

In the Supreme Court of the United States

JOHN H. MERRILL, *et al.*
Appellants,

v.

EVAN MILLIGAN, *et al.*
Appellees.

JOHN H. MERRILL, *et al.*
Petitioners,

v.

MARCUS CASTER, *et al.*
Respondents.

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

**BRIEF OF THE CENTRAL ALABAMA
FAIR HOUSING CENTER,
THE FAIR HOUSING CENTER OF
NORTHERN ALABAMA, AND
THE CENTER FOR FAIR HOUSING
AS *AMICI CURIAE* IN SUPPORT
OF APPELLEES AND RESPONDENTS**

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**INTEREST OF
AMICI CURIAE**¹

Amici curiae are the state of Alabama's three fair housing centers: The Central Alabama Fair Housing Center in Montgomery, The Fair Housing Center of Northern Alabama in Birmingham, and The Center for Fair Housing in Mobile. *Amici*, funded in part through the Department of Housing and Urban Development (HUD), work throughout Alabama to eradicate housing discrimination by enforcing the federal Fair Housing Act and other laws. The centers engage in legal assistance, public education, homeownership counseling, policy advocacy, and fair housing testing investigations to promote equal access to quality affordable housing.

Amici file this brief to acquaint the Court with the state of residential segregation in Alabama today and to identify the historical factors that have led to current housing patterns in order to give context for the compactness of the Black voting age population in Alabama.

**SUMMARY OF
ARGUMENT**

The Black voting age population in Alabama is numerous and geographically compact, as the District Court panel found, and so satisfies the first prerequisite for a vote dilution claim under *Thornburg*

¹ No counsel for any party authored any part of this brief. No one other than *amici* or their counsel financed the brief's preparation or submission. The parties have filed blanket consent waivers with the Court consenting to the filing of all *amicus* briefs.

v. Gingles, 478 U.S. 30, 49 (1986). This compactness is a result of the pervasive residential segregation that continues in Alabama today as the result of a century of government policy and government-endorsed private conduct aimed at separating people by race. Black Alabamians have opposed this segregation at every turn.

The District Court correctly found that Alabama's current congressional district plan effects vote dilution by exploiting this segregation. Because of the undisputed evidence of racially polarized voting in Alabama, under the current map, Black Alabamians are either packed in one majority-Black district or are cracked into majority-white districts where they are represented by legislators who accurately do not see themselves as accountable to Black Alabamians. See *Shaw v. Reno*, 509 U.S. 630, 648 (1993). Districts drawn in this way do nothing to further the "need for voters or candidates to build bridges between racial groups," *Holder v. Hall*, 512 U.S. 874, 907 (1994) (Thomas, J., concurring); instead, they entrench segregation's harms and deprive Black voters of a political avenue for redress.

Ending this vote dilution would not create "political apartheid," *Holder*, 512 U.S. at 905 (quotation marks omitted); instead, it is the best hope of reducing the actual residential apartheid that exists in Alabama. Black Alabama voters have always supported racial integration and voted for pro-integration policies while white voters and the governments that represent them have insisted on segregation.

ARGUMENT

Geographic compactness of the minority population is a threshold requirement for a vote-dilution claim under *Gingles*. 478 U.S. at 50. *See also League of United Latin American Citizens v. Perry*, 548 U.S. 399, 434 (2006) (“*LULAC*”) (geographic compactness “refers to the compactness of the minority population” (quotation marks omitted)). This is because, even if the voting age population is sufficiently large to constitute a majority in *some* voting district, “there is no § 2 right to a district that is not reasonably compact . . .” *LULAC*, 548 U.S. at 430. Thus, in order to show that district boundaries, rather than residential patterns, are the cause of the dilution, Black voters raising a claim of vote dilution must show that the Black voting age population is sufficiently geographically compact to constitute a majority in a reasonably sized district that they have been denied. *Bush v. Vera*, 517 U.S. 952, 979 (1996); *Gingles*, 478 U.S. at 50 n.17. Geographic compactness is a factual question, and the District Court found, in part based on credibility determinations of the parties’ experts, that “Black voters as a group are sufficiently large and geographically compact to constitute a majority in a second congressional district.” MSA154 (quotation marks omitted).

Amici Citizens United, Citizens United Foundation, and the Presidential Coalition (collectively, “Citizens United”) suggest that Alabama is not, in fact, residentially segregated such that the Black voting age population is not geographically compact. This could not be further from the truth. In fact, Alabama is incredibly residentially segregated, a result of a century of government and government-

backed conduct designed to produce this effect. Residential segregation has been imposed over the wishes of Black Alabamians, and it has caused significant harms for them. These common harms have produced majority-Black communities of interest in Alabama, but because of the current district map, these communities have been deprived of an opportunity to participate meaningfully in the electoral process to redress those harms.

I. Alabama Is Highly Segregated by Race.

Both cities and rural areas in Alabama are extremely racially segregated. The “standard measure of segregation” is the dissimilarity index, which shows the extent to which people of different races are evenly spread across neighborhoods. Douglas S. Massey & Nancy Denton, *American Apartheid* 20 (1993) (hereinafter “Massey”). See also, e.g., Housing Patterns: Appendix B: Measures of Residential Segregation, U.S. Census Bureau, <https://www.census.gov/topics/housing/housing-patterns/guidance/appendix-b.html> (“Housing Patterns”) (citing Douglas S. Massey & Nancy A. Denton, *The Dimensions of Residential Segregation*, 67 Soc. Forces 281 (1988)). A Black/white dissimilarity index shows the percentage of Black residents who would have to move “to achieve an ‘even’ residential pattern—one where every neighborhood replicates the racial composition of the

city.” Massey at 20.² A value above 60 is considered high, 30 to 60 moderate, and anything under 30 low. *See id.*

Alabama is incredibly segregated.³ *Seven* out of Alabama’s ten most populous counties have a “high”

² Although it purportedly addressed segregation between white and Black Alabamians, Citizens United did not actually use a Black/white dissimilarity index; it used a white/non-white index. *See* Citizens United Br. at 12. Using this metric, residential proximity between white residents and *any* non-white residents lowers the dissimilarity index. Because Black Americans are more segregated from white Americans than are other non-white groups, *see* Massey at 77, such an index masks segregation between white and Black Alabamians. Since the question before the District Court was the geographical compactness of the Black population in Alabama, a Black/white dissimilarity index is the relevant measure.

³ This analysis uses block-level data. Because Alabama’s cities are small (Birmingham is the largest, with only 206,950 people, *see* City and Town Population Totals, <https://www.census.gov/programs-surveys/popest/technical-documentation/research/evaluation-estimates/2020-evaluation-estimates/2010s-cities-and-towns-total.html>), dissimilarity indices by census blocks, rather than tracts, provide the most accurate picture of residential segregation. *See* Barrett A. Lee, et al., *Beyond the Census Tract: Patterns and Determinants of Racial Segregation at Multiple Geographic Scales*, 73 Am. Socio. Rev. 766, 768–69 (2008). Census tract-level data, which Citizens United relies on, are often used because they are convenient (tract-level information is widely available), *see* Lee at 767, but the use of census tracts “necessarily obscure[s] racial patterns that extend over territorial domains bigger or smaller than tracts.” *Id.* at 770. *See also* Sean F. Reardon, et al., *The Geographic Scale of Metropolitan Segregation*, 45 Demography 489 (2008). Because census tracts typically contain about 4,000 people, *see* Lee at 770, they cover large swaths of land in small, low-density Alabama cities, so tract-based dissimilarity indices obscure neighborhood segregation.

level of segregation, and only one has a dissimilarity index under 50.⁴

Table 1: Dissimilarity Index (D) for 2020, Ten Most Populous Counties in Alabama, Measured at the Census Block Level

County	Dissimilarity Index
Jefferson County	73.6
Mobile County	67.6
Montgomery County	60.7
Madison	59.4
Baldwin	65.3
Shelby	48.2
Tuscaloosa	65.0
Lee	53.8
Morgan	70.0
Calhoun	62.8

Dissimilarity indices and mapping reveal that Alabama's cities are also highly segregated:

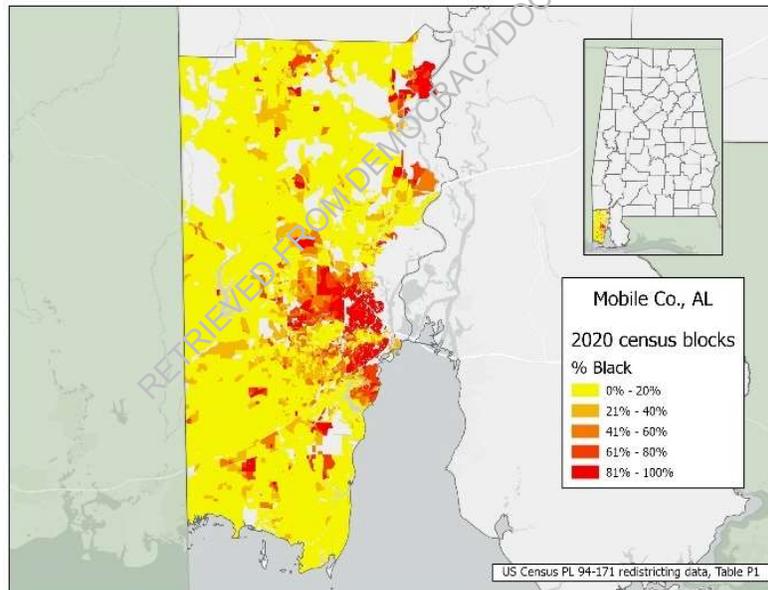
⁴ *Amici* engaged Dr. Allan Parnell to calculate the dissimilarity indices and draft the maps included in Part I based on publicly available census data, available at <https://data.census.gov/cedsci/>. Dr. Parnell, a demographer with over 30 years of experience, has published extensively in peer-reviewed journals and currently serves as a Senior Research Fellow at the Frank Hawkins Kenan Institute on Private Enterprise at the University of North Carolina at Chapel Hill and as the Vice-President of Cedar Grove Institute for Sustainable Communities. Dr. Parnell has been qualified as an expert to provide demographic and statistical analysis in more than twenty-five Fair Housing Act cases. *See, e.g., Anderson Grp., LLC v. City of Saratoga Springs*, 805 F.3d 34 (2d Cir. 2015); *Treece v. Perrier Condo. Owners Ass'n, Inc.*, 519 F. Supp. 3d 342 (E.D. La. 2021).

Table 2: Dissimilarity Index (D) for 2020, Select Cities in Alabama, Measured at the Census Block Level

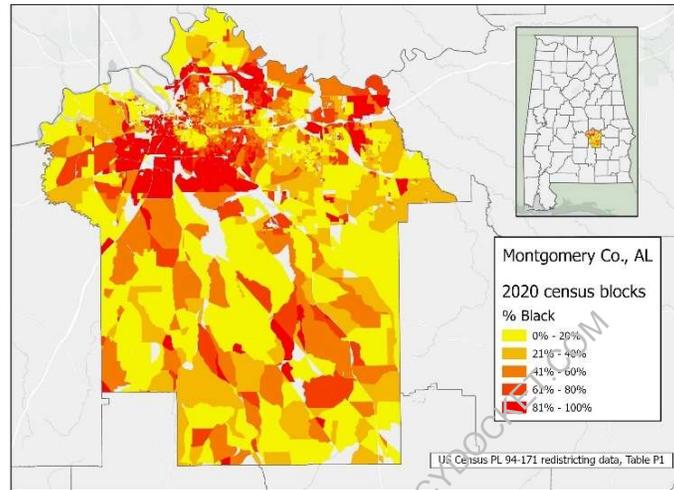
City	Dissimilarity Index
Birmingham	75.0
Mobile	63.6
Montgomery	60.6

In the following maps, yellow areas are less than 20% Black, while red areas are over 80% Black:

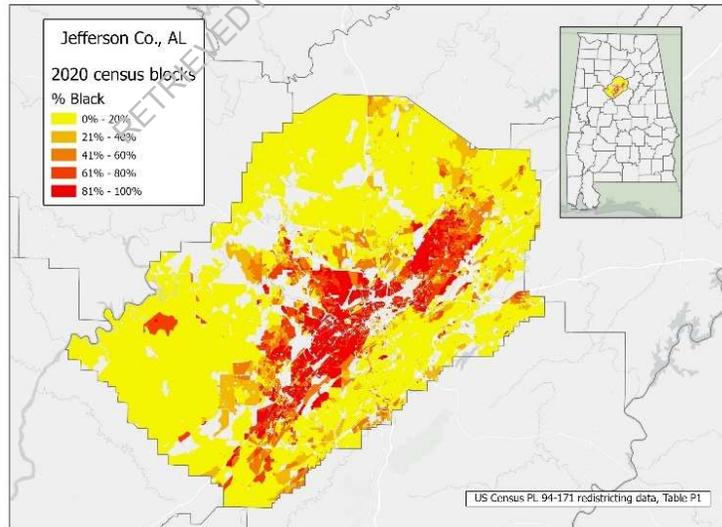
Map 1: Mobile County, Alabama, Percentage of Black Population by Census Block



Map 2: Montgomery County, Alabama, Percentage of Black Population by Census Block



Map 3: Jefferson County, Alabama, Percentage of Black Population by Census Block



Alabama's Black Belt likewise contains a significant Black population, segregated from the rest of the state. This residential pattern closely tracks the historical locations of Alabama's plantations, as discussed in Part II.B, *infra*.

Alabama is undeniably highly segregated. The dissimilarity indices Citizens United offers do not refute this—they reflect significant segregation throughout Alabama and increased segregation in Birmingham—but they understate the true level of residential segregation among Black and white Alabamians because they use tract-level data and are not specific to Black-white dissimilarity.

Citizens United's contention that "[l]awsuits making possible the election of minority-preferred candidates become ever harder to win as minority voters grow ever more dispersed," Citizens United Br. at 14, simply does not apply to Alabama, where residential segregation remains pronounced. Instead, consistent with this evidence of severe segregation, the District Court panel found that the Black voting age population is so geographically compact that it is possible to draw two majority-Black congressional districts while prioritizing traditional redistricting principles. MSA167-83. Indeed, this segregation produces "literally thousands" of ways to draw two such districts. MSA56.

II. Government Action Aimed at Separating People Created Residential Racial Segregation in Alabama.

The brutal reality of residential segregation in Alabama is the direct result of government action aimed at separating people by race stretching back a century, imposed against the will of Black Alabamians and at great cost to them.

The two centers of the Black population are Alabama's cities and its rural Black Belt. MSA167-68. Government and government-backed conduct produced segregation in both areas, but because this conduct operated differently in cities than in rural areas, *amici* address them separately here.

A. A history of government and government-backed conduct produced stark residential segregation in Alabama's cities.

i. Racial zoning ordinances separated cities into racially distinct areas.

In 1923, six years after the Supreme Court had declared racial zoning ordinances illegal in *Buchanan v. Warley*, 245 U.S. 60 (1917), Alabama passed an enabling statute to allow cities to use such ordinances to separate people by race, Act No. 435, Acts of Alabama, 1923. See Charles E. Connerly, "*The Most Segregated City in America*": *City Planning and Civil Rights in Birmingham, 1920-1980* 46 (2005). Birmingham then passed a zoning ordinance restricting white and Black residents to separate neighborhoods in response to complaints by white

residents about Black homebuyers moving in. Connerly at 37-42, 47-48; *see also Monk v. City of Birmingham*, 87 F. Supp. 538, 539 (N.D. Ala. 1949), *aff'd* 185 F.2d 859 (5th Cir. 1950).

Black residents opposed the racial zoning law,⁵ but they had no political power with which to block it. Connerly at 43-45. Although 99,077 Black people lived in Birmingham in the late 1920s, there were only 352 Black registered voters. Connerly at 17, 45.

This government policy of apartheid codified and enforced existing segregated racial housing patterns by blocking individuals' attempts to integrate: in the first ten years after the ordinance was passed, the City rejected 360 applications by Black families seeking to move into areas zoned for whites. Connerly at 51. Indeed, the law ultimately criminalized attempts to integrate. *See Monk*, 87 F. Supp. at 539.

But in addition to codifying *existing* housing patterns, the ordinance also actively created segregated neighborhoods where they had not existed. In the western part of the city, the land adjacent to the Village Creek river had been unoccupied, in part

⁵ Black leaders were clear that their desire for integration was practical. The *Birmingham Reporter*, a Black newspaper, explained its opposition to the zoning ordinance: "Some might get the impression that the Negro would oppose the bill because they desire to live with or near white people. Nothing is further from the truth. They oppose the measure because Negroes are unprotected when they are not near white people. They don't have police supervision, lights are not given, streets are not kept up and a general lack of interest is exercised in any absolute Negro community." Connerly at 44 (quoting *Birmingham Reporter*, Jan. 13, 1923).

because the river was prone to flooding. Rather than turn the area into parkland, as the City's planning consultants recommended, Birmingham zoned the area for Black occupancy, creating a Black community where there had not previously been one and ensuring that it would bear the cost of the predicted flooding. Connerly at 52.

The neighborhoods set aside for Black residency by racial zoning laws contained overcrowded, substandard housing. *Id.* at 56, 76-77, 93, 106. Moreover, the zoning map in Birmingham allowed industrial and commercial uses in Black residential areas, so Black families often lived near heavy industry. *Id.* at 53.

Alabama was uniquely committed to, and effective at, maintaining state-sponsored residential apartheid, even among states in the Deep South. Many Southern cities passed racial zoning ordinances after *Buchanan*, but most were struck down in the 1920s. *Id.* at 49. By contrast, Birmingham tactically mooted challenges to its ordinance and exploited the lack of Black political power to evade judicial review for nearly twenty-five years, dramatically shaping the city's landscape. *Id.* at 44-45, 49, 63-65. Other towns in Alabama likewise used racial zoning to separate and exclude Black residents long after *Buchanan* prohibited such practices. *See, e.g., City of Pleasant Grove v. United States*, 623 F. Supp. 782, 787 (D.D.C. 1985) ("From the 1940s to the present, Pleasant Grove's housing and zoning policies have been designed to exclude blacks from the City."), *aff'd*, 479 U.S. 462 (1987).

The ordinance in Birmingham was ultimately

struck down after the NAACP raised thousands of dollars to support an effort to end racial zoning. Connerly at 78-79. In 1949, Mary Means Monk, a Black woman, purchased a home in a white-zoned area and filed suit. In 1950, decades after the racial zoning law was passed, the Court of Appeals for the Fifth Circuit declared it invalid. *City of Birmingham v. Monk*, 185 F.2d 859, 862 (5th Cir. 1950). The next day, Monk's home was bombed by whites. Connerly at 95.

ii. *“Move-in” violence preserved residential segregation.*

The bombing of Monk's home was an example of “move-in violence,” where private violence aimed at preserving residential segregation supplemented government action. Local governments in Alabama allowed such violence, communicating to white residents for decades that they would not arrest perpetrators or intervene to prevent it. Connerly at 83–88.

In the years before Birmingham's racial zoning ordinance was outlawed, Black residents, outgrowing the areas zoned for Black occupancy and with nowhere else to go, tried to move into nearby white neighborhoods, and they faced significant violence. Connerly at 84. From 1946 to 1950, there were ten publicized efforts by Black families to move into or near the white North Smithfield neighborhood. *Every one* of these efforts was met with a threat of violence or actual violence, and in *eight* instances, white residents bombed Black families' homes, earning the neighborhood the nickname “Dynamite Hill.” See Connerly at 84-85; Leonard S. Rubinowitz & Imani

Perry, *Crimes Without Punishment: White Neighbors' Resistance to Black Entry*, 92 J. Crim. L. & Criminology 335, 382 (2002). Not a single person was tried or convicted for any of these bombings. Connerly at 87, 95. In response to law enforcement's utter failure to deter it, racially motivated violence continued, and there were an additional 43 racially motivated bombings in Birmingham from 1950 to 1965, including the bombing of the Sixteenth Street Baptist Church that killed four children. *Id.* at 101.

These incidents continued for decades. In 1978, a Black family moved into the City of Chickasaw, in Mobile County, which had been exclusively white since 1945. *United States v. Hous. Auth. of City of Chickasaw*, 504 F. Supp. 716, 724 (S.D. Ala. 1980). White residents threatened the family's landlord and threw a firebomb into their backyard. *Id.* The family moved out after a rock was thrown through their windshield while they were driving. *Id.* at 725. In 2002, a Black mother of three purchased a home in a white neighborhood in Mobile, and when she arrived at the house, the back door was broken down and racist slurs had been graffitied in the living room and kitchen. She did not end up moving her family in. Jeannine Bell, *The Fair Housing Act and Extralegal Terror*, 41 Ind. L. Rev. 537 (2008).

iii. *Alabama state and local governments used federal funds to enforce segregation in public housing.*

Alabama state and local governments used federal funds to further residential segregation in the state, constructing several federally funded housing projects that were segregated by law. In Birmingham,

these included the all-Black Smithfield Court, which opened in 1938, Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* 21 (2017); Connerly at 61-67; Southtown, which opened in 1941, Connerly at 111; and Joseph Loveman Village, completed in 1952, *id.*⁶ Today, all three housing projects are still in an almost entirely Black residential area west of I-65, which, as discussed in Part II.E, *infra*, was cut off from economic opportunities east of I-65 through federal interstate construction.

Local governments in Alabama also used federal urban renewal funds aimed at eliminating “blighted conditions” to remove Black people from areas where white residents did not want them and direct them into segregated public housing projects. Connerly at 103. The primary area targeted for urban renewal in Birmingham was the predominantly Black neighborhood surrounding the University of Alabama Medical Center. *Id.* at 103-04. The expansion displaced approximately 500 Black families to create a segregated medical campus, *id.* at 113; 126-127, and it faced vocal and sustained opposition from the Black community, *id.* at 122. The city’s housing authority directed displaced Black families into Birmingham’s three Black-only housing projects, consolidating existing segregation. *Id.* at 115-16.

State and local government-directed segregation of public housing residents took place throughout Alabama and continued well after Jim

⁶ Federal funds were also used to construct the all-white Charles Marks Village, which opened in Birmingham in 1952. Connerly at 111.

Crow ended. In Mobile County, the City of Chickasaw deliberately excluded Black residents from its public housing until 1980. *City of Chickasaw*, 504 F. Supp. at 732. The all-white city, which had maintained its color line since World War II, in part through the private violence described above, was adjacent to the City of Prichard, which at the time was about 50% Black. *Id.* It was also about five miles from Mobile. *Id.* at 718. Over 59% of Mobile residents who were eligible for Chickasaw's public housing were Black, and Prichard had over 2,800 Black people on the waitlist for public housing and Section 8 certificates, but there had never been a Black resident in Chickasaw's public housing. *Id.* at 723. Chickasaw ensured this by maintaining a "citizenship requirement" limiting public housing residents to current Chickasaw citizens. *Id.* at 717-18, 723-24. The law remained in place until a federal court enjoined it as a clear violation of the Fair Housing Act. *Id.* at 732.

iv. Restrictive covenants prevented Black homebuyers from moving into white neighborhoods.

Restrictive covenants were also used throughout Alabama in the first half of the twentieth century to bar Black families from living in neighborhoods with whites.

The Alabama Supreme Court upheld the use of covenants prohibiting sales of homes to Black homebuyers in 1928 in *Scheuer v. Britt*, 118 So. 658 (Ala. 1928). In *Scheuer*, the developer of the South Cloverdale neighborhood in Montgomery had sold lots with restrictive covenants providing: "All lots sold for residential purposes only . . . No lots can be resold or

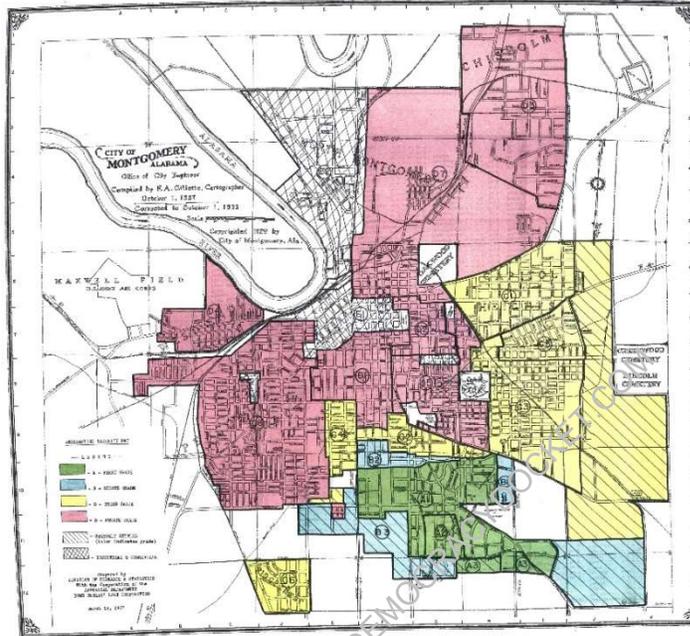
transferred to negroes.” *Id.* at 659. A purchaser whose deed did not contain the residential restriction began building storehouses and filling stations on his land. *Id.* The Court found that the restrictions in the other deeds “create[d] equitable easements in favor of” the deeds’ owners, which they could enforce against any owner in the development. *Id.* at 660. Although the defendant had not sold property to a Black purchaser, the Court used racial integration as the bogeyman requiring its holding, warning that under a contrary reading, an owner whose deed did not contain a restrictive covenant “may convert the district into a negro settlement in violation of the restriction . . . rendering the property . . . less valuable and less desirable for residential purposes.” *Id.* at 661.

Racial restrictive covenants had the backing of not just the Alabama Supreme Court, but also the federal government. In 1926, the United States Supreme Court had suggested racial restrictive covenants were potentially permissible private action, *see Corrigan v. Buckley*, 271 U.S. 323, 330-31 (1926), and beginning in the 1930s, the Federal Housing Administration (FHA) recommended that properties for which it issued mortgages include deeds prohibiting sale or rental to Black residents. Rothstein at 83-84. Where it provided financing for entire developments, the FHA often required that developers include covenants excluding Black residents. *Id.* at 84-85. Even after the United States Supreme Court struck down racial restrictive covenants in *Shelley v. Kraemer*, 334 U.S. 1 (1948), the FHA continued to insure mortgages for properties conveyed with racial restrictive covenants for almost two more years, Rothstein at 86-88.

- v. *The FHA prevented Black homebuyers from moving by refusing to lend to Black homeowners or in Black communities.*

In 1933, the federal government created the Home Owners' Loan Corporation (HOLC) to purchase distressed mortgages and issue new, amortized mortgages. Massey at 51–52; Rothstein at 63. To identify loan risk by neighborhood, HOLC created color-coded maps reflecting local real estate agents' risk calculations, in which “safe” areas were colored green and areas HOLC perceived to be riskiest colored red. Rothstein at 64. Any predominantly Black neighborhood was colored red, even middle-class neighborhoods filled with single-family homes. *Id.* In Montgomery, the middle-class Black neighborhood south of Oak Park, home to many professors at the historically Black Alabama State University, was coded red.⁷ Cloverdale, where the Alabama Supreme Court had upheld a restrictive covenant barring sales to Black families a decade before, was coded green.

⁷ As discussed in Part II.A.vi, *infra*, the Alabama Department of Transportation would later demolish much of this neighborhood to build an interstate highway directly through it.

Map 4: 1937 HOLC Map of Montgomery, Alabama⁸

The FHA built on this approach. With the FHA's founding, the federal government became enormously influential in the residential mortgage market. Massey at 52-53. By 1950, the FHA and the Veterans Affairs Administration, which used the FHA's policies and underwriting manual, insured half of all new mortgages nationwide. *Id.*; Rothstein at 70. These policies played a significant role in determining segregated housing patterns.

The FHA had a policy of insuring mortgages

⁸ Robert K. Nelson, et al., *Mapping Inequality: Redlining in New Deal America*, available at <https://dsl.richmond.edu/panorama/redlining/#loc=12/32.379/-86.376&city=montgomery-al&text=downloads>.

only for homes occupied by whites. *Id.* at 64-67. Even among white homes, FHA policy favored those distant from Black neighborhoods or separated from them by physical barriers. *Id.* at 65-66. The FHA also favored suburbs over cities, encouraging the white flight that exacerbated segregation in Birmingham and Montgomery. *Id.* at 65.

Even when the FHA did not expressly decline to insure mortgages for Black homeowners, its policies built on Alabama's earlier racial zoning laws and practices in a way that made it impossible for Black families to get mortgages. For example, the FHA would not provide mortgages for houses near industrial areas; the practice of zoning Black neighborhoods adjacent to and in the same districts as heavy industry thus rendered many Black-occupied houses ineligible for FHA financing. Rothstein at 50; Connerly at 53.

- vi. *Alabama used federal highway funding to impose physical barriers to maintain racial separation and destroy Black communities.*

Alabama also used federal highway funding to create physical barriers between white and Black neighborhoods. Rothstein at 126-31; Rebecca Retzlaff, *Interstate Highways and the Civil Rights Movement*, 41 J. of Urb. Aff. 930, 930-32 (2019).

In Birmingham, the routes of both Interstate 65 and Interstate 59, which bisect the city, coincide with the racial zoning boundaries from the 1926 zoning map. Connerly at 154-58. Interstate 65, which bisects Birmingham running north to south, was constructed

through a Black neighborhood west of the city's central business district, eliminating the Black housing closest to that district and physically separating the Black neighborhood that remained (home to Birmingham's three federally funded Black housing projects) from the central business district and the hospital. *Id.* at 153-54.

In Montgomery, the state highway department, under the leadership of avowed segregationist Sam Engelhardt, chose to run I-85 through the city's only middle-class Black neighborhood, adjacent to Alabama State University and home to civil rights leader Ralph Abernathy, although the route was more expensive than others would have been. Retzlaff at 934-38. The decision encountered substantial resistance from Montgomery's Black community. *Id.* at 937-39. Abernathy wrote to President Kennedy that the route would

destroy one of the best negro neighborhoods in the south and make for a hazardous condition near the local negro college, a high school, and an elementary school . . . my concern is mainly for the large number of negroes who have sacrificed across the years and from inferior wages built comfortable homes. These families will not have decent neighborhoods in which they can relocate their homes, businesses, churches, etc.

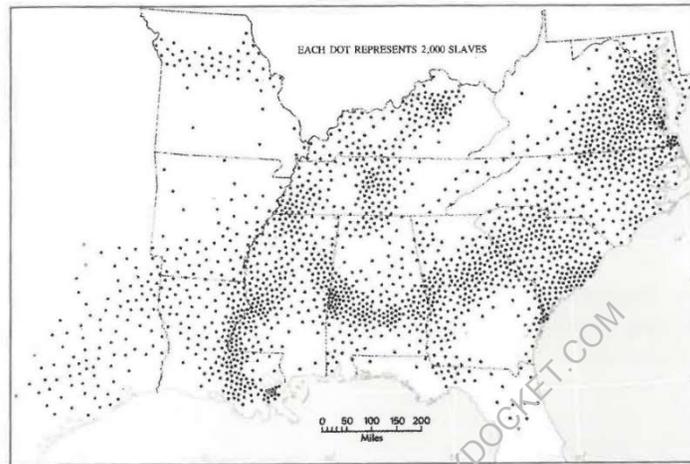
Id. at 939. But the Black population in Montgomery lacked the voting power to block the decision, and I-85 was constructed along the route, avoiding white neighborhoods while demolishing the city's primary Black middle-class neighborhood. *Id.* at 945-46.

B. State and local government action and government-backed private conduct restricted movement out of the rural Black Belt and segregated people within it.

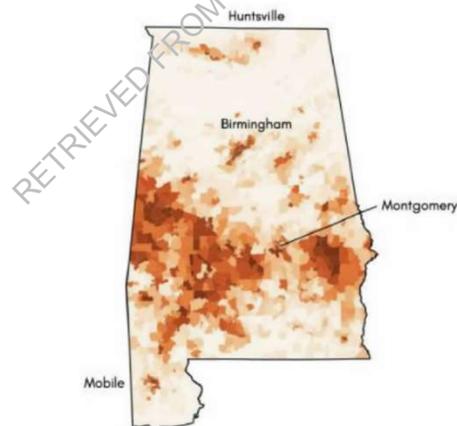
- i. Alabama law restricted movement out of the Black Belt to accommodate white plantation owners.*

The residential concentration of Black Alabamians in the rural Black Belt originates with enslavement. A map of the distribution of enslaved Black people from 1860 shows a band running through the middle of Alabama and stretching down into Mobile County, corresponding to the band of plantations running across the state. This map closely tracks the distribution of the Black population in the Black Belt today.

Map 5: Distribution of enslaved Black people in Alabama, 1860⁹



Map 6: Black Alabama voting-age population at precinct-level¹⁰



⁹ Charles S. Aiken, *The Cotton Plantation South Since the Civil War* 11, Map 1.2 (1998).

¹⁰ MSA167-68.

After 1865, white plantation owners needed a workforce, so they lobbied for laws to control Black movement, such as emigrant agent laws, ensuring that a segregated Black community would remain there.

Emigrant agents were labor recruiters who facilitated individual and group Black migration by bringing workers from rural communities in the Deep South to better-paying jobs in other parts of the country. David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 *Tex. L. Rev.* 781, 782-83, 792, 821 (1998). By creating more choice for Black workers, emigrant agents pressured white landowners to improve working conditions. *Id.* at 783. In response, white Alabama landowners lobbied for punitive licensing fee measures to prevent emigrant agents from operating. *Id.* at 790-93. The state passed an emigrant agent law in 1877, originally applying only to counties in the Black Belt. *Id.* at 795. In 1882, the Alabama Supreme Court struck down the law, but in 1900, the United States Supreme Court declared such laws constitutional, *see Williams v. Fears*, 179 U.S. 270 (1900), ignoring the well-known reality in the South that they “were passed with the intent of reducing African-Americans’ mobility.” Bernstein at 817. In 1903, Alabama again passed an emigrant agent law, depriving rural Black Alabamians of information and resources that would have facilitated their departure. *Id.* at 820.

- ii. *White plantation owners and local governments segregated Black residents within the Black Belt.*

Although white planters wanted Black Alabamians to stay in the Black Belt to work, they did not want them to stay too close. The Black Belt was highly residentially segregated during this time, as it continues to be. One mode of achieving racial segregation was to employ exclusively Black tenant farmers, such that all workers on a given plantation would form a racially segregated community. More than 50% of Southern plantations in the 1930s had this arrangement. Aiken at 154.

Rural towns in the Black Belt were also extremely segregated, and housing conditions for Black residents were far worse than for white residents. *Id.* at 156. In towns in the Southern plantation areas in the first half of the twentieth century, “[b]oundaries between the white and black residential territories were sharp,” and they were marked by physical barriers like railroad tracks and streams. *Id.* at 155. As Black populations grew, they did not spread into white areas but out to planned and unplanned residential territories. *Id.* at 156. Local governments contributed to poor conditions in Black areas by failing to provide municipal services to them. *Id.* at 159. As John Lewis described the Alabama Black Belt farm where he grew up: “We had unpaved roads, and for many years the county refused to pave the major road. They paved it up to where the black section of the county started.” *Id.* (quoting Howell Raines, *My Soul is Rested: Movement Days in the Deep South Remembered* 72 (1983)).

Hand in glove with residential segregation in the Black Belt was the effort of whites to maintain political power. White residents of the Black Belt were particularly hostile to Black voting rights. *See, e.g.*, Aiken at 209 (“The principal areas of white resistance [to Black voting rights] were counties in plantation regions where the black population surpassed 50 percent.”). Dallas County, home to Selma, typified this reaction: Sheriff Jim Clark, “allow[ed] resistance to black voter registration to advance to the stage of open hostility and blatant defiance of federal court decrees.” *Id.* at 193-94.

When the Voting Rights Act facilitated Black voter registration, rural white residents sought to maintain political control by ensuring that residential segregation tracked municipal boundaries. In order to maintain white voting majorities, white-controlled municipalities refused to annex Black territories and insisted that new housing for Black families be built outside city limits. *See id.* at 319-27.¹¹ The federal government complied by siting federal housing projects for Black families outside of municipalities. *Id.* at 324-27 (“The major factor [in the decision to site federally funded housing outside of municipal limits] is fear by white-controlled municipal governments that increases in housing for blacks within corporate limits will dilute white voting strength.”). In addition to reducing voting power and deepening residential

¹¹ This practice continued in Alabama for decades. In 1995, the City of Foley, in Baldwin County, reached a consent decree in response to allegations that it actively sought annexation of majority-white areas while rejecting and ignoring annexation requests from majority-Black areas. *Dillard v. City of Foley*, 926 F. Supp. 1053, 1059 (M.D. Ala. 1995).

segregation, refusing to annex adjacent Black areas meant that these areas did not receive basic municipal services like streetlights, sewers, and paved roads.

* * *

These historical forces produced sharp racial segregation in Alabama's cities and in the Black Belt and continue to shape current living patterns.

III. Contemporary Forces Maintain Residential Segregation in Alabama.

Residential segregation continues today with a host of discriminatory actions aimed at maintaining the color line. *Amici* highlight a few of the most widespread and pernicious forces currently driving residential segregation in Alabama: mortgage lending discrimination, racial steering, and school district boundary lines.

A. Mortgage lending discrimination prevents Black Alabamians from purchasing homes and increases their costs when they do.

Mortgage lending discrimination continues to perpetuate segregation by making it harder for Black borrowers to obtain home loans and purchase homes in high-opportunity neighborhoods. Massey at 104-09. Since the 1970s, racial gaps in loan denials between Black and white borrowers have declined only slightly, and racial gaps in mortgage costs have not declined at all. Lincoln Quillian, et al., *Racial Discrimination in the U.S. Housing and Mortgage Lending Markets: A Quantitative Review of Trends*,

1976-2016, 12 Race & Soc. Probs. 13, 23-24 (2020).

These trends are most pronounced for Black borrowers in Southern cities, including Huntsville, Mobile and Montgomery. Emmanuel Martinez & Aaron Glantz, *How Reveal Identified Lending Disparities in Federal Mortgage Data* (2018); Andrew J. Yawn, *Cleaved by Concrete: The Legacy of Montgomery's Interstates and the Neighborhoods They Destroyed*, Montgomery Advisor, Feb. 1, 2022. In Mobile, a Black resident is 5.5 times more likely to be denied a loan than a similarly situated white resident, the worst disparity in the country. *Id.*

Rural Alabamians similarly face mortgage discrimination in the purchase of manufactured homes. Until it entered into a consent decree with the Department of Justice and agreed to stop this practice, First Lowndes Bank, which operates in the Black Belt, discriminated based on race in setting rates for mortgages for owner-occupied manufactured homes, charging similarly situated Black borrowers a staggering 1.5% higher interest rate than white borrowers. Consent Decree, *United States v. First Lowndes Bank, Inc.*, No. 2:08-cv-0798-WKW-CSC, at 3 (Nov. 4, 2008). As a consequence of lending discrimination, Black home-seekers have less choice about where to live and are foreclosed from more expensive homes in majority-white areas.

B. Racial steering preserves the color line by directing Black and white home-seekers to different neighborhoods.

The practice of “racial steering” or “directing prospective home buyers interested in equivalent

properties to different areas according to their race,” has been in place throughout the twentieth century, *Gladstone Realtors v. Vill. Of Bellwood*, 441 U.S. 91, 94 (1979); Massey at 97-105, and it continues to drive segregation in Alabama today. When engaging in racial steering, realtors and landlords direct Black home-seekers away from majority-white areas by showing them homes in majority-Black or mixed-race neighborhoods, misleading them as to the availability of units, and quoting higher rents and selling prices to Black buyers and renters than to whites. Massey at 98; Margery Austin Turner, et al., *Housing Discrimination Against Racial and Ethnic Minorities 2012* 55 (2013), https://www.huduser.gov/portal/publications/pdf/hud-514_hds2012.pdf.

From Birmingham to Mobile, racial steering is rampant, confining Black residents’ housing options. Throughout the state, white realtors and landlords direct Black home-seekers away from majority-white neighborhoods and toward majority-Black ones. See, e.g., Consent Decree, *United States v. Chandi Biswas, et al.*, No. 2:09-cv-683-MEF (M.D. Ala. Feb 3, 2011); Consent Order, *United States v. Damron*, No. 2:98-cv-488-ID-VPM (M.D. Ala. Feb. 16, 1999); see *United States v. Stevens*, No. 1:05-cv-295-KD-B (S.D. Ala. Dec. 5, 2006). They lie about home availability. See, e.g., *United States v. Dawson Dev. Co., LLC*, No. CV 05-S-0095-M, 2007 WL 9717604 (N.D. Ala. July 23, 2007); Consent Decree, *United States v. Neysa C. Crim*, No. 5:08-cv-00172-UWC (N.D. Ala. Dec. 16, 2008); *Damron*. White sellers refuse to return Black home-seekers’ phone calls. See *Crim*; Consent Decree, *United States v. Lawrence Properties, Inc., et al.*, No.

2:12-cv-00776-MHT-CSC (M.D. Ala. June 27, 2013). White sellers tell Black home-seekers that they cannot afford houses without knowing anything about their finances. *See Hall v. Lowder Realty Co., Inc.*, 160 F. Supp. 2d 1299, 1309 (M.D. Ala. 2001). And often, they simply state outright that they will not rent to Black people. *See Consent Order, United States v. Ralph R. Johnson & Dawn Stockton*, No. 01-478-CB-M (S.D. Ala. Apr. 8, 2002); *Crim; Lawrence*.

As Alabama's high levels of segregation demonstrate, these practices are extremely effective at keeping Black residents from entering white neighborhoods.

C. School district secession encourages residential segregation and undoes the integration gains of county-wide districts.

School district secession, a political process whereby communities secede from larger school districts to create smaller, more racially homogenous districts, has grown in Alabama since 2000. Alabama law facilitates school secession, providing that any city with 5,000 residents can form its own school system. EdBuild, *Fractured: The Breakdown of America's School Districts* (2019), <https://edbuild.org/content/fractured>; Ala. Code § 16-13-199.

In the decades following *Brown v. Board of Education*, 347 U.S. 483 (1954), some Alabama counties were forced to create county-wide school districts. *See, e.g., Stout v. Jefferson Cty. Bd. of Educ.*, 448 F.2d 403, 404 (5th Cir. 1971). County-wide

districts facilitate residential integration, because they remove the link between residential neighborhood and school choice within a county. Erica Frankenberg, et al., *Racial Segregation in the Southern Schools, School Districts & Counties Where Districts Have Seceded*, 5 AERA Open 1, 2 (2019).

In response to increased integration in schools and aided by Alabama law, several districts have seceded from county school systems. Indeed, of the 47 school districts that seceded nationwide from 2000 to 2017, more than 20% were in Alabama. Edbuild; Frankenberg at 4. They include secessions in Jefferson, Montgomery, and Mobile counties. Edbuild.

In each county where secession occurred, the residential population had become majority non-white between 2000 and 2014. Frankenberg at 5; *see also Stout by Stout v. Jefferson Cty. Bd. of Educ.*, 882 F.3d 988, 994 (11th Cir. 2018) (secession movement by Gardendale, near Birmingham, “started when the schools in that City were becoming racially diverse” because of the County’s demographics, “while the population of the City remained overwhelmingly white”). Secession is incredibly effective at pulling white children out of county schools: in Jefferson County, in 2000, the student population was about 75% white and 23% Black. In 2015, it was about 43% white and 47% Black. *Stout*, 882 F.3d at 994.

In the same way that county-wide schools facilitate integration, secession facilitates segregation, encouraging white families (whose relative mobility is aided by lending discrimination) to move within a given county to enter the bounds of majority-white, seceded school districts. As expected,

in Alabama, residential segregation has increased along new school district lines following secession, and this is most pronounced with segregation between white and Black families. Frankenberg at 8.

IV. Residential Segregation Has Produced Majority-Black Communities of Interest.

This unbroken history of action aimed at producing segregation by white Alabamians and the state and local officials who represent them has worked. Alabama is highly segregated, and this segregation has, in turn, produced majority-Black “communities of interest.” The Alabama Legislature, in setting forth the state’s districting principles, defines a “community of interest” as an “area with recognized similarities of interests, including, but not limited to ethnic, racial, economic, tribal, social, geographic, or historical identities.” MSA175. The District Court panel considered the degree to which the proposed alternative districts encompassed communities of interest, as this Court’s vote dilution cases instruct it to do. *See* MSA48; *LULAC*, 548 U.S. at 433.

The District Court correctly found that the Black Belt was a community of interest. *See* MSA66-67. And witness after witness testified that salient challenges are common to Black populations in the Black Belt, including Montgomery and Mobile. *See, e.g.,* MSA65-67 (discussing testimony regarding commonalities between Black communities of Black

Belt, Montgomery, and Mobile); Tr. at 1359¹² (“So Montgomery is tied to the Black Belt. It’s almost one and the same for the black population.”); JA757 (connections between Black Belt and Mobile).

Black Alabamians in the Black Belt, Montgomery, and Mobile face common economic and social challenges stemming from common discrimination. By recognizing these communities of interest, the District Court did not assume that members of a racial group “must think alike,” *Holder*, 512 U.S. at 906. Instead, it found, based on ample record evidence, that these communities share common challenges and vote in a politically cohesive way in an attempt to address them.¹³ These commonalities arose because Black communities have been treated alike by governments and white Alabamians who have sought to segregate them.

Indeed, the record is replete with examples, credited by the trial court, of unique challenges segregated Black communities currently face in Alabama as a direct result of the history of state-imposed residential segregation. For example, in 2019, a United Nations mission to the United States identified conditions of “extreme poverty” in the Black Belt that are “very uncommon in the First World.” JA239. These conditions, including lack of proper sewage, unreliable electricity, and contaminated drinking water, result in large part from towns’

¹² “Tr.” refers to transcripts of the preliminary injunction hearing. *See* Milligan, ECF 105.

¹³ This is consistent with the well-documented phenomenon where residential proximity gives rise to common political interests. *See* Massey at 153-55; Rothstein at 195.

annexation and municipal boundary decisions. *See* Part II.B.2, *supra*. They lead to widespread illness, including “entire households at a time with E. Coli and hookworm and so on.” JA240; JA757-58. Relatedly, as a result of the state’s history of siting heavy industry near Black communities, *see* Part II.A.1, *supra*, Black residents throughout the Black Belt and cities throughout the region are particularly likely to “live in areas that suffer from the effects of environmental pollution.” JA 758. These hazards include “4 million tons of potentially toxic coal dumped” over Uniontown in the south-central Black Belt, and a superfund site, with “highly toxic” soil resulting from industrial waste in a north Birmingham neighborhood. JA240; JA757-58; Tr. at 1166; *see also, e.g.*, JA792-94 (discussing Black communities’ proximity to factories causing negative health consequences and diminished access to clean drinking water).

Unsurprisingly, Black Alabamians in these communities are particularly likely to experience negative health consequences, including cancer and lung disease, JA792-93, as well as increased likelihood of other health issues like diabetes and increased susceptibility to Covid-19. *See, e.g.*, Tr. at 373; JA773-74; JA790; Tr. at 1173. But despite the increased need, members of these communities have less access to quality and affordable healthcare than do other Alabamians. *See, e.g.*, Tr. at 373; Tr. at 1359; JA792-93.

Members of these Black communities also face significant socioeconomic disadvantages relative to others in the state and live under conditions that

prevent them from closing these gaps. The education available is substandard—the state’s yearly review of failing schools contained “almost exclusively . . . public schools in the Black Belt, in Birmingham, or in the urban core of Mobile[,]” JA753; *see also* JA243-49, and, in Montgomery, the public schools are 80 to 90 percent Black and are “substandard[,]” JA769-70. Black Alabamians who attend these schools are thus less likely to secure quality jobs that will provide meaningful wages and opportunities for upward mobility. *See, e.g.*, Tr. at 374-75; JA770; JA772. These educational outcomes are exacerbated by the pro-segregation school secession movement described in Part III.C, *supra*. Relatedly, Black Belt residents, who have been geographically isolated from work because of the history described in Part II.B, lack access to training that can provide well-paying jobs at plants that employ large numbers of white Alabamians. JA789-90. The failing infrastructure, including the lack of public transportation, in these areas also makes it harder to access such jobs, and lack of access to high-speed internet makes it difficult to search for work and participate in remote education programs. *See* JA795-96; Tr. at 398-99.

V. The Current Districting Scheme Dilutes Black Alabamians’ Votes, Preventing Them From Accessing the Political Process While Doing Nothing to Bring Voters of Different Races Together.

The disadvantages above are common to members of Black communities throughout Mobile, Montgomery, and the rest of the Black Belt, and the District Court panel found that Black Alabamians vote in a cohesive manner, such that if their votes

were not diluted, they could form a coalition to use the political system to address these disadvantages. But the current district map makes that impossible, diluting Black Alabamians' votes while doing nothing to bring them together with white voters or encourage coalition building. In the Black Belt, for example, where the population is cracked among three districts, it is so outnumbered by white voters that representatives simply ignore the needs of Black constituents. *See* MSA31; MSA41-42; *see also, e.g.*, Tr. at 1624.

Witnesses living within these districts repeatedly testified that despite their desperation to use the political process to address their needs, their representatives simply did not need to listen to Black constituents to get elected. *See, e.g.*, Tr. at 1346-47 (elections not competitive and “almost foregone conclusion that the conservative candidate is going to win in the general election”); Tr. at 1624-27 (representatives “didn’t represent the needs of [the Black] community[,]” elections are not competitive, and residents “not getting someone that’s representing the black community”); Tr. at 402 (discussing lack of representation); *see also* JA262-67; Tr. at 1347-48 (Black Alabamians in majority-white districts do not even have an “opportunity to represent the interests of the black community.”); Tr. at 1358 (discussing lack of “compromise or collaboration” regarding issues important to members of the Black community). This dilution has led many Black voters conclude it is not even worth attempting to engage with the electoral process. *See* Tr. at 1625-26.

The record reveals many times where Black

communities have identified pieces of federal legislation that would address the issues most important to them, only to watch their elected representatives vote them down. These include: (1) an infrastructure bill that would improve water systems, access to public transit and jobs, and high-speed internet, *see* JA770; JA791; JA795-96; (2) the Build Back Better Act, H.R. 5376, 117th Cong. (2021), which would increase access to childcare and healthcare, provide energy and Covid assistance, reduce pollution, and improve drinking water, *see* JA771; JA775-76; JA793-94; and (3) the expansion of Medicaid and a Covid relief bill that also included employment assistance for those who lost their jobs during the pandemic, *see* JA773-75; JA790-91. In each case, the representative from the district into which members of the Black community were cracked voted against the bill that would address the community's needs. Representative Terri Sewell, by contrast, represents the State's only majority-Black district, and she has supported such legislation and "has used her political capital as a federal legislator to impact state policy that's been beneficial to the black community." Tr. at 1356; *see also* JA771; Tr. at 1166, 1173-74.

Given the undisputed record on racially polarized voting, the current districting plan exploits the white-imposed residential racial Balkanization in Alabama by diluting the strength of the Black vote to the point where representatives can comfortably win without even pretending to consider the Black community's needs. *See Shaw*, 509 U.S. at 648 ("When a district obviously is created solely to effectuate the perceived common interests of one racial group,

elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.”).

Reversing this vote dilution would allow Black Alabamians to use the political process to remedy the harms caused by state-supported residential segregation, and, in light of the consistent political support by Black Alabamians for residential integration, would promote actual integration.

CONCLUSION

In a democracy, the benefit of residential concentration of a particular group is political power. Having forced residential segregation, and insisted that Black Alabamians bear its harms, Alabama now deprives Alabamians of the benefit of a political voice through its Congressional map. This inability of Black Alabamians to meaningfully participate in the political process and elect representatives of their choosing is precisely what the Voting Rights Act exists to prevent. *See, e.g., LULAC*, 548 U.S. at 434. *Amici* respectfully request that this Court affirm the panel’s holding.

Respectfully submitted,

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