Nos. 24-109, 24-110

In the Supreme Court of the United States

LOUISIANA, APPELLANT
v.
PHILLIP CALLAIS, ET AL.

PRESS ROBINSON, ET AL., APPELLANTS
v.
PHILLIP CALLAIS, ET AL.

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

BRIEF FOR *AMICI CURIAE* INDEPENDENT STATE REDISTRICTING COMMISSIONERS IN SUPPORT OF NEITHER PARTY

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INTERESTS OF *AMICI CURIAE*[1]

Amici are current and former Commissioners of state independent redistricting commissions, some affiliated with the Republican Party, some with the Democratic Party, and some with neither. Because this Court has asked the parties whether it should recalibrate the legal landscape facing redistricting bodies, *amici* write to share our experience in drawing lawful district lines subject to current constraints, and to share some concerns about the litigation environment should the Court significantly depart from its substantial precedent. We believe that our experience highlights the nuanced approach to race required by current federal law in this context, and reveals the impracticality and risks posed by an alternative approach that would render any consideration of race constitutionally suspect here. As commissioners charged with drawing lines on behalf of local communities, we know that we cannot unlearn what we know about those communities — including their racial composition — in fulfilling our obligations. If any consideration of race were constitutionally suspect and subject to challenge, our redistricting work — indeed, any redistricting work by any entity familiar with the local communities to be represented — would be embroiled in repeated and protracted litigation. Neither this Court's precedent nor the Constitution condones any such result.

Amici include Arizona Commissioner Colleen Mathis, who served in the 2010 redistricting cycle as the Chair of the Arizona Independent Redistricting Commission ("Arizona Commission"); California Commissioners Isra Ahmad, Linda Akutagawa, Vincent

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation of or submission of this brief. No one other than the *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

Barabba, Cynthia Dai, Michelle DiGuilio, Alicia Fernández, Jodie Filkins, Stanley R. Forbes, Neal Fornaciari, Gil Ontai, Connie Archbold Robinson, Sara Sadhwani, Pedro Toledo, Trena Turner, and Russell Yee, who are serving in the 2020 redistricting cycle or served in the 2010 redistricting cycle as members of the California Citizens Redistricting Commission ("California Commission"); and Colorado Commissioners Carlos Perez and Samuel Greenidge who are serving as Chair and a member, respectively, of the Colorado Independent Legislative Redistricting Commission charged with redrawing the lines for the state legislative districts ("Colorado Legislative Commission"). *Amici* are part of a group that submitted a brief to this Court on December 23, 2024; that brief summarizes the backgrounds, procedures, and mandates of their respective independent commissions, and *amici* incorporate that summary here by reference. Brief for *Amici Curiae* Independent State Redistricting Commissioners in Support of Neither Party 1-4, *Louisiana v. Callais*, Nos. 24-109, 24-110 (2024).

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has ordered supplemental briefs addressing whether Louisiana's intentional creation of a second majority-minority congressional district violates the Fourteenth or Fifteenth Amendments to the U.S. Constitution. *Amici* believe that the proper answer to that question involves a localized and fact-driven analysis that depends primarily on Louisiana's legislative process — and as a second-order concern, on local social and political context. Without that particularized context, *amici* offer no opinion on the question as it pertains to Louisiana's current congressional map.

However, to the extent the Court may revisit the more general question whether the intentional creation of districts with certain demographic profiles is

constitutional, *amici* believe that our experience may assist the Court.

The Court's long-established precedent instructs that the answer to this more general question has been "sometimes." And *amici* believe "sometimes" should remain the correct answer. Absent invidious intent to injure based on race, if significant populations are not moved within or without a district predominantly based on their race, with race the "dominant and controlling" consideration subordinating other redistricting criteria, this Court has repeatedly found no constitutional injury. *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 260–61 (2015); *see also Alexander v. South Carolina State Conf. of the NAACP*, 602 U.S. 1, 7–8 (2024); *Cooper v. Harris*, 581 U.S. 285, 291–92 (2017); *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 187 (2017).

In our earlier brief to this Court, *amici* explained that when we consider race in the course of drawing district lines, we endeavor to do so without allowing race to predominate, readily navigating the terrain Louisiana now declares impassable. Brief for *Amici Curiae* Independent State Redistricting Commissioners in Support of Neither Party 9-14, *Louisiana v. Callais*, Nos. 24-109, 24-110 (U.S.); Supp. Br. for Appellant 5, *Louisiana v. Callais*, No. 24-109 (2025).

Preserving the "predominance" test recognizes, as a practical matter, that "redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines." *Shaw v. Reno*, 509 U.S. 630, 646 (1993). "Predominance" is also consistent with treating race as one of the "myriad considerations that a legislature must balance as part of its redistricting efforts. . . ." *Alexander*, 602 U.S. at 24 (quotation marks omitted). Moreover, the "predominance" standard recognizes that if districts are to be drawn, they must be drawn somewhere, and people

of differing racial and ethnic characteristics will inevitably find themselves on one side or another of a district line. And "predominance" recognizes that if entities tasked with drawing district lines intend to foster the representation of communities, the racial or ethnic composition of those communities may be inextricably intertwined with other community traits.

This Court has repeatedly found that the process of drawing a district to reflect a certain community, geography, geometry, or (for linedrawers in other states) partisan preference does not rise to a constitutionally cognizable injury if the decisionmakers also considered the race of district constituents. *Allen v. Milligan*, 599 U.S. 1, 30–33 (2023); *Miller v. Johnson*, 515 U.S. 900, 920 (1995) ("A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests."); *Shaw*, 509 U.S. at 646 (finding "when members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes"). As this brief explains, to do otherwise would subject the work of districting bodies to invasive litigation that would be nearly impossible to defend. The litigation morass Louisiana ostensibly seeks to avoid is one its proposed doctrine would create.

Amici also believe it is important to recognize that even when districts are drawn predominantly because of race, this Court has determined that the choice should be strictly scrutinized rather than automatically invalidated. And this Court has consistently assumed, for good reason, that narrowly tailored compliance with the Voting Rights Act satisfies strict scrutiny. *See Abbott v. Perez*, 585 U.S. 579, 587 (2018) (noting the consistency); *see also Cooper*, 581 U.S. at 292–93; *Ala. Legis. Black Caucus*, 575 U.S. at

278; *Bethune-Hill*, 580 U.S. at 193–94. As this brief explains, properly applied, with a mapmakers' localized and fact-dependent assessment of the "myriad considerations" the statute demands, the Voting Rights Act prevents linedrawers from perpetuating discriminatory dilution in a manner fulfilling, not contrary to, the constitutional authority that the Constitution gives to Congress.

ARGUMENT

I. WHEN *AMICI* CONSIDER RACE AND ETHNICITY, FOLLOWING THIS COURT'S PRECEDENT, WE DO SO AS ONE OF THE "MYRIAD CONSIDERATIONS," NOT STEREOTYPE

This Court has consistently guarded against racial stereotyping, both in electoral cases and beyond. Grounded in the text and historical context of the Fourteenth and Fifteenth Amendments, this Court reserves its most searching scrutiny for differential government treatment of individuals because of their race, because the assumptions and stereotypes associated with race have too often served as pretext for discrimination or the unwarranted communication of difference. *Brown v. Bd. of Education*, 347 U.S. 483, 493–94 (1954*); Gomillion v. Lightfoot*, 364 U.S. 339, 345–46 (1960); *Johnson v. California*, 543 U.S. 499, 505–06 (2005). And when this Court refuses to condone differential treatment without rigorous justification, it guards against lazy government predilections that fall back on assumptions and stereotypes. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 742–43 (2007); *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. 181, 218 (2023).

Amici understand and share this Court's underlying concern with racial stereotyping. We are, by the design of the commissions in our states, individuals of various

racial and ethnic backgrounds working together with others of various racial and ethnic backgrounds. Sometimes we agree with those with whom we share demographic traits in common, sometimes we do not; sometimes we agree with those who have different demographic traits, sometimes we do not. We recognize the stereotyping in ascribing political preferences and affiliations to individuals solely because of their race even as we understand that the data show there are sometimes (and in some locations) correlations between race and representational preference. And these experiences help ensure that when we, as commissioners, consider race in the course of drawing of district lines, we do so grounded deeply in fact rather than stereotype.

A. Proper application of the Voting Rights Act requires an approach to race and ethnicity grounded in local fact and context, and shuns stereotypes.

The Voting Rights Act is the principal statute requiring mapmakers to consider race. The Voting Rights Act was passed pursuant to Congress's express power to enforce the Fourteenth and Fifteenth Amendments' prohibition of abridgement of the vote based on race.[2] *See generally City of Rome v. United States*, 446 U.S. 156, 176 (1980) (identifying Congress's ability to "prohibit state action that . . . perpetuates the effects of past discrimination" as a permissible use of

[2] The Fourteenth Amendment grants Congress the power to enforce Section 1's substantive protections against racial discrimination and Section 2's substantive protections against abridgment of adult male citizens' right to vote "in any way"; the Fifteenth Amendment grants Congress the power to enforce Section 1's substantive protections against abridgment of the right to vote on the basis of race, color, or previous condition of servitude. *See* U.S. Const., amends. XIV, XV; Franita Tolson, *What is Abridgment? A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 435–36 (2015).

constitutional power to enforce the Reconstruction Amendments). Pursuant to this constitutional authorization, the Voting Rights Act was passed with strong bipartisan majorities not only in its initial enactment, but in every amendment or reauthorization since.[3]

We have noted in some spheres a tendency to caricature the Voting Rights Act as advancing racial preferences or a theory of racial entitlement. *See, e.g.*, Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FLA. ST. U. L. REV. 573, 575 (2016) (noting instances); Ellen D. Katz, *A Cure Worse than the Disease?*, 123 YALE L.J. ONLINE 117, 118–19 (2013) (same). In this mistaken caricature, the Voting Rights Act simply guarantees each racial or ethnic community of sufficient size its own legislative district. *Cf.* Supp. Br. for Appellant 31–33, *Louisiana v. Callais*, No. 24-109 (2025) (asserting "racial balancing" as the goal while ignoring the actual conditions for liability). But this kind of proportionality is not how we understand or apply the Voting Rights Act in the process of drawing district lines. *Cf. Milligan*, 599 U.S. at 26 (finding "properly applied, the *Gingles* framework imposes meaningful constraints on proportionality, as our decisions have

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[3] In 1965, 79% of Democrats voting on the measure voted in favor of the Act, and 88% of Republicans voting voted in favor of the Act. *See* 111 Cong. Rec. 19,201, 19,378 (1965). In 1970, 75% of Democrats voting on the measure voted in favor, and 63% of Republicans voting voted in favor. *See* 116 Cong. Rec. 7,335–36, 20,199–200 (1970). In 1975, 92% of Democrats voting on the measure voted in favor, and 75% of Republicans voting voted in favor. *See* 121 Cong. Rec. 24,780, 25,219–20 (1975). In 1982, 97% of Democrats voting on the measure voted in favor, and 89% of Republicans voting voted in favor. *See* 127 Cong. Rec. 23,205–06 (1981); 128 Cong. Rec. 14,337 (1982). And in 2006, 100% of Democrats voting on the measure voted in favor, and 88% of Republicans voting voted in favor. *See* 152 Cong. Rec. H5204–07 (2006).

frequently demonstrated"); *id.* at 43 (Kavanaugh, J., concurring) ("As the Court's precedents make clear, *Gingles* does not mandate a proportional number of majority-minority districts.").

Instead, the Voting Rights Act is aimed squarely at dismantling discrimination. The Voting Rights Act initially prevented intentional discrimination on the basis of race or language minority status. When Congress amended the statute in 1982, it expanded coverage to prevent the perpetuation of discrimination even when direct intent was difficult to prove. But in adopting the 1982 amendments, Congress rejected the notion that statutory violations would turn on a simple demographic threshold.

As this Court held in *Thornburg v. Gingles*, the necessary predicates for Voting Rights Act liability ensure that the Act is properly deployed to prevent state perpetuation of discrimination. 478 U.S. 30, 47–51 (1986). Demonstrating that racial or language minority communities are sufficiently sizable to constitute more than half of a district-sized population is only the first step of several necessary predicates. In addition, there must be a reliable basis to believe that those racial or language minority communities have cohesive political preferences. *Gingles*, 478 U.S. at 50-51. In addition, there must be a reliable basis to believe that the remainder of the community also has cohesive political preferences, sufficiently distinct and polarized from the racial or language minority communities to regularly deprive those minority communities of representation if special care were not otherwise taken. *Id.* These preconditions are designed to indicate when minority voters would have an opportunity to elect their candidates of choice if (and only if) district lines were drawn for that purpose. But crucially, these preconditions are insufficient for liability on their own. In addition to these factors, the totality of

the circumstances — localized and fact-driven and requiring nuance — must reveal the continuing impact of past or present discrimination, such that drawing district lines that preserve the ability of the polarized majority to continue to dominate racial or language minorities would continue to perpetuate discrimination against those communities. *Id.* at 44-45; *City of Rome*, 446 U.S. at 176–78; *cf. Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 349 (1977) ("One kind of practice "fair in form, but discriminatory in operation" is that which perpetuates the effects of prior discrimination."); *see also League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (finding "political, social, and economic legacy of past discrimination . . . may well hinder their ability to participate effectively in the political process" (quotation marks omitted)). Contrary to Louisiana's supplemental brief in this case, Supp. Br. for Appellant 3, 10, 18–21, *Louisiana v. Callais*, No. 24-109 (2025), none of these elements can ever be presumed; each must be grounded in local facts.

This Court's precedent, reaffirmed as recently as two years ago, in *Allen v. Milligan*, 599 U.S. 1 (2023), emphasizes the importance of each of these predicates for liability. *Id.* at 17–19. *Milligan* also confirms that these liability guardrails ensure section 2's constitutionality. *Id.* at 41-42 ("We also reject Alabama's argument that § 2 as applied to redistricting is unconstitutional under the Fifteenth Amendment."). That is in part because each predicate for liability ensures that the Voting Rights Act contains its own significant limiting principles. Louisiana protests that Section 2 "lack[s] a 'logical end point," Supp. Br. for Appellant 3, 24, *Louisiana v. Callais*, No. 24-109 (2025), because the State invents a caricature that Section 2 itself does not reflect. When particular local communities no longer exhibit voting preferences locally polarized on the basis of race, the Voting Rights Act

imposes no liability. When particular local communities are no longer residentially segregated such that racial or language minorities in a single-member districted system are no longer sufficiently concentrated to constitute more than half of a district's electorate, the Voting Rights Act imposes no liability. And when particular local racial or language minorities no longer experience the continuing impact of localized discrimination, the Voting Rights Act imposes no liability. Trial courts understand and apply these limits, finding liability for some claims and rejecting others even within the same case, when facts in one part of a state differ from the facts in another. *See, e.g.*, *Ala. State Conf. of the NAACP v. Allen*, No. 2:21-cv-01531, 2025 WL 2451166, at *2 (N.D. Ala. Aug. 22, 2025) (finding that plaintiffs adequately proved Voting Rights Act liability in the Montgomery region of Alabama, but not in the Huntsville area); *Miss. State Conf. of the NAACP v. State Bd. of Election Comm'rs*, 739 F. Supp. 3d 383, 466 (S.D. Miss. 2024) (finding that plaintiffs adequately proved Voting Rights Act liability in northwest Mississippi and the Hattiesburg area, but not around Copiah, Simpson, and Jefferson Davis counties or in the outskirts of Jackson); *see also League of United Latin Am. Citizens*, 548 U.S. at 442–47 (plurality opinion) (finding that plaintiffs adequately proved Voting Rights Act liability in west Texas, but not in the Dallas area).

Amici have also heeded this Court's instructions, painstakingly considering each step of the analysis. We have evaluated sizable communities of racial or language minorities. Sometimes we have found voting locally polarized based on race. But sometimes we have found insufficient evidence that voting is locally polarized based on race — and we have recognized that the Voting Rights Act provides no mandate with respect to those communities in those locations. For example, the Colorado Legislative Commission in 2021 found evidence

of polarized voting in the eastern Denver suburbs, but not in Denver or its western suburbs.[4] The California Commission in 2011 found sizable Latino populations in Kings County, but insufficient evidence of polarized voting there — even as the evidence indicated polarization in neighboring Fresno.[5] By 2021, the evidence revealed polarization in Kings County, but not in the Bay Area or portions of California's Central Coast.[6] Based on rigorous attention to granular factual detail, the California Commission in 2021 even noted portions of Los Angeles County where the evidence showed voting to be polarized based on race and portions of Los Angeles County where it did not, and calibrated its linedrawing accordingly.[7]

Sometimes, even in sizable communities of racial or language minorities where the evidence shows polarization based on race, we have found insufficient evidence of continuing discrimination or a link to past or present discrimination — and we have recognized that the Voting Rights Act provides no mandate with respect to those communities in those locations. In still other circumstances, even in sizable communities of racial or language minorities subject to polarized voting and a

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[4] In re Colorado Ind. Legis. Redistricting Comm'n, No. 2021 SA 305, Exh. 9 Report of Dr. Lisa Handley at 6 (Colo. Oct. 15, 2021), https://redistricting.lls.edu/wp-content/uploads/CO-In-re-Ind.-Leg.-Commn-20211015-final-proposed-plans.zip.

[5] Final Report on 2011 Redistricting, California Citizens Redistricting Comm'n, 19-20 (Aug. 15, 2011), https://wedrawthelines.ca.gov/wp-content/uploads/sites/64/2011/08/crc_20110815_2final_report.pdf.

[6] Report on Final Maps, 2020 California Citizens Redistricting Comm'n, 40–41 & appx. 7 (Dec. 26, 2021), https://wedrawthelines.ca.gov/wp-content/uploads/sites/64/2023/01/Final-Maps-Report-with-Appendices-12.26.21-230-PM-1.pdf.

[7] *Id.*

history of discrimination, the totality of circumstances has indicated no need to draw majority-minority districts to prevent the perpetuation of discrimination — and so we recognized that the Voting Rights Act provides no mandate with respect to such districts in those locations. For example, the California Commission in 2011 recognized that Black communities were able to elect candidates of their choice in areas of Los Angeles even without tailored Black-majority districts.[8] The Colorado Legislative Commission in 2021 recognized much the same for the Latino communities in western Adams County.[9]

When we consider race in applying the Voting Rights Act, we do so grounded in local facts and context, without indulging in stereotype. And we do so mindful of the overall purpose of the Voting Rights Act, recognizing that the Act represents Congress's directive that we not perpetuate the effects of demonstrated discrimination.

B. When amici consider race and ethnicity outside of the context of the Voting Rights Act, following this Court's precedent, we do so grounded in fact, not stereotype.

Amici occasionally consider race or ethnicity independent of our obligations under the Voting Rights Act. We are tasked with determining representation for communities. We are chosen in part for our familiarity with the communities we serve, and in part for our commitment to listen to other citizens who are similarly familiar with their own communities. Indeed, for some of us, we came to our understanding of communities and their representational needs well before we acquired any other information about the redistricting process. We

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[8] Final Report on 2011 Redistricting, *supra* note 5, at 17.

[9] In re Colorado Ind. Legis. Redistricting Comm'n, *supra* note 4, at 4–5.

necessarily know the demographic composition of the communities in question. And some of us find it valuable, in shaping districts for representation, to avoid artificially splitting communities defined predominantly along other lines that also share racial or ethnic heritage. In so doing, as mentioned in our prior brief, we do not draw lines predominantly based on race, subordinating other considerations. Brief for *Amici Curiae* Independent State Redistricting Commissioners in Support of Neither Party 9–14, *Louisiana v. Callais*, Nos. 24-109, 24-110 (2024). But when we know that a community shares common racial or ethnic bonds that bear on common representational concerns, some of us will — intentionally — avoid wielding state power to split that community in two.

For example, the city of Glendale, California, lies about ten miles north of downtown Los Angeles. The more densely populated center of Glendale is relatively compact, but the formal municipal boundaries stretch a bit up and into the southwest portion of the Angeles National Forest. The population of Glendale is socioeconomically diverse, with a mix of income and a mix of homeowners and renters.

Those of us who know the city also know that it is home to the world's largest Armenian population outside of Armenia, which is a source of significant cultural weight, religious practice, commercial interest, and civic pride. The community commemorates this heritage in historical remembrances — including, but not limited to, the 1915 onset of the Ottoman genocide — and an Armenian-American museum, educational, and cultural center with substantial civic support is scheduled to open in 2026.

The Armenian community in and around Glendale is not politically homogenous. But even as community members have different preferences for representatives

within and across partisan lines, the community as a whole has some common representational concerns at various levels of government drawn from that ethnic heritage. *Amici* serving on the California Commission in 2010 and 2020 did not have reason to believe that this community would qualify under *Gingles* for the protections of the Voting Rights Act. But when drawing district lines in and around this region, choosing districts pursuant to California law based on the integrity of municipal boundaries, based on socioeconomic communities of interest (including adjacency to the Los Angeles National Forest, including the care for natural resources and concern for fire safety connecting these communities), based on geographical compactness, and based on the ability to nest districts for different chambers of the legislature, *see* Cal. Const. art. XXI, § 2(d) (2010), some commissioners also intentionally considered this ethnic identity, and attempted to avoid dividing the Armenian community so that the community could more coherently communicate with their representatives.[10]

This consideration of race or ethnicity carefully heeds this Court's concern with stereotype. Where we as individuals considered factors such as those described above, they were not based on assumptions fueled by the mere fact of racial or ethnic background. We did not presume that the members of any particular ethnic groups had common concerns, or should be treated similarly — though we remained open to applying such treatment where the facts warranted. Rather, in our experience, consideration of race or ethnicity in the manner described above is premised on individual commissioners' deep familiarity with particular communities, supported by public comment and

[10] Report on Final Maps, *supra* note 6, at 72; *see also* Final Report on 2011 Redistricting, *supra* note 5, at 35–36.

testimony from the community members themselves. That is, to the extent that the example above reveals individual commissioners' intentional consideration of race or ethnicity, such consideration was based not on suppositions about Armenians, but rather on understanding the demonstrated particulars of the Armenian community of Glendale. And such consideration serves not to balkanize, but to respect distinct communities' pre-existing representational needs.

II. RETREATING FROM THE PREDOMINANCE STANDARD WILL SUBJECT REDISTRICTING BODIES TO INVASIVE LITIGATION BASED ON COMMUNITY CHARACTERISTICS THAT ARE IMPOSSIBLE TO IGNORE

In the question that this Court has presented as the focus of supplemental briefing and argument, the Court has asked whether the intentional drawing of a district based on race violates the Constitution. Precedent establishes that the answer is "sometimes" — specifically, when that intentional drawing reveals that race served as the "dominant and controlling" consideration, subordinating other redistricting criteria, without sufficiently narrow tailoring to a compelling government interest, that would violate the Constitution. *Ala. Legis. Black Caucus*, 575 U.S. at 260–61; *see also Alexander*, 602. U.S. at 7–8; *Cooper*, 581 U.S. at 291–92; *Bethune-Hill*, 580 U.S. at 192–94; *Shaw*, 509 U.S. at 642–44; *Miller*, 515 U.S. at 904.

To the extent that the Court may be reconsidering the value of "racial predominance" as a governing standard in the redistricting context, *amici* urge the Court to maintain that vital principle. In our experience, the "predominance" standard has proven consistent with the "myriad considerations," *Milligan*, 599 U.S. at 35, that a mapmaker "must balance as part of its redistricting

efforts," *Alexander*, 602 U.S. at 24, and has served as a useful gating mechanism to protect routine redistricting decisions from invasive litigation. Lowering the standard – such as purporting to require a race-blind process or providing that a cause of action may be maintained by "but-for" intent (or a lower threshold) – would subject *amici* and other mapdrawers to second-guessing and protracted litigation. In such circumstances, mapdrawers would be forced to prove a negative – that there was no consideration of race – and would in practice require mapdrawers to disavow the knowledge of local communities they cannot possibly truthfully disavow.

The racial predominance standard owes much to Justice O'Connor, the last Justice to serve on this Court who served as a legislator and participated in that capacity in drawing district lines. Her decision for the Court in *Shaw v. Reno*, 509 U.S. 630 (1993), recognized that the stigmatic injury perpetrated by racial gerrymandering founded on stereotype would be present only in district plans that "rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race." *Id.* at 649, 657–58. And when the Court refined that standard in *Miller v. Johnson*, 515 U.S. 900 (1995), to focus on legislative intent rather than appearance, Justice O'Connor explained her support for the majority opinion in a concurrence:

> I understand the threshold standard the Court adopts that "the legislature subordinated traditional race-neutral districting principles ... to racial considerations," *ante*, at 916 — to be a demanding one. To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices. Those

> practices provide a crucial frame of reference and therefore constitute a significant governing principle in cases of this kind. The standard would be no different if a legislature had drawn the boundaries to favor some other ethnic group; certainly the standard does not treat efforts to create majority-minority districts less favorably than similar efforts on behalf of other groups. Indeed, the driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks.
>
> Application of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts, where presumably the States have drawn the boundaries in accordance with their customary districting principles. That is so even though race may well have been considered in the redistricting process. *See Shaw v. Reno*, 509 U.S. 630, 646 (1993); *ante*, at 916. But application of the Court's standard helps achieve *Shaw*'s basic objective of making extreme instances of gerrymandering subject to meaningful judicial review. I therefore join the Court's opinion.

Id. at 928-929 (O'Connor, J., concurring).

Justice O'Connor's support of a "demanding" threshold of intent for redistricting challenges likely drew upon her experience as a state legislator personally involved in redistricting — an experience that was, at the time, unique on the Court.[11] As Justice O'Connor

[11]Justice O'Connor served as an Arizona State Senator during three separate redistricting battles: the state's court-driven redistricting in 1970; *see Klahr v. Williams*, 313 F. Supp. 148 (D.

recognized, it is impossible for those who are familiar with communities, and who are tasked with determining representation for those communities, to ignore their own understanding of the communities' demographic composition. As she wrote:

> [R]edistricting differs from other kinds of state decisionmaking in that *the legislature always is aware of race when it draws district lines*, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination. As *Wright* [*v. Rockefeller*, 376 U.S. 52 (1964)] demonstrates, when members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes.

Shaw, 509 U.S. at 646 (emphasis added).

Amici's experience is consistent with Justice O'Connor's observations. We were chosen to serve on our respective state commissions in part based on our familiarity with local communities, and in part based on our commitment to listen to members of those communities. That includes an understanding of the demographic composition of those communities, including

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Ariz. 1970), *aff'd sub nom. Ely v. Klahr*, 403 U.S. 108 (1971); H.B. 1, 29th Gen. Assemb., 1st Spec. Sess. (Ariz. 1970); the state's redistricting in 1971, following the next Census, *see* H.B. 1, 30th Gen. Assemb., 1st Spec. Sess. (Ariz. 1971); S.B. 2, 30th Gen. Assemb., 1st Spec. Sess. (Ariz. 1971), *Klahr v. Williams*, 339 F. Supp. 922 (D. Ariz. 1972); and the state's 1972 remedial redrawing of state legislative lines after litigation, *see* S.B. 1333, 30th Gen. Assemb., 2d Reg Sess., ch. 173 (Ariz. 1972).

the local mix of race and ethnicity. We understand that legislators who draw district lines in other states are no less familiar with the communities they represent. We are unable to unlearn what we know.

Amici who served in Arizona and California in the 2010 redistricting cycle drew district plans that were substantively challenged in court, but none of these challenges were meritorious or successful. *Vandermost v. Bowen*, 53 Cal.4th 421, 486 (Cal. 2012) (petition denied); *Radanovich v. Bowen*, No. S196852 (Cal. Oct. 26, 2011) (petition denied); *Radanovich v. Bowen*, No. 2:11-cv-09786, 2012 WL 13012647, at *3 (C.D. Cal. Feb. 9, 2012) (Rule 12 dismissal order); *Harris v. Ariz. Ind. Redistricting Comm'n*, 578 U.S. 253, 265 (2016) (unanimous affirmance). *Amici* in California who served in the 2020 redistricting cycle drew district plans that were not challenged in court at all; *amici* in Colorado who served in the 2020 redistricting cycle (and our counterparts on the congressional commission) drew district plans that were, pursuant to the state constitution, subject to automatic review by the state Supreme Court, but were not otherwise challenged. *In re Colo. Ind. Cong. Redistricting Comm'n*, 497 P.3d 493 (Colo. 2021); *In re Colo. Ind. Legis. Redistricting Comm'n*, 513 P.3d 352 (Colo. 2021). That litigation record is something of an anomaly nationwide, and we are proud of that record.

However, *amici* fear that relaxing the "demanding" predominance threshold would invite far more litigation and that such litigation would be far more intrusive even when substantively unwarranted. Moreover, in addition to the wave of likely litigation over each municipal district attuned to neighborhood or local community boundaries, each such case over congressional or state legislative districts would be subject to direct appeal to this Court. 28 U.S.C. §§ 2284(a); 1253.

At the moment, because litigants challenging district plans drawn by legislators must prove that race predominated over partisan objectives, those challengers must proffer a substitute map that demonstrates how the State could have achieved its partisan objectives with less reliance on race. *Alexander*, 602 U.S. at 34–36. The absence of such a map provides a critical inference — "dispositive in many, if not most, cases," *id.* at 35 — that race did not in fact predominate. Though *amici* and those serving on similar independent commissions are often precluded from drawing districts to favor or disfavor candidates or parties, *see, e.g.*, Ariz. Const. art. IV, pt. 2, § 1(15); Cal. Const. art. XXI, § 2(e); Colo. Const. art. V, §§ 44(3)(b)(IV), 44.3(4)(a), 46(3)(b)(IV), 48.1(4)(a), we presume that challengers in such States would, in practice, have to produce a similar substitute map demonstrating how we could have achieved our *non*partisan objectives with less reliance on race.

That evidentiary threshold provides a measure of insulation, including protection for good-faith linedrawers who have presumably drawn the "vast majority" of districts, in Justice O'Connor's language, "in accordance with their customary districting principles," *Miller*, 515 U.S. at 928 (O'Connor, J., concurring), against litigants disgruntled by the results of legitimate districting choices, and seeking a new venue to re-engage fights lost in the public forum. Conversely, if a district's constitutionality were no longer dependent on a showing of racial predominance, and were instead subject to a standard of purported race-blindness or but-for intent (or a lower threshold), every district in which race or ethnicity were modestly correlated with non-racial factors would be subject to repeated legal challenges all but impossible to defend. As Justice O'Connor recognized, mapmakers cannot unknow the demographic composition of their communities. That fact alone would render every

district suspect — municipal, state, congressional alike — and not merely for districts in which racial minorities happen to constitute a majority. Any district's racial profile, and therefore every district's racial profile, would render it subject to attack. Was district 1 drawn to provide more coherent representation to an agricultural or industrial or technology sector or because of the particular racial mix of the district? Was district 2 drawn to provide more coherent representation to tenants or homeowners or commuters or because of the particular racial mix of the district? Was district 3 drawn to provide more coherent representation to a particular constellation of towns with common challenges or school districts with common needs or because of the particular racial mix of the district? Any acknowledgment by mapmakers of familiarity with the demography achieved through experience will become fodder for litigation claiming that knowledge amounts to impermissible intent. Successfully defending against such challenges would effectively require districts to be drawn by those who are unfamiliar with the communities in question, to the ultimate detriment of those communities and turning the very rationale for district-based representation on its head.

* * * * *

CONCLUSION

Amici take no position on the resolution of the question presented as it pertains to Louisiana's intentional creation of a second majority-minority congressional district. But *amici* urge this Court to decide this case consistent with the Court's well-considered and practical precedent, precluding the predominant consideration of race when based on stereotypes and unfounded assumptions but recognizing, as Justice O'Connor did, that just because "race consciousness" is inescapable in mapmaking, it "does not lead inevitably to impermissible race discrimination," where there is rigorous fact-based attention to local conditions and context.

Respectfully submitted.

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