No. 19-1199

In The
Supreme Court of the United States

DON HIGGINSON,

Petitioner,

v.

XAVIER BECERRA, in his official capacity as the Attorney General of California; CITY OF POWAY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CATO INSTITUTE, CENTER FOR EQUAL OPPORTUNITY, PROJECT 21, REASON FOUNDATION, AND INDIVIDUAL RIGHTS FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the California Voting Rights Act violates the Equal Protection Clause of the Fourteenth Amendment.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF), Cato Institute, Center for Equal Opportunity (CEO), Project 21, Reason Foundation, and Individual Rights Foundation (IRF) respectfully submit this brief in support of Petitioner Don Higginson.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of California for the purpose of litigating matters affecting the public interest. In support of its Equality Under the Law practice group, PLF supports a color-blind interpretation of the United States Constitution and opposes race-based government decisionmaking. PLF has participated as amicus curiae in this Court's major voting rights and racial gerrymandering cases. *See, e.g.*, *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254 (2015); *Shelby Cty. v. Holder*, 570 U.S. 529 (2013); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996). PLF submits this brief because it believes its public policy perspective and litigation experience in the area of voting rights will provide an additional viewpoint with respect to the issue presented.

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

CEO is a nonprofit research and educational organization devoted to issues of race and ethnicity, such as civil rights, bilingual education, immigration, and assimilation. CEO supports color-blind public policies and seeks to block the expansion of racial preferences in areas such as employment, education, and voting. CEO has participated as amicus curiae in past voting rights cases. *See, e.g.*, *Ala. Legislative Black Caucus*, 575 U.S. 254; *Shelby Cty.*, 570 U.S. 529; *Bartlett*, 556 U.S. 1; *and League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006).

Project 21, the National Leadership Network of Black Conservatives, is an initiative of the National Center for Public Policy Research to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility have not traditionally been echoed by the nation's civil rights establishment. Project 21 has participated as amicus curiae in past significant voting rights cases. *See, e.g.*, *Ala. Legislative Black Caucus*, 575 U.S. 254; *Shelby Cty.*, 570 U.S. 529; *Bartlett*, 556 U.S. 1.

Reason Foundation (Reason) is a national, nonpartisan, and nonprofit public-policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets,

individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing Reason magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets" and equality before the law, Reason selectively participates as amicus curiae in cases raising significant constitutional issues and has filed amicus curiae briefs in numerous cases involving racial classifications, including *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014); *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013) (*Fisher I*); *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (*Fisher II*); *Ricci v. DeStefano*, 557 U.S. 557 (2009); and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

The IRF was founded in 1993 and is the legal arm of the David Horowitz Freedom Center. The IRF is dedicated to supporting free speech, associational rights, and equality of rights. To further these goals, the IRF has filed amicus curiae briefs in cases involving fundamental equal protection issues, including *Schuette*, 572 U.S. at 291; *Fisher I*, 570 U.S. at 297; *Fisher II*, 136 S. Ct. at 2198; and *Ricci*, 557 U.S. at 557.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since this Court first interpreted Section 2 of the Voting Rights Act to encompass claims of vote dilution, multiple Members of the Court have raised concerns that such an interpretation demanded the imposition of racial proportionality in districting. *See*

Holder v. Hall, 512 U.S. 874, 944 (1994) (Thomas, J., concurring in the judgment); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 512 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part). While the Court's Voting Rights Act jurisprudence continues to mandate the rough balancing of political power by race, the Court has curtailed government racial classifications in all other aspects of society—from contracting, to education, to criminal justice. The Court can no longer ignore the reality that interpreting Section 2 so as to prohibit vote dilution requires government actors to consider race when drawing electoral districts. This case, concerning the constitutionality of the California Voting Rights Act, illuminates this problem. The Court must intervene, at the very least to enforce meaningful limits on vote dilution doctrine so it does not become a de facto racial quota.

The Court's seminal vote-dilution case, *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), requires plaintiffs to prove three "preconditions" in order to proceed to the "totality of the circumstances" inquiry set out by Section 2(b) of the federal Voting Rights Act: (1) that members of the racial minority are sufficiently large and compact to form a majority of voters in a single electoral district; (2) that said minority group is "politically cohesive"; and, (3) that members of the racial majority usually are able to out-vote the minority and prevent the minority group from electing its preferred candidates. These preconditions are meant to ensure that federal law does not entitle "minority groups to the maximum possible voting strength." *Bartlett v. Strickland*, 556 U.S. 1, 16 (2009) (plurality opinion).

Nevertheless, vote dilution claims require federal courts to determine whether racial groups have sufficient political power. That very exercise is troubling: the right to vote, like the rights guaranteed by the Equal Protection Clause, is an individual right. Vote dilution claims, however, treat people simply as members of their racial group and further "the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting). Unfortunately, such an understanding slows our society's progress towards the ultimate goal of rendering race irrelevant to public life, all the while deterring the Court from reaching the promise of the color-blind Constitution. *See Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). To avoid conflict with these basic principles, courts ought to limit the enforcement of voting rights to redress violations of the individual right to vote. Individuals, not racial groups, cast ballots. No "racial group"—however perniciously and stereotypically one defines the "group"—is entitled to any particular amount of representation.

With all the problems that vote dilution doctrine has brought, this Court's intervention is necessary here, if not to repudiate the theory altogether, at least to enforce its outer limits. At issue here is the California Voting Rights Act (CVRA), enacted in 2002 in response to what state legislators saw as this Court's *restrictive* interpretation of Section 2 in dilution cases. Rather than strengthening the safeguards to protect against race-based action, the CVRA eliminates the *Gingles* requirement that a plaintiff prove that the relevant minority group is

sufficiently large and compact. And because the CVRA includes a strong fee-shifting provision, it effectively requires California cities to abandon at-large or multi-member district systems in favor of single-member districts based merely upon the existence of racially-polarized voting. Put another way, the CVRA requires municipalities to alter their entire system of choosing representatives to ensure that racial groups may elect a "group" representative. Without even the minimum *Gingles* safeguards, the CVRA extends the worst aspects of this Court's Section 2 precedent by mandating race-based voting districts and enshrining in law the idea that individuals of the same race think alike.

This Court should grant the petition for certiorari to reconsider the propriety of the theory of vote dilution—or at least to limit its proliferation outside the confines of Section 2—and repudiate California's racial gerrymandering mandate.

I. Vote-Dilution Claims Raise Serious Equal Protection Concerns

This case concerns the CVRA. But to understand the problems inherent in the CVRA, it is necessary to explore the starting point for that legislation: Section 2 of the federal Voting Rights Act, 52 U.S.C. § 10301. After all, the CVRA did not invent vote dilution claims, nor did it create the inherent conflict between the prohibition of vote dilution for racial groups and the individual's right to equal protection of the laws. This case demands the Court's attention not only because of the CVRA's rejection of a basic *Gingles* safeguard, but also because it highlights the issues with vote-dilution more generally. If left unchecked, the prohibition on vote dilution enforced in the name

of voting rights threatens to become a nationwide racial quota for the drawing of electoral districts.

Section 2(a) of the Voting Rights Act prohibits the imposition of any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). Subsection (b) explains that a violation of Section 2 occurs when "the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens protected" by the statute, such that "its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Bolstered by a Senate committee report, this Court has interpreted Section 2 to encompass claims of vote dilution through the practice of districting or the use of at-large voting systems on the theory that "where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters." *Gingles*, 478 U.S. at 48. Such arrangements may be invalidated even without a showing of discriminatory intent. *See id.* at 43-44.

A. The Equal Protection Clause Sharply Restricts the Government's Consideration of Race

Comparing the current vote-dilution paradigm to government consideration of race in areas such as education or contracting illuminates the problem. Generally, where a racial classification is designed to distribute benefits and burdens based on race, this Court's precedents require it to satisfy strict scrutiny.

That is, the classification must be narrowly tailored to further a compelling state interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

Racial classifications "are inherently suspect." *Parham v. Hughes*, 441 U.S. 347, 351 (1979). We consider them equally suspect "regardless of 'the race of those burdened or benefited by a particular classification.'" *Miller v. Johnson*, 515 U.S. 900, 904 (1995) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion)). This standard is necessary because relaxing judicial scrutiny for racial classifications thought "benign" would "effectively assure[] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race,' will never be achieved." *Croson*, 488 U.S. at 495 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 320 (1986) (Stevens, J., dissenting)). Strict scrutiny serves the important purpose of limiting, to the extent possible, government use of race until the day racial classifications may be abolished entirely.

With that ultimate goal in mind, this Court has sharply limited the power of government to consider race in doling out benefits and burdens. In government contracting, jurisdictions may use racial classifications only "when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination" and they are able to "identify that discrimination, public or private, with some specificity." *Croson*, 488 U.S. at 504 (majority opinion). In education, public school districts may only

use race to remedy their own past intentional discrimination. *Parents Involved*, 551 U.S. at 721 ("the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation"). So too with public universities, although they may also consider race as one of many factors in admissions in order to obtain the benefits of a diverse student body. *Grutter v. Bollinger*, 539 U.S. 306, 328, 334 (2003); *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 313 (2013). But even in those limited circumstances, the Court has recognized the importance of limiting the use of race both in time and scope. *See Grutter*, 539 U.S. at 334 (rejecting quotas, set-asides, and other mechanisms designed to perform racial balancing); *id.* at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."); *Parents Involved*, 551 U.S. at 723-25 (declining to apply *Grutter* to K-12 schools and emphasizing that race can never be the determinative factor for school assignments); *Fisher*, 570 U.S. at 313 (rejecting deference to a university's good faith assertion that racial preferences were necessary, and emphasizing that race-conscious plans must be "sufficiently flexible," "limited in time," and enacted only after a serious consideration of race-neutral alternatives).

Two related principles emerge from this precedent. First, the right to be free from racial discrimination belongs to the individual, not to a racial "group." *See Adarand*, 515 U.S. at 227. And second, racial balancing for its own sake is "patently unconstitutional." *Fisher*, 570 U.S. at 311. In accordance with these ideas, the Court has resisted government efforts to impose racial quotas, holding them flatly prohibited by the Equal Protection Clause.

See, e.g., *Croson*, 488 U.S. at 507 ("[T]he 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing."); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (admissions policy granting racial groups one-fifth of the total points required for admission is not narrowly tailored to any interest in obtaining a diverse student body); *see also id.* at 293 (Souter, J., dissenting) (noting that "Justice Powell's opinion in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), rules out a racial quota or set-aside"). Similarly, it has declined to assume that racial discrimination is the cause of racial disparities which may result from private choice or simply the laws of chance. *Croson*, 488 U.S. at 507 (deriding as "completely unrealistic" the "assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population"); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992 (1988) (plurality opinion) ("It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance."). At bottom, we do not in this country assume that a person's race dictates his views or decisions. *See Metro Broadcasting*, 497 U.S. at 636. That is why "[a]n interest 'linked to nothing other than proportional representation of various races'" simply cannot stand. *Parents Involved*, 551 U.S. at 731 (plurality opinion) (quoting *Metro Broadcasting*, 497 U.S. at 614 (O'Connor, J., dissenting)).

Members of the Court continue to debate the extent to which the Court has followed these principles in particular cases. *See generally Grutter*, 539 U.S. at 349-78 (Thomas, J., concurring in part and dissenting in part); *id.* at 387-95 (Kennedy, J.,

dissenting). But enunciation of the principles has been consistent across racial discrimination cases *except* those involving the drawing of electoral districts. In such cases, instead of limiting the use of race to narrow circumstances deemed "compelling," this Court has interpreted Section 2 of the Voting Rights Act to require states and political subdivisions to engage in race-conscious districting. *See* Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate Racial Gerrymandering Cases*, 50 Stan. L. Rev. 779, 825 (1998) ("So long as section 2 and section 5 are in effect and applicable to districting, race is a privileged criterion. The legislature and everyone who participates in the process must start with race."). As described below, this line of precedent is in significant tension with the Equal Protection Clause's mandate that the government treat everyone equally without respect to race.

B. The Prohibition of Vote Dilution Transforms Individual Rights into Group Quotas

The supposed evil of vote dilution is conceptually easy to understand—many people have an intuitive sense that representation of a particular group should be proportional to the group's size in the electorate. *See, e.g.*, Douglas J. Amy, *How Proportional Representation Would Finally Solve Our Redistricting and Gerrymandering Problems*, *available at* https://www.fairvote.org/how_proportional_representation_would_finally (last visited May 4, 2020). And one can easily see how the use of at-large elections or multi-member districts would lessen the power of the political minority in a jurisdiction. If a hypothetical city is comprised of 60% Democrats and 40%

Republicans, an at-large system would usually elect all Democrats to the city council. On the other hand, single-member districting might give Republicans some seats, depending on how voters were distributed across the city. In this situation, if the Democrats on the city council voted to institute at-large voting to increase their partisan advantage, city Republicans could argue that their votes had been diluted—after all, despite comprising 40% of the city's voters, they might be completely shut out of representation. *See Vieth v. Jubelirer*, 541 U.S. 267, 354 (2004) (Kennedy, J., concurring in the judgment) ("The harm from partisan gerrymandering is . . . a species of vote dilution . . . ."). Yet these voters have no federal remedy for such an action, as this Court held last Term that partisan gerrymandering claims are non-justiciable. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). As a result, partisans have no protectable right to proportional or even roughly proportional representation, and individuals have no right to cast a vote in a particular type of district.

The situation changes, however, once race enters the picture. Although federal courts lack the power to redress even *intentional* political gerrymandering, they have enormous power to redress *unintentional* "dilution" of racial groups' voting power. For example, take the same hypothetical city, but instead of classifying the voters by political affiliation, consider their race. All of a sudden, even in the absence of any evidence of racial discrimination, courts become more than willing to enforce near proportional representation. Take the case of single-member districts of the U.S. House of Representatives—where such districting is required by law. In states where race and party are heavily correlated, the same

political exercise described in the previous paragraph becomes actionable, even if race was not a factor in the line drawing. And it need not be remotely as extreme as eliminating representation for a particular racial group. Indeed, any scheme that does not result in proportional representation by race is suspect under Section 2 of the Voting Rights Act.[2]

Courts have labored to describe the proper racial composition of single-member districts under Section 2. One prominent example is *League of United Latin American Citizens* (*LULAC*), where the plaintiffs argued that a change in the composition of Texas' 23rd Congressional District diluted the votes of Latino voters. 548 U.S. at 423-24 (majority opinion). The Latino share of the citizen voting-age population indeed fell from 57.5% to 46% under the challenged map. *Id.* at 427. In an attempt to avoid a Section 2 violation, Texas noted that it had still drawn six so-called "Latino opportunity districts" by replacing the 23rd District with the 25th. *Id.* at 429. But this Court rejected Texas' argument that it could replace a Latino opportunity district with another one, holding that this is permitted only where "the racial group in each area had a § 2 right and both could not be accommodated." *Id.* The Court then found a Section 2 violation substantially based on a finding that Latinos

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[2] To be sure, intentionally drawing district lines in order to discriminate against voters of a particular race—or instituting an at-large voting scheme for the same purpose—is suspect under either Section 2 or the Equal Protection Clause. *But see infra* I.C (discussing how the Court accommodates a certain amount of racial gerrymandering to accommodate vote-dilution claims). The term "vote dilution," as used here and in the case law, refers only to those cases where discriminatory intent is absent.

in Texas were "two districts shy of proportional representation." *Id.* at 439.

Under this theory of Section 2, the individual right to vote is effectively transformed into a group right to "roughly proportional" representation. To be sure, the *LULAC* Court described the purported right to a non-diluted vote as an individual right. *See id.* at 437. In practice, however, any right against vote dilution must be afforded to groups. Indeed, the very term "vote dilution" makes no sense unless the right to an undiluted vote is held by a group, rather than an individual. And the term "Latino opportunity district" is nonsensical unless it is a description of the collective action of a racial group seeking to elect a candidate of the group's choice. It is unintelligible as a way to describe the individual right of any particular Latino voter. Despite some statements to the contrary, this Court has all but conceded that point. *LULAC*, 548 U.S. at 429 (describing Section 2 rights as being held by a "racial group"); *Bartlett*, 556 U.S. at 24-25 ("Section 2 concerns minority groups' opportunity 'to elect representatives of their choice[.]'" (quoting 52 U.S.C. § 10301(b))).

Transforming Section 2 into a group-based right to some form of "fair" representation inevitably renders all vote-dilution—and racial gerrymandering—cases little more than fights "over the 'best' racial quota." *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 294 (2015) (Thomas, J., dissenting). The facts of most such cases make this quite plain. In *LULAC*, the Court subordinated traditional districting criteria to racial considerations, invalidating Texas' attempt to protect a congressional incumbent's seat because of the race of the voters who voted for and against him.

LULAC, 548 U.S. at 427-28. And even in cases where vote-dilution claims fail, the Court has emphasized the importance of proportionality, rejecting a claim because "minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population." *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994). While the Court has repeatedly emphasized that racial proportionality is not dispositive, measures of proportionality have nevertheless played an outsized role in determining vote-dilution liability. A collective right of racial vote strength measured against the population as a whole looks much more like racial balancing than the protection of any particular individual's right to vote.

The problem is stark. "In pursuing 'undiluted' or maximized minority voting power, '[this Court has] devised a remedial mechanism that encourages federal courts to segregate voters into racially designated districts to ensure minority electoral success.'" *Ala. Legislative Black Caucus*, 575 U.S. at 297 (quoting *Holder v. Hall*, 512 U.S. 874, 892 (1994) (Thomas, J., concurring in the judgment)). This outcome was inevitable once the Court began parsing the racial composition of electoral districts without even an allegation of discriminatory intent. After all, a court cannot determine whether the strength of a racial group's vote has been unlawfully diluted unless it has "an idea in mind of how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system." *Gingles*, 478 U.S. at 88 (O'Connor, J., concurring in the judgment); *see also Holder*, 512 U.S. at 880 (plurality opinion) ("a court must find a reasonable alternative practice as a benchmark against which to measure the existing

voting practice"). Racial proportionality is simply the most practical benchmark. That is why courts, including this Court, continue to lean on it to assess vote dilution. *See Gingles*, 478 U.S. at 88 (comparing simple proportionality with more complex benchmark possibilities, including one that would require courts to draw "fair" districts themselves). This Court's entire vote-dilution jurisprudence has been infected with racial balancing from the start.

Incredibly, vote-dilution theory remains unaffected by the doctrinal developments limiting the use of race in other areas. Binding precedent *requires* that voters be treated not as individuals, but as members of various collectives defined by race. Jurisdictions themselves are required to sort voters according to race to avoid Section 2 liability. Failure to do so—and account for at least "rough proportionality" among racial groups, *Johnson*, 512 U.S. at 1023, leaves the jurisdiction open to claims that it diluted the voting strength of a minority group. *See Shaw v. Hunt*, 517 U.S. 899, 914 (1996) (discussing North Carolina's concern "that failure to enact a plan with a second majority-black district would have left the State vulnerable to a lawsuit under" Section 2). This is exactly what the Court has repeatedly rejected in racial preference cases in education and contracting. As even some commentators generally supportive of racial preferences have noted, were Section 2's application to vote-dilution considered today on a blank slate, there is little chance it would pass constitutional muster. *See* Michelle E. O'Connor-Ratcliffe, *Colorblind Redistricting: Racial Proxies as a Solution to the Court's Voting Rights Act Quandry*, 29 Hastings Const. L.Q. 61, 71-72 (2001) (describing the

constitutionality of Section 2 as applied to districting as "questionable at best").[3] Continuing to apply this constitutionally suspect precedent just postpones the day the Court will have to reckon with the conflict between vote-dilution theory and equal protection.

C. The *Gingles* Safeguards Limit the Pervasiveness of Race-Based Districting, But Do Not Eliminate It

Gingles requires vote-dilution plaintiffs to prove the existence of three "preconditions" before proceeding with a claim. A minority group must first be (1) sufficiently large and compact to form a majority in a single-member district and (2) politically cohesive. *Bartlett*, 556 U.S. at 11 (citing *Gingles*, 478 U.S. at 50-51 (majority opinion)). The third requirement is that the majority usually votes as a bloc to defeat minority-preferred candidates. *Id.* These threshold requirements are necessary to limit the scope of race-based districting. As Justice Kennedy once explained, eliminating the requirement that a minority group prove that it is sufficiently large and compact to form a majority in a district would "unnecessarily infuse race into virtually every redistricting, raising serious constitutional

[3] The Court has never declared that compliance with Section 2 in and of itself constitutes a compelling interest. Indeed, doing so would be a classic example of circular reasoning—an assertion that the challenged statute survives strict scrutiny because complying with the challenged statute constitutes a compelling interest. This illustrates the problem with the Court's racial gerrymandering cases. *See infra* I.C. Applying genuine strict scrutiny would limit the consideration of race in districting to the remedial interest identified in modern equal protection cases.

questions." *Id.* at 21 (quoting *LULAC*, 548 U.S. at 446 (opinion of Kennedy, J.)).

Yet those serious questions remain even with the *Gingles* preconditions intact. *Gingles* and its progeny have interpreted Section 2 so that it often requires racial gerrymandering, which, "even for remedial purposes, may balkanize us into competing racial factions" and "threatens 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." *Shaw v. Reno*, 509 U.S. 630, 657 (1993). No remedial purpose is required to activate Section 2's race-based districting requirement—nothing in the statute or this Court's precedent requires proof that a jurisdiction has previously used racial gerrymanders. So although the preconditions limit the scope of Section 2's effect on districting, the *cause of action* for vote dilution necessitates the consideration of race far beyond what is "compelling."

What is more, to facilitate vote-dilution claims and avoid the obviously impending direct conflict with the Equal Protection Clause, the Court has had to relax its standards for judging intentional racial gerrymandering. After all, what is a state to do if Section 2 requires race-based districting and the Equal Protection Clause forbids it? So the Court crafted a special standard for racial gerrymandering, holding that strict scrutiny applies only where the scheme is "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race." *Id.* at 658. This is plainly inconsistent with modern equal protection precedent, which requires strict scrutiny

even when race is one consideration among many. *See Grutter*, 539 U.S. at 326 (applying strict scrutiny to admissions policy where race was one of many factors); *Vill. of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977) ("racial discrimination is not just another competing consideration"). Indeed, there is no question that the Court "is much quicker to apply strict scrutiny to affirmative action cases than it is to racial redistricting cases." Evan Gerstmann & Christopher Shortell, *The Many Faces of Strict Scrutiny: How the Supreme Court Changes the Rules in Race Cases*, 72 U. Pitt. L. Rev. 1, 18 (2010).

So while the *Gingles* preconditions have blunted the impact of applying Section 2 to districting, they have not lessened the conflict between this interpretation and the generally accepted principles of equal protection. Not only does Section 2 now require race-based districting when it applies, it also exacerbates the problem nationwide by permitting jurisdictions to use race as a factor in redistricting for less than "compelling" reasons. Certiorari is warranted here to give the Court an opportunity to reconsider its vote-dilution precedent and bring its interpretation of Section 2 into conformity with modern equal protection law.

II. The CVRA Repudiates a Key *Gingles* Safeguard and Challenges the Outer Limits of Vote Dilution Doctrine

Against this background, the California Legislature concluded that this Court had not gone *far enough* in requiring race-based redistricting. Despite warnings in this Court's precedent that Section 2 could not constitutionally prohibit vote dilution

without the *Gingles* safeguards, the CVRA emphatically discards the size and compactness precondition, declaring that plaintiffs must only show "that racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision." Cal. Elec. Code § 14028(a). The law specifically targets those municipalities which use at-large elections to elect their legislative body, stating that "[a]n at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election . . . as a result of the dilution," Cal. Elec. Code § 14027. Under the more recently enacted safe-harbor provision, municipalities can avoid liability (and the effect of the fee-shifting provision) simply by switching to elections by district in response to a demand letter alleging the existence of racially polarized voting. Cal. Elec. Code § 10010(e)(1). That is exactly what happened here.

This case demonstrates vote dilution taken to its logical extreme. Take a variation on an example from above: a hypothetical city that is 80% white and 20% black and whose citizens vote entirely according to their race. Were the city to maintain at-large elections, it would be subject to a Section 2 claim if the black voters lived close enough to each other to make up a majority in one hypothetical single-member district. Thus, if the city were entirely segregated, black voters could assert a Section 2 claim. But if voters were randomly distributed throughout the city without respect to race, black voters could not make out a Section 2 claim. They *could*, however, assert a

CVRA claim. Without the *Gingles* compactness safeguard, the existence of racially polarized voting—and resulting lack of racial proportionality—is enough.

California's decision to jettison the most important *Gingles* safeguard has significant consequences. State law now requires any municipality that experiences racially-polarized voting to abandon at-large elections. Courts have broad discretion to "implement appropriate remedies," including requiring by-district elections. *Id.* § 14029. And because of the fee-shifting and safe-harbor provisions, plaintiffs in effect do not even have to show racially-polarized voting to radically change the electoral system. The threat suffices. Critically, no matter the remedy, it must be race-based; after all, it is impossible to remedy a violation consisting of the lack of "ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election" without considering race. In many cases, "bug-splat" racial gerrymandering might be required to remedy a CVRA violation. Indeed, the very act of requiring municipalities to alter their system of elections based only on the existence of racially-polarized voting is itself race-based.

Since the CVRA requires race-based action, it must satisfy strict scrutiny. In this regard, it suffers a worse defect than Section 2. Even assuming that preventing vote dilution might constitute a compelling interest—something that not only has this Court never held, but would also be contrary to the general rule that governments can only remedy their own intentional discrimination—the CVRA's near blanket invalidation of at-large voting schemes sweeps far

beyond Section 2's mandate. Such mandatory discriminatory action forces the government to stereotype and stigmatize individuals according to their race, and it puts the day further off when race becomes irrelevant. Certiorari is needed so this Court can enforce meaningful limits on the ability of states and localities to require race-based voting districts.

"It is a 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). By enacting the CVRA, California has supercharged that business. As the nation's most populous state, California's experimentation with the outer bounds of racial discrimination in voting is extremely consequential. Therefore, even if the Court is unwilling to reconsider its vote-dilution precedent, it should grant certiorari here to halt the expansive and discriminatory extensions of that precedent.

CONCLUSION

For these reasons, and those stated by the Petitioner, Amici respectfully request that this Court grant the petition for certiorari.

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Respectfully submitted,

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