Nos. 24-109, 24-110

In the Supreme Court of the United States

STATE OF LOUISIANA, APPELLANT

v.

PHILLIP CALLAIS, ET AL., APPELLEES

PRESS ROBINSON, ET AL., APPELLANTS

v.

PHILLIP CALLAIS, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF OF AMERICA FIRST LEGAL AS AMICUS CURIAE IN SUPPORT OF THE APPELLEES

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QUESTIONS PRESENTED

Whether section 2 of the Voting Rights Act, as amended in 1982 and as currently construed by this Court, violates the Fourteenth or Fifteenth Amendments or exceeds Congress's power to enforce those amendments.

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae America First Legal Foundation is a nonprofit organization dedicated to promoting the rule of law in the United States and defending individual rights

1. No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

guaranteed under the Constitution and federal statutes. America First Legal has a substantial interest in this case because it firmly believes, as part of its mission to encourage understanding of the law and individual rights guaranteed under the Constitution of the United States, that a proper understanding of those rights must be informed by reference to their text, and any other rights not expressly mentioned must be deeply rooted in this nation's history and tradition. And further, America First Legal believes that a proper understanding of the law in the United States must include a coherent, consistent understanding of the role of federal courts in deciding cases or controversies presented to them.

SUMMARY OF ARGUMENT

Section 2 of the Voting Rights Act, as currently construed by this Court, violates the Constitution in at least two respects.

First, section 2's application to vote-dilution claims requires courts to engage in impermissible racial stereotyping. Vote-dilution claims under section 2 call on courts to decide whether a reapportionment or redistricting plan allows racial minorities the same "opportunity" as others to elect "representative of their choice." 52 U.S.C. § 10301(b). The Constitution forbids this conception of "group rights." And it is a false concept. Racial minorities do not have uniform preferences when it comes to the representatives that they wish to elect. Section 2, however, compels courts to proceed on the "offensive and demeaning assumption that voters of a particular race, because of their race, think alike, share the same political interests, and will prefer the same candidates at the

polls." *Miller v. Johnson*, 515 U.S. 900, 911–12 (1995) (citation and internal quotation marks omitted)). That is impermissible under the Court's equal-protection precedents, and the Court should declare section 2 unconstitutional as applied to vote-dilution claims.

The second constitutional problem arises from section 2's "results" test, which sweeps far beyond the purposeful racial discrimination outlawed by the Fourteenth and Fifteenth Amendments. Although this Court has recognized that Congress may sometimes enact prophylactic legislation that reaches beyond the Reconstruction Amendments' self-executing commands, the recent cases of this Court have limited Congress's prerogatives in this area by insisting that prophylactic measures qualify as "congruent and proportional" remedies to a "pattern of constitutional violations" identified by Congress. *See Coleman v. Court of Appeals of Maryland*, 566 U.S. 30, 43 (2012). The vague and ill-defined "results" test in section 2 comes nowhere close to satisfying the congruence-and-proportionality test. It is a blunderbuss statute that purports to target any state voting measure with a disparate impact on racial minorities, without any regard for the motives behind the challenged law, the present-day need for congressional prophylactic measures, or the extent or recency of any "pattern" of past constitutional violations. The Court should affirm the judgment below and declare section 2 unconstitutional.

ARGUMENT

Section 2 of the Voting Rights Act, as amended in 1982, provides as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that 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 subsection (a) 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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301. The language of this statute is remarkable in many respects. Consider first the text of subsection (a), which purports to protect *every* citizen of the United States—both Whites and minorities—from laws that merely "*result* in a denial or abridgement" of

their right to vote "on account of race or color." *Id.* (emphasis added). The Court interprets this language to reach voting-related measures that merely have a disproportionate impact on racial minorities—even when there is no evidence or reason to believe that these laws were enacted with a racially discriminatory purpose, *i.e.*, that they were enacted because of, rather than in spite of, their effects on minority voters. *See Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) ("Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test'").

Yet it is untenable to construe section 2 as preempting every state voting qualification that has a racially disproportionate impact—even though that appears to be what the text of subsection (a) requires.[2] There are no

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2. The language of subsection (a) does not have to be construed in this manner. One of the most puzzling features of subsection (a) is that it purports to reach beyond the Fifteenth Amendment by establishing a "results" test for liability, while simultaneously preserving the requirement that any denial or abridgement of the right to vote that "results" from the challenged law occur "*on account of* race or color"—language that this Court has invariably construed to require purposeful or intentional racial discrimination. *See City of Mobile v. Bolden*, 446 U.S. 55, 62–65 (1980) (plurality opinion); *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959); *Ashcroft v. Iqbal*, 556 U.S. 662, 676–77 (2009). So it remains possible to interpret subsection (a) to allow facially neutral voting qualifications that have a disproportionate racial impact, so long as the administration of those purportedly race-neutral laws does not "result in" purposeful or intentional racial discrimination, *e.g.*, a literacy

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"voting qualifications" or "prerequisites to voting" that have a symmetrical impact on every racial group. Felon disenfranchisement,[3] voter-identification laws,[4] and laws that prevent incarcerated or paroled individuals from voting[5] all could be argued to have a disparate impact on racial minorities.

Even the 18-year-old voting age could be said to have a disparate impact on minorities, as the racial makeup of

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test that purports to apply equally to all races but is administered by corrupt election officials in a racially discriminatory manner. *See Lassiter*, 360 U.S. at 53 ("[A] literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot."). But the Court has never adopted or seriously considered this construction of subsection (a).

3. *See* Bruce E. Cain & Brett Parker, *The Uncertain Future of Felon Disenfranchisement*, 84 Mo. L. Rev. 935, 968 (2019) ("[R]ates of disenfranchisement among African Americans exceed rates of disenfranchisement among the general population in every state outside of Maine and Vermont (which do not practice disenfranchisement)").

4. *See* Jillian A. Rothschild, *Who Lacks ID in America Today? An Exploration of Voter ID Access, Barriers, and Knowledge,* University of Maryland Center for Democracy and Civic Engagement (Jan. 2024), http://bit.ly/4nle45L ("Black Americans and Hispanic Americans are disproportionately less likely to have a current driver's license.").

5. *See* Alex R. Piquero & Robert W. Brame, *Assessing the Race–Crime and Ethnicity–Crime Relationship in a Sample of Serious Adolescent Delinquents*, 54(3) Crime & Delinquency 390, 390 (July 2008), http://bit.ly/4nPNrWv ("The lifetime risk of being arrested and incarcerated for Black and Hispanic males is much higher than it is for White males").

the under-18 population has a higher percentage of Blacks, Hispanics, and Asian-Americans (and a lower percentage of non-Hispanic Whites) than the population at large.[6] Voter-registration requirements could be said to disproportionately affect the races, as some races have higher voter-registration rates than others. *See Shelby County v. Holder*, 570 U.S. 529, 548 (2013) (providing statistics showing racial disparities in voter registration between Whites and Blacks in both directions throughout the states).[7] But a federal law that bans any voting

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6. *See* Megan Rabe & Eric Jensen, *Exploring the Racial and Ethnic Diversity of Various Age Groups*, U.S. Census Bureau Census Blogs, Fig. 2 (Sept. 2023), http://bit.ly/4nPbdBP (showing that the White, non-Latino share of the United States population was less than 50% for ages under 5 and between 5 and 17); Angelica Menchaca et al., *Examining the Racial and Ethnic Diversity of Adults and Children*, U.S. Census Bureau (May 22, 2023), http://bit.ly/46Fmlu ("[I]n 2020 the population under age 18 was more racially and ethnically diverse than the population age 18 and over"); Kenneth Johnson, *New Census Reflects Growing U.S. Population Diversity, with Children in the Forefront*, Carsey School of Public Policy (Oct. 4, 2021), http://bit.ly/3ID8e0j ("52.7 percent of U.S. population under age 18 belonged to a minority group in 2020 compared to 39.2 percent of the population over age 18").

7. *See also* Hansi L. Wang, *Why there's a long-standing voter registration gap for Latinos and Asian Americans*, NPR (Apr. 2024) ("[W]hile the estimated registration rate for Black eligible voters has stayed closer to (and, in 2012, even surpassed) the rate for white eligible voters, the rates for Asian Americans and Latinos — who make up the country's top two fast-growing electorates by race or ethnicity — have remained among the lowest of the racial and ethnic groups in the United States."),

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qualification with a disparate racial impact would sweep far beyond Congress's power to "enforce" the Fifteenth Amendment, and it would outlaw long-established measures such as felon disenfranchisement, minimum-age requirements, and voter-registration regimes.

For good reason, the courts have been unwilling to follow the "results" test to its logical conclusion, and they have found ways to salvage felon disenfranchisement and other longstanding voter qualifications by ignoring the statutory language and concocting atextual exceptions or limitations to the supposed textual command of subsection (a). In *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc), for example, the Second Circuit rejected a section 2 challenge to felon disenfranchisement by claiming that it could subordinate the enacted text of subsection (a) to the subjective thoughts or intentions of individual legislators. *See id.* at 315 ("[O]ur interpretation of a statute is not in all circumstances limited to any apparent 'plain meaning.'"); *id.* at 322–23 ("In light of this wealth of persuasive evidence that Congress has never intended to extend the coverage of the Voting Rights Act to felon disenfranchisement provisions, we deem this one of the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the in-

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http://bit.ly/4nmFiJg; Rodrigo Dominguez-Villegas & Michael Rios, *From Eligibility to the Ballot Box*, Latino Policy and Politics Institute (Sep. 27, 2022), http://bit.ly/4gNZ6CL ("Latinos had the lowest registration rate among racial and ethnic groups during the 2020 general election at 61.1 percent. This was more than 10 percentage points lower than the 72.7% registration rate for all voters regardless of race").

tentions of its drafters." (citation and internal quotation marks omitted)); *id.* at 323 ("[T]he intention of the drafters, rather than the strict language, controls." (citation and internal quotation marks omitted)).

And in *Brnovich v. Democratic National Committee*, 594 U.S. 647, 678–82 (2021), both the majority and dissenting opinions sought to cabin the scope of subsection (a)'s "results" test by requiring *all* section 2 plaintiffs to make the showing described in subsection (b)—even though the statutory text indicates that subsection (b) merely provides one possible means (rather than the only permissible means) of establishing a violation of subsection (a) and its "results" test. *See id.* at 667 ("We need not decide what [subsection (a)] would mean if it stood alone because § 2(b), which was added to win Senate approval, explains what must be shown to establish a § 2 violation."); *id.* at 703 (Kagan, J., dissenting) ("But when to conclude—looking to effects, not purposes—that a denial or abridgment has occurred? Again, answering that question is subsection (b)'s function.").[8]

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8. In *Brnovich*, the majority opinion claims that:

> Section 2(b) states that § 2 is violated *only where* "the political processes leading to nomination or election" are not "equally open to participation" by members of the relevant protected group "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."

Brnovich, 594 U.S. at 667 (emphasis added, emphases removed). That is simply untrue. The word "only" is nowhere to be found it subsection (b). It says: "A violation of subsection (a) is estab-

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Finally, Justice Kagan's dissent in *Brnovich* sought to stave off the *reductio ad absurdum* of a disparate-impact regime by allowing voter qualifications that are "necessary to support a strong state interest"—even when those laws have an undeniable and disproportionate effect on racial minorities. *See Brnovich*, 594 U.S. at 701 (Kagan, J., dissenting) ("Section 2's text requires courts to eradicate voting practices that make it harder for members of some races than of others to cast a vote, *unless such a practice is necessary to support a strong state interest*." (emphasis added)). Yet the text of section 2 makes no allowance or exception for laws that advance interests that courts deem sufficiently "strong" or important. The only relevant inquiries under the statute are whether a challenged law or policy: (a) "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color"; or (b) causes "the political processes leading to nomination or election in the State" to be "not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity

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lished *if* . . ." It does not say: "A violation of subsection (a) is established *only if* . . ." The *Brnovich* court's construction of subsection (b) also leaves subsection (a) with no work to do, as its inclusion in the statute serves no purpose when subsection (b) is treated as both a necessary and sufficient condition to a section 2 violation. *See Corley v. United States*, 556 U.S. 303, 314 (2009) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." (citations and internal quotation marks omitted)).

than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301. Whatever countervailing interests might be served by a state's voting laws have no bearing on their legality under section 2.

Courts and judges have gone to great lengths to avoid interpreting subsection (a) in a manner that would prohibit all voting qualifications with a racially disparate impact—even going so far as to make up limitations that are nowhere to be found in the enacted statutory language. Yet they simultaneously insist that subsection (a)'s "results" test is supposed to outlaw practices that disproportionately affect racial minorities, regardless of whether the challenged practice is motivated by a racially discriminatory purpose. It is safe to say that the current judicial interpretations of subsection (a) have little or no connection to the enacted language of the statute.

Now consider the text of subsection (b), which allows section 2 plaintiffs to establish a violation of subsection (a) if they can show, "based on the totality of circumstances" that:

> 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 subsection (a) 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). What does this mean? The statute instructs courts to ask whether the "members" of "a

class of citizens protected by subsection (a)" have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." But *every* citizen of the United States is "protected by subsection (a)." *See* 52 U.S.C. § 10301(a) ("No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied . . . in a manner which results in a denial or abridgement of the right of *any citizen of the United States* to vote on account of race or color . . ." (emphasis added)). So a "class of citizens protected by subsection (a)" should encompass *any* class of U.S. citizens, however defined. The "class[es] of citizens protected by subsection (a)" include: (1) citizens of a particular race (*e.g.*, all White citizens); (2) any subset of a particular race (*e.g.*, "White Republican citizens" or "Black Democratic citizens"); and (3) any class defined by characteristics having nothing to do with race or language-minority status (*e.g.*, "all Republican citizens," "all Democratic citizens," or "all incarcerated citizens").

But applying this statute as written would be absurd. Consider the issue of incarceration. Every incarcerated U.S. citizen is "protected by subsubsection (a)" by virtue of their status as a U.S. citizen. *See* 52 U.S.C. § 10301(a) But incarcerated people obviously have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." It is very difficult to "participate in the political process" while behind bars, and nearly every state prevents incarcerated individuals from casting ballots. Yet no court has dared to suggest that subsection (b) prohib-

its states from incarcerating their criminals—even though the statute as written protects incarcerated citizens in the same way that it protects any other "class of citizens" protected by subsection (a).

Or consider classes defined by partisan affiliation. Every redistricting plan creates some "safe" districts in which only a Republican (or a Democrat) has a realistic chance of winning election. That means that citizens in those districts who belong to the minority party "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). Indeed, Republicans who reside in a safe Democratic district have practically *no* opportunity to "elect representatives of their choice," and vice versa. And even most competitive districts will at least lean Republican or Democratic. So even in those districts the citizens who support the underdog party will have less opportunity than others to "elect representatives of their choice." It is impossible to devise a map that gives Republicans and Democrats equal opportunities to "elect representatives of their choice" in every district created by the plan. And it is inevitable that some "class of citizens protected by subsection (a)" will have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice"—no matter how a state's redistricting plan is drawn.

The courts have managed to avoid these absurd implications of subsection (b) by limiting the permissible "classes" of protected citizens. Rather than acknowledging that every citizen of the United States is protected

by subsection (a) (and that any class of U.S. citizens however defined will therefore constitute a "class of citizens protected by subsection (a)"), the courts have pretended as though subsection (b) refers only to "classes of citizens" that encompass every member of a racial or language minority in the relevant jurisdiction. When a section 2 vote-dilution claim is brought by Black voters, the relevant "class" consists of all Black citizens residing in the state or in the challenged districts, regardless of the candidate or candidates that they support. *See Thornburg v. Gingles*, 478 U.S. 30, 80 (1986) ("[B]lack voters in the districts other than House District 23 . . . have less opportunity than white voters to elect representatives of their choice."). The same approach will apply when a section 2 claim is brought by Hispanics, Asian-Americans, or members of other racial or language minorities. The courts ask whether the challenged practice leaves the "members" of that racial or language-minority group with "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *See, e.g.*, *Abbott v. Perez*, 585 U.S. 579, 587 (2018) ("A State violates § 2 if its districting plan provides less opportunity for racial minorities to elect representatives of their choice." (citations and internal quotation marks omitted). The only "classes of citizens" protected by subsection (a), according to the courts, are classes of racial or language-minority groups taken as whole.

* * *

The courts' present-day interpretations of subsections (a) and (b) are textually dubious—one could even

say textually indefensible. But these atextual constructions of section 2 have had staying power because they enable courts to avoid the staggering implications that arise from equating subsections (a)'s "results" test with an unlimited disparate-impact regime. *See* pp. 4–11, *supra*. They also shield courts from the absurdity of allowing any class of U.S. citizens, however defined, to qualify as a "class of citizens protected by subsection (a)" and demand equal "opportunity" to elect "representatives of their choice." *See* pp. 11–14, *supra*.

While this judicial gloss may have launched section 2 out of the absurd-results frying pan, the statute has nonetheless landed in the constitutional fire. Section 2, as currently interpreted by this Court, violates this Court's constitutional doctrines in at least two respects.

I. SECTION 2, AS CURRENTLY CONSTRUED BY THIS COURT, VIOLATES CONSTITUTIONAL PROHIBITIONS ON RACIAL STEREOTYPING BY ASSUMING THAT VOTERS OF A CERTAIN RACE WISH TO ELECT THE SAME "REPRESENTATIVES OF THEIR CHOICE"

The first constitutional problem arises from section 2's application to vote-dilution claims, which requires courts to evaluate whether a redistricting plan leaves "members" of a racially defined class with the same opportunities as others to elect "representatives of their choice." 52 U.S.C. § 10301(b). This runs headlong into the Constitution's protection of individual rights, not group rights. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("[T]he Constitution protect *persons,* not *groups.*"). Racial and language-minority groups

are not monolithic in their political preferences. Some vote for Democrats, some vote for Republicans, and some are swing voters. It is therefore nonsensical to speak of a racial group's "opportunity" to "elect representatives of their choice" in a vote-dilution case, because the individual members of that group will not agree on the "representatives" that they wish to elect.

Consider the situation under the Louisiana congressional maps. HB 1 created one Black-majority district along with five White-majority districts. The Black-majority district was safely Democratic and the remaining White-majority districts were safely Republican. Yet the *Robinson* plaintiffs attacked HB 1 by claiming that Blacks residing in Louisiana had less opportunity than Whites to elect "representatives of their choice," and demanded that a second majority-Black district be drawn to rectify this problem.

But not all Black voters want to be represented by the progressive Democrats that win elections in majority-Black districts. The *Robinson* plaintiffs assumed that any Black voter who lives in a majority-White district has "less opportunity" than others to elect representatives of his choice. But that is true only for voters in those districts who are Democrats or who otherwise oppose the elected Republican representative. Black voters who support the elected Republican in those districts have the same "opportunity" to "elect representatives of their choice" as any other Republican voter. And White Democrats who reside in those districts have the same inability to elect their preferred representatives as the

Black Democrats who have been placed alongside them in a safe Republican district.

The remedy sought by the *Robinson* plaintiffs (and eventually adopted by the Louisiana legislature) is based on a similar presumption of racial groupthink. The second majority-Black district that appears in the current Louisiana map is a Democratic district represented by a progressive Democratic congressman. The Blacks who vote Republican in that district now have less opportunity than others to elect representatives of their choice—and they have less opportunity to elect their preferred representatives than they had when living in majority-White districts under HB 1. But the courts would never consider any of that a violation of section 2, even though it undeniably dilutes the voting power of Black Republicans, because the current interpretation of section 2 forces courts to treat Black voters as an undifferentiated group and assume that they will prefer the Democratic representative who gets elected in a majority-Black district over the Republicans who win elections in majority-White districts.

This is racial stereotyping—and it is impermissible under this Court's equal-protection precedents. *See Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 218 (2023) ("[R]ace . . . may not operate as a stereotype"). The Court has repeatedly held that the Equal Protection Clause forbids states to "engage[] 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) (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)). That same constitutional command carries over to congressional legislation. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). The Voting Rights Act, no less than a state redistricting plan, cannot adopt "the offensive and demeaning assumption that voters of a particular race . . . will prefer the same candidates at the polls." *Miller*, 515 U.S. at 912.

None of these racial-stereotyping problems arise when applying section 2 to voter qualifications or laws that abridge or affect an individual voter's ability to cast a ballot. A law that renders a class of citizens unable to vote will always leave the affected individuals with "less opportunity" than others to "participate in the political process and to elect representatives of their choice"—and that remains true regardless of the candidates that the disenfranchised voters would support. But vote-dilution claims require courts to assume that racial or language-minority groups have "representatives of their choice," even though the individual members of these groups have diverse and divergent political beliefs, and even though many minority voters oppose the representatives who win elections in majority-minority districts.

II. SECTION 2'S "RESULTS" TEST, AS CURRENTLY CONSTRUED BY THIS COURT, EXCEEDS CONGRESS'S AUTHORITY TO ENFORCE THE FOURTEENTH AND FIFTEENTH AMENDMENTS

The Fourteenth and Fifteenth Amendments prohibit purposeful racial discrimination; they do not reach laws that merely have a disproportionate impact on racial mi-

norities. *See Washington v. Davis*, 426 U.S. 229 (1976); *City of Mobile v. Bolden*, 446 U.S. 55, 62–65 (1980) (plurality opinion); *see also Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (discriminatory purpose requires an action to be taken "'because of,' not merely 'in spite of,'" racial considerations); *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1959) (holding that literacy tests do not violate the Fifteenth Amendment because they are "neutral on race, creed, color, and sex," regardless of whether they have a racially disproportionate impact).

Yet section 2's results test, as currently interpreted by this Court, sweeps far beyond the commands of the Fourteenth and Fifteenth Amendment by reaching voting qualifications and redistricting plans that disproportionately affect minority voters—even when there is no evidence or reason to believe that these laws were enacted for racially discriminatory reasons, *i.e.*, that they were enacted because of rather than in spite of their adverse effects on minorities.

Section 5 of the Fourteenth Amendment and section 2 of the Fifteenth Amendment authorize Congress to "enforce" the Reconstruction Amendment's prohibitions on purposeful racial discrimination "by appropriate legislation." Congress may in limited circumstances use its enforcement powers to prohibit practices that do not necessarily violate the self-executing commands of the Fourteenth or Fifteenth Amendments. Congress may, for example, temporarily suspend state literacy tests for voting, notwithstanding *Lassiter*'s holding that literacy tests do not violate the Fifteenth Amendment. *See Ore-*

gon v. Mitchell, 400 U.S. 112 (1970). This was a permissible use of section 5's enforcement power because literacy tests, though neutral on their face, were administered in a racially discriminatory manner, as election officials in southern States used these laws to exclude even literate Blacks from registering to vote, while permitting White illiterates to register. *See id.* at 132 (opinion of Black, J.) (noting that "Congress had before it a long history of the discriminatory use of literacy tests to disfranchise voters *on account of* their race." (emphasis added)).

But Congress's enforcement powers do not allow it to preempt state voting laws whenever they have a disparate impact on racial minorities. This Court has already held that section 5 of the Fourteenth Amendment does not authorize Congress to target state laws or practices that merely have a disparate impact on a suspect class. *See Coleman v. Court of Appeals of Maryland*, 566 U.S. 30, 43 (2012) ("To the extent, then, that the self-care provision addresses neutral leave policies with a disparate impact on women, it is not directed at a pattern of constitutional violations."); *id.* at 44–45 (Scalia, J., concurring in the judgment). Section 2 of the Fifteenth Amendment is equally incapable of authorizing Congress to preempt state voting measures simply because they disproportionately affect racial minorities. Congressional enforcement legislation that reaches beyond the commands of the Reconstruction Amendments must qualify as a "congruent and proportional remedy" to an "identified pattern" of constitutional violations. *See Coleman*, 566 U.S. at 43 ("Congress must identify a pattern of constitutional violations and tailor a remedy congruent and pro-

portional to the documented violations."). Section 2's "results" test, as currently construed by this Court, is neither "congruent" nor "proportional" to any pattern of constitutional violations identified by Congress.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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September 24, 2025