Nos. 21-1086, 21-1087

IN THE

Supreme Court of the United States

JOHN H. MERRILL, ALABAMA SECRETARY OF STATE, *et al.*,
Appellants,

—v.—

EVAN MILLIGAN, *et al.*,
Appellees.

JOHN H. MERRILL, ALABAMA SECRETARY OF STATE, *et al.*,
Petitioners,

—v.—

MARCUS CASTER, *et al.*,
Respondents.

ON APPEAL FROM AND ON WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF OF *AMICI CURIAE* PROFESSORS JOWEI CHEN, CHRISTOPHER S. ELMENDORF, NICHOLAS O. STEPHANOPOULOS, AND CHRISTOPHER S. WARSHAW IN SUPPORT OF APPELLEES/RESPONDENTS

RUTH GREENWOOD
Counsel of Record
THERESA J. LEE
HARVARD LAW SCHOOL
ELECTION LAW CLINIC
6 Everett Street, Suite 4105
Cambridge, Massachusetts 02138
(617) 496-0222
rgreenwood@law.harvard.edu

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors and political scientists who research and write about the Voting Rights Act and minority representation.

Amicus curiae Jowei Chen is Associate Professor of Political Science at the University of Michigan. His works on the Voting Rights Act include *The Race-Blind Future of Voting Rights*, 130 Yale L.J. 862 (2021) (with Nicholas O. Stephanopoulos).

Amicus curiae Christopher S. Elmendorf is Martin Luther King Jr. Professor of Law at the UC Davis School of Law. His works on the Voting Rights Act include *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. Pa. L. Rev. 377 (2012).

Amicus curiae Nicholas O. Stephanopoulos is Kirkland & Ellis Professor of Law at Harvard Law School. His works on the Voting Rights Act include *Race, Place, and Power*, 68 Stan. L. Rev. 1323 (2016).

Amicus curiae Christopher S. Warshaw is Associate Professor of Political Science at the George Washington University. His works on minority representation include *Districts for a New Decade – Partisan Outcomes and Racial Representation in the 2021-22 Redistricting Cycle*, 52 Publius: J.

[1] In accordance with Supreme Court Rule 37.6, *amici curiae* state that neither Appellants, nor Appellees, nor their counsel, had any role in authoring, nor made any monetary contribution to fund the preparation or submission of, this brief.

Federalism (forthcoming 2022) (with Eric McGhee and Michal Migurski).

SUMMARY OF THE ARGUMENT

There's a narrative that frames Section 2 of the Voting Right Act as an exceptionally—overly—potent provision. On this view, most Section 2 plaintiffs claiming racial vote dilution win their cases. Winning is easy since, supposedly, a plaintiff group merely has to "establish[] that it is mathematically possible for it to control another seat . . . and that it is a distinct political group." *Holder v. Hall*, 512 U.S. 874, 939 (1994) (Thomas, J., concurring in the judgment). This perspective on Section 2 also sees the measure as "a right to a form of proportional representation" for minority communities. *Thornburg v. Gingles*, 478 U.S. 30, 85 (1986) (O'Connor, J., concurring in the judgment). Allegedly, racial disproportionality is Section 2's test for liability, and racial proportionality is the necessary result of the provision's operation.

This narrative is flatly wrong. In fact, under current law, Section 2 is a highly constrained measure under which plaintiffs typically lose and rarely achieve proportional representation. This brief's first goal is thus to inform the Court about the realities of Section 2 litigation, which are so different from some of the myths. The brief's other aim is to explain what would happen if the Court endorsed Appellants' proposal to render race-blind *Gingles*'s first prong. In violation of Congress's clear instructions, minority voters would have "less opportunity . . . to elect representatives of their choice"—exactly what Section 2 forbids. 52 U.S.C.

§ 10301(b). Because of this diminished representation by their preferred candidates, "a significant lack of [governmental] responsiveness" to minority voters' substantive interests would follow as well. S. Rep. No. 97-417, at 29 (1982).

Starting with plaintiffs' recent record under Section 2, it's strikingly unsuccessful. Over the last two redistricting cycles, only about thirty suits asserting that district plans dilute minority electoral influence have resulted in court decisions on the merits. In these cases, plaintiffs have *lost* almost three times out of four. *See Section 2 Cases Database*, Michigan Law Voting Rights Initiative (Dec. 31, 2021), https://voting.law.umich.edu/database/. At the congressional and state legislative levels, plaintiffs' only clear victories since 2010 have been a pair of court-ordered state house minority opportunity districts, one in Texas and another in Wisconsin. *See Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 854-58 (E.D. Wis. 2012); *Perez v. Texas*, No. 11-CA-360-OLG-JES-XR, 2012 WL 13124275, at *4-5 (W.D. Tex. Mar. 19, 2012).

Plainly, a provision that leads to just two new minority opportunity districts being created over two redistricting cycles is unlikely to dramatically impact minority representation. And indeed, minority representation remains disproportionally low almost across the board. At the congressional level, for example, the fraction of Black opportunity districts is currently below the Black share of the eligible voter population in every state but three. Likewise, only *one* state (California) has attained a proportional share of

Hispanic congressional opportunity districts. *See* Warshaw et al., *supra*, at 20-22 figs.6 & 7.

Above all, two elements of Section 2 doctrine account for plaintiffs' poor litigation record and inability to achieve proportional representation. The first is the requirement of *Gingles*'s first prong that a minority population be "sufficiently . . . geographically compact." 478 U.S. at 50. One of the most important demographic developments of the last half-century is gradually declining residential segregation in certain parts of the country. *See, e.g.*, William H. Frey, *Diversity Explosion: How New Racial Demographics Are Remaking America* 173 (2015). Thanks to this desegregative trend, Section 2 plaintiffs are often unable to establish sufficient compactness. That is, certain minority populations are now too residentially dispersed for liability to attach.

The second key obstacle for Section 2 plaintiffs is the white bloc voting requirement of *Gingles*'s third prong. *See* 478 U.S. at 51. In certain jurisdictions (like Alabama), white voters do oppose minority-preferred candidates at very high rates. But this pattern doesn't hold in large swathes of the country. In many areas, especially in and near cities, substantial proportions of white voters are willing to cast ballots for minority candidates of choice. *See, e.g.*, Shiro Kuriwaki et al., *The Geography of Racially Polarized Voting: Calibrating Surveys at the District Level* 18-24 (Mar. 2022). The prevalence of such "crossover" voting frequently dooms Section 2 claims. It means that minority voters don't face an unyielding wall of white opposition.

The existing *Gingles* framework, then, tightly limits Section 2's reach. Appellants nevertheless argue for an additional shackle: a rule that *Gingles*'s first prong can be satisfied only by a race-blind map, like one spit out at random by a computer without considering race. Contradicting Section 2's text and purpose, this proposal would significantly reduce minority representation in America, undoing decades of progress. Consider Alabama's state house plan. It currently contains twenty-seven Black opportunity districts. Race-blind computer simulations, though, typically produce twenty-one to twenty-four Black opportunity districts. *See* Chen & Stephanopoulos, *supra*, at 906-07. Under Appellants' proposal, Alabama could thus eliminate three to six Black opportunity districts without running afoul of Section 2.

Nor would the effects of such cuts be confined to the election of fewer minority-preferred candidates. Minority representation in America's legislatures is closely linked to how sensitive these bodies are to minority voters' substantive interests. Legislatures with smaller minority presences are less active in areas of particular concern to minority voters, such as education, housing, and welfare. *See, e.g.*, Christopher J. Clark, *Gaining Voice: The Causes and Consequences of Black Representation in the American States* 85 (2019). Consequently, the world that Appellants' proposal would make possible wouldn't just be one of less diverse legislatures that more poorly reflect their constituents. It would be a world, too, of less "responsiveness on the part of elected officials to the particularized needs of the members of the minority group." S. Rep. No. 97-417, at 29.

ARGUMENT

I. UNDER CURRENT LAW, SECTION 2'S REACH IS ALREADY LIMITED.

This Court once observed that "some § 2 plaintiffs may have easy cases." *Johnson v. De Grandy*, 512 U.S. 997, 1012 (1994). Given certain facts, it's obvious that all three *Gingles* preconditions are satisfied and that the totality of circumstances supports liability. This dispute happens to be one of these "straightforward" cases. *Singleton v. Merrill*, No. 2:21-cv-1530-AMM, 2022 WL 272636, at *1 (N.D. Ala. Jan. 27, 2022). Not even Appellants argue that they should prevail under the existing legal framework. That's why their sole contention is that current Section 2 doctrine should be revised. As Chief Justice Roberts pointed out, with no rebuttal, "the District Court properly applied existing law in an extensive opinion with no apparent errors for our correction." *Merrill v. Milligan*, 142 S. Ct. 879, 882 (2022) (Roberts, C.J., dissenting from grant of applications for stays).

However, it's critical that the straightforwardness of *this* case not mislead the Court about the properties of *most* Section 2 litigation. Overall, the volume of racial vote dilution suits has been very low in recent years. When these challenges have been launched, they have been highly likely to fail. The general rule is thus that jurisdictions are free to redistrict under only a light constraint from Section 2. This case is the "out-out-out-outlier" (to borrow a phrase from Appellants) that

proves the rule. Br. for Appellants at 1, 80, *Merrill v. Milligan*, No. 21-1086 (U.S. Apr. 25, 2022).[2]

The Voting Rights Initiative at the University of Michigan Law School recently compiled a database of all dispositive Section 2 decisions from 1982 to 2021 in suits no longer being litigated. *See About the Project*, Michigan Law Voting Rights Initiative (Dec. 31, 2021), https://voting.law.umich.edu/about/. This database makes clear just how rare racial vote dilution claims now are. Over the last two redistricting cycles (the 2010s and the 2020s), only *thirty-one* Section 2 challenges to district plans resulted in rulings on the merits. These thirty-one cases were limited to just seventeen states. They involved state legislative districts in only nine states, and congressional districts in just four. The overwhelming majority of contemporary district plans therefore lead to no Section 2 litigation at all.

Moreover, when modern district maps are disputed under Section 2, they're very likely to survive judicial scrutiny. Of the thirty-one racial vote dilution suits over the last two redistricting cycles, only eight (or about one-fourth) yielded favorable rulings for the plaintiffs. Even this figure is inflated because it includes preliminary victories that ultimately failed to cause district lines to be changed. In the 2010s and the 2020s, the *only* state legislative or congressional districts that were redrawn because of successful Section 2 challenges were a handful of

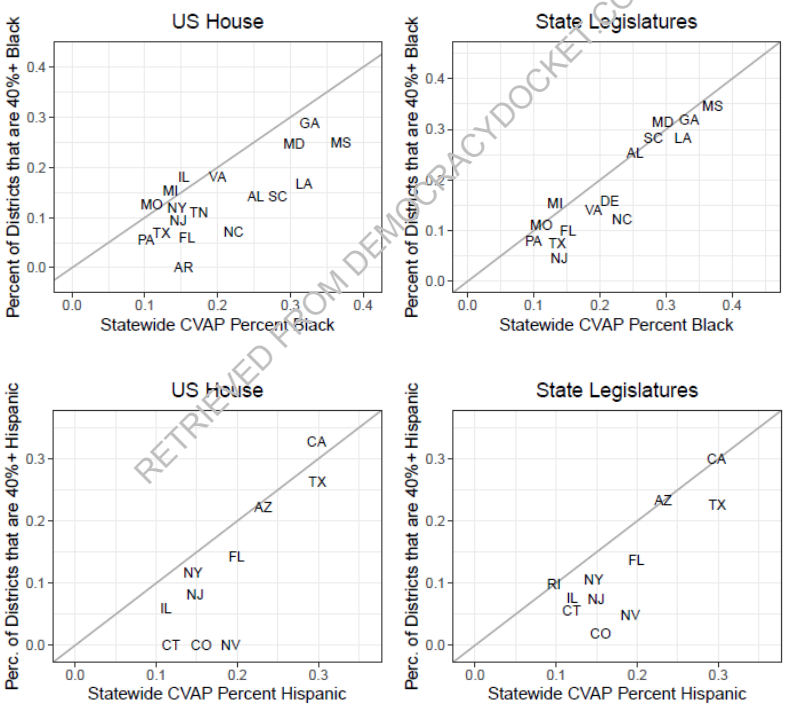
[2] Of course, Section 2's impact isn't limited to successful litigation. Jurisdictions also frequently draw district lines to comply with (and avoid being sued under) the provision.

state house districts near Milwaukee and Houston. A few enacted districts in each metropolitan area were adjusted to create a new Hispanic opportunity district. *See Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 860, 862-63 (E.D. Wis. 2012); *Perez*, 2012 WL 13124275, at *4-5.

To be sure, the Voting Rights Initiative database undercounts Section 2 cases. It doesn't include suits that are still ongoing or that were settled without generating decisions on the merits. *See About the Project*, *supra*. It's also true that racial vote dilution claims were somewhat more common, and more successful, in earlier eras. In the 1990s, for instance, forty-three Section 2 challenges to district plans led to dispositive rulings, twenty-two of them in favor of plaintiffs. *See also* Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 Colum. L. Rev. 1, 13-14 (2008) (discussing this period); Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. Mich. J.L. Reform 643, 656 (2006) (same). But these caveats in no way change the bottom line about today's racial vote dilution litigation: It's both infrequent and highly prone to failure.

Litigation with these characteristics shouldn't be expected to sharply increase minority representation—let alone to lead to proportional representation for minority communities. And indeed, in almost all cases, it doesn't. A team of scholars recently tallied the shares of congressional and state legislative districts in which Black or Hispanic residents comprise more than forty percent of the citizen voting age population. (Districts with minority

populations this large are likely, if not certain, to be minority opportunity districts.) These authors also plotted these shares against the fractions of *states'* citizen voting age populations that are Black or Hispanic. The diagonal lines in the below charts thus denote proportional representation for minority communities. Points below the lines reflect subproportional representation, and points above them superproportional representation. *See* Warshaw et al., *supra*, at 20-22 figs.6 & 7.[3]



[3] The authors only included states where Black or Hispanic residents make up at least ten percent of the population. Few or no minority opportunity districts can be drawn in less diverse states.

It's evident that minority voters are disproportionally underrepresented (and white voters are disproportionally overrepresented) almost everywhere. In the newly enacted congressional plans, the share of likely Black opportunity districts is lower than the Black fraction of the citizen voting age population in Alabama, Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, Virginia. Black voters are only (slightly) overrepresented in Illinois, Michigan, and Missouri. Similarly, the share of likely Hispanic congressional opportunity districts is below the Hispanic fraction of the citizen voting age population in Arizona, Colorado, Connecticut, Florida, Illinois, Nevada, New Jersey, New York, and Texas. Only in California are Hispanic voters overrepresented (again slightly).

The story is much the same at the state legislative level. In the newly enacted plans, Black voters are disproportionally underrepresented in ten states. The share of likely Black opportunity districts only reaches the Black fraction of the citizen voting age population in five states. Likewise, Hispanic voters are disproportionally underrepresented in eight states. Only in three states does the share of likely Hispanic opportunity districts match the Hispanic fraction of the citizen voting age population.

This study's findings are by no means exceptional. In fact, a sizable literature agrees that minority voters have been, and continue to be, disproportionally underrepresented in Congress and state legislatures. *See, e.g.*, Jason P. Casellas, *The*

Institutional and Demographic Determinants of Latino Representation, 34 Legis. Stud. Q. 399, 400-01 & figs.1 & 2 (2009); Clark, *supra*, at 38-39; Tyson King-Meadows & Thomas F. Schaller, *Devolution and Black State Legislators: Challenges and Choices in the Twenty-first Century* 75 (2006). The under-representation of minority voters extends to local legislative bodies as well. In city councils and school boards over the last several decades, the shares of Black, Hispanic, and Asian American officeholders have all lagged municipalities' fractions of Black, Hispanic, and Asian American residents. *See* Federico Ricca & Francesco Trebbi, *Minority Under-representation in U.S. Cities* 32-33 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29738, 2022); Christopher S. Warshaw et al., *Local Representation in the United States: A New Comprehensive Dataset of Elections* 6 (Apr. 7, 2022).

* * * *

If Section 2 were as potent as its detractors allege, then litigants would invoke it—successfully—all the time. But they don't. Few district plans are ever disputed on racial vote dilution grounds, and an even smaller number are redrawn for this reason. Analogously, if Section 2 "plac[ed] undue emphasis upon proportionality," *De Grandy*, 512 U.S. at 1028 (Kennedy, J., concurring in part and concurring in the judgment), then minority communities would often be proportionally represented. But they're not. In the vast majority of district maps, the share of minority opportunity districts trails the minority fraction of eligible voters. The narrative of Section 2 as a destabilizing threat to electoral systems across the

country is therefore built on sand. In reality, Section 2 poses no danger to all but the most racially discriminatory district configurations.

II. SEVERAL DOCTRINAL RULES EXPLAIN SECTION 2's LIMITED REACH.

Why is Section 2's reach so limited? The essential answer is that this Court has already imposed a series of doctrinal constraints on the provision's operation. Because these constraints are frequently (and increasingly) difficult to satisfy, they have caused most plaintiffs to lose their cases. They have also convinced many other potential litigants not to bother bringing racial vote dilution claims. In order of how they're typically analyzed, the rigorous criteria for Section 2 liability include the following:

- *Minority group size:* A minority group must be large enough to constitute a *majority* of the citizen voting age population of an *additional* district (beyond any existing minority opportunity districts in a plan). *See Bartlett v. Strickland*, 556 U.S. 1, 26 (2009) (plurality opinion); *Gingles*, 478 U.S. at 50. If a minority group is only large enough to anchor a new "crossover" district (in which a minority-preferred candidate's election depends on the support of some white voters), or a new "influence" district (in which a minority candidate of choice can't even be elected), the plaintiffs lose. *See Strickland*, 556 U.S. at 14-15 (plurality opinion); *League of United Latin Am.*

Citizens (LULAC) v. Perry, 548 U.S. 399, 445 (2006) (plurality opinion).

- *Minority group compactness:* A minority group must be reasonably compact—a term that has at least three connotations. First, reasonable compactness means that a group isn't too geographically dispersed. *See Bush v. Vera*, 517 U.S. 952, 979 (1996) (plurality opinion); *Gingles*, 478 U.S. at 50. Second, reasonable compactness entails compliance with traditional districting principles like respect for political subdivisions and communities of interest. *See LULAC*, 548 U.S. at 433; *Abrams v. Johnson*, 521 U.S. 74, 92 (1997). And third, a reasonably compact group is one whose members don't have overly divergent socioeconomic and cultural needs and interests. *See LULAC*, 548 U.S. at 434-35.
- *Minority political cohesion:* Minority voters must be politically cohesive in that they generally vote for the same candidates. *See id.* at 427; *Gingles*, 478 U.S. at 51.
- *White bloc voting:* White voters must generally vote together, too, and against minority-preferred candidates. Because of white bloc voting, minority candidates of choice must generally lose (except in minority opportunity districts designed so they can win). *See Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017); *Gingles*, 478 U.S. at 51.
- *Senate factors:* Seven numbered factors and two additional factors, all identified in the

Senate report that accompanied the 1982 amendments to Section 2, must be considered. These factors include a jurisdiction's history of public and private discrimination, other dilutive electoral practices used by a jurisdiction, the extent to which minority members have previously won office, a jurisdiction's responsiveness to minority voters' needs and interests, and the tenuousness of a jurisdiction's justification for a challenged policy. *See Gingles*, 478 U.S. at 36-37; S. Rep. No. 97-417, at 28-29.

- *Proportionality:* Finally, the relationship between the share of reasonably compact minority opportunity districts in a plan, and the minority fraction of the eligible voter population, must be considered as well. The plaintiffs' case is weakened if minority voters are already roughly proportionally represented. *See LULAC*, 548 U.S. at 436-48; *De Grandy*, 512 U.S. at 1017-22.

A. Geographic Compactness

These curbs on Section 2 are anything but paper tigers. Rather, they directly explain why the bulk of racial vote dilution suits end in defeat. Two hurdles are particularly important because they're particularly hard for plaintiffs to clear. The first is the compactness requirement of *Gingles*'s first prong. As noted earlier, only eight of thirty-one Section 2 challenges to district plans have led to favorable decisions for plaintiffs over the last two redistricting cycles. *Thirteen* times in these cases, courts ruled

against plaintiffs because they were unable to satisfy *Gingles*'s first prong.

These losses mostly had similar facts. Typically, a minority population *was* arithmetically large enough to support an additional minority opportunity district. But because of the geographic dispersion of the population, it was either impossible to draw another majority-minority district or any such district would have failed *Gingles*'s compactness requirement. This Court confronted a case of this kind in *Abbott v. Perez*, 138 S. Ct. 2305 (2018). Texas's congressional plan included seven Latino opportunity districts. Because "the geography and demographics of south and west Texas [did] not permit the creation of any more . . . Latino opportunity districts," the plan survived a Section 2 attack. *Id.* at 2331.

Numerous lower courts reached the same conclusion in this scenario, upholding district maps where, due to minority populations' geographic diffusion, plaintiffs couldn't design an additional majority-minority district. *See, e.g.*, *Rios-Andino v. Orange Cty.*, 51 F. Supp. 3d 1215, 1225 (M.D. Fla. 2014); *NAACP v. Snyder*, 879 F. Supp. 2d 662, 671 (E.D. Mich. 2012); *Backus v. South Carolina*, 857 F. Supp. 2d 553, 567 (D.S.C. 2012); *Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 581 (N.D. Ill. 2011). Several more lower courts conceded that another majority-minority district could be drawn but nevertheless ruled against plaintiffs because of minority populations' noncompactness. Some of these populations had overly divergent needs and interests, *see, e.g.*, *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 899 (D. Md.

2011) (discussing Black communities in Baltimore City and the suburbs of Washington, D.C.), while others could comprise a district majority only by flouting traditional districting criteria, *see, e.g.*, *Rodriguez v. Harris Cty.*, 964 F. Supp. 2d 686, 753-54 (S.D. Tex. 2013) (discussing Latino communities in and around Houston).

A major demographic trend helps account for these adverse outcomes for plaintiffs. *Gingles*'s geographic compactness criterion essentially requires a minority population to be residentially segregated. A "geographically insular" or "sufficiently concentrated" population meets this criterion. 478 U.S. at 49, 50 n.17. In contrast, minority voters "spread evenly throughout a multimember district" or "substantially integrated throughout the jurisdiction" don't. *Id.* at 50 n.17; *see also, e.g.*, Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. Chi. Legal F. 83, 87 ("The first [*Gingles*] element focuses on geographic segregation."); Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. Chi. L. Rev. 1329, 1379 (2016) ("To require a group to be geographically compact before liability may be imposed, in essence, is to require it to be residentially segregated.").

Over the last half-century, residential segregation has declined substantially in certain parts of the country. Sociologists often measure segregation using the index of dissimilarity, which represents the share of a group's members who would have to move from one neighborhood to another to achieve perfect uniformity across a metropolitan area.

From a high around 80 percent in 1970, the Black-white dissimilarity score of the average metropolitan area fell to about 50 percent by 2020. This is a considerable improvement, albeit one that stops well short of complete integration. *See, e.g.*, Joe Cortright, *America's Least (and Most) Segregated Metro Areas: 2020*, City Commentary (Oct. 20, 2021), https://cityobservatory.org/most_segregated2020/; Frey, *supra*, at 173; Edward Glaeser & Jacob Vigdor, *The End of the Segregated Century: Racial Separation in America's Neighborhoods, 1890-2010*, at 4 (Manhattan Inst. Civic Rpt. No. 66, Jan. 2012). For their part, Hispanic-white and Asian-white segregation have been lower than Black-white segregation for decades. *See, e.g.*, Reynolds Farley, *The Waning of American Apartheid?*, 10 Contexts 36, 39 (2011). Hispanic and Asian American residents are even more integrated if they were born in the United States or have lived in the country for longer. *See, e.g.*, John Iceland, *Where We Live Now: Immigration and Race in the United States* 58 (2009).

(Somewhat) lower segregation, of course, is a cause for (some) celebration. But it plainly makes it more difficult for plaintiffs to satisfy *Gingles*'s geographic compactness requirement. Beyond the court decisions cited above, several studies find that states with less segregated minority populations manage to create fewer minority opportunity districts. *See, e.g.*, Jason Barabas & Jennifer Jerit, *Redistricting Principles and Racial Representation*, 4 St. Pol. & Pol'y Q. 415, 423 (2004); King-Meadows & Schaller, *supra*, at 82; Stephanopoulos, *Race, Place, and Power*, *supra*, at 1378. The last of these works further shows that declining Black segregation from 1992 to 2012 reduced

Black representation in state houses. But for this desegregative trend, Black representation would have been roughly one percentage point higher by the end of this period. *See* Stephanopoulos, *Race, Place, and Power*, *supra*, at 1376, 1380.

B. White Bloc Voting

The other doctrinal hurdle that plaintiffs have frequently been unable to surmount is the white bloc voting requirement of *Gingles*'s third prong. In *fourteen* of the thirty-one Section 2 challenges to district plans that have generated merits decisions over the last two redistricting cycles, courts held that this requirement wasn't satisfied. The problem (for plaintiffs) was that white voters in these cases were willing to support minority-preferred candidates at fairly high rates. This meant that one of the predicates for racial vote dilution—overwhelming white opposition to minority candidates of choice—was absent.

This Court grappled with this sort of case in *Harris*. North Carolina argued that it had to create a Black opportunity district in the eastern part of the state to comply with Section 2. *See* 137 S. Ct. at 1469. However, "electoral history provided no evidence that a § 2 plaintiff could demonstrate . . . white bloc-voting." *Id.* at 1470. Over the preceding decade, an earlier district with a Black voting age population well below fifty percent had reliably elected Black-preferred candidates by huge margins. *See id.* "Those victories (indeed, landslides) occurred because . . . a meaningful number of white voters joined a politically cohesive black community to elect that group's favored candidate." *Id.* White voters thus didn't vote en masse against Black

candidates of choice, meaning that Section 2 couldn't be violated and North Carolina couldn't use Section 2 as a justification for its racial gerrymander.

This Court's decision in *Harris* is the tip of a larger iceberg. Over and over, during the last two redistricting cycles, lower courts have also found insufficient white bloc voting to satisfy *Gingles*'s third prong. Many of these cases arose in the Midwest, Northeast, and West, and involved Hispanic plaintiffs. *See, e.g.*, *Baca v. Berry*, 806 F.3d 1262, 1274-75 (10th Cir. 2015); *McConchie v. Scholz*, ___ F. Supp. 3d ___, 2021 WL 6197318, at *8-9 (N.D. Ill. 2021); *Radogno v. Ill. State Bd. of Elections*, 836 F. Supp. 2d 759, 772-73 (E.D. Ill. 2011); *Comm. for a Fair and Balanced Map*, 835 F. Supp. 2d at 588; *Fletcher*, 831 F. Supp. 2d at 899-900; *see also* Christopher S. Elmendorf et al., *Racially Polarized Voting*, 83 U. Chi. L. Rev. 587, 607-27 (2016) (discussing lower court analyses of racially polarized voting).

Just as declining residential segregation is partly responsible for plaintiffs' defeats under *Gingles*'s first prong, another important development helps explain these third-prong losses. In many parts of the country, white voters are reasonably willing to cast ballots for minority-preferred candidates. A plurality of this Court drew attention to this fact in *Strickland*, noting that "[s]ome commentators suggest that racially polarized voting is waning." 556 U.S. at 24 (plurality opinion). More recent studies confirm that, while voting remains highly racially polarized in certain jurisdictions (like Alabama), white bloc voting is less prevalent elsewhere. Particularly in and near urban areas, white voters back minority candidates of

choice at rates of forty percent and up. *See, e.g.*, Brian Amos & Michael P. McDonald, *Racially Polarized Voting and Roll Call Behavior in the U.S. House* 8 (Apr. 16, 2015); Stephen Ansolabehere et al., *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 Harv. L. Rev. 1385, 1416 (2010); William D. Hicks et al., *Revisiting Majority-Minority Districts and Black Representation*, 72 Pol. Rsch. Q. 408, 417 (2018); Kuriwaki et al., *supra*, at 18-24.

Like less extreme residential segregation, more convergent voting by voters of different races is good news. It represents progress toward "a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life." *Georgia v. Ashcroft*, 539 U.S. 461, 490-91 (2003). But this otherwise positive phenomenon is a mixed bag for racial vote dilution plaintiffs. On the one hand, it clearly makes it harder for them to establish white bloc voting, and thus to win Section 2 suits. On the other, if substantial fractions of white voters are willing to pull the lever for minority-preferred candidates, then these politicians might not need Section 2 litigation to be elected in the first place. A study shows that these dueling points essentially cancel each other out. Black representation in state houses is about the same whether Black-white polarization in voting is high or low. *See* Stephanopoulos, *Race, Place, and Power*, *supra*, at 1374-75, 1379.

* * * *

Ever since this Court set forth the *Gingles* framework, commentators have recognized its "self-

liquidating" nature. Bernard Grofman et al., *Minority Representation and the Quest for Voting Equality* 131 (1992). If "residential segregation becomes a thing of the past, minority groups will be unable to launch successful voting rights suits." *Id.* Similarly, if "racially polarized voting [ceases], then vote dilution litigation will wither away on its own." D. James Greiner, *Re-Solidifying Racial Bloc Voting: Empirics and Legal Doctrine in the Melting Pot*, 86 Ind. L.J. 447, 497 (2011). Of course, neither residential segregation nor racially polarized voting has yet been consigned to the dustbin of American history. But there *are* certain parts of the country where voters of different races live closer together, and vote more similarly, than they did in earlier eras. These desegregative and depolarizing trends, gradual and tentative though they are, provide crucial context for racial vote dilution plaintiffs' dismal record in court over the last two cycles. Section 2 has not self-liquidated everywhere, but it has done so, more or less, in some of the places where plaintiffs have recently filed suit. And if these trends continue in the years to come, successful Section 2 litigation will become even rarer.

III. APPELLANTS' PROPOSAL WOULD UNDERMINE MINORITY REPRESENTATION IN VIOLATION OF THE STATUTE.

The upshot is that Section 2's reach is already highly limited by the existing doctrinal framework. Appellants would nevertheless add another hoop through which racial vote dilution plaintiffs would have to jump. In Appellants' view, the demonstration maps that plaintiffs submit to satisfy *Gingles*'s first

prong should be designed *without* taking race into account. That is, plaintiffs should have to prove that *race-blind* redistricting would result in the creation of more reasonably compact minority opportunity districts than already exist. *See* Br. for Appellants, *supra*, at 29-30, 42-50, 64-68. Contradicting Section 2's text and purpose, Appellants' proposal would sharply reduce minority representation in America—likely more so than any development since the end of Reconstruction. Both the election of minority-preferred candidates and governmental responsiveness to minority interests would suffer.

A. Representation by Candidates of Choice

There can be no doubt that Section 2 emphasizes the election of candidates preferred by minority voters. The provision explicitly states that it's violated when minority voters have "less opportunity" than other voters "to elect representatives of their choice." 52 U.S.C. § 10301(b). The Senate report that accompanied Section 2's revision in 1982 identified "the extent to which members of the minority group have been elected to public office" as a relevant factor. S. Rep. No. 97-417, at 29. And this Court held in *Gingles* that "[t]he *essence* of a § 2 claim" is that an electoral practice "cause[s] an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives." 478 U.S. at 47 (emphasis added); *see also, e.g.*, Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. Chi. L. Rev. 1493, 1500 (2008)

("The *Gingles* framework focuse[s] . . . on the electoral success of minority-preferred candidates . . . .").

To assess the fit of Appellants' proposal with Section 2's terms and goals, it's therefore critical to determine how it would affect the election of minority candidates of choice. This analysis requires the generation of the kinds of demonstration maps envisioned by Appellants—maps that *don't* incorporate race but that *do* match or beat jurisdictions' enacted plans with respect to nonracial criteria. Once these race-blind maps have been produced, by either a human or a computer algorithm, race must be brought back into the picture to calculate the numbers of minority opportunity districts in both the demonstration maps and jurisdictions' enacted plans. The crucial issue is then how these numbers compare: how many minority-preferred candidates would be elected under nonracial redistricting versus under the status quo.

A recent study addresses this issue at the state house level using computer simulations.[4] In Alabama, as noted at the outset, the enacted plan has twenty-seven Black opportunity districts (out of 105). In contrast, most simulated maps have between twenty-one and twenty-four. *See* Chen & Stephanopoulos, *supra*, at 906-07. Under Appellants' proposal, Alabama could thus dismantle three to six Black

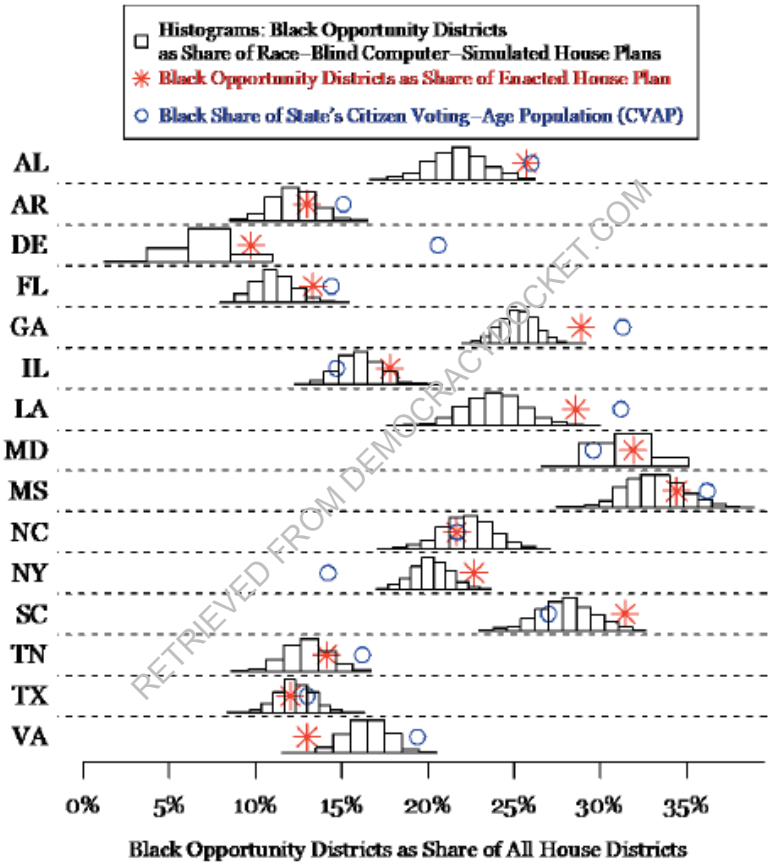
[4] This study and the rest of the relevant literature use essentially the same nonracial criteria for all states and don't attempt to incorporate state-specific requirements like respect for communities of interest. The results of this work should therefore be seen as suggestive, not definitive.

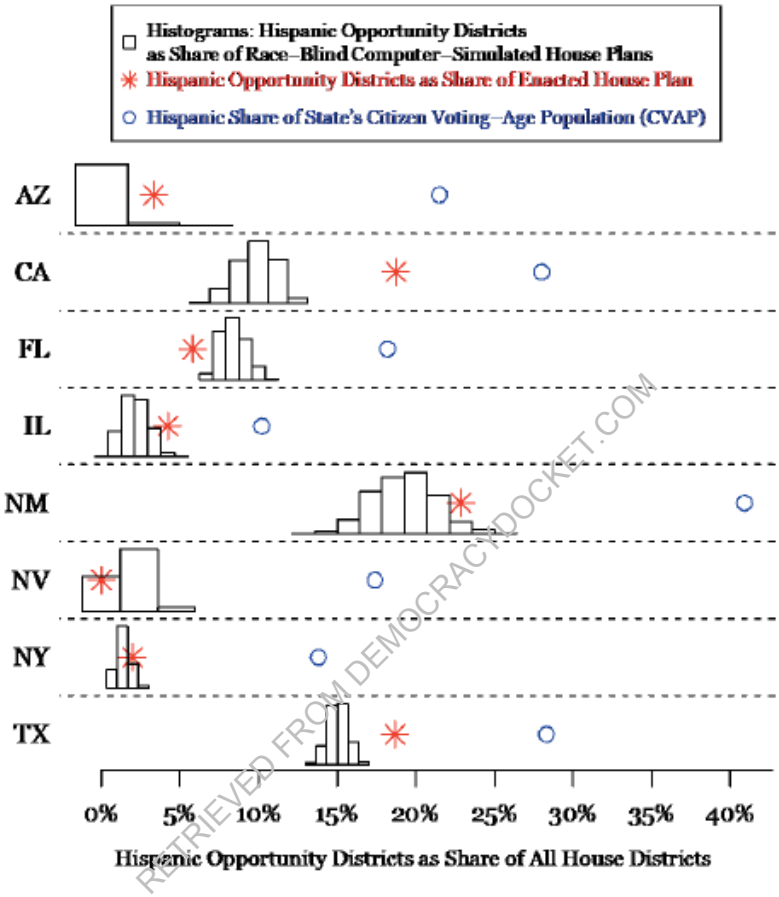
opportunity districts without transgressing Section 2. If plaintiffs challenged the elimination of these districts, they would be unable to show (as Appellants would require) that race-blind redistricting would typically yield a larger number of reasonably compact Black opportunity districts.

The situation is similar in many other states. In the below charts, the histograms indicate the proportions of Black and Hispanic state house opportunity districts, respectively, in sets of one thousand simulated maps. The red stars denote the shares of Black or Hispanic opportunity districts in states' enacted plans. And the blue circles correspond to proportional representation: the fraction of minority opportunity districts that would match a minority group's share of the citizen voting age population. *See id.* at 915-16 figs.11 & 12.

Many states resemble Alabama in that simulated state house maps for them have fewer minority opportunity districts than their enacted plans. In Georgia, for example, the median simulated map has forty-five Black opportunity districts (out of 180), compared to fifty-two in the enacted plan. In Texas, the median simulated map has twenty-three Hispanic opportunity districts (out of 150), versus twenty-eight in the enacted plan. In California, the median simulated map has barely half as many Hispanic opportunity districts as the enacted plan: eight as opposed to fifteen (out of eighty). Across all states, the clear pattern is that simulated minority representation under nonracial redistricting (the histograms) is less than actual minority representation (the red stars), which in turn is less

than proportional representation (the blue circles). In other words, minority communities' already subproportional representation would further decline under Appellants' proposal. *See id.*





Another recent study confirms this finding and extends it to the state senate and congressional levels. This analysis uses two thresholds for Black opportunity district status: a Black voting age population above forty percent or fifty percent. Under either cutoff, for most states, the median race-blind simulated map has fewer likely Black opportunity districts than the enacted plan, which has fewer likely Black opportunity districts than are necessary to achieve proportional representation. *See* Moon Duchin & Douglas M. Spencer, *Models, Race, and the*

Law, 130 Yale L.J. F. 744, 765-66 (2021); *see also* Carmen Cirincione et al., *Assessing South Carolina's 1990s Congressional Districting*, 19 Pol. Geography 189, 201 (2000) (finding fewer congressional majority-minority districts in nonracial simulated maps than in South Carolina's enacted plan); Daniel B. Magleby & Daniel B. Mosesson, *A New Approach for Developing Neutral Redistricting Plans*, 26 Pol. Analysis 147, 162-63 (2018) (same for Mississippi's, Texas's, and Virginia's congressional plans); Zachary Schultzman, *Algorithmic Redistricting and Black Representation in U.S. Elections* 16, 20 (MIT Case Stud. in Soc. and Ethical Resps. of Computing, 2022) (same for Alabama's and Michigan's state senate plans).

The empirical literature is thus unanimous about the impact of Appellants' proposal: It would enable most states to substantially reduce their numbers of minority opportunity districts without violating Section 2. If they occurred, these cuts would be the first of this magnitude since the end of Reconstruction. Take Alabama's state house from the 1970s (the first redistricting cycle after the Voting Rights Act's enactment in 1965) to the present. Over this half-century, the volume of Black legislators in this chamber has gradually risen, from just two in the early 1970s to twenty-seven today. Never in these fifty years has Black representation in Alabama's state house fallen by more than a seat. *Cf.* Hicks et al., *supra*, at 411. Yet Appellants' proposal would make possible the elimination of *three to six* Black opportunity districts. The destruction of these districts would undo decades of progress, returning the chamber to an earlier, much less diverse era. And

to reiterate, it would do so in violation of Congress's words and aims. By amending Section 2 in 1982, Congress sought to *improve* minority voters' opportunities "to elect representatives of their choice," 52 U.S. § 10301(b), and to *enhance* "the extent to which members of the minority group [are] elected to public office," S. Rep. No. 97-417, at 29.[5]

B. Substantive Representation

The election of minority-preferred candidates isn't the only kind of minority representation that Section 2 tries to achieve. The provision also aspires for governments to be responsive to minority voters' substantive interests—to enact policies that reflect minority voters' substantive preferences. This goal is evident in Section 2's reference to minority voters' "opportunity . . . to participate in the political process." 52 U.S.C. § 10301(b). More explicitly, one of the factors in the key 1982 Senate report is "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group." S. Rep. No. 97-417, at 29; *see also, e.g.*, *Rogers v. Lodge*, 458 U.S. 613,

[5] Of course, the elimination of existing minority opportunity districts wouldn't be the end of the story. If Appellants' proposal were adopted, states that deliberately destroyed these districts would find themselves plausibly accused of intentional racial discrimination. *See, e.g.*, *Strickland*, 556 U.S. at 24 (plurality opinion) ("[I]f there were a showing that a State intentionally drew district lines in order to destroy otherwise effective [minority opportunity] districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments.").

625 n.9 (1982) ("unresponsiveness is an important element" of racial vote dilution litigation).

Appellants' proposal would damage minority voters' substantive representation in addition to their representation by their candidates of choice. A large empirical literature establishes that federal, state, and local governments alike are less responsive to minority voters' interests when those governments include fewer minority-preferred officeholders.[6] As explained above, Appellants' proposal would lead to fewer minority legislators of choice holding office. This reduction would cause legislatures to do a worse job serving the needs of minority voters.

At the federal level, one study analyzes how Black representation in Congress is related to the likelihood that Black respondents' preferences for federal spending by issue area will be heeded. The smaller the cohort of Black members of Congress, the less likely that federal spending in domains like education, health care, and urban aid will move in the directions favored by Black respondents. *See* John D. Griffin & Brian Newman, *Minority Report: Evaluating Political Equality in America* 153-54 (2008). Another study examines the link between the minority presence in Congress and the volume of congressional hearings on civil rights issues. Again,

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[6] This literature generally controls for the partisan composition of the electorate and of the legislature. The reported results are therefore plausibly understood as the impact of representation by minority-preferred candidates—*not* by candidates of a given party—on minority voters' substantive representation.

fewer hearings are held on these matters when minority legislators are a rarer sight in Congress's halls. *See* Michael D. Minta & Valeria Sinclair-Chapman, *Diversity in Political Institutions and Congressional Responsiveness to Minority Interests*, 66 Pol. Rsch. Q. 127, 131-32 (2013); *see also, e.g.*, Michael D. Minta, *Diversity and Minority Interest Group Advocacy in Congress*, 73 Pol. Rsch. Q. 208, 213 (2020) (finding that bills favored by civil rights groups are less likely to receive markups in congressional committees when these committees have fewer Black members).

At the state legislative level, several scholars have exploited the large number of states, all with their own trends in minority representation and policy outcomes. These studies conclude that state legislatures with fewer minority members enact policies that are more adverse to minority citizens. Less diverse state legislatures spend less money on education generally, *see* Clark, *supra*, at 85, on aid to school districts with high minority enrollments specifically, *see* Michiko Ueda, *The Impact of Minority Representation on Policy Outcomes: Evidence from the U.S. States* 24-25 (Cal. Inst. of Tech., Working Paper No. 1284, Mar. 2008), on health care, *see* Chris T. Owens, *Black Substantive Representation in State Legislatures from 1971–1994*, 86 Soc. Sci. Q. 779, 787 (2005), and on unemployment benefits, *see id.* at 786-87; Robert R. Preuhs, *The Conditional Effects of Minority Descriptive Representation: Black Legislators and Policy Influence in the American States*, 68 J. Pol. 585, 591 (2006). All these spending decisions contravene the preferences of most minority citizens.

Lastly, at the local level, studies go beyond spending decisions to municipalities' nonfiscal policy choices. City councils with more white members exacerbate gaps in housing prices between minority and white neighborhoods. This effect occurs because these bodies prioritize municipal services in white neighborhoods. *See* Brian Beach et al., *Minority Representation in Local Government* 22-24 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25192, 2019). Less diverse city councils also adopt more aggressive, and more racially biased, policing strategies. Traffic stops are more likely to result in searches in these jurisdictions, especially for Black motorists. *See* Leah Christiani et al., *Better for Everyone: Black Descriptive Representation and Police Traffic Stops*, 10 Pol., Groups, & Identities (forthcoming 2022) (manuscript at 1).

It's important to remember, then, that minority representation isn't limited to the election of minority-preferred candidates. It extends to governmental responsiveness to minority interests, too. And in this respect as well, Appellants' proposal would be deeply harmful and contrary to Section 2's text and purpose. By leading to the election of fewer minority-preferred candidates, it would also cause federal, state, and local legislatures more frequently to ignore the needs of minority voters.

CONCLUSION

This Court should reject Appellants' proposal to render race-blind *Gingles*'s first prong. Section 2's reach is already sufficiently limited, especially by the existing framework's requirements of geographic

compactness and white bloc voting. Moreover, if the Court endorsed Appellants' proposal, the Court would be responsible for undermining both the election of minority-preferred candidates and governmental responsiveness to minority interests, in violation of Congress's clear instructions.

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Respectfully submitted,

/s/ Ruth Greenwood
Ruth Greenwood
Counsel of Record
Theresa J. Lee
ELECTION LAW CLINIC
HARVARD LAW SCHOOL
6 Everett Street, Suite 4105
Cambridge, MA 02138
(617) 496-0222
rgreenwood@law.harvard.edu

Counsel for Amici Curiae