Nos. 13-895, 13-1138

In the

Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, et al.,
Appellants,
v.
ALABAMA, et al.,
Appellees.

ALABAMA DEMOCRATIC CONFERENCE, et al.,
Appellants,
v.
THE STATE OF ALABAMA, et al.,
Appellees.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, AND PROJECT 21 IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether the plaintiffs proved that Alabama's legislative redistricting plans for the House and Senate unconstitutionally classify black voters by race on a statewide basis, even though they did not show that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.

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INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF), Center for Equal Opportunity (CEO), and Project 21 respectfully submit this brief amicus curiae in support of Appellees, the State of Alabama, et al.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating matters affecting the public interest. PLF has participated as amicus curiae in this Court in numerous cases relevant to these cases. *See, e.g.*, *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612 (2013); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419 (1991); *City of Rome v. United States*, 446 U.S. 156 (1980). PLF submits this brief because it believes its public policy perspective and litigation experience in the area of voting rights will provide an additional viewpoint with respect to the issues presented.

CEO is a nonprofit research and educational organization devoted to issues of race and ethnicity, such as civil rights, bilingual education, and

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

immigration and assimilation. CEO supports color-blind public policies, and seeks to block the expansion of racial preferences and to prevent their use in employment, education, and voting. CEO has participated as amicus curiae in past Voting Rights Act cases, such as *Shelby County*, 133 S. Ct. 2612; *Nw. Austin Mun. Util. Dist. No. 1*, 557 U.S. 193; *Bartlett*, 556 U.S. 1; and *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006). In addition, officials from CEO testified before Congress several times during hearings on the 2006 reauthorization of the Voting Rights Act.

Project 21, the national leadership network of black conservatives, is an initiative of The National Center for Public Policy Research to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility have not traditionally been echoed by the nation's civil rights establishment. Project 21 participated as amicus curiae in *Shelby County*, 133 S. Ct. 2612; *Nw. Austin Mun. Util. Dist. No. 1*, 557 U.S. 193; and *Bartlett*, 556 U.S. 1. Project 21 participants seek to make America a better place for African-Americans, and all Americans, to live and work.

Amici Curiae have a substantial interest in preventing the racial segregation and gerrymandering of voting districts that is the result of Section 2 and Section 5 of the Voting Rights Act. Amici believe that their public policy perspectives and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases concern the interplay between this Court's racial gerrymandering cases, Section 5 of the Voting Rights Act, and the Equal Protection Clause. The first permits consideration of race in redistricting, the second requires it,[2] and the third forbids it. Prior to *Shelby County*, 133 S. Ct. 2612, Alabama was subject to Section 5 of the Voting Rights Act of 1965 (Section 5), 52 U.S.C. § 10304, which required the state to obtain preclearance from the Department of Justice or the United States District Court for the District of Columbia before any new "standard, practice, or procedure with respect to voting" could go into effect. Under Section 5, legislative district lines would not be precleared unless the state could prove they would not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997) (quoting *Beer*, 425 U.S. at 141).

After the 2010 Census,[3] the Alabama Legislature hired an expert to help draw district lines that complied with Section 5. *Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1244 (M.D. Ala. 2013). The expert considered many factors; in

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[2] As explained below, the non-retrogression principle from *Beer v. United States*, 425 U.S. 130, 141 (1976), requires states to consider race in order to comply with Section 5 of the Voting Rights Act.

[3] After each decennial census, the Alabama Constitution requires the state legislature to "fix by law the number of representatives and apportion them among the several counties of the state, according to the number of inhabitants in them." Ala. Const. art. IX, § 199.

particular, the Legislature requested that the population deviation among districts be only one percent, as opposed to the five percent guideline used in prior redistricting cycles.[4] *Id.* at 1245. The purpose of the one percent guideline was to comply with the constitutional one-person, one-vote requirement of *Reynolds v. Sims*, 377 U.S. 533 (1964), especially in light of a recent case that cast doubt on the ability of states to use a five percent deviation as a "safe harbor" for compliance.[5] *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1245-46 (citing *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004)). The Legislature also instructed the expert to consider traditional redistricting criteria such that district lines "be contiguous and reasonably compact, be composed of as few counties as practicable, avoid contests between incumbent members whenever possible, and respect communities of interest." *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1245. Of course, because of Alabama's status as a covered jurisdiction under Section 5, the expert was also required to consider the racial makeup of resultant districts in order to ensure that there was no "retrogression" in the position of African-American voters.

After the redistricting plans were signed into law, Plaintiffs challenged them on the grounds that they were unconstitutional racial gerrymanders under the Fourteenth Amendment and unlawfully diluted the voting strength of African-Americans in violation of Section 2 of the Voting Rights Act (Section 2), 52

[4] The population of each district must be within one percent, above or below, the population of the state's mean district.

[5] Several states adopted a one percent deviation guideline during the 2010 round of redistricting. *See id.* at 1246.

U.S.C. § 10301. *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1237. The district court rejected both claims. *Id.* at 1312. The court held that, assuming Plaintiffs had standing, the plans were not an unconstitutional racial gerrymander because race was not the "predominant factor motivating the decision of the Legislature." *Id.* at 1293. "Although race was a factor in the creation of the districts," it was just one of many alongside compliance with one-person, one-vote and other traditional districting criteria. *Id.* at 1293-96. Thus, under prevailing Supreme Court precedent, it was unnecessary to apply strict scrutiny. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 658 (1993); *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999). In the alternative, however, the district court held that even if race was the predominant factor in the redistricting decisions, the Legislature's use of race was constitutional because it was narrowly tailored to comply with Section 5. *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1306-12.

The district court correctly applied existing precedent; under *Shaw* and its progeny, redistricting acts which consider race as just one of many factors do not violate the Equal Protection Clause. However, *Shaw* is inconsistent with this Court's more recent equal protection jurisprudence mandating strict scrutiny whenever race is *any* factor in an official decision. *See, e.g.*, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418 (2013) (holding that strict scrutiny applies whenever the state "considers" race); *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720, 741 (2007) (same); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local

governmental actor, must be analyzed by a reviewing court under strict scrutiny."). Accordingly, this Court should extend its decision in *Shaw* to explain that any redistricting decision should be required to satisfy strict scrutiny upon a judicial determination that the Legislature used race as a factor in drawing district lines. Although application of strict scrutiny is nearly always fatal, in this case the Alabama Legislature considered race only to the extent necessary to satisfy the United States and Alabama Constitutions. The judgment below should be affirmed on that limited basis.

ARGUMENT

I

THE COURT SHOULD AFFIRM THE JUDGMENT BELOW ON THE NARROW GROUNDS THAT ALABAMA'S USE OF RACE WAS NECESSARY TO REDISTRICT IN COMPLIANCE WITH ONE-PERSON, ONE-VOTE AND THE STATE CONSTITUTION

The lower court's judgment in favor of Alabama on Plaintiffs' racial gerrymandering claims should be affirmed because the Legislature's consideration of race was limited to ensuring it was able to comply with the United States and Alabama Constitutions. The Alabama Constitution requires the state to redistrict every ten years. Ala. Const. art. IX, § 199. In 2010—when the state needed to redistrict—Alabama was subject to Section 5 preclearance, so in order to ensure that the new district lines did not cause "retrogression," the Alabama Legislature was required to consider the race of the resulting districts. Put

simply, before this Court's decision in *Shelby County*, 133 S. Ct. 2612, ensuring that the new district lines would not lead to retrogression of black voters was a condition precedent for lawfully adopting a redistricting plan in Alabama. Alabama's consideration of race was limited to satisfying its constitutional obligation to redistrict, as it was then understood.

Alabama's limited consideration of race to comply with Section 5 was in effect the *only* means Alabama could have used to satisfy its constitutional requirement to redistrict. The district court correctly concluded that the redistricting plan only used race as required by Section 5 because "[t]he more stringent version of section 5 that Congress enacted in 2006 required the Legislature to maintain, where feasible, the existing number of majority-black districts and not substantially reduce the relative percentages of black voters in those districts." *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1311. Because Alabama's consideration of race was required by Section 5, the redistricting acts were necessarily narrowly tailored to ensuring the state was able to comply with the Alabama Constitution.

Moreover, Alabama was also required to redistrict in order to comply with the federal Constitution. Section 2 of the Fourteenth Amendment, which abolished the Three-Fifths Clause, provides that "[r]epresentatives shall be apportioned among the several States according to their respective numbers." U.S. Const. amend. XIV, § 2. The Equal Protection Clause includes a "one-person, one-vote" requirement that requires state legislatures to, "as nearly as is practicable," balance legislative districts by population. *Gray v. Sanders*, 372 U.S. 368, 381 (1963); *Wesberry v.*

Sanders, 376 U.S. 1, 7-8 (1964); *Reynolds*, 377 U.S. at 568. There is no dispute that Alabama would have been in violation of the one-person, one-vote principle had it failed to redistrict according to its constitutional mandate after the 2010 Census. *See Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1241. Therefore, it follows that Alabama needed to redistrict in order to satisfy both the Fourteenth and Fifteenth Amendments.

The dissent below errs in its claim that the redistricting plan was not narrowly tailored because a plan that permitted greater deviations in district populations would have resulted in fewer minority voters being shifted into new districts. *See id.* at 1315 & n.2 (Thompson, J., dissenting). The Legislature's decision to adopt a one percent deviation was not racially motivated; as noted above, Alabama would have been in violation of one-person, one-vote had it failed to redistrict after the 2010 Census. *See id.* at 1241 (majority opinion). Because of the large population disparities between districts—owing to prior redistricting plans[6] and natural population shifts—compliance with the one percent guideline required significant changes in district lines. Thus, the selection of a one percent standard was race-neutral; its purpose was to bring Alabama into compliance with the Constitution's one-person, one-vote requirement. *Id.* at 1293 ("[T]he main priority of the Legislature was

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[6] The prior district lines created by a Democrat-dominated legislature contained stark racial disparities. For example, the district court found that at the time of the 2010 Census, 25 of the 27 majority-black districts were underpopulated by more than five percent and nine by more than 20 percent. *Id.* By contrast, one majority-white district was overpopulated by over 60 percent. *Id.*

to comply with the constitutional mandate of one person, one vote.").

Absent a showing that the Legislature's intent in complying with *Reynolds* was discriminatory, it is irrelevant that the *impact* of the decision was to change the district designations of more black citizens than white citizens. *See Washington v. Davis*, 426 U.S. 229, 239-41 (1976) (disparate impact, standing alone, is not sufficient to show a violation of the Equal Protection Clause). Here, the evidence shows that race was considered only to the extent necessary to comply with the Voting Rights Act. *See Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1245. And where there is no evidence that complying with *Reynolds* was racially motivated, the impact of that decision should not be strictly scrutinized.

While the Legislature may have been able to comply with *Reynolds* with somewhat less dramatic district line shifts, it does not follow that race motivated the decision to choose a one percent guideline. "[T]he overriding objective [of apportionent] must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Reynolds*, 377 U.S. at 579. Alabama should not be penalized for attempting to come as close as possible to population equality while also complying with the Voting Rights Act.[7] The final

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[7] This is especially true because *Larios* cast doubt on the idea that a state is immune from a one-person, one-vote challenge when the population disparity does not exceed ten percent in any district. The *Larios* Court summarily affirmed the district court's finding that one-person, one-vote was violated even where all population

(continued...)

approved district lines complied with the one percent guideline and, in turn, the Constitution's one-person, one-vote requirement. *See Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1256.

Given this Court's decision in *Shelby County*, the situation presented to Alabama in this case is unlikely to recur. No state is currently subject to Section 5 preclearance, and therefore no state must consider race to safeguard against claims of retrogression. Here, however, Alabama was required to consider race to ensure that it was able to satisfy its constitutional obligation to redistrict every ten years and to remain compliant with the Constitution's one-person, one-vote principle. Because compliance with Section 5's race-conscious mandate was necessary to accomplish these compelling interests, Alabama's limited use of race satisfies strict scrutiny. The decision below should be affirmed on this limited basis.

II

STRICT SCRUTINY SHOULD APPLY WHENEVER THE GOVERNMENT MAKES A RACE-BASED DECISION

Although the judgment in these cases should be affirmed because of the specific difficulties presented by Alabama's former coverage under Section 5, the larger issue is the scope of review required where, as here, it is shown that race was a factor in a

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[7] (...continued)
deviations were less than five percent from the mean district. *See* 542 U.S. at 947; *id.* at 951 (Scalia, J., dissenting) (discussing the lower court's findings). In light of *Larios*, Alabama's decision to reduce population disparities to less than one percent was quite sensible.

redistricting decision. Constrained by this Court's decisions in *Shaw*, 509 U.S. at 658, and *Hunt*, 526 U.S. at 547, the court below held that strict scrutiny only applies where race was the "predominant factor" in the Legislature's redistricting decision. *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1293. This case provides a good vehicle for the Court to extend *Shaw* and *Hunt*. This Court should make clear that whenever a state actor makes race a factor in an official decision—whether contracting, education, or redistricting—the action is unconstitutional unless it is the least restrictive means of furthering a compelling governmental interest. *See Adarand*, 515 U.S. at 227; *Fisher*, 133 S. Ct. at 2418-19.

The *Shaw* Court held that strict scrutiny is required when a redistricting scheme is "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race." 509 U.S. at 658; *see also Hunt*, 526 U.S. at 547 ("[S]trict scrutiny applies if race was the 'predominant factor' motivating the legislature's districting decision."). To establish a racial gerrymandering claim, a plaintiff must show that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Hunt*, 526 U.S. at 547 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). If the plaintiff can prove that race was the predominant factor, the redistricting legislation will be subjected to strict scrutiny; if not, it will generally be sustained. *See id.*

Permitting race-based redistricting decisions without strict scrutiny is inconsistent with this Court's understanding of the Equal Protection Clause in other contexts. *See* Evan Gerstmann & Christopher Shortell, *The Many Faces of Strict Scrutiny: How the Supreme Court Changes the Rules in Race Cases*, 72 U. Pitt. L. Rev. 1, 18 (2010) ("The Supreme Court is much quicker to apply strict scrutiny to affirmative action cases than it is to racial redistricting cases."). This Court has repeatedly held 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*, 526 U.S. at 546; *see also Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) ("We have held that all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" (quoting *Adarand*, 515 U.S. at 227)). It is irrelevant whether the government's motives are pure or malevolent; all government action that classifies citizens on the basis of race is inherently suspect. *Johnson v. California*, 543 U.S. 499, 505 (2005); *Fisher*, 133 S. Ct. at 2430 (Thomas, J., concurring). Even a showing that race was but one of many factors is insufficient to avoid strict scrutiny. *See Grutter*, 539 U.S. at 326 (applying strict scrutiny to admissions policy that considered race as one of many factors); *Fisher*, 133 S. Ct. at 2415 (majority opinion) (same). Similarly, in the redistricting context, it should be no answer to say that the Legislature only slightly considered race, or that it placed other factors ahead of racial considerations. Any consideration of race by a governmental body must be subjected to strict scrutiny.

A. Federal Courts Are Able to Determine When a Government Entity Makes a Decision "Because Of" Race

The Court has permitted redistricting legislation to avoid the most searching level of judicial scrutiny, even where a state admits that race played a role in its official decisionmaking. This aberration appears to be partly the result of the inherent difficulty in distinguishing between mere consciousness or awareness of race and racially motivated legislation. Indeed, this Court has recognized that legislative actors—and most everyone else in our society—will be aware of race when making decisions with legal implications. *See Shaw*, 509 U.S. at 646. But this Court has also clarified that mere race awareness "does not lead inevitably to impermissible race discrimination." *Id.*

A discriminatory purpose "implies more than intent as volition or intent as awareness of consequences." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). While it is true that many legislative decisions are made with knowledge of race, it does not follow that race was a factor in these decisions. Such reasoning would invalidate nearly every voting regulation. *See Shaw*, 509 U.S. at 646 ("[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes.").

Courts are in the best position to make the factual findings necessary to determine when official action is

made *because of* race.[8] Reapportionment statutes should not be exempt from the same exacting scrutiny given to all other race-based classifications simply because the line between race-awareness and race-consciousness may be difficult to ascertain. It is possible to be aware of race and at the same time act in a race-neutral manner, and in such cases, the actions of legislatures should stand, regardless of the impact the decision has upon racial groups. *See Davis*, 426 U.S. at 239 ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."). It is only when racial considerations motivate a decisionmaker that the decision should be examined closely in order to

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[8] The *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* inquiry into legislative motive is an exception to the general rule that an otherwise constitutional statute will not be struck down "on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). Indeed, even the *Arlington Heights* Court recognized that questioning legislative motivation represents a "substantial [judicial] intrusion into the workings of other branches of government." 429 U.S. 252, 268 n.18 (1977). But given the "ingenious defiance" of equal protection perpetrated by government in our nation, a "sensitive inquiry" into legislative motivation in this context is often necessary. *See South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966) (explaining how southern states denied equal protection in purportedly race-neutral ways); *Arlington Heights*, 429 U.S. at 266 (detailing how courts should determine intent for race-neutral legislation in alleged discrimination cases).

determine whether a compelling governmental interest necessitated the action.[9]

B. The *Arlington Heights* Framework Can Be Applied to Race-based Redistricting Claims

The courts already possess a valuable tool in determining whether race motivated a particular action. Recognizing that "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one," this Court held that deference to official action is not warranted so long as the plaintiff proves "that a discriminatory purpose has been a motivating factor in the decision." *Arlington Heights*, 429 U.S. at 265-66. The *Arlington Heights* rationale should apply equally to redistricting cases.[10]

The *Arlington Heights* framework is applied in many difficult circumstances in an attempt to ferret out impermissible racial motivation from reliance on

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[9] The district court recognized the difference between awareness and motivation, but concluded that the Legislature was entitled to deference and a presumption of good faith on this point in part due to the difficulty in drawing that distinction. *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1293 (citing *Miller*, 515 U.S. at 916). But, as explained above, courts routinely parse such a distinction in racial discrimination cases. *See Feeney*, 442 U.S. at 279. That racial motivation may be difficult to prove does not mean that courts are incapable of deciding cases along these lines. *See Bush*, 517 U.S. at 1000-01 (Thomas, J., concurring in the judgment).

[10] In fact, in *Wright v. Rockefeller*, 376 U.S. 52 (1964), decided well before *Shaw*, this Court upheld a New York legislative apportionment statute on the ground that the plaintiffs failed to show that race motivated the drawing of the district lines.

permissible, race-neutral factors. Concluding that a legislative body was at least in part motivated by race does not imply that the body was motivated by "any dislike, mistrust, hatred or bigotry" against a minority group. *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 778 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part). Nevertheless, basing a decision even in part on racial considerations in and of itself demands strict scrutiny, regardless of the nature of the decisionmaker's actual intent. Hence, the Court has directed lower courts to conduct a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. It is the application of strict scrutiny that acts to "smoke out illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Grutter*, 539 U.S. at 326 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (internal quotation marks omitted)).

The initial inquiry in racial gerrymandering cases should concern whether race was used as a factor in the legislative decisionmaking process. This is analogous to the inquiry that applies in an *Arlington Heights* case, where courts must determine whether facially neutral laws are racially discriminatory in fact. *See United States v. Thurmond*, 7 F.3d 947, 952 (10th Cir. 1993). It is also the same inquiry this Court has conducted to determine if race was the "predominant factor" in redistricting. *See Miller*, 515 U.S. at 917-18 (citing *Arlington Heights* in concluding that race was the predominant factor in the drawing of Georgia's Eleventh Congressional District). The *Arlington Heights* Court instructed lower courts to consider many different factors in order to determine "whether

invidious discriminatory purpose was a motivating factor" in the government's decision. 429 U.S. at 266. Through a similar evidentiary framework, courts can determine when race has been used as a factor in legislative decisionmaking.[11] *See Miller*, 515 U.S. at 917-18; *Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2014 WL 5019686, at *6-14 (E.D. Va. Oct. 7, 2014) (concluding, based on several evidentiary factors, that an attempt to comply with Section 5 was the predominant factor in the drawing of Virginia's Third Congressional District). Where legislation is adopted in part based on race, it is presumed unconstitutional and should be struck down in most cases. *Fisher*, 133 S. Ct. at 2421 ("Strict scrutiny must not be strict in theory but feeble in fact.").

C. Federal Courts Can Distinguish Between Racial and Political Gerrymanders

Related to the difficulty in determining whether race motivated an official decision, is the difficulty in distinguishing between racial gerrymanders—which are presumed unconstitutional—and political gerrymanders—which a plurality of this Court held to be non-justiciable. *Compare Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960), and *id.* at 349 (Whittaker, J., concurring), *with Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality opinion). There is a significant

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[11] In the present case, an *Arlington Heights*-like inquiry is unnecessary because it is undisputed that race was a factor in the legislation. *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1293 ("[T]he Legislature sought to comply with sections 2 and 5 of the Voting Rights Act by preserving—and, in the House, increasing—the majority-black districts and by not substantially reducing the percentage of black persons in those districts.").

distinction between racial and political gerrymandering. Political gerrymanders are "root-and-branch a matter of politics." *Vieth*, 541 U.S. at 285 (citation omitted). On the other hand, it is never a lawful purpose to segregate voters on the basis of race. *Id.* at 286; *see also City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 86 (1980) (Stevens, J., concurring in the judgment) (concluding that the Equal Protection Clause compels courts to invalidate racial gerrymanders). Indeed, the *Vieth* Court rejected the *Shaw* standard for political gerrymandering cases precisely because there is an inherent distinction between political decisions and decisions motivated by race.[12]

Yet it is often true that race and political affiliation are highly correlated. In fact, one criticism of the Court's redistricting cases is that they have encouraged state legislatures to use partisan affiliation as "benign racial proxies." *See* Michelle E. O'Connor-Ratcliff, *Colorblind Redistricting: Racial Proxies as a Solution to the Court's Voting Rights Act Quandary*, 29 Hastings Const. L.Q. 61, 79-85 (2001). However, that race and partisanship are highly correlated in many states, including Alabama, does not render every political gerrymander racially motivated. The suggestion that states are now encouraged to use indicators such as partisan affiliation to discriminate on the basis of race rings hollow; it seems far more likely that a legislature would use *race* as a proxy for

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[12] The *Hunt* majority agreed when it noted that "prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." 526 U.S. at 551 (emphasis in original).

political affiliation. After all, redistricting is an "inherently political process," *Bush*, 517 U.S. at 1012 n.9 (Stevens, J., dissenting), and race may provide the most tempting approximation of a district's political leanings.[13] It should be expected that political parties will act rationally to maximize their expected allotment of seats during the apportionment process. *See* Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, "Fair Representation," and an Exegesis into the Judicial Role*, 78 Notre Dame L. Rev. 527, 543 (2003). Allowing plaintiffs to assume that, in a racially polarized jurisdiction, consideration of political affiliation always entails consideration of race would transform every reapportionment debate into a racial conflict.

In particular, one of the main difficulties in crafting a judicially manageable standard in political gerrymandering cases is that the question, "[h]ow much political motivation and effect is too much?" is unanswerable. *Vieth*, 541 U.S. at 296-97. But there should be no similar difficulty in racial gerrymandering cases, as the Constitution requires that all race-based governmental action be subjected to strict scrutiny. *Adarand*, 515 U.S. at 227. Any consideration of race is suspect, and it can only be permitted when it is narrowly tailored to further some compelling state interest. *Id.* Federal courts stand in the best position to separate race from legitimate

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[13] *See* How Groups Voted in 2012, Roper Center Public Opinion Archives, *available at* http://www.ropercenter.uconn.edu/elections/how_groups_voted/voted_12.html (last visited Oct. 10, 2014) (showing that 59 percent of white voters nationwide supported Republican Mitt Romney in the last presidential election, while 93 percent of African-Americans voted for Democrat President Obama).

considerations and to strictly scrutinize those situations in which a state legislature engaged in pernicious racial balancing. Courts need only conduct the same inquiry they are required to do in many other contexts, such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* *See, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973) (describing the burden-shifting framework designed to root out impermissible discriminatory intent in employment decisions).

Although it may be difficult to prove that race and not partisanship motivated the majority caucus, it is precisely the function of the courts to make hard judgments regarding discriminatory intent. *See Arlington Heights*, 429 U.S. at 266. Rooting out the use of race in legislative redistricting is an important constitutional goal. Under *Shaw*, courts have given state legislatures too much deference and legitimized racial considerations as a key part of redistricting. Such deference is unwarranted in any other area of law and should not be tolerated in redistricting. *Cf. Fisher*, 133 S. Ct. at 2420 ("The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference.").

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people." *Id.* at 2418 (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)). When a government entity uses race as a factor in an official decision, it presumptively violates the Equal Protection Clause. *Id.* at 2419. It then must prove that the use of race was narrowly tailored to further some compelling interest. *Id.* (citing *Grutter*, 539 U.S. at 326). Permitting states to consider

race in legislative reapportionment cases is inconsistent with constitutional ideals and general Equal Protection jurisprudence. This Court should subject race-based legislative redistricting decisions to the same exacting judicial scrutiny as every other type of racially motivated state action. The Court should extend *Shaw* to make clear that it applies to any consideration of race.

CONCLUSION

In these cases, Alabama was prohibited by federal law from acting in a race-neutral manner. Its redistricting was done under the preclearance regime in place before *Shelby County*. In order to satisfy its constitutional obligation to redistrict every ten years, and respect the constitutional requirement of one-person, one vote, it had no alternative other than to comply with the race-conscious decisionmaking required by Section 5 of the Voting Rights Act. On this limited basis, the judgment of the district court should be affirmed.

Although the era of Section 5 preclearance is now behind us, the conflict between the Equal Protection Clause and the Voting Rights Act in redistricting is just beginning. This Court has already confronted cases where a state has defended against an allegation of racial gerrymander by claiming that its use of race was required by Section 2. *See Shaw v. Hunt*, 517 U.S. at 914 (discussing North Carolina's assertion in defense to a racial gerrymandering suit "that failure to enact a plan with a second majority-black district would have left the State vulnerable to a lawsuit under [Section 2]"). Such a result is inevitable when Section

2 is interpreted as a disparate impact statute requiring racial balancing prohibited by the Equal Protection Clause. As in the context of Title VII, "the war between disparate impact and equal protection will be waged sooner or later." *Ricci v. DeStefano*, 557 U.S. 557, 595-96 (2009) (Scalia, J., concurring).

In the post-*Shelby County* era, states will continue to be placed in the impossible position of being required to comply with racial balancing statutes and the Equal Protection Clause simultaneously. "[T]his Court has rejected the assumption that 'members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1634 (2014) (plurality opinion) (quoting *Shaw*, 509 U.S. at 647). If the Court finds that race-based redistricting should be subject to strict scrutiny in every case, it will soon have to confront the constitutionality of Section 2's vote-dilution prohibition. *See* O'Connor-Ratcliff, *supra*, at 71-74 (arguing that both Sections 2 and 5 of the Voting Rights Act are "probably unconstitutional" under the current Equal Protection jurisprudence because they would not satisfy the level of scrutiny applied in other race cases); Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate Racial Gerrymandering Cases*, 50 Stan. L. Rev. 779, 824-26 (1998) (arguing that one consequence of the interaction between Section 2, Section 5, and the racial gerrymandering cases is likely to be "heightened dominance of racial considerations in redistricting"). For now, however, the Court should

simply hold that all race-based official action must be subject to strict scrutiny.

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Respectfully submitted,

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