Nos. 21-1086, 21-1087

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

BRIEF FOR AMERICA FIRST LEGAL AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS/PETITIONERS

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QUESTION PRESENTED

Whether the State of Alabama's 2021 redistricting plan for its seven seats in the United States House of Representatives violated Section 2 of the Voting Rights Act, 52 U.S.C. § 10301.

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INTEREST OF *AMICUS CURIAE*

America First Legal Foundation is a nonprofit organization dedicated to promoting the rule of law in the United States by preventing executive overreach, ensuring due process and equal protection for every American citizen, and encouraging understanding of the law and individual rights guaranteed under the Constitution and laws of the United States.

America First Legal has a substantial interest in this case. Equality under the law is one of our Nation's founding principles, reflected in the Declaration of Independence and later in the Fourteenth Amendment. The decision below threatens that principle by rejecting legislative maps because those maps did not sufficiently segregate citizens based on race. America First Legal has an interest in ensuring that neither the judiciary nor Congress requires discrimination based on race.[1]

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

The district court ordered Alabama to engage in intentional racial segregation. The court justified its order on a statute that is valid only if it enforces the Constitution's prohibitions on race discrimination in voting. Requiring racial segregation repudiates—rather than enforces—the Constitution's guarantee of equal treatment under the law. Something has gone wrong.

1. Though all identify the perplexing statute at issue as Section 2 of the Voting Rights Act of 1965, it is not. That original Section 2 prohibited *intentional* denials of the right to vote on account of race, just like the Fifteenth Amendment. The claims here are under a much different Section 2, enacted in 1982 as a congressional attempt to override this Court's holding that Section 2, like the Fifteenth Amendment, requires a showing of purposeful discrimination. The new Section 2 prohibits any "standard, practice, or procedure" that "results" in a discriminatory denial of the right to vote. 52 U.S.C. § 10301.

VRA plaintiffs have long said that the point of this new "results" test was to change the law's substance, eliminating any requirement of discriminatory intent. But without a constitutional amendment, Congress cannot change the Fifteenth Amendment's meaning, and it lacks other authority to enact Section 2. Nor is the new Section 2 congruent or proportional to any proven record of Fifteenth Amendment violations. The only systematic evidence examined in the 1982 legislative record showed no discrimination. Even as Congress failed to provide evidence to justify the new results test, it wrote a statute that sweeps broadly, encompassing every possible voting district in the

country. Worst, Section 2's remedy forces jurisdictions that treated citizens equally to instead discriminate based on race. The new Section 2 has caused ever-heightening official racial segregation, and it requires statutory resegregation in perpetuity. When racial discrimination in redistricting now occurs, it is almost entirely due to Section 2, not despite Section 2. The new Section 2 is unconstitutional.

Section 2 is also unconstitutional because, at least as applied to vote dilution claims, it provides no comprehensible principles to the judiciary or the states. Congress has lawmaking authority, not this Court. But Section 2 sets forth no intelligible way to adjudicate vote dilution claims. Section 2's only possible principle is proportional representation based on race, but the statute disclaims that principle and requiring it would violate Equal Protection. The best proof of Section 2's standardless nature is this Court's jurisprudence trying to interpret it. That jurisprudence is incomprehensible, beset by contradictions, and incapable of principled application. Section 2 is an unconstitutional delegation of legislative authority.

2. At a minimum, a court cannot order a map that would violate the Constitution as a remedy for a statute that supposedly enforces the Constitution. Alabama here relied on traditional, neutral districting principles to draw its maps. The plaintiffs themselves simulated that effort millions of times, *never* producing a map with more than one majority-minority district. Only by putting race first could the plaintiffs, and then the district court, believe that Section 2 *required* two such districts. The map ordered by the court below would never exist but for racial discrimination. Ordering a state "to engage in race-

based redistricting and create a minimum number of districts in which minorities constitute a voting majority" "entrench[es] the very practices and stereotypes the Equal Protection Clause is set against." *Johnson* v. *De Grandy*, 512 U.S. 997, 1029 (1994) (Kennedy, J., concurring in part and in judgment). The remedy below is unconstitutional.

3. The district court justified its remedy under this Court's strict scrutiny test. Neither text nor history supports watering down constitutional rights, especially not in the policy-oriented way required by strict scrutiny's balancing test. And that test's application to Section 2 cases has been particularly obscene. The Court has assumed that compliance with the Voting Rights Act—apparently including 1982's Section 2—is a compelling government interest that justifies violating the Constitution. But the Constitution is supreme over statutes. See U.S. Const. art. VI, cl. 2. Labeling statutory compliance a compelling interest would let Congress dilute the Constitution. And this circular assumption forestalls meaningful review because compliance will always be narrowly tailored to compliance. Statutory compliance as justification for a constitutional violation would be laughed out of court in any other context. Did this Court think that the Topeka Board of Education had a compelling interest in complying with Kansas law by segregating schools?

The Court's assumed interest reflects a more sinister assumption: that voters of a particular race ascribe to similar views and *should* be segregated into racial enclaves. That is Section 2's world and its only operating principle. Our Nation's core principle, by contrast, is equal treatment under the law. Section 2 is unconstitutional.

ARGUMENT

I. Section 2 is unconstitutional to the extent it reaches beyond intentional discrimination.

A. The new Section 2 exceeds Congress's authority.

Congress's authority to enact Section 2 comes from the Fourteenth and Fifteenth Amendments, which permit Congress to "enforce" those amendments' substantive provisions "by appropriate legislation." U.S. Const. amend. XIV, § 5; *id.* amend. XV, § 2. Congress may enforce them "by creating private remedies against the States for actual violations." *United States* v. *Georgia*, 546 U.S. 151, 158 (2006) (emphasis omitted).

Two initial hurdles to cases like this are that Section 2 does not apply to vote dilution claims, and that Congress did not provide a private remedy. *Abbott* v. *Perez*, 138 S. Ct. 2305, 2335 (2018) (Thomas, J., concurring, joined by Gorsuch, J.); *Holder* v. *Hall*, 512 U.S. 874, 922–923 (1994) (Thomas, J., concurring in judgment); *Arkansas State Conf. NAACP* v. *Arkansas Bd. of Apportionment*, 2022 WL 496908, at *9–17 (E.D. Ark. Feb. 17, 2022).

Setting aside those problems for now, the new Section 2 (at least as understood by VRA plaintiffs) sweeps far beyond the constitutional prohibition on intentional discrimination. As originally enacted in the Voting Rights Act of 1965, Section 2 mirrored the Fifteenth Amendment:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any

> citizen of the United States to vote on account of race or color.

Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437; see U.S. Const. amend. XV, § 1.

Under this Court's precedents, "racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation." *City of Mobile* v. *Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion). A few years after Section 2's enactment, the Court made clear that because "the language of § 2 no more than elaborates upon that of the Fifteenth Amendment," Section 2 claims equally required a showing of intentional discrimination. *Id.* at 60.

In 1982, Congress directly challenged this Court's holding by rewriting the statute "to reach cases in which discriminatory intent is not identified." *De Grandy*, 512 U.S. at 1009 n.8. Instead, "a violation could be proved by showing discriminatory effect alone." *Thornburg* v. *Gingles*, 478 U.S. 30, 35 (1986). The new Section 2 focused on whether the challenged practice "*results* in a denial or abridgement" of the right to vote and added a new subsection:

> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the

> State or political subdivision is one circumstance which may be considered.

Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, 134 (emphasis added).

This rewriting moved the substantive scope of Section 2 beyond its constitutional underpinnings. Under the Fourteenth and Fifteenth Amendments, a discriminatory effect might be relevant to a showing of discriminatory intent, but it is not enough to prove "invidious racial discrimination forbidden by the Constitution." *Washington* v. *Davis*, 426 U.S. 229, 242 (1976). Because "the Constitution requires a showing of intent that [the new] § 2 does not, a violation of § 2 is no longer a fortiori a violation of the Constitution." *Reno* v. *Bossier Par. Sch. Bd.*, 520 U.S. 471, 482 (1997). Thus, the Fifteenth Amendment cannot provide a basis for Section 2 to the extent that the statute reaches beyond intentional discrimination. Absent other authority for the new Section 2, it is unconstitutional. See U.S. Const. art. I, § 8; *id.* amend. X; see generally *Shelby County* v. *Holder*, 570 U.S. 529, 542–45 (2013) ("[T]he [VRA] constitutes extraordinary legislation otherwise unfamiliar to our federal system." (cleaned up)).[2]

This Court has held that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself

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[2] It is also unclear whether Section 2 could constitutionally extend to vote dilutions claims at all, given that "[t]his Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims." *Voinovich* v. *Quilter*, 507 U.S. 146, 159 (1993). The Court has never "held any legislative apportionment inconsistent with the Fifteenth Amendment." *Ibid.*

unconstitutional." *City of Boerne* v. *Flores*, 521 U.S. 507, 518 (1997). Even under that dubious rule, see *Tennessee* v. *Lane*, 541 U.S. 509, 555–65 (2004) (Scalia, J., dissenting), "it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees." *Bd. of Trustees of Univ. of Alabama* v. *Garrett*, 531 U.S. 356, 365 (2001). As this Court has explained:

> Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the provisions of the [Constitution].

City of Boerne, 521 U.S. at 519 (cleaned up).

The new Section 2 purports to change the substance of the underlying right; that was its stated purpose. See *Brnovich* v. *Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2357–58 (2021) (Kagan, J., dissenting). And it is neither congruent nor proportional to the Fourteenth and Fifteenth Amendments. When enforcement legislation extends to constitutional conduct, the Court has required "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Allen* v. *Cooper*, 140 S. Ct. 994, 1004 (2020). "On the one hand, courts are to consider the constitutional problem Congress faced—both the nature and the extent of state conduct violating the [Constitution]. That assessment usually . . . focuses on the legislative record." *Ibid.* "On the other hand, courts are to

examine the scope of the response Congress chose to address that injury." *Ibid.*

The new Section 2 flunks this means-ends test. Even before the 1982 amendment, the Voting Rights Act "authorize[d] federal intrusion into sensitive areas of state and local policymaking and represent[ed] an extraordinary departure from the traditional course of relations between the States and the Federal Government." *Shelby County*, 570 U.S. at 545. At first, the Act "could be justified by 'exceptional conditions.'" *Ibid.* (quoting *South Carolina* v. *Katzenbach*, 383 U.S. 301, 334 (1966)). But the law's "current burdens . . . must be justified by current needs." *Id.* at 542.

Start with Congress's failure to identify any constitutional problem. Even by 1982, as the Senate Subcommittee on the Constitution explained, "there [wa]s absolutely no record to suggest that the proposed change in Section 2 involves a similar remedial exercise" as the original VRA. S. Rep. No. 97-417, 97th Cong., 2d Sess., 171 (1982) ("Senate Report"). There was "no such evidence offered during either the House or Senate hearings," and "the subject of voting discrimination outside the [jurisdictions 'covered' by other VRA provisions] [was] virtually ignored during hearings in each chamber." *Ibid.*; see T. Boyd & S. Markman, The 1982 Amendments to the Voting Rights Act: A Legislative History, 40 Wash. & Lee L. Rev. 1347, 1394 n.231 (1983) ("Virtually no substantial evidence was introduced during the hearings related to voting rights problems outside [covered] jurisdictions."). In covered jurisdictions, Congress "identified only three isolated episodes involving the outright denial of the right to vote," *Brnovich*, 141 S. Ct. at 2333, even though that is the focus of the

Fifteenth Amendment. Cf. *Allen*, 140 S. Ct. at 1006 ("only a dozen possible examples" insufficient).

The Senate Committee Report—which *Gingles* unblushingly called "the authoritative source for legislative intent" on Section 2, 478 U.S. at 43 n.7—showed little "concern with whether" the few vote dilution examples it discussed "raise[d] a constitutional issue" by evidencing "intentional" discrimination. *Allen*, 140 S. Ct. at 1006. The only systematic evidence considered by the Committee was a Justice Department study of more than 200 cities that found *none* was engaged in unlawful vote dilution, even under the new Section 2 results test. Senate Report, *supra*, at 35. Lacking any systematic evidence justifying its amendment, the Committee pointed to a few cases that rejected Section 2 claims because the plaintiffs had not proven a discriminatory intent. *Id.* at 37–39. But a statute that changes the Constitution's substance will lead to different substantive outcomes; that is always the problem when Congress tries to amend the Constitution via statute. See *City of Boerne*, 521 U.S. at 529, 532; D. Laycock, Conceptual Gulfs in *City of Boerne* v. *Flores*, 39 Wm. & Mary L. Rev. 743, 749–52 (1998) (comparing the new Section 2 to the application of RFRA invalidated in *City of Boerne*).

All that's left in the record are such conclusory assertions as "there are still some communities in our Nation where racial politics do dominate the electoral process." Senate Report, *supra*, at 33. That does not come close to a showing of extraordinary conditions. And making that assertion *today* would beggar belief, except that Section 2 itself requires legislatures and courts to obsess over race. As one commentator has explained, the Senate Report does not "contain[] enough evidence of nationwide systemic problems with

intentional state discrimination to justify the dramatic remedy of section 2"—and "more recent evidence of intentional racial discrimination in voting" only "appears to be diminishing." R. Hasen, The Supreme Court and Election Law: Judging Equality from *Baker* v. *Carr* to *Bush* v. *Gore* 132 (2003) (emphases omitted). Yet Congress has not reconsidered Section 2 since 1982.

Next consider Section 2's means. This Court has looked to limitations like "termination dates, geographic restrictions, [and] egregious predicates" "to ensure Congress' means are proportionate to ends legitimate." *City of Boerne*, 521 U.S. at 533. Section 2's "indiscriminate scope offends th[ese] principle[s]." *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *Coll. Sav. Bank*, 527 U.S. 627, 647 (1999). "The language of Section 2 is as broad as broad can be." *Brnovich*, 141 S. Ct. at 2372 (Kagan, J., dissenting). It has no limits in time, space, or scope. It applies to water districts and county councils, state legislatures and school boards. *See Bartlett* v. *Strickland*, 556 U.S. 1, 18 (2009) (plurality opinion). It has no expiration date. And even Section 2's defenders have conceded that a "disparate impact test for representational impairment—measured against a baseline of proportionality—[is] a very clumsy device for capturing instances of intentional discrimination." C. Elmendorf, Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes, 160 U. Pa. L. Rev. 377, 428 (2012) ("Making Sense of Section 2"). Even if a defendant *proves* that it did not adopt or maintain a map for discriminatory reasons, it can be liable under the new Section 2.

More, Section 2's "remedial mechanism" only "encourages federal courts [and states] to segregate

voters into racially designated districts." *Holder*, 512 U.S. at 892 (Thomas, J., concurring in judgment). To the extent that Section 2 focuses on proportional representation, its mandate for segregation will never end, requiring an "indefinite use of racial classifications, employed first to obtain the appropriate mixture" "and then to ensure that the [map] continues to reflect that mixture." *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731 (2007) (plurality opinion). Section 2's "principal use" now "is to coerce state and local jurisdictions into drawing districts with an eye on race." R. Clegg, The Future of the Voting Rights Act after *Bartlett* and *NAMUDNO*, 2008 Cato Sup. Ct. Rev. 35, 40 (2009); see *Ricci* v. *DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) ("[D]isparate-impact provisions place a racial thumb on the scales.").

Finally, the substantive "uncertainty at the heart of [S]ection 2"—detailed next—reinforces that the new Section 2's results test is not a "congruent and proportional response to constitutional violations." C. Elmendorf & D. Spencer, Administering Section 2 of the Voting Rights Act After *Shelby County*, 115 Colum. L. Rev. 2143, 2158 (2015) ("Administering Section 2"). A statute incapable of principled application cannot be a reasonable response to supposed intentional discrimination.

In short, "[i]n the total absence" of actual evidence of constitutional problems, "it is impossible" to "contend that the permanent, nationwide change" in the new Section 2 "is a 'remedial' effort." Senate Report *supra*, at 171. Section 2 is now a statute "with no discernable core value whose functional connection to the VRA's animating purpose is incidental at best." Making Sense of Section 2, *supra*, at 399.

Section 2 cases today are partisan fistfights that use the statute's amorphous requirements for political advantage and to replace forbidden partisan gerrymandering claims. Section 2 cases lead to the invalidation of duly enacted district maps with no discriminatory intent. They perpetuate rather than remedy discrimination, for they force states and courts to draw maps that would never exist absent purposeful discrimination based on race. They reflect "a major departure in the Nation's understanding of 'equality,' transforming the focus of analysis" "from the individual citizen to the collective racial or ethnic group." Boyd & Markman, *supra*, at 1428. And they consume an enormous amount of state and judicial resources because (as discussed next) the statute and the standards set by this Court are incomprehensible. Enough is enough. Beyond intentional discrimination, Section 2 is unconstitutional.

B. The new Section 2 is an improper delegation.

Section 2 exceeds Congress's authority for an independent reason. Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." § 1. "Accompanying that assignment of power to Congress is a bar on its further delegation." *Gundy* v. *United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion). When Congress seeks to delegate some of its authority, at minimum it must "lay[] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Ibid.* And under the better "traditional tests," Congress must "ma[k]e all the relevant policy decisions," leaving to the other

branches only "the responsibility to find facts and fill up details." *Id.* at 2139 (Gorsuch, J., dissenting).

Section 2, at least as applied to vote dilution claims, fails all these tests and is thus an unconstitutional delegation to the judiciary. As the Senate Subcommittee on the Constitution explained in 1982, the new Section 2 "affords virtually no guidance whatsoever to communities in evaluating the legality and constitutionality of their governmental arrangements," and "it affords no guidance to courts in deciding suits." Senate Report, *supra*, at 137. Professor James Blumstein testified to "the problem" after aggregating various unknown "factors": "what do you have? Where are you? . . . You balance and you balance but ultimately how do you balance? What is the core value?" *Ibid.* According to Professor Blumstein, "there is no 'core value'" except possibly "the value of equal electoral results for defined minority groups." *Ibid.*

But the statute disclaims proportional representation, albeit in a way that Professor Irving Younger testified was "simply incoherent." *Id.* at 145; see 52 U.S.C. § 10301(b) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."). This provision disclaims a "right" focusing on the race of elected officials, even as the statute affirmatively suggests consideration of the "extent to which members of a protected class have been elected to office." *Ibid.* The disclaimer does not speak to what the rest of the statute covers—voting "practices or procedures"—much less permissible remedies. In any event, the Committee (the supposed authority on legislative intent) disclaimed any idea of proportional representation. Senate Report, *supra*, at

16 (stating that the disclaimer "codifies" the rule "that there is no right to proportional representation"); see *Holder*, 512 U.S. at 933 (Thomas, J., concurring in judgment) ("§ 2 was passed only after a compromise was reached through the addition of the provision in § 2(b) disclaiming any right to proportional representation."). And this Court has read the disclaimer to "confirm[] what is otherwise clear from the text of the statute, namely, that the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *De Grandy*, 512 U.S. at 1014 n.11.

All this led Senator Hatch to conclude that Section 2 sets forward "a standard that literally no one can articulate." Senate Report, *supra*, at 136. The statute "has absolutely no coherent or understandable meaning beyond the simple notion of proportional representation," *ibid.*—but that is the very meaning that Congress rejected. And "[t]he legislative history" is "bereft of pertinent guidance" on the question of proportionality. Making Sense of Section 2, *supra*, at 449–50. One NAACP representative testified that Section 2's test was much like what was "said about pornography: 'I may not be able to define it but I know it when I see it.'" Senate Report, *supra*, at 136.

Whatever might be said of that test elsewhere, in a statute it violates Article I, because it leaves all the crucial policy questions to the judiciary. "[T]he statutory command . . . provides no guidance concerning which one of the possible standards setting undiluted voting strength should be chosen over the others." *Holder*, 512 U.S. at 925–26 (Thomas, J., concurring in judgment); accord H. Gerken, Understanding the Right to an Undiluted Vote, 114 Harv. L. Rev. 1663, 1675 (2001) ("[T]here is no clear

baseline for determining how many additional majority-minority districts a state can fairly be expected to create under § 2.").

To confirm the lack of any intelligible principle, this Court need look only to its precedents. The Court has "construed § 2 to prohibit the distribution of minority voters into districts in a way that dilutes their voting power." *Wisconsin Legislature* v. *Wisconsin Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022). "The governing standard for vote dilution claims under section 2" "is set forth" in *Gingles*—not the statute. *Merrill* v. *Milligan*, 142 S. Ct. 879, 882 (2022) (Roberts, C.J., dissenting). There is no need to belabor the *Gingles* preconditions of compactness, cohesiveness, and bloc-voting or the ultimate totality-of-the-circumstances inquiry. "[I]n their various incarnations and by whatever names they are known," they "are nothing but puffery used to fill out an impressive verbal formulation and to create the impression that the outcome in a vote dilution case rests upon a reasoned evaluation of a variety of relevant circumstances." *Holder*, 512 U.S. at 939 (Thomas, J., concurring in judgment). Especially when applied to single-member districts, "phrases such as 'vote dilution' and factors relied upon to determine discriminatory effect are all but useless as analytical tools." *Mississippi Republican Exec. Comm.* v. *Brooks*, 469 U.S. 1002, 1012 (1984) (Rehnquist, J., dissenting).

Unsurprisingly, as the Chief Justice recently explained, "*Gingles* and its progeny have engendered considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim." *Merrill*, 142 S. Ct. at 882–83 (dissenting opinion). His citations prove the point:

- *Gingles*, 478 U.S. at 97 (O'Connor, J., concurring in judgment) (characterizing the Court's approach at the outset as "inconsistent with . . . § 2's disclaimer of a right to proportional representation");
- *De Grandy*, 512 U.S. at 1028 (Kennedy, J., concurring in part and concurring in judgment) (warning that "placing undue emphasis upon proportionality risks defeating the goals underlying the Voting Rights Act");
- *Gonzalez* v. *Aurora*, 535 F.3d 594, 597 (CA7 2008) (Easterbrook, J.) (referring to Section 2's "famously elliptical" language);
- J. Chen & N. Stephanopoulos, The Race-Blind Future of Voting Rights, 130 Yale L. J. 862, 871 (2021) (describing Section 2 vote dilution doctrine as "an area of law notorious for its many unsolved puzzles"); and,
- Making Sense of Section 2, *supra*, at 389 (noting the lack of any "authoritative resolution of the basic questions one would need to answer to make sense of the results test"). See also *id.* at 381 ("[N]either Congress nor the Supreme Court has been able or willing to explain what vote dilution is, except to say that its presence may be detected through a mysterious judicial inquiry into the 'totality of circumstances'").

"Thirty years later, there is a substantial body of law interpreting Section 2 but no authoritative resolution of the basic questions one would need to answer to make sense of the results test." *Id.* at 389; see *id.* at 389–94, 407–09 (collecting circuit splits and intractable questions); Administering Section 2, *supra*, at 2164–66 (collecting more splits). This Court's

effort to make sense of Section 2 has been nothing but "a disastrous misadventure in judicial policymaking." *Holder*, 512 U.S. at 893 (Thomas, J., concurring in judgment); see generally A. Thernstrom, Voting Rights and Wrongs 89–109 (2009).[3]

Other separation of powers doctrines reinforce the nondelegation problem with applying the new Section 2 to vote dilution claims. "A statute that does not contain sufficiently definite and precise standards to enable Congress, the courts, and the public to ascertain whether Congress's guidance has been followed at once presents a delegation problem and provides impermissibly vague guidance." *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting) (cleaned up). States cannot follow Section 2 or predict its application because it provides no standard. This Court's jurisprudence incomprehensibly requires states to engage in some—but not too much—racial discrimination. Section 2 is as void for vagueness as for being an unconstitutional delegation.

Last, interpreting Section 2 in the vote dilution context requires "highly political judgments" that "courts are inherently ill-equipped to make." *Holder*, 512 U.S. at 893 (Thomas, J., concurring in judgment). Specifically, "establish[ing] a benchmark concept of an 'undiluted' vote" is "a hopeless project of weighing questions of political theory." *Id.* at 892. The statute does not provide "[a]ny standard" that is "grounded in a limited and precise rationale and [is] clear" or "manageable." *Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2498 (2019) (cleaned up). "Any judicial decision

[3] Of course, because Section 2 does not cover vote dilution claims in the first place, it is hardly surprising that it is incapable of principled application to these claims. See *Holder*, 512 U.S. at 914–45 (Thomas, J., concurring in judgment).

on what is [proportional] in this context would be an unmoored determination of the sort characteristic of a political question beyond the competence of the federal courts." *Id.* at 2500 (cleaned up).

Even Section 2's boosters call it "a delegation of authority to the courts to develop a common law of racially fair elections." Making Sense of Section 2, *supra*, at 383; see also Gerken, *supra*, at 1671 ("Vote dilution doctrine has largely been developed by the courts over time."). But our lawmaking is given to Congress. Congress has not made law here. If anyone has made anything resembling law, it is this Court. And that delegation violates the Constitution.

II. The new Section 2 is unconstitutional as applied below.

Even if Section 2's results test were otherwise constitutional, the district court's application of it violates the Equal Protection Clause. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943). "For that reason," official "classification or discrimination based on race" is "a denial of equal protection." *Ibid.* "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller* v. *Johnson*, 515 U.S. 900, 911 (1995) (cleaned up); see *Plessy* v. *Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("The law" "takes no account of" a citizen's "color when his civil rights as guaranteed by the supreme law of the land are involved.").

Accordingly, "[u]nder the Equal Protection Clause, districting maps that sort voters on the basis of race are by their very nature odious"—and unconstitutional. *Wisconsin Legislature*, 142 S. Ct. at 1248 (cleaned up). Yet such odiously discriminatory maps are what the court below ordered. The plaintiffs' experts used computer simulations to draw millions of neutral maps "without taking race into account," and *none* produced two majority-minority districts. MSA 364. So their experts instead discriminated based on race "on purpose," MSA 367, forcing simulations that drew two majority-minority districts as a "nonnegotiable principle," MSA 344; see MSA 322 ("I needed to make sure that the districts I was creating would be over 50 percent black."). The district court accepted this analysis. It agreed that consideration "of race likely is required to draw two majority-Black districts." MSA 261. The district court emphasized that "[b]eyond ensuring crossing that 50 percent line, there was no further consideration of race." MSA 263.

Construing Section 2 to require threshold discrimination based on race is unconstitutional. As shown above, the new Section 2 is facially incongruent to the constitutional prohibition on intentional discrimination. But nothing could be more incongruent than interpreting it to *require* racial discrimination. If, besides all the disproportionate aspects of the statute addressed above, an application of Section 2 requires race to overlay traditional redistricting principles, it is unconstitutional.

Invoking some of this Court's more confused precedents, the district court said that the plaintiffs' proposed remedies did not have "a level of racial manipulation that exceeds what § 2 could justify." MSA. 216 (quoting *Bush* v. *Vera*, 517 U.S. 952, 980–81

(1996)). An "acceptable" level of racial manipulation is difficult to countenance. This Court has rejected it in almost all other contexts, holding that an "invidious discriminatory purpose" may not be even "a motivating factor." *Village of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).[4] Only here does the Court excuse racial discrimination if it is merely "*a* motivation" rather than "the *predominant* factor." *Easley* v. *Cromartie*, 532 U.S. 234, 241 (2001) (cleaned up); *id.* at 257 (permitting "racial considerations" that are not "dominant and controlling"). But see *Miller*, 515 U.S. at 914 ("districting cases" are not "excepted from standard equal protection precepts").

Defenses of this watered-down protection are nonsensical. According to one opinion, for instance, "Racial gerrymandering of the sort being addressed in these cases is 'discrimination' only in the sense that the lines are drawn based on race, not in the sense that harm is imposed on specific persons on account of their race." *Vera*, 517 U.S. at 1008 (Stevens, J., dissenting); cf. *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting) ("separate but equal"). But "[w]hen the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, think alike, share the same political interests, and will prefer the same candidates at the polls." *Miller*, 515 U.S. at 911–12 (cleaned up). Such classifications necessarily "promote notions of racial inferiority and lead to a politics of racial hostility." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion).

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[4] But see generally *Grutter* v. *Bollinger*, 539 U.S. 306 (2003); *Korematsu* v. *United States*, 323 U.S. 214 (1944).

That is true even if racial segregation is just one motivation. Racial classifications "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Shaw* v. *Reno*, 509 U.S. 630, 657 (1993). "Racial classifications with respect to voting carry particular dangers." *Ibid.* The "use of a mathematical formula to assure a minimum number of majority-minority districts tends to sustain the existence of ghettos by promoting the notion that political clout is to be gained or maintained by marshaling particular racial, ethnic, or religious groups in enclaves." *De Grandy*, 512 U.S. at 1030 (Kennedy, J., concurring in part and in judgment) (cleaned up). "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Miller*, 515 U.S. at 912. When racial lines are drawn, "the multiracial . . . communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race . . . rather than to political issues are generated; communities seek not the best representative but the best racial . . . partisan." *Reno*, 509 U.S. at 648 (quoting *Wright* v. *Rockefeller*, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting)). "[T]hat system"—which Section 2 encourages—"is at war with the democratic ideal." *Id.* at 648–49.

In all events, when the government "intentionally creates a majority-minority district, race is necessarily its predominant motivation." *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 517 (2006) (Scalia, J., concurring in judgment in part and dissenting in

part, joined by Roberts, C.J., and Thomas & Alito, JJ.). That millions of neutral maps here *never* produced two majority-minority district proves that race predominated. The map demanded by the district court "would not have existed but for the express use of racial classifications," so it "must be viewed as a racial gerrymander." *Vera*, 517 U.S. at 1001 (Thomas, J., concurring in judgment). That map would have been invalidated as unconstitutional if enacted by Alabama in the first place. And contra the court below, it makes no difference that the plaintiffs "prioritized race only for the purpose of determining and to the extent necessary to" state a claim and that this racial discrimination was followed by the application of "traditional redistricting criteria." MSA 214. "This working backward to achieve a particular type of racial balance" "is a fatal flaw." *Parents Involved*, 551 U.S. at 729 (plurality opinion).

"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Id.* at 748. This Court "would no doubt apply" the Equal Protection Clause in full "if a [government] decreed that certain districts had to be at least 50 percent white." *Vera*, 517 U.S. at 996 (Kennedy, J., concurring). Its "analysis should be no different if the [government] so favors minority races." *Ibid.* Only racial segregation explains the map ordered by the district court. Its order violates Equal Protection.

III. Complying with the new Section 2 is not a compelling interest.

Invoking strict scrutiny to excuse the district court's racial gerrymander, the plaintiffs have said that "racial targets are not per se unconstitutional when supported by a functional analysis and narrowly

tailored to further the compelling government interest in complying with the VRA." *Milligan* Opp. to Emergency App. for Stay 29 n.5. The district court held that racially discriminatory maps here would pass strict scrutiny based on "the case law assuming that compliance with the Voting Rights Act is a sufficient reason." MSA 216. That assumption is wrong, even on the dubious view that strict scrutiny ever provides a valid exception to Equal Protection. A bare interest in complying with the new Section 2 cannot justify a constitutional violation.

The "balancing test" of strict scrutiny arose in the 1950s and 1960s in the First Amendment context. *Ramirez* v. *Collier*, 142 S. Ct. 1264, 1286–87 & n.1 (2022) (Kavanaugh, J., concurring); *see Heller* v. *District of Columbia*, 670 F.3d 1244, 1280–81 (CADC 2011) (Kavanaugh, J., dissenting). Though the test finds no footing in the Constitution's text or history, it has infected other areas of the law and was eventually applied to racial classifications under the Equal Protection Clause. See *Palmore* v. *Sidoti*, 466 U.S. 429, 432–33 (1984).

"The illegitimacy of using 'made-up tests' to 'displace longstanding national traditions as the primary determinant of what the Constitution means' has long been apparent." *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting) (quoting *United States* v. *Virginia*, 518 U.S. 515, 570 (1996) (Scalia, J., dissenting)). "The Constitution does not prescribe tiers of scrutiny." *Ibid.* And no historical evidence supports the proposition that a constitutional violation is excused if the government comes up with a good enough reason.

More, strict scrutiny is incapable of principled judicial application. "[W]hat does 'compelling' mean, and how does the Court determine when the State's interest rises to that level?" *Ramirez*, 142 S. Ct. at 1287 (Kavanaugh, J., concurring). "Good questions, for which there are no great answers." *Ibid.* Strict scrutiny "requires judges to engage recurrently in only minimally structured appraisals of the significance of competing values or interests in many cases." *Id.* at 1287 n.1. The appraisal is "difficult" and "necessarily imprecise." *Id.* at 1288. And unsurprisingly, it often ends up aligning with "the Court's own intuitive policy assessment." *Ibid.*; see also *Hellerstedt*, 136 S. Ct. at 2327–28 (Thomas, J., dissenting) (noting "how easily the Court tinkers with levels of scrutiny to achieve its desired" "policy preferences"). Thus, not only is strict scrutiny untethered from the Constitution's text and history, it is a "vague and amorphous test[]" that is "antithetical to impartial judging." B. Kavanaugh, Keynote Address: Two Challenges for the Judge As Umpire: Statutory Ambiguity and Constitutional Exceptions, 92 Notre Dame L. Rev. 1907, 1919 (2017). And the legal gymnastics required by "[t]his kind of decisionmaking threatens to undermine the stability of the law and the neutrality (actual and perceived of the judiciary." B. Kavanaugh, Book Review, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2143 (2016).

This case proves the point and offers a chance to correct a recurring mangling of strict scrutiny. Following this Court's lead, the district court assumed a "compelling" government interest in engaging in the precise type of intentional discrimination that the Constitution bars. MSA 216. Lest there be any confusion, this assumed interest is not a proxy for

righting past wrongs. This Court has assumed that "compliance with the Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination." *Miller*, 515 U.S. at 921.[5]

That assumption is wrong. First, it makes little sense to characterize compliance with a *statute* as justifying a violation of the *Constitution*. See U.S. Const. art. VI, cl. 2 (Supremacy Clause). The Court's assumption "take[s] the effect of the statute and posit[s] that effect as the [government's] interest." *Simon & Schuster, Inc.* v. *Members of New York State Crime Victims Bd.*, 502 U.S. 105, 120 (1991). "If accepted, this sort of circular defense [would] sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored." *Ibid.*

Second, "[r]acial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it" compliance with the VRA. *Parents Involved*, 551 U.S. at 732 (plurality opinion). "History should teach" that courts cannot "distinguish good from harmful governmental uses of racial criteria." *Id.* at 742. Any such distinction "reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable." *Ibid.*

That conclusion, in turn, hinges on "the very stereotypical assumptions the Equal Protection Clause forbids." *Miller*, 515 U.S. at 914. Here, it is "based on the demeaning notion that members of the

[5] To forestall another potential response, "alleviat[ing] the effects of societal discrimination is not a compelling interest." *Shaw* v. *Hunt*, 517 U.S. 899, 909–10 (1996).

defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens." *Ibid.* This is "the precise use of race as a proxy the Constitution prohibits." *Ibid.*

Third, saying that compliance with the VRA is a compelling interest improperly defers constitutional decision-making to the political branches. It allows Congress to narrow the Constitution's protections without bothering to amend it. See U.S. Const. art. V. "The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *J.A. Croson*, 488 U.S. at 501 (citing *Korematsu*, 323 U.S. at 235–240 (Murphy, J., dissenting)). "[S]uch deference is fundamentally at odds with our equal protection jurisprudence." *Johnson* v. *California*, 543 U.S. 499, 506 n.1 (2005). Congress does not have "the power to determine what are and what are not 'compelling state interests' for equal protection purposes." *Oregon* v. *Mitchell*, 400 U.S. 112, 295 (1970) (Stewart, J., concurring in part and dissenting in part).

In no other "context" would this Court "assume[] away part of the [government's] burden to justify its intentional use of race." *Bethune-Hill* v. *Virginia State Bd. of Elections*, 137 S. Ct. 788, 804 (2017) (Thomas, J., concurring in judgment in part and dissenting in part). The Court would not have "assumed" that Topeka's Board of Education had a compelling interest in complying with Kansas law or local policy by segregating its schools, even though that is how the Board justified segregation:

> [T]he Kansas legislature has simply recognized that there are situations where Negroes live in

> sufficient numbers to create special school problems and has sought to provide a law sufficiently elastic to enable Boards of Education in such communities to handle such problems as they may, in the exercise of their discretion and best judgment, deem most advantageous to their local school system under their local conditions.

Brief for Appellees 16, *Brown* v. *Bd. of Educ. of Topeka*, Nos. 1, 2, 4, 10, 1952 WL 87553 (Dec. 8, 1952); *id.* at 31–32 ("This was the method provided by the legislature of the State of Kansas"). "It is not up to the school boards—the very government entities whose race-based practices we must strictly scrutinize—to determine what interests qualify as compelling under the Fourteenth Amendment." *Parents Involved*, 551 U.S. at 765 (Thomas, J., concurring).

Nor would anyone "assume" that the District of Columbia had a compelling interest in "compliance" with Congress's "various enactments" requiring that "schools for white and colored children . . . be separate." *Carr* v. *Corning*, 182 F.2d 14, 18 (CADC 1950).[6] This Court held that the District of Columbia could not show even a "proper governmental objective" sufficient for rational basis review, so compliance with Congress's laws would be far from a *compelling* interest. *Bolling* v. *Sharpe*, 347 U.S. 497, 500 (1954).

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[6] "The Negro who decides to settle in the District . . . must send his children to the inferior public schools set aside for Negroes and entrust his family's health to medical agencies which give inferior service. In addition, he must endure the countless daily humiliations that the system of segregation imposes upon the one-third of Washington that is Negro." Brief for the United States as Amicus Curiae 5, *Brown*, 1952 WL 82045 (Dec. 2, 1952).

Fourth, calling the assumed interest "compliance with the VRA" misses the distinction between the new Section 2 and the original Voting Rights Act. For instance, it might have once made sense to assume an interest in complying with VRA Section 5, when it was "a proper exercise of Congress's authority" and "remed[ied] identified past discrimination" in "jurisdictions with a history of official discrimination." *LULAC*, 548 U.S. at 518–19 (Scalia, J., concurring in judgment in part and dissenting in part). As shown above, that does not describe the new Section 2. Yet the Court has assumed compliance with the new Section 2 is a compelling interest even with no identifiable (much less intentional) discrimination. The only race discrimination here is offered by the plaintiffs and the district court.

Fifth and last, the Court has compounded the error of its compelling interest assumption by suggesting that "consideration of race in making a districting decision is narrowly tailored . . . if the [government] has good reasons for believing that its decision is necessary in order to comply with the VRA." *Abbott*, 138 S. Ct. at 2315 (cleaned up).[7] In other words, not only is compliance with the VRA presumed to be a compelling government interest, but racial segregation is "narrowly tailored" even if not required to comply with the VRA. This is lawlessness stacked on lawlessness. This "approach to narrow tailoring—

[7] Other decisions have suggested the necessary "strong basis" is a prerequisite for the compelling interest part of strict scrutiny. *E.g.*, *Hunt*, 517 U.S. at 908 n.4. But see *Vera*, 517 U.S. at 977 (plurality opinion) (part of narrow tailoring). Either way, it makes no sense. And the Court's inability to articulate whether it is part of the compelling interest prong or the narrow tailoring prong highlights the silliness of the whole enterprise.

deferring to a [government's] belief that it has good reasons to use race—is 'strict' in name only." *Bethune-Hill*, 137 S. Ct. at 805 (Thomas, J., concurring in judgment in part and dissenting in part); see, *e.g.*, *Vera*, 517 U.S. at 978 (plurality opinion) ("[D]eference is due to [states'] reasonable fears of, and to their reasonable efforts to avoid, § 2 liability.").

Leaving this Court's "equal protection jurisprudence" to "the mercy of elected government officials"—both state legislatures and Congress—"would be to abdicate [the Court's] constitutional responsibilities." *Parents Involved*, 551 U.S. at 766 (Thomas, J., concurring). Compliance with an unconstitutional statute is not a compelling government interest. Racial segregation not mandated by the statute is not narrowly tailored to compliance with the statute. This Court cannot "defer to legislative majorities where the Constitution forbids it." *Id.* at 766 n.14. Racial segregation violates Equal Protection. So does Section 2 here.

CONCLUSION

For the last 40 years, Section 2 has "involved the federal courts, and indeed the Nation, in the enterprise of systematically dividing the country into electoral districts along racial lines—an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of political apartheid." *Holder*, 512 U.S. at 905 (Thomas, J., concurring in judgment). This Court should do more than reverse. It should end our Nation's decades-long unconstitutional experiment with court-mandated racial segregation in redistricting.

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MAY 2, 2022