Nos. 21-1086 and 21-1087

In The
Supreme Court of the United States

JOHN 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 Writ of Certiorari to the
United States District Court for the
Northern District of Alabama

BRIEF OF *AMICUS CURIAE* THE NATIONAL REPUBLICAN REDISTRICTING TRUST IN SUPPORT OF APPELLANTS/PETITIONERS

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The National Republican Redistricting Trust, or NRRT, is the central Republican organization tasked with coordinating and collaborating with national, state, and local groups on a fifty-state congressional and state legislative redistricting effort for 2020 and for decades to come.

NRRT's mission is threefold. First, it aims to ensure that redistricting faithfully follows all federal constitutional and statutory mandates. Under Article I, Section 4 of the Constitution, it is the State legislatures that are primarily entrusted with the responsibility of redrawing the States' congressional districts. Every citizen should have an equal voice, and laws must be followed in a way that protect the constitutional rights of individual voters.

Second, NRRT believes redistricting should result in districts that are sufficiently compact and preserve communities by respecting municipal and county boundaries, avoiding the forced combination of disparate populations to the extent possible. Such districts are consistent with the principle that legislators represent individuals living within identifiable communities and not the political parties themselves.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, other than *amicus curiae*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, all parties have consented to the filing of this brief.

Third, NRRT believes redistricting should make sense to voters. Each American should be able to look at their district and understand why it was drawn the way it was.

SUMMARY OF THE ARGUMENT

The test developed by the U.S. Supreme Court in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986) for determining whether the votes of minority citizens have been unlawfully diluted in violation of Section 2 of the Voting Rights Act ("VRA") was atextual on the day it was announced, and has only become less relevant to the question of minority access to the political process with the passage of time and America's changing demographics.

The first *Gingles* factor, which requires a reviewing court to assess whether a given minority group is sufficiently numerous and compact to form a majority in a single-member district, is related to minority representation but has become increasingly less relevant thanks to the demographic sea change America has experienced since the 1980s. At the time the *Gingles* factors were developed, America was still an overwhelmingly white society and an extremely segregated one, where a majority of the suburban population lived in a community where more than 90% of their neighbors belonged to the same race. In the intervening four decades, urban, suburban, and even rural America have become less white, thanks both to internal migration out of central cities and external immigration that is largely Hispanic and Asian in composition. At the same time the nation has diversified, political participation levels for minority voters—particularly

for black voters, who were the original intended beneficiaries of the VRA—have reached similar levels as white participation levels. These trends combine to make the first *Gingles* factor less relevant to the goal of increasing minority access to the political process.

The second and third *Gingles* factors, by contrast, are focused on the political cohesion of the relevant minority group and white majority. But political cohesion appears nowhere within the text of the VRA. A test that looks solely at whether the white majority votes against the minority-preferred candidate, without ever inquiring whether minority access to the political process has been denied or abridged "on account of race," is a test that is totally unrelated to the plain text of the statute or its ostensible goals. It is not a violation of the VRA when a minority-preferred candidate loses an election due to factors unrelated to the race of the candidate or their supporters, such as the partisanship of the jurisdiction or the geographic distribution of the minority vote. Political cohesion alone says nothing about the reasons motivating the votes of the minority group or the white majority. It is past time that this Court determined whether *Gingles* remains the best test for assessing violations of Section 2, and this case presents an opportunity for just that.

ARGUMENT

I. The *Gingles* Test Imposes Burdens Not Justified by Current Needs.

A. The Nation Has Experienced Dramatic Increases in Diversity and Minority Participation and Representation Since the *Gingles* Test Was Created.

1. Racial and ethnic division loomed large over Section 2 and *Gingles*.

In its seminal decision *Thornburg* v. *Gingles*, the Court developed a test by which courts should adjudicate claims of minority vote dilution brought under Section 2 of the Voting Rights Act of 1965 ("VRA") as amended June 29, 1982, 52 U.S.C. § 10301 ("Section 2"). 478 U.S. 30 (1986). The Court stated that to prevail in a Section 2 claim of minority vote dilution, a plaintiff must show: (1) that the minority which is allegedly injured by a challenged election practice is sufficiently large and geographically compact to constitute a majority in a single-member electoral district; (2) that the minority group is politically cohesive; and (3) that the white majority votes sufficiently as a bloc usually to defeat the minority's preferred candidate. *Id.* at 50–51. In Section 2 vote dilution cases that followed, courts employed the criteria stated in *Gingles* along with consideration of the factors specified in the legislative history of Section 2.

The *Gingles* test was developed by this Court after years of judicial confusion as to how to properly

apply Section 2. *See generally e.g.*, *Mobile* v. *Bolden*, 446 U.S. 55 (1980). Various courts viewed the legislative history of Section 2 differently, especially the Senate Report issued by the Committee on the Judiciary that accompanied the 1982 Senate Bill. Kosterlitz, Note, Thornburg v. Gingles: The Supreme Court's New Test For Analyzing Minority Vote Dilution, 36 Cath. U. L. Rev. 531, 543 (1987). After examining the 1982 Amendments to Section 2, the accompanying Senate Report, and the varying standards developed by different lower courts in adjudicated Section 2 vote dilution claims since that time, the Court ultimately settled on the three-factor plus the totality of the circumstances test we know today. *Gingles*, 478 U.S. 30.

These changes and developments did not occur in a vacuum. During the time of the 1982 Amendment and Senate Report, as well as the 1986 *Gingles* test, minority populations were significantly concentrated in racially polarized areas that lacked diversity. For example, this and the immediately preceding period saw suburbanization proliferate. Rastogi, A Place-based Examination of Racial Residential Integration in U.S. Suburbs, 2000-10 (ProQuest Dissertations Publ'g 2020). "In 1980, 54% of the suburban population lived in a suburb that was greater than 90% one racial or ethnic group . . . ." *Id.* at 88. This concentration and de facto segregation led to minority voting strength easily, and even inadvertently, being diluted through "packing"—concentrating large numbers of minority voters within a relatively small number of districts. *See*, *e.g.*, Katz et al., Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982: Final Report of the

Voting Rights Initiative, University of Michigan Law School, 39 U. Mich. J.L. Reform 643, 689 (2006). Packing happened often during the time of the 1982 Amendments and *Gingles*. *Id.* at 676-93.

Many feared that the racial divide culminating in the 1970s and 1980s—even if unintentional—would lead to demographic "balkanization." W. Frey, Diversity Explosion: How New Racial Demographics Are Remaking America 44–49 (Bookings Inst. Press 2018) (hereinafter, Frey, Diversity Explosion). It was thought that this balkanization would "separate, culturally and politically," the regions where minorities clustered from the rest of the country. *Id.* "At the time, it appeared that the ongoing racial and demographic dynamics" could be creating "different Americas" for different people based on geography and race. *Id.*

The 1982 Amendments to Section 2, the accompanying Senate Report, and this Court's development of the *Gingles* test—especially the first factor—were all created with this crisis of race looming large. Indeed, the first *Gingles* factor, that a minority must be sufficiently large and geographically compact to constitute a majority in a single-member electoral district, is clearly a direct response to fears of balkanization and packing resulting from segregation of a racial populace. But the fears of balkanization have not come to fruition, and the country is becoming increasingly more diverse and multiracial. Not only did this crisis loom large during the formation of the measures, but the Court specifically cited these kinds of concerns in developing *Gingles*. *See, e.g.*, *Gingles*, 478 U.S. at 39–41 (discussing depressed black voter registration and low political participation and success); *id.* at

64–65 (discussing the common socioeconomic characteristics shared by "geographically insular racial and ethnic groups"). Accordingly, this Court must reexamine the *Gingles* test, which now has lost its utility and is no longer justified by long-outdated fears of racial balkanization looming over the country and VRA jurisprudence.

2. There have been dramatic demographic shifts since Section 2 and *Gingles*.

A lot has changed in the decades since the 1982 Amendments, the Senate Report, and the *Gingles* test were developed. Three broad demographic forces have reshaped the U.S. population in recent years: growing racial and ethnic diversity, increasing immigration and migration, and an aging white population. Parker et al., What Unites and Divides Urban, Suburban and Rural Communities, Pew Research Ctr., *available at* https://www.pewresearch.org/social-trends/2018/05/22/demographic-and-economic-trends-in-urban-suburban-and-rural-communities; *see generally* Frey, Diversity Explosion; Lee et al., Racial and Ethnic Diversity Goes Local: Charting Change in American Communities Over Three Decades, US2010 Project, *available at* https://s4.ad.brown.edu/projects/diversity/data/report/report08292012.pdf. Moreover, there has been an increase in multiracial identity. Frey, Diversity Explosion at 58–59. These racial and ethnic changes all have led to dramatic shifts in the nation's demographics in the preceding decades—and they will continue to do so for the foreseeable future.

"At the turn of the twentieth century, segregation often occurred in local, central city neighborhoods." Rastogi, A Place-based Examination of Racial Residential Integration in U.S. Suburbs, 2000-10, 1 (ProQuest Dissertations Publ'g 2020). "For example, in northern cities, Blacks typically lived in predominantly white neighborhoods spatially sequestered on blocks or streets." *Id.* "By 1940, whites segregated themselves from people of color across neighborhoods, yet within the same city." *Id.* In the period before the 1982 Amendments, Senate Report, and *Gingles*—"suburbs proliferated creating the stereotypical geography of the highly resourced, white suburb and the disadvantaged Black or Brown central city." *Id.*

Broadly speaking, in the succeeding decades the nation has become, and is continuing to become, more racially and ethnically diverse. For example, "[t]he white share of the population fell 8 percentage points since 2000 in the suburbs, 7 points in the urban core and 3 points in rural counties." Parker et al., What Unites and Divides Urban, Suburban and Rural Communities, Pew Research Ctr. Moreover, "the white population did not grow as sharply as other groups did, leading to a decline in the white share of the total U.S. and suburban populations." *Id.* "In urban counties, the decline in the share of the white population was due both to a decrease in the number of whites and an increase in the size of other populations, chiefly Hispanics." *Id.* "In rural counties, the white population also decreased and other groups also increased in size . . . ." *Id.* Indeed, current estimates say that the nation will be a majority-minority society by 2042. *Id.*

Much of this boom in diversity is led by urban and suburban counties, which are becoming more racially and ethnically diverse at a much faster pace. The nation has seen tremendous demographic shifts, this time marked by the suburbanization of people of color in the twenty-first century. Rastogi, A Place-based Examination of Racial Residential Integration in U.S. Suburbs, 2000-10 (ProQuest Dissertations Publ'g 2020). "[D]eclines in overall levels of residential segregation are largely attributable to declines in segregation" within suburbs. *Id.* Furthermore, durable, multiethnic census tracts are located almost entirely within suburbs. *Id.* at 2. This within-suburb racial diversity almost necessarily reduces segregation and racial concentration as whites and people of color share suburban resources and political power under the same regimes. *See*, *e.g.*, *id.* at 1, 88. "[A]s of 2010, most Blacks, Asians, Latinxs, and Native Americans lived in suburbs." *Id.* at 2 (citation omitted). "Furthermore, since 1980, inner-ring suburbs increasingly contribute to metropolitan racial diversity as central cities' populations have declined." *Id.* at 88 (citation omitted). Whereas in 1980—contemporaneous to the 1982 Amendments, the Senate Report, and *Gingles*—"54% of the suburban population lived in a suburb that was greater than 90% one racial or ethnic group," by 2010 that number declined to only 15%. *Id.* (citation omitted) Moreover, now "[e]very one of the 100 largest metropolitan areas is becoming more diverse." Frey, Diversity Explosion at 61.

In addition to differences in aging and migration, some of the explosion in diversity in recent decades has come from a rise in the number of individuals

who identify as multiracial. This "small but growing minority of the population . . . associate[s] with two or more of the standard racial groups (white, Black, Asian, American Indian/Alaska Native, and other races)." *Id.* at 58. In the 2010 census, a little more than 9 million people, nearly 3 percent of the entire population, classified themselves as multiracial. *Id.* This represented an increase of almost one-third since 2000. *Id.* The most prominent multiracial combinations are white/Black, white/Asian, and white/American Indian and Alaska Native. *Id.* Most of the nation's counties have multiracial populations constituting 1 to 3 percent of the entire population and only a very small number of counties have less. *Id.* at 59. While this may seem like a small figure at first glance, it is hardly insignificant and demonstrates that multiracial identity is growing and becoming more pervasive in many areas of the country. *Id.* In addition to representing an increase in diversity, multiracial identity is also representative of a decrease in segregation and racial division.

Minority political participation and political success has also increased significantly in the last four decades. *See, e.g.*, *Shelby Cnty.* v. *Holder*, 570 U.S. 529, 547–48 (2013) (discussing how minority voter turnout and registration rates in covered jurisdictions approached parity with white voter turnout and registration in those jurisdictions); *id.* at 547 (observing that "[b]latantly discriminatory evasions of federal decrees are rare" "[a]nd minority candidates hold office at unprecedented levels" (quoting *Northwest Austin Mun. Util. No. One* v. *Holder*, 557 U.S. 193, 202 (2009)); *id.* (stating that when Congress reauthorized the Act in 2006,

"[s]ignificant progress ha[d] been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices." (quotation omitted); *id.* (explaining that African-American registration and turnout has "increased significantly over the last 40 years." (quotation omitted).

All this to say, the nation is now more diverse, less balkanized, and has greater minority political participation than ever in modern history,[2] and certainly much more so than when the Court developed the first *Gingles* factor or when the Senate Report was created. This new norm of diversity and desegregation weakens the importance of the *Gingles* test. The *Gingles* test is so weakened that it is unworkable, unduly burdensome, and without justification. We are not living in the same world that necessitated the creation of *Gingles,* and so it is high time we advance Section 2 jurisprudence to follow suit.

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[2] The Congressional Black Caucus ("CBC") was established in 1971 with 12 members of the United States House of Representatives. Since *Gingles*, the number of Black elected members of the United States House of Representatives jumped from 25 in 1990 to 38 in 1992, and now stands at 58. Lublin, Eight White-Majority Districts Elected Black Members of Congress this Year. That's a Breakthrough., Wash. Post, Nov. 19, 2018, *available at* https://www.washingtonpost.com/news/monkey-cage/wp/2018/11/19/this-november-eight-mostly-white-districts-elected-black-members-of-congress-thats-a-breakthrough/; Cong. Black Caucus, Membership, https://cbc.house.gov/membership/ (last visited Apr. 30, 2022).

B. Due to Demographic Shifts Over the Preceding Decades, the First *Gingles* Factor No Longer Makes Sense.

As the nation becomes more diverse, the rationale that necessitated this Court's development of the *Gingles* test, especially the first *Gingles* factor, begin to disappear. Indeed, it has become clear that after the demographic shifts of the past four decades the *Gingles* test is no longer viable or justifiable at all. This necessitates a fresh review of *Gingles* and Section 2 jurisprudence by this Court and the development of a new and more workable test.

In essence, *Gingles* continued to "employ[] [the] extraordinary measures to address an extraordinary problem" behind the VRA. *Shelby Cnty.*, 570 U.S. at 534. Section 2 and the *Gingles* factors require courts to examine electoral history and population distributions, which may not involve any intent or even action by the government whatsoever, to then hold the government liable for discriminating based on race. The VRA "was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting, 'an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.'" *Id.* at 535 (quoting *South Carolina* v. *Katzenbach*, 383 U.S. 301, 309 (1966)). As the Court has explained in the context of the VRA, "exceptional conditions can justify legislative measures not otherwise appropriate." *Katzenbach*, 383 U.S. at 334. Essentially, "the Act imposes current burdens and must be justified by current needs." *Northwest Austin*, 557 U.S. at 203.

While voting discrimination may still exist, it is hard to deny that the conditions that originally justified *Gingles*, the 1982 Amendments, and the Senate Report no longer threaten the country to nearly the same extent as they did nearly four decades ago. *See supra* Sec. I.A.; *Shelby Cnty.*, 570 U.S. at 535–36. The question, then, is whether the extraordinary measures set forth by *Gingles* continue to satisfy constitutional and statutory requirements. They do not. *Gingles* and the exceptional burdens it places on states and municipalities are not justified by the same types of concerns that faced the Country in the prior decades. Indeed, as discussed *supra*, the Country is more diverse, less segregated, and has greater minority political participation than ever before in modern history. *See supra* Sec. I.A. Moreover, the fears of racial balkanization that hung over the country in the 1970s and 1980s like the Sword of Damocles have dissipated. *See id.* Accordingly, *Gingles* and its burdensome test are not justified by current needs and must be reexamined by the Court.

It must also be noted that the Court's efforts to reduce the previously looming threat of balkanization through the development of the *Gingles* test now in effect works toward balkanization. This is because the *Gingles* test, and especially the first *Gingles* factor, without a tether to race, is being used to group unlike persons of the same race together based on mere race alone. The first *Gingles* factor now works counter to its intended purpose because the Country is experiencing an explosion of diversity and minority groups are no longer cloistered in their traditional enclaves, but instead have been migrating to

suburban and rural areas throughout the country. *See id.* By requiring an inquiry into geographic compactness of a racial group, sufficient to constitute a majority in a single-member district, *Gingles* is actually stripping all other identifiers from that population and only seeking to examine them by race. This only pushes the country toward balkanization and it cannot be the point of Section 2. The first *Gingles* factor is flawed, and the Court must reexamine it.

The Court faced a similar situation in *Shelby County*, which serves as a near perfect illustration of why the *Gingle*s factors are unworkable in the modern era. In that appeal, the Court held that Section 4 of the VRA was unconstitutional; its formula no longer could be used as a basis for subjecting jurisdictions to preclearance. *Shelby Cnty.*, 570 U.S. at 557. The Court so held because Section 4's coverage formula was based on data over 40 years old, making it no longer responsive to current needs and therefore an impermissible burden on the constitutional principles of federalism and equal sovereignty of the states. *See id.* The same is true in the current appeal concerning Section 2 and *Gingles*. Section 2 of the VRA employs the extraordinary measure of delving into areas of sensitive legislative sovereignty—redistricting—to combat the extraordinary ill of racial vote dilution.

Gingles was "strong medicine," but Congress and the Court determined it was needed to address entrenched racial vote dilution. Because the "exceptional conditions" that justified the measure no longer exist, *see supra* Sec. I.A., the intrusion into legislative and state sovereignty are not appropriate. *See Katzenbach*, 383 U.S. at 334. Just as in *Shelby*

County, the conditions that originally justified these measures no longer characterize voting, redistricting, or population distribution. The Court reexamined its VRA jurisprudence in *Shelby County* due to similar changes and it should do the same here.

II. Section 2's Requirement that any Violation Be "On Account of Race or Color" Forecloses the Continued Use of *Gingles* to Address Vote Dilution Claims Without First Proving Causation.

Section 2 of the VRA provides that: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote *on account of race or color* . . . ." 52 U.S.C. § 10301(a) (emphasis added). The totality of the circumstances analysis in Subsection (b) requires courts to assess the "equal[] open[ess]" of a state's political process and whether minority voters have "less opportunity" to "participate in the political process and to elect representatives of their choice." *Id.* Moreover, the "on account of race" language in Section 2 mirrors and gives effect to the nearly identical language found in the Fifteenth Amendment. *See Mobile*, 446 U.S. at 60–61; *see also* U.S. Const., Amdt. 15, § 1.

Because "[i]t is a cardinal principle of statutory construction that [the Court] must give effect . . . to every possible clause and word of a statute," *NLRB* v. *SW Gen., Inc.,* 137 S. Ct. 929, 941 (2017), the language "on account of race" must be a prerequisite

to a finding of discriminatory effect as demonstrated by the totality of the circumstances, with race—not party preference—being the causal factor underlying the demonstrated effect. In other words, there must be some proof not only that the challenged law was the cause of an alleged denial or abridgement of minority voting rights, *but also* that the alleged burden occurred because of the *race* of the voters involved rather than any other attribute. *Greater Birmingham Ministries* v. *Sec'y of State of Ala.*, 992 F.3d 1299, 1330 (11th Cir. 2021). This reading is in perfect accord with what many circuits have held, either explicitly or implicitly. *See, e.g.*, *id.* (collecting cases from five circuits). In fact, read in context, the phrase "on account of race or color" in Section 2 is susceptible to only two possible readings: (1) a requirement that plaintiffs show that the legislators who adopted a challenged law intended to discriminate on the basis of race; or (2) a requirement that plaintiffs demonstrate that their race (not some other factor) was the cause of their asserted injury. The former explanation was explicitly disclaimed by the history of the 1982 VRA amendments, so the latter must be correct.

A. The Second and Third *Gingles* Preconditions Are an Atextual Interpretation of Section 2.

A statute is only as great as the sum of its parts, and no provision can be analyzed (or properly understood) when considered in isolation. *See Brnovich* v. *Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2337 (2021). Hence, Sections 2(a) and 2(b) of the VRA must be read together to understand what

kinds of state action they prohibit. Section 2(a), by banning only voting qualifications or prerequisites to voting that deny or abridge the voting rights of citizens "on account of race or color" clearly restricts its ambit only to laws that impact the voting rights of racial minorities. A Section 2 cause of action would never get a white Wyoming Democrat or white Vermont Republican past the courthouse door because Section 2 was not designed to protect the rights of those voters; rather, it was originally targeted at a specific problem of intentional discrimination against racial minorities in state voting processes. *See Mobile*, 446 U.S. at 60–61.

Although Section 2 was later amended to eliminate the intent requirement, the class of individuals protected by the statute—namely, minority voters whose rights have been abridged or denied "on account of race or color"—has never changed. After Section 2(a) clearly established *whose* rights the statute was designed to protect, the 1982 amendment codified as Section 2(b) explained how a violation of those rights could be established: The totality of the circumstances test.

Section 2(b) requires plaintiffs to show 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)," 52 U.S.C. § 10301(b)—*i.e.*, minority voters who have been impacted by a law because of their race. But the statute does not leave potential litigants in the dark concerning how to prove a violation; Section 2(b) goes on to explain that unequal openness to participation can be demonstrated by showing that the plaintiffs "have less opportunity than other

members of the electorate to participate in the political process and to elect representatives of their choice." *Id.*

Of course, there are many reasons a voter (including a minority voter) could have "less opportunity" than other voters within their State to elect the representative they would prefer, but the most prominent reason is partisanship. As Wyoming Democrats, Vermont Republicans, and other American voters can bitterly attest, millions of Americans live within States or political subdivisions where the partisan voting trends of their neighbors diverge from their personal political preferences. Section 2 was designed to equalize minority access to the political process by prohibiting state laws that denied or abridged their voting rights *on account of their race*, but it was clearly never intended to guarantee the success of an individual partisan candidate simply because that candidate is favored by minority voters (or, conversely, because that candidate is *disfavored* by white voters). *See Frank* v. *Walker*, 768 F.3d 744, 754 (7th Cir. 2014). To read the statute any more broadly than the sweep of its plain terms is to conjure a law that does not exist—and yet, that is precisely what the Court's leading racial vote dilution precedent has done for the last thirty-six years.

The *Gingles* Court erred in two ways: It read a conditional guarantee of proportional representation into Section 2 and read the "on account of race or color" language out of the statute altogether. *See Gingles*, 478 U.S. at 63. The first *Gingles* factor, although flawed for the reasons discussed in Section I *supra*, at least establishes a necessary precondition for establishing a majority-minority district

(numerosity and compactness). The second and third factors, however, focus only on the *political* cohesiveness of a given racial minority and the relevant white majority, never requiring the reviewing court to inquire into the necessary racial *cause* of any disparate effect. In fact, the plurality opinion expressly disclaims causation as relevant in any way. *See Gingles*, 478 U.S. at 63 (holding that "the reasons black and white voters vote differently have no relevance to the central inquiry of § 2"). If it were true that causation was irrelevant, then the "on account of race" language in Section 2(a) would be superfluous, and "courts should disfavor interpretations of statutes that render language superfluous." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992).

Unlike *Gingles*, a test rooted in the plain terms of the statute would ask whether a candidate favored by a racial minority group consistently loses elections *because* they are the favored candidate of a racial minority, or for any of the plethora of factors beyond racial animus that motivate the votes of the majority, such as partisanship. No matter how strenuously some might argue otherwise, race and partisanship are not coextensive categories and never have been. *See Davis* v. *Bandemer*, 478 U.S. 109, 156 (1986) (O'Connor, J., concurring) ("[W]hile membership in a racial group is an immutable characteristic, voters can—and often do—move from one party to the other or support candidates from both parties."). Section 2 was designed to equalize voting opportunities for racial minorities, but it was not intended to establish an immediate violation any time racial minority plaintiffs file suit. Causation is a necessary element of Section 2 analysis, as an

increasing number of federal courts across the country are beginning to recognize. *See Greater Birmingham Ministries*, 992 F.3d at 1330; *Lopez* v. *Abbott*, 339 F. Supp. 3d 589, 604, 613 (S.D. Tex. 2018) (holding that "[p]laintiffs have the duty, in the first instance, to demonstrate some evidence of racial bias through the factors used in [*Gingles*]" and finding that "partisanship is a better explanation for defeats of Hispanic-preferred candidates than racial vote dilution"); *Ala. State Conference of the NAACP* v. *Alabama*, 2020 U.S. Dist. LEXIS 18938, at *11–21 (M.D. Ala. Feb. 5, 2020) (detailing Alabama's partisan journey from the Democratic to the Republican Party). This case presents a prime opportunity for the Court to reevaluate the *Gingles* factors, and the Court's recent analysis in other election-related cases can help point the way towards a test that more faithfully adheres to the statutory text.

B. *Rucho, Brnovich,* and Recent Circuit Court Decisions Highlight *Gingles*'s Flaws.

Shortly after deciding *Gingles*, the Supreme Court began clarifying that it did not believe *all* voting restrictions that have a racially disproportionate effect constitute Section 2 violations. *See, e.g.*, *Chisom* v. *Roemer*, 501 U.S. 380, 383–84 (1991) (noting that the 1982 VRA amendments "make clear that *certain* practices and procedures that *result* in the denial or abridgment of the right to vote are forbidden" (emphasis added)). Hence, while the addition of Section 2(b) to the statute expanded the scope of prohibited state action

beyond that which was motivated by a racially discriminatory intent, it did not widen the aperture so far as to encompass all state actions that have a racially disparate effect. Lower federal courts have correctly recognized the intermediate nature of the change wrought by Section 2(b) for years, *see Johnson* v. *Governor of Fla.*, 405 F.3d 1214, 1227–28 (11th Cir. 2005) (holding that while "a plaintiff could establish a [Section 2] violation without proving discriminatory intent," Section 2 nevertheless "does not prohibit all voting restrictions that may have a racially disproportionate effect"), and recent decisions of this Court further indicate that the *Gingles* test in its current form is prone to misapplication.

The first hint that the second and third *Gingles* factors rested on shaky jurisprudential ground came in *Rucho* v. *Common Cause*. 139 S. Ct. 2484 (2019). In that case, which was brought under the First Amendment and Equal Protection Clause, the Court held that partisan gerrymandering claims are not justiciable in federal court because there exists no judicially manageable standard for determining how much partisan motivation in redistricting is too much. *Id.* at 2508. *Gingles*, however, requires a minority group "to show that it is politically cohesive," and that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate" to succeed in proving a Section 2 violation. *Gingles*, 478 U.S. at 51. It is not clear how to square these requirements with *Rucho*, which seems to conflict with *Gingles*'s command that Section 2 plaintiffs demonstrate a particular degree of partisan solidarity among both the racial minority group at issue in the particular

case and the white majority.[3] *Gingles* essentially requires Section 2 plaintiffs to produce evidence that *Rucho* held federal courts are not competent to evaluate, and these dueling precedents will coexist in uneasy tension until the Court reconciles them.

Two years after deciding *Rucho*, the Court in *Brnovich* v. *DNC* reviewed a Section 2 challenge to Arizona's precinct voting rule and ballot harvesting restrictions. 141 S. Ct. 2321, 2330 (2021). Justice Alito, writing for the majority, confirmed that the Court's "statutory interpretation cases almost always start with a careful consideration of the text, and there is no reason to do otherwise" when analyzing Section 2. *Id.* at 2337. Moving on to the statutory text itself, Justice Alito quoted the "on account of race or color" language of Section 2(a) and then noted that "[w]e need not decide what this text would mean if it stood alone because §2(b), which was added to win Senate approval, explains what must be shown to establish a §2 violation." *Id.* This confirms that Section 2(b)'s totality of the circumstances test cannot be properly interpreted when divorced from the confines of the Section 2(a)

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[3] In addition, much litigation has ensued over whether Black and Hispanic voters are sufficiently "cohesive" politically to urge the creation of "coalition" districts. *See, e.g.*, *Pope* v. *Cnty. of Albany*, 2014 U.S. Dist. LEXIS, 10023 at *22 (N.D.N.Y. 2014) (noting that "[c]ourts are divided on whether Section 2 authorizes a coalition of minority voters to comprise a 'minority group'"); *see also Growe* v. *Emison*, 507 U.S. 25, 41 (1993) (declining to decide whether "it was permissible . . . to combine distinct ethnic and language minority groups for purposes of assessing compliance with § 2," but holding that "proof of minority political cohesion is all the more essential" for such alleged coalition districts).

condition that any injury be on account of the voter's race.

The *Brnovich* Court wisely declined to unnecessarily interpret the "on account of race" language when that case could be decided on other grounds, but the test the Court advanced as relevant to the totality of the circumstances inquiry in the time, place, and manner context implicitly recognizes the centrality of the causation requirement. The Court first explained that "equal opportunity helps to explain the meaning of equal openness" in Section 2(b), confirming that Section 2 is focused on ensuring equality of access and not an equalization of electoral outcomes. *Id.* at 2338. It then identified five factors pertinent to the analysis, among them the overall size of the burden imposed by the challenged law and the size of any disparities in the law's impact on racial minority groups. *Id.* at 2339–40. Regarding the latter, the Court noted that: "To the extent that minority and non-minority groups differ with respect to employment, wealth, and education, even neutral regulations, no matter how crafted, may well result in some predictable disparities in rates of voting. . . ." *Id.* at 2339. One can add residential sorting patterns and statewide partisanship to the Court's list of factors that, while not inherently racial, are sufficiently correlated with race to sometimes affect a minority group's ability to elect its preferred candidate. But the fact remains that factors which are merely correlated with race do not mean a law operates "on account of race." The *Brnovich* factors clearly reflect an understanding of Section 2 premised on something more than disparate impact alone, but less than invidious

intent—namely, a requirement that any disparate impact be caused by the race of the affected voters.

Despite the signs that *Gingles* conflicts with certain other precedents as explained *supra*, it remains the Court's "seminal §2 vote dilution case." *Id.* Still, some lower federal courts have in recent years indicated that, contra *Gingles*, they view the causation inquiry as a mandatory step in proving any Section 2 claim. The Eleventh Circuit in *Greater Birmingham Ministries* v. *Secretary of State of Alabama* has gone the farthest in this direction. In that Section 2 challenge to Alabama's voter ID law, plaintiffs alleged that "disparate voter ID possession rates and disparate burdens placed on minority voters" such as "travel disparities, socioeconomic disparities, and lack of Spanish-language materials"—*i.e.*, the kind of disparities that are correlated with race but not "on account of race" as discussed in *Brnovich*—constituted evidence sufficient to prove a Section 2 violation. 992 F.3d at 1329. But although the three-judge panel determined that "minority voters in Alabama are slightly more likely than white voters not to have compliant IDs" and therefore to be burdened by the challenged law, it nevertheless held that "the plain language of Section 2(a) requires more" than this (relatively minor) racially disparate impact. *Id.* at 1330. The two-part test the Eleventh Circuit adopted is simple:

> First, the challenged law has to "result in" the denial or abridgement of the right to vote. Second, the denial or abridgement of the right to vote must be "on account of race or color." In other words, the challenged law

> must have *caused* the denial or abridgement of the right to vote on account of race.

Id. Both showings are essential to prove a violation, and this test—unlike *Gingles*—succeeds in giving meaningful effect to every word of Section 2.

Other federal circuits seem to agree, even if none have expressly admitted that they think the *Gingles* test is irreparably flawed. In upholding a Virginia voter ID law against a Section 2 challenge, a three-judge panel of the Fourth Circuit affirmed that a demonstration of disparate impact is not enough when plaintiffs fail to establish the necessary causal link. *Lee* v. *Va. State Bd. of Elections*, 843 F.3d 592, 600–01 (4th Cir. 2016) (stating "[w]e conclude that § 2 does not sweep away all election rules that result in a disparity in the convenience of voting"). A three-judge panel of the Sixth Circuit came to a similar conclusion in upholding Ohio's 29-day early voting period against a Section 2 challenge claiming it was insufficiently long, holding that Section 2 plaintiffs must demonstrate that the specific law they are challenging, "as opposed to non-state-created circumstances[,] *actually make voting harder*" for minority voters. *Ohio Democratic Party* v. *Husted*, 834 F.3d 620, 631 (6th Cir. 2016). The Seventh Circuit, Ninth Circuit, and at least one judge on the Fifth Circuit agree. *See Frank*, 768 F.3d at 753–54; *Gonzalez* v. *Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc) (stating that "proof of 'causal connection between the challenged voting practice and a prohibited discriminatory result' is crucial" in Section 2 analysis (citation omitted)); *Veasey* v. *Abbott*, 830 F.3d 216, 311 (Jones, J. dissenting) (explaining that a better vote dilution test would

"dispense[] with the *Gingles* factors," "require[] a causal connection between the challenged regulation and the disparate impact," and read Section 2(b) "as an 'equal-treatment requirement (which is how it reads)' rather than 'an equal-outcome command.'" (quoting *Frank*, 768 F.3d at 754)).

To summarize, the second and third *Gingles* factors skip past an essential step of any Section 2 analysis: Inquiring whether the demonstrated effect occurs "on account of race." If it does not, even if a challenged law creates disparate impacts for different racial groups, then the law does not present a Section 2 violation. As Judge Jones of the Fifth Circuit aptly noted in her dissent in *Veasey* v. *Abbott*, "the statute alone sufficiently describes how violations of Section 2 vote abridgement claims are to be proved" without the necessity for courts to cast the statutory net any wider. 830 F.3d at 306 (Jones, J. dissenting). It should go without saying that it does not undermine the purpose of a statute to interpret that statute consistent with its express terms. The *Gingles* factors depart from the text of Section 2 by imposing a political cohesion requirement that appears nowhere in the statute itself, and although a showing of political cohesion is essential to demonstrate that the creation of a majority-minority district will tend to result in the election of the minority's candidate of choice, it is hardly sufficient to prove that a challenged law dilutes minority votes "on account of race."

C. Modern Vote Dilution Claims Have Been Used as a One-Way Ratchet To Elect Democrats, Not To Remedy Minority Underrepresentation.

Reading the foregoing analysis, some might ask: So what? What's the harm if the Court's current test for assessing Section 2 violations in redistricting departs somewhat from the text of the statute and skips to asking whether the creation of a majority-minority district would have the intended remedial effect? There are two distinct dangers. The first, already alluded to, is the Court's oft-stated principle that "statutory interpretation cases almost always start with a careful consideration of the text." *Brnovich*, 141 S. Ct. at 2337. To unmoor statutory interpretation from the strictures of statutory text is to engage in an exercise more akin to lawmaking than judicial review. But even setting aside that issue, the proliferation of Section 2 claims in recent years should still be a cause of concern to this Court because of the one-sided way in which they have been used to expand partisan political power. A statute intended to equalize minority voting opportunities has instead become a cudgel wielded against any state law that fails to advance the institutional interests of the Democratic Party.

In large part, the Democratic Party relies on the high correlation of black voters' support for Democratic candidates to allege "race discrimination" in many cases where the inability of Democrats to win election to office is more a result of the decline of the Democratic Party in certain states or regions than racial discrimination. For example, as chronicled in *Alabama State Conference of the*

NAACP v. *Alabama*, "despite large spending disparities, losing black candidates receive a slight edge in their share of the vote over losing white candidates." 2020 U.S. Dist. LEXIS 18938, at *128. Hence, as the district court in that case found, Democratic candidates regardless of race receive similar levels of overall support (and black Democratic candidates may even have a slight advantage over white Democrats), "[b]ut the notion that African-American candidates lost solely because of their skin color is not supported by the evidence." *Id.* Similar claims have been brought by Democratic Party-allied voters in Louisiana, Georgia, and Texas. Compl., *Robinson et al.* v. *Ardoin*, No. 3:22-cv-211-SDD-RLB, (M.D. La. Mar. 30, 2022); Compl., *New Georgia Project et al.* v. *Raffensperger et al.*, No. 1:21-cv-1229-JPB (N.D. Ga. Mar. 25, 2021); Compl., *Texas State Conference of the NAACP* v. *Abbott et al.*, No. 1:21-cv-1006 (W.D. Tex. Nov. 5, 2021). The partisan dynamics of these states will likely produce electoral results similar to those already identified by the district courts in Alabama and Texas.

The second and third *Gingles* factors are two sides of the same coin; one requires a showing of minority group political cohesion, and the other a showing of majority group (*i.e.*, white) political cohesion. *Gingles*, 478 U.S. at 51. On one level, these requirements make sense; there would be no point in a court ordering the creation of a majority-minority district if the minority group did not typically vote for the same candidate, or if white voters in the district shared minority political preferences.

But at their core, the second and third *Gingles* factors perpetuate the dangerous myth that race and partisanship are not only correlated, but

synonymous and immutable. Justice O'Connor identified the danger in such an approach in her opinion concurring in the judgment in *Gingles* itself, joined by Chief Justice Burger and Justices Powell and Rehnquist: "Nothing in . . . the language and legislative history of § 2 supports the Court's creation of this right to usual, roughly proportional representation on the part of every geographically compact, politically cohesive minority group that is large enough to form a majority in one or more single-member districts." *Id.* at 99 (O'Connor, J., concurring). Interpreting Section 2 to require such proportionality, in a world in which certain minority groups in some states or regions typically favor a particular political party, will redound to the political benefit of that party by ensuring that the electoral environment is structured in a way that guarantees it some minimum level of electoral success.[4]

The example presented by the instant case is illustrative: When a bloc of minority voters, such as black voters in Alabama, vote for a single party at rates regularly exceeding 90%, *see Ala. State Conf. of*

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[4] As NRRT has previously explained in amicus briefs submitted to this Court, the political alignments and preferences of Americans are subject to constant change. *See, e.g.*, Amicus Curiae Br. of the Nat'l Republican Redistricting Trust, *Moore et al.* v. *Harper et al.*, No. 21A455 (Mar. 2, 2022). The gains the Republican Party has made among Hispanic voters in states like Florida and Texas over the last decade have been immense, and voting trends among Hispanic voters in many other states do not demonstrate monolithic support for the Democratic Party. Russonello & Mazzei, Trump's Latino Support Was More Widespread Than Thought, Report Finds, N.Y. Times, Apr. 2, 2021, *available at* https://www.nytimes.com/2021/04/02/us/politics/trump-latino-voters-2020.html.

the NAACP, 2020 U.S. Dist. LEXIS 18938, at *13, the second and third *Gingles* preconditions are transformed from a method for minority voters to effectuate their rights into an unapologetic mechanism for electing more Democrats. For instance, at least one federal court has found that Democratic candidates receive essentially consistent percentages of the two-party vote share in Alabama irrespective of the race of the candidate. *Id.* at *11–21 (outlining the decline of the Democratic Party in Alabama). There is of course no requirement that state legislatures redistrict in a way that maximizes Democratic vote share, and a plaintiff would be laughed out of court for suggesting otherwise. And yet, plaintiffs are permitted to advance *that very argument* by simply dressing up their gripe about partisan representation as a Section 2 claim of racial vote dilution. This ruse has gone on long enough.

The second and third *Gingles* factors place state legislatures in an impossible bind when redistricting: Because partisanship in certain states or regions is correlated with race, any attempt at constitutionally permissible race-blind redistricting is easily framed by the minority-preferred party as a racial gerrymander. The fact that the Supreme Court has read the racial causation requirement out of Section 2 entirely has only made it easier for politically motivated plaintiffs to obtain the electoral adjustments they seek by relieving them of their statutory responsibility to demonstrate a causal link to the challenged law. The maintenance of a legal regime under which even miniscule differential impacts on various racial groups are deemed Section 2 violations provides legal cover to Democrats who seek electoral rule changes that enhance their

chances of winning elections. *See Frank*, 768 F.3d at 754 (noting that such a broad-brush approach would invalidate even motor-voter registration options).

A better textual interpretation of Section 2 would read it as "an equal-treatment requirement" rather than "as an equal-outcome command." *Id.* Section 2 by its own terms only prohibits state laws that deny or abridge the right to vote "on account of race or color," as demonstrated by a showing that minority voters "have less opportunity to participate in the political process and to elect representatives of their choice" than do members of the white majority. 52 U.S.C. § 10301. If, by contrast, minority voters *do* have equal access to the political process, but their favored candidates are regularly foiled by some non-racial factor—like, for example, their State's partisan lean or the dispersal of the minority group over a large geographic area—then a Section 2 violation has not occurred. The political cohesion of the minority or majority group is irrelevant to the threshold causation showing, because it is only once a violation has actually been established that the difficult work of crafting an appropriate remedy can begin.

CONCLUSION

For the aforementioned reasons as well as those articulated by Appellants, the Court should reverse the decision below.

Respectfully submitted,

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