Nos. 25-243, 25-273, 25-274

In the Supreme Court of the United States

WES ALLEN, ALABAMA SECRETARY OF STATE, *et al.*,
Petitioners,
v.
MARCUS CASTER, *et al.*,
Respondents.

WES ALLEN, ALABAMA SECRETARY OF STATE, *et al.*,
Appellants,
v.
BOBBY SINGLETON, *et al.*,
Appellees.

WES ALLEN, ALABAMA SECRETARY OF STATE, *et al.*,
Appellants,
v.
EVAN MILLIGAN, *et al.*,
Appellees.

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

BRIEF OF NORTH DAKOTA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS / APPELLANTS

DAVID H. THOMPSON
PETER A. PATTERSON
BRADLEY L. LARSON
Special Assistant Attorneys General
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036

DREW H. WRIGLEY
Attorney General
PHILIP AXT
Solicitor General
Counsel of Record
600 E. Boulevard Ave.
Dept. 125
Bismarck, ND 58505
(701) 328-2210
pjaxt@nd.gov

Counsel for State of North Dakota as Amicus Curiae

QUESTIONS PRESENTED

As framed by Petitioners / Appellants, the questions presented are:

1. Does § 2 [of the Voting Rights Act] require Alabama to segregate a conceded community of interest to combine black voters from that community with black voters elsewhere to form a majority-black district?

2. Whether § 2 can require Alabama to intentionally create a second majority-minority district without violating the Fourteenth or Fifteenth Amendments to the U.S. Constitution?

3. Does § 2 create a privately enforceable right?

4. Did Alabama violate the Fourteenth Amendment by declining to draw a race-based plan?

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INTEREST OF *AMICUS CURIAE*[1]

"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*, 585 U.S. 579, 603 (2018) (quoting *Miller v. Johnson,* 515 U.S. 900, 915 (1995)). North Dakota consequently has a deeply held interest in seeing that this Court's redistricting jurisprudence is understood and applied consistently by the lower courts.

Recent history has also shown that claims of unintentional "vote dilution" under Section 2 of the VRA are ripe for abuse, providing political actors with a means to malign the States as racist while simultaneously using race in a thinly veiled proxy fight to secure a few more seats for their favored political party. Claims of vote dilution are thus supposed to have "exacting requirements," and this Court has said Section 2 "never requires adoption of districts that violate traditional redistricting principles." *Allen v. Milligan*, 599 U.S. 1, 30 (2023) (cleaned up). However, the Court has not yet clearly articulated what it means for a Section 2 plaintiff to "violate traditional redistricting principles."

Without definitive guidance, some lower courts around the country have floundered. For example, based on an apparent misunderstanding of this Court's recent aside about not requiring a "beauty contest," the lower court here—as well as a district court in North Dakota—treated as irrelevant the fact that Section 2 plaintiffs sought to strike down duly

[1] Pursuant to Supreme Court Rule 37.2, North Dakota provided counsel of record with timely notice of its intent to file this brief.

enacted districts in order to replace them with racial-target districts that performed objectively *worse* on traditional districting criteria.[2]

But applying Section 2 to invalidate duly enacted districts and replace them with districts that perform *worse* on traditional districting criteria—and to do so for the express purpose of bolstering one racial group's voting strength—is a perversion of why the VRA was enacted in the first place. Doing so is also toxic to our body politic, puts States in an extremely untenable position, and is manifestly contrary to the goal of building a society that eliminates all "official conduct discriminating on the basis of race." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023) (quoting *Washington v. Davis*, 426 U.S. 229, 239 (1976)).

Alabama's petition and jurisdictional statements provide convincing reasons to revisit the framework for Section 2 claims entirely. But if the Court is unwilling to revisit that framework, North Dakota encourages the Court to use these cases to provide lower courts with clearer guidance on what the Court meant when it said Section 2 "never requires adoption of districts that violate traditional redistricting principles." *Allen*, 599 U.S. at 30 (cleaned up).

SUMMARY OF THE ARGUMENT

Under this Court's current precedent, a Section 2 plaintiff must establish three threshold criteria, often referred to as "*Gingles* factors." To establish the

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[2] *Compare* App.328–29, *with Turtle Mountain Band of Chippewa Indians v. Howe*, No. 3:22-cv-22, 2023 WL 8004576, at *9 (D.N.D. Nov. 17, 2023), *vacated on other grounds*, 137 F.4th 710 (8th Cir. 2025), *pet. for certiorari pending*, No. 25-253 (U.S.).

first *Gingles* factor, a Section 2 plaintiff must proffer an alternative majority-minority district that is "reasonably configured" (or "reasonably compact"), which means that "it comports with traditional districting criteria." *Allen*, 599 U.S. at 18. And this Court has declared that Section 2 "never requires adoption of districts that violate traditional redistricting principles." *Id.* at 30 (cleaned up).

Determining whether a plaintiff's alternative district "comports with" or "violates" traditional districting criteria necessarily requires comparing it against some sort of benchmark. To ask the question in the abstract would be pointless. And because Section 2 requires "an 'intensely local appraisal' of the challenged district," *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 406 (2022) (citation omitted), the proper benchmark for whether an alternative district "comports with" or "violates" traditional districting criteria must be the district(s) that a plaintiff seeks to invalidate and replace.

Moreover, if a Section 2 plaintiff seeks to replace a duly enacted district with a racial-target district that performs *worse* on traditional districting criteria, that is also strong evidence that either: (a) the State's as-enacted district does not reduce that minority group's voting power "on account of race" in the first place, and/or (b) the plaintiff's alternative district impermissibly elevated considerations of race to predominate over race-neutral criteria. Either way, at an absolute minimum, the worse performance of a plaintiff's alternative district is an important data point for courts to consider; it is not an irrelevancy that courts should deliberately ignore by claiming they do not need to engage in a "beauty contest."

Despite the need for a benchmark and an intensely local appraisal to determine whether a proffered alternative "comports with" or "violates" traditional districting criteria, lower courts have been shutting their eyes to the fact that recent Section 2 plaintiffs are proffering racial-target alternatives that perform *worse* on traditional criteria than the districts that they seek to invalidate. Here, for example, the lower court largely treated as irrelevant the fact that the plaintiffs' proffered alternatives required sacrificing traditional districting criteria to achieve a racially motivated end. App.328–29. That was error. And it is an error that has been metastasizing in lower courts around the country.

ARGUMENT

I. Courts Should Not Turn a Blind Eye When Proffered Alternative Districts Perform Worse on Traditional Districting Criteria.

A. The *Gingles* analysis requires an appropriate benchmark.

1. For a vote-dilution claim to be viable, a plaintiff must establish three threshold criteria, or "*Gingles* factors." First, the plaintiff must establish that another "reasonably configured" majority-minority district can be created in the relevant area. Second, the plaintiff must establish that minority-group voters in the area are politically cohesive. And third, the plaintiff must establish that candidates preferred by a majority of the racial-minority voters in the area generally lose due to racial-bloc voting. If these preconditions are met, courts are then directed to undertake a relatively free-form "totality of the circumstances" analysis to decide whether that group

of minority voters does not have an equal opportunity to elect candidates of their choice "on account of race." *Thornburg v. Gingles*, 478 U.S. 30, 50–51, 79 (1986); *see also Allen*, 599 U.S. at 19.

"It is fair to say that *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) (Mem.) (Roberts, C.J., dissenting from grant of stays). Indeed, numerous "basic questions" about how to implement and make sense of Section 2 claims remain unanswered. *Id.* at 883 (quoting C. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 389 (2012)).

2. One of the "basic questions" wrapped up in the first *Gingles* factor analysis is how to assess whether plaintiffs proffering an alternative racial-target district have satisfied their burden to produce an alternative that is "reasonably configured."

Plaintiffs generally satisfy their *Gingles 1* burden by proffering a different election map with an alternative district that bolsters the voting strength of their favored minority group. And as the Court has explained, such an alternative district is "reasonably configured" (or "reasonably compact") when "it comports with traditional districting criteria." *Allen*, 599 U.S. at 18. Conversely, Section 2 "never requires adoption of districts that violate traditional redistricting principles." *Id.* at 30 (cleaned up).[3]

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[3] Traditional districting criteria are race-neutral bases for drawing districts, including: "'compactness, contiguity, respect for political subdivisions or communities' … 'incumbency

But establishing those criteria just begets another question: what does it mean for a district to "comport with," or to "violate," traditional districting criteria? And on that question, this Court has yet to provide a "precise rule … governing § 2 compactness." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433 (2006) ("*LULAC*").

3. In truth, the only way to assess whether a proffered alternative "comports with" or "violates" traditional districting criteria is to compare that alternative district against a proper benchmark. "Determining how a legislature [(or plaintiff)] [sh]ould have drawn district lines in a vacuum is a fool's errand." *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 43 (2024) (Thomas, J., concurring in part). Without a benchmark to compare against, the inquiry is rudderless. Indeed, "the very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the … [alleged] dilution may be measured." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997).

Consequently, as with the entire concept of "vote dilution" itself, the "critical question" for whether a plaintiff's proffered alternative district "comports with" or "violates" traditional districting criteria is "'relative to what benchmark?'" *Allen*, 599 U.S. at 50 (Thomas, J., dissenting, joined by Gorsuch and Barrett, J.J.) (citation omitted). And as will be addressed in the next section, the answer to that

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protection, and political affiliation.'" *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 272 (2015) (quoting *Miller*, 515 U.S. at 916, and citing *Bush v. Vera*, 517 U.S. 952, 964, 968 (1996)). However, those criteria "are numerous and malleable." *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 190 (2017).

critical question requires comparing the plaintiff's proffered alternative district(s) against the district(s) that the plaintiff seeks to invalidate and replace. Using any other benchmark (or no benchmark at all) becomes an inquiry without moorings.[4]

B. The district a plaintiff seeks to replace is the proper benchmark to assess the proffered alternative district.

1. As this Court has repeatedly noted, vote-dilution claims require an "'intensely local appraisal' of the challenged district." *Wis. Legislature*, 595 U.S. at 406 (quoting *LULAC*, 548 U.S. at 437); *see also Abbott*, 585 U.S. at 616 ("[R]edistricting analysis must take place at the district level.").

Therefore, when searching for a benchmark to compare a plaintiff's alternative district(s) against, the most natural (and seemingly obvious) comparator for that assessment would be the same district(s) that the plaintiff is trying to invalidate and replace.

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[4] As the Court has noted, traditional districting criteria "are surprisingly ethereal and admit of degrees." *Bethune-Hill*, 580 U.S. at 190 (cleaned up). It is also not clear how the different criteria are supposed to be valued against each other. North Dakota therefore shares the concern that vote-dilution claims predicated on whether alternate districts "comport with" or "violate" traditional districting criteria are not readily subject to *any* judicially manageable standards, and it encourages the Court to reconsider the justiciability of "vote dilution" claims altogether. *See Alexander*, 602 U.S. at 47–49 (Thomas, J., concurring in part). But if the Court remains unwilling to do so, lower courts are very much in need of guidance on how they are supposed to assess whether a proffered alternative map "comports with" or "violates" traditional criteria.

Using the district(s) that the plaintiffs seek to invalidate and replace as the comparator for the proffered alternative also makes an overwhelming amount of sense. The acceptable range of metrics for different traditional districting criteria will not be the same from State to State, nor from region to region. Legislative districts in North Dakota will not be crafted the same way as legislative districts in Alabama. And even within the same State, the priorities and acceptable parameters may change from locale to locale based on the various geographic and historical characteristics of each locality.

2. Precisely because the analysis must be "intensely local," this Court has itself compared the plaintiffs' proffered alternative districts against the districts they sought to replace in order to determine whether the proffered alternatives comport with traditional districting criteria. *Allen*, 599 U.S. at 20–21; *see also id.* at 44 n.2 (Kavanaugh, J., concurring) ("To ensure that *Gingles* does not improperly morph into a proportionality mandate, courts must rigorously apply the 'geographically compact' and 'reasonably configured' requirements.").

Case-in-point: the Court's discussion of the *Gingles* analysis in this very case (the last time it came before the Court) is a prime example of using the districts that the plaintiff seeks to replace as the relevant benchmark. In that appeal, the State argued that the plaintiffs' proffered alternative districts were not "reasonably configured" because they failed to satisfy traditional districting criteria. *Allen*, 599 U.S. at 20–21. And while a majority of the Court disagreed, its explanation for *why* was informative.

As remains true for the instant appeal, the dispute in the prior appeal revolved around the configuration of districts in southern Alabama. Consequently, it was districts in southern Alabama that served as the Court's benchmark, and the Court compared the plaintiffs' alternative districts with the districts they sought to replace. *Id*.

Using the State's as-enacted districts in southern Alabama as the benchmark, the Court determined that the plaintiffs' alternatives satisfied the districting criteria of contiguity and equal population "roughly" as well as the State's districts and "split the same number of county lines as (or even *fewer* county lines than)" the State's districts. *Id.* at 20. On compactness, the Court noted evidence that the plaintiffs' alternatives "performed generally better" than the State's districts. *Id.* (cleaned up). And for splitting communities of interest, the Court remarked that the issue was essentially a wash, as "[t]here would be a split community of interest in both" the plaintiffs' alternatives and the districts that they sought to replace. *Id.* at 21.

In other words, for a dispute that involved the configuration of districts in southern Alabama, the *Allen* Court compared the relative performance of the plaintiffs' alternative districts against the as-enacted districts they sought to invalidate and replace in southern Alabama. The Court did not expand the scope of its analysis up to northern Alabama and assess whether the metrics of the districts proffered as alternatives for southern Alabama performed better than the worst-performing district capable of being found anywhere else in the State.

C. If the proffered alternative performs worse, that is also evidence the as-enacted district does not reduce group voting power "on account" of race.

Comparing the plaintiffs' proffered alternative district(s) against the as-enacted district(s) they seek to replace is also relevant to determining whether the State's as-enacted districts reduce group voting power "on account of race" in the first place.

1. When Congress amended Section 2 in 1982 to create a species of disparate-impact liability, it did not remove the requirement that for a Section 2 claim to be viable, a minority group's inability to elect the candidates of its choice must be "on account of race," and not some other factor. *See* 52 U.S.C. § 10301(a). Thus, although claims of "vote dilution" under Section 2 "turn[] on the presence of discriminatory effects, not discriminatory intent," *Allen*, 599 U.S. at 25, race must still be the relevant causal factor for a minority group's inability to elect its candidates of choice.

And the comparison of the plaintiff's alternative district(s) against the State's as-enacted district(s) is key to determining whether a group's alleged inability to elect the candidates of its choice is "on account of race" (prohibited by Section 2), or "on account" of some other factor (not prohibited by Section 2).

2. For that very reason, this Court has "consistently focused, for purposes of litigation, on the specific illustrative maps that a plaintiff adduces. Deviation from that map shows it is *possible* that the State's map has a disparate effect *on account* of race." *Id.* at 25–26 (second emphasis added). "Such would-have, could-have … arguments are a familiar means

of undermining a claim that an action was based on a permissible, rather than a prohibited, ground." *Cooper v. Harris*, 581 U.S. 285, 317 (2017).

However, the only way for deviation from the plaintiff's alternative district to be probative of a possibility that the State's as-enacted district dilutes any group's voting power "on account of race" is for the alternative district to meet or exceed the performance of the State's district on other, non-racial criteria. Otherwise, the only thing that the plaintiff's alternative is probative of is the possibility that the State's as-enacted district reduces that group's voting power "on account of" traditional, non-racial criteria. And a district that reduces group voting power "on account of" traditional, non-racial criteria does not violate the proscription of Section 2.

Consequently, a comparison of the plaintiffs' proffered alternative against the district(s) targeted for replacement is relevant for more than just determining whether the alternative "comports with" or "violates" traditional criteria. Because when the only way for a plaintiff to increase the voting power of a specific racial group is by drawing district lines that sacrifice traditional districting criteria, that itself is evidence that the State's as-enacted districts likely do not reduce that group's voting power "on account of race" in the first place.

D. If the proffered alternative performs worse, that also evidences the plaintiff may have impermissibly elevated race above all other considerations.

A related—albeit distinct—benefit of comparing the plaintiffs' proffered alternatives against the as-

enacted districts they challenge is that it may provide evidence as to whether the plaintiffs impermissibly used race as their predominant design criteria.

1. A State generally cannot make race the "predominant" criteria for designing voting districts without violating the Equal Protection clause. *E.g.*, *Allen*, 599 U.S. at 31 (plurality op.). And because the purpose of requiring a plaintiff to proffer an alternative district is to establish that the State could have created an additional majority-minority district that was "reasonably configured," the design of the plaintiff's alternative also cannot be predominantly based on considerations of race.

Thus, "to satisfy the first step of *Gingles*," the plaintiff must produce a remedial map where race was not the "predominan[t]" motivation for its design. *Id.* at 33; *accord id.* at 99 (Alito, J., dissenting) (a Section 2 plaintiff "must show at the outset that such a district can be created without making race the predominant factor in its creation").[5]

2. Race "predominates" when it is the design criteria that could not be compromised or when "race-neutral considerations 'came into play only after the race-based decision had been made.'" *Bethune-Hill*, 580 U.S. at 189 (citation omitted).

And while "the line between racial predominance and racial consciousness can be difficult to discern," *Allen*, 599 U.S. at 31 (plurality op.), it can be found by

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[5] Though, reflecting layers of confusion in some lower courts with the current framework for analyzing Section 2 claims, some courts have said that plaintiffs can satisfy *Gingles 1* even if they proffer an alternative district that is in fact predominantly based on race. *See Turtle Mountain*, 2023 WL 8004576, at *10 n.3.

examining both direct and circumstantial evidence. *See, e.g.*, *Alexander*, 602 U.S. at 8.

3. This Court has long held that a strong source of circumstantial evidence for assessing whether race may have predominated in the design of a district is a comparison of the challenged district with the plaintiff's alternative district. *Id.* at 10. Because if the alternative district performs worse on traditional districting criteria in order to achieve race-motivated ends, the fact of its worse performance is strong evidence that race may have been improperly elevated above all other considerations in its design.

Departures from traditional districting criteria don't necessarily matter for their own sake. But they matter for a Section 2 analysis "because mapmakers usually heed these criteria." *Allen*, 599 U.S. at 97 (Alito, J., dissenting). And "when it is evident that they have not done so, there is reason to suspect that something untoward—specifically, unconstitutional racial gerrymandering—is afoot." *Id.*

For that reason, "violations of traditional districting criteria constitute strong *circumstantial evidence* of unconstitutionality." *Id.* at 98 (Alito, J., dissenting) (emphasis original). That's as true for a State-designed district as it is for a plaintiff-designed one. Though in actuality, the specter of impermissible racial predominance is higher for a plaintiff's proffered alternatives, because Section 2 plaintiffs are always engaged in a "quintessentially race-conscious calculus." *Id.* at 31 (plurality op.) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)).

Thus, in addition to evincing that a State's as-enacted district likely does not dilute a group's voting

strength "on account of race," when the plaintiff's alternative districts sacrifice traditional criteria to achieve a racial-target district, the worse performance of the alternative district is also evidence that the plaintiff may have impermissibly used race as the predominant design criteria.

E. The confusion about "beauty contests."

In *Allen,* the Court remarked that there was no need to conduct a "beauty contest" between the plaintiffs' proffered alternative and the challenged district because "[t]here would be a split community of interest in both." 599 U.S. at 21 (citing *Bush*, 517 U.S. at 977–78 (plurality op.). This line has engendered significant confusion in some lower courts, including the court below.

1. As noted *supra*, the *Allen* majority concluded that the plaintiffs' alternative districts were "reasonably configured," despite splitting the Gulf Coast community of interest, because splitting that community allowed for the "join[ing] together [of] a different community of interest called the Black Belt." *Id*. In addition, a majority of the Court noted that the plaintiffs had proffered alternative districts that "perform[ed] generally better on average than" the State's with regard to compactness, *id*. at 20 (quoting the lower court's finding), and which "split the same number of county lines as (or even *fewer* county lines than) the State's map," *id*.; *see also id*. at 44 n.2 (Kavanaugh, J., concurring) ("In this case, … it is important that at least some of the plaintiffs' proposed alternative maps respect county lines at least as well as Alabama's redistricting plan.").

It was only *after* the Court compared the State's as-enacted districts against the plaintiffs' proffered alternatives, and determined that the latter were at least as consistent with traditional districting principles (if not more so), did the majority then make the statement about not needing to conduct a "beauty contest." *Allen*, 599 U.S. at 21. And it did so specifically in the context of affirming it did not need to conduct a beauty contest because "[t]here would be a split community of interest in both." *Id.*

The context of that "beauty contest" statement in *Allen* highlights a fundamental misunderstanding of some lower courts, like the one in the instant appeal, which cherrypicked that language to justify a blanket assertion that it need not "compare the Plaintiffs' plans with the 2023 Plan." App.328. Because if there was no need to compare the performance of the plaintiffs' proffered alternative districts against the districts they sought to replace, then it's unclear why this Court spent multiple pages doing precisely that in *Allen*. *See* 599 U.S. at 20–22.

Moreover, Justice Kavanaugh provided the fifth vote in *Allen*, and his concurrence expressly noted that it was "important that at least some of the plaintiffs' proposed alternative maps respect county lines at least as well as Alabama's redistricting plan." *Id*. at 44 n.2 (Kavanaugh, J., concurring).

2. This Court's previous invocation of the "beauty contest" language makes it even more clear that *Allen's* use of the phrase was not intended to spark a revolution in Section 2 jurisprudence that would deem the worse performance of a plaintiff's proffered alternative district to be utterly irrelevant.

Allen referenced the beauty-contest line from the plurality opinion in *Bush v. Vera*, which involved a challenge to Texas's post-1990 redistricting on racial-gerrymandering grounds. 517 U.S. at 952. *Bush* was one in a series of cases where this Court "assume[d] without deciding" that a State's attempt to comply with Section 2 of the VRA could justify violating the Equal Protection clause. *Id.* at 977. That portion of the decision was addressing the tightrope States are forced to walk in that situation, and the need for giving States "flexibility." *Id.* at 978. In that context, the plurality remarked that as long as a State's Section 2 defense was predicated on a district that satisfied traditional criteria, the State did not have to "defeat rival compact districts designed by plaintiffs' experts in endless 'beauty contests.'" *Id.* at 977.

In other words, *Bush*'s language about not needing to conduct "beauty contests" was to protect *States* whose duly enacted districts comport with traditional districting criteria from endless challenges by plaintiffs predisposed to engage in perpetual nitpicking. Nothing about the *Bush* plurality's use of the phrase suggests that lower courts should not compare the plaintiffs' proffered alternatives against the district(s) that they seek to replace when plaintiffs are actively trying to invalidate a State's duly enacted map, nor that the alternative district's worse performance on traditional criteria is something that should be treated as entirely irrelevant.

3. At an absolute minimum, if Section 2 plaintiffs proffer alternative districts that generally perform worse on traditional districting criteria than the district(s) they seek to replace, that is an important

data point that courts should consider and address, not something to be casually ignored.

To be sure, traditional districting criteria "are numerous and malleable." *Bethune-Hill*, 580 U.S. at 190. And it's also not clear how a district's worse performance on some criteria should be weighed against better performance on other criteria. But if the plaintiffs' proffered alternatives perform worse than the district(s) they seek to replace on all, or on most, of the traditional districting criteria, then that is not a fact that should be blinked away.

Instead, that comparison is necessary for assessing whether the alternative district "comports with" or "violates" traditional districting criteria. *See* Part I.B, *supra*. That comparison is also important for assessing whether the State's map reduces the group's voting power "on account of race" in the first place. *See* Part I.C, *supra*. And if the only way that a plaintiff can proffer an additional majority-minority district is by sacrificing on all or most of the other districting criteria, then that is also strong evidence that the plaintiff may have engaged in unlawful racial gerrymandering. *See* Part I.D, *supra*.

II. Courts Have Been Turning a Blind Eye When Proffered Alternative Districts Perform Worse on Traditional Districting Criteria.

Despite the need to compare the plaintiffs' proffered alternatives with the district(s) they seek to replace, lower courts around the country have been treating as irrelevant the fact that recent Section 2 plaintiffs are proffering alternative districts that perform worse on traditional criteria in order to

achieve racially motivated ends. The Court should stop that error from continuing to spread.

1. This case provides an excellent example of why the federal courts must account for the State's enacted districts when conducting the *Gingles 1* analysis.

Alabama's as-enacted map was crafted by the State legislature to focus on accomplishing several traditional districting objectives. In addition to the usual goals of contiguity, equal populations, limiting county splits, and the like, *see Miller*, 515 U.S. at 916, Alabama's legislature zeroed in on limiting the number of communities of interest that would be split. App.339–41, 545–46. Keeping shared communities of interest together in the same district to the extent possible—ideally not splitting them at all—has long been recognized as a valid goal of redistricting. *E.g.*, *Miller*, 515 U.S. at 916; *Allen*, 599 U.S. at 34–35.

Alabama's as-enacted districts sought to accomplish that goal by keeping the Gulf Coast community of interest in a single district while placing the 18 core Black Belt counties and the Wiregrass community of interest into two districts each. *See* App.346–47, 353, 546. Because of Alabama's population and geography, it was not possible to keep each of those communities in a single district. *See id.* So the Alabama legislature did the next best thing and kept them in two districts each, maximally respecting those communities of interest. *Id.*

Plaintiffs' alternative districts failed to respect those communities of interest to the same extent as the State. Every alternative proposed by plaintiffs resulted in worse community-of-interest splits than did the State's as-enacted map. For starters, every one

of plaintiffs' proposals split the Gulf Coast community of interest into two districts. App.206–10, 345. And in addition to splitting the Gulf Coast community, all of the plaintiff's proposals to create another racial-target district required further fragmenting the Black Belt community of interest. Nearly every single plan they proposed split the Black Belt's 18 core counties into more than two districts, while also splitting the Gulf Coast at the same time. App.206–10;[6] *contra Allen*, 599 U.S. at 21 (holding plaintiffs' proffered splitting of communities of interest on the last appeal acceptable because the as-enacted districts split the same number of communities of interest).

Moreover, in addition to splitting more communities of interest than the State's as-enacted districts, the plaintiffs' proffered alternatives were also almost unanimously worse on objectively measurable metrics of compactness, such as the Reock and Polsby-Popper scores. *See Singleton v. Allen*, No. 2:21-cv-1291, ECF No. 321 (State Defendants' Joint Proposed Findings of Fact and Conclusions of Law) at ¶¶ 181, 188 (N.D. Ala. Mar. 17, 2025). And while one of those proffered alternatives, "Cooper 9," scored about as well as the as-enacted districts on

[6] The district court in the instant case also declared the plaintiffs' alternative districts "respect[ed]" "communities of interest" by splitting them up. App.339, 350 (quoting plaintiff's expert to say "there are times when respect or consideration for communities of interest … might call for a split"). That would seem to be clear legal error. *E.g.*, *Rucho v. Common Cause*, 588 U.S. 684, 706–07 (2019) ("keeping communities of interest together"—not splitting them apart—is a traditional districting criteria). But if "respect[ing]" a community of interest can now mean both keeping it together *and* splitting it apart, then that traditional districting principle has become completely meaningless.

compactness, that alternative split the Black Belt into *four* different districts, which is the epitome of fracturing a community of interest. *Id.* at ¶¶ 188, 195. Not a single alternative proffered by the plaintiffs for the instant case managed to keep together communities of interest as well as the State while also maintaining comparable compactness scores.

Rather than meaningfully grappling with those deficiencies, the lower court pointed to the *Allen* Court's "beauty contest" verbiage to declare "[o]ur task is not to compare the Plaintiffs' plans with the 2023 Plan to determine which plan would prevail." App.328; *see also* App.329 ("An illustrative plan may be reasonably configured even if it does not outperform the 2023 Plan on every (or any particular) metric."). But the reliance on *Allen*'s beauty-contest language to deem a comparison with the State's as-enacted district to be irrelevant was legal error.

2. The lower court in the instant case was not the only one to (mis)read *Allen* as suggesting the *Gingles 1* inquiry has become significantly less rigorous.

A district court in North Dakota also recently pointed to the *Allen* Court's use of the "beauty contest" verbiage to justify its assertion that "a Section 2 claim is not a competition between which version of district 9 better respects traditional redistricting criteria." *Turtle Mountain*, 2023 WL 8004576, at *9. That district court apparently thought that it was completely irrelevant whether "the challenged plan performs better on certain traditional redistricting criteria than the proposed plan." *Id.* And then after dismissively brushing aside the entire issue as thereby "resolved," *id.*, the district court went on to

invalidate the State's as-enacted districts based on proffered alternatives that performed objectively *worse* on traditional districting criteria—all without any inquiry as to what to do with the fact that plaintiffs were seeking to invalidate a duly enacted district in order to replace it with a racial-target district that performed *worse* on traditional criteria.

The North Dakota district court's refusal to compare the plaintiffs' proffered alternatives against the district they targeted for replacement seems especially egregious in that case. Because that was not a case that involved competing snake-like districts, and where the court would have had to assess whether one snake-like district adhered to traditional districting criteria better than another snake-like district. Instead, the challenged district in that case was one of the most compact imaginable—it was essentially a rectangle. *See id.* at *4 (citing Pls.' Ex. 101). The plaintiffs' proffered alternatives, by contrast, required the creation of a diagonal land bridge that stretched south-by-southeast for approximately 100 miles to join together two different Native American reservations into an elongated district roughly in the shape of a dumbbell. *See id. (*citing Pls.' Exs. 105 & 106).

It does not require expert analysis to look at those districts and deduce that the proffered alternatives required sacrificing traditional criteria in order to achieve a racially motivated outcome. Nonetheless, expert analysis also confirmed that the plaintiffs sought to replace one of the *most* compact districts in the entire State with one of the *least* compact districts in the entire State. *See Turtle Mountain Band of Chippewa Indians v. Howe*, No.

3:22-cv-22, ECF No. 60-35 (Expert Report of M.V. Hood III) at 8–10 (D.N.D. Feb. 1, 2023).

The district court's holding in *Turtle Mountain* should have been a flashing light that Section 2 jurisprudence has gotten off-course from what the VRA was intended to identify and remediate. Section 2 is not supposed to require the "adoption of districts that violate traditional redistricting principles." *Allen*, 599 U.S. at 30 (cleaned up). Yet that is precisely what happened in North Dakota. And it happened because the district court apparently misunderstood *Allen*'s verbiage about not needing to conduct a "beauty contest" as suggesting that any comparison between the as-enacted district and the proffered alternatives was irrelevant and unnecessary.

3. Similarly, in *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, a Georgia district court held the plaintiffs' proffered alternative was "reasonably compact" even though when "using empirical measures" it was objectively "less compact" than the as-enacted district which the plaintiffs sought to replace. 700 F.Supp.3d 1136, 1312 (N.D. Ga. 2023), *appeal filed*, No. 23-13914 (11th Cir.).

To get around the proffered alternative's objectively worse performance on traditional criteria, the district court declined to give weight to comparing the alternative against the district targeted for replacement, and it instead compared the proffered alternative against less-compact districts found elsewhere in the State. *Id.* But as discussed *supra*, the acceptable parameters for traditional criteria vary from region to region, and from locale to locale, even within the same State. That is why the analysis for a

vote-dilution claim goes "astray" when it does not take place "at the district level." *Abbott*, 585 U.S. at 616.

The Georgia district court's refusal to do an apples-to-apples comparison against the appropriate benchmark is more evidence that lower courts are not conducting the *Gingles 1* inquiry in an "exacting" manner. *Allen*, 599 U.S. at 30.

CONCLUSION

"'The purpose of the Voting Rights Act is … to foster our transformation to a society that is no longer fixated on race.'" *LULAC*, 548 U.S. at 433–34 (citation omitted). Federal courts do an immense disservice to that purpose when they order traditional districting criteria to be sacrificed in order to replace duly enacted districts with racial-target districts that perform *worse* on traditional, non-racial criteria.

If the Court does not reconsider its approach to vote dilution claims entirely, it should use these cases to provide lower courts with guidance on what the Court meant when it said Section 2 "never requires adoption of districts that violate traditional redistricting principles." *Allen*, 599 U.S. at 30 (cleaned up). And it should make clear that an alternative district's *worse* performance on traditional districting criteria is not something to be deliberately ignored.

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Respectfully submitted,

DREW H. WRIGLEY
Attorney General

PHILIP AXT
Solicitor General
Counsel of Record
pjaxt@nd.gov
(701) 328-2210
600 E. Boulevard Ave.,
Dept. 125
Bismarck, ND 58505

DAVID H. THOMPSON
PETER A. PATTERSON
BRADLEY L. LARSON
Special Assistant
Attorneys General
dthompson@cooperkirk.com
ppatterson@cooperkirk.com
blarson@cooperkirk.com
(202) 220-9600
1523 New Hampshire
Ave., N.W.
Washington, D.C. 20036

Counsel for State of North Dakota as Amicus Curiae