Nos. 25A914, 25A915

IN THE

Supreme Court of the United States

NICOLE MALLIOTAKIS, *et al.*,

Applicants,

v.

MICHAEL WILLIAMS, *et al.*,

Respondents.

PETER KOSINSKI, *et al.*,

Applicants,

v.

MICHAEL WILLIAMS, *et al.*,

Respondents.

ON APPLICATIONS FOR STAY TO THE COURT OF APPEALS OF NEW YORK

RESPONSE IN SUPPORT OF APPLICATIONS FOR STAY OF THE IRC NESBITT RESPONDENTS

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JUSTIN M. BLOCK
Counsel of Record
LISA A. PERILLO
TIMOTHY F. HILL
PERILLO HILL LLP
285 West Main Street,
Suite 203
Sayville, NY 11782
(631) 582-9422
jblock@perillohill.com

Counsel for the IRC Nesbitt Respondents

390688

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

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This brief is submitted on behalf of five individual members of the New York State Independent Redistricting Commission ("IRC"): Charles Nesbitt, Vice Chair, Ross Brady, John Conway III, Lisa R. Harris, and Willis H. Stephens Jr. (collectively, the "IRC Nesbitt Respondents"). It is submitted in support of the Applicants' emergency requests for a stay of the Order of the Supreme Court of the State of New York (the "trial court") dated January 21, 2026.

INTRODUCTION

The trial court's order is marred by significant flaws that will require it to be reversed on federal constitutional grounds. These shortcomings are well presented by the two Applicants. The IRC Nesbitt Respondents submit this brief in support of those applications because the infirm order of the trial court, absent reversal, directs them, as IRC Commissioners, to violate the Constitution.

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"A State may not use race as the predominant factor in drawing district lines unless it has a compelling reason." *Cooper v. Harris*, 581 U.S. 285, 291. The Equal Protection Clause of the Fourteenth Amendment constrains racial gerrymanders in legislative districting plans and prohibits, in the absence of sufficient and particularly exacting justification, a State from "separating its citizens into different voting districts on the basis of race." *See id.*, *citing Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 187 (2017).

Here, the trial court unabashedly calls for such a racial gerrymander—its order enjoins any election until the district is sufficiently reconfigured to control

election outcomes by “adding Black and Latino voters from elsewhere” and charges the IRC with making it so. App.13a. In so doing, the trial court predestines that any map drawn in compliance with this crude race-based directive will fail strict scrutiny and violate the Equal Protection Clause. The IRC cannot be made to myopically and uncritically execute the court’s narrow, race-based directive without honoring the ultimate guardrails imposed by the federal Constitution.

Notably, the trial court did not ask or order the IRC to look into or investigate whether a “crossover” district is possible (nor did it impose any such burden of proof on either the petitioners or itself). Rather, the trial court simply demands that the IRC change the district’s composition in order to racially engineer election outcomes. *See Allen v. Milligan*, 599 U.S. 1 (2023); *Bethune-Hill*, 580 U.S. at 190 (noting the impropriety of redistricting based upon “race for its own sake”). Not only does this set the IRC up to commit an unconstitutional act, it asks the Commissioners to engage in monolithic racial stereotyping. The trial court’s directive for the IRC to redraw CD-11 is amazingly oblivious to the complications such alteration would have for neighboring districts, including with respect to Voting Rights Act considerations, and to the statewide Congressional map as a whole (the entirety of which has been disabled by the court’s order).

In deciding whether to issue a stay, this Court asks “(1) whether the applicant is likely to succeed on the merits, (2) whether it will suffer irreparable injury without a stay, (3) whether the stay will substantially injure the other

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parties interested in the proceedings, and (4) where the public interest lies." *See Ohio v. EPA*, 603 U.S. 279, 291 (2024).

The Applicants have comprehensively addressed these elements in their respective submissions. The IRC Nesbitt Respondents agree with the Applicants' persuasive arguments that they are likely to succeed on the merits, both with respect to certiorari being granted and in having the decision of the trial court reversed, and that each of the additional elements weigh strongly in favor of granting a stay. The IRC Nesbitt Respondents wish to offer their perhaps unique perspective as to both the implications of the merits review and the specter of injury given that it is the IRC that has been directed to redraw the map in accordance with the court's facially unconstitutional order.

The IRC was not made a party to the state court proceeding when it was commenced, nor when it was tried, nor when the court issued its post-trial merits decision. It is in that order that the trial court directed the IRC, though still not a party at the time of its issuance, to draw a congressional map that comports with the decision's unconstitutional directive. The IRC was subsequently added as a respondent on February 11, 2026.

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POINT I

THE IRC MUST NOT BE COMPELLED TO DRAW AN UNCONSTITUTIONAL RACIALLY GERRYMANDERED MAP

The trial court order openly calls for a racial gerrymander in violation of the Equal Protection Clause. Worse, it asks, indeed commands, the IRC to commit this constitutional violation. And it casts the IRC off on this perilous mission in the context of a mangled analysis of applicable legal authorities and upon a barren evidentiary record that is wholly incapable of justifying the race-based map drawing that the court's order demands.

Where race-based districts are drawn without sufficient justification, the Equal Protection Clause is violated. *See Wisconsin Legislature v. Wisconsin Elections Commission*, 595 U.S. 398, 400-401 (2022). "Under the Equal Protection Clause, districting maps that sort voters on the basis of race 'are by their very nature odious.'" *See id*. at 401, *quoting Shaw v. Reno*, 509 U.S. 630, 643 (1993). Accordingly, strict scrutiny is triggered where "race is the predominant factor motivating the placement of voters in or out of a particular district," and the burden falls upon the State to satisfy the daunting and appropriately demanding standard. *See Wisconsin*, 595 U.S. at 401; *see also Cooper v. Harris*, 581 U.S. 285 (2017) (strict scrutiny is triggered where "race furnished the predominant rationale" for adjusting district boundaries); *Bethune-Hill*, 580 U.S. 178.

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A. The Trial Court Order Requires the IRC to Violate the Equal Protection Clause

Here, the lower court's crude directive to "add[] Black and Latino voters from elsewhere" obviates the need to inquire as to the motivation of anyone carrying out that racial mandate since the motivation is express. But it should not fall to the IRC or its commissioners to blindly follow a court order, which necessarily violates the Equal Protection Clause, when neither the petitioners that brought the action nor the court that directed the racial gerrymander have demonstrated that such race-based districting could survive strict scrutiny. Moreover, the limited record that exists as a result of the trial being conducted under the petitioners' (subsequently rejected) influence district theory serves to confirm that strict scrutiny could never be satisfied.

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The only recognized compelling state interest invoked to permit the otherwise "odious" practice of separating voters according to race is compliance with Section 2 of the Voting Rights Act. And, even there, race-conscious mapping of districts can only begin to be constitutionally justified once all three *Gingles* preconditions have been cleared. *See Thornburg v. Gingles, 478 U.S. 30 (*1986). Here, there is no dispute that the *Gingles* preconditions could not be met.

Any congressional district drawn or created by the IRC is subject to the requirements of—and therefore must satisfy and comply with— the Constitution. The required fidelity to the Constitution, while always present and applicable in any case, is explicitly reinforced both in the state Constitution that created and

empowers the IRC (*see* N.Y. Const. Art. III, § 4[c]) and in the oath that each of the IRC commissioners swore to uphold upon accepting their respective appointments to serve.

The trial court's order, however, asks the IRC to do that which it may not do—violate the Constitution. The order directs the IRC "to redraw the CD-11 map so that it comports with the standard described" by the court. App.17a. Drawing a map to comport with the order, however, means "adding Black and Latino from elsewhere" (App.13a) in order to achieve a certain racial goal. The trial court's order is an express directive to discriminate on the basis of race. Were the IRC commissioners to carry out the task the trial court prescribes, they would violate the Equal Protection Clause of the Constitution.

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As this Court recounted in *Wisconsin*, the proposition has long stood that "the institution that makes the racial distinction must have had a 'strong basis in evidence' to conclude that remedial action was *necessary*, *before* it embarks on an affirmative action program.'" 595 U.S. at 404, quoting *Shaw v. Hunt*, 517 U.S. 899 (1996). Here, the particular and acute problem for the IRC is that *it, the IRC*, is being asked to be that "institution mak[ing] the racial distinction," and yet the trial court has completely deprived the IRC of the required predicate, *i.e.*, the strong basis in evidence that such action is necessary, that must exist in order to proceed without offending the Constitution. Further, the trial court fatally inverted the required constitutional sequencing that demands that the evidentiary basis of necessity be established *before* a conclusion to take a race-based action is reached.

While the trial court largely adopted the crossover district concept proposed by the Harvard *amici*, those same *amici* have since emphatically commented that the court "made a serious mistake" and did not even apply its own standard. App.439a.

Notably, the evidentiary record that this Court concluded was insufficient to justify racial gerrymandering in *Wisconsin*, so as to not only grant a stay but to reverse the state court, appears to nevertheless have been a substantially more developed and robust record than what was before the trial court in the matter at bar.

Finally, *Wisconsin* instructs that this Court's precedents ask whether a race-neutral alternative exists and require an answer to that question. *See id*. at 406. Here, as in *Wisconsin*, the state court wholly neglected to make the inquiry into race-neutral alternatives and thus failed to provide an answer. Here again, the Harvard *amici* emphasize that the trial court's analysis was bereft of either any showing or finding that "minority voters' current underrepresentation could be ameliorated by a reasonable alternative policy." App.440a. The *amici* further warn that "it might be that no plausible remedy" exists. App.440a. This confirms that the trial court asks the IRC not only to violate the Constitution but also to set out in search of a remedy that very well may not exist.

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B. Strict Scrutiny Cannot Be Satisfied

A plaintiff asserting an equal protection violation arising from a racially gerrymandered district must establish that "race was the predominant factor

motivating" the placement of voters within or without a district and subordinated other redistricting objectives to such racial considerations. *See Cooper*, 581 U.S. at 291, *quoting Miller v. Johnson*, 515 U.S. 900 (1995). Where race predominates in this regard, the burden shifts to the State to prove both that its race-based sorting of voters serves a compelling interest and that it is narrowly tailored to that end. *See id.*, *citing Bethune-Hill*, 580 U.S. at 193. Here, a map drawn to comport with the trial court's order will have already checked both boxes of this two-pronged analysis, making certain that an equal protection violation will have been proven. The IRC commissioners cannot be compelled to commit such a violation of the Constitution and of their oaths to uphold it. Yet that is what the trial court's order directs them to do.

It would be constitutional folly for a legislature, for example, to commit knowingly to a racial gerrymander and then to endeavor, after the fact, to back-fill a rationale for it. It is likewise and perhaps even more improper for a court to require a race-based drawing of a district and then delegate the task of justifying *post hoc* such a presumptively unconstitutional act to an *independent* commission. Here, the trial court appears to have been wholly unconcerned with establishing or articulating a justification. Its analysis, while explicitly calling for race-based districting, never acknowledges let alone addresses the strict scrutiny standard plainly triggered by its expressly racial directive and fails to otherwise identify a compelling state interest capable of satisfying that standard.

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The trial court's egregious oversight aside, it is in any case patent that strict scrutiny cannot be satisfied here—the petitioners below did not and do not propose that CD-11 could be made to create a majority-minority district as may be compelled by Section 2 of the Voting Rights Act and concede as much. Further, no legal authority exists that would authorize a racial gerrymander outside the context of a Section 2 Voting Rights Act district.

To the extent that the court reimagined the petitioners' claim to demand the creation of a "crossover" district, this too is foreclosed by this Court's plurality opinion in *Bartlett v. Strickland*, 556 U.S. 1 (2009) (noting "serious constitutional concerns under the Equal Protection Clause" and observing that mandating such districts "would unnecessarily infuse race into virtually every redistricting." *Id.,* at 21). The controlling authorities locate no daylight, for strict scrutiny purposes, between the interest in complying with Section 2 of the Voting Rights Act, recognized to be a compelling interest when measured against the *Gingles* preconditions (constitutional) and any race-based districting conducted in service of some lesser objective (unconstitutional). *See Miller*, 515 U.S. at 927. To be sure, this case does not present circumstances to open up any such window.

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CONCLUSION

In the absence of the relief sought by the Applicants, the IRC Nesbitt Respondents reasonably fear that all of the trial court's grave constitutional errors will be laid at their feet and become their problem. This should not be. Accordingly, in view of the foregoing, and for the reasons set forth in the Applicants' submissions, it is respectfully submitted that both Applications be granted.

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February 19, 2026

PERILLO HILL LLP

By: */s/ Justin M. Block*
JUSTIN M. BLOCK, ESQ.
(Counsel of Record)
LISA A. PERILLO, ESQ.
TIMOTHY HILL, ESQ.
285 West Main Street, Suite 203
Sayville, New York 11782
(631) 582-9422
jblock@perillohill.com

Attorneys for IRC Nesbitt Respondents

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