Nos. 24-109, 24-110

Supreme Court of the United States

STATE OF LOUISIANA, *Appellant*,
v.
PHILLIP CALLAIS, ET AL., *Appellees*.

PRESS ROBINSON, ET AL., *Appellants*,
v.
PHILLIP CALLAIS, ET AL., *Appellees*.

On Appeal from the United States District Court
for the Western District of Louisiana

BRIEF OF ALABAMA AND 15 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTERESTS OF *AMICI CURIAE*

Amici States agree that "race-based state action" is forbidden "except in the most extraordinary case." *SFFA v. Harvard*, 600 U.S. 181, 208 (2023). In 1965, the country faced an "extraordinary problem," *Shelby County v. Holder*, 570 U.S. 529, 534 (2013), and a "pervasive evil" in discriminatory voting practices, *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966). "The purpose of the Voting Rights Act" was to combat that evil and "foster our transformation to a society that is no longer fixated on race." *LULAC v. Perry*, 548 U.S. 399, 433-34 (2006).

Thanks in part to the VRA, 2025 is not 1965. But they share this in common: voting districts can still be "divided along obvious racial lines without consequence," *cf.* Robinson.Br.35, so long as federal courts are drawing the lines. Courts today order affirmative action in redistricting without "evidence of Black voters being denied the right to vote," *Robinson v. Ardoin*, 605 F.Supp.3d 759, 847 (M.D. La. 2022), and despite "racial parity in rates of voter registration and turnout," *Singleton v. Merrill*, 582 F.Supp.3d 924, 1022 (N.D. Ala. 2022).

Worse still, many States can't know with any certainty whether they must engage in or refrain from race-based districting. They have faced "competing hazards of liability" for decades, *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality), and the path through hasn't gotten any clearer. However States traverse the "legal obstacle course," *Abbott v. Perez*, 585 U.S. 579, 587 (2018), they seem destined to lose. Consider the post-2020 travails of Louisiana and Alabama.

Louisiana's congressional plan was preliminarily enjoined, so the State enacted a race-based map with a new majority-black district "stretch[ing] some 250 miles" from Shreveport to Baton Rouge. *Callais v. Landry*, 732 F.Supp.3d 574, 588 (W.D. La. 2024). That second attempt was declared unconstitutional and enjoined. *Id.* at 582.

Alabama's congressional plan was preliminarily enjoined too, so the State enacted a new map prioritizing non-racial goals. This second attempt was enjoined for *not* creating a new majority-black district stretching some 250 miles from Mobile to the Georgia border. *Singleton v. Allen*, 782 F.Supp.3d 1092 (N.D. Ala. May 8, 2025), *appeal pending*, No. 25-274 (U.S). The State was even branded intentionally racist for *trying to avoid* an unconstitutional use of race.

It's time that this "lose-lose situation" ends. *Alexander v. S.C. NAACP*, 602 U.S. 1, 65 (2024) (Thomas, J., concurring). No one disputes that "[t]he VRA is the crown jewel of civil rights legislation," but its "brilliance" can be seen without viewing "dilution" litigation through rose-colored glasses. Robinson.Br.1. There is no "clarity and exactness" in deciding when a map dilutes. *Id.* There is no "careful crafting" in §2 that "limit[s]" the use of race "to tailored remedies for ongoing race discrimination." *Id.* at 47. Perhaps in decades past, the Court could assume that §2 was "remediating specific, identified instances of past discrimination" in redistricting. *SFFA*, 600 U.S. at 207. No longer. This unconstrained, opaque, and odious use of race "cannot extend" any further. *Allen v. Milligan*, 599 U.S. 1, 45 (2023) (Kavanaugh, J., concurring).

SUMMARY OF ARGUMENT

The Voting Rights Act ended literacy tests, poll taxes, character requirements, and the like. It authorized federal observers and barred intimidation. It threatened violators with civil and criminal sanctions. *Katzenbach*, 383 U.S. at 315-16. And it worked. We no longer see litigation over literacy tests and poll taxes, "[v]oter turnout and registration rates now approach parity," and "minority candidates hold office at unprecedented levels." *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009). "In part due to the success of that legislation, we are now a very different Nation." *Id.* at 212. Yet courts continue to wield an extraordinary power that imposes serious harms on individual dignity and state sovereignty: §2-authorized race-based districting.

The question here is not whether Congress could *ever* "authorize race-based redistricting as a remedy." *Allen*, 599 U.S. at 41. Nor is it whether this Court has correctly interpreted §2. It is settled that there is "no precise rule … governing § 2 compactness," *LULAC*, 548 U.S. at 433, and "no simple doctrinal test for the existence of legally significant racial bloc voting," *Thornburg v. Gingles*, 478 U.S. 30, 58 (1986). Likewise, "[n]othing in § 2 provides an answer," "rule[,] or standard for determining which of" the "difficult, contestable choices" made by mapdrawers "are better than others." *Cf. Allen*, 599 U.S. at 35.

The question here is whether this "notoriously unclear and confusing" test can continue to authorize race-based districting. *Merrill v. Milligan*, 142 S.Ct. 879, 881 (2022) (Kavanaugh, J., concurring). The Court has never considered that argument. *Allen*, 599 U.S. at 45 (Kavanaugh, J., concurring). "But this

Court's precedents make clear that the answer is no." *SFFA*, 600 U.S. at 316 (Kavanaugh, J., concurring). After forty years, there is still no "dilution" test that is "sufficiently coherent for purposes of strict scrutiny" to ensure that race-based districting has "a logical end point." *Id.* at 214, 221 (quotations omitted).

While States may have a compelling interest in "remediating specific, identified instances of past discrimination," Robinson.Br.2, that does not describe "dilution" litigation. Plaintiffs owe their successes to "uncertainty" about the very "nature and contours of a vote dilution claim," *Merrill*, 142 S.Ct. at 883 (Roberts, C.J., dissenting), not to the existence of "*actual* racial discrimination" in voting, Robinson.Br.15.

Tellingly, the Robinson Appellants ignore this uncertainty. They extol a dilution test that is "appropriately constrained," "brillian[t]" in its "clarity and exactness," and "tailored" to remedy "specific" discrimination. Robinson.Br.1, 14, 47. That test is imagined.

The very concept of vote "dilution" rests on an "amorphous concept of injury." *SFFA*, 600 U.S. at 226. Perhaps dilution was easier to identify in 1982, but the VRA's successes in "cutting away … obstacles to full participation," have made "clear lines of legality and morality … more difficult to locate." *LULAC v. Clements*, 999 F.2d 831, 837 (5th Cir. 1993) (en banc). Every step of the test is plagued by vague and manipulable factors that can be stretched to find liability despite significant progress. What remains today are claims by racial groups "for a fair share of political power and influence, with all the justiciability conundrums that entails." *Rucho v.*

Common Cause, 588 U.S. 684, 709 (2019). No specific discrimination is identified, and what *is* identified is never remedied.

Nothing in this test makes it likely its racial demands will "expire any time soon." *SFFA*, 600 U.S. at 225. Its mission to combat the "vestigial effects" of discrimination, *Gingles*, 478 U.S. at 69, has no end in sight, *see SFFA*, 600 U.S. at 370 (Sotomayor, J., dissenting). Even where drastic steps were needed to eradicate school desegregation "root and branch," the Court would not accept "vestiges" as a basis for the indefinite use of race. *Freeman v. Pitts*, 503 U.S. 467, 486, 491-92 (1992).

Worse, race-based districting involves "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 v. Johnson*, 515 U.S. 900, 911-12 (1995). Acting on that assumption is forbidden, especially when it harms "other innocent persons" based on their race. *SFFA*, 600 U.S. at 212.

One can celebrate the achievements of the VRA without condoning §2's unconstrained and indefinite demands of racial preferences in redistricting. Indeed, one must, for this use of race strikes at the very "purpose" of the VRA to "prevent discrimination in the exercise of the electoral franchise," *LULAC*, 548 U.S. at 433-34, and at the "core purpose" of the Equal Protection Clause to end "all" official discrimination, *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). "Eliminating racial discrimination means eliminating all of it." *SFFA*, 600 U.S. at 206. That is the only way to become "a society that is no longer fixated on race." *LULAC*, 548 U.S. at 434.

ARGUMENT

I. The means and ends of race-based redistricting under §2 have proven too amorphous for meaningful judicial review.

The Court allowed race-based admissions programs on the assumption that universities could run them "in a manner that is sufficiently measurable to permit judicial review." *SFFA*, 600 U.S. at 214 (quotations omitted). Time and experience showed it could not be done. Universities lacked "sufficiently coherent" interests in their use of race and could not "articulate a meaningful connection between the means they employ[ed] and the goals they pursue[d]." *Id.* at 214, 215.

Section 2's goal of ending "dilution" in districting is every bit as "amorphous" as the hazy goals proffered in *SFFA*. *Id.* at 214. At oral argument in this case, the Court twice asked the Robinson Appellants a simple question: explain "exactly what the violation was" in Louisiana's 2022 plan. Oral.Arg.Tr.46; *see id.* at 30. The answer was *not* a description of "*actual* racial discrimination" by the State of Louisiana. Robinson.Br.15. It was a mix of buzzwords ranging from the "elusive" to the "imponderable." *SFFA*, 600 U.S. at 215.

That is hardly the fault of the advocates: as applied to redistricting, §2 has always been "a statute in search of a theory."[1] Before *Gingles*, there was no "overriding conception of the precise constitutional harm" or even "[w]hat was meant by

[1] L. Guinier, *[E]racing Democracy: The Voting Rights Cases*, 108 Harv. L. Rev. 109, 113 (1994).

'minority vote dilution.'"[2] *Gingles* purported to define the "essence of a §2 claim," 478 U.S. at 47, but decades later, there remains "no generally accepted theory of racial vote dilution."[3] If no one can articulate the very "concept of injury," then this area of law is not safe enough for courts to wield the "dangerous" tool of racial sorting. *SFFA*, 600 U.S. at 209, 212; *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236 (1995) ("reasons" for using race must be "clearly identified and unquestionably legitimate").

The results speak for themselves. If the test has such "clarity and exactness in filtering out all but the most meritorious claims," Robinson.Br.1, then how can materially identical maps survive §2 in one cycle and succumb to it the next? For example, Alabama's 2012 Senate plan had eight majority-black districts and was challenged for not having more. The district court rejected the §2 claim, noting that "black voters in Alabama are highly politically active" and "have successfully elected the candidates of their choice in the majority-black districts." *ALBC v. Alabama*, 989 F.Supp.2d 1227, 1287 (M.D. Ala. 2013) (W. Pryor, J.).[4] But Alabama's 2021 Senate plan, also with eight majority-black districts, was deemed dilutive because

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[2] S. Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 Mich. L. Rev. 1833, 1844 (1992); *see* N. Stephanopoulos, *Race, Place, and Power*, 68 Stan. L. Rev. 1323, 1333 (2016) (describing the "conventional [if "overstated"] wisdom" that the doctrine "was formless mush before *Gingles*").

[3] C. Elmendorf et. al., *Racially Polarized Voting*, 83 U. Chi. L. Rev. 587, 590 (2016); H. Gerken, *Understanding the Right to an Undiluted Vote*, 114 Harv. L. Rev. 1663, 1666 (2001) (no "fully developed theory for describing and understanding" dilution).

[4] *See ALBC v. Alabama*, 231 F.Supp.3d 1026, 1033 (M.D. Ala. 2017) (readopting conclusion on remand).

the district court "refuse[d] to give punitive effect to the political participation of Black Alabamians" and because the candidates favored by most black voters had rarely won outside of "majority-Black districts." *Ala. NAACP v. Allen*, No. 2:21-cv-1531, 2025 WL 2451166, at *74, *78 (N.D. Ala. Aug. 22, 2025). The story is the same in case after case this cycle. Maps have fallen, despite having the same number of majority-minority districts as their predecessors.[5] Retrogression cannot explain these divergent results. *Contra* D.C.Br.28.

As with partisan gerrymandering, some hold out hope "that in another case a standard might emerge." *Rucho*, 588 U.S. at 702 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring)); *see* Stephanopoulos.Br.29. Experience—not "the mere passage of time," D.C.Br.5—has dashed that hope. Thus, the Robinson Appellants and their *amici* can say (*ad nauseum*) that §2's use of race is "constrained" and "exacting." But they cannot prove it. Not a single

[5] *Robinson*, 605 F.Supp.3d at 766, 775 (enjoining elections under Louisiana's 2022 congressional plan though the plan stuck to "the status quo of one majority-minority district"); *Nairne v. Landry*, No. 24-30115, 2025 WL 2355524, at *23 (5th Cir. Aug. 14, 2025) (affirming §2 liability for Louisiana's 2022 House and Senate plans though they have "more majority-Black districts than in 2011"); *Miss. NAACP v. State Bd. of Election Comm'rs*, 739 F.Supp.3d 383, 400, 403 (S.D. Miss. 2024) (holding that Mississippi's 2022 House and Senate plans violate §2 despite both "retain[ing] the same number of black-majority districts used for the last state legislative elections prior to the 2020 Census"); *Alpha Phi Alpha Fraternity v. Raffensperger*, 700 F.Supp.3d 1136, 1181 (N.D. Ga. 2023) (holding that Georgia violated §2 though "the number of majority-Black congressional and legislative districts remained the same").

step in the *Gingles* framework has proven "sufficiently coherent." *SFFA*, 600 U.S. at 214.

A. The map-comparison test for dilutive effects has proven standardless.

The first step in a vote-dilution claim requires plaintiffs to produce a reasonably configured alternative map. There are supposed to be two major hurdles. First, a plaintiff's map must comply with a State's "traditional redistricting principles." *Allen*, 599 U.S. at 30. Only then could "[d]eviation" from that map show "that the State's map has a disparate effect on account of race." *Id.* at 26. Second, race cannot predominate in a plaintiff's map because a map "motivated by … simple racial politics" is not one the State could constitutionally adopt. *Shaw v. Reno*, 509 U.S. 630, 643 (1993). This "map-comparison test" may sound plausible, but it is "flawed in its fundamentals," *cf. Allen*, 599 U.S. at 35, and broken in practice.

1. Distinguishing race predominance from race consciousness is hopeless.

Section 2 demands a "quintessentially race-conscious calculus." *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994). In any other context, the Court would treat this explicit use of race as "inherently suspect," *Miller*, 515 U.S. at 915; and "presumptively invalid," *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). But race-based districting has long skirted scrutiny on the belief that plaintiffs, States, and courts can use race without letting it "predominate." *Allen*, 599 U.S. at 31 (plurality).

That belief has proven mistaken. The line between benign and odious uses of race in districting is not just "difficult to discern," *id.*, but far too "imprecise" and "opaque" for anyone "to understand how courts are

supposed to scrutinize" illustrative maps, *SFFA*, 600 U.S. at 216-17; *accord* Crum.Br.18 ("[O]ver four redistricting cycles, the predominant factor test has also proved unworkable.").

When the Court first used the term *predominates* in redistricting, it drew on the constitutional standard in employment discrimination: Race predominates when an action is taken "at least in part 'because of'" its racial effects. *Miller*, 515 U.S. at 916 (quoting *Feeney*, 442 U.S. at 279). Every dilution remedy would flunk that test, so the doctrine became more malleable to permit "the consideration of race in a way that would not otherwise be allowed." *Abbott*, 585 U.S. at 587. But the Court clarified in *Bethune-Hill* that a map satisfying "traditional redistricting criteria" is still race-predominant if race was the "overriding reason" it was chosen "over others" or "the criterion" that "could not be compromised," like when "race-neutral considerations 'c[o]me into play only after the race-based decision had been made.'" *Bethune-Hill v. Va. State Bd. of Elections* 580 U.S. 178, 189-90 (2017).

In theory, defendants could prove predominance with "evidence that some district lines deviated from traditional principles." *Id.* at 190. In practice, it is impossible to overcome a court's "intuitions" and "subjective views that demonstrative districts are good enough." *See* Stephanopoulos.Br.30-31. After all, "[t]raditional redistricting principles … are numerous and malleable," and many "are surprisingly ethereal and admit of degrees." *Bethune-Hill*, 580 U.S. at 190 (cleaned up). "By deploying those factors in various combinations and permutations," plaintiffs can craft "a plethora of potential maps that look consistent with traditional, race-neutral principles." *Id.*

And "modern computer technology" makes the task easier than ever, as "mapmakers can now generate millions of possible districting maps for a given State." *Allen*, 599 U.S. at 23. Plaintiffs today can "find innovative combinations of geography that even the most expert human mapmakers may overlook" when contriving new "reasonably compact" districts. Br. of *Amici* Computational Redistricting Experts 14, No. 21-1086, *Allen* (July 18, 2022).

Even for more objective criteria like compactness, courts are poorly suited to say how compact is enough in the abstract. It is "an imprecise concept." *Miss. NAACP*, 739 F.Supp.3d at 414. And of the "dozens of competing metrics" for compactness, which one "should be used?" *Allen*, 599 U.S. at 35; *but see Robinson*, 605 F.Supp.3d at 823 (deeming one metric "the best"). The same goes for county lines—how many can be split? And for communities of interest—which ones should be respected? And so on. There is "no legal answer" to the "question of 'how much deviation from each [criterion] to allow.'" *Banerian v. Benson*, 589 F.Supp.3d 735, 738 (W.D. Mich. 2022) (Kethledge, J.) (quoting *Rucho*, 588 U.S. at 708)); *see Gonzalez v. Aurora*, 535 F.3d 594, 598 (7th Cir. 2008) (Easterbrook, C.J.).

It is thus all too easy for courts to find that plaintiff plans still "*reasonably*" respect the State's criteria. *Vera*, 517 U.S. at 977. The State's map can "excel[] at whatever traditional districting principle the Legislature deems most pertinent," and it makes no difference. *Singleton*, 782 F.Supp.3d at 1264. States are then forced to adopt race-based snake districts to salvage some of their traditional goals. Oral.Arg.Tr.37-38 (the Court). *See also* App.182a

(describing "'bizarre' 250-mile-long" district); Oral.Arg.Tr.41 (conceding "squiggly snake" shape).[6]

The problem cannot be solved by more rigorous application of *Gingles*. "[N]o precise rule has emerged governing § 2 compactness," *LULAC*, 548 U.S. at 433, because no such rule exists for a test that poses "inescapably imponderable" questions, *SFFA*, 600 U.S. at 215. Even if *Gingles* were a proper beauty contest, courts would face the puzzle of weighing a plaintiff map's poor performance on one criterion (*e.g.*, having no snake districts) against its better performance on another (*e.g.*, respecting a snake-shaped community of interest) with no neutral principle to guide the way. Deciding how many split counties equals a tenth of a Polsby-Popper score is much like deciding "whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring). "How are courts to decide?" *Allen*, 599 U.S. at 35. "Nothing in §2 provides an answer." *Id.*

Courts turn to the subjective intent of expert mapmakers, which is similar to accepting Harvard's "trust us" defense. *SFFA*, 600 U.S. at 217. Indeed, the *Robinson* court treated predominance as a credibility issue, believing Fairfax's promise that he used race only to get an "initial sense of where BVAP levels were strong" but did "not look at the racial data constantly." 605 F.Supp.3d at 827. He was "adamant and credible."

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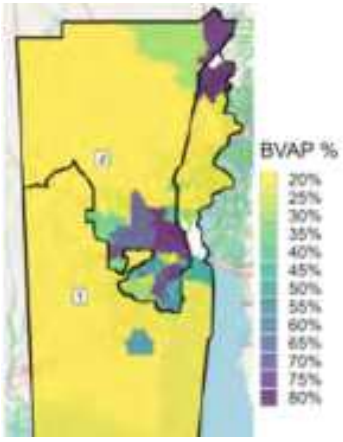
[6] Complicating matters further is the question-begging move to treat "non-dilution of minority voting strength" *itself* as traditional districting principle, *see, e.g.*, *Miss. NAACP*, 739 F.Supp.3d at 420, and allow plaintiffs to "prioritize race" over non-racial principles "as necessary" to draw new districts, *Singleton*, 582 F.Supp.3d at 1029.

Id. Likewise, race did not predominate in Cooper's maps because he "persuaded the Court" that it did not. *Id.* Meanwhile, in Mississippi, some legislative districts survived when a court concluded that Cooper's denial of a "racial objective [was] not credible." *Miss. NAACP*, 739 F.Supp.3d at 383.

"We would not offer such deference in any other context," *SFFA*, 600 U.S. at 256 (Thomas, J., concurring), because the subjective inquiry is so easily manipulated. Indeed, it appears the experts have learned what to say and what not to say. *Compare, e.g.*, *ALBC*, 231 F.Supp.3d at 1046 ("[Cooper] came dangerously close to admitting that race predominated[.]") *with Singleton*, 582 F.Supp.3d at 1006 (crediting "Cooper's testimony that he worked hard to give 'equal weighting' to all traditional redistricting criteria").

To be sure, courts still look for "tentacles, appendages, bizarre shapes, or any other obvious irregularities" in a plaintiff's map. *Id.* at 1011. But this "I know it when I see it" approach to racial sorting is unserious and cannot be the "ultimate standard" for deciding what is invidious and what is innocent. *Shaw*, 509 U.S. at 648; *see Vieth*, 541 U.S. at 278 (plurality).

All the more, because courts often cannot "see it" when predominance is staring them in the face. In *Milligan*, Duchin admitted that creating majority-black districts was "nonnegotiable" and that "other considerations" had "to yield" to that racial "criterion." *Singleton*, 582 F.Supp.3d at 1030. The results of her racial priorities were plain to see in her maps, which unquestionably segregated Mobile on racial lines:



Duchin E

Milligan v. Allen, No. 2:21-cv-1530 (N.D. Ala.), DE425-1:76. Despite recognizing that every plaintiff map split Mobile County to make a new majority-minority district, the court would not admit the conclusion that race predominated. Why? Because Duchin said that "race is a consideration that doesn't dominate others." *Singleton*, 782 F.Supp.3d at 1260.

In sum, how much race to allow in mapmaking is not judicially manageable. Section 2 "provides no basis whatever to guide the exercise of judicial discretion." *Cf. Rucho*, 588 U.S. at 716. If "the same map could be [lawful] or not depending solely on what the mapmakers said they" did, "there is no reliable way to determine who wins, or even where the finish line is." *Allen*, 599 U.S. at 35, 37. The Court should follow *Rucho* where it leads. Once some race is allowed (or required), saying "[t]his much is too much" does not answer "the original unanswerable question" of how much is too much. *Rucho*, 588 U.S. at 716.

2. The communities-of-interest factor is too malleable to constrain the use of race.

The Court has repeatedly instructed that the *Gingles* 1 "inquiry should take into account … maintaining communities of interest." *LULAC*, 548 U.S. at 433. But there is no "clarity" or "exactness" in how to do it. *Contra* Robinson.Br.1. The factor is paramount for many States, yet courts "struggle with analyzing and giving [it] meaning." *Robinson*, 605 F.Supp.3d at 829. "Communities of interest" is "a term of art," yet it is "subjective," and there is "no universal definition." *Id.* at 776, 829. After decades of litigation, there is still "no bright line test for determining whether a district combines communities with common interests or disparate communities." *Alpha Phi Alpha*, 700 F.Supp.3d at 1259.

That "[c]ommunities of interest are very hard to measure," *id.*, is a very big problem because the Constitution *requires* that a racial program "operate in a manner that is 'sufficiently measurable,'" *SFFA*, 600 U.S. at 224. Otherwise, courts cannot discern whether a community is proffered for "neutral" reasons or as a "pretext for racial discrimination." *Cf. Shaw*, 509 U.S. at 644. This leads to an overbroad use of race.

In practice, courts pay lip service to a "state's districting guidelines," *Robinson*, 86 F.4th at 590, but States in no way control their fate. Federal judges redo the work of legislatures, holding *de facto* town halls where they hear from voters, experts, and politicians. Then federal judges define the relevant communities and decide which ones to promote and how. "That is just a political-gerrymandering claim by another name." *Banerian*, 589 F.Supp.3d at 738.

The absence of anything resembling legal rules was on full display last year in Mississippi, where the court repeatedly relied on weak lay testimony to force changes in the State's maps. On the one hand, the court credited a local reporter's testimony that there is a community along Highway 61 because people use it "to travel between towns" for "activities." *Miss. NAACP*, 739 F.Supp.3d at 423. Another district had to be created because, according to one resident, it would "better respect[] the geographic boundaries of highways." *Id.* at 425. On the other hand, the court rejected two districts despite testimony about "transportation corridors" and "all sorts of common … roads and highways." *Id.* at 427, 432. Similarly, Mississippi was said to have "cracked" a community that was "similarly concerned" with "economic, education, healthcare, and [] other issues." *Id.* at 423-24. But for another alleged community, "share[d] economic, shopping, work, hospital, and travel interests" was "not enough." *Id.* at 428; *see id.* at 431.

Or consider the Robinson Appellants' arguments. They contend that "the district court's conclusion that SB8 fails to satisfy *Gingles*" should be reversed because the court ignored "testimony of four fact witnesses—all lifetime residents of Louisiana who reside or work in CD6—attesting to the communities of interest tied together in the new district." Robinson.Op.Br.47-48. In other words, the 250-mile-long, parish-splitting snake district could satisfy *Gingles* (and doom a State that didn't draw it) based on lay witness testimony. That is great test for empowering plaintiffs. Not so much for "filtering out all but the most meritorious claims of racial discrimination." Robinson.Br.1.

Those are just problems *defining* communities of interest; when it comes to *respecting* them, §2 also draws courts into political disputes beyond their ken. After Alabama proved why it has long respected the Gulf Coast region by keeping it whole in one district, the *Milligan* court announced that splitting some communities is "inevitable" and does "not always disrespect" them. 782 F.Supp.3d at 1274.

In short, this test "is standardless." *SFFA*, 600 U.S. at 215. If a state-spanning snake district can be a community, then anything can. And even if courts could avoid baking race into the test, they could still easily nitpick a State's prerogatives or invent new communities to meet the moment. Either path loosens the reins on the use of race with a factor that is not "measurable and concrete enough to permit judicial review." *Id.* at 217. This "is no business of the courts." *Banerian*, 589 F.Supp.3d at 738.

B. There is no objective standard for racially polarized voting, and its existence does not prove discrimination.

The second and third preconditions require a minority group that forms "a politically cohesive unit" and a majority group that "vote[s] sufficiently as a bloc usually to defeat the minority's preferred candidates." *Gingles*, 487 U.S. at 56. Although critical to distinguish "the mere inability to win" elections, *Gingles* provided "no simple doctrinal test for the existence of legally significant racial bloc voting." *Id.* at 57-58. Nearly forty years later, there remains "no standard set by courts on the level of cohesion needed to support the analysis under *Gingles*." *Miss. NAACP*, 739 F.Supp.3d at 441.

In theory, "substantial crossover voting" could be a meaningful limitation on the use of race because it makes legally significant polarization "unlikely." *Barlett v. Strickland*, 556 U.S. 1, 24 (2009). A majority-minority district is not required by §2 when a crossover district could do. *See Cooper v. Harris*, 581 U.S. 285, 306 (2017).

Yet courts are unrestrained by any clear rule in how they handle crossover voting. In Alabama, the 2024 election proceeded under a court-ordered district that was a crossover district by definition: Shomari Figures won by 9.2 points even though the district was 48.69% BVAP. *Singleton*, 782 F.Supp.3d at 1145. Nonetheless, the district court refused to "describe District 2 … as a crossover district" because there was "no evidence that Congressman Figures won it with *significant* support from White voters." *Id.* at 1283 (emphasis added). Another "question of degree" with no clear answer. *SFFA*, 600 U.S. at 215.

On the other side of the country, a federal court in Washington found bloc voting on the ground that whites voted for Republicans "approximately 70%" of the time, and Hispanics voted for Democrats at about the same rate. *Soto Palmer v. Hobbs*, 686 F.Supp.3d 1213, 1226 (W.D. Wash. 2023). Because a "defeat is a defeat, regardless of the vote count," *id.* the court adopted a plan to make the majority-Hispanic-citizen voting-age-population district *less* Hispanic but "substantially more Democratic." *Palmer v. Hobbs*, 2024 WL 1138939, at *2, *5 (W.D. Wash. Mar. 14, 2024); *see also Turtle Mountain Band of Chippewa Indians v. Howe*, No. 3:22-cv-22, 2023 WL 8004576, at *15 (D.N.D. Nov. 17, 2023) ("defeat rate [of] 59.5% … alone satisfies the third *Gingles* precondition").

It may be tempting to think that polarization reflects "*actual* racial discrimination," Robinson.Br.15, but when States explain that partisanship, not racism, drives voting patterns, the outcome is seemingly a tossup. For example, in 2020, a court rejected §2 claims based on "strong case that party, not race, is driving election results in Alabama." *Ala. NAACP v. Alabama*, 612 F.Supp.3d 1232, 1293 (M.D. Ala. 2020). But five years later, another court in Alabama declined to reach "the same conclusion." *Singleton*, 782 F.Supp.3d at 1291. When States cite a minority candidate's success in a majority-white jurisdiction, courts can dismiss the candidate as a "unicorn," *id.* at 1285, an "anomaly," *Soto Palmer*, 686 F.Supp.3d at 1225 n.8., or a Hispanic with "more in common with [the] Anglo population," *Elizondo v. SBISD*, No. 21-cv-1997, 2025 WL 1222270, at *18 (S.D. Tex. 2025).

Thus, proving two of the three preconditions for vote dilution does not prove ongoing discrimination. What bloc voting actually tracks in 2025 is whether a jurisdiction has more Democrats or Republicans. The idea that race-based districting is a "prophylactic" to "remedy and deter" "intentional discrimination," Robinson.Br.11, is belied by the test itself.

C. The "totality of circumstances" inquiry has proven standardless.

The three *Gingles* preconditions establish that a minority group could obtain more electoral success under a different system. But losing an election is not discrimination; it's ordinary politics. So, the "totality of circumstances" inquiry requires courts to discern whether "the political process is … 'equally open' to minority voters." *Allen*, 599 U.S. at 18. Courts

consider the so-called Senate Factors and any other factor that might potentially be relevant. *Gingles*, 478 U.S. at 36-37.

But even at this stage, discrimination is "*not essential to*" the analysis. *Id.* at 48 n.15; *contra* Robinson.Br.21. Once the preconditions are satisfied, the result is often a foregone conclusion. And when courts do find "discrimination," it is not even in the same category as the "pervasive" disenfranchisement that motivated enactment of the VRA. *Katzenbach*, 383 U.S. at 308; *cf. Rizzo v. Goode*, 423 U.S. 362, 373 (1976) (no relief for three million people based on few violations). Recent §2 cases demonstrate that the totalities are no "guardrail" against court-ordered racial gerrymanders. Robinson.Br.21.

1. These factors are not "evidentiary tool[s]" for proving actual discrimination. *Cf. Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring); *contra* Robinson.Br.21-23. Not only does the test turn on effects, "not discriminatory intent," *Allen*, 599 U.S. at 25, but district courts have held that intent is "[n]ot relevant to the [] inquiry" at all, *Robinson*, 605 F.Supp.3d at 777. Thus, courts will find §2 violations even when "the record establishes that the Secretary and [North Dakota] Legislative Assembly were intensely concerned with complying with the VRA in passing" a plan. *Turtle Mountain*, 2023 WL 8004576, at *16. Even when "[t]he boundaries that were drawn by [Washington State's] bipartisan and independent commission reflected a difficult balance of many competing factors and could be justified in any number of rational, nondiscriminatory ways." *Soto Palmer*, 686 F.Supp.3d at 1232.

Discrimination is neither the "most important" factor nor even necessary. *Gingles*, 478 U.S. at 48 n.15. In practice, the preconditions and proportionality carry the most weight. Although this Court has cautioned against overreliance on "the force of the *Gingles* factors," which show only the possibility of dilution, *De Grandy*, 512 U.S. at 1013, it has also said that "good reason to think that all the '*Gingles* preconditions' are met, … [is] good reason to believe that §2 requires drawing a majority-minority district," *Cooper*, 581 U.S. at 1470. And while "proportionality is never dispositive," *Wisc. Legislature v. Wisc. Elections Comm'n*, 595 U.S. 398, 405 (2022) (per curiam), it is "relevant," *LULAC*, 548 U.S. at 426. If a court finds the preconditions satisfied, the State will prevail in only "the very unusual case," *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1304 (11th Cir. 2020),[7] and proportionality "generally explains the results" from there.[8]

That is not because the *Gingles* preconditions and disproportionality are sure indicators of "substantial racial discrimination." *Allen*, 599 U.S. at 25. The fact that "[v]oter turnout and registration rates now approach parity" in States recently hit with §2 injunctions should put that notion to rest. *Shelby*

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[7] *See also Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995); *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1019 n.21 (2d Cir. 1995); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1116 n.6 (3d Cir. 1993); *Clark v. Calhoun Cnty.*, 21 F.3d 92, 97 (5th Cir. 1994); *Sanchez v. Colorado*, 97 F.3d 1303, 1322 (10th Cir. 1996).

[8] *Allen*, 599 U.S. at 72 (Thomas, J., dissenting) (citing E. Katz, et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. Mich. J. L. Reform 643, 730-32 (2006)).

County, 570 U.S. at 540. The reason plaintiffs usually succeed on the totalities is that the "test is not arduous." *Anne Harding v. Cnty. of Dallas*, 948 F.3d 302, 315 (5th Cir. 2020) (Ho, J., concurring).

And why would it be? From its inception, the "linchpin" of *Gingles* has been "electoral success," not actual discrimination. 478 U.S. at 93 (O'Connor, J., concurring in judgment). Minority electoral success and polarized voting, *i.e.*, *Gingles* 3, "predominate the totality-of-the-circumstances analysis." *Mo. NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 938 (8th Cir. 2018); *see Singleton*, 782 F.Supp.3d at 1289.

Plaintiffs often focus on past discrimination, which is not enough to show unequal opportunity in elections today. That much is clear. *See Allen*, 599 U.S. at 25-26; *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 671 (2021); *see also Shelby County*, 570 U.S. at 550 ("[C]urrent burdens must be justified by current needs." (cleaned up)). But equally clear is the ease with which courts condemn a State for its original sin. Courts tie the past to the present by papering over whether past discrimination actually caused current disparities, *Alpha Phi Alpha*, 700 F.Supp.3d at 1279-81, and by disclaiming any need to show that "socioeconomic disparities" are "link[ed]" to voter participation, *id.* at 1281. Ties to the past are "near-obvious," even in the face of "racial parity in rates of voter registration and turnout," *Singleton*, 782 F.Supp.3d at 1300-02, and recent judicial findings that the State proved equal opportunity by "overwhelming evidence," *ALBC*, 989 F.Supp.2d at 1287 (W. Pryor, J.). Even when "there is no evidence that any history of official discrimination … touched the right of" a minority group "to register, to vote, or otherwise to participate in the democratic process,"

Elizondo, 2025 WL 1222270, at *26-27, courts find "less opportunity" for that group "to participate in the political process," 52 U.S.C. §10301(b). It is doubtful that a reminder that "recent events are more probative than distant history" (Stephanopoulos.Br. 33) would finally clear the fog.

The Robinson Appellants (at 16) say that "the totality-of-circumstances test" is "sensitive to 'changing conditions.'" The problem is that the test becomes ever more "sensitive" as conditions improve. "[D]emands for outcomes have followed the cutting away of obstacles to full participation," *Clements*, 999 F.2d at 837, "effectively assur[ing] that race will always be relevant," *SFFA*, 600 U.S. at 224.

In Washington, for example, the court focused not on current barriers to voting, but rather "barriers that make it harder for Latino voters to be able to *believe* that their vote counts." *Soto Palmer*, 686 F.Supp.3d. at 1228 (emphasis added). Among these barriers to belief was the "problem" that a "significant percentage of the community … is ineligible to vote because of their immigration status," *id.* at 1228—*i.e.*, their votes did not count. The court also found that holding "senate election[s] in a non-presidential … election year" "hinder[ed] Latino voters' ability to fully participate in the electoral process," *id.* at 1228, even though "the concept of a voting system that is 'equally open' and that furnishes an equal 'opportunity' to cast a ballot must tolerate the 'usual burdens of voting,'" *Brnovich*, 594 U.S. at 669.

Georgia recently expanded early voting, allows no-excuse absentee voting, and has automatic voter registration. *Alpha Phi Alpha*, 700 F.Supp.3d at 1274-75. Of eligible Georgians, 98% are registered to vote;

both major party nominees for the last U.S. Senate race were black; Georgia's congressional delegation includes five black Democrats despite having only two majority-black districts; and black Georgians enjoy proportional representation in Congress. *See id.* at 1190-91, 1283, 1288, 1360, 1365, 1372. The district court even commended the State for its "great strides," but found Georgia had not reached "equal openness and equal opportunity." *Id.* at 1290. Why? An increasingly *sensitive* inquiry that transmuted voting laws "determined … to *not* be illegal under federal law" into recent "official discrimination in the state." *Id.* at 1268, 1272. The court also relied on Georgia's experience during the 1990 redistricting cycle when DOJ twice denied Georgia preclearance for its congressional plans under §5. DOJ's objection letters were treated as evidence of "Georgia's history of discrimination against Black voters," *id.* at 1270, even though DOJ was misusing §5 to demand a flagrantly gerrymandered "'max-black' plan." *Abrams v. Johnson*, 521 U.S. 74, 80 (1997). A refusal to enact an unconstitutional "max-black" plan in the 1990s justified imposing a max-black plan thirty years later.

In Louisiana, the totalities test proved even more "sensitive" still. Robinson.Br.16. After surveying some of the scant evidence of recent official discrimination, the court found that VRA violations are not "less prevalent" than in the past, just "less visible now with the elimination of federal oversight." *Nairne v. Ardoin,* 715 F.Supp.3d 808, 870 (M.D. La. 2024). In addition to invisible VRA violations, the court cited "the subliminal message of the Sheriff's Office being housed on the same floor as [a] Registrar of Voter's Office," as evidence of vote dilution. *Id.* at 874 n.461. A dilution test triggered by even the subliminal is

incapable of "filtering out all but the most meritorious claims of racial discrimination." Robinson.Br.1.

2. Once again, the problem is not poor application of the test; the problem is that the inquiry is "as empty as the resigned 'I know it when I see it' approach to obscenity." Issacharoff, *supra* at 1845. In 2025, it offers no guidance in an area where "courts and legislatures alike" desperately need "workable standards." *Barlett*, 566 U.S. at 17 (plurality); *see Holder v. Hall*, 512 U.S. 874, 881 (1994) (plurality). There is no clear guidance on how courts should account for socioeconomic disparities or past discrimination, perhaps because there is no nexus between those factors and whether *a district* creates unequal opportunity. Does a voter who can satisfy the *Gingles* preconditions but lives in a State with greater parity in car ownership have any more opportunity to elect than one who lives in a State with wider gaps?

If discrimination causes disparities in turnout rates and the like, then the remedy should be focused on turnout, not on using race to "'rig[]' elections." *United States v. Dallas Cnty. Comm'n*, 850 F.2d 1433, 1433-44 (11th Cir. 1988) (Hill, J., concurring).

II. Race-based redistricting has no end point.

Because race-based redistricting under §2 turns on "qualitative standards" that "are difficult to measure," there is no "end point" to the statute's racial preferences. *SFFA*, 600 U.S. at 224 (cleaned up). But an end point is "critical" because all racial programs are inherently "dangerous." *Id.* at 212. Section 2's effects test for maps has applied for two generations and five redistricting cycles. If race-based districting had any "efficacy," it should "no longer be necessary." *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

A. Because "equal treatment of all racial and ethnic groups" is the "norm," racial classifications must be "temporary." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989) (plurality). Even in the wake of *Brown*, desegregation injunctions could not "operate in perpetuity." *Bd. of Ed. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237, 248 (1991). They had to be "temporary" because the "ultimate objective" was to "relinquish[] … judicial control," *Freeman*, 503 U.S. at 489, not to oversee "year-by-year adjustments" to keep schools "demographically stable," *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 31-32 (1971). If race-based remedies for intentional segregation must have an endpoint, so must race-based remedies for unintentional dilution.

Yet unlike an order to desegregate public schools, majority-minority districts will never render vote-dilution claims obsolete. They do nothing to reduce racially polarized voting; if anything, they yield the opposite effect. *See Shaw*, 509 U.S. at 648; *cf. Rucho*, 588 U.S. at 751 (Kagan, J., dissenting).

To be sure, there are a finite number of majority-minority districts States can draw, but that is not much of a solution. Changes in demographics and voting patterns require States to "reassess" after every census. Robinson.Br.32. Maybe a racial group becomes numerous and compact enough to form a majority in a new district, maybe existing boundaries must change, or maybe the districts should remain the same because of their racial performance. To answer these questions, legislators and their mapdrawers are forced to "consum[e] … racial data" every decade, *Alexander*, 602 U.S. at 37, to see if §2 requires picking election "winners and losers based on the color of their skin," *SFFA*, 600 U.S. at 225. That

process "assures that race will always be relevant" and "that the ultimate goal of eliminating race as a criterion will never be achieved." *Id.* at 181 (cleaned up). The threat of §2 liability precludes a world where "race no longer matters," *Shaw*, 509 U.S. at 657, and the slim chance that a State could survive the ten-year "periodic review" without considering race does not satisfy the Constitution's "durational requirement." *SFFA*, 600 U.S. at 225. *Contra* Robinson.Br.31.

Section 2's use of race in redistricting also has no discernible end point because it does not pursue discrete and measurable goals. *Supra* §I. For school desegregation, the constitutional demand and remedial goal was obvious: treat students equally. Not so for redistricting. Congress has not "amassed a sizable record" that a little more race-based districting will produce greater equality in political participation. *Cf. Nw. Austin*, 557 U.S. at 205. To the contrary, empirical evidence suggests that electing a minority candidate has *no relationship* to minority voter turnout.[9]

Instead of proof that this remedy works, which might point toward an expiration date, what's on offer is the nebulous goal that race-based districting must continue until a State has "outrun the effects of its past." *Singleton*, 782 F.Supp.3d at 1323. Of course, that logic will force race-based districting to "extend

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[9] *See, e.g.*, C. Gay, *The Effect of Black Congressional Representation on Political Participation*, 95 Am. Pol. Sci. Rev. 589, 599 (2001) ("The optimism of some who champion minority representation (and, by extension, the districting mechanism that ensures it) as a way to increase black voter participation may be misplaced."); L. Drutman, *Elections, Political Parties, and Multiracial, Multiethnic Democracy: How the United States Gets It Wrong*, 96 N.Y.U. L. Rev. 985, 1009 (2021).

indefinitely into the future," *Allen*, 599 U.S. at 45 (Kavanaugh, J., concurring), because "[e]quality is an ongoing project in a society where racial inequality persists," *SFFA*, 600 U.S. at 370 (Sotomayor, J., dissenting). No amount of progress can cure an injury that is "ageless in its reach into the past." *Cf. Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.). There will always be "experts [to] tell us [more] is required to level the playing field and march forward together" to "achieve true equality." *SFFA*, 600 U.S. at 408 (Jackson, J., dissenting). Even in the face of "substantial progress," a court can declare "we are certainly not yet there." *Singleton*, 782 F.Supp.3d at 1322; *cf. SFFA*, Oral.Arg.Tr.83 (Oct. 31, 2022) ("Are we there yet? No."). The project will not be over "any time soon." *SFFA*, 600 U.S. at 225.

B. Nor will race-based districting soon achieve the VRA's aim to "foster our transformation to a society that is no longer fixated on race." *LULAC*, 548 U.S. at 434. "The reality is that districting inevitably has and is intended to have substantial political consequences." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). That creates perennial "incentives for those who support or oppose certain policies to cast the debate in terms of racial advantage or disadvantage." *Schuette v. BAMN*, 572 U.S. 291, 309 (2014) (plurality).

The concern is not hypothetical. One of the plaintiffs in Alabama's case, a state legislator, accused his Republican colleagues of trying to "make sure an African-American would not win." *Singleton*, 782 F.Supp.3d at 1348. The court credited that remark as evidence of racial intent. *Id.* at 1347-48. In another case, evidence that a Democratic candidate "targeted

Black voters" with racial appeals was counted as evidence that the Republican Legislature needed to draw another Democratic district. *Ala. NAACP*, 2025 WL 2451166, at *82.

Similarly, during Alabama's 2023 special session, Dr. Joe Reed—one of the most influential Alabama Democrats of the past forty years—pushed his preferred map by arguing, "our plan is the blackest."[10] This form of racial politicking is nothing new. Nor is its success as a political strategy. Indeed, "Alabama's 2010 plans" for state legislative districts "were modeled" on "max-black district maps that it inherited from Reed[]" in the 1990s. *ALBC v. Alabama*, 575 U.S. 254, 304 (2015) (Thomas, J., dissenting). Dr. Reed "set out to maximize … the number of black-majority districts," and the State "entered into a consent decree agreeing to the use of [his] Plan." *Kelley v. Bennett*, 96 F.Supp.2d 1301, 1309 (M.D. Ala. 2000). Decades on, §2 does not reduce the role of race in politics; it encourages at least one political party to remain "fixated on race." *LULAC*, 548 U.S. at 434.

III. Race-based redistricting relies on stereotypes and penalizes voters based on race.

Because drawing districts "does not, without more, diminish" anyone's vote, what's at stake is "the political power of a group." *Shaw*, 509 U.S. at 682 (Souter, J., dissenting). Grievances to vindicate "group political interests" are already constitutionally suspect, *Gill v. Whitford*, 585 U.S. 48, 72 (2018), and §2's use of "plainly overbroad" racial categories is even worse. *SFFA*, 600 U.S. at 216. Despite "countless

[10] *See* The Alabama Channel, *Alabama Joint Permanent Legislative Committee on Reapportionment* (July 17, 2023), www.youtube.com/watch?v=AGM4k9nRgXk&t=5997s (1:40:00).

differences" *within* racial groups, *id.* at 292 (Gorsuch, J., concurring), vote-dilution law permits a single voter to assert harm to a *whole racial group*, forcing States to move thousands, even millions, of voters. Nowhere else does the law tolerate litigation "on behalf of … all other black citizens" as a matter of course. *Burton v. Hobbie*, 543 F.Supp. 235, 235 (M.D. Ala. 1982); *Wesch v. Hunt*, 785 F.Supp. 1491, 1493 (S.D. Ala. 1992).

A. Section 2's application to redistricting involves racial stereotypes at every step. First, when assessing illustrative plans, courts endorse testimony about racial groups that they would be loath to indulge in any other context. The *Robinson* court credited testimony that communities must "be considered through the lens of Black experiences," rather than shared "cultural concerns." 605 F.3d at 790. Another court credited an expert who relied on "public-school-district athletics … because he did not think black children would be attending private schools." *Miss. NAACP*, 739 F.Supp.3d at 426. Still another credited an expert who opined it was important to combine rural black voters from hundreds of miles away with what he termed "Black Mobile." *Singleton v. Allen*, 690 F.Supp.3d 1226, 1305 (N.D. Ala. Sept. 5, 2023).

The polarization inquiry fares even worse. It is a vice, not a virtue, that §2 demands proof of racial voting patterns, *i.e.*, "the very stereotype the law condemns." *Powers v. Ohio*, 499 U.S. 400, 410 (1991). Even if "statistical support can be conjured up," *J.E.B. v. Alabama*, 511 U.S. 127, 139 n.11 (1994), governments can never assume that "race in itself says something about who you are," *SFFA*, 600 U.S. at 220 (cleaned up). Yet that assumption underpins race-based districting, which its supporters knew

decades ago. Dissenting in *Shaw*, Justice Stevens argued that *Gingles* "depend[s] on proving that what the Court today brands as 'impermissible racial stereotypes' are true." 509 U.S. at 678 n.3 (citation omitted). And it remains a "paradox" that the VRA "require[s]" racial stereotypes "that the Constitution … prevents reliance on." *Id.*

One solution is a double standard, permitting racial tropes if they "*benefit* th[e] group" being stereotyped. *Id.* at 678 (Stevens, J., dissenting); *see* Crum.Br.2; *id.* at 17 (endorsing role for the "belief that racial groups 'think alike, share the same political interests, and will prefer the same candidates at the polls'"). But the law cannot endorse that "offensive and demeaning" assumption. *Miller*, 515 U.S. at 911-12. *Any* use of stereotypes is "shortsighted," inhibits "progress," and "causes hurt and injury." *Id.* at 927. *Any* racial program is "infirm" if it assumes that minorities "consistently[] express some characteristic minority viewpoint." *SFFA*, 600 U.S. at 219. The rule should not be different for electoral politics.

B. Race-based districting also uses race as a negative. Like college admissions, districting is zero-sum: To increase the voting strength of a racial group, vote-dilution remedies must "discriminate *against* those racial groups that were not the beneficiaries of the race-based preference," *SFFA*, 600 U.S. at 212. It is not only offensive but a contradiction in terms to say that "the right to vote free of racial discrimination" permits the use of race to "advance" and "benefit[]" one race of voters. Crum.Br.4, 17; *cf. Parents Involved v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 742-43 (2007) (plurality) (rejecting "benign racial classifications"); *Adarand*, 515 U.S. at 225-30 (same); *SFFA*, 600 U.S. at 257 (Thomas, J., concurring). Yet under §2, it is not

hard for courts to rationalize benefits for some racial groups and penalties for others.

In Alabama, the district court recognized that "[f]ewer splits are generally better" when discussing a majority-black community of interest, *Singleton*, 582 F.Supp.3d. at 1008, but held that splits are just "inevitable" for a majority-white community, *Singleton*, 782 F.Supp.3d at 1275. Only the court's antecedent view that white voters cannot suffer a "racially discriminatory harm" could justify the differential treatment. *Id.* at 1276. "How else but 'negative' can race be described," *SFFA*, 600 U.S. at 219, when a majority-white community is divided, but not "cracked," because the latter term applies only to "the dispersal of blacks"? *Singleton*, 782 F.Supp.3d at 1276; *cf. Ames v. Ohio Dep't Youth Servs.*, 145 S.Ct. 1540, 1546-47 (2025).

IV. The Fifteenth Amendment does not save race-based redistricting under §2's indeterminate dilution test.

The Fifteenth Amendment allows Congress to enforce the prohibition on race-based denials or abridgements of the right to vote. Congress passed §2 pursuant to that authority. The Robinson Appellants argue (at 12) that States may classify their citizens based on race whenever done pursuant to enforcement legislation, as if an equal-opportunity-in-admissions statute would have saved Harvard's affirmative action program. But §2 as applied to redistricting is not appropriate legislation to enforce the Fifteenth Amendment because it violates the Fourteenth Amendment.

Enforcement legislation must be consistent with "the letter and spirit of the constitution," *Katzenbach*,

383 U.S. at 326, even if the legislation is "otherwise proper," *Miller*, 515 U.S. at 927. And the letter and spirit demand that "all racial classifications, imposed by whatever federal, state, or local governmental actor" are "narrowly tailored measures that further compelling government interests." *Adarand*, 515 U.S. at 227. When a State complies with enforcement legislation like bans on literacy tests and polls taxes, or when §2 limits laws regulating the time, place, or manner of voting, no one is treated differently based on race. But when §2 demands race-based districts, that harm ensues.

Thus, unlike ordinary enforcement legislation or many other applications of §2, the statute's authorization of race-based redistricting is not an appropriate means to enforce the Fifteenth Amendment unless it survives strict scrutiny. *See Oregon v. Mitchell*, 400 U.S. 112, 128 (1970) (opinion of Black, J.) ("Congress has no power under the enforcement sections to undercut the [Thirteenth, Fourteenth, and Fifteenth] amendments' guarantees of personal equality and freedom from discrimination."); *cf. Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732-33 (1982); *Ricci*, 557 U.S. at 594 (Scalia, J., concurring). *Contra* Robinson.Br.33 (suggesting this case threatens other "permanent," "prophylactic" legislation). The Court cannot presume that because §2 is enforcement legislation, its demand for race-based districts is narrowly tailored to further a compelling interest. *Cf. Miller*, 515 U.S. at 926 (reading of §5 raised "serious constitutional concerns"); *id.* at 922 (no "blind judicial deference"); *SFFA*, 600 U.S. at 217-18 & n.5. Congress may have thought §2 was a "rational means to effectuate the constitutional prohibition of racial discrimination in

voting," *Katzenbach*, 383 U.S. at 324, but for race-based action, only "the most exact connection between justification and classification" can suffice, *Adarand*, 515 U.S. at 236. Otherwise, Congress could "enforce" the Fifteenth Amendment by *denying* the franchise based on race.

To be sure, the Court rejected "the constitutional argument presented" in *Allen* that "Congress in 1982 could [not] constitutionally authorize race-based redistricting under § 2." 599 U.S. at 45 (Kavanaugh, J., concurring). But the Court never considered whether §2's continued use of race "compl[ies] with strict scrutiny," "use[s] race as a stereotype or negative," or will ever "end." *SFFA*, 600 U.S. at 213. "Alabama did not raise [those] argument[s]." *Allen*, 599 U.S. at 45 (Kavanaugh, J., concurring). Since *Allen*, the Court has confirmed that the "consideration of race to achieve racial equality" at Harvard was unconstitutional. *SFFA*, 600 U.S. at 361 n.34 (Sotomayor, J., dissenting). And Harvard's "consideration of race" was "[j]ust like" the "consideration of race" needed for "drawing district lines that comply with the Voting Rights Act." *Id.* Both are forms of racial discrimination, and "all of it" must be eliminated. *Id.* at 206 (majority).

CONCLUSION

The Court should affirm.

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