind or race-conscious simulations. JA542, 546. Imai's simulated race-

blind plans contained two districts with median BVAPs near 40%, SJA61, 63, far higher than all of HB1's districts except packed District 7.

Simulations that do not match what states actually do in redistricting are neither useful nor relevant. As Defendants explained below, "[w]hile professors might draw maps on blank slates, States generally do not." *Milligan*, Doc. 78 at 39. States do not redistrict by randomly stitching together mathematically compact districts while ignoring communities of interest and municipalities. If Defendants' point is that total race-blindness is required, that is not the law. *See Shaw*, 509 U.S. at 642 ("This Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances."). If it were, HB1 would fail a race-blindness test. Alabama's Guidelines relied on existing precedent to allow Alabama to use race to draw HB1, MSA228-229; Defendants admit that HB1 consciously prioritized the preservation of a White ethnicity-focused community, Br. 21; and they rejected the Singleton Plan for race-based reasons, *supra* 12-13.

In any event, here, a wealth of testimony and evidence focused on the salience of communities of interest and Alabama's disparate treatment of majority-Black communities. Given that, the district court did not err in finding that Duchin's 2010 and Imai's 2020 simulations, which did not account for this key redistricting factor, proved nothing relevant about Plaintiffs' illustrative plans, much less that race predominated in their creation. *See, e.g.*, MSA261.

E. Even if Race Predominated in Plaintiffs' Plans, the District Court Did Not Clearly Err in Finding that those Plans Would Survive Strict Scrutiny.

Even if Plaintiffs, as private parties, were bound by the Equal Protection Clause, and even if this Court were to conclude that race predominated in Plaintiffs' illustrative plans, that would not per se invalidate the plans. *Wisconsin*, 142 S. Ct. at 1249.

Contrary to Defendants' assertion that "race cannot predominate in redistricting, no matter what the reason," Br. 37, a state actor can "satisfy strict scrutiny if it proves that its race-based sorting of voters is narrowly tailored to comply with the VRA," *Wisconsin*, 142 S. Ct. at 1249. Alabama's own Guidelines recognize as much. JA158-159. Members of this Court have agreed that VRA compliance is a compelling state interest.[8] And for good reason: "race may be used where necessary to remedy identified past discrimination," and were VRA compliance not a compelling interest, a "State could be placed in the impossible position of having to choose between" VRA compliance and "compliance with the Equal Protection Clause." *LULAC*, 548 U.S. at 518 (Scalia, J., concurring in judgment in part and dissenting in part). Additionally, "eradicating the effects of past racial discrimination" is a "compelling interest entirely distinct from the [VRA]." *Shaw*, 509 U.S. at 656.

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[8] *LULAC*, 548 U.S. at 518 (Scalia, J., concurring in judgment in part and dissenting in part, joined in relevant part by Roberts, C.J., Thomas & Alito, JJ.); *id*. at 475 n.12 (Stevens, J., concurring in part and dissenting in part, joined in relevant part by Breyer, J.); *id*. at 485 n.2 (Souter, J., concurring in part and dissenting in part, joined by Ginsburg, J.); *Vera*, 517 U.S. at 990 (O'Connor, J., concurring)

A state's decision is narrowly tailored where there is "good reason" to believe that the district is needed to satisfy the VRA. *See Bethune-Hill*, 137 S. Ct. at 801 (upholding race-predominant district). A state can have "good reason" for race to predominate, even if there is evidence that its actions were not strictly necessary to avoid a VRA violation. *Id*. States "enjoy leeway to take race-based actions reasonably judged necessary under a proper interpretation of the VRA." *Cooper*, 137 S. Ct. at 1472. Thus, "[a] § 2 district that is *reasonably* compact *** may pass strict scrutiny without having to defeat rival compact districts designed by [challengers or simulations] in endless 'beauty contests.'" *Vera*, 517 U.S. at 977.

Defendants' contrary rule, which posits that a race-conscious map is per se unconstitutional, Br. 44, 47-50, contorts the *Shaw* doctrine to compel an impossible race-blind ideal that this Court has "never" required, *Shaw*, 509 U.S. at 642. Defendants' proposal would strike down *Gingles* 1 districts where race allegedly predominates before a court even considers other evidence of a § 2 violation, putting the cart before the horse. *Cf. Perez*, 138 S. Ct. at 2332 (holding, where an alleged racial gerrymander "satisfied the *Gingles* factors," a state had "good reason" to believe that the district "likely satisfied strict scrutiny").

Here, as explained in Section II above, the court made extensive findings demonstrating a § 2 violation, including findings that evince disparate treatment, and therefore had "good reasons" to believe that § 2 required a reconfiguration of Alabama's congressional districts. And the court found that the use of race in Plaintiffs' illustrative plans was narrowly tailored insofar as a district is narrowly tailored if it does "not subordinate traditional districting principles to race substantially more than is 'reasonably necessary'

to avoid § 2 liability." *Vera*, 517 U.S. at 979. As the court found, if Plaintiffs' experts did "prioritize[] race," they did so "only as necessary to answer the essential question" posed by *Gingles* 1. MSA214.

F. Defendants' Proposal that § 2 Be Interpreted to Require a Showing that the State's Map Is Only Explainable By Race Is Contrary to the Statute's Text.

Defendants argue that § 2 "requires a plaintiff to establish irregularities in the State's enacted plan that can be explained only by racial discrimination." Br. 44. In advancing this atextual proposition, Defendants contend 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." Br. 75. Nothing could be further from § 2's text, nor would this proposal make any sense as an evidentiary tool.

Defendants' view would limit § 2 violations to intentional discrimination, like the elimination of an existing majority-minority district or the "twenty-eight-sided figure" from *Gomillion*, 364 U.S. at 341. But this Court has never endorsed such a cramped view of § 2. Defendants' proposed "only-explainable-by-race" standard ignores § 2's rejection of an intent standard and § 2's "textual command" that "the presence or absence of a violation be assessed 'based on the totality of circumstances.'" *De Grandy*, 512 U.S. at 1018 (quoting 52 U.S.C. § 10301(b)). Although Defendants' race-based "inconsistent treatment" of communities of interest in HB1 constitutes "significant evidence of a § 2 violation," *id.* at 1015, "even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing [a violation] through other factors." S. Rep. No. 97-417 at 207 n.117. This

Court cannot rewrite § 2 to mean what Congress said it did not. *See Gingles*, 478 U.S. at 44 n.8.

IV. SECTION 2 APPLIES TO SINGLE-MEMBER DISTRICTING PLANS AND IS CONSISTENT WITH THE CONSTITUTION.

A. Section 2's Text Compels its Application to Single-Member Redistricting Plans.

For thirty years, this Court has "construed § 2 to prohibit the distribution of minority voters into districts in a way that dilutes their voting power." *Wisconsin*, 142 S. Ct. at 1248; *see Growe*, 507 U.S. at 40; *Voinovich*, 507 U.S. at 157-158. This longstanding approach is required by § 2's text, which covers any discriminatory "standard, practice, or procedure." 52 U.S.C. § 10301(a). Defendants' claim—that § 2 does not reach single-member districting plans because it only addresses practices that "interfere with a citizen's ability to cast his vote," Br. 51—contravenes the text.

First, Defendants themselves define "procedure" as the "[m]anner or method of proceeding in a process or course of action," Br. 52, which plainly encompasses the drawing of district lines.

Second, in arguing that § 2 concerns only barriers to "cast[ing] [a] ballot," Br. 31, Defendants ignore § 2's focus on minority voters' "opportunity *** to elect representatives of their choice" and consideration of "[t]he extent to which members of a protected class have been elected to office." 52 U.S.C. § 10301(b). This language "was taken almost verbatim" from vote dilution cases and reflects Congress's "focus on the issue of vote dilution." *Brnovich*, 141 S. Ct. at 2332-33. Single-member districts can have precisely that dilutive effect. *See id*. at 2333 n.5 (collecting cases).

Third, the statute prohibits "abridgment" of the right to vote. 52 U.S.C. § 10301. "[A]n 'abridgement' of

the right to vote under § 2 does not require outright denial of the right," *Brnovich*, 141 S. Ct. at 2341, and includes a "reduction or diminution," *Veasey* v. *Abbott*, 830 F.3d 216, 259-260 (5th Cir. 2016) (en banc) (quotation omitted). The VRA states that the right to vote "includes all action necessary to make a vote effective." 52 U.S.C. § 10101(e). Accordingly, the statutory language encompasses both "vote denial" *and* dilutive practices that "abridge" the vote. *Bossier II*, 528 U.S. at 333.

In amending § 2 in 1982 to prohibit any discriminatory "standard, practice, or procedure," 52 U.S.C. § 10301(a), Congress acted after this Court had held that § 5's similar prohibition on discriminatory "standard[s], practice[s], or procedure[s]," 52 U.S.C. § 10304(a), encompassed single-member redistricting plans, *United Jewish Orgs. of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144, 157 (1977). When "Congress use[s] the materially same language [in later enactments], it presumptively [is] aware of the longstanding judicial interpretation of the phrase and intend[s] for it to retain its established meaning." *Lamar, Archer & Cofrin, LLP* v. *Appling*, 138 S. Ct. 1752, 1762 (2018). Indeed, the 1982 Senate Report favorably cites cases applying § 2 to single-member districts. *See* S. Rep. No. 97-417 at n.114 (citing *Kirksey* v. *Bd. of Supervisors of Hinds Cnty.*, 554 F.2d 139 (5th Cir. 1977) (en banc)).

Defendants do not seriously dispute that § 2 applies to at-large schemes, Br. 51-52, confirming that the statute reaches vote dilution. Indeed, Alabama's Guidelines expressly recognize that the VRA applies to redistricting. MSA228, 231. Defendants observe that single-member districts are "traditionally" used to remedy at-large schemes. Br. 51. But just because a non-discriminatory single-member plan *can* remedy

a dilutive at-large scheme does *not* mean that all single-member plans are non-discriminatory. *See LULAC*, 548 U.S. at 440-441. Even remedial redistricting plans are reviewed for § 2 compliance. *See Abrams*, 521 U.S. at 90-95. Defendants offer no basis for manufacturing an atextual exemption.

B. Section 2's Application to Single-Member Districts Is Consistent with the Constitution.

Defendants contend that, in the "absence of racially discriminatory intent," applying § 2 to single-member districts would raise constitutional concerns. Br. 73, 75-77. Not so. Section 2 "does not demand proof of discriminatory purpose[.]" *Brnovich*, 141 S. Ct. at 2341. In amending § 2, Congress "[i]nvok[ed] the power conferred by §2 of the Fifteenth Amendment," to enact legislation that prophylactically prohibits more than intentional discrimination. *Id.* at 2331 (citing *City of Rome* v. *United States*, 446 U.S. 156, 173 (1980)). There is no reason to exempt single-member redistricting plans from that broad authority.

The Fifteenth Amendment prohibits racially discriminatory denials or abridgments of the right "to vote," and gives Congress the power to enforce that prohibition "by appropriate legislation." U.S. Const. amend. XV. As Defendants concede, Br. 72, Congress may enforce the Fifteenth Amendment by legislation that extends beyond the Amendment's text so long as the "end [is] legitimate" and the "means *** are appropriate." *Katzenbach*, 383 U.S. at 326 (quoting *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 (1819)).

Appropriate "means" include "[l]egislation which deters or remedies constitutional violations *** even if in the process it prohibits conduct which is not itself unconstitutional[.]" *City of Boerne* v. *Flores*, 521 U.S.

507, 518 (1997) (quotation omitted). Such remedial legislation is appropriate so long as Congress had evidence of a pattern of constitutional violations to justify the exercise of its enforcement powers. *Id*. at 518-19.

That is the case here. Congress heard an "extensive survey of what it regarded as Fifteenth Amendment violations," including "many examples of what the [Senate Judiciary] Committee took to be unconstitutional vote dilution" that "called out for legislative redress." *Brnovich*, 141 S. Ct. at 2333. In response, Congress determined that prophylactic legislation barring discriminatory "results was "necessary and appropriate to ensure full protection of the Fourteenth and Fifteenth Amendments rights." *Vera*, 517 U.S. at 992 (O'Connor, J., concurring) (cleaned up). Congress believed that a results test would deter and capture constitutional violations that would go unremedied under a burdensome intent test. *See Gingles*, 478 U.S. at 44.

Applying § 2 to single-member districts does not impose "an affirmative obligation to deploy racial preferences in redistricting." Br. 73. Section 2's results standard requires more than disparate impact. *Brnovich*, 141 S. Ct. at 2341-42. It does not mandate additional majority-minority districts simply because they can be drawn. Rather, § 2 considers evidence and circumstances that are also "relevant to the issue of intentional discrimination," *Rogers*, 458 U.S. at 623-624, and requires a remedy only where plaintiffs can prove that those circumstances exist. *See Wisconsin*, 142 S. Ct. at 1249-50.

"[R]acial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions; and § 2 must be interpreted to

ensure that continued progress." *Bartlett*, 556 U.S. at 25. The district court's factual findings prove this point.

CONCLUSION

This Court should affirm the preliminary injunction.

Respectfully submitted,

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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 relevant 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.