Nos. 21-1086 & 21-1087

In the Supreme Court of the United States

JOHN H. MERRILL, ET AL.,
Appellants,
v.
EVAN MULLIGAN, ET AL.,
Appellees.

JOHN H. MERRILL, ET AL.,
Petitioners,
v.
MARCUS CASTER, ET AL.,
Respondents.

On Appeal from and on Writ of Certiorari to the United States District Court for the Northern District of Alabama

AMICI CURIAE BRIEF OF THE STATES OF LOUISIANA, ARIZONA, ARKANSAS, GEORGIA, INDIANA, MISSOURI, MISSISSIPPI, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH AND WEST VIRGINIA IN SUPPORT OF APPELLANTS/PETITIONERS

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INTEREST OF *AMICI CURIAE*

Even at the best of times, "[e]lectoral districting is a most difficult subject for legislatures." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). Federal-court review of redistricting "represents a serious intrusion" on a State's ability to draw new maps. *Id.* Given the delicate nature of the State's task—and the interruptive force represented by federal judicial intervention—one might expect federal redistricting law to be clear. Not so.

When staying the district court's orders in this litigation, several Justices commented upon the murkiness of this Court's jurisprudence interpreting Section 2 of the Voting Rights Act. The Chief Justice noted the "considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim." *Merrill v. Milligan*, 142 S. Ct. 879, 883 (2022) (Roberts, C.J., dissenting). Justice Kavanaugh (writing for himself and Justice Alito) agreed. *Id.* at 881 (Kavanaugh, J., concurring) (observing "the Court's case law in this area is notoriously unclear and confusing"). *Amici* States have pleaded for clarity on these issues. *See id.*

The district court's misinterpretation of both Section 2 and this Court's precedents only adds to the confusion. By relying on remedial maps that prioritize race as a "non-negotiable factor"—MSA215—the district court's orders are incompatible with the Fourteenth Amendment's Equal Protection Clause and Section 2's express disclaimer of any right to proportional representation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under this Court's precedent, a plaintiff's vote dilution claim fails right out of the gate unless a "minority group" is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). Even if a group can satisfy this requirement, Section 2 expressly disclaims any right to "proportional representation." 52 U.S.C. § 10301(b) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."); *see Gingles,* 478 U.S. at 84 (O'Connor, J., concurring) (observing the "disclaimer was essential to the compromise that resulted in passage of the amendment" to Section 2).

Thanks to modern mapmaking technology, Plaintiffs' experts were able to generate millions of illustrative remedial maps—without using race as a factor. The result? Not one map included two majority-Black districts. *See* MSA260–61. In other words, using only traditional redistricting tools, a second majority-Black district *could not be drawn* in Alabama. MSA261 ("[T]he simulation results suggest that some awareness of race likely is required to draw two majority-Black districts."). Only by prioritizing race as a "non-negotiable factor" could Plaintiffs contort the map to fit their claims. MSA215. Thus, it seems that "race furnished 'the overriding reason for choosing one map over others.'" *Cooper v. Harris*, 137 S. Ct. 1455, 1469 n.2 (2017) (quoting *Bethune–Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 799 (2017)).

According to the district court, it was permissible for Plaintiffs' experts to use race as a non-negotiable factor when drawing their maps because "the law does not demand zero race consciousness from a Section Two plaintiff"—MSA261—and "a Section Two plaintiff either must place race in precisely the role that Defendants assail, or fail at the starting gate." MSA269. But in the face of overwhelming evidence showing that a second district could not be drawn without considering race, the district court's interpretation of Section 2 cannot be right. In fairness, this evidence is derived from modern mapmaking technology that has developed rapidly over the past decade. Chen & Jowei Chen, Nicholas O. Stephanopoulos, *The Race-Blind Future of Voting Rights*, 130 Yale L.J. 862, 878 (2021) ("[M]apmaking methods have advanced in leaps and bounds over the last ten years."). That is no reason to discount it, however.

Moreover, if courts are not careful, vote dilution claims can devolve into mandates for proportional representation. *See Holder v. Hall*, 512 U.S. 874, 903 (1994) (Thomas, J., concurring) (worrying that the Court's decision in *Gingles* effectively "adopted a rule of roughly proportional representation, at least to the extent proportionality [is] possible given the geographic dispersion of minority populations."); Chen & Stephanopoulos, 130 Yale L.J. at 872 ("[M]ore than any other doctrinal factor, [the proportionality benchmark] sets the level of representation to which minority voters are legally entitled."). This Court has emphasized that "[t]he role of proportionality" is limited and is meant merely to provide "some evidence" of whether a section 2 violation occurred.

League of United Latin American Citizens v. Perry, 548 U.S. 399, 437 (2006) (*LULAC*). But if the district court's interpretation of Section 2 is correct, and the statute allows plaintiffs to make race a non-negotiable factor, then vote dilution claims essentially mandate proportional representation.

Overreliance on proportionality has the perverse effect of making race the "predominant factor in drawing the lines" of a district. *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring). It flatly contravenes the Fourteenth Amendment's Equal Protection Clause, which "removed the race line from our governmental systems." *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting). The Constitution "is color-blind"—*id.* at 559—but the district court's interpretation of Section 2 is not.

Instead of eradicating race-based redistricting, the district court's order entrenched it. Rather than complying with Congress' edict in Section 2, the district court flouted it. If the district court's interpretation of Section 2 is correct, the statute is unconstitutional.

ARGUMENT

I. THE COURT SHOULD NOT ALLOW VOTE DILUTION CLAIMS TO MANDATE PROPORTIONAL REPRESENTATION.

Knowing how the Court got in the business of addressing vote dilution claims is helpful to understanding why the Court should reject the district court's interpretation of Section 2—which would put federal courts in the "sordid business" of

"divvying us up by race." *LULAC*, 548 U.S. at 511 (Roberts, C.J., concurring in part and dissenting in part). As an initial matter, it is important to remember that "redistricting differs from other kinds of state decisionmaking in that the legislature always is aware of race when it draws district lines." *Shaw v. Reno*, 509 U.S. 630, 646 (1993). "That sort of race consciousness" was inescapable, and the Court concluded it does "not lead inevitably to impermissible race discrimination." *Id.*

Still, the fact that legislatures could consider race when drawing their maps raised the possibility that majorities might engage in "vote dilution" or, in the words of the Court, the "dispersal of [a group's members] into districts in which they constitute an ineffective minority of voters." *Gingles*, 478 U.S. at 46, n.11. The Court construed Section 2 of the VRA to ban vote dilution. *See Cooper*, 137 S. Ct. at 1464 (citing *Gingles*, 478 U.S. at 46 n.11).

Eventually, the question arose of how to identify vote dilution. After this Court employed an "intent" test in *Mobile v. Bolden*, 446 U.S. 55, 100 (1980) (plurality op.), Congress amended Section 2 to codify language from this Court's prior opinions requiring a plaintiff bringing a vote dilution claim to show that the "political processes leading to nomination and election were not equally open to participation by the group in question." *White v. Regester*, 412 U.S. 755, 766 (1973); *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *see Gingles*, 478 U.S. at 83 (O'Connor, J., concurring). Importantly, Congress passed the amendment to Section 2 with a disclaimer of any right to proportional representation. *See id.*

Making sense of Congress' mandate proved to be "not an easy task" for the Court. *Gingles*, 478 U.S. at 83 (O'Connor, J., concurring). Justice O'Connor observed "[t]here is an inherent tension between what Congress wished to do and what it wished to avoid." *Id.* She worried that "any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large." *Id.*

Sticking with the text of Section 2, this Court has never interpreted the statute to mandate proportional representation. But, as part of its analysis vote dilution claims, the Court considers "whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area." *LULAC*, 548 U.S. at 426; *accord Wisconsin Legislature v. Wisconsin Elections Comm'n*, 142 S. Ct. 1245, 1249 (2022); *see Johnson v. De Grandy*, 512 U.S. 997, 1025 (1994) (O'Connor, J., concurring) ("[P]roportionality . . . is always relevant evidence in determining vote dilution, but is never itself dispositive.").

This Court should vigorously guard against proportionality becoming the alpha and omega of vote dilution claims. Beyond the fact that Section 2 expressly disclaims any right to proportionality, jurists and scholars have noted other serious drawbacks associated with overreliance on proportionality.

Emphasis on proportionality encourages legislatures to create districts for minority voters to elect their preferred candidates—*i.e.*, proportionality encourages districts to be drawn "on account of race

or color." § 10301(a); *see Holder*, 512 U.S. at 892 (Thomas, J., concurring) ("[I]n pursuing the ideal measure of voting strength, we have devised a remedial mechanism that encourages federal courts to segregate voters into racially designated districts to ensure minority electoral success."). According to Justice Thomas, mandating proportionality causes what may "aptly be termed the racial balkanization of the Nation." *Holder*, 512 U.S. at 892 (Thomas, J., concurring) (cleaned up)); Chen & Stephanopoulos, 130 Yale L.J. at 873.

Justice Kennedy observed that "placing undue emphasis upon proportionality risks defeating the goals underlying the Voting Rights Act." *De Grandy*, 512 U.S. at 1028 (Kennedy, J., concurring in part and concurring in judgment). One might reasonably believe that making race "a predominant factor in drawing the lines" of a redistricting map would violate Section 2. *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring).

The biggest problem with overreliance on proportionality is its fundamental incompatibility with the Fourteenth Amendment's Equal Protection Clause—which mandates "racial neutrality in governmental decisionmaking," *Miller*, 515 U.S. at 904. Under that mandate, "efforts to separate voters into different districts on the basis of race must satisfy the rigors of strict scrutiny." *Cooper*, 137 S. Ct. at 1487 (cleaned up).

To be sure, "[t]his Court has long assumed that one compelling interest is compliance with the [VRA]." *Id.* at 1459. But requiring proportionality on these grounds can have the effect of subordinating

the Equal Protection Clause to Section 2.[1] Again, Section 2 expressly disclaims any right to proportional representation. So, even accepting the assumption that a State can satisfy strict scrutiny by complying with the VRA, it is impossible to understand how the district court's orders are consistent with the Fourteenth Amendment.

II. THE DISTRICT COURT'S INTERPRETATION OF SECTION 2 DISCOUNTS KEY EVIDENCE AND EFFECTIVELY MANDATES PROPORTIONAL REPRESENTATION.

In this litigation, Plaintiffs' expert "considered two majority-Black districts as 'non-negotiable'" in Alabama. MSA214–15. For that reason, Plaintiffs' expert kept race as a necessary factor when preparing illustrative remedial maps. *Id.* But why? Everyone agrees that if a second majority-minority district could not be drawn *with* race considered in the mapping process, Plaintiffs' vote dilution claim would fail right out of the gate under the first *Gingles* factor. *Gingles*, 478 U.S. at 50. Using similar reasoning, if Plaintiffs' expert could not draw one majority-minority district *without* using race as a consideration, surely a court could safely conclude that Plaintiffs' voting power had not been diluted.

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[1] To be clear, the subordination follows from these three steps: (1) The Equal Protection Clause prohibits States from separating voters into districts on the basis of race unless they can satisfy strict scrutiny; (2) States can satisfy strict scrutiny by complying with the VRA; and (3) the district court's interpretation of the VRA requires States to separate voters into districts on the basis of race.

Cf. Gonzalez v. City of Aurora, Illinois, 535 F.3d 594, 600 (7th Cir. 2008).

The district court allowed Plaintiffs' expert to keep race as a necessary factor in the mapping process because the expert did not try "to maximize the number of majority-Black districts." MSA214. But even the "minimum level" of race-based redistricting that the district court approved—*id.*—is an affront to the Equal Protection Clause absent "sufficient justification." *Cooper*, 137 S. Ct. at 1463 (internal quotation marks omitted). The district court grounded its use of remedial race-based maps in its need to comply with the VRA. MSA216. But justifying the race-based sorting required by its interpretation of the VRA with a need to comply with the VRA is circular, and ultimately no justification at all.

The district court acknowledged that Section 2 expressly disclaims the "right to have members of a protected class elected in numbers equal to their proportion in the population." MSA52 (quoting § 10301(b)). The district court defended its reliance on proportionality by arguing this was merely "part and parcel of the totality of the circumstances." MSA205. But the effect of the district court's ruling is to aggrandize the role of proportionality beyond the limits of the Equal Protection Clause and Section 2's text. Again, this litigation features the "show-stopper claim that one of the plaintiffs' experts had randomly generated a large number of Alabama plans, and produced not a one with two majority-Black districts." *Merrill*, 142 S. Ct. at 887 (Kagan, J., dissenting). It is not clear why the district court allowed Plaintiffs' expert to make race a non-negotiable factor, especially in light of overwhelming

evidence showing that a second district *could not be drawn* using only traditional districting criteria. But it is clear that making race indispensable to the question of whether a majority-minority district can be drawn effectively mandates proportional representation, as this litigation plainly illustrates.

In fairness, vote dilution claims have long been difficult to define. *See Holder*, 512 U.S. at 896 (Thomas, J., concurring) ("The central difficulty in any vote dilution case, of course, is determining a point of comparison against which dilution can be measured." *See Gonzalez*, 535 F.3d at 598 ("Diluted relative to what benchmark?"). But, thanks to modern mapmaking technology, it is now possible to know whether a map is race conscious. *See Cooper*, 137 S. Ct. at 1491 (Alito, J., concurring in part and dissenting in part) ("Today, an expert with a computer can easily churn out redistricting maps that control for any number of specified criteria"—including race). What was technologically impossible even 15 years ago—let alone in 1965 when Congress enacted Section 2 or in 1982 when Congress amended the statute—is now possible. Chen & Stephanopoulos, 130 Yale L.J. at 878.

The district court failed to account for the advancements in mapping technology when concluding that race is a non-negotiable factor. *See Merrill*, 142 S. Ct. at 883 (Kagan, J., dissenting) ("There may—or may not—be a basis for revising our VRA precedent in light of the modern districting technology that Alabama's application highlights."). This error led it to prioritize race in a manner that practically mandates proportionality. That, in turn, puts the district court's decision at odds with both

the text of Section 2 and the Equal Protection Clause.

III. EVEN IF SECTION 2 IS AMBIGUOUS, THE COURT SHOULD REJECT THE DISTRICT COURT'S INTERPRETATION.

The pressing question in this case is "whether a second majority-minority congressional . . . is required by the Voting Rights Act and not prohibited by the Equal Protection Clause." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). *Amici* States respectfully assert that the district court's order is incompatible with this Court's jurisprudence and Section 2, for the reasons explained above.

That said, the text of Section 2 has been described as "famously elliptical." *Gonzalez*, 535 F.3d at 597. Under the most natural interpretation of Section 2, the law disclaims proportionality and requires political processes to be "equally open." § 10301(b). According to the district court, however, Section 2 requires traditional redistricting criteria to yield to race as a non-negotiable factor—which raises grave constitutional concerns. *See Miller*, 515 U.S. at 904; *Cooper*, 137 S. Ct. at 1487.

Assuming the text is truly ambiguous, it triggers the avoidance canon—which is "a tool for choosing between competing plausible interpretations of a statutory text." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). If there are two possible interpretations of Section 2, under the avoidance canon, the Court employs the "reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Id.* Here, that would mean jettisoning the

district court's interpretation of Section 2 for an interpretation that does not make race a non-negotiable factor.

At bottom, racial gerrymandering is odious to the constitution. The district court elevated racial considerations over traditional redistricting principles. That cannot be the law.

CONCLUSION

Amici respectfully ask the Court to reverse the district court and hold Alabama's 2021 redistricting plan is consistent with Section 2.

Respectfully submitted,

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