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 APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR PROJECT ON FAIR REPRESENTATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*

The Project on Fair Representation is a public-interest organization committed to the principle that racial and ethnic classifications are unconstitutional, unfair, and harmful. It works to advance race-neutral rules in education, government action, and voting. The Project pursues these goals through education and advocacy and has been involved in several cases before the Supreme Court involving these important issues. The Project opposes racial gerrymandering of all kinds. Eliminating racial sorting in districting is not only what our Constitution requires, but it is also a needed remedy for our Nation's increasingly polarized and racialized politics. Because S.B. 8 structures elections based on citizens' races, the Project has a direct interest in this case. It filed an *amicus* brief below regarding remedies, D. Ct. Dkt. 231, and filed an *amicus* brief in this Court before last Term's argument, see Brief for Project on Fair Representation as *Amicus Curiae* in Support of Appellees, *Louisiana* v. *Callais*, Nos. 24-109, 24-110, 2025 WL 356621 (U.S. Jan. 27, 2025) ("*Amicus* Brief").*

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* Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

No one denies that Louisiana intentionally segregated citizens by their race in drawing S.B. 8's district maps. That use of race violates the Fourteenth Amendment, and neither § 2 of the Voting Rights Act nor the Fifteenth Amendment can justify this denial of equal protection.

First, as this Court recently held, States "may never use race as a stereotype or negative." *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard College*, 600 U.S. 181, 213 (2023). But that is exactly what States do when they sort voters by race into voting districts. They assume that voters will vote particular ways based on their race, and tell computers to draw maps according to this racist assumption. The result? Systematically segregating voters by race. *Students for Fair Admissions* said that use of race as a stereotype or negative is *never* allowed, so it makes no difference what a judge-created exception like strict scrutiny or a Congress-created justification like § 2 might say. S.B. 8—like most modern applications of § 2—violates the equal protection right of citizens to be free of invidious racial discrimination by the government.

Second, even if strict scrutiny could excuse using race as a negative, § 2 does not provide a sufficient compelling interest. The statute as applied today goes far beyond the Fifteenth Amendment's coverage, encompassing vote dilution claims with no allegation of intentional discrimination and finding liability practically whenever racially polarized voting exists. But racially polarized voting is not state discrimination. So whatever § 2's historical roots, it

has evolved into a sword for creating racially gerrymandered districts rather than a shield against racial discrimination. Politics and society at large have become vastly more integrated than when § 2 was enacted and amended, and evidence shows that partisan attachments are much more significant than racial ones. Thus, modern § 2 applications are not congruent and proportional to the Fifteenth Amendment's coverage, and the statute cannot continue to provide a compelling government interest to excuse racial discrimination.

Even if § 2 applications today were otherwise authorized by the Fifteenth Amendment, they would still be unconstitutional when they violate the Fourteenth Amendment. The Fifteenth Amendment's sanction of "appropriate" legislation, the scheme of the Reconstruction Amendments, and the overall design of the Constitution all confirm that one constitutional provision should not be read to sanction a violation of another. Instead, constitutional provisions are read in harmony. So Fifteenth Amendment legislative applications remain subject to the Fourteenth Amendment's guarantee of equal protection of the laws. Because modern § 2 applications that give rise to discriminatory laws like S.B. 8 violate equal protection by mandating racial gerrymandering, they are not authorized by the Constitution as a whole and cannot provide a valid basis for any compelling government interest.

To protect citizens' equal treatment before the law—from Congress, courts, and States—the Court should hold that S.B. 8's racial redistricting is unconstitutional and affirm.

ARGUMENT

The Fourteenth Amendment's Equal Protection Clause "requires equality of treatment before the law for all persons without regard to race." *Students for Fair Admissions*, 600 U.S. at 205. The Clause was viewed as embodying "a 'foundational principle'—'the absolute equality of all citizens of the United States politically and civilly before their own laws.'" *Id.* at 201 (cleaned up). It does "not permit any distinctions of law based on race or color." *Id.* at 202.

But for almost a century after the Civil War, the Court and many parts of the country departed from that guarantee in an approach with "inherent folly"—"trying to derive equality from inequality." *Id.* at 203. In *Brown* v. *Board of Education*, 347 U.S. 483 (1954), this Court agreed with the plaintiffs that States had "no" "authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor." *Students for Fair Admissions*, 600 U.S. at 204. "Laws dividing parks and golf courses; neighborhoods and businesses; buses and trains; schools and juries were undone, all by a transformative promise" that "'the Constitution forbids discrimination . . . against any citizen because of his race.'" *Id.* at 205 (cleaned up) (quoting *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954)). "These decisions reflect[ed] the core purpose of the Equal Protection Clause: doing away with all governmentally imposed discrimination based on race." *Id.* at 206 (cleaned up). The Fourteenth Amendment's "clear and central purpose . . . was to eliminate *all* official state sources of invidious racial discrimination in the States." *Ibid.* (emphasis added).

But even as the Court course corrected, a new exception to the Clause's absolute prohibition on official racial discrimination crept into its jurisprudence. At first suggested only "in the infamous case *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944)," *Students for Fair Admissions*, 600 U.S. at 207 n.3, the notion that the Clause's guarantee could be balanced away with a good enough policy excuse—i.e., strict scrutiny—was applied more expressly in *Palmore* v. *Sidoti*, 466 U.S. 429, 432–33 (1984), and subsequent cases.

This exception to the Clause has no roots in text, history, or neutral principles of adjudication. The "Clause sought to reject the Nation's history of racial discrimination, not to backdoor incorporate racially discriminatory and oppressive historical practices and laws into the Constitution." *United States* v. *Rahimi*, 602 U.S. 680, 723 (2024) (Kavanaugh, J., concurring). "The Court 'appears to have adopted' heightened-scrutiny tests 'by accident' in the 1950s and 1960s in a series of Communist speech cases, 'rather than as the result of a considered judgment.'" *Id.* at 731–32 (quoting *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 125 (1991) (Kennedy, J., concurring in judgment)). "[B]efore the late 1950s, 'what we would now call strict judicial scrutiny did not exist.'" *Id.* at 731 (quoting Fallon, *The Nature of Constitutional Rights: The Invention and Logic of Strict Judicial Scrutiny* 30 (2019)). The strict scrutiny test thus "ha[s] no basis in the text or original meaning of the Constitution." *Ibid.* (quoting Alicea & Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, National Affairs 72, 73 (2019)).

What's more, strict scrutiny requires policy balancing that is hard to square with the limited judicial role under the Constitution. "It requires judges to weigh the benefits against the burdens of a law and to uphold the law as constitutional if, in the judge's view, the law is sufficiently" compelling, based on "highly subjective judicial evaluations of how important a law is." *Rahimi*, 602 U.S. at 732 (Kavanaugh, J., concurring). Strict scrutiny "permits and even requires judges to engage recurrently in only minimally structured appraisals of the significance of competing values or interests." *Ramirez* v. *Collier*, 595 U.S. 411, 442 n.1 (2022) (Kavanaugh, J., concurring) (quoting Fallon, *supra*, at 66–67). In other words, it "forces judges to act more like legislators who decide what the law should be, rather than judges who 'say what the law is.'" *Rahimi*, 602 U.S. at 732 (Kavanaugh, J., concurring) (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

In sum, "[t]he Constitution does not prescribe tiers of scrutiny," and "[t]he illegitimacy of using 'made-up tests' to displace" text and history "as the primary determinant of what the Constitution means has long been apparent." *Whole Woman's Health* v. *Hellerstedt*, 579 U.S. 582, 639 (2016) (Thomas, J., dissenting) (cleaned up) (quoting *United States* v. *Virginia*, 518 U.S. 515, 570 (1996) (Scalia, J., dissenting)).

Fortunately, this Court recognized in *Students for Fair Admissions* that regardless of States' policy excuses, they "may *never* use race as a stereotype or negative." 600 U.S. at 213 (emphasis added). So this Court need not consider strict scrutiny at all, for race-

based districting inherently uses race as a stereotype or negative.

Even if strict scrutiny applied, S.B. 8 could not satisfy it. Though S.B. 8's defenders claim a compelling interest in complying with § 2, this Court has never sanctioned the circular, rights-destroying suggestion that statutory compliance can excuse a constitutional right. At any rate, modern § 2 applications are detached from the statute's supposed Fifteenth Amendment authority, as liability under modern § 2 is based on little more than citizens' voluntary choices about where to live and how to vote. Especially as politics and society have become integrated over the past few decades, with voting differences traceable to partisan disagreements, the connection between modern § 2 applications and the Fifteenth Amendment is too tenuous. Plus, even if modern § 2 applications were otherwise authorized, Fifteenth Amendment legislation must be "appropriate" and thus in harmony with the rest of the Constitution, including the Fourteenth Amendment. Requiring States to engage in racial segregation is contrary to the Fourteenth Amendment. And a State could have no compelling interest in complying with a federal statute that is unauthorized by the Constitution as a whole. So regardless of which test applies, S.B. 8 is unconstitutional.

I. S.B. 8 impermissibly uses race as a negative or a stereotype.

Regardless of whether a State's law "compl[ies] with strict scrutiny," it "may never use race as a stereotype or negative." *Students for Fair Admissions*, 600 U.S. at 213. In *Students for Fair Admissions*, the

Court repeated the point: under the "commands of the Equal Protection Clause," "race may *never* be used as a 'negative' and . . . may not operate as a stereotype." *Id.* at 218 (emphasis added). And "[j]ust like" universities used race as a negative and stereotype in the affirmative action context, "drawing district lines" with "consideration of race" also uses race as a negative or stereotype. *Id.* at 361 n.34 (Sotomayor, J., dissenting). "[F]encing" citizens of certain races "out of town" "obviously discriminate[s] against" them. *Gomillion* v. *Lightfoot*, 364 U.S. 339, 341–42 (1960).

There appears to be no dispute that "race was one consideration" in S.B. 8's district lines. Tr. of Oral Arg. in *Louisiana* v. *Callais*, O. T. 2025, Nos. 24-109, 24-110, p. 45 (statement of counsel for Appellants in No. 24-110); see *id.* at 56 (agreeing that "there's a second majority-minority district . . . because of race"). And "systematically dividing the country into electoral districts along racial lines" is "nothing short of a system of 'political apartheid.'" *Holder* v. *Hall*, 512 U.S. 874, 905 (1994) (Thomas, J., concurring in judgment) (quoting *Shaw* v. *Reno*, 509 U.S. 630, 647 (1993)). "[D]istricting [laws] that sort voters on the basis of race 'are by their very nature odious.'" *Wisconsin Legislature* v. *Wisconsin Elections Comm'n*, 595 U.S. 398, 401 (2022) (quoting *Reno*, 509 U.S. at 643). "When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, think alike, share the same political interests, and will prefer the same candidates at the polls." *Miller* v. *Johnson*, 515 U.S. 900, 911–12 (1995) (cleaned up). These assumptions "further[]

stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Students for Fair Admissions*, 600 U.S. at 221 (cleaned up).

Further, when racial lines are drawn, "the multiracial . . . communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race . . . rather than to political issues are generated; communities seek not the best representative but the best racial . . . partisan." *Reno*, 509 U.S. at 648 (quoting *Wright* v. *Rockefeller*, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting)). Race-based districting thus "tends to sustain the existence of ghettos by promoting the notion that political clout is to be gained or maintained by marshaling particular racial, ethnic, or religious groups in enclaves." *Johnson* v. *De Grandy*, 512 U.S. 997, 1030 (1994) (Kennedy, J., concurring in part and in judgment) (cleaned up).

This Court in *Students for Fair Admissions* relied on the above cases in holding that race-based college admissions policies impermissibly used race as a stereotype or negative. 600 U.S. at 220–21. This implicitly acknowledges the reality that race-based districting too "fail[s] to comply with the . . . commands of the Equal Protection Clause." *Id.* at 218. "[A]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller*, 515 U.S. at 911 (cleaned up).

Sorting voters into districts by their race based on assumptions about a race's propensity to support particular candidates "turn[s] that principle on its head." *Students for Fair Admissions*, 600 U.S. at 223–24. Because S.B. 8 indisputably involves race-based districting with race used as a negative or stereotype, it is unconstitutional, and no further analysis is needed.

II. S.B. 8 is unsupported by a compelling interest so flunks strict scrutiny.

Even if States could ever justify using race as a negative or a stereotype by invoking strict scrutiny, judicial balancing could not save S.B. 8. This Court's "precedents have identified only two compelling interests that permit resort to race-based government action": "remediating specific, identified instances of past discrimination," and "avoiding imminent and serious risks to human safety in prisons." *Students for Fair Admissions*, 600 U.S. at 207.

Neither appears to be asserted as justification for S.B. 8. See, *e.g.*, Supplemental Brief for Robinson Appellants 32 (asserting "compelling interest in remedying racial vote dilution"). Rather, S.B. 8's defenders assert a bare "compelling interest" in "§2" of the Voting Rights Act. *Id.* at 36. But as Project on Fair Representation has already shown, allowing statutory compliance to be asserted as a justification for a constitutional violation inverts our constitutional order. See *Amicus* Brief 19–29.

Though S.B. 8's defenders try to shoehorn § 2 compliance into "remediating specific, identified instances of past discrimination," *Students for Fair*

Admissions, 600 U.S. at 207, that effort is baseless. No one has identified any "specific, identified instance[] of past discrimination" with a logical connection to the racial discrimination in S.B. 8. Compare *Shaw* v. *Hunt*, 517 U.S. 899, 909–10 (1996) (explaining that "[a] generalized assertion of past discrimination in a particular . . . region is not adequate," and "an effort to alleviate the effects of societal discrimination is not a compelling interest"), with *Robinson* v. *Ardoin*, 605 F. Supp. 3d 759, 847 (M.D. La. 2022) (the *Robinson* district court relying on old historical discrimination on the ground that "1965, the year the Voting Rights Act was passed, is only 57 years [ago] today," so "is not ancient history").

S.B. 8's defenders repeatedly invoke the vacated preliminary injunction in the prior *Robinson* litigation, but even taking the preliminary findings there at face value, no one could pretend that the framework of *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), is intended to or does identify past discrimination with any direct connection to race-based districting. The *Gingles* framework "is notoriously unclear and confusing," with "'considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim.'" *Merrill* v. *Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring) (quoting *id.* at 883 (Roberts, C.J., dissenting)). The best "approximat[ion]" of the convoluted *Gingles* standard for § 2 liability is: "If voting is racially polarized in a jurisdiction, and if there exists any more or less reasonably configured districting plan that would enable the minority group to constitute a majority in a number of districts

roughly proportional to its share of the population, then the jurisdiction must ensure that its districting plan includes that number of majority-minority districts 'or something quite close.'" *Allen* v. *Milligan*, 599 U.S. 1, 81 (2023) (Thomas, J., dissenting).

"But racially polarized voting is not evidence of unconstitutional discrimination," *Nw. Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 228 (2009), and the independent choices of citizens of all races about how to vote and where to live do not stack up to discrimination of any type. Plus, "[g]iven the ubiquity and long tradition of highly majoritarian electoral systems in American democracy, there is scant basis for suspecting an official intent to discriminate from the mere fact that an electoral system results in a minority community enjoying a less-than-proportionate share of political representation." Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. Pa. L. Rev. 377, 401 (2012).

S.B. 8's defenders also invoke the Fifteenth Amendment, suggesting that a statute that purportedly implements that amendment can provide a compelling interest sufficient to violate the Fourteenth Amendment. That is wrong, for at least two reasons. First, it is doubtful that the Fifteenth Amendment could still authorize § 2 as applied today. Second, even assuming the Fifteenth Amendment could otherwise justify modern § 2 applications, a federal statute cannot be "appropriate" within the meaning of § 2 of the Fifteenth Amendment if its applications violate the Fourteenth Amendment. And a State could not have a compelling interest in

complying with a federal statute that is not authorized by the Constitution.

A. The Fifteenth Amendment cannot justify modern § 2 applications like S.B. 8.

Louisiana could not have a compelling interest sufficient to justify S.B. 8 in complying with § 2, for the Fifteenth Amendment cannot today authorize such race-based districting—if it ever could. The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," and Congress may "enforce" that prohibition "by appropriate legislation." U.S. Const. amend. XV. The amendment's prohibition on discriminatory denials of the right to vote cannot be invoked today to justify discriminatory districting. States could only have a "strong interest in complying with federal antidiscrimination laws *that are constitutionally valid as interpreted and as applied*." *Reno*, 509 U.S. at 654 (emphasis added). That no longer describes § 2 applications.

As an initial matter, Congress's Fifteenth Amendment power to "enforce" should be read in accord with its "normal meaning"—to "'put in execution.'" *Tennessee* v. *Lane*, 541 U.S. 509, 558–59 (2004) (Scalia, J., dissenting). The amendment thus "does not authorize . . . so-called 'prophylactic' measures" that "prohibit[] primary conduct that is itself not forbidden by the" amendment. *Id.* at 560. "So-called 'prophylactic legislation' is reinforcement rather than enforcement." *Id.* at 559.

Here, there is no doubt that § 2 has long exceeded the Fifteenth Amendment's scope. For instance, "[t]his Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims" at all. *Voinovich* v. *Quilter*, 507 U.S. 146, 159 (1993).[1] And "racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation." *City of Mobile* v. *Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion). Section 2 required that ingredient too at its outset, *id.* at 60, but in 1982, Congress rewrote the statute "to reach cases in which discriminatory intent is not identified." *De Grandy*, 512 U.S. at 1009 n.8. Because "the Constitution requires a showing of intent that [the new] § 2 does not, a violation of § 2 is no longer a fortiori a violation of the Constitution." *Reno* v. *Bossier Par. Sch. Bd.*, 520 U.S. 471, 482 (1997).

Applying the new § 2, the district court in the prior *Robinson* litigation declared that "whether the Louisiana Legislature *intended* to dilute the votes of Black Louisianans" is "[n]ot relevant" and "the wrong question." 605 F. Supp. 3d at 777. Thus, § 2's application here exceeds Congress's Fifteenth Amendment enforcement authority, and S.B. 8 lacks a compelling government interest rooted in any constitutional statute.

The same result obtains even on the assumption that the Fifteenth Amendment lets Congress "prohibit[] a somewhat broader swath of conduct,

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[1] Properly understood, § 2 "does not apply to redistricting" either, underscoring the implausibility of any compelling interest here in complying with § 2. *Abbott* v. *Perez*, 585 U.S. 579, 622 (2018) (Thomas, J., concurring, joined by Gorsuch, J.).

including that which is not itself forbidden by the Amendment's text." *Lane*, 541 U.S. at 518 (quoting *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000)). Such legislation may be "valid if it exhibits 'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Id.* at 520 (quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997)).

Notwithstanding the arguments of S.B. 8's defenders, this rule applies to both Fourteenth and Fifteenth Amendment legislation, given "Congress' parallel power to enforce the provisions of" these amendments. *City of Boerne*, 521 U.S. at 518; see *City of Rome* v. *United States*, 446 U.S. 156, 208 n.1 (1980) (Rehnquist, J., dissenting) (collecting cases holding that "the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive"). S.B. 8's defenders point to no difference in the meaning of "enforce" between these provisions that would warrant a different test. See *United States* v. *Blaine Cnty.*, 363 F.3d 897, 904 (CA9 2004) (applying congruence-and-proportionality review to § 2). And it would be passing strange to adjudicate the constitutionality of Voting Rights Act provisions—which were founded on the Fourteenth and Fifteenth Amendments together, H.R. Rep. No. 89-439, at 6 (1965); S. Rep. No. 97-417, at 39 (1982)—differently

depending on whether a particular application implicates one amendment or the other.[2]

Modern § 2 applications are not congruent or proportional. From the start, § 2 "authorize[d] federal intrusion into sensitive areas of state and local policymaking and represent[ed] an extraordinary departure from the traditional course of relations between the States and the Federal Government." *Shelby Cnty.* v. *Holder*, 570 U.S. 529, 545 (2013) (cleaned up); see *Alexander* v. *S.C. State Conf. of the NAACP*, 602 U.S. 1, 6 (2024) (noting that "[t]he Constitution entrusts state legislatures with the primary responsibility for drawing congressional districts"). Even if the provision originally "could be justified by 'exceptional conditions,'" *Shelby Cnty.*, 570 U.S. at 545 (quoting *South Carolina* v. *Katzenbach*, 383 U.S. 301, 334 (1966)),[3] the law's "current

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[2] For instance, "the Fourteenth Amendment must afford the basis for Section 2 claims brought by groups who are protected owing to their status as language minorities rather than racial minorities." *Making Sense of Section 2*, *supra*, at 457 n.117. And § 2 "may need the Fourteenth Amendment as its anchor insofar as it reaches injuries beyond simple vote denial." *Ibid.*

[3] It is doubtful that the "legislative record" even in 1982 when § 2 was amended supported the statute's breadth. *Allen* v. *Cooper*, 589 U.S. 248, 261 (2020); see generally Brief for America First Legal as *Amicus Curiae* in Support of Appellants/Petitioners 9–13, *Allen* v. *Milligan*, Nos. 21-1086, 21-1087, 2022 WL 1462954 (May 2, 2022). As one academic has written, § 2 "remain[s] a results test with no discernable core value whose functional connection to the [Voting Rights Act's] animating purpose is incidental at best." *Making Sense of Section 2*, *supra*, at 399.

burdens . . . must be justified by current needs," *id.* at 542. "[A]t some point," racial remedies "must end." *Students for Fair Admissions*, 600 U.S. at 213.

As this Court explained over a decade ago, "[v]oter turnout and registration rates now approach parity." *Shelby Cnty.*, 570 U.S. at 540. "Blatantly discriminatory evasions of federal decrees are rare," "[a]nd minority candidates hold office at unprecedented levels." *Ibid.* Contemporary research consistently shows that political party attachment has become far more important than racial, religious, or ethnic attachments.[4] Voting patterns show fluidity and the importance of partisan mobilization, rather than discrimination. For instance, the 2024 presidential election showed significant swings in racial voting patterns, with minority voters

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[4] See Westwood et al., *The Tie that Divides: Cross-National Evidence of the Primacy of Partyism*, 57 Eur. J of Pol. Rsch. 333, 338 (2017); Meyer et al., *It's Not Race, It's Politics! A Natural Experiment Examining the Influence of Race in Electoral Politics*, 98 Soc. Sci. Q. 120, 130 (2017) (echoing finding that "when party and ideology of candidates are controlled for whites are just as likely to support an African-American candidate as they are a white candidate"); Abrajano et al., *A Natural Experiment of Race-Based and Issue Voting: The 2001 City of Los Angeles Elections*, 58 Pol. Rsch. Q. 203, 215 (2005) ("Our analysis very clearly indicates that whites are willing to vote for Latino candidates, and that this willingness varies based on the ideology and issue positions of the candidates."); see also Stewart et al., *Inequality, Identity, and Partisanship: How Redistribution can Stem the Tide of Mass Polarization*, 118 Proceedings Nat'l Acad. Sci. U.S.A. 1, 4 (2021).

supporting the Republican candidate much more strongly.[5]

These political changes echo social interspersion. "For the first time in modern American history, most White people live in mixed-race neighborhoods."[6] "Back in 1990, 78 percent of White people lived in predominantly White neighborhoods," but "[i]n the 2020 Census, that[] plunged to 44 percent."[7] What's more, "a majority of major metro area residents in each race and ethnic group now lives in the suburbs," and "a majority of youth (under age 18) in these combined suburban areas is comprised of people of color."[8] Interracial marriages have been steadily increasing too, "growing from 7.4 percent in 2000 to 10.2 percent by 2016."[9] And "[i]ntermarriage rates are higher for Millennials than for Gen Xers across all racial and ethnic groups," with "[t]he rate of intermarriage among black Millennials" "nearly twice

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[5] Hartig et al., *Behind Trump's 2024 Victory, a More Racially and Ethnically Diverse Voter Coalition*, PEW Resch. Ctr. (June 26, 2025), https://perma.cc/RF5P-CRXT.

[6] Mellnik & Van Dam, *How Mixed-Race Neighborhoods Quietly Became the Norm in the U.S.*, Wash. Post (Nov. 4, 2022), https://tinyurl.com/2tku43tm.

[7] *Ibid.*

[8] Frey, *Today's Suburbs are Symbolic of America's Rising Diversity: A 2020 Census Portrait*, Brookings (June 15, 2022), https://perma.cc/JT3C-MQZ3.

[9] Woolley et al., *Interracial and Interethnic Marriages: Given Recent History, Have Things Been Getting Better?*, 48 Soc. Work Rsch. 229, 229 (2024).

as high as that of black Gen Xers at a comparable age (18% vs. 10%)."[10]

Despite all these changes, S.B. 8's defenders insist that § 2 is "an evergreen statute" with a "built-in focus on current conditions" that "obviates the need for a sunset date." Supplemental Brief for Robinson Appellants 29. This response is unconvincing, for several reasons.

First, this Court rejected essentially the same argument in *Students for Fair Admissions*, explaining "that periodic review" does not "make unconstitutional conduct constitutional." 600 U.S. at 225.

Second, § 2 as applied today boils down to racial group contiguity and racially polarized voting. As explained above, voluntary choices by citizens in 2025 about where to live and how to vote do not evidence discrimination. Those voluntary choices in no way suggest a "deni[al] or abridg[ment] . . . by any State" of "the right . . . to vote" "on account of race," U.S. Const. amend. XV §1. They do not even qualify as "state action." *Nw. Austin*, 557 U.S. at 228. What's more, "racial assumptions play critical roles in judicial fact-finding about minority cohesion and in the identification of minority candidates of choice"—and are even "baked into the statistical tools for estimating candidates' vote shares by racial group." Elmendorf et al., *Racially Polarized Voting*, 83 U. Chi. L. Rev. 587, 626 (2016). Repeated use of racial stereotypes

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[10] Barroso et al., *As Millennials Near 40, They're Approaching Family Life Differently Than Previous Generations*, PEW Resch. Ctr. (May 27, 2020), https://perma.cc/8M6M-MEBU.

magnifies rather than eliminates the constitutional problems here.

Third, S.B. 8's defenders seek refuge in "the very plasticity of the results test," *Making Sense of Section 2*, *supra*, at 384, particularly in "th'ol' 'totality of the circumstances' test." *United States* v. *Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting). But the totality-of-the-circumstances test does not do much work in modern § 2 litigation, as the *Robinson* district court explained: "it will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances." 605 F. Supp. 3d at 844 (quoting *Ga. State Conf. of NAACP* v. *Fayette Cnty. Bd. of Comr's*, 775 F.3d 1336, 1342 (CA11 2015)); see *Racially Polarized Voting*, *supra*, at 600 n.73. And review of lower court applications of the totality-of-the-circumstances test confirms why it is the "test most beloved by" "court[s] unwilling to be held to rules." *Mead*, 533 U.S. at 241 (Scalia, J., dissenting). Consider the *Robinson* opinion, which dredged up old discrimination ("only 57 years old"!) connected to modern district lines only by hand-wavy testimony by purported "experts" opining on cherry-picked elections and anecdotes. 605 F. Supp. 3d at 844–51; cf. *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 766 (2007) (Thomas, J., concurring) (explaining that "leav[ing] our equal protection jurisprudence at the mercy of . . . the evanescent views of a handful of social scientists" "would be to abdicate our constitutional responsibilities").

Fourth and relatedly, laws like S.B. 8 are not § 2. S.B. 8's defenders say that States only need "good reasons" to think racial discrimination is needed to comply with § 2, Supplemental Brief of Robinson Appellants 14, making laws like S.B. 8 two steps removed from the Fifteenth Amendment. Once again, "the very plasticity of the results test," *Making Sense of Section 2*, *supra*, at 384, means that States could often claim "good reason" to fear § 2 and thus racially discriminate despite the absence of current conditions that could possibly warrant race-based remedies.

In short, modern § 2 applications have the most tenuous connection to the Fifteenth Amendment and cannot be justified by that amendment. And because those applications have no constitutional foundation, complying with § 2 cannot be a compelling government interest.

B. Section 2 cannot be "appropriate" to the extent it requires violations of equal protection.

Second, even assuming that the Fifteenth Amendment otherwise sanctions modern § 2 applications, those applications still flunk the requirement that Congress's implementing legislation be "appropriate." U.S. Const. amend. XV, § 2. As this Court has long recognized, "command[ing] that States engage in presumptively unconstitutional race-based districting brings [§ 2], once upheld as a proper exercise of Congress' authority under § 2 of the Fifteenth Amendment, into tension with the Fourteenth Amendment." *Miller*, 515 U.S. at 927 (citation omitted). The original meaning of "appropriate" precludes Fifteenth Amendment

statutory applications that violate the Fourteenth Amendment's Equal Protection Clause. More generally, allowing Congress to wield Fifteenth Amendment authority in a way that results in Fourteenth Amendment violations contradicts the Constitution's overall scheme and fragments the Reconstruction Amendments. "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause," *Graham* v. *Richardson*, 403 U.S. 365, 382 (1971), and "districting cases" are not "excepted from standard equal protection precepts," *Miller*, 515 U.S. at 914.

The term "appropriate," used in similar ways in the Thirteenth, Fourteenth, Fifteenth, and Eighteenth Amendments, "has its origins in the latitudinarian construction of congressional power" in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), in which "the terms 'appropriate' and 'necessary and proper' were used interchangeably." McConnell, *Institutions and Interpretation: A Critique of* City of Boerne *v.* Flores, 111 Harv. L. Rev. 153, 178 n.153, 188 (1997) (citing 17 U.S. at 421–22); see also Lawson & Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 336 n.189 (1993) (tracing this connection).

This Court has likewise held that "the draftsmen" of the Reconstruction Amendments "sought to grant to Congress" the "same" "powers expressed in the Necessary and Proper Clause." *Katzenbach* v. *Morgan*, 384 U.S. 641, 650 (1966); see *id.* at 651. "Thus the *McCulloch* v. *Maryland* standard is the [general] measure of what constitutes 'appropriate legislation,'" and that standard asks "whether [the law] is 'plainly

adapted to [the amendment's] end' and whether it is not prohibited by but is consistent with 'the letter and spirit of the constitution.'" *Id.* at 651 (quoting *McCulloch*, 17 U.S. at 421).

The last part of this inquiry—whether the statutory action "is not prohibited by but is consistent with the letter and spirit of the constitution"—is critical here. As this formulation suggests, the implementing law must be consistent with not just the amendment itself but with the Constitution as a whole. Laws that "are not 'consistent with the letter and spirit of the constitution' are not '*proper*' means" for executing Congress's power. *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 559 (2012) (opinion of Roberts, C.J.) (cleaned up). Rather, these laws are "merely acts of usurpation which deserve to be treated as such." *Ibid.* (cleaned up) (quoting *Printz* v. *United States*, 521 U.S. 898, 924 (1997), in turn quoting The Federalist No. 33, at 204 (Hamilton)). This Court has not hesitated to do just that, even with voting legislation, in the face of inconsistency with other parts of the Constitution. See *Shelby Cnty.*, 570 U.S. at 555.

In sum, Fifteenth Amendment "legislation is appropriate only when it does not conflict with another constitutional provision." Carter, *The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 U. Pa. L. Rev. 1341, 1378 (1983). And as shown above, § 2's modern applications require race-based districting in violation of the Fourteenth Amendment. Thus, the statute no longer qualifies as "appropriate," and compliance with

a federal statute beyond congressional power cannot be a compelling interest.

Even apart from the Fifteenth Amendment's express "appropriate" requirement, Fifteenth Amendment legislation should still conform to the Fourteenth Amendment's parameters. Again, "Congress has no affirmative power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation." *Saenz* v. *Roe*, 526 U.S. 489, 508 (1999).

"[F]ederal statute[s], in addition to being authorized by [the Constitution to Congress], must also not be prohibited by the Constitution." *United States* v. *Comstock*, 560 U.S. 126, 135 (2010) (cleaned up). This Court has long viewed each constitutional provision "as one part of a unified constitutional scheme." *Tennessee Wine & Spirits Retailers Ass'n* v. *Thomas*, 588 U.S. 504, 519–20 (2019). That makes sense, because "[c]ontext is a primary determinant of meaning." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012). "A legal instrument typically contains many interrelated parts that make up the whole," and "[t]he entirety of the document thus provides the context for each of its parts." *Ibid.* So "[w]hen construing the United States Constitution in *McCulloch* v. *Maryland*, Chief Justice John Marshall rightly called for 'a fair construction of the whole instrument.'" *Id.* at 167–68 (quoting 17 U.S. at 406); see also, *e.g.*, *Rice* v. *Cayetano*, 528 U.S. 495, 512 (2000) (looking to "[c]onsisten[cy] with the design of the Constitution"); *Reid* v. *Covert*, 354 U.S. 1, 21 (1957) (interpreting a provision in light of its "grand

design of the Constitution" and "other constitutional provisions").

This "holistic endeavor" is especially appropriate when interpreting the Fourteenth and Fifteenth Amendments. Scalia & Garner, *supra*, at 168 (quoting *United Sav. Ass'n of Texas* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)). Congress rested the Voting Rights Act on both amendments. H.R. Rep. No. 89-439, at 6; S. Rep. No. 97-417, at 39. And the amendments share a common "promise": "that our Nation is to be free of state-sponsored discrimination." *Bush* v. *Vera*, 517 U.S. 952, 968 (1996) (opinion of O'Connor, J.). As Justice Harlan put it, their "common purpose" was to "remove[] the race line from our governmental systems." *Plessy* v. *Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting). Thus, the "meaning of the amendments . . . cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish." *Strauder* v. *West Virginia*, 100 U.S. 303, 306 (1879).

All this confirms that the Fifteenth Amendment legislative applications remain subject to the Fourteenth Amendment's overriding guarantee of equal protection of the laws. Requiring States to racially segregate their citizens is contrary to the "core purpose" of *both* amendments: "doing away with all governmentally imposed discrimination based on race." *Students for Fair Admissions*, 600 U.S. at 206 (brackets omitted). Because modern § 2 applications violate equal protection, compliance with those unconstitutional applications cannot be considered a

compelling government interest sufficient to justify racial segregation of voting districts.

CONCLUSION

For these reasons, the Court should affirm.

Respectfully submitted,

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