No. 23-13914
(consolidated with Nos. 23-13916 & 23-13921)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ALPHA PHI ALPHA FRATERNITY, INC., et al.,
Plaintiffs-Appellees,

v.

SECRETARY OF STATE OF GEORGIA,
Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Georgia, No. 1:21-CV-05337-SCJ

BRIEF OF ALABAMA AND 13 OTHER STATES AS *AMICI CURIAE* SUPPORTING APPELLANT AND REVERSAL

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No. 23-13916
(consolidated with Nos. 23-13914 & 23-13921)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

COAKLEY PENDERGRASS, et al.,
Plaintiffs-Appellees,

v.

SECRETARY OF STATE OF GEORGIA,
Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Georgia, No. 1:21-CV-05339-SCJ

BRIEF OF ALABAMA AND 13 OTHER STATES AS *AMICI CURIAE* SUPPORTING APPELLANT AND REVERSAL

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No. 23-139121
(consolidated with Nos. 23-13914 & 23-13916)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANNIE LOIS GRANT, et al.,
Plaintiffs-Appellees,

v.

SECRETARY OF STATE OF GEORGIA,
Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Georgia, No. 1:22-CV-00122-SCJ

BRIEF OF ALABAMA AND 13 OTHER STATES AS *AMICI CURIAE* SUPPORTING APPELLANT AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1(a)(3) and 26.1-2(b), the undersigned counsel certifies that the following listed persons and parties, in addition to those listed in Appellant's opening brief, may have an interest in the outcome of this case:

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Respectfully submitted this 14th day of February, 2024.

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INTERESTS OF *AMICI CURIAE*

The States of Alabama, Florida, Indiana, Iowa, Kansas, Louisiana, Mississippi, Montana, Nebraska, North Dakota, South Carolina, Texas, Utah, and West Virginia, respectfully submit this brief under Federal Rule of Appellate Procedure 29(a) as *amici curiae* in support of Georgia. Congress gave to the United States Attorney General alone the authority to enforce the "stringent new remedies" of the Voting Rights Act of 1965, *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). Despite the text's clarity, the District Court allowed private plaintiffs to bring a §2 challenge to Georgia's redistricting plans. The *Amici* States have an interest in ensuring the law is not misconstrued to enable unauthorized "intrusion[s] on the most vital of local functions." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).

The intrusion here is especially troubling because, while liability turns on the meaning of §2, the District Court blew past the statute's text. The result is an unconstitutional expansion of the VRA that, having succeeded in "cutting away … obstacles to full participation," has been repurposed to satisfy "demands for outcomes." *LULAC v. Clements*, 999 F.2d 831, 837 (5th Cir. 1993) (en banc). In 2020s Georgia, there are no meaningful obstacles for voters of any race to registering, voting, or participating with the party of one's choosing. In the words of §2, as originally understood in 1982, there is equal "opportunity" to "participate in the political process."

SUMMARY OF ARGUMENT

This case presents several questions about the meaning of the VRA. For these, as for "any other question of statutory interpretation," a court should follow "Justice Frankfurter's three-part test: '(1) Read the statute; (2) read the statute; (3) read the statute!'" *Daker v. Comm'r, Ga. DOC*, 820 F.3d 1278, 1283 (11th Cir. 2016). The District Court's decision, however, showed little interest in the text or structure of the VRA.

As a result, the court committed at least two reversible errors. First, rather than interpret the VRA's text to determine whether §2 is privately enforceable, the court simply *assumed* that it was. That's wrong for the fundamental reason that Section 2 does not create "new individual rights" "in clear and unambiguous terms." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286, 290 (2002). Thus, "there is no basis for a private suit" under §2 directly or under §1983. *Id.* at 286.

Second, the District Court departed from §2's text yet again by assuming that if Plaintiffs could tap a few Senate Factor bases, they've shown denial of equal opportunity to participate in the political process. But the text of §2 and the Supreme Court decisions from which it was drawn impose a clearer and stronger standard: there is no vote dilution unless minorities face serious barriers to registering to vote, voting, and participating with the political party of one's choosing. Here, the evidence and the District Court's findings reveal a political system open to all.

Unable to identify meaningful burdens to political participation, the District Court relied on Georgia voting laws that do *not* to violate §2 as evidence that Georgia's redistricting laws do violate §2. That makes little sense, but is still more sensible than the District Court faulting Georgia for not obtaining preclearance of its congressional plans in the 1990s when the reason DOJ objected was its flawed demand that Georgia racially gerrymander its citizens. That is farcical. Refusal to discriminate based on race is not evidence of discrimination based on race. If §2 applies like this to Georgia in the 2020s, then it cannot be constitutional, as the demands for "race-based redistricting" will "extend indefinitely into the future." *Allen v. Milligan*, 599 U.S. 1, 45 (2023) (Kavanaugh, J., concurrence).

To avoid that constitutional problem, this Court need only interpret §2 like the Court interprets other statutes. In doing so, the Court should reverse.

ARGUMENT

I. Section 2 Is Not Privately Enforceable.

Congress has not *expressly* authorized private persons to sue under §2 of the Voting Rights Act of 1965, as it did one year earlier in the Civil Rights Act of 1964. *See* 42 U.S.C. §2000a-3(a). Nevertheless, sometimes "a private right of action can be implied" from the text, so long as "the statute manifests an intent 'to create not just a private *right* but also a private *remedy*.'" *Gonzaga*, 536 U.S. at 284 (quoting

Alexander v. Sandoval, 532 U.S. 275, 286 (2001)). And sometimes Plaintiffs can enforce statutory rights under 42 U.S.C. §1983. *Id.*

Those two "inquiries overlap in one meaningful respect"—"whether Congress *intended to create a federal right.*" *Id.* at 283. If a federal statute does not create "new individual rights" "in clear and unambiguous terms," then "there is no basis for a private suit, whether under §1983 or under an implied right of action." *Id.* at 286, 290. With any question of statutory interpretation, the inquiry requires careful analysis of "the text and structure." *31 Foster Child. v. Bush*, 329 F.3d 1255, 1270 (11th Cir. 2003). "If they provide some indication that Congress may have intended to create individual rights, and some indication it may not have, that means Congress has not spoken with the requisite 'clear voice.'" *Id.*

Here, the text and structure of the VRA provide more than "some indication" that §2 created no new private right.[1] First, the VRA was enacted not to create new rights but rather, in the words of the Act's preamble, "to enforce" the preexisting rights guaranteed by "the fifteenth amendment to the Constitution." 79 Stat. 437. Second, the text places enforcement solely in the hands of the Attorney General, further "evidenc[ing] a congressional intent to avoid the multiple interpretations of [the VRA] that might arise if the act created enforceable individual rights." *31 Foster*

[1] The Eighth Circuit recently held that it "is unclear whether § 2 creates an individual right." *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204, 1209-10 (8th Cir. 2023).

Child., 329 F.3d at 1270. The answer is, at the very least, ambiguous, and "[a]mbiguity precludes enforceable rights." *Id.*

A. Section 2, as Remedial Legislation to Enforce the Fifteenth Amendment, Does Not Confer Substantive Rights.

Unless a federal statute creates new "substantive private rights," *Sandoval*, 532 U.S. at 290, it does not secure privately enforceable rights, *see Gonzaga*, 536 U.S. at 285. Unlike in some statutes enacted pursuant to Congress's Commerce or Spending Clause powers, Congress does not create substantive rights when enforcing the provisions of the Fourteenth and Fifteenth Amendments. *City of Boerne v. Flores*, 521 U.S. 507, 527 (1997) ("Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law.").[2] The VRA is an exercise of Congress's power to enforce the "constitutional prohibition against racial discrimination in voting" guaranteed by the Fifteenth Amendment. *Katzenbach*, 383 U.S. at 308. As such, it created only "new remedies,"

[2] *Accord* Erwin Chemerisnky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1770 (2006) (recognizing that "Congress may not use its Section 5 powers to expand the scope of rights or to create new rights"); Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 189 (1997) (Congress "cannot create new rights" when enforcing the Fourteenth Amendment.); *see also* Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 701 (2001); *see also N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83-84 (1982) (plurality opinion) (contrasting Congress's broad power to define and prescribe remedies for statutory rights with Congress's limited power over rights "not of congressional creation").

not new rights. *Id.* at 308, 315, 329-31. Therefore, §2—one of its "remedial portions"—is not privately enforceable. *Id.* at 316.

Congress's "parallel" enforcement powers under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment are "corrective or preventive, not definitional." *City of Boerne*, 521 U.S. at 518, 525. As the Supreme Court explained long ago, the Fourteenth Amendment invests Congress with the power only "to provide modes of relief against State legislation[] or State action" "when these are subversive of the fundamental rights specified in the amendment." *Civil Rights Cases*, 109 U.S. 3, 11 (1883). "Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges." *Id*.

One such right is the right to vote free from discrimination. "The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been." *United States v. Cruikshank*, 92 U.S. 542, 556 (1875); *see also United States v. Reese*, 92 U.S. 214, 217-18 (1875) (describing Fifteenth Amendment as securing a "new constitutional right"). From the ratification of the Fifteenth Amendment up until the passage of the VRA, Congress attempted to secure the right to vote free from discrimination in myriad ways. *See Katzenbach*, 383 U.S. at 310-14 (chronicling Congress's

"unsuccessful remedies" prescribed "to cure the problem of voting discrimination"). One remedy was §1983 and its statutory predecessor, which have allowed private parties to seek redress for violations of their Fifteenth Amendment rights. *See, e.g.*, *Lane v. Wilson*, 307 U.S. 268, 269 (1939); *cf. Maine v. Thiboutot*, 448 U.S. 1, 26-29 (1980) (Powell, J., dissenting) (relaying history of §1983 and noting that "cases dealing with purely statutory civil rights claims remain nearly as rare as in the early years"). Criminal prohibitions were another enforcement mechanism. *See, e.g.*, 18 U.S.C. §241.

Despite these measures, many States persisted in their "unremitting and ingenious defiance of the Constitution." *Katzenbach*, 383 U.S. at 309. Something more was needed. So in 1965, Congress passed a "complex scheme" of "stringent new remedies" necessary to "banish the blight of racial discrimination in voting." *Katzenbach*, 383 U.S. at 308, 315. With these "new, unprecedented remedies," Congress enforced the provisions of the Fifteenth Amendment without making "a *substantive* change in the governing law." *City of Boerne*, 521 U.S. at 519, 526.

The "fundamental" "distinction between rights and remedies" is on full display in §2. *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 384 (1918). As originally enacted, "the coverage provided by § 2 was unquestionably coextensive with the coverage provided by the Fifteenth Amendment." *Chisom v. Roemer*, 501 U.S. 380, 392 (1991). Section 2 obviously made no "substantive change in the governing law"

because the remedy corresponded directly to the underlying constitutional right. *City of Boerne*, 521 U.S. at 519. As such, §2's inclusion in the VRA, by itself, would have done nothing to redress violations of the right to vote free from discrimination that wasn't already being done through §1983 actions to enforce the Fifteenth Amendment. But §2 paired with §12 did a new thing: grant the federal government the power to bring civil and criminal actions to secure Fifteenth Amendment rights. *Katzenbach*, 383 U.S. at 316.

In 1982, Congress amended §2 by replacing the language "to deny or abridge" with the language "in a manner which results in a denial or abridgement" to reflect its determination "that a 'results' test was necessary to enforce the fourteenth and fifteenth amendments." *Jones v. City of Lubbock*, 727 F.2d 364, 375 (5th Cir. 1984). Consequently, "a violation of §2 is no longer *a fortiori* a violation of the Constitution." *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 482 (1997). This modified, prophylactic remedy changed the evidentiary bar for proving a §2 claim. *See City of Boerne*, 521 U.S. at 518 (collecting examples of similar remedies promulgated to protect voting rights). But it did not and could not create new substantive rights, because even prophylactic remedies cannot "substantively redefine the States' legal obligations." *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 722 (2003). If the legal duty remains unaltered, so does the corresponding legal right. This must be so, because the corresponding right here is a constitutional right, which Congress has

no power to change. *See City of Boerne*, 521 U.S. at 519. The only conclusion is that Congress created no new rights in §2, and §2 thus cannot give rise to private enforcement under §1983 or an implied right of action.[3]

Compare §2 with provisions of Titles VI and IX, which the Supreme Court has cited as statutes containing "explicit rights-creating terms" and which conferred *new* rights never before articulated in federal law. *Gonzaga*, 536 U.S. at 284. Both statutes are Spending Clause legislation, not legislation enforcing the Reconstruction Amendments, *see Davis v. Monroe County Board of Education*, 526 U.S. 629, 640 (1999); *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 287 (1998), so they are not purely "remedial."

Section 2, however, is like other statutes enacted to enforce preexisting rights. The Violent Crime Control and Law Enforcement Act of 1994, for example, declared it "unlawful for any governmental authority" or agent "to engage in a pattern or practice of conduct by law enforcement officers … that deprives persons of rights,

[3] In *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003), this Court read a different statute, 52 U.S.C. §10101(a)(2)(B), as creating rights enforceable under § 1983. This statute is found in Title I of the Civil Rights Act of 1964, which Congress passed pursuant to its Fifteenth Amendment enforcement power. *See United States v. Mississippi*, 380 U.S. 128, 138 (1965). The *Schwier* court neither heard nor considered the argument that Congress creates new remedies, not new rights, when enforcing the Reconstruction Amendments. This case concerned a different statute, different text, and different arguments. Because it does not "directly control," this Court is "not obligated to extend" its reach "by even a micron." *Jefferson County v. Acker*, 210 F.3d 1317, 1320 (11th Cir. 2000); *Bourdon v. U.S. Dep't of Homeland Sec.*, 940 F.3d 537, 548 (11th Cir. 2019).

privileges, or immunities secured or protected by the Constitution" or federal law. 34 U.S.C. §12601(a). That provision references "rights," but the text makes clear that no new right is being created. And structure confirms it too, where the following subsection empowers the Attorney General to bring civil actions when he has "has reasonable cause to believe that a violation of" §12601(a) has occurred. §12601(b). Courts interpreting this statute have concluded that it "confers no such express right upon a benefitted class. Instead, the statute only prohibits certain governmental conduct without conferring an unambiguous private right of action." *Malecki v. Christopher*, 2008 WL 11497819, at *3 n.6 (M.D. Pa. May 27, 2008); *see also Gumber v. Fagundes*, 2021 WL 4311904, at *5 (N.D. Cal. July 3, 2021). The same is true of §2.

B. The VRA's Express Method of Enforcement Shows Further that Section 2 Confers No New Individual Rights.

Where a statute provides a "federal review mechanism," the Supreme Court has been far less willing to identify "individually enforceable private rights." *Gonzaga*, 536 U.S. at 289-90.[4] For example, the *Gonzaga* Court held that the Family Educational Rights and Privacy Act's nondisclosure provisions created no rights enforceable under §1983. *Id.* at 290-91. The Court's conclusion was "buttressed by the

[4] This argument is distinct from the second prong of the §1983 enforceability inquiry, which asks whether Congress, *after* conferring new individual rights, "specifically foreclosed a remedy under §1983." *Gonzaga*, 536 U.S. at 284 n.4; *see also* Blue.Br.60 (making a "second prong" argument).

mechanism that Congress chose to provide for enforcing those provisions. Congress expressly authorized the Secretary of Education to '*deal with violations*' of the Act ...." *Id.* at 289.

The Court contrasted FERPA's authorization of federal enforcement with provisions in the Public Housing Act and the Medicaid Act that lacked a "federal review mechanism." *Id.* at 280, 290. In *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), the Court held that the rent-ceiling provision of the Public Housing Act was enforceable under §1983 in "significant" part because "the federal agency charged with administering the Public Housing Act had never provided a procedure by which tenants could complain to it." *Gonzaga*, 536 U.S. at 280. And in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), the Court found a reimbursement provision of the Medicaid Act privately enforceable in part because there was "no sufficient administrative means of enforcing the requirement against States that failed to comply." *Gonzaga*, 536 U.S. at 280-81.

In the VRA, like in FERPA, Congress carefully delineated a robust scheme of federal enforcement. Pursuant to his powers under §12, the Attorney General can and does enforce §2. *See* 52 U.S.C. §10308; *see also* Voting Section Litigation, *Cases Raising Claims Under Section 2 of the Voting Rights Act*, https://www.justice.gov/crt/voting-section-litigation#sec2cases (last visited Feb. 9, 2024). "If the text and structure of § 2 and § 12 show anything, it is that Congress intended to place

enforcement in the hands of the Attorney General, rather than private parties." *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204, 1211 (8th Cir. 2023).

Ultimately, if unmistakable clarity and unambiguity is the standard for conferring privately enforceable rights, §2 does not meet it. "Basic federalism principles confirm" this. *Carey v. Throwe*, 957 F.3d 468, 481, 483 (4th Cir. 2020) ("To the extent [the *Gonzaga*] standard permits a gradation, we think it sound to apply its most exacting lens when inferring a private remedy [that] would upset the usual balance of state and federal power."). "Redistricting is primarily the duty and responsibility of the State, and federal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Perez*, 138 S. Ct. at 2324. To scrutinize §2 with anything less than the "most exacting lens," *Carey*, 957 F.3d at 483, for the presence of a privately enforceable federal right would potentially "subject to judicial oversight" every state redistricting map "at the behest of a single citizen," *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 645 (1979) (Powell, J., concurring). Section 2's text does not make unmistakably clear Congress's intent to "upset the usual constitutional balance of federal and state powers" in that way. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

II. Plaintiffs Failed To Prove Unequal Opportunity "To Participate In The Political Process."

The District Court held that three different Georgia redistricting laws violated §2, but the court paid little attention to the words of that statute. The result is an opinion that strays unthinkingly from the original meaning of the statute and renders it utterly unpredictable for any Legislature trying to determine whether race-based districting is required or whether race-neutral districting will do. Congress did not write a law that arbitrary (and unconstitutional). *See* Part III.

If this Court treats §2 like a statute, reading it in light of Supreme Court guidance, it is plain that Plaintiffs failed to prove that Georgia's electoral systems are not "equally open" to minority voters. Returning to the text, Plaintiffs needed to show that members of a minority group "have less opportunity than other members of the electorate [1] to participate in the political process *and* [2] to elect representatives of their choice." 52 U.S.C. §10301(b) (emphasis added). In *Chisom v. Roemer*, the Supreme Court clarified that proving only the second—less opportunity to elect—"is not sufficient to establish a violation unless, under the totality of the circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process." 501 U.S. at 397.

To determine if Plaintiffs have shown that black voters in Georgia in the 2020s have "less opportunity than other members of the electorate to participate in the political process," it is of first importance to determine what that phrase means. *Chisom*

points to the answer. The 1982 amendments to "§ 2 [were] intended to 'codify' the results test employed in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *White v. Regester*, 412 U.S. 755 (1973)." *Chisom*, 501 U.S. at 394 n.21 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 83-84 (1986) (O'Connor, J., concurring in the judgment)). Those two decisions supplied §2's key language. And because the phrase "is obviously transplanted from another legal source, it brings the old soil with it." *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019). Thus, "it is to *Whitcomb* and *White* that [courts] should look in the first instance in determining how great an impairment of minority voting strength is required to establish vote dilution in violation of § 2." *Gingles*, 478 U.S. at 97 (O'Connor, J., concurring in the judgment).[5]

1. *Whitcomb* makes clear what is *not* enough to establish a "vote dilution" claim. The plaintiffs in *Whitcomb* challenged the use of a multimember districting scheme in Marion County, Indiana, to elect the county's "eight senators and 15 members of the house," alleging the system illegally "diluted the force and effect of" a heavily black and poor part of Marion County "termed 'the ghetto area.'" 403 U.S. at 128-29. In identifying the "racial element" of plaintiffs' claim, the district court determined the area was "inhabited predominantly by members of a racial, ethnic,

[5] *See also Johnson v. DeSoto Cnty. Bd. of Com'rs*, 204 F.3d 1335, 1346 n.23 (11th Cir. 2000); *Nipper v. Smith*, 39 F.3d 1494, 1517 (11th Cir. 1994) (en banc) (plurality opinion).

or other minority group, most of whom are of lower socioeconomic status than the prevailing status in the metropolitan area and whose residence in the section is often the result of social, legal, or economic restrictions or custom." *Chavis v. Whitcomb*, 305 F. Supp. 1364, 1373 (S.D. Ind. 1969). The court found further that voters in that area had "almost no political force or control over legislators under the present districting scheme because the effect of their vote is cancelled out by other contrary interest groups in Marion County." *Id.* at 1368. The court concluded that the plaintiff group's "voting strength … is severely minimized … by virtue of": (1) the control exerted by "party organizations" over nominations in the primary election; (2) the inability of black voters "to be assured of the opportunity of voting for prospective legislators of their choice"; and (3) "the absence of any particular legislator accountable" to black voters residing in the area. *Id.* at 1386; *see also Whitcomb*, 403 U.S. at 135-36 (summarizing district court's conclusions).

Then there was the lack of proportionality. For "the period 1960 through 1968," plaintiffs' relevant area made up "17.8% of the population" of Marion County, but was home to only "4.75% of the senators and 5.97% of the representatives." *Whitcomb*, 403 U.S. at 133. Part of the disproportionality arose because the voters there "voted heavily Democratic," while "the Republican Party won four of the five elections from 1960 to 1968" and did not slate anyone from the area in

several of those elections. *Id.* at 150. The district court found vote dilution and ordered single-member districting. *Id.* at 129.

Despite these disparities, the Supreme Court reversed the finding of vote dilution. Critical to the Court's holding was the lack of "evidence and findings that ghetto residents had less" "opportunity to participate in and influence the selection of candidates and legislators." *Id.* at 149, 153. The Court made clear what these words meant by describing what plaintiffs failed to prove:

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

Id. at 149-50.

This is what "equal *opportunity* to participate in the political process" means—being "allowed" to register and vote, choose the party one desires to support, participate in its affairs, and have an equal vote when the party's candidates are chosen. The political party the *Whitcomb* plaintiffs favored was the Democratic Party, and it was "reasonably clear" that their "votes were critical to Democratic Party success." *Id.* at 150. Thus, "it seem[ed] unlikely that the Democratic Party could afford to overlook the ghetto in slating its candidates." *Id.*

It made *no* difference to the Court that the Democratic Party had won only 23 out of 115 legislative races in "the five elections from 1960 to 1968." *Id.* The record suggested that "had the Democrats won all of the elections or even most of them," plaintiffs "would have had no justifiable complaints about representation." *Id.* at 152. That the area did not "have legislative seats in proportion to its populations emerge[d] more as a function of losing elections," not built-in racial bias. *Id.* at 153. The plaintiffs' alleged denial of equal opportunity was "a mere euphemism for political defeat at the polls." *Id.*

2. *White v. Regester* provides a helpful contrast. There, black voters of Dallas County, Texas, favored the Democratic Party, but at-large elections and "a white-dominated organization that [was] in effective control of Democratic Party candidate slating in Dallas County" combined to deny black voters equal opportunity to participate in the political process. 412 U.S. at 766-67. The district court had found that "the Texas rule requiring a majority vote as a prerequisite to nomination in a primary election" and "the so-called 'place' rule limiting candidacy for legislative office from a multimember district to a specified 'place' on the ticket" "enhanced the opportunity for racial discrimination." *Id.* at 766. But "[m]ore fundamentally," the Democratic Party "did not need the support of the [black] community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the [black] community." *Id.* at 767. Because

"the black community" was "effectively excluded from participation in the Democratic primary selection process," it "was therefore generally not permitted to enter into the political process in a reliable and meaningful manner." *Id.* Similarly, Mexican-American residents of Bexar County, Texas, were "excluded … from effective participation in political life" by virtue of "cultural incompatibility … conjoined with the poll tax and the most restrictive voter registration procedures in the nation." *Id.* at 768-69. The Supreme Court found "no reason to disturb" the district court's "findings and conclusions." *Id.* at 767.

3. The point of this historical study is straightforward: "unequal opportunity to participate in the political process," as it appears in §2, carries a particular meaning; *Whitcomb* and *White* supply that meaning. *See Allen*, 599 U.S. at 13 (discussing *White*). These two decisions speak with a unified voice: a plaintiff must show that members of the minority group are excluded "from effective participation in political life," *White*, 412 U.S. at 769; *i.e.*, they are "denied access to the political system," *Whitcomb*, 403 U.S. at 155. Access to the "political system" means access to those tangible and traditional methods of participation like registering to vote, voting, and participating in the political party of one's choosing. *Id.* at 149-50. Thus, Plaintiffs needed to show that, based on the totality of the circumstances, black Georgians today face *more inequality* in terms of those traditional methods of participation than

did black Indianians in 1960s Marion County. Here, both thankfully and unsurprisingly, the evidence comes nowhere close.

What the District Court instead relied on were socioeconomic disparities between black and white Georgians, including a 3.9% gap in adults lacking a high school diploma (13.3% to 9.4%); a 4.7% gap when it comes to lacking health insurance (18.9% to 14.2%); and a 0.9% disparity in reporting a disability (11.8% to 10.9%). DE333:248-49.[6] And black voter turnout is sometimes lower than white turnout (which is the wrong comparator, see BlueBr.39). *Id.* at 242-44; 459-60.

But none of this is legally significant because the same or worse could certainly be said for poor black residents of Marion County in the 1960s. *Whitcomb*, 403 U.S. at 132-33. Whether they exercised it or not, they had "equal *opportunity* to participate in and influence the selection of candidates and legislators," *id.* at 153 (emphasis added), because they were "*allowed* to register [and] vote, to choose the political party they desired to support, to participate in its affairs [and] to be equally represented on those occasions when legislative candidates were chosen," *id.* at 149 (emphasis added).

Thus, what matters is that black Georgians are allowed to register and vote. Indeed, ***98%*** percent of the eligible voter population in Georgia is registered to vote.

[6] "DE" cites refer to docket entries on the *Alpha Phi Alpha* docket, No. 1:21-cv-5337, unless otherwise indicated.

DE332:103. It's easy to see why. As the District Court noted, "Georgia employs no-excuse absentee voting, automatic voter registration through the Department of Driver Services[,] and [allows] voters to register the vote using both paper registration and online voter registration." DE333:231. Also, "Georgia offers free, state-issued identification cards that voters can use to satisfy Georgia's photo ID laws." *Id.*[7] And black Georgians are not "overlook[ed]" by their own party; to the contrary, they are "critical to Democratic Party success." *Whitcomb*, 403 U.S. at 150. The District Court found no evidence that Georgia's elected representatives are unresponsive to the needs of black voters. DE333:258-60, 472-75.[8] And unlike the black Indianians in *Whitcomb*, black Georgians regularly win state-wide office and even enjoy proportional representation. *Compare* 403 U.S. at 133, 150-52, *with*, DE333:254, 255, 266, 468, 491. They quite clearly are not "excluded … from effective participation in political life." *White*, 412 U.S. at 769.

Here, "had the Democrats won all of the elections or even most of them," black voters "would have had no justifiable complaints about representation." *Whitcomb*, 403 U.S. at 152. Accordingly, under *Whitcomb*, *White*, and thus §2, Plaintiffs'

[7] In contrast, the Mexican-American plaintiffs in *White* faced "the most restrictive voter registration procedures in the nation" *and* "the poll tax." *White*, 412 U.S. at 768.

[8] In *White*, the Democratic Party did not "exhibit good-faith concern for the political and other needs and aspirations of the [black] community." 412 U.S. at 767. The same was true for the Mexican-American residents of Bexar County. *Id.* at 769.

claims fail because losing in the political process is not the same as being excluded from it. The District Court's contrary approach of identifying a history of discrimination (which surely existed in 1960s Indiana too[9]), a few socioeconomic disparities (which defined the plaintiff group in *Whitcomb*), and elections that didn't go the "right" way "enough" proves nothing about whether black Georgians have an equal "opportunity … to participate in the political process." Indeed, it's not clear what the District Court's test proves at all, much less how it could justify race-based remedies. *See* Part III. The court's finding of vote dilution on this record "becomes plausible only if *Whitcomb* is purged from … voting rights jurisprudence." *LULAC v. Clements*, 999 F.2d 831, 862 (5th Cir. 1993) (en banc) (discussing *Whitcomb* at length).

* * *

The opinion below represents a zombified jurisprudence, wandering aimlessly away from the original meaning of §2. But in every statutory case, the text matters. And *Chisom* already told courts to read §2 in light of *Whitcomb* and *White*. This Court should follow that command, and it should conclude that in Georgia in the 2020s, all voters have an equal opportunity to participate in the political process and to elect representatives of their choice.

[9] *See, e.g.*, *Baird v. Consol. City of Indianapolis*, 1991 WL 557613, at *6 (S.D. Ind. Apr. 25, 1991) ("Dr. Moore testified about the history of race discrimination in Indiana generally and in Marion County in particular.").

III. The District Court's Interpretation Of Section 2 Is Unconstitutional.

Since 1965, "things have changed dramatically" in the South. *Shelby County v. Holder*, 570 U.S. 529, 547 (2013). Georgia is no exception. When the VRA was enacted, black voter registration in Georgia sat at 27%, compared to a white registration rate of 63%. *See id.* at 548. Today, ***98%*** of all eligible voters in Georgia are registered. DE332:103. "There is no doubt that these improvements are in large part *because of* the Voting Rights Act." *Shelby County*, 570 U.S. at 548. Plaintiffs' expert agreed: the VRA "ultimately change[d] the trajectory of voting rights for Black Georgians," not just in "statistical improvements in Black registration and elected officials," but also "the tone of the political system itself." *Pendergrass* DE190-5:36. The District Court too recognized that "[o]ver the last fifty years Georgia has become increasingly more politically open to Black voters and in recent elections Black candidates have enjoyed success." DE333:210. Millions more have noticed too, as Georgia's minority population from 2000 to 2020 increased by more than 2.2 million, and more than 1.1 million of those people are black. DE333:32-33. The court rightly "commend[ed] the progress that Georgia has made since 1965," DE333:210, but still, the court concluded, this wasn't enough to avoid the race-based redistricting demanded by §2.

If that's right, then §2 will impose "race-based redistricting … indefinitely into the future," *Allen*, 599 U.S. at 45 (Kavanaugh, J., concurring), and there is "no

end is in sight," *SFFA v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 213 (2023). In other words, if the District Court's reading of §2 is correct, the statute "must … be invalidated under the Equal Protection Clause of the Fourteenth Amendment." *Id.*

This case and others confirm that the VRA succeeded in its goal of "cutting away … obstacles to full participation," but highlight how plaintiffs have repurposed the law to press "demands for outcomes." *Clements*, 999 F.2d at 837. In addition to the commendable progress noted above, a look at §2 cases from decades past show how far we've come. For example, in 1992 in Alabama, all parties assumed that an "opportunity district" in the state's congressional map would need a black population of at least 65%. *See Wesch v. Hunt*, 785 F. Supp. 1491, 1495-97 (S.D. Ala. 1992) (three-judge court). In that challenge, one proposed plan included two districts with black populations of 59% and 62% respectively, but even the party who submitted the plan doubted whether black Alabamians would have an "opportunity to elect candidates of their choice in these districts." *Id.* at 1496.

And in *Dilliard v. City of Greensboro*, a proposed district in a city council map in the early 1990s with a "*bare black supermajority* in the voting-age population" was decried as preserving "white hegemony." 213 F.3d 1347, 1351 (11th Cir. 2000) (emphasis added). Plaintiffs, in turn, proposed an 83% black "swing district." *Id.* at 1351.

In the 1980s, it was "widely accepted … that minorities must have something more than a mere majority even of voting age population in order to have a reasonable opportunity to elect a representative of their choice." *Ketchum v. Byrne*, 740 F.2d 1398, 1413 (7th Cir. 1984). Back then, a DOJ "guideline of 65% of total population" was "adopted and maintained for years … to ensure minorities a fair opportunity to elect a candidate of their choice." *Id.* at 1415.

Yet in Georgia in 2022, the State sent 5 black Democrats to Congress despite having only two majority-black districts. DE333:51, 210, 468-69. No "bare supermajority" is needed because everyone has the opportunity to register and vote.

In short, it is apparent that the "stringent new remedies" of the VRA worked. *Katzenbach*, 383 U.S. at 308. "Voter turnout and registration rates now approach parity," blatant "discriminatory evasions of federal decrees are rare," and "minority candidates hold office at unprecedented levels." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009).

Thus, when the District Court looked for examples of recent discrimination to justify three §2 violations, it had to rely on evidence so thin as to merely underscore the constitutional problems with its approach. For example, in searching for recent instances of "official discrimination in the state" or voting practices that "tend to enhance the opportunity for discrimination against the minority group," DE333:213-14, the court relied on several laws that "have been determined in prior decisions by

the Court to *not* be illegal under federal law." DE333:224. For example, the Exact Match voting law that the same Court had deemed not to violate §2 because it affected only "0.045% of the total population, less than one percent of any minority group, and less than one percent of naturalized citizens," *Fair Fight Action, Inc. v. Raffensperger*, 634 F. Supp. 3d 1128, 1244 (N.D. Ga. 2022), was transmuted into evidence that Georgia's redistricting laws violate §2 because, among the miniscule number of people affected by Exact Match, a higher percentage were black. DE333:225-26. But if that sort of "misuse of data" cannot justify a finding that the challenged law violates §2, surely it can't justify invalidating three different laws. *Greater Birmingham Ministries v. Sec'y of State for Alabama*, 992 F.3d 1299, 1330 (11th Cir. 2021). The court likewise relied on SB 202, despite the fact that another district court had recently denied a preliminary injunction to plaintiffs challenging that law under §2 and the Constitution. DE333:228 & n.52.

But the most telling "evidence" was the court's reliance on the 1990 congressional redistricting cycle. Without any apparent irony, the District Court identified "DOJ reject[ing] the State's reapportionment plans" "[d]uring the 1990 redistricting cycle" as evidence of "Georgia's history of discrimination against Black voters." DE333:218-19. What the court omitted, however, was that DOJ rejected those plans because it was misusing §5 to demand a flagrantly gerrymandered "'max-black' plan." *Abrams v. Johnson*, 521 U.S. 74, 80 (1997). When, on its third try, Georgia

finally acquiesced to "[t]he Justice Department's maximization policy," the Supreme Court held that Georgia's map was unconstitutional. *Miller v. Johnson*, 515 U.S. 900, 926 (1995). So in the District Court's upside down view, Georgia's repeated *refusal* to racially discriminate was deemed *evidence* of racial discrimination.

Not done, the court then bolstered its finding of discrimination by noting that some Georgia legislators "took a leadership position in challenging the reauthorization of the" VRA in 2006. DE333:219. But perhaps those legislators, like other people of goodwill, merely thought that "[t]hings ha[d] changed in the South," and that "current burdens" needed to "be justified by current needs." *Nw. Austin*, 557 U.S. at 202-03. Or perhaps those legislators saw what was coming here: Courts contorting the VRA to force Georgia to "engage in presumptively unconstitutional race-based districting." *Miller*, 515 U.S. at 927.

If enacting laws that comply with the VRA and refusing to enact redistricting plans that violate the Constitution can justify ordering a State to engage in race-based districting, there truly is "no end in sight." *Harvard*, 600 U.S. at 213. And because "the authority to conduct race-based redistricting cannot extend indefinitely into the future," *Allen*, 599 U.S. at 45 (Kavanaugh, J., concurring), this Court should reject the District Court's flawed approach.

CONCLUSION

The Court should reverse.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 29(a)(5). This brief contains 6,483 words, including all headings, footnotes, and quotations, and excluding the parts of the response exempted under Fed. R. App. P. 32(f).

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Dated: February14, 2024

/s/ Edmund G. LaCour Jr.
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CERTIFICATE OF SERVICE

I certify that on February 14, 2024, I electronically filed this document using the Court's CM/ECF system, which will serve all counsel of record.

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