Nos. 21-1086 & 21-1087

# In the Supreme Court of the United States

JOHN H. MERRILL, *et al.*,
*Appellants,*

v.

EVAN MILLIGAN, *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*

**BRIEF OF THE DISTRICT OF COLUMBIA, NEW YORK, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, WASHINGTON, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND RESPONDENTS**


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## QUESTION PRESENTED

Whether the State of Alabama's 2021 redistricting plan for its seven seats in the United States House of Representatives violated Section 2 of the Voting Rights Act, 52 U.S.C. § 10301.

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## INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Alabama asks the Court to upend decades of settled jurisprudence and to impose a new, technology-intensive test for vote dilution claims. As sovereigns responsible for redistricting in their respective jurisdictions, states have expertise in how existing law applies in practice and strong interests in having the established framework continue to apply in the future. Because Alabama's proposed new standards for vote dilution claims are misguided and unworkable, the District of Columbia and the States of New York, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin ("*Amici* States") submit this brief as *amici curiae* in support of appellees and respondents (collectively, "Plaintiffs").

In these consolidated cases, the district court applied settled law to assess a state's congressional map—as courts around the country have done for years. Here, voters and organizations alleged that Alabama's congressional map violated Section 2 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10301, because it contained just one majority-Black district, thereby diluting the power of Black voters. Although Black voters comprise 27% of the state's population, they had an opportunity to elect a representative of their choice in only 14% of districts. Applying the established framework for such claims set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986), the district court found after trial that every relevant factor

pointed to vote dilution. This *Gingles* framework is a known quantity for states, having guided both their redistricting processes and defenses against Section 2 claims for decades.

Seeking to avoid the result of properly applying *Gingles* here—i.e., invalidation of Alabama's map under Section 2—Alabama asks the Court to upend the *Gingles* framework and, in the process, scrap decades of precedent that states have relied on. The Court should decline that invitation and the chaos it would cause.

*Amici* States have "primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993). When fulfilling this responsibility, *Amici* States undertake a complex task in geography and democratic governance, as they consider "a variety of . . . demographic factors," including race, in order to achieve fair representation for their residents. *Shaw v. Reno* (*Shaw I*), 509 U.S. 630, 646 (1993). At the same time, *Amici* States must adhere to "delicately balanced requirements" under federal law, *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018), including the "now-familiar" *Gingles* framework, *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994). In reliance on the settled understanding of *Gingles*, *Amici* States have enacted legislative maps, defended them in court, and even, in some instances, modeled their own state election laws on this Court's conception of vote dilution.

In place of this familiar *Gingles* framework, Alabama asks the Court to impose a new test on states. But Alabama's version of *Gingles* would be

unworkable. It would turn vote dilution litigation into an unpredictable battle of the experts predicated on new technology and unclear standards. Moreover, in seeking to reformulate the standards for vote dilution claims, Alabama bears a heavy burden in asking the Court to overrule a long line of statutory precedent. Yet, Alabama presents no persuasive reason to abandon *Gingles* and its progeny—and especially not for the flawed alternative Alabama proposes.

## STATEMENT

Plaintiffs in two consolidated cases alleged that Alabama's failure to include an additional majority-Black district in its congressional map diluted the power of Black voters. *Milligan* Stay Appendix ("MSA") 36-41.[1]

To prove a vote dilution claim under the *Gingles* framework, a plaintiff must make a threshold showing, and then the court will consider the totality of the circumstances to determine if a legislative map dilutes the power of minority voters. *League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 425-26 (2006). The threshold showing involves three conditions, *id.* at 425, but only the first is relevant here. That first condition requires a plaintiff to show that a minority group is "'sufficiently large and geographically compact to constitute a majority' in some reasonably configured legislative district." *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017) (quoting *Gingles*, 478 U.S. at 50). "To make the

[1] Like the parties' briefs, this brief cites the appendix filed in support of the stay applications. Alabama Br. 2 n.1.

requisite showing, plaintiffs typically submit one or more illustrative, alternative maps complying with traditional districting criteria while also adding a majority-minority district." *Merrill v. Milligan*, 142 S. Ct. 879, 885 (2022) (Kagan, J., dissenting from grant of stay). Once a plaintiff makes that showing and satisfies the other two conditions, a court considers several factors (commonly called the "Senate Factors") to decide whether the state's failure to add a majority-minority district "has the effect of denying a [minority] the equal opportunity to elect its candidate of choice." *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993) (emphasis omitted).

Applying this framework here, in one of the cases, a three-judge district court found that Plaintiffs made the threshold showing and that the totality of circumstances showed that Alabama's map diluted the power of Black voters. MSA 195-96. The question whether Plaintiffs proved their case under *Gingles* was not "a close one." MSA 195. The court thus ordered Alabama to redraw its map. MSA 5-6, 210-14. In the other case, before a single judge, the court adopted the three-judge court's findings and issued a similar order. *Caster* Stay Appendix 4-6.

Now, Alabama and a group of *amici* states (led by Louisiana) ask this Court to upend the established *Gingles* framework in at least two ways. As to the first *Gingles* condition, Alabama argues that the Court should require that a plaintiff produce an illustrative map without considering race at all. Alabama Br. 47-50. To implement this new rule, plaintiffs would need to use computer software to generate some number of maps while ignoring race,

and then show that those computer simulations happened to produce a map with an additional majority-minority district. *Merrill*, 142 S. Ct. at 887 (Kagan, J., dissenting). Next, and regardless of a plaintiff's showing at step one or any other step of *Gingles*, Alabama says that if a state's plan "resembles" maps generated using race-blind computer simulations, then a Section 2 claim should automatically fail. Alabama Br. 45; *see also* Alabama Br. 54-56. Under this new version of *Gingles*, Alabama says Plaintiffs' Section 2 claim should fail. Alabama Br. 2.

## SUMMARY OF ARGUMENT

1. Alabama's contentions regarding the first *Gingles* condition rest on fundamentally incorrect premises. Alabama argues that plaintiffs should be required to produce illustrative maps without considering race because otherwise states would be required to adopt maps drawn with race in mind each time that a plaintiff shows that it is possible to draw maps with additional majority-minority districts. Alabama Br. 64-65. But that is not accurate. Under *Gingles*, states violate Section 2 and must redraw their maps only if a plaintiff actually *proves* vote dilution—not if a plaintiff merely produces an alternative map. And proving vote dilution requires a fact-intensive showing on the totality of the circumstances using the Senate Factors, among other things.

Moreover, contrary to Alabama's assertions, if a plaintiff proves vote dilution, the state need not adopt a plaintiff's proposed map but can draw its own. And if the state chooses to adopt a plaintiff's map, that

map will comport with the requirements of the Equal Protection Clause by either adhering to traditional redistricting principles or providing a tailored solution to an adjudicated finding of vote dilution. Thus, the Court should not accept Alabama's invitation to upend the first *Gingles* condition based on unfounded concerns of what that condition means for states.

2. Alabama's new version of *Gingles* is not only misguided but also unworkable. To begin, the current *Gingles* framework is sufficiently settled and regularly applied that it does not need replacement. Moreover, Alabama's proposed framework is far worse, as Alabama fails to define manageable standards and its standard would require states to use new computer technologies to implement. It is thus Alabama's proposal that would be unworkable, not *Gingles*.

3. Stare decisis considerations, including the *Amici* States' reliance on the settled *Gingles* framework, also weigh against accepting Alabama's new version of the first *Gingles* condition. States have long relied on how *Gingles* has been applied to draft redistricting maps and to defend against Section 2 challenges to those maps. And they have also relied on *Gingles* in enacting their own voting rights laws. A substantial reworking of *Gingles* could subject redistricting maps across the country to further legal challenge and could force states to reexamine their own state-law provisions. Moreover, Alabama tries to upend this Court's settled interpretation of a federal statute, yet Congress—not this Court—is best

situated to make changes to a federal statute in response to criticism about how it has been applied.

## ARGUMENT

### I. Alabama Misconstrues How The First *Gingles* Condition Affects States.

Alabama's arguments regarding the first *Gingles* condition proceed from a flawed account of how that condition affects states. The first condition merely requires a plaintiff to show that an additional majority-minority district is *possible*, usually by producing an illustrative map. *Merrill*, 142 S. Ct. at 887 (Kagan, J., dissenting). Then the analysis moves on to consider other factors. As Plaintiffs correctly explain, drawing such proposed maps has always necessarily involved some consideration of racial demographics because the purpose of the first *Gingles* condition is to show that another district may be drawn in which members of a particular minority race constitute at least 50% of the voting-age population. Br. for *Milligan* Appellees 43; Br. for *Caster* Resp'ts 52-57. But Alabama argues that plaintiffs should now be required to produce these sample maps in a race-blind manner by using redistricting software that can ignore race. Alabama Br. 47-50. Alabama claims that this requirement is necessary because otherwise states would be forced to adopt illustrative maps crafted with race as the primary motivator. Alabama Br. 47-50, 64-65. Alabama's argument relies on several mistaken premises, and each error undermines its core contentions.

A. Alabama is wrong that the "takeaway" from this case is that "where it is possible to draw an additional majority-black district, a State must draw

the district." Alabama Br. 65 (emphases omitted). Similarly, Louisiana's brief errs in asserting that *Gingles* demands that members of a minority group be able to elect representatives of their choice in strict proportion to the number of their voting-age members. Louisiana Br. 8-11. This is so for two reasons.

First, it is not true that a state must draw a map with an additional majority-minority district whenever a plaintiff shows at step one of the *Gingles* framework that it is possible to draw, or that proportionality demands, such a map. *De Grandy*, 512 U.S. at 1009-12. Rather, the state must redraw its map only if a plaintiff also proves, among other things, that the enacted map dilutes minority voting power based on a "comprehensive, not limited, canvassing of relevant facts" under the totality of the circumstances. *Id.* at 1011; *see Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (plurality op.) ("Majority-minority districts are only required if all three *Gingles* factors are met and if § 2 applies based on a totality of the circumstances."). Here, for example, Alabama was not required to draw an additional majority-Black district solely because Plaintiffs proffered maps with such a district. Alabama was required to do so because the district court found after a trial that every relevant factor—and there were many—indicated that Alabama's map diluted the power of Black voters. MSA 195-96.

Second, even if a plaintiff prevails on a Section 2 vote dilution claim, the state is *not* required to adopt the maps that the plaintiff offered at the first step of *Gingles*. *See, e.g.*, *Pope v. County of Albany*, 687 F.3d

565, 576 (2d Cir. 2012); *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (8th Cir. 2006); *Clark v. Calhoun County*, 88 F.3d 1393, 1407 (5th Cir. 1996). Those maps are used only "to prove that a solution is possible, and not necessarily to present the final solution to the problem." *Pope*, 687 F.3d at 576 (quoting *Bone Shirt*, 461 F.3d at 1019). Courts must give the state the first opportunity to redraw the districts to remedy vote dilution. *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 917 n.9 (1996). As a result, the state "is free . . . to develop a different remedial plan from those proposed by the plaintiffs." *Clark*, 88 F.3d at 1407. And that is exactly what happened here: the district court gave Alabama the opportunity to redraw its maps. MSA 210-14.

What is more, Alabama was not even required to add another majority-minority district. Rather, the district court stated that Alabama's remedial plan could include "either an additional majority-Black congressional district, or an additional district in which Black voters otherwise have an opportunity to elect a representative of their choice." MSA 5. So Alabama could have remedied the finding of vote dilution by, for example, creating a "crossover district" in which Black voters, although not a majority, could elect candidates of their choice "with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Bartlett*, 556 U.S. at 13 (plurality op.). Thus, Alabama had several options to remedy the finding of vote dilution here.

B. In any event, Alabama and its *amici* are also wrong—again, for two reasons—in arguing that

adopting a plaintiff's illustrative map to remedy a Section 2 violation would contravene the Equal Protection Clause. Alabama Br. 48; Louisiana Br. 1.

First, a legislative map is subject to strict scrutiny only if it "subordinat[es] traditional race-neutral districting principles . . . to racial considerations." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). When a plaintiff's mapmaker attempts to draw illustrative maps to satisfy the first *Gingles* condition, the mapmaker of course considers race, as courts and parties to redistricting litigation have long understood. *Merrill*, 142 S. Ct. at 886-87 (Kagan, J., dissenting); *see, e.g.*, *Davis v. Chiles*, 139 F.3d 1414, 1425-26 (11th Cir. 1998); *Clark*, 88 F.3d at 1407-08; *Sanchez v. Colorado*, 97 F.3d 1303, 1327-28 (10th Cir. 1996); *Cane v. Worcester County*, 35 F.3d 921, 926 n.6 (4th Cir. 1994). But considering race to answer the first *Gingles* question does not mean that the mapmaker *subordinated* traditional redistricting principles to race. *Robinson v. Ardoin*, 37 F.4th 208, 222-23 (5th Cir. 2022) (per curiam), *stayed and cert. granted*, No. 21-1596, 2022 WL 2312680 (U.S. June 28, 2022) (Mem.); *Davis*, 139 F.3d at 1425-26; *Clark*, 88 F.3d at 1407-08; *Sanchez*, 97 F.3d at 1328; *Cane*, 35 F.3d at 926 n.6. To the contrary, the first *Gingles* condition protects against that outcome by requiring that plaintiffs show that the proposed additional majority-minority district "take[s] into account traditional districting principles such as maintaining communities of interest and traditional boundaries." *LULAC*, 548 U.S. at 433 (quoting *Abrams v. Johnson*, 521 U.S. 74, 92 (1997)); *see Robinson*, 37 F.4th at 218. And as the district court correctly observed, a "rule that rejects as unconstitutional a remedial plan for

attempting to satisfy [the first *Gingles* condition] would preclude any plaintiff from ever stating a Section Two claim." MSA 205.

Applying this well-settled understanding of the first *Gingles* condition, the district court here found that Plaintiffs' proposed maps did not subordinate traditional redistricting criteria to race, MSA 204-05, and rejected Alabama's attempts to misconstrue the record otherwise, MSA 244-55. As a result, Alabama could adopt the illustrative maps here without triggering strict scrutiny. MSA 204-06, 259-60.

The district court's ruling was no outlier. Several other courts have likewise rejected the argument that an illustrative map was off-limits based on equal protection concerns, each noting that if a map does not subordinate traditional redistricting principles to race, strict scrutiny does not apply. *E.g.*, *Robinson*, 37 F.4th at 222-23; *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 301 F. Supp. 3d 1297, 1325-26 (M.D. Ga. 2018), *aff'd*, 979 F.3d 1282 (11th Cir. 2020); *Rodriguez v. Harris County*, 964 F. Supp. 2d 686, 745-46 (S.D. Tex. 2013), *aff'd sub nom. Gonzalez v. Harris County*, 601 F. App'x 255 (5th Cir. 2015).

Second, even if plaintiffs considered or prioritized race in a way that states normally could not, there would be no equal protection violation in adopting their maps to remedy a Section 2 violation. That is because remedying vote dilution satisfies strict scrutiny. This Court has long assumed as much. *Cooper*, 137 S. Ct. at 1464; *see also Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality op.). That assumption is correct. States have a compelling interest in complying with the VRA and preventing or

eradicating vote dilution. *Abbott*, 138 S. Ct. at 2315. And a properly drawn majority-minority district—which must account for traditional redistricting principles as reasonably necessary—created to remedy vote dilution is a narrowly tailored means to serve that end, *Bush*, 517 U.S. at 977 (plurality op.), that should not violate the Equal Protection Clause, *e.g.*, *Clark*, 88 F.3d at 1408; *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1401 (E.D. Wash. 2014); *Ga. State Conf. of the NAACP v. Fayette Cnty. Bd. of Comm'rs*, 950 F. Supp. 2d 1294, 1305 (N.D. Ga. 2013), *aff'd in part, vacated in part, and remanded*, 775 F.3d 1336 (11th Cir. 2015). Alabama thus misplaces its reliance on equal protection concerns when asking this Court to upend the first *Gingles* condition.

## II. Alabama's Radical Proposal For *Gingles* Would Be Unworkable For States.

Alabama's proposed replacement for the first *Gingles* condition is not only misguided but also unworkable. Contrary to Alabama and its *amici*'s assertions, the *Gingles* framework is settled and predictable for states. Alabama's new version of *Gingles*, on the other hand, is too undefined and dependent on new technology for states to workably implement. Thus, "if anything would be unworkable in practice, it would be for [the Court] now to abandon [its] settled jurisprudence" for Alabama's radical new approach. *Allied-Signal, Inc. v. Dir., Div. of Tax'n*, 504 U.S. 768, 785 (1992).

### A. The settled *Gingles* framework is workable for states.

The basic *Gingles* framework is settled and straightforward for states to apply in practice, and

they have regularly done so. For decades, *Gingles* has provided a structured analytical framework for states, allowing them to draw districts without diluting votes and to defend those districts in litigation. *See De Grandy*, 512 U.S. at 1010 ("*Gingles* provided some structure to the statute's 'totality of the circumstances' test . . . ."); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 942 (7th Cir. 1988) ("[*Gingles*] reins in the almost unbridled discretion that section 2 gives the courts, focusing the inquiry . . . ."); *McGhee v. Granville County*, 860 F.2d 110, 119 (4th Cir. 1988) (describing "the *Gingles* Court's careful effort to contain the vote dilution concept and claims based upon it within principled bounds"). Indeed, courts have applied that framework in hundreds of cases to various types of election practices. *E.g.*, Ellen D. Katz, et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. Mich. J.L. Reform 643, 655 (2006) (identifying 211 lawsuits from 1982 to 2006 that "produced at least one published merits decision on the question of whether Section 2 was violated"); *id.* at 756-70 (identifying which of those cases made a finding regarding the first *Gingles* condition). And the framework has applied to redistricting for single-member districts for nearly thirty years. *Growe*, 507 U.S. at 40-41. Given states' "long experience in applying" *Gingles*, the Court should not jettison such a well-established legal framework. *Allied-Signal*, 504 U.S. at 783; *see also Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (considering that states had relied on precedent when declining to overrule it).

Indeed, the first *Gingles* condition—which Alabama seeks to transform here, *see* Alabama Br. 68-70—"provides straightforward guidance . . . to those officials charged with drawing district lines to comply with § 2," *Bartlett*, 556 U.S. at 18 (plurality op.), and "has been the baseline of [the Court's] § 2 jurisprudence," *id.* at 16. The Courts of Appeals have repeatedly explained the ease with which this first condition can be applied. *See, e.g.*, *Dillard v. Baldwin Cnty. Comm'rs*, 376 F.3d 1260, 1268 (11th Cir. 2004) (stating that the first condition provides "ascertainable and objective standards"); *McNeil*, 851 F.2d at 942 ("The Court's approach, by focusing up front on whether there is an effective remedy for the claimed injury, promotes ease of application without distorting the statute or the intent underlying it."). As one court has explained, "the first *Gingles* question is straightforward and statistical" because it asks whether a district can be drawn with "a simple majority of the relevant [minority] population." *Pope*, 687 F.3d at 576. Indeed, the first condition has not been the subject of much critique. *See* Christopher S. Elmendorf, Kevin M. Quinn, & Marisa A. Abrajano, *Racially Polarized Voting*, 83 U. Chi. L. Rev. 587, 627 (2016) (contrasting judicial consensus around the first condition with the second). Accordingly, this Court has rebuffed efforts to modify it. *See Bartlett*, 556 U.S. at 19 (plurality op.) (collecting cases rejecting a new standard for the first condition and "declin[ing] to depart from the uniform interpretation of § 2 that has guided federal courts and state and local officials for more than 20 years"). This Court should do the same here.

### B. States would struggle to implement Alabama's version of *Gingles*.

Alabama's radical new approach to *Gingles* is not feasible to implement because Alabama fails to adequately define how its test operates and litigants should not be required to use particular technologies in every vote dilution case.

#### *1. Alabama fails to define a manageable standard.*

The ultimate inquiry in Alabama's new *Gingles* test is whether a state's plan "resembles" "neutrally drawn" maps, i.e., maps generated using race-blind computer simulations. Alabama Br. 45, 54-56. If it does, Alabama contends, the state's map cannot violate Section 2. But, beyond that headline, Alabama provides no guidance on how a standard based on deviation from a "neutrally drawn" map should work.

Start with "neutrally drawn," which Alabama suggests is a map drawn considering only "traditional redistricting principles" and ignoring race. Alabama Br. 53. But such principles "are numerous and malleable. . . . By deploying those factors in various combinations and permutations, a State could construct a plethora of potential maps that look consistent with traditional, race-neutral principles." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017); *see* Moon Duchin & Douglas M. Spencer, *Models, Race, and the Law*, 130 Yale L.J. Forum 744, 768 (2021) (explaining that computer simulations allow experts to generate a high volume of maps complying with traditional redistricting principles while ignoring race). As a result, if the

benchmark becomes "traditional redistricting criteria," then states will have to spend years of litigation hashing out which permutations will be the *baseline* "neutrally drawn" map for comparison under Alabama's theory. *See Rodriguez*, 964 F. Supp. 2d at 746 (observing that, "[g]iven the nuance and discretion involved in the redistricting calculus," one party can always object to a map by arguing that the mapmaker "did not weigh competing considerations in the same manner" as another would have).

Nor does Alabama define what it means for one map to "resemble" a "neutrally drawn" map. In other words, even if "neutrally drawn" maps are an identifiable baseline, then how much deviation from those maps is acceptable? Is it enough for courts to "eyeball" a map, or is there some mathematical function that assigns a value to the level of deviation? Even if those questions are answered, how many "neutrally drawn" maps must be produced as comparators and what percentage of them must "resemble" a state's map? And does the appropriate percentage depend on the degree of resemblance?

The Court faced similar questions in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), when considering a potential standard for partisan gerrymandering claims. One proposed standard was to generate maps with computer simulations using only traditional redistricting criteria and then compare those maps with a state's map. *Id.* at 2505; *see also id.* at 2517-18 (Kagan, J., dissenting). The more a map deviated from a "neutral baseline," the more likely that it was gerrymandered. *Id.* at 2505 (majority op.). But the Court concluded that such a

proposal did not provide a sufficiently manageable standard because there was no clear benchmark from which to compare a plan, and because deciding how much deviation from any such benchmark was too much constituted an "unanswerable question." *Id.* (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004) (plurality op.)). Alabama's proposal suffers from the same flaws and thus should fail for the same reasons.

*2. States should not be required to rely on computer simulations to litigate Section 2 vote dilution cases.*

In addition to lacking clarity, Alabama's proposal requires litigants to use new technologies. Alabama's new *Gingles* requires litigants to generate large numbers of race-blind maps, which can only be done with computer simulations. *See Merrill*, 142 S. Ct. at 887 (Kagan, J., dissenting); Jowei Chen & Nicholas O. Stephanopoulos, *The Race-Blind Future of Voting Rights*, 130 Yale L.J. 862, 882-84 (2021); Louisiana Br. 3, 10. But states should not be forced as a matter of law to rely on computer simulations to litigate every Section 2 vote dilution case. This Court has never demanded a particular form of evidence in vote dilution cases, and it should not do so now. *See De Grandy*, 512 U.S. at 1011 ("[U]ltimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts.").

To begin, the technology required for this approach is new. In simple terms, the technology involves inputting redistricting criteria into a computer program that then automatically and

randomly generates different maps complying with the programmed criteria. Chen & Stephanopoulos, *supra*, at 882-83. But only since 2013 has it even become possible to use algorithms to generate maps relying on the same criteria and geographical units that real mapmakers use. *Id.* Given that this method of litigating vote dilution cases is not widely practiced, it makes little sense to impose it as the standard for all cases. *See Merrill*, 142 S. Ct. at 887 (Kagan, J., dissenting) ("[W]hatever the pros and cons of [Alabama's] method, this Court has never demanded its use; we have not so much as floated the idea, let alone considered how it would work.").

This is not to say that computer simulation evidence is always unreliable or inadequate. Both plaintiffs and states may find that such evidence is an effective way of proving their case; and a trial court, as gatekeeper, may admit such evidence after carefully considering its reliability and value. But that is quite different from requiring, as a matter of law, that these technologies be used in every vote dilution case. While computer simulations may aid in particular cases, they should not be the universal standard of proof. Moreover, it simply makes no sense for Alabama to contend that the "only" valid way to apply the VRA requires technology that did not exist when the statute was enacted or *Gingles* was decided. Alabama Br. 70. The Court should reject Alabama's demand for this "[a]vulsive change" to the nature of Section 2 vote dilution litigation. Chen & Stephanopoulos, *supra*, at 946.

## III. Abandoning The *Gingles* Framework Would Improperly Upend Decades Of Reliance By States On That Established Framework.

Stare decisis principles weigh decisively against overturning the settled *Gingles* framework, particularly given that states and their residents have relied on that framework for decades in conducting redistricting. Where, as here, states have relied on a particular precedent, that reliance has weighed against overruling the precedent. *Allied-Signal*, 504 U.S. at 785; *Hilton*, 502 U.S. at 203.

In drafting and enacting state and congressional district maps, states have long relied on the settled understanding that the first *Gingles* condition contemplates identifying a discrete group of voters by race or ethnicity, and then determining whether that group can satisfy size, compactness, and reasonable configuration requirements. States have relied on this "straightforward guidance" from *Gingles*, *Bartlett*, 556 U.S. at 18 (plurality op.), in evaluating whether another majority-minority district might be needed to comply with the VRA. *See, e.g.*, *Johnson v. Wis. Elections Comm'n*, 972 N.W.2d 559, 571-72 (Wis. 2022) (evaluating whether an additional majority-minority district is needed to comply with VRA); *In re Colo. Indep. Legis. Redistricting Comm'n* (*Colorado Redistricting*), No. 21SA305, 2021 WL 5294962, at *7 (Colo. Nov. 15, 2021) (describing independent redistricting commission efforts to evaluate whether an additional majority-minority district needed under Section 2). And states have defended their maps, including current maps recently enacted after the 2020 census, against Section 2 challenges by arguing

that the plaintiffs bringing such challenges failed to satisfy the first *Gingles* condition. *See, e.g.*, *McConchie v. Scholz*, Nos. 21-CV-3091, 21-CV-3139, & 21-CV-5512, 2021 WL 6197318, at *6 (N.D. Ill. Dec. 30, 2021); *Colorado Redistricting*, 2021 WL 5294962, at *7.

Accepting Alabama's arguments here would undermine states' reliance on the *Gingles* framework and potentially subject their current maps to further legal challenges. For example, Alabama contends that following the longstanding *Gingles* framework "raises serious constitutional questions" as to whether the resulting maps are racially gerrymandered. *See* Alabama Br. 71. But accepting that argument would mean that state legislatures, independent redistricting commissions, and courts that have drawn district maps may have long engaged in racial gerrymandering simply by following this Court's precedent. Such a startling change would not only substantially alter decades of jurisprudence but also potentially open states' current maps to legal challenges—even though states faithfully followed *Gingles*.

States have also relied on the established *Gingles* framework in enacting their own redistricting requirements or voting-rights statutes. Drastically altering the *Gingles* framework could thus, at minimum, raise significant questions about the proper interpretation and application of these state laws as well. The Court should not accept such a destabilizing interpretation of the VRA. *See Allied-Signal*, 504 U.S. at 785 (pointing to reliance by state legislatures on "settled jurisprudence defining the

limits of state power to tax" in adhering to stare decisis); *Hilton*, 502 U.S. at 202-03 (considering, as one factor in favor of adhering to stare decisis, the extent to which states had crafted workers' compensation laws to exclude certain protections in reliance on the existence of those protections under federal law).

Several states' redistricting requirements mandate compliance with the VRA as an independent state-law obligation. For example, the state constitutions or statutes of California, Colorado, Illinois, Michigan, and Wisconsin expressly require that districts comply with the VRA.[2] In some of these states, the courts have expressly looked to "the decisions of the United States Supreme Court that construe" the VRA in evaluating whether maps comply with these state-law provisions. *E.g.*, *Detroit*

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[2] *See* Cal. Const. art. XXI, § 2(d)(2) ("Districts shall comply with the federal Voting Rights Act[.]"); Colo. Const. art. V, § 48.1(1)(b) (requiring that legislative redistricting plans "[c]omply with the federal 'Voting Rights Act of 1965'"); 10 Ill. Comp. Stat. § 120/5-5(a) (requiring districts to comply with "any federal law regarding redistricting Legislative Districts or Representative Districts, including but not limited to the federal Voting Rights Act"); Mich. Const. art. IV, § 6(13)(a) ("Districts shall . . . comply with the voting rights act and other federal laws."); Mich. Comp. Laws § 3.63(b)(ii) ("Each congressional district shall not violate section 2 of title I of the voting rights act of 1965."); Mich. Comp. Laws § 4.261a ("[State legislative districts] shall not violate section 2 of title I of the voting rights act of 1965."); Wis. Stat. Ann. § 5.081 (authorizing the attorney general to enforce section 2 of the VRA); *see also* Eric S. Lynch, *Going, Gutted, Gone? Why Section 2 of the Voting Rights Act Is in Danger, and What States Can Do About It*, 22 U. Pa. J. Const. L. 1441, 1471-75 (2020) (cataloguing all states that incorporate Section 2 standards in some way as a matter of state law).

*Caucus v. Indep. Citizens Redistricting Comm'n*, 969 N.W.2d 331, 331 (Mich. 2022) (Mem.).

Moreover, several states have enacted state constitutional or statutory language that parallels the language of Section 2 of the VRA, which forbids "political processes . . . not equally open to participation by members of" protected racial classes "in that [such] members 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). For example, the District of Columbia, New York, California, Colorado, and Washington prohibit election schemes that "dilut[e] the voting strength of minority citizens," D.C. Code § 1-1011.01(g), or that "impair[] the ability" of such voters "to elect candidates of their choice . . . as a result of vote dilution," N.Y. Elec. Law § 17-206(2)(a).[3] Although these provisions exist independently as state law, in many cases they "were

[3] *See also* Cal. Elec. Code § 14027 (prohibiting an "at-large method of election" that "impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class"); Wash. Rev. Code § 29A.92.020 (prohibiting an election method "that impairs the ability of members of a protected class or classes to have an equal opportunity to elect candidates of their choice as a result of the dilution or abridgment of the rights of voters who are members of a protected class or classes"); N.Y. Const. art. III, § 4(c)(1) ("Districts shall be drawn so that, based on the totality of the circumstances, racial or minority language groups do not have less opportunity to participate in the political process than other members of the electorate and to elect representatives of their choice.").

modeled on and embrace the principles of key provisions" of the VRA, including Section 2. *In re Senate Joint Resol. of Legis. Apportionment 100*, 334 So. 3d 1282, 1288 (Fla. 2022) (internal quotation marks and alterations omitted); *see also Colorado Redistricting*, 2021 WL 5294962, at *13 ("[W]e presume that in adopting the phrase 'including diluting the impact of that racial or language minority group's electoral influence' . . . , Colorado voters were referring to the then-existing protections against voter influence that were encompassed in the VRA."). Courts thus often look to precedents construing the VRA, including *Gingles*, in interpreting these state laws. *See, e.g.*, *Kingman Park Civic Ass'n v. Williams*, 924 A.2d 979, 987 (D.C. 2007) (interpreting the District's prohibition on vote dilution to incorporate the *Gingles* framework).

Even states with additional protections that go beyond the requirements of Section 2 nevertheless rely, to some extent, on federal-court interpretations of the VRA in their implementation. For example, the state statutes enacted by New York and California dispense with the *Gingles* requirement that the group of minority voters be geographically compact. *See* N.Y. Elec. Law § 17-206(2)(c); Cal. Elec. Code § 14028(c). And some states, like New York, Illinois, and Washington, allow the creation of crossover districts, coalition districts, or influence districts in which members of different minority groups may join together in demonstrating that their combined membership constitutes the majority in a proposed district. *See* N.Y. Elec. Law § 17-206(8); 10 Ill. Comp. Stat. § 120/5-5(a)-(b); Wash. Rev. Code § 29A.92.030(2). By contrast, the first prong of

*Gingles* requires establishing that a particular minority group constitutes the "majority" of voters in a "geographically compact" district. *Gingles*, 478 U.S. at 50-51. Nevertheless, *Gingles* may remain relevant in interpreting these state-law provisions. *See Yumori-Kaku v. City of Santa Clara*, 59 Cal. App. 5th 385, 392-94 (2020) (explaining that California VRA "was in part modeled" on "the interpretation of federal voting rights law," and that "[*Gingles*] serves as our principal guide [in interpreting the Act]," and noting, however, that only the second and third *Gingles* factors are required to prove a violation of the California VRA); Wash. Rev. Code § 29A.92.010 (providing that "courts may rely on relevant federal case law for guidance" in applying Washington's VRA).

As these examples demonstrate, states have relied on the VRA and the *Gingles* framework in crafting and applying their own state redistricting provisions. Indeed, all but one of the constitutional and statutory provisions described above were adopted after *Gingles*.[4] A sudden reworking of the *Gingles*

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[4] *See* Cal. Voting Rights Act of 2001, Cal. Legis. Serv. Ch. 129 (S.B. 976) (2002) (enacting Cal. Elec. Code §§ 14025-14032); Colo. Ballot Amends. Y, Z (2018) (amending the Colorado Constitution to add art. V, §§ 44.3, 48.1); 1990 D.C. Laws 8-240 (Act 8-323) (enacting what is now D.C. Code § 1-1011.01); N.Y. Ballot Proposal 1 (2014) (amending N.Y. Const. art. III, § 4); John R. Lewis Voting Rights Act of N.Y., 2022 N.Y. Laws ch. 226 (S. 1046-E) (enacting N.Y. Elec. Law § 17-206); Ill. Voting Rights Act of 2011, Pub. Act No. 96-1541 (S.B. 3976) (promulgating 10 Ill. Comp. Stat. § 120/5-5); 1999 Mich. Pub. Act No. 221 (S.B. No. 810) (promulgating Mich. Comp. Laws § 3.63(b)(ii)); 1996 Mich. Pub. Act No. 463, § 1 (H.B. No. 5275) (promulgating Mich.

framework by this Court, as Alabama demands, might "require these States to reexamine their statutes." *Hilton*, 502 U.S. at 203. If that raised new questions about whether the meaning of state-law provisions had changed in parallel with a revised understanding of Section 2, that would, in turn, open the door to countless lawsuits attempting to require mid-cycle changes in district lines. This Court should decline Alabama's unwarranted invitation to upend the *Gingles* framework given the negative effects such a ruling would have on states.

Indeed, Congress remains free to alter—or, as it has for nearly forty years, leave in place—the framework this Court set forth in *Gingles* for adjudicating Section 2 cases. *Gingles* was itself the result of a statutory amendment to Section 2 that arose directly out of Congress's disagreement with this Court's prior interpretation of the VRA. *See Gingles*, 478 U.S. at 35. Because "Congress, not this Court, has the responsibility for revising its statutes," *Neal v. United States*, 516 U.S. 284, 296 (1996), the Court should leave to Congress the policy questions of whether and how to alter the requirements for establishing a Section 2 claim.

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Comp. Laws § 4.261a); Mich. Ballot Proposal 18-2 (2018) (amending Mich. Const. art. IV, § 6); Wash. Voting Rights Act of 2018, 2018 Wash. Legis. Serv. Ch. 113 (S.S.B 6002) (enacting Wash. Rev. Code Chapter 29A.92). The only statute that predates *Gingles* is Wis. Stat. Ann. § 5.081, which was passed in 1985. *See* 1985 Wis. Act 312 (enacting Wis. Stat. § 5.081). Section 2 has not been amended as relevant here since *Gingles* was issued in 1986.

## CONCLUSION

This Court should affirm the judgments of the district court.

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