Nos. 24-109, 24-110

IN THE

Supreme Court of the United States

LOUISIANA,

Appellant,

v.

PHILLIP CALLAIS, *et al.*,

Appellees.

PRESS ROBINSON, *et al.*,

Appellants,

v.

PHILLIP CALLAIS, *et al.*,

Appellees.

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

BRIEF OF *AMICUS CURIAE* PROFESSOR NICHOLAS O. STEPHANOPOULOS IN SUPPORT OF NEITHER PARTY

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Amicus curiae Nicholas O. Stephanopoulos is the Kirkland & Ellis Professor of Law at Harvard Law School. He writes extensively about the Voting Rights Act ("VRA"), racial gerrymandering, and other election law issues. *See, e.g.*, Jowei Chen & Nicholas O. Stephanopoulos, *The Race-Blind Future of Voting Rights*, 130 Yale L.J. 862 (2021); Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. Chi. L. Rev. 1329 (2016) [hereinafter Stephanopoulos, *Desegregating America*]; Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 Yale L.J. 1566 (2019) [hereinafter Stephanopoulos, *Disparate Impact*]; Nicholas O. Stephanopoulos, *Election Law for the New Electorate*, 17 J. Legal Analysis 42 (2025) [hereinafter Stephanopoulos, *New Electorate*]; Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 Stan. L. Rev. 1323 (2016) [hereinafter Stephanopoulos, *Race, Place, and Power*].

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[1] In accordance with Supreme Court Rule 37.6, *amicus* states that neither Appellants, nor Appellees, nor their counsel, had any role in authoring, nor made any monetary contribution to fund the preparation or submission of, this brief. *Amicus* further states that, while other attorneys in the Election Law Clinic at Harvard Law School represent the *Robinson* appellants, *amicus* has played no role in that representation.

SUMMARY OF THE ARGUMENT

Temporal arguments have played an important role in this Court's recent constitutional jurisprudence. In *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013), the Court held that §4 of the VRA was obsolete because its coverage formula was "based on decades-old data and eradicated practices." *Id.* at 551. In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (SFFA)*, 600 U.S. 181 (2023), the Court similarly relied on the fact that the "25-year limit" on the duration of affirmative action, announced in an earlier decision, had just about expired. *Id.* at 315 (Kavanaugh, J., concurring). In this case, the Court has asked the parties to address Appellees' claim that §2 of the VRA is no longer "justified by Black Louisianans' needs." Br. for Appellees, *Louisiana v. Callais*, Nos. 24-109, 24-110 (U.S. Jan. 21, 2025), 2025 WL 306386, at *37.

Appellees' claim fails, first, because §2 differs in critical respects from the policies the Court has subjected to temporal limits. On its face, §4 of the VRA applied the "extraordinary measure[]" of preclearance, *Shelby Cnty.*, 570 U.S. at 534, to certain jurisdictions based on electoral data from 1964, 1968, and 1972, 52 U.S.C. §10303(b). The text of §2 looks nothing like this. Written in the present tense, it doesn't refer to evidence from an earlier era in American history. Nor does §2 resemble affirmative action. That policy triggers strict scrutiny because it racially classifies individuals—distributes burdens or benefits to them on the basis of their race. In contrast, §2 regulates governments at various levels, not people. And

it imposes liability based on a complex set of factors, none of which is reducible to anyone's race as such.

If §2 is unlike both §4 and affirmative action, what sort of statute *is* it? As this Court has long recognized, *see, e.g.*, *Chisom v. Roemer*, 501 U.S. 380, 394 (1991), it's a law that targets discriminatory results. Such laws are found throughout both the Statutes at Large and state codes. Among their ranks, they include Title VII of the Civil Rights Act ("Title VII"), the Fair Housing Act ("FHA"), and many more. Crucially, the Court has never hinted—let alone held—that statutes aimed at alleviating discriminatory results must be temporally restricted. A time limit would be inappropriate for these laws since they neither rely on outdated data nor classify individuals based on their race.

Additionally, thanks to the framework the Court established for vote-dilution claims in *Thornburg v. Gingles*, 478 U.S. 30 (1986), §2 already includes built-in sunset clauses that curb its reach. The first *Gingles* precondition involves "the dispersion of the minority population." *Bush v. Vera*, 517 U.S. 952, 979 (1996) (plurality opinion). So when minority voters are sufficiently dispersed (that is, residentially integrated), they're unable to satisfy this requirement and their vote-dilution claims fail. Likewise, the presence of racially-polarized voting is the crux of the second and third *Gingles* preconditions. *See Gingles*, 478 U.S. at 52-74. So when voting isn't highly racially-polarized, these criteria can't be met either and vote-dilution claims again go nowhere.

Not only are the phenomena highlighted by the *Gingles* framework *capable* of change, they *have* been changing—dramatically so, and consistently in ways that confine the operation of §2. The 2020 Census revealed that, for the fifth consecutive decade, residential segregation fell throughout the country. *See, e.g.*, William Frey, *A 2020 Census Portrait of America's Largest Metro Areas: Population Growth, Diversity, Segregation, and Youth* 17-18 (2022). In many areas, it's therefore more difficult than in the past to draw reasonably-configured majority-minority districts, as required by the first *Gingles* precondition. Similarly, the 2020 and 2024 elections saw large declines in racially-polarized voting, especially in diverse states like Florida and Texas. *See, e.g.*, Stephanopoulos, *New Electorate*, *supra*, at 55-57. Based on these elections' results, Black vote-dilution plaintiffs would be unable to prove sufficient racial polarization in most places, and Hispanic litigants would be unable to do so almost everywhere.

Given these trends, it's unsurprising that "§ 2 litigation in recent years has rarely been successful," *Allen v. Milligan*, 599 U.S. 1, 29 (2023), and that "proportional representation of minority voters is absent from nearly every corner of this country," *id.* at 29 n.4. These observations remain as accurate today as in 2023. Minority voters are still disproportionally underrepresented in most states and at all electoral levels. *See, e.g.*, Christopher Warshaw et al., *Districts for a New Decade—Partisan Outcomes and Racial Representation in the 2021–22 Redistricting Cycle*, 52 Publius: J. Federalism 428, 445-46 (2022). And while the success rate of vote-dilution claims has ticked up after the Court confirmed their viability in *Milligan*, they

continue to affect very few districts. This decade, §2 litigation has led to the creation of only two more congressional minority-opportunity districts (out of 435) and just ten more state-legislative minority-opportunity districts (out of more than 7,000). *See Section 2 Cases Database*, Univ. Mich. L. Sch. Voting Rights Initiative (Jan. 1, 2025), https://voting.law.umich.edu/database/.

Finally, if the Court wishes to tether §2 even more tightly to current conditions, it has many options. The Court could require demonstrative and remedial districts to be not just reasonably-configured in the abstract but rather about as compliant with traditional criteria as the districts being challenged. *See, e.g.*, *Milligan*, 599 U.S. at 44 n.2 (Kavanaugh, J., concurring) ("[I]t is important that at least some of the plaintiffs' proposed alternative maps respect county lines at least as well as Alabama's redistricting plan."). Or, as numerous lower courts have done, the Court could set quantitative thresholds for legally significant racially-polarized voting. *See, e.g.*, *Cottier v. City of Martin*, 445 F.3d 1113, 1119 (8th Cir. 2006) (using 60-percent support as a guideline for political cohesion). Also with respect to racially-polarized voting, the Court could put more weight on analyses showing that racial differences in voting behavior persist even after controlling for partisanship. *See, e.g.*, *United States v. Charleston Cnty.*, 365 F.3d 341, 347-48 (4th Cir. 2004).

Further, the Court could orient "the totality of circumstances," 52 U.S.C. §10301(b), toward recent events instead of long-ago discrimination. *See, e.g.*, *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647,

673 (2021) (the "relevance" of whether "minority group members suffered discrimination in the past" is "much less direct"). At this stage of the inquiry, too, the Court could prioritize "the strength of the state interests served by a challenged" practice. *Id.* at 671. At present, countervailing state interests are implicated (obliquely) only by the last Senate factor. *See Gingles*, 478 U.S. at 37. Still another possibility would be for the Court to favor non-districting remedies for vote dilution like cumulative voting or ranked-choice voting. These systems entail no line-drawing at all and thus eliminate any possibility of racial gerrymandering.

ARGUMENT

I. SECTION 2 DIFFERS FROM THE POLICIES ON WHICH THE COURT HAS IMPOSED TEMPORAL LIMITS.

A. Unlike §4 of the VRA, §2 Doesn't Rely on Decades-Old Data.

This Court's decision in *Shelby County* revolved around the obsolescence of the coverage formula of §4 of the VRA. Section 4 subjected jurisdictions to preclearance if they employed certain voting restrictions in the 1964, 1968, or 1972 elections and if their voter registration or voter turnout rates were below 50 percent in those elections. *See* 52 U.S.C. §10303(b). Over and over, the Court stressed that it was unreasonable to differentiate between jurisdictions, at present, using data that was up to forty-nine years old at the time of the Court's ruling. "Coverage today is based on decades-old data and eradicated practices," the

Court commented. 570 U.S. at 551. "[T]he coverage formula … keep[s] the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs." *Id.* at 553. It was "irrational for Congress to distinguish between States … based on 40-year-old data, when today's statistics tell an entirely different story." *Id.* at 556.

This reasoning is wholly inapplicable to §2. Unlike §4, §2 doesn't refer to historical electoral data or voting restrictions no longer in use. To the contrary, §2 is written in the *present* tense to tackle *ongoing* discrimination. The provision prohibits any electoral practice that "results in" a race-based denial or abridgement of the right to vote. 52 U.S.C. §10301(a). A violation of the provision is established if political processes "are not equally open to participation" by all citizens, in that members of certain groups "have less opportunity" to participate and to elect representatives of their choice. *Id.* §10301(b). There's not a word here about decades-old elections or voting limits long abandoned. *See also* S. Rep. No. 97-417, at 43 (1982) ("[T]he very terms … of [§2] … confine its application to actual racial discrimination.").

Like the text of §2, the *Gingles* framework for vote-dilution claims is anchored to the present, not the past. All three *Gingles* preconditions involve "today's statistics," that is, "current data reflecting current needs." *Shelby Cnty.*, 570 U.S. at 553, 556. To determine if the preconditions are satisfied, contemporary residential patterns and voting behavior must be analyzed. Historical segregation and racially-polarized voting are simply irrelevant.

Distinguishing between §2 and §4 in *Shelby County*, this Court noted that "Section 2 is permanent, applies nationwide, and is not at issue in this case." *Id.* at 537. In the opinion's concluding paragraph, the Court reiterated: "Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2." *Id.* at 557. *Shelby County* therefore provides no support for extending the temporal logic that doomed §4 to the entirely different context of §2.

B. Unlike Affirmative Action, §2 Doesn't Classify Individuals on the Basis of Their Race.

Shelby County was the Court's first decision holding that a policy's allotted time had elapsed. *SFFA* was the second (and, so far, the only other) such decision. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court voiced its expectation that, twenty-five years hence, affirmative action would no longer be necessary. *See id.* at 343. In *SFFA*, the Court held that two affirmative-action programs for college admissions were unconstitutional, in part, because *Grutter*'s grace period was nearly over. "[T]he 25-year limit constituted an important part of … *Grutter*," Justice Kavanaugh explained. 600 U.S. at 315 (Kavanaugh, J., concurring). "[T]he Court's decision" in *SFFA* "appropriately respect[ed] and abide[d] by *Grutter*'s explicit temporal limit." *Id.* at 316.

Justice Kavanaugh also identified the reason why an expiration date for §2 would be unwarranted. "*Racial classifications* … must be limited in time" and

"may not continue indefinitely." *Id.* at 313-14 (emphasis added) (internal quotation marks omitted). Because §2 doesn't classify individuals on the basis of their race, "[t]he requirement of a time limit," *id.* at 313, doesn't apply to it.

The Court has long defined a racial classification as a measure that distributes burdens or benefits to people on account of their race. *See, e.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No.1*, 551 U.S. 701, 720 (2007); *Crawford v. Bd. of Educ. of City of Los Angeles*, 458 U.S. 527, 537 (1982). Recently, in *United States v. Skrmetti*, 145 S. Ct. 1816 (2025), the Court added that a statute's "mere reference to [a suspect classification] is [in]sufficient to trigger heightened scrutiny." *Id.* at 1829. Rather, a law classifies on a given basis when it "prohibit[s] conduct for one [group] that it permits for the other." *Id.* at 1831. For example, a sex classification "prescribes one rule for women, and another for men." *Id.* at 1856-57 (Alito, J., concurring in part) (internal quotation marks and alterations omitted).

Under these principles, it's obvious that affirmative-action programs employ racial classifications. Particular people incur burdens (worse odds of admission or employment) or benefits (better odds). And those burdens or benefits are allocated on the basis of race: because applicants identify with one race instead of another. In *Skrmetti*'s language, affirmative action indeed "prescribes one rule for [Black and Hispanic applicants], and another for [Asian-American and white applicants]." *Id.*

Equally clearly, §2 doesn't rely on racial classifications. For one thing, the provision regulates only "State[s]" and "political subdivision[s]"—governmental entities that have no race. 52 U.S.C. §10301(a). Unlike affirmative action, §2 doesn't harm or help individuals in their personal capacities. Also unlike affirmative action, none of §2's elements hinges on anybody's race. To the contrary, each element turns on people's *conduct*. The first *Gingles* precondition asks whether minority voters are residentially concentrated or dispersed: in other words, where they happen to live. The second and third *Gingles* preconditions ask whether voting is racially-polarized: that is, for whom minority voters and white voters tend to cast their ballots. And the crux of the totality of circumstances is historical and ongoing racial discrimination: invidious action, not anyone's racial identity. *See Gingles*, 478 U.S. at 36-37.

To be sure, §2's elements allude to race-related concepts. Residential segregation, racially-polarized voting, and racial discrimination all have something to do with race. But *Skrmetti*'s central teaching is that a mere *reference* to race doesn't necessarily amount to a racial *classification*. Rather, a racial classification is present when a statute treats racial groups differently. *See* 145 S. Ct. at 1831. And §2 does no such thing. Just as the law in *Skrmetti* equally regulated "minors of *any* sex," *id.*, so too does §2 apply to all racial groups without distinction. Members of any race or ethnicity may freely bring both vote-dilution and vote-denial claims. *See, e.g.*, *United States v. Brown*, 561 F.3d 420, 425 (5th Cir. 2009) (upholding a district court's ruling that elected officials "discriminated against the county's white voters in violation of § 2").

Precisely because §2, unlike affirmative action, doesn't racially classify individuals, lower courts have consistently found that *SFFA* has no bearing on vote-dilution litigation. *See, e.g.*, *Robinson v. Ardoin*, 86 F.4th 574, 593 (5th Cir. 2023) ("Drawing a comparison between voting redistricting and affirmative action occurring at Harvard is a tough analogy."); *Singleton v. Allen*, 690 F. Supp. 3d 1226, 1317 (N.D. Ala. 2023) ("[A]ffirmative action cases … are fundamentally unlike this [§2] case.") This Court should likewise conclude that §2 isn't subject to the "requirement of a time limit" that governs racial classifications. *SFFA*, 600 U.S. at 313 (Kavanaugh, J., concurring).

C. Temporal Limits Have Never Applied to Laws Targeting Discriminatory Results.

Section 2 is neither a coverage formula based on obsolete data nor an affirmative-action program. As the Court has acknowledged for decades, §2 *is* a statutory provision targeting discriminatory results. *See, e.g.*, *Milligan*, 599 U.S. at 25 ("§ 2 turns on the presence of discriminatory effects, not discriminatory intent"); *Chisom*, 501 U.S. at 394; *Gingles*, 478 U.S. at 44. Laws aimed at alleviating discriminatory results can be understood as "evidentiary tool[s] used to identify … intentional discrimination—to 'smoke out' … disparate treatment." *Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring). They can also be seen as efforts to induce the "removal of artificial, arbitrary, and unnecessary barriers" that differentially harm members of certain racial groups. *Tex.*

Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 540 (2015) (internal quotation marks omitted).

Of course, §2 isn't the only statute that seeks to lessen discriminatory results. Other such federal laws include Title VII, *see* 42 U.S.C. §2000e-2(k)(1), the FHA, *see id.* §§3604(a), 3605(a), the Equal Credit Opportunity Act, *see* 15 U.S.C. §1691(a), the Age Discrimination in Employment Act, *see* 29 U.S.C. §623(a) (addressing age-based disparate impacts), and the Americans with Disabilities Act, *see* 42 U.S.C. §12112(b)(6) (addressing disability-based disparate impacts). State and local governments have enacted many more provisions giving rise to liability, in part, for discriminatory results. *See generally* Stephanopoulos, *Disparate Impact*, *supra*, at 1596-1600.

Strikingly, in all the litigation about these measures, neither this Court nor any other has ever held (or implied) that they're temporally limited. In *Shelby County*, for instance, the Court twice characterized §2 as "permanent." 570 U.S. at 537, 557; *see also* S. Rep. No. 97-417, at 116 ("It is important to emphasize that the Voting Rights Act … is a permanent statute …"). If the Court were now to put §2 on the clock—let alone to rule that its time is up—the Court would therefore be charting new waters. The Court should decline Appellees' invitation to go down this unfamiliar and disruptive path.

II. THE *GINGLES* FRAMEWORK ALREADY INCLUDES BUILT-IN CURBS ON §2'S REACH.

A. Section 2 Self-Liquidates When the *Gingles* Preconditions Can't Be Satisfied.

There's a generic reason why explicit time limits are unnecessary for laws aiming to alleviate discriminatory results. It's that these laws are already *implicitly* restricted by their own elements. Under the laws, a universal prerequisite for liability is a practically and statistically significant racial disparity (in employment, housing, voting, and so on) caused by a practice now in operation. *See generally* Stephanopoulos, *Disparate Impact*, *supra*, at 1609-21. If the plaintiff can't establish such a disparity, based on current conditions, the plaintiff simply loses. Critically, disparate impacts in American society aren't fixed in amber. Instead, they ebb and flow, rise and fall, as policies and their attendant circumstances change. And when racial disparities fall below the threshold of legal significance, statutes creating liability on this basis cease their operation. Of their own accord, without any judicial deadline, they switch from on to off.

Transitioning from active to inert, moreover, is exactly what laws targeting discriminatory results *have* been doing over the last few decades. Since the 1980s, Title VII disparate-impact plaintiffs have prevailed in only 20 to 25 percent of their suits. *See* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. Rev. 701, 738-39 (2006). In FHA disparate-impact cases, similarly, plaintiffs' appellate win rate has been just 20 percent in recent years. *See* Stacy E.

Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 Am. U. L. Rev. 357, 393, 399 (2013). And in vote-dilution suits under §2—the subject of this case—"[p]laintiff success has diminished over time," dropping from about three-fourths in the 1980s to roughly two-fifths in subsequent decades (out of fewer cases, too). *The Evolution of Section 2: Numbers and Trends*, Univ. Mich. L. Sch. Voting Rights Initiative (2022), https://voting.law.umich.edu/findings/.

Nothing like this evolution did occur—or could have occurred—under the measures on which this Court imposed explicit time limits. If the Court hadn't intervened, §4 of the VRA would have continued requiring certain jurisdictions to preclear their electoral changes until 2031. *See Shelby Cnty.*, 570 U.S. at 535. At that point, Congress could have again renewed the preclearance regime, keeping it in effect for even longer. In *SFFA*, likewise, the universities' approaches to "the use of race in [their] admissions process[es] [were] the same now as [they were] nearly 50 years ago." 600 U.S. at 225 (internal quotation marks omitted). But for the Court's invalidation of these policies, they could have remained in force, unaltered, in perpetuity.

Section 2 resembles other statutes seeking to lessen discriminatory results in that it becomes inoperative when the relevant racial disparities are no longer legally significant. *See, e.g.*, *Johnson v. De Grandy*, 512 U.S. 997, 1024 (1994) (plaintiffs should generally lose if they already "constitute effective voting majorities in a number of … districts substantially

proportional to their share in the population"). But §2 diverges from other laws in this genre in that it's *also* constrained by the unique *Gingles* framework for vote-dilution claims. Under the first *Gingles* precondition, liability is precluded if a minority group is residentially dispersed such that it can't form a majority in an additional reasonably-configured district. *See, e.g.*, *Milligan*, 599 U.S. at 18. Under the second *Gingles* precondition, a vote-dilution claim fails if a minority group is insufficiently politically cohesive: that is, if its members are divided in their candidate preferences. *See, e.g.*, *id.* at 18-19. And under the third *Gingles* precondition, liability is again barred if white bloc voting is absent due to white voters backing minority-favored candidates in substantial numbers. *See, e.g.*, *id.* at 19.[2]

All three *Gingles* preconditions are plainly tied to phenomena that vary temporally and spatially: residential segregation, minority political cohesion, and white bloc voting. Accordingly, commentators have recognized ever since *Gingles* that, under its framework, §2 is inherently "self-liquidating." Bernard Grofman et al., *Minority Representation and the Quest for Voting Equality* 131 (1992). If "residential segregation becomes a thing of the past, minority groups will be unable to launch successful voting

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[2] Section 2 further differs remedially from other statutes targeting discriminatory results. The quintessential §2 remedies—new minority-opportunity districts—are intrinsically time-limited, lasting only until the next redistricting cycle. In contrast, remedies for violations of other laws in this category often lack natural endpoints.

rights suits." *Id.* Similarly, if "racially polarized voting [ceases], then vote dilution litigation will wither away on its own." D. James Greiner, *Re-Solidifying Racial Bloc Voting: Empirics and Legal Doctrine in the Melting Pot*, 86 Ind. L.J. 447, 497 (2011). These features of vote-dilution doctrine distinguish §2 from other statutes aiming to alleviate discriminatory results and make it dependent on geographic and electoral evidence that may—or may not—be present.

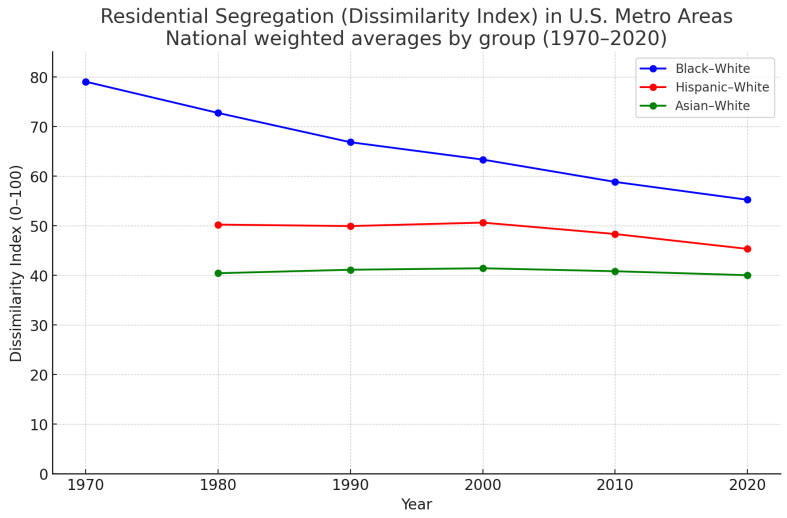
B. Section 2 *Has* Self-Liquidated in Much of the Country.

1. Residential Desegregation

As suggested by the declining win rate of §2 plaintiffs, this evidence is increasingly absent. Section 2 isn't merely capable of self-liquidation in theory; it's actually self-liquidating in practice. Start with residential segregation, the core of the first *Gingles* precondition. Sociologists often measure segregation using the index of dissimilarity, which represents the share of a group's members who would have to move from one neighborhood to another to achieve uniformity across a metropolitan area. Over the last half-century, as the below chart shows, the Black-white version of this metric fell sharply in many parts of the country. Specifically, from a high of almost 80 percent in 1970, the Black-white dissimilarity score of the average metropolitan area dropped to about 55 percent in 2020. This is a considerable improvement, albeit one that stops short of full integration. *See Data*, Diversity and Disparities, https://s4.ad.brown.edu/projects/diversity/Data/data.htm (last visited Sept. 2, 2025) (compiling the data for the chart); *see also, e.g.*,

Stephanopoulos, *Desegregating America*, *supra*, at 1343-60 (summarizing relevant studies); Stephanopoulos, *Race, Place, and Power*, *supra*, at 1345-48 (finding that statewide (as opposed to metropolitan) Black-white segregation has also decreased).

For their part (as also illustrated by the chart), Hispanic-white and Asian-white segregation have been lower than Black-white segregation for decades. In 2020, the average metropolitan area had a Hispanic-white dissimilarity score around 45 percent and an Asian-white dissimilarity score near 40 percent. *See Data*, *supra*; *see also, e.g.*, Reynolds Farley, *The Waning of American Apartheid?*, 10 Contexts 36, 39 (2011). Hispanic and Asian-American residents are even more integrated if they were born in the United States or have lived in the country for longer. *See, e.g.*, John Iceland, *Where We Live Now: Immigration and Race in the United States* 58 (2009).



Given this desegregative trend, one would expect §2 plaintiffs to have had difficulty satisfying the first *Gingles* precondition in recent years. And so they have. For example, in the last full redistricting cycle (the 2010s), at least fourteen §2 claims foundered at this early stage. *See Section 2 Cases Database*, *supra*.[3] Because of the dispersion of the minority population, it was either impossible to draw another majority-minority district or any such district would not have been reasonably-configured. This Court confronted a case of this kind in *Abbott v. Perez*, 585 U.S. 579 (2018). Texas's congressional plan included seven Latino opportunity districts. Because "the geography and demographics of south and west Texas [did] not permit the creation of any more . . . Latino opportunity districts," the plan survived a §2 challenge. *Id.* at 615; *see also* Br. of Amici Curiae Professors Jowei Chen et al. Supporting Appellees/Resp'ts, *Allen v. Milligan*, 599 U.S. 1 (2023) (Nos. 21-1086, 21-1087), 2022 WL 2873376, at *15-16 [hereinafter Chen et al. Br.] (discussing lower-court decisions that deemed the first *Gingles* precondition unsatisfied).

2. Racial Depolarization in Voting

Turning to the second and third *Gingles* preconditions, they're often examined together because, in tandem, they make racially-polarized voting a prerequisite for any successful §2 claim. *See, e.g.*, *Gingles*, 478 U.S. at 52-74. For generations, levels of racially-polarized voting were relatively stable. Black-white

[3] The next section discusses this decade's §2 litigation.

polarization was severe in the South (a 60- to 70-percentage-point gulf between Black and white voters' candidate preferences) and high in other parts of the country (a 40- to 50-point gap). Hispanic-white polarization was moderate nationwide (roughly 20 to 30 points). At these levels, Black political cohesion was generally present and Hispanic political cohesion usually was too. White bloc voting was the norm in both the South and non-southern exurban and rural areas. *See, e.g.*, Stephen Ansolabehere et al., *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 Harv. L. Rev. 1385, 1404 (2010); William D. Hicks et al., *Revisiting Majority-Minority Districts and Black Representation*, 72 Pol. Rsch. Q. 408, 417 (2018); Stephanopoulos, *Race, Place, and Power*, *supra*, at 1354-59.

Over the last decade, however, these familiar patterns have faded or even vanished. Nationwide, the share of Black voters supporting the Democratic presidential candidate dropped from 93 percent in 2016 to 89 percent in 2020 to 85 percent in 2024. *See What Happened in 2024*, Catalist (May 2025), https://catalist.us/whathappened2024/. The share of Hispanic voters backing the Democrat dipped from 70 percent in 2016 to 63 percent in 2020 to 54 percent in 2024. *See id.* The Democratic share of the Asian-American vote fell from 70 percent in 2016 to 65 percent in 2020 to 61 percent in 2024. *See id.* Meanwhile, the Democratic share of the white vote stayed flat, beginning this period at 41 percent and ending it at 42 percent. *See id.*; *see also, e.g.*, Stephanopoulos, *New Electorate*, *supra*, at 55-57; *Trends in U.S. Vote Patterns, 2008-*

2024, Cooperative Election Study, https://cooperativeelectionstudy.shinyapps.io/VoteTrends/ (last visited Sept. 2, 2025).

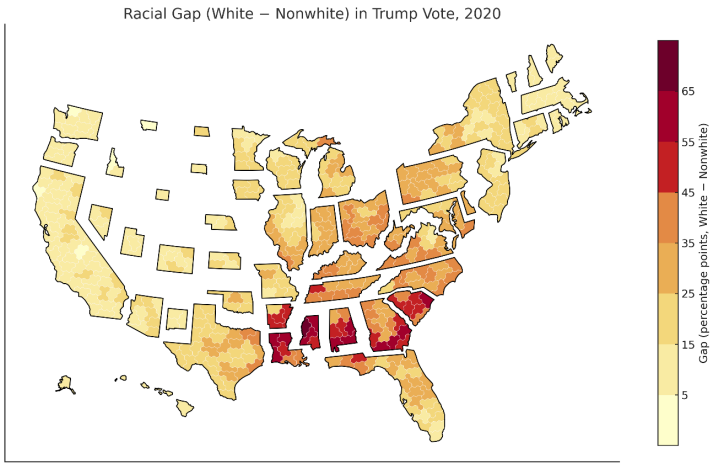
These countrywide statistics mask even sharper voting depolarization in states with large Hispanic populations. In Florida, New York, California, and Texas, respectively, the share of Hispanic voters supporting the Democratic presidential candidate plunged by 23, 23, 16, and 15 percentage points from 2016 to 2024. *See What Happened in 2024*, *supra*. In Florida and Texas, these shifts caused the Democratic share of the Hispanic vote to slump below 50 percent for the first time in modern history. *See id.* With figures in this vicinity, Hispanic-white polarization can't typically be proven in §2 litigation.[4]

Of course, most §2 suits involve regions within—not entire—states. The below choropleth map thus displays the difference between white and nonwhite voters' candidate preferences, by congressional district, in the 2020 presidential election. (Analogous data for 2024 is currently unavailable but would reveal even lower voting polarization.) *See* Shiro Kuriwaki et al., *The Geography of Racially Polarized Voting: Calibrating Surveys at the District Level*, 118 Am. Pol. Sci. Rev. 922, 924-25 (2024) (calculating racially-polarized voting in 2016 and 2020). In most congressional districts—virtually the entire West, the

[4] In any §2 suit, these "exogenous" election results would be supplemented by "endogenous" election results (for the office at issue), which might tell a different story.

whole Northeast, the upper Midwest—racially-polarized voting is low by any measure. Voting polarization is moderate in some of the Midwest and the border South. Only in the Black Belt of the deep South, comprising portions of Alabama, Arkansas, Georgia, Louisiana, Mississippi, and South Carolina, does racially-polarized voting remain high. (And even there, it's substantially lower than in the pre-2016 period.)

Cutting this data another way, there were just 156 congressional districts (out of 435) in which more than 60 percent of Black voters favored the Democratic presidential candidate in 2020 and more than 60 percent of white voters backed the Republican. (As discussed below, these are common thresholds for minority political cohesion and white bloc voting.) There was only *one* congressional district—Georgia's Seventh, northeast of Atlanta—in which Hispanic-white polarization was present based on this definition.



Unsurprisingly, voting depolarization has recently posed considerable problems for §2 plaintiffs. In the 2010s, for instance, courts found the second *Gingles* precondition (minority political cohesion) absent in at least eight cases and the third *Gingles* precondition (white bloc voting) missing in at least fifteen cases. *See Section 2 Cases Database*, *supra*. These cases mostly arose outside the deep South, and in all of them, the candidate preferences of minority voters and/or white voters were split. This Court saw one of these cases in *Cooper v. Harris*, 581 U.S. 285 (2017). In eastern North Carolina, "a meaningful number of white voters [consistently] joined a politically cohesive black community to elect that group's favored candidate." *Id.* at 303. The third *Gingles* precondition therefore couldn't be established in this region, so the State couldn't justify its racially-predominant line-drawing on the ground of §2 compliance. *See id.*; *see also* Chen et al. Br., *supra*, at 19 (summarizing lower-court decisions deeming unsatisfied the second and/or third *Gingles* preconditions).

C. Due to Its Self-Liquidation, §2 Affects Redistricting Only at the Margins Today.

Together, the trends of residential desegregation and racial depolarization in voting help explain why most contemporary §2 suits end in defeat. *See The Evolution of Section 2: Numbers and Trends*, *supra*. These trends also contribute to the disproportional underrepresentation of minority voters in most states. This underrepresentation confirms that §2 isn't being improperly construed to create "a right to have [minority] members … elected in numbers equal

to their proportion in the population." 52 U.S.C. §10301(b).

In 2022, a team of scholars tallied the shares of congressional and state legislative districts in which Black or Hispanic residents comprise more than 40 percent of the citizen voting-age population. (Districts with minority populations this large are likely, if not certain, to be minority-opportunity districts.) These authors also plotted these shares against the fractions of *states'* citizen voting-age populations that are Black or Hispanic. *See* Warshaw et al., *supra*, at 445-46. The below charts update those created by the authors to capture redistricting conducted since 2022. State abbreviations in red indicate maps revised due to successful §2 litigation, while state abbreviations in blue denote maps unaffected by §2 suits. The diagonal lines in the charts correspond to proportional representation for minority voters. Points below the lines reflect sub-proportional representation, and points above them show super-proportional representation.[5]

It's evident that today, as in 2022, minority voters are disproportionally underrepresented (and white voters are disproportionally overrepresented) in the bulk of states. In congressional plans, the share of likely Black-opportunity districts is lower than the Black fraction of the citizen voting-age population in

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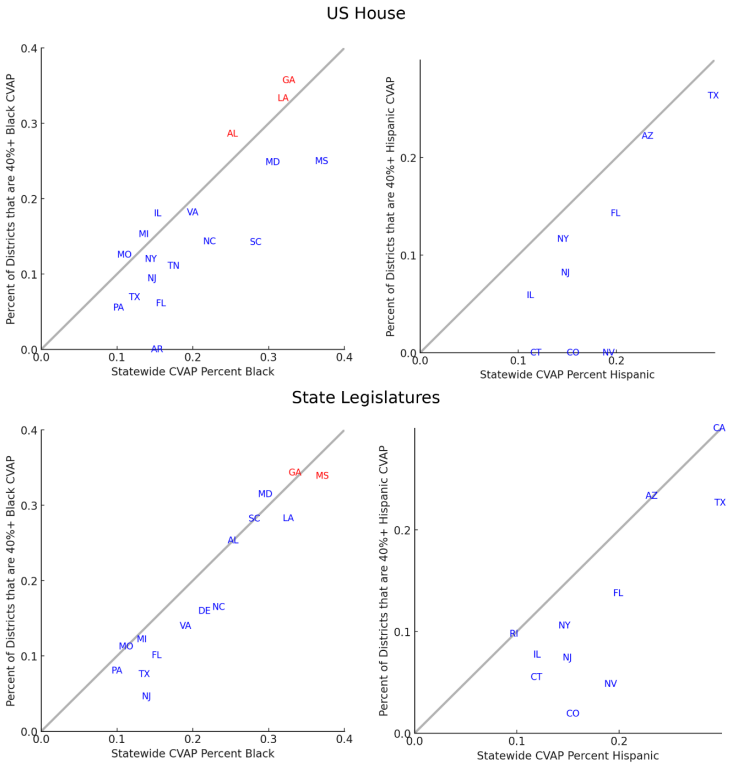
[5] Like the original charts, these include only states where Black or Hispanic residents make up at least 10 percent of the population. Few or no minority-opportunity districts can be drawn in less diverse states.

Arkansas, Florida, Maryland, Mississippi, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia. Black voters are at least proportionally represented only in Alabama, Georgia, Illinois, Louisiana, Michigan, and Missouri. Likewise, the share of likely Hispanic-opportunity districts is below the Hispanic fraction of the citizen voting-age population in Arizona, Colorado, Connecticut, Florida, Illinois, Nevada, New Jersey, New York, and Texas. Only in California are Hispanic voters at least proportionally represented.

The story is much the same at the state legislative level. In these plans, Black voters are disproportionally underrepresented in 11 states. The share of likely Black-opportunity districts reaches the Black fraction of the citizen voting-age population in only four states. Similarly, Hispanic voters are disproportionally underrepresented in eight states. Only in three states does the share of likely Hispanic-opportunity districts match the Hispanic fraction of the citizen voting-age population.



Notwithstanding this evidence, a group of states claims there has been a "wave of recent, successful §2 litigation"—a "post-2020 surge in liability." Br. of Alabama et al. as Amici Curiae Supporting Appellees, *Louisiana v. Callais*, Nos. 24-109, 24-110, 2025 WL 356623 at *29, *34 (U.S. Jan. 28, 2025) [hereinafter States' Br.]. It's true that the success rate of §2 vote-dilution claims has ticked up this decade. Just over half these claims against state-level policies have achieved at least some success in the 2020s, *see Section 2 Cases Database*, *supra*, compared to a success rate above two-fifths in the 2010s, *see The Evolution of Section 2: Numbers and Trends*. As the scholars who compile this data observe, this modest rise is

probably attributable to this Court's confirmation in *Milligan* that vote-dilution liability is warranted when §2 is plainly violated. *Milligan* "preserved [§2's] deployment in circumstances in which it has long been applied." Ellen D. Katz et al., *To Participate and Elect, 2023 Update*, Univ. Mich. L. Sch. Voting Rights Initiative (July 1, 2023), https://voting.law.umich.edu/findings-to-participate-and-elect-2023-update/.

However, the mild increase in §2 activity shouldn't be overstated. As in previous decades, vote-dilution litigation (let alone successful vote-dilution litigation) continues to affect only a tiny fraction of districts. At the congressional level, 44 states have district plans because they have more than one U.S. House member. Just five of these 44 plans have been challenged under §2 in the 2020s: those of Alabama, Georgia, Louisiana, Ohio, and Texas. *See Section 2 Cases Database*, *supra*. Courts have required the creation of only *two* new congressional minority-opportunity districts: one in Alabama (in the wake of *Milligan*), *see Singleton v. Allen*, No. 2:21-cv-1291-AMM, 2023 WL 6567895 (N.D. Ala. Oct. 5, 2023), and one in Louisiana (in litigation preceding this case), *see Robinson*, 86 F.4th at 583-84. A court also ordered the conversion of a coalition district into a majority-Black district in Georgia (without affecting the demographic or partisan makeup of the state's congressional delegation). *See Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 700 F. Supp. 3d 1136, 1286-89 (N.D. Ga. 2023).

At the state legislative level, the states have 99 chambers among them, in which 7,386 state legislators sit. *See State Partisan Composition*, Nat'l Conf. of

State Legislatures (Apr. 30, 2025), https://www.ncsl.org/about-state-legislatures/state-partisan-composition. Just 12 of these 99 chambers have been the subject of §2 litigation this decade: Alabama's senate, Arkansas's house, Georgia's house and senate, Louisiana's house and senate, Mississippi's house and senate, North Carolina's senate, Texas's house and senate, and Washington's senate. *See Section 2 Cases Database*, *supra*. In sum, these suits have led to the design of only *ten* more minority-opportunity districts: six in Georgia, *see Alpha Phi Alpha Fraternity*, 700 F. Supp. 3d at 1342, three in Mississippi, *see Miss. State Conf. NAACP v. State Bd. of Election Comm'rs*, 739 F. Supp. 3d 383, 433 (S.D. Miss. 2024), and one in Washington, *see Palmer v. Hobbs*, No. 3:22-cv-05035-RSL, 2024 WL 1138939 at *5 (W.D. Wash. Mar. 15, 2024).[6]

The "wave of recent, successful §2 litigation" bemoaned by the group of states, then, is really a ripple. States' Br., *supra*, at 34. These states are guilty of even worse hyperbole when they assert that novel "[m]ap-drawing algorithms" have "transformed the first *Gingles* precondition from a significant check … to a speedbump." *Id.* at 30. In fact, in all the successful §2 cases in the 2020s, exactly one expert for plaintiffs has used redistricting algorithms at all—and, even there, merely as "inspiration" for maps she ultimately "dr[e]w by hand." *Singleton v. Merrill*, 582 F. Supp. 3d 924, 961 (N.D. Ala. 2022). Ironically, in this decade's §2 litigation, it has been *defendants'* experts who

[6] Plaintiffs have won preliminary victories in some more §2 cases that haven't yet caused any districts to be redrawn.

have relied more heavily on computational redistricting. *See, e.g.*, *Nairne v. Landry*, ___ F.4th ___, 2025 WL 2355524, at *13 (5th Cir. 2025) (describing thousands of maps generated randomly by defendants' expert); *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 794 (M.D. La. 2022) (same).

Moreover, the first *Gingles* precondition has remained a major impediment for §2 plaintiffs in this cycle. Plaintiffs lost their cases entirely when they were unable to prove that a reasonably-configured majority-minority district could be part of Ohio's congressional map, *see Simon v. DeWine*, No. 4:22-cv-612, 2024 WL 3253267, at *2 (N.D. Ohio July 1, 2024), and Charlotte's city council map, *see Dean v. City of Charlotte*, No. 3:21-cv-587-MOC-DCK, 2022 WL 1698644, at *3 (W.D.N.C. May 26, 2022). Courts that ruled partly in plaintiffs' favor also concluded that the first *Gingles* precondition wasn't satisfied in numerous areas where additional minority-opportunity districts were sought. *See Ala. St. Conf. NAACP v. Allen*, ___ F. Supp. 3d ___, 2025 WL 2451166, at *2 (N.D. Ala. 2025) (unmet around Huntsville); *Miss. State Conf. NAACP*, 739 F. Supp. 3d at 433 (unmet for four illustrative districts); *Alpha Phi Alpha Fraternity*, 700 F. Supp. 3d at 1291 (unmet in south-metro Atlanta, the eastern Black Belt, Macon-Bibb, and southwest Georgia).

* * * *

The point of this discussion is certainly not that §2 is now useless. To the contrary, the provision has real teeth in places, like the deep South, where minority voters are still residentially concentrated and voting

is still highly racially-polarized. If the trends of residential desegregation and racial depolarization in voting were to reverse, as is possible, §2 would also regain its potency throughout the country. And in every corner of the land, even where the provision is mostly dormant today, §2 is a vital reminder of "the hard-fought compromise that Congress struck," *Milligan*, 599 U.S. at 25, in enacting a "permanent, nationwide ban on racial discrimination in voting," *Shelby Cnty.*, 570 U.S. at 557.

III. THE COURT COULD TETHER §2 EVEN MORE TIGHTLY TO CURRENT CONDITIONS.

Thanks to the *Gingles* framework, "the authority to conduct race-based redistricting" to remedy §2 violations doesn't "extend indefinitely into the future." *Milligan*, 599 U.S. at 45 (Kavanaugh, J., concurring). Again, each *Gingles* precondition is effectively a sunset clause that terminates the statute's operation whenever and wherever circumstances have sufficiently changed. As of 2025, circumstances also *have* changed enough to render §2 a "dead letter" in much of America. Grofman et al., *supra*, at 131. This Court thus need not stamp an expiration date on the provision. It's already able to expire—and in the process of doing so—on its own.

If the Court would like to bind §2 even more tightly to current conditions, however, the Court has many options. All these options are derived from "the law as it exists" at present: this Court's and lower courts' decisions construing §2. *Milligan*, 599 U.S. at 23. None

of these doctrinal possibilities is an "attempt to remake [the Court's] § 2 jurisprudence anew." *Id.*

1. Tighten the definition of "reasonably-configured": In its original formulation of the first *Gingles* precondition, the Court asked whether an additional "geographically compact" majority-minority district could be drawn. *Gingles*, 478 U.S. at 50. The Court later raised this hurdle by substituting the phrase "reasonably configured" for "geographically compact." *E.g.*, *Milligan*, 599 U.S. at 18. "Reasonably configured" still encompasses compactness but also requires demonstrative districts to "comport[] with [other] traditional districting criteria" like contiguity, respect for political subdivisions, and respect for communities of interest. *Id.* Today, plaintiffs' experts try to show that demonstrative districts perform adequately along these dimensions—usually measured in the abstract, not relative to enacted districts.

As Justice Kavanaugh suggested in *Milligan*, courts could more "rigorously apply the … 'reasonably configured' requirement[]" by insisting that demonstrative districts comply with traditional criteria about as well as the districts being challenged. *Id.* at 44 n.2 (Kavanaugh, J., concurring). Under this approach, courts' subjective views that demonstrative districts are good enough would be insufficient to satisfy the first *Gingles* precondition. Rather, it would be "important that at least some of the plaintiffs' proposed alternative maps respect [traditional criteria] at least as well as [the disputed] redistricting plan." *Id.* This refinement could also apply to §2 remedies. This Court has already held that, "if a reasonably

compact district can be created, nothing in § 2 requires the race-based creation of a [noncompact] district." *Vera*, 517 U.S. at 979 (plurality opinion). Reflecting the Court's recent vote-dilution decisions, "reasonably configured" could replace "reasonably compact" in this remedial guidance—with the same understanding that enacted districts (not courts' intuitions) establish the benchmark of a reasonable district configuration.

2. Set quantitative thresholds for racially-polarized voting: Proceeding to the second and third *Gingles* preconditions, the Court has never set numerical thresholds for legally significant minority political cohesion and white bloc voting. Most lower courts have therefore considered qualitatively whether these elements are met based on empirical evidence about voter behavior. Some lower courts, though, have adopted more fine-edged rules. The most common is a presumption that minority political cohesion and white bloc voting each is present if more than 60 percent of the relevant voters typically support the same candidates. *See, e.g.*, *Cottier*, 445 F.3d at 1119; *Old Person v. Cooney*, 230 F.3d 1113, 1122 (9th Cir. 2000); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 999 (D.S.D. 2004); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1056 (D. Md. 1994).

This Court, too, could specify presumptive quantitative floors for the second and third *Gingles* preconditions. Doing so would add structure to what's now a discretionary call about whether voter behavior is sufficiently homogeneous. Doing so would also resemble the Court's endorsement of a 50-percent threshold in

Bartlett v. Strickland, 556 U.S. 1, 19-20 (2009), for the minority population of any demonstrative district offered to fulfill the *first Gingles* precondition. As noted earlier, given a 60-percent floor for minority political cohesion and white bloc voting, Black plaintiffs would be unable to prove racially-polarized voting in about two-thirds of congressional districts, and Hispanic plaintiffs would be unable to do so nearly everywhere (using the results of the 2020 presidential election).

3. Prioritize analyses of racially-polarized voting that control for partisanship: In *Gingles*, only four of this Court's members agreed that the cause of racially-polarized voting is irrelevant. Justice White declined to join this portion of the Court's opinion, arguing that, when partisanship is responsible for racial differences in voter behavior, "interest-group politics" is the story, not "racial discrimination." 478 U.S. at 83 (White, J., concurring). Over the years, several lower courts have sided with Justice White, concluding that "evidence of partisanship as the cause of … racially divergent voting should be considered in the totality of the circumstances inquiry." *Charleston Cnty.*, 365 F.3d at 347; *see also, e.g.*, *Uno v. City of Holyoke*, 72 F.3d 973, 981 (1st Cir. 1995); *Nipper v. Smith*, 39 F.3d 1494, 1524-25 (11th Cir. 1994) (en banc).

This Court could resolve the issue left open by *Gingles* by holding that analyses of racially-polarized voting are more compelling, at the totality-of-circumstances stage, when they take partisanship into account. This resolution would encourage §2 plaintiffs to add controls for voters' party affiliations when examining most general election results, to study nonpartisan general elections in which candidates run

without party labels, and/or to focus on primary elections in which all candidates belong to the same party. Unlike in some contemporary cases, plaintiffs would be less apt merely to show that, in general elections, minority voters and white voters have distinctive partisan preferences.

4. Orient the totality of circumstances toward recent events: Also at the totality-of-circumstances stage, certain lower courts have leaned heavily on evidence about historical discrimination. *See, e.g.*, *Brnovich*, 594 U.S. at 655 (observing that the court of appeals "relied on … past discrimination dating back to [Arizona's] territorial days"). This Court could clarify that recent events are more probative than distant history in determining whether a jurisdiction's political processes "*are* not equally open"—*today*—to members of all racial groups. 52 U.S.C. §10301(b) (emphasis added); *see also, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 258 (5th Cir. 2016) (en banc) ("[L]ong-ago evidence of discrimination has less force than more contemporary evidence …").

In the context of voting regulations, the Court issued just this kind of clarification in *Brnovich*. The Court held that evidence about the use of a challenged practice between 1982 (when §2 took its current form) and the present "is a relevant consideration." 594 U.S. at 670. The implication is that older incidents predating §2's 1982 revision are less pertinent. The same approach is viable in this vote-dilution context and would helpfully orient courts toward ongoing, not bygone, discrimination.

5. Put more weight on state interests: It might seem that courts should carefully evaluate the state interests underlying a policy said to be dilutive. But only the last factor weighed at the totality-of-circumstances stage involves state interests—and in terms that implicitly benefit plaintiffs by asking if a jurisdiction's asserted justifications are "tenuous." *Gingles*, 478 U.S. at 37. This Court could rule that the state interests motivating a disputed policy must be taken seriously, without a thumb on the scale, and then incorporated into any assessment of liability.

Brnovich again supports this reframing of the tenuousness factor. There, the Court held that "the strength of the state interests served by a challenged voting rule … must be taken into account." 594 U.S. at 671. "Rules that are supported by strong state interests are less likely to violate § 2." *Id.* at 671-72. This reasoning is as applicable to alleged vote dilution as to regulations of voting itself.

6. Favor non-redistricting remedies: Ever since *Gingles*, single-member districts have been the most common remedies for vote dilution. Indeed, the *Gingles* Court commented that "[t]he single-member district is generally the appropriate standard against which to measure minority group potential to elect." 478 U.S. at 50 n.17. As the Court has seen in many racial gerrymandering cases starting with *Shaw v. Reno*, 509 U.S. 630 (1993), however, single-member districts are subject to racial manipulation. They may be, and often are, designed for racially-predominant reasons.

In contrast, alternative remedies like cumulative voting and ranked-choice voting are exempt from this concern. They require no drawing of districts and so entail no risk of racial gerrymandering. While preserving single-member districts as a remedial option, then, the Court could favor non-redistricting cures for vote dilution—especially at the local level where these systems are easier to implement. *See, e.g.*, *United States v. City of Eastpointe*, No. 4:17-CV-10079, 2019 WL 2647355 at *2 (E.D. Mich. June 26, 2019) (approving a consent decree requiring a municipality to adopt ranked-choice voting). This remedial strategy would obviate the need for "race-based redistricting under § 2," *Milligan*, 599 U.S. at 45 (Kavanaugh, J., concurring), since these policies neither are based on race nor even operate through redistricting.[7]

[7] Relatedly, the Court could favor remedial districts with smaller minority populations in which minority voters must "pull, haul, and trade" to elect their preferred candidates by "form[ing] coalitions with voters from other racial and ethnic groups." *De Grandy*, 512 U.S. at 1020.

CONCLUSION

However this Court disposes of this case, it should not hold that §2 is subject to temporal limits not already implicit in the *Gingles* framework.

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