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 Writ Of Certiorari To The United States District Court For The Northern District Of Alabama

BRIEF OF SENATOR JOHN BRAUN, LEADER OF THE WASHINGTON SENATE REPUBLICAN CAUCUS, ET AL., AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the following state legislators: Senator John Braun, Leader of the Washington Senate Republican Caucus; Representative Houston Gaines, in his official capacity as Chairman of the Georgia House Committee on Legislative and Congressional Reapportionment; Senator John F. Kennedy, in his official capacity as Chairman of the Georgia Senate Committee on Reapportionment and Redistricting; Representative Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives; Senator Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; Representative Dade Phelan, Speaker of the Texas House of Representatives; Senator Ryan McDougle, Virginia Redistricting Commission; and Representative J.T. Wilcox, Washington House Republican Leader.

Amici are elected leaders in five States who all have been involved in their States' respective redistricting processes. They submit this brief in support of the Appellants because the district court's ruling, if allowed to stand, will significantly undermine the ability of all States, including the States of *amici* legislators, to draw lines for electoral districts, which "is one of the most significant acts a State can perform to ensure

[1] No counsel for any party authored this brief in whole or in part and no entity or person, other than *amici curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All of the parties have provided written consent to the filing of this brief.

citizen participation in republican self-governance." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 416 (2006) ("*LULAC*"). Absent guidance from this Court in the form of a clear, administrable standard for map drawers, widespread confusion will unnecessarily ensue as to the extent to which traditional districting criteria can or must be considered when analyzing the preconditions in *Thornburg v. Gingles*, an area of law already riddled with disagreement and uncertainty. *Amici* respectfully urge that this Court grant the relief requested by Appellants.

SUMMARY OF THE ARGUMENT

Redistricting is a vital function of the State, and is a complicated process which involves balancing of a complex interplay of forces. The most difficult issue a mapmaker must manage is the consideration of race—a mapmaker redrawing legislative districts must paradoxically consider race, if at all, as little as possible while also considering race as much as necessary to guarantee minority voters are fully able to exercise their right to vote.

This delicate balancing act in determining the nature and contours of a vote dilution claim is already fraught with uncertainty, and here, the district court's decision has served only to entrench and exacerbate that uncertainty. Specifically, in contravention of this Court's precedent that a vote-dilution claim inquiry "should take into account traditional districting

principles such as maintaining communities of interest and traditional boundaries," *LULAC*, 548 U.S. at 433, the district court endorsed the plaintiffs' approach of establishing race as a "non-negotiable" target at the outset, only subsequently accounting for traditional districting principles. And in so doing, the district court faulted Alabama for not considering race *enough* when this Court has consistently instructed that States must not let race predominate.

Thus, the district court's decision will force map drawers to speculate whether, when, and to what extent they must "yield" traditional race-neutral districting principles to race, without violating the Fourteenth Amendment. This will inevitably lead to costly lawsuits throughout the country in every redistricting cycle, maximizing rather than minimizing judicial oversight and involvement into a process that is the function of the States. To avoid these untenable outcomes, there must be a clear, administrable standard which minimizes (if not eliminates) any unnecessary infusing of race into the redistricting process, "'carry[ing] us further from the goal of a political system in which race no longer matters.'" *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (quoting *Shaw v. Reno*, 509 U.S. 630, 657 (1993)).

ARGUMENT

1. Redistricting is the duty and responsibility of the States.

"Redistricting 'is primarily the duty and responsibility of the State,' and '[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions.'" *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (quoting *Miller v. Johnson*, 515 U.S. 900, 915 (1995)). Moreover, because "[e]lectoral districting is a most difficult subject for legislatures, . . . the States must have discretion to exercise the political judgment necessary to balance competing interests." *Miller*, 515 U.S. at 915. "[T]he obligation placed upon the Federal Judiciary is unwelcome because drawing lines for [electoral] districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance." *LULAC*, 548 U.S. at 416.

The act of redistricting generally requires that, every ten years, jurisdictions throughout the country reallocate political power amongst their constituents based on the results of the most recent census. This is accomplished by redrawing district lines, which will then serve to define the groups of individuals represented by various legislative representatives at the state and federal levels. The process requires that districts be made up of roughly equal population size, which, in theory preserves equality of representation in an environment of ever-changing demographics and population fluctuation.

Some state legislatures have reserved to themselves the authority to draw district lines, whereas others have delegated that authority to one or more commissions, often consisting of individuals from various backgrounds and qualifications. States consider common criteria during this process, which can be generally divided into two separate categories: traditional principles and emerging criteria. NCSL, *Into the Thicket: A Redistricting Starter Kit for Legislative Staff*.[2] Traditional principles consist of the following: compactness of districts; the preservation of communities of interest; the preservation of geographic boundaries of counties and other political subdivisions; preservation of cores of prior districts; and the avoidance of pairing incumbents in electoral races. *Id.* Some States rank those various criteria by priority; however, this is often not statutorily required. *Id.* Each individual state establishes its own system of redistricting and delegates authority for that process accordingly. *Redistricting Systems: A 50-State Overview*.[3]

The criteria considered in the process of redistricting, and whether a map or plan is subject to public input or additional procedural hurdles, varies on a state-by-state basis to a significant degree—with many States taking steps in recent years to delegate power through new redistricting systems. In other words,

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[2] Updated November 24, 2021, at https://www.ncsl.org/research/redistricting/into-the-thicket-a-redistricting-starter-kit-for-legislative-staff.aspx.

[3] Updated March 29, 2021, at https://www.ncsl.org/research/redistricting/redistricting-systems-a-50-state-overview.aspx.

many States are already grappling with significantly different processes and procedures, often necessitating the input and participation of those without a legislative or legal background—including, in the increasingly prevalent case of citizen-led redistricting commissions, members of the public at large.

For instance, in Washington, the authority for drawing state legislative and congressional lines has been delegated to the Washington State Redistricting Commission, which is responsible for providing a proposed map to the state legislature by November 15 of the year following the census. RCW 44.05.040. The state legislature then has a period of thirty days to amend the map upon a requisite two-thirds vote. RCW 44.05.100. The Redistricting Commission must hold open meetings pursuant to Washington's Open Meetings Act, and must preserve and disclose its meetings and public records. RCW 44.05.080. The Redistricting Commission must publish a report with the final plan—including the population deviations for each district, an explanation of the criteria used to draw the districts, and justifications for any deviations from perfect compliance with criteria or population equality. *Id.* Criteria used by the Redistricting Commission includes: compactness, contiguity, preservation of political subdivisions, communities of interest, competitiveness, and a prohibition on favoring an incumbent or party. RCW 44.05.090.

In Georgia, on the other hand, the legislature has reserved the authority to draw district lines. Ga. Code Ann. § 21-1-2. Georgia's district lines are drawn by

statute, which means they are subject to governor's veto. *Id.* Georgia's legislature looks to compactness, contiguity, preservation of political subdivisions, preservation of communities of interest, and a preference to avoid pairing incumbents when drawing district lines.

For the first time beginning with the 2020 redistricting cycle, Virginia will utilize a hybrid system similar to Washington. The Virginia legislature has delegated redistricting responsibilities to the Virginia Redistricting Commission, which bears responsibility for drawing the initial set of maps. Va. Code Ann. § 30-391. The maps are then presented to the legislature for approval or rejection. *Id*. Virginia considers the following criteria when drawing district lines: compactness, contiguity, preservation of communities of interest (excluding political affiliation) and a prohibition against unduly disfavoring a political party. Va. Code Ann. § 30-399.

Despite a longstanding recognition that redistricting is a matter generally left to States, legislators' choices must be guided by limitations imposed by federal law: at issue here, the Equal Protection Clause of the Fourteenth Amendment, the Voting Rights Act, and jurisprudence interpreting those laws. A significant number of federal parameters for congressional redistricting have resulted from judicial decisions. CRS Report R45951, *Apportionment and Redistricting*

Process for the U.S. House of Representatives at p. 8.[4] Moreover, "it is not uncommon for States to face legal challenges regarding elements of their redistricting plans." *Id.* For instance, an analysis of the 2010 redistricting cycle indicated redistricting lawsuits were filed in 38 States.[5] No doubt, the National Conference of State Legislatures had that litigiousness in mind when it issued the following message to those preparing redistricting maps and plans: "expect challenges." NCSL, *Into the Thicket: A Redistricting Starter Kit for Legislative Staff*.[6]

2. This Court's precedent supports that a *Gingles* analysis must take into account traditional districting principles.

Ensuring that the districting process complies with federal requirements is a complex endeavor. "Electoral districting is a most difficult subject for legislatures," *Miller*, 515 U.S. at 915; *Abbott*, 138 S. Ct. at 2314 ("Redistricting is never easy"), and applying equal protection principles to electoral districting is a "most delicate task." *Miller*, 515 U.S. at 905. A "complex interplay of forces . . . enter[s] a legislature's

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[4] Updated on November 21, 2021, at: https://crsreports.congress.gov/product/pdf/R/R45951.

[5] "Redistricting Lawsuits Relating to the 2010 Census," Ballotpedia, updated September 2015, at https://ballotpedia.org/Redistricting_lawsuits_relating_to_the_2010_Census.

[6] Updated on November 24, 2021, at https://www.ncsl.org/research/redistricting/into-the-thicket-a-redistricting-starter-kit-for-legislative-staff.aspx.

redistricting calculus," *id*. at 915-16, and race is the most difficult issue a mapmaker must manage when redistricting. "At the same time that the Equal Protection Clause *restricts* the consideration of race in the districting process, compliance with Voting Rights Act . . . pulls in the opposite direction: it often insists that districts be created precisely *because of* race." *Abbott*, 138 S. Ct. at 2314. "Since the Equal Protection Clause restricts consideration of race and the VRA demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to competing hazards of liability" when navigating this "legal obstacle course." *Id*. (quotations omitted); *see also* Henry L. Chambers, Jr., *Readying Virginia for Redistricting After A Decade of Election Law Upheaval*, 55 U. Rich. L. Rev. 227, 237 (2020) (commenting that these restrictions "combine to demand mapmakers to consider race as little as possible while considering race as much as necessary to guarantee minority voters are able to exercise their right to vote fully").

"When a voter sues state officials for drawing . . . race-based lines, [this Court's precedent] calls for a two-step analysis. First, the plaintiff must prove that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017) (quoting *Miller*, 515 U.S. at 916). "That entails demonstrating that the legislature subordinated other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to racial considerations." *Id*.

(quotations omitted). "Second, if racial considerations predominated over others, the design of the district must withstand strict scrutiny." *Id*. (citing *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 800 (2017)).

To that end, if the state has before it a "**strong basis in evidence**" for believing that the VRA "**require[s]**" the state to move voters based on race, and the evidence is district specific, a racially-motivated map may satisfy strict scrutiny. *Id*. at 1464 (emphases added); *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1249 (2022) (per curiam); *id*. at 1250-51 (explaining that the VRA requires the use of race in redistricting only when a "race-neutral alternative . . . would deny [a protected class of] voters equal political opportunity"). However, the state must possess this evidence *before* it creates maps based on racial classifications. A State may not "adopt a racial gerrymander that the State does not, at the time of imposition, 'judg[e] necessary under a proper interpretation of the VRA.'" *Wis. Legislature*, 142 S. Ct. at 1250 (quoting *Cooper*, 137 S. Ct. at 1472); *id*. at 1249-50 (a race-based remedy cannot precede proof of a VRA violation (citing *Shaw v. Hunt*, 517 U.S. at 910)). Indeed, this Court has rejected uncritical majority-minority district maximization. *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994); *see generally Miller*, 515 U.S. at 925 (the VRA does not "require States to create majority-minority districts wherever possible").

With respect to determining whether the VRA would require the use of race in redistricting, three

preconditions, first articulated in *Thornburg v. Gingles*, are necessary (although not sufficient, *Wis. Legislature*, 142 S. Ct. at 1248-49) to establish that "the minority [group] has the potential to elect a representative of its own choice in a possible district, but that racially polarized voting prevents it from doing so in the district as actually drawn because it is submerge[ed] in a larger white voting population." *Cooper*, 137 S. Ct. at 1470. At issue in this case is the first requirement, that a "'minority group' must be 'sufficiently large and geographically compact to constitute a majority' in some **reasonably configured legislative district**." *Id*. (emphasis added). To satisfy this precondition, a plaintiff must make a preliminary showing that it is possible to create "more than the existing number of reasonably compact districts with a sufficiently large majority population to elect candidates of its choice." *De Grandy*, 512 U.S. at 1008. Thus, a Section 2 plaintiff must demonstrate that the relevant minority population is sufficiently "geographically compact" to constitute a voting majority in a second single-member district. *Cooper*, 137 S. Ct. at 1470. In this context, "compactness" refers not to the shape of the district, but whether the minority community is sufficiently concentrated to constitute a majority of the voting age population in a single-member district. *LULAC*, 548 U.S. at 433.

How a Section 2 plaintiff can demonstrate this precondition—and when and to what extent traditional districting principles must be accounted for in that analysis—is at the center of this case. This Court

has held that "[w]hile no precise rule has emerged governing § 2 compactness, the inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries," *LULAC*, 548 U.S. at 433, and Section 2 "does not require a State to create, on predominantly racial lines, a district that is not reasonably compact." *Abrams v. Johnson*, 521 U.S. 74, 91-92 (1997) (upholding a district court's remedial plan which did not create a second majority-black district as that "would require subordinating Georgia's traditional districting policies and allowing race to predominate," and also stating that "the [Section] 2 compactness inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries"); *Bush v. Vera*, 517 U.S. 952, 977, 979 (1996) (plurality op.) (explaining that a Section 2 inquiry should account for "traditional districting principles such as maintaining communities of interest and traditional boundaries," and also that "[i]f, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district. . . .").

Further, this Court has struck down certain majority-minority districts and deemed others improper as remedies for Section 2 violations. In *LULAC*, for example, even though this Court held that a majority-Hispanic district was required, it determined that a newly-drawn majority-Latino district, which included a 300-mile gap between two majority Latino communities, failed to satisfy the VRA. *LULAC*, 548 U.S. at 432-34.

This Court held that "the enormous geographical distance separating [two minority populations], coupled with the disparate needs and interests of these populations—not either factor alone," rendered that district noncompact for Section 2 purposes. *Id*. at 435 (also stating that "[t]he mathematical possibility of a racial bloc does not make a district compact").

This Court has also struck down majority-minority districts that were not required by the VRA. In *Miller*, this Court held that a challenged congressional plan which created a third, additional majority-black district was not required by the VRA and therefore violated the Equal Protection Clause. 515 U.S. at 921, 928. In so holding, this Court explained that the State's policy of adhering to "other districting principles" instead of creating as many majority-minority districts as possible did not support an inference that the State's plan "so discriminate[d] on the basis of race or color as to violate the Constitution," and thus did not "provide any basis under [Section 5] for the Justice Department's objection." *Id*. at 924.

Indeed, the "recognition of nonracial communities of interest reflects the principle that a State may not 'assum[e] from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls.'" *LULAC*, 548 U.S. at 433 (citing *Miller* 515 U.S. at 920). "In the absence of [that] prohibited assumption, there is no basis to believe a district that combines two far-flung segments of a racial group with disparate interests provides the opportunity that § 2 requires or that the first *Gingles*

condition contemplates." *Id.* (also stating that "[t]he purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race. We do a disservice to these important goals by failing to account for the differences between people of the same race."). "Legitimate yet differing communities of interest should not be disregarded in the interest of race." *Id*. at 434; *see also Bartlett*, 556 U.S. at 22-23 (rejecting an approach which "would rest on judicial predictions, as a matter of law, that race and party would hold together as an effective majority over time—at least for the decennial apportionment cycles and likely beyond. And thus would the relationship between race and party further distort and frustrate the search for neutral factors and principled rationales for districting"). And as Justice Kennedy articulated in his concurrence in *De Grandy*, "there is good reason for state and federal officials with responsibilities related to redistricting, as well as reviewing courts, to recognize that explicit race-based districting embarks us on a most dangerous course. . . ." *De Grandy*, 512 U.S. at 1031 (Kennedy, J., concurring in part and concurring in the judgment).

3. Without guidance from this Court, the decision below significantly exacerbates the already existing uncertainty regarding the parameters of a vote dilution claim.

Absent guidance from this Court, the decision below will lead to a host of significant legal and logistical

problems undermining States' abilities to perform the "most vital of local functions" of redistricting. *Miller*, 515 U.S. at 915. Indeed, contrary to this Court's precedent, the district court's decision would improperly infuse race into every redistricting decision. And it will force map drawers, already balancing a complex interplay of forces, to speculate whether, when, and to what extent to "yield" traditional race-neutral districting principles to race, without violating the Fourteenth Amendment. This will inevitably lead to additional costly and disruptive lawsuits throughout the country in every redistricting cycle, maximizing rather than minimizing judicial involvement in a process that is the function of the States. To avoid these untenable outcomes, there must be a clear, administrable standard.

a. The district court's decision is contrary to this Court's precedent, and greatly exacerbates the disagreement and uncertainty already present in vote dilution claims.

In a manner irreconcilably inconsistent with the above precedents from this Court, the district court interpreted Section 2 in a way that will require legislatures to first "prioritize[] race" and—only "after that"—apply race-neutral traditional districting principles. MSA60-61, MSA214-215.

As aptly discussed at length in Appellants' brief, no race-neutral map drawer would draw a map with

two majority-black districts as advocated by Plaintiffs below—in the more than two-million race neutral maps generated by Plaintiffs' own experts, none contained two majority-black districts. In Plaintiffs' own words, "it is hard to draw two majority-black districts by accident" in Alabama. JA714; *see also* JA710. Yet, the district court endorsed a map-drawing process in which Plaintiffs considered traditional districting criteria only "after" two districts hit a target of 50-percent BVAP. *See* JA634-35; MSA60. In so doing, the district court held that Alabama should have first sorted its voters on the basis of race, starting with a "non-negotiable" racial target of adding a second majority-black district. MSA214; *see also* JA678.

The district court's decision, which is premised on an erroneous legal assumption that the VRA requires the creation of districts that could not otherwise be neutrally drawn, obscures the circumstances under which a map drawer is supposed to have a "strong basis in evidence" for believing that the VRA would "require" it to move voters based upon race. In *condemning* the State for not letting race predominate in its redistricting, the district court acted in contravention of this Court's precedents *requiring* the State to not let race predominate when drawing legislative districts.

As described *supra*, map drawers may not dispense with traditional redistricting principles when drawing districts. And even if a Section 2 plaintiff is not required to prioritize traditional districting principles in the exact same order as a state, it cannot simply

disregard them at the outset. If a Section 2 plaintiff's proposed district could not be neutrally drawn using only traditional districting principles, then it is inconceivable that a plaintiff could establish "[a] minority group . . . sufficiently large and compact to constitute a majority in a **reasonably configured district**." *Cooper*, 137 S. Ct. at 1470 (emphasis added); *Wis. Legislature*, 142 S. Ct. at 1248; *cf. generally Bartlett*, 556 U.S. at 15 ("Section 2 does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters."). And if a Section 2 plaintiff were permitted to prioritize race as a "non-negotiable" target to establish the first *Gingles* precondition, that precondition would be meaningless and circular, as it would almost certainly be established in any case. *Cf. generally Cooper*, 137 S. Ct. at 1472 (rejecting the State's view, pursuant to which "the third *Gingles* condition is no condition at all, because even in the absence of white bloc-voting, a § 2 claim could succeed in a district . . . with an under-50% BVAP."); *Bartlett*, 556 U.S. at 15, 20 (explaining that "[a]llowing crossover-district claims would require us to revise and reformulate the *Gingles* threshold inquiry that has been the baseline of our § 2 jurisprudence," and also rejecting the petitioners' argument for a "less restrictive interpretation of the first *Gingles* requirement").

Further, to the extent that there is a material difference between the "uncritical majority-minority maximization" that this Court has "expressly rejected,"

Wisconsin Leg., 142 S. Ct. at 1250, and the district court's endorsement of the Plaintiffs' approach of starting with a racial target of two majority-black districts that would not have resulted from a race-neutral districting process, it is a difference that could be lost on many of those responsible for drawing district lines. *See generally De Grandy*, 512 U.S. at 1017 (holding that "[f]ailure to maximize cannot be the measure of Section 2," and that "reading § 2 to define dilution as any failure to maximize tends to obscure the very object of the statute and run counter to its textually stated purpose").

Thus, the district court puts map drawers to an impossible task of drawing districts that prioritize race enough to satisfy Section 2, but not so much that they violate the Equal Protection Clause. In reality, this approach ensures that their efforts in drawing district lines will be challenged either because they did not "prioritize race . . . to the extent necessary" (or seemingly required by the Voting Rights Act under the district court's interpretation) or because they have violated equal protection by prioritizing race *beyond* the extent necessary (in violation of the Equal Protection Clause). In fact, a state legislature never could have constitutionally passed the maps that the district court endorsed, since those maps started from a "non-negotiable" racial target of two majority-black districts, and only after that considered traditional redistricting principles. *See*, *e.g.*, MSA60; *Shaw*, 517 U.S. at 907 (redistricting map was racially motivated, even though race-neutral criteria were considered in the

selection of districts, because "[r]ace was the criterion that, in the State's view, could not be compromised," and the race-neutral criteria "came into play only after the race-based decision had been made"); *Miller*, 515 U.S. at 921 ("[C]ompliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws."); *Cooper*, 137 S. Ct. at 1469.

b. The decision below underscores that a clear, administrable standard is needed.

Even prior to the district court's decision, "*Gingles* and its progeny have engendered considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim." *Merrill v. Milligan*, 142 S. Ct. 879, 882-83 (2022) (Roberts, C.J., dissenting); Jowei Chen, Nicholas O. Stephanopoulos, *The Race-Blind Future of Voting Rights*, 130 Yale L.J. 862, 872 (2021) (characterizing this as "an area of law notorious for its many unsolved puzzles"); Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. Pa. L. Rev. 377, 389 (2012) ("Thirty years later, there is a substantial body of law interpreting section 2 but no authority resolution of the basic questions one would need to answer to make sense of the results test.").

The district court's decision obfuscates an already complicated process for States. Following the district

court's decision, map drawers are in the untenable position in which they will be forced to guess what set of standards courts in their jurisdictions will adopt to determine whether and when to "prioritize[] race." *Compare, e.g.*, MSA214-15 *with Gonzalez v. City of Aurora, Illinois*, 535 F.3d 594, 600 (7th Cir. 2008) (concluding that there was no vote dilution claim, and opining that "[w]hat we can see from the record suggests that Latinos are not concentrated enough to support three 'Latino effective' districts without serious gerrymandering. . . . In other words, the Latino population is not concentrated in a way that neutrally drawn compact districts would produce three 'Latino effective' wards."); *Sensley v. Albritton*, 385 F.3d 591, 598 (5th Cir. 2004) (upholding a district court's decision where plaintiffs failed to satisfy each *Gingles* precondition because, *inter alia*, "in order to connect these two towns together, the Plaintiffs were required to ignore traditional districting principles such as maintaining communities of interest and traditional boundaries"); *cf. Johnson v. Wis. Elections Comm'n*, ___ N.W.2d ___, 2022 WL 1125401 at *11 (Wis. April 15, 2022) (rejecting a redistricting proposal that "subordinated traditional race-neutral districting to racial considerations" without first demonstrating that the *Gingles* preconditions were satisfied and that the VRA required a race-based remedy).

State legislatures, and all map drawers acting in good faith, cry out for an administrable standard. Indeed, Section 2 "applies nationwide to every jurisdiction that must draw lines for election districts required

by state or local law." *Bartlett*, 556 U.S. at 18. Legislatures look to federal decisions to determine the correct application of federal law to the district process. *Cf. generally Bush*, 517 U.S. at 985 ("Legislators and district courts nationwide have modified their practices—or, rather, reembraced the traditional districting practices that were almost universally followed before the 1990 census—in response to *Shaw I*."); Peter S. Wattson, *How to Draw Redistricting Plans That Will Stand Up in Court*, Published by the National Conference of State Legislatures on January 11, 2021.[7] And as one commentator has observed, "[d]octrinal changes—even small changes—in race predominance or VRA doctrine may have an outsized effect on a mapmaker's ability to redistrict using race to provide equal voting rights to minority voters." Henry L. Chambers, Jr., *Readying Virginia for Redistricting After A Decade of Election Law Upheaval*, 55 U. Rich. L. Rev. 227, 257 (2020).

Of course, this Court has already recognized the benefits of having such standards in VRA cases. In *Bartlett*, while determining what size minority group is sufficient to satisfy the first *Gingles* precondition, this Court upheld a 50-percent threshold requirement in part based on "the need for workable standards and sound judicial and legislative administration." 556 U.S. 1, 17. This Court explained that such a rule "draws clear lines for courts and legislatures alike," and avoids placing courts "in the untenable position of predicting many political variables and tying them to race-based

[7] Accessed April 15, 2022 at https://www.ncsl.org/documents/legismgt/How_To_Draw_Maps.pdf.

assumptions." *Id*. at 17. This Court also explained that such an objective, uniform rule would provide "straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2." *Id*. at 18; *see also LULAC*, 548 U.S. at 485 (Opinion of Souter, J.) (recognizing need for a "clear-edged rule").

Similarly, here, States need a "workable standard[]" so that they are not forced to ask, every redistricting cycle, whether they need to consider race and, if so, have considered race as little as possible but as much as necessary, including whether they have appropriately "yield[ed]" traditional districting principles to racial considerations. MSA214. An administrable standard is particularly necessary where, as in the present case, the State adopted a districting plan that employed the same basic districting framework that the State has maintained for several decades, making slight adjustments to accommodate population changes. SJA205-11; JA 270-71; JA274-75; SJA88; MSA34. Thus, the Alabama Legislature followed the "common practice" by "start[ing] with the plan used in the prior map and . . . chang[ing] the boundaries of the prior districts only as needed to comply with the one-person, one-vote mandate and to achieve other desired ends." *Cooper*, 137 S. Ct. at 1492 (Alito, J., concurring in part); *see also Johnson*, ___ N.W.2d at ___, 2022 WL 1125401 at *12 n.8 ("A race-neutral map can comply with the VRA. Specifically, a map does not violate the VRA when the *Gingles* preconditions have not been satisfied. . . . Indeed, a

race-neutral map is the preferred outcome, and an outcome explicitly contemplated by the Supreme Court." (citations omitted)); *Bush*, 517 U.S. at 964 ("Strict scrutiny would not be appropriate if race-neutral, traditional districting considerations predominated over racial ones.").

The district court's decision, with its unwarranted break from this Court's precedents, does not provide an administrable standard. Rather, a Section 2 compactness inquiry should focus on possible "outcome[s] of a race-neutral process in which all districts are compact." *Gonzalez*, 535 F.3d at 598-600 (also explaining that if randomly generated computer maps "look something like the actual map" in their racial characteristics, then "we could confidently conclude that [the actual] map did not dilute the effectiveness of the [minority] vote," but that if the actual map has fewer minority-controlled districts than most of the simulated maps, then "a court might sensibly conclude that [the jurisdiction] had diluted the [minority] vote."). The race-blind baseline articulated in *Gonzalez* would also allay concerns that the proportionality baseline is irreconcilable with Section 2's disavowal of proportional representation. *See*, *e.g.*, *De Grandy*, 512 U.S. at 1028 (Kennedy, J., concurring in part and concurring in the judgment) (warning that "placing undue emphasis upon proportionality risks defeating the goals underlying the Voting Rights Act").

Without clear guidance—or worse, with the decision below being allowed to stand—inevitable costly and highly disruptive litigation, which nearly always

occurs on an expedited schedule as a result of the timing of the decennial census and the time-sensitive nature of the election calendar, will result in every redistricting cycle. *Cf. Holder v. Hall*, 512 U.S. 874, 905 (1994) (Thomas, J., concurring) ("In response to judicial decisions . . . the States themselves, in an attempt to avoid costly and disruptive Voting Rights Act litigation, have begun to gerrymander electoral districts according to race. That practice now promises to embroil the courts in a lengthy process of attempting to undo, or at least to minimize, the damage wrought by the system we created."). The concerns of "untenable [predictions]" at issue in *Bartlett* will manifest themselves here, as map drawers will be forced to speculate whether, when, and to what extent to "yield" traditional race-neutral districting principles to race, without violating the Fourteenth Amendment. To avoid these unworkable and disruptive outcomes and work toward, rather than against, the goal of a political system in which race no longer matters, there must be a clear, administrable standard which minimizes (if not eliminates) any unnecessary infusing of race into the redistricting process.

CONCLUSION

Based on the foregoing, *Amici* respectfully request that this Court grants the relief advocated for by the Appellants and reverse the decision below.

Respectfully submitted,

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