Nos. 24-109, 24-110

IN THE

Supreme Court of the United States

LOUISIANA,

Appellant,

v.

PHILLIP CALLAIS, *et al.*,

Appellees.

PRESS ROBINSON, *et al.*,

Appellants,

v.

PHILLIP CALLAIS, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF OF PROFESSOR JAMES F. BLUMSTEIN AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS*[1]

James F. Blumstein serves as University Distinguished Professor at Vanderbilt University and Vanderbilt Law School. That is the highest title that Vanderbilt confers. Professor Blumstein teaches constitutional law and has worked in the voting rights area for over fifty years. He brought and litigated as class representative *Dunn v. Blumstein*, 405 U.S. 330 (1972), which invalidated Tennessee's one-year statewide durational residency and three-month county-based durational residency as prerequisites for voter registration. Census data showed that about 3.3% of persons moved from state to state each year, and approximately another 3.2% of persons moved from one county to another each year. That case likely enfranchised more voters than any other. With respect to the amending of Section 2 of the Voting Rights Act, Professor Blumstein was approached by representatives of Sen. Kennedy (Armand Derfner) and Sen. Hatch (Stephen Markman) to testify. He wound up supporting Sen. Hatch's position in opposition to the House-passed version of Section 2. I Voting Rights Act Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before Subcomm. on the Constitution of the S. Comm. on the Judiciary, 97th Cong. 1332 (1982) (statement of Prof. James F. Blumstein,

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1. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this Brief in whole or in part and that no entity or person, aside from *amicus curiae*, made any monetary contribution toward the preparation or submission of this Brief. Reimbursement for printing expenses will be sought from funds made available by Vanderbilt Law School to support faculty work related to faculty research and public interest activity. Such financial support does not signify a position by the University on the merits of the positions advanced in this Brief.

Vanderbilt L. Sch.). His testimony and that of others helped bring about revision in the Senate of the House-passed "results" test and the so-called Dole Compromise. He provided extensive analysis of VRA amended Section 2 in the Virginia Law Review shortly after the amendment was enacted. James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 Va. L. Rev. 633 (1983). He has explained and defended *Shaw v. Reno* and its analysis of racial gerrymandering. James F. Blumstein, *Racial Gerrymandering and Vote Dilution:* Shaw v. Reno *in Doctrinal Context*, 26 Rutgers L. J. 517 (1995). And he has sought to explain the role of the long-disregarded *Chisom v. Roemer* in analysis of VRA amended Section 2. James F. Blumstein, The Case of the Missing Case: How Neglecting Chisom v. Roemer *Leaves § 2 of the Voting Rights Act Analytically At Sea*, 66 William & Mary L. Rev. Online 35 (2024). A copy of that article is included as an Appendix to this *Amicus* Brief. Professor Blumstein believes that his experience and perspectives would be of assistance to this Court in its deliberations in this matter. *He offers this Brief in his individual professional capacity, not on behalf of any of his institutional affiliations.*

SUMMARY OF ARGUMENT

The critical question under Section 2 of the Voting Rights Act (VRA) is whether a claim of *substantive* vote dilution is freestanding, or whether it is contingent or linked to other *process-based* values as set out in amended § 2(b). Section 2(b) of the VRA links opportunity to participate in the political process and ability to elect representatives of choice; inability to elect is actionable but

only upon a finding of unequal opportunity to participate in the political process. These claims are not freestanding but are inextricably linked and form a unitary claim under § 2(b).

That interpretation of Section 2 was established in *Chisom v. Roemer*, 501 U.S. 380, 396-98 (1991), but has been neglected in subsequent claims of vote dilution under Section 2—most recently, in *Allen v. Milligan*, 599 U.S. 1 (2023) (and in this litigation). Under *Chisom*, a claim of vote dilution does not rest on a freestanding, substantive principle of race-based entitlements, which would be constitutionally problematic (and was disavowed by civil rights advocates during the debates in 1982 surrounding amending Section 2); under *Chisom*, such a vote dilution claim depends on a process-focused core value. Only if plaintiffs can carry the burden of establishing a lack of evenhanded opportunity to participate in the political process—that members of a racial minority "have less opportunity to participate in the political process" (52 U.S.C. § 10301(b))—may a court consider the question of vote dilution—whether, under the totality of circumstances, the race-based deficiencies in the opportunity to participate in the political process brought about an inability to elect representatives of choice.

There is a causal relationship between the "equality of opportunity" aspect of amended Section 2 and the "electoral success" aspect. "[T]he ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." Johnson v. DeGrandy, 512 U.S. 997, 1014, n. 11 (1994). As this Court has held, a prerequisite (a "key requirement") for finding a violation of § 2 is that "the

political processes leading to nomination and election . . . must be 'equally open' to minority and non-minority groups alike." *Brnovich v. Democratic National Comm.*, 594 U.S. 647, 667 (2021). The "touchstone" of VRA Section 2 is "equal openness." *Id.* at 668. See *id.* at 691, Kagan, J., dissenting (Justice Kagan echoed the importance, even the centrality, of the "right to an equal opportunity to vote").

The concepts of "open[ness]" and "opportunity connote the absence of obstacles and burdens that block or seriously hinder voting." *Id.* at 669. The term "open" means, as this Court has held, that the political process must be "without restrictions as to who may participate." *Id.* at 669 (internal cite omitted). Openness and opportunity are process-oriented norms. Under amended Section 2, substantive outcomes do not determine whether the political processes are "equally open," irrespective of race.

Neglecting the impact of *Chisom* has put the "results" analysis of amended Section 2 analytically at sea and runs the risk of developing a substantive, race-based benchmark. Such a benchmark risks running afoul of the constitutional race-discrimination cases and of the enforcement-clause cases as they would be substantive and not remedial as required by *City of Boerne v. Flores*, 521 U.S. 507 (1997). The doctrine of constitutional avoidance, *NFIB v. Sebelius*, 567 U.S. 519, 574 (2012) "(W]e have a duty to construe a statute to save it"), counsels against an interpretation that could jeopardize the constitutionality of amended Section 2, especially when that risky interpretation runs afoul of the already-existing analysis of *Chisom*.

In sum, under *Chisom*, the "missing case," VRA Section 2 applies to vote dilution considerations, but

not in a freestanding manner—only (i) when there is race discrimination that creates a lack of evenhanded opportunity for members of a racial minority group to participate in the political process and (ii) that lack of equal access results in a form of cognizable vote dilution. The burden of establishing these elements rests with challengers. This Court should use this case as a vehicle to (i) reaffirm the analysis in *Chisom*, (ii) vacate previous orders in this case that have found a violation of VRA Section 2, (iii) void legislation enacted under the compulsion of court mandate so as to comply with an erroneous interpretation of VRA section 2 not in sync with *Chisom*, and (iv) remand for factfinding in accord with the analysis of *Chisom*. Unless and until a proper finding of a violation of Section 2 occurs, the original challenged districting legislation should remain in effect.

ARGUMENT

I. Introduction and Overview

In the pending Louisiana Voting Rights Act (VRA) cases (Section 2), *Louisiana v. Callais*, No. 24-109, and *Robinson v. Callais*, No. 24-110, the critical question under the Voting Rights Act (VRA) in my judgment is "whether a claim of *substantive* vote dilution is freestanding, or whether it is contingent or linked to other *process-based* values as set out in amended § 2(b)."[2] My conclusion is that "[s]ection 2(b) [of the VRA) links opportunity to

2. James F. Blumstein, The Case of the Missing Case: How Neglecting Chisom v. Roemer *Leaves § 2 of the Voting Rights Act Analytically At Sea*, 66 William & Mary L. Rev. Online 35, 38 (2024) (emphasis in original) [hereinafter cited as "Missing Case"). That article is attached as an Appendix to this Amicus Brief.

participate in the political process and ability to elect representatives of choice; inability to elect is actionable but only upon a finding of unequal opportunity to participate in the political process. These claims are not freestanding but are 'inextricably linked' and form a 'unitary' claim under § 2(b)."[3]

That interpretation of Section 2 was established in *Chisom v. Roemer*[4] but has been neglected in subsequent claims of vote dilution under Section 2—most recently, in *Allen v. Milligan*.[5] The same is true in the pending Louisiana litigation.

Under *Chisom*, a claim of vote dilution does not rest on a freestanding, substantive principle of race-based entitlements, which would be constitutionally problematic (and was disavowed by civil rights advocates during the debates in 1982 surrounding amending Section 2);[6] such a vote dilution claim under *Chisom* "depends on a process-focused core value."[7] Only if plaintiffs can carry the burden of establishing a lack of evenhanded opportunity to participate in the political process—that members of

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3. *Id.* at note 25. See Chisom v. Roemer, 501 U.S. 380, 397-98 (1991).

4. 501 U.S. at 396-98. See Missing Case at 43 ("Chisom rejects a freestanding, independent claim to vote dilution under revised VRA § 2.")

5. 599 U.S. 1 (2023). See Missing Case at 35—36, 45 ("The *Allen* decision unexplainably does not consider the effect of *Chisom*" on analysis of vote dilution claims under Section 2).

6. Missing Case at 41 & note 45.

7. *Id.* at 46.

a racial minority "have less opportunity to participate in the political process"[8]—may a court consider the question of vote dilution—"whether, under the totality of circumstances, the race-based deficiencies in the opportunity to participate in the political process brought about an inability to elect representatives of choice."[9]

There is a causal relationship between the "equality of opportunity" aspect of amended Section 2 and the "electoral success" aspect.[10] "[T]he ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race."[11] As this Court has held, a prerequisite (a "key requirement") for finding a violation of § 2 is that "the political processes leading to nomination and election . . . must be 'equally open' to minority and non-minority groups alike."[12] The "touchstone" of VRA Section 2 is "equal openness."[13]

The concepts of "open[ness]" and "opportunity connote the absence of obstacles and burdens that block

8. 52 U.S.C. § 10301(b)

9. Missing Case at 46.

10. James F. Blumstein, R*acial Gerrymandering and Vote Dilution:* Shaw v. Reno *in Doctrinal Context*, 26 RUTGERS L. J. 517, 572 (1995) [hereinafter Blumstein Rutgers].

11. Johnson v. DeGrandy, 512 U.S. 997, 1014, n. 11 (1994).

12. Brnovich v. Democratic National Comm., 594 U.S. 647, 667 (2021).

13. *Id.* at 668. See *id.* at 691, Kagan, J., dissenting (Justice Kagan echoed the importance, even the centrality, of the "right to an equal opportunity to vote").

or seriously hinder voting."[14] The term "open" means, as this Court has held, that the political process must be "without restrictions as to who may participate."[15] Openness and opportunity are process-oriented norms. Under amended Section 2, "[s]ubstantive outcomes do not determine 'whether the political processes are equally open,' irrespective of race."[16]

Neglecting the impact of *Chisom* puts the "results" analysis of amended Section 2 analytically at sea[17] and runs the risk of "developing a substantive, race-based benchmark."[18] Such a benchmark risks running afoul of the constitutional race-discrimination cases and of the enforcement-clause cases as they would be substantive and not remedial as required by *City of Boerne v. Flores*.[19] The

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14. 594 U.S. at 669.

15. *Id.* at 667 (internal cite omitted).

16. Blumstein Rutgers at 573 (citing *DeGrandy*,512 U.S. at 1018).

17. *Id.* at 41("In the absence of some benchmark as a core value, a results test [such as that in amended Section 2 of the VRA] is analytically at sea"). A "results" test "draws no bottom line. It requires the consideration of a laundry list of factors, but it never orients the inquiry. It demands a balance but it provides no scale." James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 Va. L. Rev. 633, 644-45 (1983) [hereinafter Blumstein Virginia].

18. Missing Case at 44.

19. 521 U.S. 507 (1997); Civil Rights Cases, 109 U.S. 3 (1883); United States v. Morrison, 529 U.S. 598 (2000).

doctrine of constitutional avoidance[20] counsels against an interpretation that could jeopardize the constitutionality of amended Section 2, especially when that risky interpretation runs afoul of the already-existing analysis of *Chisom*.

II. Vote Dilution and Race Discrimination

This Court has recognized that the concepts of race discrimination, even in the context of voting, and vote dilution are analytically distinct[21]

In *Baker v. Carr*,[22] this Court held that legislative apportionment matters were justiciable under Equal Protection. While the Court stated that standards under equal protection existed, it did not articulate a standard. That led the dissenters (per Justices Frankfurter and Harlan) to complain that the claim of vote dilution required a normative benchmark, and such was not readily available or up to courts to establish. As Justice Frankfurter noted, the concept of vote "dilution" or "debasement" was "circular talk."[23] Dilution only makes sense if there is a normative standard that sets the benchmark. "[O]ne cannot sensibly think about whether something is 'diluted'

20. NFIB v. Sebelius, 567 U.S. 519, 574 (2012) ("[W]e have a duty to construe a statute to save it.").

21. Shaw v. Reno, 509 U.S. 630, 643 (1993). See Blumstein Rutgers at 527-33.

22. 369 U.S. 186 (1962).

23. *Id.* at 300, Frankfurter, J., dissenting ("One cannot speak of 'debasement' or 'dilution' until there is first defined a standard of reference as to what a vote should be worth").

unless one has a benchmark of what an undiluted outcome would be. In every-day terms, it would be impossible to know what it means to serve 'watered down' beer without having an understanding (a benchmark) of what non-watered-down beer would be."[24]

In the wake of *Baker v. Carr*, this Court quickly moved in *Reynolds v. Sims*[25] to adopt a normative constitutional standard for legislative apportionment—population equality or one-person, one-vote. Equal population per district is a quantitative standard, and violation can be established by focusing on outcomes or results; deviation from equal population establishes a violation once equal population is established as the quantitative requirement—the normative benchmark.

Reynolds suggested in dictum that, in addition to a quantitative requirement of equal population, there was a constitutional qualitative standard of "fair and effective representation."[26] Qualitative vote dilution was conceived

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24. The Missing Case at 39. *Cf.* Reno v. Bossier Par. Sch. Bd., 529 U.S. 471, 480 (1997)("Because the very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured, a § 2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice"); Holder v. Hall, 512 U.S. 874, 880-81 (1994)(plurality opinion) (recognizing the need for "a benchmark against which to measure the existing voting practice" and that "where there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive").

25. 377 U.S. 533 (1964).

26. *Id.* at 565.

of as "the other half of Reynolds v. Sims."[27] This Court declined to accept an argument that "[t]he mere fact that one interest group . . . has found itself outvoted and without legislative seats of its own provides [a] basis for invoking constitutional remedies where . . . there is no indication that this segment of the population is being denied access to the political system."[28] In the political vote dilution context, this Court ultimately concluded that claims of qualitative vote dilution were nonjusticiable.[29] Outside the area of quantitative vote dilution, the dissenting contentions of Justices Frankfurter and Harlan in *Baker v. Carr* prevailed so as to keep the issues of qualitative vote dilution in the political sphere, beyond the courts' authority or competence.

As a constitutional matter, claims of racial vote dilution have been treated within the framework of race discrimination. For example, in *Mobile v. Bolden*,[30] this Court applied principles from the race-discrimination cases (such as *Washington v. Davis*[31]) to constitutional claims of racial vote dilution.[32] As difficult as it is to discern qualitative standards of vote dilution in the political

27. Whitcomb v. Chavis, 403 U.S. 124, 176 (1971) (Douglas, J., dissenting).

28. *Id.* at 154-55 (1971).

29. Rucho v. Common Cause, 588 U.S. 684 708-09 (2019).

30. 446 U.S. 55 (1980) (plurality).

31. 426 U.S. 229 (1976).

32. *Mobile*, 446 U.S. at 97-101. See also Rogers v. Lodge, 458 U.S. 613 (1982) (applying race discrimination principles to claim of vote dilution).

context, developing such standards in the context of racial vote dilution is even more fraught. Implicitly or explicitly, a race-based normative benchmark is required, and since that rests on racial criteria it runs into constitutional headwinds in two ways.

(i) As a raced-based standard, it is subject to strict scrutiny; and such a standard as a substantive constitutional norm is especially problematic in a non-remedial context. A statute such as Section 2 of the VRA would likely be unconstitutional so as to invalidate it if it were interpreted to confer or create a freestanding substantive claim of racial entitlements as a normative benchmark. Such an interpretation is unwarranted under *Chisom v. Roemer*[33]; section 2 need not be invalidated but interpreted and applied consistent with *Chisom*.[34]

(ii) Under the enforcement authority of the Fourteenth Amendment (section 5) and the Fifteenth Amendment (section 2), Congress is only allowed to enact remedial legislation or legislation designed to deter unconstitutional conduct. It is not permitted to enact substantive rules not linked to violations or potential violations of court-

33. See Missing Case at 42-46.

34. See *id.* at 45, n. 71("Under *Chisom*, § 2 applies to vote dilution considerations, but not in a freestanding manner—only (i) when there is race discrimination that creates a lack of evenhanded opportunity for members of a racial minority group to participate in the political process and (ii) that lack of equal access results in a form of cognizable vote dilution").

> determined norms.[35] This Court has consistently declined to develop constitutionally-based racial benchmark norms,[36] focusing on barriers to the political process.[37] "Fair process, not fair and effective qualitative representation" has been the "core value underlying the constitutional claim."[38]

In short, this Court has channeled constitutional racial vote dilution claims into analysis under the doctrine of race discrimination.[39] A freestanding principle of racial vote dilution under VRA Section 2 would extend beyond any principle of race discrimination as established in *Mobile* and other cases. Accordingly, such an interpretation of Section 2 cannot be seen as remedial or linked to a potential violation of equal protection, but as establishing a substantive claim. That exceeds Congress' authority under its Fourteenth or Fifteenth Amendment enforcement powers.

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35. City of Boerne v. Flores, 521 U.S. 507 (1997).

36. Whitcomb v. Chavis, 403 U.S. 124 (1971)

37. *Id.* at 154-55; White v. Regester, 412 U.S. 755 (1973)

38. Blumstein Virginia at 671. See Rogers v. Lodge, 458 U.S. 613, 616 (1982) (applying race discrimination principles in context of purported racial vote dilution).

39. The constitutional focus "turned away from developing a race-based theory of representation to assuring that 'racial . . . groups [are] not . . . denied the franchise or precluded from entering into the political process in a reliable and meaningful manner.' Washington v. Seattle School Dist. No. 1, [458 U.S. 457, 466]1982)." Blumstein Virginia at 672, n.179.

III. VRA Section 2 As Amended

Mobile v. Bolden made clear that this Court would invalidate only acts of racial discrimination; it would not develop (and has not developed) any substantive or qualitative constitutional notion of fair and effective representation—in either the political or racial context. "After *Bolden*, the construction of the Voting Rights Act was in accord with the substantive and remedial standards applied in constitutional race discrimination cases."[40]

Mobile v. Bolden "[t]ouch[ed] off a furor in voting circles."[41] Other provisions of the VRA were set to expire in 1982, and that provided an occasion to review Section 2 in light of *Bolden*.

The House went first and proposed to substitute a "results" or effects test to replace the "purpose" or "intent" test applied in *Bolden*. The House Report contended that an effects test should be used in Section 2 because "[d]iscriminatory purpose is frequently masked and concealed."[42] A search for discriminatory purpose may be "futile" and may allow too much actual discrimination to go undetected.[43] The "results" test was advocated as a pragmatic preemptive strike against purposeful discrimination.

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40. *Id.* at 689.

41. *Id.* at 674.

42. H.R. Rep. No. 227, 97th Cong., 2d Sess. at 29 (1982) [hereinafter House Report].

43. Blumstein Virginia at 689.

But the House version was much more far-reaching. It did not "merely attempt to ease the difficulties of proving 'intent.'"[44] The House Report stated that discriminatory purpose would be "irrelevant" (not just hard to prove) to the question of whether election practices resulted in "discrimination."[45] "A careful reading of the Report reveal[ed] that it was concerned with affirmative principles of representational equity."[46]

The House version had unacceptable and far-reaching implications, which led me to state the following in an opinion piece in the Wall Street Journal: "It was not a stiff dose of medicine designed to restore a sick law to health but more like a sex-change operation intended to alter fundamentally the nature of the law itself."[47] The House's version was a "radically new interpretation of section 2" and "could not reasonably be justified as necessary to enforce the principle of racial nondiscrimination," the constitutional standard.[48]

Having been approached by Armand Derfner of Sen. Kennedy's staff (favoring the House version) and Stephen Markman (later Justice Markman of the Michigan Supreme Court and then chief counsel to Sen. Hatch's subcommittee on the constitution who opposed the House

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44. Blumstein Virginia at 691.

45. House Report at 29.

46. Blumstein Virginia at 691.

47. Blumstein, Minority Voting Rights and Voting, Wall St. J., May 27, 1982, at 28, col. 3.

48. Blumstein Virginia at 691-92.

version), I agreed to testify in the Senate hearings against the House version.[49]

The result of my testimony and that of others, and the hard work of Mr. Markman and Sen. Hatch, was that the Subcommittee on the Constitution declined to accept the House's version of a "results" test.[50] Sen. Hatch expressed concern that the House version of the "results" test would change the analytical focus from "equal *access* to registration and the ballot" to "equal *outcome* in the electoral process."[51] The Hatch Subcommittee Report stated that the House's version of a "results test has absolutely no coherence or understandable meaning." It either establishes a baseline of proportional representation, which advocates repudiated, or it "devolves into . . . an amorphous ad hoc review process" such that nobody was able to articulate a "clear standard."[52]

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49. I Voting Rights Act Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 97th Cong. 1332, 1336 (1982) (statement of Prof. James F. Blumstein, Vanderbilt L. Sch.) (noting that the problem with the House's proposed substantive results or effects test "is that it does not make any theoretical sense unless you assume affirmative entitlements based upon race").

50. Blumstein Virginia at 692-93.

51. Report of the Committee on the Judiciary, S. Rep. No. 417, 97th Cong. 2d Sess. at 94 (1982) (emphasis in original) (additional views of Sen. Hatch), reprinted in 1982 U.S. Code Cong & Ad. News 177 (hereinafter Senate Report)

52. Staff of Subcomm on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess., Report on S. 1992, at 30 [Comm Print 1982] (hereinafter Subcommittee Report)

Supporters of the House version did not have the votes to pass the House version.[53] Senator Dole took on the role of forging a compromise,[54] embraced as Section 2(b) of the VRA—the Dole Compromise.[55] The "deal" that sealed the Dole Compromise was that it focused analysis under amended Section 2 on racial nondiscrimination regarding individual voters and access to and participation in the political process, not electoral outcomes.[56] In essence, the Dole Compromise rejected a "freestanding vote dilution claim."[57]

Senator Dole "addressed the issue directly, not mincing words:"[58] "By the expression of entitlement to 'elect representatives of their choice,' the amendment provides . . . that members of minority groups have a right to register, vote, and to have their vote fairly counted. There is no guarantee of success: Just an equal opportunity to participate."[59] In a public mark-up session, Senator Dole reassured "results" skeptics (I was one,

53. Brnovich, 594 U.S. at 667; Blumstein Virginia at 694 and note 305.

54. Missing Case at 39 and note 36.

55. 52 U.S.C. § 10301(b).

56. The Dole Compromise "was developed and adopted to respond to criticisms and concerns" that the House version of a results test "does not make any theoretical sense unless you assume affirmative entitlements based on race." Missing Case at 39-40, n.38 (internal cites omitted).

57. *Id.* at 39.

58. *Id.*

59. 128 Cong. Rec. 14316 (1982) (Statement of Sen. Robert Dole)

having presented testimony to that effect) that revised Section 2 retained the Voting Rights Act's focus on discrimination against the rights of individuals to vote.[60]

In the Senate debate, Senator Dole was "asked if revised Section 2 dealt with equal access to the voting process or with election results."[61] His response was definitive: "The focus in section 2 is on equal access, as it should be. . . . It is not a right to elect someone of their race but it is equal access and having their vote counted."[62] As represented by Senator Dole, "the essence of the Dole compromise was to draw a basic distinction between the issue of access to the political process and election results."[63] In other words, amended Section 2 "is process-based, not outcome-oriented, at least as a freestanding matter."[64] Amended Section 2 "retained the focus on nondiscrimination against individuals, 'on access to the process not on group entitlements to representation based on race.'"[65] As summed up by Senator Dole, the issue under amended Section 2 is "whether or not minorities have 'equal access' to the political process" and "'[e]qual access' does not imply any right among minority groups to be elected in particular proportions.'"[66] The lack of a right to

60. Missing Case at 39-40 & note 39.

61. Blumstein Rutgers at 568.

62. 128 Cong. Rec. 14133 (1982) (Statement of Sen. Robert Dole)

63. *Id.* at 14317 (Statement of Sen. Robert Dole).

64. Missing Case at 40.

65. *Id.* (internal cites omitted).

66. 128 Cong. Rec. 14316 (1982) (Statement of Sen. Robert Dole)

proportional representation was expressly included in the statutory language of the Dole Compromise: "[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."[67]

IV. *Chisom v. Roemer*

Under amended VRA Section 2(a), no voting practice or procedure shall be imposed or applied "in a manner which results in a denial or abridgement of the right to vote of any citizen of the United Sates."[68] Under Section 2(b), the Dole Compromise, a violation of Section 2(a) "is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members [of a protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and[69] to elect representatives of their choice."[70]

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67. 52 U.S.C. § 10301(b). Subsequently, this Court rejected the benchmark that the political influence of black voters should be maximized (the "Max Black" principle). Johnson v. DeGrandy, 512 US. 997, 1016-17 (1994).

68. 52 U.S.C. § 10301(a).

69. In her dissent in *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 704 (2021), "Justice Kagan erroneously uses the term 'or' instead of 'and,' which is the statutory term, in relating the two pivotal provisions." Missing Case at 38, n. 30. See Chisom v. Roemer, 501 U.S. 380, 397 (1991) ("It would distort the plain meaning of the sentence to substitute the word 'or' for the word 'and.'").

70. 52 U.S.C. § 10301(b).

In *Thornburg v. Gingles*,[71] this Court's first case to interpret amended Section 2 of the VRA, this Court held that Section 2 recognizes a claim of vote dilution. A violation of Section 2 occurs where, under the totality of circumstances, an "electoral structure operates to minimize or cancel out [minority voters'] ability to elect their preferred candidates."[72] The vote dilution claim relies on the "elect representatives of their choice" provision of Section 2(b).[73]

Gingles treated the "totality of circumstances" analysis as a factual matter, subject to review under the typical "clearly erroneous" deference to trial court factfinding.[74] There is very little substantive analysis of the underlying "totality of circumstances" or vote dilution doctrine in *Gingles*. And "*Gingles* does not address or answer the critical question—whether a claim of *substantive* vote dilution is freestanding, or whether it is contingent on or linked to other process-based values as set out in amended § 2(b)."[75]

The key question, then, is the relationship between the two core provisions in Section 2 and the twin requirements

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71. 478 U.S. 30 (1986).

72. *Id.* at 48.

73. See Chisom v. Roemer, 501 U.S. 380, 407-08 (1991) (Scalia, J., dissenting).

74. 478 U.S. at 79; see also League of United Latin Am. Citizens (LULAC) v. Perry, 548 U.S. 399, 427 (2006) ("The District Court's determination whether the § 2 requirements are satisfied must be upheld unless clearly erroneous.").

75. Missing Case at 38 (emphasis in original).

for establishing a violation of Section 2: (1) that members of a racial minority "have less opportunity than other members of the electorate to participate in the political process" and (2) that members of a racial minority have less ability "to elect representatives of their choice." Is each provision and requirement separate and distinct? Or are they linked and therefore interdependent?

Chisom addressed and resolved that issue, rejecting the freestanding vote dilution approach.

Chisom concerned the question whether Section 2 of the VRA applied to judicial elections. The lower court construed Section 2 as providing "two distinct types of protection for minority voters—it protects their opportunity 'to participate in the political process' and their opportunity to 'elect representatives of their choice.'"[76] Since judges are not "representatives," VRA Section 2 did not apply to a freestanding vote dilution claim.[77]

This Court rejected the position of the lower court. It held that Section 2 embraces a "unitary claim,"[78] not "two separate and distinct rights."[79] The "opportunity to participate and the opportunity to elect" are "inextricably linked";[80] they cannot "be bifurcated into two kinds of

76. Chisom, 501 U.S. at 396 (quoting LULAC v. Clements, 914 F.2d 620, 625 (5th Cir. 1990)).

77. *Id.*

78. *Id.* at 398.

79. *Id.* at 397.

80. *Id.*

claims."[81] The "inability to elect" component, upon which vote dilution claims rest, "is not sufficient to establish a violation [of Section 2] unless, under the totality of circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process."[82] Equal access to and equal participation in the political process are critical components to any claim under amended Section 2, which "does not separate vote dilution challenges from other challenges brought under the amended § 2."[83]

Chisom, thus, rejects a freestanding, independent claim of vote dilution under amended VRA Section 2. Under *Chisom*, "Section 2 is violated only if there is racial inequality in terms of opportunity to participate in the political process and that foreclosure of opportunity results in (proximately causes) an inability to elect representatives of one's choice."[84]

Chisom also explains that "[a]ny abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election."[85] So, where there is an abridgment of the opportunity to participate, where

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81. Hous. Laws.' Ass'n v. Att'y Gen of Tex., 501 U.S. 419, 425 (1991).

82. Chisom, 501 U.S. at 397. *See also* Whitcomb v. Chavis, 403 U.S. 124, 153-55 (1971)(focusing on the opportunity to participate in the political process, not on substantive outcomes).

83. Hous. Laws.' Ass'n, 501 U.S. at 427.

84. Blumstein Rutgers at 575.

85. Chisom, 501 U.S. at 397.

members of a minority group are fenced out the political process (as in *White v. Regester*), there could be an adverse effect on the ability of minority voters to elect their choice of candidates in an election.[86] But for purposes of VRA Section 2, impairment to the ability to participate in the democratic process is a prerequisite to making a successful claim. "This point was . . . reinforced by the Court in the *Brnovich* case, by both the majority opinion and Justice Kagan's dissent."[87]

Presaging the approach adopted in *Chisom*, this is how analysis under VRA Section 2 works:"[A] plaintiff must demonstrate a causal relationship between specific 'objective' factors that evidence a faulty political process, not merely an inability to influence or win an election or an inability to elect [minority] officials."[88] "If there is a nondiscriminatory and 'open' process, then racial minorities can be expected to participate on an equal footing in the rough-and-tumble political process. Having an equal opportunity, which does not guarantee success, is all that is required by the Constitution and the VRA."[89] In the absence of a race-based lack of opportunity to participate in the political process, "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground."[90]

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86. White v. Regester, 412 U.S. 756, 768-69 (1973)(explaining that members of a minority group were effectively denied access to the political process and effectively excluded from political life).

87. Missing Case at 44 & note 64.

88. Blumstein Virginia at 704.

89. Missing Case at 44.

90. Johnson v. DeGrandy, 512 U.S. at 1020.

Under the analysis of VRA Section 2 in *Chisom*, the problem of identifying a core value and the risk of developing a substantive, race-based entitlement or normative benchmark are largely obviated. The vote dilution inquiry remains, but not as a freestanding, substantive principle, which would endanger the constitutionality of amended Section 2. Vote dilution that results from racially discriminatory lack of access to the political process is actionable, as VRA Section 2 targets race discrimination. In sum, a successful claimant "must establish that members of a racial minority 'have less opportunity than other members of the electorate to participate in the political process.' That was the 'deal' contained in the Dole Compromise"[91] and does not risk running afoul of the Constitution. Not only does it accord with precedent under *Chisom*, it is a "saving" interpretation that retains the validity of amended Section 2.

CONCLUSION

This Court should vacate all preceding final orders in this litigation, especially all orders that find a violation of VRA Section 2 and mandate a legislative remedy for a violation of VRA Section 2. In addition, this Court should void all legislation coercively enacted under judicial mandate so as to comply with judicially-determined (but erroneous) requirements of VRA Section 2. That would return matters to the *status quo ante*, before this litigation began, and would allow Louisiana to retain its initial districting legislation or, voluntarily, to enact revised legislation in the exercise of its legislative prerogatives,

91. Missing Case at 46.

uninfluenced by an erroneous judicial interpretation of VRA Section 2. That remedy would return a clean slate to Louisiana as (and if) the matter proceeds further under proper analysis consistent with *Chisom*. While vacating previous orders finding a violation of VRA Section 2 and voiding legislation enacted under judicial mandate to comply with an erroneous interpretation of VRA Section 2, this Court should remand for factfinding under VRA Section 2, consistent with *Chisom*, on (i) whether there has been race discrimination in access to the political process by minority voters and (ii) whether that lack of equal access, if established by plaintiffs, brought about an inability of minority voters to elect representatives of their choice under the totality of circumstances. The constitutional issues, therefore, should be held in abeyance.

Respectfully submitted,

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APPENDIX

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WILLIAM & MARY LAW REVIEW ONLINE

VOLUME 66 NO. 2, 2024

THE CASE OF THE MISSING CASE: HOW NEGLECTING *CHISOM V. ROEMER* LEAVES § 2 OF THE VOTING RIGHTS ACT ANALYTICALLY AT SEA

JAMES F. BLUMSTEIN*

In its June 2023 decision involving § 2 of the Voting Rights Act (VRA), *Allen v. Milligan*,[1] the Supreme Court upheld a district court's preliminary injunction that invalidated Alabama's congressional districting plan. The Supreme Court held that the district court "faithfully applied our precedents and correctly determined that, under existing law, [the Alabama congressional districting plan] violated § 2."[2] The Court ordered an additional majority-minority district, based on a theory of vote dilution.[3]

* University Distinguished Professor of Constitutional Law and Health Law and Policy, Vanderbilt Law School/Vanderbilt Medical School. The excellent research support of Will Winter, Vanderbilt Law School Class of 2023, and Kathleen Porter, Vanderbilt Law School Class of 2024, is gratefully acknowledged.

1. 143 S. Ct. 1487, 1498 (2023).

2. *Id.* at 1506.

3. *See id.* at 1502-03, 1506.

Appendix

In his opinion for the Court, Chief Justice Roberts asserted that the litigation was "not about the law as it exists," but "about Alabama's attempt to remake our § 2 jurisprudence anew."[4] And, relying on "statutory *stare decisis*,"[5] the Court "decline[d] to recast . . . § 2 case law."[6] The Court labeled its decision "a faithful application of our precedents" and discounted concerns that its decision "impermissibly elevate[d] race in the allocation of political power."[7]

The case to which the Court in *Allen* pledged allegiance was *Thornburg v. Gingles*,[8] the first Supreme Court case to interpret the 1982 amendment to § 2 of the VRA.[9] Amended § 2(a) bars the imposition of any "standard, practice, or procedure" that "results in a denial or abridgement of the right . . . to vote."[10] Although the

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4. *Id.* at 1506.

5. *Id.* at 1515.

6. *Id.* at 1507.

7. *Id.* at 1517. For an explanation that *Allen* did not require the remaking of Voting Rights Act § 2 jurisprudence, see *infra* note 71.

8. 478 U.S. 30 (1986).

9. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2333 (2021) ("This Court first construed the amended § 2 in *Thornburg v. Gingles*, [a] vote-dilution case" (citation omitted)). For an extensive discussion of amended § 2 of the VRA, see James. F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 Va. L. Rev. 633 (1983).

10. 52 U.S.C. § 10301(a). The way 52 U.S.C. § 10301 spells "abridgement" differs from the Supreme Court's spelling,

term "vote dilution" does not appear in § 2, the Court in *Gingles* held that § 2 applied to substantive claims of vote dilution.[11]

Amended § 2(b) explains a "denial or abridgment has occurred . . . when, 'based on the totality of circumstances,' a State's electoral system is 'not equally open' to members of a racial group."[12] And, under § 2(b), a system is not equally open if members of one race "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[13] Plaintiffs[14] must demonstrate that electoral "devices result in unequal access to the electoral process."[15] *Gingles* relied on the "elect representatives of their choice" provision of § 2(b) to hold that § 2 is violated under a vote

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"abridgment", in *Brnovich* and Chisom v. Roemer. *See infra* text accompanying notes 12 and 62. Merriam-Webster dictionary treats them as alternative spellings. *Abridgment*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/abridgment [https://perma.cc/M6ZC-9EYN].

11. 478 U.S. at 74-79.

12. *Brnovich*, 141 S. Ct. at 2358 (Kagan, J., dissenting) (quoting 52 U.S.C. § 10301(b)).

13. 52 U.S.C. § 10301(b).

14. *See* Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1216 (8th Cir. 2023) (holding that there is no private remedy to enforce § 2 of the Voting Rights Act).

15. *Gingles*, 478 U.S. at 46.

dilution theory[16] where an "electoral structure operates to minimize or cancel out [minority voters'] ability to elect their preferred candidates."[17]

Under *Gingles*, there are three prerequisites or thresholds that a plaintiff must establish in order to make out a claim (in other words, there must be a large, geographically compact, politically cohesive minority community faced with racially polarized voting challenges).[18] Once the threshold prerequisites are established, the analysis turns to the actual application of amended § 2 to determine, under the totality of circumstances, "whether the political process is equally open to minority voters."[19]

The Court in *Gingles* treated this "totality of circumstances" analysis as a factual matter[20] and affirmed

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16. *See* Chisom v. Roemer, 501 U.S. 380, 407-08 (1991) (Scalia, J., dissenting).

17. *Gingles*, 478 U.S. at 48.

18. Cooper v. Harris, 581 U.S. 285, 301-02 (2017).

19. Wis. Legislature v. Wis. Elections Comm'n, 142 S. Ct. 1245, 1248 (2022) (per curiam) (quoting *Gingles*, 478 U.S. at 79).

20. *Gingles*, 478 U.S. at 79. VRA § 2(b) was derived from White v. Regester. 412 U.S. 755 (1973). In this case minority communities, Black and Hispanic, were foreclosed from participation in the political process and were thereby deprived of an opportunity to elect their representatives of choice. *Id.* at 765-70; *see* Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 Wash. & Lee L. Rev. 1347,

the trial court under typical "clearly-erroneous" deference to trial court factfinding.[21] There is very little substantive analysis of the underlying "totality of circumstances" doctrine in *Gingles*.[22] And much of the case law post-*Gingles*, including in the recent Alabama case (*Allen*), has focused on the *Gingles* threshold preconditions[23] and whether or how they apply in certain circumstances—for example, whether they apply to single-member districts, not just multi-member districts.[24]

But *Gingles* does not address or answer the critical question—whether a claim of *substantive* vote dilution is freestanding, or whether it is contingent on or linked to

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1418 (1973) (noting § 2(b) "carried forth the *White v. Regester* test"); *see also Chisom*, 504 U.S. at 397 (holding amended § 2(b) is "patterned after the language used ... in *White v. Regester* and *Whitcomb v. Chavis*" (citations omitted)); Allen v. Milligan, 143 S. Ct. 1487, 1500 (2023) (observing § 2(b) "borrowed language from ... *White v. Regester*").

21. *Gingles*, 478 U.S. at 79; *see also* League of United Latin Am. Citizens (*LULAC*) v. Perry, 548 U.S. 399, 427 (2006) ("The District Court's determination whether the § 2 requirements are satisfied must be upheld unless clearly erroneous.").

22. *Cf. Allen*, 143. S. Ct. at 1532 (Thomas, J., dissenting) ("[The Court has] never succeeded in translating the *Gingles* framework into an objective and workable method of identifying the undiluted benchmark.").

23. *Id.* at 1504-06.

24. *See* Growe v. Emison, 507 U.S. 25, 26 (1993) (holding that the *Gingles* prerequisites apply to vote dilution challenges to single-member districts); *see also* Abbott v. Perez, 138 S. Ct. 2305, 2330-34 (2018) (focusing on the *Gingles* pre-conditions).

other *process-based* values as set out in amended § 2(b).[25] As explained in § 2(b), the critical focus of § 2 is that a prerequisite (a "key requirement") for finding a violation of VRA § 2 is that "the political processes leading to nomination and election ... must be 'equally open' to minority and non-minority groups alike."[26] As the Court held in *Brnovich v. Democratic National Committee*, the term "open" means that the political process must be "without restrictions as to who may participate."[27] Justice Kagan's dissent in *Brnovich* echoed the importance—even

25. In *Allen v. Milligan*, for example, plaintiffs' claims were expressed in what appears to be a freestanding form: "Black voters have less opportunity than other Alabamians to elect candidates of their choice to Congress." Singleton v. Merrill, 582 F. Supp. 3d 924, 936 (N.D. Ala. 2022). That formulation does not address the pivotal question and even camouflages it by suggesting that § 2 looks to substantive outcomes instead of lack of equal access to the political process that can cause adverse substantive outcomes such as vote dilution. The plaintiffs' formulation derives from *Abbott*. 138 S. Ct. at 2315. The formulation in *Abbott* derives from *LULAC*, which stated the issue under the totality of circumstances analysis as "whether members of a racial group have less opportunity than do other members of the electorate." *LULAC*, 548 U.S. at 425-26. Section 2(b) links opportunity to participate in the political process and ability to elect representatives of choice; inability to elect is actionable but only upon a finding of unequal opportunity to participate in the political process. These claims are not freestanding but are "inextricably linked" and form a "unitary" claim under § 2(b). *See* Chisom v. Roemer, 501 U.S. 380, 397-98 (1991).

26. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2337 (2021).

27. *Id.* (internal citations omitted).

the centrality—of "the right to an equal opportunity to vote."[28]

This raises the question of the relationship between the two critical provisions in § 2(b) and the twin requirements for establishing a violation of § 2: (1) that members of a racial minority "have less opportunity than other members of the electorate to participate in the political process;"[29] *and*[30] (2) that members of a racial minority have less ability "to elect representatives of their choice."[31] Is each provision and requirement separate and distinct? Or are they linked and therefore interdependent?

If the ability "to elect representatives of ... choice" provision, which undergirds the vote dilution claim,[32] is freestanding, then some core value (otherwise undefined) must inform the meaning of the vote dilution concept.[33]

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28. *Id.* at 2351 (Kagan, J., dissenting).

29. 52 U.S.C. § 10301(b).

30. In her *Brnovich* dissent, Justice Kagan erroneously uses the term "or" instead of "and," which is the statutory term, in relating the two pivotal provisions. *See Brnovich*, 141 S. Ct. at 2358; *see also* Chisom v. Roemer, 501 U.S. 380, 397 (1991) ("It would distort the plain meaning of the sentence to substitute the word 'or' for the word 'and.'").

31. 52 U.S.C. § 10301(b).

32. *See supra* note 16 and accompanying text.

33. Staff of S. Subcomm. on Const. to S. Comm. on the Judiciary, 97th Cong., Rep. on S. 1992 30 (Comm. Print 1982) (highlighting the problem with a results test, as was present in the House version of amended § 2, by explaining, "[t]here is no 'core value' under the results test except for the value of equal

After all, one cannot sensibly think about whether something is "diluted" unless one has a benchmark of what an undiluted outcome would be.[34] In every-day terms, it would be impossible to know what it means to serve "watered down" (or diluted) beer without having an understanding (a benchmark) of what non-watered-down beer would be.[35]

The legislative history of § 2's amendment illustrates the concerns about a freestanding vote dilution claim. Disagreement over legislating a benchmark became so pointed that it ultimately earned its own title—the Dole Compromise.[36] Senator Robert Dole, the namesake of the saga, addressed the issue directly, not mincing words: "By

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electoral results for defined minority groups, or proportional representation. There is no other ultimate or threshold criterion by which a factfinder can evaluate the evidence before it").

34. *See, e.g.*, Holder v. Hall, 512 U.S. 874, 880-81 (1994) (plurality opinion) (recognizing the need for "a benchmark against which to measure the existing voting practice" and that "where there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under § 2").

35. *See* Reno v. Bossier Par. Sch. Bd., 520 U.S, 471, 480 (1997) ("Because the very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured, a § 2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice.").

36. James F. Blumstein, *Racial Gerrymandering and Vote Dilution:* Shaw v. Reno *in Doctrinal Context*, 26 Rutgers L.J. 518, 566 (1995).

the expression of an entitlement to 'elect representatives of their choice,' the amendment provides ... that members of minority groups have a right to register, vote, and to have their vote fairly counted. There is no guarantee of success: Just an equal opportunity to participate."[37] In a public mark-up session, Senator Dole reassured "results" skeptics[38] "that revised Section 2 retained the Voting

37. 128 CONG. REC. 14316 (1982) (STATEMENT OF SEN. ROBERT DOLE).

38. *1 Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong. 1332, 1336 (1982) [hereinafter *Blumstein Testimony*] (statement of Prof. James F. Blumstein, Vanderbilt L. Sch.) (noting that the problem with the House's proposed substantive results or effects test "is that it does not make any theoretical sense unless you assume affirmative entitlements based upon race"); *see* Boyd & Markman, *supra* note 20, at 1399 n.255 ("In the view of most critics of the proposed 'results' test, no alternative standard—except for proportional representation—made sense in the context of § 2. In their view, no alternative standard exists short of comparing actual representation of minorities to the representation that they would be ideally 'entitled' under a structure of proportional representation." (citation omitted)). The Dole Compromise (§ 2(b)) was developed and adopted to respond to these criticisms and concerns. *See id.* at 1414-20. I had expressed this set of concerns in testimony that I presented to the Subcommittee: "A substantive effects standard must imply either no theory at all or an underlying theory of some affirmative, race-based entitlements." The opposition to the "purpose" or "intent" standard derived not from a commitment to race-based entitlements but "really comes on the

Rights Act's focus on discrimination against the rights of individuals to vote."[39]

Senator Dole maintained this clear position when the amendment reached the Senate floor. He was "asked if revised Section 2 dealt with equal access to the voting process or with election results."[40] Senator Dole's response was definitive: "The focus in section 2 is on equal access, as it should be. It is not a right to elect someone of their race but it is equal access and having their vote counted."[41] As Senator Dole stated, "the essence of the Dole compromise was to draw a basic distinction between the issue of access to the political process and election results."[42]

In other words, amended § 2 is process-based, not outcome-oriented, at least as a freestanding matter. After revision, § 2 still retained the focus on nondiscrimination against individuals, "on access to the process not on group entitlements to representation based on race."[43] The issue

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basis of pragmatism, that is, the problem of proof." *Blumstein Testimony, supra*, at 1332-33.

39. Blumstein, *supra* note 36, at 568; *see* LULAC v. Perry, 548 U.S. 399, 437 (2006) ("[T]he right to an undiluted vote does not belong to the 'minority as a group,' but rather to 'its individual members.'" (quoting Shaw v. Hunt, 517 U.S. 899, 917 (1996))).

40. Blumstein, *supra* note 36, at 568.

41. 128 Cong. Rec. 14133 (1982) (statement of Sen. Robert Dole).

42. *Id.* at 14317 (statement of Sen. Robert Dole).

43. Blumstein, *supra* note 36, at 568.

under revised § 2 is "whether or not minorities have 'equal access' to the political process," and "'[e]qual access' does not imply any right among minority groups to be elected in particular proportions: It does not imply a right to proportional representation of any kind."[44]

The text of § 2(b) reflects disconcertment with using outcomes as a freestanding basis for VRA liability under § 2. As part of the Dole Compromise, § 2(b) itself specifically stated that a natural bench-mark, racial proportionality, would be disavowed: "[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."[45] Not only Congress, but the Supreme Court itself has also shown squeamishness in the face of racial proportionality tests, having rejected maximization of the political influence of Black voters (so-called Max Black) as a benchmark in *Johnson v. De Grandy*.[46]

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44. 128 Cong. Rec. 14316 (1982) (statement of Sen. Robert Dole).

45. 52 U.S.C. § 10301(b). In my testimony, I was skeptical that a statutory disclaimer, such as a proposed anti-proportional representation provision could "get the job done when a willful court has its mind set to do something else." *Blumstein Testimony*, *supra* note 38, at 1338.

46. 512 U.S. 997, 1016-17 (1994). *De Grandy* reinforces the point that the Dole Compromise "confirms what is otherwise clear from the text of the statute, namely, that the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *Id.* at 1014, n.11. *De Grandy* also rejected a proposed "safe harbor" against a claim of racial vote dilution for states that achieved

Though "purpose" or "intent" could have provided such a core value,[47] revised § 2 relied on a "results" test. In the absence of some benchmark as a core value, a results test is analytically at sea. It "draws no bottom line. It requires the consideration of a laundry list of factors, but it never orients the inquiry. It demands a balance, but it provides no scale."[48] A freestanding vote dilution claim,

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racial proportionality. In rejecting that proposal, the Court noted that such a safe harbor "would be in derogation of the statutory text and its considered purpose," which focus on "whether the political processes are 'equally open.'" *Id.* at 1018 (quoting S. Rep. No. 97-417, at 30 (1982). Amended § 2 focused on the openness of the political process; racially proportional electoral outcomes did not and could not insulate a state from a substantive vote dilution claim in the face of putative process-based claims, which relied on challenges to such "reprehensible practices as ballot box stuffing, outright violence, discretionary registration, property requirements, the poll tax, ... the white primary," and other forms of race discrimination. *Id.*; *see also* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 213, 223 (2023) (illustrating the Supreme Court's growing concern with using racial proportionality as a benchmark for equality, at least in the higher education context).

47. *See Blumstein Testimony*, supra note 38, at 1333 (noting the distinction between "discrimination" and "disadvantage" and the centrality of "intent" in drawing that distinction).

48. Blumstein, *supra* note 9, at 644-45 (footnote omitted). There is a distinction between a "substantive" effects test and an "evidentiary" effects test. A substantive effects test suggests "an affirmative duty to consider race explicitly in effectuating an aliquot matching of a particular benefit to racial criteria." *Id.* at 650. In the voting context, a substantive effects test "would reflect adoption of an affirmative, race-based entitlement to

with no statutory standards, would almost certainly leave judges in the position of developing a substantive benchmark that smacked of racial proportionality or some form of race-based representational entitlement.[49] On the other hand, a process-based analysis, focusing on equal access to the political process, provides an objective benchmark.[50]

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representation; otherwise notions such as ... vote dilution are not understandable." *Id.* at 654. An "evidentiary effects analysis ... offers an attractive alternative that accommodates legitimate concerns about problems of proof with the basic commitment to the principle of nondiscrimination." *Id.* at 658. There is an analogy to the doctrine of *res ipsa loquitur*. "Under res ipsa the underlying theory of liability—negligence—remains the same; a plaintiff, however, can create an inference of negligence without directly showing that the defendant committed the negligent act." *Id.* at 659.

49. *Cf.* LULAC v. Perry, 548 U.S. 399, 437 (2006) (holding that "[t]he role of proportionality" is not to establish an affirmative, race-based claim to proportional representation but to "provide[] some evidence of whether 'the political processes leading to nomination or election ... are not equally open to participation'" (quoting 42 U.S.C. § 1973(b))). That is, the focus of analysis under amended § 2 remains on nondiscriminatory access to the political or "electoral" process and the vote dilution that can result from that lack of access. *Id.* at 439-40.

50. *See* Blumstein, *supra* note 9, at 702-03 ("The question is whether courts can resist the impetus towards a [substantive] result-based analysis—whether some analytically sensible way can be found to avoid the Scylla of a pure race-based results approach and the Charybdis of intrusive and standardless judicial oversight of state and local political practices and institutions.").

As it turns out, the Supreme Court has already confronted these issues. But the Court in *Allen* ignored or disregarded the critical case, *Chisom v. Roemer*, that rejected a freestanding vote dilution approach, contra to the most far-reaching implications of *Gingles*.[51] What was called for in *Allen* was a clarification of the relationship between *Chisom* and *Gingles*, not an exclusive focus on *Gingles*.[52]

Chisom concerned the question of whether VRA § 2 applied to judicial elections. The lower court construed § 2 as providing "two distinct types of protection for minority voters—it protects their opportunity 'to participate in the political process' and their opportunity 'to elect representatives of their choice.'"[53] Since judges were not "representatives," VRA § 2 did not apply to a freestanding vote dilution claim.[54]

The Supreme Court rejected the position of the lower court. It concluded that § 2 embraces a "unitary

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51. 501 U.S. 380, 396-98 (1991).

52. *Cf.* Allen v. Milligan, 143 S. Ct. 1487, 1504 (2023) (noting "the District Court concluded that plaintiffs' § 2 claim was likely to succeed under *Gingles*" but did not analyze or even consider the impact of *Chisom* on the *Gingles* framework).

53. *Chisom*, 501 U.S. at 396 (quoting LULAC v. Clements, 914 F.2d 620, 625 (5th Cir. 1990)).

54. *Id.*

claim,"[55] not "two separate and distinct rights."[56] The "opportunity to participate and the opportunity to elect" are "inextricably linked";[57] they cannot "be bifurcated into two kinds of claims."[58] The "inability to elect" component, upon which vote dilution claims rest, "is not sufficient to establish a violation [of § 2] unless, under the totality of circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process."[59] Equal access to and equal participation in the political process are critical components to any claim under amended § 2, which "does not separate vote dilution challenges from other challenges brought under the amended § 2."[60]

Chisom rejects a freestanding, independent claim to vote dilution under revised VRA § 2. Under *Chisom*, "Section 2 is violated only if there is racial inequality in terms of opportunity to participate in the political process and that foreclosure of opportunity results in (proximately causes) an inability to elect representatives of one's

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55. *Id.* at 398.

56. *Id.* at 397.

57. *Id.*

58. Hous. Laws.' Ass'n v. Att'y Gen. of Tex., 501 U.S. 419, 425 (1991).

59. *Chisom*, 501 U.S. at 397; *see also* Whitcomb v. Chavis, 403 U.S. 124, 153-55 (1971) (focusing on the opportunity to participate in the political process, not on substantive outcomes).

60. *Hous. Laws.' Ass'n*, 501 U.S. at 427.

choice."[61] *Chisom* also explains that, "[a]ny abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election."[62] So, where there is an abridgement of the opportunity to participate, where members of a minority group are fenced out of the political process, there could be an adverse effect on the ability of minority voters to elect their choice of candidates in an election.[63] But for purposes of § 2, impairment to the ability to participate in the democratic process is a prerequisite to making a successful claim. This point was recently reinforced by the Court in the *Brnovich* case, by both the majority opinion and Justice Kagan's dissent.[64]

Interpreting § 2 in a manner consistent with *Chisom* reduces the impetus for developing a substantive, race-based benchmark. Instead, the benchmark is process-

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61. Blumstein, *supra* note 36, at 575.

62. *Chisom*, 501 U.S. at 397.

63. *See, e.g.*, White v. Regester, 412 U.S. 755, 768-69 (1973) (explaining that members of a minority group were effectively denied access to the political process and effectively excluded from political life).

64. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2337-38 (2021) (emphasizing § 2 "is violated only" when the "key requirement" of an "open" political process is breached); *id.* at 2357-58 (Kagan, J., dissenting) (holding that courts under § 2 "are to strike down voting rules that contribute to a racial disparity in the opportunity to vote" and that "a violation is established when, 'based on the totality of circumstances,' a State's electoral system is 'not equally open' to members of a racial group").

oriented or access-oriented, rather than outcomes-focused, explainable by any number of possible causes. Presaging the approach adopted in *Chisom*, this is how the analysis works:[65] "[A] plaintiff must demonstrate a causal relationship between specific 'objective' factors that evidence a faulty political process and the disadvantageous outcome."[66] That is, "to make out a prima facie case, a plaintiff should have to demonstrate foreclosure of the opportunity to participate in the political process, not merely an inability to influence or win an election or an inability to elect [minority] officials."[67]

If there is a nondiscriminatory and "open" process, then racial minorities can be expected to participate on an equal footing in the rough-and-tumble political process. Having an equal opportunity, which does not guarantee success, is all that is required by the Constitution[68] and the VRA.[69] As the Supreme Court has stated,[70] in the

65. The approach adopted in *Chisom* was essentially proposed in the immediate aftermath of the enactment of Dole Compromise. *See* Blumstein, *supra* note 9, at 704.

66. *Id.*

67. *Id.*

68. *See* Whitcomb v. Chavis, 403 U.S. 124, 153-55 (1971) (finding where there is equal opportunity to participate in the political process, there is no unconstitutional vote dilution).

69. *See* Johnson v. De Grandy, 512 U.S. 997, 1016-17 (1994) (failing to maximize Black voters' political influence is not actionable as a violation of VRA § 2).

70. The Supreme Court has recognized that, as a constitutional matter, claims of qualitative vote dilution are nonjusticiable

absence of a race-based lack of opportunity to participate in the political process, "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground."[71]

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because of a lack of standards. Rucho v. Common Cause, 588 U.S. 684, 708-09 (2019). The concerns that undergird *Rucho* correspond to the concerns about core values or benchmarks that surround claims under VRA § 2(b). The approach adopted in *Chisom* responds to these concerns by riveting attention on nondiscriminatory access to the political process and limiting vote dilution claims to circumstances where a plaintiff can demonstrate a lack of evenhanded access to the political process as in *Regester* and *Whitcomb*. Chisom v. Roemer, 501 U.S. 380, 397 (1991). An inability to elect representatives of choice is actionable, but only when linked to or traceable to an access-based deficiency. *See id.* That reduces the impetus toward developing a theory of race-based representational entitlements, something that advocates of amended § 2, such as Senator Dole, disavowed. 128 CONG. REC. 14316 (1982) (STATEMENT OF SEN. ROBERT DOLE).

71. *De Grandy*, 512 U.S. at 1020. Eight years after *Gingles*, Justice Thomas (joined by Justice Scalia) sought to limit the scope of coverage of § 2. He would have interpreted the terms in § 2(a)—"standard, practice, or procedure"—so as to exclude from coverage "challenges to allegedly dilutive election methods that we have considered within the scope of the Act in the past." Holder v. Hall, 512 U.S. 874, 892 (1994). (Thomas, J., concurring). Justice Thomas called for "a systematic reassessment of our interpretation of § 2" because of the "gloss" that case law had placed on the statutory text, which was "at odds with the terms of the statute and has proved utterly unworkable in practice." *Id.* As Justice O'Connor pointed out, "*stare decisis* concerns weigh heavily here," and she declined to accept Justice Thomas's "suggestion that we overhaul our established reading of § 2." *Id.* at 885-86 (O'Connor, J., concurring in part and concurring in judgment); *see also id.*

The *Allen* decision unexplainably does not consider the effect of *Chisom* in channeling *Gingles*' analysis. Under *Chisom*, the problem of identifying a core value and the risk of developing a substantive, race-based entitlement—widely disavowed in the debates surrounding amended

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at 963-66 (Stevens, J., dissenting) (joined by Justices Blackmun, Souter, and Ginsburg and agreeing with Justice O'Connor on the statutory *stare decisis* point). Justice Thomas's position would have resulted in a categorical exclusion of vote dilution cases from coverage under § 2 as not a "standard, practice, or procedure" covered under § 2(a). *Id.* at 892 (Thomas, J., concurring). In this approach, Justice Thomas's categorical exclusion of coverage of vote dilution cases under § 2 extended beyond the restraints on *Gingles* applied in *Chisom*. Under *Chisom*, § 2 applies to vote dilution considerations, but not in a freestanding manner—only (i) when there is race discrimination that creates a lack of evenhanded opportunity for members of a racial minority group to participate in the political process and (ii) that lack of equal access results in a form of cognizable vote dilution. *See supra* note 70. In *Allen*, the Court declined to engage in the type of "systematic reassessment" that Justice Thomas had called for in his *Holder* concurrence. *See* Allen v. Milligan, 143 S. Ct. 1487, 1506 (2023); *Holder*, 512 U.S. at 892 (Thomas, J., concurring). But in *Allen*, there was no need to engage in that type of broad-based reassessment—only to clarify the interrelationship of *Gingles* and *Chisom*, an issue that the Court in *Allen* did not recognize or address. Therefore, that issue is still open for consideration by lower courts in pending cases. What is called for is a clarification of the doctrine under amended VRA § 2, the relationship between *Gingles* and *Chisom*, not an undoing or redoing of existing doctrine. Ignoring or disregarding a clarifying precedent such as *Chisom* is not honoring *stare decisis*. *Cf.* Groff v. DeJoy, 143 S. Ct. 2279 (2023) (clarifying a statutory term that had long been mis-interpreted by lower courts based on imprecise language in a Supreme Court decision).

§ 2—are largely obviated. The vote dilution inquiry remains, but not as a freestanding, substantive principle. Vote dilution that results from racially discriminatory lack of access to the political process is actionable, since VRA § 2 targets race discrimination.[72] A violation of § 2(b) depends upon a process— focused core value—a successful claimant must establish that members of a racial minority "have less opportunity than other members of the electorate to participate in the political process."[73] That was the "deal" contained in the Dole Compromise.

In § 2 cases, courts should rely on analysis under *Chisom*, requiring the parties to address whether there has been a lack of evenhanded opportunity to participate in the political process—a process-based question. Only if plaintiffs can carry this burden should a court examine the question of vote dilution: whether, under the totality of circumstances, the race-based deficiencies in the opportunity to participate in the political process brought about an inability to elect representatives of choice.

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72. Rogers v. Lodge, 458 U.S. 613, 622, 624 (1982) (holding unconstitutional an at-large system that was "being maintained for the invidious purpose of diluting the voting strength of the black population").

73. 52 U.S.C. § 10301(b).