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 CITIZENS UNITED, CITIZENS UNITED FOUNDATION, AND THE PRESIDENTIAL COALITION AS AMICI CURIAE IN SUPPORT OF APPELLANTS AND PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Citizens United and Citizens United Foundation are dedicated to restoring government to the people through a commitment to limited government, federalism, individual liberties, and free enterprise. Amici regularly participate as litigants (*e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)) and amici in important cases in which these fundamental principles are at stake.

Citizens United is a nonprofit social welfare organization exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). *Citizens United Foundation* is a nonprofit educational and legal organization exempt from federal income tax under IRC section 501(c)(3). These organizations were established to, among other things, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

The Presidential Coalition, LLC is an IRC section 527 political organization that was founded to educate the American public on the value of having principled conservative Republican leadership at all levels of govern-

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1. No counsel for a party authored any part of this brief. And no one other than the amicus or their members or counsel financed the brief's preparation or submission. The parties have filed blanket consents to the filing of this brief and their letters of consent are on file with the Clerk.

ment, and to support the election of conservative candidates to state and local government and the appointment of conservatives to leadership positions at the federal and state level in order to advance conservative public policy initiatives.

SUMMARY OF ARGUMENT

Two demographic realities of Alabama illustrate why it was so "hard" for plaintiffs' experts to draw two majority-black districts out of seven in Alabama, and thus why § 2 cannot possibly give plaintiffs the relief they seek under *Thornburg v. Gingles*, 478 U.S. 30 (1986). This case is nothing like the paradigm vote-dilution scenario described in *Gingles*, and it provides the Court a valuable opportunity to reorient lower courts and litigators to both the text of § 2 and the facts required to satisfy *Gingles*' compactness precondition.

First, Alabama's concentrations of black populations are dispersed throughout the state, and none of those concentrations are, by themselves, nearly populous enough to constitute a majority in a congressional district of nearly 720,000. Alabama's effort to divide 5 million residents into only seven congressional districts contrasts sharply with North Carolina's efforts to draw state legislative lines for populations that were roughly 90% smaller per seat – and where contiguous concentrations of black voters in those comparatively tiny districts constituted majorities.

Second, Alabama has become steadily more integrated over the years. Alabama, like the rest of the Nation, is much different than it was in 1980, when *Mobile v. Bolden*, 446 U.S. 55 (1980), spawned the 1982 amendment to § 2 and set in motion 40 years of vote-dilution litigation. As *Gingles* explained, the §2 remedy is potentially available when populations are compact and insular – no remedy is needed when a population is integrated. Indeed, integration should be celebrated as a civil-rights victory, but

partisan § 2 scholars and litigators perversely decry integration as a "problem" that gets in the way of their political goals.

Finally, the record in this case underscores the importance of reorienting § 2 litigators and lower courts who fixate on proportionate representation for minority groups as their touchstone. This must stop. The text of the Voting Rights Act expressly states that "nothing" in § 2 "establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b). But that principle was lost on the lower court, with predictable results.

Alabama did not violate § 2 by failing to create a second majority-black congressional district.

ARGUMENT

I. This Case Highlights How §2's Remedial Vote-Dilution Concepts Make No Sense When Minority Voters Are Geographically Dispersed And Increasingly Integrated – There Is Nothing To Remedy.

Section 2 is a remedial statute. *Chisom v. Roemer*, 501 U.S. 380, 403 (1991); *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966). As such, it is designed to thwart efforts that make "the political process[] . . . not equally open to participation by" minority voters "in that [they] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). And, critically, "nothing" in § 2 "establishes a right to have

members of a protected class elected in numbers equal to their proportion in the population." *Id.*

In vote-dilution claims under section 2, the *Gingles* preconditions flow from the remedial purpose of the statute: they weed out claims that otherwise-fair line-drawing – that is, line drawing that has not taken race into account in order to limit minority participation in the political process – has denied them political results that they prefer. 478 U.S. at 50–51.

This case highlights the importance of the *Gingles I* compactness factor: the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50. The Court explained that the absence of this "sufficient" concentration of minority voters, "as would be the case in a substantially integrated district," means that the political practice "cannot be responsible for minority voters' inability to elect its candidates." *Id.*

The Court explained in note 17 that a vote-dilution theory simply doesn't make sense in the absence of contiguous concentrations of a sufficient size to constitute a majority in a district:

> The reason that a minority group making such a challenge must show . . . that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. The single-

> member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected. Thus, if the minority group is spread evenly throughout a multimember district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure.

478 U.S. at 50 n.17 (emphasis in original). *See also* Stephanopoulos, *Civil Rights in A Desegregating America*, 83 U. Chi. L. Rev. 1329, 1334 (2016) (under *Gingles*, "Geographic compactness is almost a synonym for geographic segregation"); *see also id.* at 1334–35 & 1379–80 (discussing the relationship between geographic compactness and residential segregation).

The facts in *Gingles* are important and instructive here. That case involved a challenge to North Carolina's state legislative redistricting scheme. Plaintiffs alleged that North Carolina violated § 2 by improperly submerging pockets of black voters in five multi-member state house legislative districts and one multi-member state

senate district (i.e., a collection of at-large legislative districts). *Id.* at 34–35.[2] The district court found that "at the time the multimember districts were created, there were concentrations of black citizens within the boundaries of each that were sufficiently large *and contiguous* to constitute effective voting majorities in single-member districts lying wholly within the boundaries of the multi-member districts." *Id.* at 38 (emphasis added). It bears repeating: The concentrations of black citizens that could form a majority in a district were themselves contiguous.

The numbers tell a very different story here. Two demographic realities of Alabama illustrate why it was so "hard" for plaintiffs' experts to draw two majority-black districts out of seven in Alabama, JA714,[3] and thus why § 2 cannot possibly give plaintiffs the relief they seek under *Gingles*.

A. It Was Difficult For Plaintiffs To Draw Two Majority-Black Districts Because Alabama's Black Voters Are Geographically Dispersed Throughout The State.

Alabama's disparate concentrations of black voters do not resemble the concentrations of North Carolina's black voters submerged within the multi-member districts in

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[2] Plaintiffs also challenged a single-member state senate district on a "cracking" theory, alleging that a sufficiently large and geographically compact concentration of black voters had been split across two adjoining single-member districts. 478 U.S. at 38.

[3] In the words of the *Milligan* Plaintiffs' expert Dr. Moon Duchin, the fact "that it is hard to draw two majority-black districts by accident shows the importance of doing so on purpose." JA714.

Gingles because each of the various concentrations of black populations is not nearly populous enough to create a majority-black district. In *Gingles*, North Carolina was apportioning its nearly 6 million residents into 120 state house seats (roughly 50,000 residents per seat) and 50 state senate seats (roughly 120,000 residents per seat). U.S. Dep't of Commerce, Bureau of the Census, *1980 Population and Number of Representatives by State*, p. 2 (Dec. 31, 1980) (North Carolina's population basis for apportionment 5,874,429); *Gingles*, 478 U.S. at 40 (discussing number of seats in the North Carolina General Assembly).

Here, by stark contrast, Alabama is apportioning its 5 million residents into only *seven* congressional seats (nearly *718,000 residents* per seat). U.S. Dep't of Commerce, U.S. Census Bureau, *Apportionment of Seats in the U.S. House of Representatives and Average Population Per Seat: 1910 to 2020* (Apr. 26, 2021); *see* SJA87–88.

Alabama's urban black voters are mostly located in three counties that form the three points of a triangle in the state: Jefferson County to the north (in and around Birmingham), Mobile County 250 miles to the southwest, and Montgomery County 175 miles from Mobile (and 90 miles from Birmingham) to the southeast.

Of these three counties, only Montgomery County is majority-black – with 134,029 of the county's 228,954 residents (58.5%) identifying as Black or African American in the 2020 Census – but the county's total population is not nearly large enough to constitute an entire congressional district. Jefferson County is Alabama's largest with

674,721 residents (42.9% black). Mobile is the second largest (414,809 residents; 36.8% black).[4]

Alabama's rural black voters are predominantly located in the 18 counties making up the so-called "Black Belt" – a narrow row of counties stretching west to east across the southern third of the state. But the total population of the 18 Black Belt counties (including Montgomery County) is only 562,358 – again, not nearly enough for its own congressional district (despite comprising 18 of 67 counties).

Indeed, given this lack of concentration, Alabama's proposed majority District 7 reaches far to the northeast to gather black residents in Birmingham, and sweeps far to the east to gather black residents in Montgomery County. JA99.

Drawing seven districts in this population is an entirely different exercise than what occurred when North Carolina submerged contiguous concentrations of black voters in legislative races whose per-seat populations were 93% smaller (in the case of the house) and 83% smaller (in the case of the senate). With a black population of 22.4% in 1980 North Carolina, it's no wonder the courts found that North Carolina's failure to draw more majority-minority districts constituted vote dilution. U.S. Dep't

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[4] Population data in this section is obtained from the interactive data visualization tool on the Census Bureau's website. U.S. Census Bureau, *Race and Ethnicity in the United States: 2010 Census and 2020 Census* (Aug. 12, 2021), https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html.

of Commerce, Bureau of the Census, *1980 Census of Population, General Population Characteristics (North Carolina)*, p. 14 (June 1982). And here it's no wonder that, as plaintiffs' own experts confirmed, it's impossible to draw two majority-minority districts unless race is the "non-negotiable" top priority. MSA213–14; MSA60–61.[5]

B. Alabama's Counties and Cities Have Steadily Become More Integrated, Which Properly Makes Vote-Dilution Claims More Anachronistic.

Nine years ago, in *Shelby County v. Holder*, involving one Alabama county's challenge to § 4 of the Voting Rights Act, the Court noted that "things have changed dramatically" since the VRA's passage; namely, the "conditions justifying [Section 5's preclearance] requirement have dramatically improved." 570 U.S. 529, 547, 550 (2013). Alabama in 2022 is different than it was in 2013, and it is even more different than it was in 1980 when the Court decided *Mobile v. Bolden*, the decision that spawned the 1982 amendments to § 2. Among other things, Alabama is more integrated, which has massive consequences for vote-dilution claims, particularly given the geography and math set out above.

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[5] By the same token, Alabama's proposed statehouse maps have 27 of 105 house seats with majority black districts (plus one that's 49.72% black), and 8 of 35 senate seats with majority black districts. Alabama Legislature, *State of Alabama 2021 Redistricting Maps*, https://2021-redistricting-plans-algeohub.hub.arcgis.com/ (authors' calculation based on data exported for Alabama's 2021 districting plans).

Demographic data reveal a multi-decade pattern of decreasing racial segregation in Alabama. One key measure of residential integration is the "dissimilarity index," which is the "most widely used measure of evenness" among populations. U.S. Census Bureau, *Housing Patterns: Appendix B: Measures of Residential Segregation*, https://bit.ly/3L2x31T ("Housing Patterns"). Courts have relied on dissimilarity index measurements in § 2 cases, *e.g.*, *Holloway v. City of Virginia Beach*, 531 F. Supp. 3d 1015 (E.D. Va. 2021), and school desegregation cases, *e.g.*, *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 320 (4th Cir. 2001); *Coalition to Save Our Child. v. State Bd. of Educ. of State of Del.*, 90 F.3d 752, 761–62 & n.7 (3d Cir. 1996).

"Conceptually, dissimilarity measures the percentage of a group's population that would have to change residence for each neighborhood to have the same percentage of that group as the metropolitan area overall." Housing Patterns, *supra*. The measure ranges from 0 to 100, where "[a] high value indicates that the two groups tend to live in different [census] tracts. . . . A value of 60 (or above) is considered very high. It means that 60% (or more) of the members of one group would need to move to a different tract in order for the two groups to be equally distributed. Values of 40 or 50 are usually considered a moderate level of segregation, and values of 30 or below are considered to be fairly low." Diversity & Disparities, Spatial Structures in the Social Sciences, Brown Univ., *Residential Segregation, Index of Dissimilarity*, https://bit.ly/3xDKGRb.

Dissimilarity calculations published by the Federal Reserve Bank of St. Louis show a consistent shift toward more racial integration in Alabama's ten most populous counties over the last decade – every county became more integrated over the ten-year period:

County	2010	2020
Jefferson	63.73	59.95
Mobile	54.18	50.58
Madison	48.95	42.38
Montgomery	51.96	50.36
Baldwin	33.82	26.81
Shelby	28.10	27.02
Tuscaloosa	52.31	50.71
Lee	33.42	30.21
Morgan	56.74	51.31
Calhoun	46.06	40.00

Source: FRED, Fed. Reserve Bank of St. Louis, *Racial Dissimilarity Index: Alabama*, https://bit.ly/3MC0IPV (calculating dissimilarity index based on percentage of non-hispanic white population that would have to change Census tracts to equalize the racial distribution between white and non-white population groups across all tracts in the county, based on U.S. Census Bureau American Community Survey data).

To be sure, segregation in Jefferson County (and its main city Birmingham) remains elevated, and the State's majority-black district 7 includes much of Birmingham's black population. 2021 Alabama Congressional Plan, *Plan*

Components with Population Detail, Dkt. 83-21, *Milligan v. Merrill*, No. 2:21-cv-01530-AMM (N.D. Ala. Dec. 27, 2021), 42–43 & 58 (showing that Jefferson County's residents are split between districts 6 (380,694 total population, 26.44% black) and 7 (294,027 total population, 61.45% black)). But no other county has a dissimilarity index of greater than 51.31, and all ten counties are trending down.

We have not located county-level dissimilarity measurements for prior censuses. But dissimilarity trends in three of Alabama's most populous cities reveal a similar (and even more pronounced) trend over the 30-year period between 1980 and 2010:

City	1980	1990	2000	2010
Birmingham	75.2	66.7	61.9	62.6
Montgomery	72	67.8	61.9	54.7
Mobile	77.6	69.1	60.9	53.9

Source: Diversity & Disparities, Spatial Structures in the Social Sciences, Brown Univ., *Residential Segregation, Index of Dissimilarity*, https://bit.ly/3xDKGRb (accessing "City Data" to obtain calculation of White-Black/Black-White dissimilarity index based on census data).[6]

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[6] For the sake of context, we note the following sample of comparably-populated counties outside the South that have 2020 dissimilarity index scores higher than both Montgomery and Mobile Counties: Providence, RI (53.69); Kane, IL (54.07); Hampden, MA (56.57); Lake, IN (57.07); Berks, PA (57.41); and Plymouth, MA (65.30). And, of course, many larger counties outside the South have higher levels, including: Los Angeles, CA (56.40); Essex, MA (57.95); Cuyahoga, OH (59.33); Erie, NY (59.70); Milwaukee, WI (61.38); and Bronx, NY (63.26).

Greater racial integration should be celebrated as civil rights *progress*, but § 2 litigators don't see it that way. Rather, they view integration as a "problem" that gets in the way of reaching their goal of proportionate representation in each and every political body:

> The problems posed by integration are clearest with respect to *Gingles*'s first prong. Minority voters who are residentially integrated are the very opposite of a geographically compact group. In the Court's terminology, they are diffuse rather than "insular," dilute rather than "concentrated.

Stephanopoulos, *supra*, 83 U. Chi. L. Rev. at 1384; *see also id.* at 1388 ("Residential integration is *not* one of § 2's goals. But minority representation *is* one of them, and for all of the reasons discussed above, it is imperiled by desegregation. Lawsuits making possible the election of minority-preferred candidates become ever harder to win as minority voters grow ever more dispersed.") (emphasis in original). As one commentator put it, "[b]y making residential segregation a prerequisite for vote dilution remedies," *Gingles* " created a direct conflict between voting rights and the integration ideal." Carstarphen, *The Single Transferable Vote: Achieving the Goals of Section 2 Without Sacrificing the Integration Ideal*, 9 Yale L. & Pol'y Rev. 405, 407 (1991); *see also id.* at 418 ("Paradoxically, residential segregation has become a precondition for the full enjoyment of voting rights.").

Partisan scholars have long lamented that § 2 creates tension between integration and maximizing minority voting representation through district line-drawing.

Briffault, Book Review, *Lani Guinier and the Dilemmas of American Democracy, The Tyranny of the Majority: Fundamental Fairness in Representative Democracy*, 95 Colum. L. Rev. 418, 430 (1995) ("districting is increasingly a problematic device for even the election of minority representatives;" "[d]istricting will be effective only in areas where minority voters are residentially concentrated in homogeneous territories so that majority-minority districts can be created"); Karlan, *Our Separatism? Voting Rights As an American Nationalities Policy*, 1995 U. Chi. Legal F. 83, 88–89 (1995) ("Even a minority group whose members all live quite segregated lives . . . can seek relief through relatively race-neutral remedial districting only if they live in large ghettoes that form seemingly 'natural' districts. Otherwise, smaller minority communities must be strung together like pearls on a necklace to create a majority-nonwhite district."); Stephanopoulos, *supra*, 83 U. Chi. L. Rev. at 1335 (noting that "desegregation unsettles the [§ 2] doctrine" because where "minority populations are residentially integrated" and "a jurisdiction nevertheless encloses a dispersed minority group within a single district, then the district probably violates the constitutional ban on racial gerrymandering.").[7]

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[7] Some have argued that the supposed limitations of § 2 as interpreted by the Court (including the geographic compactness requirement) necessitate radical alternative remedies, such as cumulative voting or "transferable votes." *E.g.*, Engstrom, *The Single Transferable Vote: An Alternative Remedy for Minority Vote Dilution*, 27 U.S.F. L. Rev. 779 (1993); Richie & Spencer, *The Right Choice for Elections: How Choice Voting Will End Gerrymandering and Expand*

Disregarding the reality of increased integration to serve political ends has significant societal consequences. Drawing district lines by narrowly focusing on minority political power rests on a devious presumption: By adhering "to the view that race defines political interest," the government "act[s] on the implicit assumption that members of racial and ethnic groups must all think alike on important matters of public policy and must have their own 'minority preferred' representatives holding seats in elected bodies if they are to be considered represented at all." *Holder v. Hall*, 512 U.S. 874, 903 (1994) (Thomas, J., concurring in the judgment).

The district court's decision, in substance and effect, requires Alabama to enact a "[r]acial electoral register[]" that "weights votes along one racial line more heavily than it does other votes." *Wright v. Rockefeller*, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting). Make no mistake, divvying up voters by race – under the cover of ensuring minority political power – "is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense." *Id.* "When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether

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Minority Voting Rights, from City Councils to Congress, 47 U. Richmond L. Rev. 959 (2013); Mulroy, *Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L. Rev. 1867 (1999).

antithetical to our system of representative democracy." *Shaw v. Reno*, 509 U.S. 630, 648 (1993).

As the Nation becomes ever more integrated in the coming decades, § 2 anti-dilution lawsuits over district line-drawing will presumably (and properly) fade away. The 2021 plan has one majority-black district – District 7 – which continues to include parts of Birmingham and Montgomery, just as it has done each redistricting cycle since 1990 (including while it was subject to § 5 preclearance in 2000 and 2010). Considering the increase in integration over that same time period (not to mention the continuing dispersion throughout the state of concentrations of black populations), it is simply impossible that § 2 somehow now requires the creation of two majority-black districts.

II. This Case Also Provides The Court An Opportunity To Reiterate That § 2's Language Really Does Mean That Proportionate Representation Is Not Required And Therefore Should Not Factor So Prominently In Lower Court Litigation.

The district court expressly relied on proportional representation arguments to bolster its ruling that Alabama's congressional maps violated § 2.

Specifically, the court observed that black Alabamans were underrepresented in comparison to their share of the total population in that they comprise 27% of the state's population, but the districting plan only provided them "meaningful influence" over 14% of congressional seats (*i.e.*, 1 of 7 districts). MSA204. Sticking with its fixation on direct proportionality, the court found that white

Alabamans were overrepresented because they comprise 63% of the state's population but 86% of congressional districts (6 of 7) were majority white. *Id.* In the district court's view, even a second majority-black seat would not remedy the proportionality problem "because 71.5% of congressional districts would be majority-white" – a result the district court found anomalous because "the share of Alabama's population that is white . . . has decreased substantially in the nearly thirty years since [*Wesch v. Hunt*, 75 F. Supp. 1491 (S.D. Ala. 1992)] ordered one majority-Black district." *Id.*; *see also* SJA33, Dec. 14, 2021, Decl. of Moon Duchin, Ph.D., Ex. 1 at 10 (plaintiffs' expert witness report claiming that "[p]roportionality for the White non-Hispanic population in Alabama would amount to roughly 4.5 out of 7 seats in Congress, but the State's map would lock in fully 6 out of 7 seats for White-preferred candidates – a massively super-proportional showing").

In *Brnovich v. Democratic National Committee*, the Court reoriented lower courts away from indulging the "radical project" of treating § 2 as a disparate-impact statute and toward § 2's actual language, 141 S. Ct. 2321, 2336–38, 2341 (2021). The same reorienting is needed here. § 2 expressly states that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C § 10301(b). Yet the parties and the district court here took proportionality as its guidepost.

Even granting that proportionality may be "'a relevant fact in [Section 2's] totality of circumstances'" analysis, *League of United Latin Am. Citizens v. Perry*, 548

U.S. 399, 436 (2006) (citing *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994)), it must not be allowed to assume the prominent role it played here. "[P]lacing undue emphasis upon proportionality risks defeating the goals underlying the Voting Rights Act" and "tend[s] to entrench the very practices and stereotypes the Equal Protection Clause is set against." *De Grandy*, 512 U.S. at 1028, 1029 (Kennedy, J., concurring in part).

And there is good reason for courts to be cautious when relying on notions of proportionality to justify the creation of unusual districts that cast aside compactness and contiguity, disrespect political subdivisions, and cross community lines to serve a racial end. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995). On that score, *Gingles*' threshold requirements impose important limitations where, as here, residential integration and geographic dispersion combine to result in a districting plan where proportional representation is not possible unless race is the predominant factor in the redistricting process. *See Gingles*, 478 U.S. at 50 n.17; *see also* Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 Harv. C.R.-C.L. L. Rev. 173, 178–79 (1989) ("[R]equirements of geographic compactness provide a way to assess claims of racial vote dilution that need not devolve ultimately into a simple measure of proportionality. They thus offer courts an opportunity to avoid the tension, implicit in Section 2, between the rejection of proportional representation and the focus on the number of minority elected officials.").

But here, the district court countenanced precisely the sort of "[r]acial gerrymandering" that "balkanize[s] us

into competing racial factions [and] threatens to carry us further from the goal of a political system in which race no longer matters." *Shaw*, 509 U.S. at 657. The proposed remedy is a map designed to hit a "non-negotiable" racial target – a target that plaintiffs' own experts were unable to meet when generating millions of race-neutral alternatives. This is nothing less than racial engineering that "should be repugnant to any nation that strives for the ideal of a color-blind Constitution." *Holder*, 512 U.S. at 905–06 (1994) (Thomas, J., concurring in the judgment). As the Court observed in *Shaw v. Reno*,

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. . . . By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.

509 U.S. at 647–48.

Drawing electoral lines on the basis of race is a pernicious enterprise that is antithetical not only to the spirit of the VRA but to the Fourteenth Amendment's guarantees. Nearly three decades ago, Justice Thomas presaged the result achieved below when he wrote: "[O]ur voting rights decisions are rapidly progressing toward a system that is indistinguishable in principle from a scheme under which members of different racial groups are divided into separate electoral registers and allocated a proportion of political power on the basis of race. Under our jurisprudence, rather than requiring registration on racial rolls and dividing power purely on a population basis, we have simply resorted to the somewhat less precise expedient of drawing geographic district lines to capture minority populations and to ensure the existence of the 'appropriate' number of 'safe minority seats.'" *Holder*, 512 U.S. at 906 (Thomas, J., concurring in the judgment).

Alabama did not violate § 2 by failing to divide up its seven congressional seats to assure proportionate racial representation.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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