No. 13-1138

In the Supreme Court of the United States

ALABAMA DEMOCRATIC CONFERENCE, *ET AL.*,
Appellants,

v.

ALABAMA, *ET AL.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

BRIEF *AMICUS CURIAE* OF ANTI-DEFAMATION LEAGUE IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICUS*

The Anti-Defamation League ("ADL"), as *amicus curiae*, submits this brief in support of the petitioners.[1] ADL was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, to combat racial, ethnic, and religious discrimination in the United States, and to fight hate, bigotry, and anti-Semitism. Today, it is one of the world's leading civil and human rights organizations, and its history is marked by a commitment to protecting the civil rights of all persons, whether they are members of a minority or the majority.

ADL believes that the U.S. Constitution requires each person in our nation to receive equal treatment under the law, and that each person has the right to be treated as an individual, rather than as part of a racial, ethnic, religious, or gender-defined group. Consistent with its core mission — "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against… any sect or body of citizens" — ADL has filed numerous briefs *amicus curiae* in this Court in cases arising under the Equal Protection Clause of the Fourteenth Amendment

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents have been lodged with the Court.

to the Constitution and the Nation's civil rights laws.[2] ANTI-DEFAMATION LEAGUE 1913 CHARTER (1913).

ADL's staunch commitment to diversity has not diminished its belief in the precept that the Equal Protection Clause obligates government to refrain from racial discrimination in all forms. For this reason, ADL has *opposed* virtually all of the racial classifications that have been challenged in this Court, including racial preferences and quotas. *See supra* note 2. Indeed, ADL has long maintained that when government uses race as a decisive factor in allocating opportunities or benefits it ignores merit and

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[2] *See*, *e.g.*, ADL briefs *amicus curiae* filed in *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Cardona v. Power*, 384 U.S. 672 (1966); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP*, 461 U.S. 477 (1983); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Miller v. Johnson*, 515 U.S. 900 (1995); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009); *Fisher v. Univ. of Tex. at Austin,* 133 S.Ct. 2411 (2013); and *Shelby County v. Holder*, 133 S.Ct. 2612 (2013).

improperly classifies citizens on the basis of immutable characteristics that are, or should be, irrelevant in a free and democratic society.

In the specific context of redistricting efforts, ADL has filed numerous briefs *amicus curiae* before this Court opposing race-based redistricting. For example, in a brief submitted as *amicus curiae* in *Johnson v. De Grandy*, ADL argued that "the Voting Rights Act was not intended to relegate racial, ethnic and language minorities to permanent minority status, which is the inevitable result of a fixation on race-based numerical goals."[3] Similarly, in *Miller v. Johnson,* ADL "strongly reaffirm[ed] its principled adherence to a policy opposing racial classifications of all kinds," arguing that "when race is the substantial or motivating factor in redistricting, strict scrutiny is compelled under the Equal Protection Clause."[4]

SUMMARY OF THE ARGUMENT

In the context presented here, ADL agrees with Appellants that Alabama engaged in race-based redistricting, which triggers a strict scrutiny analysis to pass constitutional muster. Alabama's post-2010 census redistricting plan must fail this rigorous standard. Although compliance with the Voting Rights Act ("VRA") can constitute a compelling state interest, Respondents fundamentally misunderstood the VRA's requirements. As a result, the State failed to narrowly

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[3] Brief for Anti-Defamation League as Amicus Curiae Supporting Neither Party, *Johnson v. De Grandy*, 512 U.S. 997 (1994).

[4] Brief for Anti-Defamation League as Amicus Curiae Supporting Appellees, *Miller v. Johnson*, 515 U.S. 900 (1995).

tailor its redistricting plan and created a redistricting plan that unconstitutionally subordinates traditional race-neutral redistricting principles to race-based considerations.

The substantive issue before this Court is whether the non-retrogression portion of Section Five of the VRA justifies Alabama's redistricting plan such that it could pass constitutional muster. Yet, Respondents ask the Court to address the constitutionality of Section Two of the VRA. Judicial restraint dictates that this Court should issue a narrow ruling and refrain from addressing any questions about the constitutionality of Section Two of the VRA. Furthermore, the context of this case effectively raises no issue under Section Two. Therefore, this case presents a poor vehicle to address the constitutionality of that provision.

ARGUMENT

I. Alabama Engaged in Race-Based Redistricting That Subordinated Traditional Race-Neutral Districting Principles to Race-Based Considerations

The evidence is overwhelming that the Alabama officials who created the redistricting plan approved by the Alabama legislature designed districts for the Alabama House of Representatives and Senate based on the racial makeup of such districts. While a state may undoubtedly consider race as one factor among many in drawing district lines, a state engages in unconstitutional race-based redistricting when "the legislature subordinate[s] 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." *Miller v. Johnson,* 515 U.S. 900, 916, 928-29 (1995); *see also Shaw v. Reno*, 509 U.S. 630, 646 (1993).

In this case, the plan drafters' primary, if not exclusive, concern was in maintaining the percentage of black voters in majority-minority districts drawn in the prior redistricting scheme. Citing the non-retrogression requirements of Section Five of the VRA as their motivating factor, the drafters labored under the profound misunderstanding that Section Five required that Alabama design the districts so as to attain what the dissent below correctly termed "naked 'racial quotas.'" *Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1313 (M.D. Ala. 2013) (Thompson, J., dissenting) (citing *Bush v. Vera*, 517 U.S. 952, 976 (1996)). In so doing, the State engaged in unconstitutional race-based re-districting that subordinated traditional race-neutral re-districting principles to race-based considerations.

The drafters of the Alabama re-districting plan freely admit that their primary goal in drawing the district lines was race-based. The three principle actors who designed the redistricting plan in question—Senator Gerald Dial and Representative Jim McClendon, co-chairs of the Joint House-Senate Permanent Legislative Committee on Reapportionment, and Randy Hinaman, the political consultant they hired—all testified at trial that their understanding of the non-retrogression requirement of the VRA mandated that the redistricting plan retain the same percentage of black residents in majority-minority districts as those districts had when the 2010

Census data was applied to the district boundaries established by redistricting in 2001. *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1314. At trial, for example, Senator Dial agreed that his understanding of the non-retrogression principles required the drafters to "maintain the black majority percentage." *Id*. at 1314. Representative McClendon testified that they "tr[ied] not to change the percentages of the citizens, the black citizens." *Id*. Similarly, Hinaman testified that his first priority in drawing the districts was "not regressing minority districts," which he understood to mean looking at the "2010 census as applied to the 2001 lines" and "tr[ying] to be as close to that as possible." *Id*. at 1323.

The following exchange during the deposition of Senator Dial is particularly illustrative:

> Q. So you did not want the total population of African-Americans to drop in [SD 23]?
>
> A. That's correct.
>
> Q. Okay. And if that population dropped a percentage, in your opinion that would have been retrogression?
>
> A. Yes, sir.
>
> Q. So if -- And I'm not saying these are the numbers, but I'm just saying if Senator Sanders' district had been 65 percent African-American, if it dropped to 62 percent African-American in total population, then that would have been retrogression to you?
>
> A. In my opinion, yes.

> Q. And so that's what you were trying to prevent?
>
> A. Yes.

Id. at 1324.

Beyond the drafters' testimony regarding their intent, the results of the redistricting plan standing alone clearly show that the State subordinated traditional race-neutral districting principles, such as creating compact districts, preventing conflicts between incumbents, and avoiding splitting precincts, to racial considerations. For example, in the plan's redrawn House Districts 53 and 73, incumbents Demetrius Newton and Joe Newton were each left living in the other's district. *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1258. Perhaps more importantly, the plan split numerous precincts, which should have remained intact under traditional race-neutral districting principles. Indeed, the districting plan split approximately 25 percent of all precincts statewide. *Id.* at 1318. Hinaman testified that, in attempting to avoid his understanding of retrogression, he would first look for majority-minority precincts to add to majority-minority districts in need of more black residents to fulfill the quotas that he set. *Id*. at 1319. When adding whole precincts would decrease the number of black voters in the district, however, Hinaman testified that he would split precincts to achieve racial quotas. *Id*.

Race is the only factor that can explain the pervasive precinct-splitting in which the State engaged. In deciding how to draw the district maps Hinaman had access to maps illustrating the racial composition of units smaller than precincts, but not

information about political affiliation, for example, of residents in units smaller than precincts. *Id*. at 1319. The district splits, therefore, cannot be tied to political affiliation or other race-neutral considerations. Rather, they evince clear evidence of the subordination of traditional race-neutral considerations in redistricting to race-based considerations.

While it is undeniably true that the drafters of the redistricting plan simultaneously focused on compliance with a new requirement to draw the district lines within one percentage point of the ideal district size, that fact alone does not show race was not a primary concern in drawing the district lines. To the contrary, the new requirements meant that the drafters focused even more carefully on drawing racially-motivated lines. Before the latest redistricting scheme, the Alabama legislature adopted a new policy that required the population of each district not deviate from the ideal size by more than one percent. The prior Alabama redistricting rules permitted deviation of population in each district of up to five percent. Under the prior regulations, greater flexibility in the population of each district had given the drafters of the district lines a greater ability to design new districts that did not rely on racial quotas.

Many of the majority-minority districts before the latest redistricting scheme had fallen within the lower end of the five percent requirement. That is, they were under-populated by the new one percent requirement. *See Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1235. By adopting the one percent rule, the Alabama legislature created a situation in which compliance with the new rule required a larger number of black

residents to be moved into the majority-black districts under the new rule compared to the previously implemented five percent deviation model. The Alabama legislature therefore created an environment whereby the new districts required massive reorganization, elimination, combination, and splitting of districts to avoid what the drafters misunderstood to be the non-retrogression requirements of Section Five of the VRA.

The combination of the requirement that more black residents had to be moved into most of the majority-minority districts to address the ideal size requirement, with the erroneous belief that each majority black district had to match the percentage of black population from the 2000 redistricting results, led to unconstitutional race-based redistricting. The drafters' erroneous belief that any reduction in percentage of black population in majority-black districts constitutes retrogression that is not permitted by Section Five of the VRA required packing of thousands of black voters into districts wherein blacks already had a controlling interest. The belief that a specific percentage of blacks was required for each district, sometimes at rates in excess of 75%, is not only unconstitutional race-based redistricting, but it also undoubtedly constitutes a racial quota. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 335 (2003) (holding that "quotas impose a fixed number or percentage which must be attained") (internal quotation marks omitted).

II. Alabama's Redistricting Plan Fails Strict Scrutiny Because, in Misunderstanding the Requirements of the VRA, the Drafters Failed to Narrowly Tailor the Plan to a Compelling State Interest

A. Redistricting That Subordinates Traditional Race-neutral Redistricting Principles to Race-based Considerations Requires Strict Scrutiny

This Court has repeatedly held that rigid racial quotas, such as the ones in question in this case, should be met with skepticism, and that quotas strike at the heart of the Fourteenth Amendment's guarantee of equal protection. The Constitution's Equal Protection Clause mandates that citizens will be treated as individuals "not as simply components of a racial, religious, sexual, or national class." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007) (quoting *Miller,* 515 U.S. at 911) (internal citation omitted).

This Court has consistently held that the primary focus of the Fourteenth Amendment "is to prevent the States from purposefully discriminating between individuals on the basis of race." *See, e.g., Shaw*, 509 U.S. at 642. The central mandate of the Equal Protection Clause of the Fourteenth Amendment is "race neutrality in government decisionmaking." *Miller,* 515 U.S. at 904; *See also Loving v. Virginia.*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 191-192 (1964); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Although the facts of particular cases may render analysis complicated, "the basic principle is straightforward: 'Racial and ethnic distinctions of any

sort are inherently suspect and thus call for the most exacting judicial examination.'" *Miller*, 515 U.S. at 904 (citing *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 291 (1978)). As such, "laws classifying citizens on the basis of race cannot be upheld unless they are narrowly tailored to achieving a compelling state interest." *Miller*, 515 U.S. at 904.

In the particular context of redistricting, a scheme that is "'unexplainable on grounds other than race,' . . . demands the same close scrutiny that we give other state laws that classify citizens by race." *Id.* at 905 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). Pursuant to this Court's holding in *Shaw*, state-drawn districts formed so as to distinguish explicitly between individuals on racial grounds are subject to strict scrutiny. *See Miller*, 515 U.S. at 910. This Court has held that "district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption." *Shaw,* 509 U.S. at 645. As explained above, Alabama undoubtedly engaged in race-based redistricting that subordinated traditional race-neutral districting principles to race-based considerations. Alabama's redistricting scheme is therefore subject to strict scrutiny.

B. Alabama's Redistricting Plan Fails Strict Scrutiny Because it Is Not Narrowly Tailored to Comply with the Requirements of the VRA

Alabama's use of racial quotas to establish districts for election of state legislators can survive review only if such use is narrowly tailored to achieve a compelling

government interest. *Miller*, 515 U.S. at 904. While compliance with the VRA is a compelling state interest, such compliance must be based on a correct understanding of the Act. *Shaw v. Hunt,* 517 U.S. 899 (1996) ("*Shaw II*"); *see also Miller,* 515 U.S. at 921 (a district must be "required by the substantive provisions of the Act").

Section Five of the VRA has never given "covered jurisdictions *carte blanche* to engage in racial gerrymandering in the name of nonretrogression." *Shaw,* 509 U.S. at 655. The drafters of Alabama's redistricting plan fundamentally misunderstood Section Five of the VRA. The VRA does not require that the percentage of black residents in the new districts stay exactly at or above the percentages after the previous redistricting efforts after the 2000 Census. Accordingly, the State failed to narrowly tailor the redistricting plan to a compelling state interest.

Section Five of the VRA, properly read, prevents actions that would reduce minority voters' effective ability to elect candidates of choice and does not require matching of pre-existing levels of minority population. As this Court has found, "[T]he purpose of [§] 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. U.S.,* 425 U.S. 130, 141 (1976). The watchword used by Congress in amending the VRA in 2006 is that the "ability to elect" representatives of choice by minorities is to be protected. The VRA in no way justifies a slavish adherence to a particular percentage point quota, as Alabama erroneously

claims. In misreading and misunderstanding the nonretrogression requirements of Section Five, the State's resulting redistricting plan necessarily fails strict scrutiny because, as this Court has found, "a reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw*, 509 U.S. at 655. As this Court has held, "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." *Miller*, 515 U.S. at 927-28.

Alabama cannot hide behind the argument that the Department of Justice (DOJ) precleared the plan. This Court long ago rejected "the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues." *Miller*, 515 U.S. at 922. A redistricting plan that is merely permissible under the VRA does not satisfy the strict scrutiny standard. *See Id.* at 921-922. Rather, the standard mandates that the parameters of the districting plan must actually be required by the VRA. *Id*. at 921. The majority below, however, erroneously based its decision on the contrary contention; that the State having obtained preclearance has proved that its understanding of Section Five is correct. This view erroneously ignores that the burden of proof rests with the State to establish that its actions were required by a correct reading of the VRA. It is not the plaintiff's burden to show that Alabama's understanding of the requirements of the statute are demonstrably incorrect. *Id.* at 920 ("Strict scrutiny is a searching examination,

and it is the government that bears the burden …"). "Where a State relies on the Department's determination that race-based districting is necessary to comply with the Act, the judiciary retains an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest." *Id*. at 922.

In this case, DOJ's preclearance of the redistricting plan has even less bearing on the constitutionality of the scheme because DOJ did not have the authority to deny preclearance based on the constitutional questions at issue. By statute, DOJ may only ensure that a plan does not have a retrogressive effect or "any discriminatory purpose." 42 U.S.C. § 1973c(b)-(d). DOJ guidance specifically states that "the Attorney General may not interpose an objection to a redistricting plan on the grounds that it violates the one-person one-vote principle, [or] on the grounds that it violates *Shaw v. Reno*, 509 U.S. 630 (1993)." Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470 (Feb. 9, 2011). Thus, DOJ was proscribed from considering the constitutional questions at issue in this case, making its preclearance of Alabama's districting plan irrelevant.

III. This Case Does Not Squarely Present a Question Regarding the Constitutionality of Section Two of the Voting Rights Act and Would Be an Exceptionally Poor Vehicle to Analyze its Constitutionality

This Court is limited to reviewing the questions that have been presented by the parties and raised by the issues below. In issuing decisions "the 'cardinal

principle of judicial restraint' is that 'if it is not necessary to decide more, it is necessary not to decide more.'" *Morse v. Frederick*, 551 U.S. 393, 431 (2007) (Breyer, J., concurring in part and dissenting in part) (quoting *PDK Labs, Inc. v. U.S. Drug Enforcement Admin.*, 632 F.3d 786, 799 (C.A.D.C. 2004)(Roberts, J. concurring in part and concurring in judgment)).

In relevant part, the substantive issue before this Court is whether the non-retrogression portion of Section Five of the VRA justifies Alabama's redistricting plan such that it could pass constitutional muster. In Appellees' Joint Motion to Dismiss or Affirm, however, the State argues that "Section Two of the Voting Rights Act requires the state to create and maintain districts that allow compact racial minorities to elect candidates of their choice," and that "black legislators and political leaders suggested to the drafters and testified at trial that, to comply with Section Two, the black population of the majority-black district must usually be more than 60 percent and sometimes more than 65 percent." Appellees' Joint Motion to Dismiss or Affirm, 21. As argued above, it is clear from the record below that the drafters' primary, if not only, putative reason for drawing the districts as they did was compliance with their understanding of the non-retrogression requirements of Section Five of the VRA. As such, this Court should issue a narrow ruling addressing whether Alabama's redistricting scheme was narrowly tailored to fit the requirements of Section Five of the VRA. Furthermore, the context of this case effectively raises no constitutional issue under Section Two of the VRA. Therefore, this case would present an exceptionally poor vehicle to assess the constitutionality of that provision.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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