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

***Amicus Curiae* Brief of the Lawyers Democracy Fund in Support of Appellants/Petitioners**

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INTEREST OF THE AMICUS[1]

Lawyers Democracy Fund ("LDF") is a non-profit organization established in 2007 to promote the role of ethics, integrity, and legal professionalism in the electoral process. To accomplish this, LDF primarily conducts, funds, and publishes research and in-depth analysis regarding the effectiveness of current and proposed election methods, particularly those that fail to receive adequate coverage in the national media. Robust defense of reasonable, validly enacted election laws is essential to achieve these goals. As part of its mission, LDF is a resource for lawyers, journalists, policymakers, courts, and others interested in elections and the electoral process.

The need for clarity in the application of the Voting Rights Act to the decennial redistricting process is profoundly important. Redistricting authorities throughout our Nation need a clear legal standard to appropriately navigate the "competing hazards of liability," *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 802 (2017), occasioned by the Voting Rights Act's requirement to consider race in redistricting, on one hand, and the limitations on the use of race compelled by the Fourteenth Amendment's Equal Protection Clause, on the other. That certainty also inspires public confidence in the electoral process

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[1] No counsel for a party authored this brief in whole or in part, and no person other than LDF and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have filed a blanket consent to amicus briefs with the Clerk.

and the rule of law. LDF supports efforts to improve judicial review of election laws. For these reasons, LDF has an interest in the issues presented in Appellants' appeals in these consolidated cases.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

A legislature's attempt to simultaneously comply with the Voting Rights Act, which sometimes compels drawing districts on the basis of race, and with the Equal Protection Clause, which restricts the use of race, too often leaves the legislature "trapped between the competing hazards of liability" created by those competing requirements. *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 802 (2017) (quoting *Bush v. Vera*, 517 U.S. 952, 977 (1996)).

This legal regime requires states to minimize the use of race in redistricting to comply with the Fourteenth Amendment, while simultaneously considering race where necessary to avoid minority vote-dilution under Section 2 of the Voting Rights Act. A jurisdiction can be found liable under Section 2 if does not consider race enough, i.e., by failing to draw a majority-minority district where one is necessary to assure minority voters an equal opportunity to elect their preferred candidates. *See, e.g., Luna v. County of Kern,* 291 F. Supp. 3d 1088 (E.D. Cal. 2018); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976 (D.S.D. 2004); *Williams v. City of Dallas*, 734 F. Supp. 1317 (N.D. Tex. 1990).

But on the other hand, a jurisdiction that considers race too much in its redistricting, i.e., one that draws a race-based district *beyond* that needed to comply with Section 2, can find its plan struck down as a racial-gerrymander in violation of the Equal Protection Clause. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455,

1472 (2017); *Bethune-Hill v. Virginia State Bd. of Elections*, 326 F. Supp. 3d 128, 176–77 (E.D. Va. 2018); *Abbott v. Perez*, 138 S. Ct. 2305, 2334–35 (2018); *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 277 (2015).

Having clear guidance on how to balance these delicate, and often competing goals, is essential to guide the conduct of states and localities, political actors, courts, and the public. The district court decision adds confusion, rather than clarity, to the law.

The district court found that Alabama's newly enacted congressional district plan violated Section 2 of the Voting Rights Act because the plan had established one majority-minority district but should have established two. But the only way a second district could be drawn was by prioritizing race as a "nonnegotiable" design criterion that predominated over traditional districting principles. Although this second district sprawled the entire width of the state (some 250 miles), SJA27, 99–109, 149, the district court deemed it a "compact" and "reasonably configured" district to satisfy the first *Gingles* precondition. *Cooper*, 137 S. Ct. at 1470.

The district court's decision is inconsistent with this Court's precedents. If allowed to stand, the district court's decision will make redistricting standards more confusing and force states to guess when, and how much, they must subordinate traditional districting principles to "racial considerations" that trigger strict scrutiny, *id.* at 1463–64, without violating the Fourteenth Amendment. Adopting the district

court's approach to the first *Gingles* precondition would increase litigation, turning over more redistricting decisions to the courts from the people's elected legislative representatives.

This Court should reverse and should clarify the standards for a "reasonably configured" district under *Gingles*.

ARGUMENT

I. This Court Should Reverse The District Court And Clarify The Requirements For An Illustrative District To Be "Reasonably Configured" To Satisfy *Gingles*' First Precondition.

After each decade's census, the States undertake a "periodic revision of their apportionment schemes," *Reynolds v. Sims*, 377 U.S. 533, 583 (1964), to adjust district boundaries to account for population changes. This essential task is "primarily the duty and responsibility of the State through its legislature or other body..." *Growe v. Emison*, 507 U.S. 25, 34 (1993) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)).

"Redistricting is never easy." *Abbott*, 138 S. Ct. at 2314. Rather, it is "a most difficult subject for legislatures," *Miller v. Johnson*, 515 U.S. 900, 915 (1995), requiring them to make hundreds of discrete decisions about how to divide their territories into districts while navigating the "complex interplay of forces that enter a legislature's redistricting calculus," *id.* at 915–16.

Race is among the most complex challenges in the redistricting legal landscape. States often find themselves "trapped" between the "competing hazards" of Section 2 and Fourteenth Amendment racial-gerrymandering liability. *Bethune-Hill*, 137 S. Ct. at 802. Legislatures are capable of discharging their responsibilities under Article I, Section 4 of the Constitution,[2] but obtuse legal standards inevitably shift redistricting decision-making to the judicial branch.

Indeed, redistricting litigation has proliferated this cycle. The Brennan Center reports that, as of April 29, 2022, "a total of 68 cases have been filed challenging congressional and legislative maps in 24 states as racially discriminatory and/or partisan gerrymanders."[3] The expense, disruption, and legal risk that flows from the use of race in redistricting not only confounds legislatures but also polarizes the electorate.

A. The Fourteenth Amendment Circumscribes The Use Of Race In Redistricting.

The first competing hazard of liability is a racial-gerrymandering claim. Specifically, "[t]he Equal Protection Clause [of the Fourteenth Amendment] forbids 'racial gerrymandering,' that is, intentionally as-

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[2] *See Arizona State Legislature v. Arizona Indep. Redistricing Comm'n*, 576 U.S. 787, 824–27 (2015) (Roberts, C.J., dissenting).

[3] Brennan Center for Law and Justice, *Redistricting Litigation Roundup*, Apr. 26, 2022, https://www.brennancenter.org/our-work/research-reports/redistricting-litigation-roundup-0 (visited Apr. 29, 2022).

signing citizens to a district on the basis of race without sufficient justification." *Abbott*, 138 S. Ct. at 2314 (citing *Shaw v. Reno*, 509 U.S. 630, 641 (1993) ("*Shaw I*")). The Fourteenth Amendment limits "the deliberate segregation of voters into separate districts on the basis of race." *Shaw*, 509 U.S. at 641. Indeed, districting maps that "sort voters on the basis of race 'are by their very nature odious.'" *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (quoting *Shaw*, 509 U.S. at 643).

This Court has developed a two-part test to evaluate racial gerrymandering claims. First, a Fourteenth Amendment plaintiff must show "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Bethune-Hill*, 137 S. Ct. at 797 (citation omitted). Second, "[w]here a challenger succeeds in establishing racial predominance, the burden shifts to the State to 'demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest.'" *Id.* at 800–01 (citation omitted).

At the tailoring stage, the question is whether "the legislature [had] a strong basis in evidence in support of the (race-based) choice that it has made." *Id.* at 801. That test is a demanding one, as redistricting plans that assign voters based on race are subject to the "strictest scrutiny." *Miller*, 515 U.S. at 915.

This Court has long "assumed" that compliance with the Voting Rights Act of 1965 ("VRA") can be a

compelling state interest to justify race-based redistricting. *Abbott,* 138 S. Ct. at 2315. Where a state asserts the VRA as its compelling interest, the question is whether "the legislature has '*good reasons* to believe' it must use race in order to satisfy the Voting Rights Act." *Bethune-Hill,* 137 S. Ct. at 801 (emphasis in original) (citation omitted). In particular, "[i]f a State has good reason to think that all the '*Gingles* preconditions' are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district. But if not, then not." *Cooper*, 137 S. Ct. at 1470 (citation omitted). For a state to justify a district under VRA § 2, it must adduce evidence—at the time of redistricting—establishing the three *Gingles* preconditions (described below). *See, e.g.*, *Bethune-Hill*, 137 S. Ct. at 801; *Cooper*, 137 S. Ct. at 1470.

B. Section 2 Of The Voting Rights Act Sometimes Compels The Use Of Race In Redistricting To Ensure Districts Are "Equally Open" To All Voters.

But competing with the Fourteenth Amendment is the Voting Rights Act, which can *require* the use of race in redistricting. Under Section 2 of the VRA, no state may deny or abridge a person's right to vote "on account of race or color." 52 U.S.C. 10301(a). "A State violates § 2 if its districting plan provides 'less opportunity' for racial minorities 'to elect representatives of their choice.'" *Abbott*, 138 S. Ct. at 2314 (quoting *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 425 (2006) ("*LULAC*")). The Court "has construed § 2 to prohibit the distribution of minority

voters into districts in a way that dilutes their voting power." *Wisconsin Legislature*, 142 S. Ct. at 1248.

To prove a claim that § 2 requires a state to establish majority-minority districts in a jurisdiction, a plaintiff must first prove "three threshold" elements. *Cooper*, 137 S. Ct. at 1470. Those elements, i.e., the *Gingles* preconditions, are as follows:

> (1) The minority group must be sufficiently large and compact to constitute a majority in a reasonably configured district,
>
> (2) the minority group must be politically cohesive, and
>
> (3) a majority group must vote sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidate.

Wisconsin Legislature, 142 S. Ct. at 1248 (citing *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986)); *see also Cooper*, 137 S. Ct. at 1470. Notably, "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994) (quoting *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993)).

If a plaintiff can establish all three *Gingles* preconditions in a jurisdiction, the court must then "consider all other relevant circumstances and must ultimately find based on the totality of those circumstances that members of a protected class 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of

their choice.'" *Shaw v. Hunt*, 517 U.S. 899, 914 (1996) *("Shaw II")* (quoting 52 U.S.C. § 10301(b)).

While *Shaw* and its progeny treat districts drawn predominantly on the basis of race as "odious" under the Fourteenth Amendment, this Court has interpreted Section 2 "to mean that, under certain circumstance, States must draw 'opportunity' districts in which minority groups form 'effective majorit[ies],'" *Abbott*, 138 S. Ct. at 2315 (citation omitted), i.e., States may have to draw race-based districts. But there are limits to this obligation. "[C]ourts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law" under the VRA. *Voinovich*, 507 U.S. at 156.

C. The District Court's Decision Creates Further Confusion And Litigation Risk In An Already Challenging Redistricting Environment.

Navigating these competing hazards of liability requires clear, workable standards for when Section 2 requires the consideration of race in redistricting. The district court's decision fails to offer such standards, and if allowed to stand will only exacerbate the expense, disruption, and legal risk facing the redistricting process.

1. In a vote-dilution case, an essential issue is the choice of benchmark used to assess the claimed "dilution." Stated differently: is a person's vote diluted compared to *what baseline*? *See, e.g.*, *Brnovich v. Democratic Nat'l Cmte.*, 141 S. Ct. 2321, 2338 (2021)

("[I]t is useful to have benchmarks with which the burdens imposed by a challenged rule can be compared"); *Gingles*, 478 U.S. at 88 (O'Connor, J., concurring in judgment) ("[I]n order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it should be for minority voters to elect their preferred candidates under an acceptable system"); *Holder v. Hall*, 512 U.S. 874, 896 (1994) (Thomas, J., concurring in judgment) ("The central difficulty in any vote dilution case, of course, is determining a point of comparison against which dilution can be measured."). For a Section 2 vote-dilution claim, the "benchmark" is a "hypothetical, undiluted plan" the plaintiff must proffer. *See Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 478–80 (1997).

Gingles' first precondition is critical to supplying that benchmark. A Section 2 plaintiff establishes that a "minority group [is] sufficiently large and compact to constitute a majority in a reasonably configured district," *Wisconsin Legislature*, 142 S. Ct. at 1248, by showing that "there is a 'possibility of creating more than the existing number of reasonably compact' opportunity [i.e., majority-minority] districts," *Abbott*, 138 S. Ct. at 2331 (quoting *LULAC*, 548 U.S. at 430). The compactness inquiry is vital, because Section 2 "does not require a State to create, on predominantly racial lines, a district that is not 'reasonably compact.'" *Abrams v. Johnson*, 521 U.S. 74, 91–92 (1997) (quoting *Johnson*, 512 U.S. at 1008).

2. In this case, the preliminary-injunction record makes clear that two majority-minority districts could be created in Alabama only through the predominant consideration of race. Two redistricting experts, Drs. Moon Duchin and Kosuke Imai, used sophisticated computerized tools to create ensembles of plans (over two million in all) without expressly considering race. SJA58–59 (Imai); JA710–14 (Duchin). None of their plans two majority-minority districts. As Dr. Duchin explained, this result demonstrated that "it is hard to draw two majority-black districts by accident," which "shows the importance of doing so on purpose." JA714. In addition to the expert evidence, Appellants report that one of the lead Plaintiffs attempted to draw a congressional plan with two majority-minority districts with the benefit of training and software but could not do so. Appellants' Br. at 23–24.

Plaintiffs' illustrative districts were, then, all drawn with race as a "nonnegotiable principle," MSA60, and only "after" their racial targets were satisfied were traditional districting principles allegedly considered, MSA60–61. The district court credited this approach, finding it defensible for Plaintiffs' experts to prioritize race to answer the essential question, "is it possible to draw two reasonably compact majority-Black congressional districts?" MSA266. The district court deemed this prioritization of race acceptable so long as, once the target was met, Plaintiffs' experts "assigned greater weight to other traditional redistricting criteria." MSA266.

But that is, on its face, a classic subordination of traditional districting criteria to race.[4] Plaintiffs proffered, and the district court accepted, a racially gerrymandered map as the "hypothetical, undiluted plan" as the benchmark for their vote-dilution claim. *Reno*, 520 U.S. at 480. In *Shaw II*, the Court found racial predominance where "[r]ace was the criterion that, in the State's view, could not be compromised; respecting communities of interest and protecting Democratic incumbents came into play only after the race-based decision had been made." *Shaw II*, 517 U.S. at 907; *see also Miller v. Johnson*, 515 U.S. 900, 919 (1995) (rejecting defense to racial gerrymandering claim based on compliance with "traditional districting principles" where "those factors were subordinated to race").

3. To understand the challenges posed by the district court's approach, consider how a legislature or other redistricting authority would have to proceed under the framework endorsed by the district court in this case. Before the legislature can use race to redistrict, the legislature must have a "strong basis in evidence" to believe VRA compliance requires "race-

[4] The computer-simulation results could themselves be evidence of racial predominance. The simulations, when run race-blind, did not yield a single plan with two majority-minority districts; two such districts only emerged when race was a "nonnegotiable" constraint. In the partisan-gerrymandering context, similar simulations analyses have been used "to assess whether partisanship has run amok," i.e., whether traditional districting principles were subordinated to partisanship. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2520 (2019) (Kagan, J., dissenting).

based district lines." *Cooper*, 137 S. Ct. at 1464; *see also Abbott*, 138 S. Ct. at 2334. That inquiry, in turn, requires the legislature to determine if the *Gingles* preconditions are satisfied. *Cooper*, 137 S. Ct. at 1471.

Under the district court's framework, to evaluate the first *Gingles* precondition, a legislature would first have to engage in "serious gerrymandering" on the basis of race, *Gonzalez v. City of Aurora*, 535 F.3d 594, 600 (7th Cir. 2008) (Easterbrook, J.), to attempt to identify majority-minority districts within a state or region. Then, the potential districts would have to be assessed to determine if they are "compact" and "reasonably configured" to serve as suitable comparator districts under *Gingles*. *Wisconsin Legislature*, 142 S. Ct. at 1248.

This approach fails to provide any clarity to redistricting bodies to help them govern their conduct. To the contrary, it is a recipe for nothing but chaos, litigation, and judicial policymaking.

First, the district court offers no limiting principle (other than mathematics) to determine *how many* majority-minority districts a legislature must attempt to draw. But mathematical maximums are not a valid limiting principle, because "reading § 2 to define [vote] dilution as any failure to maximize tends to obscure the very object of the statute and run counter to its textually stated purpose." *Johnson*, 512 U.S. at 1016–17 (concluding that "failure to maximize cannot be the measure of § 2"); *see also, e.g.*, *LULAC*, 548 U.S. at 435 ("[T]he mathematical possibility of a racial bloc

does not make a district compact"); *Wisconsin Legislature*, 142 S. Ct. at 1249 (rejecting "uncritical majority-minority district maximization").

Second, the *Gingles* compactness inquiry is complex and dependent on the very traditional districting principles that the district court permitted Plaintiffs to subordinate to race. *Gingles* compactness is not a measurement of the shape of a district; it instead entails an assessment of the minority community with a focus on traditional districting principles, including respect for traditional boundaries and communities of interest. *See infra* § II(A). Many of these principles are subjective or qualitative in nature, leaving room for litigants to second-guess the legislature's choices. Assessing compactness under the district court's analysis is challenged by the fact that compliance with traditional districting criteria is part of the compactness inquiry, yet the court below permitted those criteria to "yield" to race, at least until the plan achieves the desired number of districts. MSA214. But if compactness constraints that block the creation of a new, "compact" majority-minority district can be forced to "yield" until the district can be drawn, compactness soon loses its power as a limiting principle. And that appears to have occurred in this case when Plaintiffs' experts made race the "nonnegotiable" criteria for drawing their illustrative benchmark plans.

This Court has previously held that "the need for workable standards and sound judicial and legislative administration" counseled in favor of adopting a bright-line rule for the first *Gingles* precondition.

Bartlett v. Strickland, 556 U.S. 1, 17 (2009). This is an area where bright-line, objective rules—like one requiring Section 2 illustrative districts be drawn in a race-neutral manner—add value and clarity in an area of law bedeviled by complexity and uncertainty. The district court's decision below fails to offer a path out of the "legal obstacle course," *Abbott*, 138 S. Ct. at 2315, but instead leads litigants and courts deeper into the thicket. Legislatures, lower courts, and the public would be better served with a clear, administrable standard for determining the benchmark "undiluted" plan to use to judge a Section 2 vote-dilution claim, and Amicus urges the Court to adopt one.

II. The Court Should Affirm That A "Reasonably Configured" District Is One That Comports With Traditional Districting Principles.

This case offers an important opportunity for this Court to clarify the parameters of a "compact" and "reasonably configured" district to serve as the comparator for a vote-dilution claim under Section 2 of the VRA. For the following reasons, the Court should affirm that for a district to be compact and reasonably configured, it must follow traditional districting principles such as maintaining communities of interest and traditional boundaries. Doing so honors the important doctrinal, historical, and policy reasons behind district-based representation. Mathematical measures of district compactness, by contrast, do not adequately capture these important qualitative features of districts—and, as applied in this case, do not

even address the legally important question: the compactness *of the minority community* itself.

A. Judging The Compactness Of A Minority Population Requires In-Depth Analysis Of Traditional Districting Principles.

1. The first *Gingles* precondition requires that the minority group be "sufficiently large and compact to constitute a majority in a reasonably configured district." *Wisconsin Legislature*, 142 S. Ct. at 1248. Notably, "compactness" for *Gingles* purposes is not the same thing as the "compactness" analysis for an equal-protection claim, which focuses on "the contours of district lines to determine whether race was the predominant factor in drawing those lines." *LULAC*, 548 U.S. at 433 (citing *Miller*, 515 U.S. at 916–17)); *see also Bush*, 517 U.S. at 997 (Kennedy, J., concurring); *Shaw II*, 517 U.S. at 916.

Compactness for *Gingles* purposes is different. It focuses on the compactness of the minority community itself, which requires a deeper analysis of that community than just its geographic shape. While "no precise rule has emerged governing § 2 compactness," *LULAC*, 548 U.S. at 433, the "inquiry should take into account 'traditional districting principles such as maintaining communities of interest and traditional boundaries,'" *Abrams*, 521 U.S. at 92 (quoting *Bush*, 517 U.S. at 977).

2. A central focus on communities of interest and traditional boundaries is essential to analyzing whether the subject minority community can be

drawn into a "reasonably configured" district. A "reasonably configured" majority-minority district should be one drawn in a manner reasonably consistent with other districts in the plan, which themselves respect these time-honored principles. Communities are not defined solely by race, and consideration of "nonracial communities of interest reflects the principle that a State may not 'assum[e] from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls.'" *LULAC*, 548 U.S. at 433 (quoting *Miller*, 515 U.S. at 920)). In the absence of that "prohibited assumption, there is no basis to believe that a district that combines two farflung segments of a racial group with disparate interests provides the opportunity that § 2 requires or that the first *Gingles* condition contemplates." *Id.*

LULAC illustrates the point well. In that case, Texas had created a majority-Latino district (District 25) that combined "the Latino community near the Mexican border" with "the one in and around Austin," with a "300-mile gap" between the two Latino communities. 548 U.S. at 432, 434. Despite the two Latino communities having different backgrounds and interests, however, the district court in that case concluded the resultant district was reasonably compact because of the "relative smoothness of the district lines," *id.* at 432–33. This was problematic because "the practical consequence of drawing a district to cover two distant, disparate communities is that one or both groups will be unable to achieve their political goals."

Id. at 434. In particular, the Court credited the idea that the sprawling size and diversity of the new district "could make it more difficult for the constituents in the Rio Grande Valley to control election outcomes." *Id.* (quotation omitted). Compactness, then, is not about "style points" for the district but is instead "critical to advancing the ultimate purposes of § 2," i.e., ensuring equal electoral opportunity. *Id.*

To be sure, the physical distance separating the different elements of the asserted minority community matters to the analysis. The "enormous geographical distance" separating the two Latino communities was an essential element that, in combination with the "disparate needs and interests of these populations," rendered the district noncompact. *Id.* at 435. Likewise, the sprawling size and character of North Carolina's District 12 doomed it in *Shaw II*. *See Shaw II*, 517 U.S. at 916 ("No one looking at District 12 could reasonably suggest that the district contains a 'geographically compact' population of any race."). But a rigorous analysis of the communities of interest and traditional boundaries in the region in question is equally essential to ensure the minority community is truly "compact" for purposes of § 2.

B. The "Compactness" Inquiry Should Incorporate The Notion That A District Is A Recognizable Representational Unit Of Geography.

Furthermore, judging *Gingles* compactness in part on respect for traditional districting principles is consistent with the historical meaning of a "district" as a

recognizable geographic unit of representation and vindicates important representational policy goals.

The term "district" encompasses the views of the Founding Fathers that effective representation can be accomplished by dividing a state into geographic units encompassing relatively recognizable meanings. Such districts give effect to political subdivisions, allow representatives to "bring with them...a local knowledge of their respective districts," and can thereby effectively represent their constituencies. *The Federalist No. 56*, at 261 (James Madison) (Hallowell ed., 1842).

Further support for the historical understanding of the term "district" is found in the debates on the Apportionment Act of 1842, "which required single-member districts for the first time" for congressional districts. *Rucho v. Common* Cause, 139 S. Ct. 2484, 2495 (2019). That debate further indicates that Congress used the term to refer to a recognizable local representational unit of geography that respects political subdivisions. Senator Graham commented "we find in every great nation with any extension of country…that the representative assemblies of the people have been chosen by counties, parishes, departments, and districts, by whatever named called. It ensures that personal and intimate acquaintance between the representative and constituent which is of the very essence of true representation." *Cong. Globe*, 27th Cong., 2d Sess. app. 749 (1842). The House debate also focused on the advantages of localized, geographically recognizable districts. Representative Summers

stated, "The essential feature of representative democracy is that the Representative shall reflect the will and know the wants of his constituents. He should live among them, be familiar with their condition, and hold with them a common political interest. These ends can only be secured by providing for representative elections in districts suited to the situation and convenience of the people." *Id.* at 354.

Nothing in the legislative history of the first Apportionment Act would indicate that the drafters ever considered that districts would be divided in any way other than straightforward geographic partitions representing local interest. And while the 1842 Apportionment Act has gone through a number of renditions over the past 150 years, the requirement that Congressional elections be held in "districts" has remained generally constant since 1842.[5] It remains so today. *See* 2 U.S.C. § 2c.

In contrast, the tortured and sprawling amalgamations of census geography that appear in some district plans largely fail to follow any political boundaries or evince any geographical reasoning, preventing representatives from becoming intimately familiar with issues important to their constituents. Such meandering districts often require the representative to represent communities of diverse interests, are inconven-

[5] The Apportionment Act of 1850, ch. 11, 9 Stat. 433, eliminated the provision requiring election by districts, but this provision was restored twelve years later in the Apportionment Act of 1862, ch. 170, 12 Stat. 572.

ient for voters, and make it far more difficult for candidates and members to become familiar with the issues that matter to their constituents. Thus, requirements that preserve political subdivisions serve independent values, including facilitation of political organization, electoral campaigning, and constituent representation. *See Karcher v. Daggett*, 462 U.S. 725, 756 (1983) (Stevens, J., concurring); *see also Prosser v. Election Bd.*, 793 F. Supp. 859, 863 (W.D. Wis. 1992) (three-judge court per curiam).

Congressional representatives are elected to "represent people" and "not trees or acres," *Reynolds*, 377 U.S. at 562, but people participate in our political process through group action. Legislators represent not only individuals, but also the interests of organized and unorganized associations of individuals. If members of a legislature become uncoupled from specific political subdivisions, their bonds to identifiable interests are lessened. Legislative members cast free of the responsibility for specific communities of interest become more vulnerable to the influence of special, or single, interest groups. This is why respect for communities of interest remains an important districting principle in the modern age of technology when communities can take many forms. Subordinating traditional districting principles to race, and thereby creating a § 2 "district" that departs from the traditional common understanding of a district, would risk depriving those voters of these benefits of traditional districting.

C. The District Court's Use Of Mathematical Measurements Of District Compactness To Evaluate Plaintiffs' Illustrative Benchmark Districts Illustrates The Limitations Of Those Metrics.

As part of the district court's "compactness" analysis under *Gingles*, the court credited mathematical measurements of the compactness of Plaintiffs' various illustrative remedial plans. The court's use of these measurements reveals weaknesses in those metrics that underscore the importance of relying on traditional districting principles for the *Gingles* compactness analysis.

In its compactness analysis, the district court began with a review of mathematical compactness measures using "an average Polsby-Popper metric," MSA167, which is a statewide calculation (i.e., the average Polsby-Popper score of all the districts in a given plan). The Polsby-Popper score is a ratio "comparing a region's area to its perimeter," and is expressed as a score from 0 to 1 with higher scores being ranked as more compact. MSA63.

Looking at the illustrative remedial plans submitted by both the *Milligan* and *Caster* plaintiffs, the court concluded that the plans as a whole were more compact than Alabama's enacted 2021 congressional plan using the Polsby-Popper metric. MSA167–68. The court also credited Dr. Duchin's testimony that her remedial plans' least compact districts, Districts 1 and 2, were "comparable to or better than the least compact plans" in the 2021 plan or the 2011 plan.

MSA167. Therefore, the court concluded, "based on statistical scores of geographic compactness, each set of Section Two plaintiffs has submitted remedial plans that strongly suggest that Black voters in Alabama are sufficiently numerous and reasonably compact to comprise a second majority-Black congressional district." MSA168.

But those metrics add little value to the compactness inquiry. To begin, Plaintiffs used these tools to measure the shape of their illustrative remedial plans and *not* the shape of Alabama's Black community, which is the relevant inquiry for *Gingles*. *LULAC*, 548 U.S. at 433; *Bush*, 517 U.S. at 997.

Second, statewide average compactness measures (or a comparison between the "least compact" districts among two plans) are not probative of the compactness of the proposed illustrative majority-minority district. It is unclear how the compactness of districts far from the Black Belt or Mobile County inform the "compactness" of the Black population residing in those regions. Nor is a statewide approach consistent with the intensely local nature of Section 2, which requires a remedy in the location of the injury and not elsewhere. *See, e.g.*, *Shaw II*, 517 U.S. at 917 ("The vote-dilution injuries suffered by these persons are not remedied by creating a safe majority-black district somewhere else in the State."); *LULAC*, 548 U.S. at 429 ("The Court has rejected the premise that a State can always make up for the less-than-equal opportunity of some individuals by providing greater opportunity to others."). Looking at an *average* allows

more compact districts in a different portion of the state to mask uncompact districts elsewhere.

Third, mathematical models of district compactness have methodological limitations and are often internally inconsistent. As one recent article put it, "scholars have shown that in fact compactness is a complicated multidimensional concept and have offered almost 100 different features of it." Aaron R. Kaufman, Gary King, Mayya Komisarchik, *How To Measure Legislative District Compactness If You Only Know It When You See It*, 65 Am. J. Poly. Sci. 533, 534 (July 2021). And the calculations given by these mathematical measurements can vary widely and be internally inconsistent; in their study, the paper's authors "estimate[d] that in our collection of 17,896 state legislative and congressional districts..., there exist 162 trillion sets of four districts such that every one of the seven measures [of compactness] provides a unique rank order." *Id.* at 536.

The same is true of the compactness measurements the district court relied on in this case. Dr. Duchin, *Milligan* Plaintiffs' expert, reported the following statewide measures of district compactness for her four remedial plans and for Alabama's enacted plan:

Compactness

	block cut edges (lower is better)	average Polsby-Popper (higher is better)	average Reock (higher is better)
HB-1	3230	0.222	0.427
Plan A	3417	0.256	0.378
Plan B	3127	0.282	0.365
Plan C	3774	0.255	0.338
Plan D	3540	0.249	0.399

SJA29 at Tbl. 2. Under her three metrics, Alabama's enacted plan was the most compact using the Reock measure, scored second-best on the "block cut edges" score, and was less compact than all four of her proposed remedial plans on the Polsby-Popper score. *Id.* Attempts to use these measurements, given their volatility and inconsistency, simply invite more uncertainty and litigation—the "devil lurks precisely in such details." *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004).

These mathematical measurements also obscured, rather than captured, the fact that Plaintiffs' illustrative remedial plans created a district that stretched from Mississippi to Georgia, a distance of 250 miles, to combine disparate communities of voters. Common sense illustrates that this district is little more "compact" than the sprawling districts condemned in *Shaw II* and *LULAC*.

Courts should accordingly be cautious when relying on these measures of compactness for evaluating *Gingles* compactness. Computer technology has advanced in the past decade to permit computers to draw millions of possible maps of a state like Alabama to look for maps that combine populations without the need to resort to "tentacles" or other geographic features

that historically have been hallmarks of a racial gerrymander. But the *real Gingles* compactness inquiry is not focused on "style points," *LULAC*, 548 U.S. at 434, that mathematical compactness measures attempt to model. Overreliance on these measures risks missing the forest for the trees, and risks reducing the compactness element to a math problem. *But see id.* at 435 ("The mathematical possibility of a racial bloc does not make a district compact."). Just because mathematical measurements of compactness can be easily obtained does not mean that they should override adherence to traditional redistricting criteria.

CONCLUSION

For the foregoing reasons, the Lawyers Democracy Fund respectfully requests that this Court reverse the district court's decision below, and provide state legislatures a clear legal standard for discharging their responsibilities under the Fourteenth Amendment and Section 2 of the Voting Rights Act.

Respectfully submitted,

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