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 THE DISTRICT OF COLUMBIA, NEW YORK, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEVADA, NEW JERSEY, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, WASHINGTON, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether the three-judge district court sitting in the Western District of Louisiana erred in enjoining the State of Louisiana's congressional redistricting plan ("S.B. 8") as an unconstitutional racial gerrymander.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

States are entitled to "breathing room" when they redraw electoral maps to address likely violations of the Voting Rights Act ("VRA"). *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 196 (2017). Federal courts that deny States that flexibility improperly intrude on the States' primary responsibility over redistricting within their own jurisdictions.

In the judgment below, the three-judge district court sitting in the Western District of Louisiana failed to adhere to this important federalism principle. The divided court invalidated Louisiana's current congressional redistricting plan ("S.B. 8") as a racial gerrymander that violated the Equal Protection Clause. *See* LA.J.S.App. 1a-146a.[1] But to reach that conclusion, the panel majority essentially ignored that Louisiana had crafted S.B. 8 in direct response to an earlier finding by a *different* federal district court. There, a court sitting in the Middle District of Louisiana had concluded that the State's initial redistricting plan ("H.B. 1") likely violated Section 2 of the VRA and required an additional majority-Black district to remedy the likely violation. *See Robinson v. Ardoin*, 605 F. Supp. 3d 759 (M.D. La. 2022).

As sovereigns entrusted with the weighty responsibility of redistricting, States understand the importance of both complying with the VRA's mandates and retaining their sovereign authority to

[1] This brief cites the appendix filed in support of Louisiana's Jurisdictional Statement. *See* Louisiana Br. 2 n.1.

draw congressional districts within their respective jurisdictions. Accordingly, the District of Columbia and the States of New York, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin (collectively, "Appellants' *Amici* States") submit this brief as *amici curiae* in support of appellants.

The decision below deprived Louisiana of the flexibility that States need to craft remedial redistricting plans. In contravention of this Court's precedents, the court below failed to recognize that Louisiana had an extraordinarily strong basis to conclude that the VRA required the State to draw an additional majority-Black district—that is, a federal court's finding of a likely VRA violation that was upheld in substance on appeal. *See Robinson v. Ardoin*, 86 F.4th 574 (5th Cir. 2023). As a result, the court below improperly left Louisiana "'trapped between the competing hazards of liability' under the Voting Rights Act and the Equal Protection Clause." *Bethune-Hill*, 580 U.S. at 196 (quoting *Bush v. Vera*, 517 U.S. 952, 977 (1996)). And the court below improperly overrode Louisiana's policy judgments about where to place new districts and how to shift existing ones while still producing a VRA-compliant plan.

For this reason alone, the decision below is wrong and should be reversed. Moreover, the Court should reject the invitation by Alabama and other States as *amici curiae* ("Alabama *Amici*") to use this appeal as a vehicle to abandon its settled Section 2

jurisprudence, including its familiar framework for adjudicating Section 2 claims set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

SUMMARY OF ARGUMENT

1. States have "primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993) (citing U.S. Const., art. I, § 2). When fulfilling this responsibility, States undertake a complex task in geography and democratic governance as they consider a variety of factors to achieve fair representation for their residents. *Shaw v. Reno*, 509 U.S. 630, 646 (1993). And, as this Court has repeatedly explained, when a State invokes the VRA to justify a redistricting decision in which race allegedly predominated, the State need only have a "strong basis in evidence" for concluding that the VRA required its action. *Cooper v. Harris*, 581 U.S. 285, 292 (2017) (quoting *Alabama Legis. Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015)). That standard requires that the State have had "good reason[]" to conclude that it would violate the VRA absent the chosen redistricting decision. *See id.* at 293. This purposefully flexible standard ensures that States have "breathing room to adopt reasonable compliance measures" that do not transgress either the VRA or the federal Constitution. *Id.* (internal quotation marks omitted).

Louisiana easily satisfied the good-reason standard here. The finding of the Middle District that H.B. 1 likely violated Section 2 of the VRA by failing to create a second majority-Black district—a finding that was based on an extensive factual hearing and

that the Fifth Circuit affirmed in substance—plainly provided Louisiana with good reason to believe that the VRA required a plan like S.B. 8 for the State to avoid liability. Indeed, Louisiana's remedial redistricting plan was based on the Middle District's comprehensive application of the *Gingles* factors and the totality of the circumstances, *see Robinson,* 605 F. Supp. 3d at 820-51, while also reflecting Louisiana's own policy objectives and balancing of traditional redistricting principles, *see* LA.J.S.App.139a-141a (Stewart, J., dissenting). The circumstances here are thus not comparable to those that the Court has previously found to be insufficient to justify race-conscious redistricting. *See, e.g.*, *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 595 U.S. 398, 403-04 (2022) (per curiam).

The three-judge court's erroneous ruling also threatens to upend the federalism considerations that underpin this Court's redistricting jurisprudence. This Court has made clear that, where practicable, States—rather than federal courts—should craft remedial plans to address VRA concerns. Louisiana availed itself of that opportunity here, only to be told that it essentially had no flexibility to adopt a VRA-compliant plan. If allowed to stand, the decision below would discourage States from attempting to enact remedial plans and encourage them to instead cede the task to federal courts. This Court can avoid that result while still preserving the federal courts' authority to adjudicate equal protection and vote-dilution claims by concluding that the good-reason standard was satisfied here and reversing the decision below.

2. The Court should also decline Alabama *Amici*'s request to toss out its settled Section 2 precedent—which has guided States' redistricting practices for decades and which this Court recently reaffirmed in *Allen v. Milligan*, 599 U.S. 1 (2023). *See generally* Jurisdiction-Stage Brief of Alabama and 12 Other States as *Amici Curiae*, 2024 WL 4138399, 12-15 (Sept. 3, 2024) ("Alabama J.S. *Amici* Br.") (supporting neither party at the jurisdictional stage).

To begin, the questions Alabama *Amici* raise about this Court's long-standing Section 2 framework are not presented in this appeal. Alabama *Amici* improperly attempt to collaterally attack the *Robinson* decisions of the Middle District, 605 F. Supp. 3d 759, and Fifth Circuit, 86 F.4th 574—which addressed the likely VRA violation presented by Louisiana's initial redistricting plan, H.B. 1. But the only decision presented for review here is that of the three-judge district court sitting in the Western District, which improperly found that a subsequent plan, S.B. 8, is an unconstitutional racial gerrymander under the Equal Protection Clause. LA.J.S.App.1a-146a. Arguments about the appropriate scope and application of Section 2 and *Gingles* are thus not properly before the Court and were not raised by the parties or considered by the court below.

Even if the Court were to consider Alabama *Amici*'s arguments, it should reject them. The Court's settled Section 2 jurisprudence, most recently reaffirmed in *Milligan*, is workable and has been used by States for decades. By contrast, the proposal that Alabama *Amici* set forth to reinterpret Section 2 and

weaken *Gingles* is both undesirable and unworkable. The Court should decline to jettison its well-established legal framework, particularly where, as here, the issue is not squarely presented.

Finally, accepting Alabama *Amici*'s arguments would undermine States' entrenched reliance interests on this Court's interpretation of Section 2 and application of the *Gingles* framework. As the Court explained in *Milligan*, any refinement of Section 2's text or the application of *Gingles* should be left to Congress. *See* 599 U.S. at 19.

ARGUMENT

I. The Court Below Erred By Failing To Provide Louisiana With Meaningful Breathing Room To Comply With The VRA.

Even if the Court concludes that racial considerations predominated in Louisiana's decision to add a second majority-Black district—a question on which Appellants' *Amici* States take no position—Louisiana plainly had the requisite "good reason" to do so. *Cooper*, 581 U.S. at 302. Louisiana enacted S.B. 8 in direct response to the Middle District's preliminary injunction findings that Louisiana would likely violate Section 2 of the VRA if it did not enact a remedial plan that included an additional majority-Black district. Whatever the outer bounds of the good-reason standard may be, preliminary injunction findings that are issued by a federal court after an extensive adversarial factual hearing, and that are upheld in substance by a federal appellate court, clearly meet the standard. For that reason, the State's legislative choice satisfies strict scrutiny under this Court's precedents.

The divided three-judge district court's contrary ruling below is inconsistent with this Court's repeated directives that, where practicable, States must be given the opportunity to remedy redistricting-related violations in the first instance, as well as the flexibility to act within reasonable bounds when doing so.

A. States must enjoy flexibility in redrawing districts to remedy VRA violations.

This Court has consistently emphasized that redistricting "is primarily a matter for legislative consideration and determination," *Reynolds v. Sims*, 377 U.S. 533, 586 (1964), "which the federal courts should make every effort not to pre-empt," *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (citing cases). Indeed, in the experiences of Appellants' *Amici* States, legislatures "elected by the people" are "as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies." *Abrams v. Johnson*, 521 U.S. 74, 101 (1997). Although federal courts play an important "backstop" role in ensuring that redistricting plans comply with federal law, *see Vera*, 517 U.S. at 985, they "possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name," *Connor v. Finch*, 431 U.S. 407, 415 (1977).

The experiences of Appellants' *Amici* States also confirm that redistricting should remain primarily the responsibility of States, rather than federal courts. That is so not only for redistricting plans subject to challenge in the first instance but also for remedial plans drawn in response to court findings

regarding actual or likely violations of federal law. As this Court has explained, a State's "freedom of choice to devise substitutes" for a redistricting plan found to be unlawful in whole or in part "should not be restricted beyond the clear commands of federal law." *North Carolina v. Covington*, 585 U.S. 969, 979 (2018) (quoting *Burns v. Richardson*, 384 U.S. 73, 85 (1966)) (internal quotation marks omitted). Accordingly, when a federal court concludes that an existing redistricting plan violates federal law, it is "appropriate, whenever practicable, to afford a reasonable opportunity" for the State to remedy that violation "by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." *Wise*, 437 U.S. at 540; *see also McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981) ("[E]ven after a federal court has found a districting plan unconstitutional, redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." (quotation marks and citation omitted)); *Palmer v. Hobbs*, No. 3:22-cv-5035, 2024 WL 1138939, at *1 (W.D. Wash. Mar. 15, 2024) (adopting a remedial map only after Washington's legislature "declined to do so"). In so doing, courts avoid "intrud[ing] upon state policy any more than necessary" in remedying a redistricting violation. *White v. Weiser*, 412 U.S. 783, 795 (1973) (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)).

This respect for States' primary responsibility over redistricting is especially important in light of "competing hazards of liability," which many of Appellants' *Amici* States have themselves experienced. *Abbott v. Perez*, 585 U.S. 579, 587 (2018)

(quoting *Vera*, 517 U.S. at 977). Specifically, Section 2, in certain respects, requires States to consider race in drawing electoral district lines to ensure that the right to vote has not been denied or abridged on account of race or color. *See* 52 U.S.C. § 10301(a); *Milligan*, 599 U.S. at 30. But under the federal Constitution's Equal Protection Clause, racial considerations generally may not "predominate" in drawing electoral districts unless strict scrutiny is satisfied, *see Cooper*, 581 U.S. at 294—that is, the State's plan must be narrowly tailored to further a compelling government interest, *see Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206-07 (2023).

To ensure that States can successfully navigate these potentially competing hazards, this Court has held that narrow tailoring in this context requires that States have "a strong basis in evidence" for concluding that race-conscious redistricting is required to comply with the VRA.[2] *Cooper*, 581 U.S. at 292. "Or said otherwise, the State must establish that it had 'good reasons' to think that it would transgress the [VRA] if it did *not* draw race-based district lines." *Id.* at 293 (quoting *Alabama Legis. Black Caucus*, 575 U.S. at 278) (emphasis in original). Appellants' *Amici* States have come to rely on this standard in the redistricting context for more than

[2] Where strict scrutiny has been applied to redistricting plans challenged under the Equal Protection Clause, the first part of the test has seldom if ever been disputed: The Court has always found it essentially self-evident that a State's effort to comply with Section 2 of the VRA is a compelling government interest. *Cooper*, 581 U.S. at 301; *see also* Louisiana Br. 41; Robinson Br. 39.

three decades. *See Shaw v. Reno*, 509 U.S. 630, 656 (1993) (applying the "strong basis in evidence" test for the first time in redistricting to assess the State assertion that race-based redistricting was required to avoid Section 2 liability).

This standard does not require the State to establish that a VRA violation in fact would have occurred absent the drawing of a majority-minority district. Rather, the State must establish that it had "*good reasons* to believe" it must allow race to predominate in the drawing of a district to avoid a Section 2 violation, even if a court might disagree that a violation would in fact have occurred. *Bethune-Hill*, 580 U.S. at 194 (citation omitted) (emphasis in original).

The good-reason standard also does not mean that a court evaluating an equal-protection challenge should itself determine whether the State would have, in fact, violated Section 2 absent the districting decision that allowed racial considerations to predominate. Likewise, the court evaluating an equal-protection challenge should not itself apply the test set forth in *Gingles* to determine whether the court would have found a Section 2 violation.[3]

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[3] The *Gingles* test requires a plaintiff alleging a Section 2 vote-dilution claim to satisfy three preconditions: *First*, that the minority group is sufficiently large and geographically compact to constitute a majority in a reasonably configured district; *second*, that the minority group is politically cohesive; and *third*, that the white majority votes sufficiently as a bloc to enable it to defeat the minority group's preferred candidate. *See Milligan*, 599 U.S. at 18. Then, having satisfied these preconditions, the plaintiff must demonstrate under the "totality of circumstances"

Instead, the proper question is whether the State that enacted the challenged redistricting plan had "good reason to think" that the *Gingles* test would be met absent the drawing of a majority-minority district. *Cooper*, 581 U.S. at 302. Where the State has such a good reason, "then so too it has good reason to believe that [the VRA] requires" the drawing of a majority-minority district—and strict scrutiny is satisfied. *Id.* at 287; *see also Abbott*, 585 U.S. at 621 (explaining that this Court has "accepted a State's 'good reasons' for using race in drawing district lines" where "the State [has] made a strong showing of a pre-enactment analysis with justifiable conclusions").

"Holding otherwise would afford state legislatures too little breathing room" in their efforts to comply with the VRA. *Bethune-Hill*, 580 U.S. at 196; *see also Alabama Legis. Black Caucus*, 575 U.S. at 278. For example, if a court were to conduct the *Gingles* test *de novo* in adjudicating an equal-protection challenge to a redistricting plan—regardless of whether the State had carefully evaluated the application of *Gingles* prior to the plan's enactment—the State's "breathing room" would effectively be reduced to nothing. Instead, States would be forced to submit themselves to liability under Section 2 to avoid litigation under the Equal Protection Clause, unless they are able to predict with precision exactly what different courts will conclude both laws require. But "[t]he law cannot insist that a [State], when redistricting, determine *precisely what*" the VRA requires. *Bethune-Hill*, 580 U.S. at 195 (citation omitted) (emphasis in original).

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that the political process is not equally open to minority voters. *Id.*

The law instead insists that the State only have good reason to believe that Section 2 requires drawing a majority-minority district. *Cooper*, 581 U.S. at 287.

B. The Middle District's finding that H.B. 1 likely violated the VRA provided Louisiana with the requisite "good reason" for promulgating S.B. 8.

Whatever the outer limits may be of the good-reason standard, that standard is plainly satisfied where, as here, a federal court has already concluded that the VRA likely required the creation of a second majority-minority district, and where the State responded to and relied on that judicial conclusion in crafting a remedial plan with a second majority-minority district. The court below thus erred in determining that Louisiana lacked "good reason" for creating a second majority-Black district as part of S.B. 8.

As the appellants' briefs and Judge Stewart's dissenting opinion below make clear, Louisiana's creation of a second majority-Black district in S.B. 8 was in direct response to the Middle District's preliminary injunction order and findings that the H.B. 1 redistricting plan likely violated Section 2. LA.J.S.App.133a-145a (Stewart, J., dissenting); Robinson Br. 41-43; Louisiana Br. 44-46 ("[T]he majority [below] assigned zero analytical weight to the *Robinson* courts' decisions in this inquiry."). In the Middle District, a group of Black voters challenged Louisiana's initial plan as violating Section 2 by "packing" a large number of such voters into a single majority-Black congressional district, and "cracking" the remaining Black voters among the other five

districts. *Robinson*, 605 F. Supp. 3d at 768. The Middle District granted the plaintiffs' motion for a preliminary injunction in a comprehensive, 152-page opinion, rendered after a five-day evidentiary hearing.

In its opinion, the Middle District carefully explained that each of the three *Gingles* preconditions was likely satisfied. The court also found that the "totality of the circumstances" likely established unlawful vote dilution. *Id.* at 851; *see also id.* at 820-51 (application of *Gingles*). And the court concluded that the "appropriate remedy in this context is a remedial congressional redistricting plan that includes an additional majority-Black congressional district," and directed the Louisiana legislature to enact such a remedial plan to avoid a court-ordered remedy. *Id.* at 766. On appeal, the Fifth Circuit found no error in the merits of the Middle District's preliminary injunction analysis and remanded with instructions to allow Louisiana's legislature to adopt a remedy in the first instance. *Robinson*, 86 F.4th at 583-84, 601-02.

The Middle District's preliminary injunction finding of a likely Section 2 violation easily provided Louisiana with good reason to believe an additional majority-Black district was required by Section 2.[4]

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[4] The appellants here argue that race did not predominate in Louisiana's enactment of S.B. 8, and thus the court below erred in even reaching the issue of whether S.B. 8 satisfies strict scrutiny under this Court's "strong basis in evidence" or "good reasons" test. Louisiana Br. 33-40; Robinson Br. 24-39. Appellants' *Amici* States take no position on that factual issue. Instead, Appellants' *Amici* States write to explain that if this

This Court has typically found "'good reasons' for using race in drawing district lines" where "the State made a strong showing of a pre-enactment analysis with justifiable conclusions." *Abbott*, 585 U.S. at 621. Here, to establish the requisite good reason for an allegedly race-based redistricting action, Louisiana was entitled to rely on the extensive analysis and conclusions of a federal court. Indeed, the Middle District's thorough "pre-enactment analysis" yielded "justifiable conclusions," affirmed in substance by the Fifth Circuit, that a second majority-Black district was likely required by the VRA. And when Louisiana availed itself of the opportunity to craft a remedial plan that included such a district, it acted on the basis of that thorough judicial application of *Gingles*. Of course, a State faced with a preliminary injunction finding like the one here cannot be certain whether further judicial proceedings will yield a final judgment that a Section 2 violation has in fact occurred. But such certainty is not required. *See Bethune-Hill*, 580 U.S. at 195.

Nor should the court below have analyzed the *Gingles* factors anew to decide for itself whether the new majority-Black district created by S.B. 8 satisfied the *Gingles* framework. LA.J.S.App.55a-58a (majority opinion). That analysis essentially ignored that the Middle District's preliminary injunction findings already provided Louisiana with good reason for concluding that Section 2 required the drawing of an additional majority-minority district. Louisiana

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Court determines that race did predominate in the enactment of S.B. 8, and therefore applies strict scrutiny, the Court should conclude that S.B. 8 satisfies that standard.

Br. 46-47. Contrary to the implications of the lower court's ruling, Louisiana was not required, in formulating the remedy called for by the Middle District (and affirmed in substance by Fifth Circuit), to make legislative findings to reestablish the need for the remedy in the first place. Instead, it permissibly relied on the Middle District's finding of a likely violation as its rationale.

For this reason, this case bears little resemblance to cases in which this Court has concluded that a State redistricting effort in which race predominated did not satisfy the good-reason standard. In *Wisconsin Legislature v. Wisconsin Elections Commission*, for example, this Court viewed Wisconsin as having relied on "generalizations" that the *Gingles* test would be satisfied if its map lacked another majority-minority district, which the Court believed failed to "carefully evaluat[e] evidence at the district level." 595 U.S. at 404. And in *Abbott*, the Court rejected a districting decision in which race predominated where there was "no actual 'legislative inquiry' that would establish the need for . . . manipulation of the racial makeup of the district." 585 U.S. at 621; *see also Cooper*, 581 U.S. at 304 (noting a failure to conduct a "meaningful legislative inquiry" into whether the district "created without a focus on race" could "lead to § 2 liability"). No such circumstances exist here, where Louisiana relied on the Middle District's comprehensive application of *Gingles* to H.B. 1 and that court's conclusion that a second majority-Black district was likely necessary for the State to avoid Section 2 liability.

Although this Court has explained that a State with a strong basis in evidence cannot draw a majority-minority district just anywhere, *see Shaw v. Hunt*, 517 U.S. 899, 916 (1996), that warning was adhered to here. As the dissent below makes clear, Louisiana carefully considered traditional redistricting factors like "identifying and assessing communities of interest; strategizing incumbency protection; calculating how often maps split parishes, census places (or municipalities), and landmarks, and measuring and comparing compactness scores" in promulgating S.B. 8. LA.J.S.App.141a (Stewart, J., dissenting); *see Shaw*, 517 U.S. at 917 n.9 (explaining that a State retains "broad discretion in drawing districts to comply with the mandate of § 2"). The judgment below is thus wrong and should be reversed.

C. The ruling below threatens to undermine States' primary role in redistricting.

If allowed to stand, the erroneous ruling below would severely undermine States' incentives to maintain primary responsibility over redistricting when there is good reason to conclude that an initial redistricting effort will result in a Section 2 violation. States would have a strong incentive instead to cede the map-making pen to federal courts rather than put the effort into crafting a revised redistricting plan that addresses a well-founded Section 2 concern. This problem can be avoided without directing the federal courts to stop adjudicating constitutional racial gerrymandering and vote-dilution claims altogether, as Louisiana wrongly suggests. *See* Louisiana Br. 53-54. Instead, the Court need only conclude that the

good-reason standard was satisfied under the circumstances presented here.

As the extensive redistricting experience of Appellants' *Amici* States establishes, States have long guarded their constitutional authority to draw their own legislative districts, including in the remedial context. And States have shown that they are able to remedy such violations when they have been found. For example, in *Whitest v. Crisp County School District*, the district court found that the at-large method of electing members of the Crisp County Board of Education diluted the voting rights of Black voters, and the court afforded the county the opportunity to remedy the Section 2 violation through state legislative action. 601 F. Supp. 3d 1338, 1347-48 (M.D. Ga. 2022), *aff'd*, No. 22-11826, 2023 WL 8627498 (11th Cir. Dec. 13, 2023) (per curiam). The court then approved the legislative remedial plan over the objections of the plaintiffs, noting that the court itself would not have imposed the same remedial plan but that deference to the legislature was required by this Court's precedents. *Id.* Similarly, in *Alabama Legislative Black Caucus v. Alabama*, the district court found that Alabama's original map was an unlawful racial gerrymander, and then subsequently upheld that State's legislative remedial map against a challenge that several of the new districts in the remedial map were unlawful partisan gerrymanders. No. 2:12-cv-691, 2017 WL 4563868, at *5-6 (M.D. Ala. Oct. 12, 2017). And as explained, this Court has consistently stressed that States should continue to be given the opportunity to remedy redistricting-related violations "whenever practicable," and should be accorded flexibility in doing so. *See supra* Part I.A.

Letting the ruling below stand would also undermine States' incentive to address serious Section 2 concerns themselves and instead encourage them to allow federal district courts to deal with crafting a redistricting solution. Here, Louisiana was provided with the opportunity to craft a new redistricting plan to address the likely Section 2 violation that the Middle District had found, with the court stepping in to impose a remedy only if the State failed to act on the timeline prescribed. *See Robinson*, 605 F. Supp. 3d at 858. The Fifth Circuit agreed with this approach, noting that federalism concerns are heightened when a federal court has found a districting plan unlawful. *Robinson*, 86 F.4th at 600-01. But by scrutinizing Louisiana's subsequent legislative solution anew under *Gingles*—while essentially ignoring the context from which it emerged—the court below severely circumscribed the flexibility that States rely on in the redistricting context. LA.J.S.App.55a-58a. Eroding that flexibility would discourage States from fulfilling their responsibility to address likely redistricting violations in the first instance whenever practicable.

II. Alabama *Amici*'s Request To Jettison This Court's Settled Interpretation Of Section 2 And *Gingles* Should Be Rejected.

Alabama *Amici* improperly ask this Court to do what Alabama failed to achieve just two years ago in *Milligan*—namely, to "remake" this Court's Section 2 jurisprudence "anew." *See* 599 U.S. at 23; *see also id.* at 42 (Kavanaugh, J., concurring in part and in the judgment) ("[T]he upshot of Alabama's argument is that the Court should overrule *Gingles*."). Alabama

Amici's proposed re-interpretation of Section 2's text is merely a veiled attempt to persuade this Court to overrule the *Gingles* framework that "has governed [the Court's] Voting Rights Act jurisprudence since it was decided [nearly 40] years ago," *id.* at 19 (plurality opinion) (Roberts, C.J.); *see* Alabama J.S. *Amici* Br. 20, 24 (first urging the Court to "adopt[] the textualist approach to §2 . . . rather than the elastic approach embraced by the [Middle District and Fifth Circuit]," and then contending that the *Gingles* preconditions relate to only a portion of Section 2's text).

Such a request is misguided, and this Court should again reject it. The Middle District's application of Section 2 and *Gingles* is not properly presented for review here. The Court should thus decline to discard its settled *Gingles* precedent. But even if the Court were to consider that request, this Court's interpretation of the text of Section 2 and application of the *Gingles* framework are settled and predictable for States—contrary to Alabama *Amici*'s contentions. Thus, "if anything would be unworkable in practice, it would be for [the Court] now to abandon [its] settled jurisprudence" for Alabama *Amici*'s new proposed approach to vote-dilution claims. *See Allied-Signal, Inc. v. Dir., Div. of Tax'n*, 504 U.S. 768, 785 (1992).

A. The Middle District's decision is not presented for review in this proceeding.

The Middle District's preliminary injunction decision is not presented here for review. In their jurisdictional statements, appellants asked this Court to review the judgment of the three-judge district court in the proceedings below. *See* Louisiana J.S. 4; Robinson J.S. 2-3; LA.J.S.App.1a-146a (deciding

whether S.B. 8 violated the Equal Protection Clause). This Court noted probable jurisdiction to review that constitutional ruling. *See Louisiana v. Callais*, No. 24-109, 2024 WL 4654960 (Nov. 4, 2024) (Mem.); *Robinson v. Callais*, No. 24-110, 2024 WL 4654959 (Nov. 4, 2024) (Mem.). Notwithstanding the clear posture in which the three-judge panel's decision comes to this Court, Alabama *Amici* instead urge the Court to revisit the judgment of the Middle District finding that H.B. 1 likely violated Section 2. *See Robinson*, 604 F. Supp. 3d at 766-68. But that preliminary injunction decision is not on appeal here.

The Court should confine its review to whether the court below erroneously concluded that S.B. 8 was an unconstitutional racial gerrymander under the Equal Protection Clause. This Court does "not ordinarily address issues raised only by *amici*." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991); *see also Reno v. Koray*, 515 U.S. 50, 55 n.2 (1995) (explaining that an argument raised only in an *amicus* brief "is not properly before the Court"). There is no reason to stray from that settled practice here. The continued viability of *Gingles* "was neither raised below nor squarely considered by" the three-judge panel, nor was it advanced by appellees in their motions to dismiss at the jurisdictional stage in this Court. *See Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 441 (1992).

Alabama *Amici* are plainly attempting to use the appeal here as an avenue to relitigate similar arguments to those Alabama raised in *Milligan* seeking to overturn this Court's long-settled *Gingles* precedent. *Compare* Alabama J.S. *Amici* Br. 15-17

(arguing that the *Gingles* preconditions are divorced from Alabama *Amici*'s proposed reinterpretation of Section 2's text), *with* Brief for Appellants, *Allen v. Milligan*, 2022 WL 1276146, at *68, *75 (Apr. 25, 2022) (characterizing *Gingles* as a "useless gatekeeper" absent a "race-neutral benchmark" derived from Alabama's proposed reinterpretation of Section 2's text). The Court properly rejected Alabama's arguments in *Milligan*, and there is no basis to reconsider *Gingles* yet again.

B. This Court's settled interpretation of Section 2 and application of *Gingles* is workable for States and has been relied on for decades.

If the Court were to consider Alabama *Amici*'s arguments regarding the interpretation of Section 2's text and application of the *Gingles* framework, the Court should again reject them. This Court's settled Section 2 jurisprudence and the *Gingles* framework have proved workable for States for decades. Any changes to that regime should come from Congress, not this Court.

This Court's interpretation of Section 2 and application of the *Gingles* framework are well-settled and workable for States, which regularly apply the framework in practice. In fact, the Court has reiterated the *Gingles* factors "in one [Section 2] case after another, [applying them] to different kinds of electoral systems and to different jurisdictions in States all over the country." *Milligan*, 599 U.S. at 19 (listing 10 cases decided over several decades involving multiple States); *see also, e.g.*, Ellen D. Katz et al., *Documenting Discrimination in Voting:*

Judicial Findings Under Section 2 of the Voting Rights Act Since 1982, 39 U. Mich. J.L. Reform 643, 655 (2006) (identifying 211 lawsuits from 1982 to 2006 that "produced at least one published merits decision on the question of whether Section 2 was violated"). Given States' and federal courts' "long experience applying" Section 2 and *Gingles*, the Court should not jettison such a well-established legal framework. *See Allied-Signal*, 504 U.S. at 783.

Indeed, notwithstanding Alabama's renewed attempt to convince this Court that the *Gingles* framework is disconnected from the text of Section 2, *see generally Milligan*, 599 U.S. 1, the interplay between the text of Section 2 and the *Gingles* framework is clear. Section 2 prohibits States from imposing any "standard, practice, or procedure . . . in a manner which results in a denial or abridgment of the right of any citizen . . . to vote on account of race or color." 52 U.S.C. § 10301(a). What that means, as the text of Section 2 goes on to explain, is that the political processes in the State must be "equally open," such that minority voters do not "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

And in *Milligan*, this Court reaffirmed that Section 2's text must be understood "against the background of the hard-fought compromise that Congress struck," so that individuals "lack an equal opportunity to participate in the political process when a State's electoral structure operates in a manner that 'minimize[s] or cancel[s] out the[ir] voting strength.'" 599 U.S. at 25 (citing *Gingles*, 478

U.S. at 47) (alterations in original). Whether a district is "equally open" turns on whether "an individual is disabled from enter[ing] into the political process in a reliable and meaningful manner in the light of past and present reality, political and otherwise." *Id.* (internal quotation marks omitted) (citing *White v. Regester*, 412 U.S. 755, 767, 770 (1973)).

Alabama *Amici* offer an interpretation of Section 2's text that the *Milligan* Court would not recognize. In the narrowest sense, Alabama *Amici* ask this Court to construe "opportunity . . . to participate in the political process" to operate as a stand-alone inquiry that is satisfied only by identifying obstacles in voter registration and party preference and participation. *See* Alabama J.S. *Amici* Br. 17-19. But as the Court reasoned in response to a similar argument from Alabama in *Milligan*, such a "single-minded view" of Section 2 "cannot be squared with the VRA's demand that courts employ a more refined approach." 599 U.S. at 26; *see also Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994) ("An inflexible rule would run counter to the textual command of § 2, that the presence or absence of a violation be assessed 'based on the totality of circumstances.'").

At bottom, Alabama *Amici* are attempting to rid this Court's Section 2 jurisprudence of *Gingles* altogether, as Justice Kavanaugh correctly observed Alabama was trying to do in *Milligan*. *See* 599 U.S. at 42 (Kavanaugh, J., concurring in part and in the judgment); *see also id.* at 33 (plurality opinion) (Roberts, C.J.) ("The upshot of the approach the dissent urges is not to change how *Gingles* is applied, but to reject its framework outright."). But Alabama

Amici are wrong in contending that without reworking this Court's Section 2 jurisprudence, vote-dilution claims will "sweep broadly and unpredictably" and be "shapeless." *See* Alabama J.S. *Amici* Br. 20, 22, 24. Decades of reliance by States on that jurisprudence prove otherwise. It is Alabama's proposed abandonment of *Gingles* and its progeny—which this Court refused to do just two Terms ago, *see Milligan*, 599 U.S. at 26—that would sow confusion and unpredictability about Section 2 challenges to existing or future legislative redistricting plans.

This Court has recognized that the widespread reliance of States on a precedent weighs heavily against jettisoning the precedent or transforming a well-known test. *See Allied-Signal*, 504 U.S. at 785; *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 203 (1991). Accepting Alabama *Amici*'s arguments would undermine States' reliance on Section 2 and the *Gingles* framework. For example, it would mean that state legislatures, independent redistricting commissions, and courts that have adopted legislative redistricting plans may have long engaged in racial gerrymandering simply by following this Court's Section 2 precedents. Such a startling change would not only substantially alter decades of jurisprudence but also potentially open States' current plans to legal challenges—even though States faithfully followed Section 2 and *Gingles* in promulgating them.

States have also relied on Section 2 and *Gingles* in enacting their own redistricting requirements and voting-rights statutes. For example, the state constitutions or statutes of California, Colorado,

Illinois, Michigan, and Wisconsin expressly require that districts comply with the VRA.[5] In some of these States, courts have expressly looked to "the decisions of the United States Supreme Court that construe" the VRA in evaluating whether redistricting plans comply with these state-law provisions. *Detroit Caucus v. Independent Citizens Redistricting Comm'n*, 969 N.W.2d 331 (Mich. 2022) (Mem.).

Moreover, several States have enacted state constitutional or statutory language that parallels certain aspects of the language of Section 2.[6] Although

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[5] *See* Cal. Const. art. XXI, § 2(d)(2) ("Districts shall comply with the federal Voting Rights Act[.]"); Colo. Const. art. V, § 48.1(1)(b) (requiring that legislative redistricting plans "[c]omply with the federal 'Voting Rights Act of 1965'"); 10 Ill. Comp. Stat. § 120/5-5(a) (requiring districts to comply with "any federal law regarding redistricting Legislative Districts or Representative Districts, including but not limited to the federal Voting Rights Act"); Mich. Const. art. IV, § 6(13)(a) ("Districts shall . . . comply with the voting rights act and other federal laws."); Mich. Comp. Laws § 3.63(b)(ii) ("Each congressional district shall not violate section 2 of title I of the voting rights act of 1965."); Mich. Comp. Laws § 4.261a ("[State legislative districts] shall not violate section 2 of title I of the voting rights act of 1965."); Wis. Stat. Ann. § 5.081 (authorizing the attorney general to enforce Section 2 of the VRA); *see also* Eric S. Lynch, *Going, Gutted, Gone? Why Section 2 of the Voting Rights Act is in Danger, and What States Can Do About It*, 22 U. Pa. J. Const. L. 1441, 1471-75 (2020) (cataloguing all States that incorporate Section 2 standards in some way as a matter of state law).

[6] *See* D.C. Code § 1-1011.01(g) (prohibiting election schemes that "dilut[e] the voting strength of minority citizens"); N.Y. Elec. Law § 17-206(2)(a) (prohibiting election schemes that "impair[] the ability" of minority voters "to elect candidates of their choice . . . as a result of vote dilution"); Cal. Elec. Code § 14027 (prohibiting an "at-large method of election" that

these provisions exist independently as state law, in many cases they "were modeled on and embrace the principles of key provisions" of the VRA, including Section 2. *See In re Senate Joint Resol. of Legis. Apportionment 100*, 334 So. 3d 1282, 1288 (Fla. 2022) (internal quotation marks and alterations omitted). Courts thus often look to precedents construing the VRA, including *Gingles*, in interpreting these state laws. *See, e.g.*, *Kingman Park Civic Ass'n v. Williams*, 924 A.2d 979, 981-82, 987 (D.C. 2007) (interpreting the District's prohibition on vote dilution to incorporate the *Gingles* framework).

As these examples demonstrate, States have relied on Section 2 and the *Gingles* framework in crafting and applying their own legislative redistricting provisions. A sudden reworking of the *Gingles* framework—or, worse yet, reinterpretation of Section 2's text wholesale—as Alabama *Amici* demand, might "require these States to reexamine their statutes." *Hilton*, 502 U.S. at 203. If that raised new questions about whether the meaning of state-

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"impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class"); Wash. Rev. Code § 29A.92.020 (prohibiting an election method "that impairs the ability of members of a protected class or classes to have an equal opportunity to elect candidates of their choice as a result of the dilution or abridgment of the rights of voters who are members of a protected class or classes"); N.Y. Const. art. III, § 4(c)(1) ("Districts shall be drawn so that, based on the totality of the circumstances, racial or minority language groups do not have less opportunity to participate in the political process than other members of the electorate and to elect representatives of their choice.").

law provisions has changed in parallel with a revised understanding of Section 2, that would, in turn, open the door to more litigation and uncertainty. This Court should decline Alabama *Amici*'s invitation to upend the settled interpretation of Section 2 and the *Gingles* framework given the disruptive effects such a ruling could have on States.

Ultimately, Congress remains free to alter—or, as it has for nearly 40 years, leave in place—the framework this Court set forth in *Gingles* for adjudicating Section 2 cases. *See Milligan*, 599 U.S. at 19 (Roberts, C.J.) ("Congress has never disturbed our understanding of § 2 as *Gingles* construed it."); *id.* at 42-43 (Kavanaugh, J., concurring in part and in the judgment) ("Congress and the President have not disturbed *Gingles*, even as they have made other changes to the Voting Rights Act."). Because "Congress, not this Court, has the responsibility for revising its statutes," *Neal v. United States*, 516 U.S. 284, 296 (1996), the Court should leave to Congress the policy questions of whether and how to alter the requirements for establishing a Section 2 vote-dilution claim.

CONCLUSION

This Court should reverse the judgment of the three-judge district court in the Western District of Louisiana.

Respectfully submitted,

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