No. 25-13253
(consolidated with No. 25-13254)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Cara McClure, *et al.*,

Plaintiffs-Appellees,

v.

Jefferson County Commission,

Defendant-Appellant.

On Appeal from the United States District Court for the
Northern District of Alabama, No. 2:23-cv-00443 (Haikala, J.)

BRIEF OF *AMICI CURIAE* FORMER DEPARTMENT OF JUSTICE ATTORNEYS AND SOCIAL SCIENTISTS IN SUPPORT OF PLAINTIFFS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, the undersigned counsel certifies that the following persons and parties may have an interest in the outcome of this appeal, in addition to those identified in other parties' briefs:

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Amici curiae further state that no publicly traded corporation or entity has an interest in the outcome of this appeal.

/s/ Annabelle E. Harless

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

Amici curiae are 16 former U.S. Department of Justice ("DOJ") attorneys and social scientists, including historians, who regularly litigated cases to enforce federal voting rights under the Voting Rights Act ("VRA") and U.S. Constitution or supported that litigation. A complete list of *amici* appears in Appendix A. *Amici* collectively served at DOJ from 1968-2025, including during both Republican and Democratic presidential administrations, and when DOJ administered preclearance under Section 5 of the VRA. *Amici* have over 270 years of collective experience at DOJ, including 184 years of service at DOJ on work related to voting. Several *amici* are also leading scholars in federal voting rights, redistricting, and constitutional law and have written extensively about the VRA and racial gerrymandering jurisprudence.

Amici have a demonstrated interest in this appeal as former leaders and career civil servants with decades of experience at DOJ who are committed to robust enforcement of the VRA and the Fourteenth Amendment. *Amici* have expertise in the VRA's mechanics, history, and purpose from both the Government and private enforcement perspectives. *Amici* are particularly well situated to discuss the standards DOJ and federal courts have used to ensure compliance with the Constitution and the VRA, including administering preclearance under Section 5.

This brief is filed pursuant to Federal Rule of Appellate Procedure 29 because all parties consent to filing this brief.

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money intended to fund preparing or submitting the brief. No person other than *amici* or their counsel contributed money that was intended to fund preparing or submitting this brief. FRAP 29(a)(4)(E).

STATEMENT OF THE ISSUE

1. Whether the district court clearly erred by finding that Jefferson County drew its 2021 districts with a predominant racial motive in part based on the Commission's use of an obsolete and unjustified 65% racial target for over thirty years, along with the Commissioners' contemporaneous race-based statements; the pattern of precinct moves between the 2013 and 2021 plans; and expert simulation, demographic, and racially polarized voting analysis demonstrating the County's race-based motive and lack of necessity to engage in race-based sorting.

SUMMARY OF ARGUMENT

For a period of time, particularly in the late 1970s and throughout the 1980s, federal courts attributed to the DOJ a rule of thumb called the "65% rule" as a rough means to assess whether a jurisdiction facing liability would avoid retrogression and provide a protected class of voters with an ability to elect candidates of their choice under the federal VRA. Under this rule of thumb, experts and courts presumed that

because minority communities were younger and had lower rates of voter registration and turnout, they would not be an "effective majority" in a district unless they were 65% of the district's total population. Indeed, due to a Supreme Court plurality decision in *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 152-55 (1977), which affirmed the legality of districts drawn using a 65% racial target and a broader understanding that such a target would satisfy DOJ officials, parties to litigation, courts, and lawmakers across the country briefly (but widely) relied on the rough measure when assessing a district's compliance with the VRA.

It is thus no surprise that when Jefferson County ("County") redrew its map in 1985 to settle a Section 2 vote dilution case brought by Black voters and submitted the plan to the DOJ for preclearance, it followed the then-conventional wisdom and drew two districts with a Black total population of at least 65%. As the County told the DOJ in its 1985 preclearance submission, the intended effect of Districts 1 and 2 (each of which the submission expressly stated contained a Black total population over 65%) was to provide Black voters with "a greater opportunity to elect 2/5 . . . of the County Commission positions." Doc. 33-5 at 240, 323.

However, by the 1990s, the DOJ, experts, and courts had begun phasing out any reliance on the 65% rule of thumb. In fact, developments in the law and expert analysis led to a prevailing view that measuring the effectiveness of a district under

the VRA requires a fact-based, circumstance-specific analysis, rather than a racial target based on unsupported presumptions. Accordingly, courts across the country repeatedly modified or rejected the "65% rule" and instead required a functional analysis of on-the-ground conditions to determine whether a district would be effective for members of a protected class, including analysis of factors such as turnout levels, voting patterns, and demographics in the particular locality. *See, e.g.*, *Johnson v. Miller*, 864 F. Supp. 1354, 1391 (S.D. Ga. 1994) (rejecting unsupported use of the "traditional 65% rule" as a "broad generalization" insufficient to hold race-based redistricting was narrowly tailored to VRA's requirements).

But while the law evolved away from the 65% rule of thumb long ago, the County has not. Rather, the County continued to draw and redraw districts while "maintain[ing] two Black majority districts with the Black population in each constituting more than 65% of the total population" for another thirty years, including in its most recent 2021 plan. Doc. 33-5 at 331. Indeed, in each of the County's preclearance submissions to the DOJ in 1993, 2001, 2004, and 2013, it made it crystal clear that Districts 1 and 2 in its plan were drawn and continued to have Black populations over 65%. *Id.* at 329-332. Moreover, the County did so without any appraisal of the local factors that might justify the necessity of such district demographics under the VRA. *See, e.g.,* Doc. 32 at 59-60; Doc. 33-5 at 329-332.

Based on this clear and lengthy pattern of maintaining a minimum racial threshold for Districts 1 and 2, along with current statements by Commissioners, the movement of population between districts, and other probative, credible evidence of racial motivation, the district court held that race predominated in the drawing of the County's 2021 Plan. Doc. 33-5 at 363.

In response, the County argues that a finding of racial gerrymandering liability here, based on "routine" Section 5 correspondence, will result in a flood of litigation. Doc. 32 at 61. But it is not merely the fact of prior preclearance here that is meaningful. The County's practice of redrawing lines predominantly to meet or exceed a 65% Black population target, which originated four decades ago and has been maintained *for over thirty years* without adequate justification, is hardly a routine occurrence. These facts make this case unlikely to repeat.

In short, the "65% rule of thumb" proxy has been obsolete for decades. The County's redrawing of districts to maintain a 65% Black population threshold for over thirty years without adequate justification thus cannot excuse its racial gerrymandering in 2021. As a result, this Court should affirm the district court's decision finding that the County's 2021 Plan is an impermissible racial gerrymander in violation of the Fourteenth Amendment.

ARGUMENT

I. The 65% rule of thumb was widely used as a rough measure of VRA compliance when the County redrew its map and entered the 1985 consent decree.

When the County entered into the 1985 consent decree to settle a vote dilution claim under Section 2, a 65% rule of thumb was widely utilized to ensure compliance with the VRA by jurisdictions otherwise facing liability. Since the passage of the VRA, courts and those drawing or assessing maps have faced a similar question in vote dilution (Section 2) and retrogression (Section 5) cases: What district composition allows a minority community facing a polarized electorate and a legacy of discrimination to have a realistic opportunity to elect officials of their choice? *See, e.g.*, *Kirksey v. Board of Supervisors of Hinds County, Mississippi*, 554 F.2d 139, 149-51 (5th Cir. 1977). In response, courts in the late 1970s and 1980s adopted a rule of thumb, often referred to as the "65% rule," to estimate a district's effectiveness. The rule reasoned that minority communities needed more than a bare total population majority to have an effective voting majority, because of differences in age, eligibility, registration, and turnout rates between minority and white communities. *Id.* at 150. Thus, the conventional wisdom held that minority communities would often not have "effective majorities" in a district unless they constituted at least 65% of the total population. *See, e.g.,* Kimball Brace, Bernard N. Grofman, Lisa R. Handley, and Richard Niemi, *Minority Voting Equality: The 65 Percent Rule in Theory and Practice*, 10 L. & Pol. 43, 43-45 (1988); Laughlin

McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 Vand. L. Rev. 1249, 1271 (1989) (stating that "courts frequently defined an effective minority district as one in which minorities comprise[] approximately sixty-five percent of the total population.").

The case most often cited as catalyst for the 65% rule is a 1977 Supreme Court plurality decision that affirmed the use of a 65% racial target to avoid retrogression and obtain preclearance under the VRA. In *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, the Supreme Court considered a challenge to New York's state legislative districts under the Fourteenth and Fifteenth Amendments. 430 U.S. 144, 152-55 (1977) ("*UJO*"). New York drew several minority opportunity districts in its state legislative plans using a 65% "nonwhite" population target to comply with Section 5 of the VRA. *Id.* at 151-52. Members of the Hasidic Jewish community sued, claiming the legislature's creation of these districts diluted their voting strength. *Id.* at 155-56. The Court rejected that argument, holding instead that the use of the 65% threshold was constitutional as "New York adopted the 1974 plan because it sought to comply with the Voting Rights Act" and "did [no] more than accede to a position taken by the Attorney General that was authorized by our constitutionally permissible construction of s 5." *Id*. at 164.

Indeed, the *UJO* plurality explicitly deferred to what it described as the DOJ's use of the 65% rule. At trial, a staffer for New York's legislative reapportionment

committee testified that in conversations with DOJ officials, "he got the feeling that 65 percent would be probably an approved figure[.]" *Id.* at 152 (citation modified); *id.* at 169 (Brennan, J., concurring) (asserting that "unnamed Justice Department officials made known that satisfaction of the Voting Rights Act in Brooklyn would necessitate creation by the state legislature of 10 state assembly and senate districts with threshold nonwhite populations of 65%."). Without much discussion, four justices considered it "reasonable for the Attorney General to conclude in this case that a substantial nonwhite population majority in the vicinity of 65% would be required to achieve a nonwhite majority of eligible voters." *Id.* at 164; *see id.* at 175 (Brennan, J., concurring) (reasoning that the VRA's careful remedial scheme adequately "minimize[d] the objections to preferential treatment, and legitimates the use of even overt, numerical racial devices in electoral redistricting.").

As *UJO* suggests, there was also a broader understanding (whether accurate or not) at the time that the 65% rule came from the DOJ. A refined version of the story supposed that a DOJ official developed the rule by taking a bare total population majority and adding "5 percent to compensate for the higher proportion of [minority] noncitizens, 5 percent for lower [minority] voting age population, and 5 percent for lower [minority] registration and turnout." Brace et al., at 45; McDonald, at 1271 (stating that the 65% "figure… has been used by the Department of Justice and reapportionment experts in measuring the degree of minority

population needed to provide minorities a meaningful opportunity to elect a candidate of their choice"); Doc. 33-5 at 239 n. 7.

Courts also often attributed the rule to the DOJ in their opinions. *See, e.g.*, *Rybicki v. State Bd. of Elections of State of Ill.*, 574 F. Supp. 1147, 1149 n.4 (N.D. Ill. 1983); *Gingles v. Edmisten*, 590 F. Supp. 345, 358 n.21 (E.D.N.C. 1984); *James v. City of Sarasota, Fla.*, 611 F. Supp. 25, 28 n.3 (M.D. Fla. 1985). And on at least one other occasion, a court found that DOJ officials explicitly instructed state legislators to draw "at least 65%" minority population districts to comply with the VRA. *Busbee v. Smith*, 549 F. Supp. 494, 501 (D.D.C. 1982).

Amici are well aware of the widespread adoption of the "65% rule of thumb," and its widespread attribution to the DOJ, but its representation as a firm DOJ requirement divorced from local circumstances reveals a bit of mythmaking. In *UJO* itself, the source of the 65% figure was a state staffer's "feeling;" in contrast, Solicitor General Bork's actual legal filing was more nuanced: given differential eligibility patterns among Kings County's Black and Puerto Rican populations, for Black and Puerto Rican voters to be district majorities in the area, they "must comprise substantially more than 50 percent of the district's total population." Brief for the United States, *UJO*, 1976 WL 181566, at *38 (Aug. 31, 1976). And in *Busbee*, where the court expressly asserted that DOJ demanded "at least 65%" minority population, the court's source flatly contradicts the assertion; rough

minutes of a conversation taken by a state legislative staffer recorded DOJ as stating that it was important to consider the fact that a larger percentage of white voters generally vote, that it was recommended to aim for a Black population of "60 to 65%" in order to achieve a voting majority, and that DOJ refused to give a more definite answer as to the precise ratio required. *Busbee*, 549 F. Supp. 494, 501, Def. Exh. CC, at 2. *Amici* are aware of no official DOJ source or policy requiring a 65% minority population for VRA compliance across the board, even in this early period.

Still, this confluence of factors—the understanding that minority districts with populations above 65 percent were necessary to afford effective representation, *UJO*'s apparent blessing of such an approach, and the attributions of the 65% rule to the DOJ (accurate or not)—led courts and jurisdictions around the country to adopt the rule as a matter of course. By 1979, courts considered it "generally conceded that, barring exceptional circumstances such as two white candidates splitting the vote, a district should contain a black population of at least 65 percent or a black VAP of at least 60 percent to provide black voters with an opportunity to elect a candidate of their choice." *State of Mississippi v. United States*, 490 F. Supp. 569, 575 (D.D.C. 1979), *aff'd sub nom.*, *United States v. Mississippi*, 444 U.S. 1050, 1050 (1980).

Courts in this period applied the rule regularly, and sometimes rigidly. For example, in *State of Mississippi v. United States*, the district court repeatedly used a

60 percent Black voting age population threshold to determine whether Mississippi's state legislative districts had retrogressive effect under Section 5 of the VRA. *Id.* at 571, 579-80, 580 n.5. On appeal, where the lower court's decision was affirmed, Justice Marshall described the district court's application of the 60% rule as "mechanical." *Mississippi*, 444 U.S. at 1056 (Marshall, J., dissenting). In *Carstens v. Lamm*, in evaluating various map proposals, a Colorado district court explained that "the fact remains that a minority population must have a majority of 60 to 65% of the voters in a district in order to exercise political control over that district." 543 F. Supp. 68, 86 (D. Colo. 1982). Because the court found that it was "mathematically impossible" that any proposed district could "'even begin to approach the 60-65% goal," it rejected claims that any of the map proposals could provide "minorities" with "representation of their choice." *Id.* And in 1984, the Seventh Circuit held that a district court reviewing Chicago City Council districts abused its discretion by failing to apply the 65% rule without any justification. *Ketchum v. Byrne*, 740 F.2d 1398, 1413-14 (7th Cir. 1984), *cert. denied sub nom.*, *City Council of the City of Chicago v. Ketchum*, 471 U.S. 1135, 1135 (1985).

These cases are emblematic, but other courts and litigants of the era regularly referenced the 65% rule in redistricting litigation. *See, e.g.*, *Rybicki*, 574 F. Supp. at 1149 n.4 ("The 65% figure is a general guideline which has been used by the Department of Justice, reapportionment experts and the courts as a measure of the

minority population in a district needed for minority voters to have a meaningful opportunity to elect a candidate of their choice") (citing *In re Illinois Congressional Districts Reapportionment Cases*, No. 81-cv-1395, slip op. at 19 (N.D. Ill. 1981), *aff'd sub nom.*, *McClory v. Otto*, 454 U.S. 1130 (1982)); *Busbee*, 549 F. Supp. at 515 (referencing legislators' understanding of 65% rule); *Latino Political Action Committee, Inc. v. City of Boston*, 784 F.2d 409, 414 (1st Cir. 1986) ("Where voting is highly polarized, a 65 percent figure is a generally accepted threshold which has been used by the Department of Justice and reapportionment experts"); *Edmisten*, 590 F. Supp. at 358 & n.21 (referencing 65% rule as a "benchmark" used "by the Justice Department in administering § 5" to reject argument that 55.1% Black population district contained effective majority); *Neal v. Coleburn*, 689 F. Supp. 1426, 1438-39 (E.D. Va. 1988) (referencing 65% rule as "ideal[]" where practically feasible or necessary); *Smith v. Clinton*, 687 F. Supp. 1361, 1362-63 (E.D. Ark. 1988), *aff'd sub nom.*, *Clinton v. Smith*, 488 U.S. 988, 988 (1988) (defaulting to 65% rule in absence of contradictory evidence).

Against this backdrop of wide acceptance of the 65% rule of thumb by several courts, it is easy to see why the County relied on a 65% racial threshold in redrawing its 1985 plan, particularly because the County had to submit the plan to DOJ for preclearance. Indeed, as the district court found, "[i]n the 1980s, nationally, there was a general understanding. . . that to have an effective district that would elect a

[B]lack candidate of choice, at least in many parts of the country you needed a district that was in the range of 65 percent [B]lack." Doc. 33-5 at 239. As a result, the 1985 plan and its reliance on the 65% rule in two districts "reflected the conventional wisdom" and court precedent at the time. *Id*. at 323. It is thus no surprise that the 1985 Commission explicitly pointed out in its preclearance materials that two districts had Black populations over 65%, and that those districts were drawn to guarantee "Black voters. . . a greater opportunity to elect 2/5. . . of the County Commission positions" and "resolve a [] vote dilution case." *Id*. at 240, 323.

II. The VRA did not require the County to redraw two districts while maintaining a 65% Black population indefinitely.

A. The 65% rule of thumb was phased out by courts, experts, and the DOJ.

Despite the 65% rule of thumb's once widespread use, changes in the law and prevailing views about measuring a district's effectiveness meant that over time, the DOJ, experts, and courts phased out reliance on the 65% rule. Indeed, throughout the 1990s, it was "widely acknowledged that there is no fixed and inflexible numerical benchmark – sixty-five percent or otherwise – to achieve [effective] minority electoral opportunity." Jack Quinn, Jonathan B. Sallet, and Donald J. Simon, *Congressional Redistricting in the 1990s: The Impact of the 1982 Amendments to the Voting Rights Act*, 1 Geo. Mason Univ. Civ. Rights L.J. 207, 237

(1990); Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. Rev. 1517, 1527-28 (2002) ("by 1990, the 65% rule was considered exceptional"). At the time, the DOJ publicly distanced itself from the rule, scholars observed that the 65% rule's basic assumptions were flawed when applied mechanically, and changes in the law meant that federal courts increasingly modified or declined to apply the 65% rule altogether. Thus, while the County may have been following prevailing practice in using the 65% threshold in 1985, it was on thin ice by 1993 without adequate localized justification for its use.

First, by the late 1980s the DOJ disclaimed any special significance of any 65% threshold and said so publicly. For example, in 1987, formal DOJ preclearance regulations explained that "any determination of retrogression must go beyond a simple numerical analysis and include the consideration of all of the factors that could be relevant to an understanding of the impact of the change." *Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 52 Fed. Reg. 486, 488 (Jan. 6, 1987). And at a November 1990 conference on redistricting, then Acting Chief of the Voting Section, J. Gerald Hebert, said:

> Let me also take this opportunity to give you the Department of Justice's position on the so-called '65% Rule,' i.e., whether a minority district must be at least 65% in order to satisfy Department of Justice requirements. *We attach no particular significance to a 65% figure.* The Department has frequently concluded, based on the facts presented in a particular submission, that districts containing a minority population

> significantly less than 65% (and even 50%) of the total may be entitled to section 5 preclearance. We have also rejected plans where the minority percentage in a district exceeded 65%. *Each Section 5 submission must be evaluated in light of the particular factual circumstances – not on the basis of some preordained population percentage.*

Quinn, et al., at 239 & n.126 (quoting Remarks of J. Gerald Hebert, Acting Chief, Voting Section, Civil Rights Division, Department of Justice at Conference on Fair Redistricting in Texas (Nov. 17, 1990)) (emphasis in original). DOJ's approach also bore out in the composition of districts. For instance, during the 1990 round of redistricting, only two of the seventeen majority-Black congressional districts drawn in the South had Black population majorities above 65%. Pildes, at 1527. More than half had Black populations between 50% and 60%. *Id.*

Second, voting rights scholars examined the 65% rule's basic assumptions and found that, rather than a rigid numerical threshold, a more functional, context-specific analysis was required to determine the population level necessary for a district to provide a minority group with a realistic opportunity to elect candidates of choice. *See, e.g.*, Brace, et al., *supra,* at 48-49, 56 (analyzing various local electoral conditions including voter registration rates, turnout, incumbency, population age, and more and concluding that "[o]ne cannot so easily find empirical justification for using a figure of 65 percent as a general rule"); *id.* at 56 (noting that in some instances, "use of the 65 percent figure may have the same effect as the classic gerrymander: squeezing more of one type of voter into districts than is

necessary for them to be competitive in order to reduce the number of districts in which those voters constitute an effective majority"); Pildes, *supra*, at 1528; Quinn, et al., *supra*, at 237. Many of these scholars often served as redistricting experts, so their views were particularly influential among litigants and jurists. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 52 (1986) (citing Dr. Bernard Grofman); *McDaniels v. Mehfoud*, 702 F. Supp. 588, 592 (E.D. Va. 1988) (citing testimony of Dr. Richard Niemi); *Puerto Rican Legal Defense and Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681, 694 (E.D.N.Y. 1992) (referencing Brace, et al., *supra*, in declining to apply a rigid minority population threshold); Pildes, at 1529-30 (referring to Drs. Grofman and Handley as "some of the political scientists upon whom federal courts, including the Supreme Court, placed greatest reliance during the" 1990s).

Finally, changes in the law also led to disfavoring the 65% rule. In 1986, following amendments to the VRA in 1982, the Supreme Court for the first time set out the standard for proving a vote dilution claim under Section 2 of the VRA in the seminal *Gingles* case. In outlining the standard, the Court held that Section 2 cases necessitate a "searching practical evaluation" that is "peculiarly dependent upon the facts of each case" and "requires an intensely local appraisal." 478 U.S. at 79. *Gingles* thus required a more circumstance-specific analysis of facts on the ground in evaluating the voting strength of a protected class under the VRA, rather than a

mechanical application of a 65% rule divorced from the reality of election conditions in a jurisdiction.

In addition, the Supreme Court began placing an increasing emphasis on eliminating essentialist racial assumptions and unjustified racial classifications. For the first time in 1993, the Supreme Court recognized a full-throated racial gerrymandering cause of action under the Fourteenth Amendment in *Shaw v. Reno*, 509 U.S. 630, 643 (1993). In doing so, the Court distinguished *UJO* and limited its reasoning to the constitutional vote dilution context. *Id.* at 651-52 (stating that "[n]othing in [*UJO*] precludes white voters…from bringing the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification"). Then, in *Miller v. Johnson*, the Supreme Court further cabined *UJO*, stating that "[t]o the extent any of the opinions in [*UJO*'s] 'highly fractured decision' can be interpreted as suggesting that a State's assignment of voters on the basis of race would be subject to anything but our strictest scrutiny, those views ought not be deemed controlling." 515 U.S. 900, 915 (1995); *see also Shaw v. Hunt*, 517 U.S. 899, 906 (1996) (applying strict scrutiny to invalidate North Carolina congressional district drawn "to assure black-voter majorit[y]" as an unconstitutional racial gerrymander).

As a result of this changing legal landscape, courts across the country moved away from the 65% proxy and increasingly rejected it in favor of a more context-sensitive approach that analyzed demographics, turnout and registration rates, the extent of racially polarized voting, prior election results, and other factors—all supported by data in a particular locality—to measure a district's effectiveness. *See, e.g.*, *Coleburn*, 689 F. Supp. at 1438 (describing 65% rule as "an approximate goal and not an inflexible rule" and accepting districts with Black majorities of 60.37% and 63.05% as sufficient VRA remedies); *Martin v. Mabus*, 700 F. Supp. 327, 333-34 (S.D. Miss. 1988) (rejecting 65% rule in light of increasing registration rates and electoral success in local analysis); *Gunn v. Chickasaw County, Miss.*, 705 F. Supp. 315, 323-24 (N.D. Miss. 1989) (rejecting application of 65% rule because it would unnecessarily dilute Black community's political impact in other districts); *Fletcher v. Golder*, 959 F.2d 106, 110 (8th Cir. 1992) (affirming district court analysis that "65% figure is not automatically mandated" and treating effectiveness as a question of fact for trial court to determine); *Nash v. Blunt*, 797 F. Supp. 1488, 1501-02 (W.D. Mo. 1992) (rejecting application of 65% rule and finding "equalizing percentage" is less than 60% of the voting age population); *Puerto Rican Legal Defense and Educ. Fund, Inc.*, 796 F. Supp. at 689, 694 (accepting special master's rejection of 65% rule based on contextual analysis); *Johnson*, 864 F. Supp. at 1391 (rejecting unsupported use of the "traditional 65% rule" as a "broad generalization" insufficient

to hold race-based redistricting was narrowly tailored to VRA's requirements); *Aldasoro v. Kennerson*, 922 F. Supp. 339, 371 (S.D. Cal. 1995) (rejecting "bright line" 65% standard).

B. The County's continued reliance on a 65% threshold without adequate justification is evidence that the predominant use of race amounts to an impermissible racial gerrymander.

The County's continued reliance on the 65% threshold without justification is evidence that its predominant use of race amounts to an impermissible racial gerrymander. Given the law's shifting quality in the late 1980s and early 1990s, it is plausible that the County, like a handful of courts, mistakenly hung onto a blunt version of the 65% rule in its 1990s redistricting process. *See Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 646-48 & n.20 (N.D. Ill. 1991) (applying 65% rule). Because preclearance was likely a priority for the County, and because DOJ's preclearance authority included only the statutory factors of invidious intent and retrogression under Section 5 and did not include constitutional concerns under *Shaw*, that arbitrary threshold may have facilitated the discrete preclearance decision. Still, by the mid-1990s, the use of a 65% threshold divorced from local conditions would have been suspect if race predominated in the relevant redistricting decisions. The 65% rule of thumb was no longer "universally accepted by experts," federal courts routinely "modified or rejected" the rule, *DeGrandy v. Wetherell*, 815

F. Supp. 1550, 1563-64 (N.D. Fla. 1992) (disclaiming 65% rule and instead applying functional analysis), and the DOJ had expressly disavowed its use.

Moreover, as the district court found, in its 1990s redistricting "the Commission did not evaluate the need to maintain 65% Black population levels in Districts 1 and 2 using an RPV analysis or an assessment of Black voter registration and turnout." Doc. 33-5 at 245. Nor did it appear to perform this analysis in the 2001, 2004, or 2013 cycles, despite intentionally maintaining the Black population in Districts 1 and 2 above 65% and explicitly highlighting that fact in its preclearance submissions. Doc. 33-5 at 252, 255, 257. As a result, contrary to the County's claim, Doc. 32 at 47-49, from at least the late 1990s onward, the County had *no* apparent reason to rely on a rigid 65% racial target to comply with the VRA.

Under the law, to prove a racial gerrymandering claim, a plaintiff must first demonstrate that race was the predominant factor behind a jurisdiction's decision "to place a significant number of voters within our without a particular district," *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 7 (2024) (internal quotations omitted). Once a showing of racial predominance is made, the burden shifts to the jurisdiction "to prove that the map can overcome the daunting requirements of strict scrutiny." *Id*. at 11. To do so, the jurisdiction must show that it considered race to further a compelling government interest, and that the use of race is narrowly tailored, or "necessary—to achieve that interest." *Id.* (internal quotations omitted).

The Supreme Court has "long assumed that one compelling interest is complying with operative provisions of the Voting Rights Act of 1965." *Cooper v. Harris*, 581 U.S. 285, 292 (2017). But the use of a racial target is only narrowly tailored when the "legislature had good reasons to believe that a . . . racial target was necessary" to comply with the VRA. *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 182 (2017) (citation modified); *Cooper*, 581 U.S. at 301. Whether a district is necessary to comply with the VRA requires a "functional analysis" of electoral conditions in a particular jurisdiction. *Bethune-Hill*, 580 U.S. at 194-196; *Harding v. County of Dallas*, *Texas*, 948 F.3d 302, 309 (5th Cir. 2020) (VRA analysis requires a "functional analysis [that] 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'") (quoting *Gingles*, 478 U.S. at 79); *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011) (stating that "determining whether the ability to elect exists. . . requires a functional analysis of the electoral behavior within the particular jurisdiction or election district").

Here, the record is clear that over multiple prior redistricting cycles, including the 2013 cycle directly preceding the County's 2021 Plan, the County utilized a 65% Black population minimum threshold for Districts 1 and 2 without any kind of

functional justification. Doc. 33-5 at 256-57; Doc. 32 at Doc. 32 at 59-60.[1] If race predominated in the drawing of those districts, such a practice is not remotely narrowly tailored to comply with the VRA. *See, e.g.*, *Cooper*, 581 U.S. at 306 (stating that VRA compliance does not demand "precise[]" minority targets); *Bethune-Hill*, 580 U.S. at 194-96 (upholding district drawn predominantly based on racial target only where the legislature performed a "functional analysis" to determine it was necessary).

The district court found that the County's preclearance letters and history of maintaining a 65% racial threshold "are direct evidence of the Commission's intent in 1985, 1993, 2001, 2004, and 2013" and "are powerful circumstantial evidence of the continuation of a pattern of using race to set the boundaries of the Commission's districts in 2021." Doc. 33-5 at 329. Indeed, the County's "consistent report to DOJ of the effort to create and maintain two majority Black voting districts" with a "specific racial threshold in those districts" "permits the inference that the Commission continued its decades-long practice in 2021." *Id*. at 330. But the simple fact of a target does not alone establish racial predominance. So the district court — quite properly — did not rely solely on the fact of maintaining two majority Black

[1] In its last preclearance letter in 2013, Appellant wrote: "The 2013 plan has two [B]lack majority districts, just like the 1993 and 2001 plans. Each of these districts have [sic] majority [B]lack populations in excess of 65%, under the 2013, 2001, and 1993 plan[s]." Doc. 33-5 at 256. Appellant clearly placed special significance on the 65% threshold.

districts, nor on the racial threshold alone, to conclude that voters were placed predominantly in or out of Districts 1 and 2 based on their race. *Id*. at 242-58, 262-65 (analyzing redistricting processes, population growth patterns, placement of population by race in Districts 1 and 2, municipal splits, and other factors from 1990-2013 cycles); *id.* at 324-29 (same); *id*. at 329, 331 (finding that in historical cycles, including 2013, the Commission had a "purpose of redrawing district boundaries after each census to aggregate the BVAP in Jefferson County in Districts 1 and 2" while "diminishing BVAP in other districts"); *id*. at 331-32.

The County's history of adjusting district lines predominantly to meet a specific racial threshold is particularly relevant because it chose to make it so. The County claims that while drawing the 2021 Plan, it minimized moving population from the 2013 map's boundaries as much as possible. Doc. 32 at 17, 35; Doc. 33.5 at 334-35 (finding that Commissioner stated the 2021 Plan was "'least-changes. . . from the prior redistricting plan."). Moreover, two Commissioners involved in the 2013 process remained on the Commission in 2021, and the County stated that it "used the procedure in drawing the 2021 plan that the Commission used to draw the 2013 plan." Doc. 33-5 at 334-35. As a result, the 2021 Plan kept over 95% of the population in the same district as in the 2013 map. *Id*. at 279. Thus, by "invoking core retention. . . as the predominant motive behind the shape of the Challenged Districts, the [County] makes the historical foundation for these districts particularly

relevant." *Jacksonville Branch of NAACP v. City of Jacksonville*, 635 F. Supp. 3d 1229, 1286 (M.D. Fla. 2022).

This historical foundation demonstrates that the County's decision to maintain two districts with 65% Black population or higher *for 40 years* was no mere redistricting by-product, nor even the result of attention to race in conjunction with other race-neutral factors. Rather, the need to meet a racial threshold was the predominant reason that voters were moved into or out of Districts 1 and 2 for decades, and was baked into the County's redistricting process, even in 2021. This is classic evidence that "'race was the criterion that, in the [County's] view, could not be compromised' in the drawing of district lines." *Alexander*, 602 U.S. at 7-8 (quoting *Shaw*, 517 U.S. at 907).

These unusual facts—including the predominant use of race to maintain a 65% racial target for over 30 years without adequate justification—make this case unlikely to produce the avalanche of litigation that the County claims will result from a finding of racial gerrymandering in the 2021 Plan. Doc. 32 at 60. Contrary to the County's argument, the district court did not just find that "routine §5 correspondence" established racial predominance in 2021. *Id.* at 35.[2] Rather, the

[2] Appellant's continued assurance that Districts 1 and 2 from 1993-2013 met a 65% Black population threshold is far from routine. Moreover, the district court is not the first to rely on preclearance correspondence to support a finding that race predominated in the drawing of district lines. *See, e.g.*, *Miller*, 515 U.S. at 919 (citing

district court found that "the commission's decision to maintain supermajority-Black populations in Districts 1 and 2 at the expense of traditional redistricting criteria" suggested that race predominated in the drawing of the 2021 districts based on the County's historical preclearance submissions, the pattern of racial population moves between districts, the County's attempt to change the previous racially-motivated map as little as possible in 2021, race-based comments by Commissioners during the redistricting process, and expert demographic, alternative map, and statistical evidence. Doc. 33-5 at 318-363. The County did not even attempt to satisfy strict scrutiny once a showing of racial predominance was made, *id*. at 363, nor could it, given the clear inadequacies of an artificial and data-free 65% threshold in this context. A decision otherwise would give the County special treatment under existing law, rather than open a floodgate of new litigation.

CONCLUSION

The 65% rule of thumb was widely used by courts and attributed to the DOJ for a brief period of time decades ago. The County relied on the rule to create two districts with over 65% Black populations in 1985, and then continued to move people into or out of those districts based on their race to maintain the 65% thresholds. But the law long ago abandoned the 65% rule, and so must the County.

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statement from state to DOJ during preclearance as "powerful evidence that the legislature subordinated traditional redistricting principles to race.").

The district court's decision finding that the County's 2021 Plan is a racial gerrymander in violation of the Fourteenth Amendment should be affirmed.

December 17, 2025

Respectfully submitted,

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Appendix A

Alphabetical List of Amici Curiae[3]

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Justin Levitt, U.S. Department of Justice, *Deputy Assistant Attorney General*, Civil Rights Division (2015-2017)

Peyton McCrary, U.S. Department of Justice, *Historian*, Voting Section (1990-2016)

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 29(a)(5) because it contains 6,283 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced font using Microsoft Word version 2510 in 14-point Times New Roman font.

December 17, 2025 */s/ Annabelle E. Harless*

CERTIFICATE OF SERVICE

I filed this brief using the Court's CM/ECF system, which will email everyone requiring service.

December 17, 2025 */s/ Annabelle E. Harless*