Nos. 21-1086, 21-1087

In the Supreme Court of the United States

JOHN H. MERRILL, *et al.*,
Appellants,
v.
EVAN MILLIGAN, *et al.*,
Appellees.

JOHN H. MERRILL, *et al.*,
Petitioners,
v.
MARCUS CASTER, *et al.*,
Respondents.

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

BRIEF OF THE PROJECT ON FAIR REPRESENTATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS/PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Project on Fair Representation is a public-interest organization committed to the principle that racial and ethnic classifications are unconstitutional, unfair, and harmful. It works to advance race-neutral rules in education, government action, and voting. The Project pursues these goals through education and advocacy and has been involved in several cases before the Court involving these important issues.[2]

The Project has a direct interest in this case because it opposes racial gerrymandering of all kinds. Eliminating racial sorting in redistricting is not only what our Constitution requires, but it is also a needed remedy for our Nation's increasingly polarized and racialized politics. Single member districts drawn on race-neutral principles that connect compact, contiguous neighborhoods (for example, by using elementary-school attendance zones as the building blocks) may not have the racial percentages sought by political parties, but they help us move past racial stereotyping and incentivize candidates for office and elected representatives to find more middle ground, based on what their constituents want.

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

[2] *E.g.*, *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016); *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Shelby Cty. v. Holder*, 570 U.S. 529 (2013); *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

INTRODUCTION

"In respect of civil rights, common to all citizens, the constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights."

Plessy v. Ferguson, 163 U.S. 537, 554 (1896) (Harlan, J., dissenting)

Justice Harlan was right. The constitutional sea change wrought by the Thirteenth, Fourteenth, and Fifteenth Amendments requires governmental colorblindness. It is not a mandate for a judicially created society of perfect equality (as if that were within courts' power). Nor is it permission for courts to ensure a "fair" allocation of political power among racial groups. Rather, the colorblind constitution is like the charred stake that Odysseus drove into the eye of Cyclops to escape that monster's man-eating tyranny. The prohibitions in the Reconstruction Amendments require a complete and fundamental destruction of the government's ability to use—and even to perceive—racial categories, categories created to justify and perpetuate the oppressive caste systems of slavery and Jim Crow.

Sadly, despite its recognition that racial categories "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," *Shaw v. Reno*, 509 U.S. 630, 642, 643 (1993) ("*Shaw*") (quoting *Hirabayashi v. United States,* 320 U.S. 81, 100 (1943)), this Court has not always insisted on colorblindness. The various exceptions and

confusions regarding this principle—however "narrow" or well intentioned they may be—have in practice blessed a continuation of racial discrimination that the Fourteenth and Fifteenth Amendments forbid. As everyone who lived through the summer of 2020 knows, our society is now more racialized and divided than perhaps any time since the Civil Rights era.

This polarization is particularly acute in disputes about redistricting. More and more, fights over gerrymandering have been based on "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, 912 (1995) (quoting *Shaw*, 509 U.S. at 647).

The decision below is but one example. Everyone recognizes that Section 2 of the Voting Rights Act as originally understood was passed to make good on the promise of the Fifteenth Amendment to end racial discrimination in the rules governing voting. Yet, as this case illustrates, in the hands of the courts it has come to require just the opposite—not merely race-consciousness to achieve the "right" kind of open racial politics, whatever that may mean, but a prioritization of race above every other criteria to achieve the proportional representation of different racial groups. As plaintiffs' experts' statistical modelling shows, it's not possible to use race-neutral criteria to create the kind of voting map for Alabama that the district court held that Section 2 requires.

As Petitioners have ably argued, this interpretation of the current version of Section 2 is impermissible under this Court's precedents. Yet the blame cannot be laid solely on the judges who wrote the decision below. As the Chief Justice noted in response to the petition for a writ of certiorari, much of the fault lies with this Court, and in particular its decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986): "[I]t is fair to say that *Gingles* and its progeny have engendered considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim." *Merrill v. Milligan*, 595 U.S. ___, ___ (2022) (Roberts, C.J., dissenting from grants of applications for stays). The Chief Justice correctly noted that these problems cry out for this Court's attention and correction.

Rather than claiming to find a mandate in the mare's nest of this Court's Section 2 jurisprudence, this Court should return to the only interpretive framework that the Constitution permits—race neutrality. Previous attempts to apply or clarify *Gingles*' standard for vote dilution claims have led courts into interpretive blind alleys that do violence to the text of the statute and the Constitution. The entire "remedial mechanism" this Court has embraced "encourages federal courts to segregate voters into racially designated districts to ensure minority electoral success," a "collaboration in what may aptly be termed the racial 'balkanization' of the Nation." *Holder v. Hall*, 512 U.S. 874, 892 (1994) (Thomas, J., joined by Scalia, J., concurring in the judgment) (quoting *Shaw*, 509 U.S. at 658).

Not all "who choose wrong roads perish; but their rescue consists in being put back on the right road. A sum can be put right: but only by going back til you

find the error and working it afresh from that point, never by simply going on." C.S. Lewis, *The Great Divorce* viii (2000 ed.). The road of race-conscious districting is wrong. The very attempt to use racial distinctions "for good" is self-defeating. That is why Justice Harlan believed not only that the government may not use racial categories, but that it cannot even be trusted "*to know* the race of those entitled to be protected in the enjoyment of [their] rights." *Plessy*, 163 U.S. at 554 (Harlan, J., dissenting) (emphasis added).[3]

As this Court has explained, racial "classifications promote 'notions of racial inferiority and lead to a politics of racial hostility,' 'reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin,' and 'endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict.'" *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007) (plurality opinion) (citations omitted).

There is only one path out: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Id.* at 748. As Justice Thomas has noted, "Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law." *Adarand Constructors, Inc. v. Peña*, 515 U.S.

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[3] This Court's assertion in *Shaw*, 509 U.S. at 646, that "the legislature always is *aware* of race when it draws district lines" is incorrect. In this case, for instance, the mapdrawer was not able to see any racial demographic information throughout the drawing process. *See* JA274-75; SJA88; MSA34.

200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment) (cleaned up).

The alternative to colorblindness is Justice Blackmun's *Animal Farm*-esque koan that "[i]n order to get beyond racism, we must first take account of race. . . . And in order to treat some persons equally, we must treat them differently." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., dissenting).

There is no compromise possible between these two alternatives, and this Court's attempts to have it both ways in the Section 2 context have failed. Pretending otherwise has required what Justice Thomas, joined by Justice Scalia, rightly described as judicial "equivocation" and "dissembling," "an empty incantation—a mere conjurer's trick that serves to hide the drive for proportionality that animates our decisions." *Holder*, 512 U.S. at 942, 943–44 (Thomas, J., joined by Scalia, J., concurring in the judgment). This "practice should not continue. Not for another Term, not until the next case, not for another day." *Id.* at 944.

This Court should finally and fully reject race-conscious districting in voting rights cases. Section 2 and the Constitution demand nothing less.

SUMMARY OF ARGUMENT

For decades, this Court has with few exceptions condemned racial gerrymandering for what it is, an "odious" and destructive practice incompatible with the clear text of the Constitution. Alongside this, however, this Court has also rendered a series of "vote di-

lution" cases anchored in *Gingles* that have taken Section 2 of the Voting Rights Act to allow—or as the district court read them, to require—just the opposite. This Court should overrule *Gingles* and its progeny for at least three reasons.

First, Section 2's text does not authorize vote dilution claims. Rather, it applies to measures that govern voting access: rules about any "voting qualification or prerequisite to voting, or standard, practice, or procedure." A return to the plain meaning of this text is justified for all the reasons that Justice Thomas set forth in his concurrence in *Holder v. Hall*, and—additionally—because *Gingles*' broader construction, creating a statutory prohibition on state action that "results in" vote dilution, exceeds Congress's "power to enforce" the Fifteenth Amendment "by appropriate legislation." U.S. Const. amend XV, § 2.

Relying heavily on legislative history, *Gingles* and its progeny construed the 1982 Amendments to the Voting Rights Act as a legislative overruling of *Bolden*'s "intent test" for vote dilution, going so far as to accept the claim that the amendments to Section 2 were "the best example of Congress' power to enact implementing legislation that goes beyond the direct prohibitions of the Constitution itself." *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 482 (1997) (quoting S. Rep. 97-417, 38 (1982)). But under *City of Boerne v. Flores*, Congress's authority "to enforce" a constitutional guarantee "by appropriate legislation" does not allow it to expand or rewrite that guarantee. 521 U.S. 507, 519–20 (1997). Rather, enforcing legislation must be "congruen[t]" and "proportional[]" to the constitu-

tional provision it seeks to support. *Id.* at 520. Applying the "results" test adopted by *Gingles* to vote dilution is incompatible with this requirement.

Second, extending Section 2 to apply to vote dilution claims puts courts in an impossible position. Section 2 expressly states that it may not be read to require "a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b). But determining whether a vote has been "diluted" requires just this inquiry. Rather than say the quiet part out loud, courts have instead "distort[ed] [their] decisions to obscure the fact that the political choice at the heart of [this Court's] cases rests on precisely the principle the Act condemns," *Holder*, 512 U.S. at 936 (Thomas, J., joined by Scalia, J., concurring in the judgment), an untenable and discrediting state of affairs that this Court has tolerated for far too long.

Third, *Gingles*' *de facto* requirement of proportional representation violates the Constitution for all the reasons set forth in the introduction. The effort to ensure that the body of elected officials "looks like" the body politic is "racial balancing, which is patently unconstitutional" under the Fourteenth Amendment. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

ARGUMENT

Something must be done about *Gingles*. This was plain from the moment that case was decided. As this Court recently noted, while *Gingles* has become "our seminal § 2 vote-dilution case," it is remarkably shy about what the text of that statute requires. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2337 (2021). *Gingles* "quoted the text of amended § 2 and

then jumped right to the Senate Judiciary Committee Report, which focused on the issue of vote dilution." *Id.* And while many "subsequent vote-dilution cases have largely followed the path that *Gingles* charted," "[t]oday, our statutory interpretation cases almost always start with a careful consideration of the text." *Id.*

Of course, *Gingles* was not decided today, but more than thirty years ago. Especially in matters of statutory interpretation, the principle of *stare decisis* puts a heavy thumb on the scale in favor of the status quo. But it is not so heavy that it cannot be outweighed "when governing decisions are unworkable or are badly reasoned." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). *Gingles* is both, and its reimagined version of Section 2 is unconstitutional to boot. This Court should say so and return to that statute's textual requirements.

I. Section 2 Does Not Authorize Vote Dilution Claims.

A. Redistricting Decisions Are Not Covered by Section 2's Text.

The existence of a "Section 2 vote dilution claim" is not something any objective reader can find in the text of that provision. In both its original and amended forms, Section 2 applies only to state actions establishing a "voting qualification or prerequisite to voting, or standard, practice, or procedure." 52 U.S.C. § 10301(a).

As Justice Thomas explained at length more than two decades ago, these terms plainly refer to government action that "regulates citizens' access to the ballot—that is, any procedure that might erect a barrier

to prevent the potential voter from casting his vote." *Holder*, 512 U.S. at 917 (Thomas, J., joined by Scalia, J., concurring in the judgment). Redistricting decisions, however, affect no one's right to cast a vote, but only the geographic, demographic, and political context in which that vote is counted.

Tellingly, *Gingles* said virtually nothing about this issue, but instead relied on the legislative history as "the authoritative source for legislative intent" justifying Section 2's application to vote dilution claims. 478 U.S. at 43 n.7. Justice Thomas's opinion in *Holder* explaining why this was unsupportable has never been refuted. The text of Section 2 simply cannot be squared with *Gingles*' holding that that provision authorizes vote dilution claims.

B. Any Other Interpretation Would Create a Statute that Exceeds Congress's Authority Under the Fifteenth Amendment.

Considerations of constitutional avoidance further underscore the need to return to the textual limits of Section 2, as application of *Gingles*' "results test" to vote dilution claims would exceed Congress's "power to enforce" the Fifteenth Amendment "by appropriate legislation." U.S. Const. amend XV, § 2.

This Court has held that "action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose." *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality); *see id.* at 65 ("That Amendment prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote 'on account of race, color, or previous condition of servitude.'"). A Fourteenth Amendment violation likewise

requires intentional discrimination. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971); *see also Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 481 (1997) ("[A] plaintiff bringing a constitutional vote dilution challenge, whether under the Fourteenth or Fifteenth Amendment, has been required to establish that the State or political subdivision acted with a discriminatory purpose.").

Congress has "power to enforce" these amendments "by appropriate legislation." U.S. Const. amend. XIV, § 5; *id.* amend XV, § 2. But as this Court explained in *City of Boerne*, "[t]here must be a congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end." 521 U.S. at 520. This emphasis on "congruence and proportionality" appropriately limits Congress to adopting "measures that remedy or prevent unconstitutional actions," and it prohibits Congress form adopting "measures that make a substantive change in the governing law." *Id.* at 519.

The facts of *City of Boerne* run parallel to this case. Congress passed the Religious Freedom Restoration Act of 1993 ("RFRA"), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.*, to prohibit governmental entities from "substantially burden[ing]" the exercise of religion unless it "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb–1. RFRA was a direct response to this Court's decision in *Employment Division, Dep't of Human Resources of Oregon v.*

Smith, 494 U.S. 872 (1990), which held that neutral laws of general applicability do not violate the religious liberties granted in the First Amendment. 494 U.S. at 878.

City of Boerne explained that Congress's power to enforce the Fourteenth Amendment (which incorporates the First Amendment) is "'remedial'" and "inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States." 521 U.S. at 519 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)). In other words, legislation enforcing constitutional provisions must be "congruen[t] and proportional[]" to the right needing protection. *Id.* at 520. Crucially, Congress cannot redefine constitutional rights through implementing legislation, which is what it tried to do with RFRA.

This case is no different. In *Bolden*, this Court held that a violation of the Fifteenth Amendment requires intent to discriminate, and interpreted Section 2 of the Voting Rights Act accordingly. *Gingles* relied heavily on its belief that Congress responded with the 1982 Amendments to remove the intent requirement from Section 2, despite invoking on the Fifteenth Amendment to justify the legislation. Just like *City of Boerne*, Congress responded (at least in *Gingles*' view) to a decision of this Court by attempting to expand constitutional rights and protections through legislation. The Senate Report that *Gingles* cited as "authoritative" even acknowledged that the 1982 Amendments were an attempt "to enact implementing legislation that goes beyond the direct prohibitions of the Constitution itself." S.Rep. No. 97-417, at 39.

Gingles' version of Section 2 is thus not "congruen[t] and proportional[]" to the right needing protection, and is unconstitutional as much as it makes unlawful statutes that do not reflect discriminatory intent.[4]

II. *Gingles*' Framework for Vote Dilution Claims is Unworkable.

Any theory of vote dilution necessarily relies on a measure of minority voting strength, which includes a comparison between the proportion of the population comprising the minority group versus the electorate at large. *Gingles* decimates any remaining distinction between ensuring that elections are "equally open to participation by members" of each race and the associated disclaimer that Section 2 does not create "a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301.

As Justice O'Connor noted in her separate opinion concurring in the judgment, the majority "creat[ed] . . . a right to a form of proportional representation" for "all geographically and politically cohe-

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[4] Of course, sometimes a disparate impact is the result of discriminatory intent. As Justice Scalia once explained, if properly considered, disparate impacts can "smoke out, as it were, disparate treatment." *Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring). And there is a compelling argument to be made that the "*Zimmer* factors" eventually incorporated into *Gingles*' "effects test" should be better understood as relevant, but not dispositive, indicia to the extent discriminatory intent can be inferred, an approach this Court endorsed in *Rogers v. Lodge*, 458 U.S. 613, 621 (1982).

sive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts." *Gingles*, 478 U.S. at 85 (O'Connor, J., joined by Burger, C.J., and Powell and Rehnquist, JJ., concurring in the judgment). *Gingles* "makes actionable every deviation from usual, rough proportionality in representation for any cohesive minority group as to which this degree of proportionality is feasible," resulting in a *de facto* requirement of proportional representation. *Id.* at 97. Doing so "disregarded the balance struck by Congress in amending § 2," and was "inconsistent with § 2's disclaimer of a right to proportional representation." *Id.* at 85, 96.

And that opened the door to serious abuses: "a steady stream of § 2 vote-dilution cases," which this Court at times has described as having "proliferated in the lower courts," thereby elevating race to a predominant consideration in voting law. *Brnovich*, 141 S. Ct. at 2333. So rather than stamping out the "sordid business" of "divvying us up by race," *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., joined by Alito, J., concurring in part, concurring in the judgment in part, and dissenting in part), *Gingles* moved racial considerations to the fore.

The decision below is just such an example. Indeed, it manifests the *de facto* requirement that *Gingles* imposed and mandates racial discrimination in the redistricting process. As plaintiffs' own modeling shows, there is no race-neutral way to create a congressional map for Alabama that would result in two majority-black districts. Not one of the over two million race-neutral maps created by one of plaintiffs' ex-

perts contained two such districts. That result required racial discrimination, and, indeed, the use of race as the predominant factor.

In this way, *Gingles*' "undue emphasis on proportionality" has reached the point where it has "defeat[ed] the goals underlying the Voting Rights Act." *Johnson v. De Grandy*, 512 U.S. 997, 1028 (1994) (Kennedy, J., concurring in part and concurring in judgment). It unconstitutionally "subordinate[s] traditional race-neutral . . . principles . . . to racial considerations." *Miller*, 515 U.S. at 916. And it perpetuates "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.'" *Id.* at 912 (quoting *Shaw*, 509 U.S. at 647).

III. Requiring Race-Conscious Redistricting Violates the Fourteenth Amendment.

"It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids." *Id.* at 927–28. The same could be said about the Fifteenth Amendment. Yet that is exactly what *Gingles* has wrought, embroiling states and the courts "in the enterprise of systematically dividing the country into electoral districts along racial lines—an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of 'political apartheid.'" *Holder*, 512 U.S. at 905 (Thomas, J., joined by Scalia, J., concurring in the judgment) (quoting *Shaw*, 509 U.S. at 647). Perversely, it does so

in construing a statute passed pursuant to a constitutional provision that expressly prohibits discriminating against voters on the basis of race.

This must cease. If a State "may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, buses, golf courses, beaches, and schools," *Miller*, 515 U.S. at 911 (citing *New Orleans City Park Improvement Ass'n v. Detiege,* 358 U.S. 54 (1958) (per curiam) (public parks); *Gayle v. Browder,* 352 U.S. 903 (1956) (per curiam) (buses); *Holmes v. Atlanta,* 350 U.S. 879 (1955) (per curiam) (golf courses); *Mayor of Balt. v. Dawson,* 350 U.S. 877 (1955) (per curiam) (beaches, bathhouses, and swimming pools); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (schools)), then why should it be able to work such segregation in matters of voting, which are of even greater importance? It shouldn't; and this Court has said it can't. *See, e.g.*, *Shaw v. Hunt*, 517 U.S. 899, 908 (1996). A *de facto* requirement of proportional representation is nothing less than "racial balancing, which is patently unconstitutional." *Grutter*, 539 U.S. at 330.

"Our constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). It is this "'moral imperative of racial neutrality [that] is the driving force of the Equal Protection Clause,' and racial classifications are [thus] permitted only 'as a last resort.'" *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518, 519 (1989) (Kennedy, J., concurring in part and concurring in judgment)).

Gingles' reinterpretation of Section 2 is incompatible with this requirement, and it should therefore be overruled.

CONCLUSION

The judgment of the district court should be reversed and this Court should overrule *Gingles*.

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Respectfully submitted,

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