No 25A839

In the Supreme Court of the United States

DAVID TANGIPA, ET AL. APPLICANTS

v.

GAVIN NEWSOM, GOVERNOR OF CALIFORNIA, ET AL., RESPONDENTS

On Emergency Application for Writ of Injunction

BRIEF OF CENTER FOR ELECTION CONFIDENCE AS *AMICUS CURIAE* IN SUPPORT OF THE APPLICATION

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INTEREST OF *AMICUS CURIAE*[1]

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution toward its preparation or submission. *See* Sup. Ct. R. 37.6.

integrity and files *amicus* briefs in cases where its background, expertise, and national perspective may illuminate the issues under consideration.

SUMMARY OF ARGUMENT

In this case, California's mapdrawer and various legislators claimed that fine-tuning the racial composition of various districts was justified in order to maintain and "bolster" majority-Latino districts to comply with the Voting Rights Act (VRA). The District Court majority accepted these assertions as wholly appropriate without stopping for a moment to consider whether such motivations make sense in light of current conditions in California. They do not make sense.

Section I of this brief examines those unique conditions and explains how purported concerns about avoiding VRA vote-dilution claims cannot justify setting aside safe Latino districts in modern-day California. The Golden State is worlds removed from *Thornburgh v. Gingles*, 478 U.S. 30 (1986), the case that spawned the VRA litigation industrial complex.

Latinos are California's largest ethnic or racial group—at 40% of the State's population—and wield substantial political power. They currently hold 16 seats in California's congressional delegation and 43 of the 120 seats in the state legislature, where Latino lawmakers also currently preside as the president pro tempore of the California State Senate and hold the speaker's gavel in the California State Assembly. They currently hold multiple statewide offices. Given this political reality, it is simply not true that Latino voters "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). Yet the

District Court majority accepted that VRA "compliance" was an acceptable cover for sorting voters to achieve just the right racial balance.

California has become increasingly integrated over the past four decades, which further undermines any claim that any "VRA districts" needed "bolster[ing]." *Gingles* is premised on the existence of residential segregation, which underlies the propriety of race-based remedial action; its anti-vote-dilution theory depends on minority populations that are compact and insular as a result of segregation. Demographic data from the district at the heart of this litigation show a significant decline in residential segregation, all while the Latino population has experienced dramatic growth.

Contrasting modern congressional redistricting (where nearly 800,000 residents are divvied up for each seat) to the tiny, segregated state legislative districts in *Gingles* (which involved state legislative districts of 50,000–120,000 residents) drives the point home. Congressional districts in 2025 present radically different demographic circumstances than were present in 1980s Mecklenburg County. There is no legitimate justification for California's effort to scoop up small disparate pockets of Latino voters to stitch together a "safe" Latino seat.

This case is thus yet another demonstration of how far removed modern VRA theory has strayed from the statute's text and original meaning. As in *Louisiana v. Callais*, No. 24-109, "VRA compliance" is being used as a sword here to justify affirmative action for candidates based on race, rather than a shield to protect voters of all races from voting "standard[s], practice[s], or procedure[s]" that "result[] in a denial or abridgement of the right" to vote "on account of race." 52 U.S.C. § 10301(a). This is backwards. Modern

circumstances in California manifestly do not allow the State to continue relying on the VRA to justify race-based districting. Only this Court can put this sordid tinkering to an end.

Section II of this brief highlights the District Court's error in permitting California to perpetuate the fiction of race-neutral maps by shielding mapmaker Paul Mitchell's work from scrutiny. Mitchell openly boasted (on X/Twitter) and elsewhere that the maps would "bolster" Latino voting strength, and multiple legislators publicly lauded the map for expanding majority-Latino districts. These statements stand in contrast to California's claim that its map-drawing decisions were driven simply (and solely) by partisan politics. Despite the fact that mapmaker testimony is a customary part of redistricting challenges, the District Court permitted the State to cloak Mitchell with legislative privilege and thwart the challengers' ability to obtain critical evidence concerning the use of race in the districting process. Even worse, at the same time it allowed Mitchell to avoid any cross-examination, the District Court cherry-picked separate public statements to conclude that Mitchell's intentions were pure. Under these circumstances, it was a mockery to confer the "good-faith presumption" on California's map-drawing. Fundamental fairness required that the mapmaker testify here.

The Court should grant the application for an injunction pending appeal.

ARGUMENT

I. In 2026, California Can No Longer Claim That The Voting Rights Act Requires It To Carefully Engineer Seats To Protect Latino Voters.

The Voting Rights Act lurks just under the surface in this case. Plaintiffs have cited a host of admissions by California's map-drawing consultant (Paul Mitchell) confirming that

the Proposition 50 map considered the Latino race of voters in drawing lines. This racial line-drawing was appropriate, he claimed, to maintain and "bolster" Latino VRA districts. *See* Op. 41–42 (majority op.); Op. 71, 76–7, 83–84 & n.12, 115, 116 (Lee, J., dissenting).

Democratic state legislative leadership made the point explicit. The president pro tempore of the California State Senate published a press release celebrating the fact that the new map would "[p]rotect[] communities of color and historically marginalized voters" by "retain[ing] and expand[ing] Voting Rights Act districts that empower Latino voters." App. to Application for Stay 1, 263. The speaker of the California State Assembly similarly proclaimed that "[t]he new map retains the voting rights protections enacted by the independent commission, and retains both historic Black districts and Latino-majority districts." Op. 28 (majority op.), 108 (Lee, J. dissenting). During debate, when Assemblymember David Tangipa pressed his colleagues about the risk of legal challenges, Assemblymember Marc Berman (former chair of legislative committees on both elections and the Census) explained: "California's maps strictly abide by the federal Voting Rights Act, which the Texas maps don't. [¶] And so we've actually put ourselves in a very good position to defend the maps that have been drawn because the Voting Rights Act and the principles of the Voting Rights Act were taken into very high consideration when those maps were drawn." App. to Application for Stay 1, 217.

These VRA-based justifications for race-based districting have no basis in legal reality. While Louisiana at least had the fig leaf of an erroneous preliminary injunction order to justify its race-based line-drawing in *Callais*, here there can be no contention that California is *required* by the VRA to continue carefully engineering majority-Latino

districts. In California in the year 2026, no one can credibly argue that Latinos are being discriminated against when it comes to district line-drawing or any other election procedure. As a result, California's claim that racial classifications here were appropriate to "comply" with the VRA is even more preposterous than the similar claim in *Callais*, and the statements here should instead serve only to prove California's unlawful racial gerrymandering.

Yet the District Court majority took the opposite approach. It dutifully accepted at face value that California is somehow still legally bound to consider race when it decides whether to include or exclude its voters in a district. For example, it blessed as perfectly innocent Assemblymember Berman's statement that VRA "principles" "were taken into very high consideration" in the Prop 50 map: "this statement, along with other references to maintaining the VRA protections from the 2021 Map, appear to communicate merely that the Proposition 50 Map complies with the law." Op. 27. Likewise, it reassured that "to the extent legislators reference the VRA, such statements appear to communicate, at best, that they are 'aware of' racial considerations, as legislatures 'almost always' are, in ensuring that Proposition 50 would be legally compliant." Op. 44 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)).

The Court has emphasized that the VRA "imposes current burdens and must be justified by current needs." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009); *accord Allen v. Milligan*, 699 U.S. 1, 19 (2023) ("Before courts can find a violation of § 2 … they must conduct 'an intensely local appraisal' … as well as a 'searching practical evaluation of the "past and present reality."'" (citations omitted)). Current conditions in

California demonstrate that the vague notion of "VRA compliance" is no basis to justify ongoing racial sorting of Latino voters.

A. Latinos Constitute California's Largest Racial Group And Possess Extraordinary Political Power, So Setting Aside Districts For Latino Candidates Has Nothing To Do With VRA Compliance.

California's Latino population does not need political affirmative action disguised as VRA compliance. No one can plausibly contend in 2026 that non-Latino legislators in California gang up to disadvantage Latino candidates based on their race, or that Latino voters lack opportunities to elect the candidates of their choice throughout the State. Latinos are the "largest ethnic or racial group" in California as well as "the second largest voting population and the fastest growing demographic in the state." Op. 74 (Lee, J., dissenting). Latinos made up approximately 40% of California's population in the 2020 Census, more than double their share of the State's population four decades earlier. *See* Gibson & Jung, *Historical Census Statistics on Population Totals by Race*, Table 19 (California - Race and Hispanic Origin: 1850 to 1990) (U.S. Census Bureau 2002).

The numbers tell the story. Latinos occupy 16 of the 52 seats in California's current congressional delegation. Congressional Hispanic Caucus, *Members*, https://perma.cc/ZR3A-B5Q8. And in the California legislature, Latinos occupy 15 of the 40 seats in the Senate and 28 of the 80 seats in the Assembly. California Latino Legislative Caucus, *Member Directory*, https://perma.cc/4MHM-VF7T (Democratic caucus); California Hispanic Legislative Caucus, *Our Members*, https://perma.cc/5UFQ-BHXM

(Republican caucus).[2] This 35% representation in the State legislature approaches Latinos' share of the population and *exceeds* its voting population.[3] Importantly for this case, race is also not a proxy for partisanship: The 43 Latino members in the State legislature include eight Republicans. Latinos have also consistently led the Assembly: Since and including Cruz Bustamonte in 1994, *six* separate Latino members have presided over the California Assembly as Speaker, and the current Speaker (Robert Rivas) is Latino. The current president pro tempore of the California Senate (Monique Limón) is Latino. And beyond the Legislature, Latinos routinely win statewide races in California.[4]

In short, Latinos' electoral successes confirm that their voters not only have an *opportunity* to elect their preferred candidates, but also that they have exercised their considerable political power to do so. In 2026, Latinos' political success in California does not depend on setting aside safe VRA districts. Imagine if a legislator in another State said that district lines needed to be engineered to assure that it reached a narrow band of white voters to keep white voting population over 50 percent? That would surely set off alarm bells as direct evidence of discriminatory intent. Yet the District Court brushed off the pro-Latino race-based districting directives here as merely showing the Legislature's

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[2] Republican Assemblywoman Leticia Castillo is a first-generation Mexican-American, who is not a member of either party's Latino caucus. Assemblymember Leticia Castillo, 58th Assembly District, *Biography*, https://perma.cc/CF8Z-QNZ9.

[3] As of 2020, the statewide Latino CVAP was 30.9%. Romero, et al., *Voter's Choice Act: 2020 General Election Voter Registration and Turnout* 56 (Univ. of S. Cal. Ctr. for Inclusive Democracy March 2022).

[4] Such recent statewide electoral victories include: Alex Padilla (U.S. Senator and Secretary of State); Xavier Becerra (Attorney General); Ricardo Lara (Insurance Commissioner); and Tony Thurmond (Superintendent of Public Education).

"'aware[ness] of' racial considerations" that furthered "fair representation for certain racial groups." Op. 44.[5]

This approach is at war with core principles of equal protection and at odds with the demographic reality in America today. The radically different racial composition of the Nation, and California in particular, has also been accompanied by increasing integration which, as discussed below, only further undermines any claim that California can cite VRA compliance concerns as a basis for drawing race-based district lines.

B. California Is Highly Integrated—Particularly In The District At Issue Here—Which Renders Its VRA Alibi Even More Anomalous.

Since California has justified its line-drawing based on the purported need under the VRA to strengthen majority-Latino districts, it is also worth recalling here that the central demographic condition underlying the Court's anti-vote-dilution doctrine since *Gingles* is residential segregation. That is the essence of the *Gingles* compactness requirement, which ensures that the § 2 remedy is potentially available when populations are compact and insular—and that no remedy is needed when a population is integrated. *See*

[5] Decisions like *Missouri State Conf. of the Nat'l Ass'n for the Advancement of Colored People v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924 (8th Cir. 2018), do not undermine the point that California's current conditions undermine any purported need to continue relying on the VRA to justify careful sorting of Latino voters. That case rejected a proposed bright-line "rule that a racial minority cannot prevail on a section 2 claim when it constitutes a bare numerical majority within the district." *Id.* at 933. The court properly focused on the VRA's text in noting that such a "per se rule would mean that any section 2 claim would be defeated the moment black voters made up a bare numerical majority of the district, regardless of whether minority voters in that district still face actual impediments and disadvantages. Such a rule does not comport with the VRA's substantive requirement that racial minorities have equal opportunity 'to participate in the political process and to elect representatives of their choice.'" *Id.* at 934 (quoting 52 U.S.C. § 10301(b)). In California, Latino voters and politicians do not merely have an equal *opportunity* to participate in the political process, they set the political agenda.

Stephanopoulos, *Civil Rights in A Desegregating America*, 83 U. Chi. L. Rev. 1329, 1377 (2016) (acknowledging that "an integrated minority group is not geographically compact, and so cannot prevail in a VRA challenge"); Crum, *Reconstructing Racially Polarized Voting*, 70 Duke L.J. 261, 279 (2020) (arguing that "[b]y focusing on residential segregation, the *Gingles* Court reinforced the relationship between geography and representation"). As the Court recognized in *Allen*, however, "residential segregation" has decreased "sharply … since the 1970s." 599 at 28–29 (citation omitted). As integration increases, the justifications under the *Gingles* regime for racial engineering erodes.

California, in particular, has experienced a multi-decade pattern of decreasing segregation, including in the district at the heart of this case. One key measure of residential integration is the "dissimilarity index," which is the "most widely used measure of evenness" among populations. U.S. Census Bureau, Housing Patterns: Appendix B: Measures of Residential Segregation, https://bit.ly/3L2x31T ("Housing Patterns"). Courts have relied on dissimilarity index measurements in § 2 cases, *e.g.*, *Holloway v. City of Virginia Beach*, 531 F. Supp. 3d 1015 (E.D. Va. 2021), and school desegregation cases, *e.g.*, *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 320 (4th Cir. 2001); *Coalition to Save Our Child. v. State Bd. of Educ. of State of Del.*, 90 F.3d 752, 761–62 & n.7 (3d Cir. 1996).

"Conceptually, dissimilarity measures the percentage of a group's population that would have to change residence for each neighborhood to have the same percentage of that group as the metropolitan area overall." Housing Patterns, *supra*. The measure ranges from 0 to 100, where "[a] high value indicates that the two groups tend to live in different

[census] tracts. … A value of 60 (or above) is considered very high. It means that 60% (or more) of the members of one group would need to move to a different tract in order for the two groups to be equally distributed. Values of 40 or 50 are usually considered a moderate level of segregation, and values of 30 or below are considered to be fairly low." Diversity & Disparities, *Spatial Structures in the Social Sciences*, Brown Univ., Residential Segregation, Index of Dissimilarity, https://bit.ly/3xDKGRb.

Municipal-level data paints a clear picture of widespread gains in integration across District 13's cities over the past half-century. Census data confirm that the white/Latino dissimilarity index has dropped dramatically across California's Central Valley as the State's Latino population nearly quadrupled from 4.5 million in 1980 to 15.6 million in 2020.

City	1980	2000	2020
Stockton	49.5 (22% Hispanic)	41.5 (32.5%)	36 (44%)
Modesto	31.6 (10.5%)	33.8 (25.6%)	29.9 (42.9%)
Merced	51.6 (28.2%)	37.7 (41.4%)	32.1 (56.3%)
Madera	38.6 (41.6%)	47 (67.8%)	39.4 (80.7%)
Turlock	30 (14.2%)	36 (29.4%)	30.5 (41.2%)

Source: *Residential Segregation*, Spatial Structures in the Social Sciences, Brown University, https://s4.ad.brown.edu/projects/diversity/segregation2020/.

And dissimilarity calculations published by the Federal Reserve Bank of St. Louis show that the counties District 13 spans are also reasonably integrated on a white/non-white basis:

County	2020
San Joaquin	35.88
Stanislaus	31.78
Merced	30.20
Madera	48.45
Fresno	40.91

Source: FRED, Fed. Reserve Bank of St. Louis, *Racial Dissimilarity Index: California*, https://perma.cc/58JP-5PQM (measuring white to non-white racial dissimilarity).

Compare these figures to the data in North Carolina when *Gingles* was percolating through the courts. In 1980, the white/black dissimilarity index for Charlotte, North Carolina was a whopping 73.4.[6] America is not stuck in 1980 Mecklenburg County forever; times have changed.

These figures demonstrate the folly of the State's efforts to invoke § 2 as a cover for its race-based districting plan. District 13's Latino population is substantial and not plagued by the sort of segregation that might have justified the strong medicine of the VRA's remedial scheme in the past. And while this progress should be celebrated, partisan scholars perversely lament that desegregation poses a "problem" for their cause: "The problems posed by integration are clearest with respect to *Gingles*'s first prong. Minority voters who are residentially integrated are the very opposite of a geographically compact group. In the Court's terminology, they are diffuse rather than 'insular,' dilute rather than

[6] Calculations drawn from *Residential Segregation*, Spatial Structures in the Social Sciences, Brown University, https://s4.ad.brown.edu/projects/diversity/segregation2020/.

'concentrated.'" Stephanopoulos, 83 U. Chi. L. Rev. at 1384; *see also id.* at 1388 ("Residential integration is *not* one of § 2's goals. But minority representation *is* one of them, and for all of the reasons discussed above, it is imperiled by desegregation.").[7] Likewise, in California, the Legislature ignores this progress and continues to draw district lines as if Latinos are a victimized political class.

The Court's legal doctrine must account for sweeping societal improvements. *See Shelby County v. Holder*, 570 U.S. 529, 547–50 (2013) (considering the continued validity of § 5 of the VRA against the backdrop of dramatic changes and significant progress in "redressing racial discrimination and integrating the voting process"). It also rightly accounts for reality. *Cf. Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 399, 404 (2024) (emphasizing the need to tailor the Court's doctrine to reality). Precisely because "any racial discrimination in voting is too much," this Court must be attentive to ensuring that the VRA's remedial reach is tailored to "speak[] to current conditions." *Shelby County*, 529 U.S. at 557.

[7] *See also* Stephanopoulos, 83 U. Chi. L. Rev. at 1335 (where "minority populations are residentially integrated" and "a jurisdiction nevertheless encloses a dispersed minority group within a single district, then the district probably violates the constitutional ban on racial gerrymandering"); Karlan, *Our Separatism? Voting Rights As an American Nationalities Policy*, 1995 U. Chi. Legal F. 83, 88–89 (1995) ("Even a minority group whose members all live quite segregated lives … can seek relief through relatively race-neutral remedial districting only if they live in large ghettoes that form seemingly 'natural' districts. Otherwise, smaller minority communities must be strung together like pearls on a necklace to create a majority-nonwhite district."); Carstarphen, *The Single Transferable Vote: Achieving the Goals of Section 2 Without Sacrificing the Integration Ideal*, 9 Yale L. & Pol'y Rev. 405, 407 (1991) (*Gingles* "created a direct conflict between voting rights and the integration ideal.").

C. In California, As In All States In 2026, The *Gingles* Principles That Have Dominated VRA Thinking No Longer Translate To Congressional Districts Of 760,000 Voters.

Given the VRA-based justifications for fortifying majority-Latino districts, it also bears emphasizing how different modern *congressional* redistricting is from constructing the tiny, segregated state legislative districts in *Gingles* more than 40 years ago. *Gingles* involved a challenge to North Carolina's unusual state legislative redistricting scheme following the 1980 Census. Some of North Carolina's legislative districts had one member, and other at-large districts had multiple (up to eight) members. Plaintiffs alleged that North Carolina violated § 2 by submerging pockets of black voters in five multi-member state house legislative districts and one multi-member state senate district in a manner that diluted the voting power of black citizens. 478 U.S. at 34–35.

North Carolina was apportioning its nearly 6 million residents into 120 state assembly seats (roughly 50,000 residents per seat) and 50 state senate seats (roughly 120,000 residents per seat). U.S. Dep't of Commerce, Bureau of the Census, *1980 Population and Number of Representatives by State*, p. 2 (Dec. 31, 1980) (North Carolina's population basis for apportionment 5,874,429); *Gingles*, 478 U.S. at 40 (identifying size of North Carolina House and Senate). These were very small districts where, given the intense segregation, pockets of black populations were themselves "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50.

Congressional districts in 2025 present radically different demographic circumstances than the state legislative districts in *Gingles*. California's population in the 2020 Census was approximately 39.5 million, so each of its 52 congressional districts

consists of roughly 760,000 residents. Across the Nation, the average size of a congressional district is now 761,169. U.S. Census Bureau, *2020 Census Apportionment Results Delivered to the President* (April 26, 2021). These district sizes bear no resemblance to the remedial districts in *Gingles*. The California congressional districts at issue here are roughly **15 times** the population of the North Carolina House seats at issue in *Gingles*, and roughly **6.3 times** the population of the State Senate seats at issue in *Gingles*.

When dealing with populations this large and this increasingly integrated, mapmakers striving to achieve specific racial-composition ends struggle to connect many tiny and disparate pockets of populations far removed from each other on the pretense that they are a "community of interest" bound only by race. This Court has rightly been skeptical of such devices. *See Bush v. Vera*, 517 U.S. 952, 979–81 (1996); *LULAC v. Perry*, 548 U.S. 399, 433–34 (2006). The dissent below catalogues multiple instances where, instead of including nearby pockets of Democrat voters (as would be expected if the partisan explanation were real), the mapdrawer skipped those voters to scoop up more Latino voters. *See* Op. 96–105 (Lee, J., dissenting).

This exercise bears no resemblance to the foundation of vote dilution theory in *Gingles*, where the tiny and segregated minority populations themselves constituted a contiguous block that constituted a majority. Absent the Court's direction, this unseemly practice will only multiply in future redistricting cycles as congressional districts continue to grow in population.

* * *

This is merely the latest case to demonstrate how far the modern VRA movement has strayed from its statutory grounding. In *Callais*, it makes no sense that, in 2025, after Louisiana went from seven congressional districts to six and after decades of § 5 preclearance, conditions suddenly required the creation of a first-ever second "safe" black district. In modern-day California, it likewise makes no sense to engage in racial fine-tuning of district lines to "bolster" "VRA districts" benefiting Latino candidates. Setting aside "protected" seats for a powerful political bloc exemplifies how modern activists have distorted the VRA past its logical breaking point. The VRA was not meant to be a permanent racial sorting machine to allow powerful political forces to strengthen their power.

II. The Panel Majority Unfairly Allowed California To Evade Examination Of Its Publicly-Announced Racial Motivations While Also Letting It Benefit From The Presumption Of Good Faith.

The panel majority allowed California to abuse the presumption of good faith that attaches in racial gerrymandering claims. *See Alexander v. South Carolina State Conference of the NAACP*, 602 U.S. 1, 10 (2024); *Abbott v. Perez*, 585 U.S. 579, 610–12 (2018). California perversely claimed that moral high ground in the face of multiple public statements by its mapmaker about the race-based goals underlying his line-drawing. As set out above, multiple legislators joined Mitchell in publicly celebrating the Prop 50 map for "bolstering," "retain[ing]," and "expand[ing]" majority-Latino "VRA districts." Such statements are entirely inconsistent with, and undermine, any presumption of good faith. Yet, when California asserted legislative privilege as a basis for shielding any inquiry into the mapmaker's intentions, goals, methods, or anything else of substance, the District

Court accommodated and then some. This process made a mockery of the good-faith presumption and went to the heart of the merits inquiry.

The lower court's approach violates basic principles of racial gerrymandering claims, starting with the fundamental rule that the intent of map maker is critical in overcoming presumption of good faith. *Abbott*, 585 U.S. at 603–05. In *Alexander*, the Court explained that a challenger seeking to prove that "'race was the overriding factor'" in drawing district lines may look to a "state actor's express acknowledgment that race played a role in the drawing of district lines." 602 U.S. at 8 (citation omitted). And while "[s]uch concessions are not uncommon because States often admit to considering race for the purpose of satisfying our precedent interpreting the Voting Rights Act of 1965," the Court nevertheless pointed out that "[d]irect evidence can … be smoked out over the course of litigation." *Id.*; *see also Cooper v. Harris*, 581 U.S. 285, 318 (2017) (positing a hypothetical where "scores of leaked emails from state officials instructing their mapmaker" to follow racial criteria could support a finding of intentional discrimination); *Vera*, 517 U.S. at 960–61 (reviewing "substantial direct evidence of the [Texas] legislature's racial motivations," including the "testimony of individual state officials" demonstrating the State intended to draw lines based on race).

To be sure, legislative privilege plays an important role in protecting legislative deliberations and separation of powers from abusive interference in the courts or otherwise. This case, however, is very far removed from the stereotypical case where an aggressive plaintiff seeks to depose or obtain documents from multiple members of the legislature to fish for information. *Cf. La Union Del Pueblo Entero v. Abbott*, 68 F.4th 228, 239 (5th Cir.

2023) (plaintiff sought production of documents from legislators); *Lee v. City of Los Angeles*, 908 F.3d 1175, 1186–88 (9th Cir. 2018) (plaintiff sought to depose mayor and three members of city council regarding city council line-drawing). Indeed, it is wholly customary for mapmakers to testify in defense of their proposed maps, even where no such direct evidence of race-based line drawings exists. Consider just a few of the Court's recent cases where mapmakers testified in the trial court:

- *Singleton v. Merrill*, 582 F. Supp. 3d 924, 950 (N.D. Ala. 2022), aff'd sub nom. *Allen v. Milligan*, 599 U.S. 1, 15–16 (2023) (discussing testimony of Randy Hinaman).
- *S.C. State Conf. of NAACP v. Alexander*, 649 F. Supp. 3d 177, 188–94 (D.S.C. 2023), rev'd in part sub nom. *Alexander v. South Carolina State Conference of the NAACP*, 602 U.S. 1, 13–15, 19 (2024) (testimony of Will Roberts).
- *Harris v. McCrory*, 159 F. Supp. 3d 600, 607, 612–15, 618–20 (M.D.N.C. 2016), aff'd sub nom. *Cooper v. Harris*, 581 U.S. 285, 295, 299–300, 311–15 (2017) (testimony of Dr. Thomas Hofeller).
- *Shaw v. Hunt*, 861 F. Supp. 408, 457–62, 465–69 (E.D.N.C. 1994), rev'd, 517 U.S. 899, 906 (1996) (testimony of Gerry Cohen).[8]

As the District Court accurately recognized, "Supreme Court precedent highlights the importance of mapmakers' testimony in these cases." D. Ct. Dkt. 167, Dec. 13, 2025

[8] Testimony of mapmakers was also a common feature of political gerrymandering cases. *See*, *e.g.*, *Benisek v. Lamone*, 348 F. Supp. 3d 493, 502–04 (D. Md. 2018), vacated and remanded sub nom. *Rucho v. Common Cause*, 588 U.S. 684 (2019) (testimony of Eric Hawkins).

Order re: Motion to Compel Testimony of Paul Mitchell at 1. Which makes it all the more inexplicable that it allowed Mitchell to *avoid* testifying altogether.

The United States moved to compel Mitchell to produce documents and have his deposition reopened. D. Ct. Dkt. 147. Although the District Court directed Mitchell to produce non-privileged documents, it refused to reopen the deposition or require him to appear at the preliminary injunction hearing; it also refused to rule on the privilege claim. D. Ct. Dkt. 167. The next day, the majority denied the preliminary injunction and purported to leave the privilege claim unresolved. *See* Op. 38–39 & n.14. The farthest it would go in defense of the privilege assertion was to meekly label it "not frivolous." Op. 38 n.14. But the State's mission was accomplished: it rebuffed the preliminary injunction without subjecting its mapmaker to any cross-examination about his provocative public statements about the racial motivations of his line-drawing.

Perhaps most perversely of all, however, the majority claimed to base its denial of the preliminary injunction on its own "examin[ation of] the intent of Paul Mitchell." Op. 45. This despite allowing the defense team to avoid any testing whatsoever of his intent by a deposition that would have constituted a real "examination." So how did the majority purport to "examin[e]" Mitchell's intent? It offered its own positive spin for Mitchell's incriminating statements and highlighted Mitchell's public professions of non-racial intentions by:

- Quoting an interview he gave to local television station that the map would "bolster Democratic candidates" in a Latino district. (Op. 41).

- Reciting his statement in a podcast that the map provided "an opportunity for Democrats to pick up five seats," while "keep[ing] a large number of communities of interest together" and "protect[ing] the Voting Rights Act." (Op. 43).
- Quoting the few self-serving and scripted statements that Mitchell was willing to give at his deposition, specifically that this was "partisan redistricting" that he "agreed to do … only because of what Texas did." (Op. 39).
- Citing "presentation charts" generated to show that Mitchell's goal "was flipping five … districts," and "also bolstering Dems" in ten additional districts (Op. 39).

By doing so, the panel majority effectively accommodated a *selective* or *strategic* waiver of the privilege: "[C]ourts have been loath to allow a legislator to invoke the privilege at the discovery stage, only to selectively waive it thereafter in order to offer evidence to support the legislator's claims or defenses." *Favors v. Cuomo*, 285 F.R.D. 187, 212 (E.D.N.Y. 2012); *see also Comm. for a Fair and Balanced Map v. Illinois State Bd. of Elections*, 2011 WL 4837508, *11 (N.D. Ill. 2011) (holding that legislators could not "invoke the privilege as to themselves yet allow others to use the same information against plaintiffs at trial"). By allowing the State to shield any inquiry into the role of race in Mitchell's line-drawing while still cherry-picking—and relying on—Mitchell's separate statements omitting any racial motivation, the panel majority performed its own version of a selective waiver.

The net effect is that the panel majority allowed California to maintain its presumption of good faith while allowing the State to shield Mitchell from answering questions that might undermine its cover story. Under the circumstances here, fundamental fairness required that the mapmaker should have explained himself under oath.

CONCLUSION

The application for an injunction pending appeal should be granted.

Respectfully submitted,

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January 2026