Nos. 24-109, 24-110

In the
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 13 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTERESTS OF *AMICI CURIAE*

The States of Alabama, Georgia, Idaho, Indiana, Iowa, Kansas, Mississippi, Montana, Nebraska, Oklahoma, South Carolina, Tennessee, Texas, and West Virginia respectfully submit this brief as *amici curiae* in support of Appellees.

"Redistricting is never easy." *Abbott v. Perez*, 585 U.S. 579, 585 (2018). And for many States, litigation-free redistricting is now impossible. Louisiana's recent travails prove the point. Louisiana was enjoined in the 1990s because its congressional plan with two majority-black districts violated the Equal Protection Clause. Then, in 2022, the State was enjoined under §2 of the Voting Rights Act for *not* enacting a plan with two majority-black districts. In response, the State enacted such a plan. What next? Another injunction for again violating the Equal Protection Clause. What Louisiana told this Court three years ago "with some justification" remains true today: "States need clarity." *Merrill v. Milligan*, 142 S.Ct. 879, 881 (2022) (Kavanaugh, J., concurring) (quoting *Amici* Br. for Louisiana et al. 25).

This quagmire is the result of an atextual and unconstitutional approach to §2 on full display in Louisiana's case. When the district court in *Robinson v. Ardoin* invoked §2 to enjoin Louisiana's 2022 Plan, the court largely ignored §2's text. Other courts—from Georgia to Washington—have recently done the same. That judicially driven expansion of the VRA departs from the guardrails imposed by Congress in 1982, dilutes the term "vote dilution" to the point of meaninglessness, and provides no "good reasons" for race-based districts. That malleable misreading has *increased* §2 liability for States this past redistricting cycle, even as the barriers to voting that inspired the

VRA fade further into the past. That version of §2 will require race-based redistricting indefinitely into the future.

There are two ways out of the thicket. One is to remind lower courts that the text of §2 is drawn from this Court's precedents in *Whitcomb v. Chavis* and *White v. Regester*. Those decisions make clear that there is equal "opportunity" "to participate in the political process" (and thus no §2 violation) if voters are "allowed to register," "vote," "choose the political party they desire[] to support," and "participate in its affairs." *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971). That is a test Legislatures can understand and courts can apply. More importantly, it is the test Congress enacted.

The other is to declare the present-day application of §2 to redistricting plans unconstitutional. "[R]ace-based redistricting cannot extend indefinitely into the future." *Allen v. Milligan*, 599 U.S. 1, 45 (2023) (Kavanaugh, J., concurring). But in 2025, six decades after the passage of the VRA, §2's demands for race-based redistricting show no signs of letting up. If the *Robinson* view of vote dilution is permitted by §2, the statute will forever require "federal courts … to inject themselves into the most heated partisan issues" unguided by any "clear standards." *Rucho v. Common Cause*, 588 U.S. 684, 704 (2019) (cleaned up). Worse still, it will require race-based actions by States and courts with "no end … in sight." *SFFA v. Harvard*, 600 U.S. 181, 213 (2023). For the sake of the States, our citizens, and the courts, this Court should fix this problem now.

SUMMARY OF ARGUMENT

This racial gerrymandering appeal involves an area of the law that is "notoriously unclear and confusing." *Merrill*, 142 S.Ct. at 881 (Kavanaugh, J., concurring). But the confusion is not the product of the Court's racial gerrymandering jurisprudence standing alone, for "a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails." *Rucho*, 588 U.S. at 709. It demands only "the elimination of a racial classification." *Id.* And it is not hard to identify a racial classification here based on direct evidence, the serpentine lines of Louisiana's 2024 plan, and Louisiana's admissions that District 6 is the product of "heavy-handed considerations of race." La.Br.35.

The confusion the Court must resolve arises from the interpretation of Section 2 adopted by the *Robinson* courts. Those courts held that Louisiana's 2022 Plan likely violated the Voting Rights Act, even though there was "no evidence of Black voters being denied the right to vote." *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 847 (M.D. La. 2022). Louisiana understandably blames *Robinson* for the racial quotas that shaped SB8. But that does not answer whether SB8 is constitutional. It tees up at least two more questions: (1) whether *Robinson* employed "a proper interpretation of the VRA" based on text and precedent, *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 595 U.S. 398, 404 (2022), and, if so, (2) whether "the authority to conduct race-based redistricting can[] extend indefinitely into the future," *Allen*, 599 U.S. at 45 (Kavanaugh, J., concurring).

This Court's precedents alongside the text and history of §2 show that *Robinson*'s reading of §2 was not "proper." It is atextual and ahistorical, leaving no constitutional basis for insisting on a §2 remedy.

The Court need only return to its own precedents to provide a meaningful standard for courts and States alike. In 1982, Congress amended §2 to codify the test for vote dilution employed by this Court in *Whitcomb v. Chavis* and *White v. Regester*. The test has two necessary elements: challengers must show that members of the minority group have less opportunity than others to (1) elect representatives of their choice and (2) participate in the political process. The second element, as defined by *Whitcomb* and *White*, requires evidence that members of the minority group are not allowed to register, vote, choose a preferred party, or participate in its affairs.

Such evidence is absent from this record, as the *Robinson* district court acknowledged. Still, that court held that §2 likely requires Louisiana to sort voters by race. That standardless expansion of §2 should be squarely rejected.

The *Robinson* interpretation of the VRA would render §2 unconstitutional, even if it were "proper" as a statutory matter. It cannot provide "ordinary people" sufficient guidance about "what conduct is prohibited," *Sackett v. EPA*, 598 U.S. 651, 680 (2023), and its race-based redistricting has no end in sight. *Cf. SFFA*, 600 U.S. at 213.

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. In decades past, *Gingles* 1 would have weeded out many such challenges, but recent advances in algorithmic mapmaking have made that precondition a mere speedbump, as plaintiffs can now create millions of maps to finetune their preferred mix of race and traditional redistricting criteria. Conversely, many courts accustomed to the *Gingles* preconditions have neglected the *Whitcomb* guard-rails, leading to completely unpredictable findings of liability. Whether on statutory or constitutional grounds, the Court must provide clarity. Either some courts are reinventing §2 to provide new guarantees that Congress never did, or the statute is so malleable that it cannot continue justifying race-based action. Like Louisiana, *Amici* States respectfully request an answer regarding how to enact lawful districts.

ARGUMENT

I. SB8 Triggers Strict Scrutiny.

Amici States sympathize with Louisiana, whose saga proves how impossible it has become, now almost sixty years after the passage of the VRA, to comply simultaneously with our color-blind Constitution and increasingly expansive approaches to §2. Even so, the Court risks harming the States and our citizens by condoning Louisiana's 2024 attempt at the impossible. Whatever race-based districting this Court permits today, §2 plaintiffs and courts will demand tomorrow. The Robinson Appellants, for example, say Louisiana must be afforded "'breathing room' in its effort to comply with §2," Robinson.Br.23, but such grace was not extended to Louisiana's decision *not* to racially gerrymander. To ensure that the option to

gerrymander does not become an "implicit command that States engage in presumptively unconstitutional race-based districting," *Miller v. Johnson*, 515 U.S. 900, 927 (1995), the Court must determine whether SB8 was based on a proper interpretation of §2. *See* Callais.Br.40.

A. Race Predominated in SB8.

"[D]iscerning the subjective motivation of those enacting [a] statute is … almost always an impossible task." *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting). And the "starting presumption that the legislature acted in good faith" may be overcome only with the clearest proof, *Alexander v. S.C. NAACP*, 602 U.S. 1, 10 (2024), such as when the State's conceded "aim" is to "disenfranchis[e] practically all of" one racial group, *Hunter v. Underwood*, 471 U.S. 222, 230 (1985), or in "rare cases in which a statistical pattern of discriminatory impact" is so stark as to be "'tantamount for all practical purposes to a mathematical demonstration' that the State acted with a discriminatory purpose," *McCleskey v. Kemp*, 481 U.S. 279, 293 n.12 (1987) (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960)).

This is one of the rare cases, for even Louisiana admits the "intensive racial focus" behind District 6. La.Br.21. The record is replete with both direct and circumstantial evidence that "betray[s] the State's aim of segregating voters on the basis of race." *Alexander*, 602 U.S. at 35. The legislative transcripts are saturated with "express acknowledgement[s]" "that race played a role in the drawing of district lines." *Id.* at 8; *see, e.g.*, J.S.48a, 52a-53a; *Robinson*.Stay.App.49-

54, 58-61.[1] That "direct evidence," which "amounts to a confession of error," accompanies "powerful circumstantial evidence" akin to "the 'strangely irregular' … district lines in *Gomillion v. Lightfoot*." *Alexander*, 602 U.S. at 8, 35; *see, e.g.*, *Robinson*.Stay. App.61-67.

Louisiana contends that while "race played a significant role" in shaping the plan, so did incumbency protection. La.Br.39. And if "incumbency protection was a non-negotiable criterion," then race, by definition, could not predominate. La.Br.38. Not so.

First, if a State's express goal of cracking a minority population significantly shaped its districts, the State's parallel goal of protecting incumbents would not make its districting any less race-predominant. *See Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 189 (2017). Here, Louisiana's racial quota "had a direct and significant impact on the drawing of at least some of District [6]'s boundaries." *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 274 (2015).

Second, incumbency protection was plainly *not* non-negotiable for the simple reason that SB8 protected only five of six incumbents, whereas Louisiana's 2022 Plan protected all six. In 2024, when race conflicted with protecting incumbent Rep. Garret Graves, race trumped. *See* JS.App.29a, 50a. No one thinks Louisiana ended up with two majority-black districts as a mere byproduct of pursuing incumbency protection. Rather, the State acted to achieve its

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[1] *Amici* States' brief uses the same citation conventions as Louisiana's. *See* La.Br.2 n.1.

"announced racial target." *Cooper v. Harris*, 581 U.S. 285, 300 (2017).

The Robinson Appellants cite *Alexander* as requiring Appellees to present an "alternative map showing that the State could have *both* created a second Black-opportunity district *and* accomplished the Legislature's political priorities in a more compact plan." Robinson.Br.20. That gets *Alexander* backward. An express racial target (like two majority-black districts) is *proof* of a gerrymandering claim, not a *defense* against one. *See Alexander*, 602 U.S. at 8. And if an alternative map were needed, the 2022 Plan would do. It protected more incumbents, was more compact, and had fewer parish splits. J.S.153a, 161a, 173a. That is why it was "the Legislature's first preference": it better advanced race-neutral principles without "heavy-handed considerations of race." La.Br.35.

B. Pressure from the *Robinson* Courts Does Not Spare SB8 from Strict Scrutiny.

Louisiana tries to shift the blame, insisting that when a federal court orders an additional majority-minority district, race cannot, by definition, predominate in the resulting plan. *See, e.g.*, La.Br.34. Similar attempts at deflection didn't work for North Carolina in *Shaw v. Hunt* or Georgia in *Miller v. Johnson*. In *Shaw*, for example, the Department of Justice had "[d]uly chastened" North Carolina "for not creating a second majority-minority [congressional] district." 517 U.S. 899, 902 (1996). When revising "its districting scheme," the State "expressly acknowledged" that the "overriding purpose" of the new plan "was to comply with the dictates" of DOJ. *Id.* at 902, 906. Rather

than absolve North Carolina, this Court affirmed that race predominated and went on to reject the State's §2 defense. *Id.* at 906, 914-17. Likewise here, despite *Robinson*'s "maximization demands," *Miller*, 515 U.S. at 918, the 2024 Plan remains Louisiana's. Blaming *Robinson* is understandable but does not spare SB8 from strict scrutiny.

C. Only A "Proper Interpretation" of §2 Could Possibly Justify Race-Based Districting.

"[W]hen a State invokes § 2 to justify race-based districting, 'it must show … that it had "a strong basis in evidence" for concluding that the statute required its action.'" *Wisconsin Legislature*, 595 U.S. at 402 (quoting *Cooper*, 581 U.S. at 292). Whatever "leeway" a State might enjoy depends on the State operating "under a *proper* interpretation of the VRA." *Id.* at 404 (emphasis added). Thus, if a State gets the law right, courts might defer to its factual determinations. But if a State "ask[s] the wrong question," its implementation of a flawed interpretation of the VRA will not satisfy strict scrutiny. *ALBC*, 575 U.S. at 279.

Appellants and their *amici* assert that, even if the *Robinson* courts misapplied §2, those mistaken rulings provide "good reasons" to justify racially gerrymandering. LA.Br.42-46; Robinson.Br.43; D.C. Br.14-16. In their view, this case should not be "treated … like a mine-run racial-gerrymandering case where a State purports to comply with the VRA in the abstract." LA.Br.46. This test is irreconcilable with *Wisconsin Legislature*, makes little sense analytically, and does no favors for the States.

Again, *Wisconsin Legislature* and *Cooper* demand a "proper interpretation of the VRA." The *Robinson* courts' misinterpretation of §2 cannot justify SB8. If a lower court, for example, faulted a state for failing to draw crossover districts, that couldn't greenlight racially gerrymandering such districts into existence. *See Bartlett v. Strickland*, 556 U.S. 1 (2009); *cf. Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 (2022) ("[I]n no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights.").

And Appellants' proposal would create an unenviable jurisprudential anomaly for States. The Constitution would reject a State's racial gerrymander if propped up by VRA compliance "in the abstract," but would permit an identical plan following an erroneous §2 decision from a federal court. Thus, two rounds of map drawing and at least one trip to the federal courthouse would be needed to enact a plan that hit racial quotas and accomplished some (though not all) of the State's legitimate, non-racial priorities. That is a losing proposition for States.

The United States (at 27), relying on *Cooper*, suggested that only the three *Gingles* preconditions are relevant to the "good reasons" inquiry. But *Cooper*'s assumption was quite clear: a State could avoid a constitutional violation when sorting voters by race only if "it had 'good reasons' to think that it would transgress *the Act* if it did not draw race-based district lines." 581 U.S. at 293 (emphasis added); *see also id.* at 282, 301. "The Act" requires a plaintiff to prove (1) less opportunity to elect *and* (2) less opportunity to

participate in the political process. So a State raising a good-reasons-to-gerrymander defense must point to a strong basis in evidence that "members of the protected class have less opportunity to participate in the political process." *Chisom v. Roemer*, 501 U.S. 380, 397 (1991); *see* Part II.B. But here, as explained below (at II.C), the *Robinson* decisions reveal that Louisiana's political processes are equally open to all.

II. *Robinson*'s Interpretation of §2 Is Not "Proper" Because It Jettisons the Vote-Dilution Test From *Whitcomb* and *White*.

"Racial gerrymandering strikes at the heart of our democratic process, undermining the electorate's confidence in its government as representative of a cohesive body politic in which all citizens are equal before the law." *ALBC*, 575 U.S. at 283 (Scalia, J., dissenting). If §2 compliance can still justify "race-based districting" today, *but see infra* Part III.B, that race-based action must be based on "a proper interpretation of the VRA." *Wisconsin Legislature*, 595 U.S. at 402, 404. The *Robinson* decisions precipitating SB8 found vote dilution under a plainly improper interpretation of §2 that cannot provide a strong basis in evidence to justify SB8.

The only application of §2 to redistricting laws that can possibly withstand constitutional scrutiny is one that conforms to the original meaning of vote dilution provided by *Whitcomb* and *White*. That definition focuses on clear markers of access, not outcomes; was adopted by Congress in 1982; and appeared nowhere in the *Robinson* decisions that induced Louisiana's racial gerrymander.

A. Section 2 Codified the Vote-Dilution Test from *Whitcomb* and *White*.

Section 2, in "its original form," "'closely tracked the language of the Fifteenth Amendment' and, as a result, had little independent force." *Allen*, 559 U.S. at 10-11 (quoting *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 656 (2021)). In *Mobile v. Bolden*, a plurality of this Court concluded that "in order to establish a violation either of § 2 or of the Fourteenth or Fifteenth Amendments, minority voters must prove that a contested election mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose." *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (citing *Mobile v. Bolden*, 446 U.S. 55 (1980)).

The "avalanche of criticism" triggered by *Mobile* "arrived at Congress's doorstep in 1981." *Allen*, 599 U.S. at 11-12. *Mobile*'s detractors demanded an "effects test" of racial vote dilution, while its defenders worried that anything short of an "intent test" would produce "a quota system for electoral politics." *Id.* at 12-13. The House sided with the detractors, which "met stiff resistance in the Senate." *Brnovich*, 594 U.S. at 659.

"The House and Senate compromised, and the final product included language proposed by Senator Dole" "taken almost verbatim" (*id.*) from an earlier vote dilution case: *White v. Regester*. Liability would turn on "whether 'the political process leading to nomination and election were not equally open to participation by the group in question—in that its members had less opportunity than did other residents in the district to participate in the political processes and to elect

legislators of their choice.'" *Allen*, 599 U.S. at 13 (quoting *White v. Regester*, 412 U.S. 755, 766 (1973)). *White*'s test, in turn, came directly from *Whitcomb v. Chavis*, another seminal vote dilution decision. 403 U.S. 124, 149 (1971) (asking whether minority "residents had less opportunity than did other … residents to participate in the political processes and to elect legislators of their choice"); *see also* James F. Blumstein, *Racial Gerrymandering and Vote Dilution:* Shaw v. Reno *in Doctrinal Context*, 26 RUTGERS L.J. 517, 538 (1995) ("With respect to vote dilution, *Whitcomb* set the foundation. Two years later, *White v. Regester* applied the *Whitcomb* standard ….").

As this Court later recognized, the amendments to §2 were "intended to 'codify' the results test employed in *Whitcomb v. Chavis* and *White v. Regester*." *Chisom*, 501 U.S. at 394 n.21; *see also Taggart v. Lorenzen*, 587 U.S. 554, 560 (2019) (recognizing the "old soil" canon). Thus, "it is to *Whitcomb* and *White* that [courts] should look in the first instance in determining how great an impairment of minority voting strength is required to establish vote dilution in violation of § 2." *Gingles*, 478 U.S. at 97 (O'Connor, J., concurring in the judgment).

B. Unequal Access to the Political Process is a Necessary Element of a §2 Claim.

To prove that a voting "standard, practice, or procedure" dilutes minority votes in violation of §2, a plaintiff must show that minorities "have less opportunity than other members of the electorate [1] to participate in the political process and [2] to elect representatives of their choice." 52 U.S.C. §10301(b). In *Gingles*, the Court established a threshold showing

every §2 plaintiff must overcome. 478 U.S. at 50-51. Those *Gingles* preconditions speak primarily to electoral opportunity. *See id.* at 50-51; *id.* at 88 (O'Connor, J., concurring in the judgment).

A few years later, in *Chisom*, the Court relied upon *Whitcomb* and *White* to clarify that proving less opportunity to elect "is not sufficient to establish a violation." 501 U.S. at 397. A plaintiff must "also" demonstrate that, "under the totality of the circumstances," "members of the protected class have less opportunity to participate in the political process." *Id.*

1. To determine if a State's citizens today enjoy an equal "opportunity … to participate in the political process," it is of first importance to determine what that statutory phrase means.

This Court already did so in *Whitcomb*. The plaintiffs there challenged the use of a multimember districting scheme in Marion County, Indiana, to elect the county's "eight senators and 15 members of the house," alleging that the system diluted the voting power of those residing in a predominantly black and poor part of the county. 403 U.S. at 128-29. For "the period 1960 through 1968," the challenged area made up "17.8% of the population" of Marion County but was home to only "4.75% of the senators and 5.97% of the representatives." *Id.* at 133. The residents "voted heavily Democratic," but "the Republican Party won four of the five elections from 1960 to 1968" and did not slate anyone from the area in several of those elections. *Id.* at 150-52. The district court found vote dilution and ordered single-member districting. *Id.* at 129.

This Court reversed, emphasizing the absence of "evidence and findings that [black] residents had less"

"opportunity to participate in and influence the selection of candidates and legislators." *Id.* at 149, 153. The Court made clear what "opportunity to participate" meant by describing what plaintiffs failed to prove:

> We have discovered nothing in the record or in the court's findings indicating that poor [blacks] were not allowed [1] to register or vote, [2] to choose the political party they desired to support, [3] to participate in its affairs or [4] to be equally represented on those occasions when legislative candidates were chosen. Nor did the evidence purport to show or the court find that inhabitants of the ghetto were [5] regularly excluded from the slates of both major parties, thus denying them the chance of occupying legislative seats.

Id. at 149-50.

Black residents of Marion County had "opportunity" because they were "allowed" to register and vote, choose their preferred party, and participate in its affairs. *Id.* at 149. "Strong differences" in socioeconomic indicators did not control. *Id.* at 132. And it was immaterial that the Democratic Party had lost all 23 of the county's legislative seats in "four of the five elections from 1960 to 1968." *Id.* at 150. Had "the Democrats won all of the elections or even most of them," plaintiffs likely "would have had no justifiable complaints about representation." *Id.* at 152. The alleged denial of equal opportunity was "a mere euphemism for political defeat at the polls." *Id.*

White v. Regester, decided two years later, shows what unequal access to the political process looks like.

There, black voters of Dallas County, Texas, also favored the Democratic Party, but at-large elections and "a white-dominated organization that [was] in effective control of Democratic Party candidate slating" combined to cripple their ability to participate in county politics. *White*, 412 U.S. at 766-67. Also, the Democratic Party did not "exhibit good-faith concern for the political and other needs and aspirations of the [black] community." *Id.* at 767. For example, the party deployed "racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community," "effectively exclud[ing]" black residents "from participation in the Democratic primary selection process." *Id.* Similarly, the "poll tax" and "the most restrictive voter registration procedures in the nation" kept Mexican-American residents of Bexar County, Texas, from accessing the political process on an equal footing with their white neighbors, which was "reflected … in the fact that Mexican-American voting registration remained very poor in the county." *Id.* at 768-69. Under *Whitcomb*'s framework, this was the kind and quantity of evidence needed to establish illegal vote dilution.

All three minority groups—black voters in Dallas County, Mexican-American voters in Bexar County, and black voters in Marion County—suffered socioeconomic hardships, historical discrimination, and persistent political defeat. All three likely would have been able to satisfy the *Gingles* preconditions. But the political process was closed to two and open to one. The key difference was that black residents of Marion County had access to those traditional means of political participation like registering, voting, and

engaging with their preferred party, while their Texas counterparts did not.

2. Appellants' *amici* the MHA Nation and the District of Columbia urge the Court to reject this straightforward reading of §2, but never explain why it is wrong. They never argue that *Chisom* was abrogated, or that *Whitcomb* did not provide §2's text. Instead, they contend (1) that the Court already rejected this argument, and (2) that a textualist approach to §2 is somehow a "rewrite" of the statute (MHA.Br.2.) that would prove "unworkable" (D.C.Br.6). Neither is true.

First, MHA Nation (at 2) asserts that this "Court expressly rejected" *Amici* States' *Whitcomb* argument "just last year in *Allen v. Milligan*," and D.C. *Amici* (at 20) claim that *Amici* States are trying to "relitigate similar arguments to those Alabama raised in *Milligan*." That's plainly false. Alabama's opening and reply briefs in *Allen* each mentioned *Whitcomb* only once to argue that intent remained a relevant part of the §2 inquiry. *See* Ala.Op.Br.5; Ala.Reply.Br.7, No. 21-1086, *Allen* (Apr. 29 & Aug. 24, 2022). The Court rejected Alabama's map-focused argument as being "*more* demanding than the intent test Congress jettisoned." *Allen*, 599 U.S. at 37. The Court, however, did not reject *Whitcomb* or precedents recognizing that *Whitcomb* informs the meaning of §2's text.

Second, courts have applied *Whitcomb* for decades, both before and after 1982. As the Court recounted in *Gingles*, lower courts had "derived" certain "factors … from the analytical framework of *White*." *Gingles*, 478 U.S. at 36 n.4. These factors would later find their way into the Senate Judiciary Committee Report in 1982

and become known as the Senate Factors. They delineated types of evidence that might shed light on whether the *Whitcomb* standard was satisfied. This is no "single-minded view," D.C.Br.23, for courts still consider "the totality of circumstances." They just do so with the benefit of a standard that measures whether those circumstances are relevant. Otherwise, the Senate Factors are just boxes to check for their own sake—precisely how the *Robinson* court misapplied them. *See infra* Part II.C.

The *Whitcomb* test has worked in numerous cases. For example, in *McGill v. Gadsden County Commission*, 535 F.2d 277 (5th Cir. 1976), plaintiffs challenged the at-large system used to elect county commissioners in rural Gadsden County, Florida. Despite establishing "an extensive history of discrimination" against the panhandle county's black residents, the plaintiffs failed to prove the at-large scheme diluted minority votes because there was "no substantial evidence … that blacks [were] not allowed to register or vote, to choose the political party they desire to support, and to fully participate in the nominating process of the party." *Id.* at 281 (citing *Whitcomb*).

Around the same time in Rapides Parish, Louisiana, plaintiffs attacked the Police Jury and School Board multi-member districting plans as diluting black voting strength. *Bradas v. Rapides Parish Police Jury*, 508 F.2d 1109 (5th Cir. 1975). Due in part to the "glaring fact" that no black resident had "ever been elected to parish office," the district court nullified the plans. *Id.* at 1112. The Fifth Circuit reversed, holding that "[n]either the record nor the district court's

findings indicates difficulty on behalf of blacks in registering to vote, in choosing the political party they desire to support, in meaningfully participating in party activities, in qualifying as candidates for a desired office, in participating in the candidate selection process, or in participating meaningfully in any other portion of the political process." *Id.* Missing was the "usual" evidence of past discrimination's "debilitating effects," such as "a relatively large discrepancy between the size of the black population and the number of registered black voters." *Id.*[2]

Returning to Dallas and Bexar counties—the two at issue in *White*—the en banc Fifth Circuit in *LULAC v. Clements* heeded this Court's instruction that "§2 plaintiffs 'must allege an abridgement of the opportunity to participate in the political process *and* to elect representatives of one's choice.'" 999 F.2d 831,

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[2] *See also Black Voters v. McDonough*, 565 F.2d 1, 6 (1st Cir. 1977) (no dilution where "pervasive" past discrimination against black Bostonians had "not crippled their ability to exercise the franchise" and no evidence "that blacks have fewer opportunities than whites to register to vote or to cast their ballots"); *Dove v. Bumpers*, 364 F. Supp. 407, 415 (E.D. Ark. 1973) (no dilution where black "voter registration participation" was "untrammeled" and black voters were not "prohibited or discouraged from participation within the political parties"), *aff'd sub nom. Dove v. Moore*, 539 F.2d 1152 (8th Cir. 1976); *Cherry v. New Hanover Cnty.*, 489 F.2d 273, 274 (4th Cir. 1973) (no dilution in Wilmington, North Carolina, because no "interference with [black residents'] rights to register to vote, to choose a political party, or otherwise to participate in local elections"); *Nevett v. Sides*, 571 F.2d 209, 227 (5th Cir. 1978) (no dilution in Birmingham suburb where the "failure of black candidates" did not depend "upon any barriers to access to the slating or registration stages of [the city's] political processes").

863 (5th Cir. 1993) (en banc) (quoting *Chisom*, 501 U.S. at 397).[3] Duly relying on *Whitcomb*'s explication of "opportunity to participate," the Fifth Circuit reversed a finding of vote dilution in the at-large system of electing Texas's trial judges. *Id.* at 837. The plaintiffs "offered 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." *Id.* at 867.

And importantly, the *Whitcomb* test ferreted out actual instances of vote dilution. In 1981, for instance, black voters in Putnam County, Georgia, showed through "low voter registration and turnout" tied to "actions of white elected officials past and present" that, "in spite of their popular majority," they would "be defeated at the polls." *Bailey v. Vining*, 514 F. Supp. 452, 463 (M.D. Ga. 1981). Like in *White*, these plaintiffs proved they had "been denied equal access to the political process." *Id.*

The point of this history is straightforward: the phrase "unequal opportunity to participate in the political process," as it appears in §2, carries a particular meaning. *Whitcomb* and *White* supply that meaning: a plaintiff must show that members of the minority group are excluded "from effective participation in political life," *White*, 412 U.S. at 769, *i.e.*, they are "denied access to the political system," *Whitcomb*, 403 U.S. at 155. The very "essence of the Dole Compromise was to draw a basic distinction between the

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[3] *Clements* dealt with claims of vote dilution in seven other Texas counties in addition to Dallas and Bexar. 999 F.2d at 838.

issue of access to the political process and election results." 128 Cong. Rec. 14133 (1982) (statement of Sen. Robert Dole); *see also id.* at 14316 ("[M]embers of minority groups have the right to register, vote, and to have their vote fairly counted. There is no guarantee of success: Just an equal opportunity to participate."). Access to the political system means being "allowed to register," "vote," "choose [a] political party," and "participate in its affairs." *Whitcomb*, 403 U.S. at 149. That standard is commanded by the text and by this Court's binding precedents. It may be a more demanding (and discernible) test than that applied by *Robinson*. But the demolition of barriers to equal access to elections should be cause for celebration, not grounds for an expanded §2 that divides voters between black and white electoral districts whenever "Democrats … suffer[] the disaster of losing too many elections." *Whitcomb*, 403 U.S. at 153.

C. The *Robinson* Courts Discerned No Evidence of Unequal Access Yet Still Found Vote Dilution.

When the Robinson plaintiffs sued Louisiana under §2, they needed to show at least that black Louisianans faced more inequality in accessing the political process than did black Indianians in 1960s Marion County. *See Whitcomb*, 403 U.S. at 149. They did not, and there was no finding by the district court or the Fifth Circuit that black Louisianans today are denied the opportunity to register to vote, cast a ballot, choose the political party they desire to support, or participate in its affairs. To the contrary, the district court found a total absence of "specific evidence" of any disparities in "political participation outcomes"

regarding "levels of black voter registration, … turnout among black voters, or any other factor tending to show that past discrimination has affected their ability to participate in the political process." *Robinson*, 605 F. Supp. 3d at 849. Nor could the court identify any evidence that Louisiana's elected officials are unresponsive to the needs of black Louisianans. *Id.* at 850. In the court's view, the lack of "evidence of Black voters being denied the right to vote [wa]s irrelevant" because the "case presents claims of vote *dilution*." *Id.* at 847. The court did not define "vote dilution," nor explain why vote dilution has nothing to do with the ability to vote.

Instead, the court simply rattled off a hodgepodge of Senate Factor findings, like the number of black mayors, a municipal "consent decree" way up in Ouachita Parish, and the majority-Republican Legislature's rejection of any plan that would give Democrats an additional congressional seat. *Id.* at 846, 850-51. *Cf. Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992) ("It cannot be surprising that the party with political control opposes a plan that would ensure the loss of at least one of [its] seats."). But while the Senate Factors may "indicate points of factual inquiry that are relevant to th[e] ultimate issue," *Blacks United for Lasting Leadership v. City of Shreveport*, 571 F.2d 248, 252 (5th Cir. 1978), they do not answer "the question … what it *means* to provide equal opportunity," *Brnovich*, 594 U.S. at 676 n.15. Nor can they say how much evidence is required, or even what is being proven.

The *Robinson* approach resembles an exercise in checking boxes more than a searching inquiry into

black Louisianans' ability to access the political process. The court checked some for plaintiffs (factors 1, 2, 7, 9, 10), left others blank (factors 3, 4, 5, 6), and marked one for Louisiana (factor 8), all while ignoring the standard of liability from *Whitcomb* and *White*. This is akin to instructing jurors in a criminal case to decide whether the prosecution proved that DNA, fingerprint, or ballistics evidence exists, but never telling the jury the elements of the crime. Senate Factor evidence, like forensic evidence, does not exist for its own sake.

Nowhere did *Robinson* ask whether black voters in Louisiana "would have … justifiable complaints about representation" "had the Democrats won all of the elections or even most of them." *Whitcomb*, 403 U.S. at 152. Because losing in the political process is not the same as being excluded from it, *Robinson*'s approach of identifying a distant history of discrimination and elections that didn't go the "right" way "enough" proves nothing about whether black Louisianans have an equal opportunity to participate in the political process. Vote dilution on this record "becomes plausible only if *Whitcomb* is purged from … voting rights jurisprudence." *Clements*, 999 F.2d at 862.

III. *Robinson*'s Interpretation of §2 Is Not "Proper" Because It Renders §2 Unconstitutional.

An "[un]constitutional reading and application" of the VRA cannot justify a racial gerrymander. *Miller*, 515 U.S. at 921. A liability standard hinging on a multi-factor balancing test untethered from any discernible definition of vote dilution is

unconstitutionally vague and judicially unadministrable. And it all but guarantees perpetual race-based redistricting.

First, §2's language creates civil *and* criminal liability, *see* 52 U.S.C. §10308(a) (providing for "imprison[ment] not more than five years" for §2 violations), meaning that it must provide "sufficient definiteness" such "that ordinary people can understand what conduct is prohibited." *Sackett v. EPA*, 598 U.S. 651, 680 (2023) (cleaned up). But even Appellants' *amici* recognize that their approach to §2 is so arbitrary that it would be unjust to insist that anyone "when redistricting, determine *precisely what* the VRA requires." DC.Br.11 (quotation marks omitted).

Recall that in *Johnson v. United States*, 576 U.S. 591 (2015), the Court considered the Armed Career Criminal Act's sentencing enhancement for prior convictions for a felony that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. §924(e)(2)(B). The Court deemed the enhancement unconstitutional because of "the indeterminacy of the wide-ranging inquiry required by" that clause. 576 U.S. at 597. It was too daunting a task for a defendant to predict whether the "ordinary burglar" or "typical extortionist" was engaged in conduct that creates a "serious potential risk of physical injury." *Id.* at 597-98.

But navigating the ACCA's residual clause is a cakewalk compared to guessing how the *Robinson* view of §2 will cash out. You might think that "no evidence of Black voters being denied the right to vote" matters in a *Voting Rights* Act case, but you'd be wrong. That's "irrelevant." *Robinson*, 605 F. Supp. 3d

at 847. What matters, apparently, is an undefined concept of "dilution" that wasn't present in Rapides Parish in the 1970s, *see Bradas*, 508 F.2d 1109, or apparently in the congressional plans Louisiana used in the 1990s, 2000s, and 2010s, each with one majority-black district.

That "shapeless" approach, *Johnson*, 576 U.S. at 602, to vote dilution is no more administrable than the partisan vote dilution claims rejected in *Rucho* as "indeterminate and arbitrary," 588 U.S. at 715. "It is vital" when intervening in "the legislative process of apportionment" that courts "act only in accord with especially clear standards." *Id.* at 703-04. But under *Robinson*, §2 is anything but "manageable," *id.* at 696, and cannot provide "good reasons" for thinking §2 demands race-based districting, *Wisconsin Legislature*, 595 U.S. at 404.

Second, if §2 means what *Robinson* says it means, then "no end is in sight" to §2's race-based demands, and §2's application to redistricting "must … be invalidated under the Equal Protection Clause of the Fourteenth Amendment." *SFFA*, 600 U.S. at 213. Every racial classification by the government is either unconstitutional or on its way to that end. Those that are not outright prohibited are allowed only to the degree "necessary" "to further compelling governmental interests." *Id.* at 207. That is because even the race-based actions our Constitution permits are "dangerous," *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003), and thus *must* be limited "in scope and duration," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989) (plurality). *See* Callais.Br.36-38.

Since the VRA was amended in 1982, "things have changed dramatically" in the South "in large part *because of* the Voting Rights Act." *Shelby County v. Holder*, 570 U.S. 529, 547-48 (2013). "By any measure, the Act has accomplished its original purposes with great success." *Petteway v. Galveston County*, 111F.4th 596, 612 (5th Cir. 2024) (en banc).

The *Robinson* court must believe that "things have changed" *again* in the decade since *Shelby County*. That's at odds with the historical record and the evidentiary record developed below.

Take, for example, black voter registration rates in Louisiana. When the VRA was enacted, black registration sat at a meager 31.6% compared to a white registration rate of 80.5%. *Shelby County*, 570 U.S. at 546. By 2004, that gap had narrowed to just 4% (75.5% white to 71.1% black). *Id.* at 548. And today, there is "no evidence of Black voters being denied the right to vote" or "that past discrimination has affected their ability to participate in the political process." *Robinson*, 605 F. Supp. 3d at 847, 849.

No longer are districts with a "bare black supermajority" accused of preserving "white hegemony." *Dilliard v. City of Greensboro*, 213 F.3d 1347, 1351 (11th Cir. 2000). No longer does an "opportunity district" require a black population of at least 65%. *Wesch v. Hunt*, 785 F. Supp. 1491, 1495-97 (S.D. Ala. 1992) (three-judge court). To the contrary, expert testimony in *Robinson* established "that effective crossover voting could exist" in Louisiana if the Republican Legislature was interested in favoring Democrats. *Robinson v. Ardoin*, 86 F.4th 574, 596 (5th Cir. 2023).

Absent "particularized findings" that members of the minority group are excluded from effective political participation, the "racial classifications" blessed by *Robinson* will be "ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986). A "Senate Factors" expert will always be able to identify at least some evidence of "race-based gaps … with respect to the health, wealth, [or] well-being of American citizens." *SFFA*, 600 U.S. at 384 (Jackson, J., dissenting). And such disparities "may make it virtually impossible for a State to devise rules that do not have some disparate impact." *Brnovich*, 594 U.S. at 677. Meanwhile, §2 plaintiffs will always have incentives to argue that "particular issues of public policy should be classified as advantageous to some group defined by race." *Schuette v. BAMN*, 572 U.S. 291, 309 (2014) (plurality). This will enshrine §2 as "an affirmative-action program" for race-based districting in perpetuity. *Shaw v. Hunt*, 517 U.S. 899, 910 (1996).

Finally, even "narrowly tailored race-based affirmative action in higher education" could not "extend indefinitely into the future." *SFFA*, 600 U.S. at 316 (Kavanaugh, J., concurring). And as the dissent in *SFFA* recognized, "drawing district lines that comply with the Voting Rights Act may require consideration of race" that is "[j]ust like" the "consideration of race" needed to "achiev[e] racial diversity in higher education." *Id.* at 361 n.34 (Sotomayor, J., dissenting). It follows that "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." *Allen*, 599 U.S. at 45 (Kavanaugh, J., concurring). The statute can no longer justify a State or court "pick[ing] winners and losers based on the color of their skin." *SFFA*, 600 U.S. at 229.

IV. States Need Clarity Now More Than Ever.

What Louisiana told this Court three years ago is even truer today: "States need clarity." *Merrill*, 142 S.Ct. at 881 (Kavanaugh, J., concurring) (quoting *Amici* Br. for Louisiana et al. 25).[4] Since then, vote dilution jurisprudence has become increasingly "unclear and confusing," *id.*, with increasing instances of liability. In *Allen*, "*amici* supporting the appellees" assured the Court that recent §2 litigation "has rarely been successful," noting that since 2010, "'the *only* state legislative or congressional districts that were redrawn because of successful Section 2 challenges were a handful of state house districts near Milwaukee and Houston.'" *Allen*, 599 U.S. at 29 (quoting Br. for Chen et al. at 7-8). But the post-2010 redistricting cycle appears to have been the calm before the storm. For the

[4] *Amici* MHA Nation quote an excerpt from an amicus brief Alabama joined in *Abbott v. Perez* to argue that Alabama believed §2's demands were sufficiently clear. MHA.Br.15-16. First, the "clarity of the law" referred only to the requirement that a proper §2 analysis must take place "using the 'district as a whole' and not any other political subdivisions." *Amici* States.Br.16, No. 17-586, *Abbott* (Nov. 20, 2017). Second, any suggestion that the *Gingles* preconditions alone could provide "good reasons" to racially gerrymander was put to rest by the Court in *Wisconsin Legislature*. *See* 595 U.S. at 402, 405.

post-2020 cycle, at least *twelve* state legislative and congressional plans have been enjoined under §2.[5]

The trend is not the product of States retrogressing following the end of §5 preclearance. To the contrary, during this cycle, "not only did minority representation in formerly covered states not decline in *absolute* terms, it also didn't drop in *relative* terms versus the benchmark of formerly uncovered states." Nicholas Stephanopoulos et. al., *Non-Retrogression Without Law*, 2023 U. CHI. LEGAL F. 267, 269-70 (2024).

Rather, the post-2020 surge in liability has at least two main causes. First, due to advances in algorithmic mapmaking, *Gingles* 1 is less equipped to "shield[] the courts from meritless claims." *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 942 (7th Cir. 1988). Second, courts have engaged in statutory mission creep, expanding §2 to right new "wrongs" now that the

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[5] *See Section 2 Cases Database, Michigan Law Voting Rights Initiative* (Dec. 31, 2023), https://voting.law.umich.edu/database/; *see also Nairne v. Ardoin*, 715 F. Supp. 3d 808 (M.D. La. 2024) (Louisiana's 2022 House and Senate plans); *Robinson*, 605 F. Supp. 3d 759 (Louisiana's 2022 congressional plan); *Miss. NAACP v. State Bd. of Election Comm'rs*, 2024 WL 3275965 (S.D. Miss. July 2, 2024) (Mississippi's 2022 House and Senate plans); *Turtle Mtn. Band of Chippewa Indians v. Howe*, 2023 WL 8004576 (D.N.D. Nov. 17, 2023) (North Dakota's 2021 state legislative plan); *Soto Palmer v. Hobbs*, 686 F. Supp. 3d 1213 (W.D. Wash. 2023) (Washington's 2022 legislative plan); *Alpha Phi Alpha Fraternity v. Raffensperger*, 700 F. Supp. 3d 1136 (N.D. Ga. 2023) (Georgia's 2021 House, Senate, and congressional plans); *Singleton v. Allen*, 690 F. Supp. 3d 1226 (N.D. Ala. 2023) (Alabama's 2023 congressional plan); *Singleton v. Merrill*, 582 F. Supp. 3d 924 (N.D. Ala. 2022) (Alabama's 2021 congressional plan).

harms identified by *Whitcomb*, *White*, and the Dole Compromise are thankfully hard to find.

A. *Gingles* 1, in the Age of the Algorithm, Provides Little Clarity Today.

Modern technology has transformed the first *Gingles* precondition from a significant check on demands for proportionality to a speedbump on the way to race-based districting. Map-drawing algorithms allow plaintiffs to "find innovative combinations of geography that even the most expert human mapmakers may overlook" when contriving a new "reasonably compact" majority-minority district. Br. of *Amici* Computational Redistricting Experts 14, No. 21-1086, *Allen* (July 18, 2022). These tools "did not even exist" in 1982, *Allen*, 599 U.S. at 36, and by 2010 had evolved into little more than the "point-and-click" variety, Micah Altman & Michael McDonald, *The Promise and Perils of Computers in Redistricting*, 5 DUKE J. CONST. L. & PUB. POL'Y 69, 79 (2010). Today, "mapmakers can now generate millions"—even "trillions"—of possible maps for a State. *Allen*, 599 U.S. at 23, 37.

Before the proliferation of these tools, state mapdrawers often struggled to create new majority-minority districts that didn't evoke thoughts of "snake[s]" or "sacred Mayan bird[s]." *Id.* at 27-28. Challengers fared little better. The original "team of trained mapmakers" consulted by Evan Milligan of *Allen v. Milligan*, for example, "was literally unable to draw a two-majority-black-district map" in Alabama, "even when they tried." *Id.* at 106 (Alito, J., dissenting).

But the million-map strategy is paying off for §2 plaintiffs, who are "increasingly us[ing] algorithmic

evidence in redistricting cases." Kayla Swan, *"Race-Blind" Redistricting Algorithms,* 73 Duke L.J. 1141, 1141 (2024). Not only can they run myriad simulations to find the "best looking" map that achieves the necessary racial result, but they do not have to account for some of the districting principles that many legislatures cannot easily ignore. *See Allen*, 599 U.S. at 21-22 (discussing "core retention"). Of the principles plaintiffs purport to balance, some are "'surprisingly ethereal' and 'admi[t] of degrees,'" meaning that mapdrawers can "construct a plethora of potential maps that look consistent with traditional, race-neutral principles" while making "race for its own sake … the overriding reason for choosing one map over others." *Bethune-Hill*, 580 U.S. at 190.

At one time, the *Gingles* 1 guardrails imposed "exacting requirements" upon parties and States daring to inject race into redistricting. *See Allen*, 599 U.S. at 30. Not any longer. Thus, one would expect the *Whitcomb* guardrails to feature more prominently in §2 decisions as *Gingles* 1 becomes easier to clear. But many courts have forgotten *Whitcomb*, leading to results that States never could have predicted, "as demands for outcomes have followed the cutting away of obstacles to full participation." *Clements*, 999 F.2d at 837. Alongside *Robinson*, the three examples below prove the point.

B. Lower Courts Are Expanding §2.

Washington. Begin in the Pacific Northwest. Hispanic residents in agricultural Central Washington already formed a "majority of voting-age citizens" in the challenged district, which sent a Latino Republican to the State Senate in 2022. *Soto Palmer v.*

Hobbs, 686 F. Supp. 3d 1213, 1222 & n.4, 1230-32 (W.D. Wash. 2023). A federal court ordered Washington to redraw the map anyway.

Why? First, the court looked not to obstacles to voting, but rather "barriers that make it harder for Latino voters to be able to *believe* that their vote counts." *Id.* 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 (or at least should 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.

Ultimately, the main problem for the court was that most Hispanics in the area vote Democrat and not enough Democrats were winning. *Id.* at 1225-26, 1235. The court adopted a remedial plan that made the district less Hispanic but "substantially more Democratic." *Palmer v. Hobbs*, 2024 WL 1138939, at *2, *5 (W.D. Wash. Mar. 15, 2024). That §2 analysis is meaningless, and the remedy of *removing* Hispanics from the district to cure their "cracking" is absurd.

Georgia. Turning south, a federal court recently decided that Georgia's 2021 congressional and state legislative plans violated §2. *Alpha Phi Alpha v. Raffensperger*, 700 F. Supp. 3d 1136 (N.D. Ga. 2023). This notwithstanding the fact that 98% of all eligible

Georgians are registered, 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.

What should have tipped off the Legislature that it was required to engage in race-based districting? In the district court's view, it was recent "official discrimination in the state" that included several voting laws "determined … to *not* be illegal under federal law." *Id.* at 1268, 1272. For example, one law that the same judge had deemed *not* to violate §2 was transmuted into evidence that Georgia's redistricting laws *did* violate §2 because, among the tiny number affected by the VRA-compliant law, a higher percentage were black. *Id.* at 1272-73.

Even more confounding was the court's reliance on Georgia's experience during the 1990 redistricting cycle when DOJ twice denied Georgia preclearance for its congressional plans under §5. The court identified DOJ's objection letters as evidence of "Georgia's history of discrimination against Black voters." *Id.* at 1270. What the court omitted was that DOJ was misusing §5 to demand a flagrantly gerrymandered "'max-black' plan." *Abrams v. Johnson*, 521 U.S. 74, 80 (1997). When Georgia acquiesced to the "Justice Department's maximization policy," this Court held that Georgia's map was an unconstitutional racial gerrymander. *Miller*, 515 U.S. at 926. But in the district court's view, Georgia's *refusal* to racially discriminate was *evidence* of racial discrimination.

Louisiana. As if Louisiana's congressional redistricting saga weren't enough, last February, Louisiana received word that its state legislative plans also violate §2. After surveying some of the same scant evidence of recent official discrimination as in *Robinson*, the district court pessimistically declared 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). The court relied on findings like the "subliminal message of the Sheriff's Office being housed on the same floor as [a] Registrar of Voter's Office" to conclude that black Louisianans cannot participate equally in the political process. *Id.* at 874 n.461. Thus, to know what §2 demands, States must see the invisible and perceive the subliminal.

* * *

This wave of recent, successful §2 litigation proves one of two things. First, the §2 test many courts are applying today is not the test Congress adopted in 1982. When a Louisiana parish in the 1970s could prevail under *Whitcomb* and *White* but half a century later Louisiana, Georgia, and even Washington all fail, the test has changed. Courts have expanded §2's meaning as violations the law initially targeted have receded, turning §2 into the proverbial golden hammer, wielded by plaintiffs and courts in a never-ending search for a nail.

Under the original standard, "[i]n most communities, … it would be exceedingly difficult for plaintiffs to show that they were effectively excluded from fair access to the political process under the results test." S. Rep. No. 417, at 33. And under that standard,

courts found vote dilution where minorities suffered unequal access to the political process (*e.g.*, *White*, *Bailey*), and rejected others where minorities were allowed to register, vote, and participate with the party of their choice (*e.g.*, *Whitcomb*, *McGill*, *Bradas*). Only that standard offers a constitutional answer to the redistricting guessing games playing out in Louisiana and beyond.

Second, if §2 is as capacious as some courts have treated it, the statute can no longer be constitutionally applied to redistricting plans. When "subliminal messages" are proof that States must use race to sort voters, there is no answer to the question: "How much is too much?" *Rucho*, 588 U.S. at 707, and thus no end in sight to race-based action. And if the question is whether such action "may extend indefinitely into the future[,] … this Court's precedents make clear that the answer is no." *SFFA*, 600 U.S. at 316 (Kavanaugh, J., concurring).

CONCLUSION

The Court should affirm.

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