No. 24-109

In the Supreme Court of the United States

STATE OF LOUISIANA,
Appellant,

v.

PHILLIP CALLAIS, ET AL.,
Appellees.

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

SUPPLEMENTAL BRIEF FOR APPELLANT

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QUESTION PRESENTED

Whether the State's intentional creation of a second majority-minority congressional district violates the Fourteenth or Fifteenth Amendments to the U.S. Constitution.

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INTRODUCTION

Louisiana's intentional creation of a second majority-minority district in S.B. 8—at the behest of a federal district judge and a Fifth Circuit panel—violates the Constitution as properly understood. That was the position Louisiana took in vigorous defense of its original congressional map: Louisiana could not constitutionally pack black voters into a plainly gerrymandered district, and a federal court could not do so either. That also is the position Louisiana is currently taking in vigorous defense of its state legislative maps: Race-based redistricting is fundamentally contrary to our Constitution.

Over and over again, the federal courts have refused to hear us. That is why S.B. 8 is on the books—Louisiana's response to unprecedented pressure by the courts to draw a second majority-minority district or else the courts would. And that is why our original briefing in this case defends S.B. 8 under the Court's existing precedents.

The Court's order for rebriefing and reargument, however, asks a threshold question about those precedents: whether, consistent with Louisiana's longstanding position, race-based redistricting is unconstitutional. It is. We thus decline to defend S.B. 8 on that question presented.

* * *

Racial classifications "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Shaw v. Reno (Shaw I)*, 509 U.S. 630, 643 (1993) (quoting *Hirabayashi v.*

United States, 320 U.S. 81, 100 (1943)). And racial classifications implicating the most sacred feature of our democracy—the right to vote—are uniquely odious. They harm voters of all races whose skin colors determine their voting districts. They harm the sovereign States that perennially suffer the indignity of discriminating against their citizens on the basis of race—and then the indignity of being sued for considering race too much or too little. They harm the federal judiciary, which must pick winners and losers based on race. And they harm our stature as a Nation—a Nation that once had the audacity to declare to the world the first truth we held to be self-evident: "[A]ll men are created equal." Declaration of Independence ¶ 2.

That founding declaration rings hollow as long as government-mandated racial discrimination exists in America. "Eliminating racial discrimination means eliminating all of it." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 206 (2023). There is no safe harbor for racial discrimination the government deems good discrimination. The Constitution instead orders no quarter—relentless enforcement of the "dedicated belief" that our Constitution "is color blind." Supp. Br. for Appellants on Reargument in Nos. 1, 2, and 4, and for Respondents in No. 10, in *Brown v. Bd. of Educ.*, O.T. 1953, p. 65; *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

Race-based redistricting in the name of Section 2 of the Voting Rights Act (VRA) should be no exception. But the Court has nevertheless understood Section 2 to "insist[]," in certain (well, uncertain) circumstances,

"that districts be created precisely because of race," *Abbott v. Perez*, 585 U.S. 579, 586 (2018)—that is, States must use racial targets to intentionally create majority-minority voting districts.

That race-based mandate is unconstitutional. The Equal Protection Clause commands that the government "may never use race as a stereotype or negative." *SFFA*, 600 U.S. at 213. Yet race-based redistricting rests on an invidious stereotype: that all minorities, by virtue of their membership in their racial class, think alike and share the same interests and voting preferences. And it uses race as a negative in this zero-sum context by advantaging some racial groups at the expense of others.

If that "were not enough," race-based redistricting under Section 2 also "lack[s] a 'logical end point.'" *Id.* at 221. It has persisted for over four decades—and its eyes are set on eternity. Just ask Washington, Louisiana, Mississippi, Alabama, and Georgia, all of which have lost their maps to Section 2's race-based mandate in this redistricting cycle alone.

These violations of basic equal protection principles ended race-based admissions programs. They should also end race-based redistricting. For the use of race in race-based admissions programs is "[j]ust like" the "drawing [of] district lines" to create majority-minority districts under Section 2. *Id.* at 361 n.34 (Sotomayor, J., dissenting).

In any event, race-based redistricting under Section 2 in response to alleged vote dilution also fails strict scrutiny. Such compliance with Section 2 cannot be a compelling interest given the above constitutional

faults. It also neither remedies a specific instance of past discrimination nor implicates a serious risk to human safety—the only two exceptions that "up to now have been the outermost constitutional limits of permissible" race-based action. *Cf. Free Enter. Fund v. PCAOB*, 537 F.3d 667, 698 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

More, the Court's "notoriously unclear and confusing" vote-dilution precedents, *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring in grant of applications for stays), are too "amorphous," *SFFA*, 600 U.S. at 214 (citation omitted), to sufficiently articulate a concrete compelling interest. And Section 2's race-based mandate exceeds Congress' Fifteenth Amendment authority because Congress did not even try to make a modern record that could survive congruence-and-proportionality review.

That race-based redistricting is unconstitutional also is true no matter how sincerely a mapmaker promises he only lightly weighted his racial targets. There is no "just a smidge of race" exception to our Constitution. "In the eyes of the Constitution, one racially discriminatory [] strike is one too many." *Flowers v. Mississippi*, 588 U.S. 284, 298 (2019). So much the more for the hundreds of thousands of strikes, based on skin color, that are necessary to balance district lines in pursuit of majority-minority districts.

The upshot is that this Court's construction of Section 2 in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and its progeny to require race-based redistricting is itself unconstitutional. For decades and in dozens of cases, the States and this Court have tried to make *Gingles* workable, coherent, predictable, and constitutional.

Some members of the Court also have proposed ways to conduct the *Gingles* analysis in a manner that avoids pernicious racial targets. *See Allen v. Milligan*, 599 U.S. 1, 64–65 (2023) (Thomas, J., dissenting); *id.* at 99–100 (Alito, J., dissenting). Yet here we are (again) with no clue how to simultaneously survive constitutional and VRA scrutiny. Louisiana's experience suggests that *Gingles* cannot be reformed and should be overruled. But, in all events, the States desperately need clarity that so far has been absent from this Court's redistricting cases. Absent that clarity, nothing will change in the extraordinary expenditure of time, money, and resources that the States (and the courts) face after every redistricting cycle.

With all respect, it is "remarkably wrong" for courts—or States coerced by courts—to be "pick[ing] winners and losers based on the color of their skin." *SFFA*, 600 U.S. at 229–30. Our Constitution does not tolerate this abhorrent and incoherent system, and Louisiana wants no part of it. The Louisiana Legislature fought it by initially refusing to racially sort voters into a second majority-minority district in Louisiana's 2021 map—a map whose predecessor the U.S. Department of Justice had twice precleared. When a federal district court enjoined that map and threatened to draw its own map, the Louisiana Legislature under protest drew the S.B. 8 map to create a second majority-minority district that avoided political harms to Louisiana's high-profile incumbents. We defended that district because this Court's current precedents permit it, and two federal courts directed it—but we have never backed away from our conviction that race-based redistricting is unconstitutional.

Our oath is to the Constitution. Our Constitution sees neither black voters nor white voters; it sees only American voters. Indeed, the "transformative promise" of the Fourteenth Amendment, *id.* at 205, is that "the law in the States shall be the same for the black as for the white," *Flowers*, 588 U.S. at 294 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 307 (1880)). But equal justice under law will never be equal as long as States must treat their citizens differently based on skin color. Now is the time to put this "sordid business" out of business. *LULAC v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

ARGUMENT

I. RACIAL CLASSIFICATIONS ARE ANTITHETICAL TO EQUAL JUSTICE UNDER LAW.

A. Racial Classifications Are Presumptively Invalid.

"The Equal Protection Clause provides that '[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws.'" *Shaw I*, 509 U.S. at 642 (quoting U.S. Const. amend. XIV, § 1). "Its central purpose is to prevent States from purposefully discriminating between individuals on the basis of race." *Id.* "Laws that explicitly distinguish between individuals on racial grounds fall within the core of that prohibition." *Id.*

For nearly 75 years, this Court's Equal Protection Clause precedents have driven race-based government action to extinction. *See, e.g.*, *Wygant v. Jackson Bd. of*

Educ., 476 U.S. 267, 320 (1986) (Stevens, J., dissenting) ("Our ultimate goal must, of course, be 'to eliminate entirely from governmental decisionmaking such irrelevant factors as a human being's race.'" (citation omitted)). Following *Brown v. Board of Education*, 347 U.S. 483 (1954), courts began "invalidat[ing] all manner of race-based state action." *SFFA*, 600 U.S. at 204–05. Beaches, bathhouses, parks, golf courses, buses, trains, schools, juries, neighborhoods, and businesses—there was no corner of American society that could escape "the Constitution's pledge of racial equality." *Id.* at 205.

So it was for the elite institutions in *SFFA* who thought themselves worthy of an exception to the Constitution. They sought indefinitely to "use [] race in their admissions programs." *Id.* at 213. But, among other constitutional defects with those programs, "'outright racial balancing' is 'patently unconstitutional.'" *Id.* at 223 (citation and alteration omitted). And equally damning, "[t]heir admissions programs 'effectively assure[d] that race will always be relevant ... and that the ultimate goal of eliminating' race as a criterion 'will never be achieved.'" *Id.* at 224 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (plurality op.)) (alteration modified). The Court thus had no trouble invalidating those admissions programs under the same color-blind rule that constrains government action elsewhere in society.

This Court's dedication to racial equality is quintessentially American. For in America, "the individual is important, not his race, his creed, or his color." *Shaw I*, 509 U.S. at 648 (quoting *Wright v. Rockefeller*,

376 U.S. 52, 66 (1964) (Douglas, J., dissenting)). Indeed, racial classifications "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Id.* at 643 (quoting *Hirabayashi*, 320 U.S. at 100). Such classifications are thus "presumptively invalid." *Id.* (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979)).

"One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *SFFA*, 600 U.S. at 220 (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)). When the government classifies its citizens "on the basis of race, it engages in the offensive and demeaning assumption that [citizens] of a particular race, because of their race, 'think alike'" and share the same interests and preferences. *Miller v. Johnson*, 515 U.S. 900, 911–12 (1995) (quoting *Shaw I*, 509 U.S. at 647). In that way, "[r]ace-based assignments 'embody 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.'" *Id.* at 912 (citation omitted). "Such stereotyping can only 'cause[] continued hurt and injury,' contrary as it is to the 'core purpose' of the Equal Protection Clause." *SFFA*, 600 U.S. at 221 (citations omitted).

Such harm to the individual extends to our society. *See Shaw I*, 509 U.S. at 657 ("Racial classifications of any sort pose the risk of lasting harm to our society."); *Miller*, 515 U.S. at 912 (racial classifications "cause society serious harm"). Racial classifications imposed by

the government "reinforce the belief ... that individuals should be judged by the color of their skin." *Shaw I*, 509 U.S. at 657; *compare* Martin Luther King, Jr. "I Have a Dream" Speech (Aug. 28, 1963) ("I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."). And in doing so, such classifications "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Shaw I*, 509 U.S. at 643. Put otherwise, they provoke "a politics of racial hostility," *Croson*, 488 U.S. at 493 (plurality op.), in a society "firmly" dedicated to "invalidating all *de jure* racial discrimination by the States and Federal Government," *SFFA*, 600 U.S. at 204; *see Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630–31 (1991) ("If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury.").

Racial classifications imposed by our government are antithetical to equal justice under law. They demean our citizens, they destroy our society, and they are directly prohibited by our Constitution. In rejecting such classifications, the Court thus has held true to "the 'core purpose' of the Equal Protection Clause: 'do[ing] away with all governmentally imposed discrimination based on race.'" *SFFA*, 600 U.S. at 206 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

B. Racial Classifications in Race-Based Redistricting Are Uniquely Odious.

The invidious racial classifications inherent in race-based redistricting present an *a fortiori* case for

presumptive invalidation. The Court itself has recognized that "[r]acial classifications with respect to voting carry particular dangers." *Shaw I*, 509 U.S. at 657. And there are many dangers because race-based redistricting harms virtually everyone involved—voters, States, the federal courts, and our Nation itself.

1. Race-based redistricting harms voters.

Race-based redistricting harms voters—and by extension, our political system—by sorting them based on their skin color and then divvying them up between minority and non-minority districts. Such stereotyping "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." *Id.* at 647. The Court has "rejected such perceptions elsewhere as impermissible racial stereotypes." *Id.* And it has recognized that, "[b]y perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract." *Id.* at 648.

"[E]ven for remedial purposes," the Court has warned, racial classifications "may balkanize us into competing racial factions; [they] threaten[] to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Id.* at 657. That aspiration "is neither assured nor well served ... by carving electorates into racial blocs." *Miller*, 515 U.S. at 927. For that reason, the Court always has criticized—as "shortsighted and unauthorized"—any use of the VRA

that "demand[s] the very racial stereotyping the Fourteenth Amendment forbids." *Id.* at 927–28.

2. Race-based redistricting harms States.

Race-based redistricting also directly harms the sovereign States that are forced to sort their citizens based on race. The racial sorting of voters opens a State up to criticism that its actions "bear[] an uncomfortable resemblance to political apartheid." *Shaw I*, 509 U.S. at 647. It allows litigants like Plaintiffs to hurl a similar accusation: "The State of Louisiana should be ashamed." Mot. to Dismiss at 1. It allows the courts to suggest that a State has engaged in "offensive and demeaning" conduct. *Miller*, 515 U.S. at 912. The cruel irony, moreover, is that, if a State *declines* to racially sort its voters, the State would face the same "shame" accusations—just from the other side. *See, e.g.*, *Fifth Circuit Sides with Black Louisianans, Strikes Down Racially Discriminatory State Map*, Legal Defense Fund (Aug. 14, 2025), tinyurl.com/4ja89emh ("We look forward to rectifying another example of Louisiana's long history of racial voter suppression.").

No State wishes to be associated with apartheid or shame—especially those like Louisiana that believe in their "heart of hearts," Tr. of Oral Arg. at 9, that the racial sorting of voters is illegal and would never choose to engage in such sorting absent legal compulsion. Nor does any State wish to be called racist for *not* engaging in racial classifications. Yet Louisiana's experience acutely illustrates that a State is damned if it does, and damned if it does not. "[I]n our federal system," these aspersions violate, rather than "pre-

serve[,] the integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 564 U.S. 211, 221 (2011); *see Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 11 (2024) ("We should not be quick to hurl such accusations at the political branches."). That is a direct consequence of perpetuating race-based redistricting.

The States also suffer harm from the endless litigation after every decennial Census. The reality of the "conflicting demands" between the Equal Protection Clause and the VRA, *Abbott*, 585 U.S. at 587, is that someone always will claim that their ox was gored. Those who say the State considered race too little sue, as they did here. *See, e.g.*, *Robinson v. Ardoin*, 605 F. Supp. 3d 759 (M.D. La. 2022). Those who say the State considered race too much sue, as they did here. *See, e.g.*, *Callais v. Landry*, 732 F. Supp. 3d 574 (W.D. La. 2024). The amount of time, money, and resources Louisiana has dedicated to whether it sufficiently discriminated against black and white voters is astronomical. And to what end? Unless something changes, the entire cycle will repeat itself after the 2030 Census.

For Louisiana, this has been a song on repeat for decades. In the 1990s, Louisiana attempted to draw a second majority-minority congressional district. That map was invalidated before this Court vacated and remanded in light of Louisiana's second attempt at a second majority-minority district. *Hays v. Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993), *vacated by Louisiana v. Hays*, 512 U.S. 1230 (1994). The second map, too, was invalidated before this Court again vacated and remanded. *Hays v. Louisiana*, 862 F. Supp. 119 (W.D.

La. 1994), *vacated by United States v. Hays*, 515 U.S. 737 (1995). Then, a third map was invalidated. *Hays v. Louisiana*, 936 F. Supp. 360 (W.D. La. 1996). And that was just the 1990s.

This extraordinary drain on States points up a final sovereign harm. "[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Shelby County v. Holder*, 570 U.S. 529, 543 (2013) (citation omitted). That power includes "[d]rawing lines for congressional districts," which is "primarily the duty and responsibility of the State." *Id.* (citation omitted); *see Alexander*, 602 U.S. at 7 ("Redistricting constitutes a traditional domain of state legislative authority.").

In practice, however, this Court's race-based redistricting precedents have diminished that sovereign power to merely making a recommendation—proposing a map—that must then be approved (or rejected) by an Article III judge. *See Miller*, 515 U.S. at 916 (recognizing "the intrusive potential of judicial intervention into the legislative realm"). Indeed, the reflexive Section 2 lawsuits filed after every redistricting cycle are a ghost of the preclearance regime this Court rejected in *Shelby County*. These days, we face a de facto *post*clearance regime in which *federal courts*, rather than the U.S. Department of Justice, dictate whether State legislatures sufficiently considered race to create (or not create) majority-minority districts. Under this regime, "States must beseech the Federal [courts] for permission to implement" their maps, which

"sharply departs from the[] basic principle[]" that redistricting is the traditional domain of the States. *Shelby County*, 570 U.S. at 544.

To be sure, States must comply with the Constitution and federal statutes. But forcing a State to engage in conduct that is itself unconstitutional—all while abridging that State's sovereign redistricting prerogative—is doubly offensive to our constitutional design. And that corresponding harm to the States is an inescapable consequence of race-based redistricting.

3. Race-based redistricting harms the federal judiciary.

As a corollary, race-based redistricting is an affront to the federal judiciary itself—for race-based redistricting has transformed the judiciary into one "that picks winners and losers based on the color of their skin." *SFFA*, 600 U.S. at 229.

Consider our story. The Middle District of Louisiana determined that Louisiana is required to have a "congressional redistricting plan that includes an additional majority-Black congressional district." *Robinson*, 605 F. Supp. 3d at 766. Then, the Middle District threatened to impose its own plan if the Louisiana Legislature did not "reconfigure such an additional district within five legislative days." *In re Landry*, 83 F.4th 300, 304 (5th Cir. 2023). More, it took the Fifth Circuit granting extraordinary mandamus relief to prevent the Middle District from again pursuing "an expedited hearing to determine a court-ordered redistricting map." *Id.*

Through all this, the Middle District's message was clear: By failing to create a second majority-Black district, Louisiana had failed to "pick[] the right race[] to benefit"—and so the Middle District itself would "pick[] the right race[] to benefit" and dictate precisely how that benefit should be designed. *Cf. SFFA*, 600 U.S. at 229. So it is in the rash of recent federal-court decisions finding alleged Section 2 violations. *See infra* Section II.A(3).

"That is a remarkable [exercise] of the judicial role—remarkably wrong." *SFFA*, 600 U.S. at 230. It is "a claim to power so radical, so destructive, that it required a Second Founding to undo." *Id.* Yet that is the reality the States and our citizens face every day that a plaintiff asks a federal court to determine—based on skin color—who should win a district and who should lose a district. And if a federal court declines to approve race-based redistricting, it will face the same aspersions the States themselves face. *See, e.g.*, Press Release, *Case Heads to Supreme Court After Divided Three-Judge Panel Overturns Louisiana Congressional Map with Two Majority-Black Districts*, ACLU (May 1, 2024), tinyurl.com/3nkpu2wj (in response to the decision below: "Today's decision creates chaos and confusion and is a slap in the face to Black voters who have already gone through one congressional election under a map that dilutes their votes").

In this respect, this is an *a fortiori* case post-*SFFA*. In *SFFA*, at least the concern about "a judiciary that picks winners and losers based on the color of their skin" arose only in the occasional lawsuit challenging a school admissions program. 600 U.S. at 229. Here,

by contrast, that concern arises in numerous cases after every redistricting cycle where the racial demands operate like clockwork: more majority-minority districts. This is the natural consequence of "plaintiffs [] seek[ing] to transform federal courts into 'weapons of political warfare' that will deliver victories that eluded them 'in the political arena.'" *Alexander*, 602 U.S. at 11 (citation omitted). Many federal courts are content—in fact, eager—to pick who wins and who loses this race war. And that is "remarkably wrong." *SFFA*, 600 U.S. at 230; *cf. Rucho v. Common Cause*, 588 U.S. 684, 734 (2019) (Kagan, J., dissenting) ("Judges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other.").

4. Race-based redistricting harms our Nation.

The cumulative impact of these various harms strikes directly at the very stature of our Nation. Among the truths we held to be self-evident, we declared that "all men are created equal." Declaration of Independence ¶ 2. Among the promises we gave to the citizens of the several States, we ensured that no State may "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. And central among this Court's own tributes to law and justice stands one message: "Equal Justice Under Law."

Our dedication to equal justice under law is one of the proudest boasts of our democracy. No matter how fervent our dedication, however, it will forever ring

hollow so long as our governments mandate racial discrimination against their citizens and so long as our courts demand that discrimination.

The invidious classifications underlying race-based redistricting present the last significant battle in defense of our "color blind" Constitution. Supp. Br. for Appellants on Reargument in Nos. 1, 2, and 4, and for Respondents in No. 10, in *Brown v. Bd. of Educ.*, O.T. 1953, p. 65; *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting); *see SFFA*, 600 U.S. at 207 (identifying the only two narrow circumstances "permit[ting] resort to race-based government action," both inapplicable here, *see infra* Section II.B(2)). But this battle is easy. For "[e]liminating racial discrimination means eliminating all of it." *SFFA*, 600 U.S. at 206. That means no quarter for race-based redistricting.

II. SECTION 2 OF THE VOTING RIGHTS ACT PROVIDES NO SHIELD FOR RACE-BASED REDISTRICTING.

Because race-based redistricting is presumptively invalid, the only question is whether some extraordinary circumstance displaces that presumption. On that question, the Court has assumed, but never decided, that race-based redistricting in the name of compliance with Section 2 of the VRA is constitutional. It is not for two independent reasons. *First*, race-based redistricting is categorically unconstitutional because it violates fundamental equal protection principles. *Second*, it fails strict scrutiny. Either way, race-based redistricting is unconstitutional.

A. Race-Based Redistricting Violates Fundamental Equal Protection Principles.

Race-based redistricting is categorically unconstitutional for all the reasons race-based admissions programs are likewise unconstitutional. It involves racial stereotyping. *Cf. SFFA*, 600 U.S. at 218 ("race ... may not operate as a stereotype"). It uses race as a negative. *Cf. id.* ("race may never be used as a 'negative'"). And, as demanded by Section 2, it extends "indefinitely into the future." *Id.* at 314 (Kavanaugh, J., concurring). Race-based redistricting is thus unconstitutional for precisely the same reasons the race-based admissions programs in *SFFA* were unconstitutional. And that is unsurprising—because the use of race in those programs was "[j]ust like drawing district lines" to create new majority-minority districts under Section 2. *Id.* at 361 n.34 (Sotomayor, J., dissenting).

1. Race-based redistricting rests on invidious racial stereotypes.

Race-based redistricting is unconstitutional principally because it violates one of "the twin commands of the Equal Protection Clause"—that the government "may never use race as a stereotype." *Id.* at 213, 218 (maj. op.). As the Court recounted in *SFFA*, "[i]n cautioning against impermissible racial stereotypes, this Court has rejected the assumption that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike[.]" 600 U.S. at 220 (quoting *Schuette v. BAMN*, 572 U.S. 291, 308 (2014) (plurality op.), in turn quoting *Shaw I*, 509 U.S. at 647) (quotation marks omitted). To that end, the Court has repudiated "the notion that government actors may intentionally

allocate preference to those 'who may have little in common with one another but the color of their skin.'" *Id.* (quoting *Shaw I*, 509 U.S. at 647).

That basic principle ended the race-based admissions programs in *SFFA* because those programs intrinsically rested on racial stereotyping. Harvard "rest[ed] on the pernicious stereotype that 'a black student can usually bring something that a white person cannot offer.'" *Id.* (citation omitted). And the University of North Carolina "argue[d] that race in itself 'says [something] about who you are.'" *Id.* (citation omitted). That was fatal: "The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well." *Id.* Indeed, in doing so, these institutions "further[ed] '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.'" *Id.* at 221 (quoting *Miller*, 515 U.S. at 912).

Race-based redistricting is, if anything, worse. "The whole point" of race-based redistricting is to draw districts "with an express target in mind": The number of minority voters within those districts must form a 50%+ majority and the number of non-minority voters must form a less-than-50% minority. *Allen*, 599 U.S. at 33 (plurality op.). But that racial target itself does not care which minority voters are selected to meet the racial quota. *Compare SFFA*, 600 U.S. at 220 (universities claiming to care about minority students' unique identities). It cares only about whether their racial

class is sufficiently large and compact enough to draw a district around them and call it a majority-minority district. *Allen*, 599 U.S. at 18 (majority op.). The choice is based on "race for race's sake." *SFFA*, 600 U.S. at 220. "Our constitutional history does not tolerate that choice." *Id.* at 231.

Worse still is the invidious stereotyping that is baked into that racial choice. The only plausible explanation for treating all voters of one race as one mass is a racial stereotype: "that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw I*, 509 U.S. at 647. That stereotype is as offensive as it is wrong. Just consider the 2024 election cycle, in which Hispanic voters split 51% for Vice President Harris and 48% for President Trump; Asian American voters split 57% for Vice President Harris and 40% for President Trump; and black voters split 83% for Vice President Harris and 15% for President Trump. *See, e.g.*, Hannah Hartig et al., *2. Voting patterns in the 2024 election*, Pew Res. Ctr. (June 26, 2025), tinyurl.com/2umdx5wb.

Unsurprisingly, therefore, it is virtually impossible to run the Section 2 analysis without stereotyping. The first two preconditions under *Gingles*, 478 U.S. 30, expressly treat racial minorities as a homogenous class. *See Allen*, 599 U.S. at 18 ("First, *the minority group* must be sufficiently large and [geographically] compact to constitute a majority in a reasonably figured district.... Second, *the minority group* must be able to show that it is politically cohesive." (citations

and quotation marks omitted; emphasis added)). And the third *Gingles* precondition assumes that any given minority voter, by virtue of their membership in their racial class, will prefer the same candidate preferred by others in their racial class. *See id.* ("And third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... to defeat *the minority's preferred candidate*." (quotation marks and citation omitted; emphasis added)).

This government-mandated stereotyping is barred by "[t]he core guarantee of equal protection," *Flowers*, 588 U.S. at 299: its "simple command that the Government must treat citizens as individuals, not as simply components of a racial ... class," *Miller*, 515 U.S. at 911 (quotation marks and citation omitted). If this scheme of "racial classification[s]" in race-based redistricting were "merely the product of *unthinking* stereotypes," perhaps we might be forgiven for our error. *Croson*, 488 U.S. at 510 (plurality op.) (emphasis added). But we *are* thinking. Race-based redistricting is intentional, as is the stereotyping that fuels this redistricting scheme. Race-based redistricting is thus directly contrary to a central "command[] of the Equal Protection Clause"—that the government "may never use race as a stereotype." *SFFA*, 600 U.S. at 213, 218; *see Miller*, 515 U.S. at 927–28 ("It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute ... to demand the very racial stereotyping the Fourteenth Amendment forbids.").

2. Race-based redistricting impermissibly uses race as a negative.

Race-based redistricting also violates the second of the Equal Protection Clause's twin commands—that

the government "may never use race as a ... negative." *SFFA*, 600 U.S. at 213. A similar violation arose in *SFFA* because the universities' use of race resulted in a "decrease" in the number of admitted Asian American and white students. *Id.* at 218. The universities attempted to sidestep that problem by claiming that race was "never a negative factor" because they were simply *preferring* other races. *Id.* The Court criticized that claim as "hard to take seriously": "College admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter." *Id.* at 218–19.

As an empirical matter, moreover, it was clear that the universities used race as a negative. They freely "maintain[ed] that the demographics of their admitted classes would meaningfully change if race-based admissions were abandoned." *Id.* at 219. To that admission, the Court responded: "How else but 'negative' can race be described if, in its absence, members of some racial groups would be admitted in greater numbers than they otherwise would have been?" *Id.*

All the same is true in the context of race-based redistricting. Redistricting is likewise zero sum, for the one-person, one-vote rule requires States to "draw congressional districts with populations as close to perfect equality as possible." *Evenwel v. Abbott*, 578 U.S. 54, 59 (2016). In Louisiana, for example, that means each congressional district must meet an ideal size of (or close to) 776,292 citizens. *Robinson*.J.S.App.616a, 671a; *Evenwel*, 578 U.S. at 59–60. In other words, just as with the finite number of available seats in any

given Harvard admissions cycle, there is a finite number of citizens that may be assigned to any given congressional district.

That numerical reality renders "the creation of majority-minority districts [] something of a zero-sum endeavor." *Allen*, 599 U.S. at 99 (Alito, J., dissenting). It requires the intentional assignment of enough *minority* voters to constitute a 50%+ majority. Or, put otherwise, it requires the exclusion of enough *majority* voters to constitute a less-than-50% minority. That is the impermissible use of race as a negative: The "intentional augmentation of the political power of any one racial group" logically means "the diminution of the power of other groups." *Id.* at 109; *see Rucho*, 588 U.S. at 706 (creating a safe district for one party "comes at the expense ... of individuals in [that district who are members of] the opposing party"). Indeed, that is the avowed purpose of race-based redistricting under Section 2. *See Abbott*, 585 U.S. at 587 ("[W]e have interpreted [Section 2] to mean that, under certain circumstances, States must draw 'opportunity' districts in which minority groups form 'effective majorit[ies].'" (citation omitted)).

Those in favor of race-based redistricting may protest that it wields race as a *positive*, not a *negative*, in its preference for minority voters. But that argument would be as "hard to take seriously" here as it was in *SFFA*. 600 U.S. at 218. Redistricting is "zero-sum": "A benefit provided to some [voters] but not to others necessarily advantages the former group at the expense of the latter." *Id.* at 218–19; *compare Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 329 (2013) (Thomas, J., concurring) ("[S]egregationists similarly

asserted that segregation was not only benign, but good for black students.").

Once again, it is unsurprising that race-based redistricting bears the same unconstitutional attributes that doomed race-based admissions: They are "[j]ust like" each other. *SFFA*, 600 U.S. at 361 n.34 (Sotomayor, J., dissenting).

3. Race-based redistricting under Section 2 extends indefinitely into the future.

a. "If all this were not enough," race-based redistricting is unlawful because it "lack[s] a 'logical end point.'" *Id.* at 221 (maj. op.) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003)). "[A] 'deviation from the norm of equal treatment of all racial and ethnic groups' must be 'a temporary matter'—or stated otherwise, must be 'limited in time.'" *Id.* at 311 (Kavanaugh, J., concurring) (quoting *Croson*, 488 U.S. at 510 (plurality op.)).

"The requirement of a time limit 'reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle.'" *Id.* at 313–14 (quoting *Grutter*, 539 U.S. at 342). To that end, therefore, "racial classifications may not continue indefinitely." *Id.* at 314.

That basic equal protection principle was a third strike against the race-based admissions programs in *SFFA*: Both institutions acknowledged that their programs were "not set to expire any time soon—nor, indeed, any time at all." *Id.* at 225 (maj. op.); *accord id.*

("[T]here is no reason to believe that respondents will—even acting in good faith—comply with the Equal Protection Clause any time soon."). In accepting that acknowledgment, moreover, this Court heard and rejected two arguments relevant here.

First, the universities said that their use of race would end when there was "meaningful representation and meaningful diversity" on campus—although they were not aiming for any "precise number or percentage." *Id.* at 221. But it was "obvious" that they were focused on "[n]umbers all the same." *Id.* at 221–22. Harvard held minority students to consistent percentages of the admitted pools, including, for example, black students who constituted between 10.0% and 11.7% of the admitted pools for a decade. *Id.* at 222. Meanwhile, the University of North Carolina explained that it sought "to obtain closer to proportional representation." *Id.* at 223.

The Court easily disposed of "these approaches." *Id.* "'[O]utright racial balancing' is 'patently unconstitutional,'" the Court said. *Id.* (quoting *Fisher I*, 570 U.S. at 311). "By promising to terminate their use of race only when some rough percentage of various racial groups is admitted," however, the universities "turn[ed] that principle on its head." *Id.* at 223–24. For "[t]heir admissions programs 'effectively assure[d] that race will always be relevant ... and that the ultimate goal of eliminating' race as a criterion 'will never be achieved.'" *Id.* at 224 (quoting *Croson*, 488 U.S. at 495 (plurality op.) (alteration modified)).

Second, the universities urged that their use of race did not need "an end point at all because they fre-

quently review[ed] [their race-based programs] to determine whether they remain[ed] necessary." *Id.* at 225. In response, this Court rejected the idea that "periodic review could make unconstitutional conduct constitutional." *Id.* "To the contrary," race-based government action "eventually ha[s] to end—despite whatever periodic review [is] conducted." *Id.* Yet the universities "concede[d]" that their race-based admissions programs "ha[d] no end point." *Id.*

b. *SFFA*'s reasoning all but disposes of race-based redistricting. There can be no dispute that Section 2's race-based redistricting mandate is neither "'a temporary matter'" nor "'limited in time.'" *Id.* at 311 (Kavanaugh, J., concurring) (quoting *Croson*, 488 U.S. at 510 (plurality op.)). That mandate has existed for more than four decades—and there is no end in sight.

In *Allen*, this Court accepted the representation of some law professors that "§ 2 litigation in recent years has rarely been successful." *Allen*, 599 U.S. at 29. That was either a bill of goods or bad fortune telling. In the 2020 redistricting cycle alone, Washington, Louisiana, Mississippi, Alabama, and Georgia have lost Section 2 cases right and left, including losses within the last few days. *See* Br. of Alabama et al. as *Amici Curiae* in No. 24-109 at 29 n.5 (U.S. Jan. 28, 2025) (collecting citations); *see also* Injunction and Order, *Ala. State Conf. of the NAACP v. Allen*, No. 21-cv-1531 (N.D. Ala. Aug. 22, 2025), ECF 274 (invalidating Alabama's state senate map under Section 2); Order and Memorandum Opinion, *White v. State Bd. of Election Comm'rs*, No. 22-cv-62 (N.D. Miss. Aug. 19, 2025), ECF 264 (invalidating Mississippi's state supreme court map under Section 2); *Nairne v. Landry*, No. 24-30115, 2025 WL

2355524 (5th Cir. Aug. 14, 2025) (affirming the invalidation of Louisiana's state senate and house maps under Section 2). Louisiana quite literally has no state legislative map or congressional map right now. Indeed, it seems that there is no map that can survive a Section 2 challenge. Thus, race-based redistricting under Section 2 is "not set to expire any time soon—nor, indeed, any time at all." *SFFA*, 600 U.S. at 225.

To be clear, this is not because States like Louisiana suddenly became racist overnight and attempted to deny minorities the right to vote. *Cf.* Nicholas Stephanopoulos et al., *Non-Retrogression Without Law*, 2023 U. Chi. Legal. F. 267, 269–70 (2024) ("[N]ot only did minority representation in formerly covered states not decline in *absolute* terms [after *Shelby County*], it also didn't drop in *relative* terms versus the benchmark of formerly uncovered states."). To the contrary, Louisiana is one of the great stories in America's fight for equality.

"Shortly before enactment of the [VRA]," "only 31.8 percent [of the black voting age population] in Louisiana" was registered to vote—"roughly 50 percentage points ... below the figures for whites." *Shelby County*, 570 U.S. at 545–46. In 2004, however, 71.1% of the black voting age population was registered to vote, compared to 75.1% of the white voting age population. *Id.* at 548. In 2020, the turnout of black voters with bachelor's degrees (76%) exceeded the turnout of white voters with bachelor's degrees (74%); so too for those with no high school diplomas—46% (black) to 30% (white). Expert Report of Dr. Traci Burch at 7, *Nairne v. Ardoin*, No. 22-cv-178 (M.D. La. Nov. 27, 2023), ECF 198-205. Those with high school diplomas turned out

at roughly the same rate, 61% (white) to 56% (black)—as did those with some college work completed, 67% (white) to 60% (black). *Id.* This is nothing like *Plessy*'s Louisiana.

Louisiana's transformation explains the extraordinary extent to which plaintiffs and courts must stretch to continue to find any sort of purported vote dilution today. For example, in striking down Louisiana's state legislative maps, the Middle District relied on the supposed "subliminal message of the Sheriff's Office being housed on the same floor as [a] Registrar of Voter's Office." *Nairne v. Ardoin*, 715 F. Supp. 3d 808, 874 n.461 (M.D. La. 2024). The Middle District also reasoned that *no evidence* of black voters being denied the right to vote is actually suspicious: Violations "may be less visible now with the elimination of federal oversight" after *Shelby County*. *Id.* at 870.

The Section 2 framework likewise allows courts to simply repeat (and, in some cases, make up) historical facts as reasons why new maps should be struck down. Dozens of Section 5 objection letters filed by the U.S. Attorney General decades ago? Strike against the State. *Id.* at 869; *Robinson*, 605 F. Supp. 3d at 846. Nevermind *Shelby County*'s landmark ruling. The "history of Louisiana's discriminatory practices, including disenfranchisement of Black voters through poll taxes, property ownership requirements, and literacy tests that were first implemented before Black Louisianans had the right to vote"? Strike against the State. *Nairne*, 715 F. Supp. 3d at 869; *Robinson*, 605 F. Supp. 3d at 846. Nevermind that no such invidious discrimination exists today in Louisiana. The fact that "David Duke, a former Grand Wizard of the Ku Klux

Klan, won three statewide elections" in Louisiana? *Robinson*, 605 F. Supp. 3d at 849. That is not even a fact—Duke never won a statewide election in Louisiana. But that falsehood was a strike against Louisiana all the same. And the list goes on.

By these courts' reasoning, the States can never shed "the burdens of history," *SFFA*, 600 U.S. at 404 (Jackson, J., dissenting)—and there is no limit on the lengths to which plaintiffs will go to find still more alleged Section 2 violations and require more race-based redistricting.

This also says nothing of the immediate future as the federal courts prepare for yet another wave of Section 2 litigation *before* the 2030 redistricting cycle in which plaintiffs try to counter the current overtly political redistricting processes across the Nation. *See* Julia Mueller, *Democrats set to take Texas redistricting fight to the courts*, The Hill (Aug. 23, 2025), tinyurl.com/y5zjaeyt (Texas House Democratic Caucus Chair: "Next stop is the courts"); Colleen DeGuzman, *Fresh off Texas Senate's approval, new congressional map is target of lawsuit*, The Texas Tribune (Aug. 23, 2025), tinyurl.com/mpehe9yf; *cf. Alexander*, 602 U.S. at 11 ("[W]e must be wary of plaintiffs who seek to transform federal courts into 'weapons of political warfare' that will deliver victories that eluded them 'in the political arena.'"). This whole enterprise is "unlimited in scope and duration—it [will] recur over and over again around the country with each new round of districting, for state as well as federal representatives." *Rucho*, 588 U.S. at 719.

Race-based redistricting under Section 2 is neither "'a temporary matter'" nor "'limited in time.'" *SFFA*,

600 U.S. at 311 (Kavanaugh, J., concurring) (quoting *Croson*, 488 U.S. at 510 (plurality op.)). It is immortal—a fixture not just for our lives but "for eternity." *Cf. Yovino v. Rizo*, 586 U.S. 181, 186 (2019) (per curiam). That, our Constitution does not permit.

c. During the original argument in this case, the Court heard that race-based redistricting under Section 2 "doesn't need ... an artificial time limit ... [because] it's always applied based on current conditions." Tr. of Oral Arg. at 55. The thrust behind that theory is that Section 2's race-based redistricting mandate will sunset itself when, apparently, Section 2 vote-dilution claims are no longer viable—*i.e.*, when minority voters have "an equal opportunity to elect candidates of choice." *Id.* at 47. That line of argument does not work.

First, the claim that race-based redistricting "doesn't need ... an artificial time limit" is wrong. *Id.* at 55. The universities in *SFFA* likewise told the Court that their race-based admissions systems did not need "an end point at all." 600 U.S. at 225. This Court rejected that argument because *all* race-based government action "eventually ha[s] to end." *Id.* Just so here.

Second, the claim that Section 2 itself will tell us when it is time to stop racial sorting should similarly sound familiar—because the Court rejected exactly that sort of argument in *SFFA*. Just as "frequent[] review" of the necessity for race-based admissions programs "could [not] make unconstitutional conduct constitutional," *id.*, repeatedly running the Section 2 analysis does not somehow render unconstitutional race-based redistricting constitutional.

On top of that, the idea that the use of race will end when minorities have "equal opportunities" to elect their candidates is no different from the asserted goals of "meaningful representation and meaningful diversity" that were insufficient in *SFFA*. *Id.* at 221. That goal is maddeningly indeterminate, as this Court itself has recognized time and again. *See infra* Section II.B(3); *see also Rucho*, 588 U.S. at 709–10 (recognizing the "justiciability conundrums" that come with a request "for a fair share of political power and influence"). And it obscures that the game here turns on "[n]umbers all the same." *SFFA*, 600 U.S. at 221.

VRA plaintiffs, of course, must disclaim any numerical target for when equal opportunities may be said to exist. *See Allen*, 599 U.S. at 43 (Kavanaugh, J., concurring) (Section 2 "does not mandate a proportional number of majority-minority districts."); Tr. of Oral Arg. at 69–71, *Merrill v. Milligan*, No. 21-1086 (U.S.) (counsel for plaintiffs refusing to answer Justice Alito's question why the VRA would not require three, rather than two, majority-minority districts in Alabama); *cf. Rucho*, 588 U.S. at 708 ("It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support."). Despite Section 2's proportionality disclaimer, however, it is no secret that plaintiffs use the totality-of-the-circumstances inquiry to seek—and the federal courts then order—"closer to proportional representation." *SFFA*, 600 U.S. at 223. That is what happened in Louisiana, twice.

On the congressional side, the Middle District endorsed the *Robinson* plaintiffs' observation that, "[a]lthough Black Louisianans make up 33.13% of the total population and 31.25% of the voting age population, they comprise a majority in only 17% of Louisiana's congressional districts." *Robinson*, 605 F. Supp. 3d at 851. The Middle District found "that Black representation" in Louisiana's original map (which had one majority-black district) "is not proportional to the Black share of population in Louisiana." *Id.* That meant that "the proportionality consideration weighs in favor of Plaintiffs." *Id.* And the Fifth Circuit affirmed that reasoning, accepting the *Robinson* plaintiffs' "emphasi[s] that the black population is one-third of Louisiana's residential population, yet it has only one out of six opportunities to elect their preferred candidates." *Robinson v. Ardoin*, 86 F.4th 574, 598 (5th Cir. 2023).

The same story played out when the federal courts threw out Louisiana's state senate and house maps. The Middle District stated that "Supreme Court precedent [] dictates that the Court must consider whether the number of majority-Black districts in the Enacted Map is roughly proportional to the Black share of the population in Louisiana." *Nairne*, 715 F. Supp. 3d at 825. And the Fifth Circuit affirmed with its own proportionality analysis:

> S.B. 1 and H.B. 14 do not contain a proportional number of majority-minority districts to the percentage of Black voting-age people in Louisiana. Twenty-nine out of one hundred and five House districts are majority BVAP (27.61%), and eleven out of thirty-nine Senate districts

> are majority BVAP (28.20%). Census data established that 33.13% of the state is Black, meaning that neither map effectuates proportionality.

Nairne, 2025 WL 2355524, at *19.

The problem with this approach is the same one that existed in *SFFA*: "'[O]utright racial balancing' is 'patently unconstitutional.'" 600 U.S. at 223 (quoting *Fisher I*, 570 U.S. at 311). "By promising to terminate [race-based redistricting under Section 2] only when some rough percentage of various racial groups [has an 'equal opportunity' to vote]," however, those who would defend such redistricting "turn that principle on its head." *Id.* at 223–24. For they "'effectively assure[] that race will always be relevant ... and that the ultimate goal of eliminating' race as a criterion 'will never be achieved.'" *Id.* at 224 (quoting *Croson*, 488 U.S. at 495 (plurality op.)). That is impermissible.

B. Race-Based Redistricting Also Fails Strict Scrutiny.

"If all this were not enough," *id.* at 221, race-based redistricting fails strict scrutiny. Because racial classifications are so pernicious, "the Equal Protection Clause demands that [they] ... be subjected to the most rigid scrutiny." *Fisher I*, 570 U.S. at 310 (quoting *Loving v. Virginia*, 388 U.S. 1, 11 (1967)) (internal quotation marks omitted); *accord SFFA*, 600 U.S. at 217 ("As this Court has repeatedly reaffirmed, '[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.'" (quoting *Gratz v. Bollinger*, 539

U.S. 244, 270 (2003))). To that end, the Court has required "an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review." *SFFA*, 600 U.S. at 217.

Race-based redistricting *because of*, or *pursuant to*, Section 2 provides no such exceedingly persuasive justification for at least four reasons: (1) Section 2 does not answer the constitutional problems above; (2) Section 2 compliance is unlike the limited contexts in which the Court has permitted race-based action; (3) the Section 2 framework is too amorphous to generate a sufficiently concrete compelling interest; and (4) Section 2 exceeds Congress' authority under the Fifteenth Amendment.

1. Section 2 does not overcome the inherently unconstitutional features of race-based redistricting.

The strict-scrutiny analysis principally does not permit race-based redistricting in the name of Section 2 compliance because Section 2 does not answer the constitutional problems identified above. *See supra* Section II.A. While "[t]he States certainly have a very strong interest in complying with federal antidiscrimination laws," the Court has hastened to add that such laws must be "constitutionally valid as interpreted and as applied." *Shaw I*, 509 U.S. at 654. As explained above, race-based redistricting mandated by Section 2 is unconstitutional because it violates basic equal protection principles: It uses race as a stereotype, uses race as a negative, and has no logical end point. Accordingly, Section 2 is unconstitutional insofar as it requires race-based redistricting.

The Court's assumption that "compliance with § 2 could be a compelling interest," *Shaw v. Hunt (Shaw II)*, 517 U.S. 899, 915 (1996), thus does not hold up with respect to race-based redistricting. For the government has no compelling interest in complying with a statutory mandate that itself is unconstitutional.

The Court has sensed this problem. Specifically, in *Miller*, the Court worried that "command[ing] that States engage in presumptively unconstitutional race-based districting brings the [VRA], once upheld as a proper exercise of Congress' authority under § 2 of the *Fifteenth* Amendment, into tension with the *Fourteenth* Amendment." 515 U.S. at 927 (citation omitted; emphases added). Although the *Miller* Court did not resolve that issue, this Court's decision in *Tennessee Wine & Spirits Retailers Association v. Thomas*, 588 U.S. 504 (2019), illustrates that the *Miller* Court's instinct was right and that compliance with Section 2's race-based mandate is not a compelling interest.

In *Tennessee Wine*, the Court considered Tennessee's residency requirement for applicants seeking a liquor license. *Id.* at 510. The question presented was whether that requirement, which was a violation of the Commerce Clause, could be saved by the later-enacted Twenty-first Amendment. The Court said no. In reaching that conclusion, the Court acknowledged "the established rule that a later adopted provision takes precedence over an earlier, conflicting provision of equal stature[.]" *Id.* at 519. But the Court explained that blindly applying this rule would permit a state law enacted pursuant to the Twenty-first Amendment to trump bedrock constitutional protections in the Equal Protection Clause and the First Amendment.

Id. Instead, the Court reaffirmed that the Twenty-first Amendment "must be viewed as one part of a unified constitutional scheme." *Id.* at 519–20. And the Court "looked to history for guidance" on how to answer the question presented. *Id.* at 520.

The same approach applied here deems race-based redistricting unconstitutional—and thus ineligible for compelling-interest status. As recounted above, the Court has criticized as "shortsighted and unauthorized" any use of the VRA that "demand[s] the very racial stereotyping the Fourteenth Amendment forbids." *Miller*, 515 U.S. at 927–28. That criticism flows directly from the historical record surrounding the ratification of the Fourteenth Amendment: Congress and the States "were determined" that "[t]he Constitution ... 'should not permit any distinctions of law based on race and color.'" *SFFA*, 600 U.S. at 202. And it is that historical record—and "the Constitution's pledge of racial equality"—that "this Court [has] continued to vindicate" in recent decades. *Id.* at 205.

Viewing Congress' authority under the subsequently enacted Fifteenth Amendment "as one part of a unified constitutional scheme," *Tennessee Wine*, 588 U.S. at 519–20, it blinks reality to think that Congress could cite the *Fifteenth* Amendment in "demand[ing] the very racial stereotyping the *Fourteenth* Amendment forbids," *Miller*, 515 U.S. at 927–28 (emphasis added). After all, "the 'core purpose' of the Equal Protection Clause" was "'do[ing] away with all governmentally imposed discrimination based on race.'" *SFFA*, 600 U.S. at 206 (citation omitted). Government-mandated race-based redistricting would turn that core purpose on its head. That is not the law—and

complying with such a mandate cannot be a compelling interest.

2. Section 2 compliance is unlike the narrow compelling interests that permit race-based government action.

Compliance with Section 2 also is not a compelling interest because it is materially different from the very limited contexts in which the Court has permitted race-based government action. The Court's precedents "identif[y] only two compelling interests that permit resort to race-based government action": (1) "remediating specific, identified instances of past discrimination"; and (2) "avoiding imminent and serious risks to human safety in prisons, such as a race riot." *SFFA*, 600 U.S. at 207; *cf. Free Enter. Fund*, 537 F.3d at 698 (Kavanaugh, J., dissenting) (where only two exceptions "up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power," "we should opt for" "drawing the line at" those exceptions rather than "extending" them).

Those two interests share a critical feature that Section 2 lacks: They turn on a specific harm and permit only a correspondingly narrow, temporary remedy. Where a government identifies a specific instance of "past intentional discrimination," *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007), that government properly may limit "the extent of the remedy necessary to cure [the] effects" of that discrimination, *Croson*, 488 U.S. at 510 (plurality op.); *accord SFFA*, 600 U.S. at 249 (Thomas, J., concurring) ("The government can plainly remedy a race-

based injury that it has inflicted—though such remedies must be meant to further a colorblind government, not perpetuate racial consciousness."). By definition, such restoration of equality "is a temporary matter." *Croson*, 488 U.S. at 510 (plurality op.). Similarly, an "imminent danger to life and limb" presented by a race riot may permit "*temporary* segregation of inmates"—but racial segregation would no longer be permissible once the danger abates. *Id.* at 521 (Scalia, J., concurring in the judgment) (emphasis added).

Race-based redistricting pursuant to Section 2, by contrast, is nothing of the sort. It presents no imminent danger to human safety. In its heartland application today, it also has nothing to do with remedying past intentional discrimination, let alone specific, identified instances of intentional discrimination. To the contrary, for example, the Middle District in *Robinson* thought it "irrelevant" that there is zero evidence of black voters "being denied the right to vote." *Robinson*, 605 F. Supp. 3d at 847. "This case presents claims of vote *dilution*," the Middle District reminded the State. *Id.* And again, the Middle District found the absence of such evidence "[n]ot relevant" when it opted to also strike down Louisiana's state legislative maps under Section 2. *Nairne*, 715 F. Supp. 3d at 825.

Because race-based redistricting pursuant to Section 2 generally does not remedy any specific instances of past discrimination, race-based redistricting is not a temporary remedy. *See supra* Section II.A(3). That is because, "[i]n the absence of particularized findings" of discrimination, race-based redistricting impermis-

sibly is "ageless in [its] reach into the past, and timeless in [its] ability to affect the future." *Croson*, 488 U.S. at 498 (plurality op.) (citation omitted).

The absence of any connection to specific discrimination is thus fatal. The Court has long rejected "[a] generalized assertion of past discrimination" as sufficient to constitute a compelling interest. *Shaw II*, 517 U.S. at 909. In *Shaw II*, the Court also held that "an effort to alleviate the effects of societal discrimination is not a compelling interest." *Id.* at 909–10. If those notions sound familiar, that is because they are part and parcel of the elusive "vote dilution" framework in Section 2—a scheme that eschews any need to identify intentional discrimination and is satisfied with only generalized notions of societal harm. That cannot be "the basis for [the] rigid racial preferences" inherent in race-based redistricting. *SFFA*, 600 U.S. at 226 (quoting *Croson*, 488 U.S. at 505).

To be clear, the point is not that Section 2 requires (or should require) a plaintiff to show intentional discrimination; it does not. *See Allen*, 599 U.S. at 44 (Kavanaugh, J., concurring). And *that* is the point. The only compelling interest in this Court's precedents that could plausibly justify race-based redistricting is an interest in "remediating specific, identified instances of past discrimination." *SFFA*, 600 U.S. at 207. But *no one* has identified a specific instance of past intentional discrimination in Louisiana that warrants a new majority-minority district to directly remedy such discrimination. And because that is true in virtually all modern vote-dilution cases filed under Section 2, there is no cognizable compelling interest in complying with Section 2's racial mandate.

3. The Section 2 framework is too amorphous to reflect a compelling interest.

Complying with Section 2's race-based redistricting mandate also suffers from the independent problem that it is virtually impossible to articulate with clarity either the supposed injury or a lawful remedy. A classification "based on [] race 'requires more than ... an amorphous end to justify it.'" *Id.* at 214 (quoting *Parents Involved*, 551 U.S. at 735). And the government "may not" wield racial classifications "without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review." *Id.* at 217.

This Court's precedents involving the use of race in redistricting do not meet that standard. Time and again, the Court itself has acknowledged the problem, observing that States face a "legal obstacle course" after every redistricting cycle. *Abbott*, 585 U.S. at 587. Specifically, "[s]ince the Equal Protection Clause restricts consideration of race and the VRA demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to competing hazards of liability." *Id.* (quotation marks and citation omitted). And in this context, as in others, the Court "has struggled without success over the past several decades to discern judicially manageable standards for deciding [] claims" under Section 2 and the Equal Protection Clause. *Rucho*, 588 U.S. at 691.

Those precedents are "notoriously unclear and confusing." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of applications for stays). They "have engendered considerable disagreement and uncertainty." *Id.* at 883 (Roberts, C.J., dissenting from grant

of applications for stays). They threaten to "afford state legislatures too little breathing room." *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 196 (2017). And they force States "to thread [an] impossible needle"—"a lose-lose situation." *Alexander*, 602 U.S. at 65 (Thomas, J., concurring in part); *see Allen*, 599 U.S. at 109 (Alito, J., dissenting) ("We have been sensitive to the gravity of trapping States between the competing hazards of liability imposed by the Constitution and the VRA." (cleaned up)).

That is the States' reality. They cannot redistrict without spawning endless, costly litigation—they are damned regardless of how much (or little) they consider race. They cannot know from the start whether their maps will survive judicial scrutiny, which, in any event, has become a game of experts unmoored from the Constitution's assignment of redistricting to the sovereign States. And there is no light at the end of the tunnel because every new redistricting precedent from this Court prompts a new wave of litigation and more questions about how a State must consider race *just enough but not too much*. When the federal courts' rejections of the States' maps boil down to "This much is too much," that is a dead giveaway that there is no clear "standard or rule" in play. *Rucho*, 588 U.S. at 716; *see id.* at 718 ("'[J]udicial action must be governed by *standard*, by *rule*,' and must be 'principled, rational, and based upon reasoned distinctions' found in the Constitution or laws." (citation omitted)).

Given this reality, neither race-based redistricting under Section 2 nor any injury it purports to remedy "is measurable and concrete enough to permit judicial

review." *SFFA*, 600 U.S. at 217. This Court has suggested as much repeatedly—and the States live that lack of clarity every redistricting cycle.

4. Race-based redistricting pursuant to Section 2 exceeds Congress' authority under the Fifteenth Amendment.

In all events, race-based redistricting pursuant to Section 2 cannot be a compelling interest for strict-scrutiny purposes because it exceeds Congress' power under the Fifteenth Amendment.

"Because Congress' prophylactic-enforcement authority is 'remedial, rather than substantive,' '[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Allen*, 599 U.S. at 80 (Thomas, J., dissenting). Moreover, "Congress' chosen means ... must 'consist with the letter and spirit of the constitution.'" *Id.* (quoting *Shelby County*, 570 U.S. at 555) (internal quotation marks omitted).

That analysis begins with the nature of the relevant constitutional right. But that is the problem: Congress never bothered to "'identif[y] a history and pattern' of actual constitutional violations that, for some reason, required extraordinary prophylactic remedies"—and in particular, the strong medicine of race-based redistricting. *Id.* at 82 (alteration added). As Justice Thomas has explained, the Senate Judiciary Committee gestured at "what the Committee *took to be* unconstitutional vote dilution," but the Committee made no effort to study whether "those examples reflected the 'intentional' discrimination required 'to raise a constitutional issue.'" *Id.* at 82–83 (citation

omitted). Section 2's race-based redistricting mandate, therefore, is an extraordinary remedy in search of a constitutional injury—an injury that Congress did not identify in 1982 and that certainly does not exist today in Louisiana. *Cf. Shelby County*, 570 U.S. at 536 ("[T]he Act imposes current burdens and must be justified by current needs." (citation omitted)).

* * *

Race-based redistricting is unconstitutional—and overwhelmingly so. The only question is whether now is the time to wind up this "sordid business, this divvying us up by race." *LULAC*, 548 U.S. at 511 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part). It is.

III. AN ENDURING REJECTION OF RACE-BASED REDISTRICTING REQUIRES ZERO TOLERANCE FOR ANY CONSIDERATION OF RACE.

The end of race-based redistricting will not truly be the end unless the Court takes care to seal off the routes that others may use to reinject race into redistricting.

The most obvious end-run is to claim that mapmakers need only profess to have lightly considered race to avoid a constitutional problem. After all, one frequent flyer, Dr. Cooper, has made a living trying to explain that his use of the racial target necessary to create a majority-minority district did not play a serious role in his maps. *See, e.g.*, *Allen*, 599 U.S. at 31 ("[W]hen asked squarely whether race predominated in his development of the illustrative plans, Cooper responded: 'No. It was a consideration. This is a Section

2 lawsuit, after all. But it did not predominate or dominate.'"); *Robinson*, 605 F. Supp. 3d at 838 ("[T]he Court found Cooper ... to be highly credible ..., and it credits [his] testimony that race did not predominate in [his] drawing as sincere."); *Nairne*, 715 F. Supp. 3d at 858 ("The Court finds Cooper to be a credible witness and is persuaded by his method to 'uncrack' and 'unpack' districts in the Enacted Maps to form additional Black-majority districts."). On that theory, a proponent of race-based redistricting may simply claim *ipso facto* that, in this Court's parlance, race is not "the predominant, overriding factor" and thus strict scrutiny is not triggered. *Miller*, 515 U.S. at 920.

The Court should foreclose such gamesmanship—and it may do so on at least four grounds. *First*, using race *in any form* as the basis for drawing a map is directly contrary to *SFFA*. *See Shaw I*, 509 U.S. at 657 ("Racial classifications of any sort pose the risk of lasting harm to our society."). That "race [was] determinative for at least some—if not many—of the [admitted] students" in *SFFA* was what rendered the race-based admissions programs unconstitutional. 600 U.S. at 219. The Court offered no safe harbor for a use of race that was wedged between other non-racial considerations; to the contrary, those programs themselves involved myriad other non-racial considerations. *See id.* at 194, 196. That could not save race-based admissions for a simple reason: "Eliminating racial discrimination means eliminating all of it." *Id.* at 206. There is no "just a smidge of race" exception to our Constitution.

Second, because race-based redistricting violates basic equal protection principles, *supra* Section II.A, there arguably is no need to proceed to strict scrutiny

to find race-based redistricting unconstitutional. Indeed, the State is aware of no instance in this Court's modern precedents where the Court permitted a racial classification notwithstanding that it used race as a stereotype or a negative and had no logical endpoint. *See SFFA*, 600 U.S. at 213 (distinguishing a failure to "comply with strict scrutiny" from these other independent grounds for reversal).

The prohibitions on stereotyping and using race as a negative, in particular, would make little sense shoehorned into the strict-scrutiny framework. Race-based government action "may *never* use race as a stereotype or negative." *Id.* (emphasis added). If never means never, then a racial classification's ability to otherwise survive strict scrutiny would be irrelevant if it uses race as a stereotype or a negative. *Cf. id.* at 311 (Kavanaugh, J., concurring) ("Importantly, even if a racial classification is otherwise narrowly tailored to further a compelling governmental interest, a 'deviation from the norm of equal treatment of all racial and ethnic groups' must be 'a temporary matter'—or stated otherwise, must be 'limited in time.'" (citations omitted)).

Accordingly, whether race technically predominates or not (and thus strict scrutiny is triggered or not) in effectuating a racial classification does not change the fact that the classification is fundamentally contrary to the Equal Protection Clause's prohibitions on stereotyping, using race as a negative, and eternal racial classifications. Those who prefer race-based redistricting, therefore, cannot sidestep a decision invalidating race-based redistricting by simply citing their expert's "sincere" promise that "race did not predominate." *Robinson*, 605 F. Supp. 3d at 838.

Third, if the viability of race-based redistricting depends on a strict-scrutiny analysis, the Court should amend or overrule its racial-predominance precedents—*Miller* and its progeny. Those precedents ask whether "race was *the* 'predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" *Alexander*, 602 U.S. at 7 (quoting *Miller*, 515 U.S. at 916) (emphasis added). If so, then the government must satisfy strict scrutiny; if not, then not. There are two problems with this formulation.

One problem is that it allows defendants to claim that race was equally weighted alongside, or subordinated to, other non-racial factors—and thereby escape strict scrutiny on that basis. *See, e.g.*, *Allen*, 599 U.S. at 31 (crediting Cooper's testimony "that he gave all these factors 'equal weighting'"); Br. of Appellant in No. 24-109 at 35–38 (asserting this argument in defense of S.B. 8). For the reasons explained above, that formulation is fundamentally at odds with *SFFA*.

The best way to resolve that conflict is to adopt Justice Alito's formulation of the predominance inquiry: "If it is 'non-negotiable' that the district be majority [minority], then race is given *a* predominant role." *Allen*, 599 U.S. at 102 (Alito, J., dissenting) (emphasis added). That formulation avoids the word games the experts play in this Court's cases when they insist that non-negotiable racial targets are somehow "less non-negotiable" than other factors they considered.

The second problem with the Court's current formulation is that it gives map drawers a window to argue that they were just "conscious[]" of race in creating majority-minority districts. *Id.* at 33 (plurality op.); *id.*

at 31 (Cooper: "It was a consideration."). That is skullduggery. To create a majority-minority district, a map drawer, by definition, cannot sacrifice his racial target of a 50%+ majority of minority voters. After all, "the whole point of the enterprise" is to "create[] [the map] with an express target in mind." *Id.* at 33. Because a racial target is non-negotiable for map drawers seeking to create majority-minority districts, they cannot avoid the Constitution's prohibition on race-based redistricting by claiming that they were only "conscious" of race.

Fourth, the upshot is that *Gingles* and its progeny—insofar as they require race-based redistricting—are inconsistent with our constitutional design. Some members of the Court have suggested that the *Gingles* analysis may be constitutionally conducted in a manner that avoids pernicious racial targets. *See Allen*, 599 U.S. at 64–65 (Thomas, J., dissenting); *id.* at 99–100 (Alito, J., dissenting). But if not, then *Gingles* must be overruled. Either way, the States desperately need clarity that has been absent from this Court's redistricting cases. Absent that clarity, nothing will change in the endless waste of resources and millions of dollars that the States and the courts face after every redistricting cycle.

CONCLUSION

Louisiana wants out of this abhorrent system of racial discrimination. The Court should answer yes to the question presented for reargument—the intentional creation of a second majority-minority district in S.B. 8 is unconstitutional—and affirm the judgment below.

Respectfully submitted,

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