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 APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF OF *AMICUS CURIAE* GOVERNOR JEFF LANDRY IN SUPPORT OF APPELLANTS LOUISIANA

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INTERESTS OF *AMICUS CURIAE*[1]

Jeff Landry, Governor of the State of Louisiana, respectfully submits this brief as *amicus curiae* in support of Appellants Louisiana.

Currently serving as Louisiana's chief executive and with more than a decade of experience holding elected public office in the State, Governor Landry has a deeply vested and personal interest in the outcome of this case. As the 45th Attorney General of Louisiana from 2016 to 2024, Governor Landry represented the State throughout proceedings in the first round of litigation challenging Louisiana's 2022 congressional redistricting plan under Section 2 of the Voting Rights Act, *Robinson v. Ardoin*. *See* 86 F.4th 574 (5th Cir. 2023). While appellate proceedings were still pending before the Fifth Circuit Court of Appeals in *Robinson*, Louisiana's voters elected him to serve as the State's Governor. He assumed office on January 7, 2024.

In the interim between the October election and his inauguration, the Fifth Circuit handed down its decision in *Robinson,* giving the newly elected Governor and the new Legislature only two weeks from inauguration to draw a new congressional map. *See id.*

[1] The law firm Holtzman Vogel Baran Torchinsky Josefiak PLLC was counsel for the State at the trial in *Callais v. Landry* and assisted with the preparation of this brief. No person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Following that decision, and under the threat of a district court judge drawing Louisiana's second majority-Black district and impacting all six of Louisiana's congressional districts in the remedy phase, the Governor issued the call for the Louisiana Legislature to convene in an extraordinary session for purposes of redistricting. Louisiana's Constitution requires a seven-day notice for the extraordinary session. Though Governor Landry issued the call on his first day in office, the Louisiana Legislature had only one week to draw a new congressional map in compliance with *Robinson*.

The extraordinary legislative session gave rise to S.B. 8, and Governor Landry signed it into law on January 22, 2024. With S.B. 8 now being declared an unconstitutional racial gerrymander, the State of Louisiana is once again being asked to reconcile inherently contradictory decisions from two separate federal courts as it has for many decades. Despite good faith attempts to follow the law and court decisions, Louisiana has not been able to establish a workable pathway between the requirements of U.S. Constitution, which requires law makers to be race-blind, and Section 2, which requires law makers to engage in race-conscious redistricting.

For the past forty years, Louisiana, like other states, has been forced to suffer the legal, economic, and political consequences of the tension created by conflicting precedents construing the Equal Protection Clause and Section 2 of the Voting Rights Act of 1965 (VRA). Governor Landry has an interest

in freeing Louisiana from this never-ending cycle of alternating liability, and in ensuring stability of the State's electoral process.

INTRODUCTION AND SUMMARY OF ARGUMENT

Louisiana's past is replete with instructions from federal courts and the Justice Department to create additional majority-minority districts in order to comply with Section 2. Yet, each time the State attempted to do so, it has resulted in racial gerrymandering lawsuits. This endless cycle of litigation has involved electoral maps used to elect the state's congressional, legislative, judicial, and even local representatives. The collateral damage of these legal battles has fallen on Louisiana's citizens, who have lost control of their democratic processes, and expended tens of millions of dollars in legal fees.

The fundamental problem is not the State, the litigants, or the judges; it is the conflict between the Fourteenth Amendment's demand of colorblind government and the color-conscious construction given to Section 2 in *Thornburg v. Gingles*, 478 U.S. 30 (1986). *Gingles* routinely puts state legislatures in a position where they must hit a quota of majority-minority districts or face VRA litigation that is likely to result in a federal court demanding that districts be redrawn on the eve of elections, disrupting the process, confusing voters, and bleeding taxpayer dollars. Given that Hobson's choice, few could fault a state for ensuring that their electoral map contains sufficient majority-minority districts to avoid costly VRA litigation. But attempting to immunize a state

from VRA litigation inevitably exposes it to Equal Protection Clause litigation. After all, any attempt to hit a number of majority-minority districts supposedly required by *Gingles* necessarily creates a litigable question as to whether "race was the predominant factor motivating" the legislature's electoral map in violation of the Equal Protection Clause. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). This creates a seesaw-like exercise that should be in plain sight to the Court.

This brief provides a case study of Louisiana's unenviable experience with redistricting litigation, illustrating the unworkability of *Gingles* and the perverse incentives it creates. The lesson of this failed experiment is this: "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion). The current system—under which states are liable under the Equal Protection Clause if they consider race too much and liable under Section 2 per the *Gingles* framework if they consider race too little—is unworkable and morally hazardous. This Court should overrule *Gingles* and realign its reading of the Voting Rights Act with the Equal Protection Clause, so that both insist on "[t]he moral imperative of racial neutrality[.]" *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring in part and concurring in judgment).

ARGUMENT

I. Louisiana's Experience Shows That *Gingles* is Unworkable and Regularly Requires States to Engage in Unconstitutional Racial Gerrymandering.

A. *Congressional Districting*

The 1990s redistricting cycle marked the first time Louisiana redrew its electoral maps in the *Gingles* era. The corrosive effects of that decision's race-based commands were immediately evident. Following the 1990 census, the state's congressional delegation had been reduced from eight to seven and, at that time, it was subject to preclearance under § 4(b) of the Voting Rights Act. *Hays v. Louisiana*, 936 F. Supp. 360, 362 (W.D. La. 1996) ("*Hays III*"). Having failed to pass a congressional redistricting plan in 1991, the legislature needed to pass a plan in its 1992 session that could quickly secure approval from the U.S. Department of Justice ("USDOJ") so the map could be implemented in the upcoming 1992 congressional election. *Hays v. Louisiana*, 839 F. Supp. 1188, 1196-97 (W.D. La. 1993) ("*Hays I*").

The USDOJ made clear to Louisiana that, to satisfy *Gingles*, their congressional map would need to establish at least two safe majority-Black districts to obtain preclearance. *Id.* n.21. Heeding this directive, the Legislature enacted a map adding an additional majority-Black district and, as promised,

the map was pre-cleared by the USDOJ.[2] A coalition of Black, White, and Asian voters residing in District 4 and District 6 promptly challenged the plan as violating the Fourteenth and Fifteenth Amendments and Section 2 of the VRA. *Id.* at 1191-92. Indicative of how complicated and mercurial race-based redistricting precedents already were at that time, the case had to be re-briefed and argued before the district court in light of the U.S. Supreme Court's new racial gerrymandering decision, *Shaw v. Reno*, 509 U.S. 630 (1993). *Hays I*, 839 F. Supp. at 1192-93.

In December 1993, the federal district court struck down the State's map as an unconstitutional racial gerrymander in violation of the Equal Protection Clause. *Id.* at 1191. Finding District 4 drawn with the specific intent to create a second majority-Black district, the court applied strict scrutiny as directed by *Shaw*. *Id.* at 1205. While the court assumed that compliance with the VRA was a compelling interest, it held that the plan was not narrowly tailored because it engaged in "more constitutionally suspect segregation than necessary[.]" *Id.* at 1207. In other words, Louisiana did not racially gerrymander "right." *Id.* at 1191.

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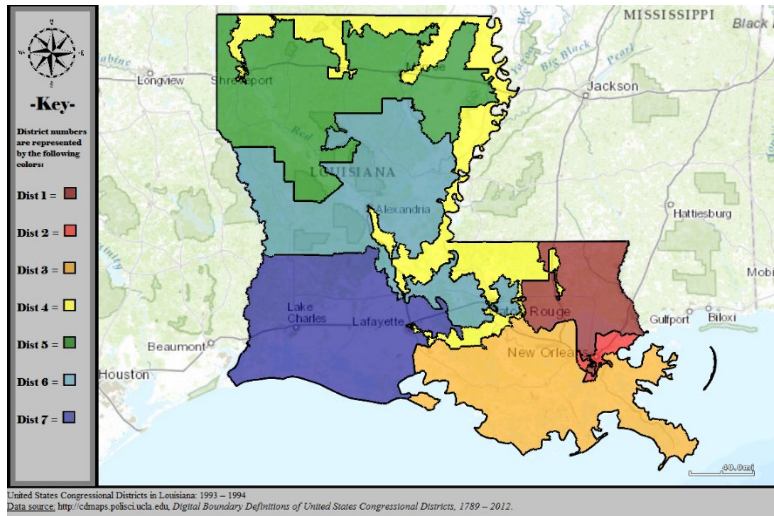
[2] Particularly relevant to the litigation today, the new majority-Black district created—District 4—"slashed a giant but somewhat shaky 'Z' across the state," loosely resembling many of the remedial districts proposed by the plaintiffs in this decade's litigation. *See Hays I*, 839 F. Supp. at 1199-1200; *Hays III*, 936 F. Supp. at 373; *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 779-85 (M.D. La. 2022).

Here is the *Hays I* Plan:



United States Congressional Districts in Louisiana: 1993 – 1994
Data source: http://cdmaps.polisci.ucla.edu, *Digital Boundary Definitions of United States Congressional Districts, 1789 – 2012.*

While its appeal was still pending, Louisiana enacted a new map that aimed to satisfy both the USDOJ's demand for a second majority-minority district and the court's insistence that the State engage in no more racial segregation than necessary. *See id.* at 1208-09.

The resulting map contained a second majority-Black district resembling an "inkblot" spread across the State that was quickly approved by the USDOJ, prompting a remand. *See Hays III*, 936 F. Supp at 365, 374. But the district court again struck down the State's plan as an unconstitutional racial gerrymander. *Hays v. Louisiana*, 862 F. Supp. 119, 121 (W.D. La. 1994). ("*Hays II*").

This time, the district court found that the State's racial gerrymander was unjustified because

there was no “basis in law or fact to believe that the Voting Rights Act *required* the creation of two majority-minority districts,” *id.* at 124 (emphasis in original), even though the USDOJ had explicitly told Louisiana that the VRA required just that.

Here is the *Hays II* Plan:

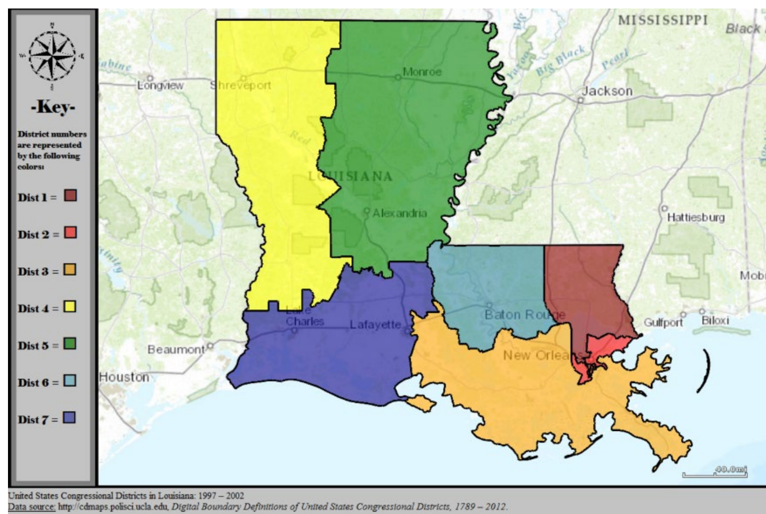
United States Congressional Districts in Louisiana: 1995 – 1996
Data source: http://cdmaps.polisci.ucla.edu, *Digital Boundary Definitions of United States Congressional Districts, 1789 – 2012.*

This Court vacated the district court’s *Hays II* decision on procedural grounds, *United States v. Hays*, 515 U.S. 737 (1995), prompting yet another remand. The district court struck the plan down yet again in January 1996, reiterating its conclusion from *Hays II* that the VRA did not require a second majority-Black district. *Hays III*, 936 F. Supp. at 371.

After nearly five years of litigation ping-pong between district and appellate courts, it was clear that Louisiana was caught hopelessly between irreconcilable directives of the court, the USDOJ, and the U.S. Constitution. Ultimately, the district court

took it upon itself to order the interim congressional plan it had drawn following *Hays II* to be used for future elections. *Id.* at 372. The court's plan, drawn without any need to consider the inherent political considerations that states must balance when redistricting, included a highly contorted, admittedly race-driven, majority-Black District 2 that, if drawn by Louisiana, would surely have invited legal challenge. *Id.* at 372, 378-79. But with the court having declared its use of race a requirement of the "Constitution and fairness," the map remained in effect for the decade. The congressional plan drawn by the district court resulted in two Democrats being elected to Congress, one white and one black. District 2 in this map around New Orleans was approximately 60.99% Black, and all other districts were less than 33% Black. *Hays III*, 936 F. Supp. at 377.

Here is the resulting *Hays III* Plan:



United States Congressional Districts in Louisiana: 1997 – 2002
Data source: http://cdmaps.polisci.ucla.edu, *Digital Boundary Definitions of United States Congressional Districts, 1789 – 2012.*

Following the 2000 census, Louisiana had a stable population and was able to enact most of its redistricting plans with minimal changes from the prior decade's plans.[3] For the 2010 census, Louisiana had significant population losses and population shifts, predominantly caused by Hurricane Katrina's devastation, which reduced Louisiana's congressional delegation (to its current number of six).[4] As a result of these losses and redistribution of population, the State could not support the second majority-Black district created following the *Hays* litigation. Even the USDOJ, notorious for exceeding the constitutional bounds of the VRA, granted preclearance to Louisiana's congressional plan on August 1, 2011.[5]

Although Louisiana's congressional districts were spared litigation during the 2000 and 2010 censuses, this stability was not attributable to any change in behavior by Louisiana or a sudden emergence of precedential clarity. Moreover, as described in detail in subsection I.B. below, Louisiana continued to face a deluge of redistricting litigation

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[3] *See generally* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, *Status of Statewide Redistricting Plans*, *available at* https://web.archive.org/web/20101129180510/http:/www.justice.gov/crt/voting/sec_5/statewides.php.

[4] *See generally* CONG. RESEARCH SERV., *Hurricane Katrina: Social-Demographic Characteristics of Impacted Areas* (Nov. 4, 2005), *available at* https://www.congress.gov/crs_external_products/RL/PDF/RL33141/RL33141.3.pdf.

[5] *See* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, *Status of Statewide Redistricting Plans*, *available at* https://www.justice.gov/crt/status-statewide-redistricting-plans.

during this period relating to its state judicial districts.

In 2022, the Louisiana State Legislature passed new congressional and state legislative maps that largely mirrored the prior decade's maps approved by the DOJ. *See Robinson v. Ardoin*, 605 F. Supp. 3d 759, 768 (M.D. La. 2022). Nonetheless, the same day the new maps were approved, the *Robinson* and *Galmon* plaintiffs sued, claiming that Section 2 required a second majority-Black district. *Id.* at 768-69.

The district court scheduled a preliminary injunction hearing for May 2022. *Id.* at 769. The State, fearful of having to redo proceedings mooted by shifting precedents, moved to postpone the hearing until this Court issued its decision in *Merrill v. Milligan*, but the district court charged ahead. *Id.* Following the hearing, the district court found that plaintiffs were likely to prevail on their vote dilution claim and granted a preliminary injunction on June 6, 2022. *Id.* at 766-67. Ironically, many of the illustrative maps to create a second majority-Black district loosely resemble the "Z" district struck down in *Hays* as a racial gerrymander. *See id.* at 779-85; *cf. Hays III*, 936 F. Supp. at 373.

The district court gave the State a deadline of just two weeks to enact a remedial plan containing an additional majority-Black district, and the Fifth Circuit denied the State's request for a stay. *Robinson v. Ardoin*, 37 F.4th 208, 232 (5th Cir. 2022). The State sought an emergency stay from this Court, which

granted the stay and treated Louisiana's request as an application for certiorari before judgment, granted it, and held the case in abeyance pending decision in *Milligan*. *Ardoin v. Robinson*, 142 S. Ct. 2892 (2022). After issuing its decision in *Milligan* nearly a year later, this Court remanded *Robinson* for further proceedings. *Ardoin v. Robinson*, 143 S. Ct. 2654 (2023).

The State's appeal of the preliminary injunction resumed, supplemental briefing was conducted, and the Fifth Circuit, applying *Milligan*, found no clear error with the district court's decision, albeit conceding the plaintiffs' arguments had weaknesses. *Robinson v. Ardoin*, 86 F.4th 574, 598-99 (5th Cir. 2023). Since the 2022 election had passed, there was no longer sufficient urgency to justify preliminary relief, so the Circuit vacated the injunction and gave the Legislature a perplexing choice: It could keep the enacted plan and proceed to trial on its merits, or it could enact a new plan within two months, which would be subject to any legal challenges the plaintiffs might bring. *Id.* at 601-02.

Louisiana chose to enact a new congressional map. The Legislature embarked on several days of intense legislative compromise attempting to balance the remedial order's directive, this Court's discussion in *Milligan*, and complex political dynamics among the State's legislators. Louisiana's second congressional map, S.B. 8, was signed into law on January 22, 2024, and contained the second majority-Black district demanded by the *Robinson* district court. To no one's surprise, S.B. 8 was promptly

challenged by a new set of plaintiffs as an unconstitutional racial gerrymander. *Callais v. Landry*, 732 F. Supp. 3d 574, 581-82 (W.D. La. 2024). The *Callais* plaintiffs alleged that District 6, the new majority-Black district drawn to satisfy the *Robinson* court's remedial demands under Section 2, violated the Equal Protection Clause. *Id.* at 582. A trial was quickly held and on April 30, 2024, a three-judge panel of the U.S. District Court for the Western District of Louisiana agreed with the plaintiffs, striking down the State's second congressional map under the Fourteenth Amendment. *Id.*

Louisiana's central argument at trial was that politics, not race, was the primary consideration when drawing District 6. *Id.* at 599. It argued the *Robinson* decision may have required the State to create an additional majority-Black district, but District 6 was drawn primarily and specifically to protect three Republican incumbents: the Speaker of the U.S. House Mike Johnson, the U.S. House Majority Leader Steve Scalise, and Representative Julia Letlow. *Id.* Recognizing the Legislature's "undisput[able]" mixed motives and cognizant of this Court's precedent that "political and racial reasons are capable of yielding similar oddities in a district's boundaries," the district court nevertheless concluded that race outweighed politics and strict scrutiny applied. *Id.* at 599, 602, 606 (quoting *Cooper v. Harris*, 581 U.S. 285, 308 (2017)).

The State argued that S.B. 8 was narrowly tailored to serve the compelling interest of complying with Section 2, citing the *Robinson* court's decision

that the VRA required a second majority-Black district. *Id.* at 607. The three-judge panel rejected this argument, however, finding that the population covered by District 6 was not sufficiently "[geographically] compact to constitute a majority in a reasonably configured district." *Id.* at 608, 610 (quoting *Allen v. Milligan*, 599 U.S. 1, 18 (2023)). The court cited this Court's holding that Section 2 "never require[s] the adoption of districts which violate traditional redistricting principles" and found that "based on the record, outside of southeast Louisiana, the State's Black population [was] dispersed." *Id.* at 608, 610 (quoting *Allen*, 599 U.S. at 29-30). Because of this dispersed population, the court observed, the state had to strain to draw a second majority-minority district as a "'bizarre' 250-mile-long slash-shaped district that functions as a majority-minority district only because it severs and absorbs majority-minority neighborhoods from cities and parishes all the way from Baton Rouge to Shreveport." *Id.* at 610.

The panel's decision laid bare the inconsistencies between federal courts—even federal courts within Louisiana—endeavoring to apply the same precedents. When the State had previously created an oddly shaped, 75% Black subdistrict to settle Section 2 litigation, the Fifth Circuit held strict scrutiny did not apply because the Legislature's primary purpose was incumbent protection, not race. *See Prejean v. Foster*, 227 F.3d 504, 508, 519-20 (5th Cir. 2000); *infra* at Part I.B. But in *Callais*, facing a near identical situation with arguably stronger evidence of the Legislature's predominantly political intent, the court concluded that race predominated

and applied strict scrutiny. *See* 732 F. Supp. 3d at 606. And the *Callais* court held that the *Robinson* court's conclusion—that the lack of a second majority-minority district likely violated Section 2—was not a sufficient basis to justify the State's use of race to create such a district. *Id.* at 607-08.

The district court gave the State until June 4, 2024, to enact its third congressional map (in less than four years), prompting Louisiana to seek yet another emergency stay from this Court, which was granted on May 15, 2024. *Robinson v. Callais*, 144 S. Ct. 1171. Now, nearly sixteen months later, the State remains without clear and workable standards against which it can organize its political system and reclaim the democratic control of its elections that is promised by Article I of the Constitution.

B. *State Judicial Redistricting*

Even when Louisiana's new congressional districts were spared, judicial maps kept the State mired in prolonged federal litigation. On the heels of *Gingles* in 1986, Louisiana's multi-member and circuit-wide judicial election system was challenged and found to dilute black voting strength in violation of Section 2. *Clark v. Edwards*, 725 F. Supp. 285, 302 (M.D. La. 1988). The district court found that subdistricts were required in identified districts to satisfy Section 2. *See Clark v. Roemer*, 777 F. Supp. 445, 468-69 (M.D. La. 1990). The parties eventually settled, agreeing that fifteen judicial districts—the eleven identified in the district court's order, plus four other districts that had been unsuccessfully

challenged, would be revised to include majority-Black subdistricts. *See Prejean*, 227 F.3d at 508.

One of the districts changed by the settlement was the 23rd JDC, which was not covered by the remedial order in *Clark* because the district court had ruled plaintiffs failed to establish a Section 2 violation there. *See Clark*, 777 F. Supp. at 460. The remedial plan divided the 23rd JDC into two subdistricts: one that was 75% Black electing one judge, and the other 80% White electing the remaining four judges. *Prejean*, 227 F.3d at 508.

Once again, the State's efforts to comply with the race-conscious demands of Section 2 promptly triggered a racial gerrymandering challenge. White voters in the 23rd JDC argued that race was the "sole and singular motivation" for the subdistricts' creation. *Id.* at 509. The State defended the subdistricts as narrowly tailored to meet the compelling interests of complying with Sections 2 and 5 of the VRA and ending the lengthy *Clark* litigation. *Id.* The Fifth Circuit held that the challenged district was created to settle the Section 2 *Clark* litigation and appease the USDOJ's preclearance demands which "strongly suggest[ed] that traditional districting principles were subordinated to racial considerations." *Id.* at 511. It further questioned whether the State had a compelling interest in complying with Section 2 because evidence of a Section 2 violation was insufficient. *Id.* at 515. On remand, the district court upheld the 23rd JDC, finding that race was not the predominant consideration and, again, plaintiffs appealed to the

Fifth Circuit. *Prejean v. Foster*, 83 Fed. App'x. 5, 8 (5th Cir. 2003). This time, the Fifth Circuit affirmed, agreeing that race was not the main factor driving creation of the 23rd JDC, but rather the reelection of incumbents. *Id.* at 10.

After seventeen years, Louisiana's State judicial election maps had been freed from the tangled web of liability but the extensive litigation left the state with more questions than answers. In *Hays III*, for example, the court required evidence of a Section 2 violation to justify the intentional creation of a majority-Black remedial district, 936 F. Supp. at 371. But in *Prejean*, the intentional creation of a majority-Black district was upheld even though a Section 2 violation was not established. 83 Fed. Appx. at 11.

Louisiana was not alone in its confusion. Courts nationwide struggled to properly parse and adjudicate voter dilution and equal protection claims, generating a constant stream of decisions from this Court attempting to clarify what its previous Section 2 or equal protection precedents did or did not say.[6] As Louisiana experienced first-hand with its judicial map litigation, lawsuits are extended for years as claims are repeatedly appealed, remanded, and re-litigated amidst ever-shifting precedential sands.

Since 1993, judges were elected to the Baton

[6] *See, e.g.*, *Voinovich v. Quilter*, 507 U.S. 146 (1993); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Bush v. Vera*, 517 U.S. 952 (1996); *Georgia v. Ashcroft*, 539 U.S. 461 (2003), *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Bartlett v. Strickland*, 556 U.S. 1 (2008).

Rouge City Court under a "2-3" election system that divided the city into two 'election sections,' a majority-Black Section 1 containing two subdistricts and a majority-White Section 2 containing three subdistricts, which consistently resulted in the election of two black judges and three white judges. *Hall v. Louisiana*, 884 F.3d 546, 548 (5th Cir. 2018). After the 2010 census showed the city's demographics had gone from 43.9% Black and 53.9% White in 1993 to 54.5% Black and 39.4% White, two Black city voters filed suit alleging the Baton Rouge City Court's "2-3" districting system diluted Black voting strength in violation of Section 2. *Id.*; *Hall v. Louisiana*, 108 F. Supp. 3d 419, 431 (M.D. La. 2015).[7]

The district court rejected the plaintiffs' claims, *id.* at 423, concluding that plaintiffs satisfied *Gingles'* first and second preconditions by demonstrating that Baton Rouge's Black population was sufficiently large and compact to support an additional, reasonably configured district and that the city's Black population was politically cohesive. *Id.* at 429, 434. The third *Gingles* precondition was not satisfied, however, because there was insufficient evidence that the city's White majority sufficiently voted as a bloc such that it *usually* defeated the Black voters' preferred candidate. *Id.* at 437 (emphasis in original).

Shortly after the district court's decision and before plaintiffs had appealed, the Legislature

[7] Although the lawsuit also included claims under the Fourteenth and Fifteenth Amendments, plaintiffs' arguments largely did not address these and instead focused primarily on Section 2. *See Hall*, 108 F. Supp. 3d at 437.

enacted a law replacing the Baton Rouge City Court's "2-3" system with a new "2-1-1" system. Under the new system, election sections one and two would each elect two judges, respectfully, and the city would elect one judge at-large. *Id.* Even though this change ultimately mooted the claims, the case persisted until 2018 as Louisiana continued to litigate plaintiffs' various procedural rulings and appeals. *See Hall*, 884 F.3d at 548, 553-54.

At the same time it was defending the Baton Rouge City Court districting plan, Louisiana was also litigating a Section 2 and constitutional challenge brought against the at-large election method for the state's 32d Judicial District Court (32d JDC), which has jurisdiction over Terrebone Parish. In 2014, a group of Black voters filed a federal lawsuit alleging the at-large election system diluted Black voting strength and was maintained for a discriminatory purpose in violation of the Fourteenth and Fifteenth Amendments. *See Terrebone Parish Branch NAACP v. Piyush "Bobby" Jindal*, 274 F. Supp. 3d 395, 406-07 (M.D. La. 2017).

The district court struck down the at-large election system, finding that it diluted Black votes and was maintained for a discriminatory purpose in violation of Section 2 and the U.S. Constitution. *See Fusilier v. Landry*, 963 F.3d 447, 453 (5th Cir. 2020). Following two years of the remedial phase, the district court adopted a special master-drawn plan dividing the 32nd JDC into five single-member districts, one of which was likely majority-Black. *Id.* The Fifth Circuit reversed, finding significant errors

throughout the lower court's decision. *Id.* at 467. The appeals court cast serious doubt on the district court's assessment of the first *Gingles* precondition, citing the remedial district's non-compact, "contorted horseshoe" shape that was necessary to achieve a 50% plus one Black district amidst the parish's overall 19% Black population. *Id.* at 457. It also questioned the satisfaction of the second and third *Gingles* preconditions, noting that the district court improperly ignored evidence of a black judicial candidate's success and relied on outdated and non-judicial election results to find racially polarized voting. *Id.* at 458-59.

Despite the lower decision's error-laden analysis of the *Gingles* preconditions, the Fifth Circuit concluded that reversal was unnecessary until it reached the totality of circumstances inquiry. *Id.* at 459. Even though the district court had found seven of the nine *Zimmer* factors weighed in favor of plaintiffs, the Fifth Circuit viewed the same record as presenting only a "marginal case" of vote dilution given the weak support for the *Gingles* preconditions. *Id.* at 459, 462. It took issue with the district court's failure to account for the "substantial [policy] interest" Louisiana had in retaining at-large elections for its judges and, citing evidence of low voter turnout, questioned whether the proposed remedial district would even sufficiently enhance Black voters' ability to elect candidates of their choice. *Id.* at 462-63.

At this point in the *Gingles* era, new plaintiffs and claims are not necessary for Louisiana to be forced back into court over its redistricting plans. In

1986, several Black voters challenged the Louisiana Supreme Court's multi-member election scheme as violating Section 2. *See Chisom v. Roemer*, 501 U.S. 380, 385 (1991). Six years of litigation culminated in a federal district court's consent decree requiring the Louisiana Legislature, in addition to other long-term directives, to establish a single-member, majority-Black Supreme Court district. *See Chisom v. Edwards*, 342 F.R.D. 1, 5 (E.D. La. 2022). The new majority-Black seat remained in effect for the next several decades, but Louisiana remained subject to the consent decree as well.

Rather than new challenges, the decree itself became the source of litigation. In the 2000s, the *Chisom* plaintiffs sought to amend the decree alleging the Legislature's new state Supreme Court plan, still containing a majority-Black district, wasn't in "strict conformity" with its requirements. *See La. State Conf. of the NAACP v. Louisiana*, 490 F. Supp. 3d 982, 996 (M.D. La. 2020). In the 2010s, the resignation announcement of the State Supreme Court's Chief Justice prompted litigation merely to clarify the meaning of the consent decree's already twenty-year-old terms regarding judicial succession. *See Chisom v. Jindal*, 890 F.Supp.2d 696, 707-09 (E.D. La. 2012). After more than thirty years, the consent decree was finally dissolved by the Fifth Circuit last year after it found that the State had satisfied all of its remedial obligations. *See Chisom v. Louisiana ex rel. Landry*, 116 F.4th 309, 320 (5th Cir. 2024). In 2019, plaintiffs in the Middle District of Louisiana brought a new case challenging the State Supreme Court map that was the subject of the Eastern District consent decree. *See*

Louisiana State Conf. of the NAACP v. Louisiana, No. 19-479-JWD-SDJ, 2024 U.S. Dist. LEXIS 39003, at 4* (M.D. La. Mar. 6, 2024) That case ended after 5 years of litigation when, without admitting any liability, the State enacted a new State Supreme Court map that contained a second majority minority district. *See Allen v. Louisiana*, No. 24-30237, 2024 U.S. App. LEXIS 26706, at 1* (5th Cir. Aug. 19, 2024). The new Supreme Court map has not yet been challenged.

II. Because It Is Flawed in Theory and Unworkable in Practice, *Gingles* Should Be Overruled.

Almost forty years of redistricting litigation in Louisiana has made clear that *Gingles* has not worked and is not workable. This is not because the State has dragged its feet or refused to comply with either the VRA or the Equal Protection Clause. To the contrary, as demonstrated by the prior section, the State has, at various times, been criticized from both sides as being either insufficiently or overly race-conscious. Nor does the problem lie with the federal courts in Louisiana: Although their decisions have frequently conflicted with one another, each judge has attempted to faithfully apply this Court's precedents.

The fundamental problem, as this Court has acknowledged, is that "the Equal Protection Clause restricts consideration of race and the VRA demands consideration of race," and, therefore, "a legislature attempting to produce a lawful districting plan is vulnerable to 'competing hazards of liability.'" *Abbott v. Perez*, 585 U.S. 579, 587 (2018) (quoting *Bush v. Vera,* 517 U.S. 952, 977 (1996) (plurality opinion)).

Worse, both "competing hazards of liability" are far from clear and objective standards. And electoral redistricting is a zero-sum game in which both sides are well-funded and incentivized to litigate. Thus, perhaps more than in any other area, in election law "court action that is available tends to be sought, not just where it is necessary, but where it is in the interest of the seeking party." *Vieth v. Jubelirer*, 541 U.S. 267, 300 (2004) (plurality opinion). So even if there is a theoretical middle-of-the-road map that violates neither *Gingles* nor *Shaw*, the rules are so subjective and the incentive to sue is so great, that states like Louisiana must litigate for five years just to arrive at a map that needs to be redrawn in another five.

A. *Gingles* Is Unworkable Because It Requires States to Risk Equal Protection Clause Liability in Order to Avoid VRA Liability.

Gingles allows any "minority group that is sufficiently large and [geographically] compact" to "constitute a majority in a reasonably configured district" to sue to require the state to create such a district. *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 595 U.S. 398, 402 (2022) (per curiam). A district is "reasonably configured … if it comports with traditional districting criteria, such as being contiguous and reasonably compact." *Allen v. Milligan*, 599 U.S. 1, 18 (2023). "Traditional districting criteria" also includes respecting political subdivisions, keeping "communities of interest" together, and protecting incumbents from having to

run against one another. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433-34 (2006) ("*LULAC*"). Asking whether a particular map "reasonably" accounts for these divergent criteria is not an objective and predictable inquiry. *See id.* at 433 (noting that "no precise rule has emerged governing § 2 compactness").

Gingles simply asks whether a "reasonably configured" majority-minority district is mathematically possible—not whether a map recognizing such a district would *most* comport with traditional districting criteria or *would be expected* absent racial discrimination. *See Allen*, 599 U.S. at 19-20 (finding *Gingles* precondition one satisfied because "black voters *could* constitute a majority in a second district that was 'reasonably configured'") (emphasis added). Showing mathematical possibility is not particularly hard now that "modern computer technology" can be used to "generate millions of possible districting maps for a given State" and "can be designed to comply with traditional districting criteria." *Id.* at 23. And plaintiffs' experts are allowed to intentionally target maps with the requisite number of majority-minority districts. *Id.* at 33 (conceding that illustrative maps used to satisfy *Gingles* precondition one are frequently "created with an express target [of majority-minority districts] in mind"). Armed with a computer and using explicit racial targets, a plaintiffs' expert will often be able to create a few maps—out of millions of possible permutations—that contain majority-minority districts and are at least arguably "reasonably

compact" with reference to traditional districting criteria.

Where that is the case, the state is in a bind. If it does not create the proposed majority-minority district, it will almost certainly be sued under the VRA. The lawsuit will cost the state time and taxpayer money, disrupt the state's political processes, and likely result in a negative ruling. To be sure, the plaintiff would also have to satisfy *Gingles*'s second and third preconditions and the "totality of circumstances" test, but these do not pose a high bar. *See id.* at 22 (dispensing with *Gingles*' second and third preconditions because there can be "no serious dispute that Black voters are politically cohesive, nor that the challenged districts' white majority votes sufficiently as a bloc to usually defeat Black voters' preferred candidate") (internal quotations omitted); Ellen D. Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 660 (2005) (finding that, in the 20 years following *Gingles*, plaintiffs that made it to the "totality of circumstances" test prevailed in 57 of 68 lawsuits).

Alternatively, a state legislature could try to do what a plaintiffs' expert would do: use explicit racial targets to draw a map with as many "reasonably compact" majority-minority districts as possible. But this would almost certainly lead to an Equal Protection Clause challenge. After all, while the plaintiffs' expert is allowed to have "an express [racial] target in mind," when the legislature draws a

map, “race may not be the predominant factor.” *Allen*, 599 U.S. at 31, 33 (internal quotations omitted). Since “the line between racial predominance and racial consciousness can be difficult to discern,” *id.* at 31, there will always be a litigable question as to whether a race-conscious legislature crossed into the line into racial predominance.

Similarly, just because a plaintiff’s expert can draw a majority-minority district that is configured reasonably enough to give rise to a plausible *Gingles* claim does not mean that a court will necessarily find a similar map drawn by the state legislature to be “reasonably configured.” Reasonableness is a flexible standard, and it is not at all obvious how to judge districts that are strong on some traditional districting criteria (e.g., protecting communities of interest and/or incumbents) but weak on others (e.g., compactness and/or respecting political subdivisions). As Justice Scalia would say, balancing those divergent factors is “like judging whether a particular line is longer than a particular rock is heavy.” *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment). And it will always be more difficult for a legislature that represents real people with diverse interests to draw reasonably configured districts than it will for a plaintiffs’ expert to draw one up in the computer lab.

This is why Louisiana is far from the only state to draw a majority-minority district to avoid a *Gingles* suit, only for a court to find that the district was not “reasonably configured” enough to survive a *Shaw* suit. *See Allen*, 599 U.S. at 27 (“Though North

Carolina believed the additional district was required by § 2, we rejected that conclusion, finding instead that those challenging the map stated a claim of impermissible racial gerrymandering") (citing *Shaw v. Reno*, 509 U.S. 630, 655, 658 (1993)); *id.* at 27-28 ("To comply with the VRA, Georgia thought it necessary to create two more majority-minority districts" but "Georgia could not create the districts without flouting traditional criteria") (citing *Miller v. Johnson*, 515 U.S. 900, 920-21 (1995)); *id.* at 28 (noting that "Texas[] create[ed] three additional majority-minority districts" to comply with Section 2 only to lose a racial gerrymandering suit because "the districts had 'no integrity in terms of traditional, neutral redistricting criteria'") (quoting *Bush v. Vera*, 517 U.S. at 960). Just like here, the problem in those cases was not that the states acted in bad faith or ignored this Court's precedents. The problem was that "no precise rule has emerged governing § 2 compactness." *LULAC*, 548 U.S. at 433. So states like Louisiana, North Carolina, Georgia, Texas, and so many others are forced to guess whether an additional majority-minority district will be deemed "reasonably compact" and then litigate either a *Gingles* or *Shaw* suit to find out if they guessed right.

As Louisiana's experience shows, even where a federal court determines that an additional "reasonably compact" majority-minority district is possible and likely required, a state could still face litigation and potential liability for trying to create one. As here, a different group of plaintiffs can sue the state in a different district and argue that the additional majority-minority district was not required

under *Gingles* after all. And those plaintiffs, if they are savvy, may even choose a district precisely because its judges are more likely to take a narrow reading of "reasonable compactness" under *Gingles* and a broad reading of "racial predominance" under *Shaw*. A standard that consistently leads to inconsistent results and leaves states in a liability minefield between two highly subjective standards simply is not workable.

B. *Stare Decisis* Does Not Require Courts to Retain Precedents that Are Flawed in Theory and Unworkable in Fact.

This Court has "long recognized . . . that *stare decisis* is 'not an inexorable command[.]'" *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 264 (2022) (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)). While members of this Court have sparred over the precise circumstances in which a precedent may be overruled, the Court has consistently held that "the fact that a decision has proved 'unworkable' is a traditional ground for overruling it." *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)); *see also Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (the Court must assess the precedent's "practical workability"); *Dobbs*, 597 U.S. at 220 ("Deciding whether a precedent should be overruled depends in part on whether the rule it imposes is workable[.]"). This is because when a precedent "is proved to be unworkable in practice[,] the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are

too great." *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965).

A precedent is "unworkable" if it cannot "be understood and applied in a consistent and predictable manner." *Dobbs*, 597 U.S. at 281. Forty years of litigation and conflicting judgments in Louisiana and elsewhere make clear that *Gingles*' application has been anything but consistent and predictable. *See supra*, Parts I and II.A.

Another indicium of unworkability is that "a decision has 'been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts . . . ." *Pearson*, 555 U.S. at 235 (quoting *Payne*, 501 U.S. at 829-30). Multiple Members of this Court have questioned *Gingles* for this very reason. Chief Justice Roberts, for example, has observed that district courts "cannot be faulted for [their] application of *Gingles*" because "it is fair to say that *Gingles* and its progeny have engendered considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim." *Merrill* v. *Milligan*, 142 S. Ct. 879, 882-83 (2022) (Roberts, C.J., dissenting from grant of applications for stays). Justices Thomas, Gorsuch, and Barrett have echoed these concerns, concluding that the Court has "never succeeded in translating the *Gingles* framework into an objective and workable method of identifying the undiluted benchmark." *Allen*, 599 U.S. at 69 (Thomas, J., dissenting). They agreed that "[i]f there is 'any area of law notorious for its many unsolved puzzles,' this is it." *Id.* at 68 (Thomas, J., dissenting) (quoting J.

Chen & N. Stephanopoulos, *The Race-Blind Future of Voting Rights*, 130 YALE L. J. 862, 871 (2021)).

An analogously unworkable decision was *Saucier v. Katz*, 533 U.S. 194, 201 (2001), which established a two-step framework for assessing qualified immunity. *Saucier* was overruled because it was "a judge-made rule . . . adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings." *Pearson*, 555 U.S. at 233. *Gingles* is likewise a "judge-made rule" adopted to "improve the operation of the courts" by establishing a three-step framework to determine whether race-based vote discrimination claims can be grounded in redistricting decisions. And as with *Saucier*, *Gingles*' amorphous framework "comes with a price" because the ping-pong of Section 2 and equal protection litigation "results in a substantial expenditure of scarce judicial resources" and "also wastes the parties' resources." *Id*. at 236-37.

Saucier was unworkable because its two-step framework was "so factbound that the decision [under that framework] provides little guidance for future cases." *Id*. at 237. The same is true of *Gingles*, as the *Allen* Court admitted: "[The] application of the *Gingles* factors is 'peculiarly dependent upon the facts of each case.' Before courts can find a violation of § 2 . . . they must conduct 'an intensely local appraisal' of the electoral mechanism at issue, as well as a 'searching practical evaluation of the "past and present reality."'" *Allen*, 599 U.S. at 19 (quoting *Gingles*, 478 U.S. at 79). As evidenced by Louisiana's post-*Gingles* litigation nightmare,

Gingles is "so factbound that [it] provides little guidance," *Pearson*, 555 U.S. at 237, rendering it pragmatically unworkable.

Another instructive case is *Rucho* v. *Common Cause*, 588 U.S. 684 (2019), which observed that "it is vital" in redistricting cases that "the Court act only in accord with especially clear standards" because otherwise, "'[w]ith uncertain limits,'" courts will "'assum[e] political, not legal, responsibility for a process that often produces ill will and distrust.'" *Id.* at 704 (quoting *Vieth*, 541 U.S. at 307 (opinion of Kennedy, J.)). Thus, in the analogous context of partisan gerrymandering, *Rucho* concluded that "federal courts are not equipped to apportion political power as a matter of fairness[.]" *Id.* at 705. As four Justices recognized in *Allen*, *Gingles* claims are likewise inherently predicated on a request for a "'fair share of political power and influence.'" 599 U.S. at 51 (Thomas, J., dissenting) (quoting *Rucho*, 588 U.S. at 709). And forty years of litigation under *Gingles* has not yielded "clear, manageable, and politically neutral" standards by which courts can make that determination in an objective and predicable manner. *Rucho*, 588 U.S. at 707.

Gingles also contains an assumption that members of racial minority groups will always vote as a block because of race. This is simply not an assumption that has held up to the realities of elections. As the State noted in its brief, Supp. Brief for Appellant at 20 (2025) (No. 24-109), President Trump won 48% of the Hispanic vote and 15% of the Black vote in 2024. Every single voting group in that

analysis voted significantly differently just as far back as 2020 – Donald Trump effectively doubled his support among Black voters from 8% to 15%, and increased support among Hispanic voters from 36% to 48%. This demonstrates the persistent change in the American electorate and illustrates nicely that voters are not monolithic decision makers whose vote in any particular election is necessarily tied to their race or ethnicity.

Finally, the quality of a precedent's reasoning is also "important" to *stare decisis* analysis. *Dobbs*, 597 U.S. at 268, 270. The Court's reasoning must be "more than just wrong"; it must be "egregiously wrong," and its analysis must stand on "exceptionally weak grounds." *Id.*; *see also Ramos v. Louisiana*, 590 U.S. 83, 121-22 (2020) (Kavanaugh, J., concurring in part) (precedent should be "egregiously wrong as a matter of law" to warrant reversal). *Gingles* satisfies this standard because it was "on a collision course with the Constitution from the day it was decided[.]" *Dobb*s, 597 U.S. at 268. Indeed, *Gingles*'s basic workability problems stem from its inherent tension with the Equal Protection Clause. *See supra*, Part II.A.

Since *Gingles* is flawed in theory and unworkable in practice, this Court should not feel "constrained to follow" it. *See Payne*, 501 U.S. at 827 (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)).[8]

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[8] When precedent causes "distortion" of important legal doctrines, this also counsels in favor of its reversal. *Dobbs*, 597 U.S. at 286. *Gingles* distorts the Court's strict scrutiny

III. *Gingles* Should Be Replaced with a Workable Standard that is Consistent with the Equal Protection Clause.

This Court should overrule *Gingles* and interpret Section 2 in a manner that is workable and does not conflict with the Equal Protection Clause. *See Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion) (invoking constitutional avoidance canon to reject use of crossover districts to satisfy *Gingles*'s first factor). Members of this Court have identified at least five ways in which this could be accomplished.

First, the Court could read time limits into Section 2 for vote dilution claims. *Cf. Shelby County v. Holder*, 570 U.S. 529 (2013). At least four Members of this Court have intimated that Section 2 may need

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jurisprudence by putting the Court "in the ridiculous position of 'assuming' that compliance with a statute can excuse disobedience to the Constitution." *Allen*, 599 U.S. at 86 (Thomas, J., dissenting). This is backwards. Where a statute is in tension with the Constitution, the Court normally invokes the constitutional avoidance canon and construes the statute to fit the Constitution. Yet, as Section 2 is presently construed by *Gingles* and its progeny, it is the Fourteenth Amendment that bends to the will of Section 2 by assuming that statutory compliance is a compelling interest that would justify a constitutionally suspect classification.

That is backwards, as a matter of constitutional supremacy. *Gingles*'s "significant negative jurisprudential" effect on constitutional law thus reinforces the conclusion that *Gingles* should be overruled.

such a temporal limitation to satisfy constitutional scrutiny. *See Allen*, 599 U.S. at 45 (Kavanaugh, J., concurring) (declining to consider temporal limit to Section 2 because it was "not raise[d]" in that case); *id*. at 83-84, 87-88 (Thomas, J., dissenting) (Section 2 lacks any "salutary limiting principles" that would satisfy the congruence and proportionality requirements for remedial legislation under the Fourteenth Amendment).

Second, the Court could narrowly construe Section 2 as limited to "practices and procedures that affect voting and the right to vote," such as "ballot access and counting," but not vote dilution predicated on redistricting. *See id*. at 46 (Thomas, J., dissenting).

Third, the Court could limit *Gingles*'s analysis to multi-member districts only. *See id*. at 48-49 (Thomas, J., dissenting).

Fourth, the Court could "require a meaningfully race-neutral benchmark" for vote dilution claims. *See id*. at 50, 52, 54, 89 (Thomas, J., dissenting). This option would relieve states of the impossible task of having to draw maps with as many majority-minority districts as those created by race-conscious plaintiffs' experts to comply with *Gingles*, without themselves engaging in racial gerrymandering prohibited by the Fourteenth Amendment.

Finally, the Court could require a "plaintiff who claims that a districting map violates § 2 because it fails to include an additional majority-

minority district must show at the outset that such a district can be created without making race the predominant factor in its creation." *Id.* at 99 (Alito, J., dissenting). This option would at least put the burden on the plaintiff to show that a State will not face *Shaw* liability if it adopts the plaintiffs' illustrative map.

Any of these solutions are preferable to the serious constitutional concerns *Gingles* has created and the unpredictability and costs it imposes upon states.

CONCLUSION

For the foregoing reasons, Appellants should prevail and *Gingles* should be overruled or realigned to the colorblind command of the Equal Protection Clause.

Respectfully submitted,

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