No. 21A814

In the Supreme Court of the United States

KYLE ARDOIN, SECRETARY OF STATE,

Applicants,

v.

PRESS ROBINSON, *et al.*,

Respondents.

MOTION OF THE STATE OF ALABAMA AND 12 OTHER STATES FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPLICANTS WITHOUT 10 DAYS' NOTICE AND IN PAPER FORMAT

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June 17, 2022

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Given the expedited briefing schedule, *amici* could not provide 10 days' notice of their intent to file this motion for leave to file a brief as *amici curiae*. *Amici* States nonetheless sought and received the consent of the Louisiana Defendant-Applicants to submit this amicus brief. *Amici* States also sought consent from Plaintiff-Respondents. One set of Plaintiffs-Respondents took no position on the States' motion and the other set did not respond. Pursuant to Supreme Court Rules 22 and 37, the undersigned States therefore respectfully move for leave to file as *amici curiae* the accompanying Brief of *Amici Curiae* Alabama and 12 Other States in Support of Applicants' Emergency Application for Administrative Stay, Stay Pending Appeal, and Petition for Writ of Certiorari Before Judgment. In addition, *amici* request leave to file the accompanying Brief on 8½-by-11-inch paper rather than in booklet form.

Amici are States that do not want their citizenry subjected to court-imposed racial segregation. When redistricting, States often follow "common practice" by "start[ing] with the plan used in the prior map" and simply "chang[ing] the boundaries of the prior districts only as needed to comply with the one-person, one-vote mandate and to achieve other desired ends." *Cooper v. Harris*, 137 S. Ct. 1455, 1492 (2017) (Alito, J., concurring in part). Yet under the district court's approach to Section 2 of the Voting Rights Act, this "common practice" would be rendered unlawful in many States—even where courts find no evidence of invidious discrimination. Worse still, this approach would empower federal courts to order States to racially gerrymander additional majority-minority districts irrespective whether any evidence suggests a

legislature could enact such districts while complying with the Equal Protection Clause. All this in the name of compliance with anti-discrimination legislation.

But Section 2 of the VRA was designed to prevent racial discrimination in elections, not require it. Decisions like the one below interpret Section 2 to trump the Fourteenth Amendment's equal-protection guarantee. Such an interpretation presents a direct threat to *Amici* States' sovereignty and to the constitutional rights of their citizens. What's more, the district court modeled its decision on a court order out of Alabama that this Court stayed earlier this Term. If left standing, the lower court's preliminary injunction will perpetuate an unconstitutional interpretation of the VRA, encourage lower courts to follow suit, and disregard this Court's guidance.

To further explain the flaws in the district court's interpretation of Section 2 and their pernicious effects on State legislatures, *Amici* States respectfully request leave of the Court to file the accompanying Brief.

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INTEREST OF AMICI CURIAE

The States of Alabama, Arkansas, Georgia, Indiana, Kentucky, Mississippi, Missouri, Montana, Oklahoma, South Carolina, Texas, Utah, and West Virginia respectfully submit this brief as *amici curiae* in support of the Louisiana Applicants. "Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). And the intrusion here is especially concerning because of how the district court transformed §2 of the Voting Rights Act, intended to be a "vital protection against discriminatory" practices, *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2343 (2021), into a tool for compelling racially discriminatory redistricting. "Racial classifications with respect to voting carry particular dangers." *Miller*, 515 U.S. at 912. If the district court's decision is not stayed, those dangers will soon manifest in Louisiana and in other States as well. *Amici* States have a strong interest in protecting their citizens from racial segregation imposed by federal courts.

When faced with the abovementioned constitutional dangers of race-prioritized redistricting and the little time left before this year's elections, this Court stayed the preliminary injunction entered against Alabama's congressional redistricting legislation. *See Merrill v. Milligan*, 142 S. Ct. 879 (2022). The Court should stay the Louisiana district court's erroneous and late-breaking preliminary injunction as well.

INTRODUCTION

Late last year, *amicus* Alabama enacted a law that set new congressional districts. The State followed "common practice" by "start[ing] with the plan used in the prior [congressional districting] map and … chang[ing] the boundaries of the prior

districts only as needed to comply with the one-person, one-vote mandate and to achieve other desired ends." *Cooper v. Harris*, 137 S. Ct. 1455, 1492 (2017) (Alito, J., concurring in part). Nevertheless, a three-judge district court construed §2 of the Voting Rights Act to require the State to scrap its duly enacted districting plan and create a new one with an additional majority-black district. On February 7, this Court stayed that order. *See Merrill v. Milligan*, 142 S. Ct. 879 (2022).

The following month, the Louisiana Legislature followed that same "common practice" that Alabama had followed in its redistricting process and passed a map that kept the State's congressional districts largely the same. Nevertheless, Plaintiffs brought suit on the theory that these familiar districts suddenly violated §2 of the Voting Rights Act. And earlier this month, the district court for the Middle District of Louisiana agreed. Because Plaintiffs showed it was possible to draw a congressional map with an additional majority-black district, Louisiana would need to draw a new map or the court would do so for the State.

The Louisiana district court's opinion borrowed heavily from the earlier district court opinion out of Alabama. *See, e.g.*, App.111-12 (adopting Alabama district court's "obvious" approach to resolving "inherent tension between the Voting Rights Act and the Equal Protection Clause"); *id.* at 99 (adopting Alabama district court's "visual assessment" test for *Gingles* compactness); *id.* at 104 (adopting Alabama district court's approach to weighing importance of "traditional districting principle of protecting incumbents"); *id.* at 143 ("As the [Alabama district court] points out,

Purcell is not the only opinion ever advanced by the Supreme Court on the subject of timing."). But that district court order has been stayed.

Unsurprisingly, given the similarities between the two decisions, the Louisiana court repeated many of the mistakes in *Merrill*. First and foremost, the court's order places §2 in unavoidable conflict with the Fourteenth Amendment. Rather than attempt to minimize this tension, the district court and the Fifth Circuit motions panel shrugged it off by suggesting that the persistence of that conflict somehow lessened its significance. *See, e.g.*, App.184 ("The defendants and their *amici* are not the first to point out that the doctrine of racial gerrymandering exists in some tension with *Gingles*."). But especially in light of "the principle that federal-court review of districting legislature represents a serious intrusion on the most vital of local functions," App.150, more is needed before casting aside constitutional doubts and a State's enacted plan to order a State to adopt a plan that will likely violate the Constitution.

Moreover, contrary to this Court's recent decision in *Wisconsin Legislature v. Wisconsin Elections Commission*, the district court "failed to answer" the "question that [this Court's] VRA precedents ask": "whether a race-neutral alternative that did not add a[n] [additional] majority-black district would deny black voters equal political opportunity." 142 S. Ct. 1245, 1250-51 (2022). One will search the court's order in vain for analysis of this core inquiry.

Instead, the court all but ignored §2's text and concluded that because Plaintiffs presented evidence that another majority-black district *could* be drawn, the

district *must* be drawn. The Fifth Circuit echoed the district court's rationale, asserting that Plaintiffs were likely to succeed on their §2 claims because they "have shown that it is possible to draw a second *Gingles* district while giving due weight to traditional redistricting criteria," App.184—not once stopping to explain what "due weight" means, or how it could possibly excuse Plaintiffs' flagrantly race-based targets. Both courts failed to recognize that §2 operates as a prohibition against abridging or denying voters' ability to cast their votes "on account of race," 52 U.S.C. §10301(a), and imposes no obligation to maximize majority-minority districts. *See Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994) ("Failure to maximize cannot be the measure of §2."). If that affirmative obligation were what §2 commanded, then §2 would be unconstitutional.

Unless stayed, the lower court's decision will encourage federal courts to buck this Court's admonitions and continue placing States in the untenable position Louisiana currently faces: with elections soon approaching, either racially gerrymander their own citizens to comply with court orders, or have court-ordered gerrymanders imposed upon them. Such orders violate this Court's decision in *Purcell* and subsequent applications of that decision. Worse, on the eve of an election, they trade a State's enacted plan for an unconstitutional one. Because of the all-too-late timing of the court's order and because §2 was designed to prevent racial discrimination, not require it, this Court should do again what it did earlier this year: stay the district court's order and protect a sovereign State's citizens from federally mandated segregation.

ARGUMENT

I. The District Court's Misinterpretation Of Section 2 Conflicts With The Constitution.

Section 2 of the VRA states that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State … in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color …." 52 U.S.C. §10301(a). To prove a violation, one must show that "political processes leading to nomination or election in the State or political subdivision are not equally open to participation," meaning individuals "have less opportunity" than others "to participate in the political process and to elect representatives of their choice." *Id.* §10301(b); *see also Wisc. Legis.*, 142 S. Ct. at 1250-51. "The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003).

The district court's order undermines this purpose and emboldens other courts to do the same. Because Plaintiffs showed that a mapdrawer could have drawn maps with a second majority-black district—though only by prioritizing race over traditional redistricting criteria like core retention—Louisiana has now been ordered to abandon its duly enacted redistricting plan and replace it with one that meets Plaintiffs' specific racial targets. Requiring racial preferences in congressional districts runs headlong into the Fourteenth Amendment's Equal Protection guarantee and exceeds any remedial measure the Fifteenth Amendment could authorize. The only way

to avoid these serious constitutional questions is to interpret §2 consonant with, not counter to, those Reconstruction Era amendments.

A. Under the District Court's Interpretation, the VRA Is Irreconcilable with the Fourteenth Amendment.

Racial gerrymandering occurs when race "predominates," *Miller*, 515 U.S. at 916, or is "the criterion that … could not be compromised" in a State's redistricting process, *Shaw v. Hunt* ("*Shaw II*"), 517 U.S. 899, 907 (1996). To "predominate" simply means "[t]o have or gain controlling power or influence." *Predominate*, The American Heritage Dictionary of the English Language (online ed. 2022), https://perma.cc/67FF-7SV8. A court can spot racial gerrymandering in districts if the districts would "obviously [be] drawn for the purpose of separating voters by race," *Shaw v. Reno* ("*Shaw I*"), 509 U.S. 630, 645 (1993), or would subordinate the State's traditional districting principles to the "predominant, overriding desire to create [two] majority-black districts," *Abrams v. Johnson*, 521 U.S. 74, 81 (1997) (internal quotation marks omitted).

The evidence adduced below shows that "[r]ace was the criterion that … could not be compromised" in Plaintiffs' comparator maps, *Shaw II*, 517 U.S. at 907; or, put differently, race "predominated." Plaintiffs' experts testified that that they "consciously drew the district[s] right around 50 percent [black population]" so they could "satisf[y] [*Gingles*'s] first precondition," *Robinson et al. v. Ardoin*, No. 3:22-cv-00211 (M.D. La.) (ECF No. 160-1 at 217:18-23) (hereafter, *Robinson*), and that they "did not" draw a map with fewer than two districts because they were "specifically asked to draw two by the plaintiffs," *id.* at 123:1-4. These are the exact sort of admissions that

constitute racial predominance in the redistricting context. *See, e.g.*, *Cooper*, 137 S. Ct. at 1468 (racial predominance where "[u]ncontested evidence in the record" showed mapmakers "purposefully established a racial target: African-Americans [in congressional district] should make up no less than a majority of the voting-age population"); *id.* (map's proponents demanded district "'must include a sufficient number of African-Americans' to make it a 'majority black district'").

Indeed, Plaintiffs' experts were not tasked with determining whether the Louisiana Legislature acted with animus or suppressed a second majority-black district that would otherwise have naturally occurred. *Cf. League of United Latin Am. Citizens* (*LULAC*) *v. Perry*, 548 U.S. 399, 427-29 (2006) (Section 2 violation where Texas dissolved existing majority-minority district and replaced it with a sprawling majority-minority district elsewhere). Rather, they were paid to show it was physically possible to draw a congressional map with two majority-black districts. And they fulfilled their charge the way any mapdrawer compensated to draw majority-black districts would: they "moved the district's borders to encompass the heavily black parts" of Louisiana, thus deliberately moving voters between districts based on race to hit their racial target. *Cooper*, 137 S. Ct. at 1469; *accord* App.184 (Fifth Circuit motions panel describing experts' findings that all illustrative maps create majority-black district by conjoining same two predominantly black parishes). Plaintiffs' maps were "obviously drawn for the purpose of separating voters by race." *Shaw I*, 509 U.S. at 645.

Beyond Plaintiffs' experts' own testimony, evidence presented by Defendants further confirms that Plaintiffs could not have accomplished their task without

prioritizing race. Dr. Christopher Blunt used redistricting software to generate 10,000 possible Louisiana congressional maps that prioritized contiguity, compactness, minimizing parish splits, and minimizing population deviation, but did not consider a voter's race. App.45-47. Not a single map came back with one—let alone two—majority-black congressional districts. *Robinson* (ECF No. 160-4 at 30:25-31:3). What's more, after one of Plaintiffs' experts alleged that Dr. Blunt's simulations had overly restrictive parameters, Dr. Blunt re-ran his simulations under more lenient criteria. The result? Still "nowhere near to having two MMDs." *Id.* at 45:13-46:13. At the preliminary injunction stage, that evidence—showing Plaintiffs' race-based plans were outliers—should have given any court pause before enjoining the State's enacted congressional redistricting legislation.

Plaintiffs' experts' concessions and Defendants' experts' statistical evidence notwithstanding, the court was adamant that "[t]here is no factual evidence that race predominated in the creation of the illustrative maps in this case." App.116. This was so, said the court, because Plaintiffs' experts "testified that they did not allow race to predominate" and because "it is crystal clear under the law that some level of consideration of race is not only permissible in the Voting Rights Act context; it is necessary if Congress's intent in passing the Voting Rights Act is to be given effect." *Id.*

Undisputed record evidence leaves no doubt that what occurred here went well beyond "some level of consideration of race." Plaintiffs instructed their experts to create maps with specific racial quotas, *Robinson* (ECF No. 160-1 at 123:1-4, 217:18-23), meaning their race-based targets exerted "controlling power" and thus

"predominated" in their plans. *See Predominate*, American Heritage Dictionary, *supra*. For Plaintiffs' mapdrawers to accomplish their assigned task, race was plainly the criterion that "could not be compromised." *Bethune-Hill v. Virginia St. Bd. of Elections*, 137 S. Ct. 788, 798 (2017).[1]

The court's basis for disagreement on that score runs headlong into this Court's precedent. The court reasoned that race could not have predominated in Plaintiffs' plans because "if Plaintiffs' experts engaged in race-predominant map drawing, their illustrative plans would surely betray this imbalanced approach by being significantly less compact, by disregarding communities of interest, or some other flaw." App.118. That analysis is precisely what this Court rejected in *Bethune-Hill*, 137 S. Ct. at 799 (rejecting that an "actual conflict" must exist to prove a racial gerrymander). It is also irreconcilable with *Cooper*, where this Court declared North Carolina's plan unconstitutional, even though the plan subordinated traditional districting principles to race only "sometimes" when those principles interfered with "'the more important thing' … to create a majority-minority district." 137 S. Ct. at 1469; *Harris v. McCrory*, 159 F. Supp. 3d 600, 612 (M.D.N.C. 2016) *aff'd sub nom. Cooper v. Harris*,

[1] This Court "review[s] a district court's finding as to racial predominance only for clear error, except when the court made a legal mistake." *Cooper*, 137 S. Ct. at 1474. The court's errors here were factual error predicated on legal mistake. Though the district court "credit[ed]" testimony "that race did not predominate" in Plaintiffs' mapdrawer's analysis, App.98, the undisputed facts about the mapdrawer's motives mirror those this Court held unconstitutional in *Cooper*. 137 S. Ct. at 1468-69. And, in any event, the court's view that racial targets of the sort invalidated in *Cooper* merely constitute permissible "race consciousness" is a legal mistake, vitiating whatever deference this Court might otherwise owe the court's finding. The court's purported findings regarding racial predominance thus warrant no deference. The Fifth Circuit erred when it deferred to "the district court's factual findings indicating that the illustrative maps are not racial gerrymanders," App.182, for it overlooked clear error and rested its deference on the district court's legally erroneous claim that the facts here showed nothing more than "racial consciousness," *id.* at 181.

137 S. Ct. 1455 (2017) (racial "quota operated as a filter through which all line-drawing decisions had to pass"). What was unconstitutional in *Cooper* is unconstitutional here.

The court then asserted that even if race does predominate in a two-majority-black-district map, there's no problem because such a map is the narrowly tailored remedy to constitutional violations. App.111. But "[t]o have a strong basis in evidence to conclude that §2 demands ... race-based steps, the State must carefully evaluate whether a plaintiff could establish the *Gingles* preconditions ... in a new district *created without those measures*." *Wisc. Legis.*, 142 S. Ct. at 1250 (quoting *Cooper*, 137 S. Ct. at 1471) (emphasis added). The district court never attempted to determine whether Plaintiffs could satisfy *Gingles* without "race-based steps," and the record suggests that it is impossible to draw two majority-black districts in Louisiana without "those measures." *Cooper*, 137 S. Ct. at 1471. No matter. The court simply assumed a comparator map bearing obvious markings of "race-based steps" was sufficient to satisfy *Gingles*, impose §2 liability on Louisiana, and replace the State's race-neutral districting plan with one drawn using "race-based steps."

The district court's §2 inquiry therefore reduced to the question whether Plaintiffs could show that another majority-black district *could* be drawn, racial predominance notwithstanding. As long as "it is possible to draw a second *Gingles* district" while giving traditional districting principles "due weight" (whatever that means), on the court's theory the State has violated the VRA. But that logic allows §2 plaintiffs to "prove" a violation by using racially gerrymandered maps that assume the

existence of the violation needed to justify the gerrymander. A State's decision not to impose litigants' preferred gerrymanders cannot possibly justify a court's "serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915.

The implications of the district court's logic are astonishing. A plaintiff's comparator plans can satisfy *Gingles*—and thus justify invalidating a State's enacted plan—even where the comparator plan is "'drawn for predominantly racial reasons.'" App.113 (quoting *Clark v. Calhoun Cnty., Miss.*, 88 F.3d 1393, 1406-07 (5th Cir. 1996)). That is, if the district court were correct, a plaintiff can prove §2 liability through nothing more than evidence that the State could have enacted racial gerrymanders. Section 2 requires no such thing. As has been clear in this Court for decades, a State is not required to maximize majority-minority districts whenever a plaintiff shows it is mathematically possible to do so.

Trying to downplay the logical conclusion of its position, the district court asserted that assigning liability for failure to enact racial gerrymanders "makes sense, since illustrative maps drawn by demographers for litigation are not state action and thus the Equal Protection Clause is not triggered." App.114; *see also id.* at 116 ("Defendants' insistence that illustrative maps drawn by experts for private parties are subject to Equal Protection scrutiny is legally imprecise and incorrect"). This is a constitutional shell game. The court's position reduces to the proposition that a federal court may compel a sovereign State to enact a map that violates the Equal Protection Clause all because a group of plaintiffs can show that it is possible to draw maps that

violate the Equal Protection Clause—and that, on top of this, the court's order does not implicate the Equal Protection Clause. To make the argument is to refute it.

The Fifth Circuit deployed a similarly defective argument, explaining that "even if the plaintiffs had engaged in racial gerrymandering" that would not present a problem because "[i]llustrative maps are just that—illustrative," so "[t]he Legislature need not enact any of them" and is "free to consider all … proposals or come up with new ones." App.183. "The task will be difficult," noted the court, "but the Legislature will benefit from a strong presumption that it acts in good faith." *Id.* at 183-84.

That misses the point entirely. Adjudicating VRA claims in such a way would render the VRA unworkable. It would mean Plaintiffs may do what a Legislature may not. Plaintiffs' racially gerrymandered maps prove nothing. Not only are racially gerrymandered maps useless comparators for demonstrating that the Louisiana Legislature denied black Louisianans an "equally open" political process, 52 U.S.C. §10301(b), but racially gerrymandered comparator maps provide no reason to think the Legislature could constitutionally enact the racial compositions those maps propose. The district court's approach permits federal courts to invalidate duly enacted districting plans even though *no evidence* suggests a State could have enacted the plan in the first place—much less that the map's enactment is necessary to remedy a wrong. Allowing plaintiffs and courts to overturn State maps based on nothing more than racially gerrymandered comparator plans will undoubtedly "transfer much"—if

not all—"of the authority to regulate election procedures from the States to the federal courts." *Brnovich*, 141 S. Ct. at 2341.

Section 2 cannot trump the Equal Protection Clause. *See United States v. Wong Kim Ark*, 169 U.S. 649, 701 (1898) ("[S]tatutes enacted by congress … must yield to the paramount and supreme law of the constitution."). If the statute is to survive, it must act in concert with the Constitution. And where, as here, the evidence points to Louisiana having drawn districts not "on account of race" but instead on account of neutral redistricting principles, there is neither a statutory nor a constitutional basis to require Louisiana to redraw those districts on account of race.

B. If the District Court's Interpretation of §2 Is Correct, then §2 Is Not Valid Fifteenth Amendment Legislation.

The Fifteenth Amendment bans racial discrimination in voting, *see City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980) (collecting cases), and gives Congress the power "to enforce" it through "appropriate legislation," U.S. Const. amend. XV, §2. To "enforce" the amendment's non-discrimination mandate means "to put in force" or "cause to take effect." Noah Webster, American Dictionary of the English Language 447 (1865); *see also City of Boerne v. Flores*, 521 U.S. 507, 524 (1997). And "appropriate" legislation means law that is "suitable" or "proper." Webster, *supra*, 68.

Accordingly, §2 cannot compel racial preferences. *Cf. Bolden*, 446 U.S. at 77 n.24 ("[T]he fact that there is a constitutional right to a system of jury selection that is not purposefully exclusionary does not entail a right to a jury of any particular racial composition."). That is especially true in single-member redistricting, which is a zero-sum game; moving one individual into a district generally requires moving

another out. *See Gonzalez v. City of Aurora, Ill.*, 535 F.3d 594, 598 (7th Cir. 2008) (Easterbrook, C.J.) ("One cannot maximize Latino influence with-out minimizing some other group's influence."). To be valid Fifteenth Amendment legislation, §2 instead must operate as a prohibition on "invidious discrimination." *White v. Regester*, 412 U.S. 755, 764 (1973).

The absence of racially discriminatory intent therefore is necessarily a relevant consideration in any "appropriate" legislation to enforce the Fifteenth Amendment. That was well understood by the 1982 Congress, which is why the Senate put up "stiff resistance" to the House's initial effort to render intent irrelevant under §2. *Brnovich*, 141 S. Ct. at 2332. The amended version of §2—which asks whether districts are "equally open" and requires a "totality of circumstances" inquiry—can only be understood as prescribing a means to suss out whether a voting rule was the product of "invidious discrimination." *White*, 412 U.S. at 764. Even as amended, disparate effects or lack of proportionality *alone* cannot be actionable discrimination, lest §2 exceed Congress's power under the Fifteenth Amendment. *Accord Brnovich*, 141 S. Ct. at 2341, 2345-46.

The district court declared the prospect of discriminatory intent "[n]ot relevant" to its §2 inquiry (App.20), vitiating the statute's Fifteenth Amendment mooring. And in a similarly brazen move, the court announced that a State's interest in maintaining its cores of districts "is irrelevant" to the §2 inquiry.[2] App.105. But "it is

[2] The court never squared this dismissiveness with its implicit command that Louisiana retain the cores of its existing majority-black district. The court thus interprets §2 to either reject or compel core retention based entirely on a district's racial composition. That means race is, according to the district court, not merely one standalone consideration, but a factor that informs the propriety of all other

important to consider the reason[s] for the" law that set Louisiana's districting lines. *Brnovich*, 141 S. Ct. at 2340. And one reason for the "common practice" of making only minimal changes to a prior map's cores is to "honor[] settled expectations." *Cooper*, 137 S. Ct. at 1492 (Alito, J., concurring in part); *see also Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (recognizing that "preserving the cores of prior districts" is a legitimate state interest). Core retention's well-established, non-racial justifications make it highly relevant to the question "whether a race-neutral alternative that did not add a [second] majority-black district would deny black voters equal political opportunity," *Wisc. Legis.*, 142 S. Ct. at 1250-51, for a lack of "equal political opportunity" connotes "invidious discrimination," while the common desire to retain cores of districts does not, *see White*, 412 U.S. at 764; *cf. Brnovich*, 141 S. Ct. at 2339 ("[T]he degree to which a challenged rule has a long pedigree or is in widespread use in the United States is a circumstance that must be taken into account.").

Though Louisiana's race-neutral, least-changes congressional map bears no resemblance to the "ingenious defiance of the Constitution" that necessitated the VRA, *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966), the district court used §2 to order that map replaced with a racial gerrymander. Under this approach, any State with racially polarized voting will violate §2 if it declines to create another majority-minority district wherever one is possible. *See* App.127 ("[I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles*

considerations. Such flagrantly race-driven analysis exacerbates §2's tensions with both the Fourteenth and Fifteenth Amendments. *See, e.g.*, *Shaw II*, 517 U.S. at 907; *Bethune-Hill*, 137 S. Ct. at 798-99 (2017).

factors but still have failed to establish a violation of § 2 under the totality of circumstances."). To avoid liability, States must therefore consider race first and everything else second. That cannot be the law.

Where no evidence suggests it is possible to draw two majority-black districts in Louisiana without racial predominance—and, indeed, the evidence suggests the contrary, *see supra* pp. 6-8—it is unfathomable that the VRA could compel Louisiana to depart from existing law and draw two majority-black districts anyway. The court's order ignores that any "exercise of [Congress's] Fifteenth Amendment authority even when otherwise proper still must 'consist with the letter and spirit of the Constitution.'" *Miller*, 515 U.S. at 927 (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819)). Requiring States' redistricting processes to bear an "uncomfortable resemblance to political apartheid," *Shaw I*, 509 U.S. at 647, consists with neither.

Consonant with the Fifteenth Amendment, Congress passed §2 to identify and eliminate racial discrimination, not to require it. Requiring Louisiana to racially segregate its congressional districts is not "appropriate" enforcement of the Fifteenth Amendment. The district court's formulation of §2 renders the statute "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne*, 521 U.S. at 532. If the district court is right, then §2 as applied to single-member districts has exceeded Congress's remedial authority.

* * *

The district court infringed on Louisiana's sovereign redistricting prerogatives based on a flawed interpretation of §2 that raises the same constitutional concerns as the preliminary injunction order, since stayed, for Alabama's congressional districts. The Louisiana court's order risks sowing "chaos and confusion" among candidates, election officials, and voters. *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). Enjoining Louisiana's enacted law at this point in the election cycle—especially given the very serious constitutional problems inherent in any plan to be put in its place—is irreconcilable with other applications of the *Purcell* principle in this redistricting cycle alone. Louisiana should not be forced to hastily replace its race-neutral plan with one that "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw I*, 509 U.S. at 647. When the district court in Alabama entered a similar preliminary injunction in January, this Court stayed it. *See Merrill*, 142 S. Ct. 879. The Court should do the same here.

CONCLUSION

For the foregoing reasons, *Amici* States respectfully ask the Court to enter an administrative stay and stay pending appeal.

Respectfully submitted,

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