Nos. 24-109, 24-110

IN THE

Supreme Court of the United States

LOUISIANA,

Appellant,

v.

PHILLIP CALLAIS, *et al.*,

Appellees.

PRESS ROBINSON, *et al.*,

Appellants,

v.

PHILLIP CALLAIS, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

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QUESTION PRESENTED

Whether the State's intentional creation of a second majority-minority congressional district violates the Fourteenth or Fifteenth Amendments to the U.S. Constitution.

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court's modern Equal Protection cases converge on one core point: every time the government claims that "remedying" past discrimination requires it to sort citizens by race, it will face the fire of strict scrutiny. *Shaw v. Hunt*, 517 U.S. 899, 904-05 (1996) ("*Shaw II*"). That principle controls here. *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 8 (2024) (noting that "considering race" to satisfy the Voting Rights Act of 1965 ("VRA") triggers strict scrutiny (citation omitted)).

"[C]urrent precedents," State Supp. Brief 5, never require courts to give VRA remedial districts a free pass. Nor do "current precedents," *id.*, require courts to bless improbable serpentine districts like SB8-6, which Louisiana finally admits sorted voters based on race, *id.*, and precisely carved highly dispersed groups of Black voters in, and White voters out, to achieve a narrow Black majority. *Shaw II*, 517 U.S. at 916 (holding if the district does not contain a "geographically compact" racial group "where that district sits, there neither has been a wrong nor can be a remedy" (quotation and footnote omitted)). Appellees won based on the district court's correct application of this Court's longstanding precedent. The Robinson Intervenors ("Robinsons") and Louisiana remain far off-base in arguing that Appellees' win contravenes precedent. Under existing law, Louisiana's creation of a second majority-Black district violates the Fourteenth and Fifteenth Amendments.

***

Yet constitutional review of VRA Section 2 (52 U.S.C. § 10301)—a task this Court has repeatedly

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reserved—is now necessary. Not every district court is the three-judge court below. As Louisiana's Supplemental Brief and the *Robinson* litigation demonstrate, the indefinite border between *Shaw* and Section 2 claims weaves through a no-man's-land in which the Constitution is uncertain to prevail. Repeat litigators choose single-judge courts for Section 2 claims, which proceed separately from *Shaw* claims in three-judge courts. They take inconsistent positions about what exactly precedent requires—as the Robinsons do even here. *Compare* Robinsons Jurisdictional Statement 27-30, 33, *and* Opening Brief 41, 46 (arguing district court erred in requiring SB8-6 to be compact under the first *Thornburg v. Gingles*, 478 U.S. 30 (1986), factor (*Gingles* I)), *to* Robinsons Supp. Brief 18 (arguing *Gingles* I ensures States don't "group together geographically dispersed minority voters into unusually shaped districts, without concern for traditional districting criteria" (quotation omitted)).

Thirty years of such whipsawing arguments and decisions have aggrieved voters, States, and the judicial system. As Louisiana's experience shows, the process is the punishment. State Supp. Brief 10-17. An ever-present "effects" test entrenches race-based thinking in districting, guarantees the persistence of race-based remedies long after intentional discrimination withers away, and makes race a permanent *casus belli*. It must end. It can end.

1. First, this Court should consider whether Section 2 remains an appropriate remedial statute today, four decades after Congress amended it to allow the prophylaxis of race-based districting based solely on certain racial "results." For the Robinsons, Section 2's remedial lineage elevates it above this

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Court's intense scrutiny for race-based remedies. But that lineage, however proud, carries a perpetual obligation: its prophylactic effects must remain congruent and proportional to the evil they address, and otherwise consistent with the Constitution. *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997); *Shelby County, Ala. v. Holder*, 570 U.S. 529, 555 (2013). Congress must justify Section 2's severe burdens by current needs.

It hasn't. From 1982 to today, Congress has never found ongoing racial discrimination in districting that would be undetectable or unstoppable without Section 2's "extraordinary" remedy. *Shelby County*, 570 U.S. at 555 (quotation omitted). By 1995, after over a decade with Section 2's "effects test," this Court could observe the VRA's "command that States engage in presumptively unconstitutional race-based districting brings the Act . . . into tension with the Fourteenth Amendment." *Miller v. Johnson*, 515 U.S. 900, 927 (1995). After 30 more years of increasingly elaborate doctrinal compromises, these concerns persist undiminished. *Allen v. Milligan*, 599 U.S. 1, 42 (2023). Rather than eliminating hard-to-reach discrimination, Section 2 is now discrimination's main source and aggravator. The Robinsons' "crown jewel," Supp. Brief 1, has lost its luster.

2. Second, regardless of whether Section 2 passes muster as an appropriate remedy, litigants should no longer rely merely on Section 2 as a compelling interest for strict scrutiny. Standing alone, Section 2 imposes race-based remedies without the requisite showing of need. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) ("*SFFA*"), demonstrates that racial discrimination to remedy racial

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discrimination rarely satisfies strict scrutiny. Appellants have not shown that persistent intentional racial discrimination in redistricting justifies the VRA's race-based sorting and balkanization of voters into mandated quota districts. "Remedies" for past discrimination unavailable to colleges under *SFFA* are equally unavailable to Congress under the VRA. *Infra* Section III.B.

3. Third, even if some case exists in which Section 2 can constitutionally apply, it is not *Callais*. The Robinsons and Louisiana purposely starved the record of any evidence, including from the *Robinson* litigation, that could have established current intentional discrimination in Louisiana districting to justify SB8-6. And the Robinsons and their amici identify no such evidence now. *Infra* Section III.C. Further, SB8-6 independently fails under the Fifteenth Amendment. *Infra* Part IV.

4. Even if Section 2 is congruent and proportional and can provide a compelling interest in some circumstances, this Court should provide clarity to lower courts to ensure Section 2's tests and remedies conform to the Constitution. *Infra* Section III.D.

5. The Louisiana voters victimized by racial discrimination deserve a prompt remedy. Appellees and their fellow voters have been frozen into an admitted racial gerrymander ever since the State and Robinsons sought extraordinary relief before this Court to guarantee SB8's two-majority-Black-seat quota for the tightly contested 2024 elections. To ensure a remedial map in advance of the 2026 election, the district court should be directed to expeditiously finish what it almost completed in early 2024: a map based on traditional redistricting

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principles unburdened by any VRA quota. *Infra* Part V.

ARGUMENT

I. THE FOURTEENTH AND FIFTEENTH AMENDMENTS PROHIBIT INTENTIONAL RACIAL DISCRIMINATION IN DISTRICTING.

The Robinsons start their analysis with the VRA, but this case (and the supplemental question presented) is about the Constitution. And the Constitution always determines the appropriate boundaries on statutes, not the other way around. *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803).

At stake is the continued vitality of the Fourteenth and Fifteenth Amendments. The Equal Protection Clause of the Fourteenth Amendment states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Section 1 of the Fifteenth Amendment states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

Both arose in the context of Reconstruction, and they have nearly identical purposes. The "'core purpose' of the Equal Protection Clause" is to "'do[] away with all governmentally imposed discrimination based on race.'" *SFFA*, 600 U.S. at 221, 206 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (Thomas, J., concurring)); *see also Shaw v. Reno*, 509 U.S. 630, 642 (1993) ("*Shaw I*") ("Its central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race." (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976))); *Loving v. Virginia*, 388 U.S. 1, 10 (1967)

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(similar); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (similar). The core purpose of the Fifteenth Amendment is to do away with "racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966); *see also Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 217 (2009); *Rice v. Cayetano*, 528 U.S. 495, 512 (2000) ("The design of the Amendment is to reaffirm the equality of races at the most basic level of the democratic process, the exercise of the voting franchise."). Racial gerrymandering violates both Amendments. *Shaw I*, 509 U.S. at 645 (citing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)).

The two Amendments share nearly identical enforcement mechanisms. *Compare* U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation."), *with* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). And the same "congruence and proportionality" analysis tests Congress's enforcement authority under them. *City of Boerne*, 521 U.S. at 518-20 (discussing "Congress' parallel power[s] to enforce" the two Amendments and testing the congruence and proportionality of a statute promulgated under the Fourteenth Amendment (citation omitted)). Finally, any congressional enforcement of one Amendment must consist with the other. *Miller*, 515 U.S. at 927 (rejecting that VRA § 5 could be enforced under the Fifteenth Amendment in "tension with the Fourteenth Amendment"). The Amendments are not, nor could they be, at odds. Instead, they work in tandem to end racial discrimination and classifications in voting. *Shaw I*, 509 U.S. at 645.

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Perhaps most importantly, the Amendments (and therefore statutes enforcing them) should be color-blind because "[o]ur Constitution," meaning all of it, "is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Both carry a "mandate of neutrality" and "equality" among the races. *Rice*, 528 U.S. at 512; *see also SFFA*, 600 U.S. at 226-27. Both bar racial classifications universally, *SFFA*, 600 U.S. at 206; *Rice*, 528 U.S. at 515; *Shaw I*, 509 U.S. at 642—regardless of context, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991); *Wright v. Rockefeller*, 376 U.S. 52, 67 (1964) ("'Separate but equal' and 'separate but better off' have no more place in voting districts than they have in schools, parks, railroad terminals, or any other facility serving the public." (Douglas, J., dissenting)), and regardless of which racial groups feel its effects, *SFFA*, 600 U.S. at 206; *Rice*, 528 U.S. at 512-13; *Miller*, 515 U.S. at 904.

The Fifteenth Amendment specifically prohibits denial of the right to vote based on race, rendering the Constitution *more*, not less, restrictive in this area. U.S. CONST. amend. XV; *Rice*, 528 U.S. at 511-12 (reiterating "fundamental principle" of Fifteenth Amendment that race is a "forbidden criteria or classification[]" in voting); *id*. at 516-17. It does not permit *greater* discrimination under the guise of remediation. *But see* Robinsons Supp. Brief 8-9. And it reinforces that dangers inherent in all racial classifications are *heightened* in redistricting: "Racial classifications with respect to voting *carry particular dangers*. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal

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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 (quoting *Shaw I*, 509 U.S. at 657) (emphasis added); *see also Rice*, 528 U.S. at 517. These principles accord with the original meaning of the Reconstruction Amendments. *SFFA*, 600 U.S. at 201-02; *id.* at 231-52, 262-66 (Thomas, J., concurring); *Rice*, 528 U.S. at 512; State Supp. Brief 6-7.

II. THE STATE'S INTENTIONAL CREATION OF A SECOND MAJORITY-BLACK DISTRICT VIOLATES THE RECONSTRUCTION AMENDMENTS BECAUSE VRA SECTION 2 CANNOT BE JUSTIFIED BY CURRENT NEEDS.

With those principles in mind, Section 2 cannot withstand constitutional scrutiny today. For one, it fails congruence and proportionality review. Thus, Appellants cannot justify SB8-6 under Section 2.

A. Congruence and Proportionality Review Tests Whether Section 2 Remains an Appropriate Remedy.

Section 2 was enacted pursuant to Congress's enforcement authority under the Fourteenth and Fifteenth Amendments. But as Congress knew, Section 2's prophylaxis prohibits conduct well beyond anything the Constitution prohibits. Though not necessarily fatal, this opens Section 2 to congruence and proportionality review, which determines whether the prophylaxis is purely remedial (and permissible) rather than substantive (and impermissible). *City of Boerne*, 521 U.S. at 519-20 (Fourteenth), 518 (Fifteenth); *cf.* Robinsons Supp. Brief 12 (agreeing Section 2 must be tested to

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determine whether it is an "appropriate" "federal statute" and meets strict scrutiny).

To meet this standard, there "must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520; *see also id.* at 530 (citing *Katzenbach*, 383 U.S. at 308, a Fifteenth Amendment case which upheld various VRA provisions, as an example of congruence and proportionality review). Second, the remedial measure must "consist with the letter and spirit of the constitution." *Shelby County*, 570 U.S. at 555 (quotation omitted). This Court has long recognized these exacting requirements as the outer limit for VRA-justified remedies. *Miller*, 515 U.S. at 926-27.

"Congruence and proportionality" is a means-end test. *Allen v. Cooper*, 589 U.S. 248, 260-61 (2020). "A critical question is how far, and for what reasons, Congress has gone beyond redressing actual constitutional violations." *Id.* at 261. Congress must make findings that the specific remedy is necessary to end racial discrimination in redistricting based on "current data reflecting current needs." *Shelby County*, 570 U.S. at 553. This test is not just historical: "current burdens must be justified by current needs." *Nw. Austin*, 557 U.S. at 202-03; *see also Shelby County*, 570 U.S. at 556. This present-day analysis is essential: it ensures remedial statutes do not linger simply to "punish for the past." *Shelby County*, 570 U.S. at 553; *see also Nw. Austin*, 557 U.S. at 226 (Thomas, J., concurring in the judgment in part and dissenting in part) ("Punishment for long past sins is not a legitimate basis for imposing a forward-looking preventative measure that has already served its purpose.").

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The Robinsons propose a weaker standard: Section 2 would continue forever, regardless of congressional findings, unless it (1) "attacked evils not comprehended by the Fifteenth Amendment" or (2) "violated equal sovereignty principles." Robinsons Supp. Brief 9 (quotation omitted). Their first criterion suggests that any congressional attempt to "attack" racial discrimination passes muster. That has never been the law. *Katzenbach* teaches that the "basic test to be applied" is whether the remedy is (1) "appropriate" (2) and otherwise complies with the Constitution. 383 U.S. at 326-27. This is congruence and proportionality review, which only "sometimes" allows preventative measures. *City of Boerne*, 521 U.S. at 530. The Robinsons' second criterion is simply *one type* of current burden for congruence and proportionality review, but not the only one. *Nw. Austin*, 557 U.S. at 202-03 (noting "current burden" of severe "federalism costs" at all levels of local government and lack of clear "current needs" called Section 5 into question, independent of concern with inequality between States).

The Robinsons also wrongly suggest that this Court has already held that Section 2 is conclusively and permanently valid. Robinsons Supp. Brief 11. But this Court has repeatedly and expressly reserved the Section 2 question when determining the constitutionality of other VRA provisions. *Shelby County*, 570 U.S. at 557; *Nw. Austin*, 557 U.S. at 198; *Katzenbach*, 383 U.S. at 316; *see also City of Rome v. United States*, 446 U.S. 156,172-73 (1980) (discussing constitutionality of other requirements, not Section 2). And this Court has only held that Congress "may" implement an effects test outside of Section 2, *City of Rome*, 446 U.S. at 176, or may allow Section 2 race-

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based districting, "on the record before" the Court, *Milligan*, 599 U.S. at 41-42.

Mississippi Republican Executive Committee v. Brooks, 469 U.S. 1002 (1984), a summary affirmance without further analysis, does not bear sufficient precedential value to resolve this case. *Comptroller of Treas. of Md. v. Wynne*, 575 U.S. 542, 560 (2015) ("[A] summary affirmance is an affirmance of the judgment only, and the rationale of the affirmance may not be gleaned solely from the opinion below." (quotation omitted)). This Court has never held that *Brooks* silently resolved the constitutionality of Section 2.

Milligan does not resolve the question either. The Court rejected Alabama's arguments that no effects test can be unconstitutional, and that race can never be used to remediate racial discrimination. *Milligan*, 599 U.S. at 41. Appellees make neither argument. Instead, they argue that Congress has not justified the burdens of Section 2's intrusive "effects test" by identifying current needs, and remedial "race-based districting cannot extend indefinitely into the future." *Id.* at 45 (Kavanaugh, J., concurring). Section 2's lineage starts rather than concludes the analysis.

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B. Section 2 Fails Congruence and Proportionality Review.

Section 2 is incongruent and disproportionate because it severely burdens States and voters; Congress has never adduced evidence that current conditions justify those current burdens; and it is inconsistent with the Constitution.

1. Section 2 severely burdens States and voters.

As Louisiana's experience shows, and as Appellees found under SB8-6, Section 2 imposes

severe burdens. They are grossly disproportionate to any violations of the rights of freedom from intentional discrimination and equality that the Reconstruction Amendments conferred on all races. *Miller*, 515 U.S. at 911; *Shaw I*, 509 U.S. at 657; *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality). Furthermore, Section 2's chosen remedy of race-based districting violates our "color-blind" Constitution. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). Those burdens injure all parties to the redistricting process. State Supp. Brief 9-17.

Section 2 also heavily impinges on States' sovereign power to regulate their elections and draw congressional districts. *Shelby County*, 570 U.S. at 543; *Nw. Austin*, 557 U.S. at 217; *Gregory v. Ashcroft*, 501 U.S. 452, 461–62 (1991); *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (opinion of Black, J.) ("No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution . . . the nature of their own machinery for filling local public offices."). "[T]he Act authorizes federal intrusion into sensitive areas of state and local policymaking . . . and represents an extraordinary departure from the traditional course of relations between the States and the Federal Government . . . ." *Shelby County*, 570 U.S. at 545 (quotation omitted). Section 2's "[s]weeping coverage . . . ensures its intrusion at every level of government, displacing laws and prohibiting official actions." *City of Boerne*, 521 U.S. at 532.

Such state sovereignty concerns are arguably greater for Section 2 than for Section 4(b). *But see* Robinsons Supp. Brief 6, 29-30. Section 2's uniquely unlimited geographic and temporal scope enshrines it

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as an "evergreen" threat to States across the nation each redistricting cycle—a threat absent for Section 4(b). *Id*. at 29. Section 2 has "no termination date or termination mechanism," and as such it is not temporally "limited to those cases in which constitutional violations [are] most likely." *City of Boerne*, 521 U.S. at 533. Geographically, state sovereignty interests are harmed more by interference in *all* States than they were by interference in *some* States. And Section 2's "*post*clearance" requirements for States today have proven just as onerous and costly as former "preclearance" ones. State Supp. Brief 12-13.

2. Congress has never justified these current burdens by current needs.

Congress has never justified the clear burdens imposed by Section 2's prophylaxis remedy by citing real, current needs. *Shelby County*, 570 U.S. at 536, 557. It first failed in 1982. By then, this Court had long recognized claims for vote dilution under the Constitution, so Section 2 was little used. *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 657 (2021) (Fourteenth Amendment); *Gomillion*, 364 U.S. 339 (Fifteenth Amendment). But in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), this Court clarified that the Fourteenth and Fifteenth Amendments—and therefore, pre-amendment Section 2—required plaintiffs to prove intentional discrimination. *See, e.g.*, *Milligan*, 599 U.S. at 10-14. In response, Congress amended the VRA to invalidate districting that arguably had particular "effects" on minority representation, potentially even without unconstitutional conduct.

Congress was required to support its new "effects" standard under the means-end test.

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Katzenbach, 383 U.S. at 330. In *Katzenbach*, for example, this Court approved the VRA's suspension of existing voter qualifications like facially non-discriminatory literacy tests. Congress had built a "record" showing that in covered States in 1965, those tests were designed and used "in a discriminatory fashion" to "facilitate" disenfranchising Black voters. *Id*. at 333-34. Congress also showed that even "fairly administered" literacy tests would freeze ongoing effects of past intentional discrimination: keeping Whites who had passed the tests on the voter rolls and keeping Blacks off. *Id*. at 334. As the Robinsons point out, Supp. Brief 9, Congress had assembled "a long history of the discriminatory use of literacy tests to disenfranchise voters on account of their race." *Oregon*, 400 U.S. at 132 (finding Congress could rely on this history to extend the tests nationwide for five more years, and as "late as the summer of 1968," non-White registration rates remained "substantially below" those of White voters). The "means" of the literacy-test-ban "effects test" was "adopted" to the "end," *City of Boerne*, 521 U.S. at 530, of moving to a "political system in which race no longer matters," *Shaw I*, 509 U.S. at 657. Congress did not go "far . . . beyond redressing actual constitutional violations," and its "reasons" were well-supported. *Allen*, 589 U.S. at 260-61.

In stark contrast, Congress in 1982 made little effort to justify the adoption of its prophylactic effects test for race in districting. Even granting deference to congressional factfinding, the Senate Judiciary Committee Report does not establish that before 1982, direct constitutional vote dilution claims were failing to identify or remedy constitutional violations in

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redistricting—*bona fide*, intentional vote dilution. S. Rep. 97-417 (1982).

Indeed, the Senate Report admitted the "main reason" for installing an "effects test" was disagreement with *Bolden* on what constitutes discrimination under the Reconstruction Amendments, *id.* at 36, even though Congress' authority to do so was questionable at best, *City of Boerne*, 521 U.S. at 519-20, 529 (holding Congress cannot "alter[] the Fourteenth Amendment's meaning" via remedial legislation). For Congress, "intent" was "of limited relevance," because the denial of a "fair opportunity to participate" (undefined in the Senate Report) was the correct harm to remedy. S. Rep. 97-417, at 36. Only after reaching this conclusion did the Senate Report speculate that proving intent could be "divisive" in litigation or difficult to prove for very old laws or in cases of immunity or dishonesty. *Id.* at 36-37. But because the Senate Report assumed courts had applied an effects test pre-*Bolden*, this was largely speculation about the future: the Report only vaguely alluded to a handful of cases in which courts had somehow failed to identify "intent" despite its strong evidence in the record. *Id.* at 37-39. This analysis was the sole basis for the Senate Report's worry that intentional discrimination would "go undetected, uncorrected, and undeterred" without an effects test. Robinsons Supp. Brief 10-11 (quoting S. Rep. 97-417, at 40).

Congress was well aware that its findings were markedly weaker than in *Katzenbach*, admitting an "absence of a detailed record of nationwide voting discrimination" and its lack of a "congressional finding of discrimination in the areas to which it applies." *Id.* at 43-44. But this failure was excusable,

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the Senate Report claimed, because an effects test would somehow "confine its application to actual racial discrimination." *Id.* at 43. Of course, that could only be true if one accepted the Senate Report's view of discriminatory effects as equal to "actual racial discrimination" under the Fourteenth and Fifteenth Amendments. *Id.* At bottom, the 1982 legislative record evidenced disagreement with the Court's constitutional interpretation rather than, as in *Katzenbach*, factual findings and evidence sufficient to sustain a remedial statute. *Cf. Nw. Austin*, 557 U.S. at 227-28 (noting congressional reliance on "second generation barriers" to reenact Section 5 in 2006 was "not probative of the type of purposeful discrimination" that supported the original enactment).

Since 1982, Congress has failed to reconsider Section 2 or issue any findings that its current burdens are justified by current needs. "This lack of support in the legislative record" is fatal. *City of Boerne*, 521 U.S. at 531. Because Congress has never made the constitutionally required showing, not in 1982 and not in the decades since as changes already apparent in 1982 have accelerated, Section 2 is an improper remedial statute under the Reconstruction Amendments. *Shelby County*, 570 U.S. at 550-57. Instead, it functions as a substantive Amendment of its own, forcing race-based maps when unnecessary to remedy current or very recent discrimination in districting.

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3. Appellants and amici have not shown current conditions justify Section 2's extraordinary remedy.

Only Congress could have justified Section 2's heavy-handed prophylaxis in 1982 or in the forty

years since, as it reauthorized other VRA sections. If such evidence was missing from the legislative record in 1982 when the VRA was 17 years old and had already achieved "dramatic" progress in eradicating voting discrimination, *Nw. Austin*, 557 U.S. at 201, it is even less available after the passage of another 43 years. *See infra* Part III. What's still missing, even from the Robinsons' and their amici's briefing, is any evidence that the VRA's costly and racially divisive "effects test" uncovers and remedies otherwise-persistent unconstitutional districting plans based in actual racial discrimination. *Shelby County*, 570 U.S. at 535, 538, 545-46, 552.

C. Section 2 Is Unlike Other Remedial Statutes.

The lack of evidence of current conditions exposes Section 2 as an outlier. This is only clearer after considering the remedial statutes the Robinsons cite that have survived congruence and proportionality review. Robinsons Supp. Brief 32 (citing *Tennessee v. Lane*, 541 U.S. 509 (2004); *Nev. Dept. of Hum. Res. v. Hibbs*, 538 U.S. 721 (2003)). Each time, Congress (i) adduced abundant evidence of recent related discrimination; (ii) provided limited remedies that did not pose significant burdens on States or their sovereignty interests; and (iii) did not craft "extraordinary legislation otherwise unfamiliar to our federal system." *Shelby County*, 570 U.S. at 545 (quoting *Nw. Austin*, 557 U.S. at 211).

Likewise, the remedies to vindicate 42 U.S.C. § 1981 and 52 U.S.C. § 10306(b) are only triggered by evidence that individuals have suffered current racial discrimination in housing or at the polls as explicitly enumerated; are narrowly tailored to address those specific violations; and do not pose the same burdens

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on state sovereignty interests. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); Robinsons Supp. Brief 32-33. Finally, 52 U.S.C. §§ 10303(e), 10501 are distinct because these are "bans," Robinsons Supp. Brief 33, not permanent "extraordinary" remedies untethered from any ongoing harm, *Shelby County*, 570 U.S. at 545 (quotation omitted); *see also id.* at 551 (distinguishing "ban[s]" on literacy tests from coverage formula remedy).

Indeed, this Court has never held that "effects" tests (or other remedies) are always and everywhere "appropriate" under the Reconstruction Amendments, since "strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *City of Boerne*, 521 U.S. at 530. Instead, there must always be congruence between a specific harm and a specific remedy. Section 2, as applied today, lacks this tight fit and is no longer an "appropriate" remedy.

D. Section 2 Is Inconsistent with the Letter and Spirit of the Constitution.

To qualify as "appropriate," even a proportional and congruent legislative remedy must still "consist" with the rest of the Constitution. *Shelby County*, 570 U.S. at 555 (quotation omitted) (treating this as a distinct inquiry). As shown in Part III, Section 2 runs afoul of this final requirement.

III. THE STATE'S INTENTIONAL CREATION OF A SECOND MAJORITY-BLACK DISTRICT FAILS STRICT SCRUTINY.

Regardless of whether Congress has justified Section 2's ongoing usage, Section 2 cannot satisfy strict scrutiny today. It necessarily stereotypes citizens by race, disfavors voters of certain races, and will continue even if intentional discrimination

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becomes not just rare, but extinct. But even if Section 2 could constitutionally apply in a given case, Appellants' reliance on it was not a compelling interest on this record.

A. Strict Scrutiny Tests Section 2's Race-Based Remedy.

"[R]ace-based districting by our state legislatures demands close judicial scrutiny." *Miller*, 515 U.S. at 912 (quoting *Shaw I*, 509 U.S. at 657). Race-based districting includes any time state legislatures classify voters based on race. *Id.* at 904 ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." (quotation omitted)); *id.* at 910 (rejecting argument that "a legislature's deliberate classification of voters on the basis of race cannot alone suffice to state a claim under *Shaw*"). And it includes districting for allegedly "remedial" purposes. *Shaw II*, 517 U.S. at 904-05; *Miller*, 515 U.S. at 917-18; *Alexander*, 602 U.S. at 8; *Cooper v. Harris*, 581 U.S. 285, 292 (2017)) ("When a state invokes the VRA to justify race-based districting, it must show (to the meet narrow tailoring requirement) that it had a strong basis in evidence for concluding that the statute required its action." (quotation omitted)); *Bush v. Vera*, 517 U.S. 952, 984 (1996) (plurality) ("satisfying § 2" still triggers strict scrutiny); *Shaw I*, 509 U.S. at 657; *see also SFFA*, 600 U.S. at 226-27; *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 741-42 (2007) (plurality).

It is undisputed that the State intentionally created a second majority-Black district as an alleged remedy. Question Presented; State Supp. Brief 1; Robinsons Supp. Brief 1; Appellees Opening Brief 34.

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That alone triggers strict scrutiny under this Court's precedents.[1]

Furthermore, Louisiana finally admits it predominantly used race. It urges the Court "to adopt Justice Alito's formulation of the predominance inquiry: 'If it is "non-negotiable" that the district be majority [minority], then race is given *a* predominant role.'" State Supp. Brief 46 (quoting *Milligan*, 599 U.S. at 102 (Alito, J., dissenting)). This standard, which the State admits it violated, *id.* at 45-47, mirrors precedent dating back to *Shaw*: "Racial considerations predominate when '[r]ace was the criterion that, in the State's view, could not be compromised' in the drawing of district lines." *Alexander*, 602 U.S. at 7 (quoting *Shaw II*, 517 U.S. at 907) (footnote omitted).

Thus, strict scrutiny applies. Under this rubric, the State must first prove "the racial classification is used to further compelling governmental interests" and then prove its "use of race is narrowly tailored—meaning necessary—to achieve that interest." *SFFA*, 600 U.S. at 207 (quotation omitted).

This Court has identified only one relevant compelling interest to theoretically justify race-based districting: "remediating specific, identified instances of past discrimination that violated the Constitution or a statute." *Id.* (citation and footnote omitted). Yet this Court has never held that alleged compliance with Section 2 is such an interest. *Milligan*, 599 U.S. at 80 (Thomas, J., dissenting).

The circumstances to satisfy this compelling interest are narrow. First, the remediated discrimination must be "intentional." *Parents*

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[1] This action also triggers strict scrutiny for the reasons stated on pages 22 to 34 of Appellees Opening Brief.

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Involved, 551 U.S. at 720 (citation omitted); *see also Croson*, 488 U.S. at 503 (requiring "inference of discriminatory exclusion"). Second, the State must have a hand in the discrimination. *Croson*, 488 U.S. at 492 (plurality); *Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021) (Thapar, J.). Third, "the discrimination must be 'identified discrimination,'" meaning States must identify "'evidence' of past or present discrimination . . . 'with some specificity before they may use race-conscious relief.'" *Shaw II*, 517 U.S. at 909 (quoting *Croson*, 488 U.S. at 499, 500, 504-05, 507; *id*. at 509 (plurality)). "A generalized assertion of past discrimination in a particular industry or region is not adequate" because it does not precisely define the scope of the injury. *Id*. (citation omitted). And "an effort to alleviate the effects of societal discrimination is not a compelling interest." *Id*. at 909-10 (citation and footnote omitted). Fourth, "the institution that makes the racial distinction must have had a 'strong basis in evidence' to conclude that remedial action was necessary, '*before* it embarks on an affirmative-action program.'" *Id*. at 910 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality) (emphasis added)). Finally, the remedy must be limited temporally and in scope to redress the specific injury at hand. *Croson*, 488 U.S. at 510-11 (plurality).

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B. Section 2 Remedies Fail Strict Scrutiny.

Section 2 compliance alone is never a sufficiently compelling interest because it does not account for present-day intentional discrimination. *SFFA*, 600 U.S. at 207 (citation omitted); *Shaw II*, 517 U.S. at 909-10; *Parents Involved*, 551 U.S. at 720. Moreover, it relies on stereotyping, trends toward

racial quotas, negatively impacts voters, and has no logical end.

1. Section 2, as courts apply it, does not require proof of current intentional discrimination.

Section 2, as currently applied, does not require proof of racial discrimination in districting. *Milligan*, 599 U.S. at 25; *id.* at 44 (Kavanaugh, J., concurring); State Supp. Brief 39. So courts inevitably interpret Section 2 to sweep up cases that do not remediate specific, intentional, identified instances of past discrimination. *Contra* Robinsons Supp. Brief 13-25, 31 (arguing Section 2 only authorizes "consideration of race . . . when doing so is required to remedy identified racial discrimination").[2] And the individual components of Section 2 do not impede its unconstitutional reach.

a. For example, most courts applying the *Gingles* factors do not address or singularly redress current racial discrimination in districting. *Gingles* I merely tests whether a minority population is sufficiently large and geographically compact (without any required threshold) to create a new district. The use of current census and election data does not solve this problem. *Contra* Robinsons Supp. Brief 16-17.

And an illustrative map satisfying *Gingles* I does not demonstrate that racial discrimination motivated the State's map. *Contra id.* at 18-19. Politics could also "yield[] similar oddities in a

[2] Perhaps that's why the main source of intentional race-based districting since *Shaw v. Reno* is the VRA itself. Behind each racial gerrymander has been an excuse that Section 2's "effects test" forced it.

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district's boundaries." *Alexander*, 602 U.S. at 9 (quoting *Cooper*, 581 U.S. at 308)); *see also* Robinsons Supp. Brief 50 (arguing State departed from illustrative map for political reasons).

Furthermore, *Gingles* I compactness has now devolved into a murky, "anything goes" inquiry. Lower courts have grown fond of repeating that "[c]ompactness under Section 2 is an imprecise concept." *Robinson v. Ardoin*, 86 F.4th 574, 590 (5th Cir. 2023) ("*Robinson III*"). It is even more flexible where clear error review insulates factual findings on capacious "compactness" criteria, such as "communities of interest and traditional boundaries" (even though "there [is] no universal definition for 'community of interest'" in places like Louisiana), "cultural, economic, social, and educational ties," and other factors divorced from any quantifiable metric. *Id*. at 591 (citation omitted). Is the gravy similar in Baton Rouge and Shreveport? Then according to the Robinsons, that can show compactness under *Gingles* I. Dkt.189, at 14; Dkt.189-1, at 33.[3]

The *Robinson* court and others now find compactness "despite the distance and distinct community identities" of minority populations in proposed districts. *Robinson III*, 86 F.4th at 591 (citation omitted). Indeed, the term is so devoid of meaning that the Robinsons still insist that SB8-6, with its "snake"-like configuration, is compact. Oral Arg. Transcript 37. And they even insisted that States

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[3] Appellees refer to documents in the Joint Appendix filed December 19, 2024, as "J.A." followed by page number(s); documents in the Robinson Jurisdictional Statement Appendix filed July 30, 2024, as "R.J.S.A." followed by page number(s); and documents available on the district court docket as "Dkt." followed by the docket number, "at," and page number(s).

are "entitled to create a non-compact majority-minority district" as a remedy that passes strict scrutiny, so long as they can muster non-racial excuses. Robinsons Jurisdictional Statement 33.

b. Turning to *Gingles* II and III, "racially polarized voting is not evidence of unconstitutional discrimination" and "is not state action." *Nw Austin*, 557 U.S. at 228. And neither *Gingles* nor subsequent cases have resolved whether a Section 2 plaintiff must prove what amounts to mere politically polarized voting (by showing majority and minority voters support different candidates—even if those candidates do not share the respective groups' races) or, in contrast, polarized voting that results from racial motivation (by showing the racial minority group's preferred candidate shares the group's race to infer the majority votes against the candidate based on race and not politics). 478 U.S. at 61-74; *id*. at 82-83 (White, J., concurring in part and dissenting in part). The former proposition did not receive five votes, while the latter arguably did. *Id*. at 101 (O'Connor, J., concurring in the judgment); Brief for *Amici Curiae* Georgia House of Representatives Leaders at 14-15, *Louisiana*, No. 24-109, *Robinson*, 24-110 (U.S. Jan. 28, 2025).

Free to choose between these two options, many lower courts today apply the former, easier standard and may even find racially polarized voting notwithstanding evidence that the Black-preferred candidate is not often Black. *See, e.g.*, *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 800-01, 808-09, 842 (M.D. La. 2022), *vacated*, 86 F.4th 574 (5th Cir. 2023) ("*Robinson I*") (encountering evidence that White candidate received larger share of Black vote than Black candidate and still finding racially polarized

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voting). But to properly apply *Gingles* II/III, plaintiffs would instead need to introduce primary election results between candidates of different races, which may control for politics. Otherwise, "interest-group politics rather than . . . racial discrimination" explains polarized voting, which is likely not "what Congress had in mind in amending § 2." *Gingles*, 478 U.S. at 82-83 (White, J., concurring in part and dissenting in part); *see also Solomon v. Liberty Cnty. Commissioners*, 221 F.3d 1218, 1225 (11th Cir. 2000) (holding *Gingles* III racial bloc voting is not conclusive, since "what appears to be bloc voting on account of race may, instead, be the result of political or personal affiliation of different racial groups with different candidates"). Courts will generate false hits for politically rather than racially polarized voting, which may remain a political feature of our democracy long after racial discrimination ends. *See, e.g.*, *Robinson I*, 605 F. Supp. at 808-09 (crediting expert testimony that "Black voters vote almost unanimously for Democratic candidates, while *Republicans* bloc vote against those candidates of choice" (emphasis added)).

Even without this conceptual problem, problems remain. Courts must find polarized voting without any required threshold. And finally, even if courts properly account for racially polarized voting and impose a quantifiable threshold, racially polarized voting still does not prove present-day intentional discrimination in redistricting.

c. Courts also fail to apply the Senate factors to find intent. While originally suggested as partial circumstantial evidence of intent, they are untethered to intentional discrimination in theory or in practice today.

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The Robinsons waver on how the factors apply in theory. *Compare* Robinsons Supp. Brief 3-4 (only results required), *with id.* at 20-24 (factors can show intentional current racial discrimination in voting). A plain reading of the factors demonstrates they do not fully approximate present-day discrimination in districting.

Senate factor 1 only assesses "the *history* of voting-related discrimination," not current circumstances. *Gingles*, 478 U.S. at 44 (emphasis added) (citation omitted); State Supp. Brief 28-29 (listing examples of supposed discrimination the Robinsons proposed and the *Robinson* district court accepted). Factor 2 considers racially polarized voting, but without further proof as discussed, it is not evidence of racial discrimination by the State. *Nw Austin*, 557 U.S. at 228. Factor 3 examines voting mechanisms in the State, which offer no direct evidence of intentional, present-day discrimination in districting. Factor 4 looks to the exclusion of minority members from candidate slating processes, which does not approximate discrimination in districting against the *voters*, especially not in a State like Louisiana that had no slating system at the time of *Robinson*. 605 F. Supp. 3d at 848; *cf.* Robinsons Supp. Brief 21-22 (not contesting absence of discrimination in Factor 4). Factor 5 reviews the effects of past discrimination in other areas, such as "education, employment, and health," which do not demonstrate intentional discrimination in redistricting, *Gingles*, 478 U.S. at 45 (citation omitted), where the State "had a hand," *Croson*, 488 U.S. at 492 (plurality). Factor 6 analyzes "the use of overt or subtle racial appeals in political campaigns," also untethered from redistricting or state action. *Gingles*, 478 U.S. at 45

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(citation omitted). Cited instances are often singular, include examples from unelected officials, and do not demonstrate that the system forecloses minority voters' participation. Factor 7 examines "the extent to which members of the minority group have been elected to public office in the jurisdiction," but this too need not correlate to intentional discrimination. *Id.* (citation omitted). Minority voters may prefer other candidates, or the pool of minority candidates may be limited. Factor 8 examines the responsiveness of elected officials to minority voters' needs. But as *Robinson* demonstrates, even when there is no evidence of lack of responsiveness, the State can still face Section 2 liability. 605 F. Supp. 3d at 850-51. Factor 9 considers whether the policy underlying the current redistricting plan is "tenuous," a capacious, undefined term. *Gingles*, 478 U.S. at 45 (citation omitted).

These factors are also untethered in practice. Just like the *Robinson* court, lower courts can decide which factors are dispositive and which ones to disregard. *See infra* Subsection III.C.2. Courts can rule for plaintiffs when *less than half* of the factors weigh in favor of Section 2. *Id.* Courts can decide that attenuated, unrelated evidence matters. *Id.* Courts can look to evidence predating the VRA's enactment in 1965 and wholly rely on isolated examples rather than real evidence of systemic continuing discrimination. *Id.* Courts can give proportionality improper weight. *Id.* Courts can even put "the burden on the jurisdiction defending the challenged practice" to present evidence as required under Section 5. *Contra* Robinsons Supp. Brief 30-31 (citation omitted). *See infra* Subsection III.C.2. These factors are so pliable that courts may find "less visible"

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discrimination today where they would not in 1982. *Nairne v. Ardoin*, 715 F. Supp. 3d 808, 874 n.461 (M.D. La. 2024). Discrimination, under this totality of the circumstances test, is now in the eyes of the beholder. Finally, these findings are shielded by clear error review on appeal.[4]

In short, these factors are not applied to account for present-day intentional racial discrimination in redistricting; and even if they were, Section 2 plaintiffs face no obligation to prove them with adequate evidence.

d. The Robinsons claim the *Shaw* predominance standard curbs race-based districting. But their view *furthers* race-based districting: they argue against all evidence that race did not predominate even in SB8-6. Robinsons Supp. Brief 27. (Previously, the Robinsons even argued that strict scrutiny doesn't apply where the VRA is the reason for a remedial map, Robinsons Opening Brief 26-29, notwithstanding this Court's precedents, *supra* Section III.A.) And a high burden for *Shaw* claims only reinforces the low bar for Section 2 ones. This creates substantial room for race-based redistricting, with little constitutional protection from gerrymanders.

e. The Robinsons' other alleged limits are not meaningful. Robinsons Supp. Brief 24-25. The possibility of remedial crossover districts, the narrow tailoring inquiry, and the absence of express racial

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[4] This sweeping deference is granted to fast-moving, single-judge district courts as in *Robinson*, bypassing the three-judge courts that have exclusive jurisdiction to weigh Fourteenth and Fifteenth Amendment concerns when plaintiffs style their claims under *Shaw*. Brief for *Amici Curiae* Georgia House of Representatives Leaders, *supra*, at 3-6, 21-24.

quotas in Section 2's text do not avoid the constitutional harms of race-based sorting. And none of these alleged limits stop Section 2 plaintiffs from pushing for maximized majority-minority districts that amount to racial quotas and expressly rely on proportionality. *Robinson III*, 86 F.4th at 598 (noting Robinsons made these arguments). Finally, none of these mechanisms proximate actual racial discrimination.

f. The "good reasons" test only aggravates these flaws. A State defending a racial gerrymandering challenge need not even prove a Section 2 violation (which, as discussed, is increasingly easier to do) to satisfy strict scrutiny. There is no required "[s]trict compliance with the *Gingles* standard [to] ensure[] that §2 compliance remains a compelling interest." *Contra* Robinsons Supp. Brief 4. Further, for Appellants, this standard is quite forgiving, treating (for example) another district court's flawed, dissolved preliminary injunction as *res judicata*. State Opening Brief 41-46; Robinsons Opening Brief 23, 40-43. This is a far cry from *Shaw*'s original requirement of a State's "strong basis in evidence to conclude that remedial action was necessary, before it embarks on an affirmative-action program." *Shaw II*, 517 U.S. at 910 (quotation omitted).

g. Finally, the Robinsons argue Section 2 is sufficiently cabined because its remedial districts are "not set in stone in perpetuity" and can change after each new census. Robinsons Supp. Brief 31. This blinks reality. States are rational actors and will enshrine those remedial majority-minority districts each cycle to avoid "reflexive Section 2 lawsuits." *Cf.* State Supp. Brief 12-13. Moreover, the fact that any particular *race-based remedy* is subject to change *is* a

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problem because Section 2 *is* "set in stone in perpetuity." It acts as an inconsistent, moving target.

2. Section 2 relies on stereotyping.

Section 2 violates strict scrutiny for other reasons. For one, underlying its focus on race to draw majority-minority districts "are the very stereotypical assumptions the Equal Protection Clause forbids." *Miller*, 515 U.S. at 914; *see also id.* at 911-12; *Shaw I*, 509 U.S. at 647; *SFFA*, 600 U.S. at 218, 220; State Supp. Brief 8-9, 18-21. The State admits it sorted citizens into and out of two majority-Black districts entirely based on racial stereotyping. State Supp. Brief 18-21. This use of Section 2 "to demand the very racial stereotyping the Fourteenth Amendment forbids" was rejected as far back as *Miller*, 515 U.S. at 927-28, and occurs anytime a State engages in race-based districting, State Supp. Brief 18-21. Indeed, this use *undermines* the original goals of the Fourteenth Amendment, Fifteenth Amendment, and VRA: eradicating racial discrimination. *SFFA*, 600 U.S. at 221, 206; *Rice*, 528 U.S. at 512, 517, 523; *Nw. Austin*, 557 U.S. at 217; *Miller*, 515 U.S. at 927; *Palmore*, 466 U.S. at 432; *Katzenbach*, 383 U.S. at 308.

3. Section 2 trends toward racial quotas.

Section 2 today also trends toward a quota-based system in many courtrooms. *Cf. SFFA*, 600 U.S. at 209. The temptation of bare proportionality inevitably determines outcomes, regardless of guardrails imposed. *Id.* at 223 (rejecting university's use of race in admissions "to obtain closer to proportional representation"); *Allen*, 599 U.S. at 71 (Thomas, J., dissenting) ("[T]he intuitive pull of proportionality is undeniable."). For example, the *Robinson* district court expressly relied on

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proportionality to justify a second majority-Black district. *Robinson I*, 605 F. Supp. 3d at 851; *see also Robinson III*, 86 F.4th at 598 (recognizing plaintiffs "emphasize[d]" HB1's disproportionate representation and agreeing with district court's "h[o]ld[ing] that the black representation was not proportional to the black population"); State Supp. Brief 31-33. Section 2 has led litigants to "balkanize" themselves "into competing racial factions" and approve proportionate quotas. *Miller*, 515 U.S. at 914 (quoting *Shaw I*, 509 U.S. at 657). The Robinsons and Galmon Amici approved SB8 as a "remedy" for their supposed vote dilution claims even though about half of them did not live in SB8-6 and had no remedy for their Section 2-defined injury. Dkt.33-1, at 8-9; Dkt.75, at 8; Dkt.76, at 3-5. Many Louisiana legislators also argued in favor of SB8—or any two-majority-Black-seat map, on the ground that this was Black voters' proportional right. Dkt.181-1, at 44:22-45:22, 56:18-22; Dkt.181-3, at 21:8-12; Dkt.181-4, at 89:10-13, 101:8-17. Without a constitutional backstop, the litigation opportunities for more majority-minority districts until maximization is achieved "effectively assure[] that race will always be relevant . . . and that the ultimate goal of eliminating' race as a criterion 'will never be achieved.'" *SFFA*, 600 U.S. at 224 (quoting *Croson*, 488 U.S. at 495 (plurality)).

4. Section 2 negatively impacts voters.

Section 2 uses race as a "negative" against members of majority groups that are segregated into allegedly remedial majority-minority districts or are packed into neighboring majority districts, where they have less political power. *Cf. SFFA*, 600 U.S. at 218-19; State Supp. Brief 21-24. Majority-group voters

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forced into majority-minority districts have less political power because their representatives, under the pressures of legislatures' "obvious" racial preferences, will play into racial stereotypes to prioritize the "perceived" will of minority-group voters over majority-group voters. *Shaw I*, 509 U.S. at 648. And voters in the rest of the State suffer. Because a State has a set number of congressional districts, redistricting decisions are "zero-sum." *SFFA*, 600 U.S. at 218. "A benefit" such as a quota for "some [voters] but not others necessarily advantages the former group at the expense of the latter." *Id.* at 218-19. The system "picks winners and losers based on the color of their skin," *id.* at 229, and undermines "the goal of equality," *Croson*, 488 U.S. at 510 (plurality), by perpetuating discrimination through discrimination, *Parents Involved*, 551 U.S. at 748 (plurality).

5. Section 2 has no logical end.

Finally, Section 2 has no "logical end point." *SFFA*, 600 U.S. at 221 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003)); *see also* State Supp. Brief 24-33. This Court has made clear that "even if a racial classification is otherwise narrowly tailored to further a compelling governmental interest, a 'deviation from the norm of equal treatment of all racial and ethnic groups' must be 'a temporary matter'—or stated otherwise, must be 'limited in time.'" *SFFA*, 600 U.S. at 312 (Kavanaugh, J., concurring) (quoting *Croson*, 488 U.S. at 510 (plurality); *Grutter*, 539 U.S. at 342). Likewise, "even if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future." *Milligan*, 599 U.S. at 45 (Kavanaugh, J., concurring) (citing *id.* at 86–88

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(Thomas, J., dissenting)); *see also id*. at 88 n.21 (Thomas, J., dissenting).

But there is no statutory expiration date for Section 2. Race-based sorting and litigation in front of single-judge courts continue. Louisiana's situation is hardly the "unicorn" of VRA litigation. Oral Arg. Transcript 27:12. "The problems of the *Robinson* regime are only getting worse as *more*—not fewer—States face §2 liability, even as the harms that spurred the VRA continue to recede. Indeed, at least *twelve* state legislative and congressional plans enacted since 2020 have been enjoined under §2." Brief of Alabama and 13 Other States as *Amici Curiae* in Support of Appellees 4-5, *Louisiana*, No. 24-109, *Robinson*, 24-110 (U.S. Jan. 28, 2025) (citation omitted); *see also id*. at 31-34; State Supp. Brief 26-27; Brief for *Amici Curiae* Georgia House of Representatives Leaders, *supra*, at 3-6, 21-24. The trajectory of VRA litigation is divorced from remediating any specific identified instances of ongoing discrimination or retrogression. Nicholas Stephanopoulos et al., *Non-Retrogression Without Law*, 2023 U. CHI. L. F. 267, 269-70 (2024).

VRA remedies have become "ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant*, 476 U.S. at 276 (plurality). The State's plight demonstrates "there is no reason to believe [States] will—even acting in good faith—comply with the Equal Protection Clause any time soon." *SFFA*, 600 U.S. at 225.

This Court should not "prolong immeasurably the day when the 'sordid business' of 'divvying us up by race' is no more." *Milligan*, 599 U.S. at 86 (Thomas, J., dissenting) (quoting *LULAC v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part,

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concurring in judgment in part, and dissenting in part)). Over 40 years after the 1982 Amendments, and 60 years after the initial Act, Section 2 cannot justify continued violence to the Reconstruction Amendments.[5]

C. Louisiana's Alleged Section 2 Remedy Fails Strict Scrutiny.

These concerns that permeate Section 2 are especially true here. For the foregoing and following reasons, SB8-6 fails strict scrutiny.

1. There was no evidence of specific, modern discrimination in the present case.

The record in this case was devoid of evidence of specific, current, intentional discrimination to justify usage of Section 2 to impose the State's race-based remedy. Appellants adduced zero evidence at trial—and can cite nothing in the legislative record—

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[5] The Robinsons wrongly argue that Appellees waived congruence and proportionality and strict scrutiny arguments. But these were never Appellees' arguments to waive. Appellants always had the burden to show that SB8-6 was "reasonably necessary under a constitutional reading and application of [Section 2]." *Miller*, 515 U.S. at 921 (holding the State failed to make this showing). They did not meet it. Instead, they gambled on the supposedly *res judicata* effect of *Robinson*'s dissolved preliminary injunction and purposely starved the factfinder below of evidence. Appellees had no obligation to mount a facial or as-applied "attack" on Section 2 when Appellants never showed it complied with the Constitution. While Appellants may be bound by that litigation strategy, Appellees and this Court are not. This Court can judicially notice the lack of congressional findings and the absence of evidence in the current record, *Robinson* record, and the latest briefing before this Court. All indicate that Section 2 is not an "appropriate" remedy for immediate past intentional discrimination and is inconsistent with *SFFA*.

even beginning to discuss voting discrimination in Louisiana in 2024. In fact, the Robinsons moved in limine and did everything in their power to exclude such evidence, hiding instead behind the shaky, vacated preliminary injunction in *Robinson*. J.A.67-81. The dearth of record evidence is a problem of their own making.

And even though Appellees had no burden on strict scrutiny to show the absence of discrimination, the record shows that discrimination and segregation in Louisiana have significantly *decreased* over time largely thanks to social advancements, such as the Fair Housing Act, Community Reinvestment Act, and school desegregation. J.A.281-82. The district court found as a factual matter "the record is clear that Louisiana's Black population has become more dispersed and integrated in the thirty years since the *Hays* litigation." R.J.S.A.189a, *see also* J.A.251, 253-54, 281-82, 376-77. This evidence of integration comports with general trends of "sharply" declining residential segregation since the 1970s. *Milligan*, 599 U.S. at 28-29 (quoting T. Crum, *Reconstructing Racially Polarized Voting*, 70 DUKE L.J. 261, 279 & n.105 (2020)). Furthermore, statewide BVAP has largely flatlined. J.A.281. All of this makes it more difficult to draw two majority-Black districts that comply with traditional redistricting criteria.

And the record reflected that SB8-6 largely replicated the State's last attempt to draw a second Black-majority district, which was rejected as unconstitutional thirty years ago. *Hays v. Louisiana*, 936 F. Supp. 360 (W.D. La. 1996); J.A.274 (noting SB8-6 shares 70% of the *Hays*' slash district's total population and 82% of its Black population); J.A.384. Only then, the circumstances were far less egregious.

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Then the State tried to create a second majority-Black district out of seven congressional districts—instead of a second majority-Black district out of six districts. R.J.S.A.189a. Then the State's Black population was far less dispersed and integrated than it is today, and two out of seven districts was less-than-proportional to the Black population share. J.A.281-82; R.J.S.A.189a. Then the State was only 25 years removed from Congress's 1965 determinations of actual discrimination. Nonetheless, *Hays* held that such a district was unconstitutional. 936 F. Supp. at 371. If Louisiana could not create 2/7 majority-Black districts in the 1990s but can create 2/6 majority-Black districts today, when voting dispersion and integration have only grown and discrimination has declined, then Section 2's alleged remedy *undermines*, rather than advances its interest in ending racial discrimination in voting.[6]

2. There was no evidence of specific, modern intentional discrimination in *Robinson*.

The Robinsons and their amici broadly gesture toward *Robinson*. But even if relevant, the *Robinson*

[6] The Robinsons claim "Black population *grew*" between 1990 and 2020, while "White population collapsed" by 10%. Robinsons Supp. Brief 42 (citing a table in *Robinson I*). Even assuming the table is accurate, it exposes Robinsons' numbers game: they cite their own chosen category of White-only voters, while using an expansive measure of Black voters that didn't even exist in 1990. *Robinson I*, 605 F. Supp. 3d at 778. Indeed, the Robinsons' expert testified that single-race Black voters are declining. *Id*. The record in this case shows White-only VAP at close to 60% with Hispanic VAP exceeding 6%. J.A.336. Robinsons apparently make an extra-record and highly dubious (*see* State Supp. Brief 20) political argument that Black voters and most non-White-only voters form a solid voting coalition.

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district court likewise determined that today there is "no evidence of Black voters being denied the right to vote"[7]; no "evidence of reduced levels of black voter registration, lower turnout among black voters, or any other factor tending to show that past discrimination has affected their ability to participate in the political process"; no evidence of other hindrances to Black Louisianans' political participation; and no evidence that elected officials are significantly unresponsive to Black voters' needs (in fact, evidence showed the opposite). 605 F. Supp. 3d at 847-50 (quotation omitted) (footnote omitted). In considering whether official discrimination existed in the State, the district court relied on pre-1965, pre-VRA discrimination. *Id.* at 846-47. In defense of its pre-1965 evidence, the court said "any *history* of voting-related discrimination" was within bounds, and the VRA was only 57 years old so the history preceding it remained relevant today. *Id.* at 847. Recent evidence of direct racial discrimination in districting was nonexistent.

How nonexistent? The blockbuster evidence included: "David Duke, a former Grand Wizard of the Ku Klux Klan, won three statewide elections" in Louisiana. *Id.* at 849 (footnote omitted). The State notes this is not even true. State Supp. Brief 28-29. Some evidence, such as certain polling place closures, had no direct evidentiary ties to intentional racial discrimination, let alone to districting. *Robinson I*, 605 F. Supp. 3d at 846-47. And some evidence was contradicted by other evidence. For example, the

[7] The district court dismissed defendants' "contention that there is no evidence of Black voters being denied the right to vote [as] irrelevant" to the claim of "vote *dilution*" without further explanation of what vote dilution was divorced from the right to vote. *Robinson I*, 605 F. Supp. 3d at 847.

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district court relied on evidence that Black Louisianans were not elected to the West Monroe Board of Aldermen (which has no relation to the congressional districts at issue), *id.* at 812, while simultaneously relying on expert testimony that Black candidates may not be Black Louisianans' candidates of choice, *id.* at 800.

Moving even further afield, the district court made sweeping references to disparities between Black and White Louisianans in various areas, such as health and socio-economic factors, outside of redistricting. *Id.* at 849. These factors resemble the "race-based gaps . . . with respect to the health, wealth, and wellbeing of American citizens" that this Court rejected as a compelling reason to allow for affirmative action in higher education. *SFFA*, 600 U.S. at 384 (Jackson, J., dissenting). And none of them evince the State's necessary participation in any intentional discrimination. *Croson*, 488 U.S. at 492 (plurality); *id.* at 503.

It ultimately found that only four of the nine Senate factors weighed in favor of the plaintiffs. This forced it to fall back upon findings of raw disproportionality to find the totality of the circumstances weighed in plaintiffs' favor. *Robinson I*, 605 F. Supp. 3d at 851.

But at the same time, the district court was forced to acknowledge that a "carbon copy" of the challenged map before the court—HB1—was precleared by the DOJ in 2011. *Id.* at 811.

And the court had to grapple with evidence of dispersion of the Black population, the strides toward integration across the State, and the difficulty of creating a second majority-Black district. The State's Black population is so dispersed that the plaintiffs'

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own expert, Mr. Fairfax, testified that "it would be very difficult to create a second majority-Black district in CD5 without including parts of East Baton Rouge Parish." *Id.* at 789. The State confirmed. Defendants' Amended Joint Proposed Findings of Fact and Conclusions of Law 43, *Robinson et al. v. Ardoin*, No. 3:22-cv-00211-SDD-SDJ (M.D. La. May 23, 2022) (ECF 166) (noting Louisiana's "Black populations" are "very dispersed" "in virtually every parish in the state" (citation omitted)); Expert Report of Dr. Alan Murray 5, 20, *Robinson*, No. 3:22-cv-00211-SDD-SDJ (M.D. La. May 9, 2022) (ECF 169-12) (noting "the entire state has noteworthy local areas of statistically significant clusters" of Black and White voters, "and the Black voting age population clusters are often not close together").

In assessing *Gingles* I, the district court found that plaintiffs' expert, Dr. Cooper, "join[ed] Black areas to other Black areas to draw a majority-Black district," without reference to evidence that these geographically diverse Black areas had any common characteristics apart from their racial makeups. *Robinson I*, 605 F. Supp. 3d at 784. While Dr. Cooper initially tried to testify that East Baton Rouge and East Carroll Parishes had similar socio-economic factors, he agreed on cross-examination "that poverty is much higher in East Carroll Parish, with much lower median income for the Black population, and that educational attainment was likewise much lower in East Carroll Parish." *Id.* Plaintiffs' other expert, Mr. Fairfax, "did not disagree that East Baton Rouge is distinguishable from the Delta parishes in some respects, such as educational attainment and income level." *Id.* at 789. The court credited the testimony of lay witnesses on communities of interest, including

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one who testified that Black Louisianans should be considered one community of interest statewide without regard to other cultural concerns of the different regions. *Id.* at 790, 829. Other evidence showed that Southern Louisiana, home to East Baton Rouge, is distinct from Northern Louisiana, home to East Carroll Parish, even though the illustrative maps united these two disparate regions in a second majority-Black district. *Id.* at 790-91. The district court even erroneously assessed geographical compactness and traditional redistricting criteria for purposes of *Gingles* I "on a plan-wide basis, not a district-by-district basis—as the first *Gingles* precondition requires." *Robinson v. Ardoin*, 37 F.4th 208, 218-19 (5th Cir. 2022) ("*Robinson II*") (per curiam) (citation omitted).

Ultimately, the *Robinson* district court reached the wrong result because it started with the wrong question—whether a second majority-Black district *could* be drawn rather than whether a district *should* be drawn to remedy specified instances of racial discrimination in voting. It only briefly addressed that latter, critical question as part of the totality of circumstances inquiry. And upon finding that four Senate factors weighed in favor of plaintiffs, it minimized the remaining five factors in reaching its ultimate finding of Section 2 liability. These errors demonstrate that the remedy had no connection to the injury Section 2 addresses—specified instances of discrimination.

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3. Other evidence from the Robinsons and amici fails to show intentional racial discrimination in districting continues.

The Robinsons and their amici's latest briefing of newfound "evidence," even had it been properly presented in the district court, also fails to show that Section 2 provided a compelling interest for SB8-6's passage. If anything, it provides a stark warning of the types of evidence and argument that Section 2 plaintiffs will continue to misuse in forcing unjustified race-based districts. The menu of "evidence" includes:

- other cases involving discrimination in jury selection and housing, Robinsons Supp. Brief 45-46, and evidence of educational, socio-economic, and health disparities—even though these contexts are untethered to the constitutional harm of intentional discrimination in congressional redistricting;
- evidence from over 20 and 30 years ago that Congress referenced when it reauthorized Sections 4(b) and 5 in 2006 (*id*. at 46-47 & nn.5-7), and of Department of Justice objection letters—all of which are outdated and no more reason to uphold Section 2 today than they were to uphold Section 4(b) in 2013, *Shelby County*, 570 U.S. at 552-53;
- successful Section 2 lawsuits, including some that are decades-old, based on Section 2's flawed regime (*see supra* Subsection III.B.1);
- *Nairne v. Landry*, No. 24-30115, 2025 WL 2355524 (5th Cir. Aug. 14, 2025) (per curiam)—which came from the same single-judge court as *Robinson* and used *Robinson*'s historical evidence of discrimination with minimal

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connection to current conditions, *Nairne*, 715 F. Supp. 3d at 868-70; State Supp. Brief 28;

- unpublished district court cases under existing Section 2 law (again, with all its flaws, *see supra* Subsection III.B.1) from three isolated incidents over several years, including one parish system of electing state judges 18 years ago; one school board election 14 years ago where the local registrar committed a "mistake" and the school board was not at "fault," *Guillory v. Avoyelles Parish Sch. Bd.*, No. 10-CV-1724, 2011 WL 499196, at **1, 10 (W.D. La. Feb. 7, 2011); and one city board of aldermen election four years ago—none of which show present, ongoing discrimination in congressional redistricting, Robinsons Supp. Brief 46;
- amici's evidence that States have engaged in partisan gerrymandering, notwithstanding this Court's recent decisions in *Rucho v. Common Cause*, 588 U.S. 684 (2019), and *Alexander*; and
- the presence of disproportionate districts, notwithstanding the Dole Amendment, *Allen*, 599 U.S. at 28; 52 U.S.C. § 10301(b).

None of this newfound "evidence," unpresented below, comes close to approximating present-day, intentional racial discrimination in redistricting.

D. This Court Must Clarify *Gingles* and Related Doctrine if Section 2 Is to Be Constitutionally Applied.

If this Court is convinced that Section 2 (1) survives congruence and proportionality review, and (2) can ever be applied by lower courts to require race-based remedies consistent with *SFFA*, the Court

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should clarify plaintiffs' burdens to prove that race-based districting is necessary to remedy intentional racial discrimination by the State in redistricting in the relevant geographic area. And because redistricting is a zero-sum game, the remedy cannot use race as a negative or punish some to benefit others. *SFFA*, 600 U.S. at 218-19. Section 2 plaintiffs should bear the following specific burden, and no less.

1. They must prove *ongoing or very recent intentional* discrimination. As an enforcement statute, Section 2 must approximate an injury that is very close to an actual constitutional violation. *City of Boerne*, 521 U.S. at 519-20. Thus, to ensure Section 2 remains a remedial, preventative measure in furtherance of the Fourteenth and Fifteenth Amendments, there must either be ongoing current racial discrimination in the same area as the remedy, or *Katzenbach*-style evidence that immediate past intentional discrimination in districting will continue to affect district-drawing without forcible consideration of race. *Shelby County*, 570 U.S. at 552-53 (requiring evidence of recent discrimination); *City of Boerne*, 521 U.S. at 533 (finding required evidence of "intentional racial discrimination in voting" ensured VRA § 5 was congruent and proportional in *City of Rome* (citation omitted)); *City of Rome*, 446 U.S. at 175-77 (citing *Katzenbach* to hold VRA § 5 could reach voting rules that had discriminatory effect where past purposeful voting discrimination would otherwise persist, and where the remedy was limited in time and place); *White v. Regester*, 412 U.S. 755, 767-68 (1973) (looking to "residual impact" of "invidious discrimination"); *Katzenbach*, 383 U.S. at 333-34; *cf. SFFA*, 600 U.S. at 207; *Parents Involved*, 551 U.S. at 720. Even the Robinsons now acknowledge

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that "*present-day* evidence" of "*actual* racial discrimination" is necessary to comply with the Reconstruction Amendments. Robinsons Supp. Brief 12, 15 (quotation omitted). Otherwise, Section 2 is no remedy for "the effects of past and present discrimination," *White*, 412 U.S. at 769 (quotation omitted), and it creates rather than prevents constitutional violations.[8]

Such proof is fully consistent with precedent. *See, e.g.*, *Gingles*, 478 U.S. at 69 ("Congress intended that the Voting Rights Act eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination. S.Rep., at 5, 40; H.R.Rep. No. 97–227, p. 31 (1981)."); *id.* at 45 (noting totality of circumstances are non-exclusive); *Brnovich*, 594 U.S. at 674. And, in fact, precedent requires it. *SFFA*, 600 U.S. at 226-27; *Parents Involved*, 551 U.S. at 720; *id.* at 741-42 (plurality).

2. They must prove *racial* discrimination. If redistricting decisions are due to politics, rather than race, then States have engaged in permissible conduct, and courts lack subject matter jurisdiction to create some desired political balance. *Rucho*, 588 U.S. 684; *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999). Thus, Section 2 plaintiffs must prove that race, not politics or some other motivation, drove the districting decisions. *Alexander*, 602 U.S. at 9; *Cooper*, 581 U.S. at 308. This will continue to require Section 2 plaintiffs to present alternative maps that not only satisfy *Gingles* I, but that also "disentangle race from

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[8] As such, the Robinsons parade of horribles (Robinsons Supp. Brief 33-36) is unfounded, because Section 2 would continue to remedy "proven instances of ongoing racial discrimination" and "actual intentional discrimination." *Id.* at 34, 36 (quotation omitted).

politics." *Alexander*, 602 U.S. at 9-10 (quotation omitted). And at *Gingles* II/III, Section 2 plaintiffs must prove—for example, by using primary results that control for race—that polarized voting is due to race, not politics that merely correlate with race. *See supra* Subsection III.B.1 (showing, *inter alia*, how *Gingles* did not resolve whether the majority's polarized voting must be racially motivated, but some lower courts have inferred this requirement from this Court's prior decisions).

3. They must prove the discrimination emanates *from the State*, not private parties. *Croson*, 488 U.S. at 492 (plurality).

4. They must prove discrimination in *redistricting*. Section 2 remedies must be narrowly tailored to remedy the precise harm at issue. *LULAC*, 548 U.S. at 429-31; *Shaw II*, 517 U.S. at 916-17; *Rogers v. Lodge*, 458 U.S. 613, 628 (1982); *see also SFFA*, 600 U.S. at 215-17. Thus, to create a Section 2 remedy for congressional districts, there must be evidence of discrimination in congressional redistricting. While Section 2 plaintiffs currently try to remedy other harms through Section 2, *see supra* Subsections III.C.2-3, Section 2 does not redress those harms. *Cf. LULAC*, 548 U.S. at 433-34, 442 (noting the VRA's purpose "is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race" and Section 2's "goal" is "overcoming prior electoral discrimination"). Moreover, the Robinsons' and amici's "effort to alleviate the effects of societal discrimination" has never been an adequate justification under the Constitution. *Shaw II*, 517 U.S. at 909-10 (citation and footnote omitted); *id.* at

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909 (noting "generalized assertion of past discrimination" is insufficient).

5. They must prove discrimination in the *relevant geographic area*. Redistricting is "an intensely local appraisal." *White*, 412 U.S. at 769; *see also LULAC*, 548 U.S. at 437; *Gingles*, 478 U.S. at 79. Proof from other parts of the State than the remedial district's location is irrelevant and cannot justify the remedy. *LULAC*, 548 U.S. at 437; *Shaw II*, 517 U.S. at 916-17; *Growe v. Emison*, 507 U.S. 25, 41-42 (1993). The Robinsons suggest such evidence is currently required. Robinsons Supp. Brief 5. But they also argue that SB8-6 is constitutional based solely on *Robinson* even though SB8-6 occupies a different part of the State than the alleged remedial districts in the *Robinson* maps. *Id.* at 1, 49-50.

6. Finally, even if Section 2 plaintiffs can meet this burden, they cannot seek a remedy that unconstitutionally uses race as a negative or elevates some to the detriment of others. *SFFA*, 600 U.S. at 218-19. That would only remedy discrimination through discrimination. *Parents Involved*, 551 U.S. at 748 (plurality).

Only strict compliance with these limits can justify Section 2's continued use under the Constitution. The Robinsons never approached this showing in *Robinson* or *Callais*. They may now protest that such showings seem impossible today. But if true, that makes the point: intentional racial discrimination that Section 2 was meant to eradicate has receded. *Gingles*, 478 U.S. at 69.

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IV. SB8 Violates the Fifteenth Amendment Independently of *Shaw* and Without Strict Scrutiny Analysis.

Alternatively, this Court can hold the State's creation of SB8-6 uniquely violates the Fifteenth Amendment as stated in Count II of Appellees' Complaint. J.A.60-65. The Amendment forbids racial classifications, *Rice*, 528 U.S. at 517, and it protects all racial groups from redistricting decisions which intentionally overrepresent voters of a particular race over others, *Gomillion*, 364 U.S. 339. Here, as in *Gomillion*, SB8 imposes an obvious racial preference. Moving beyond *Gomillion*, it intentionally creates super-proportional majority-Black districts. Black voters constitute a little more than 31% of the citizen voting age population. J.A.94-95. SB8 intentionally creates two majority-Black districts of the six districts, or slightly more than 33%. J.A.336. This mandatory racial quota to exceed the BVAP percentage abridges the voting power of other racial groups to influence their representatives. *See supra* Subsection III.B.4. As such, SB8 violates the Fifteenth Amendment.

V. The Proper Remedy Is to Remand to the District Court to Impose a Map Free of Racial Gerrymandering.

The only proper remedy that fully redresses Appellees' injuries is remand to allow the district court to finish the task it had nearly completed over a year ago when the State sought an emergency stay under *Purcell v. Gonzalez*, 549 U.S. 1 (2006), to ensure SB8's use for the 2024 election. There, the district court can finally impose a map free of racial gerrymandering without any racial quotas.

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The Court should not, as the Robinsons urge, remand the case to impose a new map that remedies a Section 2 violation supposedly identified in *Robinson*. First, the Robinsons intentionally withheld any alleged *Robinson* remedy, or evidence for it below, so this Court cannot enter an order enforcing it. Second, the Robinsons have no Article III injury and thus have no remedy. U.S. CONST. art. III; *North Carolina v. Covington*, 585 U.S. 969, 978 (2018) (per curiam). Third, courts and States will continue to violate the Constitution if they must draw maps with racial quotas, even if those quotas come from this nation's highest Court.

Finally, *Robinson* is not the super-precedent the Robinsons make it out to be. All that's left of *Robinson* is a vacated, moot preliminary injunction of HB1, a map that has not been the law for almost two years. This Court cannot "collaterally overrule" *Robinson* because it does not bind *any* court, much less this one or the statutorily empaneled three-judge court. *Contra* Robinsons Supp. Brief 48.

Moreover, *Robinson* was deeply flawed, not only for the reasons previously stated. *See supra* Subsection III.C.2. The appellate judges recognized the shortcomings of the plaintiffs' case and district court's findings and merely upheld them under clear error review at the preliminary stage, given the State's limited evidentiary showings. *Robinson II*, 37 F.4th at 215 ("The plaintiffs have prevailed at this preliminary stage given the record as the parties have developed it and the arguments presented (and not presented). But they have much to prove when the merits are ultimately decided."); *id.* at 222 ("In sum, the plaintiffs have much to prove when the merits are ultimately decided. But our review is limited by the

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evidence and arguments that defendants chose to present in the district court and on appeal, with the burden on the defendants to show that a stay is appropriate." (citation omitted)); *id*. at 216-17, 219-20, 232; *In re Landry*, 83 F.4th 300, 306 & n.6 (5th Cir. 2023); *Robinson III*, 86 F.4th at 591-92, 599; *id*. at 598 ("We agree with the 2022 motions panel that the Plaintiffs' arguments 'are not without weaknesses,' *Robinson*, 37 F.4th at 215, and Plaintiffs' analysis is not 'entirely watertight.' *Id*. at 232.").

The appellate judges recognized the State's initial loss was partly due to its poor "tactical choice" to "put all [its] eggs in the basket" of an argument rejected in *Milligan*—an error it could cure at trial. *Robinson II*, 37 F.4th at 217-18; *see also Robinson III*, 86 F.4th at 592 (similar); *id*. at 599 (urging the State to "adjust its arguments as the case moves to its next phase"). And *Robinson*'s extremely "expedited" timeline after plaintiffs had months to prepare put the State at a severe disadvantage. *In re Landry*, 83 F.4th at 304-05 & n.5 (citation omitted). The district court moved so quickly that the Fifth Circuit had to issue an extraordinary writ of mandamus to vacate the expedited remedial hearing. *Id.* at 303.

The Court should not give the State a third chance either. *Cf. Covington*, 585 U.S at 977 (affirming denial of State's "second bite at the apple" (quotation omitted)). The State's conduct in the *Robinson* and *Callais* litigation have established the State's unpredictability. Though the State now finally admits it engaged in "odious" racial gerrymandering in SB8, State Supp. Brief 1-2 (quotation omitted), the State enacted SB8, SB8 remains the law, and the State fought tooth and nail to impose SB8 for the 2024

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election even after the three-judge court declared it unconstitutional, and even though the parties were just a few weeks from a remedial map. The State repealed and abandoned HB1—a map free from racial gerrymandering whose predecessor was pre-cleared by the DOJ twice, *id*. at 5—at the prospect of further litigation. If the State will bend to the "unprecedented pressure" of a vacated, non-final preliminary injunction without any trial on the merits and with a successful litigation roadmap from the appellate court, Louisiana voters cannot be certain what other pressures might lead it to engage in the same odious racial gerrymandering the third time around. *Id*. at 1; *cf. Covington*, 585 U.S at 977; *Hays*, 936 F. Supp. at 371-72 (holding Louisiana's history of "succumb[ing] to the illegitimate preclearance demands of the Justice Department," "continu[ing] its vigorous legal defense of its actions," and failing to "adopt a constitutionally defensible congressional redistricting plan" left the court with "no basis for believing that, given yet another chance, it would produce a constitutional plan" (footnote omitted)). The only way to end this controversy is through a court-ordered plan that approximates the last map with no racial quota.

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CONCLUSION

For the foregoing reasons, and the reasons stated in their Opening Brief, Appellees ask this Court to affirm and remand to the district court.

Respectfully submitted,

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