No. 22-30333

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

**Press Robinson, *et al.*,**

*Plaintiffs-Appellees,*

*v.*

**Kyle Ardoin, Secretary of State,**

*Defendant-Appellant.*

On Appeal from the United States District Court
Middle District of Louisiana, No. 3:22-cv-00211
Consolidated with 3:22-cv-00214

# AMICUS BRIEF OF ALABAMA AND 11 OTHER STATES IN SUPPORT OF DEFENDANTS-APPELLANTS

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## INTEREST OF *AMICI*

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

The Supreme Court is currently considering this very interplay between Section 2 and the Equal Protection Clause with respect to *amicus* Alabama's redistricting plan. Because of the abovementioned constitutional dangers of race-prioritized redistricting and the little time left be-

fore this year's elections, the Court stayed the preliminary injunction entered against Alabama's congressional redistricting legislation. *See Merrill v. Milligan*, 142 S. Ct. 879 (2022). The same principles apply here, compelling a stay of the district court's preliminary injunction.

## INTRODUCTION

To draw its current redistricting plan, Louisiana followed "common practice" by "start[ing] with the plan used in the prior map and … chang[ing] the boundaries of the prior districts only as needed to comply with the one-person, one-vote mandate and to achieve other desired ends." *Cooper v. Harris*, 137 S. Ct. 1455, 1492 (2017) (Alito, J., concurring in part); *see* Op. 48 (showing core-retention rate). Even so, the district court enjoined the plan, not because Plaintiffs demonstrated anything suspect about it, but rather because Plaintiffs showed that if a mapdrawer disregards prior district lines and prioritizes racial targets, it is possible to draw another majority-black congressional district.

The court's order misconstrues §2 and puts it at loggerheads with the Constitution. Section 2 operates as a prohibition against abridging or denying voters' ability to cast their votes "on account of race." 52 U.S.C. §10301(a). But §2 does not impose an obligation to ensure that wherever

a majority-minority district *can* be drawn, it *must* be drawn. Indeed, if that were what §2 commanded, then §2 would be unconstitutional.

If the lower court's interpretation of §2 persists, federal courts will continue to place States in an untenable position: either racially gerrymander their own citizens to comply with the court order, or let the court impose the gerrymander itself. Because §2 was designed to prevent racial discrimination, not require it, this Court should stay the district court's order and protect voters from federally mandated segregation.

## ARGUMENT

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

Section 2 of the VRA states that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State … in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color …." 52 U.S.C. §10301(a). To prove a violation, one must show that "political processes leading to nomination or election in the State or political subdivision are not equally open to participation," meaning individuals "have less opportunity" than others "to participate in the political process and to elect representatives of their choice." *Id.*

§10301(b). "The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003).

The district court's order undermines this purpose. Because Plaintiffs could draw maps with a second majority-black district—though only by prioritizing race over traditional redistricting criteria like core retention—Louisiana has now been ordered to abandon its duly enacted redistricting plan and enact a race-based plan in its place. But requiring racial preferences in congressional districts runs headlong into the Fourteenth Amendment's equal-protection guarantee and exceeds any remedial measure the Fifteenth Amendment could authorize. The only way to avoid these serious constitutional questions is to interpret §2 consonant with, not counter to, those Reconstruction Era amendments.

### A. Under the District Court's Interpretation, the VRA Trumps the Fourteenth Amendment.

Racial gerrymandering occurs when race "predominates," *Miller*, 515 U.S. at 916, or is "the criterion that … could not be compromised" in a State's redistricting process, *Shaw v. Hunt* ("*Shaw II*"), 517 U.S. 899, 907 (1996). To "predominate" simply means "[t]o have or gain controlling

power or influence." *Predominate*, The American Heritage Dictionary of the English Language (online ed. 2022), https://perma.cc/67FF-7SV8. A court can spot racial gerrymandering in districts if they would "obviously [be] drawn for the purpose of separating voters by race," *Shaw v. Reno* ("*Shaw I*"), 509 U.S. 630, 645 (1993), or would subordinate the State's traditional districting principles to the "predominant, overriding desire to create [two] majority-black districts," *Abrams v. Johnson*, 521 U.S. 74, 81 (1997) (internal quotation marks omitted).

The evidence adduced below shows that "[r]ace was the criterion that … could not be compromised" in Plaintiffs' comparator maps. *Shaw II*, 517 U.S. at 907. Plaintiffs' experts testified that that they "consciously drew the district[s] right around 50 percent [black population]" so they could "satisf[y] [*Gingles*'s] first precondition," 5/9 Tr. 217:18-23, and that they "did not" draw a map with fewer than two districts because they were "specifically asked to draw two by the plaintiffs," *id.* at 123:1-4.

In other words, race "predominated" in Plaintiffs' plans. Plaintiffs' experts were not tasked with determining whether the Louisiana Legislature acted with animus or suppressed a second majority-black district that would otherwise have naturally occurred. Rather, they were paid to

show it was physically possible to draw a congressional map with two majority-black districts. Their maps were "obviously drawn for the purpose of separating voters by race." *Shaw I*, 509 U.S. at 645.

Aside from Plaintiffs' experts' own testimony, evidence presented by Defendants further confirms that Plaintiffs could not have accomplished their task without prioritizing race. Dr. Christopher Blunt used redistricting software to generate 10,000 possible Louisiana congressional maps that prioritized contiguity, compactness, minimizing parish splits, and minimizing population deviation, but did not consider a voter's race. Op. 45-47. Not a single map came back with one—let alone two—two majority-black congressional districts. 5/12 Tr. 35:25-36:6. What's more, after one of Plaintiffs' experts alleged that Dr. Blunt's simulations had overly restrictive parameters, Dr. Blunt re-ran his simulations under more lenient criteria. The result? Still not one majority-minority district in another 10,000 less-restrictive maps. 5/12 Tr. 45:4-48:4.

Plaintiffs' experts' concessions and Defendants' experts' statistical evidence notwithstanding, the court was adamant that "[t]here is no factual evidence that race predominated in the creation of the illustrative maps in this case." Op. 116. This was so, said the court, because "it is

crystal clear under the law that some level of consideration of race is not only permissible in the Voting Rights Act context; it is necessary if Congress's intent in passing the Voting Rights Act is to be given effect." *Id.*

Putting aside the district court's disputable claims about Congress's intent, what occurred here went well beyond "some level of consideration of race." Plaintiffs instructed their experts to create maps with specific racial quotas, 5/9 Tr. 123:1-4, 217:18-23, meaning their racial targets exerted "controlling power" and thus "predominated" in their plans. *See Predominate*, American Heritage Dictionary, *supra.* Race was the criterion that "could not be compromised." *Bethune-Hill v. Virginia St. Bd. of Elections*, 137 S. Ct. 788, 798 (2017).

Doubling down, the court further reasoned that race could not have predominated in Plaintiffs' plans because "if Plaintiffs' experts engaged in race-predominant map drawing, their illustrative plans would surely betray this imbalanced approach by being significantly less compact, by disregarding communities of interest, or some other flaw." Op. 118. But that analysis is precisely what the Supreme Court recently rejected in *Bethune-Hill*, 137 S. Ct. at 799 (rejecting that an "actual conflict" must

exist to prove a racial gerrymander). The court's logic is also irreconcilable with *Cooper*, where the Supreme Court declared unconstitutional North Carolina's plan, even though it subordinated traditional districting principles to race only "sometimes" when those principles interfered with "'the more important thing' … to create a majority-minority district." 137 S. Ct. at 1469; *Harris v. McCrory*, 159 F. Supp. 3d 600, 612 (M.D.N.C. 2016) *aff'd sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017) (racial "quota operated as a filter through which all line-drawing decisions had to pass"). What was unconstitutional in *Cooper* is unconstitutional here.

And in its final effort to justify Plaintiffs' race-based maps, the district court reasoned that even if race does predominate in a two-majority-black-district map there's no problem because such a map is the narrowly tailored remedy to constitutional violations. Op. 111. But that logic allowed Plaintiffs to "prove" a violation by using racially gerrymandered maps that assumed the presence of a violation. The court's circular approach proves nothing, for a legislature's decision not to deliberately maximize majority-black districts does not deny or abridge "the right of any citizen … to vote on account of race." 52 U.S.C. §10301(a); *accord,*

*e.g.*, *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994) ("Failure to maximize cannot be the measure of §2.").

Section 2 cannot trump the Equal Protection Clause's guarantee of equal treatment. *See United States v. Wong Kim Ark*, 169 U.S. 649, 701 (1898) ("[S]tatutes enacted by congress … must yield to the paramount and supreme law of the constitution."). Rather, §2 and the Equal Protection Clause must act in concert. And where, as here, the evidence points to Louisiana having drawn districts not on account of race but instead on account of neutral redistricting principles, there can be no constitutional basis to require Louisiana to redraw those districts on account of race.

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

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

Accordingly, §2 cannot operate as an affirmative obligation to deploy racial preferences. *Cf. Bolden*, 446 U.S. at 77 n.24 ("[T]he fact that there is a constitutional right to a system of jury selection that is not purposefully exclusionary does not entail a right to a jury of any particular racial composition."). That is especially true in single-member redistricting, which is a zero-sum game; moving one individual into a district generally requires moving another out. *See Gonzalez v. City of Aurora, Ill.*, 535 F.3d 594, 598 (7th Cir. 2008) (Easterbrook, C.J.) ("One cannot maximize Latino influence with-out minimizing some other group's influence."). Section 2 therefore must operate as a prohibition on "invidious discrimination." *White v. Regester*, 412 U.S. 755, 764 (1973).

But the district court declared the prospect of discriminatory intent "[n]ot relevant" to its §2 inquiry (Op. at 20), vitiating the statute's Fifteenth Amendment mooring. Though Louisiana's race-neutral, least-changes congressional map bears no resemblance to the "ingenious defiance of the Constitution" that necessitated the VRA, *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966), the district court used §2 to require a racial gerrymander. Under this approach, a State with racially polar-

ized voting can violate §2 by declining to create another majority-minority district wherever one is possible. To avoid liability, the State must consider race first and everything else second. That cannot be the law.

Most astonishing is the district court's claim that §2 allows federal courts to invalidate a State's electoral maps based on a plaintiff's comparator maps that show nothing more than ways the State *could have* racially gerrymandered its districts. As the district court sees it, a plaintiff's comparator plans can satisfy *Gingles*—and thus justify invalidating a State's enacted plan—even where the comparator plan is "'drawn for predominantly racial reasons.'" Op. 113 (quoting *Clark v. Calhoun Cnty., Miss.*, 88 F.3d 1393, 1406-07 (5th Cir. 1996)). That is, a plaintiff can prove liability through nothing more than evidence that the State could have enacted racial gerrymanders. The court's interpretation will thus require many States to maximize majority-minority districts whenever a plaintiff shows it is mathematically possible to do so.

Trying to downplay the remarkable implications of its position, the district court asserted that assigning liability for failure to enact racial gerrymanders "makes sense, since illustrative maps drawn by demographers for litigation are not state action and thus the Equal Protection

Clause is not triggered." Op. 114; *see also id.* at 116 ( "Defendants' insistence that illustrative maps drawn by experts for private parties are subject to Equal Protection scrutiny is legally imprecise and incorrect"). But the court's position reduces to the proposition that a federal court may compel a sovereign State to enact a map that violates the Equal Protection Clause all because a group of plaintiffs can show that it is possible to draw maps that violate the Equal Protection Clause—and that, on top of this, the court's order does not implicate the Equal Protection Clause. To make the argument is to refute it.

Where *no evidence* suggests it is possible to draw two majority-black districts in Louisiana without racial predominance—and, indeed, all evidence suggests the contrary, *see supra* pp. 5-7—it is unfathomable that the VRA could compel Louisiana to depart from existing law and draw two majority-black districts anyway. The court's order ignores that any "exercise of [Congress's] Fifteenth Amendment authority even when otherwise proper still must 'consist with the letter and spirit of the Constitution.'" *Miller*, 515 U.S. at 927 (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819)). Requiring States' redistricting processes to bear an "uncomfortable resemblance to political apartheid," *Shaw I*, 509 U.S.

at 647, consists with neither. The district court's order demanding racial discrimination in redistricting should be immediately stayed.

* * *

The district court infringed on Louisiana's sovereign redistricting prerogatives based on an interpretation of §2 that raises serious constitutional questions. Thus, at the very least, a stay of the district court's preliminary injunction is in order. It is bad enough that the court's order risks sowing "chaos and confusion" among candidates, election officials, and voters. *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). Worse still is the remedy of replacing the State's race-neutral plan with a plan that "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw I*, 509 U.S. at 647. When the district court in Alabama entered a similar preliminary injunction in January, the Supreme Court stayed it. *See Merrill*, 142 S. Ct. 879. This Court should do the same.

## CONCLUSION

This Court should stay the district court's order.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with Fed. R. App. P. 27(d)(2)(A) and 29(a)(5) because it contains 2,554 words as measured by Microsoft Word software. The brief also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & 32(a)(6) because it has been prepared in a proportionally spaced typeface, 14-point Century Schoolbook.

Dated: June 10, 2022

*/s/ Edmund G. LaCour Jr.*
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## CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2022, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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