No. 21A814

In the Supreme Court of the United States

KYLE ARDOIN,
IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR LOUISIANA, et al.,

Applicants,

v.

PRESS ROBINSON, et al.,

Respondents.

ON EMERGENCY APPLICATION FOR ADMINISTRATIVE STAY AND STAY OR INJUNCTIVE RELIEF PENDING APPEAL TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

MOTION OF UNITED STATES REPRESENTATIVES FROM LOUISIANA TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPLICANTS WITHOUT 10 DAYS' NOTICE AND IN PAPER FORMAT

Tyler R. Green
Counsel of Record
David L. Rosenthal
CONSOVOY MCCARTHY PLLC
222 S. Main Street, 5th Fl.
Salt Lake City, UT 84101
tyler@consovoymccarthy.com

Counsel for Amici Curiae

Four of Louisiana's six United States House of Representatives members respectfully move for leave to file the enclosed brief as *amici curiae* in support of applicants. *Amici* are Representatives Steve Scalise (First District), Clay Higgins (Third District), Mike Johnson (Fourth District), and Julia Letlow (Fifth District). All are running for reelection in 2022 and thus have a significant interest in both the timeliness and the boundaries of the congressional districts. This case presents an important issue of interpreting and applying Section 2 of the Voting Rights Act—issues identical to those this Court has already agreed to review on the merits next Term. *See Merrill v. Milligan*, No. 21-1086 (probable jurisdiction noted Feb. 7, 2022; argument set for Oct. 4, 2022). *Amici* have a strong interest in the administration of a nondiscriminatory election system that allows all Louisiana citizens to participate equally. And *amici* are concerned that the remedy pursued by the plaintiffs and ordered by the district court will not only disrupt Louisiana's elections but also jeopardize the State's neutral districting process. Their proposed brief analyzes these and other relevant legal issues from *amici's* unique perspective.

Amici also move to file their brief without ten days' notice to the parties of their intent to file as ordinarily required by Sup. Ct. R. 37.2(a) and to file this brief in an unbound format on 8½-by-11-inch paper rather than in booklet form. These requests are necessary due to the press of time related to the emergency nature of the application.

Amici notified counsel for the applicants and respondents to obtain consent for their proposed brief. The applicants and the *Robinson* plaintiffs both consented, and

the *Galmon* plaintiffs informed counsel that they take no position on the filing of this brief.

Respectfully submitted,

Tyler R. Green
Counsel of Record
David L. Rosenthal
CONSOVOY MCCARTHY PLLC
222 S. Main Street, 5th Fl.
Salt Lake City, UT 84101
tyler@consovoymccarthy.com

Counsel for Amici Curiae

JUNE 22, 2022

No. 21A814

In the Supreme Court of the United States

KYLE ARDOIN,
IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR LOUISIANA, et al.,

Applicants,

v.

PRESS ROBINSON, et al.,

Respondents.

ON EMERGENCY APPLICATION FOR ADMINISTRATIVE STAY AND STAY OR INJUNCTIVE RELIEF PENDING APPEAL TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

BRIEF FOR UNITED STATES REPRESENTATIVES FROM LOUISIANA AS *AMICI CURIAE* IN SUPPORT OF APPLICANTS

Tyler R. Green
Counsel of Record
David L. Rosenthal
CONSOVOY MCCARTHY PLLC
222 S. Main Street, 5th Fl.
Salt Lake City, UT 84101
tyler@consovoymccarthy.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE

Amici are four of six United States House of Representatives members from Louisiana: Representatives Steve Scalise (First District), Clay Higgins (Third District), Mike Johnson (Fourth District), and Julia Letlow (Fifth District). All are running for reelection in 2022 and thus have a significant interest in both the boundaries of the congressional districts and the deadline by which those boundaries are set. This case presents an important issue of interpreting and applying Section 2 of the Voting Rights Act. *Amici* have a strong interest in the administration of a nondiscriminatory election system that allows all Louisiana citizens to participate equally. And *amici* are concerned that the remedy pursued by the plaintiffs and ordered by the district court will not only disrupt Louisiana's elections but also jeopardize the State's neutral districting process.*

* In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The National Republican Congressional Committee made a monetary contribution intended to fund the preparation and submission of this brief. All App. references are to the applicants' appendix in *Ardoin v. Robinson*, No. 21A814.

SUMMARY OF ARGUMENT

Precisely because "[t]here is no caste here" in our Nation, *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), Americans of all races, ages, and backgrounds live among other Americans of all races, ages, and backgrounds. This geographic dispersion means that when drawing electoral district lines using a neutral districting process, proportionality between population and discrete identifying characteristics—such as age or race—is not the norm. To achieve this type of unnatural proportionality across districts, the line-drawing process cannot be neutral. Something else must be given priority.

Here, the district court decided that the "something else" to be given priority was racial segregation. For years—including under prior Department of Justice supervision when the Voting Rights Act required preclearance—Louisiana's neutral process had produced one majority-minority congressional district. And in Louisiana's redistricting cycle after the 2020 Census, an expert had run ten thousand neutral maps, not one of which produced even a single majority-minority district—let alone two. App. 15. Even so, the district court fixated on the fact that while "Black Louisianans make up 33.13% of the total population and 31.25% of the voting age population, they comprise a majority in only 17% of Louisiana's congressional districts." App. 140.

So, the district court emphasized, "Louisiana's Black community" could "comprise more than 50% of the voting-age population in a second congressional district." App. 10. In fact, the plaintiffs' experts were "specifically asked to draw two [black-majority districts] by the plaintiffs," App. 116-17, and "did not attempt to draw

any maps with one majority-minority district instead of two," App. 247. The plaintiffs' experts therefore prioritized race to determine whether the other factors could be manipulated to "divvy[] [Louisianans] up by race." *LULAC v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in judgment in part, and dissenting in part).

Not only is the district court's approach inconsistent with the nature of proportional representation, it defies the Voting Rights Act, this Court's precedents, and the Fourteenth Amendment. Section 2 of the VRA does not "create a right to proportional representation." *Thornburg v. Gingles*, 478 U.S. 30, 84 (1986) (O'Connor, J., concurring in judgment). It protects equal access to "the political process" and expressly not "a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b). Section 2 should not be read to require states to adopt "proportional" maps that would never exist under neutral criteria, for such maps would themselves violate the statute. This Court has repeatedly upheld maps that did not provide proportional representation—and struck down proportional maps that hinged on race. Ordering a State "to engage in race-based redistricting and create a minimum number of districts in which minorities constitute a voting majority" "tend[s] to entrench the very practices and stereotypes the Equal Protection Clause is set against." *Johnson v. De Grandy*, 512 U.S. 997, 1029 (1994) (Kennedy, J., concurring in part and in judgment).

And independent of those merits issues, a stay is warranted here because the Court has already agreed to consider virtually identical Section 2 issues on the merits

next October. *Merrill v. Milligan*, 142 S. Ct. 879 (2022). The same considerations of avoiding unfairness and confusion for candidates and voters that justified a stay in *Merrill* apply with equal force here and likewise warrant a stay of the district court's order through the 2022 midterm elections.

The district court's "explicit race-based districting embarks us on a most dangerous course." *Id.* at 1031. This Court should stay the ill-considered injunction below, which "promot[es] the notion that political clout is to be gained or maintained by marshaling particular racial, ethnic, or religious groups in enclaves." *Id.* at 1030 (cleaned up). The application should be granted.

ARGUMENT

I. The Court's decision to grant a stay and set for argument identical issues at an identical time is the clearest reason to grant the application.

This application is not the first one to present these Section 2 redistricting issues for this Court's consideration before the 2022 elections. In *Merrill v. Milligan*, 142 S. Ct. 879 (2022), this Court has already issued a stay order, noted probable jurisdiction, and set oral argument (for next October) on a materially identical Section 2 districting claim at a materially identical time in the same election cycle. As a result, *Merrill* itself provides an independently sufficient basis to grant Louisiana's application, stay the district court's order through the 2022 midterm elections, and hold this case pending *Merrill*'s outcome. In fact, since the Fifth Circuit has denied Louisiana's stay application, granting this application is the only way to ensure that two sovereign States—and the candidates for U.S. House in those two States—receive identical treatment from the federal courts.

Beyond that, the same substantive considerations that properly justified granting the stay in *Merrill* exist with equal force here. Like the three-judge panel that presided over Section 2 claims against Alabama's new districts, the district court below violated the bedrock principle that "federal district courts ordinarily should not enjoin state election laws in the period close to an election." 142 S. Ct. at 880 (Kavanaugh, J., concurring) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)). For "[w]hen an election is close at hand, the rules of the road must be clear and settled." *Id.* at 880-81. "Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Id.* at 881.

Those same concerns about timing—and avoiding the resulting confusion for voters and unfairness for candidates—apply in like manner here. When this Court granted the stay in *Merrill*, the primary election in Alabama was "about four months" away and the general election "around nine months away." *Id.* at 888 (Kagan, J., dissenting). Here, Louisiana's November 8 primary is just over four months away, and the congressional general election (set for December 10) is just over five months away. App. 148. More to the point, candidates for Congress in Louisiana can file their candidacy paperwork on July 20, 2022, App. 3, 145, and begin campaigning and fundraising immediately after that. But they cannot do so if their districts' boundaries are not drawn—and if the state has not completed its processes for running elections in those districts after that line-drawing. All those intervening events that predate the election and must occur for the election to succeed merely

confirm that "[r]unning elections state-wide is extraordinarily complicated and difficult." 142 S. Ct. at 880 (Kavanaugh, J., concurring). So, "[t]he District Court's order would require heroic efforts by those state and local authorities in the next few weeks—and even heroic efforts likely would not be enough to avoid chaos and confusion." *Ibid.*

The stay in *Merrill* also confirms that the plaintiffs here—like the plaintiffs there—cannot show that "the merits" are "clearcut" in their favor and that the "changes" the district court's injunction would require are "feasible without significant cost, confusion, or hardship." 142 S. Ct. at 881. The claims and relief ordered here are materially identical to the claims and relief ordered in *Merrill*. And the record here does not show that redrawing Louisiana's congressional districts mere months before the election would produce less confusion or hardship, or cost less, than redrawing Alabama's congressional districts at effectively the same time in the 2022 election cycle. In short, what wasn't clearcut or feasible in Alabama isn't clearcut or feasible in Louisiana, either. That means, "the *Purcell* principle requires that" this Court "stay the [Louisiana] District Court's injunction with respect to the 2022 elections." *Id.* at 882.

It's worth emphasizing again that given the virtually complete overlap of issues between this case and *Merrill*, this Court can resolve this application by staying the district court's order and holding this case until it decides *Merrill* after plenary consideration during the October 2022 Term. Doing so will prevent the same

harms and confusion for Louisiana's voters and candidates that the *Merrill* stay avoided for Alabama's voters and candidates.

II. Because proportional representation is atypical in single-member districts, the district court prioritized race.

The district court's analysis assumes that because 33% of Louisiana's population is black, two of its six congressional districts (33%) should be majority black. App. 140. The court thus adopted the views of the plaintiffs' experts, who worked backwards from that assumption and made racial division a guiding principle before determining whether Louisiana's black population is sufficiently numerous and compact. App. 117, 301. This assumption of proportional representation turns out to be far less defensible than it appears. That is because "the representational baseline for single-member districts is strongly dictated by the specific political geography of each time and place." Moon Duchin et al., *Locating the Representational Baseline: Republicans in Massachusetts*, 18 Election L.J. 388, 392 (2019).

Many examples prove the point. For instance, Republican voters are 35% of the population in Massachusetts but, because of their uniform distribution throughout the State, "1/3 of the vote prov[es] insufficient to secure any representation." *Id.* at 389 (emphasis omitted); *cf. Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019) (noting that in 1840, the Whigs in Alabama "garnered 43 percent of the statewide vote, yet did not receive a single seat" in the House of Representatives). Even though the population of the United States is about 13%

black,[1] no U.S. Senate district (i.e., a State) is majority black. Ten percent of Floridians are at least 75 years old, but they apparently do not have a majority in any of the State's 27 U.S. House districts.[2] At the extreme, take a hypothetical ten-district state with 100 voters per district, in which a group constituting only 50% of the population (500 voters) could form a majority in nine districts if their geographic dispersion was such that those districts each contained 51 group members. The point is that political geography matters.

What is true nationally is true in Louisiana. Fifty-three of Louisiana's 64 parishes are majority white, whereas only 7 parishes are majority black.[3] And many black Louisianans live in majority-white places like Metairie (Jefferson Parish) and Lafayette (Lafayette Parish), both among Louisiana's five largest cities. Thus, as a matter of political geography, Louisiana's longstanding single majority-minority district comes as no surprise. App. 12. It is a consequence not of discriminatory motives, but of dispersion and intermingling of state residents regardless of race. In fact, federal courts previously invalidated Louisiana congressional maps with two majority-minority districts as racial gerrymanders and the State has since maintained the status quo of one majority-minority district for decades. *Hays v. Louisiana (Hays I)*, 839 F. Supp. 1188, 1195 (W.D. La. 1993); *Hays v. Louisiana (Hays IV)*, 936 F. Supp. 360, 368 (W.D. La. 1996).

---

[1] *See Quick Facts*, U.S. Census Bureau, https://www.census.gov/quickfacts/LA (last visited June 16, 2022).

[2] *2021 Demographics*, Miami Matters, https://www.miamidadematters.org/demographicdata?id=12&sectionId=942 (Jan. 2021).

[3] *See Louisiana: 2020 Census*, U.S. Census Bureau, https://www.census.gov/library/stories/state-by-state/louisiana-population-change-between-census-decade.html (Aug. 25, 2021) (providing data for Jefferson Parish (50.1% white and 28.6% black) and Lafayette Parish (63.4% white and 26.9% black)).

As experts have argued elsewhere, "[a]ny meaningful claim of gerrymandering must be demonstrated against the backdrop of valid alternative districting plans, under the constraints of law, physical geography, and political geography that are actually present in a jurisdiction." Duchin et al., *supra*, at 399. But here, the plaintiffs took a different route. Overcoming fundamental facts about Louisiana's political geography required the plaintiffs to do just what the Voting Rights Act and the Fourteenth Amendment forbid: draw maps based on race with the singular goal of racial gerrymandering in mind. While the plaintiffs' experts did not even consider maps with less than two majority-minority districts, the defendants' expert had drawn ten thousand neutral maps "without racial criteria and according to neutral principles." App. 15. None of them produced two majority-minority districts. *Ibid.* The median number of majority-minority districts in the maps was zero and the maximum number of majority-minority districts was zero, let alone two as the plaintiffs demand. *Ibid.*

As another expert has explained, proportional outcomes do not "come for free," and "representation doesn't kick in until you're fairly segregated."[4] Statistical anomalies notwithstanding, the plaintiffs' experts specifically set out to draw two majority-minority districts and decided that it was "important" to carry out that charge. App. 40. Only after the plaintiffs' experts operationalized a new model based on a new mission—segregation based on race—could they produce maps with two majority-minority districts. App. 15.

[4] Harvard University, *Political Geography: The Mathematics of Redistricting, A Lecture by Moon Duchin*, YouTube, at 17:58, 44:52 (Nov. 26, 2018), https://youtu.be/pi_i3ZMvtTo.

As one of the plaintiffs' experts candidly admitted, he was "aware" of race during the map drawing process. App. 23. And such awareness was undoubtedly required to draw two majority-black districts when ten thousand race-neutral, simulated maps do not create even one. App. 15. Even so, one reason that the court found that the plaintiffs presented reasonably compact maps is because the maps provide a number of majority-black districts that are "roughly proportional to its share of the population." App. 9. Compactness, according to the court, apparently is unbounded by the 180-mile gap between Baton Rouge and the delta parishes of northeast Louisiana that the plaintiffs would lump together to accomplish their race-based objective. In other words, once segregated by race, citizens were treated equally. *Cf. Plessy*, 163 U.S. at 552 (Harlan, J., dissenting) ("separate but equal").

III. The district court's approach defies the statute, precedent, and 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). "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).

This Court has since applied the VRA to the drawing of single-member districts. *See Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) (noting that the "Court has long assumed that one compelling interest" to excuse race-based districting "is complying with operative provisions of the Voting Rights Act"); *see also Holder v. Hall*, 512 U.S. 874, 893 (1994) (Thomas, J., concurring in judgment) ("[W]e have converted the Act into a device for regulating, rationing, and apportioning political power among racial and ethnic groups."). To establish a Section 2 violation in such circumstances, three preconditions must be met: (1) "a 'minority group' must be 'sufficiently large and geographically compact to constitute a majority' in some reasonably configured legislative district," (2) "the minority group must be 'politically cohesive,'" and (3) "a district's white majority must 'vote[] sufficiently as a bloc' to usually 'defeat the minority's preferred candidate.'" *Cooper*, 137 S. Ct. at 1470 (quoting *Gingles*, 478 U.S. at 50-51).

The central question under Section 2 is "whether members of a racial group have less opportunity than do other members of the electorate." *LULAC*, 548 U.S. at 425-26. Here, the court's injunction is premised on a fundamental legal error about how a Section 2 plaintiff can establish that "a 'minority group' is 'sufficiently large and geographically compact to constitute a majority' in some reasonably configured legislative district." *Cooper*, 137 S. Ct. at 1470. The court believed that the plaintiffs satisfied *Gingles* even in the face of evidence showing that a Louisiana map drawer

would not draw even a single majority-minority district using only race-neutral criteria. To arrive at the opposite answer, the court and the plaintiffs started with race and worked backwards.

Yet this Court's precedents—and the Constitution—make clear that a Section 2 plaintiff alleging vote dilution must first prioritize traditional redistricting criteria. Only then may the plaintiff assess whether the employment of traditional redistricting criteria has resulted in "reasonably configured" majority-minority districts that the State failed to create. *See Cooper*, 137 S. Ct. at 1470; *see, e.g.*, *LULAC*, 548 U.S. at 399 (discussing use of traditional redistricting criteria in satisfying *Gingles* I, lest courts "fail[] to account for the differences between people of the same race"); *Abrams v. Johnson*, 521 U.S. 74, 91-92 (1997); *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality op.) (Section 2 inquiry should account for "traditional districting principles such as maintaining communities of interest and traditional boundaries").

Injecting race as one of those traditional redistricting principles at step one is circular. It assumes from the start what the plaintiffs are ultimately trying to prove. A plaintiff cannot prioritize race at step one, and then work backwards with the specific objective of drawing two majority-minority districts and considering no other possibilities. App. 116-17. That approach unavoidably prioritizes race-based considerations above race-neutral redistricting criteria, thereby raising serious constitutional questions. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

That error would be bad in any case. But it is especially serious here where the

prioritization of race at the start made all the difference. No race-neutral map drawing would result in a single majority-minority district, let alone two. App.15. For this reason, the plaintiffs had to start with the requirement of creating two black-majority districts, no matter what race-neutral criteria would provide. Everything else was secondary. Simply put, the plaintiffs first prioritized a racial target (drawing two majority-minority districts) and then backfilled their case with various arguments about how those illustrative plans were sufficiently consistent with race-neutral traditional redistricting criteria, even though such plans would not have resulted but for the prioritization of race first and other criteria second. The plaintiffs' reverse order of operations rendered their maps unconstitutional.

As shown above, "[r]ace was the criterion that ... could not be compromised," *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 907 (1996), even in applying the *Gingles* preconditions. In fact, the court's view of the VRA makes VRA compliance irreconcilable with the U.S. Constitution. A map that starts with a specific racial target of two majority-black districts and that can be drawn only when race is prioritized at the outset, goes far beyond Section 2's mandate of an "equally open" political process. 52 U.S.C. §10301(b). Just as "[n]othing in §2 grants special protection to a minority group's right to form political coalitions," *Bartlett v. Strickland*, 556 U.S. 1, 15 (2009), nothing in Section 2 grants the plaintiffs a right to a predetermined number of majority-minority districts that can exist only when race subordinates "traditional districting principles," *LULAC*, 548 U.S. at 433; *see also Holder*, 512 U.S. at 907 (Thomas, J., concurring) ("few devices could be better

designed to exacerbate racial tensions than the consciously segregated districting system currently being constructed in the name of the Voting Rights Act"). The focus on race at the outset of the analysis contradicts Section 2, this Court's precedents, and the Fourteenth Amendment's guarantee of equal protection.

A. Section 2 does not require proportional representation.

As this Court observed in *Ashcroft*, "the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life." 539 U.S. at 490-91. The VRA seeks "a society that is no longer fixated on race." *Id.* at 490. But the district court's conclusion depends on a fixation with race. Not once in ten thousand map simulations did a stipulated expert happen upon a scheme with even one majority-minority district. Only when race became the guiding principle could a map with two such districts be made. App. 15. Using those maps would violate Section 2, and the VRA should not be interpreted in such a self-defeating way.

Section 2 does not guarantee equality through proportional representation. "[T]he ultimate right of § 2 is equality of opportunity." *De Grandy*, 512 U.S. at 1014 n.11. Section 2 is violated only if "the political processes leading to nomination or election … are not equally open to participation by members of a class of citizens." 52 U.S.C. § 10301(b). Here, ten thousand efforts at other maps conclusively show that Louisiana elections are equally open based on neutral criteria. So the plaintiffs can prevail on their Section 2 claim only if the statute guarantees representation, rather than protection against state action that abridges the right to compete on an equal

footing in the electoral process. But Section 2 specifically disclaims that it "establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." *Ibid.*; *see also Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2342 n.14 (2021) (noting this disclaimer as "a signal that § 2 imposes something other than a pure disparate-impact regime"); *Rucho*, 139 S. Ct. at 2502 ("[A] racial gerrymandering claim does not ask for a fair share of political power and influence .... It asks instead for the elimination of a racial classification.").[5]

To be sure, this Court in *De Grandy* examined proportionality as potentially relevant in the "totality of the circumstances" analysis after the three *Gingles* preconditions have been met. But the Court also cautioned that "the degree of probative value assigned to disproportionality, in a case where it is shown, will vary not only with the degree of disproportionality but with other factors as well." 512 U.S. at 1021 n.17. "[L]ocal conditions" matter. *Ibid.* (cleaned up). Here, application of neutral factors to Louisiana's political geography yielded, ten thousand times over, no more proportional representation.

In any event, considering proportionality after the *Gingles* conditions have been shown is much different from what the district court did here, which is look to

[5] As the Senate Report accompanying the 1982 amendments to the Act (which added this language) states, this provision is intended to "put[] to rest any concerns that have been voiced about racial quotas." Sen. Rep. No. 97-417, at 31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 208. The Senate Report shows that this language was intended to "codify" the analysis this Court used in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *White v. Regester*, 412 U.S. 755 (1973). *See* S.R. Rep. No. 97-417, supra, at 196-201, 204-13. Under these cases "[t]he plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open ... in that its members had less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice." *White*, 412 U.S. at 765-66; *accord Whitcomb*, 403 U.S. at 149.

proportionality to excuse race-based consideration of the conditions themselves. Starting with segregation distorts the *Gingles* analysis by de facto favoring a race-based plan over either the existing plan or other neutral ones. The *Gingles* conditions presume "traditional districting principles such as maintaining communities of interest and traditional boundaries." *Abrams*, 521 U.S. at 92 (cleaned up). Considering race before these traditional principles makes the "prohibited assumption" "from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls." *LULAC*, 548 U.S. at 433 (cleaned up); *see also Miller*, 515 U.S. at 919 (warning that "traditional districting principles" cannot be "subordinated to racial objectives"). Thus, if neutral maps cannot (or rarely) produce a sufficiently numerous, compact minority group, the *Gingles* conditions cannot be satisfied. *See Gonzalez v. City of Aurora*, 535 F.3d 594, 600 (7th Cir. 2008) (Easterbrook, C.J.) (asking whether Latino population was "concentrated in a way that *neutrally drawn compact districts* would produce three" majority-minority districts (emphasis added)); *see generally* Jowei Chen & Nicholas O. Stephanopoulos, *The Race-Blind Future of Voting*, 130 Yale L.J. 862 (2021).

Finally, the district court's analysis would trap states in an endless cycle of Section 2 violations. Again, the central question is "whether members of a racial group have less opportunity than do other members of the electorate." *LULAC*, 548 U.S. at 425-26. If a map can exist only by racial discrimination, necessarily it discriminates against members of a group. The very relief given to one set of plaintiffs—racially based districts that would never exist under neutral principles—

would itself create a new Section 2 violation as to another plaintiff class, whose voting strength would be diminished by the remedial plan. Had a legislative mapmaker started off making racial segregation a "nonnegotiable principle," there is little doubt what fate the resulting map would meet on a Section 2 challenge. *E.g.*, *Miller*, 515 U.S. at 919 ("This statement from a state official is powerful evidence that the legislature subordinated traditional districting principles to race"); *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring) ("Race cannot be the predominant factor in redistricting"). So telling the Louisiana legislature to adopt such a map (within 14 days) is telling it to violate the very federal law the new map would supposedly remedy. App. 2-3. The statute should not be read to lead to so absurd a result. Not only does its text forbid this result, "few devices could be better designed to exacerbate racial tensions than the consciously segregated districting system" required by the district court. *Holder*, 512 U.S. at 907 (Thomas, J., concurring in judgment).

B. Precedent does not require proportional representation.

This Court's precedents confirm that there are no race-based traditional districting criteria a State may employ to achieve proportional representation. In *Miller*, the Court explained that to establish a racial gerrymandering claim, "a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles ... to racial considerations." 515 U.S. at 916 (cleaned up). "Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can defeat a claim that a district has been gerrymandered on racial lines." *Ibid.* (cleaned up). Nowhere has the Court suggested

that there are legitimate or traditional race-based principles to which states may point as a defense.

In *Miller*, this Court invalidated congressional maps drawn in Georgia that sought proportional representation. At the insistence of the U.S. Department of Justice, the state legislature had drawn three of 11 districts as majority-minority to mirror the State's black population (27%). *Id.* at 906-07, 927-28. The Court rejected those maps because, as the State had all but conceded, "race was the predominant factor in drawing" the new majority-minority district. *Id.* at 918. "[E]very objective districting factor that could realistically be subordinated to racial tinkering in fact suffered that fate." *Id.* at 919 (cleaned up). Even where "the boundaries" of the new district "follow[ed]" existing divisions like precinct lines, those choices were themselves the product of "design[] ... along racial lines." *Ibid.* (cleaned up).

The Court rejected this racial gerrymander, specifically holding that "there was no reasonable basis to believe that Georgia's earlier [non-proportional] plans violated" the VRA. *Id.* at 923. "The State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan ... discriminates on the basis of race or color." *Id.* at 924. Because engaging in "presumptively unconstitutional race-based districting" would have brought the VRA "into tension with the Fourteenth Amendment," the Court rejected the State's maps, even though those maps provided proportional representation. *Id.* at 927. As the Court explained, "[i]t takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played

a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids." *Id.* at 927-28.

This Court thus remanded the case, and after the state legislature failed to act, the district court drew maps with only one majority-minority district (9%)—representation far below black Georgians' 27% share of the population. *Abrams*, 521 U.S. at 78; *see id.* at 103 (Breyer, J., dissenting). "The absence of a second, if not a third, majority-black district" was "the principal point of contention" here. *Id.* at 78 (majority opinion). Yet this Court upheld the district court's maps, which focused on "Georgia's traditional redistricting principles." *Id.* at 84. The district court had "considered the possibility of creating a second majority-black district but decided doing so would require it to subordinate Georgia's traditional districting policies and consider race predominantly, to the exclusion of both constitutional norms and common sense." *Ibid.* (cleaned up). This Court agreed, and explained "that the black population was not sufficiently compact" for even "a *second* majority-black district." *Id.* at 91 (emphasis added). Thus, even getting to two majority-minority districts (18%) by focusing on race would have violated the Equal Protection Clause, and the Court rejected the use of DOJ's proposed "plan as the basis for a remedy [that] would validate the very maneuvers that were a major cause of the unconstitutional districting" at issue in *Miller*. *Id.* at 86; *see id.* at 109 (Breyer, J., dissenting) ("The majority means that a two-district plan would be unlawful—that it would violate the Constitution").

This Court's teachings in *Miller* and *Abrams* show the error of the district court's analysis, which prioritized race over traditional districting principles in pursuit of proportional representation. Not only is the degree of disproportionality in this case well below the disproportionality permitted in *Abrams*, the district court's overarching focus on race makes the same mistake made by the state legislature (at DOJ's insistence) in *Miller*. The district court's decision thus conflicts with this Court's precedents.

C. The Fourteenth Amendment prohibits maps drawn by race.

A State cannot constitutionally be forced to adopt a plan that is premised on and would never exist absent unequal treatment based on race. "[T]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause." *Bartlett*, 556 U.S. at 21 (cleaned up). "[S]ystematically dividing the country into electoral districts along racial lines" is "nothing short of a system of 'political apartheid.'" *Holder*, 512 U.S. at 905 (Thomas, J., concurring in judgment) (quoting *Shaw v. Reno* (*Shaw I*), 509 U.S. 630, 647 (1993)). For that reason, "the sorting of persons with an intent to divide by reason of race raises the most serious constitutional questions." *De Grandy*, 512 U.S. at 1029 (Kennedy, J., concurring in part and in judgment).

This Court has applied strict scrutiny when the government discriminates based on "racial classifications." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (plurality opinion) (collecting cases). Racial gerrymanders must be narrowly tailored to achieving a "compelling state interest." *Shaw II*, 517 U.S. at 908. Proportional representation is not a compelling state

interest. *See Gingles*, 478 U.S. at 84 (O'Connor, J., concurring in judgment) ("Congress did not intend to create a right to proportional representation"). This Court has "assume[d], without deciding, that the State's interest in complying with the Voting Rights Act [is] compelling." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 801 (2017).[6] But "the purpose of the Voting Rights Act [is] to eliminate the negative effects of past discrimination," *Gingles*, 478 U.S. at 65, and "[a] State's interest in remedying the effects of past or present racial discrimination" will only "rise to the level of a compelling state interest" if the State "satisf[ies] two conditions," *Shaw II*, 517 U.S. at 909. *First*, "the discrimination must be 'identified discrimination.'" *Ibid.* Any mere "generalized assertion of past discrimination in a particular industry or region is not adequate." *Ibid.* And likewise, "an effort to alleviate the effects of societal discrimination is not a compelling interest." *Id.* at 909-10. Second, a legislature "must have had a strong basis in evidence to conclude that remedial action was necessary, before it" acts based on race. *Id.* at 910 (cleaned up)

Here, the plaintiffs cannot show either condition leading to a compelling interest, much less narrow tailoring. They cannot identify any relevant discrimination, because ten thousand neutral maps produced even less representation. App. 15. And they cannot show that a "strong basis in evidence" justifies their maps. *Cooper*, 137 S. Ct. at 1464. The only discrimination here is by the plaintiffs, whose proposed "racial tinkering" and prioritization of "mechanical racial targets above all other districting criteria" provides strong "evidence that race

[6] Compliance with a statute cannot justify a violation of the Constitution. *Cf. Bethune-Hill*, 137 S. Ct. at 804-05 (Thomas, J., concurring in judgment in part and dissenting in part).

motivated the drawing" of their proposed remedial redistricting plan. *Miller*, 515 U.S. at 919 (cleaned up) (first quote); *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 267 (2015) (second and third quotes).

All told, the court's order is contrary to the promise of the Equal Protection Clause. The injunction is premised on the noxious idea that redistricting begins and ends with racial considerations. The race-based sorting of a State's voters that the injunction will require "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. And it sends an "equally pernicious" message to elected representatives in those districts: "their primary obligation is to represent only the members of that [racial] group, rather than their constituency as a whole." *Id.* at 648. If this is what the VRA requires of single-member districts, then the VRA is unconstitutional as applied here.

In the dissenting opinion in *Rucho*, members of this Court lamented the possibility that "today's mapmakers can generate thousands of possibilities at the touch of a key—and then choose the one giving their party maximum advantage (usually while still meeting traditional districting requirements)." 139 S. Ct. at 2513 (Kagan, J., dissenting). What the plaintiffs have done here would make the dissenters' nefarious mapmaker blush. The plaintiffs ignored ten thousand random race-neutral maps. None resulted in a single majority-minority district, let alone two. App. 15. There can be no question, then, that the maps the plaintiffs ultimately

proffered are an extreme racial gerrymander solely designed to hit a predetermined racial target. *Cf. id.* at 2518 (deeming congressional map an extreme political gerrymander after an "expert produced 3,000 maps, adhering … to the districting criteria that the North Carolina redistricting committee had used, other than partisan advantage," and every "one of the 3,000 maps would have produced at least one more Democratic House Member than the State's actual map"). They are "an out-out-outlier" with the most severe constitutional consequence—ordering unprecedented changes to Louisiana's longstanding balance and existing districts on the basis of race alone. *Ibid.*

"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 551 U.S. at 748. This Court should not countenance the district court's substitution of a race-neutral plan for one premised on segregation.

CONCLUSION

The Court should grant the application for a stay.

Respectfully submitted,

Tyler R. Green
Counsel of Record
David L. Rosenthal
CONSOVOY MCCARTHY PLLC
222 S. Main Street, 5th Fl.
Salt Lake City, UT 84101
tyler@consovoymccarthy.com

Counsel for *Amici Curiae*

JUNE 22, 2022