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United States Senate Committee on the Judiciary
Subcommittee on the Constitution

Chairman Schmitt, Ranking Member Welch, and Members of the Subcommittee, thank you for the opportunity to testify before you regarding the enforcement of the U.S. Supreme Court's decision in *Louisiana v. Callais*, 608 U.S. ___ (2026).

Callais was one of the most significant election law decisions—indeed, one of the most significant Fourteenth and Fifteenth Amendment decisions—of the past several decades. It should end the drawing of legislative districts based on race. It also ends an unnecessary tension in the law. Understanding the source of that tension is necessary to properly implement *Callais*, because at bottom *Callais* is a resolution of that tension.

I. Reconciling Applications of the Reconstruction Amendments

Starting in the mid-1980s, lower courts, misreading the Supreme Court's decisions and the Voting Rights Act, gradually created tension between the Fourteenth Amendment and Fifteenth Amendment where none should exist. Both Amendments guarantee rights in the field of voting and redistricting. Part of Reconstruction, these Amendments were part of a unified whole that worked a revolution in our Republic. Properly understood, those rights should mesh together seamlessly to protect all citizens regardless of race. They aren't separate concepts that can be weaponized by one set of citizens against another, creating a sort of war of rights. When it appears the amendments are in conflict, it is a sure sign that something is amiss. But that is precisely what unfolded in the lower courts.

Start with the Fourteenth Amendment. "Its central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993) ("*Shaw I*"). This means a citizen has the right to be free of governmental distinctions or classifications based on race. Under *Shaw I*, in the redistricting context, a citizen has the right to not be drawn into or out of districts based predominantly on race. Another way to view the right is to consider the injury: it's racial stereotyping; the view that a given citizen's race determines his or her beliefs, ideology, and politics. *Miller v. Johnson*, 515 U.S. 900, 927 (1995). Indeed, when the Supreme Court invalidated affirmative action in higher education

admissions, it relied on this same equal protection injury—racial stereotyping—and even cited redistricting cases. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) ("*SFFA*").

Now turn to the Fifteenth Amendment. It guarantees that the right to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The core purpose of the Fifteenth Amendment is to do away with "racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). The Fifteenth Amendment protects against intentional racial discrimination. *City of Mobile v. Bolden*, 446 U.S. 55 (1980). It does not guarantee equality of outcomes based on race or implement a race-based spoils system. It does allow Congress to pass "appropriate" legislation to implement it. Relying on this authority, Congress passed the Voting Rights Act in 1965.

Racial gerrymandering violates both Amendments. *Shaw I*, 509 U.S. at 645 (citing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)). It violates the Fourteenth Amendment because it stereotypes voters and assigns them to districts based on their races. It violates the Fifteenth Amendment for that same reason, but also to the extent it dilutes the voting power of a voter based on his or her race. Although the redistricting injury is different because the Fourteenth Amendment and Fifteenth Amendment protect different (but closely related) rights, one would think that courts would be unable to tease out any conflict between the Amendments.

But enter the Voting Rights Act, which as noted above is on the Fifteenth Amendment side of the equation. It enforces the Fifteenth Amendment. Congress amended Section 2 of the Voting Rights Act in 1982 in response to the *Mobile v. Bolden* decision, which had clarified that under the Fifteenth Amendment, a plaintiff must show intentional discrimination. As our brief in the Supreme Court pointed out, the amendment seemed motivated by a congressional concern that it would be too difficult for plaintiffs in redistricting cases to prove intentional discrimination. Yet the report of this body—the Senate Report—recommended that plaintiffs should still prove a set of factors that could be viewed as circumstantial evidence of intentional discrimination. And the plain text of the Voting Rights Act made clear that plaintiffs still had to prove the lack of an equal opportunity to elect representatives of their choice "on account of" race, and that nothing in the Act gave members of any one race a right to proportional race-based representation in a legislature. Then, in 1986, in *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court elucidated a three-part test for making Voting Rights Act claims and instructed that courts should faithfully apply the factors in the Senate Report—including factors that demonstrated intentional discrimination. Notwithstanding this guidance, it was lower courts' reaction to this Section 2 amendment, and to *Gingles*, that pitted the Fifteenth

Amendment against the Fourteenth Amendment and removed any such proof of intentional discrimination.

In many cases, including in the Louisiana *Robinson* case which formed the starting point for *Callais*, plaintiffs prevailed by showing little more than a lack of proportional representation based on race. That is the opposite of what the Fifteenth Amendment and VRA actually require. The specific ways in which this tended to occur in district courts are detailed in the *Callais* Supreme Court briefing and are beyond the scope of this testimony. Crucially, though, both the proof and the remedy in these cases required parties and courts to study and pinpoint voters' race. They then would carefully carve up new districts based on race. Of course, that is precisely what violates the Fourteenth Amendment. Yet in almost none of the cases did plaintiffs show that race-based districting was a necessary evil in order to unwind immediately prior race-based discrimination by the state in redistricting. So over time, use of the VRA to enforce the Fifteenth Amendment began to violate the Fourteenth Amendment.

This was the tension. It was completely unnecessary given the actual text and coverage of the Fourteenth and Fifteenth Amendments. But it arose because majority-minority districts were forcibly created, either by states or by courts, every time it appeared that they were even somewhat possible. And courts created them without finding that the reason the district had not been created was because of intentional racial discrimination in drawing districts.

Callais solves this tension by clarifying an obvious misunderstanding in the courts. It clarifies that in applying the Voting Rights Act, majority-minority districts can't be intentionally created—that is, created with the intent to make such a district—without making the kinds of showings that the Fourteenth and Fifteenth Amendment already require. That showing is of intentional discrimination: a showing that the state's districting choices didn't arise from political or other traditional districting criteria, but instead emerged from an atmosphere where intentional discrimination—not party politics—is driving districting decisions and racial animus—not party politics—is driving voting. If a state or court intends to rely on Section 2 to create or preserve a "remedial" majority-minority district, then they must meet three conditions in addition to what had been the regular elements for making a Section 2 showing:

(a) The majority-minority district cannot be drawn with race a districting criterion. And the district must meet traditional and non-racial redistricting criteria, including any non-racial political goals of the state.

(b) Racially polarized voting must be shown to stem from racial animus—the desire to vote for or against someone because of their race—and be separated from the mere circumstance where different races tend to vote for different parties because of different political beliefs.
(c) There must be a showing of factors indicating an objective likelihood of intentional racial discrimination in districting in the area where the remedial district was drawn.

Requiring proof of these three factors ensures that the Fourteenth and Fifteenth Amendments operate as a mesh—as a seamless web of protection for voters. It resolves the tension that had developed. But, critically for purposes of my testimony, it also defines the areas in which the *Callais* decision should be implemented to study existing districts.

II. Implementing and Enforcing *Callais*

In my view, the only proper application of *Callais* is to identify the districts that would fail today under the Supreme Court's clarified factors. One would properly start with districts that were drawn based predominantly on race, which includes districts that were allegedly drawn to comply with the Voting Rights Act even absent other proof of racial considerations in drawing district lines.

Once those districts are identified, the next step is to apply the basic *Gingles* test before *Callais*. Do the districts qualify? If not, they can be challenged even without *Callais*' clarifications.

Finally, for districts that don't obviously fail under this calculus, one would simply move to the three factors from *Callais*. Districts that fail this test violate the Fourteenth Amendment and Fifteenth Amendment.

In applying these principles to existing districts, it is important to note some important limitations.

First, districts are not suspect and subject to challenge merely because they are majority-minority districts. Districts are neither more suspect nor less suspect because of their initial racial makeup. There is nothing inherently unconstitutional or problematic about a district based on the race (if any) that happens to make up its numerical majority. Indeed, that is the very principle that *Callais* vindicated.

Second, districts that necessarily had to be drawn to remedy recent intentional discrimination based on race should survive until the underlying racial

discrimination dissipates. Of course, if that discrimination dissipated years ago and a district originally drawn under the VRA has been mindlessly grandfathered through with no additional analysis, cycle after cycle, it needs to be subjected to close legislative review and strict judicial scrutiny; the map-drawer's original racial intent, even if calcified and nearly forgotten, is no more acceptable than a recent use of race. Indeed, as noted above, *Callais* vindicates the principle that race simply cannot predominate in district line-drawing. So state decisions that violate this principle (other than what is necessary to unwind prior discrimination) should continue to be forbidden, and should be no part of any post-*Callais* effort.

Finally, it is important to implement *Callais* as expeditiously as sound election administration allows. Given *Purcell v. Gonzalez*, 549 U.S. 1 (2007), and the election deadlines and administrative structure in many states, federal courts may have a limited role to play in enjoining unconstitutional maps during the current cycle. (There are some notable exceptions.) The laboring oar is held by state legislatures in many states, and those bodies can exercise their authority granted under the U.S. Constitution's Elections Clause to redistrict and, where possible, alter deadlines and other provisions to remedy unconstitutional racial gerrymanders. Much more will be possible in 2028.

Although much may change over the next two years, much remains the same after *Callais*. Section 2 of the Voting Rights Act and the Fifteenth Amendment will remain available options, along with racial gerrymandering claims under the Fourteenth Amendment, for challenging racial discrimination in drawing legislative districts. On the proper factual showing, as noted above, Voting Rights Act districts can still be drawn. And at all times race cannot predominate in drawing district lines.

The continued availability of these claims and the useful corrective of *Callais* will work together to mend redistricting and election law. They won't guarantee politically wise choices by legislatures in drawing districts, but they will move the battles into politics and policy, away from cynical racial stereotyping and bitter racial animus. More broadly, they will bring our country much further along the trajectory of the last century of Supreme Court jurisprudence. That trajectory is a hopeful one: toward the realization of a color-blind Constitution and a color-blind America. As our country faces new challenges and opportunities both at home and abroad, we must put racial divisions behind us. The sooner, the better.