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 FOR PROFESSOR W. KERREL MURRAY AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae is an Associate Professor of Law and the Milton Handler Fellow at Columbia Law School. He researches, writes, and teaches about constitutional law and election law. His forthcoming article *False Conflict: Colorblindness and Section Two of the Voting Rights Act* explains that Section 2 of the Voting Right Act's consideration of race is compatible with constitutional limits on race-based state action reflected in cases like *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard College*, 600 U.S. 181 (2023). As a scholar of Section 2, amicus curiae has a strong interest in the statute's proper interpretation as consistent with the Constitution. He writes separately to explain the compatibility between Section 2 and several core canons of colorblind constitutionalism. He submits this brief in his individual capacity and references his university affiliation for identification purposes only.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court ordered supplemental briefing addressing the question of whether Louisiana's intentional creation of a second majority-minority congressional district violates the Fourteenth or Fifteenth Amendments, as raised on pages 36-38 of Appellees' brief. That portion of Appellees' brief presents Section 2 of the Voting Rights Act as fundamentally incompatible with this Court's understanding of the limits that the Constitution imposes on race-based state action. In advancing their

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amicus curiae and his counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

attack, Appellees' touchstone is *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard College*, 600 U.S. 181 (2023) ("*SFFA*"). In *SFFA*, Appellees perceive at least three key tenets of a "color-blind Constitution." Appellees Br. 41. First, resort to race-based action can be justified only by a "compelling interest" and only in "the most extraordinary case." Appellees Br. 37. Second, there must be "time limits on race-based state action." *Id.* And third, "race may never be used as a 'negative' and … may not operate as a stereotype." Appellees Br. 38. Louisiana's supplemental brief sings the same tune: "Race-based redistricting is … unconstitutional for precisely the same reasons the race-based admissions programs in *SFFA* were unconstitutional." Louisiana Suppl. Br. 18; *see also* Louisiana Suppl. Br. 15 ("[T]his is an *a fortiori* case post-*SFFA*.").

Section 2 presents no conflict with any of these principles of colorblindness. *First*, Section 2 fits comfortably within one of the enduring justifications embraced by this Court for governmental consideration of race. As *SFFA* recognized, "remediating specific, identified instances of past discrimination that violated the Constitution or a statute" constitutes a "compelling interest" that "permit[s] resort to race-based state government action." 600 U.S. at 207. Compliance with Section 2 satisfies this rationale because it requires states to consider race in redistricting only when necessary to remediate the present-day effects of past or present intentional discrimination. That much is clear from the history of the 1982 amendments to the Voting Rights Act. This Court's subsequent cases reflect and acknowledge that the statute keys on the discriminatory effects that may arise when historical discrimination has so corrupted the political process that genuinely neutral electoral devices nevertheless hinder minority voters' ability to cast or

aggregate their votes on equal terms with others. The bottom line is that, at its core, Section 2 is concerned with remediating past (or present) intentional discrimination.

Second, Section 2's design means that there is a "logical endpoint" to the circumstances in which it requires race-based state action. *SFFA*, 600 U.S. at 212. Because Section 2 targets the present-day effects of past or present discrimination, the statute should trigger remedial steps less frequently as those present-day effects dissipate. That is the genius of the framework that this Court crafted to implement Section 2 in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986): as the conditions that signal the presence of intentional discrimination's effects diminish, due in part to remedial measures like those contained in Section 2 itself, it becomes harder and harder for plaintiffs to satisfy the three *Gingles* factors and the totality-of-the-circumstances test. As scholars have put it, *Gingles* reflects that Section 2 is "self-liquidating." *See, e.g.*, Grofman & Handley, *Identifying and Remedying Racial Gerrymandering*, 8 J.L. & Pol. 345, 402 (1992). Moreover, *Gingles* has that function precisely because it looks to the kinds of current conditions—residential segregation and racially polarized voting—that serve as reasonable indicia of the lasting effects of intentional discrimination that the statute targets. Section 2 thus has a logical endpoint baked into it, ensuring that race-based redistricting will not "extend indefinitely into the future." *Allen* v. *Milligan*, 599 U.S. 1, 45 (2023) (Kavanaugh, J., concurring).

Third, Section 2 does not use race as a "negative" or a "stereotype." *SFFA*, 600 U.S. at 218-219. In *SFFA*, the Court reasoned that "[c]ollege admissions are zero-sum": because there are a limited number of spots available for new students at any particular school, any

advantage given to a minority-group applicant because of his race necessarily disadvantages a majority-group applicant because of her race. *Id.* The same is not true of voting rights. A minority-group voter casting a ballot stops no majority-group voter from doing so. And when an additional majority-minority district is properly drawn to remedy a Section 2 vote-dilution claim, the enforcement of a minority resident's right to have his vote aggregated on equal terms with others' votes does not eliminate any majority-group resident's right to the same. True, the majority-group resident might have preferred district lines that better positioned her to combine her vote with likeminded voters. But Section 2 dashes no legally cognizable expectations when—to cure racially discriminatory vote dilution—it moves a majority-race voter from one aggregative regime that does not dilute her vote to a differently configured nondilutive regime. *See* Karlan & Levinson, *Why Voting is Different*, 84 Cal. L. Rev. 1201, 1231-1232 (1996). Nor does Section 2 use race as a stereotype. The three *Gingles* preconditions and the totality-of-the-circumstances test do not rest on "assumption[s]" about how individuals think or behave. *SFFA*, 600 U.S. at 220. They look to hard evidence—linked to intentional discrimination's effects—of how individuals within a specific geographic region vote and live today, as well as how local history may have influenced those voting and residential patterns.[2]

[2] The arguments in this brief are drawn from amicus curiae's forthcoming article, *False Conflict: Colorblindness and Section Two of the Voting Rights Act.*

ARGUMENT

I. SECTION 2 PERMISSIBLY CONSIDERS RACE TO REMEDIATE THE EFFECTS OF PAST OR PRESENT INTENTIONAL DISCRIMINATION

As Appellees (Br. 37) and Louisiana (Br. 9) note, the Court in *SFFA* underscored the principle that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." 600 U.S. at 208 (quoting *Rice* v. *Cayetano*, 528 U.S. 495, 517 (2000)). That principle, the Court said, "cannot be overridden except in the most extraordinary cases." *Id.* Still, the Court acknowledged the existence of certain "compelling interests" that "permit resort to race-based government action." *Id.* at 207. As relevant here, the Court confirmed that state actors may take race-based action in "remediating specific, identified instances of past discrimination that violated the Constitution or a statute." *Id.* That much commands widespread agreement. *See, e.g.*, *Parents Involved in Community Schools* v. *Seattle*, 551 U.S. 701, 772 n.19 (2007) (Thomas, J., concurring) ("[T]he colorblind Constitution does not bar the government from taking measures to remedy past state-sponsored discrimination—indeed, it requires that such measures be taken in certain circumstances."); Louisiana Suppl. Br. 37-38.

Section 2 satisfies this demanding exception to the Constitution's general bar on race-based state action, because Section 2's design targets the present-day effects of past or present intentional discrimination.

To see how, start with the history of the 1982 amendments that produced the modern-day Section 2, which this Court recounted in detail in *Milligan*. *See* 599 U.S. at 11-14. To briefly summarize: In 1980, a plurality of the

Court in *City of Mobile* v. *Bolden* concluded that the prior version of Section 2 prohibited only electoral devices that contemporary actors enacted or retained with discriminatory purpose. *See* 446 U.S. 55, 61-62 (1980). Congress repudiated that interpretation by amending Section 2 in 1982 to impose a discriminatory "effects test." *Milligan*, 599 U.S. at 12-13, 25. While the preceding version of the statute had barred states from using electoral devices that "deny or abridge" the right to vote based on race, the 1982 amendments barred states from using electoral devices "*in a manner which results* in a denial or abridgment" of that right based on race. 52 U.S.C. §10301(a) (emphasis added).

Critics believed that this text "would inevitably require a focus on *proportionality*—wherever a minority group won fewer seats in the legislature than its share of the population, the charge could be made that the State law had a discriminatory effect." *Milligan*, 599 U.S. at 12. In response—to "allow courts to consider effects but avoid proportionality," *id.* at 13—Congress affirmatively defined Section 2's prohibition by writing into its text language "borrowed" from *White* v. *Regester*, 412 U.S. 755 (1973), a pre-*Bolden* voting-rights case that had repudiated a right to proportionality, *Milligan*, 599 U.S. at 13. Section 2 accordingly activates when "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [Section 2] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. §10301(b); *see Regester*, 412 U.S. at 766. To make this design unmistakable, Congress added a "robust" textual "disclaimer

against proportionality." *Milligan*, 599 U.S. at 13; *see* 52 U.S.C. §10301(b).

Congress's reference to *Regester* provides additional confirmation of Section 2's focus on the effects of past or present intentional discrimination. *Regester* neither demanded that a challenged map's makers had a discriminatory purpose nor required racial proportionality in elections. On the one hand, the Court embraced *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971)—a then-recent case that had contemplated the possibility that unconstitutional racial vote dilution was occurring even absent evidence that districts "were conceived or operated as *purposeful* devices to further racial or economic discrimination." *Id.* at 149 (emphasis added); *see Regester*, 412 U.S. at 765. On the other hand, the Court confirmed that "it is not enough that a racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential." *Regester*, 412 U.S. at 765-766.

Instead, *Regester* asked whether the political processes were not "equally open" to participation by a minority group 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"—the language Congress seized on in the 1982 amendments. 412 U.S. at 766 (citing *Whitcomb*, 403 U.S. at 149-150). To ascertain whether that was the case, the Court started its analysis by first citing "the history of official racial discrimination in Texas" and then looking to indicia of the "residual impact" of that past discrimination, including facts reflecting both residential segregation and racially polarized voting, *id.* at 766 n.10, 766-768—features that would later animate the Court's framework in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), *see infra* Part II. By referencing *Regester*'s standard, Congress sought to reinstate this pre-*Bolden* regime.

That was how contemporaries understood the "mischief" that the 1982 amendments targeted. *See* Bray, *The Mischief Rule*, 109 Geo. L.J. 967, 968, 973, 1003 (2021) (explaining how the textualist "mischief rule" treats "the generating problem … as part of the context for reading the statute"); *Fischer* v. *United States*, 603 U.S. 480, 491-492 (2024) (interpreting statute "in light of the history of the provision," including the "loophole" in prior law that preceding events exposed). What *Bolden* had broken—and what the 1982 amendments aimed to fix—was Section 2's ability to attack the "effects or results of discrimination." *E.g.*, *Panel Advances Extension of 1965 Voting Rights Act*, Boston Globe (Mar. 25, 1982), at p.9.[3] The *New York Times* put it best: the status quo before *Bolden* that the amendment reinstated was one where liability would lie if "the impact of past or present racial discrimination" "preclud[ed] blacks from participating in the political process" to the same degree as other citizens. *Once Again a Clash Over Voting Rights*, N.Y. Times (Sept. 27, 1981), at p.A100.

The Court's later cases interpreting Section 2 appreciate that point. As the Court recognized in *Gingles*, Section 2 is designed to "eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination." 478 U.S. at 69. And as

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[3] *See also, e.g.*, *Senate Panel Approves Vote Law Fought by Blacks*, Chicago Tribune (Mar. 25, 1982), at p.2; *Senate Panel Extends '65 Voting Rights Act*, The Hartford Courant (Mar. 25, 1982), at p.A9; Shanahan, *Voting Rights Bill Blocked in Senate Committee*, The Hartford Courant (Apr. 30, 1982), at p.A4; *2 Southern Senators Block Action on Voting Rights Bill*, Newsday (Apr. 30, 1982), at p.11; *Senate Liberals Want a More Stringent Voting Rights Measure*, Reno Evening Gazette (Mar. 25, 1982), at p.15A; *Veto of Energy Controls Survives Senate Attack*, Spokane Chronicle (Mar. 25, 1982), at p.26.

the Court put it recently in *Milligan*, 599 U.S. at 25, a Section 2 violation occurs "when minority voters face—unlike their majority peers—bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the State, that renders a minority vote unequal to a vote by a nonminority voter." Section 2 thus recognizes that neutral electoral devices adopted or maintained by pure-hearted officials may nevertheless "interact[] with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47.

For these reasons, Section 2 is distinct from a statute that justifies its resort to race by reference to "generalized assertion[s] of past discrimination" or to the general importance of "alleviat[ing] the effects of societal discrimination." *Shaw* v. *Hunt*, 517 U.S. 899, 909-910 (1996); *contra* Louisiana Suppl. Br. 39. Section 2 looks specifically for inequalities in voting rights traceable to past or present intentional discrimination within a particular geographic region. As discussed further in Part II, *infra*, the *Gingles* framework ensures a tight connection between local contemporary or historic instances of intentional discrimination and present-day conditions like residential segregation and intensely racially polarized voting that dilute minority votes.

Section 2 thus targets the present-day effects of past or present intentional discrimination. Of course, A experiences discriminatory effects when X intentionally treats A worse than B due to A's race—and Section 2 bars that, to be sure. But the concept of discriminatory effects is broader. *See* Murray, *Discriminatory Effect(s)*, 78 Fla. L. Rev. __ (forthcoming 2026). It also includes X's unintended treatment of A worse than B in virtue of Y's earlier, intentionally discriminatory

actions. That disparate treatment is also a "discriminatory effect," even though X lacked the discriminatory purpose that Y previously possessed. And Section 2's discriminatory-effects design also keys on that sort of disparate treatment of voters.

Section 2's remedial consideration of race thus presents no conflict, and indeed aligns neatly, with this Court's continuing recognition that "remediating specific, identified instances of past discrimination" constitutes a "compelling interest." *SFFA*, 600 U.S. at 207.

II. RACE-BASED STATE ACTION UNDER SECTION 2 HAS A LOGICAL ENDPOINT

Appellees (Br. 37) and Louisiana (Br. 24-33) also appeal to *SFFA*'s principle that race-based state action "must be a 'temporary matter'" and "must have a 'logical endpoint.'" 600 U.S. at 212 (quoting *Grutter* v. *Bollinger*, 539 U.S. 306, 342 (2003)); *accord id.* at 313-314 (Kavanaugh, J., concurring). That rule reflects that "[e]nshrining a permanent justification for racial preferences would offend" a "fundamental equal protection principle." *Grutter*, 538 U.S. at 342. As relevant here, this principle suggests that "the authority to conduct race-based redistricting cannot extend indefinitely into the future." *Milligan*, 599 U.S. at 45 (Kavanaugh, J., concurring); *see id.* (declining to address that "temporal argument" under the party-presentation rule).

Fortunately, race-based state action under Section 2 *does* have a logical endpoint: because Section 2 targets the present-day effects of past or present intentional discrimination, the statute triggers remedial measures less frequently as those present-day effects dissipate. To be sure, Section 2 is "permanent," *Shelby County* v. *Holder*, 570 U.S. 529, 557 (2013), in that it contains no sunset date and will always prohibit present-day intentional

discrimination based on race in voting. But the need for states to consider race in intentionally crafting majority-minority districts to avoid dilution on account of the present-day effects of past intentional discrimination is *not* permanent. Those effects can and do dissipate, and Section 2 should require race-based remedies less frequently as they do. That is how the Court's *Gingles* framework works, both in theory and in practice.

Start with the first *Gingles* precondition. To satisfy *Gingles* 1, a plaintiff must be a member of a minority group "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. The district, moreover, must be "reasonably configured," in that it "comports with traditional districting criteria, such as being contiguous and reasonably compact." *Milligan*, 599 U.S. at 18. One thing this means is that as housing segregation declines, it becomes harder and eventually impossible to satisfy *Gingles* 1. "That is because as residential segregation decreases … satisfying traditional districting criteria such as the compactness requirement 'becomes more difficult.'" *Milligan*, 599 U.S. at 28-29 (quoting Crum, *Reconstructing Racially Polarized Voting*, 70 Duke L.J. 261, 279 & n. 105 (2020)).

In practice, residential segregation has declined "'sharply' … since the 1970s." *Milligan*, 599 U.S. at 28-29 (quoting Crum, 70 Duke L.J. at 279 & n. 105). Leading measures of housing segregation show that it reached its height in 1970, after half a century of government-sanctioned segregation policies. *See* Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. Chi. L. Rev. 1329, 1339-1340 (2016). But by 2010 it had fallen to approximately where it stood in 1910. *Id.* at 1343-1344.

Based on this trend, it has become harder and harder to satisfy *Gingles* 1 over time. "Indeed, … § 2 litigation in recent years has rarely been successful for just that reason." *Milligan*, 599 U.S. at 29. In recent years, "'[n]umerous lower courts' have upheld districting maps 'where, due to minority populations' geographic diffusion, plaintiffs couldn't design an additional majority-minority district' or satisfy the compactness requirement." *Id.* (quoting Chen Amicus Br. 7). And "[t]he same has been true of recent litigation in this Court," *id.*, such as *Abbott* v. *Perez*, 585 U.S. 579, 615 (2018), where the Court held that a Texas district did not violate Section 2 because "the geography and demographics of south and west Texas do not permit the creation of any more than the seven Latino opportunity districts that exist under the current plan."

Gingles 1 thus imposes a real and substantial limit on the instances in which Section 2 requires states to intentionally draw an additional majority-minority district based on race. *See Milligan*, 599 U.S. at 44 n.2 (Kavanaugh, J., concurring) (highlighting the importance of *Gingles* 1 as a limiting factor). What is more, that limit is logically connected to Section 2's focus on the present-day effects of past intentional discrimination. *Gingles* 1 links to the existence of residential segregation, which can reflect the vestiges of past intentional discrimination like government-sponsored housing segregation. True, racialized living patterns are not inevitably the result of discrimination. But housing is sticky: historical discrimination not only affects the material ability to choose a desired neighborhood and home but also infects attitudes shaping living choices. Krysan & Crowder, *Cycle of Segregation: Social Processes and Residential Stratification* 10-14, 244-245, 252-256 (2017). Particular instances of racially siloed housing thus quite plausibly

have a causal connection to historical housing-segregation policies, and *Gingles*'s first precondition tracks that reasonable inference. By the same token, housing integration provides reason to think that the effects of past intentional discrimination that forcibly separated racial groups are diminishing. *Gingles* 1 correspondingly quiets in the presence of such residential integration. Accordingly, *Gingles* 1 bakes into Section 2 a "logical endpoint" for race-based redistricting. *Grutter*, 539 U.S. at 342.

The second and third *Gingles* preconditions likewise impose a logical endpoint on race-based redistricting under Section 2. *Gingles* 2 requires the plaintiff's minority group to be "politically cohesive." 478 U.S. at 51. And *Gingles* 3 requires that a majority group vote "sufficiently as a bloc" to "usually … defeat the minority's preferred candidate," absent "special circumstances." *Id.* Together, the two are often shorthanded as "racially polarized voting." *Id.* at 52. Courts may never presume the presence of these features; "plaintiffs must prove" cohesive electoral behavior with hard, jurisdiction-specific facts. *Id.* at 46; *see League of United Latin American Citizens* v. *Perry*, 548 U.S. 399, 500-501 (2006) (Roberts, C.J., concurring in part and dissenting in part) (explaining that "[n]o one" in that Section 2 case had "made any 'assumptions' about how voters … will vote based on their ethnic background" because "[t]here was a trial" and "[a]t trials, assumptions and assertions give way to facts"). When the facts show a decline in racially polarized voting, *Gingles* 2 and 3 make it harder and harder to trigger Section 2's remedies.

And indeed, the "primary racial development in recent elections has been a decline in racially polarized voting." Stephanopoulos, *Election Law for the New Electorate*, 17 J. Legal Analysis 41, 55 (2025). The 2024

presidential election continued a national trend that has covered the last three presidential elections and their dividing midterms: nonwhite voters moving toward the Republican Party. *See id.* at 55-56. The most dramatic shift has been among Hispanic voters. After losing Hispanic voters by 38 points in 2016, President Donald Trump lost them by only 25 points in 2020, and then by only 3 points in 2024. Hartig et al., *Behind Trump's 2024 Victory, a More Racially and Ethnically Diverse Voter Coalition* 22-23, Pew Rsch. Ctr. (June 26, 2025). Over the same period, Asian American and Pacific Islander voters have also trended toward decohesion. *What Happened In 2024*, Catalist (May 2025). And while the trend is less dramatic for Black voters, decohesion has reached them as well. Hartig, *Behind Trump's 2024 Victory* 23, *supra*. After losing Black voters by about 85 points in 2016 and 2020, President Trump lost them by only 68 points in 2024. *Id.* To be sure, national trends penetrate different subnational regions at different rates. But the national trend here underscores that racial polarization's causes can dissipate in practice, not just in theory. And when they do, it becomes harder for plaintiffs to satisfy *Gingles* 2 and 3—and appropriately so.

That is appropriate because, like housing segregation, the kind of racially polarized voting that *Gingles* 2 and 3 track is logically connected to Section 2's interest in the present-day effects of past or present intentional discrimination. One cannot presume it to be happenstance when most Black individuals within a jurisdiction cohere politically *qua* Black voters. Nothing about being a member of an identifiable group requires political cohesion with other group members—consider, for example, the national trends for Hispanic voters discussed above. When a racial minority that has been subjected to past racial discrimination remains tightly cohesive in

voting, the stronger inference is that there is some connection between the cohesion and past discrimination that has materially defined that community's experience. *See* Karlan & Levinson, 84 Cal. L. Rev. at 1229. Likewise, cohesion among voters best explained by them being *White* voters offers some reason to suspect the persistence of distinctively racialized political processes rooted in intentional discrimination. And of course *Gingles* 3 demands not just sufficient majority cohesion for bloc voting but also majority bloc voting that consistently opposes and denies a cohesive minority group's preferred outcomes.

When these features exist together, they reflect an electorally agonistic relationship between cohesive, differently raced groups that plausibly reflects the effects of past intentional discrimination. On the flip side, as such racially polarized voting declines, that provides some reason to think that the effects of past discrimination are dissipating. Like *Gingles* 1, then, *Gingles* 2 and 3 embed a logical endpoint for race-based state action required by Section 2.

Even plaintiffs that can establish all three *Gingles* preconditions must still satisfy a totality-of-the-circumstances standard. *See Milligan*, 599 U.S. at 18. The Court's cases channel this inquiry with the factors set out in the Senate Report on Section 2, which explicitly look to (among other things) "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process." *Gingles*, 478 U.S. at 36-37; *see Milligan*, 599 U.S. at 18 (highlighting this Senate Report factor in particular). Like the rest of the *Gingles* framework, assessing the totality of the circumstances requires "an intensely local appraisal" of the electoral

device at issue and a "peculiarly" fact-dependent analysis of "past and present reality." *Gingles*, 478 U.S. at 79. And in this local appraisal, states may offer evidence that the *Gingles*-based inferences are rebutted. *See Johnson* v. *De Grandy*, 512 U.S. 997, 1011-1012 & n.10 (1994). The totality-of-the-circumstances test thus rounds out Section 2's focus on the present-day effects of past or present intentional discrimination by testing whether the present-day factual conditions required by the *Gingles* preconditions may be traceable to intentional discrimination. In light of this design, it should surprise no one that Section 2's on-the-ground results bear no resemblance to a proportionality regime, which would require consistent and indefinite resort to race-based remedies. *See Milligan*, 599 U.S. at 27-28 (citing statistics).

Section 2's logical endpoint distinguishes the statute from other race-based state action that the Court has held unconstitutional. In *SFFA*, the Court concluded that the universities' admissions programs violated the Constitution in part because they "lack[ed] a 'logical end point.'" *SFFA*, 600 U.S. at 221 (quoting *Grutter*, 539 U.S. at 342). In *Grutter*, the Court had set an "expectation" that "'25 years from now, the use of racial preferences will no longer be necessary.'" *Id.* at 224 (quoting *Grutter*, 539 U.S. at 343). Yet, "[t]wenty years later," in *SFFA*, there was "no end … in sight." *Id.* at 213. The Court could locate no coherent durational limitation in the universities' justification for relying on race as a factor in admissions. *See id.* at 221-225. Indeed, the Court characterized the universities as appealing to diversity as an intrinsic and evergreen societal interest. *Id.* at 221-224. Not so for Section 2, which is laser focused on the present-day effects of intentional discrimination and

authorizes race-based state action only insofar as necessary to remediate those particularized harms.

Section 2's self-liquidating nature also distinguishes it from *Shelby County* v. *Holder*, 570 U.S. 529 (2013). There, Congress had for over four decades repeatedly reauthorized the stringent Section 5 preclearance requirements without updating the Section 4 coverage formula that determined which states were subject to those requirements—"as if nothing had changed" since 1965. *Id.* at 549. But in the years that had passed, "dramatic[]" progress toward equal voting rights had occurred. *Id.* at 547. The Court concluded that Congress failed "to shape a coverage formula grounded in current conditions" and "instead reenacted a formula based on 40-year-old facts having no logical relation to the present day." *Id.* at 554. Here, by contrast, the *Gingles* factors ensure that Section 2's remedies are determined by "current conditions," *id.*, including the current state of residential segregation and racially polarized voting in a particular geographic area.

As noted, Section 2 contains no specific expiration date. But the fact that the statute's limiting principle lies in its measure of discriminatory effects rather than any particular date is a feature, not a bug, of Congress's design. It is not surprising that Congress in 1982 could not precisely foresee when the effects of past or present intentional discrimination might cease to infect political life. So Congress reasonably enacted a statute that keys on those effects themselves, a design that this Court elegantly implemented in the *Gingles* framework. Congress's decision to use that empirically grounded approach, rather than a particular sunset date, is entitled to deference.

III. SECTION TWO DOES NOT USE RACE AS A "NEGATIVE" OR A "STEREOTYPE"

In *SFFA*, this Court concluded that the universities' admissions systems violated the "twin commands of the Equal Protection Clause that race may never be used as a 'negative,' and that it may not operate as a stereotype." 600 U.S. at 218. Appellees (Br. 38) and Louisiana (Br. 18-24) contend that the same is true of Section 2. They are wrong; Section 2 contravenes neither commandment.

First, Section 2 does not use race as a "negative" to remedy inequality because it does not involve "discriminat[ing] *against*" any "racial group[]." *SFFA*, 600 U.S. at 212. To see why, consider the context in *SFFA* where the Court found that race was used impermissibly as a "negative": college admissions. As the Court stated, college admissions, by design, stack applicants with different characteristics and credentials against one another. *Id.* at 218-219. When a college or a university gives a preference to a certain factor when making admissions decisions, applicants possessing that preferred factor benefit. *Id.* But by the same token, applicants who do not have the preferred factor are disadvantaged in the admissions process, as "[a] benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter." *Id.* Thus, if "members of some racial groups would be admitted in greater numbers than they otherwise would have been" due to a racial preference, then race operates as a "negative factor"—like how a preference for applicants with high grades and test scores is a "negative" for applicants lacking them. *Id.* at 219. Put otherwise, "[c]ollege admissions are zero-sum." *Id.* at 218.

That "zero-sum" paradigm, however, does not fit Section 2. True enough, elections are zero-sum games: one candidate wins and other candidates lose. But Section 2 is not about "pick[ing] winners and losers" of elections. *SFFA*, 600 U.S. at 229; *contra* Louisiana Suppl. Br. 2, 14-16. The statute instead aims to ensure equal opportunity to exercise *voting rights*, which pose no zero-sum problem.

Consider the right to participate (i.e., the "right to cast a ballot that is counted"), which is one facet of the right to vote. Karlan, *The Rights to Vote: Some Pessimism About Formation*, 71 Tex. L. Rev. 1705, 1709-1710 (1993). My right to cast a ballot and have it counted loses no value when my fellow voters exercise their own right, and my vote stops no one else from voting. *See* Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 Mich. L. Rev. 1833, 1879 (1992). Accordingly, protecting one voter's participation right discriminates against no one else's.

The same goes for the aggregation right (i.e., the right to have one's ballot combined with the ballots of like-minded individuals on equal terms with all cast ballots), another aspect of the right to vote. Karlan, 71 Tex. L. Rev. at 1712-1713. The aggregation right underpins Section 2 vote-dilution claims, which recognize that intentional race discrimination's effects still prevent some individuals from aggregating their ballots on equal terms with others. A Section 2 claim lies "where an 'electoral structure operates to minimize or cancel out' minority voters' 'ability to elect their preferred candidates.'" *Milligan*, 599 U.S. at 17-18 (quoting *Gingles*, 478 U.S. at 48). As discussed above, Section 2 is designed to root out that evil.

To remediate such dilution, Section 2 may require altering the aggregative status quo; a remedy, for example, may call for an additional majority-minority district to be drawn. No doubt, such alterations might affect the aggregative *desires* of already-undiluted voters. Everyone likes their preferred candidate to win, and different devices for aggregating votes—one congressional map versus another—might better position a voter to see her preferred candidate succeed. If the Black Louisianans here have a valid Section 2 claim that justifies drawing a second majority-minority district, some non-Black Louisianans might like the new aggregative regime less than the old one. But their aggregation rights do not encompass those dashed desires. They, like Black Louisianans, are entitled to a nondilutive aggregative regime. So long as the remedial map respects that right, no law makes their preference for a *particular* nondilutive regime an entitlement. *See* Karlan & Levinson, 84 Cal. L. Rev. at 1231; Issacharoff, 90 Mich. L. Rev. at 1879-1880. Put simply, such non-Black Louisianans will have been moved from one regime in which they received what the law entitled them to receive to another that grants them the same.

Appellees' and Louisiana's error may be in mistaking Section 2 as protecting groups' entitlements to preferred electoral outcomes, such that it cannot help but "discriminate *against*" one group or another. *SFFA*, 600 U.S. at 212; *see* Appellees Br. 38; Louisiana Suppl. Br. 22. That is wrong. Section 2 protects *individuals'* rights to cast and aggregate their votes on par with others. *See Milligan*, 599 U.S. at 25; *Shaw*, 517 U.S. at 917. As relevant here, Section 2 requires only that past or present intentional discrimination's effects not bar any Louisianans from aggregating their votes on par with other Louisianans. It requires only, in short, that every

Louisianan be able to coalition-build sans intentional discrimination's distortive effects. That aim "advantages" no individuals, let alone groups, "at the expense of" others. *SFFA*, 600 U.S. at 218-219.

Second, Section 2 does not use race as a "stereotype." In *SFFA*, the Court underscored that it has repeatedly "rejected the assumption that 'members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike." 600 U.S. at 220 (quoting *Schuette* v. *BAMN*, 572 U.S. 291, 308 (2014) (plurality op.)). Louisiana (Br. 3) argues that this is how Section 2 works, claiming that "race-based redistricting rests on" the "invidious stereotype" that "all minorities, by virtue of their membership in their racial class, think alike and share the same interests and voting preferences."

Nothing could be further from the truth. As discussed in Part II, *supra*, the *Gingles* preconditions require a plaintiff to come forward with *evidence* that a particular localized population does in fact vote and reside on highly racially polarized lines. That showing turns on empirical data reflective of the effects of discrimination that Section 2 targets, not on "assumption[s]" about how individuals think or behave. *SFFA*, 600 U.S. at 220-221. And that showing makes no claim about how minority or non-minority individuals vote or live writ large. The *Gingles* inquiry instead involves an analysis that is "peculiarly dependent upon the facts of each case" and requires "'an intensely local appraisal' of the local electoral mechanism at issue" within a specific contiguous and compact geographic area. *Milligan*, 599 U.S. at 19 (quoting *Gingles*, 478 U.S. at 79).

CONCLUSION

For the reasons above, Appellees and Louisiana present a false conflict between Section 2 and the colorblind principles reflected in *SFFA*. The Court should reaffirm the constitutionality of Section 2.

Respectfully submitted.

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