

Nos. 25-273, 25-274

In the Supreme Court of the United States

WES ALLEN, ALABAMA SECRETARY OF STATE, ET AL.,
Appellants,

v.

BOBBY SINGLETON, ET AL., *Appellees.*

WES ALLEN, ALABAMA SECRETARY OF STATE, ET AL.,
Appellants,

v.

EVAN MILLIGAN, ET AL., *Appellees.*

*ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA*

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

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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 districting 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 Alabama properly declined to segregate citizens based on race yet was somehow found to have intentionally discriminated based on race, the Project has a direct interest in this case.*

* Under Rule 37.2, the parties' counsel of record received timely notice of the intent to file this brief. 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

A State does not discriminate by declining to discriminate. Yet the district court held that Alabama intentionally discriminated when it chose *not* to enact a map that would segregate black citizens. To justify that counterintuitive result, the district court said that the State’s decision not to follow a non-existent order to draw a second majority-minority district—and decision to pass a new race-neutral map instead—amounted to intentional discrimination. That holding turns the promise of equal protection upside down. Drawing maps based on race violates equal protection, while a State’s refusal to sort voters by race does not. This Court has created a mess in which States face liability for intentional discrimination even when they specifically refuse to discriminate. It is time to fix that mess.

Though the decision below runs past 125,000 words, one searches in vain for any mention of *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, in which this Court reiterated that “trying to derive equality from inequality” is “inherent folly.” 600 U.S. 181, 203 (2023). But unlike the decision below, the State could not ignore that the Fourteenth Amendment condemns “all manner of race-based state action.” *Id.* at 204. That includes race-based districting. So when Alabama set out to draw a new map, it had no choice but “to comply with the twin commands of the Equal Protection Clause”: “that race may never be used as a ‘negative’ and that it may not operate as a stereotype.” *Id.* at 218. The State complied with those commands, yet the district court found intentional discrimination.

The district court tried to transform the State's race-neutral effort into discrimination by implying that the State refused to provide a remedy for the Court's finding that the prior map could have violated § 2 of the Voting Rights Act. But this is not evidence of discrimination at all, much less the type of stringent evidence that would overcome the State's presumption of good faith. The court never ordered the State to do anything, and it never adjudicated an actual § 2 violation. It did nothing more than find that the plaintiffs were likely to succeed in showing a violation and give the State an opportunity to pass a new map. The State did so, passing a map that it believed would satisfy § 2 while remaining race-neutral. Disagreement with a court's preliminary finding about § 2's notoriously incomprehensible standard does not show an intent to discriminate.

Even if some § 2 violation had been actually adjudicated, passing the new map here still would not have been enough to show intentional discrimination. That is because modern-day § 2 liability is based almost entirely on the independent decisions of voters of all races about (1) where to live and (2) how to vote. Because § 2 liability under current standards would say practically nothing about discrimination based on race—much less show *intentional* discrimination—a State's decision to draw a map that might implicate § 2's modern applications does not show intentional discrimination.

What's more, disagreement with any court's suggestion that § 2 today could excuse a violation of the Constitution does not show intentional discrimination. If anything, it shows a basic compre-

hension of the Supremacy Clause. Indeed, if the State had segregated voters using the overriding principle of the plaintiffs and the district court's special master—draw another majority-minority district—it would have used race to stereotype voters' decisions and segregate them, and thus would have squarely violated the Fourteenth Amendment. But States must adhere to the Fourteenth Amendment's guarantee of equal treatment based on race, and Alabama's effort to satisfy that guarantee is not discriminatory.

This case reinforces that § 2 has evolved into a sword for creating racially gerrymandered districts rather than a shield against racial discrimination. Courts should not be in the business of forcing States to violate the Fourteenth Amendment's promise that the government will treat citizens equally regardless of race. Much less should courts smear a State that declines to eagerly segregate citizens as itself discriminatory. Under *Students for Fair Admissions*, the State had no other choice. Neither should courts—and it is time for this Court to say so.

ARGUMENT**States do not intentionally discriminate by declining to discriminate.**

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. In *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court finally held that States have “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.

“The Constitution entrusts state legislatures with the primary responsibility for drawing congressional districts,” and “a legislature may pursue partisan ends when it engages in redistricting.” *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 6 (2024). When a claimant argues that redistricting was impermissibly motivated by race, courts must presume “legislative good faith” by “draw[ing] the inference that cuts in the legislature’s favor when confronted with evidence that could plausibly support multiple conclusions.” *Id.* at 10. Several reasons account for this presumption, including “the Federal Judiciary’s due respect for the judgment of state legislators,” judicial hesitance to “hurl [racist] accusations at the political branches,” and a wariness “of plaintiffs who seek to transform federal courts into

weapons of political warfare that will deliver victories that eluded them in the political arena.” *Id.* at 11 (cleaned up).

The district court claimed that it “underst[ood] the importance of this presumption” and “tried to apply it.” App. 487. But the district court’s explanation of its “try” casts some doubt on its understanding. For instance, the court believed that it was applying the presumption when it did not issue an unnecessary constitutional opinion earlier in the case. App. 487–88. But the presumption has nothing to do with constitutional avoidance principles. The court also believed that it was applying the presumption when it “conducted [its] Senate Factors analysis [under *Gingles*] with restraint.” App. 487. (Put aside what that says about the absence of neutral principles under *Gingles*.) But the *Gingles* factors too have nothing to do with the presumption of legislative good faith in an intentional discrimination claim. Last, the court believed that it was applying the presumption when it “allow[ed] the Legislature sufficient time to enact a new plan.” App. 488. But that leeway is required by this Court’s precedents, see, e.g., *White v. Weiser*, 412 U.S. 783, 795 (1973),¹ and is a separate issue from the premise that courts should not assume that state legislatures seek to discriminate based on race. The district court’s repeated misapprehensions

¹ And likely also required by the limits on federal courts’ equitable powers. See *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 591 U.S. 610, 627 n.8 (2020) (plurality opinion) (explaining that the judicial authority under Article III “amounts to little more than the negative power to disregard an [unlawful] enactment” (cleaned up)).

of the legislative presumption of good faith suggest that it neither understood nor properly applied it.

Claimants must overcome the presumption of good faith and prove “racially discriminatory intent or purpose” “to show a violation of the Equal Protection Clause.” *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). “This showing can be made through some combination of direct and circumstantial evidence.” *Alexander*, 602 U.S. at 8. Direct evidence may be some “relevant state actor’s express acknowledgment that race played a role in the drawing of district lines.” *Ibid.* There was no direct evidence here. The district court tried to manufacture direct evidence, mainly in the form of legislative findings and statements suggesting that the legislature “was not focused on trying to remedy likely vote dilution.” App. 510. But that simply restates that the legislature was focused on achieving its political goals; it is not direct evidence of discriminatory intent. The district court also pointed to aspersions on the map cast by legislators on the losing end of the vote, but comments from (as the district court put it) “legislators whose preferences did not prevail” (App. 511)—and who have an obvious motivation to smear the map—are not “relevant.” *Alexander*, 602 U.S. at 8.

So the district court was left to rely on circumstantial evidence. But “[p]roving racial [discrimination] with circumstantial evidence alone is much more difficult.” *Ibid.* In fact, this Court has “never invalidated an electoral map in a case in which the plaintiff failed to adduce any direct evidence” of discriminatory intent. *Ibid.*

Circumstantial evidence is especially suspect when used to “infer[] bad faith based on the racial effects of a political gerrymander in a jurisdiction in which race and partisan preference are very closely correlated.” *Id.* at 20–21. Alabama has that close correlation. See App. 280 (noting apparently undisputed testimony that in “Alabama, Black voters are voting Democratic more than 90% of the time”). Where a large percentage of “black voters vote[s] for Democratic candidates,” “it is obvious that any map” seeking a Republican advantage in a district “would inevitably involve the removal of a disproportionate number of black voters.” *Alexander*, 602 U.S. at 20. If there is a “possibility” that the legislature had such a “partisan goal,” and “nothing rules out that possibility,” it “is dispositive” “[i]n light of the presumption of legislative good faith”: no discriminatory intent can be found. *Ibid.*

Here, it is blindingly obvious that the Alabama legislature preferred a map that would generally support the election of six Republican House members to a map that would generally support only five. The district court acted as if there were some evidentiary question on that point, waving aside calls from national leaders about preserving “the slim Republican majority in the United States House” as “precious little evidence.” App. 524. Yet even the plaintiffs affirmatively argued below that the legislature wanted to support the election of a “Republican instead in District 2.” App. 473 (cleaned up). Of course it did. Denying that each party has a motivation in districting to support election of its own blinks reality.

The district court eventually (and obliquely) conceded the point, acknowledging that “[t]he Legislature may well have drawn the 2021 Plan the way it did for partisan reasons.” App. 525. And the court acknowledged that the map it believed the legislature *should* have passed in 2023 “does not achieve all the political goals of the Legislature.” App. 514. Again, *of course not*: it inevitably resulted in the election of two Democrats rather than one. Yet the court refused to follow this Court’s lead and hold that “the high priority that the legislature gave to its partisan goal provides an entirely reasonable explanation for” its map. *Alexander*, 602 U.S. at 21. Nor did the court even try to disentangle race and politics in its intentional discrimination discussion. Contra App. 488 (“we draw every inference we can in the Legislature’s favor”).²

Rather, the court’s entire intentional discrimination holding hinged on one fact: the State’s decision after a preliminary ruling against the prior map not to draw a second majority-minority district. “[T]he State’s avowed partisan objective easily explains” this decision: it is no surprise that Alabama preferred its own map that would likely result in the election of six Republicans to a court-imposed one that would likely lead to only five. *Alexander*, 602 U.S. at 21. Because “the legislature’s stated partisan goal can easily explain this decision,” the district court “erred

² The legislature also had an avowed “political goal[]” of “keeping Mobile and Baldwin Counties whole and together in one congressional district”—a permissible goal that the district court agreed its preferred plan did not satisfy. App. 514.

in crediting the less charitable conclusion that the legislature’s real aim was racial.” *Id.* at 22.

The district court’s errors, though, did not end there. As detailed below, it also erred in its (vehement) belief that a State’s effort to address a tentative ruling by passing a new map with a different approach to the alleged statutory violation proved racial discrimination. Indeed, even if the prior map had an *adjudicated* § 2 violation, modern-day § 2 liability can be imposed absent racial discrimination. Thus, even an actual decision to draw a map that a State *knew* would fail § 2 could not alone prove intentional discrimination. In too many cases, § 2 is now read to require race-based districting. A State’s efforts to resist race-based action are not discriminatory. Quite the opposite: they vindicate “the constitutional promise of equal treatment.” *Students for Fair Admissions*, 600 U.S. at 228.

A. The district court’s evidence does not show intentional racial discrimination.

The circumstantial evidence relied on by the district court to find intentional discrimination was “very weak”—and wholly inadequate to overcome the legislative presumption of good faith. *Alexander*, 602 U.S. at 18. Though the court walked through several factors articulated by this Court’s precedents about intentional discrimination—historical background, the events leading to the 2023 map, the legislative process, and any disparate impact—its findings all boiled down to a single focus: the State did not draw a map that adhered to the suggestion in a preliminary ruling against a prior map that another majority-

minority district could be necessary to resolve an alleged § 2 violation by that old map.

1. To begin, the district court’s intentional discrimination analysis depended on its view that the State “purposefully refuse[d] to satisfy the remedial requirements unambiguously found in a federal court order.” App. 526. A hypothetical shows this reliance. If there had been no preliminary injunction in the challenge to the 2021 map—or if there had been no prior litigation—and a suit had been brought against Alabama only for the 2023 map, would the district court’s reasoning have stood up? Of course not. Its entire intentional discrimination analysis centered on the State’s supposed refusal to provide a remedy. See App. 527 (“We do not hold that if SB5 had been originally adopted in 2021, the *Milligan* Plaintiffs would have prevailed on a claim of intentional discrimination at that time.”).

But the district court’s reasoning immediately runs into problems. “[I]ntent is identified as the constitutional standard and yet the persons who allegedly harbored an improper intent are never identified or mentioned.” *Rogers v. Lodge*, 458 U.S. 613, 647 (1982) (Stevens, J., dissenting); see App. 490 (“[W]e do not accuse any Legislator of being animated by racism.”).

Instead, the court identified the passage of a new map as intentionally discriminatory—because the court had suggested different maps in a preliminary ruling. But the court’s earlier preliminary injunction ordered the State to do only one thing: refrain “from conducting any congressional elections according to the [2021] Plan.” App. 769. Once this Court allowed

that order to take effect, the State did not conduct a congressional election using the 2021 map. So the State fully complied with the preliminary injunction order.

At the same time, the State chose to enact a new map. To be sure, the district court gave the State the option “to enact a remedial plan.” App. 770. And the court alluded to what it saw as “the practical reality, based on the” evidence “adduced during the preliminary injunction proceedings, that any remedial plan will need to include two districts in which Black voters either comprise a voting-age majority or something quite close to it.” *Ibid.* But it did not require the State to draw such a map. See App. 515 (acknowledging that “the face of the order did not order the Legislature to do anything”); contra App. 520 (darkly pronouncing that “an attempt to evade a court order is not legitimate”). And it did not even say that such a map would *ever* be required. As several plaintiffs reassured this Court, the district court “did not order Alabama to enact Plaintiffs’ plans or even to create a second majority-Black district.” Brief for *Milligan* Appellees 2, *Allen v. Milligan*, No. 21-1086 (U.S. July 11, 2022). So while the district court now proclaims that “[p]reliminary injunctions are preliminary, but they are not advisory,” App. 517, the court’s suggestions about a new map were expressly advisory.

“[T]he preliminary nature of the” prior opinion “is relevant” to understand the State’s response. *Abbott v. Perez*, 585 U.S. 579, 610 (2018). Preliminary injunctions “do not conclusively resolve legal disputes” and are “often dependent as much on the equities of a

given case as the substance of the legal issues it presents.” *Lackey v. Stinnie*, 604 U.S. 192, 200 (2025). Thus, this Court has repeatedly “cautioned against improperly equating ‘likelihood of success’ with ‘success’ and treating preliminary injunctions as tantamount to decisions on the underlying merits.” *Id.* at 201 (cleaned up) (quoting *University of Texas v. Camenisch*, 451 U.S. 390, 394 (1981)). A preliminary injunction grants “no *enduring* change” and is “tentative in character, in view of the continuation of the litigation to definitively resolve the controversy.” *Id.* at 203 (brackets omitted) (quoting *Sole v. Wyner*, 551 U.S. 74, 78, 86 (2007)). In short, the district court’s preliminary injunction did no more than “temporarily preserve[] the parties’ litigating positions based in part on a prediction of the likelihood of success on the merits.” *Id.* at 207.

Though the district court repeatedly emphasized this Court’s affirmance of the preliminary injunction, that affirmance was about *likelihood* of success and only “[b]ased on [the Court’s] review of the record” assembled at the preliminary stage. *Allen v. Milligan*, 599 U.S. 1, 19 (2023). That record was compiled “on an extremely expedited basis” without even depositions of expert witnesses. App. 777; see App. 793–94. This Court’s decision in *Allen* necessarily “intimate[d] no view as to the ultimate merits of [the Plaintiffs’] contentions.” *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 934 (1975) (cleaned up).

All that shows that the district court’s tentative suggestion that a permissible map that would preserve the parties’ positions could require something like another majority-minority district has

little bearing on the State’s subsequent enactment of the 2023 map. The State was perfectly entitled to think that it would eventually prevail on the § 2 challenge to its old map after a full trial, particularly given the “considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim.” *Merrill v. Milligan*, 142 S. Ct. 879, 883 (2022) (Roberts, C.J., dissenting from grant of applications for stays). That four Justices of this Court believed that the State should have prevailed even at the preliminary stage is ample evidence that the State’s view was reasonable. What’s more, the State at trial would have the opportunity to show that “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” had expired. *Allen*, 599 U.S. at 45 (Kavanaugh, J., concurring in part); see also *id.* at 78–88 (Thomas, J., dissenting, joined by Gorsuch and Barrett, JJ.); *id.* at 100 (Alito, J., dissenting).

The State was also entitled to think that, whatever the district court’s tentative view of a permissible map, it could find another way to comply with § 2. Section 2 “determination[s] [are] peculiarly dependent upon the facts of each case,” *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986), requiring “an intensely local appraisal of the electoral mechanism at issue,” *Allen*, 599 U.S. at 19 (cleaned up). And again, the district court’s § 2 view of the 2021 map was only tentative. In fact, in recent § 2 dilution cases, the State won at the totality-of-circumstances stage after full trial. See *Alabama Leg. Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1287 (M.D. Ala. 2013), *vacated on other*

grounds, 575 U.S. 254 (2015); *Alabama St. Conf. NAACP v. Alabama*, 612 F. Supp. 3d 1232, 1316 (M.D. Ala. 2020). The legislature could have found those decisions persuasive and thought the State could prevail on similar grounds after having a chance to fully make its case.

Thus, the State had good reasons to think that it could design another map that would be legally compliant. Its choice to follow that view, rather than assume that a district court’s tentative view of another map would automatically invalidate a different approach, is not evidence of discriminatory intent *at all*. “There is nothing to suggest that the Legislature proceeded in bad faith—or even that it acted unreasonably—in pursuing this strategy.” *Abbott*, 585 U.S. at 612. Yet the district court strangely counted the State’s efforts “to persuade” the federal judiciary “to change its view about the Legislature’s Section Two violation” as itself discriminatory. App. 21–22; see, *e.g.*, App. 494 (faulting the legislature for “invit[ing] a historian to testify about the historical connections between Mobile and Baldwin Counties”).

The district court also expressed great concern that enactment of a new map would result in “an infinity loop that no court order can break.” App. 516. First, that concern has nothing to do with whether the State intentionally discriminated based on race. Second, that challenges to an “old rule” are often “moot” is not unique to districting. *New York State Rifle & Pistol Ass’n, Inc. v. City of New York*, 590 U.S. 336, 339 (2020). “[W]here the plaintiff may have some residual claim under the new framework,” any prior judgment should be vacated and “the parties may, if necessary,

amend their pleadings or develop the record more fully”—as happened here. *Ibid.* Plaintiffs “remain[] free to initiate a § 2 proceeding if [they] believe[] that a jurisdiction’s newly enacted voting ‘qualification, prerequisite, standard, practice, or procedure’ may violate that section.” *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 485 (1997). But federal courts do not sit as permanent “councils of revision,” *United States v. Rutherford*, 442 U.S. 544, 555 (1979), and the district court’s apparent frustration with that fact is no substitute for actual evidence of intentional discrimination.

2. Even if the district court had finally adjudicated an actual § 2 violation (and been affirmed), the State’s choice below *still* would not suggest intentional discrimination. Perhaps one could argue that a refusal to remedy intentional discrimination itself shows such discrimination. But modern-day § 2 liability attaches absent any intentional discrimination—or even any race-based official discrimination at all. See *Chisom v. Roemer*, 501 U.S. 380, 394 (1991) (“[P]roof of intent is no longer required to prove a § 2 violation.”). Under *Gingles*, liability generally attaches “[i]f 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.” *Allen*, 599 U.S. at 81 (Thomas, J., dissenting); see App. 115–16 (“it will be only the very unusual case in which the [P]laintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2”).

“But racially polarized voting”—and independent residential choices—are “not evidence of unconstitutional discrimination,” *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 228 (2009); see *Rogers*, 458 U.S. 623–24 (“bloc voting along racial lines” is “insufficient” “to prove purposeful discrimination”). That is especially true given that *Gingles*, as applied by the district court, does not disentangle race and politics. See App. 372 (declining to “fully disentangle party and race”); App. 392 (“we cannot separate voters’ racial considerations from their party affiliations”). 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.” C. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. Pa. L. Rev. 377, 401 (2012). Thus, § 2 is “doctrinally divorced from the [Voting Rights Act’s] purpose” to stand against official discrimination in voting. *Id.* at 398.

While the district court characterized its preliminary holding as finding that the old map “likely unlawfully diluted the votes of Black Alabamians,” App. 489, a liability finding under *Gingles* does not show that any dilution occurred *because of* race. Given that, it is wrong to say that, by passing another map without two majority-minority districts, “the Legislature purposefully diluted Black Alabamians’ opportunity to participate in the political process”

based on race. App. 490. Modern-day § 2 liability does not permit this extrapolation, for it identifies neither intentional nor race-based discrimination. Compare *Alexander*, 602 U.S. at 6 (“[A] party challenging a map’s constitutionality must disentangle race and politics if it wishes to prove that the legislature was motivated by race as opposed to partisanship.”); *Brnovich v. Democratic Nat’l Comm.*, 594 U.S. 647, 689 (2021) (“partisan motives are not the same as racial motives”).

An analogy proves the point. Say that Congress passed a “results test” for college admissions, and a district court found that a public university did not enroll enough minority students—making no effort to disentangle merit from race. Cf. App. 372 (declining to “disentangle party and race”). Would the university’s choice of another merit-based system—that would not change the racial composition of the student body, but would continue to be race-neutral—prove intentional discrimination? It is hard to see how the answer to that question could be yes.

In short, “choos[ing] a redistricting plan that has a dilutive impact”—especially given how *Gingles* envisions vote dilution—“does not, without more, suffice to establish that the jurisdiction acted with a discriminatory purpose.” *Reno*, 520 U.S. at 487–88. “Discriminatory purpose” “implies more than intent as volition or intent as awareness of consequences,” and instead “implies that the decisionmaker” “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Pers. Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). The

evidence that Alabama purposefully discriminated based on race because it enacted a race-neutral law is pitifully weak—no matter how much the district court was evidently affronted by this new law. As shown next, it makes much more sense that Alabama enacted such a law because the Fourteenth Amendment requires equal treatment based on race.

B. The State’s conduct is explained by its obligation to provide equal treatment.

Beyond politics, another explanation exists for the 2023 map that is far more compelling than racial discrimination—the State’s adherence to its constitutional obligation to eliminate “all” race-based state action. *Students for Fair Admissions*, 600 U.S. at 206. To the extent that the district court believed that the State *had* to draw another “district[] in which Black voters either comprise a voting-age majority or something quite close to it” (App. 491)—though no such order existed—that would have required the State to discriminate based on race.

The district court seemed to welcome that discrimination. Indeed, the remedial map it adopted was premised on such discrimination, notwithstanding the court’s claim that its special master’s plan was “race-blind.” App. 514. Not so. The *only* “reason the Special Master Plan splits Mobile County” is to segregate citizens by race. *Ibid.*; see App. 530–31 (“all stakeholders know that . . . all paths to” drawing a second district “revolve around Mobile County”). As the court itself explained, all remedial plans “split Mobile County to join Black Alabamians living in Mobile with parts of the Black Belt in a majority-Black district.” App. 521. So while the court highlighted that

its special master “did not display racial demographic data within the mapping software . . . while drawing his remedial proposals,” App. 17, he had no need to. He had already decided to split Mobile County to segregate citizens by race, and before he produced his map, he confirmed that adequate segregation was accomplished with “an election performance analysis” based on race. *Ibid.*; see *Milligan* D. Ct. Dkt. 295, at 29 (“A performance analysis assesses whether, using recent election results, a candidate preferred by a particular [racial] group would be elected from a proposed opportunity district.”); see *id.* at 35 (“the Special Master confirmed that Black residents had an opportunity to elect candidates of their choice”).

“Racial considerations predominate when race [i]s the criterion” that cannot “be compromised in the drawing of district lines.” *Alexander*, 602 U.S. at 7 (cleaned up). And when the government “intentionally creates a majority-minority district, race is necessarily its predominant motivation.” *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 517 (2006) (Scalia, J., concurring in judgment in part and dissenting in part, joined by Roberts, C.J., and Thomas & Alito, JJ.).

Thus, there is no question that the district court wanted the State to intentionally discriminate based on race, in service of its preliminary view about § 2 liability. But States have a higher calling than the feelings of district judges: “the Constitution’s unambiguous guarantee of equal protection.” *Students for Fair Admissions*, 600 U.S. at 212. Alabama has consistently argued that drawing the map envisioned by the district court would violate that guarantee. See, e.g., *Allen*, 599 U.S. at 41. That provides an easy,

obvious, and more “charitable” (*Alexander*, 602 U.S. at 22) explanation for its map: it continued to seek ways to comply with the Constitution, while also gamely trying to satisfy § 2’s “notoriously unclear and confusing” standards. *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring).

This explanation is valid regardless of whether § 2 could somehow serve as an adequate justification for racial segregation today. As *amicus* has recently explained, there is significant reason to doubt that. See generally Brief for Project on Fair Representation 10–26, *Louisiana v. Callais & Robinson v. Callais*, Nos. 24-109, 24-110 (U.S. Sept. 23, 2025). But there is no doubt that racial segregation for districting purposes is still racial segregation. That is why this Court has repeatedly emphasized the tension between § 2 and the Constitution’s guarantee of equal treatment based on race. See, e.g., *Abbott*, 585 U.S. at 587 (quoting *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion)).³ No matter if strict scrutiny might excuse that discrimination sometimes, it is still discrimination. Thus, a State that refuses to discriminate—even one that, unlike Alabama, believes its law will certainly violate modern § 2—has not intentionally discriminated. It has *refused* to discriminate, prioritizing its constitutional obligations over a potential statutory excuse to discriminate.

By analogy, take a State that declined to ever segregate its prisons based on race. Even if it *could*

³ Even the district court claimed to “take seriously the concern that Section Two ‘may impermissibly elevate race in the allocation of political power within the States.’” App. 520 (quoting *Allen*, 599 U.S. at 41–42); see App. 456.

have avoided liability for such segregation in some circumstances, see *Students for Fair Admissions*, 600 U.S. at 207, it beggars belief to say that this refusal is itself discriminatory. It is the opposite of discriminatory; it is equal.

What’s more, regardless of whether a State’s law “compl[ies] with strict scrutiny,” this Court said in *Students for Fair Admissions* that a law “may never use race as a stereotype or negative.” 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).

“[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 *Shaw v. Reno*, 509 U.S. 630, 643 (1993)). “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). Consider, for instance, the district court’s finding that “issues of race drive Black voters’ choices at the polls,” accompanied by snippets from two black voters’ testimony and the conclusion that “[w]e see no reason to think that these Black voters are unusual.” App. 391. Assumptions like these

“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).

Thus, a refusal to racially stereotype voters amply justifies Alabama’s new map. That commitment to equal treatment does not show discrimination. This Court has explained that “the Fourteenth Amendment guarantees equal laws, not equal results.” *Feeney*, 442 U.S. at 273. So a State choosing between equal laws and equal results has no real choice at all: it must follow the Constitution. The Constitution guarantees that laws will not discriminate based on race. Alabama’s proper refusal to discriminate was not discriminatory.

* * *

Permeating the district court’s opinion is a frustration that Alabama did not just do what the court suggested in its preliminary finding. However frustrating a State’s perceived recalcitrance might be, a State does not have to make a federal court’s job easy. But it *does* have to follow the Constitution, including its promise of equal treatment. No doubt, the federal courts have made that job harder by pretending that a statute perhaps can override States’ constitutional obligations. But a state legislature that errs on the side of the Constitution’s promise of equal treatment has not discriminated based on race; it has *refused* to discriminate based on race. The district court’s upside-down analysis “regrettably succumbs to th[e] trend” of “attempt[ing] to discredit an argument

not by proving that it is unsound but by attacking the character or motives of the argument’s proponents.” *Ramos v. Louisiana*, 590 U.S. 83, 141 (2020) (Alito, J., dissenting, joined by Roberts, C.J., and Kagan, J.). Hence the court’s disregard of *Students for Fair Admissions* and its reminder that “[e]liminating racial discrimination means eliminating all of it.” 600 U.S. at 206. Imputing racism to legislative bodies that are acting without regard to race “cheapens the gravity” of actual intentional discrimination—like segregating voters based on racial stereotypes. *Whole Woman’s Health v. Jackson*, 595 U.S. 30, 49 (2021).

CONCLUSION

For these reasons, the Court should note probable jurisdiction and reverse.

Respectfully submitted,

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OCTOBER 9, 2025

AFFIDAVIT OF SERVICE

SUPREME COURT OF THE UNITED STATES

Nos. 25-273, 25-274

-----X
WES ALLEN, ALABAMA SECRETARY OF STATE, ET AL.,

Appellants,

v.

BOBBY SINGLETON, ET AL.,

Appellees,

WES ALLEN, ALABAMA SECRETARY OF STATE, ET AL.,

Appellants,

v.

EVAN MILLIGAN, ET AL.,

Appellees,

-----X

STATE OF NEW YORK)

COUNTY OF NEW YORK)

I, Ann Tosel, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Counsel of Record for *Amicus Curiae* Project on Fair Representation.

That on the 9th day of October, 2025, I served the within *Brief for Project on Fair Representation as Amicus Curiae In Support of Appellants* in the above-captioned matter upon:

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by sending three copies of same, addressed to each individual respectively, through Priority Mail. An electronic version was also served by email to each individual.

That on the same date as above, I sent to this Court forty copies of the within *Brief for Project on Fair Representation as Amicus Curiae In Support of Appellants* through the Overnight Next Day Federal Express, postage prepaid. In addition, the brief has been submitted through the Court's electronic filing system.

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 9th day of October, 2025.



Ann Tosel

Sworn to and subscribed before me
this 9th day of October, 2025.



MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 5,992 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).


I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 9th day of October, 2025.



Ann Tosel

Sworn to and subscribed before me
this 9th day of October, 2025.



MARIANA BRAYLOVSKIY
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