Nos. 24-109, 24-110

IN THE

Supreme Court of the United States

STATE OF 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 OF *AMICI CURIAE* RACE AND DEMOCRACY SCHOLARS IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are law professors who specialize in election law, the law of democracy, and the intersection of race and law.[2] They have studied the history of the Voting Rights Act and the Equal Protection Clause. *Amici* submit this brief to help the Court understand that the Court's voting rights jurisprudence has articulated a framework that is harmonious with a State's obligations under both the Equal Protection Clause and the Voting Rights Act.

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[1] Pursuant to Rule 37.6, *amici curiae* affirms that no counsel for a party wrote this brief in whole or in part and that no person other than *amici curiae* and their counsel made a monetary contribution to its preparation or submission.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Louisiana argues that it is caught between a rock and a hard place. *See* Br. Opposing Mot. to Dismiss or Affirm at 11. No matter what it does, its redistricting plan has been and will continue to be challenged by litigants seeking to impose inconsistent obligations on the State. If the State implements a redistricting plan that voting rights advocates believe contains an insufficient number of majority-minority districts, voting rights plaintiffs will sue the State, seeking to vindicate their rights under Section 2 of the Voting Rights Act ("VRA"). At the same time, if the State passes a redistricting plan that some advocates believe contains too many majority-minority districts, even potentially just one majority-minority district, political activists will sue the State, seeking to vindicate their rights under the Equal Protection Clause. Louisiana presents this as a Catch-22: "[w]hatever Louisiana does, it will be sued again and again." *Id.* at 12.

Amici respectfully argue that this Court's voting rights jurisprudence anticipated Louisiana's predicament and articulated a framework that lower courts frequently employ to ensure that States are not subject to competing risks of liability when they perform a necessarily political function while complying with the legitimate and oft-affirmed requirements of the VRA. This Court articulated a two-step burden-shifting framework—the racial predominance test and a strong basis in evidence analysis—to safeguard a State's redistricting prerogative while harmonizing the State's prerogative

with its obligations under both the Equal Protection Clause and the VRA. To be clear, such a framework operates in conjunction with, and in no way supplants, the well-established and frequently upheld statutory requirements of Section 2, which this Court has recently affirmed "provides vital protection against discriminatory voting rules" while "not depriv[ing] the States of their authority to establish non-discriminatory voting rules." *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 678 (2021) (Alito, J.). This case presents a straightforward opportunity for the Court to re-affirm this unobjectionable two-step framework so that States may be able to perform what this Court has repeatedly recognized as a State's core political responsibility, consistent with the State's constitutional obligations, and free from fears that whatever it does, it will be sued by self-interested political actors.

In *Miller v. Johnson*, 515 U.S. 900 (1995) this Court articulated a doctrinal framework that has provided clear guidance to lower courts and States for almost thirty years and enabled them to address conflicts that arise in the context of redistricting. This Court stated in *Miller* that where race is "the predominant, overriding factor explaining" a redistricting plan, that plan will not be upheld unless it satisfies strict scrutiny. *Id.* at 920. Under this "predominance test," a plaintiff must first "prove that the legislature subordinated traditional race-neutral districting principles, . . . to racial considerations." *Id.* at 916. Such traditional principles may include compliance with the VRA. According to this Court's racial gerrymandering jurisprudence, *Miller's* predominance test harmonizes two crucial goals.

First, it preserves States' prerogatives to "exercise the political judgment necessary to balance competing interests," including complying with necessary State obligations. *Id.* at 915. Second, it safeguards the Constitution's guarantee of equal rights to all citizens under the law by prohibiting States from "assign[ing] voters [to districts] on the basis of race" and from having their votes diluted because of race. *Id.* This Court explained in *Miller* that State redistricting plans may infringe upon the individual's right to equal treatment under the Equal Protection Clause "not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object." *Id.* at 913.

Implicit in this Court's predominance test is the Court's recognition that those two goals—protecting States' abilities to exercise political judgment and protecting voters from being assigned to districts because of their race—may be in tension and require careful balancing. As this Court has recognized, on the one hand, redistricting is, at its core, the State's responsibility and reflects the policy judgments of the people's representatives. This Court stated: "reapportionment is primarily the duty and responsibility of the State," and because "[e]lectoral districting is a most difficult subject for legislatures . . . the States must have discretion to exercise the political judgment necessary to balance competing interests." *Id.* at 915 (cleaned up). On the other hand, a State violates the Equal Protection Clause when it "use[s] race as a basis for separating voters." *Id.* at 911, 914-15; *see also Shaw v. Reno*, 509 U.S. 630, 646-47 (1993). Acknowledging the tension and the delicate balancing act that courts need to perform, this Court

remarked in *Miller*: "The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller*, 515 U.S. at 916.

The predominance test is only the first step in a two-step burden-shifting framework. If a plaintiff successfully shows that race predominated in redistricting, the district or redistricting plan will be subject to strict scrutiny. Where the State relies on the VRA as a justification for race-based line drawing, the State must have "a strong basis in evidence" to satisfy the compelling interest prong of the strict scrutiny analysis. *Id.* at 922 ("When a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. Rather, we insist on a strong basis in evidence of the harm being remedied."); *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 193-94 (2017) ("When a State justifies the predominant use of race in redistricting on the basis of the need to comply with the Voting Rights Act, 'the narrow tailoring requirement insists only that the legislature have a strong basis in evidence in support of the (race based) choice that it has made.'" (quoting *Alabama Legis. Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015)); *see also Parents Involved in Cmty. Schools v. Seattle Sch. Dis. No. 1*, 551 U.S. 701, 754-55 (2007) (Thomas, J., concurring) (noting that "the

Court has required" the government "to demonstrate 'a [] strong basis in evidence for its conclusion that remedial action was necessary.'") (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989)) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion)).

Consistent with the underlying justifications for this Court's predominant factor test, the strong basis in evidence analysis is also designed to permit the State to balance and reconcile potentially competing obligations. As this Court has stated on more than one occasion, the strong basis evidence analysis allows States "breathing room" to navigate "between competing hazards of liability under the Voting Rights Act and the Equal Protection Clause." *Bethune-Hill*, 580 U.S. at 196; *see also Cooper v. Harris*, 581 U.S. 285, 292-93 (2017). As Justice O'Connor put it in *Bush v. Vera*, making a similar point in the context of the narrow tailoring prong, the States need "a limited degree of leeway in" complying with Section 2 of the VRA. 517 U.S. 952, 977 (1996) (plurality opinion). Otherwise, State actors will "be 'trapped between the competing hazards of liability' by the imposition of unattainable requirements under the rubric of strict scrutiny." *Id.* at 992 (quoting *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring in part and concurring in judgment).

Thus, the predominant factor test and the strong basis in evidence analysis are central to this Court's Equal Protection Clause and voting rights jurisprudence. It is an all-purpose utility tool: it protects States' legitimate political judgment against judicial second-guessing while simultaneously

protecting voters' right to challenge redistricting maps infected by unconstitutional racial motivation in violation of the Equal Protection Clause and providing a necessary safe harbor to States when States are attempting good faith compliance with remedial requirements of Section 2 of the VRA. In other words, the predominant factor test addresses the very problem that Louisiana fears: an irreconcilable conflict in legal obligations that will lead to a never-ending cycle of litigation.

As if this were not enough, the predominant factor test and the strong basis in evidence burden-shifting framework also reduces the incentive for frivolous litigation, thereby shielding the federal courts from having to adjudicate what are really partisan and political disputes. Sidelining the predominant factor test and strong basis in evidence analysis would unduly burden the federal courts with proceedings best left to the political process. This is so for two reasons. First, this Court has held that the Constitution, specifically the Equal Protection Clause and the Fifteenth Amendment, forbids racial vote dilution in redistricting. Concomitantly, this Court has also held that the Constitution, specifically the Equal Protection Clause, prohibits the States from classifying voters based on race when redistricting. Though "legislatures will . . . almost always be aware of racial demographics," as this Court has acknowledged, the line between racial awareness and racial vote dilution, or between racial awareness and racial classification in redistricting is a difficult one to trace. *Alexander v. South Carolina St. Conf. of the NAACP*, 602 U.S. 1, 22 (2024) (quoting *Miller*, 515

U.S. at 916). Second, as this Court has observed numerous times, redistricting is a political exercise.

The Court's two-step framework traces a clear line between legitimate political State action and unconstitutional racial discrimination in redistricting to guide courts, State actors, and potential litigants. Without the two-step framework, whenever there is evidence that a legislature was aware of race – or even whenever a redistricting plan yields districts in which a majority (or plurality) of the district's residents are people of a minority racial group – the plan will be subject to challenge under the Equal Protection Clause, either as a racial classification or as racial vote dilution. Disregarding the two-step analysis creates perverse incentives for litigation by encouraging and arguably rewarding political losers to relitigate their causes in a new arena: the federal courts. Thus, the predominant factor test and strong basis in evidence analysis protect the federal courts from having to resolve political lawsuits that are best left to the political process.

Finally, if the Court is disinclined to re-affirm the predominant factor and strong basis in evidence burden-shifting framework, the Court could adopt a different burden-shifting framework. For example, the Court could retrofit the *Gingles* framework to apply to Equal Protection claims. By way of demonstration, such a burden-shifting test could require plaintiffs *challenging a district or a redistricting plan on the ground that the district or the district plan is a racial classification* to state a *prima facie* case by showing that: (a) the plaintiffs belong to a racial group; (b) the racial group is politically

cohesive; (c) the State cracked or packed the plaintiffs group; (d) using an alternative map, the State could have achieved its objectives differently. If they make that showing, the burden would then shift to the State to articulate a legitimate, non-discriminatory reason for the districting decision. Finally, the plaintiff could prevail by establishing that the State's proffered reason was pretextual. This burden-shifting, well-tested by federal courts in other contexts, would allow lower courts to effectively evaluate claims that the State engaged in a racial classification without subjecting all redistricting plans to judicial second-guessing.

ARGUMENT

I. The Court Should Reaffirm the Racial Predominance and the Strong Basis In Evidence Burden-Shifting Framework

A. The Court Should Reaffirm the Racial Predominance Test

For decades, this Court has endorsed a racial predominance test in redistricting cases. The Court should continue to do so.

This Court first laid the groundwork for its racial predominance test in redistricting cases in *Shaw v. Reno*, which held that laws classifying citizens on the basis of race is subject to strict scrutiny under the Equal Protection Clause. 509 U.S. at 646. There, in response to the U.S. Attorney General's objection under Section 5 of the VRA to North Carolina's newly drawn map, the legislature drew a new map deliberately creating a second majority-minority district. *Id.* at 637-38. North Carolina residents

challenged the new map as violating the Equal Protection Clause because the second majority-minority district was created arbitrarily and without regard for any traditional redistricting principles. *See id.* Although this Court reiterated that it "never has held that race-conscious state decisionmaking is impermissible in all circumstances," it concluded that the new map was "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for the purpose of voting without regard for traditional districting principles" and thus the North Carolina residents stated an Equal Protection Clause claim. *Id.* at 642 (emphasis omitted).[3] *Shaw* clarified that all racial classifications—whether explicit or not, including redistricting legislation based on race—are subject to strict scrutiny under the Equal Protection Clause.

Two years later, in *Miller v. Johnson*, 515 U.S. 900 (1995), the Court affirmed *Shaw*'s core holding and formally articulated the racial predominance test. Notwithstanding this Court's declaration that race-based line drawing is subject to the strictures of the

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[3] "A reapportionment plan that *includes* in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It 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. We have rejected such perceptions elsewhere as impermissible racial stereotypes." *Shaw*, 509 U.S. at 647 (emphasis added—cleaned up).

Fourteenth Amendment, this Court also recognized from the outset, in *Shaw* and *Miller*, that applying the Court's Equal Protection jurisprudence to the redistricting domain cannot be done mechanically, but must respond to the distinctive context of redistricting. The reasons are manifold. For one, as this Court stated in *Shaw* and *Miller*, there are thorny "difficulty of proof" and "evidentiary difficulty" problems in the redistricting context. *Shaw*, 509 U.S. at 646; *Miller* 515 at 916. "A reapportionment statute typically does not classify persons at all; it classifies tracts of land, or addresses." *Shaw*, 509 U.S. at 646. Additionally, "redistricting differs from other kinds of state decisionmaking in that the legislature is aware of race when it draws district lines . . . ." *Id*. (emphasis omitted). Moreover, though a districting plan may appear to group members of one racial group together, the plan might "reflect wholly legitimate purposes. The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions." *Id*. This is one reason that the *Shaw* majority emphatically stated that the Court "never has held that race-conscious state decisionmaking is impermissible in all circumstances." *Id*. at 642 (emphasis omitted). A State can be "aware of race," "just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." *Id*. at 646. Racial awareness or race consciousness in drawing district lines "does not lead inevitably to impermissible race discrimination"; compliance with the VRA does not always raise issues of predominance, but a finding of predominance is required to implicate strict scrutiny review. *Id*.; *see*

also Miller, 515 U.S. at 916 ("Redistricting legislatures will, for example, almost always be aware of racial demographics, but it does not follow that race predominates in the redistricting process.").

In *Miller*, this Court articulated additional considerations that should be considered when crafting a test to implement the Constitution's equal treatment command in the context of redistricting. As a point of departure, "[f]ederal court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915. Moreover, "[i]t is well settled that 'reapportionment is primarily the duty and responsibility of the State.'" *Id*; *see also Allen v. Milligan*, 599 U.S. 1, 29 (2023) ("Reapportionment, we have repeatedly observed, is primarily the duty and responsibility of the State, not the federal courts.") (cleaned up); *Abbot v. Perez*, 585 U.S. 579, 603 (2018) (reasoning that "federal-court review of districting legislation represents a serious intrusion on the most vital of local functions.") (cleaned up).

Additionally, States are attempting to achieve several different and complex redistricting aims, including, of course, adhering to the statutory requirements of Section 2 of the VRA. *Miller*, 515 U.S. at 915 ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests."); *see also Bethune-Hill*, 580 U.S. at 193 (assuming that the State had a compelling interest in complying with the VRA). The predominant factor test compels lower courts to be sensitive to the State's political prerogatives and the

various factors that the State must balance when districting. As a consequence, as this Court instructed, the "evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller*, 515 U.S. at 916.

In *Miller*, this Court concluded that Georgia's 11th congressional district was racially gerrymandered in violation of the Equal Protection Clause and that plaintiffs satisfied their burden "to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to a legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.* "To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to, compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations. 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). Accordingly, the racial predominance test balances States' ability to give effect to their political judgments while also providing a test to suss out when States have segregated voters using race.

In the generation since *Shaw* and *Miller*, the Court has reaffirmed and further developed the racial predominance test. For example, in *Alabama Legislative Black Caucus v. Alabama*, the Court evaluated how to "properly calculate predominance." 575 U.S. at 271. In that case, the Court clarified that the need for equal population is not a permitted enumerated factor that can offset the use of race in the redistricting process, because the proper question is "whether the legislature 'placed' race 'above traditional districting considerations in determining *which* persons were placed *in appropriately apportioned districts*.'" *Id.* at 273 (cleaned up). "The 'predominance' question [therefore], concerns *which* voters the legislature decides to choose and specifically whether the legislature predominantly uses race as opposed to other 'traditional' factors when doing so." *Id.*

Lower courts have effectively and faithfully applied the racial predominance test, managing to balance competing redistricting factors while respecting the Equal Protection Clause.[4] For

[4] *See, e.g.*, *Tennessee State Conf. of NAACP v. Lee*, 2024 WL 3896639 (M.D. Tenn. Aug. 21, 2024); *Singleton v. Allen*, 2024 WL 3384840 (N.D. Ala. July 11, 2024); *Coca v. City of Dodge City*, 2024 WL 3360446 (D. Kan. July 10, 2024); *Mississippi State Conf. of NAACP v. State Bd. of Election Comm'rs*, 2024 WL 3275965 (S.D. Miss. July 2, 2024); *Callias v. Landry*, 2024 WL 1903930 (W.D. La. Apr. 30, 2024); *Walen v. Burgum*, 700 F. Supp. 3d 759 (D.N.D. 2023); *Finn v. Cobb Cnty. Bd. of Elections & Registration*, 2023 WL 9184893 (N.D. Ga. Dec. 14, 2023), *appeal dismissed,* 111 F.4th 1312 (11th Cir. 2024); *Walters v. Boston City Council*, 676 F. Supp. 3d. 26 (D. Mass. 2023); *Turtle Mountain Band of Chippewa Indians v. Howe*, 2023 WL 2868670 (D.N.D. Apr. 10,

example, in *GRACE, Inc. v. City of Miami*, the Southern District of Florida concluded that the City of Miami violated the Equal Protection Clause by racially gerrymandering the five city commission districts. 730 F. Supp. 3d 1245 (S.D. Fla. 2024). There, the court found that, although it presumed the legislature's good faith, "[p]laintiffs have met their demanding burden of proving that race predominated in the 2021-2022 redistricting cycle. Over the course of six Commission meetings, the Commissioners repeatedly instructed [the City's redistricting consultant] to design a map containing three majority Hispanic, one majority Black, and one plurality 'Anglo' district. More than any other consideration, this objective was of paramount importance." *Id.* at 1293-94. Further, the City "made clear that [its redistricting consultant] should achieve this result at the expense of traditional redistricting criteria such as compactness, adherence to manmade or natural barriers, and respect for traditional neighborhoods." *Id.* at 1294. The court concluded this subordination of traditional districting principles to an overriding racial motivation constituted illegal racial gerrymandering in violation of the Equal Protection Clause. *Id.* at 1300.

Likewise, in *Page v. Virginia State Board of Elections*, a three-judge district court in the Eastern District of Virginia concluded that race predominated

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2023); *Agee v. Benson*, 2023 WL 10947213 (W.D. Mich. Aug. 29, 2023); *Georgia State Conf. of the NAACP v. Georgia*, 2023 WL 7093025 (N.D. Ga. Oct. 26, 2023); *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris*, 581 U.S. 285 (2017).

over other traditional districting principles after evaluating statements made by legislators indicating that race was a predominant factor in redistricting, evidence that race or the percentage of race within a given district was the redistricting criterion that could not be compromised, the creation of non-compact and oddly shaped districts, use of land bridges in a deliberate attempt to bring the Black population into a district, and the creation of districts that disregarded city limits, local election precincts, and voting-tabulation districts. 2015 WL 3604029, at *7 (E.D. Va. June 5, 2015), *appeal dismissed for lack of standing sub nom. Wittman v. Personhuballah*, 578 U.S. 539 (2016). And in *Alpha Phi Alpha Fraternity, Inc. v. Raffensperger*, the Northern District of Georgia concluded that because there was evidence both that the map-drawer was aware of race when drawing proposed districts, but that he also evaluated and adhered to traditional districting principles, "it would need to make both fact and credibility determinations before it can decide whether race predominated the creation of the Proposed Districts." 2023 WL 5674599, at *8 (N.D. Ga. July 17, 2023); *see also Robinson v. Ardoin*, 86 F.4th 574, 593, 595 (5th Cir. 2023) (concluding that racial "[a]wareness becomes racial predominance when the district lines are drawn with the traditional, race-neutral districting criterial considered *after* the race-based decision is made" and that race did not predominate where a legislature set a target of reaching a 50% Black-Voting-Age-Population in a district where that target was considered along with, and subordinate to, other race-neutral traditional districting criteria).

As these cases—and many more—suggest, the racial predominance test is working as intended. Lower courts are respecting States' prerogative while assuring that States do not violate the Equal Protection Clause.

B. The Strong Basis in Evidence Analysis Complements the Racial Predominance Test and Protects States' Interests

The racial predominance test is only step one of this Court's demanding two-step burden-shifting framework. As this Court has reiterated, States "may not use race as the predominant factor in drawing district lines unless it has a compelling reason." *Cooper*, 581 U.S. at 291. Accordingly, "if racial consideration predominated over others, the design of the district must withstand strict scrutiny." *Id.* at 292; *see also Wisconsin Legislature v. Wisconsin Elections Comm'n*, 595 U.S. 398, 401 (2022) ("If race is the predominant factor motivating the placement of voters in or out of a particular district, the State bears the burden of showing that the design of that district withstands strict scrutiny."). Thus, a finding of racial predominance is necessary, but not sufficient, to implicate strict scrutiny review. The required next step is to shift the burden to the State. Where, as here, the State relies on VRA compliance to justify a redistricting plan in which race was considered, the State cannot meet strict scrutiny's narrow-tailoring requirement unless it had "a strong basis in evidence for concluding that the [VRA] required [the State's] action." *Wisconsin Legislature*, 595 U.S. at 402; *Cooper*, 581 U.S. at 292 ("When a state invokes the VRA to justify race-based districting, it must show to

meet the 'narrow tailoring' requirement that it had 'a strong basis in evidence' for concluding that the statute required its action.") (citing *Alabama Legislative Black Caucus*, 575 U.S. at 278) (cleaned up).

The "strong basis" standard provides States "breathing room," so they are not "trapped between the competing hazards of liability under the Voting Rights Act and the Equal Protection Clause." *Bethune-Hill*, 580 U.S. at 190 (quoting *Bush*, 517 U.S. at 977 (cleaned up)); *see also Cooper*, 581 U.S. at 293. Put differently, it provides that if a State shows a strong basis in evidence for its redistricting actions, its redistricting decisions will survive strict scrutiny review. Maintaining this well-established and oft-used two-step structure ensures legislatures can properly balance their VRA and Equal Protection Clause obligations.

To be sure, the "strong basis in evidence" standard is appropriately demanding, requiring that legislators must make an evidentiary showing that they had good reasons to believe using racial classifications was necessary to comply with the VRA. *Bethune-Hill*, 580 U.S. at 180. This evidence takes different forms. For example, in a Section 2 case, "[t]o have a strong basis in evidence to conclude that . . . such race-based steps [were required], the State must carefully evaluate whether a plaintiff could establish the *Gingles* preconditions—including effective white bloc-voting—in a new districting created without those measures." *Cooper*, 581 U.S. at 304. Good reasons a State may proffer include evidence of turnout rates, population numbers, and the results of recent elections. *Bethune-*

Hill, 580 U.S. at 194-95. This evidentiary standard is robust and effectively balances all stakeholders' legal imperatives.

As noted above, lower courts have faithfully applied the strong basis in evidence standard and protected the "breathing room" States require to effectively redistrict.[5] For example, in *Walen*, the District of North Dakota preserved that "breathing room" by applying this Court's guidance in *Cooper* and concluding that the strong basis in evidence test does not require legislatures to preemptively establish the *Gingles* preconditions before using race to draw VRA-compliant districts. 700 F. Supp. 3d at 771. Instead, legislators must "carefully evaluate whether the *Gingles* preconditions are met." *Id.* The court there held that the "undisputed record shows the Legislative Assembly did perform a contemplative and thorough pre-enactment analysis as to whether the subdistricts were required by the VRA and whether Native American voters would have a viable Section 2 claim without the subdistricts," which satisfied the strong basis in evidence test. *Id.* at 774; *see also Midwest*

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[5] *See, e.g.*, *GRACE, Inc.*, 730 F. Supp. 3d 1245; *Walters*, 676 F. Supp. 3d 26; *Bethune-Hill v. Virginia State Bd. of Elections*, 326 F. Supp. 3d 128 (E.D. Va. 2018); *Page*, 2015 WL 3604029; *Harris*, 159 F. Supp. 3d 600; *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd sub nom. North Carolina v. Covington*, 581 U.S. 1015 (2017); *Perez v. Texas*, 891 F. Supp. 2d 808 (W.D. Tex. 2012); *Kornhaas Constr., Inc. v. Oklahoma Dep't of Cent. Servs.*, 140 F. Supp. 2d 1232 (W.D. Okla. 2001); *Webster v. Fulton Cnty.*, 51 F. Supp. 2d 1354 (N.D. Ga. 1999), *aff'd*, 218 F.3d 1267 (11th Cir. 2000); *Engineering Contractors Ass'n of S. Fla., Inc. v. Metro. Dade Cnty.*, 943 F. Supp. 1546 (S.D. Fla. 1996), *aff'd*, 122 F.3d 895 (11th Cir. 1997).

Fence Corp. v. U.S. Dep't of Transp., 84 F. Supp. 3d 705 (N.D. Ill. 2015), *aff'd*, 840 F.3d 932 (7th Cir. 2016), *cert. denied*, 582 U.S. 930 (2017) (recognizing that statistical disparity studies were probative evidence of discrimination and supported a finding that the strong basis in evidence test was met).

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The combination of the racial predominance test and the strong basis in evidence test should be reaffirmed because courts have successfully implemented the test with appropriate guidance from this Court for decades.

II. The Court Could Also Consider A Different Burden-Shifting Test in Voting-Rights Cases

If the Court is disinclined to apply the combination of the predominant factor and strong basis in evidence framework, it could articulate a different burden-shifting test to resolve racial gerrymandering claims in voting rights cases.

It is worth noting that notwithstanding the continued viability of the Court's jurisprudence under Section 2 of the VRA, States and courts will still require guidance to determine when a State properly considers race to address racial vote dilution as opposed to when the State has classified based upon race without adequate justification. *See Shaw*, 509 U.S. at 652 (noting that the Fourteenth Amendment recognizes a racial vote dilution claim and the "analytically" distinct racial classification claim); *Miller*, 515 U.S. at 911 (same); *Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (Fifteenth Amendment prohibits the State from diluting votes based on race).

A potential new test could use *Thornburg v. Gingles*, 471 U.S. 1064 (1985) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) as guides for ascertaining racial classifications in mixed-motive cases or cases in which direct evidence of intent is unlikely. Illustratively, under such a test, plaintiffs challenging a redistricting plan on racial gerrymandering grounds would bear the initial burden of establishing a *prima facie* by showing that: (a) plaintiffs belong to a racial group; (b) the racial group is politically cohesive; (c) the State cracked or packed the plaintiffs' group; (d) using an alternative map, the State could have achieved its objectives differently. If they make that showing, the burden would then shift to the State to articulate a legitimate, non-discriminatory reason for the districting decision. Justifications satisfying this burden would include, as relevant here, compliance with (a) Section 2 of the VRA, or (b) a court order. Finally, the plaintiff could prevail by establishing that the State's proffered reason was pretextual. This approach builds upon this Court's Section 2 cases, which the Court recently confirmed in *Allen*. 599 U.S. at 19 ("*Gingles* has governed our Voting Rights Act jurisprudence since it was decided 37 years ago. Congress has never disturbed our understanding of § 2 as *Gingles* construed it. And we have applied *Gingles* in one § 2 case after another, to different kinds of electoral systems and to different jurisdictions in States all over the country.") (collecting cases).

This approach is also consistent with burden-shifting tests applied in other civil rights claims. Specifically, in Title VII discrimination claims lacking direct evidence of discrimination, courts apply the

burden-shifting test this Court created in *McDonnell Douglas*. Under the *McDonnell Douglas* test, plaintiffs bear the initial burden of establishing a *prima facie* case of discrimination by showing that (1) they belong to a racial minority; (2) they applied, and were qualified, for a job for which an employer was seeking applicants; (3) despite their qualifications, they were rejected; and (4) after their rejection, the position to which they applied remained open and the employer continued to seek similarly qualified applicants. *McDonnell Douglas Corp.*, 411 U.S. at 802. After establishing that *prima facie* case, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for rejecting the plaintiff's application. *Id.* If the employer does so, the plaintiff may show that the employer's reason was a pretext for discrimination. *Id.* at 804.

The Courts of Appeals have used the *McDonnell Douglas* test, or a substantially similar test, to analyze discrimination claims brought under other federal statutes which seek to remedy discrimination, including the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*, the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*, and the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2615, *et seq.* *See, e.g.*, *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1135 (10th Cir. 2003) (applying *McDonnell Douglas* to ADA and FMLA claims); *E.E.O.C. v. Chevron Phillips Chem. Co., LP*, 570 F.3d 606, 615 (5th Cir. 2009) (applying *McDonnell Douglas* to ADA claim); *McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 96 (2d Cir. 2009) (same); *Pugh v. City of Attica*, 259 F.3d 619, 624-25 (7th Cir. 2001) (same); *Paul v. Murphy*, 948

F.3d 42, 53 (1st Cir. 2020) (applying *McDonnell Douglas* to ADEA claim); *Hall v. Giant Food, Inc.*, 175 F.3d 1074, 1077 (D.C. Cir. 1999) (same); *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1432 (11th Cir. 1998) (same).

Likewise, lower courts have applied *McDonnell Douglas* burden-shifting to claims brought under 42 U.S.C. §§ 1981 and 1983. *See, e.g.*, *Owens v. Rochester City Sch. Dist.*, 27 F. Supp. 3d 365, 368-69 (W.D.N.Y. 2014); *Lelaind v. City & Cnty. of San Francisco*, 576 F. Supp. 2d 1079, 1094 (N.D. Cal. 2008) ("Although the Supreme Court developed the *McDonnell Douglas* burden-shifting framework in the context of discrimination claims pursuant to Title VII . . ., the framework is equally applicable to claims of discrimination based on disparate treatment pursuant to 42 U.S.C. sections 1981 and 1983."); *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1225-26 (10th Cir. 2000) (applying *McDonnell Douglas* to 42 U.S.C. § 1981 claim); *Carney v. American Univ.*, 151 F.3d 1090, 1092-93 (D.C. Cir. 1998) ("In order to evaluate claims under 42 U.S.C. § 1981, . . . courts use the three-step *McDonnell Douglas* framework for establishing racial discrimination under Title VII."); *Sorlucco v. N.Y.C. Police Dep't*, 888 F.2d 4, 6-7 (2d Cir. 1989) (applying *McDonnell Douglas* to 42 U.S.C. § 1983 claim).

Courts have also applied the *McDonnell Douglas* test in evaluating Equal Protection Clause claims. *See, e.g.*, *Dejarnett v. Willis*, 976 F. Supp. 2d 1271, 1292 (M.D. Ala. 2013); *Burks v. Wisconsin Dep't of Transp.*, 464 F.3d 744, 750 n.2 (7th Cir. 2006); *Cuenca v. Univ. of Kansas*, 265 F. Supp. 2d 1191, 1206 (D. Kan.

2003), *aff'd*, 101 F. App'x 782 (10th Cir. 2004), *cert. denied* 543 U.S. 1089 (2005).

Variations of the *McDonnell Douglas* test are not the only burden-shifting tests that apply in civil rights litigation. For example, disparate impact claims brought under the Fair Housing Act, 42 U.S.C. §§ 3601, *et seq.*, are analyzed using a burden-shifting framework under which the plaintiff has the initial burden of proving that the challenged housing practice "caused or predictably will cause a discriminatory effect." 24 C.F.R. § 100.500(c)(1). Then, the burden shifts to the defendant to prove that the practice "is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." *Id.* § 100.500(c)(2). Finally, the plaintiff may prevail if she proves that the substantial, legitimate, non-discriminatory interest could be served by a less discriminatory alternative. *Id.* § 100.500(c)(3); *see also Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 527 (2015).

In sum, burden-shifting tests to evaluate VRA claims is consistent with well-established civil-rights jurisprudence. Courts are thoroughly familiar with applying these burden-shifting tests in discrimination cases and are well-equipped to implement a similar test for racial gerrymandering claims. The proposed test, or something similar, offers an alternative method of analysis to evaluate racial gerrymandering claims under the Equal Protection Clause that is both workable for the judiciary and harmonizes States' obligations under the VRA and the Fourteenth Amendment.

CONCLUSION

The Court should retain its racial predominance and strong basis in evidence tests. Alternatively, the Court should consider adopting an alternative burden-shifting test to guide courts, States, and potential litigants in voting-rights litigation to determine when States have engaged in a prohibited racial classification or when they are attempting to comply with the remedial commands of the Constitution and federal statutes in good faith.

Respectfully submitted,

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