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 FOR *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, THE LEADERSHIP CONFERENCE EDUCATION FUND, AND ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF APPELLEES/RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Formed at the request of President John F. Kennedy in 1963, *Amicus* Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have voice, opportunity, and power to make the promises of our democracy real. For the entirety of its history, the Lawyers' Committee has had an active voting rights practice and has fought to ensure that all Americans have an equal opportunity to participate in the electoral process.

Section 2 of the Voting Rights Act of 1965, based on the precedent established in *Thornburg v. Gingles*, 478 U.S. 30 (1986), has been a major weapon used by the Lawyers' Committee in that fight. The Lawyers' Committee has litigated voting rights cases before this Court including *Shelby County, Alabama v. Holder*, 570 U.S. 529 (2013), *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013), *Young v. Fordice*, 520 U.S. 273 (1997), and *Clark v. Roemer*, 500 U.S. 646 (1991).

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Pursuant to Rule 37.3(a), counsel for *amici* also represent that all parties have consented to the filing of this brief; letters reflecting their blanket consent to the filing of *amicus* briefs are on file with the Clerk.

Additionally, the Lawyers' Committee has participated as amicus curiae in numerous voting rights cases before the United States Supreme Court, including cases that have defined the contours of Section 2 of the Voting Rights Act, such as *Gingles* and *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021). Amicus Curiae has a direct interest in this case because it raises important voting rights issues central to the organization's mission.

The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is a coalition of over 230 organizations committed to the protection of civil and human rights in the United States. It is the nation's oldest, largest, and most diverse civil and human rights coalition. The Leadership Conference was founded in 1950 by three legendary leaders of the civil rights movement—A. Philip Randolph, of the Brotherhood of Sleeping Car Porters; Roy Wilkins, of the NAACP; and Arnold Aronson, of the National Jewish Community Relations Advisory Council. One of the missions of The Leadership Conference is to promote effective civil rights legislation and policy. The Leadership Conference was in the vanguard of the movement to secure passage of the Civil Rights Acts of 1957, 1960 and 1964, the Voting Rights Act of 1965 and its subsequent reauthorizations, and the Fair Housing Act of 1968.

The Leadership Conference Education Fund ("The Education Fund") is the education and research arm of The Leadership Conference on Civil and Human Rights. The Education Fund's mission is to inform the public not only to achieve civil and human rights, but

to make sure those rights endure. By activating the power of the coalition, The Education Fund and its partners can share innovative research and information around the country — and, ultimately, shift the narrative on civil and human rights.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a New York-based national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF has monitored elections through annual multilingual exit poll surveys since 1988. Consequently, AALDEF has documented both the use of, and the continued need for, protection under the Voting Rights Act of 1965 ("VRA"). AALDEF has litigated cases around the country under the language access provisions of the VRA, and seeks to protect the voting rights of language minority, limited English proficient ("LEP"), and Asian American voters. AALDEF has litigated cases that implicate the ability of Asian American communities of interest to elect candidates of their choice, including lawsuits involving equal protection and constitutional challenges to discriminatory redistricting plans. *See*, *e.g.*, *Favors v. Cuomo*, 881 F. Supp. 2d 356 (E.D.N.Y. 2012); *Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997); *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017); Complaint, *Detroit Action v. City of Hamtramck*, No. 2:21-cv-11315 (E.D. Mich. June 3, 2021), ECF No. 1; *All. of South Asian Am. Labor v. The Bd. of Elections in the City of New York*, No. 1:13- cv-03732 (E.D.N.Y. July

2, 2013), ECF No. 1; Complaint, *Chinatown Voter Education All. v. Ravitz*, No. 1:06-cv-0913 (S.D.N.Y. Feb. 6, 2006), ECF No. 1.

INTRODUCTION AND SUMMARY OF ARGUMENT

After the passage of the Voting Rights Act of 1965 enabled many Black voters to exercise their constitutional right to vote for the first time, white officials in many jurisdictions resorted to schemes designed to render the Black vote ineffective — what is commonly known as vote dilution. Preventing vote dilution was a driving force behind the 1982 amendments of the Voting Rights Act where Congress amended Section 2 of the Act to allow for results claims.

Four years after the 1982 amendments, this Court handed down *Thornburg v. Gingles*, 478 U.S. 30 (1986), which just last year this Court described as the "seminal § 2 vote-dilution case." *Brnovich v. Democratic Nat'l Comm.,* 141 S. Ct. 2321, 2337 (2021). Faithfully interpreting Section 2 of the Voting Rights Act and consistent with the constitutional bases for that law in the Fifteenth and Fourteenth Amendments, *Gingles* has provided courts with a fair and workable framework by which to assess whether a jurisdiction's redistricting decision's adverse impact on the opportunity of voters of color to participate in the political process was "on account of race."

It has accomplished this by, first, setting forth three objective preconditions — all of which a plaintiff must satisfy before the court will engage in the totality of

circumstances balancing test. The first precondition of proof of a reasonably compact majority-minority district is intended to show that there is, in fact, a potentially injured population. The second and third preconditions, which together prove racially polarized voting, are intended to establish a prima facie showing that it is the structure selected by the jurisdiction combined with voting patterns, and not something else such as merely losing an occasional election, that forms the basis for a possible Section 2 violation. Indeed, "[T]he *Gingles* threshold inquiry . . . has been the baseline of our § 2 jurisprudence." *Bartlett v. Strickland*, 556 U.S. 1, 16 (2009).

Further, consistent with the express intent of Congress, the *Gingles* Court steered the lower courts to a set of non-exclusive factors to determine whether plaintiffs ultimately prove vote dilution. These factors had been deemed relevant by this Court in *White v. Regester*, 412 U.S. 755 (1973), and the Senate Judiciary Committee specifically embraced them in its report accompanying the 1982 amendments. These factors are themselves objective, including empirically provable facts such as the history of voting discrimination in the district, the interaction between historic socio-economic discrimination against voters of color in the jurisdiction and voting participation by those voters, and the success of voters of color themselves being elected in the jurisdiction.

Over the years, as this Court has addressed Section 2 vote dilution cases, this Court has consistently stated its fidelity to *Gingles* and its framework as opposed to criticizing or minimizing the decision or the framework.

Concomitantly, courts have applied *Gingles* and its progeny rigorously, and the history of their decisions reflects a standard that is judicially manageable. Moreover, the *Gingles* framework has proved to be a fair gatekeeper for Section 2 vote dilution cases, with plaintiffs winning about the same percentage of cases that they lose. There is no need for this Court to abandon its longstanding faithfulness to the *Gingles* framework. It has stood the test of time.

Indeed, the arguments made by Appellants and their amici against preservation of the *Gingles* framework are virtually identical to those made by opponents of the 1982 amendments, including the argument that vote dilution is not a problem that requires a statutory remedy, which in 1982 meant not amending Section 2 and today means overruling *Gingles*. In actuality, Appellants and their amici are asking this Court to import the functional equivalent of a sunset provision into Section 2 of the Voting Rights Act.

This is not the time to give opponents of the Voting Rights Act another bite at the apple. With the effective evisceration of Section 5 of the Voting Rights Act in *Shelby County, Alabama v. Holder*, 570 U.S. 529 (2013), Section 2 is the last standing federal statutory protection against the practice of diluting the votes of persons of color. The record in this case — and claims recently or currently litigated — shows that the problem is far from over. Black, Latinx, Asian-American, and Native American voters in certain jurisdictions are being denied their equal opportunity to participate in the political process on account of their

race. And Section 2 of the Voting Rights Act, as construed by this Court in *Gingles*, remains a fair and effective bulwark against these insidious practices.

ARGUMENT

I. *Gingles* and its progeny provide constitutional standards appropriate for assessing Section 2 vote dilution cases.

Contrary to the pleas of Appellants[2] and several of Appellants' *amici*, this Court should not seize the opportunity presented by this case so as to tamper with or — as suggested by one *amicus* — overrule *Thornburg v. Gingles*, 478 U.S. 30 (1986). The spurious grounds pressed by these advocates range from there no longer being a need for the *Gingles* framework because times have supposedly changed,[3] to *Gingles*' "unnecessary infusing of race into the redistricting process,"[4] to *Gingles* leading to "balkanization" of the electorate,[5] to the claim that application of *Gingles* favors plaintiffs.[6]

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[2] Br. for Appellants at 31.

[3] Br. of Alabama Center for Law and Liberty as *Amicus Curiae* in Supp. of Appellants and Pet'rs at 19, 21–24.

[4] Br. of Senator John Braun, Leader of the Washington Senate Republican Caucus, et al., as *Amicus Curiae* in Supp. of Appellants at 3.

[5] Br. of *Amicus Curiae* National Republican Redistricting Trust in Supp. of Appellants/Pet'rs at 13–14.

[6] Br. *Amicus Curiae* for American Legislative Exchange Council in Supp. of Pet'r at 6.

Appellants' and *amici*'s concerns mimic, almost verbatim, the concerns raised by opponents of the 1982 amendments to the Voting Rights Act, who claimed that the addition of the "results" cause of action to Section 2 would:

> Inevitably lead to a requirement of proportional representation for minority groups on elected bodies;
>
> Make thousands of at-large election systems across the country either per se illegal or vulnerable on the basis of the slightest evidence of underrepresentation of minorities; and
>
> Be a devisive [sic] factor in total communities by emphasizing the role of racial politics.

S. Rep. No. 97-417, at 31 (1982). In response back then, the Senate Judiciary Committee meticulously detailed how these concerns were belied by the actual results of litigation applying the very standards which Congress was about to codify in the 1982 amendments. *Id.* at 31-34. *Gingles*, as will be demonstrated below, did not change that dynamic.

In fact, *Gingles* has stood the test of time as solidly grounded in Section 2 of the Voting Rights Act, totally consistent with the Fourteenth and Fifteenth Amendments protections furthered by the Voting Rights Act, and providing fair, objective, and judicially manageable standards for both litigants and the courts. Indeed, Congress in its express disavowal of proportional representation as a right created under Section 2 and this Court in its establishment of excess of proportionality as a consideration in defense to a

Section 2 action have built safeguards against abuse of the *Gingles* standards that are reflected in the balanced outcome of Section 2 vote dilution cases adjudicated since *Gingles*.

In this context, Appellants' *amici*'s recurrent theme that times have changed and therefore the *Gingles* framework is no longer needed must be addressed at the outset. One *amicus* phrased the argument in terms of "the South has largely turned from its former ways."[7] Section 2, of course, is not a law directed at the South or at any specific part of the country. It is directed at the whole country, and it has been applied to stop racial discrimination in voting in every state in this nation.

Further, the need for Section 2's protections has not diminished with the times. In 1982, the Senate Judiciary Committee recognized that "The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot," and that in reaction to the rising political power of Black voters, "a broad array of dilution schemes were employed to cancel the impact on the new Black vote." S. Rep. No. 97-417, at 6 (1982). Such schemes are still being deployed today, particularly where — in many areas of the country — increases in population growth of communities of color are met with districting maps that, as was found in this case, expressly ignore that population growth, or, has been alleged elsewhere,

[7] Alabama Center for Law and Liberty *Amicus* Br. at 19.

actually decrease the political power of those very communities.[8]

When this Court struck down Section 4 of the Voting Rights Act less than a decade ago, effectively eliminating the protections of Section 5, Chief Justice Roberts's majority opinion emphasized that, "Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2." *Shelby County v. Holder*, 570 U.S. 529, 557 (2013). With the demise of Section 5, the protections of Section 2, as manifested in the *Gingles* framework's furtherance of the aims of that important statute, are as essential as they have ever been.

A. *Gingles* is consistent with Section 2's implementation of Fourteenth and Fifteenth Amendment Protections.

Section 2 of the Voting Rights Act of 1965 and its 1982 amendments are deeply rooted in the Fourteenth

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[8] *See e.g., Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 2022 WL 633312, (N.D. Ga. 2022) (finding probability of success on merits of Section 2 vote dilution claims as to Georgia congressional and state legislative maps, but denying motion for preliminary injunction on *Purcell v. Gonzalez*, 549 U.S. 1 (2006) grounds); *League of United Latin Am. Citizens v. Abbott*, 2022 WL 1410729 (W.D. Tex. 2022) (denying preliminary injunction as to Texas redistricting of state senate district on intentional discrimination and racial gerrymander claims, but recognizing possible colorable Section 2 vote dilution results claim which had not been pled); *Robinson v. Ardoin*, 37 F.4th 208 (5th Cir. 2022), *cert. granted sub nom. Ardoin v. Robinson,* 2022 WL 2312680 (Jun. 28, 2022) (denying stay (subsequently entered by this Court) of preliminary injunction issued on Section 2 vote dilution grounds as to Louisiana congressional map).

and Fifteenth Amendments. "Congress enacted § 2 of the Voting Rights Act of 1965 . . . to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall 'be denied or abridged ... on account of race, color, or previous condition of servitude.'" *Voinovich v. Quilter*, 507 U.S. 146, 152 (1993) (citing U.S. Const., Amdt. 15 and *N.A.A.C.P. v. New York,* 413 U.S. 345, 350 (1973)). And it was a ruling in a Fourteenth Amendment case, *White v. Regester*, 412 U.S. 755 (1973), that a vote dilution plaintiff had to show that the political processes leading to an election were not "equally open" to participation by the protected group in that its members had "less opportunity" than did others to use the political process that became the foundation of the 1982 amendments to Section 2. *Id.* at 766. In *White*, this Court further ruled that it was a vote dilution plaintiff's burden to illustrate that "the totality of the circumstances," including the cultural and economic realities, as "designed and operated," excluded Mexican-American voters from "effective participation in political life." *Id.* at 768–69. This Court in *White* thus looked to "a blend of history" and conducted an "intensely local appraisal of the design and impact" of the challenged district. *Id.* at 769–70.

This Court recently described *White* as having "outsized importance in the development of our VRA case law." *Brnovich v. Democratic Nat'l Comm.,* 141 S. Ct. 2321, 2331 (2021). As Justice Alito's majority opinion observed, it was vote dilution cases that "reflected the results of the Senate Judiciary Committee's extensive survey of what it regarded as Fifteenth Amendment violations that called out for

legislative redress" in 1982. *Id.* at 2333 (citing S. Rep. No. 97–417, at 6, 8, 23–24, 27, 29). Indeed, the *White* Court's precise phraseology — "equally open," "less opportunity," and "totality of the circumstances" — became the key elements of Congress' 1982 overhaul of Section 2 and addition of the "results" prong to Section 2(a) and the "totality of circumstances" standard to Section 2(b).[9] *See Gingles*, 478 U.S. at 43-44.[10] In *Brnovich*, this Court characterized *White*'s "equally open" standard as the "touchstone" of Section 2 jurisprudence. *Brnovich*, 141 S. Ct. at 2338.

Further, the *White* Court's discussion of the sort of facts that instruct on the totality of the circumstances, such as the history of discrimination, the present impact of that history, and the success of candidates of color, became the Senate Factors which the Senate Judiciary Committee, in its report accompanying the

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[9] Section 2(b) of the VRA, as amended, reads, in pertinent part:

> (b) A violation of subsection (a) is established if, based on *the totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not *equally open* to participation by members of a class of citizens protected by subsection (*a) in that its members have *less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice." (Emphasis added.) Codified at 42 U.S.C. § 1973.

[10] In 1982, Congress, rejecting this Court's plurality decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), that had required proof of discriminatory intent behind the challenged voting practice, clarified that a practice that "results" in depriving members of a protected class of their equal opportunity to participate in the political process was also actionable under Section 2.

1982 amendments, characterized as "typical" in the proof of whether a challenged voting practice results in person of color having an unequal opportunity to participate in the political processes. S. Rep. No. 97-417, at 28–29 (1982).[11]

Gingles is in complete harmony with the intent behind the 1982 amendments and this Court's construction of the VRA — and has been so since it was handed down. In *Gingles*, this Court was confronted with a challenge under Section 2 of the VRA to a legislative redistricting plan of five North Carolina multimember legislative districts. 478 U.S. at 34. Considering factors deemed relevant in *White*, the district court had held that the redistricting plan had diluted the votes of Black citizens. In affirming the

[11] The Senate Report accompanying the 1982 amendments to the VRA set forth the following non-exclusive factors which "typically may be relevant to a § 2 claim: the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, . . . ; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. . . . The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group, and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous, may have probative value." *Gingles*, 478 U.S. at 44–45.

district court's ruling, the *Gingles* Court began with the premise that, "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." 478 U.S. at 47. Certain voting schemes, this Court continued, may "'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.'" *Id.* (quoting *Burns v. Richardson*, 384 U.S. 73, 88 (1966)). But, this Court cautioned, they are "not *per se* violative of minority voters' rights." *Gingles*, 478 U.S. at 48. A plaintiff must prove so, not only by reference to "many or all of the factors listed in the Senate report," but by proving "a conjunction" of circumstances demonstrating that "a bloc voting majority [is] *usually* . . . able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Id.* at 48–49 (emphasis in original).

This Court spelled out these circumstances as three preconditions: "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it — in the absence of special circumstances . . . — usually to defeat the minority's preferred candidate." *Id.* at 50–51. The extent to which voting is racially polarized in the affected jurisdiction, this Court later

explained, is essential to proof of the second and third preconditions. *Id.* at 55–56.

Significantly, this Court explained why each of these preconditions was relevant. If the first precondition of proving the existence of a geographically compact majority-minority population could not be met, "as would be the case in a substantially integrated district," then the form of the district "cannot be responsible for minority voters' inability to elect its candidates." *Id.* at 50. If the second precondition of proving cohesion of voters of color could not be met, "it cannot be said that the selection of [the districting] structure thwarts distinctive minority group interests." *Id.* at 51. And meeting the third precondition of showing that white bloc voting usually prevents the population of voters of color from electing candidates of their choice "distinguishes structural dilution from the mere loss of an occasional election." *Id.*[12]

The *Gingles* preconditions are, therefore, not geared to making race the primary consideration in the drawing of districts, but rather to ascertaining whether it is even possible, as a prima facie matter, that the districting choices made by the jurisdiction could result

[12] In this regard, the argument of *amicus* National Republican Redistricting Trust that *Gingles* is obsolete because times have supposedly changed and communities are more integrated is factored into the *Gingles* preconditions. If, in fact, communities are so integrated, it should be difficult to meet the first precondition, and if, in fact, the communities' supposed integration has led to a confluence of interest among disparate racial groups, then that should manifest itself in the racially polarized voting analysis under the second and third preconditions.

in less than an equal opportunity for the population of voters of color to participate in the electoral process. If it is not possible to draw a reasonably compact majority-minority district, there is no possibility of a claim. If the minority group or groups in question do not vote cohesively, there is no possibility of a claim. If the white majority population does not vote as a bloc to usually defeat the minority population's candidates of choice, there is no possibility of a claim. The preconditions do not presume liability or predetermine, let alone require, a remedy. They are "threshold conditions for establishing a § 2 violation." *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 425–26 (2006). As per the express language of Section 2(b), it is the totality of the circumstances, including consideration of any of the Senate Factors that are relevant to the case, that prove the vote dilution claim.

B. This Court's post-*Gingles* Section 2 vote dilution cases have consistently looked to *Gingles* as the touchstone.

Following *Gingles*, this Court has addressed Section 2 vote dilution cases several times. In doing so, this Court has consistently tried to decide the case before it in a way that was most faithful to the *Gingles* framework. Throughout this time, the *Gingles* framework has been shown to have sufficient flexibility to apply to different circumstances and to be subject to refinement without losing its relevance or vitality.

In *Growe v. Emison*, 507 U.S. 25 (1993), a unanimous Court applied *Gingles* to a single-member redistricting scheme and to "vote fragmentation"

(commonly known as "cracking") claims in which a community of color was split among multiple districts. *Id.* at 40. Recognizing the importance of the preconditions to establish the threshold for liability, Justice Scalia's opinion rejected the Section 2 claim because the *Gingles* preconditions "were not only ignored but were unattainable." *Id.* at 41. Less than a month later, this Court in *Voinovich v. Quilter*, 507 U.S. 146 (1993), applied *Gingles* to a "packing" case, where the plaintiffs claimed that Black voters had been added to a district in numbers far in excess of what was needed to provide them with an equal opportunity to participate in the political process. In reversing the District Court's finding of liability, this Court stated that "[h]ad the District Court employed the *Gingles* test in this case, it would have rejected appellees' § 2 claim." *Id.* at 158.

In *Johnson v. De Grandy*, 512 U.S. 997 (1994), this Court "amplif[ied]," what had been decided in *Voinovich*, that "'the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim.'" 512 U.S. at 1007 (quoting *Voinovich*, 507 U.S. at 158). Citing *Gingles*, the *De Grandy* Court stated that meeting the three *Gingles* factors was necessary, but not sufficient, to establish vote dilution: "But if *Gingles* so clearly identified the three as generally necessary to prove a § 2 claim, it just as clearly declined to hold them sufficient in combination, either in the sense that a court's examination of relevant circumstances was complete once the three factors were found to exist, or in the sense that the three in combination necessarily and in all circumstances demonstrated dilution." *Id.* at 1011.

In *De Grandy*, this Court found that the district court's finding of unlawful vote dilution failed to consider proportionality — the fact that the number of majority-minority districts reflected the minority group's share of the relevant population — in its totality of the circumstances analysis. *Id.* at 1006, 1014–20. At the same time, this Court emphatically rejected the premise of an "inflexible rule" that proportional representation absolutely barred a vote dilution claim under Section 2, as violative of the "totality of the circumstances" standard. *Id.* at 1018. Importantly, this Court noted that, even in a jurisdiction "with numerically demonstrable proportionality," a court must undertake the searching review of the past and present reality, including factors deemed relevant under the Senate factors, to decide whether proportionality is a harbor "safe for voters." *Id.* at 1018–19. Indeed, the *De Grandy* Court returned to *Gingles* on this point: "'[P]ersistent proportional representation . . . [may] not accurately reflect the minority group's ability to elect its preferred representatives.'" *De Grandy*, 412 U.S. at 1019 (quoting *Gingles*, 478 U.S. at 77).

In *LULAC v. Perry*, 548 U.S. 399 (2006), this Court emphasized the importance of the compactness inquiry under the first *Gingles* threshold in finding that "there is no basis to believe a district that combines two far-flung segments of a racial group with disparate interests provides the opportunity that § 2 requires or that the first *Gingles* condition contemplates." *Id.* at 433. This Court also acknowledged the continued vitality of *Gingles'* approach to the totality of the circumstances, considering not only the proportionality

factor, but — significantly — two factors embraced in *Gingles* as part of the Senate factors: the effect of historic racial discrimination in voting and the tenuousness of the State's rationale for its redistricting (incumbency protection). *Id.* at 439–41. As to the latter rationale, key to this Court's ruling was that voters had been moved in and out of districts because of their race, in order to protect an incumbent. *Id.* at 440–41.

In *Bartlett v. Strickland*, this Court settled an issue reserved in *Gingles* and *Voinovich*, and held that the first *Gingles* precondition cannot be satisfied by a district comprised of less than a majority of voters of color. 556 U.S. 1. In rejecting petitioner's argument, which this Court said "would call in question the *Gingles* framework the Court has applied under § 2," *id.* at 16, this Court was implicitly endorsing the *Gingles* framework that Appellants and their supporting *amici* are now asking this Court to abolish or materially weaken.

Finally, in *Brnovich v. Democratic National Committee*, this Court reaffirmed that Section 2 and in particular the *Gingles* standards apply with full force to vote dilution claims. 141 S. Ct. 2321. *Brnovich* was a Section 2 vote denial claim, i.e., dealing with voting practices as to time, place, or manner of elections, not with allegations of vote dilution. Throughout the opinion, this Court took pains to emphasize the importance of *Gingles* in vote dilution jurisprudence, highlighting the differences between vote dilution cases and the case before it. In this context, the *Brnovich* Court described *Gingles* as "our seminal § 2 vote-

dilution case," *id.* at 2337, a case that set a path this Court's "many subsequent vote-dilution cases have largely followed . . . ," *id.* (*and see* at 2333 n.5 for the "steady stream" of vote-dilution cases that have applied *Gingles)*, stressing that the Senate factors "grew out of and were designed for use in vote-dilution cases," *id.* at 2340, and that several, notably Factors 2 (racially polarized voting), 6 (racially tinged campaign appeals), and 7 (election of candidates of color), had particular application in vote dilution cases, in addition to Factors 1 (past discrimination) and 5 (the effects of discrimination that persist), which have relevance to all Section 2 claims. *Id.*

In this Court's post-*Gingles* Section 2 vote dilution jurisprudence, this Court has consistently looked to *Gingles* and its framework to decide the matter before it, whether the case involved multi-member districts, or single member district "cracking" or "packing," or the relevance of proportionality to the assessment of Section 2 vote dilution claims. The *Gingles* framework has proven to be durable and flexible.

C. The *Gingles* standards are judicially manageable.

Not only has the *Gingles* framework proved easily adaptable to numerous districting scenarios, but it is also a framework of the sort that courts are experienced in applying. *Gingles* and its progeny provide objective, judicially manageable standards for determining Section 2 vote dilution claims.

First, similar to vote dilution claims based on the one person/one vote doctrine, racial vote dilution claims

emanate from clear constitutional authority. *See Reynolds v. Sims*, 377 U.S. 533, 566 (1964) (explaining why "complex and many-faceted" issues involved in apportionment and "dangers of entering into political thickets and mathematical quagmires" must yield when the states use their power to circumvent a federally protected right).

Second, unlike the partisan gerrymander claims that this Court has found to be non-justiciable, vote dilution claims under Section 2 of the VRA, as assessed under the guidance of *Gingles* and its progeny are "grounded in a 'limited and precise rationale' and [are] 'clear, manageable, and politically neutral.'" *Rucho v. Common Cause*, 139 S. Ct. 2484, 2498 (2019) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 306-308 (2004) (opinion concurring in judgment)). Indeed, the *Gingles* objective preconditions and the equally objective Senate factors allow courts adjudicating Section 2 vote dilution claims to "act only in accord with especially clear standards." *Rucho*, 139 S. Ct at 2498.

Nor do such claims, when adjudicated in accordance with the *Gingles* standards result in a court's dithering as to "what fairness looks like in this context." *Id.* at 2500. The *Gingles* preconditions, particularly the first precondition, guide the courts as to "what fairness looks like in this context." Indeed, this Court has recently observed that it "need not decide" what "denial or abridgement of the right . . . to vote on account of race or color" as used in Section 2(a) "would mean if it stood alone because § 2(b) . . . explains what must be shown to establish a § 2 violation." *Brnovich*, 141 S. Ct. at 2337.

This Court has distinguished racial vote dilution claims that are judicially unmanageable from those which are judicially manageable, without even hinting that *Gingles* presents a problem in that regard. For example, in *Holder v. Hall*, 512 U.S. 874 (1994), this Court found that a Section 2 claim to enlarge a commission from one member to five, so as to create a majority-minority district, was not actionable because it was impossible to determine "acceptable principles for deciding future cases." *Id.* at 885.

Further, one of the reasons the *Bartlett* Court ruled that crossover-district claims were not actionable under Section 2 was that such claims would "require courts to make predictive political judgments not only about familiar, two-party contests in large districts, but also about regional and local jurisdictions that often feature more than two parties or candidates." 556 U.S. at 18. Far from finding that *Gingles* was judicially unmanageable, the *Bartlett* Court instead noted that *Gingles*' "majority-minority rule" had "its foundation in principles of democratic governance" and that "[t]he special significance, in the democratic process, of a majority means it is a special wrong when a minority group has 50 percent or more of the voting population and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district." *Id.* at 19. That *Gingles* provides standards that are judicially manageable is not in serious dispute.

D. *Gingles* is an effective gatekeeper for vote dilution claims.

Finally, any argument that *Gingles* creates a "strict-liability regime," Br. for Appellants at 31, is simply untrue.[13] First, of course, Section 2(b) and the case law is abundantly clear that plaintiffs cannot prove a Section 2 vote dilution claim merely by meeting the *Gingles* preconditions. Plaintiffs must also demonstrate that the "totality of the circumstances," which include reference to the Senate factors, proportionality concerns, traditional districting principle issues, and "any circumstance that has a logical bearing on whether voting is 'equally open' and affords equal 'opportunity,' may be considered." *Brnovich*, 141 S. Ct. at 2338. The language in Section 2(b) that no right to proportional election of candidates of the group of voters of color is created in the statute and the *De Grandy* holding that proportionality of representation may provide a defense to a Section 2 claim further serve to limit any notion that Section 2 can be used improperly to maximize electoral opportunity for voters of color.

The actual results of Section 2 vote dilution litigation demonstrate that *Gingles* has provided courts with a workable and fair framework that serves as an effective gatekeeper for Section 2 vote dilution cases. Since the 1982 amendment to the Voting Rights Act, there have been 316 reported cases that addressed

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[13] *See also* Br. *Amicus Curiae* for American Legislative Exchange Council in Supp. of Pet'r, p. 9-15 (indicating that *Gingles* results in rare victories for existing election systems and legislative policy determinations).

some form of vote dilution, most of which involved a challenge to an at-large electoral structure or a redistricting plan.[14] Plaintiffs achieved successful outcomes in 49% of such cases.[15]

Contrary to the assertions of some of Appellants' *amici*, *see e.g.,* Br. of *Amicus Curiae* Republican Nat'l Comm. at 13–14; courts frequently find that plaintiffs do not satisfy the *Gingles* factors, even when a state "could have" created a majority-minority district. *See Milwaukee Branch of the N.A.A.C.P. v. Thompson*, 116 F.3d 1194, 1196 (7th Cir. 1997) ("The possibility of increasing minority representation does not compel a jurisdiction to achieve that outcome, unless the three conditions have been met and the judge is satisfied that

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[14] Katz, Ellen D.; Remlinger, Brian; Dziedzic, Andrew; Simone, Brooke; and Schuler, Jordan, "To Participate and Elect: Section 2 of the Voting Rights Act at 40" (2022). *Other Publications*. 192. https://repository.law.umich.edu/other/192. The sample of 316 vote dilution cases includes judicial decisions from June 29, 1982 through December 31, 2021 that were published or made available on Westlaw or Lexis. Most cases in the sample are decisions on the merits that determined whether Section 2 was violated. Absent a direct decision on the merits, the sample evaluated cases based on a final ruling that made a substantive determination (e.g., preliminary injunction, evidentiary disputes, judicial approval of a settlement, or a remedial order) for or against the plaintiff. The sample omits cases in which the Section 2 claim appeared frivolous and cases in which the merits decision was vacated on appeal. A case was coded as successful for the plaintiff if it resulted in a change to a challenged practice.

[15] *Id.* Plaintiffs succeeded in 74% of the dilution cases brought during the first decade following the 1982 amendments to the Voting Rights Act; plaintiffs succeeded in 35% of the dilution cases in 1992-2001; 39% in 2002-2011; and 43% from 2012-2021.

minority voters have lacked an equal opportunity to participate in the political process.").[16]

Nor is it true that courts "exclusive[ly] focus on the three *Gingles* preconditions" or that "the *Gingles* factors have subsumed the 'totality of the circumstances' analysis." Br. of *Amicus Curiae* Republican Nat'l Comm. at 12–13. To the contrary, prior decisions demonstrate that courts hold plaintiffs to their burden of proof in their totality of the circumstances analysis. Lower courts have taken seriously this Court's admonition that the *Gingles* factors are only "necessary preconditions" in vote dilution cases and do not replace plaintiffs' burden of showing that their district is not "equally open" to voters of all races. *See Gingles*, 478 U.S. at 48–50. Lower courts have "emphatically rejected the suggestion that courts can rely solely on the three

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[16] *See, e.g., Pope v. County of Albany*, 687 F.3d 565 (2d Cir. 2012)(rejecting vote dilution claim where plaintiffs met the first *Gingles* factor, where they failed to prove third *Gingles* factor; *Kumar v. Frisco Independent School District*, 476 F. Supp. 3d 439 (E.D. Tex. 2020) (rejecting vote dilution claim where plaintiffs met the first *Gingles* factor, but failed to prove second *Gingles* factor); *see also Johnson v. Hamrick*, 296 F.3d 1065, 1073–74 (11th Cir. 2002) (rejecting plaintiffs' claim that Gainesville's at-large election system for city commissioners diluted Black votes, holding that "the plaintiffs could not show white bloc voting under the third *Gingles* factor"); *Lewis v. Alamance Cty.,* 99 F.3d 600 (4th Cir. 1996); *Sanchez v. Bond*, 875 F.2d 1488, 1495–96 (10th Cir. 1989) (holding that plaintiffs failed to establish second *Gingles* factor, even though it would have been possible to create majority-minority district in place of the county's at-large election system); *Kumar v. Frisco Indep. Sch. Dist.*, 476 F. Supp. 3d 439, 508 (E.D. Tex. 2020) (holding that minority voters were not politically cohesive even though they were geographically compact).

Gingles preconditions to establish a Section 2 dilution violation." *N.A.A.C.P. v. Fordice*, 252 F.3d 361, 373 (5th Cir. 2001).[17] As the First Circuit has explained, the *Gingles* factors "give rise to an inference that racial bias is operating . . . to impair minority political opportunities," but do not always conclusively prove it. *Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995). Thus, several courts have denied relief under the totality of circumstances analysis, even where plaintiffs have satisfied the *Gingles* factors.[18]

These decisions are not outliers. Statistics demonstrate that courts hold plaintiffs to their burden of proof in their totality of the circumstances analysis. Plaintiffs in vote dilution and non-dilution claims

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[17] *See also Wright v. Sumpter Cty. Bd. of Elecs. & Reg.*, 979 F.3d 1282, 1304–05 (11th Cir. 2020); *Lewis v. Alamance Cty.,* 99 F.3d 600, 604 (4th Cir. 1996); *Houston v. Lafayette Cty.*, 56 F.3d 606, 609–10 (5th Cir. 1995); *Nipper v. Smith*, 39 F.3d 1494, 1513–14 (11th Cir. 1994); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1115 (3d Cir. 1993); *Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 298 (D. Mass. 2004) (explaining that "[p]laintiffs who satisfactorily complete [*Gingles*'s] three-step pavane are not home free" because they must satisfy the "wide-ranging" totality of circumstances analysis).

[18] *See, e.g.*, *Fordice*, 252 F.3d at 374; *Old Person v. Brown*, 312 F.3d 1036, 1042, 1050 (9th Cir. 2002); *United States v. Alamosa Cty.*, 306 F. Supp. 2d 1016, 1040 (D. Colo. 2004) ("Although the evidence presented at trial is arguably facially sufficient to satisfy the three *Gingles* preconditions, upon consideration of the totality of the circumstances, it does not prove that the at-large method of electing county commissioners in Alamosa County dilutes the vote of Hispanic residents."); same: *Fusilier v. Landry*, 963 F.3d 447, 459–68 (5th Cir. 2020); *Solomon v. Liberty County Commissioners*, 221 F.3d 1218 (11th Cir. 2000) *Jenkins v. Manning*, 116 F.3d 685, 699–700 (3d Cir. 1997); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004).

under Section 2 have lost 85% of cases in which a court determined that Senate Factor 7 (the extent to which candidates of color have won elections) was absent; 77% of cases where Senate Factor 5 (discrimination in socioeconomic areas) was absent; 74% of cases where Senate Factor 3 (the extent of the jurisdiction's use of majority vote requirements, unusually large electoral districts, prohibitions on bullet voting, and other devices that tend to enhance the opportunity for voting discrimination) was absent; and 72% of cases where Senate Factor 1 (history of official discrimination in the jurisdiction that affects the right to vote) was absent.[19]

Similarly, in vote dilution cases where plaintiffs have prevailed, courts have looked beyond the *Gingles* factors and considered the totality of the circumstances before granting relief.[20] Indeed, after concluding that Plaintiffs here satisfied the three *Gingles* factors, the district court in this case undertook a lengthy discussion of the Senate factors. *Singleton v. Merrill*, 2022 WL 265001, at *45–47 (N.D. Ala. 2022).

Particularly since this Court clarified the proportionality issue in *Johnson v. De Grandy* and *LULAC v. Perry*, the lower courts have proved adept at, first, using the *Gingles* preconditions as a tool to separate the wheat from the chaff in the first instance,

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[19] Katz, et al., supra note 14, at 11.

[20] *See, e.g., Clerveaux v. E. Ramapo Central School District.*, 984 F.3d 213, 237–44 (2d Cir. 2021); *Large v. Fremont Cty.*, 709 F. Supp. 2d 1176, 1207–32 (D. Wyo. 2010); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1017–52 (D.S.D. 2004); *Goosby v. Town Bd. of the Town of Hempstead*, 956 F. Supp. 326, 337–48 (E.D.N.Y. 1997), *aff'd*, 180 F.3d 476 (2d Cir. 1999).

and, then, applying the statutorily-mandated totality of the circumstances test — including those Senate Factors that are relevant — in ways that sometimes result in plaintiffs' victories, but just as often result in defendants' victories. These decisions do not reflect uncertainty and confusion on the part of the courts charged with applying *Gingles* in the first instance, but rather illustrate courts finding sufficient guidance from the objective *Gingles* standards to decide these cases.

Thus, contrary to the assertions of Appellants' *amici*, *Gingles* does not provide voters of color with a free pass. Rather, when voters of color succeed in these cases, it is because plaintiffs have proved that the totality of the circumstances demonstrate that the districting plans denied them an equal opportunity to participate in the political process, and that, therefore, the electoral system is not "equally open" to them.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court affirm the judgment of the District Court.

Respectfully submitted,

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