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 UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR *AMICI CURIAE* GEORGIA HOUSE OF REPRESENTATIVES SPEAKER JON BURNS, HOUSE SPEAKER PRO TEM JAN JONES, HOUSE MAJORITY LEADER CHUCK EFSTRATION, AND HOUSE MAJORITY WHIP JAMES BURCHETT; AND LT. GOVERNOR AND PRESIDENT OF THE STATE SENATE BURT JONES, SENATE PRESIDENT PRO TEM JOHN F. KENNEDY, AND SENATE MAJORITY LEADER STEVE GOOCH IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST[1]

Amici, Georgia House of Representatives Speaker Jon Burns, House Speaker Pro Tem Jan Jones, House Majority Leader Chuck Efstration, and House Majority Whip James Burchett; and Lt. Governor and President of the State Senate Burt Jones, Senate President Pro Tem John F. Kennedy, and Senate Majority Leader Steve Gooch are Republican elected officials in the State of Georgia who dealt personally with redistricting and redistricting litigation following the 2020 Census. *Amici* have a significant interest in the correct application of the law, particularly which courts can hear challenges under § 2 of the Voting Rights Act to statewide redistricting and the enforcement of this Court's precedent to provide clear direction to State officials engaged in redistricting.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 2 of the Voting Rights Act (VRA) is an *enforcement* mechanism for constitutional rights. This brief addresses two issues that support affirmance of the district court's decision in this case.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amici or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

First, statewide redistricting cases brought under § 2 should be heard by a three-judge court because § 2 enforces the Fourteenth and Fifteenth Amendment. The failure to convene a three-judge court under 28 U.S.C. § 2284 creates a subject matter jurisdiction problem because a single judge cannot decide a § 2 challenge to congressional or statewide legislative apportionment. Georgia faced a similar problem in 2021 and 2022, where several sets of plaintiffs confronted the State with competing theories of liability. Some of these cases came before a single judge and others before a three-judge court. Properly interpreting the three-judge court requirement protects States and plaintiffs.

Second, Louisiana relied on incumbent protection as justification for the location of the second majority-Black district in its congressional plan. But this Court would have to overrule the *Shaw* line of cases to endorse the approach Louisiana takes in this appeal. While partisan considerations are always important in redistricting, they cannot be used to justify racial gerrymandering to place a district in an area of the state where § 2 does not require it.

While *Amici* are sympathetic to the challenges of drawing statewide redistricting plans and the resulting court challenges, having those plans reviewed by three-judge district courts is the best protection against gamesmanship by creative plaintiffs that can result in confusing decisions, conflicting appellate tracks, and unnecessary delays in reaching a final resolution. And ensuring courts consistently enforce the *Shaw* line of cases provides

protection for States and plaintiffs alike. This Court should affirm.

ARGUMENT

I. Like Louisiana, Georgia faced separate Section 2 and constitutional lawsuits following the 2020 Census.

Five sets of plaintiffs challenged Georgia's congressional and legislative redistricting plans following the 2020 Census. Three of these cases alleged claims exclusively under § 2 of the Voting Rights Act. *See Alpha Phi Alpha Fraternity, Inc., et al v. Raffensperger,* 1:21-cv-05337 (N.D. Ga. 2021) ("*APA*"); *Coakley Pendergrass, et al., v. Raffensperger,* 1:21-cv-05339 (N.D. Ga. 2021); *Annie Lois Grant, et al.,* 1:22-cv-00122 (N.D. Ga. 2022).[2] These three cases were consolidated for trial and heard by a single district judge in the Northern District of Georgia. *See Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 700 F. Supp. 3d 1136, 1186 (N.D. Ga. 2023).

The other two cases alleged a combination of § 2 claims and claims under the U.S. Constitution. *See Georgia State Conference of the NAACP, et al., v. State of Georgia, et al.*, 1:21-cv-05338 (N.D. Ga. 2021) ("*Georgia NAACP*")[3]; *Common Cause, et al. v.*

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[2] For convenience, all docket references to the three consolidated § 2 cases will be to the *APA* docket.

[3] For convenience, all docket references to the two consolidated three-judge court cases will be to the *Georgia NAACP* docket.

Raffensperger, 1:22-cv-00090 (N.D. Ga. 2022). Pursuant to 28 U.S.C. § 2284, those two cases were assigned to a three-judge district court by the Chief Judge of the Eleventh Circuit and eventually consolidated. *Georgia NAACP* at Doc. 40. And thus began the confusing and convoluted litigation track that led the State of Georgia to its current posture before multiple courts regarding its congressional and state legislative districts.

Initially, the three § 2 cases were subject to a preliminary-injunction proceeding in early 2022, while plaintiffs in the constitutional cases did not seek emergency relief. *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 587 F. Supp. 3d 1222, 1237 (N.D. Ga. 2022) (ruling on preliminary injunction). Unlike in Louisiana, the single-judge district court in Georgia denied the preliminary injunction and the challenged maps were used in the 2022 election cycle. *Id*. Discovery then proceeded in all five cases and all five cases reached the summary-judgment phase. And that's where things became even more challenging for the State.

The single-judge district court moved more quickly than the specially convened three-judge district court. The single-judge district court denied the competing summary judgment motions and set the case for trial, which took place in September 2023. *Alpha Phi Alpha Fraternity Inc*., 700 F. Supp. 3d at 1186. Meanwhile, the three-judge district court, which included the judge from the § 2 cases, continued consideration of the pending summary-judgment motions.

Following an eight-day trial, the single-judge district court found Georgia's redistricting plans violated § 2. *Id*. at 1379–81. The same day, the three-judge panel denied the motions for summary judgment and set the constitutional cases for trial in November 2023. *Georgia State Conf. of the NAACP v. Georgia*, No. 1:21-CV-05338-ELB-SCJ-SDG, 2023 WL 7093025, at *21 (N.D. Ga. Oct. 26, 2023).

But when the State of Georgia elected to appeal the single-judge order and did not seek an emergency stay, the three-judge court found that the single-judge court had effectively deprived it of jurisdiction by at least temporarily rendering consideration of the 2021 maps moot. *Georgia NAACP* at Doc. 201. And while the merits order from the single-judge district court § 2 case remains on appeal, the three-judge district court stayed consideration of the cases before it. *Id*. at Doc. 222.

Now Georgia is left in a position that makes no sense from a statutory perspective and even less sense as a practical matter. Having lost on the merits at trial on the § 2 claims, the State appealed that decision while the legislature enacted remedial plans to comply with the underlying order from the district court. After the single-judge district court approved the remedial maps, the plaintiffs also appealed, arguing the remedial maps still violated Section 2.

If the State loses its merits appeal, the remedial maps may be challenged anew as an unconstitutional racial gerrymander. If the State

wins its appeal and reinstates the old maps,[4] the currently terminated three-judge district court case will spring back to life and Georgia is effectively back to where it started, facing potential liability under § 2 (again) and under the U.S. Constitution. This convoluted structure is entirely unnecessary and unsupported by statute and binding precedent.

II. Section 2 cases regarding statewide redistricting must be heard by three-judge panels.

Georgia's experience in 2021 is emblematic of the problems associated with putting § 2 claims on a different but parallel litigation track from claims that allege violations of specific constitutional provisions—a similar situation in which Louisiana finds itself here. Before turning to practical reasons why having all statewide redistricting challenges decided by three-judge courts, it is necessary to first analyze the statutory framework of both § 2 of the VRA and the Three Judge Court Act to explain why § 2284 covers challenges to statewide legislative and congressional districts made exclusively under § 2.

A. The original language of Section 2.

The VRA is a direct exercise of the enforcement power of Congress under the Fourteenth and Fifteenth Amendments. *See City of Boerne v. Flores*, 521 U.S. 507, 518 (1997); *Lewis v. Governor of Ala.*,

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[4] The Georgia legislature included a provision in the remedial plans reverting to the prior maps if they are later found lawful on appeal.

896 F.3d 1282, 1293 (11th Cir. 2018), *vacated and rehearing en banc granted by* 914 F.3d 1291 (11th Cir. Jan. 30, 2019) (Wilson, J.). Thus, more than most congressional actions, the VRA is a direct effort by Congress to effect specific constitutional provisions.

As originally enacted in 1965, the text of § 2 tracked the language set forth in the Fifteenth Amendment:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

79 Stat. 437, as amended (quoted in *City of Mobile v. Bolden,* 446 U.S. 55, 60 (1980)). Similarly, Section 1 of the Fifteenth Amendment states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. Amend. XV, Sec. 1.

Thus, for the first decades after passage of § 2, this Court made clear that "it is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment…" *City of Mobile,* 446 U.S. at 60. Discussing the legislative history of the original text, this Court recognized that "[t]he view that this section simply restated the prohibitions already contained in the Fifteenth Amendment was expressed without contradiction." *Id.* at 61. And it

was uncontroversial that § 2 as originally enacted was "almost a rephrasing of the 15th Amendment." *Id.* (internal alterations omitted); *accord Kirksey v. City of Jackson, Miss.*, 663 F.2d 659, 665 (5th Cir. 1981).

Prior to 1980, most lower courts interpreted these Supreme Court precedents as not requiring a showing of discriminatory intent in vote dilution cases, but if proof of discriminatory intent was required, *circumstantial evidence* of the lingering effects of such an intent was a sufficient basis to prove a claim. The principal case during this period was *Zimmer v. McKeithan*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Bd. v. Marshall,* 424 U.S. 636 (1976), which involved a challenge by Black citizens to the at-large election of the school board and police jury (essentially a county commission) of Louisiana's East Carroll Parish. The Fifth Circuit *en banc* established a list of standards for testing plaintiffs' equal protection claims, including proof of:

- a lack of access to the process of slating candidates;
- the unresponsiveness of legislators to a minority's particularized interests;
- a tenuous state policy underlying the preference for multi-member or at-large districting; or

- that the existence of past discrimination in general precludes the effective participation in the electoral system.

485 F.2d at 1305.

Such proof could be further enhanced by a showing of the following factors:

- the existence of large districts;
- majority vote requirements;
- anti-single shot voting provisions; and
- the lack of provision for at-large candidates running from particular geographical sub-districts.

Id.

Applying these standards, the district court found for the plaintiffs by using those factors as evidence of the continuing effect of a protracted history of discrimination affecting the right to vote. *Id*. at 1301, 1305–07. One significant point was that the jurisdiction changed elections to an at-large method in the immediate wake of increased Black voting strength after the 1965 enactment of the Voting Rights Act. *Id*. The court concluded that the timing of the change indicated that racial discrimination *motivated* the change. *Id*. at 1306–07.

Thus, the *Zimmer* court relied upon an aggregation of factors to find a violation, connecting

the historical factors to enforce the constitutional protections against racial discrimination. *Id.* at 1304–07. Numerous other lower court decisions followed this approach. For example, in *Kirksey v. Bd. of Supervisors of Hinds Cnty., Miss.*, 554 F.2d 139 (5th Cir. 1977), the court applied the *Zimmer* factors to conclude that a past pattern of racial discrimination with regard to voting rights was evident, citing impediments like poll taxes, literacy tests, and bloc voting. *Id.* at 143–51. The court again tied the plan to constitutional prohibitions against intentional discrimination:

> Where a plan, though itself racially neutral, carries forward intentional and purposeful discriminatory denial of access that is already in effect, it is *not constitutional*. Its benign nature cannot insulate the redistricting government entity from the existent taint. If a neutral plan were permitted to have this effect, minorities presently denied access to political life for *unconstitutional* reasons could be walled off from relief against continuation of that denial.

Id. at 146–47 (emphasis added).[5]

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[5] This Court's rulings in the non-voting rights cases *Washington v. Davis*, 426 U.S. 229 (1976) and *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) similarly recognized a requirement that plaintiffs in constitutional discrimination cases prove discriminatory intent. Lower courts interpreted this to mean that this would be of particular significance if the only issue in the case before

B. *Bolden* and the 1982 amendments.

This method of analysis came to an abrupt halt following *City of Mobile v. Bolden*, 446 U.S. 55 (1980), where this Court reversed lower courts that applied the *Zimmer* factors. In that case, a plurality held that "racially discriminatory *motivation* is a necessary ingredient of a Fifteenth Amendment violation." *Id.* at 62 (emphasis added). The plurality also concluded that the Fifteenth Amendment only prohibits direct interference with voting rights and not vote dilution, *id.* at 65, and that the Equal Protection Clause of the Fourteenth Amendment reaches only purposeful discrimination, *id.* at 72. As a result, the factors found relevant by the district court were insufficient to prove an unconstitutionally discriminatory purpose, *id.* at 72–74. With respect to the *Zimmer* factors, this Court concluded: "[a]lthough the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose, satisfaction of those criteria is not of itself sufficient proof of such a purpose." *Id.* at 73.

Faced with this decision, Congress amended the VRA in 1982. But those amendments did nothing to alter the underlying prohibition on racial discrimination in voting practices secured by the Fourteenth and Fifteenth Amendments—and indeed they could not. "Congress does not enforce a

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it was whether a challenged redistricting plan was the original source of the discrimination claimed. *See Kirksey*, 554 F.2d at 151.

constitutional right by changing what the right is." *City of Boerne*, 521 U.S. at 519.

Instead, Congress merely shifted the evidentiary burden on parties seeking to prove a violation of the Fifteenth Amendment via § 2. This was not a *new* requirement but rather a *reestablishment* of the old.

The point of the 1982 amendments was to "*relieve* plaintiffs of the *burden* of proving discriminatory intent," so a plaintiff could prove his case "by *proof* of discriminatory results alone." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (emphasis added). Or, in the words of the Senate Report to the 1982 amendment, the change "thereby *restores* the legal standards, based on the controlling Supreme Court precedents, which applied in voting discrimination claims prior to the litigation involved in *Mobile v. Bolden*." S. Rep. No. 97-417, at 2 (1982) (emphasis added).

The "controlling Supreme Court precedents" referenced here are found in *White v. Regester,* 412 U.S. 755 (1973). The statutory language in subsection (b) of § 2 "codifies the test for discriminatory result laid down by the Supreme Court in *White v. Regester,* and the language is taken *directly* from that decision." S. Rep. No. 97-417, at 67 (1982) (emphasis added). Understanding the statute in this context matters when determining whether a three-judge court should be convened in certain exclusively § 2 claims.

Because the amended § 2 restores the pre-*City of Mobile* line of caselaw and § 2 as originally enacted "simply restated the prohibitions already contained in the Fifteenth Amendment," *City of Mobile,* 446 U.S at 61, then every claim brought under § 2, even as amended, is and must be a purely constitutional claim—because § 2 is a statutory mechanism to enforce a *right* under the Constitution. The 1982 amendments could not and did not establish new rights. They merely returned to a simpler pathway for enforcing "the prohibitions already contained in the Fifteenth Amendment," even as amended. *Id.* at 61.[6]

At bottom, Congress "has been given the power 'to *enforce*,'" the Fourteenth and Fifteenth Amendments, "not the power to determine what constitutes a constitutional violation." *City of Boerne,* 521 U.S. at 519 (emphasis added). Congress stayed within these bounds when it originally enacted § 2 as a restatement of the Fifteenth Amendment pursuant to its enforcement authority. And it did nothing to alter the constitutional character of a § 2 claim through the 1982 amendments—instead it reestablished the results test set forth by this Court

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[6] If there were any lingering doubt on this point, Justice White extinguished it in his dissent in *City of Mobile* when he noted the decision was "flatly inconsistent with *White v. Regester*…" *Id.* at 94 (White, J. dissenting). And as the author of the unanimous opinion in *Regester*, he was highlighting the fact that the return to pre-*City of Mobile* precedents *necessarily* means a return to a universe where "invidious discriminatory purpose can be *inferred* from objective factors of the kind relied on in *White v. Regester*." *Id.* at 95 (White, J., dissenting) (emphasis added).

in *White* that had been discarded in *City of Mobile,* which provided a coherent evidentiary scheme for enforcing the guarantees of the Fourteenth and Fifteenth Amendments.

This becomes clearer when considering what a majority of justices said in this Court's first opportunity to revisit § 2 following the 1982 amendments in *Thornburg v. Gingles,* 478 U.S. 30, 82–105 (1986). While a plurality of justices pushed for a racially polarized voting test under § 2 that ignored causation in the analysis, that view did not carry the day. Instead, Justice White noted that such a test would transform § 2 into a rule that condemns "interest-group politics rather than a rule hedging against racial discrimination." *Id.* at 82 (White, J., concurring). And Justice O'Connor writing for herself and three others flatly declared, "I agree with Justice White" in rejecting the portion of Justice Brennan's plurality opinion that insisted causation was irrelevant to a § 2 inquiry. *Id.* at 101 (O'Connor, J., concurring).

In the Eleventh Circuit, it has long been the case that for a § 2 claim "to be actionable, a deprivation of the minority group's right to equal participation in the political process must be *on account* of a classification, decision, or practice that depends on race or color, *not on account of some other racially neutral cause*." *Solomon v. Liberty Cnty. Com'rs,* 221 F.3d 1218, 1225 (11th Cir. 2000) (en banc) (quoting *Nipper v. Smith,* 39 F.3d 1494, 1515 (11th Cir. 1994) (Tjoflat, C.J., plurality opinion) (internal alterations omitted)). Retaining this causal element of a § 2 claim effects the statutory command

that violations must occur "on account of race." And that statutory language shows Congress was enforcing the Fourteenth and Fifteenth Amendments' intent-based rights in § 2, not creating a new right out of whole cloth through some power to regulate.

Indeed, the power to *enforce* constitutional guarantees is categorically different than the power to *regulate* under the Constitution. Other provisions of the Constitution give Congress the broad power to regulate in various areas include (but are not limited to):

- The power to "*regulate* Commerce . . . along the several States." U.S. Const. Art. I, Sec. 8 (emphasis added).

- The power to "*regulate* the Value" of money. *Id*. (emphasis added).

- The power to "make Rules for the Government and *Regulation* of the land and naval Forces." *Id*. (emphasis added).

- The power to "make all needful *Rules* and *Regulations* respecting the Territory or other Property belonging to the United States." *Id*. at Art. IV, Sec. 3 (emphasis added).

In sharp contrast, neither the Fourteenth nor Fifteenth Amendment give Congress the power to *regulate* anything. Instead, the Fourteenth

Amendment gives Congress the "power to *enforce*, by appropriate legislation, the provisions of this article." U.S. Const. Amend. XIV, Sec. 5 (emphasis added). And the Fifteenth Amendment grants Congress the "power to *enforce* this article by appropriate legislation." U.S. Const. Amend. XV, Sec. 2 (emphasis added). As a result, the VRA was enacted under Congress's power to enforce those constitutional provisions, *City of Boerne*, 521 U.S. at 518, and cases brought under § 2 are constitutional enforcement actions.

C. Why three-judge district courts are required.

Having confirmed that § 2 claims are constitutional enforcement actions, we turn next to the text of the statute on three-judge district courts. Section 2284 of the Three Judge Court Act requires "[a] district court of three judges… when an action is filed challenging the *constitutionality* of the apportionment of congressional districts…" 28 U.S.C. § 2284(a) (emphasis added). Because a § 2 claim is, as already explained, a challenge to districts under the Fourteenth and Fifteenth Amendments, it is necessarily a challenge to the constitutionality of those districts, meaning a three-judge district court is required when a claim involves congressional districts or other statewide legislative apportionment.

The statute mandates that "[a] district court of three judges *shall be convened*…" for constitutional challenges to congressional and statewide legislative apportionment. 28 U.S.C. § 2284(a) (emphasis

added). Thus, "[i]t follows that the district judge [i]s *required* to refer the case to a three-judge court, for § 2284(a) admits of no exception…" *Shapiro v. McManus,* 577 U.S. 39, 43 (2015) (emphasis original). Indeed, "the mandatory 'shall' normally creates an obligation impervious to discretion." *Id.* (cleaned up) (citing *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 35 (1998).

In other words, "[i]n ordinary circumstances, a single district court judge cannot adjudicate a case on the merits that is required to be heard by a three-judge court." *Kalson v. Paterson,* 542 F.3d 281, 286 (2nd Cir. 2008); *see also Igartua v. Obama*, 842 F.3d 149, 152 (1st Cir. 2016) ("If a case is brought improperly to the court of appeals—because the district court erroneously refused to convene a three-judge court—any subsequent merits ruling by the appellate panel is void.").

In addition to the textual and related jurisdictional reasons for applying § 2284 to claims brought only under § 2 challenging statewide districts, doing so also makes sense within the broader congressional purpose of convening the unique adjudicatory apparatus of a three-judge district court in the first place.[7]

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[7] While not addressed in this brief, there is currently debate about whether § 2 of the VRA contains a private right of action. *See Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204, 1206 (8th Cir. 2023). But if this Court ultimately concludes some method exists for private parties to bring § 2 claims, then those actions must constitute

Enacting the 1976 amendments to § 2284(a) brought the three-judge statute to its present text. In doing so:

> Congress was concerned less with the source of the law on which an apportionment challenge was based than on the unique *importance of apportionment cases generally*. The Senate Report, for example, consistently states that "three-judge courts would be retained… in any case involving congressional reapportionment or the reapportionment of any statewide legislative body…"

Page v. Bartels, 248 F.3d 175, 190 (2001) (citing S. Rep. No. 94-204 (1976)) (emphasis added). And though we look to the text of the statute first and foremost, the legislative history also supports the textual reading advanced by *Amici*.

The Senate Report accompanying the changes to § 2284 explains that, while the 1976 change to the statute dramatically reduced the number of cases in which three-judge courts were required, it "preserves three-judge courts *for cases involving*… the reapportionment of a statewide legislative body because it is the judgment of the committee that these *issues are of such importance* that they ought to be heard by a three-judge court…" S. Rep. No. 94-204 at 9 (1976) reprinted in 1976 U.S.C.C.A.N. 1996

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enforcement of constitutional rights under the Fourteenth and Fifteenth Amendments—requiring a three-judge panel. *See* 42 U.S.C. § 1983.

(emphasis added). Thus, the Senate was concerned less with the particular legal vehicle chosen for challenging a statewide apportionment scheme, and more with the fact that a federal district court would potentially be intruding in an area constitutionally reserved to the states. *See Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well settled that 'reapportionment is primarily the duty and responsibility of the State.'").

The pattern of maintaining three-judge courts for issues Congress considered of great importance—such as reapportionment of its own districts—has continued since 1976. Congress has since that time added several election-related categories of cases to those that must be heard by three-judge courts. For example, it required challenges to the Census to be heard by three-judge panels. *Depts. of Commerce, Justice, and State, The Judicial, and Related Agencies Appropriations Act*, 1998, PL 105–119 § 209(e)(1), November 26, 1997, 111 Stat 2440 § 209(e)(1) (requiring three-judge panels for actions regarding the Census). It also required challenges to campaign-finance regulations to be heard by three-judge courts. *Bipartisan Campaign Reform Act of 2002*, PL 107–155 § 403(a)(1), March 27, 2002, 116 Stat 81 § 403(a)(1) ("The action shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3–judge court convened pursuant to section 2284 of title 28, United States Code."); *see also* 26 U.S.C. § 9011 (three judges for Presidential campaign commission issues).

Considering the limited scope of three-judge panels, it would be strange if Congress in 1982 carved out § 2 challenges to statewide redistricting plans from § 2284 as a special case—even though § 2 claims typically challenge *precisely the same legislative maps* as those that are challenged directly under the Fourteenth and Fifteenth Amendments. Acknowledging these specific § 2 claims as covered by § 2284 would not open the door to just *any* § 2 claim challenging redistricting. Because § 2284 provides that a three-judge court is convened only for challenges to "congressional districts or the apportionment of any statewide legislative body," 28 U.S.C. § 2284(a), § 2 challenges to county or other local legislative bodies would proceed along a normal litigation track. Accordingly, this Court can avoid the burden of being statutorily summoned to pass judgment on every local apportionment issue, while maintaining its necessary role in promptly deciding weighty issues of statewide apportionment.

For these reasons, the general purpose advanced and articulated by Congress in amending § 2284 fits well with the textual analysis set forth by *Amici* in the previous section.

D. Practical importance of three-judge panels.

Finally, there are numerous practical reasons for convening a three-judge district court in § 2 claims challenging statewide legislative reapportionment.

As this Court has recognized, Congress's policy behind the use of three-judge courts and the direct-review process was "the saving of state and federal statutes from improvident doom at the hands of a single judge." *MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975); *see also Three-Judge Court Acts—History and Purpose*, 17A Fed. Prac. & Proc. Juris. § 4234 (3d ed.). With issues as important as statewide redistricting and the VRA, where there is a significant danger that federal courts could "invite the losers in the redistricting process to seek to obtain in court what they could not achieve in the political arena," *Cooper v. Harris*, 581 U.S. 285, 335 (2017) (Alito, J., concurring), the three-judge panel process provides significant protection for all litigants.[8]

Further, *Amici* have already detailed the State of Georgia's ongoing challenges with separate parallel tracks challenging statewide redistricting plans. But the confusion exists in states other than Louisiana and Georgia. For example, in *Garcia v. Hobbs,* a three-judge district court dismissed as moot a constitutional challenge to Washington's 2021

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[8] Challenges to statewide redistricting plans brought only under § 2 without constitutional claims are a recent phenomenon. For most of the time after the 1982 amendments, § 2 cases were brought in combination with constitutional claims that resulted in the appointment of three-judge panels to hear them. *See, e.g., Page*, 248 F.3d at 180 (three-judge court required to consider VRA and constitutional claims). In recent years, lawyers have strategically filed claims only under § 2 to obtain single judges to hear their cases instead of the geographically broader three-judge process.

legislative apportionment after a single-judge court found the same map violated § 2 of the VRA and ordered it redrawn. 691 F. Supp. 3d 1254, 1259 (2023).

The issue in the three-judge district court centered on the legal effect of the more expeditious outcome of a parallel § 2 claim in *Soto Palmer v. Hobbs,* 686 F. Supp. 3d 1213 (W.D. Wash. 2023). Although both cases challenged the same district as unlawfully drawn, the single-judge case involved an exclusively § 2 claim from plaintiffs alleging the district should have been *more* racially gerrymandered, while the plaintiff in the three-judge court alleged it violated the Equal Protection Clause because it was *too* racially gerrymandered. *Garcia,* 691 F. Supp. 3d at 1266 (Vandyke, J., dissenting).

Once the § 2 claim was resolved by the single judge (before the three-judge panel could weigh in), the three-judge district court concluded it lacked jurisdiction to hear the plaintiff's claim because the challenged map no longer existed. The dissenting opinion noted its view that the map as challenged by the plaintiff in *Garcia* violated the Equal Protection Clause. As a result, it was "void ab initio, [and] the *Soto Palmer* decision amounts to an advisory opinion…" *Garcia,* 691 F. Supp. 3d at 1260 (Vandyke, J., dissenting). But even if it was not advisory, the dissent explained the § 2 claim should have been considered *after* the three-judge district court's case because "it makes little sense to undertake a complicated test that involves indeterminate balancing when a simpler threshold basis exists for resolving the matter." *Id.* at 1624.

Nevertheless, the single-judge district court promptly disposed of the § 2 case.

This was a strange situation but not an uncommon one. On the one hand, the *Garcia* plaintiff complained that the State "considered race too much unlawfully in drawing the legislative map." *Id*. at 1266. At the same time, the *Soto Palmer* plaintiff complained that the State "violated the VRA because LD-15 did not *consider race enough*…" *Id.* at 1266. Thus, the majority in *Garcia* concluded that *increased* racial gerrymandering pursuant to the VRA mooted a claim that alleged the State racially gerrymandered *too much*. *Id.* at 1267. This decision deprived the three-judge court of jurisdiction. *See Kalson,* 542 F.3d at 286. And even had the majority agreed with the dissent, it still would have created an endless game of whack-a-mole for a State powerless to satisfy potentially conflicting orders from two different courts on the same maps.[9]

In *Garcia*, the single-judge district court ruling prevailed over the three-judge district court not because it was correct, but because it was first. That makes little sense considering the congressional purpose of § 2284 is to place these matters of great

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[9] The problem works the other way as well: it makes little sense for plaintiffs in a constitutional challenge before three judges to have to choose to intervene in a single judge case to have their claims heard or risk the entire case becoming moot upon the ruling of the single judge. That absurd result is avoided by recognizing that § 2 cases involving congressional or statewide redistricting plans are to be heard by a three-judge court.

importance in the hands of a three-judge district court with a direct and non-discretionary path of appeal to this Court. *See, e.g, Iguartu,* 842 F.3d at 156 ("An inclusive construction of § 2284(a)'s language is also supported by the singular importance legislators attributed to apportionment claims when the Three–Judge Court Act was amended in 1976."). But that is how these situations are now playing out, including in Georgia, where the § 2 claim advanced to trial, remedy, and appeal, which forced the three-judge district court to stay the case pending the appeals. *Georgia NAACP* at Doc. 222.

This Court can avoid condemning States and litigants to the inefficiencies and dangers of parallel litigation tracks by applying the text of § 2284 to § 2 claims. As a result, this Court should affirm the district court because Louisiana could not rely on a preliminary injunction entered by a single judge under § 2 to justify its racial gerrymandering. The single-judge district court had no jurisdiction to enter any order under § 2 in the first place.

III. This Court has consistently held that partisan decisions cannot justify placing majority-Black districts in other parts of a state.

In addition to the lack of jurisdiction of the single-judge court, Louisiana seeks to use politics as a defense to racial gerrymandering in a way this Court has never allowed. For this Court to reverse

the district court, it must overrule the *Shaw* line of cases.[10]

States can defend against a racial gerrymandering claim by using political data for the decisions to draw a district instead of utilizing racial data. *See Easley v. Cromartie*, 532 U.S. 234, 252 (2001). But that is not what Louisiana did here. In this appeal, Louisiana admits that it drew the new majority-Black district solely on the basis of race but claims its motive of protecting certain Republican incumbent members of Congress allowed it to locate the racial gerrymander where it preferred without making race the predominant factor in creating the plan. App. Br. at 35–39. Even if Louisiana could rely on the single-judge decision as justification for its racial mapdrawing, it did not create the additional majority-Black district in the areas identified by the single-judge court and instead placed it in an entirely different part of the State. *See Robinson v. Ardoin*, 605 F. Supp. 3d 759, 781 (M.D. La. 2022), *vacated and remanded*, 86 F.4th 574 (5th Cir. 2023) (identifying area of minority population in southern part of the state). That position ignores this Court's binding precedent that politics cannot save a racially predominant map when a State chooses to place a majority-Black district in a part of the state other than the area where § 2 requires it—which has been

[10] This section also further underscores why constitutional and § 2 claims should all be heard by three-judge district courts—because that court can properly weigh the sometimes-competing directives of the VRA and the Constitution. *See Abbott v. Perez*, 585 U.S. 579, 586 (2018) (noting VRA "pulls in the opposite direction" than the Constitution).

the consistent holding throughout the *Shaw* line of cases.

Several examples from States defending *Shaw* claims based on incumbent protection demonstrate this reality.

A. North Carolina.

The most obvious example is in North Carolina with the maps that led to *Shaw*. While North Carolina originally did not draw any majority-Black districts in the 1990 redistricting cycle, it eventually created a congressional redistricting plan that had "one district with a majority of Black voters, located in northeastern North Carolina." *Pope v. Blue*, 809 F. Supp. 392, 394 (W.D.N.C.), *aff'd*, 506 U.S. 801 (1992). The "very contorted" shape and location was "to protect white Democratic congressmen at the expense of Republicans." *Id*. That was the plan originally submitted for preclearance.

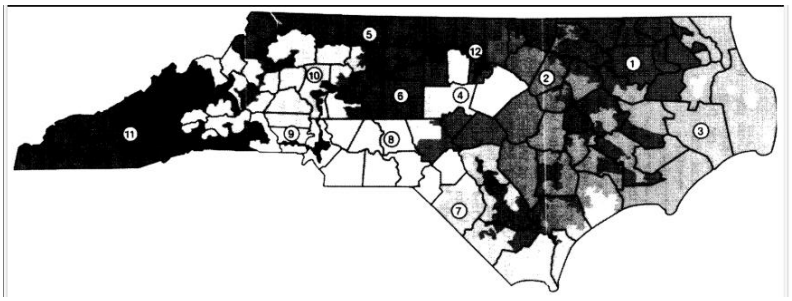
The Attorney General objected to that redistricting plan, specifically to the configuration of lines in the "south-central to southeastern region of the State." *Shaw v. Reno*, 509 U.S. 630, 635 (1993) (*Shaw I*). He specifically noted the "unusually convoluted shape" of the "district drawn in the northeast region of the state." DOJ Objection Letter, at 4 (Dec. 18, 1991), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/NC-1500.pdf This convoluted shape was not required to create a majority-Black district, because "at least one alternative configuration was available that would have been more compact." *Id*.

The reason for the unusual location of the majority-Black district was partisan—specifically the protection of Democratic incumbent members of Congress. DOJ noted that several commenters alleged "the state's decision to place the concentrations of minority voters in the southern part of the state into white majority districts attempts to ensure the election of white incumbents while minimizing minority electoral strength." *Id.* at 5.

But that pattern continued as the legislature undertook to create a revised redistricting plan in a different location of the state than the location identified by DOJ—specifically "in the north-central region along Interstate 85," which was designated as District 12, as the compactness of districts continued to spiral downward in each plan. *Shaw*, 509 U.S. at 635.

That led to a political gerrymandering case that was dismissed, but which alleged that the second majority-Black district's shape and location were—again—due to an effort at protecting "white incumbent Democratic Congressmen." *Pope*, 809 F. Supp. at 396.

Following dismissal, the racial-gerrymandering theory of *Shaw I* began its journey to this Court, challenging District 12 in the following map. 509 U.S. at 636.



Id. at 659.

In *Shaw I*, the plaintiffs alleged that the revised plan was an unconstitutional racial gerrymander. One of the concurring judges noted specifically that the reason for the placement of District 12 was the result of the General Assembly rejecting the DOJ's construction in favor of its preferred plan. *Shaw v. Barr*, 808 F. Supp. 461, 479 (E.D.N.C. 1992) (Voorhees, J., concurring and dissenting in part), *rev'd sub nom. Shaw I*, 509 U.S. at 630. The defendants alleged that the reason for this was political—protecting incumbents. *Id.* at 464 n.3. The three-judge court then dismissed the case for failure to state a claim. *Shaw I*, 509 U.S. at 638.

This Court then explained that "[n]o inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute." *Id.* at 642. And it determined that "on the facts of this case," which included the decisions about where to place the new majority-Black district for purposes of incumbent protection, "appellants have stated a claim sufficient to defeat the state appellees' motion to dismiss." *Id.* at 649.

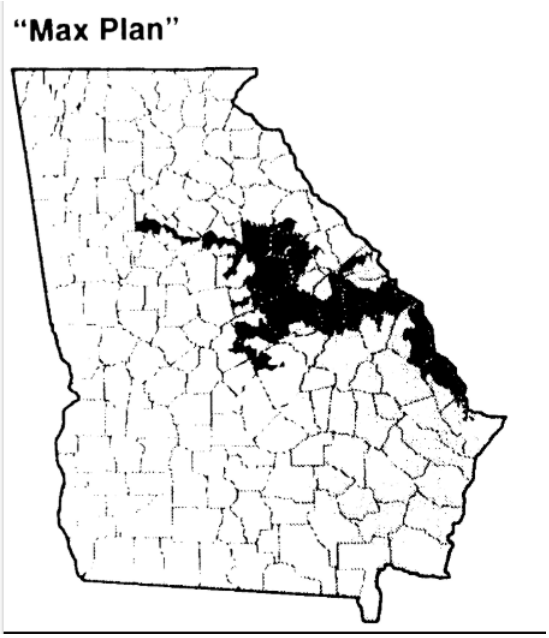
B. Georgia.

Shortly thereafter, the same issue arose in Georgia. Following the 1990 Census, the Democratically controlled Georgia General Assembly initially added a second majority-Black district to its congressional plan, but the Department of Justice rejected that proposal, instead insisting on a third majority-Black district. *Johnson v. Miller*, 864 F. Supp. 1354, 1362 (S.D. Ga. 1994), *aff'd and remanded*, 515 U.S. 900 (1995).

The problem the Democratic majority in Georgia faced in drawing a third majority-Black district was incumbent protection. In its rejection letter, "DOJ criticized plans for both chambers of the General Assembly for *protecting white incumbents* rather than drawing additional majority-black districts." Charles S. Bullock III, *The History of Redistricting in Georgia*, 52 GA. L. REV. 1057, 1073 (2018) (emphasis added).

In order to create the third majority-Black district pointed out by the DOJ, the legislature was forced to place majority-Black areas of middle Georgia previously in Democratic Congressman Ben Jones' district into a new majority-Black district. But a compact method of creating that district would have resulted in adding Republicans to Congressman Jones' district. The legislature instead chose to take majority-Black areas in Savannah into District 11 to protect Congressman Jones—meaning the district now ran from Atlanta to Savannah. *Id.* at 1074; *Johnson*, 864 F. Supp. at 1366–67; *Miller*, 515 U.S. at 907. The Georgia legislature then

created the other districts required by DOJ and constructed the remaining districts based on the then-existing incumbents. *Johnson*, 864 F. Supp. at 1366–67; Bullock, 52 GA. L. REV. at 1075.



Johnson, 864 F. Supp. at 1398.

A group of Plaintiffs challenged District 11 as an unconstitutional racial gerrymander. *Johnson*, 864 F. Supp. at 1359. The three-judge court then undertook the inquiry of "[h]ow to determine if a district is so founded upon race that it warrants constitutional notice?" *Johnson*, 864 F. Supp. at 1369. The three-judge court eventually concluded that "the plan fails strict scrutiny under the Fourteenth Amendment." *Id*. at 1393.

When the appeal reached this Court, it rejected the appellants' theory that a district's shape has to be "so bizarre that it is unexplainable other than on the basis of race." *Miller*, 515 U.S. at 910–11. Instead, this Court explained "that parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding the district's geometry and makeup nor required to make a threshold showing of bizarreness." *Id.* at 915. To prevail, a plaintiff must show "that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.* at 916.

The Court did not countenance or provide an option for States to use incumbent protection or other political considerations as a defense to a finding of racial predominance.

C. Texas.

The next child of *Shaw*, *Bush v. Vera*, was from Texas. 517 U.S. 952 (1996). The Texas legislature drew a series of districts which resembled an onion skin surrounding the area around Dallas-Fort Worth and drew districts centered in Houston which "interlock like a jigsaw puzzle . . . in which it might be impossible to get the pieces apart." *Id.* at 973 (quoting Barone & Ujifusa, ALMANAC OF AMERICAN POLITICS 1996 at 1307–08). As the DOJ stated in its preclearance letter for the Texas congressional redistricting scheme, "[w]hile we are preclearing this

plan under Section 5 the *extraordinarily convoluted nature of some of the districts* compels me to disclaim any implication that our preclearance establishes that the proposed plan is otherwise lawful or constitutional…Our preclearance of the submitted redistricting plan in no way addresses the state's approach to its redistricting obligations other than with regard to section 5." Letter of John Dunne to Texas Attorney General Morales, Nov. 18, 1991 (emphasis added).

In the subsequent *Shaw*-based litigation, the District Court found all three districts violated the principles of *Shaw* and its progeny. *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994). This was despite the State's defense of incumbent protection, where the bizarre shapes led to the configuration of other districts to protect sitting members of Congress. *Id.* at 1334.

This Court affirmed the district court. *Vera*, 517 U.S. at 952. Texas' primary defense that "incumbency protection (including protection of 'functional incumbents,' *i.e.*, sitting members of the Texas Legislature who had declared an intention to run for open congressional seats), also played a role in the drawing of the district lines" was insufficient. *Id.* at 959. But like Louisiana's defense here, the evidence "confirmed that the decision to create the districts now challenged as majority-minority districts was made at the outset of the process and never seriously questioned." *Id.* at 961. And the state did so by avoiding drawing more compact options. District 30 especially had quite an unusual shape:

Id. at 986.

Given the combination of incumbent protection with the decision to draw districts based on race at the outset, this Court concluded "[t]he districts before us exhibit a level of racial manipulation that exceeds what § 2 could justify." *Id*. at 981. As a result, it affirmed the district court. *Id*. at 986.

This Court also dealt with another Texas map that similarly attempted to place districts required by § 2 in another part of the state. Following the 2000 Census, this Court determined that

> The State chose to break apart a Latino opportunity district to protect the incumbent congressman from the growing dissatisfaction of the cohesive and politically active Latino community in the district. The State then purported to

> compensate for this harm by creating an entirely new district that combined two groups of Latinos, hundreds of miles apart, that represent different communities of interest. Under § 2, the State must be held accountable for the effect of these choices in denying equal opportunity to Latino voters.

League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 441–42 (2006). This was consistent with how this Court has applied the standards of *Shaw* and its progeny—and the opposite of what Louisiana argues here.

D. Virginia.

The Virginia redistricting process in the 1990s also resulted in legislators placing a majority-Black district in a different part of the state for incumbent protection reasons, but that was not justification for racial gerrymandering.

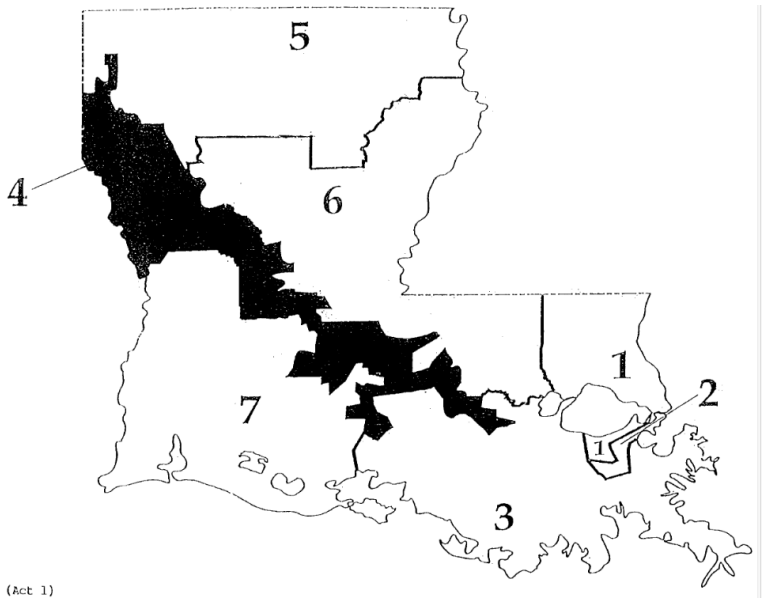
With the population growth following the 1990 Census, Virginia's legislature debated where to place a new majority-Black district. *Moon v. Meadows*, 952 F. Supp. 1141, 1144 (E.D. Va.), *aff'd*, 521 U.S. 1113 (1997). The resulting district ignored proposals for more compact options and instead was drawn in an incredibly bizarre shape to protect nearby incumbents, with the district court quoting descriptions of the district as a "grasping claw" and a "squashed salamander." *Id.* at 1147. Despite recognizing that the legislature used the more convoluted district for the "protection of incumbent office holders," it still found that race predominated

in the creation of the district. *Id*. at 1148. This Court affirmed. 521 U.S. at 1113.

E. Louisiana.

Finally, this is not the first time Louisiana faced a racial gerrymandering claim—it also faced litigation after the 1990 Census. Following that Census, Louisiana lost a congressional seat, reducing its delegation to seven members of Congress. *Hays v. State of La.*, 936 F. Supp. 360, 362 (W.D. La. 1996) (*Hays III*). Again, the DOJ denied preclearance requiring that a second majority-black district be constructed in the state. The plan the legislature drew had two majority-Black districts and placed those districts in locations based on incumbency protection, which "affected only the general location of the gerrymander that is District 4." *Hays v. State of La.*, 839 F. Supp. 1188, 1202 n.43 (W.D. La. 1993), *vacated sub nom. Louisiana v. Hays*, 512 U.S. 1230, 114 S. Ct. 2731, 129 L. Ed. 2d 853 (1994) (*Hays I*).

Incumbent protection by locating a majority-Black district in some other location in the state was not sufficient to save the district from a finding of racial predominance. *Id*. That led to a finding that District 4 (in the shape of a slash—and very similar to the district at issue in this case) was unconstitutional. *Hays III*, 936 F. Supp. at 371.



Id. at 374.

All of these examples demonstrate this Court's consistent holding that political considerations are not sufficient to justify placing a district drawn primarily based on race in a part of the state where it is not required by § 2. *Shaw I*, 509 U.S. at 624.

Those cases require affirmance here. And although no longer subject to DOJ preclearance, Louisiana apparently interpreted the preliminary injunction ordered by the single-judge court as something akin to the preclearance process—you cannot draw fewer than two majority-Black districts, no matter where you draw them. This Court should not change its consistent approach and should ensure that States have clear rules of the road for the creation of majority-Black districts required by § 2 in particular geographic areas.

CONCLUSION

This Court should affirm the district court.

Respectfully submitted this 28th day of January, 2025.

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