

No. 21-1086, 21-1087

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IN THE  
**Supreme Court of the United States**

JOHN H. MERRILL, *et al.*,  
*Appellants,*

v.  
EVAN MILLIGAN, *et al.*,  
*Appellees.*

JOHN H. MERRILL, *et al.*,  
*Petitioners,*

v.  
MARCUS CASTER, *et al.*,  
*Respondents.*

**On Appeal from and on Writ of Certiorari to the  
United States District Court for the Northern  
District of Alabama**

**BRIEF OF U.W. CLEMON, FRED D. GRAY,  
HENRY SANDERS, THE ALABAMA  
LEGISLATIVE BLACK CAUCUS, AND SOCIAL  
SCIENCE PROFESSORS AS *AMICI CURIAE*  
FOR APPELLEES AND RESPONDENTS**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
INTEREST OF <i>AMICI CURIAE</i> .....	1
INTRODUCTION AND SUMMARY OF ARGUMENT.....	4
ARGUMENT .....	4
I. RACIAL HIERARCHY IN ALABAMA’S POLITICAL CULTURE AND INSTITU- TIONS REFLECTS PATH DEPENDENCE FROM 1860 TO THE PRESENT .....	4
A. A State’s Historical Choices and Actions Shape Behavior and Decision-Making in the Present .....	6
B. Alabama’s Prior Commitment to En- trenched Racial Hierarchy Measurably Affects its Present-Day Political Culture .....	9
II. ALABAMA’S HISTORY OF VOTING-RE- LATED DISCRIMINATION MAKES IT AN UNRELIABLE GUARANTOR OF RACIAL EQUALITY IN THE PRESENT .....	13
CONCLUSION .....	18

## TABLE OF AUTHORITIES

CASES	Page
<i>Brnovich v. Democratic Nat'l Comm.</i> , 141 S. Ct. 2321 (2021).....	14
<i>Gomillion v. Lightfoot</i> , 364 U.S. 339 (1960).....	1, 7
<i>Harris v. Siegelman</i> , 695 F. Supp. 517 (M.D. Ala. 1988) .....	13
<i>League of United Latin Am. Citizens v. Perry</i> , 548 U.S. 399 (2006).....	14
<i>People First of Ala. v. Merrill</i> , 491 F. Supp. 3d 1076 (N.D. Ala. 2020).....	13
<i>Thornburg v. Gingles</i> , 478 U.S. 30 (1986).....	4, 14
<i>United States v. McGregor</i> , 824 F. Supp. 2d 1339 (M.D. Ala. 2011) ....	5, 12
<i>Whitfield v. Oliver</i> , 399 F. Supp. 348 (M.D. Ala. 1975) .....	17
BOOKS	
Avidit Acharya, Matthew Blackwell, & Maya Sen, <i>Deep Roots: How Slavery Still Shapes Southern Politics</i> (Princeton Univ. Press, 2018).....	3, 7, 9, 10, 11, 12, 15
C. Vann Woodward, <i>The Strange Career of Jim Crow</i> (1955).....	9, 10, 18
Peyton McCrary et al., <i>Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965–1990</i> (Davidson & Grofman, eds., 1994) .....	17
W.E. Burghardt Du Bois, <i>Black Reconstruc tion</i> (1935).....	10

## TABLE OF AUTHORITIES—continued

	Page
ARTICLES	
Charles Stewart III, Nathaniel Persily & Stephen Ansolabehere, 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 (2013) .....	15, 16
Eric Foner & Olivia Mahoney, America's Reconstruction: People and Politics After the Civil War (1995).....	10
Margaret Levi, A Model, a Method, and a Map: Rational Choice in Comparative and Historical Analysis, Compar. Pol.: Rationality, Culture, and Structure 19 (Mark I. Lichbach and Alan S. Zuckerman, eds., 1997) .....	7
Nico Voigtländer & Hans-Joachim Voth, Persecution Perpetuated: The Medieval Origins of Anti-Semitic Violence in Nazi Germany, 127 The Quarterly J. of Econ. 1339 (2012) .....	8
Paul Pierson, Increasing Returns, Path Dependence, and the Study of Politics, 94 Amer. Pol. Sci. Rev. 251 (2000) .....	6, 8
Roger L. Ransom & Richard Sutch, One Kind of Freedom: The Economic Consequences of Emancipation (Cambridge Univ. Press 2001).....	10
Ronald Smothers, The 1992 Campaign: House Race; After 115 Years, a Black Will Represent Alabama, N.Y. Times, May 23, 1992 .....	17

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	Page
U.W. Clemon & Bryan K. Fair, Making Bricks without Straw: The NAACP Legal Defense Fund and the Development of Civil Rights Law in Alabama 1940–1980, 52 Ala. L. Rev. 1121 (2001).....	17
Volha Charnysh, Historical Legacies of Interethnic Competition; Anti-Semitism and the EU Referendum in Poland, 48 Compar. Pol. Stud. 1711 (2015).....	8

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Investigation of the Ferguson Police Department, U.S. Dep’t of Just. Civ. Rights Div. (March 2015) .....	7
Kim Chandler, <i>Alabama elects first Black Republican to House in 140 years</i> , Associated Press (July 13, 2021) <a href="https://apnews.com/article/government-and-politics-alabama-election-2020-house-elections-df2ff75265ffc67482290f2f1a272">https://apnews.com/article/government-and-politics-alabama-election-2020-house-elections-df2ff75265ffc67482290f2f1a272</a> .....	13

## TABLE OF AUTHORITIES—continued

	Page
Letter from Jerrie Leonard, Assistant Attorney General, Civil Rights Division, to MacDonald Gallion, Att’y General, Alabama (Mar. 13, 1970), <a href="https://www.justice.gov/crt/case-document/file/1277176/download">https://www.justice.gov/crt/case-document/file/1277176/download</a> .....	17
National Conference of State Legislatures, <i>State Legislator Demographics</i> (Dec. 1, 2020), <a href="https://www.ncsl.org/research/about-state-legislatures/state-legislator-demographics.aspx">https://www.ncsl.org/research/about-state-legislatures/state-legislator-demographics.aspx</a> .....	5
Voting Rights and Election Administration in Alabama: Hearing before the Subcomm. on Elections, Comm. on House Admin., H.R., One Hundred Sixteenth Congress, First Session (2019), <a href="https://www.govinfo.gov/content/pkg/CHRG-116hrg38128/pdf/CHRG-116hrg38128.pdf">https://www.govinfo.gov/content/pkg/CHRG-116hrg38128/pdf/CHRG-116hrg38128.pdf</a> ..	5

## INTEREST OF *AMICI CURIAE*<sup>1</sup>

U.W. Clemon was the first African-American federal judge in the State of Alabama, being appointed in 1980 and serving a term as Chief Judge of the Northern District of Alabama. He was the presiding judge in the Lilly Ledbetter case. A graduate of Columbia Law School, he previously worked as a cooperating civil rights lawyer with the NAACP Legal Defense Fund. One of the first two African Americans elected to the Alabama Senate since Reconstruction, and as Chairman of its Rules Committee, he often confronted then Governor George Wallace on racial issues. After retirement from the bench in 2009, he returned to the active practice of civil rights law.

Fred D. Gray is an attorney in Tuskegee, Alabama. Mr. Gray represented Rosa Parks and Claudette Colvin following their arrests for refusing to give up their bus seats to white passengers. He also represented plaintiffs in integrating both the University of Alabama and Auburn University. He has successfully presented argument in four cases before this Court, including *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (unanimously holding that Alabama violated the Fifteenth Amendment by shaping an electoral district to deny equal representation to Black citizens). Mr. Gray was the second African American elected to the Alabama state legislature since Reconstruction, and was a member of the Alabama House of Representatives from 1970 to 1974. He served as the President of the

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<sup>1</sup> No counsel for any party authored this brief in whole or in part, and no other entity or person made any monetary contribution toward the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3, all parties have consented to the filing of this brief.

National Bar Association in 1985, and in 2001 was elected as the first African-American President of the Alabama State Bar. He also received a Presidential Medal of Freedom in 2022.

Henry Sanders served in the Alabama Senate for 35 years (1983–2018). As a graduate of Harvard Law School, he founded one of the largest Black law firms in Alabama (Chestnut, Sanders & Sanders), which later led the *Pigford v. Glickman* and *In re Black Farmers Discrimination* class actions. Those actions ultimately won \$2.25 billion for Black farmers who had been discriminated against by the U.S. Department of Agriculture in the provision of loans and other services. The Alabama Legislative Black Caucus has named him Outstanding Legislator, and he received a 1999 Nation Builder Award from the National Caucus of Black State Legislators. Mr. Sanders is also a published novelist.

The Alabama Legislative Black Caucus is an organization of Black state and county elected officials, whose members are engaged in the day-to-day struggles to advance the interests of their constituents, particularly Black Alabamians, in a social, political and legal environment that is still dominated by vestiges of official racial discrimination and still is governed by the 1901 Alabama Constitution that was adopted for the purpose of disfranchising Black citizens and preserving white supremacy.

Avidit Acharya is an Associate Professor of Political Science and Political Economy at Stanford University. He has authored 19 peer-reviewed articles on political economy, including several articles on the historical origins of political attitudes and institutions. Together with Professors Blackwell and Sen, Dr. Acharya is the recipient of the Joseph L. Bernd Best Paper Award for best paper published in *The Journal of Politics* for his

work on the political impact of Southern slavery. Dr. Acharya holds a PhD in Political Economy from Princeton University.

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Professors Acharya, Blackwell, and Sen co-authored *Deep Roots: How Slavery Still Shapes Southern Politics*, Princeton University Press (2018). Their book was awarded the William H. Riker Book Award for the best book in Political Economy. Together, they examine the lasting effects of slavery on modern-day politics in Southern states.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The “essence of a § 2 claim is that a certain electoral law, practice, or structure” in the present “interacts with social and historical conditions” to produce inequalities in electoral opportunity. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). This Court’s precedent and the Voting Rights Act’s legislative history reflect an understanding that historical, discriminatory practices impact political participation in the present. *Amici* include individuals who have experienced those historical practices and have dedicated their lives to countering their impact. *Amici* also include social scientists whose work explains why the effects of historical practices do not dissipate, even if it is assumed—and often inaccurately so—that all of society’s members would not express a commitment to racial hierarchy. Through rigorous analysis, social scientists have demonstrated that past rules, policies, and practices are not confined to the past, immobilized and irrelevant. Instead, they continue to incentivize behavior and reproduce the effects of those past commitments, regardless of whether present-day actors share past motives. That principle applies to redistricting in Alabama and demonstrates the critical importance of historical analysis in applying the Voting Rights Act.

### ARGUMENT

#### I. RACIAL HIERARCHY IN ALABAMA’S POLITICAL CULTURE AND INSTITUTIONS REFLECTS PATH DEPENDENCE FROM 1860 TO THE PRESENT.

The district court expressly found that Alabama had not come far enough in addressing its history of racial discrimination. See App. to Emergency Application for Stay (or “MSA”), Vol. 1, 182, 183–88. That observation

applies to Alabama’s government institutions—and, despite the significant civil rights victories of the past, the situation is now getting worse, not better. For instance, only two Black people have ever held any statewide office—both were Alabama Supreme Court Justices—and none have held statewide office in the last twenty years. JA423–24, 261. The number of Black state legislators has decreased over the last 12 years (to 23%)<sup>2</sup>—even while the non-white population has increased<sup>3</sup>—and nearly all Black state legislators were elected in majority-Black legislative districts.<sup>4</sup>

Federal courts in Alabama have recognized that racial bias continues to taint the business of the state legislature. Just a few years ago, Alabama senators and “influential” legislative allies were recorded referring to Black citizens as “Aborigines,” and suggesting that they would be lured to the polls by “free food.” *United States v. McGregor*, 824 F. Supp. 2d 1339, 1345–46 (M.D. Ala. 2011) (citation omitted). The same recording captured these influential politicians actively strategizing about how to suppress Black votes. *Id.* Those findings align with the experiences of Alabama Legislative Black Caucus members, who report

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<sup>2</sup> National Conference of State Legislatures, *State Legislator Demographics* (Dec. 1, 2020), <https://www.ncsl.org/research/about-state-legislatures/state-legislator-demographics.aspx>.

<sup>3</sup> See America Counts Staff, *Alabama Population Grew 5.1% Since 2010, Surpassing 5 Million*, U.S. Census Bureau, (Aug. 25, 2021), <https://www.census.gov/library/stories/state-by-state/alabama-population-change-between-census-decade.html>.

<sup>4</sup> See Voting Rights and Election Administration in Alabama: Hearing before the Subcomm. on Elections, Comm. on House Admin., H.R., One Hundred Sixteenth Congress, First Session at 25 (2019), <https://www.govinfo.gov/content/pkg/CHRG-116hhr38128/pdf/CHRG-116hhr38128.pdf>.

routinely confronting racist commentary and disrespectful behavior—such as refusal to recognize their right to speak during debate on proposed legislation implicating the constitutional rights of Black protestors—during the course of their duties. And all of the above aligns with a marked resurgence in politicians’ resort to racial appeals. Caster Br. at 13; JA455–57.

Recent peer-reviewed research sheds crucial light on how patterns, statements, and actions consistent with racial hierarchy persist in Alabama. In so doing, that research unites the experience of legislators and long-time civil rights advocates with rigorous analysis, demonstrating through empirical methods what others have seen, lived, and litigated: that Alabama’s historical commitment to racial hierarchy still defines its contemporary political culture, and that there is no reason to expect that culture to change of its own accord.

**A. A State’s Historical Choices and Actions Shape Behavior and Decision-Making in the Present.**

Researchers of all stripes routinely rely on the concept of “path dependence” to explain the persistence of patterns in the social and political world over time. The concept refers to a dynamic in which “preceding steps in a particular direction induce further movement in the same direction” because “the *relative* benefits of the current activity compared with other possible options increase over time.” Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 *Amer. Pol. Sci. Rev.* 251, 252 (2000). Another metaphor is that of a tree: “From the same trunk, there are many different branches and smaller branches. Although it is possible to turn around or to clamber from one to the other. . . the branch on which a climber begins is the one she tends to follow.” See

Margaret Levi, *A Model, a Method, and a Map: Rational Choice in Comparative and Historical Analysis*, *Compar. Pol.: Rationality, Culture, and Structure* 19, 28 (Mark I. Lichbach and Alan S. Zuckerman, eds., 1997). Movement down one behavioral branch from a prior point at which many branches converge—called a “critical juncture”—raises the cost of reversing course relative to any alternative.

Recent contributions to the path dependence literature have identified the role of past institutional choices in producing persistence in the political attitudes, ideologies, or beliefs of individuals and communities. See, *e.g.*, Avidit Acharya, Matthew Blackwell, & Maya Sen, *Deep Roots: How Slavery Still Shapes Southern Politics* 29 (Princeton Univ. Press, 2018) (noting that “at a conceptual level, institutional mechanisms (*i.e.*, rules, laws, and local ordinances) can, over time, influence behavioral path dependence by reinforcing particular attitudes, values, customs, or beliefs”).

Attitudes, ideologies, or beliefs—which can persist even after the laws, norms, and practices that reinforced them have disappeared—become part of the environment within which institutions operate and new political developments unfold. Thus, they influence institutional forms and political outcomes across time periods and social contexts. Compare, *e.g.*, *Gomillion*, 364 U.S. at 347 (“the inescapable human effect of this essay [changing the boundaries in the city of Tuskegee in 1957] is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights”), *with* Investigation of the Ferguson Police Department, U.S. Dep’t of Just. Civil Rights Div., 4 (March 2015) (“Ferguson’s approach to law enforcement both reflects and reinforces racial bias, including stereotyping.”); see Nico Voigtländer & Hans-Joachim Voth,

*Persecution Perpetuated: The Medieval Origins of Anti-Semitic Violence in Nazi Germany*, 127 *The Quarterly J. of Econ.* 1339, 1385–86 (2012) (examining German towns during the period between World War I and World War II and finding a higher vote share for the Nazi party in towns where residents had engaged in Jewish pogroms during the Black Death, 500 years earlier); Volha Charnysh, *Historical Legacies of Inter-ethnic Competition; Anti-Semitism and the EU Referendum in Poland*, 48 *Compar. Pol. Stud.* 1711, 1741 (2015) (noting that an anti-Jewish pogrom in 1941 predicts opposition to European Union accession in 2003, during which political actors used anti-Semitic rhetoric in opposing EU membership).

Thus, explaining the current outcomes solely or primarily in terms of current circumstances is likely to produce a “highly misleading” result—“a ‘snapshot’ explanation for what should be seen as a moving picture.” Pierson, 94 *Amer. Pol. Sci. Rev.* at 263. Instead, the relevant analysis must identify the critical junctures that mark the start of distinct paths, ascertain the path chosen at that point, identify the factors that contribute to continuity along that path, and take stock of any intervening forces that may have disrupted those mechanisms.

In this case, that analysis reveals that Alabama’s history of discrimination in electoral opportunity leaves it vulnerable to further discrimination in the present and future.

**B. Alabama’s Prior Commitment to Entrenched Racial Hierarchy Measurably Affects its Present-Day Political Culture.**

Peer-reviewed research shows that Alabama’s history is an essential part of its political culture in the present. In particular, the published work of *amici*

Professors Avidit Acharya, Matthew Blackwell, and Maya Sen demonstrates that the concentration of enslaved persons in a given county in 1860 predicts negative racial and race-related political attitudes of white citizens living in those counties today.<sup>5</sup> See Avidit Acharya, Matthew Blackwell, & Maya Sen, *Deep Roots: How Slavery Still Shapes Southern Politics* (Princeton Univ. Press, 2018) (hereinafter *Deep Roots*) at 60–62. They conclude that the contemporary correlation is in significant part explained by historical path dependence.

Emancipation was a clear “critical juncture” defining the course of southern politics over the 20th and 21st centuries. See *Deep Roots* at 128; C. Vann Woodward, *The Strange Career of Jim Crow* 44 (1955) (hereinafter Woodward) (describing “three alternative philosophies of race relations” at emancipation, when “[t]here were still real choices to be made”). That is because not only were enslaved persons the backbone of the American and southern export economies, but they were also the South’s principal asset. Half of all wealth in the five principal cotton states, including Alabama, consisted of enslaved persons. Roger L. Ransom & Richard Sutch, *One Kind of Freedom: The Economic Consequences of Emancipation* 52 (Cambridge Univ. Press, 2001). That means emancipation was a particularly disruptive event—a defining moment of political and

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<sup>5</sup> Those attitudes include partisan affiliation—long connected to perspectives on race relations in the South—opposition to affirmative action, and levels of racial resentment and hostility. 78 *J. Pol.* at 625 (describing construction of outcome variables measuring contemporary white political and racial attitudes). As the share of the enslaved population in 1860 increases, the average contemporary level of racial resentment rises, conservative party affiliation increases, support for affirmative action decreases, and the gap between how white citizens view other white citizens versus Black ones increases. *Deep Roots* at 61.

economic change that disrupted the old path and created the possibility of defining a new one. See *Deep Roots* at 25–26, 128; see also W.E. Burghardt Du Bois, *Black Reconstruction* 30 (1935).

Although Reconstruction offered a brief glimpse of progress on racial equality, the South soon transitioned from slavery to other forms of racial hierarchy in many aspects of social and political life. See Eric Foner & Olivia Mahoney, *America's Reconstruction: People and Politics After the Civil War* 114 (1995) (noting that “most white Southerners” during Reconstruction “could not accept the idea of former slaves . . . enjoying equality before the law” because “[t]hey had always regarded blacks as an inferior race whose proper place was as dependent laborers”); Woodward at 32 (“[T]he old heritage of slavery and the new and insecure heritage of legal equality were wholly incompatible as ideas.”).

This choice in Alabama was a response to incentives—white planters and businessmen depended on cheap labor, other white citizens resented the loss of superior legal and social status, and still others feared that Black citizens would disrupt the balance of political power. *Deep Roots* at 129–130. While these incentives affected the whole South, they affected the Black Belt counties most of all: “the more that the local white elite had to lose as a result of a free, mobile, and politically active black labor force, the more intense was their response to emancipation.” *Id.* at 130. Alabama in particular was at the forefront of this response. *Id.* at 129 (“For example, the former slaveholding bastions within states like Alabama and Mississippi were also those that most strongly supported enactments of regressive state constitutions; these early twentieth-century state constitutions codified many provisions that

would go on to form the bedrock of Southern Jim Crow.”).

This entrenchment of racial hierarchy depended on racist attitudes that were passed down through generations and persist today. The dynamic is observable empirically. One statistical analysis of the expressed racial preferences of Southern high school seniors and their parents in 1965, 1973, 1982, and 1997 demonstrated significant intergenerational correlation in racist attitudes. This correlation increased with the number of enslaved persons in their county of residence in 1860. *Id.* at 167–69. Critically, this correlation was as strong in 1997 as it was in 1965, notwithstanding enactment of landmark civil rights legislation in the intervening years. *Id.* Similarly, another statistical analysis differentiating contemporary southern residents who grew up in the South from those who later migrated there demonstrates a significantly higher incidence of negative racial attitudes among those socialized in the South. *Id.* at 169–70.

Additionally, Southern institutions reinforced this intergenerational transfer of attitudes. Segregation at schools, in businesses, in means of transportation, and in virtually all other settings, reinforced racial hierarchy by requiring its practice in everyday life. *Id.* at 178–80 (describing statistical analyses of the impact of school segregation on racial attitudes, and finding increased negative racial attitudes today in counties where segregation was highest in 1960). Worse, the rate of natural attrition or decay of such attitudes is slow and small.<sup>6</sup> As for intervening forces, the logic of

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<sup>6</sup> See *Deep Roots* at 40 (noting studies estimating that the observable effects of the 45-year Cold War would take two to four decades to dissipate in Germany, and that the effect of the 400-

path dependence dictates that to be effective in altering the existing path of a political culture, such a force must disrupt the mechanisms sustaining that path.

On that score, the foregoing analyses reveal an uncomfortable truth: while the reform efforts of the Civil Rights Movement were effective at repressing certain manifestations of negative racial attitudes, they were not effective at fully uprooting the attitudes themselves. There is no debate that legal rulings, national legislation, and popular organizing delegitimized and undermined much institutional reinforcement of racial hierarchy. See *id.* at 197–99, 201 (noting that differences between high-slave counties and low-slave counties within the South have become less pronounced as measured in terms of educational outcomes, levels of voter registration, and certain other indicators). But the continued connection between contemporary negative racial attitudes and the earlier commitment to racial hierarchy strongly suggests that the reform efforts associated with the Civil Rights Movement—the South’s most recent critical juncture—did not fundamentally alter the path of political culture in the Southern states, including in Alabama.

Alabama’s federal courts have independently reached similar conclusions. See *McGregor*, 824 F. Supp. 2d at 1347 (noting that “[t]o some extent, ‘things have changed in the South’ . . . . Certain things, however, remain stubbornly the same” and that “Alabama remains vulnerable to politicians setting an agenda that exploits racial differences”) (citation omitted); *Harris v. Siegelman*, 695 F. Supp. 517, 525–26 (M.D. Ala. 1988) (noting that while harassment and intimidation were “much less frequent today than in the

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year African slave trade continues to be felt 100 years after it ended (and is hypothesized to take even longer to dissipate)).

past,” perpetrators “well know” that “even isolated recent instances of discrimination would quickly ripple through the black community and frighten away black voters,” and that “racially-inspired policies and law continue to have their intended effects today”); MSA, Vol. 1, 182–88 (describing recent evidence that Alabama’s contemporary political culture is shaped by its racial history); *People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1106–08 (N.D. Ala. 2020) (similar).

And Alabama’s legislature—almost exclusively Black Democrats and white Republicans—also reflects its path dependent political culture. Kim Chandler, *Alabama elects first Black Republican to House in 140 years*, Associated Press (July 13, 2021) <https://ap-news.com/article/government-and-politics-alabama-election-2020-house-elections-df2ff75265ffc67482290149f2f1a272> (“The political parties in the Alabama Legislature are almost entirely divided along racial lines . . . . The Alabama Senate and House each have one white Democratic member.”). Certainly the interventions associated with the Civil Rights Movement have not been effective at placing Alabama’s political culture on a new path altogether.

## II. ALABAMA’S HISTORY OF VOTING-RELATED DISCRIMINATION MAKES IT AN UNRELIABLE GUARANTOR OF RACIAL EQUALITY IN THE PRESENT.

“The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with *social and historical conditions* to cause an inequality in the opportunities enjoyed by [B]lack and white voters to elect their preferred representatives.” *Gingles*, 478 U.S. at 47 (emphasis added). That essence is confirmed by the 1982 Senate Report this Court has often cited for its analysis of §2 claims. *Id.* at 42–47 (citing S. Rep. No.

97-417 (1982)).<sup>7</sup> *Amici* submit that the empirical evidence of path-dependent processes deepens the significance of Congress’s and this Court’s analytical commitment to historical conditions and a “searching practical evaluation of the past and present reality” in § 2 cases. *Id.* at 45 (citing S. Rep. at 36).

That “searching practical evaluation” cannot be complete without consideration of empirical evidence showing that Alabama’s history has deeply shaped its present. The foregoing scholarship establishes that Alabama’s prior institutional commitments to racial hierarchy go to the heart of its contemporary political culture. It also establishes that Alabama’s contemporary political culture is steeped in durable attitudes consistent with belief in racial hierarchy. These attitudes are a prominent feature of Alabama’s political landscape, and for that reason incentivize political and strategic decisions that perpetuate Alabama’s prior commitment to racial hierarchy.

The history and path dependence of attitudes carries over into political behavior, with evidence showing steep political polarization along racial lines that is sharpest in the former slaveholding south—including in Alabama. *Deep Roots* at 62–64.

Analysis of recent elections corroborates this conclusion—that is, white citizens seldom vote for non-white

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<sup>7</sup> *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 426 (2006) (explaining that the Court has “referred to the Senate Report” for its analysis of the “totality of circumstances” test under § 2); *see also Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2332 (2021) (referring to the “oft-cited” 1982 Senate Report); *id.* at 2337 (recognizing *Gingles*’ reliance on the Report and noting that the Court’s vote-dilution cases have largely followed *Gingles*); *but see id.* (taking “a fresh look” at the Act’s text because the Court was addressing its “first § 2 time, place or manner” case).

candidates, whom Black citizens frequently prefer. See MSA, Vol. 1, 69–73 (crediting expert statistical analysis that reveals the “clarity and starkness of the pattern of racially polarized voting” between Black and white Alabamians). That is the case even after controlling for party, ideology, and a range of other considerations. For example, race remains a statistically significant predictor of vote choice for white citizens in Alabama. See Charles Stewart III, Nathaniel Persily & Stephen Ansolabehere, *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, 206, 217 (2013).

Alabama’s slaveholding history is an important predictor of this deep racial polarization. For example, higher slave prevalence in 1860 predicts lower 2008 non-Black vote share for President Obama in six Southern states—including in Alabama.<sup>8</sup> *Deep Roots* at 62–64 (“[F]or counties at the lowest levels of slavery, Obama won about thirty percent of the nonblack vote, while in those at the highest levels of slavery Obama only won around ten percent of the nonblack vote.”). That result—which the authors note may *overestimate* the support of white voters, *id.* at 63—shows that prior history of entrenched discrimination directly influences both negative racial attitudes and vote choices that align with those attitudes.

This feature of the Alabama political landscape interacts with one of the principal interests at play in the redistricting process—representatives’ desire to keep their seats. Pet. Br. at 17, 55 (noting that incumbent protection is a traditional redistricting principle). The

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<sup>8</sup> The six Southern states included in this analysis were selected based on the availability of quality data. *Deep Roots* at 62.

result is that white, non-minority preferred representatives and their allies have a perverse incentive to draw or preserve districts that exclude Black citizens in favor of white ones, because existing patterns make white citizens more reliable voters for those white candidates. See Stewart, Persily & Ansolabehere, 126 Harv. L. Rev. F. at 209 (“[W]hen political preferences fall along racial lines, the natural inclinations of incumbents and ruling parties to entrench themselves have predictable racial effects. Under circumstances of severe racial polarization . . . race-based discrimination becomes an efficient tool for incumbent protection or partisan advantage.”). Put differently, white representatives who today seek to gain or keep seats have the best chance when districts are drawn to maximize the impact of white voters.

In Alabama, that means largely preserving the district maps already in place. And it means doing so despite changing demographics and increasing racial diversity throughout the state. America Counts Staff, *Alabama Population Grew 5.1% Since 2010, Surpassing 5 Million*, U.S. Census Bureau, (Aug. 25, 2021), <https://www.census.gov/library/stories/state-by-state/alabama-population-change-between-census-decade.html> (explaining that between 2010 and 2020: (1) the diversity index in Alabama rose 5%; (2) the number of counties with a diversity index of more than 55% tripled from four to thirteen; and (3) the population that identifies as Black or African American—alone or in part—rose by 6.5%). As petitioners note, “[f]or nearly 50 years, Alabama’s congressional districts have remained remarkably similar.” Pet. Br. at 9; see also Pet. Br. at 53 (noting that “enacted districts

reflect past districts”).<sup>9</sup> They have also *always* produced all-white congressional delegations during that time—the only exception is District 7, where court intervention in 1992 resulted in the election of Alabama’s first Black congressman in nearly a century. Pet. Br. at 9–12; see also Ronald Smothers, *The 1992 Campaign: House Race; After 115 Years, a Black Will Represent Alabama*, N.Y. Times, May 23, 1992 (§ 1), at 8.

It follows that Alabama representatives’ incentives make them unreliable guardians of equality in electoral opportunity. That is true regardless of the subjective beliefs of legislators themselves. The state is “among the slowest to put away old habits,” Peyton McCrary et al., *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965–1990* 39 (Davidson & Grofman, eds., 1994) and remains predisposed to acquiesce in future exclusionary practices. See U.W. Clemon & Bryan K. Fair, *Making Bricks without Straw: The NAACP Legal Defense Fund and the Development of Civil Rights Law in Alabama 1940–1980*, 52 Ala. L. Rev. 1121, 1124 (2001) (“[r]acism is not simply the work of a few random bad actors. It has been a foundation of American life and will remain so.”). This

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<sup>9</sup> Notably, literacy requirements remained a live issue in Alabama in 1970. Letter from Jerrie Leonard, Assistant Attorney General, Civil Rights Division, to MacDonald Gallion, Att’y General, Alabama (Mar. 13, 1970), <https://www.justice.gov/crt/case-document/file/1277176/download> (noting that act requiring applicant for absentee registration to complete a written questionnaire without assistance “impose[d] a literacy requirement.”). That fact dovetails with the tremendous amount of racial discrimination documented in the Alabama federal courts between 1965 and 1975, occurring in and beyond the political process. See *Whitfield v. Oliver*, 399 F. Supp. 348, 355–57 (M.D. Ala. 1975) (noting and summarizing dozens of cases). *Amici* personally litigated many of these cases.

aspect of Alabama's politics can only be mitigated through sustained attention to the role of history in shaping contemporary political attitudes and incentives. *Cf.* Woodward at 69 ("The South's adoption of extreme racism was due not so much to a conversion as it was to a relaxation of the opposition.").

The foregoing analysis demonstrates that, where path-dependent processes operate, evaluating the causes and consequences of contemporary phenomena requires a deep understanding of historical choices and a focus on the links between those choices and present-day outcomes. The objectives of the Voting Rights Act will be frustrated without continued attention to the role history plays in structuring contemporary decision-making.

### CONCLUSION

For these reasons, the Court should affirm the decision below.

Respectfully submitted,

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