No. 25A839

In The Supreme Court of the United States

DAVID TANGIPA, ET AL., APPLICANTS

v.

GAVIN NEWSOM, GOVERNOR OF CALIFORNIA, ET AL.

On Application for Writ of Injunction of the Order of the United States District Court for the Central District of California

BRIEF OF PROFESSOR RICHARD L. HASEN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS GAVIN NEWSOM, ET. AL.

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INTEREST OF *AMICUS CURIAE*[1]

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From 2001-2010, Professor Hasen served as founding co-editor of the quarterly peer-reviewed publication, *Election Law Journal*. He is the author of well over 100 articles on election law issues, published in numerous journals including the *Harvard Law Review*, *Stanford Law Review*, *Supreme Court Review*, and *Yale Law Journal*. He was elected to The American Law Institute in 2009 and serves as Co-Reporter on the Institute's law reform project, Restatement (Third) of Torts: Remedies and an Adviser on the Restatement of Election Litigation.

He submits this brief on his own behalf in support of Respondents Governor Newsom and Secretary of State Weber to address an issue of first impression involving a racial gerrymandering claim brought against a redistricting plan approved by voters via a ballot measure. The district court below relied upon his analysis in a brief he submitted there. D. Ct. Doc. 216 (Op.), at 14 (Jan. 14, 2026).

SUMMARY OF THE ARGUMENT

This case concerns an issue of first impression: How should a court determine

[1] No party's counsel authored this brief in whole or in part; no party, counsel for a party, or any person other than amici curiae or his counsel made a monetary contribution toward the preparation and submission of this brief. *Amicus* submits this brief in his personal capacity; organizations are listed for identification purposes only.

whether an intent to separate voters in a redistricting plan on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment predominated when that plan was adopted by voters via a ballot measure? As set forth below, in rejecting Petitioners' request for a preliminary injunction, the district court properly concluded that because California's voters were the ones who enacted Proposition 50—which put into effect a new congressional district map—the *voters'* intent, and not that of the California Legislature that proposed the ballot measure, controls in determining whether race was the predominant factor motivating the redistricting plan. Op. 22. And it found that voters likely had no such unconstitutional intent that would support a preliminary injunction in this case. Op. 37.

Focusing on voters' intent when it is the voters who enact the challenged redistricting plan makes sense given the nature of the claim. The harm that this Court first recognized in *Shaw v. Reno*, 509 U.S. 630 (1993) is an expressive one based on a message sent from the decisionmaker that it has intentionally separated voters on the basis of race without a compelling justification. Consideration of voters' intent is crucial in the case of a redistricting plan passed by ballot measure because it is *voters*, not the person or body proposing the plan to voters, who risk sending a message of racial separation.

In this case, all of the reliable evidence of California voters' intent reveals that race did not predominate in the voter's passage of Proposition 50 and its accompanying maps. The official ballot materials made available to and relied upon by the voters when they voted on the measure repeatedly described Proposition 50 as

a redistricting plan benefitting Democrats to counteract a Republican partisan gerrymander in Texas. Indeed, the ballot measure materials repeatedly describe the measure as follows: "AUTHORIZES TEMPORARY CHANGES TO CONGRESSIONAL DISTRICT MAPS IN RESPONSE TO TEXAS' PARTISAN REDISTRICTING." D. Ct. Doc. 113, at 10, 9–17 (Dec. 3, 2025).

Because this evidence demonstrates that Petitioners cannot show they are likely to succeed on the merits of their claim, the district court properly rejected Petitioners' motion for a preliminary injunction.[2]

Petitioners, the United States, and Judge Lee in his dissent below did not disagree with the majority's conclusion that there was zero evidence that voters intended a racial gerrymander in passing Proposition 50; voters wanted a Democratic partisan gerrymander to counteract the Republican partisan gerrymander in Texas. Justice Alito, joined by Justice Gorsuch, recently made the same point in the Texas gerrymandering case: "the dissent does not dispute—because it is indisputable—that the impetus for the adoption of the Texas maps (*like the map subsequently adopted in California*) was partisan advantage pure and simple." *Abbott v. LULAC*, slip op. 2–3

[2] The district court found, in the alternative, that even if the court considered the intent of the Legislature or of the mapmaker, Paul Mitchell, who assisted the Legislature in crafting the proposal submitted to voters, Petitioners did not show that race predominated. Op. 37–38, 67. This brief does not consider this alternative basis. Nor does this brief consider whether it is too late under *Purcell v. Gonzalez*, 549 U.S. 1 (2006), for this Court to fashion a remedy as it held for the recent passage of Texas's partisan gerrymandering, *Abbott v. LULAC*, No. 25A608, slip op. 2 (Dec. 4, 2025), or if it is appropriate for this Court to grant a statewide injunction, as Judge Lee argued in his dissent, Op. 115–16, in a case in which Petitioners at most attempted to show a constitutional violation in a single district, District 13. *Cf. Growe v. Emison*, 507 U.S. 25, 34 (1993) ("'We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.' *Chapman v. Meier*, 420 U. S. 1, 27 (1975). Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.").

(Alito, J. concurring in the grant of application for stay) (emphasis added).

Petitioners view voters as simply the dupes of the legislature that proposed the ballot measure, Appl. 15–17, a conclusion foreclosed by this Court's decision in *Brnovich v. Democratic National Committee*, 594 U.S. 647, 689 (2021) ("partisan motives are not the same as racial motives"). The United States seems to agree with the district court and this brief that voters' intent should control in a case like this one, but it then ignores that intent in favor of an abstract examination of the maps themselves. Brief of the United States 21–22. Judge Lee focused on the intent of the legislature because he apparently believed that discerning voter intent is impossible. Op. 88. To the contrary, this Court has examined voters' intent in the past in cases such as *Romer v. Evans*, 517 U.S. 620 (1996), and states routinely do so when they engage in statutory interpretation of voter-approved ballot measures. All the evidence here shows voters intended a partisan gerrymander, not a racial one.

Even if the district court's legal or factual conclusions were debatable, Petitioners should still lose in this Court. To begin with, voters, like legislators, are entitled to a "presumption of good faith" when they enact redistricting plans. *See Abbott v. Perez*, 585 U.S. 579, 610–612 (2018). Petitioners offered no evidence to rebut this presumption. Indeed, the flip side of Petitioners' claim that voters were "dupes" is that the voters were acting in good faith and did not intend to unconstitutionally separate voters on the basis of race, regardless of the intent of the ballot measure's sponsors.

It is not enough in this case even for Petitioners to show a clear error of fact by

the district court or an abuse of discretion in denying the preliminary injunction. (There was neither.) Petitioners face a far heavier burden because they seek an injunction pending appeal. A request for an injunction pending appeal in this Court "'demands a significantly higher justification' than a request for a stay." *Respect Me. PAC v. McKee*, 562 U.S. 996, 996 (2010) (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)). A heightened standard applies because "unlike a stay, an injunction 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.'" *Id.* (quoting *Ohio Citizens for Responsible Energy*, 479 U.S. at 1313). As the Chief Justice has written, such injunctions are appropriate only when "the legal rights at issue are indisputably clear and, even then, sparingly and only in the most critical and exigent circumstances." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (internal quotation marks omitted) (quoting Stephen M. Shapiro et al., Supreme Court Practice § 17.4 (11th ed. 2019)); see also *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403 (2012) (Sotomayor, J., in chambers); *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers); see generally Note, *The Role of Certiorari in Emergency Relief*, 137 Harv. L. Rev. 1951, 1956 & nn. 56–58 (2024).

Because Petitioners have not demonstrated an indisputably clear right to an injunction pending appeal in this case, this Court should deny the application.

ARGUMENT

I. Only Redistricting Plans Adopted with a Predominant Motive to Separate Voters on the Basis of Race Violate this Court's Test for Racial Gerrymandering Under the Equal Protection Clause.

This Court has long recognized that a state violates the Equal Protection Clause of the Fourteenth Amendment when it engages in intentional racial discrimination, such as intentional vote dilution, in designing its rules for electing members of legislative bodies. *City of Mobile v. Bolden*, 446 U.S. 55 (1980). In 1993, this Court first recognized an "analytically distinct" racial gerrymandering claim, also under the Equal Protection Clause. *Shaw*, 509 U.S. at 652. This claim is one based not upon intentional discrimination, but one in which a state enacts a redistricting plan with predominant racial intent, and without a compelling justification for doing so.

As this Court explained in *Miller v. Johnson*, 515 U.S. 900, 917 (1995):

> [T]he plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

Id.

Where these or other considerations, such as partisan gerrymandering, are the basis for redistricting legislation, and they are not subordinated to race, a state can "'defeat a claim that a district has been gerrymandered on racial lines.'" *Id.* (quoting *Shaw*, 509 U.S. at 647). Further, "if racial considerations predominated over others,"

the state must prove that "the design of the district" satisfies "strict scrutiny" by showing "that its race-based sorting of voters serves a compelling interest and is narrowly tailored to that end." *Cooper v. Harris*, 581 U.S. 285, 292 (2017) (internal quotations and citations omitted).

Since *Miller*, this Court has decided a number of cases determining whether race or partisanship predominated in drawing district lines, including *Easley v. Cromartie*, 532 U.S. 234 (2001), *Cooper*, and *Alexander v. S.C. State Conference of NAACP*, 602 U.S. 1 (2024). It is currently considering this issue, as well as whether compliance with Section 2 of the Voting Rights Act can serve as a compelling interest to justify racial predominance, in *Louisiana v. Callais*, 145 S. Ct. 2608 (2025) (setting the case for reargument).

This case raises the same question: whether race or other considerations, including partisanship, predominated in the drawing of California's new congressional districts.

II. In Determining Whether Race Predominated in a Redistricting Plan Enacted by Voters via a Ballot Measure, the Voters' Intent Should Matter, Not That of the Legislature Proposing the Plan.

When this Court set out the elements of the racial gerrymandering cause of action in *Miller*, it framed the issue in terms of "legislative purpose." *Miller*, 515 U.S. at 916; *see also id.* (holding that plaintiffs must prove "that *the legislature* subordinated traditional race-neutral districting principles") (emphasis added). It is unsurprising that this Court focused on the intent of the state legislature in framing the issue in that case: Not only did *Miller* concern a redistricting plan adopted solely by the state legislature, but before this case, this Court has never considered a racial

gerrymandering claim in the context of districts adopted by any state actor *other than* a state legislature, such as a plan enacted by voters through a ballot measure or by a state-appointed redistricting commission.[3]

As a matter of first impression, however, it should be the body that actually enacted the redistricting plan, rather than some other body that proposed the plan, whose purpose should matter in the first prong of the racial gerrymandering inquiry. After all, the gravamen of a racial gerrymandering claim is that of an expressive harm—that adoption of the redistricting plan sends a message to the public that people are being separated into different districts by the state on the basis of race. As the Court explained in *Shaw*:

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls.

509 U.S. at 647; *see also Bush v. Vera*, 517 U.S. 952, 984 (1996) (plurality opinion) (recognizing the harm in racial gerrymandering cases as "expressive harm"); *id.* at 1054 (Stevens, J., dissenting) (explaining that a racial gerrymandering "injury is probably best understood as an 'expressive harm,' that is, one that 'results from the

[3] Under California law, it is well-established that the state's voters—"the ultimate source of legitimate political power"—are acting in a legislative capacity in adopting a redistricting plan through a ballot measure. *Legislature v. Deukmejian*, 669 P.2d 17, 30 (Cal. 1983). In that case, the California Supreme Court affirmed that the adoption of district boundaries was an exercise of "legislative" power, even when accomplished by a ballot measure, and that "the power of the people through the statutory initiative is coextensive with the power of the Legislature." *Id*. at 22, 26–27.

idea or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about.'" (quoting Pildes & Niemi, Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election–District Appearances after *Shaw v. Reno*, 92 Mich. L.Rev. 483, 506–507 (1993))).

Therefore, when voters or a redistricting commission enact a plan, it should be that body's intent that matters. It is the voters in passing a redistricting ballot measure who risk sending a message that they are subordinating traditional redistricting principles to make race predominate. *See* Op. 15 ("the very nature of the injury, 'that the State has used race as a basis for separating voters into districts,' *Miller*, 515 U.S. at 911, demands that we focus not on preliminary or peripheral comments, but on why the relevant decisionmaker chose to enact these congressional district maps").

III. The Voters' Intent Should Matter Even If the Redistricting Plan Originated as a Proposal from the State Legislature.

In the case before this Court, California voters approved Proposition 50, a ballot measure that enacted a congressional redistricting plan proposed by the California Legislature. The California Legislature could not have enacted a congressional redistricting plan on its own because California voters had taken away the Legislature's power to draw district lines for congressional elections through a 2010 voter initiative amending the California Constitution, which gave that power to an independent citizens' commission.[4] That is, the Legislature's authority was

[4] The voter initiative was Proposition 20, whose text is available online. Redistricting of Congressional Districts, UC Law SF Scholarship Repository (2010), https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=2334&context=ca_ballot_props/.

limited; the only authority it possessed to create new congressional districts was the power *to propose* to the voters another ballot measure amending the state Constitution to enact a new redistricting plan for use in the 2026 through 2030 congressional elections. It was ultimately up to the voters to decide whether to adopt the proposed districts, and therefore it is the voters' intent that is relevant for the racial gerrymandering inquiry. The district court agreed. Op. 14–22.

Thus, even if—as Petitioners argue—there were evidence that the California Legislature had proposed a plan with predominantly racial intent, it is the *voters'* intent in enacting the plan that should matter. Voters enacting redistricting plans are entitled to a presumption of good faith, the same presumption of good faith that this Court has recognized is appropriate in evaluating a legislature's intent. *Alexander*, 602 U.S. at 10 ("This presumption of legislative good faith directs district courts to draw the inference that cuts in the legislature's favor when confronted with evidence that could plausibly support multiple conclusions. This approach ensures that 'race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines.'" (first citing *Abbott v. Perez*, 585 U.S. 579, 610–612 (2018); and then quoting *Miller*, 515 U.S. at 913). One reason for this presumption is to "be wary of plaintiffs who seek to transform federal courts into weapons of political warfare that will deliver victories that eluded them in the political arena." *Id.* (citations and internal quotation marks omitted). Petitioners, having been spurned by the district court, ask this Court to be their new weapon of political lawfare.

In *Abbott*, for example, this Court held that there could be no presumption of unconstitutional racial intent when the Texas Legislature readopted a map that the district court had found two years earlier to have been enacted with such unconstitutional intent. The Court rejected the idea of "original sin" and held that even if the state had originally enacted its plan with unconstitutional intent, it was entitled to a presumption of good faith in reenacting the same plan. 585 U.S. at 603–05. If, under *Abbott*, the same legislative body reenacting the same plan is entitled to the presumption of good faith even after the plan had been judicially determined to have initially been adopted with an unconstitutional intent, then surely the voters—who are distinct from and act independently of the state legislature—should be entitled to the same presumption of good faith when they enact a new redistricting plan. That is especially true when the voter-enacted plan has not previously been adjudicated to be unconstitutional. Any "original sins" of the legislature should not be transmuted to the voters.

Indeed, even when considering the intent of the legislative body itself, this Court has instructed that courts should not infer unconstitutional legislative intent from the views or motives of the legislation's sponsors. In *Brnovich v. DNC*, 594 U.S. 647, 689 (2021), the Court rejected the Ninth Circuit's adoption of a "cat's paw" theory to determine a legislature's intent:

> A "cat's paw" is a "dupe" who is "used by another to accomplish his purposes." Webster's New International Dictionary 425 (2d ed. 1934). A plaintiff in a "cat's paw" case typically seeks to hold the plaintiff's employer liable for "the animus of a supervisor who was not charged with making the ultimate [adverse] employment decision." *Staub v. Proctor Hospital*, 562 U.S. 411, 415 (2011). The "cat's paw"

> theory has no application to legislative bodies. The theory rests on the agency relationship that exists between an employer and a supervisor, but the legislators who vote to adopt a bill are not the agents of the bill's sponsor or proponents. Under our form of government, legislators have a duty to exercise their judgment and to represent their constituents. It is insulting to suggest that they are mere dupes or tools.

Voters are not dupes or tools, either. Just as courts should not infer that state legislatures are "dupes" of the sponsors of bills who may harbor an unconstitutional intent, this Court should not infer that voters are dupes of the Legislature that proposed Proposition 50 for their consideration. The district court agreed with this conclusion. *See* Op. 18–19 (rejecting as "antithetical" to law Petitioners' argument that voters were impermissibly asked to "cleanse" a legislative redistricting proposal submitted to voters; "this is simply a reiteration of the cat's paw: that although the voters have the real power, they are mere dupes of the legislature's impermissible will"); Op. 20–21 (citing this Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996) as an example of a court discerning whether voters had an unconstitutional intent in passing a ballot measure).

IV. Ballot Measure Materials Available to Voters Before Passage of Proposition 50 Aid in Determining the Voters' Intent.

Determining the voters' intent in passing a ballot measure is different from establishing the intent of a legislature, which typically holds hearings, hears from witnesses, and debates the finer points of legislation before a statute's passage. Voters do none of these things. Instead, in California, voters receive official materials related to the ballot measure, including the text of the measure, a summary prepared by the Attorney General, an analysis by the state's Legislative Analyst, and arguments for and against the measure. Voters are also sometimes exposed to

campaign-related advertising, news coverage, and other materials addressing the proposed measure.

Amicus is aware of no case before this one in which a court has had to determine whether voters had an unconstitutional intent to make race predominant in enacting a redistricting plan, much less what evidence is relevant to such an inquiry. But there are many cases in which California courts have been called upon to determine voters' intent in an analogous context, that of statutory interpretation. These cases can and should guide the Court in determining what evidence best establishes voters' intent in the present case. *See* D. Ct. Doc. 113, at 15, 22; Op. 22–37 (giving detailed examination of voters' intent).

In determining the meaning of California ballot measures for purposes of statutory interpretation, the unambiguous text of course controls. But when a measure's text is ambiguous and California courts are called upon to determine the underlying "legislative intent," they look primarily to the official ballot measure materials, which are the only materials that courts can be confident were available to all California voters when voting on the measure. As the California Supreme Court explained in *People v. Rizo*:

> In interpreting a voter initiative like Proposition 187, we apply the same principles that govern statutory construction. Thus, we turn first to the language of the statute, giving the words their ordinary meaning. The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme. When the language is ambiguous, we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.

996 P.2d 27, 30 (Cal. 2000) (citations and internal quotation marks omitted).

Of particular note for the present case, California caselaw makes clear that the courts must consider the understanding and intent of the voters in *enacting* a ballot measure—as reflected in the official ballot materials—and not the views and intent of the drafters who *proposed* the measure to the voters for their adoption. As the California Supreme Court summarized in *Robert L. v. Superior Court*, "[t]his court has made it clear that the motive or purpose of the drafters of a statute is not relevant to its construction, absent reason to conclude that the body which adopted the statute was aware of that purpose and believed the language of the proposal would accomplish it. The opinion of drafters or legislators who sponsor an initiative is not relevant since such opinion does not represent the intent of the electorate and we cannot say with assurance that the voters were aware of the drafters' intent." 69 P.3d 951, 957 (Cal. 2003) (citations and internal quotation marks omitted).

Thus, in *Mobileparks West Homeowners' Association v. Escondido Mobileparks West*, 41 Cal. Rptr. 2d 393, 399 n.6 (Ct. App. 1995), a California Court of Appeal rejected declarations submitted from the sponsors of an initiative to shed light on its meaning, holding that "such evidence is not persuasive as to voter intent, and . . . the ballot arguments are the only proper extrinsic aid which could be considered on that subject." *See also Knight v. Superior Court*, 26 Cal. Rptr. 3d 687, 695 n.4 (Ct. App. 2005) (same); *C-Y Development Co. v. City of Redlands*, 187 Cal. Rptr. 370, 374 (Ct. App. 1982) (rejecting declarations of initiative proponents purporting to interpret its meaning, and adding: "The general rule is that, in determining legislative intent, the views of individual drafters are not considered as grounds upon which to construe a

statute. There is no necessary correlation between what the drafter understood the text to mean and what the voters enacting the measure understood it to mean" (quoting 2A Sutherland, Statutory Construction (4th ed. 1973) § 48.12, pp. 214–215)). The reason is simple: courts are entitled to review what was shared with voters. *Gilbert v. Chiang,* 173 Cal.Rptr.3d 864, 872 (Cal. Ct. App. 2014) (legislative staff notes not shared with voters improper basis for construing meaning of ballot measure); *Legislature v. Deukmejian*, 669 P.2d at 25 & n.14 (noting that materials placed before the voters may be considered in ascertaining voter intent).

These cases suggest that it was appropriate for the district court to examine the official ballot materials made available to the voters regarding Proposition 50 in determining whether race or other considerations predominated in the drawing of California's new congressional districts. And as set forth below, those materials make it abundantly clear that *partisan* considerations, not racial considerations, were the predominant and motivating factors in the voters' adoption of the new redistricting plan.

V. The Proposition 50 Ballot Measure Materials Demonstrate Unequivocally that California Voters Were Supporting a Partisan Gerrymander, Not Intending to Make Race the Predominant Factor in Adopting the New Redistricting Plan.

The Proposition 50 ballot measure materials provide the relevant evidence for this Court to consider on voter intent. Official Voter Information Guide, Special Statewide Election, Tuesday, November 4, 2025, https://vig.cdn.sos.ca.gov/2025/special/pdf/complete-vig.pdf. That evidence shows that California voters were asked to adopt, and they ultimately enacted, a partisan

gerrymander of the state's congressional seats to benefit Democrats in order to counteract a partisan gerrymander favoring congressional Republicans in Texas. *See* D. Ct. Doc. 113, at 22; Op. 3–4, 9–10 (describing the ballot materials' focus on partisan gerrymandering, not race).

The quick-reference guide describes Proposition 50 as follows: "AUTHORIZES TEMPORARY CHANGES TO CONGRESSIONAL DISTRICT MAPS IN RESPONSE TO TEXAS' PARTISAN REDISTRICTING." D. Ct. Doc. 113 at 10. This same language appears on the header of *every page* in the pamphlet from pages 9-17 containing the Legislative Analyst's analysis and the arguments for and against the proposition. D. Ct. Doc. 113-2, at 20–28.

The guide also summarizes an argument in support of Proposition 50 on the grounds that it would "counter Donald Trump's scheme to rig next year's congressional election." *Id.* at 16. It also includes a summary of the argument against adoption on the grounds that Proposition 50 would remove "protections that ban maps designed to favor political parties." *Id.*

The Attorney General's title and summary describes Proposition 50 as a response to "Texas' mid-decade partisan redistricting." *Id.* at 19. The California Legislative Analyst's Office, the nonpartisan body responsible for, among other things, analyzing the impact of ballot measures offers an analysis of Proposition 50. The analysis addresses the background events motivating Proposition 50, describes the unusual nature of mid-decade redistricting, and explains the impact of Proposition 50 as adopting new maps drawn in compliance with "federal law," but

without the limitations otherwise imposed by California law on the redistricting commission. *Id*. at 20. The analysis notes projected fiscal impacts, and the proposition's call for federal redistricting reform, but it does not comment on the potential partisan impacts of Proposition 50's proposed maps; the analysis likewise does not mention race once. *Id*. at 19–26.

Finally, the ballot pamphlet contains two pages (approximately 1,473 words) of double-column arguments for and against adoption of Proposition 50. In favor of adoption, a statement submitted by Governor Gavin Newsom and other California Democrats describes the purpose of Proposition 50 as ensuring Californians "aren't silenced by partisan gerrymandering in other states" and calls on voters to "STOP TRUMP FROM RIGGING THE 2026 ELECTION." *Id.* at 27. Newsom's statement does not mention race, aside from a passing reference to California's "diverse communities," which he claims will be fairly represented by Proposition 50. *Id.*

Likewise, the argument against Proposition 50 contained in the ballot pamphlet urges voters to reject the ballot measure not because it will constitute a racial gerrymander, but rather because it would put "politicians back in charge of drawing their own districts, or those of their friends." *Id.* at 28. Among the arguments and rebuttals included in the ballot pamphlet, the only appeal to racial considerations comes in opposition to Proposition 50. The argument against Proposition 50 includes this quote: "'When politicians gerrymander, they divide our neighborhoods and weaken the voice of communities of color. Whatever happens in Texas, we cannot save democracy by destroying it in California. Vote NO on Prop. 50.'—Reverend Mac

Shorty, Civil Rights Leader." *Id.* The rebuttal to Newsom's argument in favor of the measure claims that the redistricting commission should not be suspended because its maps have led to "Better Representation," shown by the fact that, in the California Legislature, "Asian representation tripled, Black representation nearly doubled, and Latino seats grew by 8%" since the commission was established. *Id.* at 27. If anything, these arguments from those opposed to Proposition 50 show that adopting the maps proposed by Proposition 50 would make race *less* important in California redistricting.

VI. Judge Lee's Dissent Incorrectly Assumed That Determining Voter Intent Is Impossible.

In his dissent below, Judge Lee did not reject a focus on voter intent because of irrelevance. Nor could he have done so, given that Proposition 50 simply could not have become law without the approval of California voters.

Instead, Judge Lee threw up his hands, believing it is impossible to discern voters' intent when they passed Proposition 50. He asked rhetorically:

> How do we discern the intent of 11 million voters for a specific congressional district when they voted on a statewide package of redistricting all 52 congressional districts? Perhaps it may be theoretically possible to figure out the voters' intent in a simple but hot-button initiative. *Cf. Romer v. Evans*, 517 U.S. 620, 624 (1996) (statewide referendum denying 'claim of discrimination' based on "homosexual, lesbian, or bisexual orientation"). But Proposition 50 was no simple ballot initiative.

Op. 88 (Lee, J., dissenting).

Respectfully, whatever the voters intended in passing Proposition 50 (and all the available evidence showed they wanted to cancel out Texas's Republican gerrymander with a Democratic one), they did not intend to separate voters on the

basis of race without adequate justification. The evidence is as one-sided as it is clear. Neither the ballot materials, nor the statements of Proposition 50's opponents or supporters, nor any relevant analysis available to voters before they cast their ballots gave any indication that Proposition 50 was a racial gerrymander.

Judge Lee's analysis appears to confuse the absence of such evidence with a failure or impossibility of proof. But, to the contrary, courts can and do determine voter intent from ballot measures. Just as this Court in *Romer* could determine whether or not voters acted with animus in passing a ballot measure, the district court in this case could properly determine if voters had an unconstitutional intent in passing Proposition 50. For example, if the ballot materials available to all voters emphasized the role of race in drawing the districts, or in drawing any particular district, Petitioners might be able to make the case of racial predominance. Those are just not the facts here.

Judge Lee further suggested that one must drill down to the voters' intent as to a particular district to resolve this case. Op. 88–89 (Lee, J., dissenting). But given that voters had no intent to racially gerrymander *any* district, it follows there is no evidence they intended to commit a racial gerrymander in any particular district, including District 13. Once again, the absence of such evidence demonstrates there was no racial predominance.

Finally, Judge Lee worried that proponents of ballot measures could be "hoodwinked" into voting for unconstitutional laws. Op. 89. But that is just another way of saying that voters, who held the power to pass or reject Proposition 50, were

"dupes" of the Legislature, an argument foreclosed by this Court in *Brnovich*. This is especially true for a claim such as racial gerrymandering, where the question is the message *the decisionmaker*—not the body proposing a plan—intended to send in passing the plan. This is not a case where voters ratified a districting plan that intentionally diluted the votes of voters of a particular race or ethnicity.

VII. Petitioners Cannot Meet Their Heavy Burden of Showing an "Indisputably Clear" Right to an Injunction. They Would Treat Voters as "Dupes" of Ballot Measure Proponents, Contrary to this Court's Approach in *Brnovich*, and Contrary to the Position of the United States in this Litigation.

For the reasons described above, the district court was well within its discretion in determining that Petitioners did not present adequate evidence that race predominated when voters approved new district lines though Proposition 50. But to obtain an injunction from this Court *ab initio*, Petitioners must do more than show an abuse of discretion. Petitioners cannot meet their heavy burden of showing an "indisputably clear" right to an injunction pending appeal. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613; *Hobby Lobby Stores*, 568 U.S. at 1403; *Lux*, 561 U.S. at 1307 .

Although the district court extensively analyzed why it was proper to focus on voter intent, Op. 14–22, and why voters did not intend a racial gerrymander in passing the maps via Proposition 50, Op. 22–37, Petitioners barely address these analyses. They seek to replace analysis with hyperbole, calling the district court's determination "breathtaking, untenable, and contrary to this Court's case law." Appl. 15.

The few pages that Petitioners devote to the question simply reprise their "cat's

paw" theory properly rejected by the district court. Appl. 15–17. They accuse the Legislature of "laundering" unconstitutional intent through potentially "ignorant" voters and an "unsuspecting public." Appl. 15. They state that only legislators "are able to evaluate the text and impact of a proposed statute," "in a way that is readily distinguishable from the voters' ability to understand the racial intent in how district lines were changed *in a bill sold to them* as partisan gerrymandering." Appl. 17 (emphasis added). It is hard to think of a better description of a dupe than an ignorant or unsuspecting person sold a bill of goods.[5]

Petitioners also misapprehend the nature of the racial gerrymandering inquiry, treating voters as if they have no agency. It is true that the intent of a mapmaker hired by a decisionmaker to draw a map and advise the decisionmaker could be probative of the decisionmaker's intent. Appl. 16. But here, the voters were the decisionmakers, not the state legislature. They did not hire Paul Mitchell, and few if any voters had any idea who he was, much less what he may or may not have been trying to accomplish in proposing maps to the Legislature that the Legislature then tweaked and proposed to the voters.

The United States, although supporting Petitioners' request for an injunction, agrees with this brief and the district court that the voters' intent should control, concluding that "[i]t thus is appropriate here to treat the voters as the ultimate legislature for purposes of this Court's racial-gerrymandering precedents." Brief of the United States 21.

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[5] Petitioners also repeat the dissent's arguments about discerning intent as impractical, Appl. 16. The dissent's point is addressed above in Part VI.

Instead, the United States makes two arguments. The first is that Mitchell's intent as a mapmaker should be relevant, Brief of the United States 21–22, an argument addressed above. The second is that the map "is not facially neutral" and there can be a racial gerrymander even "irrespective of voters' purposes." Brief of the United States 22. This too, misapprehends the nature of a racial gerrymandering claim.

To the extent racial gerrymandering is an expressive harm, see Part I, *ante*, the question is the message the decisionmaker is sending in passing the maps. In particular cases, the shape of the map can send that message of a racial gerrymander. As this Court explained in *Miller*, 515 U.S. at 917, "the plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." But neither Petitioners nor the United States made the case below that the shape of the districts is so "bizarre" that the voters must have intended a racial gerrymander. That certainly would be news to most voters, given the absence of anything in the campaign focused on the proposed districts' shape or racial separation of voters. *Compare Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (explaining that "[p]rior to Act 140 the City of Tuskegee was square in shape; the Act transformed it into a strangely irregular twenty-eight-sided figure"). The district court made no clear error of fact. It did not abuse its discretion in its legal analysis. But more to the point, Petitioners have not met their higher burden of showing it is

"indisputably clear" that the district court erred on the law or facts. All the relevant evidence shows that California voters intended to enact a partisan gerrymander, pure and simple.

CONCLUSION

For the foregoing reasons, this Court should deny Petitioners' request for an emergency injunction pending appeal.

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Respectfully Submitted,

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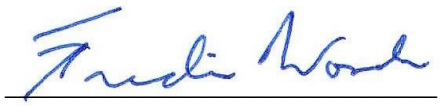
CERTIFICATE OF COMPLIANCE

I certify that, pursuant to the Rules of the Supreme Court of the United States, the attached **BRIEF OF PROFESSOR RICHARD L. HASEN AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS GAVIN NEWSOM, ET. AL** is proportionally spaced, has a typeface of 12 points or more, and contains 6,421 words, as determined by a computer word count.



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