No. 201PA12-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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MARGARET DICKSON, *et al.*, *Plaintiffs,*	)	**From Wake County**
v.	)	11 CVS 16896
	)	11 CVS 16940
ROBERT RUCHO, *et al.*, *Defendants.*	)	*(Consolidated)*
NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, *et al.*, *Plaintiffs,*	)	
v.	)	
THE STATE OF NORTH CAROLINA, *et al.*, *Defendants.*	)	

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AMICUS CURIAE BRIEF

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***AMICUS* BRIEF**

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STATEMENT OF INTEREST

Amici are four law professors at three North Carolina law schools whose teaching and scholarship focus on federal constitutional law. Our interest is in the correct interpretation and application of the federal Constitution, and of United States Supreme Court decisions addressing constitutional issues.

Amici are:

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INTRODUCTION

In July 2011, the North Carolina General Assembly enacted redistricting plans ("the Enacted Plans") for the North Carolina House of Representatives, the North Carolina Senate, and the United States House of Representatives. In the three plans, the General Assembly deliberately drew twenty-six districts to include an African American voting age population of at least 50%, and did so with the objective of "achiev[ing] a 'roughly proportionate' number of Senate, House and Congressional districts as compared to the Black population in North Carolina." *Dickson v. Rucho*, 11 CVS 16896/11 CVS 16940, at 14 (July 8, 2013) [henceforth, Memorandum of Decision]. The twenty-six districts were drawn with race as the predominant consideration, those districts were presented as such to the two houses

of the General Assembly, which then passed the plans, and the Defendants in the litigation have in effect acknowledged these facts. The Plaintiffs challenged the Enacted Plans as unconstitutional on several grounds: this brief addresses the Plans' validity under the Equal Protection Clause of the Fourteenth Amendment. The three-judge Superior Court in this litigation correctly held that the Enacted Plans therefore involved the use of racial gerrymanders. As to these districts, there is no question that, as the Superior Court concluded, the General Assembly used "a racial classification." *Id.* at 15. This litigation thus does not present the sometimes-difficult evidentiary questions that arise when a redistricting plan – which on its face distinguishes people on the basis of geography rather than race – is challenged as in fact a racial classification. The undisputed facts and the Defendants' own concessions establish the racial nature of the 2011 plans.

It is, of course, settled law that *any* use of a racial classification by government is subject to strict scrutiny under the Constitution of the United States. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). This principle applies with its full force in the context of redistricting. *See Shaw v. Reno*, 509 U.S. 630 (1993). When the challengers to a redistricting plan establish the use of a racial gerrymander by the legislature, and thus that the redistricting plan is a racial classification, the courts must subject the plan to the same requirements of a compelling interest and narrow tailoring that apply to any other use of race to

discriminate among individuals. *See, e.g., Hunt v. Cromartie*, 526 U.S. 541, 546 (1999). The burden rests on government to prove that the use of race in any redistricting plan involving a racial gerrymander was narrowly tailored to meet a compelling governmental interest. *See Shaw v. Hunt*, 517 U.S. 899, 904 (1996). It is just as clearly settled that "'outright racial balancing ... is patently unconstitutional.'" *See Fisher v. University of Texas at Austin*, 133 S.Ct. 2411, 2419 (2013). Racial balancing is *never* a narrowly tailored means to achieving even the most compelling end, except in a narrow remedial context that does not apply to the 2011 redistricting plans challenged in this litigation.

The Superior Court correctly identified strict scrutiny as the approach it should employ in reviewing the constitutionality of the General Assembly's decision to employ racial gerrymandering. However, the three-judge panel misunderstood and misapplied strict scrutiny analysis in three specific ways that constitute, singly and jointly, clear reversible error.

First, the Superior Court failed to recognize that the burden of persuasion as to both prongs of strict scrutiny rests on the government defending the racial classification. The court did not require the Defendants to prove that it was necessary for the legislature to use race in constructing the twenty-six districts to achieve what Defendants contend were its compelling purposes, to secure preclearance of the redistricting plans under section 5 of the Voting Rights Act of

1965 ("the Act") and to safeguard against potential litigation or liability under section 2 of the Act. Instead, the court expressly shifted to the Plaintiffs the burden of persuasion of demonstrating that the use of race was not narrowly tailored. The Superior Court's imposition of this burden on the Plaintiffs was directly contrary to controlling United States Supreme Court precedent, and renders the court's decision indefensible.

The Superior Court, secondly, failed to recognize the constitutional significance of the undisputed fact that the Enacted Plans were intentionally and expressly designed to create the number of majority minority districts for the state House and the state Senate that would be as directly proportional as possible "compared to the Black population in North Carolina." Under the controlling case law, it is patently unconstitutional for a legislature to calculate a demographically-based numerical objective for the number of majority minority electoral districts it intends to create, and then to devise a redistricting plan to meet that quota – which is precisely what the undisputed facts show that the General Assembly did. Overt racial balancing of this sort is unconstitutional as a means to any legitimate governmental end, and in fact undermines the argument that the legislature actually had in view a compelling interest. On the undisputed facts, the Enacted Plans were the product of unconstitutional racial balancing, and the Superior Court's failure to hold them unconstitutional was reversible error.

Finally, the Superior Court erred in accepting the Defendants' argument that the General Assembly's otherwise unconstitutional use of racial gerrymandering in constructing the twenty-six districts was justified by the legislature's goal of securing section 5 preclearance and avoiding section 2 litigation. The court was mistaken in thinking that the Supreme Court's decisions in *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006), and *Johnson v. De Grandy*, 512 U.S. 997 (1994), provide any justification for the General Assembly's use of numerical racial quotas in the Enacted Plans. If sections 2 and 5 did provide a justification for the legislature's action, they would be to that extent unconstitutional. It is, however, the duty of the courts to avoid giving the provisions an unconstitutional construction if possible, and neither section of the Act need be given the meaning that the Superior Court accorded them. The court failed to execute this duty, and for this reason as well, it committed reversible error.

I. THE SUPERIOR COURT DID NOT APPLY THE STRICT SCRUTINY ANALYSIS REQUIRED BY CONTROLLING UNITED STATES SUPREME COURT PRECEDENT.

A. A redistricting plan found to involve racial gerrymandering is subject to the same strict scrutiny analysis applicable to any other racial classification.

Under the Constitution's requirement of equal protection, "'*any* official action that treats a person differently on account of his race ... is inherently suspect.'" *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411, 2419 (2013)

(emphasis added and citation omitted). In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the United States Supreme Court therefore held that

> *all* racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

Id. at 227 (emphasis added). *See also Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding that all state and local governmental uses of racial classifications are subject to strict scrutiny). There are no exceptions to this constitutional rule: strict scrutiny applies regardless of the circumstances in which a racial classification is applied or the purpose for which race is being used, and the Supreme Court has repeatedly insisted that the scrutiny must be no less demanding when government asserts a legitimate or "benign" objective. *See, e.g., Fisher*, 133 S.Ct. at 2430 (quoting *Johnson v. California*, 543 U.S. 499, 505 (2005) ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications")); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) ("We apply strict scrutiny to all racial classifications to '"smoke out" illegitimate uses of race') (quoting *Croson*, 488 U.S. at 493). "Any racial classification must meet strict scrutiny, for when government decisions 'touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental

interest.'" *Fisher*, 133 S.Ct. at 2417 (quoting *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 299 (1978) (opinion of Powell, J.)).

The Supreme Court's decisions make it clear that under strict scrutiny it is the defender of the racial classification who bears the burden of proving that the classification is actually serving a compelling interest *and* the burden of proving that the classification is narrowly tailored to achieve this goal. *See, e.g.*, *Fisher*, 133 S.Ct. at 2420 ("it remains at all times the [government entity's] obligation to demonstrate, and the Judiciary's obligation to determine" that the demands of strict scrutiny have been met). The plaintiff bears the initial burden of showing that the challenged governmental action in fact makes use of race to classify or categorize individuals, and that as a consequence strict scrutiny applies. If the plaintiff can make this showing, however, it is the public entity that has used a racial classification that must prove to the court that its action meets the compelling interest and narrow tailoring requirements. Even as to issues where legislators or other officials have "traditionally exercise[d] substantial discretion" such as ""the redistricting context," the Supreme Court has emphasized that "we have refused to defer to state officials' judgments on race." *Johnson*, 543 U.S. at 512. It is reversible error for a court applying strict scrutiny to a racial classification to presume good faith on the government's part, "and place on [the challenger] the burden of rebutting that presumption," or to defer to governmental assertions of "'a

"benign" or legitimate purpose.'" *Fisher*, 133 S.Ct. at 2420 (quoting *Croson*, 488 U.S., at 500 (such assertions are entitled to "'little or no weight'")).[1]

The Supreme Court applied these constitutional requirements most recently in *Fisher*, a case challenging the use of race in undergraduate admissions. The Court explained that the "plaintiff, of course, bears the burden of placing the validity of a [public] university's adoption of an affirmative action plan in issue." 133 S.Ct. at 2420. Once the plaintiff has shown the presence of a racial classification, however, "strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice." *Id. See also id.* at 2414 (the university must "establish[] that its goal ... is consistent with strict scrutiny [and] must prove that the means chosen ... are narrowly tailored to that goal"). There is nothing unique to the university admissions context in this regard: strict scrutiny of any racial classification imposes the burden of proof on the government.

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[1] Strict scrutiny shifts the burden to government to demonstrate a compelling interest and show that its use of a suspect classification is narrowly tailored under the North Carolina Constitution as well. *State ex rel. Utilities Com'n v. Carolina Utility Customers Ass'n, Inc.*, 336 N.C. 657, 680-81, 446 S.E.2d 332 ("North Carolina cases applying the equal protection clause of the state ... constitution[] to challenged classifications have used the same test the federal courts use ... This level of review 'requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest.'") (citations omitted).

The principle that "[s]trict scrutiny applies to all governmental classifications based on race" applies in the context of legislative redistricting no less fully than in other situations. "Our decisions have established that all laws that classify citizens on the basis of race, including racially gerrymandered districting schemes, are constitutionally suspect and must be strictly scrutinized." *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999). *See also Shaw v. Hunt*, 517 U.S. 899, 904 (1996) [henceforth *Shaw II*].[2] Redistricting differs in only one respect from other situations in which a legislature or other governmental entity might employ race. Unlike the overt use of a racial classification in, for example, determining whom to admit to a public university, on their face district lines classify individuals on the basis of geography and not race. However, as the courts have long recognized, political line-drawing can serve as a means for what is effectively a classification on the basis of race. *See Gomillion v. Lightfoot*, 364 U.S. 339 (1960). In *Shaw v. Reno*, 509 U.S. 630 (1993) [henceforth, *Shaw I*], therefore, the Court held that

[2] In discussing the strict scrutiny analysis that must be applied to all racial classifications, the Supreme Court often cites cases involving redistricting along with decisions that address other uses of race. *See, e.g.*, *Johnson v. California*, 543 U.S. at 505 (citing *Shaw v. Reno*, 509 U.S. 630 (1993)). The Court has never suggested that there is any difference in the form of scrutiny to be applied in redistricting cases once, as here, the challenger has established the presence of racial gerrymandering. *See Bush v. Vera*, 517 U.S. 952, 1000 (1996) (Thomas, J., concurring in the judgment) ("Strict scrutiny applies to all governmental classifications based on race, and we have expressly held that there is no exception for race-based redistricting.").

legislative redistricting must sometimes be treated as a racial classification, and in those situations a court must review the legislature's decisions under strict scrutiny. *Id.* at 653. Because "a legislature may be conscious of the voters' races without using race as a basis for assigning voters to districts," the Court has required a plaintiff to do more than show race-consciousness to trigger strict scrutiny. *Shaw II*, 517 U.S. at 905. "The constitutional wrong occurs when race becomes the 'dominant and controlling' consideration." *Id.* Strict scrutiny accordingly applies to legislative redistricting where the plaintiff proves that the use of race was "the predominant, overriding factor" in the legislature's decisions about drawing electoral lines – what the Court calls a racial gerrymander. *Miller v. Johnson*, 515 U.S. 900, 920 (1995).

Under the *Shaw* line of cases, the initial burden on the plaintiffs to show that a redistricting plan in fact involves racial gerrymandering "is a 'demanding one.'" *Easley v. Cromartie*, 532 U.S. 234, 241 (2001). The plaintiff must prove that race was "'the 'predominant factor' motivating the legislature's districting decision," *id.*, before the court should apply strict scrutiny. If the plaintiff does meet this burden, however, it is the court's obligation to determine whether the defendant can demonstrate that the legislature's race-based redistricting decision satisfies strict scrutiny. In *Shaw II*, for example, the Court noted that in a racial gerrymandering case, the "plaintiff bears the burden of proving the race-based

motive" and concluded that in that litigation the plaintiffs had shown "that race was the predominant factor motivating the legislature's [redistricting] decision." 517 U.S. at 905. The plaintiffs having carried their burden of proving a racial gerrymander, the burden shifted to the state to prove that the challenged congressional district satisfied strict scrutiny. "North Carolina, therefore, must show not only that its redistricting plan was in pursuit of a compelling state interest, but also that 'its districting legislation is narrowly tailored to achieve [that] compelling interest.'" *Id.* at 908 (quoting *Miller*, 515 U.S. at 920).

B. The Superior Court correctly held that the plaintiffs had carried their burden of showing that the 2011 Enacted Plans involved racial gerrymandering.

Among other federal and state constitutional arguments, the plaintiffs in this litigation have challenged the 2011 Enacted Plans as involving unconstitutional racial gerrymanders.[3] The Superior Court correctly determined that it should analyze this claim under the *Shaw v. Reno* line of United States Supreme Court decisions, and as a result that the first substantive issue to be resolved was whether the challenged districts in the 2011 plans are racial gerrymanders. Memorandum of Decision, at 13. While acknowledging the evidentiary difficulties that a plaintiff may face in proving the existence of a racial gerrymander, the Superior Court

[3] *Amici* do not address the Plaintiffs' other claims.

concluded that it was "able to by-pass this factual inquiry for some, but not all, of the challenged districts."

> The Plaintiffs collectively challenge as racial gerrymanders 9 Senate, 18 House and 3 U.S. Congressional districts created by the General Assembly in the Enacted Plans. Of those 30 challenged districts, it is undisputed that the General Assembly intended to create 26 of the challenged districts to be "Voting Rights Act districts" [hereinafter "VRA districts"] and that it set about to draw each of these VRA districts so as to include at least 50% Total Black Voting Age Population ... Moreover, the General Assembly acknowledges that it intended to create as many VRA districts as needed to achieve a "roughly proportionate" number of Senate, House and Congressional districts. To draw districts based upon these criteria necessarily requires the drafters of districts to classify residents by race so as to include a sufficient number of black voters inside such districts, and consequently exclude white voters from the districts, in an effort to achieve a desired racial composition of >50% [Total Black Voting Age Population] and the desired "rough proportionality." This is a racial classification.

Id. at 14-15. The Superior Court determined that it did not need to conduct a trial on the racially gerrymandered nature of the so-called VRA districts because the undisputed facts and the defendants' own admissions showed that race was the predominant factor in drawing the boundaries of those districts. *Id.* at 14. *See also id.* at 17 n. 12 (noting that all parties "reach the same conclusion, as does the trial court, that the issues before the trial court are predominantly issues of law appropriate for summary judgment"). The court therefore "conclude[d] ... that in

drawing VRA districts ... the shape, location and racial composition of each VRA district was predominantly determined by a racial objective and was the result of a racial classification sufficient to trigger the application of strict scrutiny as a matter of law." *Id.* at 15.[4]

The Superior Court's holding as to the racially gerrymandered nature of the VRA districts is correct and, *amici* submit, beyond serious question. There is no dispute over the fact that the *legislators* chiefly responsible for developing the 2011 Enacted Plans did so with express, numerical racial benchmarks in mind. The plans were to include the number of majority minority districts as closely proportionate as possible to the overall African American population of the state, and furthermore, the districts were to be drawn to include a total black voting age population of at least 50%. *Id.* at 14. As the Superior Court concluded, there can be no doubt that in both respects the General Assembly employed "a racial classification," and that race was in fact the predominant motivation in the construction of these districts. *Id.* at 26 (racial purpose of creating VRA districts

[4] The Superior Court concluded that there were genuine issues of material fact as to the legislative purpose behind the redistricting of the four challenged districts that were not "VRA districts." As to those four districts, the court conducted a trial and in each instance found against the plaintiffs. *Amici* do not address whether those conclusions are correct.

shown by "undisputed evidence").[5] The Defendants therefore had the burden of proving that the General Assembly's use of race in drawing the VRA districts satisfied the demands of strict scrutiny.

C. The Superior Court did not apply the proper strict scrutiny analysis in reviewing the 2011 Enacted Plans.

The Superior Court recognized that the proper analysis to apply to a redistricting plan that involves the use of a racial gerrymander is strict scrutiny. Memorandum of Decision, at 13.[6] However, the court clearly failed to understand

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[5] The Superior Court, following the defendants' characterization of the plans, refers to the General Assembly's goal as to the number of majority minority districts as one of "rough proportionality" between the number of such districts created and the percentage of African American citizens in North Carolina. *Amici* discuss below the court's misunderstanding of the United States Supreme Court's use of this term. *See* below at 35-40. The court was right to dismiss any argument that because the General Assembly sought only *rough* proportionality, its use of race was not a racial gerrymander: exact proportionality would be an almost impossible mathematical requirement for a *Shaw* plaintiff to meet. In any event, it is undisputed that the legislators who developed the 2011 plans sought as great a degree of proportionality as possible.

[6] Rather mysteriously, having found that the General Assembly engaged in racial gerrymandering in drawing the lines of the VRA districts, the Superior Court then observed that "a persuasive argument can be made ... that a lesser standard of review might be appropriate" because the General Assembly was balancing "several competing redistricting criteria," Memorandum of Decision, at 15, but that it was nonetheless applying strict scrutiny. *But see id.* ("the trial court concludes" that the VRA districts were "the result of a racial classification sufficient to trigger the application of strict scrutiny as a matter of law"). Whether a legislature has engaged in racial gerrymandering is a question of fact if the facts are disputed, *see Easley*, 532 U.S. at 241 (racial gerrymandering issue is an "evidentiary" one about whether "the legislative's motive was predominantly racial"), and summary judgment is inappropriate where there are material facts in question. Since the

or apply correctly the United States Supreme Court's description of what the strict scrutiny of racial classifications requires. As pointed out above, once a reviewing court has found that that a redistricting plan involved racial gerrymandering, the court must apply the same strict scrutiny analysis that the controlling Supreme Court cases require for all racial classifications. This the Superior Court plainly did not do.

The Supreme Court's decisions make it clear that a court applying strict scrutiny to a racial classification does *not* defer to, or accept without searching independent judicial examination, a legislature's assertion of good faith, its claims about its benign or legitimate purposes, or the degree to which it has been careful enough either in determining whether a non-race-based classification would accomplish its goals or in tailoring its use of race if the use of race was in fact necessary. *All* of these are issues on which the legislature or other governmental defendants have the burden of proof. In none of them may the reviewing court require the challenger to disprove the legislature's assertions. *See Fisher*, 133 S.Ct. at 2420 (discussing strict scrutiny analysis for racial classifications). This burden of proof lies with the governmental defendants as much in a redistricting case as in

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Superior Court concluded – correctly in the view of *amici* – that there was no genuine factual dispute about the predominance of race in drawing the VRA districts the court was under an "obligation to determine" whether strict scrutiny was satisfied: the standard of review was not a matter of the court's discretion. *See Fisher*, 133 S.Ct. at 2420.

any other. *See, e.g., Shaw II*, 517 U.S. at 908. In the context of this litigation, these accepted constitutional principles required that the Defendants carry the burden of showing that the 2011 General Assembly employed racial gerrymandering to pursue a compelling governmental interest and that is use of race was narrowly tailored to achieve that end.[7]

The Superior Court misread the controlling Supreme Court decisions. First, the court expressly asserted that the plaintiffs "bear the burden of proof of establishing that the Enacted Plans violate equal protection guarantees. This remains true even in the context of strict scrutiny analysis." Memorandum of Decision, at 9-10. The court supported this assertion by a quotation from the federal district court in *Shaw v. Hunt* that once the state has produced evidence that the redistricting plan serves a compelling interest, "'the plaintiffs bear the ultimate burden of persuading the court either that the proffered justification is not compelling or that the plan is not narrowly tailored." *Id.* at 10 (quoting *Shaw v. Hunt*, 861 F. Supp. 408, 436 (E.D.N.C. 1994)). That statement is clearly contrary to the settled principles discussed above. The district court's decision, moreover, was reversed by the Supreme Court in *Shaw II*, and in doing so the Supreme Court

[7] *Amici* assume, for the purposes of this brief, that under appropriate circumstances compliance with section 2 of the Voting Rights Act, and obtaining preclearance under section 5 of the Act, where it constitutionally can be applied, can be compelling state interests that would justify a narrowly tailored use of race if the use of race were necessary to achieve those ends.

clearly rejected as erroneous the district court's deviation from the rule that the government bears the burden of proof where a racial classification has been put in issue. *See Shaw II*, 517 U.S. at 908 ("*North Carolina* ... must show not only that its redistricting plan was in pursuit of a compelling state interest, but also that its districting legislation is narrowly tailored to achieve [that] compelling interest.") (emphasis added).

The Superior Court also quoted the Supreme Court's recent decision in *Fisher* restating the defendants' burden of proof under strict scrutiny, Memorandum of Decision, at 10-11, but it thought that *Fisher* was distinguishable: the court asserted that "redistricting, unlike university enrollment, is an inherently political process delegated to the legislative branch." *Id.* at 11. In fact, however, *Fisher* illustrates the judicial obligation to require government to prove both elements of strict scrutiny even when on some other issue the courts are obliged to give some deference to the defendants' judgments. Following *Grutter v. Bollinger*, *Fisher* acknowledged that the university's decision to pursue an interest in "'student body diversity' ... is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper" because of the university's "experience and expertise.'" *Fisher*, 133 S.Ct. at 2419 (citation omitted). Notwithstanding this degree of deference to the university's decision whether to pursue an interest in diversity, the Supreme Court held that the lower

court was wrong in failing to require the university to prove that its use of race was narrowly tailored. "On this point, the University receives no deference." *Id.* at 2420. *Fisher* was not a decision unique to university admissions, but a restatement and application of the principles that the Court has long insisted apply to *all* uses of racial classifications, including the use of race in redistricting.

The Supreme Court has made it clear that where a legislature is shown to have drawn redistricting lines with race as its predominant concern – as here – the judiciary's traditional deference to legislative decisions on such a quintessentially political matter gives way, and the courts are not allowed to defer to the legislative judgment but must apply their own.

> [W]e have refused to defer to state officials' judgment on race in other areas [besides prison administration] where those officials traditionally exercise substantial discretion. For example ... in the redistricting context, despite the traditional deference given to States when they design their electoral districts, we have subjected redistricting plans to strict scrutiny when States draw lines based predominantly on race.

Johnson v. California, 543 U.S. at 512. "The difficulty of proof, of course, does not mean that a racial gerrymander, once established, should receive less scrutiny under the Equal Protection Clause than other state legislation classifying citizens by race." *Shaw I*, 509 U.S. at 646.

The Superior Court seems to have put great weight on the statement in *Bush v. Vera* that strict scrutiny must allow the states "'a limited degree of leeway in

furthering" its compelling interests in satisfying sections 2 and 5 of the Voting Rights Act in devising redistricting plans. Memorandum of Decision, at 11-12 (quoting *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion of O'Connor, J.)). *See also id.* at 27, 28, 34, 35, 39, 40, 44, 49, 72 (referring to the "leeway" the Superior Court thought it was obliged to allow the General Assembly). The court, for example, referred to "the limited degree of leeway that permits the General Assembly to exercise political discretion in its reasonable efforts to address compelling governmental interests," as a factor in its conclusion that the legislature "had a strong basis in evidence for concluding that 'rough proportionality' was reasonably necessary" to satisfy sections 2 and 5 of the Voting Rights Act. Memorandum of Decision, at 28. The court, however, clearly misunderstood the significance of the language it found in Justice O'Connor's plurality opinion (joined by only two other justices) in *Bush v. Vera*. In that case, Justice O'Connor concluded that the narrow tailoring requirement of strict scrutiny should not be applied to a redistricting plan in so absolute a fashion as to require the state to prove that its *precise* use of race was the *only* possible means of pursuing a genuinely compelling interest. *See Bush*, 517 U.S. at 977 (O'Connor, J.) (narrow tailoring does not entail that "state actors [are] 'trapped between the competing hazards of liability' by the imposition of unattainable requirements") (citation omitted). Justice O'Connor referred to the state legislature's "limited degree of

leeway" in drawing the lines of an electoral district in the context of rejecting the lower court's insistence that the "district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria,'" in order to satisfy narrow tailoring. *Id.* (O'Connor, J.) (citation omitted).

Amici do not disagree with Justice O'Connor's actual point, which was that strict scrutiny is not an impossible standard to meet and that a court should not impose on the legislature the duty to achieve "the least possible amount of irregularity in shape." However, contrary to the Superior Court's misreading of her opinion, Justice O'Connor did not purport to carve out an exception to the principle that the courts do *not* defer to government when applying strict scrutiny.[8] Nor did she attempt to modify the requirement of *Shaw II* (decided the same day)

[8] The Superior Court also misapplied Justice O'Connor's comment in asserting that "the trial court is required to defer to the General Assembly's 'reasonable fears of, and their reasonable efforts to avoid, § 2 liability.'" Memorandum of Decision, at 18 (quoting *Vera*, 517 U.S. at 978 (O'Connor, J.)). The court entirely ignored the context of the comment, which was to contrast the "flexibility" a state legislature possesses in redistricting with the "lack" of such flexibility on the part of "federal courts enforcing § 2:" in reviewing the legislature's decision, the federal court should respect its choices "*insofar* as deference is due." *Id.* (emphasis added). Justice O'Connor did not address the extent to which deference is due to the legislature's use of race in redistricting, and in any event a single sentence in her plurality opinion in *Vera*, which was joined by only two other members of the Court, cannot properly be read to contradict the Court's simultaneous and clear statement in *Shaw v. Hunt* that the burden of persuasion lies on the state. *See Shaw II*, 517 U.S. at 908. *Amici* are aware of only one other case in which a court has referred to Justice O'Connor's comment. *See Session v. Perry*, 298 F.Supp. 2d 451 (E.D. Tex. 2004), *vacated and remanded*, 543 U.S. 941 (2004).

that the government has the burden of proof as to both prongs of strict scrutiny once it is shown that race was the predominant motivation in a redistricting plan. In any event, as *amici* have shown, the case law since *Bush v. Vera* rebuts any suggestion that a court applying strict scrutiny may recognize the legislature's power to "exercise political discretion" to use racial classifications under a reasonableness standard – such a deferential standard is not strict scrutiny. The Superior Court transformed a phrase in Justice O'Connor's rejection of a specific, impossibly severe application of strict scrutiny in *Bush v. Vera* into a novel, deferential and wholly erroneous line of analysis with *no* basis in the controlling caselaw.[9]

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[9] *Compare* Memorandum of Decision at 28 (stating that the Superior Court "allow[ed] for the limited degree of leeway that permits the General Assembly to exercise political discretion in its reasonable efforts to address compelling governmental interests") *with Parents Involved v. Seattle School Dist. No. 1*, 551 U.S. 701, 744 (2007) (plurality opinion of Roberts, C.J.) ("'deference' is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified"); *id.* at 766 (Thomas, J., concurring) ("To adopt [a] deferential approach would be to abdicate our constitutional responsibilities"); *Johnson v. California*, 543 U.S. at 512 ("we have refused to defer to state officials' judgments on race in other areas where those officials traditionally exercise substantial discretion [including] in the redistricting context"). The Supreme Court has never quoted or relied on Justice O'Connor's reference to the existence of "a limited degree of leeway" in any case.

D. The Superior Court incorrectly put the burden of proof on the Plaintiffs to rebut the Defendants' claim that the challenged VRA districts are narrowly tailored.

When a court reviews the use of a racial classification under strict scrutiny, "it remains *at all times*" the defendants' obligation to prove that the use of race was narrowly tailored to achieve a compelling governmental interest. *Fisher*, 133 S.Ct. at 2420 (emphasis added). The Superior Court's faulty understanding of strict scrutiny, however, led it to impose on the Plaintiffs the ultimate responsibility for rebutting the Defendants' assertion that the use of racial gerrymandering in the 2011 Enacted Plans was narrowly tailored to meet the General Assembly's concerns about the Voting Rights Act. The Superior Court's opinion makes its error in this regard manifest:

> In [reviewing the narrow tailoring question], the trial court is obligated to consider whether lawful alternatives and less restrictive means could have been used, regardless of whether the General Assembly considered those alternatives. But the obligation of the trial court to consider all lawful alternatives must be harmonized with the Plaintiffs' burden of persuasion; even with the heavy burden of production resting upon the General Assembly, the Plaintiffs have some obligation to persuade the trial court that lawful alternatives in fact exist that could be compared in some meaningful way to the Enacted Plans and that, after such comparison, do "less violence to the electoral landscape."

Memorandum of Decision, at 41-42 (citation omitted). The Superior Court's imposition on the Plaintiffs of the burden of persuasion, once they proved the use

of race as a classification, is flatly inconsistent with the Supreme Court's decisions, not just those articulating the strict scrutiny test generally but specifically the *Shaw v. Reno* line of cases applying strict scrutiny to race-based redistricting. Having carried their burden of showing that the 2011 plans used race as a classification, the Plaintiffs were under *no* obligation to persuade the court that the plans were not narrowly tailored. *See, e.g.*, *Shaw II*, 517 U.S. at 908 (the plaintiffs having proven that an electoral district was racially gerrymander, "North Carolina ... must show not only that its redistricting plan was in pursuit of a compelling state interest, but also that its districting legislation is narrowly tailored to achieve [that] compelling interest.").

The Superior Court's error, moreover, was not just verbal but plainly affected its legal analysis and its conclusion. In its analysis, the court repeatedly invoked its non-existent duty to defer to the General Assembly's "political discretion:" the court "allow[ed] for the limited degree of leeway that permits the General Assembly to exercise political discretion in its reasonable efforts to address compelling governmental interests." Memorandum of Decision, at 39. As the court explained, in its view the issue was "whether a hypothetical alternative plan exists that better conforms with traditional notions of redistricting, and the Plaintiffs have failed to persuade the trial court that one exists. Plaintiffs' arguments are not persuasive because Plaintiffs have not produced alternative

plans that are of value to the trial court for comparison in this narrow tailoring analysis." *Id.* at 42. The Supreme Court's decisions make it clear beyond any question that it was not the Plaintiffs but the Defendants who bore the burden of persuasion in this matter. The Superior Court should have resolved any doubt whether there was a better alternative to the General Assembly's use of racial gerrymandering against the Defendants. *See Parents Involved*, 551 U.S. at 786 (Kennedy, J., concurring in part and concurring in the judgment) ("When a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State.") The Superior Court's error in imposing the burden of persuasion on the Plaintiffs renders its judgment indefensible.

II. THE 2011 ENACTED PLANS EMPLOYED OVERT RACIAL BALANCING AND ARE THEREFORE UNCONSTITUTIONAL PER SE.

A. Racial balancing either as an end or as a means is patently unconstitutional.

It is a settled principle of constitutional law that "'outright racial balancing ... is patently unconstitutional.'" *Fisher*, 133 S.Ct. at 2419 (quoting *Grutter*, 539 U.S. at 330).[10] The Supreme Court has repeatedly explained that

[10] The one very narrow exception involves the use of race as a remedy for identified past discrimination by the specific governmental entity making use of race. *See, e.g., Freeman v. Pitts*, 503 U.S. 467, 494 (1992) ("Racial balance ... is to be pursued when racial imbalance has been caused by a constitutional violation."). The Defendants do not attempt to justify the use of race in the Enacted Plans as a remedy for past discrimination by the state.

racial quotas or other forms of racial balancing are unconstitutional whether as an end or as a means. Whether defined as a compelling interest or defended as the means to achieve such an interest, deliberate governmental action structured in terms of "some specified percentage of a particular [racial] group" is simply unconstitutional. *Fisher*, 133 S.Ct. at 2424 (quoting *Grutter*, 539 U.S. at 329).

The Court's most extensive recent discussions have been in the contexts of university admissions and public school pupil assignments. While the Court has recognized student body diversity as a possible compelling interest in university admissions, a "university is not permitted to define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin.' 'That would amount to outright racial balancing.'" *Fisher*, 133 S.Ct. at 2416 (citation omitted). Even a sincere desire on the part of the government to pursue a recognized compelling interest does not license "working backward to achieve a particular type of racial balance" since "[r]acial balance is not to be achieved for its own sake." *Parents Involved*, 551 U.S. at 729-30 (plurality opinion of Roberts, C.J.). "The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'" *Id.* at 732. If the "'purpose is to assure within [a university's] student body some specified percentage of a particular group merely because of its race," the purpose is

"facially invalid.'" *Id.* at 729 (citation omitted). "[R]acial balance ... cannot be the goal, whether labeled 'racial diversity' or anything else." *Id.* at 733.

Racial balancing is equally unacceptable as a means even if government is genuinely acting to secure a compelling end. "To be narrowly tailored, a race-conscious admissions program cannot use a quota system." *Grutter*, 539 U.S. at 334. "The point of the narrow tailoring analysis [is] to ensure that the use of racial classifications" is "not simply an effort to achieve racial balance, which the Court [has] explained would be 'patently unconstitutional.'" *Parents Involved*, 551 U.S. at 723 (citation omitted). Where a racial classification identifies "a certain fixed number or percentage which must be attained, or which cannot be exceeded," it is a racial quota for purposes of strict scrutiny, and therefore unconstitutional. *Grutter*, 539 U.S. at 335. In *Parents Involved*, for example, the Court held that two race-conscious public school pupil-assignment plans were not narrowly tailored but, instead, employed impermissible racial balancing. The race-based assignment decisions were "tied to each district's specific racial demographics" and "the racial balance the districts seek is a defined range set solely by reference to the demographics of the respective school districts." 551 U.S. at 726, 729 (plurality opinion).

As *amici* have shown above, when a court reviews a racially gerrymandered redistricting plan, the Supreme Court's precedents require it to apply the same

principles of strict scrutiny that the Court applies in other contexts. *See, e.g.*, *Shaw I*, 509 U.S. at 646 (rejecting suggestion that "a racial gerrymander, once established, should receive less scrutiny under the Equal Protection Clause than other state legislation classifying citizens by race"). A redistricting plan designed to distribute legislative seats according to a fixed racial percentage tied to the racial demographics of the state is engaged in racial balancing, regardless of whether its purpose is described in terms of a legitimate governmental interest. Such a plan, furthermore, cannot be narrowly tailored to achieve any permissible governmental end: it is "outright racial balancing" and, as such, "patently unconstitutional." *Fisher*, 133 S.Ct. at 2424 (quoting *Grutter*, 539 U.S. at 329). It is for this reason, among others, that the Supreme Court has been careful not to interpret either section 2 or section 5 of the Voting Rights Act to require racial balancing or maximization in the creation of majority minority districts, since to do so would be to put the constitutionality of those provisions in question. *See Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (using canon of constitutional avoidance in construing section 2); *Miller*, 515 U.S., at 923 (same as to section 5).

B. The Defendants acknowledge, and the undisputed facts demonstrate, that the General Assembly employed express racial balancing in constructing the VRA districts in the 2011 Enacted Plans, and for that reason, those districts are unconstitutional per se.

The Defendants have made no attempt to disguise the fact that the chief legislative sponsors of the 2011 plans had the plans drawn up with the express purpose of creating the number of African American majority electoral districts that would be directly proportionate to the percentage of African American citizens in North Carolina. *See* Memorandum of Decision, at 14. Nor have the Defendants denied that they set a specific numerical quota (50%>) for the number of African American voters in each of these districts. *See id*. Furthermore, it is undisputed that both houses of the General Assembly were fully aware of these facts, and that the legislature deliberately enacted the 2011 plans knowing that "[i]n design and operation," *Parents Involved,* 551 U.S. at 726 (plurality opinion), the plans were driven by the goal of creating a set number of African American majority districts. *See* Memorandum of Decision, at 26 ("The undisputed evidence establishes that the General Assembly, in drafting the Enacted Plans, endeavored to create VRA districts in roughly the same proportion as the ratio of Black population to total population in North Carolina.").[11] In some circumstances, it is difficult as an

[11] The Superior Court's consistent qualification of its references to the General Assembly's use of racial proportionality as "rough" stems from the court's mistaken understanding of the idea of "rough proportionality" found in *Bush v.*

evidentiary matter to determine whether race-conscious governmental action, which can be constitutional in narrow circumstances, involved the intentional use of a racial quota, which is patently unconstitutional. This case is not one of those circumstances: no one denies what is quite clear, that the General Assembly engaged in express, intentional racial balancing, employing specific numerical goals, in devising the 2011 plans. The Defendants, to be sure, shy away from the unattractive term "quota," but that is irrelevant. The undisputed facts show that the challenged VRA districts are the result of a decision to create a "'fixed number or proportion'" of African American majority districts that the legislature determined "'must be attained.'" *Grutter*, 539 U.S. at 335 (citations omitted). Call this what you will, the General Assembly's method of proceeding is a racial quota under the controlling Supreme Court case law, and as such it is patently unconstitutional.

Vera. *See* below, at 35-40 (discussing the issue). As the court correctly observed, the undisputed facts show that the 2011 Enacted Plans come as close to precise proportionality as the racial demographics of North Carolina permit – in short, the General Assembly used the 2010 census figures to determine the "'fixed number or percentage,'" *Grutter*, 539 U.S. at 339 (citation omitted), of majority minority districts it would create and did so as far as was mathematically possible. *See* Memorandum of Decision, at 26 ("because the 2010 census figures established that 21% of North Carolina's population over 18 years of age was 'any part Black,' the corresponding rough proportion of Senate seats, out of 50 seats, would be 10 seats, and hence 10 VRA Senate districts. Likewise, of the 120 House seats, 21% of those seats would be roughly 25 House seats, and hence 25 VRA districts.").

C. On the undisputed facts, the 2011 Enacted Plans do not satisfy strict scrutiny regardless of the governmental interest that the Defendants claim the legislature was pursuing.

The Defendants do not argue, of course, that the General Assembly's use of express, numerical racial goals—what they and the Superior Court label "rough proportionality"—was an attempt to achieve racial balancing for its own sake. Their claim, instead, is the legislature was engaged in a good faith, reasonable effort to achieve preclearance under section 5 and avoid liability under section 2 of the Voting Rights Act, and that these are compelling interests that satisfy strict scrutiny. The Defendants' argument is inconsistent with the Act, see below, but quite apart from that flaw, on the undisputed facts the 2011 Enacted Plans do not satisfy strict scrutiny for two different reasons, regardless of which governmental interest the Defendants attribute to the General Assembly.

First, there is no evidence whatever that the General Assembly considered alternative approaches to redistricting that would not have subordinated race to other redistricting criteria as a means of satisfying the Voting Rights Act, or that it made a considered judgment that no such alternatives were available. In order to satisfy strict scrutiny, government is under an obligation to consider non-racial alternatives before it turns to racial classifications as a means to achieve even the most compelling interest. *See, e.g., Shaw v. Hunt*, 517 U.S. at 929 (district court erred in failing to "perform[] any inquiry into whether North Carolina had

considered race-neutral districting criteria in drawing District 12's boundaries"). In considering whether the use of race was necessary to address concerns under the Voting Rights Act, the General Assembly would have needed to take into account the Supreme Court's rejection of the argument that section 5 requires the creation of the maximum possible number of majority minority districts, *see Miller*, 515 U.S. at 926-27, and the fact that redistricting plans in this state have not been the subject of section 2 challenge since the conclusion of the litigation in *Thornburg v. Gingles*, 478 U.S. 30 (1986). The undisputed facts show that the legislature undertook none of this before deciding to employ race as a classification through the creation of racial gerrymanders. It was constitutionally impermissible for the General Assembly to turn to the most severe and questionable use of race – overt racial balancing – without first giving serious consideration to less troubling means of addressing its concerns. The Superior Court appears to have overlooked this aspect of strict scrutiny analysis because it mistakenly thought that the burden was on the Plaintiffs to demonstrate the existence of alternatives to the legislature's decision to use race in this manner.

Even if the General Assembly had fulfilled its duty to consider alternative means of satisfying the Voting Rights Act before turning to the use of racial classifications, the 2011 Enacted Plans cannot be upheld as a narrowly tailored means of achieving a compelling interest. Where a governmental action— such as

the creation of the VRA districts in the 2011 plans—has the achievement of a number-based racial balance as its objective, under the Supreme Court's decisions that action is unconstitutional even if the government labels the action a good faith attempt to achieve a constitutionally compelling end.

It is entirely clear that racial balancing can never satisfy the narrow tailoring requirement of strict scrutiny. "'To be narrowly tailored, a race-conscious admissions program cannot use a quota system.'" *Fisher*, 133 S.Ct. at 2418 (quoting *Grutter*, 539 U.S. at 334). The constitutional problem with the use of racial balancing goes even further, because its employment undermines any claim that government is in fact pursuing a compelling interest. In *Parents Involved*, for example, the Court held that the use of race in pupil assignment plans by the defendant school boards was not narrowly tailored to achieve any compelling end because the plans involved the use of racial balancing. But as the Court also pointed out, the school board's use of racial balancing as *the* means of achieving their avowed interest in racial diversity for educational reasons undermined the compelling-interest part of their defense as well:

> In design and operation, the plans are directed only to racial balance, an objective this Court has repeatedly condemned as illegitimate. They are tied to each district's specific racial demographics, balance. .... [T]he schools worked backward [from the specific racial demographics] to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the

> purported benefits. This is a fatal flaw under [the Court's] existing precedent. ... Racial balancing is not transformed from "patently unconstitutional" to a compelling state interest simply by relabeling it "racial diversity." While the school districts use various verbal formulations to describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition of the interest that suggests it differs from racial balance.

551 U.S. at 726, 729, 732 (plurality opinion).

The Court's discussion of the "fatal flaw" in the defendants' argument in *Parents Involved* fits perfectly what both the Defendants and the Superior Court describe as the process by which the General Assembly came to enact the 2011 plans. The principal sponsors of the plans "worked backward" from "the specific racial demographics" of the state to determine how many majority minority districts to create, "rather than working forward from some demonstration" of what would be necessary to obtain section 5 preclearance and ward off section 2 litigation. The Defendants offered no explanation of how the legislature's avowed interest in satisfying Voting Rights Act requirements "differs from racial balance." Redistricting plans that are, on their face and both "[i]n design and operation," unconstitutional racial quotas cannot be saved by relabeling them. "The principle that racial balancing is not permitted is one of substance, not semantics." *Id.* at 726, 732 (plurality opinion). The 2011 Enacted Plans are straightforward exercises

in racial balancing and, as such, are unconstitutional regardless of the legislature's or the Defendants' assertions that they serve a compelling state interest.

III. THE SUPERIOR COURT MISTAKENLY ASSUMED THAT THE VOTING RIGHTS ACT AUTHORIZES A STATE LEGISLATURE TO EMPLOY RACIAL PROPORTIONALITY AS A MEANS OF SATISFYING THE ACT'S REQUIREMENTS.

A. The Supreme Court has recognized "rough proportionality" only as a factor that should be considered in determining liability under section 2 of the Act, not as tool that a state legislature may employ in order to avoid litigation.

In upholding the General Assembly's express adoption of racial balancing as a goal to be achieved in devising and enacting the 2011 redistricting Plans, the Superior Court relied on the Supreme Court's decisions in *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) [henceforth *LULAC*] and *Johnson v. De Grandy*, 512 U.S. 997 (1994). In both cases, the Court concluded that in a case brought under the "results test" of section two of the Voting Rights Act, racial "proportionality is 'a relevant fact in the totality of circumstances.'" *LULAC*, 548 U.S. at 536 (quoting *De Grandy*, 512 U.S. at 1000). *See* 42 U.S.C. § 1573(b) (section 2 is violated "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens" defined by race or color). The Superior Court asserted that the General Assembly was entitled to rely on *LULAC* and *De Grandy* in "using 'rough proportionality' as

a benchmark for the number of VRA districts it created in the Enacted Plans," because "[w]hen the Supreme Court says 'no violation of § 2 can be found' under certain circumstances, prudence dictates that the General Assembly should be given the leeway to seek to emulate those circumstances in its Enacted Plans." Memorandum of Decision, at 26-27 (quoting *De Grandy*, 512 U.S. at 1013). The court identified no other factors beyond "rough proportionality" as making up the "certain circumstances" in which "'no violation of § 2 can be found,'" and it is clear from the court's opinion that it believed the legislature could reasonably treat rough proportionality as in itself a practical guarantee of safety from liability under section 2. In reality, however, *LULAC* and *De Grandy* cannot reasonably be read in this fashion: both decisions expressly reject precisely this line of reasoning.

In *De Grandy*, the Supreme Court accepted the proposition that a "rough proportionality" between the number of majority-minority districts and the percentage of the given minority in the total population "'is always relevant evidence in determining vote dilution, but is never itself dispositive.'" *LULAC*, 548 U.S. at 436 (quoting *De Grandy*, 512 U.S. at 1025 (O'Connor, J., concurring)). The reasoning is obvious: if the party challenging a redistricting plan alleges that it violates section 2 by denying a racial group's equal opportunity to participate in the electoral system, evidence that the group is in the majority in districts roughly

equal to its percentage of the population tends to rebut the allegation.[12] But in *De Grandy* the Court expressly rejected the further argument that, in a vote dilution case, section two is not violated "whenever the percentage of single-member districts in which minority voters form an effective majority mirrors the minority voters' percentage of the relevant population. Proportionality so defined ... would thus be a safe harbor for any districting scheme." 512 U.S. at 1017-18. The Court flatly rejected this argument that proportionality should be given "the status of a magic parameter;" *id.* at 1017 n. 14; as *LULAC* put it later, proportionality "does not ... act as a 'safe harbor' for States in complying with § 2." 548 U.S. at 436.

De Grandy explained that allowing state legislatures to treat the use of racial proportionality as insurance against potential section two liability "would be in

[12] There is nothing illogical in concluding (1) that the fact of racial proportionality is relevant to showing that the state is not violating section 2, but (2) that the use of racial balancing as a means to achieving racial proportionality may violate the Equal Protection Clause. This distinction runs throughout both equal protection jurisprudence and statutory civil rights law. An employer sued for racial discrimination in violation of Title VII of the 1964 Civil Rights Act on a "disparate impact" theory may defeat the suit by demonstrating that its hiring and promotion practices have not led to disparate results for different racial groups. It does not follow that it would be lawful for the employer to treat similarly positioned individuals differently on the basis of race in order to achieve a particular set of racial outcomes – doing so might very well be a "disparate treatment" violation of Title VII. *See Ricci v. DeStefano*, 557 U.S. 557, 581 (2009) ("Allowing employers to violate the disparate-treatment prohibition based on a mere good-faith fear of disparate-impact liability would encourage race-based action at the slightest hint of disparate impact.").

derogation of the statutory text and its considered purpose ... and of the ideal that the Voting Rights Act of 1965 attempts to foster."

> An inflexible 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 circumstances." ... [Furthermore,] we reject the safe harbor rule because of [its] 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. Because in its simplest form the State's rule would shield from § 2 challenge a districting scheme in which the number of majority-minority districts reflected the minority's share of the relevant population, the conclusiveness of the rule might be an irresistible inducement to create such districts.

512 U.S. at 1018, 1018-20. *See also LULAC*, 548 U.S. at 436 ("'placing undue emphasis upon proportionality risks defeating the goals underlying the Voting Rights Act'") (quoting *De Grandy*, 512 U.S. at 1027 (Kennedy, J., concurring in part and concurring in judgment)). *De Grandy* therefore concluded that while proportionality has evidentiary relevance in determining whether section 2 has been violated by a redistricting plan, it is neither necessary nor sufficient as a defense to a section 2 challenge. *See De Grandy*, 512 U.S. at 1020-21 (proportionality inquiry not a "shortcut" to determining whether section 2 has been violated); *id.* at 1018-19 (racially proportionate plan might violate section 2). Proportionality "is *never* itself dispositive." *LULAC*, 548 U.S. at 436 (quoting *De Grandy*, 512 U.S. at 1025 (O'Connor, J., concurring) (emphasis in original)).

The 2011 Enacted Plans illustrate precisely the dangerous tendency that led *De Grandy* to reject the argument that proportionality (rough or otherwise) can serve as a safe harbor from section 2 liability. Rather than engaging in a careful examination of whether there was any significant risk of a section 2 challenge to its redistricting decisions – a dubious concern in light of the absence of such challenges for over a quarter century – and about the means that might be employed to avoid section 2 liability, the General Assembly's apparent misunderstanding of *LULAC* and *De Grandy* proved "an irresistible inducement" to treat racial proportionality as a simple solution for this concern. The Superior Court's decision sustaining the constitutionality of the Plans on this ground, if upheld by this Court, would send a clear signal to future legislators that "devis[ing] majority-minority districts" in a number proportionate to the racial demographics of North Carolina is a reliable means of insulating a redistricting plan against section 2 liability, an outcome that *De Grandy* clearly meant to foreclose. Such a result is plainly inconsistent both with *DeGrandy* and *LULAC*, which thus provide no basis for the Superior Court's decision to uphold the legislature's overt use of racial balancing.

Amici do not suggest, of course, that *LULAC* and *De Grandy* prohibit the consideration of race in redistricting generally, or when a state legislature is reasonably concerned about the possibility of section 2 litigation. The *Shaw v.*

Reno line of cases clearly recognize the legitimacy of using race, even race as the predominant criterion in the drawing of an electoral district's lines, when the legislature does so after fulfilling its obligation to consider alternatives, and makes use of racial line-drawing no more so than is necessary to achieve a genuinely compelling interest. The Enacted Plans, however, are not the product of such careful legislative deliberation; instead, the General Assembly made use of racial proportionality as if it were a "magic parameter" shielding the Plans from section 2 challenge. In devising the Plans, "[r]ace was the criterion that, in the State's view, could not be compromised." *Shaw II*, at 517 U.S. at 907. *LULAC* and *De Grandy* provide no support for that approach to redistricting, or for the Superior Court's decision upholding the General Assembly's actions.

B. The Enacted Plans are not constitutionally defensible as a means to securing preclearance under section 5 for North Carolina's electoral districts

The Enacted Plans cannot be defended as a means to securing section 5 preclearance, *even on the assumption* that under the proper circumstances obtaining section 5 preclearance from the Department of Justice can be a compelling state interest. This is clear for two independent reasons. First, the General Assembly's use of racial proportionality in devising the Plans is indefensible *under Miller v. Johnson*. *Miller* flatly rejected a state's argument that it had a compelling interest in maximizing the number of majority minority

electoral districts because the Justice Department's section 5 policy required such maximization. The Supreme Court held that the Department's policy was a serious misreading of section 5, and furthermore that the state did not have a compelling interest in acceding to the Department's mistaken and potentially unconstitutional policy. "We do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues. … Were we to accept the Justice Department's objection itself as a compelling interest adequate to insulate racial districting from constitutional review, we would be surrendering to the Executive Branch our role in enforcing the constitutional limits on race-based official action. We may not do so." *Miller*, 515 U.S. at 922. *See generally id.* at 920-26 (rejecting maximization policy as inconsistent with section 5's non-retrogression principle and constitutionally suspect). A speculative fear that the Justice Department might ignore *Miller* in administering section 5 cannot justify the General Assembly's decision to employ race in a constitutionally indistinguishable fashion, outright racial balancing, from the racial gerrymandering the Court rejected in *Miller*.

Second, as discussed earlier, strict scrutiny requires that a legislature seriously consider the possibility of addressing even a genuine compelling interest by non-racial means before turning to a racial classification. The General Assembly was under a duty, therefore, to consider other means of securing

preclearance, which the undisputed facts show that it did not do. The Defendants, furthermore, have not carried their burden of showing that racial gerrymandering was necessary in order for the state to obtain preclearance under section 5.

There is, in any event, a very substantial argument that the Supreme Court's recent decision in *Shelby County v. Holder*, 133 S.Ct. 2612 (2013), shows that securing preclearance under section 5 has not been a compelling state interest since Congress reauthorized section 5 in 2006. *Shelby County* held that section 4 of the Voting Rights Act, which determines which jurisdictions are subject to section 5 preclearance, is unconstitutional, because in reauthorizing the preclearance process Congress failed to update the criteria set out in section 4. The invalidation of section 4 renders section 5 inoperative for the present. More importantly for the purposes of this litigation, it seems clear that section 4 has been unconstitutional at least since 2006, and thus in principle section 5 has had no legally binding force since then. *See Danforth v. Minnesota*, 552 U.S. 264, 286 (2008) (quoting *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment)) ("'Either enforcement of the statute at issue in [the decision holding the statute unconstitutional] (which occurred before our decision there) was unconstitutional, or it was not; if it was, then so is enforcement of all identical statutes in other States, whether occurring before or after our decision"). The Defendants would be hard put to defend the legislature's use of section in

2011 on the ground that retroactive application of *Shelby County* would be unfair, in light of the clear constitutional concerns stated in *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009). *See also Danforth*, 552 U.S. at 286 (“‘the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense’”) (citation omitted). However, this Court need not resolve this question in light of the facts that the General Assembly employed racial balancing (a patently unconstitutional means) without first considering alternatives (a requirement of strict scrutiny).

C. If either section 2 or section 5 of the Act authorized or required state legislatures to engage in racial balancing in redistricting, to that extent the provision would be unconstitutional.

The Fourteenth and Fifteenth Amendments to the Constitution authorize Congress to impose limitations and obligations on the states in order to enforce the Amendments’ requirements. However, as the Supreme Court has long recognized, in doing so Congress has no power to violate constitutional prohibitions itself or to authorize or require the states to do so. In *Miller v. Johnson*, for example, the Court rejected a Justice Department interpretation of section 5 requiring “that States engage in presumptively unconstitutional race-based districting” because it “brings the Act ... into tension with the Fourteenth Amendment.” *Cf. South Dakota v. Dole*, 483 U.S. 203, 210 (1987) (congressional spending “power may not be used to induce the States to engage in activities that would themselves be

unconstitutional"). Because both section 2 and section 5 of the Voting Rights Act may require race-conscious measures on the part of a state to insure its compliance with their requirements, the Supreme Court has been extremely careful not to construe either section to authorize state action that would itself be unconstitutional. *See Bartlett*, 556 U.S. at 18 (rejecting the argument that section 2 requires state to create "crossover districts" because that interpretation "raises serious constitutional questions"); *Miller*, 515 U.S. at 926-27 (rejecting interpretation of section 5 requiring states to create the maximum possible number of majority minority districts because of constitutional concerns). The Court has warned against constructions of the Act that would invite "divisive constitutional questions that are both unnecessary and contrary to the purposes of our precedents under the Voting Rights Act." *Bartlett*, 556 U.S. at 23.

The decision of the Superior Court, if upheld, would commit the very error that concerned the Supreme Court in *Bartlett v. Strickland*. The Superior Court held that it was lawful for the General Assembly to employ a numerical quota, tied to the state's racial demographics, to determine precisely how many majority minority districts it would create, and to do so without the careful consideration of alternatives that the Supreme Court's precedents require as a prerequisite to any use of a racial classification. The Superior Court justified this holding on the ground that the General Assembly acted in order to secure section 5 preclearance

and to avoid section 2 litigation. Its holding implies that sections 2 and 5 authorize the states to engage in what would otherwise be "presumptively unconstitutional race-based districting,' *Miller*, 515 U.S. at 927, in two respects: in the use of overt racial balancing, and in the licensing of the use of race for the indefinite future in redistricting decisions.[14] Rather than advancing the goal of the Equal Protection Clause and the Voting Rights Act, "'a political system in which race no longer matters,'" the Superior Court's implicit construction of sections and 5 invites legislators, for the foreseeable future, to continue to engage in racial gerrymandering, with its inherent tendency to "'balkanize us into competing racial factions.'" *Bartlett*, 556 U.S. at 21 (quoting *Shaw I*, 509 U.S. at 657). It is unnecessary, and contrary to the Supreme Court's precedents, to construe either section 2 or section 5 to authorize the legislature's use of overt racial balancing in the Enacted Plans. It is, therefore, the obligation of the courts to construe both provisions to avoid the constitutional issues that the Superior Court has inadvertently raised. *See Bartlett*, *id.* at 23 (applying the canon of avoidance in

[14] Section 2 has no sunset provision. The Supreme Court has stressed "the requirement that all governmental use of race must have a logical end point." *Grutter*. 539 U.S. at 342. The trial court's reasoning would license overt racial balancing as a redistricting tool for the indefinite future, and thus contradict the Court's insistence that all racial classifications must have a durational limit. *Grutter*, 539 U.S. at 342.

concluding that "we *must not* interpret § 2 to require crossover districts") (emphasis added).

CONCLUSION

Redistricting is one of the most important and most difficult tasks that any state legislature undertakes. Legislators must take into account many factors, legal and political, including their obligation to adopt redistricting plans that meet the requirements of the Equal Protection Clause and of the Voting Rights Act. It is appropriate, therefore, that the judiciary undertake its task of reviewing redistricting plans for their constitutionality with respect for the legislature. As the United States Supreme Court has made clear, however, when a legislature turns to racial gerrymandering, even for the most laudable of goals, it employs a highly suspect tool and must do so only after careful consideration. The undisputed facts in this litigation show, regrettably, that the 2011 General Assembly failed to fulfill its responsibilities and that, instead, the legislature chose, without careful consideration, to engage in overt racial balancing in creating at least twenty-six districts in the three Enacted Plans.

The General Assembly passed the 2011 Plans, and the Superior Court upheld those Plans, on a mistaken understanding of the requirements of the Equal Protection Clause. As authoritatively construed by the United States Supreme Court, equal protection requires that a legislature give serious consideration to

other alternatives before turning to racial classifications as a means of achieving even the most compelling end, and if it does so, it must narrowly tailor its use of race. Without any significant consideration of other approaches, the General Assembly adopted the most constitutionally objectionable use of race, overt, numerical racial balancing, in order to devise the Enacted Plans. In reviewing the Plans, the Supreme Court's precedents place the burden of persuasion on the government to show that its use of race satisfies strict scrutiny, and those precedents forbid altogether the use of racial balancing or a racial quota as a legislative means. The Superior Court, however, transferred the burden of persuasion as to narrow tailoring to the Plaintiffs, and ignored the patently unconstitutional nature of the means the Defendants acknowledge that the legislature employed.

The decision below upholding the 2011 Enacted Plans was manifestly erroneous, and this Court should reverse the Superior Court.

Respectfully submitted, this the 11th day of October, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing ***AMICUS BRIEF*** on counsel by transmitting a copy via e-mail to the following persons at the following e-mail addresses:

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