No. 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.,

Appellant,

v.

PHILLIP CALLAIS, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

AMICI CURIAE BRIEF OF JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF APPELLEES

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IDENTITY AND INTERESTS OF AMICI CURIAE[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. Judicial Watch regularly files amicus curiae briefs and lawsuits related to these goals.

In furtherance of these goals, Judicial Watch has litigated voting cases on behalf of private and government clients. This experience includes investigating and litigating cases under Section 2 of the Voting Rights Act ("VRA"). 52 U.S.C. § 10301. As part of its election integrity mission, Judicial Watch has a substantial interest in the proper enforcement of Section 2. Judicial Watch has filed several amicus briefs before this Court on cases involving the VRA. *See Brnovich v. Democratic National Committee*, 594 U.S. 647 (2021) (No. 19-1257) (Section 2 of the Voting Rights Act); *North Carolina v. N.C. State Conf. of the NAACP*, 581 U.S. 985 (2017) (No. 16-833) (Section 2 challenge to North Carolina's election laws); and *Alexander v. S.C. State Conference of the NAACP*, 602 U.S. 1 (2024) (No. 22-807) (racial gerrymander challenge to South Carolina's Congressional map).

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[1] Amici state that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Amici sought and obtained the consent of all parties to the filing of this amici curiae brief.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files amicus curiae briefs as a means to advance its purpose and has appeared as an amicus curiae in this Court on many occasions.

Amici submit the Western District of Louisiana's order finding that Louisiana's Congressional redistricting map ("SB8") a racial gerrymander should be affirmed.

SUMMARY OF ARGUMENT

There is an inherent inconsistency between this Court's framework for vote dilution claims under § 2 of the VRA and its Equal Protection Clause jurisprudence. *See Thornburg v. Gingles*, 478 U.S. 30 (1986) (establishing preconditions for racial dilution claims under 52 U.S.C. § 10301) and *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023). The former mandates racial districting under the Fifteenth Amendment while the latter provides that our Constitution is color blind. For almost 30 years, courts and states have struggled to balance the conflicting mandates under the *Gingles* framework and Equal Protection Clause. This case is just the latest example. While these conflicting mandates have put Louisiana in an untenable position, SB8 nevertheless is a racial gerrymander, violating both *Shaw I* and *Harvard College*. The dividing of citizens by race, which is

necessary under the *Gingles* framework, continues to do more to harm than good.

ARGUMENT

I. Race Necessarily Predominated The Creation of a Second Majority-Black District in SB8.

The Court has held that state legislatures must adhere to the VRA's requirements in redistricting. *See Shaw v. Reno,* 509 U.S. 630, 655 (1993) ("*Shaw I*"); *Miller v. Johnson*, 515 U.S. 900, 920 (1995); *Shaw v. Hunt*, 517 U.S. 899, 911-16 (1996) ("*Shaw II*"); and *Wis. Legis. v. Wis. Elections Comm'n*, 595 U.S. 398, 402 (2022). But the VRA is not an unlimited license for states to engage in race-based classifications that are "antithetical to the Fourteenth Amendment." *Shaw II*, 517 U.S. at 906. Sorting citizens into voting districts based on their race is a violation of the Equal Protection Clause.

This Court has held that, despite the Equal Protection Clause's prohibition against race-based state action, states may still treat voters differently in redistricting if it is necessary to comply with § 2 of the VRA. 52 U.S.C. § 10301. But the question of what must be shown to establish a compelling justification based on the need to comply with § 2 remains unsettled. The Court's voting rights jurisprudence in this area has been variously described by justices as either unclear or misguided. *See Wis. Legis.*, 595 U.S. at 406 (Sotomayor, J., dissenting) ("the Court today faults the State Supreme Court for its failure to

comply with an obligation that, under existing precedent, is hazy at best"); *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 294 (2015) (Thomas, J., dissenting) ("This is nothing more than a fight over the 'best' racial quota. . . . [O]ur jurisprudence in this area continues to be infected with error."). The line dividing permissible racial considerations for § 2 compliance and impermissible racial considerations under the Equal Protection Clause is functionally impossible to discern.

Race certainly predominated the design of District 6 in SB8. Louisiana's use of race to create a second majority-Black congressional district was not narrowly tailored because it failed to satisfy the first *Gingles* precondition and did not comply with traditional redistricting principles. This Court, therefore, should affirm the Western District's finding that SB8 is an impermissible racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment.

II. Permitting Racial Classifications in the Voting Context Perpetuates, Rather Than Remedies, Discrimination.

Less than two years ago, this Court rejected Alabama's challenge to the *Gingles* framework for vote dilution claims under § 2 of the VRA. *Allen v. Milligan*, 599 U.S. 1 (2023). Three weeks later it affirmed that our Constitution is color blind. *Harvard College*, 600 U.S. at 230. The principles that underly these two rulings conflict: How can the Constitution

be color blind while enforcement of the Fifteenth Amendment mandates race-based districting?

This conflict originated from the framework the Court established to bring § 2 dilution claims under the 1982 amendment to § 2. *Gingles*, 478 U.S. at 34. Distilled, *Gingles* provides that racial districting is necessary whenever a plaintiff identifies a geographic area where a sufficiently concentrated racial minority constitutes an electoral minority under the existing districting scheme.[2] Then, seven years later, the Court recognized that allegations of race-based districting could establish a racial gerrymandering claim under the Equal Protection Clause. *Shaw I*, 509 U.S. 630. The conflict arises because under these holdings racial districting is necessary to enforce the Fifteenth Amendment (*Gingles*) even though racial districting violates the Equal Protection Clause (*Shaw I*). *See also All*en, 599 U.S. at 31 ("[T]he line between racial predominance and racial consciousness can be difficult to discern[.]").

In the time since, enormous public and private resources have been spent litigating, in vain, to resolve the conflict between *Gingles* and *Shaw* progeny. These efforts have resulted in impossibly complex, multi-year litigation projects yielding voluminous judicial rulings that attempt to reorient

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[2] In 20 years following *Gingles*, Plaintiffs that satisfied its three prongs prevailed in 57 of 68 lawsuits. *See* DOCUMENT DISCRIMINATION IN VOTING: JUDICIAL FINDINGS UNDER SECTION 2 OF THE VOTING RIGHTS ACT SINCE 1982: FINAL REPORT OF THE VOTING RIGHTS INITIATIVE, 39 U. Mich. J.L. Reform 643, 660.

without resolving this conflict.[3] The next redistricting cycle will be here soon. Before then, it is important for the public and state legislatures to have clear statement as to why there is voting exception to the Constitution's color-blind mandate and how it can be implemented without millions of dollars in litigation fees.

Ultimately, there is no textual basis for exempting voting and districting from the Constitution's color-blind mandate. The Fifteenth Amendment's text prohibits denial or abridgment of the right to vote "on account of race, color, or previous condition of servitude," which Congress is authorized to enforce. U.S. CONST. amend. XV and 52 U.S.C. § 10301(a). This prohibition does not provide affirmative rights nor require race-based reallocation of voting strength whenever a critical mass of geographically compact minority voters fail to elect their candidate of choice. Judicial inertia and *stare decisis* do not supersede the duty to faithfully apply the text of the Constitution or statutes.

Similarly, the text of § 2 does not mandate race-based districting either. "[E]qual openness," not

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[3] Indeed, these complicated rulings have created new sources of conflict. For example, in *Bush v. Vera*, this Court held that a district drawn to comply § 2 of the VRA, 52 U.S.C. 10301, "must not subordinate traditional redistricting principles to race substantially more than is '*reasonably necessary*' to avoid § 2 liability." 517 U.S. 952, 979 (1996) (emphasis added). Yet, more recently, this Court held that § 2 never requires the adoption of districts that violate traditional redistricting principles. *Allen*, 599 U.S. at 29-30 (citation omitted)

racial balancing, is its "touchstone." *See Brnovich*, 594 U.S. at 669 (analyzing the text of 52 U.S.C. § 10301); *see also Allen*, 599 U.S. at 98 (Alito, J., dissenting). Yet, rather than ensuring "equal opportunity," *see id*., dilution claims under *Gingles* go well beyond the text of both § 2 and the Fifteenth Amendment. *Gingles* does not simply prohibit discrimination "on account of race, color, or previous condition of servitude." [4] It mandates racial preferences in the form of majority-minority districts. In that regard, the *Gingles* framework is closer to racial retribution than reconciliation. *Gingles* facilitates extraordinary relief in the form of perpetual electoral realignment in favor of racial minorities whenever they satisfy certain size requirements to create a remedial district. *Gingles* mandates race-based representative districts that are "ageless in their reach into the past, and timeless in their ability to affect the future." *See Allen*, 599 U.S. at 84 (Thomas, J., dissenting) (citations omitted).

To be sure, the desire to protect the voting rights of racial minorities is understandable, especially given the well-known history of discrimination. But the United States is not defined by its irredeemable past. *Gingles* goes well beyond the text of both the Fifteenth Amendment and § 2. [5] The race-based

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[4] In 1975, § 2's protections "on account of race, color, or previous condition of servitude" were extended to members of "language minority group[s]." 94 Pub. L. No. 73, 89 Stat. 400 (1975); *see also* U.S. CONST. amend. XV; 52 U.S.C. § 10301(a); 52 U.S.C. § 10303(f)(2).

[5] This task of protecting racial minorities against any backsliding in voting rights is even more muddled given that

districting regime this Court ordered in *Gingles* is "inimical to our Constitution." *Alexander*, 602 U.S. at 40 (Thomas, J., dissenting).

III. The Division of Citizens Based on Race Causes Irreparable Harm to the Individual and to Society.

Racial segregation under the guise of redistricting or § 2 compliance is segregation. This Court should make clear that sorting citizens into voting districts based on their race, regardless of what a government actor believes is necessary to satisfy the VRA or any other statute, is a violation of the Equal Protection Clause.

This Court recognized in its earliest opinions on racial gerrymandering the harm it threatens to inflict. It noted that allowing racial stereotypes to govern redistricting "may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract," *Shaw I,* 509 U.S. at 648. And it noted that "[w]hen the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the

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race is now viewed as a "social construct[.]"*Harvard College*, 600 U.S. at 276. "[W]e may each identify as members of particular races for any number of reasons, having to do with our skin color, our heritage, or our cultural identity. And, over time, these ephemeral, socially constructed categories have often shifted." *Id.*

same candidates at the polls.'" *Miller*, 515 U.S. at 911-12 (citations omitted).

Indeed, when this Court first determined that racial gerrymandering violated the Equal Protection Clause, it explained that such racialized decision-making "injures voters" because it "reinforces stereotypes and threatens to undermine our system of democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." *Shaw I*, 509 U.S. at 650. This system "emphasiz[es] differences between candidates and voters that are irrelevant in the constitutional sense," and "is at war with the democratic ideal." *Id.* at 648-49 (quoting *Wright v. Rockefeller*, 376 U.S. 52, 66-67 (1964) (Douglas, J., dissenting)). "Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters." *Id.* at 657. Moreover, racial gerrymanders are bad democratic practice. They send a pernicious message to elected representatives: "When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group," which is "altogether antithetical to our system of representative democracy." *Id.* at 648.

This Court has compared race-based districting to segregation of "public parks, . . . buses, . . . and

schools," and warned that we "should not be carving electorates into racial blocs." *Miller*, 515 U.S. at 912, 928 (internal citations and quotations omitted). That is because "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw I*, 509 U.S. at 643 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). Racial gerrymandering, like all "[r]acial classifications of any sort" cause "lasting harm to our society" because "[t]hey reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Shaw I*, 509 U.S. at 657; *see United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part) ("An explicit policy of assignment by race may . . . suggest[] the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs.").

There should be no question that race-based division of citizens for purposes of redistricting is a violation of the Equal Protection Clause, the "central purpose" of which "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw I*, 509 U.S. at 642 (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)). The same may be said of the Voting Rights Act.

CONCLUSION

For these reasons, amici curiae respectfully request the Court affirm the Western District's ruling.

Respectfully submitted,

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