Nos. 21A375, 21A376

In the Supreme Court of the United States

JOHN H. MERRILL, ET AL.,

Applicants,

v.

EVAN MILLIGAN, ET AL.,

Respondents.

JOHN H. MERRILL, ET AL.,

Applicants,

v.

MARCUS CASTER, ET AL.,

Respondents.

ON EMERGENCY APPLICATIONS FOR ADMINISTRATIVE STAY AND STAY OR INJUNCTIVE RELIEF PENDING APPEAL TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

MOTION OF UNITED STATES REPRESENTATIVES FROM ALABAMA FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPLICANTS WITHOUT 10 DAYS' NOTICE AND IN PAPER FORMAT

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Five of Alabama's seven United States House of Representatives members respectfully move for leave to file the enclosed brief as *amici curiae* in support of applicants. *Amici* include Representatives Jerry Carl Jr. (First District), Barry Moore (Second District), Mike Rogers (Third District), Robert Aderholt (Fourth District), and Gary Palmer (Sixth District). All are running for reelection in 2022 and thus have a significant interest in both the timeliness and the boundaries of the congressional districts. This case presents an important issue of interpreting and applying Section 2 of the Voting Rights Act. *Amici* have a strong interest in the administration of a nondiscriminatory election system that allows all Alabama citizens to participate equally. And *amici* are concerned that the remedy pursued by the plaintiffs and ordered by the district court will not only disrupt Alabama's elections but also jeopardize the State's neutral districting process. Their proposed brief analyzes these and other relevant legal issues from *amici*'s unique perspective.

Amici also move to file their brief without ten days' notice to the parties of their intent to file as ordinarily required by Sup. Ct. R. 37.2(a) and to file this brief in an unbound format on 8½-by-11-inch paper rather than in booklet form. These requests are necessary due to the press of time related to the emergency nature of the applications.

Amici notified counsel for applicants and respondents to obtain consent for their proposed brief. All parties consented.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

Amici are five of the seven United States House of Representatives members from Alabama, including Representatives Jerry Carl Jr. (First District), Barry Moore (Second District), Mike Rogers (Third District), Robert Aderholt (Fourth District), and Gary Palmer (Sixth District). All are running for reelection in 2022 and thus have a significant interest in both the timeliness and the boundaries of the congressional districts. This case presents an important issue of interpreting and applying Section 2 of the Voting Rights Act. *Amici* have a strong interest in the administration of a nondiscriminatory election system that allows all Alabama citizens to participate equally. And *amici* are concerned that the remedy pursued by the plaintiffs and ordered by the district court will not only disrupt Alabama's elections but also jeopardize the State's neutral districting process.*

* In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The National Republican Congressional Committee made a monetary contribution intended to fund the preparation and submission of this brief. All App. references are to the applicants' appendix in *Merrill v. Milligan*, No. 21A375.

SUMMARY OF THE ARGUMENT

The population of the United States is about 13% black, but no State is majority black. Republican voters compose about 35% of the Massachusetts electorate, but it is considered mathematically impossible to draw even one of its nine House districts as majority Republican. Nearly 10% of Floridians are at least 75 years old, yet those citizens do not form a majority in any of the State's 27 House districts. And none of these examples is surprising, because "[t]here is no caste here." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Americans of all backgrounds live among other Americans. This geographic dispersion means that proportionality between population and district dominance is not the norm in a neutral districting process. To achieve this type of unnatural proportionality, the process cannot be neutral. Something else must be given priority.

In the district court's view, Alabama's neutral process required a new overlay: racial segregation. The State's neutral process had, for years, produced one majority-minority district. The plaintiffs' own expert had run two million neutral maps, not one of which led to two majority-minority districts. App. 346. Most resulted in *zero* such districts. But the district court fixated on the fact that "Black Alabamians comprise approximately 27% of the State's population, and Alabama has seven congressional seats." App. 4–5. So, the district court emphasized, "Black Alabamians" *could* "constitute a voting-age majority in a second congressional district." App. 4. The plaintiffs' experts therefore "prioritized race" (App. 204) to determine whether the other factors could be manipulated to "divvy[] [Alabamians] up by race." *LULAC v.*

Perry, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in judgment in part, and dissenting in part).

Not only is the district court's approach inconsistent with the nature of proportional representation, it defies the Voting Rights Act, this Court's precedents, and the Fourteenth Amendment. Section 2 of the VRA does not "create a right to proportional representation." *Thornburg v. Gingles*, 478 U.S. 30, 84 (1986) (O'Connor, J., concurring in judgment). It protects equal access to "the political process" and expressly *not* "a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b). Section 2 should not be read to require states to adopt "proportional" maps that would never exist under neutral criteria, for such maps would themselves violate the statute. This Court has repeatedly upheld maps that did not provide proportional representation—and struck down proportional maps that hinged on race. Ordering a State "to engage in race-based redistricting and create a minimum number of districts in which minorities constitute a voting majority" "tend[s] to entrench the very practices and stereotypes the Equal Protection Clause is set against." *Johnson v. De Grandy*, 512 U.S. 997, 1029 (1994) (Kennedy, J., concurring in part and in judgment).

The district court's "explicit race-based districting embarks us on a most dangerous course." *Id.* at 1031. This Court should stay the ill-considered injunction below, which "promot[es] the notion that political clout is to be gained or maintained by marshaling particular racial, ethnic, or religious groups in enclaves." *Id.* at 1030 (cleaned up). The applications should be granted.

ARGUMENT

I. Because proportional representation is atypical in single-member districts, the district court prioritized race.

The district court's analysis assumes that because 27% of Alabama's population is black, two of its seven congressional districts (28%) should be majority black. App. 4–5, 196. The court thus adopted the views of the plaintiffs' experts, who worked backwards from that assumption and made that racial division a "nonnegotiable principle" before determining whether Alabama's black population is sufficiently numerous and compact. App. 246. This assumption of proportional representation turns out to be far less defensible than it appears. That is because, as the plaintiffs' own expert elsewhere explained, "the representational baseline for single-member districts is strongly dictated by the specific political geography of each time and place." Moon Duchin et al., *Locating the Representational Baseline: Republicans in Massachusetts*, 18 Election L.J. 388, 392 (2019).

As noted, many examples prove the point. The plaintiffs' expert has discussed Massachusetts, where Republican voters are 35% of the population but, because of their uniform distribution throughout the state, "1/3 of the vote prov[es] insufficient to secure any representation." *Id.* at 389 (emphasis omitted); *see also* D. Ct. Dkt. 105-2, Tr. 612:5-7 (Duchin testifying that "it's not only unlikely, it is on the nose mathematically impossible to draw a congressional district in Massachusetts that would have Republican majority"); *cf. Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019) (noting that in 1840, the Whigs in Alabama "garnered 43 percent of the statewide vote, yet did not receive a single seat" in the House of Representatives).

Even though the population of the United States is about 13% black,[1] no U.S. Senate district (*i.e.*, a State) is majority black. Ten percent of Floridians are at least 75 years old, but they apparently do not have a majority in any of the State's 27 U.S. House districts.[2] At the extreme, take a hypothetical ten-district state with 100 voters per district, in which a group constituting only 50% of the population (500 voters) could form a majority in nine districts if their geographic dispersion was such that those districts each contained 51 group members. The point is that political geography matters.

What is true nationally is true in Alabama. Fifty-three of Alabama's 67 counties are majority white, including five counties among the 18 in the Black Belt, which "is named for the region's fertile black soil" and "has a substantial Black population." App. 36. Black Alabamians live in majority-white places like Mobile (Mobile County) and Dothan (Houston County).[3] Thus, as a matter of political geography, Alabama's longstanding single majority-minority district comes as no surprise. It is a consequence not of nefarious motives, but of dispersion and intermingling of state residents regardless of race.

As the plaintiffs' expert has argued elsewhere, "Any meaningful claim of gerrymandering must be demonstrated against the backdrop of valid alternative districting plans, under the constraints of law, physical geography, and political

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[1] *See Quick Facts*, U.S. Census Bureau, https://perma.cc/2WDD-UE5L (last visited Jan. 31, 2022).
[2] *2021 Demographics*, Miami Matters, https://www.miamidadematters.org/demographicdata?id=12&sectionId=942 (Jan. 2021).
[3] *See Alabama: 2020 Census*, U.S. Census Bureau, https://www.census.gov/library/stories/state-by-state/alabama-population-change-between-census-decade.html (Oct. 8, 2021) (providing data for Mobile County (55.3% white and 35.3% black) and Houston County (64.6% white and 26.5% black)).

geography that are actually present in a jurisdiction." Duchin et al., *supra*, at 399. But here, the plaintiffs took a different route. Overcoming fundamental facts about Alabama's political geography required the plaintiffs to do just what the Voting Rights Act and the Fourteenth Amendment forbid: draw maps based on race.

The plaintiffs' expert had drawn two million neutral maps "without taking race into account in any way." App. 346. None of them produced two majority-minority districts. *Ibid.* The median number of majority-minority districts in the maps was *zero*. Moon Duchin & Douglas M. Spencer, *Models, Race, and the Law*, 130 Yale L.J.F. 744, 764 (2021).

As the expert explained, proportional outcomes do not "come for free," and "representation doesn't kick in until you're fairly segregated."[4] So she and the plaintiffs' other experts set about to segregate the State. Concluding "that it is hard to draw two majority-black districts by accident," the plaintiffs' expert decided that it was "importan[t]" to "do[] so on purpose." App. 349. Only after she operationalized the new model—with the "nonnegotiable principle" being segregation based on race—could she produce maps with two majority-minority districts. App. 246; *see also* App. 306 ("I needed to make sure that the districts I was creating would be over 50 percent black."); App. 280 ("None" of the "30,000 simulated plans included two" majority-black districts "because [the plaintiffs' other expert] didn't tell the algorithm to create a second.").

[4] Harvard University, *Political Geography: The Mathematics of Redistricting, A Lecture by Moon Duchin*, YouTube, at 17:58, 44:52 (Nov. 26, 2018), https://youtu.be/pi_i3ZMvtTo.

As the district court agreed, "some awareness of race likely is required to draw two majority-Black districts." App. 245. And one reason that the court found that the plaintiffs presented reasonably compact maps is because the maps "provide a number of majority-Black districts that is roughly proportional." App. 173. The district court excused the plaintiffs' race-based drawing because "[b]eyond ensuring crossing that 50 percent line, there was no further consideration of race." App. 247; *see also* App. 149, 151 (similar). In other words, once segregated by race, citizens were treated equally. *Cf. Plessy*, 163 U.S. at 552 (Harlan, J., dissenting) ("separate but equal").

II. The district court's approach defies the statute, precedent, and the Constitution.

This Court has construed Section 2 of the VRA to extend to state "dispersal of a group's members into districts in which they constitute an ineffective minority of voters." *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) (cleaned up); *but see Holder v. Hall*, 512 U.S. 874, 922–23 (1994) (Thomas, J., concurring in judgment). Under this Court's decision in *Thornburg v. Gingles*, "three threshold requirements for § 2 liability" exist—"namely, (1) that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district, (2) that the minority group is politically cohesive, and (3) that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate." *Bartlett v. Strickland*, 556 U.S. 1, 8–9 (2009) (plurality opinion) (cleaned up). "[O]nly when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances." *Id.* at 11–12.

The central question under Section 2 is "whether members of a racial group have less opportunity than do other members of the electorate." *LULAC*, 548 U.S. at 425–26. Given that two million neutral maps *never* produced two majority-minority districts (and usually produced zero), the answer here to that question must be "no." To arrive at the opposite answer, the district court and the plaintiffs started with race and worked backwards. As shown above, "[r]ace was the criterion that . . . could not be compromised," *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 907 (1996), even in applying the *Gingles* preconditions. This focus on race at the outset of the analysis contradicts Section 2, this Court's precedents, and the Fourteenth Amendment's guarantee of equal protection.

A. Section 2 does not require proportional representation.

As this Court observed in *Georgia v. Ashcroft*, "the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life." 539 U.S. 461, 490–91 (2003). The VRA seeks "a society that is no longer fixated on race." *Id.* at 490. But the district court's conclusion depends on a fixation with race. Not once in two million map simulations did the plaintiffs' expert happen upon a scheme with two majority-minority districts. Only when race became the "nonnegotiable principle" could such a map be made. App. 246. Using those maps would violate Section 2, and the VRA should not be interpreted in such a self-defeating way.

Section 2 does not guarantee equality through proportional representation. "[T]he ultimate right of § 2 is equality of opportunity." *De Grandy*, 512 U.S. at 1014 n.11.

Section 2 is violated only if "the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens." 52 U.S.C. § 10301(b). Here, two million efforts at other maps conclusively show that Alabama elections are equally open based on neutral criteria. So the plaintiffs can prevail on their Section 2 claim only if the statute guarantees representation, rather than protection against state action that abridges the right to compete on an equal footing in the electoral process. But Section 2 specifically disclaims that it "establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." *Ibid.*; *see also Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2342 n.14 (2021) (noting this disclaimer as "a signal that § 2 imposes something other than a pure disparate-impact regime"); *Rucho*, 139 S. Ct. at 2502 ("[A] racial gerrymandering claim does not ask for a fair share of political power and influence . . . . It asks instead for the elimination of a racial classification.").[5]

To be sure, this Court in *De Grandy* examined proportionality as potentially relevant in the "totality of the circumstances" analysis after the three *Gingles* preconditions have been met. But the Court also cautioned that "the degree of probative value assigned to disproportionality, in a case where it is shown, will vary

[5] As the Senate Report accompanying the 1982 amendments to the Act (which added this language) states, this provision is intended to "put[] to rest any concerns that have been voiced about racial quotas." Sen. Rep. No. 97-417, at 31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 208. The Senate Report shows that this language was intended to "codify" the analysis this Court used in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *White v. Regester*, 412 U.S. 755 (1973). *See* S.R. Rep. No. 97-417, *supra*, at 196–201, 204–13. Under these cases "[t]he plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open . . . in that its members had less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice." *White*, 412 U.S. at 765–66; *accord Whitcomb*, 403 U.S. at 149.

not only with the degree of disproportionality but with other factors as well." 512 U.S. at 1021 n.17. "[L]ocal conditions" matter. *Ibid.* (cleaned up). Here, application of neutral factors to Alabama's political geography yielded, two million times over, no more proportional representation.

In any event, considering proportionality *after* the *Gingles* conditions have been shown is much different from what the district court did here, which is look to proportionality to excuse race-based consideration of the conditions themselves. Starting with segregation distorts the *Gingles* analysis by de facto favoring a race-based plan over either the existing plan or other neutral ones. The *Gingles* conditions presume "traditional districting principles such as maintaining communities of interest and traditional boundaries." *Abrams v. Johnson*, 521 U.S. 74, 92 (1997) (cleaned up). Considering race *before* considering these traditional principles makes the "prohibited assumption" "from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls." *LULAC*, 548 U.S. at 433 (cleaned up); *see also Miller v. Johnson*, 515 U.S. 900, 919 (1995) (warning that "traditional districting principles" cannot be "subordinated to racial objectives"). Thus, if neutral maps cannot (or rarely) produce a sufficiently numerous, compact minority group, the *Gingles* conditions cannot be satisfied. *See Gonzalez v. City of Aurora*, 535 F.3d 594, 600 (7th Cir. 2008) (Easterbrook, C.J.) (asking whether Latino population was "concentrated in a way that *neutrally drawn compact districts* would produce three" majority-minority districts (emphasis added)); *see generally* Jowei Chen & Nicholas O. Stephanopoulos, *The Race-Blind Future of Voting*, 130

Yale L.J. 862 (2021).

Finally, the district court's analysis would trap states in an endless cycle of Section 2 violations. Again, the central question is "whether members of a racial group have less opportunity than do other members of the electorate." *LULAC*, 548 U.S. at 425–26. If a map can exist only by racial discrimination, necessarily it discriminates against members of a group. The very relief given to one set of plaintiffs—racially based districts that would never exist under neutral principles—would itself create a new Section 2 violation as to another plaintiff class, whose voting strength would be diminished by the remedial plan. Had a legislative mapmaker started off making racial segregation a "nonnegotiable principle," there is little doubt what fate the resulting map would meet on a Section 2 challenge. *E.g.*, *Miller*, 515 U.S. at 919 ("This statement from a state official is powerful evidence that the legislature subordinated traditional districting principles to race"); *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring) ("Race cannot be the predominant factor in redistricting"). So telling the Alabama legislature to adopt such a map (within 14 days) is telling it to violate the very federal law the new map would supposedly remedy. The statute should not be read to lead to so absurd a result. Not only does its text forbid this result, "few devices could be better designed to exacerbate racial tensions than the consciously segregated districting system" required by the district court. *Holder*, 512 U.S. at 907 (Thomas, J., concurring in judgment).

B. Precedent does not require proportional representation.

This Court's precedents confirm that there are no race-based traditional districting criteria a State may employ to achieve proportional representation. In

Miller v. Johnson, the Court explained that to establish a racial gerrymandering claim, "a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." 515 U.S. at 916 (cleaned up). "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." *Ibid.* (cleaned up). Nowhere has the Court suggested that there are legitimate or traditional *race-based* principles to which states may point as a defense.

In *Miller*, this Court invalidated congressional maps drawn in Georgia that sought proportional representation. At the insistence of the U.S. Department of Justice, the state legislature had drawn three of 11 districts as majority-minority to mirror the State's black population (27%). *Id.* at 906–07, 927–28. The Court rejected those maps because, as the State had all but conceded, "race was the predominant factor in drawing" the new majority-minority district. *Id.* at 918. "[E]very objective districting factor that could realistically be subordinated to racial tinkering in fact suffered that fate." *Id.* at 919 (cleaned up). Even where "the boundaries" of the new district "follow[ed]" existing divisions like precinct lines, those choices were themselves the product of "design[] . . . along racial lines." *Ibid.* (cleaned up).

The Court rejected this racial gerrymander, specifically holding that "there was no reasonable basis to believe that Georgia's earlier [non-proportional] plans violated" the VRA. *Id.* at 923. "The State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not

support an inference that the plan . . . discriminates on the basis of race or color." *Id.* at 924. Because engaging in "presumptively unconstitutional race-based districting" would have brought the VRA "into tension with the Fourteenth Amendment," the Court rejected the State's maps, even though those maps provided proportional representation. *Id.* at 927. As the Court explained, "It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids." *Id.* at 927–28.

This Court thus remanded the case, and after the state legislature failed to act, the district court drew maps with only one majority-minority district (9%)—representation far below black Georgians' 27% share of the population. *Abrams*, 521 U.S. at 78; *see id.* at 103 (Breyer, J., dissenting). "The absence of a second, if not a third, majority-black district" was "the principal point of contention" here. *Id.* at 78 (majority opinion). Yet this Court upheld the district court's maps, which focused on "Georgia's traditional redistricting principles." *Id.* at 84. The district court had "considered the possibility of creating a second majority-black district but decided doing so would require it to subordinate Georgia's traditional districting policies and consider race predominantly, to the exclusion of both constitutional norms and common sense." *Ibid.* (cleaned up). This Court agreed, and explained "that the black population was not sufficiently compact" for even "a *second* majority-black district." *Id.* at 91 (emphasis added). Thus, even getting to two majority-minority districts (18%) by focusing on race would have violated the Equal Protection Clause, and the

Court rejected the use of DOJ's proposed "plan as the basis for a remedy [that] would validate the very maneuvers that were a major cause of the unconstitutional districting" at issue in *Miller*. *Id.* at 86; *see id.* at 109 (Breyer, J., dissenting) ("The majority means that a two-district plan would be unlawful—that it would violate the Constitution").

This Court's teachings in *Miller* and *Abrams* show the error of the district court's analysis, which prioritized race over traditional districting principles in pursuit of proportional representation. Not only is the degree of disproportionality in this case well below the disproportionality permitted in *Abrams*, the district court's overarching focus on race makes the same mistake made by the state legislature (at DOJ's insistence) in *Miller*. The district court's decision thus conflicts with this Court's precedents.

C. The Fourteenth Amendment prohibits maps drawn by race.

A State cannot constitutionally be forced to adopt a plan that is premised on and would never exist absent unequal treatment based on race. "[T]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause." *Bartlett*, 556 U.S. at 21 (cleaned up). "[S]ystematically dividing the country into electoral districts along racial lines" is "nothing short of a system of 'political apartheid.'" *Holder*, 512 U.S. at 905 (Thomas, J., concurring in judgment) (quoting *Shaw v. Reno* (*Shaw I*), 509 U.S. 630, 647 (1993)). For that reason, "the sorting of persons with an intent to divide by reason of race raises the most serious constitutional questions." *De Grandy*, 512 U.S. at 1029 (Kennedy, J., concurring in part and in judgment).

This Court has applied strict scrutiny when the government discriminates based

on "racial classifications." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (plurality opinion) (collecting cases). Racial gerrymanders must be narrowly tailored to achieving a "compelling state interest." *Shaw II*, 517 U.S. at 908. Proportional representation is not a compelling state interest. *See Gingles*, 478 U.S. at 84 (O'Connor, J., concurring in judgment) ("Congress did not intend to create a right to proportional representation"). This Court has "assume[d], without deciding, that the State's interest in complying with the Voting Rights Act [is] compelling." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 801 (2017).[6] But "the purpose of the Voting Rights Act [is] to eliminate the negative effects of past discrimination," *Gingles*, 478 U.S. at 65, and "[a] State's interest in remedying the effects of past or present racial discrimination" will only "rise to the level of a compelling state interest" if the State "satisf[ies] two conditions," *Shaw II*, 517 U.S. at 909. *First*, "the discrimination must be 'identified discrimination.'" *Ibid.* Any mere "generalized assertion of past discrimination in a particular industry or region is not adequate." *Ibid.* And likewise, "an effort to alleviate the effects of societal discrimination is not a compelling interest." *Id.* at 909–10. *Second*, a legislature "must have had a strong basis in evidence to conclude that remedial action was necessary, *before* it" acts based on race. *Id.* at 910 (cleaned up)

Here, the plaintiffs cannot show either condition leading to a compelling interest, much less narrow tailoring. They cannot identify any relevant discrimination,

[6] It is passing strange to characterize compliance with a *statute* as justifying a violation of the *Constitution*. *Cf. Bethune-Hill*, 137 S. Ct. at 804–05 (Thomas, J., concurring in judgment in part and dissenting in part).

because two million neutral maps produced the same (or less) representation. And they cannot show that a "strong basis in evidence" justifies their maps. *Cooper*, 137 S. Ct. at 1464. The only discrimination here is by the plaintiffs, whose proposed "racial tinkering" and prioritization of "mechanical racial targets above all other districting criteria" provides strong "evidence that race motivated the drawing" of their proposed remedial redistricting plan. *Miller*, 515 U.S. at 919 (cleaned up) (first quote); *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 267 (2015) (second and third quotes).

"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 551 U.S. at 748. This Court should not countenance the district court's substitution of a race-neutral plan for one premised on segregation.

CONCLUSION

"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—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Bartlett*, 556 U.S. at 21 (quoting *Shaw I*, 509 U.S. at 657). By prioritizing race to pursue segregated maps, the district court ran afoul of both the VRA and the Constitution. The applications should be granted.

Respectfully submitted,

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