No. 21-1086, 21-1087

IN THE

Supreme Court of the United States

JOHN H. MERRILL, *et al.*
Petitioner,
v.
EVAN MILLIGAN, *et al.*
Respondent.

JOHN H. MERRILL, *et al.*
Petitioner,
v.
MARCUS CASTER, *et al.*
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF AMICUS CURIAE FOR THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL IN SUPPORT OF PETITIONER

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III. IDENTITY AND INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the American Legislative Exchange Council respectfully submits this brief *amicus curiae* in support of Petitioner John H. Merrill, et al.[1]

The American Legislative Exchange Council (ALEC) is America's largest, non-partisan voluntary membership organization of state legislators who are dedicated to the principles of limited government, free markets, and federalism. ALEC's interest in this case is to ensure that state legislators have a clear, consistent, and objective standard when fulfilling their decennial constitutional redistricting responsibilities. ALEC has participated as a party *amicus curia* in several cases involving state legislative redistricting, including *Berger v. North Carolina Chapter of the NAACP*, *Virginia House of Delegates v. Bethune-Hill*, ___ U.S. ___, 139 S.Ct. 1945 (2019), and *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006). As such, ALEC has a strong interest in fostering respect for the role of state

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[1] Pursuant to this Court's Rule 37.3(a), all parties have provided blanket consent to the filing of amicus briefs, which consent is on file with the Clerk's office.

Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

legislatures within the constitutional order, ensuring their perspective is understood within the federal judiciary, and preserving state legislative power and prerogatives granted by the Constitution.

ALEC members – state legislators – have long maintained an interest in protecting and promoting their authorities. Where that authority intersects with the federal government and necessarily implicates constitutional principles, state legislators desire clarity and consistency to ensure that the way in which they exercise their authorities comports with the appropriate standards.

At the encouragement and participation of state legislative members, ALEC has adopted several model policies speaking to the role of state legislatures either with respect to the federal government or with respect to their vested constitutional authorities. These policies include the Resolution Reaffirming the Right of State Legislatures to Determine Electoral

Districts [2] and the Resolution Reaffirming Tenth Amendment Rights.[3]

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[2] Resolution Reaffirming the Right of State Legislatures to Determine Electoral Districts, American Legislative Exchange Council (September 18, 2018), https://alec.org/model-policy/draft-resolution-reaffirming-the-right-of-state-legislatures-to-determine-electoral-districts/ (Recognizing the grant of authority under Art. I, Sec. 4 of the Constitution to state legislatures for determining the "Times, Places and Manner of holding Elections for Senators and Representatives," and criticizing specifically the drawing and adoption of maps by state supreme courts prior to legislative enactment).

[3] Resolution Reaffirming Tenth Amendment Rights, American Legislative Exchange Council (updated January 16, 2016), https://alec.org/model-policy/resolution-reaffirming-tenth-amendment-rights/ (Recognizing that state legislators swear to support the Constitution of the United States as well as the constitution of their state and that the Tenth Amendment reserves to States all powers not delegated to the United States by the Constitution).

IV. SUMMARY OF ARGUMENT

The Constitution grants to state legislatures primary redistricting responsibilities. U.S. Const. Art. I, Sec. 4, *Growe v. Emison*, 507 U.S. (1975) ("[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts.") *Growe*, 507 U.S. at 34. When exercising this responsibility, state legislators must weigh numerous considerations, including age, economic status, religious, political persuasion, and non-division of geographically similar regions. On top of this, state legislators must weigh all those criteria and redistricting consistent with state and federal constitutions, federal law and jurisprudence.

Section 2 of The Voting Rights Act prohibits the imposition or application "by any state or political subdivision" of any "voting qualification or prerequisite to voting or standard, practice, or procedure" which results in "a denial or abridgement of the right of any citizen of the United States to vote on account of race or color…" 52 U.S.C. § 10301(a). As clarified by the next subsection, states may violate (a) 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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301(b). *See also*, *Thornburg v. Gingles*, 478 U.S. 30, 83-84 (1986) (O'Connor, J., concurring in the judgment) (Noting that as "[a]mended § 2 is intended to codify the 'results' test employed in *Whitcomb v. Chavis*, and *White v. Register* and to reject the "intent" test propounded in the plurality opinion in *Mobile v. Bolden*." Citations omitted.)

In no case may a state apportion solely on the basis of race. *See*, *Shaw v. Reno*, 509 U.S. 630, 647-648 (1993) ("A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.") and *Cooper*, 137 S.Ct. at 1453 (2017) ("The Constitution entrusts States with the job of designing congressional districts. But it also imposes an important constraint: A State may not use race as the predominant factor in drawing district lines unless it has a compelling reason"). If a state may not

elevate race above neutral criteria when redistricting, neither may a court.

As interpreted by this Court, in *Gingles*, plaintiffs in reapportionment litigation must establish three preconditions before they can try to prove, applying a totality of the circumstances standard, that a state's maps result in prohibited discrimination.

> As both amended § 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the "totality of the circumstances" and to determine, based "upon a searching practical evaluation of the 'past and present reality,'" whether the political process is equally open to minority voters. "'This determination is peculiarly dependent upon the facts of each case,'" and requires "an intensely local appraisal of the design and impact" of the contested electoral mechanisms."

Gingles, 478 U.S. at 79 (citations omitted).

While well-intentioned, *Gingles*' precondition and totality of the circumstances tests have empowered plaintiffs and federal courts to second-guess and supplant the state legislative process. Plaintiffs encourage courts to ignore or disregard legislatures' arguments for crafting districts certain ways, or even to substitute plaintiff or court drawn maps in favor of the duly debated maps passed by legislatures.

The *Gingles* preconditions and totality of the circumstances are far from perfect. The application of the precedent to single-member districts is somewhat tenuous, as the Court addressed whether multimember districts improperly diluted minority voting strength. *Id.* at 46-50. Single member districts were viewed as the solution to this specific vote dilution problem. Only starting in 1993 did this Court start applying *Gingles* to single-member districts. *Growe*, 507 U.S. at 40.

None of this is to say that courts don't have a role nor that legislatures should have *carte blanche* to redistrict independent of constitutional protections for minorities. Rather, it is to say that state legislators find themselves – as do judges – searching for an objective standard by which they can judge whether proposed redistricted maps satisfy constitutional concerns and the Voting Rights Act, while ensuring that legislators may first consider race-neutral concerns such as compactness, contiguity, economic and environmental communities of interest, and other such factors.

Without a consistent, objective standard, the difficulty for state legislators is plain: Plaintiffs and district and circuit courts second-guess legislative application of race-neutral standards; substitute plaintiffs' reapportionment experts for those relied upon by legislatures; and force legislatures to redraw maps, which focus first on race, then race-neutral criteria, in violation of constitutional principles. In other words, without an objective standard, courts deprive state legislators and the people they represent

of Constitution's representational guarantees by effectively excising state legislators from the reapportionment process.

Surveying challenges filed within the last three years to election systems and redistricting legislation – including election districts and methods of electing local and statewide officials – under § 2 where the courts applied *Gingles* preconditions and totality-of-the-circumstances is revealing. In nearly every case, the district courts found that the maps violated § 2, and the circuit courts largely affirmed the district courts' rulings.

Certainly, the purpose of § 2 is to provide a benchmark for legislators and to hold them accountable to the promises the Constitution affords all citizens and was not intended as a tool to completely supplant legislative debate. Yet, the survey of recent cases suggests that too often, the lack of a consistent, objective standard results in substantial federal judicial overreach.

A solution, then, fulfilling the Constitution's guarantee promising equal access to the political process for all people regardless of race, is necessary. The solution must also ensure that state legislatures have the freedom to redistrict applying traditional, race-neutral criteria. The balance state legislators crave must be objective and capable of consistent application If properly crafted, it would guide legislators, potential plaintiffs, and courts alike.

The test should come from the plain text of § 2, focusing on whether a state's "political process" is

"equally open" to minorities, giving significant weight when legislatures focus on traditional race-neutral redistricting considerations, and intervene only when the sole explanation for irregularities is racial discrimination. *E.g. Shaw*, 509. U.S. at 642 (Accepting that plaintiffs stated a valid complaint when objecting to "redistricting legislation that [was] so extremely irregular on its face that it rationally [could] be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification").

V. ARGUMENT

A. A Survey of Recent *Gingles* and Section 2 Cases Reveal That Legislative Policy Determinations Are Rarely Sustained

Redistricting is challenging work. The Constitution, Voting Rights Act (VRA), this Court's jurisprudence, and state constitutional standards all inform and confine how legislatures draw legislative districts. The Constitution rightly restricts states from considering race as a primary factor when creating districts. *Cooper v. Harris*, 581 U.S. ___, 137 S.Ct. 1455 (2017).[4] *Accord*, *Shaw*, 509 U.S at. 643

[4] "The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans. It prevents a State, in the absence of 'sufficient justification,' from 'separating its citizens into different voting districts on the basis of race.'" 581 U.S. at ___, 137 S.Ct. at 1463 (internal citations omitted).

("Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality'"). The VRA, and this Court's jurisprudence interpreting the VRA, often acts as a countervailing force, requiring the creation of districts "precisely because of race." *Abbott v. Perez*, 518 U.S. ___ , 138 S.Ct. 2305, 2314 (2018).

The countervailing forces leave open the door for a "difference between what the law permits and what it requires." *Shaw*, 509 U.S. at 654. Those challenging redistricting legislation seize on the discretion afforded states. Through battles of experts and competing theories, plaintiffs manage to convince courts that the legislative discretion exercised falls outside of what the law requires rather than discrimination the law prohibits.

Reasonable minds can differ about how to apply § 2 as currently interpreted by *Gingles*. Unfortunately, from the perspective of state legislators, the lack of clarity can mean that courts second-guess policy decisions the federal and state constitutions reserve for legislators, who are accountable to the voter for the decisions they make. Courts, though, are free to correct those policy decisions when they clearly violate constitutionally guaranteed civil rights. *E.g.*, *Cooper*, 137 S.Ct. at 1463.

The Constitution grants, and state constitutions frequently empower, state legislatures to redraw districts at least once every ten years. The general theory for empowering state legislatures is that they,

more so than federal judges, know the various economic, societal, religious, and environmental concerns within their borders. Legislators understand the balances they must attain for political constituencies, state constitutional redistricting provisions, the U.S. Constitution, federal law, and jurisprudence.

A state, for example, may have a shoreline, farming communities, urban areas, and areas rich in energy resources. State legislators may understand that those along the shore have vastly different interests than those in farming communities or urban areas, independent of race and ethnicity. While it may be possible to craft a majority-minority district by combining localities from the farming and urban areas to the shoreline, doing so would emphasize race while separating communities of interest based on vocation, environmental, or other common societal interests.

State legislatures need a consistent objective standard. Just over the past three years, plaintiffs have filed dozens of cases pursuant to § 2 and where the asked the district or circuit courts to apply *Gingles* preconditions and totality of the circumstances tests. The cases spanned a variety of vote dilution challenged, from school board districts to local judicial offices, from to statewide utility commissioners to state legislative districts, and – of course – the instant case. The vast majority of cases filed, and all of the challenges to legislative districts, occurred in states where Republicans control the legislative branch, if not both the legislative and judicial branches.

Similarly, an overwhelming majority of the cases occur in the south, with the exception of one each in New York, New Jersey and Missouri.

The court in *Clerveaux v. East Ramapo Central School District*, 984 F.3d 213 (2nd Cir. 2021) held that at-large school districts violate *Gingles*' preconditions and the totality-of-the-circumstances test, when applying the relevant factors in the Senate Report. The court opined that at-large districts seemed to minimize minority representation in a school district where most of the non-minority students attended private, religious schools. Most minority students attended the public school system, but the at-large nature of the school board districts denied black and Latino citizens the opportunity to elect candidates of their choice. *See Clerveaux*, 984 F.3d at 241 (Detailing how non-minorities were able to band together and defeat minority preferred candidates in the school board races from 2008-2018).

The legislature in Georgia ran afoul of *Gingles*' preconditions and the totality-of-the-circumstances test, when the court applied the Senate Report factors in *Wright v. Sumter County Board of Elections and Registration*, 979 F.3d 1282 (11th Cir. 2020). At the school board's request, the Georgia Legislature changed the board members' districts, eliminated two seats, and changed from nine single-member districts to five single-member and two at-large seats. The plaintiff argued, and the court accepted, that the new maps and two at-large seats improperly diluted minority voting strength through "'the unnecessary packing of blacks' into two of the five single-member

districts." *Wright*, 979 F.3d at 1288. During the first trial, the district court denied the plaintiff's various motions, concluding that he was unable to "satisfy the third *Gingles* factor," in part because he had not been able to establish that a non-black-preferred candidate would win against a black-preferred candidate. *Id*. at 1290.

What makes this case even more remarkable is the district court's analysis. The Georgia Legislature, rather than reinvent the wheel, mirrored the districts for the County Board of Commissioners for the new school board. Between mirroring the districts, and other factors considered by the Legislature, the district court believed the map was "justified on race-neutral grounds" but those grounds "did not negate [plaintiff's] showing through other factors that the challenged practice denies minorities fair access to the electoral process." *Id*. at 1296-1297.

In a rare victory for an existing election system, in *Fusilier v. Landry*, 963 F.3d 447 (5th Cir. 2020) a district court in Louisiana held that plaintiffs could not establish a vote dilution case where an at-large election system for a single state Judicial District Court where the election was linked to the court's parish-wide jurisdiction. The linkage was a substantial interest for the state and the race-neutral reasons for the election system meant that plaintiffs could not satisfy *Gingles*' totality-of-the-circumstances analysis.

In *Thomas v. Bryant*, 938 F.3d 134 (5th Cir. 2019), *vacated and appeal dismissed as moot*, 961 F.3d 800

(en banc), the district court found that a single State Senate seat in Mississippi improperly diluted African American voting strength based on *Gingles* preconditions and the totality-of-the-circumstances when applying the Senate Report factors. The Fifth Circuit, seven years after the enactment of apportionment legislation in 2012, affirmed the district court's decision, finding no reason to reverse the determination that legislature's reapportionment legislation improperly diluted African American voting strength.

Moving to district court decisions, in *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, Slip Copy, 2022 WL 300917 (E.D. Arkansas, 2022), the plaintiffs have challenged Arkansas' reapportionment plan. The state filed for summary judgement, but the *Gingles* preconditions and totality-of-the-circumstances analysis were enough for plaintiff to survive.

In a novel challenge, and decision, the district court in *Rose v. Raffensperger*, ____ F.Supp.3d ___, 2022 WL 205674 (N.D. Georgia 2022) found that the constitutionally required statewide election of Georgia's Public Service Commission likely violated § 2. Applying the *Gingles* preconditions and under a totality-of-the-circumstances analysis for the first time to statewide, multi-member panels, the court concluded that minority participation in the political process could be improperly diluted. As a result, the matter should proceed to a trial rather than be addressed through motions for summary judgment.

When Baltimore County redistricted after the 2020 Census, its initial maps improperly diluted minority voting strength by including one, rather than two, majority-black districts, according to the court in *Baltimore County Branch of National Association for the Advancement of Colored People v. Baltimore County*, ___ F.Supp.3d ___, 2022 WL 657562 (D.Md. 2022).

Lastly, for purposes of this brief, the district court in *Louisiana State Conference of the National Association for Advancement of Colored People v. Louisiana*, 490 F.Supp.3d 982 (M.D. Louisiana 2020) found that single-member State Supreme Court districts likely violated the *Gingles* preconditions and totality of the circumstances. The districts at the time included only one majority-minority district and the plaintiffs argued that the state's African American "population and its voting age population are sufficiently large and geographically compact to constitute a majority in two fairly drawn, constitutional single-member districts." 490 F.Supp.3d at 991. The district court accepted the argument and denied the State's motion to dismiss, finding that the plaintiffs properly raised and pleaded vote dilution claims under *Gingles*. *Id.* at 1007.

B. State Legislatures Need an Objective Standard Based on the Text of § 2

"Failure to maximize [majority-minority districts] cannot be the measure of § 2." *Johnson v. DeGrandy*, 512 U.S. 997, 1017 (1994). Nor could Congress's intent

when enacting § 2 be for it to be used, almost always, to strike down redistricting language. *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420 (2006) ("[W]e are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs. Presumably such a challenge could be litigated if and when the feared inequity arose." Opinion of Kennedy, J.). Congress certainly intended for state legislatures to competently redistrict and for courts to give those debates some measure of deference.

What state legislators need, then, is a test, based in the language of the statute that will reflect the balance Congress's recognition that states play the primary role redistricting with its duty to ensure no citizen is denied the right to vote, or the right is abridged, "on account of race [or] color." *See* U.S. Const. Amend. XV. Section 2 of the VRA prohibits the imposition or application of any "voting qualification or prerequisite to voting or standard, practice or procedure which results in a denial or abridgement" on account of color to voting rights. 52 U.S.C. § 10301(a). As applied to redistricting, the law requires political processes to be "equally open to participation" by minorities and other historically protected classes of citizens based on race. 52 U.S.C. § 10301(b). Congress slightly clarified what it meant by "equally open," when it stated that a violation occurs when members of the protected classes previously identified in the statute "have less opportunity than other members of the electorate to participate in the

political process and to elect representatives of their choice." *Id*.

The text suggests a "simple" question when examining the totality of the circumstances. "Is the 'redistricting legislation… so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification'?" *See Shaw v. Reno*, 509 U.S. 630, 642 (1993).

The passage in *Shaw* suggests a two-part test to determine whether a state's "political process" is "equally open" to minorities:

- Whether the Legislature applied "traditional, race-neutral" redistricting considerations; and
- Whether the sole reasonable explanation for a map's irregularities is racial discrimination

Both parts of the test work together. But if plaintiffs fail to satisfy any of the criteria, the conclusion should be that the state's political process is equally open to all. Where there are insubstantial changes to districts, courts should heavily favor state legislative discretion and judgment. Where there are substantial changes to districts, state legislative discretion should still be heavily favored, but a court may be justified digging a bit deeper to ensure that minorities equal access to the political process is preserved.

And "equal access to the political process" should be the gold standard for courts – not proportionality. Congress expressly disclaimed proportionality as a

benchmark in § 2: "[*P]rovided,* That nothing in this section establishes a right to have members of a protected class elected in numbers *equal to their proportion* in the population." 52 U.S.C. 10301(b) (some emphasis added).

1. State Legislatures Must Have Discretion to Apply Traditional, Race-Neutral Redistricting Criteria

When plaintiffs challenge maps in courts alleging improper dilution, they essentially force courts to focus solely on race as a factor, frequently to the exclusion or minimization of other, race-neutral considerations. Ensuring equal opportunity means evaluating whether state legislatures applied traditional, race neutral redistricting criteria and intervening only if, after such an evaluation occurs, the sole reasonable explanation is racial discrimination.

Redistricting is an inherently political activity. While legislatures are acutely aware of partisan considerations, they must divide tracts of land and the people within those tracts applying a variety of different factors such as "age, economic status, religious and political persuasion, and a variety of other demographic factors." *Shaw*, 509 U.S. at 646.

The difficult nature of redistricting demands deference to the work state legislators put into it. "Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). Based on the review of § 2 cases filed over

the past 3 years relating to "electoral districting," election systems, and similar, judicial discretion to state legislatures is seriously lacking. In most cases, the courts ultimately rejected the experts upon which states relied or, alternatively, preferred the plaintiffs' experts over those of the State.

Demographics are dynamic. Over the course of a year, states will lose and gain population. Even regions within states will see shifts. *LULAC*, 548 U.S. at 421. Residents may move from the north of a state to the south. Urban areas may experience population loss, while suburban areas gain it. The shifts that occur within a year are magnified exponentially over the course of a decade. Even assuming, for the sake of argument, that a state's population remains largely unchanged from one decade to the next, population shifts within a state will demand some reapportionment.

The law demands that state legislators ensure racial minorities have equal access to the political process. Allowing state legislators the freedom to first consider race-neutral redistricting concerns and then, once that is complete, to add criteria ensuring that minorities in the state continue to have equal access will relieve some of the uncertainties legislators experience. Any standard this Court adopts must grant substantial deference to legislative bodies when they apply traditional, race-neutral criteria to redistricting.

Deference, even significant, cannot be the end. It is possible, after a court has analyzed whether a

legislature applied traditional race-neutral criteria, it may conclude irregularities still exist.

2. Courts Should Not Disturb Redistricting Legislation Unless The Sole Reasonable Explanation For Irregularities is Racial Discrimination

A state

> may not separate its citizens into different voting districts on the basis of race. The idea is a simple one: At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as individuals, not "as simply components of a racial, religious, sexual or national class."

Miller, 515 U.S. at 911 (internal citations omitted).

An irregularity should not be interpreted to refer to the shape, appearance, or other visual indicia. Visual indicia, of course, may serve as potential factors for a court to evaluate the presence or absence of racial preferencing or discrimination, but are not evidence. After all, there may be neutral reasons why a district looks odd. *See Shaw*, 509 U.S. at 647.

Rather than visual, an irregularity should apply when a state clearly uses non-traditional redistricting criteria.

In *Shaw*, for example, this Court determined congressional reapportionment legislation in North Carolina violated the Constitution and § 2. The North Carolina Legislature created maps that included a

highly irregularly shaped majority-minority district because it was ordered to by the federal courts. This Court determined that North Carolina impermissibly applied a race-first criteria and bore a striking resemblance to "the most egregious racial gerrymanders of the past." *Shaw*, 509 U.S. at 641. The Court afforded North Carolina no deference because "the racial classification appear[ed] on the face of the statute." *Id*. at 642.

The Court also recited some other irregularities for which no reasonable explanation could exist other than racial discrimination. The list included literacy requirements for voters with a "'grandfather clause' applicable to individuals and their lineal descendants entitled to vote 'on or prior to January 1, 1866,'" an "'uncouth twenty-eight-sided' municipal boundary," and the exclusion of non-whites from one district while concentrating them in three. *See id*. at 644-645.

The takeaway is that courts, after giving due deference to a state legislature's application of race-neutral criteria, may be left with the only conclusion that the redistricting legislation is "unexplainable on grounds other than race." *Miller*, 515 U.S. at 913. *Accord*, *Shaw*, 509. U.S. at 646-647.

VII. CONCLUSION

The Constitution grants redistricting authority to state legislatures. U.S. Const. Art. I, Sec. 4. It also guarantees that the right to vote shall not be "denied or abridged… on account of race [or] color." U.S. Const. Amend. XV. Congress tried to balance the

complimentary constitutional provisions by enacting § 2 of the Voting Rights Act, which protects against the "denial or abridgment of the right of any citizen of the United States to vote on account of race or color" by imposing any "voting qualification or prerequisite to voting or standard, practice, or procedure." 52 U.S.C. § 10301(a). The law further requires that states' "political processes" be "equally open to participation," defining a lack of the condition as minorities having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

State legislatures need an objective, consistent standard when evaluating whether redistricting legislation satisfies the plain language of § 2. All-to-frequently, plaintiffs and courts apply *Gingles* preconditions and totality of the circumstances to second-guess race-neutral legislative considerations, which results in them forcing state legislators to elevate racial redistricting concerns above race-neutral considerations. Such a practice effect is not consistent with the Constitution nor could it have been Congress's intent when enacting § 2.

State legislatures have a difficult task redistricting. Any objective test should defer to state's policy decisions when they apply traditional, race neutral criteria. And the deference should be meaningful, rather than a perfunctory practice prior to finding violations of the VRA.

Courts should not touch redistricting legislation unless a plaintiff can clearly establish that the only reasonable explanation for irregularities is racial discrimination. Irregularities should reference any non-traditional criteria applied in a way that it becomes clear the only reason for their application is to categorize individuals on the basis of race.

An objective standard drawn from the text of § 2 will provide state legislators with greater clarity and guidance. It will make redistricting no less challenging but will provide the confidence needed to know that their exercises of discretion, applying traditional, race-neutral criteria will receive great deference.

Respectfully submitted,

/s/
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