Nos. 24-109, 24-110

In the
Supreme Court of the United States

STATE OF LOUISIANA,
Appellant,
v.
PHILLIP CALLAIS, et al.,
Appellees.

PRESS ROBINSON, et al.,
Appellants,
v.
PHILLIP CALLAIS, et al.,
Appellees.

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

BRIEF OF ALABAMA AND 12 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF NO PARTY

OFFICE OF THE ALABAMA
ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Edmund.LaCour@
AlabamaAG.gov

STEVE MARSHALL
Attorney General

EDMUND G. LACOUR JR.
Solicitor General
Counsel of Record

SOREN GEIGER
Assistant Solicitor General

Counsel for Amicus Curiae
State of Alabama

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

INTERESTS OF *AMICI CURIAE*

The States of Alabama, Georgia, Idaho, Indiana, Iowa, Mississippi, Montana, Nebraska, South Carolina, Tennessee, Texas, Utah, and West Virginia respectfully submit this brief as *amici curiae* in support of no party.[1]

This Court has recognized that "[r]edistricting is never easy." *Abbott v. Perez*, 585 U.S. 579, 585 (2018). And for many States, litigation-free redistricting is now impossible. Louisiana's case perfectly exemplifies the utter indeterminacy States face. Louisiana was first enjoined in 2022 under Section 2 of the Voting Rights Act for not enacting a congressional plan with two majority-black districts, then enjoined in 2024 for violating the Equal Protection Clause for enacting just such a plan. What Louisiana told this Court two years ago "with some justification" is even more justified today: "'States need clarity.'" *Merrill v. Milligan*, 142 S.Ct. 879, 881 (2022) (Kavanaugh, J., concurring) (quoting Brief for State of Louisiana et al. as Amici Curiae 25).

To provide that clarity, this Court should remind lower courts to interpret §2 like any other law, following "Justice Frankfurter's three-part test: '(1) Read the statute; (2) read the statute; (3) read the statute!'" *Daker v. Comm'r, Ga. Dep't of Corr.*, 820 F.3d 1278, 1283 (11th Cir. 2016). The text of §2 is drawn from this Court's precedents in *Whitcomb v. Chavis* and *White v. Regester*. And those decisions make clear that there is equal "opportunity" "to participate in the political process" (and thus no §2 violation) if voters are "allowed to register," "vote," "choose the political party they desire[] to

[1] Per Rule 37, *Amici* provided timely notice to counsel of record.

support," and "participate in its affairs." *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971).

But the district court that preliminarily enjoined Louisiana from using its 2022 plan, *see Robinson v. Ardoin*, 605 F. Supp. 3d 759 (M.D. La. 2022), relied on §2 without seriously considering its text. The result was an increasingly common and unconstitutional expansion of the VRA that lacks any discernible standard. Under that freewheeling approach, §2 is rendered "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application," which "violates the first essential of due process of law." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Now is the time for this Court to make clear that §2 should be interpreted like any other statute.

SUMMARY OF ARGUMENT

In 1982, Congress amended Section 2 of the Voting Rights Act, codifying the test for vote dilution employed by this Court in *Whitcomb v. Chavis* and *White v. Regester*. This test has two key elements: members of the minority group must have less opportunity than other voters to (1) elect representatives of their choice, and (2) participate in the political process. Proof of both is required to establish liability.

The three preconditions to a vote dilution claim established in *Thornburg v. Gingles* weed out particularly weak vote dilution claims and primarily concern the first element in §2's text: opportunity to elect. Plaintiffs who clear these hurdles still must show less opportunity to participate in the political process. That element is articulated in *Whitcomb* and *White*

and codified in §2. It requires evidence that members of the minority group are not allowed to register, vote, choose a preferred party, or participate in its affairs.

Evidence that black Louisianans have less opportunity to participate in the political process is absent from the record, as the *Robinson* district court expressly acknowledged. Still, the court held that §2 requires Louisiana to sort voters by race. That betrays an atextual and standardless approach to §2 that this Court should squarely reject in this appeal. There is no §2 violation in present-day Louisiana and thus no §2 basis for racially sorting Louisianans.

And even if the *Robinson* court's interpretation of §2 is correct as a statutory matter, it is flawed as a constitutional matter. The court's endlessly malleable approach to §2 cannot justify race-based remedies and will demand race-based redistricting in perpetuity. Thus, unless this Court holds that these sorts of redistricting challenges are nonjusticiable, the Court should affirm the judgment below. Whatever the Court holds, it should put an end to these decennial guessing games and articulate a standard that provides States fair notice regarding how to lawfully draft redistricting laws.

ARGUMENT

I. "The Courts Made Us Do It" Is No Excuse To Racially Gerrymander.

Amici States sympathize with Louisiana, whose saga proves how impossible it has become, now almost sixty years after the passage of the Voting Rights Act, to comply simultaneously with our color-blind Constitution and increasingly expansive interpretations of

Section 2. Nevertheless, Louisiana's attempt to do the impossible cannot be condoned by this Court.

To be sure, "discerning the subjective motivation of those enacting [a] statute is … almost always an impossible task." *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting). The presumption of legislative good faith can be overcome only with the clearest proof, such as when the State's conceded "aim" is to "disenfranchis[e] practically all of" one racial group, *Hunter v. Underwood*, 471 U.S. 222, 230 (1985), or in "rare cases in which a statistical pattern of discriminatory impact" is so stark as to be "'tantamount for all practical purposes to a mathematical demonstration' that the State acted with a discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 294 n.12 (1987) (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960)).

This is one of those rare cases. The record contains an abundance of both direct and circumstantial evidence that the law at issue was driven by racial goals.

The legislative transcripts, for example, are saturated with "express acknowledgement[s]" "that race played a role in the drawing of district lines." *Alexander v. S.C. NAACP*, 144 S. Ct. 1221, 1234 (2024); *see, e.g.*; La.JS.48a, 52a-53a; La. Stay App.49-54, 58-61. That "direct evidence," which "amounts to a confession of error," accompanies "extraordinarily powerful circumstantial evidence" akin to "the 'strangely irregular' … district lines in *Gomillion v. Lightfoot*." *Alexander*, 144 S.Ct. at 1234, 1250 (quoting *Gomillion*,

364 U.S. 399, 341 (1960)); *see, e.g.*, La. Stay App.61-67.[2]

To explain all this away, Louisiana seeks to shift the blame to the *Robinson* courts. *See, e.g.*, La.JS.18 ("All considerations of race … stem from the federal court decisions … not the Legislature."). Similar arguments of deflection didn't work for North Carolina in *Shaw v. Hunt* or Georgia in *Miller v. Johnson*. "Just following orders" is no excuse for violating citizens' constitutional rights.

In *Shaw v. Hunt*, for example, the Department of Justice had "[d]uly chastened" North Carolina "for not creating a second majority-minority [congressional] district." 517 U.S. 899, 902 (1996). When revising "its districting scheme," the State "expressly acknowledged" that the "overriding purpose" of the new plan "was to comply with the dictates" of DOJ. *Id.* at 902, 906. Rather than absolve North Carolina of wrongdoing in light of federal "dictates," this Court affirmed

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[2] Citing *Alexander*, Robinson Appellants fault the District Court for not making Appellees present an "alternative map showing that the State could have *both* created a second Black-opportunity district *and* accomplished the Legislature's political priorities in a more compact plan." Robinson.JS.13. That makes no sense. An express racial target (like two majority-black districts) is *proof* of a gerrymandering claim, not a *defense* against one. And even if an alternative map were needed, the 2022 Plan would do. It was more compact than the 2024 Plan, which had to stretch to make race-based "adjustments to heed the instructions of the court." Robinson.JS.138a, 153a. And "it is not credible that Louisiana's majority-Republican Legislature would choose to draw a map that eliminated a Republican-performing district for predominantly political purposes." Robinson.JS.173a n.10.

that race predominated and went on to reject the State's §2 defense. *Id.* at 906, 914-17.

That same redistricting cycle, the Georgia "General Assembly set out to create three majority-minority districts to gain preclearance" for its congressional redistricting plan after having been "twice spurned" by DOJ. *Miller v. Johnson*, 515 U.S. 900, 907 (1995). "The State admitted that" it would not have engaged in racial sorting in District 11 "but for the need to offset the loss of black population caused by the shift of predominantly black portions" in District 2, "which occurred in response to the Department of Justice's … objection letter." *Miller*, 515 U.S. at 918. *Compare id.*, *with* La.JS.21 ("But for the *Robinson* decisions, the Legislature never would have … enacted S.B. 8."). The district court found the evidence "of the General Assembly's intent to racially gerrymander" "overwhelming." *Miller*, 515 U.S. at 910.

Thus, Louisiana is not the first State forced to defend a gerrymander before this Court due to a federal actor's "maximization demands." *Id.* at 918. But the 2024 Plan remains Louisiana's. The mere prospect that a federal court might adopt an atextual (*see* Part II) and unconstitutional (*see* Part IV) reading of §2 does not allow States to deny their citizens the guarantees of the Equal Protection Clause.

II. The *Robinson* Decisions Adopted An Atextual Approach To §2.

Under our Constitution, race-based classifications "are by their very nature odious," *Shaw v. Reno*, 509 U.S. 630, 643 (1993), "offensive," *Miller*, 515 U.S. at 912, "demeaning," *id.*, and "inconsistent ... with

that equality of rights which pertains to citizenship" and "the personal liberty enjoyed by every one within the United States," *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting).

Nevertheless, Section 2 of the VRA "demands consideration of race," "often insist[ing] that districts be created precisely because of race." *Abbott*, 585 U.S. at 586-87. Recognizing these "competing hazards of liability," *id.* at 587, the Court has "assumed"[3] "that complying with" §2 can justify "narrowly tailored" "race-based sorting of voters," *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 401 (2022) (per curiam).

To survive "strict scrutiny," the State "must show … that it had a strong basis in evidence for concluding that the statute required" "race-based districting." *Id.* at 402 (quoting *Cooper v. Harris*, 581 U.S. 285, 292 (2017)). While this standard gives the States a little "'breathing room' to make reasonable mistakes" of fact, it "does not allow a State to adopt a racial gerrymander that the State does not, at the time of imposition, 'judge reasonably necessary under a proper interpretation of the VRA.'" *Id.* at 505 (quoting *Cooper*, 581 U.S. at 292, 306). A reading of the VRA is not proper unless it is "a constitutional reading and application of" the law. *Miller*, 515 U.S. at 921.

The *Robinson* courts found vote dilution under a plainly improper interpretation of §2. Their approach was oblivious to the statute's text, rendering §2

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[3] The Court has "never applied this assumption to uphold a districting plan that would otherwise violate the Constitution"—the result sought by Appellants here. *Allen v. Milligan*, 599 U.S. 1, 79 (2023) (Thomas, J., dissenting).

utterly unpredictable for any legislature trying to determine whether race-based districting is required or whether race-neutral districting will do. Those flawed decisions cannot provide the strong basis in evidence to justify the Louisiana Legislature's racial sorting.

A. Unequal Opportunity to Participate in the Political Process is a Necessary Element of a §2 Vote Dilution Claim.

To prove that a voting "standard, practice, or procedure" dilutes minority voting strength in violation of §2, a plaintiff must show that members of a minority group "have less opportunity than other members of the electorate [1] to participate in the political process *and* [2] to elect representatives of their choice." 52 U.S.C. §10301(b) (emphasis added). In *Chisom v. Roemer*, the Court clarified that proving only less opportunity to elect "is not sufficient to establish a violation unless, under the totality of the circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process." 501 U.S. 380, 397 (1991). A few years earlier, in *Thornburg v. Gingles*, the Court established a threshold showing every §2 plaintiff must overcome. 478 U.S. 30, 50-51 (1986). These three prerequisites, known as the *Gingles* preconditions, speak primarily to electoral opportunity. *See Johnson v. De Grandy*, 512 U.S. 997, 1011-13 (1994). But "courts must also examine … the extent of the opportunities minority voters enjoy to participate in the political processes." *Id.* at 1011-12.

To determine if all Louisiana's citizens today enjoy an equal "opportunity … to participate in the political

process," it is of first importance to determine what that statutory phrase means. *Chisom* again points to the answer. The 1982 amendments to "§ 2 [were] intended to 'codify' the results test employed in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *White v. Regester*, 412 U.S. 755 (1973)." *Chisom*, 501 U.S. at 394 n.21 (quoting *Gingles*, 478 U.S. at 83-84 (O'Connor, J., concurring in the judgment)). Those two decisions supplied §2's key language. And because the phrase "is obviously transplanted from another legal source," standard rules of statutory interpretation mandate that "it brings the old soil with it." *Taggart v. Lorenzen*, 139 S.Ct. 1795, 1801 (2019) (cleaned up). Thus, "it is to *Whitcomb* and *White* that [courts] should look in the first instance in determining how great an impairment of minority voting strength is required to establish vote dilution in violation of § 2." *Gingles*, 478 U.S. at 97 (O'Connor, J., concurring in the judgment).

1. *Whitcomb* makes clear what is *not* enough to establish a "vote dilution" claim. The plaintiffs there challenged the use of a multimember districting scheme in Marion County, Indiana, to elect the county's "eight senators and 15 members of the house," alleging the system diluted the voting strength of a heavily black and poor part of the county "termed 'the ghetto area.'" 403 U.S. at 128-29. For "the period 1960 through 1968," that area made up "17.8% of the population" of Marion County but was home to only "4.75% of the senators and 5.97% of the representatives." *Id.* at 133. The voters there "voted heavily Democratic," but "the Republican Party won four of the five elections from 1960 to 1968." *Id.* at 150. The

district court found vote dilution and ordered single-member districting. *Id.* at 129.

This Court reversed, emphasizing the absence of "evidence and findings that [black] residents had less" "opportunity to participate in and influence the selection of candidates and legislators." *Id.* at 149, 153. The Court made clear what these words meant by describing what plaintiffs failed to prove:

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

Id. at 149-50.

This is what equal "opportunity … to participate in the political process" means. One has "opportunity" if he is "allowed" to register and vote, choose his preferred party, and participate in its affairs. "Strong differences" in socioeconomic indicators did not control. *Id.* at 132. And it made no difference that the Democratic Party in Marion County had lost all 23 legislative seats in "four of the five elections from 1960 to 1968." *Id.* at 150. The record suggested that "had the Democrats won all of the elections or even most of

them," plaintiffs "would have had no justifiable complaints about representation." *Id.* at 152. That the area did not "have legislative seats in proportion to its populations emerge[d] more as a function of losing elections," not built-in racial bias. *Id.* at 153. The plaintiffs' alleged denial of equal opportunity was "a mere euphemism for political defeat at the polls." *Id.*

White v. Regester shows what *is* enough to prove vote dilution. There, black voters of Dallas County, Texas, also favored the Democratic Party, but at-large elections and "a white-dominated organization that [was] in effective control of Democratic Party candidate slating" combined to stymie political participation by black voters. 412 U.S. at 766-67. The Democratic Party "did not need the support of the [black] community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the [black] community." *Id.* at 767. Because "the black community" was "effectively excluded from participation in the Democratic primary selection process," it "was therefore generally not permitted to enter into the political process in a reliable and meaningful manner." *Id.* Similarly, the "poll tax" and "restrictive voter registration procedures" kept Mexican-American residents of Bexar County, Texas, from accessing the political process on an equal footing with their white neighbors. *Id.* at 768-69. This evidence was sufficient to establish illegal vote dilution.

2. All three minority groups—black voters in Dallas County, Mexican-American voters in Bexar County, and black voters in Marion County—experienced socioeconomic hardship and persistent political

defeat. All three would likely have been able to satisfy the *Gingles* preconditions. But the political process was closed to two and open to one. The key difference was that black residents of Marion County had access to those traditional means of political participation like registering, voting, and engaging with their preferred party, while their Texas counterparts did not. This was the type and quantum of evidence Congress had in mind when it amended §2 in 1982 to require proof of unequal opportunity to participate in the political process.

Thus, when the *Robinson* plaintiffs brought their §2 claim against Louisiana's 2022 congressional plan, they needed to show that black Louisianans face *more inequality* in terms of those traditional methods of political participation than did black Indianians in 1960s Marion County. But there was no finding by the district court or Fifth Circuit that black Louisianans today are denied the opportunity to register to vote, cast a ballot, choose the political party they desire to support, or participate equally in its affairs. To the contrary, the district court noted the *lack* of "specific evidence" of disparities in "political participation outcomes" regarding "levels of black voter registration, … turnout among black voters, or any other factor tending to show that past discrimination has affected their ability to participate in the political process." *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 849 (M.D. La. 2022). Further, the court could identify no evidence that Louisiana's elected officials are unresponsive to the needs of black Louisianans. *Id.* at 850.

Nowhere did the district court ask whether black voters in Louisiana "would have … justifiable

complaints about representation" "had the Democrats won all of the elections or even most of them." *Whitcomb*, 403 U.S. at 152. But under *Whitcomb*, *White*, and thus §2, losing in the political process is not the same as being excluded from it. The *Robinson* court's contrary approach of identifying a history of discrimination, racially polarized voting, and elections that didn't go the "right" way "enough" proves nothing about whether black Louisianans today have an equal "opportunity … to participate in the political process." Indeed, it's not clear what the *Robinson* court's test proves at all, much less how it could justify race-based remedies. The finding of vote dilution on this record "becomes plausible only if *Whitcomb* is purged from … voting rights jurisprudence." *LULAC v. Clements*, 999 F.2d 831, 862 (5th Cir. 1993) (en banc).

B. The *Robinson* Courts' Interpretation of Section 2 is Hopelessly Indeterminate.

The *Robinson* decisions reveal that once vote dilution claims are severed from the text of §2, they can sweep broadly and unpredictability. These critical problems trigger several interpretative principles that point toward adopting the textualist approach to §2 outlined above rather than the elastic approach embraced by the *Robinson* courts.

First, federalism requires a more disciplined reading of §2. "Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915. In "such circumstances," courts must "act only in accord with especially clear standards," lest they "risk assuming political, not legal, responsibility for a process that

often produces ill will and distrust." *Rucho v. Common Cause*, 588 U.S. 684, 704 (2019). And the Constitution "requires Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 679 (2023) (cleaned up). Congress has not spoken so clearly as to greenlight what happened in *Robinson*—federal intrusion into redistricting where no "specific evidence" exists of disparities in "political participation outcomes." *Robinson*, 605 F. Supp. 3d at 849.

Second, it must not be forgotten that §12 of the VRA authorizes criminal penalties for §2 violations. *See* 52 U.S.C. §10308(a) ("Whoever shall deprive or attempt to deprive any person of any right secured by section 2 … shall be fined … or imprisoned."). In other words, the "same language creates civil *and* criminal liability." *United States ex rel. Martin v. Hathaway*, 63 F.4th 1043, 1050 (6th Cir. 2023). This is an additional reason why state and local government officials are owed "fair warning … of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). The *Robinson* courts' interpretation of §2 falls far short of providing "sufficient definiteness" such "that ordinary people can understand what conduct is prohibited" and "in a manner that does not encourage arbitrary and discriminatory enforcement." *Sackett*, 598 U.S. at 680-81 (quoting *McDonnell v. United States*, 579 U.S. 550, 576 (2016)).

Recall that in *Johnson v. United States*, 576 U.S. 591 (2015), the Court considered the Armed Career Criminal Act's sentencing enhancement for prior convictions for a felony that "involves conduct that

presents a serious potential risk of physical injury to another." 18 U.S.C. §924(e)(2)(B). The Court deemed the enhancement unconstitutional because of "the indeterminacy of the wide-ranging inquiry required by" that clause. 576 U.S. at 597. And to be sure, it was a daunting task for a defendant to predict whether the "ordinary burglar" or "typical extortionist" was engaged in conduct that creates a "serious potential risk of physical injury." *Id.* at 597-98. But that's a cakewalk compared to trying to guess how the *Robinson* courts' view of §2 will cash out. You might think that "no evidence of Black voters being denied the right to vote" matters in a *Voting Rights* Act case, but you'd be wrong. *Robinson*, 605 F. Supp. 3d at 847. In the *Robinson* district court's view, such evidence is "irrelevant" because "[t]his case presents claims of vote *dilution*." *Id.* at 847.

That view of §2 is "shapeless." *Johnson*, 576 U.S. at 602. Like the law that criminalized being "annoying" while on a sidewalk, *Robinson* renders §2 "vague, not in the sense that it requires" state and local officials "to conform [their] conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). That approach cannot provide "good reasons" for thinking §2 demands race-based districting. *Wis. Legislature*, 595 U.S. at 404.

C. The *Gingles* Preconditions Alone Cannot Justify a Racial Gerrymander.

The further the meaning of §2 drifts from its text, the more emphasis is placed upon the judicially

created, atextual *Gingles* preconditions. Both Louisiana and the Robinson Appellants argue that the *Robinson* courts' *Gingles* findings suffice to justify the 2024 Plan's racial sorting. La.JS.31-32; Robinson.JS.24-26. This does not track §2's text and misapprehends the purpose served by the preconditions—to weed out particularly weak claims. The prerequisites further respect the States' sovereign authority over reapportionment by ensuring that "§ 2 never requires adoption of districts that violate traditional redistricting principles." *Allen v. Milligan*, 599 U.S. 1, 28, 30 (2023). But they do not answer whether minority voters are allowed to register, vote, or participate in the party of their choosing. Courts have declared that "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," *Robinson*, 605 F. Supp. 3d at 844 (quoting *Ga. NAACP v. Fayette Cnty. Bd. of Commr's*, 775 F.3d 1336, 1342 (11th Cir. 2015)), but they have not explained why that would be so.

Appellants rely on a line, plucked out of context, from *Cooper v. Harris*, where the Court remarked: "If a State has good reason to think that all the *Gingles* preconditions are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district." 581 U.S. at 302. This line, read alone, appears to condone Appellants' tunnel vision. But that statement must be understood in context and in light of this Court's §2 precedents.

Earlier in the *Cooper* opinion, the Court set the stage by declaring in no uncertain terms that a State

could avoid a constitutional violation when sorting voters by race only if "it had 'good reasons' to think that it would transgress the Act if it did not draw race-based district lines." 581 U.S. at 293; *see also id.* at 282 (repeating that the State must reasonably believe "the statute required its action"). "The Act" requires a plaintiff to prove, under the totality of circumstances, (1) less opportunity to elect *and* (2) less opportunity to participate in the political process. As noted earlier, the *Gingles* preconditions speak primarily to the former. *See De Grandy*, 512 U.S. at 1011-12. Their presence alone is "not sufficient to establish a violation." *Chisom*, 501 U.S. at 397.

Ultimately, a State wishing to avoid liability under the Equal Protection Clause must conduct the full "totality-of-circumstances analysis," *Wis. Legislature*, 595 U.S. at 405, which includes an inquiry into whether "members of the protected class have less opportunity to participate in the political process," *Chisom*, 501 U.S. at 397. Here, Louisiana threw up its hands in understandable exasperation and sorted voters by race even though the record reveals that the State's political processes are equally open to all.

III. The States Need Clarity.

Robinson and several other recent decisions from lower courts demonstrate that vote dilution jurisprudence is becoming increasingly "unclear and confusing" with time. *Merrill*, 142 S.Ct. at 881 (Kavanaugh, J., concurring). This paradox is the result of the VRA's past successes. "Relatively clear lines of legality and morality have become more difficult to locate as demands for outcomes have followed the cutting away of

obstacles to full participation." *Clements*, 999 F.2d at 837. In other words, courts have enabled statutory mission creep. But §2's successes are no reason to extend the law or deny legislators a fair chance of complying with §2 and the Constitution. The decisions discussed below underscore that legislators lack a clear rule and that the Court should provide it now.

1. Begin in the Great Plains. Within nine days of each other, two sets of private plaintiffs challenged North Dakota's 2021 State Legislative Plan. One alleged that the State racially gerrymandered by subdividing two districts. The district court held that North Dakota could racially gerrymander in order to comply with §2. *Walen v. Burgum*, 700 F. Supp. 3d 759, 774 (D.N.D. 2023), *appeal docketed* (U.S. Mar. 6, 2024). Weeks later, another district court determined that the same districting law *violated* §2 because the Legislative Assembly's race-based efforts "did not go far enough." *Turtle Mtn. Band of Chippewa Indians v. Howe*, 2023 WL 8004576, at *1, 17 (D.N.D. Nov. 17, 2023). More racial line-drawing was needed. "How much is too much?" *Rucho*, 588 U.S. at 707. The court didn't say.

2. Turning south, a federal court recently decided that Georgia's congressional and state legislative plans violated §2. *Alpha Phi Alpha v. Raffensperger*, 700 F. Supp. 3d 1136, 1380 (N.D. Ga. 2023). This notwithstanding the fact that **98%** of all eligible voters in Georgia are registered, both major party nominees for the last U.S. Senate race were black, the State's congressional delegation includes five black Democrats despite having only two majority-black districts, and

black Georgians enjoy proportional representation in Congress. *See id.* at 1190-91, 1283, 1288, 1360, 1365.

What should have tipped off the Georgia Legislature that it was required to engage in race-based districting? In the district court's view, it was recent "official discrimination in the state" that included several voting laws "determined in prior decisions … to *not* be illegal under federal law." *Id.* at *59, 62. For example, one law that the same judge had deemed *not* to violate §2 was transmuted into evidence that Georgia's redistricting laws *did* violate §2 because, among the tiny number of people affected by the VRA-compliant law, a higher percentage were black. *Id.* at *63.

But the most telling "evidence" was the district court's reliance on the 1990 congressional redistricting cycle. Without any apparent irony, the court identified DOJ's objection letters as evidence of "Georgia's history of discrimination against Black voters." *Id.* at *60. What the court omitted, however, was that DOJ was misusing §5 to demand a flagrantly gerrymandered "'max-black' plan." *Abrams v. Johnson*, 521 U.S. 74, 80 (1997). When Georgia finally acquiesced to the "Justice Department's maximization policy," this Court held that Georgia's map was unconstitutional. *Miller*, 515 U.S. at 926. Thus, in the district court's upside-down view, Georgia's repeated *refusal* to racially discriminate was *evidence* of racial discrimination. It is hard to fathom how the Georgia Legislature could have seen this coming.

3. Likewise, a three-judge court just held that Mississippi's House and Senate plans violate §2. *Miss. NAACP v. Bd. of Election Comm'rs*, 2024 WL 3275965

(S.D. Miss. July 2, 2024). In the court's view, even if no racial gap in turnout existed, the disparities flowing from "the nature of black poverty" would be enough to support a finding of vote dilution. *Id.* at *36, 49. That holding is neither predictable nor reconcilable with *Whitcomb*, where neither poverty nor its natural effects sufficed to demonstrate that members of the minority group were "denied access to the political system," 403 U.S. at 155; *see also Alexander*, 144 S.Ct. at 1264 (Thomas, J., concurring) (recounting recent case of court-ordered racial stereotyping in Washington State).

4. This cross-country trek naturally ends in Louisiana. The topsy-turvy tale of Louisiana's congressional redistricting efforts needs no more exposition.

But when it rains in Louisiana, it pours. Louisiana received word in February that its state legislative plans also violate §2 due, in part, to the "subliminal message of the Sheriff's Office being housed on the same floor as [a] Registrar of Voter's Office." *Nairne v. Ardoin,* 2024 WL 492688, at *41 n.461 (M.D. La. Feb. 8, 2024). And because walls can't talk, legislators had no way to know that this allocation of government real estate would doom their redistricting plan. States deserve greater respect and clarity than provided by this ever-expanding, whack-a-mole approach to §2.

* * *

The way out of this morass is to read §2 like any other statute. The text, drawn from *Whitcomb* and *White*, shows that the Voting Rights Act is concerned with the right to register, vote, and participate in politics—win or lose—not on subliminal messages from

parish buildings. But whatever the statute means, the Court should tell the States.

IV. If The Text Does Not Control, Then Either §2 Claims Are Nonjusticiable Or §2 Is Unconstitutional.

The *Robinson* court required Louisiana to sort voters by race notwithstanding the fact that black voters have an equal "ability to participate in the political process." 605 F. Supp. 3d at 849. Both sets of Appellants argue that a State may engage in race-based districting without offending the Constitution whenever it reasonably believes the *Gingles* preconditions require it. And Louisiana, for its part, insists that when a federal court orders an additional majority-minority district, race cannot, by definition, predominate in the resulting plan.

"It is vital" when intervening in "the legislative process of apportionment" that courts "act only with especially clear standards." *Rucho*, 588 U.S. at 703-04. These "must be 'principled, rational, and based upon reasoned distinctions' found in the Constitution or laws." *Id.* at 718 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004)). But if §2 requires some race-based districting, rather than barring it, there is no principled answer to the question "How much [race] is too much?" *Id.* at 707. The standards of §2 liability employed by the *Robinson* courts and offered by Appellants are anything but "manageable." *Id.* at 696. If §2 means what the *Robinson* court thinks it means, claims of vote dilution under §2 are not justiciable. *Id.* at 703.

Moreover, if these interpretations are right, then there is "no end is in sight" to §2's race-based demands, and §2 "must … be invalidated under the Equal Protection Clause of the Fourteenth Amendment." *SFFA v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 213 (2023). Every racial classification by the government is either unconstitutional or on its way to that end. Those that are not outright prohibited are allowed only to the degree "necessary" "to further compelling governmental interests." *Id.* at 207. That is because even the race-based actions our Constitution permits are "dangerous," *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003), and "the deviation from the norm of equal treatment"; as such, they *must* be limited "in scope and duration." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498, 510 (1989) (plurality opinion).

Even if the VRA has required race-based districting since §2 was amended in 1982, in the intervening decades, "things have changed dramatically" in the South. *Shelby County v. Holder*, 570 U.S. 529, 547 (2013). "By any measure, the [Voting Rights] Act has accomplished its original purposes with great success." *Petteway v. Galveston County*, No. 23-40582, 2024 WL 3617145, at *12 (5th Cir. Aug. 1, 2024) (en banc). For example, when the VRA was enacted, black voter registration in Louisiana sat at a meager 31.6% compared to a white registration rate of 80.5%—a 49% gap. *Shelby County*, 570 U.S. at 546. As of 2004, that gap had narrowed to just 4% (75.5% white to 71.1% black). *Id.* And today, as recognized by the *Robinson* court, there is "no evidence of Black voters being denied the right to vote" or "that past discrimination has

affected their ability to participate in the political process." *Robinson*, 605 F. Supp. 3d at 847, 849.

Absent "particularized findings" that members of the minority group are excluded from effective political participation, the "racial classifications" condoned by the *Robinson* court and relied on by Appellants will be "ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986). A so-called "Senate Factors" expert will always be able to identity at least some "race-based gaps … with respect to the health, wealth, [or] well-being of American citizens." *SFFA*, 600 U.S. at 384 (Jackson, J., dissenting). This will allow §2 to function as "an affirmative-action program" for race-based districting in perpetuity. *Shaw v. Hunt*, 517 U.S. 899, 910 (1996).

But "this Court's precedents make clear that" even "narrowly tailored race-based affirmative action in higher education" may not "extend indefinitely into the future." *SFFA*, 600 U.S. at 316 (Kavanaugh, J., concurring). Likewise, "even if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future." *Allen*, 599 U.S. at 45 (Kavanaugh, J., concurring). If §2 allows courts to "pick[] winners and losers based on the color of their skin," *SFFA*, 600 U.S. at 229, it is time to get out of that business.

In sum, this Court should grant and affirm, clarifying that the meaning of §2 is married to its text. But if the Court grants and reverses, it should reverse only upon holding that §2 vote-dilution claims are nonjusticiable.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

STEVE MARSHALL
Attorney General

EDMUND G. LACOUR JR.
Solicitor General
Counsel of Record

SOREN GEIGER
Assistant Solicitor General

OFFICE OF ALA. ATT'Y GEN.
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Edmund.LaCour@
AlabamaAG.gov

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(additional counsel listed below)

ADDITIONAL COUNSEL

CHRIS CARR
Attorney General
State of Georgia

RAÚL R. LABRADOR
Attorney General
State of Idaho

THEODORE E. ROKITA
Attorney General
State of Indiana

BRENNA BIRD
Attorney General
State of Iowa

LYNN FITCH
Attorney General
State of Mississippi

AUSTIN KNUDSEN
Attorney General
State of Montana

MICHAEL T. HILGERS
Attorney General
State of Nebraska

ALAN WILSON
Attorney General
State of South Carolina

JONATHAN SKRMETTI
Attorney General
State of Tennessee

KEN PAXTON
Attorney General
State of Texas

SEAN D. REYES
Attorney General
State of Utah

PATRICK MORRISEY
Attorney General
State of West Virginia