

No. 16-24

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IN THE  
**Supreme Court of the United States**

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MARGARET DICKSON, *ET AL.*,  
*Petitioners,*

v.

ROBERT RUCHO, *ET AL.*,  
*Respondents.*

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On Petition for Writ of Certiorari  
to the Supreme Court of North Carolina

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**BRIEF OF CONSTITUTIONAL LAW  
SCHOLARS AS *AMICI CURIAE* IN SUPPORT  
OF PETITIONERS**

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**INTERESTS OF *AMICI CURIAE*<sup>1</sup>**

*Amici curiae* are professors and scholars of constitutional law at schools in North Carolina. *Amici* are gravely concerned about the North Carolina Supreme Court's decision upholding the congressional and legislative redistricting plans for North Carolina. As *amici* explain herein, the North Carolina Supreme Court acted in blatant disregard of this Court's precedent in upholding the plans.

Michael Kent Curtis is the Judge Donald L. Smith Professor in Constitutional and Public Law at Wake Forest University School of Law. He teaches courses on constitutional law, legal history, and the First Amendment. Professor Curtis is one of the foremost constitutional historians in the United States. He has received the Frank Porter Graham Award from the North Carolina Civil Liberties Union for achievement in defending and advancing civil liberties in North Carolina.

William (Bill) Marshall is currently the Kenan Professor of Law at the University of North Carolina. He was previously Deputy White House Counsel and Deputy Assistant to President Bill Clinton. He has also served as the Solicitor General of the State of Ohio.

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<sup>1</sup> Pursuant to Rule 37.2, *amici* notified counsel of record for all parties of their intent to file an *amicus* brief at least ten days prior to the due date for the brief. The parties' written consent to this filing accompany this brief. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

Professor Marshall has published extensively on freedom of speech, freedom of religion, federal courts, presidential power, federalism, and judicial selection matters. He teaches civil procedure, constitutional law, election law, first amendment, federal courts, freedom of religion, the law of the presidency, and media law.

H. Jefferson Powell is a Professor at Duke University School of Law. He returned to Duke in May 2012 after serving as deputy assistant attorney general in the Office of Legal Counsel at the U.S. Department of Justice and as a professor at George Washington University Law School. He previously served on the Duke Law faculty from 1989 to 2010 and served in the U.S. Department of Justice in various capacities from 1993 to 2000. In 1996, he was the principal deputy solicitor general. Professor Powell's scholarship has addressed the law and history of American constitutionalism.

### SUMMARY OF ARGUMENT

On June 27, 2016, this Court noted probable jurisdiction in *McCrorry v. Harris*, No. 15-1262, and thereby agreed to review the decision of the three-judge federal court in North Carolina that two of the State's congressional districts were racially gerrymandered in violation of the Equal Protection Clause. As Petitioners in this case—*Dickson v. Rucho*, No. 16-24—have noted, the North Carolina Supreme Court reached the exact opposite conclusion with respect to the very same claims and as to the very same districts. Thus, in *McCrorry*, this Court agreed to “resolve the split between the [three-judge federal]

court below and the North Carolina Supreme Court which reached the opposite result in a case raising identical claims[.]” See Jurisdictional Statement at ii-iii, *McCrory v. Harris*, No. 15-1262 (U.S. Apr. 8, 2016), 2016 WL 1426639. This Court should likewise agree to grant the petition in *Dickson* so that the split can be fully resolved.

Although this Court might consider simply holding the *Dickson* petition and then granting, vacating, and remanding the case following the outcome in *McCrory*, there are at least two reasons it should instead grant certiorari in *Dickson* and order full briefing and argument of *Dickson* alongside *McCrory*.

First, a grant, vacate, and remand following *McCrory* would only cause further delay with a high likelihood that Petitioners would again have to return to this Court. Petitioners first brought their racial gerrymandering claims in North Carolina state court on November 3, 2011—almost *five years and three election cycles ago*—and have been back and forth between the North Carolina Supreme Court and this Court once already. This Court held, then granted, vacated, and remanded this case following its decision in *Alabama Legislative Black Caucus v. Alabama* (*ALBC*), 135 S. Ct. 1257 (2015). See *Dickson v. Rucho*, 135 S. Ct. 1843 (2015) (mem.). The North Carolina Supreme Court, however, declined to follow this Court’s guidance on remand. It propounded instead a grudging interpretation of this Court’s *ALBC* decision that ignored this Court’s fundamental holding that a state may not “adopt[] and appl[y] a policy of

prioritizing mechanical racial targets above all other districting criteria.” 135 S. Ct. at 1267. The North Carolina Supreme Court’s intransigence upon remand, combined with the importance of resolving this issue before the 2018 election cycle begins, counsels in favor of addressing this case in tandem with *McCrorry*. Otherwise, the state court may well again ignore this Court’s instructions on remand, or decline to rule in time for the next election cycle.

Second, this case presents an important issue that is not raised in *McCrorry* regarding the permissibility of setting racial targets based on proportionality. As the State trial court held, and as Respondents have acknowledged, when conducting both congressional and legislative redistricting, North Carolina explicitly sought to ensure “rough proportionality” between the percentage of majority-minority legislative districts and the percentage of minority voters in the State. Pet. App. 174a. The State’s legislative leaders stated that their plan “mean[t] the creation of 24 majority African American House districts and 10 majority Senate districts,” guaranteeing “substantial proportionality for North Carolina’s African American citizens.” Pet. App. 117a-118a (quotation marks omitted). In other words, the architects of North Carolina’s legislative maps looked to the racial demographics of the State, then used those figures to impose a strict racial quota on the number of majority-minority seats.

The North Carolina Supreme Court upheld this quota system, Pet. App. 73a-77a, in a deeply divided

opinion. Although the four-justice majority conceded that “proportionality does not provide a safe harbor for States seeking to comply with section 2” of the Voting Rights Act (VRA), *id.* at 75a (citing *LULAC v. Perry*, 548 U.S. 399, 436 (2006)), it stated that “the General Assembly did not use proportionality improperly,” *id.* at 76a.<sup>2</sup> This holding badly misconstrues this Court’s precedents. As the Court held in *Johnson v. De Grandy*, proportionality cannot serve as a shield against liability under the VRA, nor can it insulate a state’s race-conscious districting from an equal protection challenge. 512 U.S. 997, 1017-18 (1994). The North Carolina Supreme Court’s misreading of this Court’s decisions would permit the imposition of racial quotas in clear defiance of equal protection principles. Its rule would have serious consequences in advance of the 2020 redistricting cycle by sanctioning states’ efforts to trade “the rights of some minority voters . . . against the rights of other members of the same minority class.” *Id.* at 1019. This Court should grant certiorari to address this important question.

## ARGUMENT

### I. The North Carolina Supreme Court Has Not Complied with this Court’s Mandate.

In the 2015 Term, this Court underscored the risk that “new district boundaries [can] create ‘racial

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<sup>2</sup> Three justices, writing in dissent, disagreed. Pet. App. 90a-139a. They concluded that “the majority appears to join the trial court in using race as a legislative safe harbor in derogation of the clear prohibition against reliance upon such criteria set forth by the Supreme Court of the United States.” *Id.* at 119a.

gerrymanders’ in violation of the Fourteenth Amendment’s Equal Protection Clause.” *ALBC*, 135 S. Ct. at 1262-63 (internal citation omitted). Underlying this warning is a central tenet of constitutional law: “Racial classifications are antithetical to the Fourteenth Amendment, whose ‘central purpose’ was ‘to eliminate racial discrimination emanating from official sources in the States.’” *Shaw v. Hunt (Shaw II)*, 517 U.S. 899, 907-08 (1996) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491 (1989); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)). Accordingly, where a state makes race the predominant factor in drawing district lines, those districts are subject to strict judicial scrutiny to ensure that they do not run afoul of the Equal Protection Clause. *See, e.g., id.* at 906-07.

In *ALBC*, this Court emphasized the clear principle governing racial gerrymandering claims: “[E]lectorate districting violates the Equal Protection Clause when (1) race is the ‘dominant and controlling’ or ‘predominant’ consideration in deciding ‘to place a significant number of voters within or without a particular district,’ and (2) the use of race is not ‘narrowly tailored to serve a compelling state interest.’” *ALBC*, 135 S. Ct. at 1264 (first quoting *Miller v. Johnson*, 515 U.S. 900, 913, 915 (1995); then quoting *Shaw II*, 517 U.S. at 902). After engaging in a detailed analysis, this Court concluded that Alabama’s practices failed strict scrutiny by “rel[ying] heavily upon a mechanically numerical view” of race and electoral dynamics. *Id.* at 1273. This Court thus vacated and remanded the case to the district court, urging it to adopt a “more purpose-oriented view” of

the VRA that reflected actual voting opportunities on the ground, rather than allowing Alabama to rely on mechanical racial targets. *Id.*

The fundamental issue in *ALBC* was the lack of any connection between the Alabama legislature’s redistricting policy and the actual effect of district lines on minority voters. The State declined to analyze whether particular areas needed to be redrawn in order to afford minority voters an equal opportunity to elect candidates of their choice. Instead of this type of nuanced study—or indeed, any apparent assessment of the relationship between the minority population in an area and that population’s electoral opportunities—the Alabama legislature’s redistricting committee relied on racial targets. To create majority-minority districts that would meet its pre-specified racial targets, the State “deliberately chose additional black voters to move into underpopulated majority-minority districts.” 135 S. Ct. at 1266 (quoting 989 F. Supp. 2d 1227, 1274 (M.D. Ala. 2013)). Given such evidence that “Alabama expressly adopted a policy of prioritizing mechanical racial targets [for the makeup of a district] above all other districting criteria,” *id.* at 1267, the Court vacated and remanded the case to the district court.

Alabama’s adoption of mechanical racial calculations is not unique among the states; to the contrary, there are strong parallels between its use of racial targets and the redistricting policy of North Carolina. As in Alabama, the North Carolina legislature insisted that it needed to prioritize a “mechanical racial target” of creating majority-minority districts in “roughly the

same proportion as the ratio of Black population to total population” in order to avoid liability under the VRA. Pet. App. 174a; *see also id.* at 166a-174a. And as in Alabama, this conclusion was divorced from a nuanced assessment of whether black voters had the opportunity to elect voters of their choice *before the lines were redrawn*. As the dissent below stated, “[w]ithout asking the correct question—‘To what extent must we preserve existing minority percentages in order to maintain the minority’s present ability to elect the candidate of its choice?’—the trial court authorized the legislature to move minority voters based solely on their race without justification. Pet. App. 116a. Yet, in a decision handed down before *ALBC*, the North Carolina Supreme Court found this policy entirely unproblematic. *See Dickson v. Rucho*, 766 S.E.2d 238 (N.C. 2014).

In the wake of *ALBC*, this Court vacated and remanded the North Carolina Supreme Court’s earlier decision and sent it back, ordering the North Carolina Supreme Court to reconsider its decision in light of what this Court had held in *ALBC*. *See Dickson v. Rucho*, 135 S. Ct. 1843 (2015) (mem.). But on remand, the North Carolina Supreme Court again ducked its analytical duty with a reading of *ALBC* that ignored this Court’s reasoning. The court construed *ALBC* to require only “a district-by-district analysis in which the federal equal population requirement is simply a ‘background’ rule that does not influence the predominant motive analysis.” Pet. App. 5a (quoting *ALBC*, 135 S. Ct. at 1271). But *ALBC* does not simply require a “detailed district-by-district analysis” that

does not “giv[e] improper weight to population equalization.” *Id.* at 6a (citation omitted). *ALBC* prohibits the use of racial targets in making race *predominant* in a manner that is not narrowly tailored to advance a compelling state interest. *See ALBC*, 135 S. Ct. at 1264. The North Carolina Supreme Court’s conclusion that the State’s redistricting plan comports with the Equal Protection Clause is thus completely inconsistent with *ALBC*.

North Carolina’s single-minded focus on creating majority-minority districts without undertaking any analysis of whether such districts were needed to afford minority voters the opportunity to elect candidates of choice cannot be sustained after *ALBC*. In this case, as in *ALBC*, “a primary redistricting goal was to maintain existing racial percentages in each majority-minority district,” even though doing so required foregrounding race in drawing district lines. 135 S. Ct. at 1271. Yet, rather than taking the *ALBC* directive seriously, the North Carolina Supreme Court strained to read the case extremely narrowly. It contrasted the State’s treatment of equal population requirements with *ALBC*, declaring “[u]nlike the situation in *Alabama*, the General Assembly here did not place special emphasis on compliance with federal one-person, one-vote standards; rather, equal population was a ‘background’ criterion that entered into formulating the challenged [districts].” Pet. App. 34a.

The North Carolina court’s parsimonious treatment of this Court’s decision ignores the reality that racial

metrics played a predominant role in the General Assembly's policy in clear disregard of *ALBC*'s reasoning. In its redistricting plan, the General Assembly determined that avoiding liability under Section 2 of the Voting Rights Act required that each VRA district have a total black voting population of no less than 50%. *See* Pet. App. 99a. The General Assembly, however, failed to consider whether a district, before its lines were redrawn, was *already* successfully allowing minority voters to elect their preferred candidate even though it had less than 50% black voting age population. When it went to draw lines, North Carolina focused only on whether a district was majority-minority: this policy clearly “prioritize[ed] mechanical racial targets above all other districting criteria.” *ALBC*, 135 S. Ct. at 1267. This Court's reasoning in *ALBC* bars precisely this sort of redistricting policy.

The North Carolina Supreme Court's failure to take *ALBC* seriously—as this Court expected it to do in remanding the case for reconsideration in light of *ALBC*—also demonstrates why this Court should address this issue now. If this Court stays the case pending resolution of *McCrory*, and then grants, vacates, and remands to the North Carolina Supreme Court to reconsider its decision in light of what this Court holds in *McCrory*, that would simply delay the moment when North Carolina must once again take up these questions. The North Carolina Supreme Court's erroneous interpretation of *ALBC* on remand, however, creates doubt as to whether that same court would correctly address the issues after *McCrory* is

decided. If, as seems likely, the North Carolina Supreme Court continues to improperly construe this Court's racial gerrymandering doctrine on remand, then the end result would likely be yet another flawed decision and another petition for certiorari filed with this Court. A grant of certiorari now avoids dragging out an ongoing stream of litigation and is particularly appropriate because *McCrorry* presents overlapping issues.

Moreover, with the 2020 redistricting looming, time is of the essence. If this case—which was first filed in November 2011—is remanded for a second time after *McCrorry*, then the North Carolina Supreme Court is unlikely to decide it in time to effect any change before the 2018 election cycle. This outcome would permit yet another election to proceed using unconstitutional, racially-gerrymandered districts. No judicial remedy can redress the electoral impact of districts that—at the time that citizens cast their votes—failed to implement redistricting principles properly. In addition, a lack of clarity regarding North Carolina's maps risks setting the wrong national example in advance of the 2020 redistricting. This Court should grant certiorari now to avoid significant potential confusion and should schedule this case for full merits briefing and argument in conjunction with *McCrorry*.

## **II. The North Carolina Supreme Court's Proportionality Ruling Is Contrary to this Court's Precedents.**

Even apart from the need to resolve the conflict between this case and *McCrorry* without delay, the

Court should grant this petition because it presents an issue of exceptional importance regarding the proper interpretation of this Court's precedents about the use of racial proportionality in redistricting. It is undisputed that North Carolina's districting policy imposed an inflexible proportionality requirement. The State ordered its mapmaker to create plans that provided "substantial proportionality," Pet. App. 99a, and its legislative leaders publicly stated that their proposals would ensure a proportional number of majority-minority seats, *id.* at 117a. Nothing in the record suggests that North Carolina tolerated deviations from proportionality when it drew its district lines.

This reflexive, mechanical use of race flies in the face of the Equal Protection Clause and this Court's precedent concerning the proper use of proportionality. The State's "sorting of persons with an intent to divide by race raises the most serious constitutional questions." *De Grandy*, 512 U.S. at 1029 (Kennedy, J., concurring). By blessing North Carolina's race-based districting scheme, the North Carolina Supreme Court misread this Court's redistricting jurisprudence and ignored fundamental equal protection principles. The North Carolina Supreme Court cited a single case—*De Grandy*—in support of its proportionality ruling. Pet. App. 75a-76a. In its view, *De Grandy* permitted the State to use proportionality to "protect[] the redistricting plans from potential legal challenges under section 2's totality of the circumstances test." Pet. App. 76a. Accordingly, the court explained,

proportionality was permissible as long as it was not explicitly used to achieve racial balancing. *Id.*

This reading is inconsistent with the Court’s reasoning in *De Grandy* and with redistricting case law generally. *De Grandy* holds—contrary to the opinion below—that proportionality cannot serve as a “safe harbor for any districting scheme” and cannot inoculate a state from Section 2 liability. 512 U.S. at 1017-18. Accordingly, even if compliance with the Voting Rights Act is a compelling government interest,<sup>3</sup> proportionality alone cannot satisfy North Carolina’s obligation to narrowly tailor its race-conscious policies.

This Court in *De Grandy* gave several reasons for the Court’s refusal to adopt the rule that states can avoid Section 2 liability through proportionality. First, the Court explained that an “inflexible” proportionality rule would “run counter to the textual command of § 2, that the presence or absence of a violation be assessed ‘based on the totality of the circumstances.’” 512 U.S. at 1018 (quoting 42 U.S.C. § 1973(b) (current version at 52 U.S.C. § 10301 (2012))). Second, the Court feared that proportionality could serve as a fig leaf for nefarious gerrymandering schemes, noting that “[u]nder the State’s view, the most blatant racial

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<sup>3</sup> The Court has often “assume[d] without deciding” that compliance with the VRA can serve as a compelling government interest. *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion); see *Shaw II*, 517 U.S. at 915; *Miller*, 515 U.S. at 921; see also *LULAC v. Perry*, 548 U.S. 399, 518 (2006) (Scalia, J., dissenting) (“We have in the past left undecided whether compliance with federal antidiscrimination laws can be a compelling state interest.”).

gerrymandering in half of a county's single-member districts would be irrelevant under § 2 if offset by political gerrymandering in the other half, so long as proportionality was the bottom line." *Id.* at 1019. Finally, it worried that such a rule might foster "a tendency to promote and perpetuate efforts to devise majority-minority districts even in circumstances where they may not be necessary to achieve equal political and electoral opportunity." *Id.* at 1019-20.

Each of those concerns applies with force in this case. First, North Carolina relied upon proportionality to avoid the contextual analysis that the VRA demands. Its "mechanically numeric" approach, *see ALBC*, 135 S. Ct. at 1273, produced highly irregular districts that cannot be explained except through the lens of race, *see* Pet. 15-16. Second, the State sought to use proportionality to shield its maps from close consideration of whether the totality of circumstances supports the creation of particular majority-minority districts. And finally, the North Carolina General Assembly failed to consider whether equal political opportunity in fact required such redistricting contortions. Its districting scheme therefore "reinforce[s] the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Shaw v. Reno (Shaw I)*, 509 U.S. 630, 657 (1993).

*De Grandy's* concurrences underscored the problems with singular reliance on proportionality. Justice Kennedy reasoned that "placing undue emphasis upon proportionality risks defeating the goals

underlying the Voting Rights Act.” 512 U.S. at 1028 (concurring opinion); *see also id.* at 1026 (O’Connor, J., concurring) (“Proportionality is not a safe harbor for States; it does not immunize their election schemes from § 2 challenge.”). In Justice Kennedy’s view, proportionality could raise grave constitutional concerns by requiring “the sorting of persons with an intent to divide by reason of race.” *Id.* at 1029. The “‘use of a mathematical formula’ to assure a minimum number of majority-minority districts,” he explained, “may balkanize us into competing factions” and “threatens to carry us further from the goal of a political system in which race no longer matters.” *Id.* at 1030 (first quoting *United Jewish Orgs. v. Carey*, 430 U.S. 144, 186 (1977) (Burger, C.J., dissenting); then quoting *Shaw I*, 509 U.S. at 657).

North Carolina’s redistricting procedure raises these additional concerns. North Carolina put race front-and-center in its redistricting process. With no analysis whatsoever as to whether such districts were necessary, North Carolina’s legislative leaders stated from the start of the districting cycle that they would ensure numerical proportionality by creating twenty-four majority-minority House districts and ten majority-minority Senate districts; the final maps included twenty-three majority-minority House districts and nine majority-minority Senate districts. Pet. App. 117a, 172a-173a. These figures were marked increases from the legislature’s previous maps passed in 2003: then, the State drew ten majority-minority House districts and zero majority-minority Senate districts. *Id.* at 172a-173a.

As the trial court found—but as the North Carolina Supreme Court ignored—the “undisputed evidence” is that the General Assembly used proportionality as an inflexible “benchmark” that predominated over all other considerations in the redistricting process—including whether minority voters were able to elect candidates of choice under the State’s previous maps. *Id.* at 174a-175a. This “benchmark” is precisely the sort of “mathematical formula” Justice Kennedy rejected in *De Grandy*.

Of course, *De Grandy* acknowledges that proportionality may be relevant as a component of the “totality of circumstances” VRA inquiry. 512 U.S. at 1018 (quoting 42 U.S.C. § 1973(b)). However, the North Carolina Supreme Court did not consider proportionality as part of the totality of the circumstances, but rather considered the factor in isolation. *See* Pet. App. 76a. Because the court “failed to ask whether the totality of facts, including those pointing to proportionality, showed that the new scheme would deny minority voters equal political opportunity,” it misunderstood the role of proportionality in VRA analysis. *De Grandy*, 512 U.S. at 1013-14 (footnote omitted). This error, as the state court dissent sharply noted, infects the court’s entire analysis. *See* Pet. App. 119a-120a.

The North Carolina Supreme Court’s flawed proportionality reasoning, in turn, allowed the court to deviate from bedrock equal protection principles. This Court has warned against government reliance on crude racial metrics to advance equal protection goals:

“Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that ‘[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens 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 (alteration in original)); *see also Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2225 (2016) (Alito, J., dissenting) (“To the extent that UT is pursuing parity with Texas demographics, that is nothing more than ‘outright racial balancing,’ which this Court has time and again held ‘patently unconstitutional.’” (quoting *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2419 (2013))). The North Carolina Supreme Court’s acquiescence to the State’s explicit and mechanical proportionality-based districting, therefore, finds support in neither the VRA nor the Constitution.

If the North Carolina Supreme Court’s proportionality analysis is allowed to stand, jurisdictions across the country will feel emboldened to mask racial gerrymanders through mechanical adherence to proportionality. North Carolina’s use of districting quotas as a substitute for careful analysis of the needs of minority voters raises serious constitutional problems and contravenes the core purposes of the Voting Rights Act. This Court’s review is warranted to clarify the appropriate use of

proportionality in drawing district lines—an issue that is not directly presented in *McCrorry*.

\* \* \*

On remand from this Court, the North Carolina Supreme Court misread both *ALBC* and this Court’s proportionality jurisprudence. It thereby blessed a redistricting scheme that relies on crude racial metrics and contravenes core equal protection principles. This Court should grant certiorari and schedule full merits briefing and argument of this case alongside *McCrorry* to ensure that North Carolina’s districts accord with this Court’s precedents and with what the Constitution demands.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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