No. 24-109

In the Supreme Court of the United States

STATE OF LOUISIANA,
Appellant,

v.

PHILLIP CALLAIS, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Louisiana

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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INTRODUCTION

For all its rhetoric, Plaintiffs' motion does not dispute this Court's jurisdiction, nor does it seriously claim that the Court should summarily affirm. In fact, several of Plaintiffs' statements are so divorced from reality that they reinforce that the Court should note probable jurisdiction, set the case for argument, and reverse.

For example, Plaintiffs represent that "there is no tension to resolve between the *Robinson* litigation and the district court's decision below." Mot. at 31. No one believes that. *See, e.g.*, *Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1266–67 (2024) (Thomas, J., concurring in part) ("untenable," "impossible needle," "lose-lose"). Similarly, Plaintiffs claim that "[t]his is a standard *Shaw* case." Mot. at 1. No one believes that. *See, e.g.*, App.1a (maj. op.) ("tension between Section 2 of the Voting Rights Act [(VRA)] and the Equal Protection Clause"), 70a (Stewart, J., dissenting) ("anything but a 'usual' racial gerrymandering case"); *Robinson v. Callais*, 144 S. Ct. 1171, 1172 (2024) (Jackson, J., dissenting from grant of applications for stay) ("complex series of cases").

While rejecting *Robinson*'s relevance, moreover, Plaintiffs express disbelief that "Republicans are squandering a vital seat in Congress" through S.B. 8's creation of a second majority-Black district. Mot. at 1. The only plausible explanation is that the *Robinson* courts, in fact, forced a Republican Legislature and Governor to do so. Plaintiffs likewise claim that S.B. 8 violates the Constitution since Louisiana could have just enacted a map that "protected all five Republican incumbents"—*i.e.*, a one majority-Black district map.

Id. That is precisely what the *Robinson* courts rejected.

That Plaintiffs refuse to acknowledge reality illustrates the weakness of their position on appeal—and indeed, the importance of full briefing and argument on the unprecedented circumstances presented in this case. As this Court's experience reflects, the States are embroiled in unending litigation as they attempt to conduct their normal redistricting processes—trying in vain to consider race "just enough" and no more. *Alexander*, 144 S. Ct. at 1267 (Thomas, J., concurring in part) (South Carolina); *Allen v. Milligan*, 599 U.S. 1 (2023) (Alabama); *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398 (2022) (per curiam) (Wisconsin); *Miller v. Johnson*, 515 U.S. 900 (1995) (Georgia). Few States know that struggle better than Louisiana. Br. of Alabama *et al.* as *Amici Curiae* at 20 ("[W]hen it rains in Louisiana, it pours."). The Court should deny the motion, note probable jurisdiction, set the case for argument, and reverse by providing clarity to States attempting to square the VRA and the Constitution.

ARGUMENT

I. THE MAJORITY ERRED IN FINDING THAT RACE PREDOMINATED IN THE LEGISLATURE'S ENACTMENT OF S.B. 8.

The predominant factor motivating the Legislature's decision to enact S.B. 8 was an order from the Middle District of Louisiana, followed by an affirmance from a unanimous Fifth Circuit panel—each holding that, unless two of the State's six congressional districts are majority-Black, the State likely violates Section 2 of the VRA. Indeed, in vacating the Middle District's order on procedural grounds, the

Fifth Circuit unequivocally stated that "[t]he district court's preliminary injunction . . . was valid when it was issued." *Robinson v. Ardoin*, 86 F.4th 574, 599 (5th Cir. 2023). That is not just *motivation*; that is *compulsion* by court order. *Compare* Mot. at 1 (claiming "no compulsion").

Plaintiffs and the *amici* States suggest that the Court should reject any attempt at "deflection" based on the courts' findings. Br. of Alabama *et al.* as *Amici Curiae* at 5; Mot. at 21–22. Unlike in the cases they cite, however, the State here was not pressured to reconsider its map by angry letters and chastisement from Department of Justice officials. *See, e.g.*, *Shaw v. Hunt*, 517 U.S. 899, 902 (1996). Instead, both the Middle District and the Fifth Circuit expressly told the State that its previous map likely violated the VRA for failing to include a second majority-Black district. Therefore, the State could either fix the problem itself or live under a judge-imposed map with two majority-Black districts. The State chose the former option, and in doing so, justifiably relied on the courts' race-based directives.

Betraying the weakness of their position here, Plaintiffs dispute the Louisiana Legislature's obvious political goals undergirding S.B. 8—going so far as to claim that they "are irrelevant on this record." Mot. at 22. Plaintiffs complain that no "one would expect the Republican Legislature to draw District 6 to forfeit a Republican seat—an outcome they expressly opposed." *Id.* But that proves *the State's* point. The threat of a judge-imposed, two majority-Black district map from the Middle District was so great that a Republican-controlled Legislature and a Republican

Governor were forced to adopt a map that they otherwise would have never adopted, both because of the courts' race-based dictates and because it likely meant giving up a Republican congressional seat.

Plaintiffs also strangely claim "a major reversal of [the State's] trial position" given the State's explanation that "the Legislature heavily weighted its political goals to draw the S.B. 8 map" in carrying out the courts' directives. *Id.* (citing Jurisdictional Statement at 23). This was *virtually every legislator's* position in passing S.B.8, and it has always been the State's position: The courts imposed a two majority-Black district baseline, and the Legislature and the Governor sought to protect their political objectives in light of that baseline or else face a judge-imposed, two majority-Black district map that did not account for those objectives. Jurisdictional Statement at 13–15 & n.2 (citing examples).

It bears noting, moreover, that Plaintiffs quietly concede the Legislature "espoused political goals of protecting four Republican incumbents." Mot. at 22. Rightly so. *See* Stay App.779 (S.B. 8 sponsor stating: "I firmly submit that the congressional voting boundaries represented in this bill best achieve the goals of protecting Congresswoman Letlow's seat, maintaining strong districts for Speaker Johnson and Majority Leader Scalise, ensuring four Republican districts, and adhering to the command of the Federal Court in the Middle District of Louisiana."). Plaintiffs simply cannot avoid that politics drove the district lines in S.B. 8 and indeed were the exact reason Louisiana sought to avoid the Middle District's own two majority-Black district map.

In addition, Plaintiffs invoke *Alexander*'s alternative-map requirement to suggest that any number of maps—including H.B. 1, Louisiana's original and preferred map, which the State unsuccessfully defended in years of litigation—"could have protected five (and certainly four) Republican incumbents while avoiding racial gerrymanders and adhering to traditional redistricting criteria." Mot. at 23. Plaintiffs are talking past the issue: By the State's lights, H.B. 1 was perfectly suitable for Louisiana—that's why the Legislature passed it, and that's why the State vigorously sought to keep it. *But* once it became apparent that the Middle District planned to impose its own two majority-Black district map in place of H.B. 1, this became a rescue operation: How could the State protect its most important incumbents with a two majority-Black district map coming to Louisiana? The district lines in S.B. 8 answer that question. Plaintiffs' suggestion that the State should have just passed another one majority-Black district map thus blinks reality. This was not an option according to the Middle District and the Fifth Circuit. And Plaintiffs' reliance on this sort of "alternative" map inadvertently demonstrates that Plaintiffs did not, and could not, actually carry their affirmative burden under *Alexander*.

Finally, Plaintiffs notably—and correctly—abandon their stay-stage "attempt[] to insulate the majority's predominance errors from this Court's review by invoking the clear-error standard." Jurisdictional Statement at 23–24. As the State explained, *Alexander* forecloses that strategy. *See id.*

In short, although the *Robinson* courts unquestionably imposed a race-centered baseline, race was not

the predominant factor to which all other "legitimate districting principles were 'subordinated'" in the Legislature's own calculus. *Bush v. Vera*, 517 U.S. 952, 959 (1996) (plurality op.) (quoting *Miller*, 515 U.S. at 916). Indeed, if strict scrutiny is not automatically triggered even where *a State* is "committed from the outset to creating majority-minority districts," *id.* at 962, then that is especially so here where *court decisions* themselves backed Louisiana into creating a second majority-Black district. All this ends the predominance analysis in the State's favor on the unique facts of this case. *See Miller*, 515 U.S. at 916 ("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.'") (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)). The majority below erred in concluding otherwise.

II. THE MAJORITY ERRED IN FINDING THAT S.B. 8 FAILS STRICT SCRUTINY.

Even if Plaintiffs had carried their burden of demonstrating that race predominated, S.B. 8 would still pass constitutional muster.

First, there is no serious dispute that "[i]f VRA compliance itself is a compelling interest"—as this Court has assumed—"then compliance with court orders telling a State how to comply with the VRA is a compelling interest, too." Jurisdictional Statement at 25; *see also Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 193 (2017) ("As in previous cases, therefore, the Court assumes, without deciding, that the State's interest in complying with the Voting

Rights Act was compelling."). Plaintiffs attempt to reframe the State's interest as one of "appeasing litigants or front-running allegedly hostile district courts," rather than a sincere effort to comply with the VRA. Mot. at 25. But Plaintiffs again disregard reality: The State did not seek to comply with the VRA in the abstract or to prevent future legal battles; it sought to comply with the Middle District and Fifth Circuit's decisions that themselves established what (in those courts' view) VRA compliance likely required.

This disposes of Plaintiffs' attempt to analogize this case to *Miller*. *Id.* at 24–25. There, the Court held that Georgia's creation of a majority-Black district "to satisfy the Justice Department's preclearance demands" did not implicate a compelling interest because its congressional map "was not required by the Act under a correct reading of the [VRA]." *Miller*, 515 U.S. at 921. Here, by contrast, the federal courts themselves told Louisiana that the VRA likely required a second majority-Black district—and the Middle District did not hide its intent to place Louisiana under "'a court-ordered redistricting map'" reflecting two such districts. *See* Jurisdictional Statement at 30 (explaining Middle District's approach to the case). This case is thus markedly different than *Miller*. Indeed, "unless this Court disagrees with the Fifth Circuit's analysis in *Robinson* and instead agrees with the State's position in that litigation, it necessarily follows that the State's enactment of S.B. 8 served a compelling State interest." *Id.* at 25.

Second, S.B. 8 is narrowly tailored to achieve that interest. "[T]he 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." *Bethune-Hill*, 580 U.S. at 193 (citation omitted). This standard does not require the State "to show that its action was actually necessary to avoid a statutory violation, so that, but for its use of race, the State would have lost in court." *Id.* at 194 (cleaned up). Rather, the State has a strong basis in evidence where it has "good reasons to believe it must use race" to satisfy the VRA. *Id.* (citation removed).

There can be no question that the State had good reason to believe that the VRA required a second majority-Black district. The Middle District expressly held that H.B. 1's failure to include a second majority-Black district likely violated the VRA. *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 766 (M.D. La. 2022). And the Fifth Circuit affirmed that analysis, holding that the Middle District "did not clearly err in its necessary fact-findings nor commit legal error in its conclusions that the Plaintiffs were likely to succeed on their claim" that H.B. 1 violated the VRA. *Robinson*, 86 F.4th at 583. The legislative record overflows with references to these court orders, as well as unambiguous declarations by legislators that they sought to forestall a court-imposed, two majority-Black district map by adopting S.B. 8. A stronger basis in evidence does not exist in this Court's precedents.

That Plaintiffs have no answer is best illustrated by their bottom-line position: "[T]here is no tension to resolve between the *Robinson* litigation and the district court's decision below." Mot. at 31. With all due respect, Plaintiffs' refusal to acknowledge what everyone knows speaks for itself. *See, e.g.*, *Alexander*, 144

S. Ct. at 1266–67 (Thomas, J., concurring in part) (describing Louisiana's predicament in this case as "untenable," an "impossible needle" to thread, and "a lose-lose situation"); App.70a (Stewart, J., dissenting) (this is "anything but a 'usual' racial gerrymandering case"). Indeed, it is hard to take seriously Plaintiffs' insistence that "[t]he Fifth Circuit never ordered the State to create two majority-Black districts" and "[t]here was no court order or mandate to enact SB8 or repeal HB1 in January 2024." Mot. at 30. The best evidence that Plaintiffs have shut their eyes to reality? Their own disbelief that, through S.B. 8, "Republicans [] surrender[ed] a vital seat in Congress." *Id.* at 1. As explained above, this unprecedented situation—and S.B. 8 itself—exists only because the Middle District was poised to replace H.B. 1 with its own two majority-Black district map, with the Fifth Circuit's express blessing.

Sensing trouble, Plaintiffs complain that the State "stunted the development of the record" by seeking a stay of the majority's injunction against S.B. 8. *Id.* at 32. As the Court's stay order reflects, however, a stay was necessary and appropriate given the impending 2024 elections. Moreover, if Plaintiffs are unhappy with the record on which they must now defend the majority's injunction, that is a product of their litigation strategy below. They must stand on their record in this Court.

Plaintiffs also ask the Court "not [to] stay the district court's remedial phase." *Id.* at 34. But this Court did not stay those proceedings. Following the Court's stay of the injunction, the district court canceled a

hearing that would have commenced remedial proceedings. *See* Dist. Ct. ECF No. 232. Plaintiffs have not asked the district court to start remedial proceedings, and thus their request to this Court is not properly preserved. In addition, the State would vehemently oppose any such request: As Plaintiffs well know, this Court's precedents entitle the Legislature to the first shot at remedying any redistricting problem. But the Legislature cannot reasonably be compelled to exercise or forego that choice while the majority's merits decision is on appeal in this Court. Because the Court's eventual merits decision may will conclude that there is no constitutional violation to remedy, it would make no sense to force remedial proceedings in the meantime.

In sum, whether on the merits or in complaining about their record, Plaintiffs have no way around the fact that the strict scrutiny analysis cuts squarely in the State's favor. As the State has emphasized, the entire point of the "strong basis in evidence" standard is to give States "breathing room" between the demands of the Fourteenth Amendment and the VRA. *Bethune-Hill*, 580 U.S. at 196. That captures the unique facts here.

III. THE MAJORITY ERRONEOUSLY IMPORTED *GINGLES* INTO THE STRICT SCRUTINY ANALYSIS.

Relatedly, the majority erred by analyzing anew whether the State satisfied the *Gingles* preconditions before enacting S.B. 8. This flips the normal use of *Gingles* on its head: In a typical VRA vote-dilution case, it is the plaintiff's burden to establish the *Gingles* factors. In a case (like this) brought under the Equal Protection Clause, the Court has referred to

Gingles only as a valid defense against a gerrymandering claim. *See Cooper v. Harris*, 581 U.S. 285, 302 (2017). The reversal of the typical analysis here warrants consideration by the Court.

Adding to the majority's error is the *Robinson* courts' finding that the *Gingles* preconditions were already satisfied. *See Robinson*, 86 F.4th at 589–99 (affirming the Middle District's *Gingles* findings across the board). To re-engage the *Gingles* analysis is to ignore what two other courts already found—that the State was required to create two majority-Black districts or else face likely liability under the VRA.

Plaintiffs do not seriously engage with the State's contentions on this point. Instead, Plaintiffs assert that, by agreeing with the State, the Court "would eviscerate the Fourteenth Amendment to subject 'odious' racial gerrymandering to anything less than strict scrutiny." Mot. at 32. But the State does not argue that strict scrutiny is inapplicable. Nor does the State ask the Court to overrule *Gingles*. The State simply asks the Court to apply *Gingles* as it always has, and to respect a finding that *Gingles* has already been satisfied. The majority erred in concluding otherwise.

IV. PLAINTIFFS' CHALLENGE IS NON-JUSTICIABLE.

The sniping between Plaintiffs and the *Robinson* plaintiffs underscores the impossible situation Louisiana faces—and the folly of redistricting litigation more generally. Plaintiffs tell Louisiana that only a one majority-Black district map can avoid any constitutional issue. Mot. at 5 ("a second Black-majority district can't be drawn"). But the *Robinson* plaintiffs tell Louisiana that only a two majority-Black district map can avoid any VRA problem in light of *Robinson*.

Whatever Louisiana does, it will be sued again and again.

For that reason, Justice Thomas was exactly right to say that "[t]he Court's attempts to adjudicate the impossible have put the States in an untenable position" when it comes to drawing congressional maps. *Id.* at 1266; *see id.* at 1267 ("The Court's involvement in congressional districting is unjustified and counterproductive."); *see also Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (mem.) (Kavanaugh, J., concurring) ("[T]he Court's case law in this area is notoriously unclear and confusing."). More than any other before it, therefore, this case presents the problems inherent in the Court's precedents, and demands reconsideration of whether claims like Plaintiffs' are justiciable.

CONCLUSION

The Court should deny the motion, note probable jurisdiction, set this case for argument, and reverse.

Respectfully submitted,

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