Nos. 13-895 & 13-1138

IN THE

Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, *et al.*,
Appellants,

v.

ALABAMA, *et al.*,
Appellees.

ALABAMA DEMOCRATIC CONFERENCE, *et al.*,
Appellants,

v.

THE STATE OF ALABAMA, *et al.*,
Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE[1]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit legal organization established under the laws of New York to assist Black and other people of color in the full, fair, and free exercise of their constitutional rights. Founded in 1940 under the leadership of Thurgood Marshall, LDF focuses on eliminating racial discrimination in education, economic justice, criminal justice, and political participation.

LDF has been involved in nearly all of the precedent-setting litigation relating to minority voting rights before state and federal courts, including lawsuits involving constitutional and legal challenges to discriminatory state voter registration laws. *See, e.g.*, *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *League of*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus state that no counsel for a party authored this brief in whole or in part, and no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

United Latin Am. Citizens v. Clements, 999 F.2d 831 (5th Cir. 1993) (*en banc*); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, 501 U.S. 419 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Beer v. United States*, 425 U.S. 130 (1976); *White v. Regester*, 422 U.S. 935 (1975) (per curiam); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Schnell v. Davis*, 336 U.S. 933 (1949) (per curiam); *Smith v. Allwright*, 321 U.S. 649 (1944); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139 (5th Cir. 1977); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973). As such, LDF has a significant interest in ensuring the full, proper, and continued enforcement of the Voting Rights Act and United States Constitution.

SUMMARY OF THE ARGUMENT

The focus of this brief is whether Alabama's redistricting plan satisfies strict scrutiny under *Shaw v. Reno*, 509 U.S. 630 (1993), *i.e.*, was it narrowly tailored to a compelling state interest. Amicus contends that compliance with the Voting Rights Act (VRA or Act) is a compelling state interest, *see* Part I, but that Alabama's redistricting plan was not narrowly tailored, *see* Part II.

ARGUMENT

I. Compliance with the Voting Rights Act Is a Compelling State Interest.

The Voting Rights Act of 1965 was enacted 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.'" *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612, 2618 (2013) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966)).

In the decision below, the majority and dissent agreed that compliance with the VRA is a compelling state interest. Appendix to the Jurisdictional Statement in No. 13-895 ("J.S. App.") 173 (majority); *see* J.S. App. 244 (dissent). That conclusion is consistent with this Court's guidance in *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) ("*LULAC*"), in which all eight Justices who reached the issue agreed that compliance with Section 5 of the Act is a compelling state interest. *See id.* at 475 n.12 (Stevens, J., concurring in part and dissenting in part); *id.* at 485 n.2 (Souter, J., concurring in part and dissenting in part); *id.* at 518 (Scalia, J., concurring in the judgment in part and dissenting in part).

As Justice Scalia noted in *LULAC*, this Court had upheld Section 5 "as a proper exercise of Congress's authority under § 2 of the Fifteenth Amendment to enforce that Amendment's prohibition on the denial or abridgment of the right to vote." *Id.* Thus, at the time of Alabama's redistricting, Section 5 was binding on Alabama by virtue of the Supremacy Clause, which "obliges the States to comply with all constitutional exercises of Congress' power." *Bush v. Vera*, 517 U.S. 952, 991-92 (1996) (O'Connor, J., concurring) (recognizing that compliance with Section 2 of the VRA is a compelling state interest). And, "[i]f compliance with [Section 5 of the VRA] were not a compelling state interest, then a State could be placed in the impossible position of having

to choose," between compliance with the VRA and compliance with *Shaw* and its progeny. *LULAC*, 548 U.S. at 518 (Opinion of Scalia, J.).

The conclusion that compliance with the VRA is a compelling state interest "is bolstered by concerns of respect for the authority of Congress under the Reconstruction Amendments." *Vera*, 517 U.S. at 992 (O'Connor, J., concurring). Racial discrimination in voting causes a grave constitutional injury because it lies at the intersection of race, the most suspect classification, and the right to vote, the right "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). As this Court recognized in *Shelby County*, 133 S. Ct. 2631, "any racial discrimination in voting is too much."

Congress has carefully studied the problem of racial discrimination in voting, and it has determined that the Voting Rights Act is necessary to remedy unconstitutional voting discrimination. *See, e.g.*, *City of Rome v. United States*, 446 U.S. 156, 180-82 (1980) (discussing Section 5); *Vera*, 517 U.S. at 992 (O'Connor, J., concurring) (discussing Section 2). These determinations are entitled to respect both because of Congress's expressly delegated authority under the Reconstruction Amendments, and because Congress "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions," *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (citations and internal quotation marks omitted)—questions such as what tools are necessary to remedy a complex and persistent problem like racial discrimination in voting. The failures of legislative

and judicial efforts to address such discrimination prior to the VRA are well-documented. *See, e.g., Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197-98 (2009).

Amicus recognizes that this Court has held that the VRA's section 4(b) coverage provision is unconstitutional. *Shelby County*, 133 S. Ct. at 2629. This Court, however, did not question Congress's authority under the Reconstruction Amendments, or the importance of Congress's institutional role in undertaking legislative factfinding or making predictive judgments in this area. *See Nw. Austin*, 557 U.S. at 205 ("The Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it."). And this Court in *Shelby County* stressed that its holding did not undermine other provisions of the VRA. *See*, *e.g.*, 133 S. Ct. at 2631 ("Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2.").

In sum, compliance with the VRA is a compelling state interest: the VRA enforces the Reconstruction Amendments, and the Supremacy Clause obligates the States to comply with the Act. As another three-judge court stated in holding that compliance with Section 2 of the VRA is a compelling state interest:

> "In *Shaw*, the Court recognized that a significant state interest exists in eradicating the effects of past racial discrimination, provided the State has a 'strong basis in evidence for concluding that remedial action is necessary.' This

> compelling state interest extends to remedying past or present violations of federal statutes intended to eliminate discrimination in specific aspects of life."

King v. State Bd. of Elections, 979 F. Supp. 619, 622 (N.D. Ill. 1997) (citations and alterations omitted); *summarily aff'd* 522 U.S. 1087 (1998).

II. Alabama's Legislative Redistricting Was Not Narrowly Tailored to Comply with the Voting Rights Act.

Although amicus agrees with the District Court that compliance with the Voting Rights Act is a compelling state interest, amicus disagrees with the conclusion of the majority below that Alabama's legislative redistricting was narrowly tailored.

Amicus recognize that, particularly in the redistricting context, narrow tailoring does not require perfect tailoring. "[T]he 'narrow tailoring' requirement of strict scrutiny allows the States a limited degree of leeway in furthering such interests." *Vera*, 517 U.S. at 977 (plurality opinion). When a State has a "'strong basis in evidence'" for concluding that its redistricting decisions are "reasonably necessary" to comply with the Voting Rights Act, the redistricting plan is narrowly tailored. *Id*. (discussing Section 2) (citations omitted); *see also LULAC*, 548 U.S. at 519 (Opinion of Scalia, J.) (discussing Section 5).

Thus, districts designed to comply with the VRA that are "*reasonably* compact and regular, taking into account traditional districting principles . . .

may pass strict scrutiny"; they need not "defeat rival compact districts designed by plaintiffs' experts [as hypothetical alternatives] in endless 'beauty contests.'" *Vera*, 517 U.S. at 977 (plurality opinion) (emphasis in original); *see also id.* ("We . . . reject, as impossibly stringent, the District Court's view of the narrow tailoring requirement that 'a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria.'") (citation omitted).

Here, the majority of the District Court concluded that Alabama's redistricting was narrowly tailored because the legislature had a strong basis in evidence for believing that: (a) maintaining the number of majority-Black districts; and (b) maintaining the percentages of Black voters in those districts, were both reasonably necessary to comply with Section 5 of the VRA. J.S. App. 183. Amicus agrees with the majority about the first point, but not the second.

A. The VRA Can Require the Creation or Maintenance of Majority-Minority Districts.

Shortly after passage of the VRA, it "became apparent that guaranteeing equal access to the polls would not suffice to root out other racially discriminatory voting practices. . . . [designed to] reduce or nullify minority voters' ability, as a group, to elect the candidate of their choice.'" *Shaw*, 509 U.S. at 640-41 (1993) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969)). Such unconstitutional efforts to "cancel out or minimize the voting strength" of minority voters, *White v.*

Regester, 412 U.S. 755, 765 (1973), are known as vote dilution. This Court has always interpreted the VRA to prohibit vote dilution, which can "nullify [minority voters'] ability to elect the candidate of their choice just as would prohibiting some of them from voting." *Allen*, 393 U.S. at 569.

A necessary precondition for vote dilution is racially polarized voting, a phenomenon that can be manipulated by jurisdictions to enact districting schemes or other measures (such as at-large voting) that serve to freeze minority voters out of the political process. And in voting, as in many other areas, stark polarization along racial lines has long been an unfortunate reality throughout this country. *See*, *e.g.*, *LULAC*, 548 U.S. at 427 (majority opinion of Kennedy, J.) (citation omitted) (noting that the district court had found "found 'racially polarized voting' in south and west Texas, and indeed 'throughout the State'").

In a total of "6,667 House elections in white majority districts between 1966 and 1996 . . . only 35 (0.52 percent) were won by blacks." David T. Canon, *Race, Redistricting, and Representation: The Unintended Consequences of Black Majority Districts* 10 (1999). This is especially true in Alabama, where, as of 2005, *every* African-American member of the legislature was elected from a single-member district with an effective black voter majority. *See Voting Rights Act: Section 5 of the Act — History, Scope & Purpose: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 109th Cong. 3199 (Oct. 25, 2005) (statement of James U. Blacksher). Stated

differently, in 2006, Alabama had no Black officials elected statewide, and virtually all Black local officials were elected from majority-minority districts – notwithstanding the fact that Black people comprise more than 26% of the population. *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options after LULAC v. Perry: Hearing Before the Subcommittee on the Constitution, Civil Rights and Property Rights of the Senate Committee on the Judiciary*, 109th Cong. 388-89 (July 13, 2006).

While there has been undeniable progress, "racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions . . . ." *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009) (Kennedy, J.) (plurality opinion). And, while racial polarization has declined in some parts of the country, data from recent federal elections show that in other areas, including Alabama, "the extent of racial polarization in presidential elections *increased* over the past decade," even while "account[ing] for partisan identification," meaning that "the race of the voter continues to constitute a statistically significant factor in determining vote choice even after controlling for party." Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 Harv. L. Rev. F. 205, 210, 218 (2013) (emphasis added).

The 2008 Presidential election results, for example, confirm the existence of extreme racial polarization in Alabama. President Obama received near-unanimous support from Black voters, with 98 percent of Black voters pulling the lever for him, but received support from only 10 percent of white voters in Alabama—his worst showing among the 50 states. Brief of Nathaniel Persily, et al. as Amici Curiae in *Northwest Austin*, No. 08-322, at 11-12. Two additional striking examples of racially polarized voting, "indicative of the racial cleavage that exists in Alabama to this day," were the 2003 and 2004 unsuccessful voter referenda to remove unconstitutional Jim Crow provisions of Alabama's Constitution, including poll tax language. July 13, 2006 Hearing, at 367, 372.

To combat vote dilution, the VRA sometimes requires jurisdictions to create or maintain majority-minority districts. *See, e.g., Georgia State Conference NAACP v. Fayette County Bd. of Commissioners,* 950 F. Supp. 2d 1294, 1312, 1316, 1322, 1326-27 (N.D. Ga. 2013) (finding the creation of a majority-minority district necessary to remedy a Section 2 violation based on the county's use of at-large elections, in combination with racially polarized voting, to prevent Black voters from ever electing candidates of choice to either the county school board or board of commissioners in nearly two centuries). Such districts can be essential to ensuring that the majority, "by virtue of its numerical superiority," does not always defeat the choices of minority voters. *Thornburg v. Gingles*, 478 U.S. 30, 48 (1986). In other words, in light of the

reality of racially polarized voting, majority-minority districts are sometimes necessary for minority voters to have a meaningful opportunity to participate in the political process and to elect candidates of their choice.

Indeed, much of the progress caused by the VRA has been the result of majority-minority districts. In *Northwest Austin*, this Court noted, as one of the VRA's great successes, that "minority candidates [now] hold office at unprecedented levels." 557 U.S. at 202. Such office holding has been made possible because, notwithstanding persistent racial polarization, the VRA has required the creation of majority-minority districts to combat vote dilution. *See*, *e.g.*, Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation*, in Quiet Revolution in the South 335 (Chandler Davidson & Bernard Grofman eds., 1994) (noting that since the enactment of the VRA, "the increase in the number of blacks elected to office in the South [has been] a product of the increase in the number of majority-black districts and not of blacks winning in majority-white districts").

In this case, the Alabama legislature had a strong basis in evidence to believe that racially polarized voting remains stark and persistent in the State, *see* J.S. App. 84-85; and, therefore, amicus agrees with the District Court that maintaining the same number of majority-Black districts was reasonably necessary to comply with Section 5. As this Court has explained, under Section 5's non-retrogression principle, "the minority's opportunity to elect representatives of its choice," may not be

"diminished, directly or indirectly, by the State's actions." *Vera*, 517 U.S. at 983 (plurality opinion) (emphasis omitted); *see also Miller v. Johnson*, 515 U.S. 900, 906 (1995) (Section 5 prohibits "'voting-procedure changes . . . that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'") (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)). The Alabama legislature's decision to maintain the same number of majority-Black districts, standing alone, would have passed muster under strict scrutiny.

B. The VRA Does Not Require Fixed Percentages of Minority Voters.

The drafters of Alabama's redistricting plan also attempted to maintain "as closely as possible" the Black population percentage in the majority-Black districts because they believed that doing so was required by Section 5. J.S. App. 33 (majority); J.S. App. 245 (Thompson, J., dissenting). That is not a "correct reading of § 5," which means it cannot justify Alabama's use of race as a predominant factor in these districting decisions. *Shaw v. Hunt*, 517 U.S. 899, 911 (1996); *see* J.S. App. 244 (Thompson, J., dissenting).

As discussed, Section 5 prohibits retrogression, *i.e.*, diminishing minority voters' opportunities to elect candidates of their choice. *See Vera*, 517 U.S. at 983 (plurality opinion). But not all reductions in the minority population of a majority-minority district are retrogressive. Judge Thompson noted an obvious example: reducing a district's Black population from 99% to 98% is not retrogressive

because Black voters will still retain their ability (or opportunity) to elect a candidate of choice in the new district. *See* J.S. App. 253.

The majority below nonetheless concluded that the 2006 Amendments to Section 5, which prohibit retrogression in minorities "ability to . . . elect their preferred candidates of choice," 42 U.S.C. § 1973c, mean that any reduction in the minority population of a majority-minority district violates Section 5. J.S. App. 180.[2] This interpretation, however, "is contrary to the intent of Congress" and "has been rejected by both entities primarily responsible for administering § 5." J.S. App. 251 (Thompson, J., dissenting).

As the majority of the District Court recognized, Congress's intent through the 2006 Amendments was to restore the retrogression standard set forth in *Beer*, 425 U.S. at 130, and reverse what Congress viewed as a departure from that standard in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). *See* J.S. App. 179.

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[2] Although the majority below stated that "the Alabama Legislature correctly concluded that it could not . . . *significantly* reduce the percentages of black voters in the majority-black districts," J.S. App. 180 (emphasis added), what it meant by "significantly" is unclear. The Alabama Legislature did not seek to prevent "significant" reductions in the Black populations of majority-Black districts, it sought to prevent, as much as possible, any reduction in the Black populations of majority-Black districts. *See* J.S. App. 33 (majority); J.S. App. 245 (Thompson, J., dissenting).

Congress's concern with *Georgia* was *not* that the case permitted reductions in the minority population percentage of majority-minority districts (which both the majority and dissent in *Georgia* agreed were not categorically prohibited by Section 5). Instead, Congress's concern was that *Georgia* permitted States to trade "districts where minority voters *had actual ability to elect* in exchange for amorphous influence districts or apparently powerful jobs for minority representatives." J.S. App. 254 (Thompson, J., dissenting) (emphasis added). It is this aspect of *Georgia*, and this aspect alone, which Congress overturned in the 2006 Amendments. *See id.*[3]

Thus, the 2006 Amendments prohibit the dismantling of districts where minority voters have the ability to elect candidates of choice, but the Amendments do not prohibit all reductions in the minority population of a majority-minority district.

Determining whether a district retains the opportunity for minority voters to elect candidates of choice is a fact-specific inquiry, which requires

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[3] The majority below also erred in suggesting that there is a difference between the "ability to elect" standard and the question of whether minority voters have opportunities to elect candidates of choice. J.S. App. 181. As the majority itself recognized, the "ability to elect" standard is simply the *Beer* standard, J.S. App. 179, and this Court equated the *Beer* standard with electoral opportunities for minority voters. *See*, *e.g.*, *Vera*, 517 U.S. at 983 (plurality opinion); *Miller*, 515 U.S. at 906.

consideration of numerous factors including registration and turnout rates, the size of the minority population, and the severity of racially polarized voting. *Cf. Texas v. United States*, 831 F. Supp. 2d 244, 272 (D.D.C. 2011) ("Section 5 requires a multi-factored, functional approach to gauge whether a redistricting plan will have the effect of denying or abridging minority citizens' ability to elect representatives of their choice. It does not lend itself to formalistic inquiry and complexity is inherent in the statute."). This is equally true under Section 2's "ability to elect" standard. *See Gingles*, 478 U.S. at 45 ("the question whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality, and on a functional view of the political process") (citations and quotation marks omitted).

The Department of Justice (DOJ) explained in its guidance to covered jurisdictions after the 2010 census that the Section 5 retrogression inquiry turns on a context-specific comparison of minority voters' electoral opportunities in the new plan as opposed to the benchmark plan, not predetermined numerical percentages:

> In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, this determination requires a functional analysis of the

> electoral behavior within the particular jurisdiction or election district.

76 Fed. Reg. 7470-01, 7471 (Feb. 9, 2011).

Consistent with this standard, DOJ granted preclearance to post-2010 redistricting plans that reduced the minority population percentages in majority-minority districts below the levels in the benchmark plans. *See* Brief of Appellant Alabama Democratic Conference at 30-31. Indeed, DOJ had similarly granted preclearance to post-2000 redistricting plans with reductions in the minority populations of majority-minority districts, *including Alabama's*. *See id*. at 28-30; Brief of Appellant Alabama Black Caucus at 3-4.

In sum, nothing in Section 5, as amended in 2006, requires the maintenance of a specific minority population percentage in majority-minority districts. Alabama's redistricting decisions were premised on an incorrect interpretation of the VRA. Therefore, the State's use of a race as the predominant factor in those decisions was not narrowly tailored to its compelling interest in complying with the Act.

CONCLUSION

The judgment of the District Court should be reversed so that the State may enact a new redistricting plan which complies both with the Voting Rights Act and the Constitution.

Respectfully submitted,

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