

In The
Supreme Court of the United States

JOHN H. MERRILL, ET AL., APPELLANTS

v.

EVAN MILLIGAN, ET AL.

JOHN H. MERRILL, ET AL., PETITIONERS

v.

MARCUS CASTER, ET AL.

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

**BRIEF FOR LOCAL GOVERNMENTS
AS AMICI CURIAE SUPPORTING
APPELLEES AND RESPONDENTS**

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INTERESTS OF AMICI CURIAE¹

Amici are local governments from across the United States.² Amici's residents rely on them to provide critical services and infrastructure, promote economic development, and maintain safe and healthy neighborhoods. Local governments can best perform these functions when local laws—and the elected officials who enact and enforce them—reflect the needs and policy preferences of all their residents. But amici recognize that racial discrimination has long limited the ability of people of color to meaningfully participate in the political process. Amici seek to create inclusive governments to help remedy the ongoing consequences of past racial discrimination and to eradicate discrimination that persists today. Amici thus have a strong interest in ensuring that their electoral processes are representative of and responsive to all members of their communities.

In particular, amici have a critical interest in preserving the balance that Congress struck in enacting Section 2 of the Voting Rights Act. States and localities have the constitutional responsibility to regulate elections, including by drawing electoral districts and regularly updating those maps in response to

¹ No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to its preparation or submission. The parties have filed blanket consents to the filing of amicus briefs.

² A complete list of amici appears in an appendix to this brief.

population changes. At the same time, Congress enacted Section 2 with the goal of ensuring that all individuals, regardless of race, have equal opportunity to participate in the political process.

For decades, amici have conducted redistricting against the backdrop of Section 2 and this Court's longstanding precedents interpreting it. In amici's experience, existing Section 2 jurisprudence strikes an appropriate and workable balance by furthering collective commitments to democracy representative of our multi-racial society without unduly intruding on state and local prerogatives. Alabama's effort here to rewrite Section 2 would upset that balance. It would undermine Section 2's protections and impair amici's efforts to promote racial justice and equity in their communities, while imposing substantial burdens on amici and their officials involved in redistricting.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Voting Rights Act of 1965 to ensure that members of every racial group have an equal opportunity to participate in the political process. In 1982, it amended Section 2 of the statute to prohibit not only voting practices motivated by a discriminatory purpose, but also those that “result[] in” unequal access to the political process based on race. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), this Court interpreted the amended Section 2 and set forth the standard that has long governed vote-dilution claims—claims that a districting plan impairs minority voters’ ability to elect representatives of their choice.

For the nearly four decades since *Gingles*, States and localities have relied on that framework in drawing congressional, statewide, and local district lines. After several redistricting cycles resulting in thousands of electoral maps, Section 2 vote-dilution claims have been relatively rare, and successful challenges rarer still. And this Court has continued to provide consistent guidance on compliance with Section 2’s requirements. As the Court observed just last Term, its “many subsequent vote-dilution cases have largely followed the path that *Gingles* charted.” *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2337 (2021). Section 2 has served as a critical check on redistricting plans that grossly dilute the votes of people of color, while allowing state and local governments to draw nearly all maps without litigation.

This case presents a textbook example of the rare redistricting plan that denies minority voters equal access to the political process in violation of Section 2. Voting in Alabama is racially polarized, and “Alabama’s extensive history of repugnant racial and voting-related discrimination is undeniable and well documented.” *Milligan* Stay App. 182. Under Alabama’s 2021 congressional redistricting plan, Black voters could be expected to elect a representative of their choice in only one district out of seven. A three-judge district court held a lengthy evidentiary hearing with testimony from numerous expert witnesses. It then made extensive factual findings and concluded that Alabama could have drawn a second Black-majority district consistent with the State’s traditional districting principles, such as keeping together existing communities of interest—the first showing required to prove a Section 2 violation under *Gingles*. *Id.* at 157-74. The court also found that the plaintiffs had satisfied the remaining *Gingles* requirements and that “under the totality of the circumstances * * * Black voters have less opportunity than other Alabamians to elect candidates of their choice to Congress.” *Id.* at 5.

Alabama hardly disputes the correctness of the district court’s decision under *Gingles* and its progeny. Instead, Alabama asks this Court to upend those longstanding Section 2 precedents. It contends that “neutrally drawn districting plans”—apparently meaning maps drawn without expressly considering voters’ race—cannot violate Section 2. Alabama Br. 29. It

faults Plaintiffs for considering voters' race when drawing comparator maps, as Section 2 challengers have done for decades. And it claims there is "tension" between complying with Section 2 and the Equal Protection Clause's constraints on race-based classifications. *Id.* at 42.

Amici file this brief to encourage the Court to reject Alabama's efforts to rewrite Section 2. Amici and other local governments are responsible for drawing numerous electoral district boundaries. In amici's experience, this Court's well-settled vote-dilution standards provide sufficient guidance to map drawers on how to comply with Section 2 and the Constitution simultaneously. By contrast, Alabama's proposed standard would significantly weaken Section 2's protections while imposing needless burdens on States and localities involved in redistricting. This Court should affirm.

ARGUMENT

I. SECTION 2 REFLECTS LOCALITIES' OBLIGATION TO DRAW DISTRICTS THAT ENABLE EQUAL OPPORTUNITY TO PARTICIPATE IN THE POLITICAL PROCESS

1. "[P]articipation in local government is a cornerstone of American democracy." *FERC v. Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring). Local laws, no less than state and federal laws, have a profound effect on individuals' daily lives. The elected officials who enact and enforce local laws are thus of critical importance to amici and their residents.

Although redistricting is most often associated with state governments, local governments are responsible for drawing district boundaries for a wide range of elected officials. To name a few examples, in some jurisdictions, electoral maps are drawn at the local level for city councils, *e.g.*, City of Albuquerque, *2022 City Council Redistricting Process*;³ county supervisors, *e.g.*, El Dorado County, *County of El Dorado Redistricting*;⁴ county school boards, *e.g.*, Montgomery County Public Schools, *Board of Education Redistricting*;⁵ community college boards of trustees, *e.g.*, Alamo Colleges District, *Redistricting*;⁶ water district boards of directors, *e.g.*, Santa Clara Valley Water District, *Redistricting*;⁷ and local judiciaries, *e.g.*, King County Council, *District Court Redistricting*.⁸

Every ten years after the decennial national census—and sometimes more frequently—localities redraw district lines to reflect changes in the population. *See, e.g.*, Va. Const. art. VII, § 5 (requiring redrawing of districts for local governing bodies every ten years). Local

³ <https://www.cabq.gov/council/projects/current-projects/2022-city-council-redistricting-process> (last visited July 14, 2022).

⁴ <https://www.edcgov.us/Government/Elections/county-of-el-dorado-redistricting> (last visited July 14, 2022).

⁵ <https://www.montgomeryschoolsmd.org/boe/about/redistricting.aspx> (last visited July 14, 2022).

⁶ <https://www.alamo.edu/about-us/leadership/board-of-trustees/redistricting> (last visited July 14, 2022).

⁷ <https://www.valleywater.org/how-we-operate/redistricting> (last visited July 14, 2022).

⁸ <https://kingcounty.gov/council/issues/DistrictCourtRedistricting.aspx> (last visited July 14, 2022).

governments take this responsibility seriously. Many city and county redistricting bodies adopt public guidelines for their redistricting processes, such as prioritizing compact and contiguous districts and preserving communities of interest. *See, e.g., Loudoun County, Local Redistricting in Loudoun County*;⁹ Harris County, *Harris County Commissioner Court Precinct Redistricting Criteria* (July 20, 2021).¹⁰ In some jurisdictions, officials solicit public input on proposed maps or the redistricting process more generally. *See, e.g., Office of the Harris County Attorney, Join the Discussion*.¹¹ Some local governments have established advisory or independent redistricting commissions to consider and draw draft maps and recommend or adopt final maps that comply with Section 2, the Equal Protection Clause, and well-settled traditional redistricting criteria. *See, e.g., County of Santa Clara, 2021 Advisory Redistricting Commission*;¹² Tompkins County, *Redistricting 2021*;¹³ City of Los Angeles, *2021 City of Los Angeles Redistricting*.¹⁴ And some

⁹ <https://www.loudoun.gov/redistricting> (last updated June 2022).

¹⁰ <https://cao.harriscountytexas.gov/Portals/20/Documents/Redistricting%20Order.pdf?ver=ebmKIX1ellRIVmYTTNE6Kg%3d%3d>.

¹¹ <https://cao.harriscountytexas.gov/Commissioner-Precinct-Redistricting/Join-the-Discussion> (last visited July 14, 2022).

¹² <https://countyexec.sccgov.org/2021-redistricting-process/2021-advisory-redistricting-commission> (last visited July 14, 2022).

¹³ <https://www.tompkinscountyny.gov/redistricting> (last visited July 14, 2022).

¹⁴ <https://redistricting2021.lacity.org> (last visited July 14, 2022).

jurisdictions retain outside consultants or experts to assist with the redistricting process. *See, e.g.,* Palm Beach County, *Redistricting Program*.¹⁵ Based on census data, voter records, public comments, and a variety of other information, local redistricting officials or commissions adopt maps that will govern elections until the following redistricting cycle. *See generally* U.S. Election Assistance Comm’n, *Local Election Officials’ Guide to Redistricting* (Aug. 25, 2021).¹⁶

2. Section 2 plays an important role in these local redistricting processes. Localities’ basic goal in redistricting is to ensure that every eligible voter has an equal opportunity to participate in the political process. After all, as this Court has recognized, the “basic aim of legislative apportionment” is “the achieving of fair and effective representation for all citizens.” *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964).

Section 2 aligns with and complements that basic mission. Section 2 prohibits imposition of any “standard, practice, or procedure” that “results in a denial or abridgement of the right * * * to vote on account of race.” 52 U.S.C. § 10301(a). Notably, Section 2 applies not only to “State[s]” but also to their “political subdivision[s],” including counties, cities, and towns. *Id.* §§ 10301(a), 10310(c)(2).

Section 2 is thus an important component of local redistricting. It prevents even apparently neutral

¹⁵ <https://discover.pbcgov.org/Pages/redistricting.aspx> (last visited July 14, 2022).

¹⁶ <https://discover.pbcgov.org/Pages/redistricting.aspx>.

election practices and procedures from depriving individuals of an equal opportunity to participate in the political process based on their race. *Id.* § 10301(b). The focus on outcomes, rather than intent, is especially important given the perniciousness of racial discrimination and the lingering consequences of past discrimination in American society. As Congress found when reauthorizing the Voting Rights Act in 2006, “[d]iscrimination today is more subtle than the visible methods used in 1965,” but “the effect and results are the same, namely a diminishing of the minority community’s ability to fully participate in the electoral process and to elect their preferred candidates of choice.” H.R. Rep. No. 109-478, at 6 (2006).

If anything, Section 2’s prohibition on electoral maps that dilute minority voters’ ability to elect representatives of their choice is even more crucial today than when Congress first enacted the Voting Rights Act in 1965 and amended Section 2 in 1982. Mapmakers now have access to more data, such as population demographics and voter preferences, than did their predecessors from previous generations. *See* Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. Chi. L. Rev. 553, 571 (2011). Using that information, they can more effectively “pack” disfavored voters “into supermajority districts that are essentially thrown away electorally” and “crack[]” disfavored voters among several districts “so as not to constitute a majority in any single district.” *Id.* at 561-62; *see also* *League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, No. 2021-1193,

2022 WL 803033, at *7 n.6 (Ohio Mar. 16, 2022) (noting that “the party controlling the map-drawing process” had used computer software to create “outlier maps solely to maximize that party’s partisan advantage”).

This particularly affects minority voters in urban areas. Not only are such voters less able to elect state representatives of their choice, but the resulting non-representative state legislatures can also preempt local policymaking. See Nicholas O. Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 Wm. & Mary L. Rev. 2115, 2125-26 (2018); Br. of City of Cincinnati as Amicus Curiae at 5, *League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, No. 2021-1193 (Ohio Oct. 29, 2021) (describing how Ohio’s gerrymandered legislative maps disenfranchise Black Cincinnatians). Section 2’s limits on electoral maps that “dispers[e]” a racial group’s members “into districts in which they constitute an ineffective minority of voters” is an important tool in combating that conduct. *Gingles*, 478 U.S. at 46 n.11.

Section 2’s importance has also been heightened by the fact that Section 5 of the Voting Rights Act, which was “intended to be temporary,” is no longer operative. *Shelby Cnty. v. Holder*, 570 U.S. 529, 538 (2013) (finding the coverage formula for the preclearance requirement invalid). Section 2’s “permanent, nationwide ban on racial discrimination in voting” thus plays an even more vital role now. *Id.* at 557.

3. Section 2 also gives States and localities flexibility to consider race (among other information about

voters and communities of interest) in districting to ensure that all groups can meaningfully participate in the political process. The Court has “long assumed that one compelling interest” justifying consideration of race “is complying with operative provisions of the Voting Rights Act.” *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017). This (limited) ability to consider race in map-drawing is critical to meeting localities’ objectives in redistricting. When legislative and executive officials are representative of the voting population’s diversity, all citizens have an equal opportunity to have their ideas and priorities considered. In amici’s experience, that produces better policies and outcomes for the entire voting public.

In fact, consideration of race in redistricting is often inevitable. Many communities of interest are defined in part by race, such as Japantown in San Jose. Local governments thus necessarily take race into account when considering those communities during redistricting. And when members of the public propose maps, districting officials must consider demographic information to assess whether the maps maintain those communities of interest. Indeed, Alabama’s redistricting guidelines expressly define a “community of interest” to include “ethnic” and “racial” identities. *Milligan Stay App.* 46.

As this discussion shows, Section 2 shares the same “intensely local” and practical focus as the redistricting process itself. *Gingles*, 478 U.S. at 79. Section 2 thus complements redistricting officials’ obligation to ensure that all voters can participate in the political

process on equal footing, without regard to past or current racial discrimination.

II. EXISTING STANDARDS FOR ASSESSING SECTION 2 COMPLIANCE IN REDISTRICTING ARE APPROPRIATE AND ADMINISTRABLE

Alabama asserts that this Court’s existing law has “left States caught in the middle” between attempting to comply with Section 2, on one hand, and the Fourteenth Amendment’s limits on considering race when redistricting, on the other. Alabama Br. 42. To be sure, this Court has recognized that these two constraints can sometimes “pull[] in the opposite direction.” *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018). In amici’s real-world experience with redistricting, however, this Court’s “effort[s] to harmonize these conflicting demands” have proven largely successful. *Id.* at 2315. In particular, the Court’s current vote-dilution standards provide map drawers sufficient guidance on how to comply with Section 2 and the Constitution simultaneously—while also respecting States’ and localities’ traditional districting criteria.

1. This Court’s standards for assessing electoral maps’ Section 2 compliance have been settled for more than three and a half decades. To prevail on a vote-dilution claim under Section 2, a plaintiff must prove “three threshold conditions”: (1) a minority group exists that is “sufficiently large and geographically compact to constitute a majority in a single-member district,” (2) the minority group is “politically cohesive,”

and (3) “the white majority vot[es] sufficiently as a bloc to enable it * * * usually to defeat the minority’s preferred candidate.” *Johnson v. De Grandy*, 512 U.S. 997, 1006-07 (1994) (quoting *Gingles*, 478 U.S. at 50-51).

In addition to satisfying those three conditions, a Section 2 plaintiff must also show that the challenged map “den[ies] minority voters equal political opportunity” under the “totality of facts.” *Id.* at 1013-14; see 52 U.S.C. § 10301(b) (providing that a Section 2 violation “is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected] class of citizens”). The relevant circumstances include “the history of voting-related discrimination in the State or political subdivision,” “the extent to which voting in the elections of the State or political subdivision is racially polarized,” and “the extent to which members of the minority group have been elected to public office in the jurisdiction.” *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 426 (2006) (*LULAC*) (citing *Gingles*, 478 U.S. at 44-45).

Experienced practitioners in the field have noted that Section 2 cases are among the most “work intensive” cases tried in federal court. Dale E. Ho, *Voting Rights Litigation After Shelby County: Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. Legis. & Pub. Pol’y 675, 682-83 (2014). The plaintiff bears the burden of proof on each of the three *Gingles* preconditions and the totality-of-the-circumstances test. *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993); see

Milligan Stay App. 25-26. And proving the *Gingles* preconditions, plus all the other factors relevant under the totality of the circumstances, “ordinarily involves a considerable amount of statistical evidence derived from population figures, demographics, and voter behavior.” Bruce M. Clarke & Robert Timothy Reagan, *Redistricting Litigation: An Overview of Legal, Statistical, and Case-Management Issues* 10 (2002).¹⁷

This case proves the point. The district court conducted a seven-day preliminary injunction hearing, documented in nearly 2,000 pages of transcript, and included testimony from eleven expert witnesses and six other fact witnesses. *Milligan* Stay App. 4. The proceedings also involved “more than 400 pages of pre-hearing briefing and 600 pages of post-hearing briefing; reports and rebuttal reports from every expert witness; more than 350 hearing exhibits;” and “joint stipulations of fact that span seventy-five pages.” *Ibid.*

These practical realities show that *Gingles* and later cases have provided an effective, administrable framework for Section 2 cases. This Court’s existing test guards against excessive litigation while preserving the most meritorious claims: challenges to maps that blatantly undermine minority voters’ ability to elect representatives of their choice.

2. Section 2 litigation statistics bear out these observations. Though critics of Section 2 have long expressed concern that Section 2’s results test would

¹⁷ <https://www.fjc.gov/sites/default/files/2012/Redistri.pdf>.

prompt endless and protracted litigation, *see, e.g.*, S. Rep. No. 97-417, at 99-103 (1982) (additional views of Sen. Hatch), those fears have proven unfounded. Over the last 40 years, Section 2 litigation—especially successful challenges to redistricting plans—has been rare.

Thousands of local jurisdictions engage in redistricting every decade, if not more frequently. For example, in 2018, there were 6,459 county or county-equivalent electoral jurisdictions within States and U.S. territories. *See* U.S. Election Assistance Comm’n, *Election Administration and Voting Survey: 2018 Comprehensive Report* 4 (2019).¹⁸ Those jurisdictions contain numerous cities, towns, school districts, and special districts that may also engage in redistricting. Yet only a fraction of those maps have been challenged under Section 2. One recent study found only 316 Section 2 vote-dilution cases resulting in published decisions between the 1982 Voting Rights Act amendment and the end of 2021. Ellen D. Katz et al., *To Participate and Elect: Section 2 of the Voting Rights Act at 40*, U. Mich. L. Sch. Voting Rts. Initiative (2022).¹⁹ Plaintiffs achieved successful outcomes in 49% of these vote-dilution cases, though that rate has sharply decreased over time: plaintiffs succeeded in 74% of vote-dilution cases in the first decade after the 1982 amendment,

¹⁸ https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf.

¹⁹ <https://voting.law.umich.edu>.

but less than 40% of cases in the following years. *Ibid.*²⁰

Another survey by the U.S. Commission on Civil Rights, an independent agency directed by Congress to examine federal civil rights enforcement efforts, showed similar results. It determined that, since this Court’s *Shelby County* decision in 2013, only 61 suits have been filed under Section 2. U.S. Comm’n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Report* 10 (2018).²¹ As of 2018, only 23 of those had been successful, and only 14 of those successful cases involved vote-dilution claims. *Id.* at 227-28.

In sum, States and localities have drawn countless electoral maps since Congress adopted Section 2’s “results” test in 1982. Yet very few have resulted in Section 2 litigation, and even fewer have been successfully challenged. So under this Court’s longstanding interpretations, Section 2 only minimally “intru[des]” into redistricting legislation, among “the most vital of local functions.” *Miller v. Johnson*, 515 U.S. 900, 915 (1995). But Section 2 still plays a critical role in ensuring recourse when a redistricting authority, like Alabama here, adopts a map that grossly dilutes minorities’ votes.

3. Alabama’s complaints about this Court’s Section 2 precedents mischaracterize those cases and are

²⁰ <https://voting.law.umich.edu/findings>.

²¹ https://www.usccr.gov/files/pubs/2018/Minority_Voting_Access_2018.pdf.

inconsistent with amici's practical experience applying them in redistricting.

a. For instance, Alabama objects to applications of Section 2 that "[f]ind[] a * * * violation based on a mere lack of proportionality" and that "subordinate traditional redistricting criteria." Alabama Br. 31, 39. But this Court's existing vote-dilution framework already accounts for these concerns. The Court has made clear that "whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population" is only one "relevant consideration" among many others in the totality-of-the-circumstances test. *LULAC*, 548 U.S. at 426; see *De Grandy*, 512 U.S. at 1000 (explaining that "proportionality is not dispositive in a challenge to single-member districting"). And the first *Gingles* precondition requires the plaintiff to show that another "reasonably compact" majority-minority district can be drawn consistent with "traditional districting principles such as maintaining communities of interest and traditional boundaries." *LULAC*, 548 U.S. at 432-33.

The Court thus has declined to find Section 2 violations where minorities were underrepresented relative to their share of the population, but no additional majority-minority district could be drawn consistent with traditional districting criteria. For example, in *Bush v. Vera*, a plurality of this Court explained that "[i]f, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, [Section 2] does not require a

majority-minority district.” 517 U.S. 952, 979 (1996) (plurality opinion). And in *Miller*, the Court determined that the Voting Rights Act did not compel creation of an additional majority-Black district where doing so would require “connecting the [B]lack neighborhoods of metropolitan Atlanta and the poor [B]lack populace of coastal Chatham County, though 260 miles apart in distance and worlds apart in culture.” 515 U.S. at 908.

b. Nor does Section 2 compliance leave States unduly “vulnerable” to racial-gerrymandering claims, as Alabama contends. Alabama Br. 42. “In an effort to harmonize these conflicting demands,” this Court has long “assumed that compliance with the [Voting Rights Act] may justify the consideration of race in a way that would not otherwise be allowed.” *Abbott*, 138 S. Ct. at 2315. “[A] State’s consideration of race in making a districting decision is narrowly tailored and thus satisfies strict scrutiny if the State has ‘good reasons’ for believing that its decision is necessary in order to comply with” the Voting Rights Act. *Ibid.*

Notably, this Court has emphasized that States and localities “enjoy leeway to take race-based actions reasonably judged necessary under a proper interpretation of” the Voting Rights Act. *Cooper*, 137 S. Ct. at 1472. The Court’s cases thus do not “insist that a state legislature, when redistricting, determine *precisely* what percent minority population” the Voting Rights Act “demands.” *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015). And

“[a]s a practical matter,” challengers generally “will be unable to prove an unconstitutional racial gerrymander without evidence that the enacted plan conflicts with traditional redistricting criteria.” *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017).

All this means that when States and localities draw electoral maps to ensure that minority voters have an equal opportunity to participate in the political process, those maps are unlikely to be invalidated as unconstitutional racial gerrymanders. In amici’s experience, this Court’s existing cases have provided workable standards for simultaneously complying with both Section 2 and the Constitution in districting. Alabama’s contrary assertion does not warrant upsetting this Court’s longstanding Section 2 precedents.

III. ALABAMA’S PROPOSED SECTION 2 STANDARD IS INFLEXIBLE AND UNWORKABLE

As explained, States and localities have successfully relied on this Court’s existing cases for nearly four decades to produce lawful districting plans. But Alabama effectively proposes replacing those longstanding precedents with an entirely new, atextual standard for Section 2 liability. Under Alabama’s theory, Section 2 is violated only when there are “irregularities in the State’s enacted plan that can be explained only by racial discrimination.” Alabama Br. 44. And Alabama would demand that Section 2 plaintiffs produce comparator maps drawn without any consideration of race. *Id.* at 49-50. Alabama’s position “would

essentially require [Section 2] plaintiffs to demonstrate that modern map-drawing software, designed to give no attention at all to race, would produce maps with” an additional majority-minority district. *Merrill v. Milligan*, 142 S. Ct. 879, 886 (2022) (Kagan, J., dissenting from grant of applications for stays). For multiple reasons, this Court should reject Alabama’s proposed upheaval of Section 2.

1. Most important, Alabama’s position contravenes Section 2’s text and purpose. The statute prohibits districting plans that “*result[] in* a denial or abridgement of the right * * * to vote on account of race.” 52 U.S.C. § 10301(a) (emphasis added); *see id.* § 10301(b) (providing that a statutory violation “is established” if members of a protected class “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice”). Section 2 thus focuses on the results of the challenged law, not the State or locality’s intent in adopting it.

Indeed, Congress’s 1982 amendment to Section 2 was intended to reject any such requirement of discriminatory intent. Before that amendment, this Court had held that “facially neutral voting practices violate [Section 2] only if motivated by a discriminatory purpose.” *Brnovich*, 141 S. Ct. at 2332 (citing *Mobile v. Bolden*, 446 U.S. 55, 68-70 (1980)). Congress amended Section 2 “[s]hortly” thereafter; the “oft-cited” Senate Report accompanying the amendment “stated that the amendment’s purpose was to repudiate *Bolden* and establish a new vote-dilution test”

that turns on whether the challenged practice “*results in*” an abridgement of the right to vote based on race. *Ibid.* (citing S. Rep. No. 97-417, at 2, 15-16, 27). Thus, “[t]he essence of a [Section 2] claim” after the 1982 amendment “is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” *Gingles*, 478 U.S. at 47.

Far from merely “clarif[ying] the evidentiary showing required of a [Section 2] plaintiff,” as Alabama asserts (at 33), Congress’s amendment to Section 2 prohibited any districting plans that result in dilution of the votes of minority voters. Alabama’s proposed Section 2 standard cannot be squared with Congress’s “broad remedial purpose of ridding the country of racial discrimination in voting.” *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (internal quotation marks and alterations omitted). Simply put, Congress enacted and amended Section 2 to guard against practices that dilute the voting strength of people of color; it would be illogical to adjudicate Section 2 claims in an entirely “race-neutral” manner, as Alabama suggests. Alabama Br. 47.

2. Alabama’s position also could deprive jurisdictions of any ability to consider race in redistricting and impose unnecessary burdens on States and localities. As noted, state and local governments may take race into account during redistricting—as one factor among many—to help ensure that elected officials represent the interests and needs of the entire eligible voting

population. *See supra* pp. 10-12. Again, however, this Court has permitted “race-based districting” only when there is “good reason to think” a plaintiff otherwise would prevail on a Section 2 vote-dilution claim. *Cooper*, 137 S. Ct. at 1469-70.

Under Alabama’s proposed standard, jurisdictions may need to use computer software that randomly generates districting maps to ascertain their potential Section 2 liability—and thus the extent to which they can consider race in districting. That is simply unrealistic for the vast majority of localities. True, some larger counties and cities already use map-drawing software, such as Geographic Information System (GIS) programs, as part of their redistricting processes. *See, e.g.,* Los Angeles County, *Mapping Software*.²² But such software can be expensive, and its redistricting functions require specialized training and expertise. *See, e.g.,* Caliper Software, *Mapping Software*.²³ So some jurisdictions hire or contract with experts that license and use these programs during redistricting. *See, e.g.,* City of San Diego, *Mapping Services and Demographic Consulting Request for Proposal (RFP) Is Posted*.²⁴ Yet these arrangements burden localities’ already-strained budgets. The result is that using

²² <https://redistricting.lacounty.gov/mapping-software> (last visited July 14, 2022).

²³ <https://www2.caliper.com/store/product-category/software> (last visited July 14, 2022).

²⁴ <https://www.sandiego.gov/department-document/mapping-services-and-demographic-consulting-request-proposal-rfp-posted> (last visited July 14, 2022).

mapping software during redistricting is prohibitively expensive for many local governments, especially smaller jurisdictions and those in rural areas.

What is more, Alabama apparently would require jurisdictions to run computer simulations that randomly generate tens of thousands of possible maps, as Plaintiffs' experts did here. *See* Alabama Br. 54-56; *Milligan* Stay App. 56. Such simulations are even less widely accessible, as they require greater expertise than typical map-drawing functions. *See, e.g.,* Jowei Chen & Nicholas O. Stephanopoulos, *The Race-Blind Future of Voting Rights*, 130 Yale L.J. 862, 884-85, 891-95 (2021) (describing Markov chain Monte Carlo algorithms for producing randomized district maps). Thus, as a practical matter, Alabama's position would all but eliminate jurisdictions' ability to consider race in districting.

* * *

Amici have decades of experience with redistricting under this Court's well-established Section 2 framework. States and localities need "discretion to exercise the political judgment necessary" in drawing district lines. *Miller*, 515 U.S. at 915. But that freedom must be balanced against Congress's important goal of ensuring that all eligible voters have an equal opportunity to participate in the political process. This Court's existing Section 2 precedents reflect a reasonable, workable accommodation between those interests. The Court should reaffirm those precedents and reject Alabama's efforts to undermine them.

CONCLUSION

For these reasons and those in appellees' and respondents' briefs, the judgments should be affirmed.

Respectfully submitted,

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