No. 22-30333

United States Court of Appeals for the Fifth Circuit

PRESS ROBINSON; EDGAR CAGE; DOROTHY NAIRNE; EDWIN RENE SOULE; ALICE WASHINGTON; CLEE EARNEST LOWE; DAVANTE LEWIS; MARTHA DAVIS; AMBROSE SIMS; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE LOUISIANA STATE CONFERENCE, ALSO KNOWN AS NAACP; POWER COALITION FOR EQUITY AND JUSTICE, PLAINTIFFS-APPELLEES,

v.

KYLE ARDOIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR LOUISIANA, DEFENDANT-APPELLANT,

CLAY SCHEXNAYDER; PATRICK PAGE CORTEZ; STATE OF LOUISIANA ATTORNEY GENERAL JEFF LANDRY, INTERVENOR DEFENDANTS-APPELLANTS.

EDWARD GALMON, SR.; CIARA HART; NORRIS HENDERSON; TRAMELLE HOWARD, PLAINTIFFS-APPELLEES,

v.

KYLE ARDOIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR LOUISIANA, DEFENDANT-APPELLANT,

CLAY SCHEXNAYDER; PATRICK PAGE CORTEZ; STATE OF LOUISIANA ATTORNEY GENERAL JEFF LANDRY, MOVANTS-APPELLANTS.

APPEAL FROM THE U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA, NOS. 22-CV-211 & 22-CV-214, HON. SHELLY D. DICK, PRESIDING

BRIEF OF NATIONAL REPUBLICAN REDISTRICTING TRUST AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND REVERSAL

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JUNE 22, 2022

CERTIFICATE OF INTERESTED PARTIES

Robinson, et al. v. Ardoin, et al., No. 22-30333:

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1, in addition to those listed in the briefs of the parties, have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

***Amicus*:** National Republican Redistricting Trust is a trust that does not have a parent corporation and is not publicly held.

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/s Christopher Mills
Christopher Mills

Counsel for *Amicus Curiae*

June 22, 2022

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INTEREST OF *AMICUS CURIAE*

The National Republican Redistricting Trust, or NRRT, is the central Republican organization tasked with coordinating and collaborating with national, state, and local groups on the fifty-state congressional and state legislative redistricting effort underway.[1]

NRRT's mission is threefold. First, it aims to ensure that redistricting faithfully follows all federal constitutional and statutory mandates. Under Article I, Section 4 of the U.S. Constitution, the State Legislatures are primarily entrusted with the responsibility of redrawing the States' congressional districts. *See Growe v. Emison*, 507 U.S. 25, 34 (1993). Every citizen should have an equal voice, and laws must be followed to protect the constitutional rights of individual voters, not political parties or other groups.

Second, NRRT believes redistricting should be conducted primarily by applying the traditional redistricting criteria States have applied for centuries. This means districts should be sufficiently compact and preserve communities of interest by respecting municipal and county boundaries, avoiding the forced combination of disparate populations as much as possible. Such sensible districts follow the principle

[1] All parties consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and, no person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

that legislators represent individuals living within identifiable communities. Legislators do not represent political parties, and we do not have a system of statewide proportional representation in any State. Article I, Section 4 of the U.S. Constitution tells courts that any change in our community-based system of districts is exclusively a matter for deliberation and decision by our political branches—the State Legislatures and Congress.

Third, NRRT believes redistricting should make sense to voters. Each American should be able to look at their district and understand why it was drawn the way it was.

INTRODUCTION

This case involves another effort to force a State to make last-minute redistricting decisions by engaging in racial segregation. Much as in *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (U.S. Nos. 21-1086, 21-1087), plaintiffs sued under Section 2 of the Voting Rights Act as an end-run around the prohibition on partisan gerrymandering claims. Like the plaintiffs in *Merrill*, they argued that a State's enacted maps violate Section 2 because "the number of majority-Black districts in the enacted plan" does not equal "the Black share of the population in Louisiana." ROA.6654. Like the plaintiffs in *Merrill*, they had to prioritize race at the outset; millions of race-neutral maps *never* produced two majority-minority districts. The plaintiffs' maps would not exist but for intentional racial segregation.

Like the district court in *Merrill*, the district court accepted this analysis anyway, waving away open racial discrimination on the ground that the "mapdrawers considered race after they were asked to consider race." ROA.6751-52. Faced with evidence that the new maps demolished existing districts and wrenched voters away from their longstanding representatives, the court said "that fact is entitled to essentially no weight." ROA.6739. The court "struggle[d] to grasp why" core retention—the principle that stable districts promote democratic representation—is ever "importan[t]." ROA.6738. Concluding that "core retention does not trump the Voting

Rights Act," the district court thus subordinated traditional principles like core retention to a vision of Section 2 focused on forced racial balancing.

If all this sounds familiar, it is because the district court and the dissenting opinion in *Merrill* offered the same rationales for racial discrimination. Indeed, the district court here quoted extensively from those opinions. *E.g.*, ROA.6643, 6653-54, 6718, 6720, 6726, 6730, 6733, 6738, 6745-46, 6751. Here, as in *Merrill*, the district court dismissed core retention, prioritized race, and commanded the State to adopt racially segregated maps that could not be drawn in a neutral process. As reflected by the Supreme Court's stay and grant of certiorari in *Merrill*, this is not the correct course. To vindicate proper Section 2 analysis and the Equal Protection Clause's guarantee of equality under the law, reversal is required.

1. The district court's focus on proportional representation was error. The population of the United States is about 13% black, but no State is majority black. Republican voters compose about 35% of the Massachusetts electorate, but it is considered mathematically impossible to draw even one of its nine House districts as majority Republican. Over 20% of Floridians are at least 65 years old, yet those citizens do not form a majority in any of the State's 27 House districts. And none of these examples is surprising, because "[t]here is no caste here." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Americans of all backgrounds live among other Americans. This geographic dispersion means that proportionality

between population and district dominance is not the norm in the districting process. To achieve unnatural proportionality, the process cannot be neutral. Something else must be given priority.

In the district court's view, Louisiana's process required a new overlay: racial segregation. The State's process had, for years, produced one majority-minority district. Party and independent experts ran millions of neutral map simulations, not one of which led to two majority-minority districts. 99.9997% led to *zero* such districts. But the district court fixated on the fact that "Black Louisianans make up" "31.25% of the voting age population" yet "comprise a majority in only 17% of Louisiana's congressional districts." ROA.6774. The plaintiffs' experts therefore used race "at the beginning" (ROA.6751) to determine whether the traditional, neutral factors could be manipulated to "divvy[] [the people of Louisiana] 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).

2. To accept this racial manipulation, the district court had to disregard neutral districting criteria, particularly core retention. Louisiana follows the traditional principle that the core of legislative districts should be retained. Core retention promotes democratic representation by ensuring that constituents can develop meaningful relationships with those who speak for them. These lasting relationships foster government by the consent of the people. Core retention leads to representatives who

are better equipped to understand, promote, and respond to the unique needs, cultures, and histories of their districts.

Because of their racial prioritization, the plaintiffs' proposed maps dramatically deviated from the enacted map in terms of core retention. The district court dismissed that "obvious" deviation as "irrelevant" and "entitled to essentially no weight" because "Plaintiffs' illustrative maps were intended to demonstrate that it is possible to draw . . . two majority-minority districts." ROA.6738. "Naturally, their maps are less similar to the benchmark," the district court said, but "core retention is not a consideration that trumps compliance with the Voting Rights Act." ROA.6739. That misunderstands the VRA as mandating racial discrimination. Core retention is an important, traditional districting principle that States properly prioritize. States' reliance on such neutral principles—rather than racial segregation—means they have *not* violated the equal treatment guarantees of the VRA and the Constitution.

3. The district court's subordination of neutral principles to race defies the Voting Rights Act, the Supreme Court's precedents, and the Fourteenth Amendment. Section 2 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 and the Constitution. The Supreme Court has repeatedly upheld maps that did *not* provide proportional representation—and struck down racially driven maps drawn under the guise of proportionality. 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). The decision below should be reversed.

ARGUMENT

I. 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 should be majority black. ROA.6654, 6774. The court thus adopted the views of the plaintiffs' experts, who worked backwards from that assumption and made that racial division "the purpose of the illustrative maps [they] drew." ROA.6659. 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." M. Duchin et al., *Locating the*

Representational Baseline: Republicans in Massachusetts, 18 Election L.J. 388, 392 (2019).

As noted, many examples prove the point. In Massachusetts, Republican voters are 35% of the population 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). Likewise, 21% of Floridians are at least 65 years old, but they do not have a majority in any of the State's 27 U.S. House districts—even in District 11, the U.S. congressional district with the highest percentage of citizens 65 and older.[2] Political geography matters.

What is true nationally is true in Louisiana. Fifty-three of Louisiana's 64 parishes are majority white; Louisiana's "Black populations" are "very dispersed" "in virtually every parish in the state." ROA.6524. Black Louisianians live in majority-white places like Lisbon (Claiborne Parish, 43.6% black) and Vidalia (Concordia Parish, 41.3% black), exemplifying the fact that "the entire state has noteworthy local areas of statistically significant clusters," "and the Black voting age population

[2] *See Quick Facts: Florida*, U.S. Census Bureau, https://www.census.gov/quickfacts/FL (last visited June 19, 2022) (providing data for Floridian population); *Florida 11th Congressional District Demographics,* BiggestUSCities.com (Mar. 1, 2022), https://www.biggestuscities.com/demographics/fl/11th-congressional-district (providing data for Eleventh District); G. Giroux, Rich, Poor, Young, Old: *Congressional Districts at a Glance*, Bloomberg Government (Sep. 15, 2017, 4:37 PM), https://about.bgov.com/news/rich-poor-young-old-congressional-districts-glance/ (same).

clusters are often not close together." ROA.7343, 7363.[3] As a matter of political geography, Louisiana's longstanding single majority-minority district comes as no surprise: "demographic distribution is simply too diffuse to generate a majority voting age population in any district outside of the Orleans Parish region." *Hays v. Louisiana*, 862 F. Supp. 119, 124 n.4 (W.D. La. 1994) (*Hays II*). This is a consequence not of nefarious motives, but of intermingling of residents regardless of race.

Overcoming fundamental facts about Louisiana's political geography required the plaintiffs to do just what the law forbids: draw maps based on race. One expert below simulated drawing 10,000 race-neutral maps, and "[n]one of the simulated plans produces even one majority-minority congressional district." ROA.6679. Likewise, independent experts have drawn "two million maps made for Louisiana's congressional delegation," and "just six districting plans included [*one*] majority-Black district." M. Duchin & D. Spencer, *Models, Race, and the Law*, 130 Yale L.J.F. 744, 763 n.75 (2021) (emphases altered). "The remaining 1,999,994 plans had *zero* majority-minority districts." *Id.* (emphasis added). Given this evidence, the motion panel's suggestion that "racial gerrymandering is far from inevitable" if the State is forced to draw *two* majority-minority districts (ROA.6818) beggars belief.

[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).

Indeed, the plaintiffs' experts had to segregate Louisiana on "purpose." ROA.6659. Only after they operationalized the new model—using race as a "threshold" "at the beginning of [the] process"—could they produce maps with two majority-minority districts. ROA.3715; ROA.6670, 6750. Quoting the dissent in *Merrill*, the district court excused the plaintiffs' "racially *conscious* map drawing" because their experts used "race data" merely "to check [their] work." ROA.6752. In other words, except for being segregated by race, citizens were treated equally. *Cf. Plessy*, 163 U.S. at 552 (Harlan, J., dissenting) ("separate but equal"). As discussed in Part III below, such discrimination based on race to achieve an unnatural proportional representation contradicts both the Constitution and the VRA.

II. The district court's dismissal of core retention was error.

As it elevated race and unnatural proportional representation, the district court devalued neutral, traditional districting principles. And it especially and expressly devalued one: core retention. Core retention means that maps are drawn so that, in the main, districts do not change from election to election. Most citizens, living in the district "cores," stay in the same district. This principle is important to democratic representation, for it more closely connects citizens with their representatives. Yet the district court tossed it aside, "struggl[ing] to grasp why Defendants elevate [its] importance." ROA.6738. According to the district court, that "Plaintiffs' illustrative maps have lower core retention than the enacted plan" "is entitled to

essentially no weight" and "is irrelevant." ROA.6739. "[A] desire to maximize core retention," said the court, "is not a consideration that trumps compliance with the Voting Rights Act." *Id.*

This analysis misunderstands the law and the importance of core retention. First, the point is not that core retention "trumps" statutory compliance. Instead, neutral districting principles like core retention must be considered *before* finding a VRA violation. There is no warrant to find a VRA violation (or draw a remedial map) if the State's existing map complies with neutral districting principles. Section 2 "does not deprive the States of their authority to" rely on traditional, "non-discriminatory" districting principles like core retention. *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321, 2343 (2021). "[S]trong state interests" like core retention can "save" even an "otherwise discriminatory" map. *Id.* at 2360 (Kagan, J., dissenting). And in all events, a remedial map cannot "subordinate[] traditional districting principles to race." *Miller v. Johnson*, 515 U.S. 900, 919 (1995). Under any plausible reading of the VRA, a legislature's choice to focus on neutral districting principles instead of segregation cannot point to a *violation* of the VRA.

Louisiana has followed the essential districting principle of core retention for decades. Its enacted map maintains more than 96% of constituents in their existing districts, preserving "the traditional boundaries as best as possible" to "keep the status quo." ROA.6484 ¶ 10. This map closely mirrors the last three congressional

maps, from 1996, 2002, and 2012. As part of redistricting litigation in the 1990s, a three-judge court ordered a congressional plan containing a single majority-black District 2, striking down multiple plans with a second majority-black District 4 as violating equal protection. *See Hays v. Louisiana*, 839 F. Supp. 1188, 1191 (W.D. La. 1993) (*Hays I*); *Hays v. Louisiana*, 936 F. Supp. 360, 368 (W.D. La. 1996) (*Hays IV*). The court picked what became the 1996 plan to "follow[] traditional lines." *Hays II*, 862 F. Supp. at 125.

The 2002 congressional map—enacted by a majority-Democratic legislature and precleared by the Department of Justice—retained the core of the 1996 plan with one majority Black district anchored in Orleans Parish and no others. Likewise, the 2012 congressional map—precleared by the Department of Justice under President Obama—maintained the cores of the prior maps despite losing a congressional seat in the 2010 census. And the enacted map continues adherence to the core retention principle.

There are good reasons for core retention. The foundation of our democratic republic is that representatives speak for the citizens they represent. In this way, we hear "the public voice pronounced by the representatives of the people." The Federalist No. 10 (Madison). So States have a legitimate interest in "promot[ing] 'constituency-representative relations'" by "maintaining existing relationships between incumbent congressmen and their constituents." *White v. Weiser*, 412 U.S. 783, 791-

92 (1973). This "common practice" "honors settled expectations." *Cooper v. Harris*, 137 S. Ct. 1455, 1492 (2017) (Alito, J., concurring in judgment in part and dissenting in part); *accord Karcher v. Daggett*, 462 U.S. 725, 740 (1983) ("preserving the cores of prior districts" is a "legitimate objective[]").

Maintaining the core of each district permits representatives to build stronger relationships with their constituents. The "location and shape of districts" dictate "the political complexion of the area." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Representatives "have the responsibility to learn the needs of their constituents and represent their constituents." J. Fromer, *An Exercise in Line-Drawing: Deriving and Measuring Fairness in Redistricting*, 93 Geo. L.J. 1547, 1581 (2005). "Long-term representatives have a chance to learn about and understand the unique problems of their districts and to pursue legislation that remedies those problems." N. Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 Harv. L. Rev. 649, 671 (2002). Citizens come to trust their representatives, who help them navigate government bureaucracies and deal with local issues. *See generally* B. Cain, J. Ferejohn & M. Fiorina, *The Personal Vote: Constituency Service and Electoral Independence* (1987).

Moreover, "the cores in existing districts are the clearest expression of the legislature's intent to group persons on a 'community of interest' basis." *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 649 (D.S.C. 2002). And "because

the cores are drawn with other traditional districting principles in mind, they will necessarily incorporate the state's other recognized interests in maintaining political boundaries, such as county and municipal lines." *Id.*

Disregarding core retention can lower public familiarity with candidates and representatives, leading to abstention and voter disengagement. *See generally* D. Hayes & S. McKee, *The Participatory Effects of Redistricting*, 53 Am. J. Pol. Sci. 1006 (2009); J. Winburn & M. Wagner, *Carving Voters Out: Redistricting's Influence on Political Information, Turnout, and Voting Behavior*, 63 Pol. Rsch. Q. 373 (2010). These voter depression "effects are strongest among African Americans," who suffer a significant drop off in voter participation when drawn into a new district. D. Hayes & S. McKee, *The Intersection of Redistricting, Race, and Participation*, 56 Am. J. Pol. Sci. 115, 115 (2012).

In sum, representatives can be expected to better represent their citizens' views when they are equipped to understand their communities, and not left to worry about their represented community changing with each new electoral cycle. And with stronger relationships, they can provide better service to constituents. State legislatures best understand the importance of these relationships, and efforts to create and sustain these relationships through redistricting fosters democratic accountability and service.

Despite the importance of this longstanding districting principle of core retention, the plaintiffs disregarded it. Their maps were less than half as similar to the existing maps as the enacted map. ROA.6684-85. The most their own proposed findings of fact could say is that *some* of their proposed districts "maintain at least *50%* of the" population. ROA.6064 (emphasis added). The State's map retained 96% statewide. ROA.5897-98.

The district court acknowledged that the plaintiffs' maps were far inferior to the State's in terms of core retention. ROA.6738. But the district court believed that core retention should always be assigned "essentially no weight" because it "would upend the entire intent of Section 2, allowing States to forever enshrine the status quo regardless of shifting demographics." ROA.6739. To begin, this belief is divorced from reality. No significant demographic shift has occurred in Louisiana: the share of the State's voting population that is black was "approximately 30%" in 1994, 30.5% in 2010, and 31.25% in 2020. *Hays II*, 862 F. Supp. at 124 n.4; *see* ROA.6656.

Two more problems exist with the district court's reasoning. First, prioritizing traditional principles over racial segregation keeps the law right-side up. Section 2 is premised on Congress's authority under the Fourteenth and Fifteenth Amendments, which operate only against *intentional* discrimination. *See Washington v. Davis*, 426 U.S. 229, 242 (1976); *City of Mobile v. Bolden*, 446 U.S. 55, 60-62 (1980)

(plurality opinion). Holding unlawful a duly enacted map that adheres to neutral principles like core retention based on the unsupported premise of proportional representation is a dubious extension of Section 2 beyond its constitutional moorings. And as discussed more below, the district court's "*command* that [Louisiana] engage in presumptively unconstitutional race-based districting brings" Section 2 into extreme "tension with the Fourteenth Amendment." *Miller*, 515 U.S. at 927 (emphasis added). "Congress' exercise of its Fifteenth Amendment authority even when otherwise proper still must 'consist with the letter and spirit of the constitution.'" *Id.* at 926-27 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)); *cf. City of Boerne v. Flores*, 521 U.S. 507, 532-33 (1997) (observing that the VRA's Section 5 restrictions were "placed only on jurisdictions with a history of intentional racial discrimination in voting" to prevent "the mischief and wrong which the Fourteenth Amendment was designed to protect against" (cleaned up)).

The district court's statement that "core retention . . . is not a legal requirement like one person, one vote" (ROA.6704-05) underscores the court's error. Core retention is not required to be the sole focus of redistricting but *is* a valid, traditional, and race-neutral principle. Racial discrimination is also "not a legal requirement." Quite the opposite: "discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." *Fullilove v. Klutznick*, 448 U.S. 448, 548 n.21 (1980) (Stevens, J., dissenting) (cleaned up).

More, the district court's hypothesized example of States "replicat[ing] the same maps" (ROA.6705) is distinct from cases in which the Supreme Court "has found a problem under § 2," all of which "involve transparent gerrymandering that boosts one group's chances at the expense of another's." *Gonzalez v. City of Aurora*, 535 F.3d 594, 598 (7th Cir. 2008) (Easterbrook, J.) (citing *Shaw v. Reno*, 509 U.S. 630 (1993); *Miller*, 515 U.S. 900; *LULAC*, 548 U.S. 399). Louisiana's adherence to longstanding, neutral districting principles is much different. Imposing liability for Louisiana's approach "would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion).

For that reason, the Supreme Court has refused to find liability under Section 2 in similar cases. In *Abrams v. Johnson*, for example, the Court emphasized "Georgia's traditional redistricting principles" that included preserving "district cores, four traditional 'corner districts' in the corners of the State, [and] political subdivisions such as counties and cities." 521 U.S. 74, 84 (1997). The Court agreed with the district court's decision not to order the "creat[ion of] a second majority-black district" because "doing so would require it to 'subordinate Georgia's traditional districting policies and consider race predominately, to the exclusion of both constitutional norms and common sense.'" *Id.* (quoting *Johnson v. Miller*, 922 F. Supp. 1556, 1566 (S.D. Ga. 1995)).

Second, recognizing the importance of core retention does not immunize maps. Sometimes, it could *help* Section 2 plaintiffs. In *LULAC*, for example, a system like Louisiana's of promoting core preservation would have favored the plaintiffs' preferred outcome. There, "Webb County, which [was] 94% Latino, had previously resided entirely within District 23; under the new plan, nearly 100,000 people were shifted into neighboring District 28." 548 U.S. at 424. And District 23 saw its "Latino share of the citizen voting-age population" drop from 57% to 46%. *Id.* Disruption of the district core could provide evidence of an unlawful race-based gerrymander, for it shows that the legislature disregarded traditional districting principles. Here, by contrast, the *plaintiffs* proposed disrupting the district cores to discriminate based on race instead.

In sum, the district court's disregard of core retention disserves democratic accountability and threatens the constitutionality of Section 2 as applied here.

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

A. Section 2 does not require proportional representation.

"[T]he 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." *Gregory v. Ashcroft*, 539 U.S. 461, 490-91 (2003). 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 millions of map simulations did neutral mapmaking produce two majority-minority districts. Only when race became the starting assumption could such a map be made. 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). Section 2 is not violated when neutral traditional districting principles, like core retention, guide districting decisions.

Here, Louisiana's enacted map preserves core retention, follows other traditional districting criteria, and avoids racial discrimination. Millions of efforts at similarly neutral maps show that Louisiana elections are equally open based on neutral criteria. Thus, the plaintiffs can prevail on their Section 2 claim only if the statute guarantees proportional representation, rather than protection against state action that abridges the right to compete on an equal footing in the electoral process. But Section 2's text "makes clear" that it is "not a guarantee of electoral success for minority-preferred candidates of whatever race." *De Grandy*, 512 U.S. at 1014 n.11; *see also Brnovich*, 141 S. Ct. at 2342 n.14 (noting the statutory disclaimer as "a signal that § 2 imposes something other than a pure disparate-impact regime").

To be sure, the Supreme 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. *Id.* (cleaned up). Here, application of neutral factors to Louisiana's political geography yielded, millions of times over, no more proportional representation. And the race-based maps proposed by the plaintiffs destroyed the district cores, undermining democratic representation. The district court "improperly reduced *Gingles*' totality-of-circumstances analysis to a single factor": "proportionality." *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 142 S. Ct. 1245, 1250 (2022).

Just as bad, the district court focused on race not only in the totality of the circumstances analysis but also before considering the *Gingles* threshold conditions. This use of race is particularly egregious because, in the district court's view, a plaintiff that "establish[es] the existence of the three *Gingles* factors" will almost by default have "establish[ed] a violation of § 2 under the totality of circumstances." ROA.6756. And starting with segregation distorts the *Gingles* analysis by favoring a race-based plan over either the existing plan or other neutral ones. Considering race before core retention and other 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* ROA.6686 (focusing extensively on "the Black candidate of choice").

If neutral maps cannot (or rarely) produce a sufficiently numerous, compact majority-minority district, the *Gingles* conditions cannot be satisfied. This proper approach to applying *Gingles*—which the district court rejected—is the only one consistent with both the text of Section 2 and the Supreme Court's precedents. As Judge Easterbrook has explained, "neither [Section] 2 nor *Gingles* nor any later decision of the Supreme Court speaks of *maximizing* the influence of any racial or ethnic group." *Gonzalez*, 535 F.3d at 598. "Section 2 requires an electoral process 'equally open' to all, not a process that favors one group over another." *Id.* This makes sense, because a court "cannot maximize [one group's] influence without minimizing some other group's influence. A map drawn to advantage [one racial group's] candidates at the expense of [another racial group's] candidates violates [Section] 2 as surely as a map drawn to maximize the influence of those groups at the expense of [the original ethnic group]." *Id.* The key, then, is to ask whether a racial group's population is "concentrated in a way that *neutrally drawn compact districts* would produce" more majority-minority districts. *Id.* at 600 (emphasis

added). Here, the undisputed analysis showed that race-neutral maps do not produce more majority-minority districts.

For similar reasons, the district court's analysis would trap States in an endless cycle of Section 2 violations. Again, 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. 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 the starting assumption, there is little doubt what fate the resulting map would meet on a Section 2 challenge. *E.g.*, *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring) ("Race cannot be the predominant factor in redistricting").

In the motion panel's view, "even if the plaintiffs had engaged in racial gerrymandering as they drew their hypothetical maps, it would not follow that the Legislature is required to do the same to comply with the district court's order." ROA.6874. Put aside that the district court gave the State *five days* to draw new maps. ROA.6889. The district court has no authority to order the State to do anything unless it finds a VRA violation—and it cannot be a VRA violation to decline to draw

maps that would exist only if racial segregation is the "threshold" consideration. Telling Louisiana to adopt a racially drawn map is telling it to violate the very law the new map would supposedly remedy (and the Constitution too). Section 2 should not be read to lead to so absurd a result.

B. Precedent does not require proportional representation.

The Supreme Court's precedents confirm that there are no race-based districting criteria that states may employ to achieve proportional representation. The Court has explained that to establish a racial gerrymandering claim, "a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles" like core retention "to racial considerations." *Miller*, 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." *Id.* (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*, the Supreme Court invalidated congressional maps drawn in Georgia that sought proportional representation. At the insistence of the 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." *Id.* (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 Section 2 "into tension with the Fourteenth Amendment," the Court rejected the State's maps, even though those maps provided proportional representation. *Id.* at 927.

The Supreme 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." *Id.* at 78 (majority opinion). Yet the Supreme Court upheld the district court's

maps, which focused on "Georgia's traditional redistricting principles" like core retention. *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." *Id.* (cleaned up). The Supreme 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").

The Supreme 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*.

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 v. Hall*, 512 U.S. 874, 907 (1994) (Thomas, J., concurring in judgment) (quoting *Reno*, 509 U.S. at 647). The Court has time and again recognized that any "maps that sort voters on the basis of race 'are by their very nature odious.'" *Wisconsin Legislature*, 142 S. Ct. at 1248.

The Supreme Court has applied strict scrutiny when the government discriminates based on "racial classifications." *Parents Involved in Cmty. Schs. 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 v. Hunt*, 517 U.S. 899, 908 (1996). Without narrow tailoring, "[s]uch laws cannot be upheld." *Wisconsin Legislature*, 142 S. Ct. at 1248 (cleaned up).

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"). The Supreme 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). 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," *Hunt*, 517 U.S. at 909. *First*, "the discrimination must be 'identified discrimination.'" *Id.* Any mere "generalized assertion of past discrimination in a particular industry or region is not adequate." *Id.* 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 millions of neutral maps produced the same (or less) representation. They cannot establish that race, rather than neutral principles like core retention, was the "predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Cooper*, 1137 S. Ct. at 1463. And they cannot show that a "strong basis in evidence" justifies their maps. *Id.* 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 motivated the drawing" of *their* proposed remedial plans. *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).

Interpreting Section 2 to sanction the plaintiffs' approach would challenge its constitutionality. As discussed, Section 2 is grounded in the constitutional prohibitions on intentional discrimination. Imposing liability on a State that drew race-neutral maps disconnects Section 2 from its constitutional authority. Given that the standard American electoral "rule usually results in less-than-proportionate representation for all political minorities," "there is scant basis for suspecting an official intent to discriminate from the mere fact that an electoral system results in a minority community enjoying a less-than-proportionate share of political representation." C. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. Pa. L. Rev. 377, 401 (2012). That is especially true when the State's map is closely tied to longstanding district cores. Requiring a State to depart from that neutral map and *instead* intentionally discriminate based on race would be a strange way to enforce the Constitution's prohibition on purposeful race discrimination. This constitutional quandary is yet another reason to reject the district court's extraordinary approach, under which "a district drawn for predominantly racial reasons" would not "necessarily fail the *Gingles* test." ROA.6747.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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I, Christopher Mills, an attorney, certify that on this day the foregoing Brief was served electronically on all parties via CM/ECF.

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