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 THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR PROJECT ON FAIR REPRESENTATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

CHRISTOPHER E. MILLS
Counsel of Record
Spero Law LLC
557 East Bay Street
#22251
Charleston, SC 29413
(843) 606-0640
cmills@spero.law

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

INTEREST OF *AMICUS CURIAE*

The Project on Fair Representation is a public-interest organization committed to the principle that racial and ethnic classifications are unconstitutional, unfair, and harmful. It works to advance race-neutral rules in education, government action, and voting. The Project pursues these goals through education and advocacy and has been involved in several cases before the Supreme Court involving these important issues. The Project opposes racial gerrymandering of all kinds. Eliminating racial sorting in districting is not only what our Constitution requires, but it is also a needed remedy for our Nation's increasingly polarized and racialized politics. Because S.B. 8 structures elections based on citizens' races, the Project has a direct interest in this case and filed an *amicus* brief below regarding remedies. D. Ct. Dkt. 231.*

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* Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

All too often, Voting Rights Act litigation in the last 40 years has led to voters being cobbled together by race. Even as societal racial segregation wanes and our neighborhoods better reflect the diversity of America, some States wield the VRA to force us backwards, splitting apart multi-racial and multi-ethnic neighborhoods to create racially homogeneous voting districts. To be sure, sometimes this state action comes after pressure from litigants. But no matter its impetus, treating citizens differently based on their race violates the Constitution.

Here, pressured by a VRA suit, Louisiana voluntarily enacted a new congressional map in an extraordinary legislative session with an overriding purpose: to separate citizens by race and create another majority-minority district. Of course, as with every state action, Louisiana had secondary purposes too, including protecting incumbents. But it is undeniable that the new map in S.B. 8 would not exist absent a dominating intent to draw another majority-minority district—thereby providing less than proportional representation to Louisiana's non-black voters. As the State forthrightly explains, "[t]he new district had to be a majority-Black district." Appellant's Br. 36. That was the point of S.B. 8's expedited proceedings, which lasted just eight days from introduction to signature into law.

Unfortunately, this situation exemplifies the mismatch between the VRA's original goal—to enfranchise black voters—and its applications today. Not only have racial attitudes dramatically changed for the better since the VRA's passage in 1965, but

three developments in the last 40 years have turned the VRA on its head. The first was the development of powerful and affordable microprocessors and software that facilitated the creation of voting districts constructed with extremely small units of race-specific geography strung together over disparate land areas—in other words, racial gerrymandering. The second was the acceleration of suburban population growth throughout the nation in multi-racial neighborhoods. The third was the development of jurisprudence geared toward "fair representation" of racial groups instead of individual rights.

Today, black and Hispanic candidates, like white candidates, almost always succeed or fail based on their partisan affiliation, and very rarely because of their race.[1] Yet thanks to the developments just discussed, modern applications of the VRA tend to engineer election outcomes in which minority voters elect minority candidates in proportion to their percentage of the population, free from the hassles of forming multi-racial coalitions. The quest to achieve racially proportional representation thus results in racially gerrymandered voting districts.

That's what happened here. On a quest to draw a second majority-minority district, Louisiana subordinated other considerations to race and divided neighborhoods up, block by block, to ensure sufficient racial segregation in its congressional map. In the

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[1] Cf. Borelli, *Americans Differ Over How Important It Is for Political Candidates They Support to Share Their Personal Traits*, Pew Research Center (Oct. 3, 2023), https://tinyurl.com/35av7ryj.

process, Louisiana "fenc[ed] [non-black] citizens out of" districts so that black voters could have super-proportional representation. *Gomillion* v. *Lightfoot*, 364 U.S. 339, 341 (1960). The result was a convoluted map that never would've existed without making race the main consideration.

The court below correctly held "that SB8 violates the Equal Protection Clause as an impermissible racial gerrymander." J.S. App. 67a. The Fourteenth and Fifteenth Amendments "nullif[y] sophisticated as well as simple-minded modes of discrimination." *Gomillion*, 364 U.S. at 342 (cleaned up). Yet Louisiana's discrimination was hardly sophisticated. Rather than recognizing Louisiana's demographically diverse neighborhoods, the State segregated them block-by-block in pursuit of an artificial proportional (or more) representation for a particular racial group.

To justify this discrimination, the State has pointed to the tentative findings of another district court applying the VRA to a prior map. Those preliminary findings are irrelevant, even if compliance with a statute could ever justify racial discrimination. The State disagreed with those findings, so its goal in S.B. 8 was not to comply with the VRA—it believed that it already had. Rather, the State's goal was a litigation strategy one: to avoid a trial. But the People's right to equal protection of the laws should not be subordinated to either a State's litigation exhaustion or preliminary trial court findings.

More generally, the People's constitutional right to elections free of invidious racial discrimination should never be traded away to appease a statute. The Constitution wins over statutes. And the

Reconstruction Amendments' extraordinary authority, including the power to enforce the Fourteenth Amendment's guarantee of equal protection, was given to Congress to combat continued state efforts to discriminate based on race. Louisiana's map is an *example* of state racial discrimination, so the State cannot claim refuge in the VRA—or use the VRA to perpetuate unconstitutional discrimination. Neither States nor courts have any leeway to depart from the Constitution.

As Justice O'Connor explained, "At the same time that we combat the symptoms of racial polarization in politics, we must strive to eliminate unnecessary race-based state action that appears to endorse the disease." *Bush* v. *Vera*, 517 U.S. 952, 993 (1996) (concurring opinion). Louisiana's S.B. 8 manifests discrimination that the Constitution bars. The Court should affirm.

ARGUMENT

I. S.B. 8 does not reflect the realities of Louisiana's multi-racial neighborhoods.

As is increasingly common across the nation, Louisiana has multi-ethnic and multi-racial neighborhoods dispersed throughout the State. But rather than prioritize keeping those neighborhoods together, the State systematically segregated those neighborhoods in pursuit of misplaced notions about proportional representation.

A. Proportional representation is not the norm in single-member districts.

As Louisiana legislators repeatedly explained, the fundamental point of SB8 was "to draw a second majority-minority seat." J.S. App. 21a. The legislators worked backwards from that assumption of a need for "proportional" representation for black voters. But 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." Duchin et al., *Locating the Representational Baseline: Republicans in Massachusetts*, 18 Election L.J. 388, 392 (2019). And Louisiana features a widely-dispersed black population, with citizens of every race mingling in neighborhoods throughout the State. That dispersion means that proportional representation is not the norm: it can be achieved only through intentional racial division.

Many examples from elsewhere prove the general point. In Massachusetts, for instance, Republican voters are 35 percent 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); cf. *Rucho* v. *Common Cause*, 588 U.S. 684, 705 (2019) (noting that in 1840, the Whigs in Alabama "garnered 43 percent of the statewide vote, yet did not receive a single seat" in the House of Representatives). Likewise, even though the population of the United

States is about 14% black,[2] no U.S. Senate district (a State) is majority black. Twenty-one percent 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.[3] At the extreme, take a hypothetical ten-district State with 100 voters per district, in which a group constituting only 50 percent of the population (500 voters) could form a majority in nine districts if their geographic dispersion was such that those districts each contained 51 group members. The point is that political geography matters.

What is true nationally is true in Louisiana. Fifty-six of Louisiana's 64 parishes are majority white (and one plurality white), while only seven are majority black.[4] Louisiana's "Black populations" are "very

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[2] *Race and Ethnicity in the United States: 2010 Census and 2020 Census*, U.S. Census Bureau, https://tinyurl.com/5fwyfwej (last visited Jan. 8, 2025).

[3] See *2022: ACS 1-Year Estimates Data Profiles*, U.S. Census Bureau, https://data.census.gov/table/ACSDP1Y2022.DP05?g=040XX00US12 (last visited Jan. 8, 2025) (providing data for Floridian population); *Florida 11th Congressional District Demographics,* BiggestUSCities.com (Mar. 1, 2022), https://tinyurl.com/55nyn7ap (providing data for Eleventh District); *Rich, Poor, Young, Old: Congressional Districts at a Glance*, Bloomberg Government (Sep. 15, 2017), https://about.bgov.com/insights/news/rich-poor-young-old-congressional-districts-glance/ (same).

[4] *Race and Ethnicity in the United States*, *supra* note 2.

dispersed" "in virtually every parish in the state."[5] Black Louisianians live in majority-white places like Gramercy (St. James Parish, 48% black) and Vidalia (Concordia Parish, 41% black), exemplifying the fact that "the entire state has noteworthy local areas of statistically significant clusters," "and the Black voting age population clusters are often not close together."[6]

This trend has only increased in recent years. For instance, Hurricane Katrina "significantly accelerated the dispersion of Black voters from Southeastern Louisiana to other areas."[7] Nearly every Louisiana parish became more diverse from 2010 to 2020, making a compact district composed mostly of one racial group all the more unlikely.[8] Thus, as a matter of political geography, Louisiana's longstanding single majority-minority district comes as no surprise:

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[5] Defendants' Amended Joint Proposed Findings of Fact and Conclusions of Law 43, *Robinson* v. *Landry*, No. 22-cv-00211, Dkt. 166 (M.D. La. May 23, 2022). Cites hereinafter to this *Robinson* docket are listed as "*Robinson* Dkt."

[6] Expert Report of Dr. Alan Murray 5, 25, *Robinson* Dkt. 169-12 (M.D. La. May 9, 2022); see *Louisiana: 2020 Census*, U.S. Census Bureau (Aug. 25, 2021), https://www.census.gov/library/stories/state-by-state/louisiana-population-change-between-census-decade.html; *Race and Ethnicity in the United States*, *supra* note 2; *QuickFacts: St. James Parish, Louisiana*, U.S. Census Bureau, https://tinyurl.com/mwr47bvv (last visited Jan. 8, 2025); *Gramercy Town, Louisiana*, U.S. Census Bureau, https://tinyurl.com/2m6hmhd7 (last visited Jan. 8, 2025).

[7] D. Ct. Dkt. 191 ¶¶ 142–43.

[8] See Potter, *Census 2020 Results: Here's How Louisiana Looks After a Decade of Change*, Daily Advertiser (Aug. 12, 2021), https://perma.cc/66D3-HHAZ.

"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).

B. Forcing proportional representation results in racial discrimination.

"[A]s residential segregation decreases—as it has sharply done since the 1970s—satisfying traditional districting criteria such as the compactness requirement becomes more difficult" in designing maps that purport to provide "proportional representation." *Allen* v. *Milligan*, 599 U.S. 1, 28–29 (2023) (cleaned up). That is another way of saying that drawing proportional maps increasingly requires subordinating traditional districting criteria to race. "In most states, it seems, minority voters are geographically distributed in such a way that a proportional share of reasonable-looking opportunity districts cannot be drawn." Chen & Stephanopoulos, *The Race-Blind Future of Voting Rights*, 130 Yale L.J. 862, 921 (2021).

Using computer models, experts have drawn "two million maps made for Louisiana's congressional delegation" that are compact and contiguous (and the proper size), and "just six districting plans included [*one*] majority-Black district." Duchin & Spencer, *Models, Race, and the Law*, 130 Yale L.J.F. 744, 796 n.75 (2021) (emphases altered). "The remaining 1,999,994 plans had *zero* majority-minority districts." *Ibid.* (emphasis added). Drawing *two* here meant making race the non-negotiable operating principle.

When the government "intentionally creates a majority-minority district, race is necessarily its predominant motivation." *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 517 (2006) ("*LULAC*") (Scalia, J., concurring in judgment in part and dissenting in part, joined by Roberts, C.J., and Thomas & Alito, JJ.); *see Vera*, 517 U.S. at 1001 (Thomas, J., concurring in judgment) (a map that "would not have existed but for the express use of racial classifications" "must be viewed as a racial gerrymander"). And the Supreme Court recently reiterated that "[f]orcing proportional representation is unlawful." *Allen*, 599 U.S. at 28.

Forcing proportional representation inevitably means segregating citizens based on their race. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard College*, 600 U.S. 181, 208 (2023) (cleaned up). "For that reason," official "classification or discrimination based on race" is "a denial of equal protection." *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943). "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller* v. *Johnson*, 515 U.S. 900, 911 (1995) (cleaned up); see *Plessy* v. *Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("The law" "takes no account of" a citizen's "color when his civil rights as guaranteed by the supreme law of the land are involved.").

Voting laws that prescribe differential treatment for citizens based on their race are not "excepted from standard equal protection precepts." *Miller*, 515 U.S. at 914. "Under the Equal Protection Clause, districting [laws] that sort voters on the basis of race 'are by their very nature odious.'" *Wisconsin Legislature* v. *Wisconsin Elections Comm'n*, 595 U.S. 398, 401 (2022) (quoting *Shaw* v. *Reno*, 509 U.S. 630, 643 (1993)). These laws "tend[] to sustain the existence of ghettos by promoting the notion that political clout is to be gained or maintained by marshaling particular racial, ethnic, or religious groups in enclaves." *Johnson* v. *De Grandy*, 512 U.S. 997, 1030 (1994) (Kennedy, J., concurring in part and in judgment) (cleaned up).

Recognizing the danger of artificial proportional representation is no mere technicality. "When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, think alike, share the same political interests, and will prefer the same candidates at the polls." *Miller*, 515 U.S. at 911–12 (cleaned up). "In doing so, the [State] furthers stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Students for Fair Admissions*, 600 U.S. at 221 (cleaned up). These classifications necessarily "promote notions of racial inferiority and lead to a politics of racial hostility." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion). When racial lines are drawn, "the

multiracial . . . communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race . . . rather than to political issues are generated; communities seek not the best representative but the best racial . . . partisan." *Reno*, 509 U.S. at 648 (quoting *Wright* v. *Rockefeller*, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting)).

In sum, in a State with Louisiana's multi-racial neighborhoods, proportional representation is practically impossible *apart* from intentional race discrimination. The State should celebrate these neighborhoods, recognize them as units, and encourage them to stand together in democratic representation. One way to achieve that goal, for instance, would have been to rely on elementary school attendance zones, which are drawn using connected neighborhoods. Neighborhoods should *not* be split apart by block to divide citizens based on their race. "[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, 905 (1994) (Thomas, J., concurring in judgment) (quoting *Reno*, 509 U.S. at 647). Because that was the predominant goal and effect of S.B. 8, the district court rightly held that the State unlawfully discriminated based on race.

II. Fears about trial court feelings cannot excuse racial discrimination.

The State insists that S.B. 8 is constitutional anyway because it was worried about a trial before the court in the prior *Robinson* proceeding. But the State's actual purpose in enacting S.B. 8 was *not* to comply

with the VRA, for it believed that it already did. Instead, the State's purpose was to avoid further litigation. No court in *Robinson* adjudicated a VRA § 2 violation. And no decision in *Robinson* (that was not vacated) *ordered* the State to do *anything*.

As the State previously explained, S.B. 8 "[wa]s not a 'remedial map.'" *Robinson* Dkt. 352-1 at 8. Though the old map (H.B. 1) had been subject to legal challenges, "there was *no* judgment or finding of a violation" of the VRA. *Id.* at 9. "[A] trial on the merits had yet to occur when the State passed" S.B. 8. *Ibid.* Rather than defend H.B. 1 at trial, "the Legislature voluntarily discontinued the challenged practice." *Robinson* v. *Ardoin*, No. 22-cv-211, 2024 WL 1812141, at *3 (M.D. La. Apr. 25, 2024); see D. Ct. Dkt. 192 at 1 (State's post-trial brief noting that it "chose" to draw a discriminatory map instead of "go[ing] to trial").

At a minimum, when the State's actual purpose is not VRA compliance, the State cannot excuse racial discrimination by invoking litigation fears. Of course, compliance with a statute should *never* justify otherwise unconstitutional discrimination. When a statute and the Constitution are at odds, the Constitution wins. That conclusion follows from both general constitutional principles and the history of the Reconstruction Amendments. The People's constitutional protections against racial discrimination should not turn on the whims of Congress, States' litigating tactics, or predictions about trial court feelings.

A. The State did not believe S.B. 8 was needed to comply with the VRA.

This Court has "assume[d], *arguendo*" "that compliance with § 2 could be a compelling interest" for strict scrutiny purposes. *Shaw* v. *Hunt*, 517 U.S. 899, 915 (1996). Under this "assumed" permission to use VRA compliance as a justification for intentional racial discrimination, "the State must show that the alleged objective was the legislature's 'actual purpose' for the discriminatory classification." *Id.* at 908 n.4. This Court has "never applied this assumption to *uphold* a districting plan" under § 2 "that would otherwise violate the Constitution," *Allen*, 599 U.S. at 79 (Thomas, J., dissenting), and it should not do so here.

Here, Louisiana's "actual purpose" in enacting S.B. 8 was not complying with the VRA, for it believed that it already did. Instead, it wanted to avoid further litigation because of fears about one trial court's feelings. See D. Ct. Dkt. 192 at 11 (the State explaining that it did not want "to go to trial on H.B. 1 . . . before a factfinder who had already made her views abundantly clear"). That is not enough for "a strong basis in evidence to support [any VRA] justification." *Hunt*, 517 U.S. at 908 n.4.

To begin, legislating out of fear of what one judge's preliminary injunction—vacated on appeal—might portend about future litigation is not a narrowly tailored way to advance an interest of the highest order. "At the preliminary injunction stage, the court is called upon to assess the probability of the plaintiff's ultimate success on the merits." *Sole* v. *Wyner*, 551 U.S. 74, 84 (2007). It is "only the parties' opening

engagement," and any "provisional relief granted" is "tentative," "in view of the continuation of the litigation to definitively resolve the controversy." *Ibid.* "[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *Univ. of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981).

As the State told the Fifth Circuit, the district court in *Robinson* never "even reached a final determination that there even is a Section 2 violation." Reply Brief for Appellants 31, *Robinson* v. *Ardoin*, No. 22-30333, 2023 WL 4855350 (CA5 July 19, 2023) ("*Robinson* Reply Br."); see generally Pet. for a Writ of Mandamus 14–16, *In re Landry*, No. 23-30642, Dkt. 2-1 (CA5 Sept. 15, 2023) ("Mandamus Pet.") (similar); contra U.S. Br. 22, 28, 30 (referring to a nonexistent "Section 2 violation that the *Robinson* courts had already found" and "decisions finding a Section 2 violation," and asserting that "a VRA claim ha[d] in fact been adjudicated").

That the Fifth Circuit tentatively agreed with the *Robinson* district court's preliminary findings—while vacating its injunction—is not compelling either. The scope of appellate review of a preliminary injunction is circumscribed, as the appeals court asks merely "whether the District Court had abused its discretion in issuing a preliminary injunction," an inquiry that is "significantly different" from "a final resolution of the merits." *Camenisch*, 451 U.S. at 393. Because of the limited "extent of [the] appellate inquiry," the Fifth Circuit necessarily "intimate[d] no view as to the ultimate merits of [the *Robinson* Plaintiffs']

contentions." *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 934 (1975) (cleaned up).

The State now seems to concede that no court order required it to discriminate based on race, instead calling such a map "an impending reality." Appellant's Br. 34. But that speculative assertion ignores that the State could have presented more evidence at trial or pursued any number of appellate avenues. See *Robinson* v. *Ardoin*, 37 F.4th 208, 215 (CA5 2022) (noting that the *Robinson* plaintiffs "have much to prove when the merits are ultimately decided"); *In re Landry*, 83 F.4th 300, 305 (CA5 2023) (emphasizing that any "court-ordered redistricting plan will be appealed to this court and likely to the Supreme Court").

On the point about more evidence, the State itself emphasized the error of "assum[ing] the evidence taken at a preliminary injunction hearing will be the same as the evidence developed at a full trial on the merits." *Robinson* Reply Br. 28–29. The State continued: "To say that the preliminary injunction proceedings here proceeded on the basis of procedures that were less formal and evidence that is less complete than a trial on the merits is an understatement." *Id.* at 29. "The preliminary injunction hearing was held on an extremely expedited basis . . . less than 45 days from the filing of the complaint," "[n]o fact discovery was conducted," and expert depositions were not taken. *Ibid.* According to the State, "That is not the fulsome record required to adjudicate claims arising under Section 2 of the Voting Rights Act." *Ibid.*; see also Mandamus Pet. 11 (the State noting that the "preliminary-injunction

order" "(1) was justified based on an event that has since passed (the November 2022 congressional elections), (2) was rushed so terrifically that the State was not able to fully defend its work, and (3) relied on now-outdated Section 2 and Equal Protection jurisprudence"); *id.* at 18 ("[T]he lack of evidentiary *quality*, given the rushed nature of the proceedings during the run-up to the 2022 congressional elections, is what renders a full trial on the merits critical to ensuring that the district court reaches a correct and just outcome.").

Even if the trial went south, the State would have had several avenues to appeal. Indeed, the State had already succeeded on several of those avenues, obtaining (1) a stay by this Court, 142 S. Ct. 2892, (2) vacatur of the preliminary injunction, *Robinson* v. *Ardoin*, 86 F.4th 574, 602 (CA5 2023), and (3) mandamus by the Fifth Circuit halting the *Robinson* district court's attempt to impose a preliminary remedial map, *Landry*, 83 F.4th at 308.

Despite all this, the State evidently tired of "f[ighting] vigorously for the mere opportunity to make its case." Mandamus Pet. 17. It folded. And it voluntarily chose to adopt its own discriminatory map—not even a map suggested in *Robinson*. As the State's prior briefing well explains—contrary to its current position—a trial court's preliminary dictum is neither a gun to the head nor "the *best* of reasons to" discriminate based on race. Appellant's Br. 35, 45.

To read the *Robinson* decisions more broadly is to assign those courts authority that they did not have. In the State's words, "[t]here is no legally defensible reason" that "the district court's preliminary-

injunction order [would] control its resolution of the [*Robinson*] Plaintiffs' claims on the merits." Mandamus Pet. 20. That vacated order is no strong basis in the evidence to excuse racial discrimination.

In any event, even if the *Robinson* preliminary order could be read to provide a basis in evidence, the State's defense here fails because it did not believe it had violated the VRA. So its "actual purpose" in passing S.B. 8 was to avoid further litigation—not to achieve compliance with a statute that it believed it already complied with. *Hunt*, 517 U.S. at 908 n.4; see J.S. App. 15a. *None* of the legislative statements relied on by the State (Appellant's Br. 10–12) refers to VRA compliance. It defies logic to excuse a State's constitutional violation on the ground that it had "good reason to believe" a § 2 violation existed *when it did not in fact believe that*. *Cooper* v. *Harris*, 581 U.S. 285, 302 (2017). "[D]eferring to a State's belief that" someone else might think "it has good reasons to use race—is 'strict' in name only." *Bethune-Hill* v. *Virginia State Bd. of Elections*, 580 U.S. 178, 202 (2017) (Thomas, J., concurring in judgment in part and dissenting in part); cf. Appellant's Br. 40 (the State now justifying its discriminatory map because "the *Robinson* Plaintiffs would have just sued Louisiana again").

The State says that the Appellees here "do not argue that—without the Legislature's adoption of S.B. 8—the Middle District would have *upheld* H.B. 1." Appellant's Br. 49. Putting aside that it would be obscene to make the guarantee of equal protection turn on a guessing game about a trial that never started, two can play the game: the State does not

argue that any eventual order by the Middle District holding H.B. 1 unlawful would have been affirmed by a skeptical Fifth Circuit. See, *e.g.*, *Robinson*, 86 F.4th at 598 (emphasizing that "the Plaintiffs' arguments 'are not without weaknesses'" (quoting *Robinson*, 37 F.4th at 215)).

As the State elsewhere said, "[i]ssuing a [race-based] remedy without establishing liability is a constitutional violation of the highest order." Petitioners' Reply Br. 1, *Landry*, Dkt. 24 (CA5 Sept. 21, 2023) ("Mandamus Reply Br."). The State offers no support for its theory that a single trial court's intimations in a vacated order are enough to transmogrify unconstitutional racial discrimination into the law of the land.

B. Statutory compliance cannot justify a constitutional violation.

Regardless, no matter how much "the Middle District was dedicated to creating a second majority-Black district in Louisiana," Appellant's Br. 49, the People have expressed their law foremost through the Constitution—not the future and unordered hopes of one trial court. The Equal Protection Clause "requires equality of treatment before the law for all persons without regard to race." *Students for Fair Admissions*, 600 U.S. at 205. And, to use the State's words again, "Louisiana's entire electorate" should not be made to "suffer[] an irreversible Fourteenth Amendment violation when they next cast their ballots for their congressional representatives" because of a State's predictions about one trial court's feelings or litigation exhaustion. Emergency App. for Admin. Stay, Stay Pending Appeal, and Pet. for Writ of Cert. Before

Judgment 39, *Ardoin* v. *Robinson*, No. 21A814, 2022 WL 2441061 (U.S. June 17, 2022); see Mandamus Pet. 11 (the State emphasizing that "the Louisiana electorate will experience profound and irreparable injury" from a discriminatory map).

When a statute and the Constitution are in tension, the Constitution should always win. A statute cannot be applied in unconstitutional ways. And a State cannot justify unconstitutional discrimination by pointing to a statute's otherwise lawful sweep. Both general constitutional principles and the Reconstruction Amendments refute the idea that compliance with the VRA justifies violating the Constitution. "[I]f complying with a federal statute would require a State to engage in unconstitutional racial discrimination, the proper conclusion is not that the statute excuses the State's discrimination, but that the statute is invalid." *Allen*, 599 U.S. at 79 (Thomas, J., dissenting).

1. The VRA is subject to the Constitution.

Any assumption that compliance with the VRA can justify a constitutional violation is wrong as a matter of first principles. In other words, even assuming some new map was necessary to comply with the VRA, it makes no sense to characterize compliance with a *statute* as justifying a violation of the *Constitution*. See *Marbury* v. *Madison*, 5 U.S. 137, 180 (1803) (emphasizing "the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument" (emphasis omitted)); see also U.S. Const. art. VI, cl. 2 (Supremacy Clause).

Assuming that statutory compliance excuses a constitutional violation "take[s] the effect of the statute and posit[s] that effect as the [government's] interest." *Simon & Schuster, Inc.* v. *Members of New York State Crime Victims Bd.*, 502 U.S. 105, 120 (1991). "If accepted, this sort of circular defense [would] sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored." *Ibid.* Congress does not have "the power to determine what are and what are not 'compelling state interests' for equal protection purposes." *Oregon* v. *Mitchell*, 400 U.S. 112, 295 (1970) (Stewart, J., concurring in part and dissenting in part).

"Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it" compliance with the VRA. *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 732 (2007) (plurality opinion). "History should teach" that courts cannot "distinguish good from harmful governmental uses of racial criteria." *Id.* at 742. Any such distinction "reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable." *Ibid.*

That conclusion, in turn, hinges on "the very stereotypical assumptions the Equal Protection Clause forbids." *Miller*, 515 U.S. at 914. Here, it is "based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens." *Ibid.* This is "the precise use of race as a proxy the Constitution prohibits." *Ibid.*

In no other context would courts "assume[] away part of the State's burden to justify its intentional use of race." *Bethune-Hill*, 580 U.S. at 200 (Thomas, J., concurring in judgment in part and dissenting in part). It might have once made sense to assume a compelling interest in complying with § 5 of the VRA, when it was "a proper exercise of Congress's authority" and "remed[ied] identified past discrimination" in "jurisdictions with a history of official discrimination." *LULAC*, 548 U.S. at 518–19 (Scalia, J., concurring in judgment in part and dissenting in part). That does not describe the partisan food fights that are the focus of today's VRA § 2. Assuming *today* that compliance with § 2 is a compelling interest absent identifiable (and intentional) past discrimination inverts our constitutional order. Perhaps for these reasons, the State does not even attempt to defend this assumption about statutory compliance as a compelling interest.

Invoking Justice Scalia's opinion in *LULAC* about VRA § 5, the United States bemoans placing States "'in the impossible position of having to choose' between complying with a valid federal statute and complying with the Equal Protection Clause." Br. 23 n.2 (quoting *LULAC*, 548 U.S. at 518 (Scalia, J., concurring in judgment in part and dissenting in part)).[9] But even putting aside that VRA § 2 is not § 5, the United States omits Justice Scalia's emphasis that "the State must demonstrate that such compliance was its 'actual purpose.'" *LULAC*, 548 U.S. at 519 (cleaned up). As shown above, the State's actual

[9] The United States has since disavowed its brief here.

purpose was not to comply with the VRA, but to avoid further litigation.

Justice Scalia also said that "the State must demonstrate that" the decision "was 'reasonably necessary under a constitutional reading and application of' the [VRA]." *Ibid.* (quoting *Miller*, 515 U.S. at 921). Here, as the court below held, S.B. 8 "violates the Equal Protection Clause as an impermissible racial gerrymander." J.S. App. 67a. And if an application of a "valid federal statute" (U.S. Br. 23 n.2)—whatever that means[10]—is unconstitutional, the choice before either a State or a court is easy. See *Marbury*, 5 U.S. at 180; see also U.S. Const. art. VI, cl. 2; *Barr* v. *Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 627 n.8 (2020) (plurality opinion) (describing the judicial power under Article III as "the negative power to disregard an unconstitutional enactment" (quoting *Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923))).

That choice is no more "impossible" than the ones faced by States in the desegregation era between complying with a state statute and complying with the Constitution. See generally Br. for America First Legal 23–30, *Allen* v. *Milligan*, Nos. 21-1086, 21-1087 (U.S. May 2, 2022). Or the one faced by Massachusetts between complying with the federal Aid to Families with Dependent Children statute—which required

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[10] See generally Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933 (2018); *N.J. Thoroughbred Horsemen's Ass'n* v. *Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 489 (2018) (Thomas, J., concurring) ("[C]ourts do not have the power to 'excise' or 'strike down' statutes.").

sex-based distinctions—and complying with the Constitution. See *Califano* v. *Westcott*, 443 U.S. 76, 78–79 (1979). The Constitution wins. And the State is right that "the Court should say so." Appellant's Br. 53.

Last, at least seven times, the State frets about "breathing room" between "the VRA and the Equal Protection Clause." *E.g.*, Appellant's Br. 2. To the extent "breathing room" means that the VRA boxes out the Constitution, that is wrong. Beyond that, the Court already gives States "breathing room" in this area by upping the level of discriminatory purpose necessary to prove an equal protection claim. In almost all other contexts, an "invidious discriminatory purpose" may not be even "a motivating factor." *Village of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). But here, the Court has appeared to excuse a State's racial discrimination if it is merely "*a* motivation" rather than "the *predominant* factor." *Easley* v. *Cromartie*, 532 U.S. 234, 241 (2001) (cleaned up); *id.* at 257 (permitting "racial considerations" that are not "dominant and controlling").

S.B. 8's predominant motivation *was* racial, as the court below correctly found. See D. Ct. Dkt. 192 at 1–2 (the State explaining that "two majority-Black district[s]" were the "baseline for S.B. 8"). And "districting cases" are not *supposed* to be "excepted from standard equal protection precepts." *Miller*, 515 U.S. at 914. But if the concern is about giving States room to depart from the Constitution, for better or more likely worse, they already have it. There is no

reason to water down strict scrutiny when governments discriminate based on race.

2. The Reconstruction Amendments give Congress power to stop States' discrimination—they do not give States power to keep discriminating.

Confirming this conclusion is the history of the Reconstruction Amendments. Congress's authority to enact the VRA came from the Fourteenth and Fifteenth Amendments, which permit Congress to "enforce" those amendments' substantive provisions "by appropriate legislation." U.S. Const. amend. XIV, § 5; *id.* amend. XV, § 2. Congress may enforce them "by creating private remedies against the States for actual violations." *United States* v. *Georgia*, 546 U.S. 151, 158 (2006) (emphasis omitted). In other words, the Reconstruction Amendments sought to give Congress the power to *stop* States from discriminating based on race, not to enable that discrimination. "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause." *Graham* v. *Richardson*, 403 U.S. 365, 382 (1971).

Letting States like Louisiana *continue* discriminating even in part based on race would turn the Reconstruction Amendments on their head. Those amendments conferred "extraordinary" power on Congress to *remedy* racial discrimination—not power on States to propound it. *Shelby County* v. *Holder*, 570 U.S. 529, 546 (2013). In the wake of the Civil War, Congress recognized that the role of rebuilding had to be placed "in the hands of men who would be loyal to the Union." Fernandez, *The Constitutionality of the*

Fourteenth Amendment, 39 S. Cal. L. Rev. 378, 385 (1966). The Reconstruction Congress understood that this responsibility could not be left to the States: Northern States denied black people the right to vote, ex-Confederate soldiers threatened to disarm and murder freedmen, and the South was implementing the Black Codes. See *McDonald* v. *City of Chicago*, 561 U.S. 742, 772 (2010); Amar, *The Lawfulness of Section 5—and Thus of Section 5*, 126 Harv. L. Rev. F. 109, 113 (2013); Lash, *Enforcing the Rights of Due Process: The Original Relationship between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 Geo. L.J. 1389, 1396 (2018). Congressional Republicans, heeding the lessons of the Civil War, understood that the restoration of the Union required a strong federal government and protection of civil rights. See *Students for Fair Admissions*, 600 U.S. at 239 (Thomas, J., concurring); Balkin, *The Reconstruction Power*, 85 N.Y.U. L. Rev. 1801, 1807, 1810 (2010). The job of reconstructing the Union fell to the federal government.

Faced with the responsibility of stabilizing a wounded nation, the federal government sought to exercise greater power. Using the Republican Guarantee Clause, Congress forced southern States to adopt new constitutions that "establish[ed] a race-neutral voting system" and "promise[d] to maintain this race-neutral suffrage regime forever thereafter." Amar, *supra*, at 111. Congress also passed the Civil Rights Act of 1866 to outlaw slavery, guarantee equal protection, and expand citizenship to all those born on U.S. soil regardless of race. § 1, 14 Stat. 27.

But some questioned whether Congress had authority to enforce the Civil Rights Act. In his veto message to Congress, President Johnson wrote that the provisions of the Act "destroy our federative system of limited powers and break down the barriers which preserve the rights of the States." Cong. Globe, 39th Cong., 1st Sess. 1681 (1866). Even Representative John Bingham, a zealous supporter of civil rights and key framer of the Fourteenth Amendment, viewed the Civil Rights Acts as exceeding congressional authority. Goldstein, *The Birth and Rebirth of Civil Rights in America*, 50 Tulsa L. Rev. 317, 321 (2015).

To remedy this problem and "provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866," Congress passed the Reconstruction Amendments. *McDonald*, 561 U.S. at 775. These amendments included enforcement clauses "drafted to give Congress the power to act against state racial discrimination." Tsesis, *Enforcement of the Reconstruction Amendments*, 78 Wash. & Lee L. Rev. 849, 904 (2021). These amendments enabled the federal government to "intrude[] into legislative spheres of autonomy previously reserved to the States." *City of Boerne* v. *Flores*, 521 U.S. 507, 518 (1997) (cleaned up). And they enabled the federal government to use remedies like the VRA's, all thanks to "the authority of Congress under the Reconstruction Amendments." *Vera*, 517 U.S. at 992 (O'Connor, J., concurring). The VRA was "part of the apparatus chosen by Congress to effectuate this Nation's commitment to confront its conscience and fulfill the guarantee of the Constitution with respect to equality in voting." *Ibid.* (cleaned up). Congress

considered the VRA "necessary and appropriate to ensure full protection of the Fourteenth and Fifteenth Amendments rights." *Ibid.* (cleaned up).

States do not share those same congressional prerogatives under the Reconstruction Amendments. Of course, federalism did not end with the passage of the Fourteenth Amendment, and States "retain broad autonomy in structuring their governments and pursuing legislative objectives," including "the power to regulate elections." *Shelby County*, 570 U.S. at 543 (cleaned up). Louisiana can adopt laws that expand the protections available to voters. But it must not violate citizens' rights under the Fourteenth Amendment. And "Congress has no affirmative power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation." *Saenz* v. *Roe*, 526 U.S. 489, 508 (1999).

Race-based laws, by their very nature, entail discrimination: one group receives preferential treatment. When it comes to laws that require governments to divide citizens based on race, the Fourteenth Amendment makes clear that "[n]o State shall" "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Letting a State's litigating tactics *or* VRA excuses limit the Constitution's force gets the text, history, and context of the Reconstruction Amendments backwards. No matter the reason for what the State describes as "the Legislature's mission to add a second majority-Black district," Appellant's Br. 34, "[t]he history of racial classifications in this country suggests that blind judicial deference to legislative or

executive pronouncements of necessity has no place in equal protection analysis." *J.A. Croson*, 488 U.S. at 501 (citing *Korematsu* v. *United States*, 323 U.S. 214, 235–240 (1944) (Murphy, J., dissenting)). "[W]orking backward to achieve a particular type of racial balance" "is a fatal flaw." *Parents Involved*, 551 U.S. at 729 (plurality opinion). Speculation about the VRA is constitutionally irrelevant.

CONCLUSION

As the State once recognized, "The fairness of the franchise in Louisiana is at issue here, as are principles as deeply important to the fabric of our Nation as the Equal Protection rights of thousands, if not millions, of Louisiana voters." Mandamus Reply Br. 11. That the State gave up on those voters does not mean that the courts must. "[D]iscrimination 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). And racial gerrymandering "may balkanize us into competing racial factions," "threaten[ing] to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Bartlett* v. *Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion) (quoting *Reno*, 509 U.S. at 657). The district court rightly respected the rights of Louisiana voters to elections free of invidious racial discrimination. The Court should affirm.

Respectfully submitted,

CHRISTOPHER E. MILLS
Counsel of Record
Spero Law LLC
557 East Bay Street
#22251
Charleston, SC 29413
(843) 606-0640
cmills@spero.law

Counsel for *Amicus Curiae*

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