IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

DAWN CURRY PAGE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
VIRGINIA STATE BOARD OF ELECTIONS, et al.,	)	**Civil Action No.: 3:13-cv-678**
	)	
Defendants.	)	
	)	

INTERVENOR-DEFENDANTS' RESPONSE BRIEF REGARDING
ALABAMA LEGISLATIVE BLACK CAUCUS V. ALABAMA

Intervenor-Defendants respectfully submit this response brief regarding "the Order of the Supreme Court of the United States vacating the judgment herein and remanding this case for further consideration in light of Alabama Legislative Black Caucus v. Alabama, 575 U.S. ___ (2015)." 3/31/15 Order (DE 142). The *Alabama* decision unequivocally confirms that this Court fundamentally erred in finding a *Shaw* violation and should enter judgment dismissing Plaintiffs' claim. Although it did not resolve the question whether race predominated in the redistricting plan challenged in *Alabama*, the Supreme Court reiterated "what 'predominance' is all about": a *Shaw* plaintiff's threshold burden is to "prove that the legislature subordinated *traditional race-neutral districting principles*"—including the "offsetting" traditional principles of "incumbency protection" and "political affiliation"—"to racial considerations." *Ala.* Op. 16 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)) (emphasis in *Alabama*) (Ex. A). This burden is especially crucial here because th Court found that "partisan considerations, as well as a desire to protect incumbents" "inarguably" "played a role in" this "mixed motive" case. Op. 32 (DE 109). But as

Intervenor-Defendants have explained, *see* Juris. Stat. 1–2, 8–31 (Ex. B); Reply 3–10 (Ex. C), Plaintiffs wholly failed to satisfy this burden. Indeed, there is *no* dispute that the Legislature treated majority-black District 3 *exactly the same* as the majority-white districts across the Commonwealth. Juris. Stat. 10–11, 13–16, 28–31; Reply 3–10. Thus, even now, neither Plaintiffs nor their newly-allied Defendants have identified any *conflict*, much less *subordination*, between the Legislature's political, incumbency-protection, and core-preservation goals and the alleged racial goal of maintaining District 3's BVAP at 53% (or 55% or 56%).

Nor could Plaintiffs identify such a conflict, had they tried: in a series of concessions Plaintiffs never confront, Plaintiffs' only witness, expert Dr. Michael McDonald, admitted that it would have made "perfect sense" for the Legislature to adopt the Enacted Plan for *political* reasons even if every affected voter "was *white*," Tr. 128 (emphasis added), because the Republican-authored Enacted Plan's changes involving District 3 had a "clear political effect" of benefitting "the Republican incumbents" in surrounding districts from which "[y]ou could infer" a "political purpose," *id.* at 122, 128. Because the Legislature's alleged use of race *coincided*, rather than *conflicted*, with its acknowledged race-neutral goals of politics, incumbency protection, and core preservation, it is not possible that the Legislature "subordinated" traditional principles to "racial considerations," *Ala.* Op. 16, and the Enacted Plan is constitutional under *Alabama*, *see id.*; *see also* Juris. Stat. 1–2, 8–31; Reply 3–10.

In other words, race did not "*affect*" District 3's boundaries at all, let alone "*significantly*," *Ala.* Op. 7, 17 (emphases added), because the Legislature would have adopted the same Enacted Plan for political, incumbency-protection, and core-preservation reasons *regardless* of race, *see* Tr. 128; *see also* Juris. Stat. 8–24; Reply 3–10. In fact, based on the record evidence, the Enacted Plan was the *only* way to protect all incumbents and maintain an 8-

3 partisan ratio. *See* Juris. Stat. 13–14; Reply 6. Plaintiffs had the burden to offer an alternative plan showing "at the least" that the Legislature "could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" and bring about "significantly greater racial balance" than Enacted District 3. *Easley v. Cromartie*, 532 U.S. 234, 258 (2001); *see also Ala.* Op. 10 (confirming that *Easley* articulates the plaintiff's burden in a case where the plan's proponents "argue[] that politics, not race, was its predominant motive"). But by Dr. McDonald's own admission, Plaintiffs' Alternative Plan *undermines* the Enacted Plan's "political goals of having an 8/3 incumbency protection plan" and performs "significant[ly]" *worse* than the Enacted Plan on the traditional principles of politics, incumbency protection, and core preservation. Tr. 172–73, 180, 422–23; *see also* Juris. Stat. 3, 9–10, 14–15, 26–30; Reply 7–9.

Finally, *Alabama* squarely rejected this Court's holding that strict scrutiny prevented the Legislature from doing anything "more than was necessary to avoid 'a retrogression in the position of racial minorities,'" Op. 39 (quoting *Bush v. Vera*, 517 U.S. 952, 973 (1996)), and therefore from "increas[ing]" District 3's BVAP, *id.* at 41; *see also id.* at 43 (narrow tailoring requires "least race-conscious measure"). *Alabama* clarified that strict scrutiny lays no such "trap for an unwary legislature," but instead merely requires "a strong basis in evidence"—*i.e.*, "good reasons to believe"—that the use of race was needed to comply with Section 5, "even if a court does not find that the actions were necessary for statutory compliance." *Ala.* Op. 22. Therefore, contrary to this Court's prior ruling, a plan that increases the BVAP in the challenged district can satisfy strict scrutiny because narrow tailoring does not penalize a legislature for "plac[ing] a few too many minority voters in a district" or "a few too few." *Id.* The record here—including Plaintiffs' own racial bloc voting analysis—demonstrates that the Legislature

had more than ample reasons to believe that the Enacted Plan complied with Section 5. The Court therefore erred in holding that the Enacted Plan failed strict scrutiny. *See* Juris. Stat. 34–38; Reply 10–11.

For each of these reasons, the Court should adhere to *Alabama* and enter judgment dismissing Plaintiffs' claim.

ARGUMENT

I. *ALABAMA* CONFIRMS THAT THE COURT MISAPPLIED THE LAW AND FACTS IN CONCLUDING THAT RACE PREDOMINATED IN DISTRICT 3

A. The Court Failed To Apply *Alabama*'s Clear Requirements

Alabama clarified and confirmed "what 'predominance' is all about": a plaintiff *must* "prove that the legislature subordinated *traditional race-neutral districting principles*"—including the "offsetting traditional race-neutral districting principles" of "incumbency protection" and "political affiliation"—"to racial considerations." *Ala.* Op. 16 (quoting *Miller*, 515 U.S. at 916) (emphasis in *Alabama*). Thus, a *Shaw* plaintiff must show a *conflict* between race and traditional districting principles that the legislature resolved by redistricting in a way that sacrificed traditional principles to racial objectives. *See id.* This makes perfect sense: where there is no conflict between race and traditional principles—or, in other words, where race and traditional principles independently would have led the legislature to adopt the same redistricting plan—it is impossible to "prove" or find that the legislature "subordinated traditional race-neutral districting principles to racial considerations." *Id.*; Juris. Stat. 2–4, 8–24; Reply 1, 3–10.

It therefore is not enough for a plaintiff to prove that the "legislature considered race" or targeted a specific "racial balance" in the challenged district. *Easley*, 532 U.S. at 253. Indeed, even "direct evidence"—such as statements from sponsoring legislators—of such racial considerations or goals "say[s] little or nothing about whether race played a *predominant* role

comparatively speaking." *Id.* (emphasis in original). Rather, as the *Alabama* court explained, a plaintiff must show that race had "a *direct and significant impact* on the drawing" of the challenged legislative district that "*significantly affect[ed]*" and "*change[d]*" the district's boundaries compared to what those boundaries would have been if traditional principles had not been subordinated to race. *Ala.* Op. 7, 17 (emphases added); *see* Juris. Stat. 8–24; Reply 3–10.

The *Alabama* court's confirmation of these bedrock principles underscores the Court's basic error in this case. The Court found that "partisan considerations, as well as a desire to protect incumbents" "inarguably" "played a role in drawing" Enacted District 3. Op. 32. It therefore recognized that this is "a mixed motive suit" involving political, incumbency-protection, and race-related motivations. *Id.* But the Court never required Plaintiffs to prove, and never found, that the racial motive "predominated" over the "offsetting" non-racial motives of "incumbency protection" and "partisan affiliation." *Ala.* Op. 16. Plaintiffs' failure to prove that "race *rather than* politics" predominated in the Legislature's changes to District 3 dooms their racial gerrymandering claim. *Easley*, 532 U.S. at 242 (emphasis in original); *see also Ala.* Op. 16; Juris. Stat. 8–24; Reply 3–10.

Plaintiffs' failure of proof is unsurprising because the undisputed record forecloses any finding that race subordinated traditional principles in Enacted District 3, or changed District 3 from what it would have been absent racial considerations. *See* Juris. Stat. 13–14; Reply 3–8. Even Dr. McDonald admitted that it would have made "perfect sense" for the Legislature to adopt the Enacted Plan for *political* reasons even if every affected voter "was *white*." Tr. 128 (emphasis added). That is because—again according to Dr. McDonald—the Republican-authored Enacted Plan's changes involving District 3 had a "clear political effect" of benefitting "the Republican incumbents" in surrounding districts from which "[y]ou could infer" a "political

purpose." *Id.* at 122, 128. These concessions comported with *all* contemporaneous statements—including Dr. McDonald's pre-litigation law review article—universally describing the Enacted Plan *not* as a racial gerrymander, but as a "political gerrymander" that created "an 8-3 partisan division" in favor of Republicans and "protected all incumbents." Int.-Def. Ex. 55 at 816; Juris. Stat. 2–3, 13–14; Reply 3–10.

In short, just as with every other majority-white district in the State, the Legislature preserved the basic core of District 3 and made minor alterations at the margins, which increased its BVAP by 3.2% and *uniformly* benefitted the four Republican incumbents in the adjacent districts. Tr. 128; *see also* Juris. Stat. 8–24; Reply 3–10. Conversely, any effort to cognizably alter District 3's shape or reduce its BVAP would have injected significant Democratic voting blocs into the adjacent districts, to the political detriment of the Republican incumbents. *See* Juris. Stat. 17–27; Reply 3–10.

Thus, the Legislature's alleged racial goal of maintaining (or slightly increasing) District 3's BVAP did not *conflict*, but perfectly *coincided*, with the Legislature's political, incumbency-protection, and core-preservation goals. *See* Juris. Stat. 13–14, 16–17; Reply 6. In other words, race did *not* "*affect*" District 3's boundaries at all, let alone "*significantly*," *Ala.* Op. 7, 17 (emphases added), because the Legislature would have adopted the same Enacted Plan for political, incumbency-protection, and core-preservation reasons, *see* Tr. 128; *see also* Juris. Stat. 8–24; Reply 3–10.

In fact, there is *no* evidence that the Republican-controlled Legislature could have achieved its political and incumbency-protection goal of protecting the 8 Republican and 3 Democratic incumbents *other* than through the Enacted Plan. *See* Juris. Stat. 13–14; Reply 6. The reason there is no such evidence is because the plaintiffs here wholly failed to meet "the

plaintiff's burden in cases" where the plan's proponents "argue[] that politics, not race, was its predominant motive." *Ala.* Op. 10 (citing *Easley*). As a central part of that burden to decouple race and political considerations, a plaintiff must offer an alternative plan showing "at the least" that the legislature "could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" and bring about "significantly greater racial balance" than the challenged district. *Easley*, 232 U.S. at 258 (cited at *Ala*. Op. 10); *see also* Juris. Stat. 1–4, 8–16, 24–31; Reply 7–9.

Here, however, Plaintiffs' Alternative Plan *confirms* that the Legislature's non-racial political and incumbency-protection "motives" directly mirrored—indeed, could only be achieved by pursuing—the alleged racial "motive" of having a district with 53% (or 55% or 56%) BVAP. The Alternative Plan's BVAP reduction of only 3% resulted in a plan that performs "significant[ly]" worse than the Enacted Plan on the traditional principles of incumbency protection and core preservation because it creates a 7-4 partisan division by turning District 2, a 50/50 district currently represented by Republican Scott Rigell, into a "heavily Democratic" district. Tr. 119, 152–53, 304, 422–23; Int.-Defs. Ex. 22; Juris. Stat. 3, 9–10, 14–15, 26; Reply 7–9. Since reducing BVAP to even 50% significantly undermined the Legislature's political, incumbency-protection, and core-preservation goals, this demonstrates that any alleged goal of maintaining (or increasing) BVAP was not only fully consistent with, but necessary to, achieving the Legislature's non-racial purposes.

In sum, the Enacted Plan fully complied with *Shaw* because it treated majority-black District 3 precisely the same as the other, majority-white districts in Virginia; *i.e.*, making minimal changes to the core that politically benefitted incumbents. *See* Juris. Stat. 10–11, 13–16, 28–31; Reply 3–10. Condemning such equal treatment and requiring racially-based

differential treatment of minority districts would therefore turn the principles set forth in *Shaw*, and reaffirmed in *Alabama*, on their head. *See* Juris. Stat. 10–11, 13–16, 28–31; Reply 3–10.

B. Plaintiffs And Defendants Do Not Identify Any Conflict Between Race And Traditional Principles Or A Viable Alternative Plan

Plaintiffs and Defendants do not identify *any* conflict between race and traditional principles in the Legislature's changes to Enacted District 3 or dispute that the Enacted Plan is the only plan in the record that achieves the Legislature's preferred 8-3 partisan split. *See* Pls. Br. 4–8; Defs. Br. 4–8. They nonetheless offer four arguments for why Enacted District 3 violates *Shaw*'s requirements, as applied in *Alabama*. All of them fail.

First, Plaintiffs and Defendants contend that the Legislature did not *want* to protect all 8 Republican incumbents because, for the first time in American history, a legislature did not want to return all incumbents of the majority party to Congress. *See* Defs. Br. 6; *see also* Juris. Stat. 12–14; Reply 6–7. But this contention is directly contrary to the Court's express finding that "partisan considerations" and "a desire to protect incumbents" "inarguably" "played a role in drawing" Enacted District 3, Op. 32, as well as to all of the undisputed evidence cited above, *see supra* Part I.A.

Indeed, the very quotes Defendants themselves invoke contradict this counterintuitive position. In fact, Delegate Janis expressly acknowledged the partisan goals of the Enacted Plan in a display of candor rarely seen among legislators engaged in redistricting. *See* Juris. Stat. 19–20; Reply 7. As Defendants recount, Delegate Janis sought "'to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 elections,'" when voters elected 8 Republicans and 3 Democrats (as opposed to the 5-6 split resulting from the 2008 election). Defs. Br. 6 (quoting Pls. Ex. 43 at 4). Accordingly, the Enacted Plan made only "minimal" changes and preserved "the core of the existing congressional districts." Pls. Ex.

43 at 4, 6. When making changes to each district, Delegate Janis sought "the input of the existing congressional delegation, both Republican and Democrat," and drew the lines based on the incumbents' "specific and detailed recommendations." Int.-Defs. Ex. 9 at 8. All of the incumbents "support[ed] the lines" for their districts (and were, unsurprisingly, re-elected in 2012). *Id.* Thus, the Enacted Plan did far more than merely avoid "'cutting our currently elected congressmen from their current districts [and] drawing current congressmen into districts together,'" Defs. Br. 6 (quoting Pls. Ex. 43 at 4), but directly advanced the incumbents' political preferences and preserved the 8-3 partisan split, *see* Juris. Stat. 19–21; Reply 7.

Second, Plaintiffs and Defendants attempt a strained analogy between District 3 and the Senate District 26 discussed in *Alabama*. *See* Pls. Br. 7; Defs. Br. 4–5. But Senate District 26 did not even *present* the issue that is *dispositive* for District 3. As established above, the fatal flaw in the challenge here is the complete absence of any proof that any alleged desire to maintain or enhance District 3's BVAP predominated *over* political or other concerns, since any such racial goal was *coextensive* with the Legislature's political goals. *See supra* Part I.A. *Alabama*, in contrast, did not involve *any* politics defense or any argument that the increase in Senate District 26's BVAP was driven by politics and incumbency protection, rather than race. *See Ala.* Op. 10. Accordingly, Senate District 26 did not present the issue of whether a policy of maintaining existing BVAP conflicted with or subordinated political and incumbency protection goals. *See id.*

Thus, even if Delegate Janis's statements here *echoed* those attributed to legislators in *Alabama* and established an unequivocal intent to maintain District 3's BVAP, this is of no moment. For where, as here, the question is whether "race *rather than politics*" predominates, such "direct evidence" that the legislature targeted a specific "racial balance" would "say little or

nothing about whether race played a *predominant* role comparatively speaking." *Easley*, 532 U.S. at 243, 253 (emphasis in original). Such "predominan[ce]," again, can be established only where, unlike here, racial concerns *subordinate conflicting* non-racial political or other factors. *See Ala.* Op. 6.

In any event, Delegate Janis's statements do not echo the racial views of the Alabama legislature, but instead the legally correct views of the *Supreme Court* in *Alabama*. The *Alabama* plaintiffs presented evidence that legislators set out "to prevent the percentage of minority voters in each district from declining" and "relied heavily upon a mechanically numerical view" of Section 5. *Ala.* Op. 9, 21. The Supreme Court, however, clarified the crucial distinction between avoiding reductions in minority voting *percentages* and avoiding reductions in minority voting *strength*, holding that Section 5 "does not require a covered jurisdiction to maintain a particular numerical percentage" but rather "to maintain a minority's ability to elect a preferred candidate of choice." *Id.* at 19. Delegate Janis's statements cited by Defendants precisely replicate the Supreme Court's formulation: those statements say *nothing* about preventing a BVAP decrease in District 3, but, like the Supreme Court, say only that the Legislature sought to "'mak[e] sure that the 3rd Congressional District did not retrogress in its minority voting influence.'" Defs. Br. 4 (quoting Pls. Ex. 43 at 14–15). Delegate Janis's statements therefore cannot be viewed as equivalent to *Alabama*'s *legislative* statements requiring no diminution in *BVAP*, since they are the same as the *Supreme Court's* admonition against diminution in minority "*voting influence*." *See* Juris. Stat. 21–24; Reply 9–10.

Having failed to unearth a nonexistent statement from a legislator or plan architect saying that BVAP will be maintained, Plaintiffs and Defendants attempt to fill this void by asserting that Defendants' and Intervenor-Defendants' expert John Morgan opined that the Legislature

employed a 55% BVAP floor in District 3. *See* Pls. Br. 7; Defs. Br. 4–5; *see also* Op. 19. But even if Mr. Morgan had said this, it would not reflect the Legislature's purpose because, as the Court affirmatively noted, Mr. Morgan "did not work with or talk to any members of the Virginia legislature" regarding the Enacted Plan. Op. 20 n.11; Juris. Stat. 24 n.1.

Moreover, Mr. Morgan *never* said that the Legislature applied a BVAP floor in District 3. Rather, he explained that a year before adoption of the Enacted Plan, the Democrat-controlled Legislature had enacted, "with strong support of bipartisan and black legislators, *a House of Delegates* redistricting plan with a 55% Black VAP as the floor for black-majority districts." Int.-Defs. Ex. 13 at 26 (emphasis added); Juris. Stat. 24 n.1. As Defendants go to great lengths to explain, a statement regarding an alleged use of race in one redistricting plan proves precisely nothing about an alleged use of race in a *different* redistricting plan adopted in a different year by a legislature controlled by a different political party. *See* Defs. Br. 2 n.7 (a "finding that race predominated in drawing CD3 . . . does not mean that race predominated when the General Assembly revised its State voting districts"). Defendants are entirely correct on this issue, for the reason they note: *Alabama* "underscored this point" when it emphasized that a claim for racial gerrymandering is "'a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*.'" *Id.* (quoting *Ala.* Op. 6) (emphasis in Defs. Br.). Since a racial intent in one district cannot be transferred to establish such intent in a different district in the *same* plan, Mr. Morgan's statement about a BVAP floor in the 2011 Democratic *House of Delegates* plan says absolutely nothing about the existence of such a floor in the 2012 Republican *Enacted Plan*. *See id.*

Finally, Plaintiffs' and Defendants' theories concerning the Legislature's purported BVAP floor are internally inconsistent and facially cannot explain the BVAP that actually

resulted in District 3. On the one hand, they claim that Delegate Janis used the benchmark BVAP as the floor, *see* Pls. Br. 7; Defs. Br. 4–5, but that would create a floor of *53.2%*, thus *refuting* Plaintiffs' and Defendants' imaginary *55%* floor. And, of course, the actual District 3 *increased* the BVAP to 56.3%, which Plaintiffs strenuously criticize in their discussion of Section 5. *See* Pls. Br. 8–12; Defs. Br. 8–11. Accordingly, Plaintiffs and Defendants are inconsistently arguing that the Legislature's racial goal was both *maintaining* BVAP to satisfy Section 5 and *increasing* BVAP to "pack" black voters. Pls. Br. 7, 8–12; Defs. Br. 4–5, 8–11. But since the District 3's BVAP *augmentation* could not have stemmed from some policy to *maintain* BVAP, the increase is necessarily attributable to something other than Delegate Janis's alleged desire to maintain—namely, the undisputed beneficial *political* effect of transferring predominantly Democratic (and predominantly black) VTDs into District 3 and out of the adjacent Republican districts (and vice versa). *See supra* Part I.A; Juris. Stat. 17–24; Reply 3–6.

Third, Plaintiffs and Defendants invoke a handful of traditional districting principles, such as compactness, contiguity, and VTD splits, that, in their view, support a conclusion that race predominated in the Enacted Plan's changes to District 3. *See* Pls. Br. 7; Defs. Br. 7. Plaintiffs miss the point entirely: these alleged "flaws" were all present (to a greater extent) in Benchmark District 3, so would *necessarily* continue if District 3's core were preserved. *See* Juris. Stat. 27–31; Reply 5. And, again, such core preservation was the predominant principle driving *all* districts and was necessary to accomplish the Legislature's political and incumbency-protection goals. *See supra* Part I.A; Juris. Stat. 27–31; Reply 5. Thus, these alleged *departures* from traditional districting principles reflect nothing more than *adherence* to the dominant and uniform principles of core preservation and incumbency protection. *See* Juris. Stat. 27–31; Reply 5. Again, the Alternative Plan *concededly* shared *these* flaws *and* also violated the core

preservation and incumbency protection principles, even though it reduced the benchmark BVAP by only 3%. *See* Juris. Stat. 27–31; Reply 5. Since such a minor departure from Enacted District 3's shape and BVAP has such tangible negative effects on core preservation and the political prospects of at least one Republican incumbent, this again vividly confirms that District 3's BVAP was not the result of subordinating these race-neutral principles, but maximizing them. *See* Juris. Stat. 27–31; Reply 5.

Finally, Defendants attempt to sidestep the Court's legal errors by suggesting that its predominance finding is reviewable only for "clear error." Defs. Br. 3. *Alabama*, however, makes clear that a three-judge court's application of "incorrect legal standards in evaluating" a *Shaw* claim can be reversible error even if it is not clear that the court's "predominance conclusions" necessarily would "have been different." *Ala.* Op. 2, 17. Here, the Court applied an incorrect legal standard because it failed to assess whether "the legislature subordinated *traditional race-neutral districting principles*," including the "offsetting" traditional principles of "incumbency protection" and "political affiliation," to "racial considerations," *id.* at 16, in this "mixed-motive suit," Op. 32; *see also supra* Part I.A.

In all events, as in *Easley*, the Court's finding that race predominated in the Enacted Plan *was* clearly erroneous. *See* Juris. Stat. 31–34. The myth perpetuated by Dr. McDonald that "African-American voters accounted for over 90% of the voting age residents added to the Third Congressional District," Op. 41 n.22 (cited at Pls. Br. 7), has been debunked, Juris. Stat. 38 n.4. Moreover, Dr. McDonald's VTD analysis, *see* Defs. Br. 7, is even *less* defensible than the similar analysis the Supreme Court rejected as a matter of law in *Easley*, *see* Juris. Stat. 31–34.

II. *ALABAMA* REJECTED THE COURT'S CONSTRUCTION OF THE NARROW TAILORING REQUIREMENT

Alabama not only confirmed the fundamental errors in the Court's application of *Shaw*

and *Easley*, but also squarely rejected the Court's construction of the narrow tailoring standard for satisfying strict scrutiny. *Alabama* held that "the narrow tailoring requirement insists only that the legislature have a strong basis in evidence in support of the (race-based) choice it has made." *Ala.* Op. 22. Legislatures "may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance." *Id.* (emphasis in original).

This deferential standard "does not demand that a State's actions actually be necessary to achieve a compelling state interest in order to be constitutionally valid." *Id.* The *Alabama* court therefore did not "insist that a legislature guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive" because "[t]he law cannot insist that a state legislature, when redistricting, determine *precisely* what percentage minority population § 5 demands." *Id.* (emphasis in original). As the *Alabama* court explained, "[t]he standards of § 5 are complex; they often require evaluation of controverted claims about voting behavior; the evidence may be unclear; and, with respect to any particular district, judges may disagree about the proper outcome." *Id.* "The law cannot lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) retrogressive under § 5 should the legislature place a few too few." *Id.*

In contrast, this Court misstated the narrow-tailoring requirement confirmed in *Alabama* and, in the process, erred when it held that the Enacted Plan fails strict scrutiny. *See* Juris. Stat. 34–38; Reply 10–11. The Court held that a plan cannot be narrowly tailored where it "did more than was necessary to avoid 'a retrogression in the position of racial minorities.'" Op. 39

(quoting *Bush v. Vera*, 517 U.S. 952, 973 (1996)); *see also id.* at 43 (narrow tailoring requires "least race-conscious measure"). It therefore concluded that the Enacted Plan failed strict scrutiny because it "increased [District 3's] BVAP." *Id.* at 41.

More specifically, *Alabama* rejected this Court's conclusion that a redistricting plan automatically fails strict scrutiny whenever it increases the BVAP in a majority-black district. *See Ala.* Op. 22 (strict scrutiny does not penalize legislatures for placing "a few too many minority voters in a district" and for placing "a few too few"). Moreover, the Court's test would interject even *more* race-consciousness into redistricting because it would place states in a racial straitjacket requiring them to precisely pinpoint whatever BVAP level was "necessary to avoid" retrogression. Op. 39; *see also* Juris. Stat. 34–35; Reply 10–11. But *Alabama* forecloses turning narrow tailoring into such "a trap for an unwary legislature": to the contrary, a legislature is not required to divine "*precisely* what percent minority population § 5 demands," but is afforded broad discretion to choose among a range of options for achieving Section 5 compliance based on "controverted claims" and "unclear" evidence. *Id.* (emphasis in original); *see* Juris. Stat. 34–38; Reply 10–11.

Although strict scrutiny is not triggered because Plaintiffs failed to prove that the Legislature "subordinated traditional race-neutral principles to racial considerations," *Ala.* Op. 16; *see supra* Part I, the Legislature clearly had "good reasons to believe" that the Enacted Plan was appropriate to comply with Section 5, *Ala.* Op. 22. Delegate Janis echoed *Alabama* and properly focused on not "'retrogress[ing] minority voting influence'" in District 3. *Compare* Op. 2, 8 (quoting Pls. Ex. 43 at 25), *with Ala.* Op. 19; *see also supra* Part I.B; Juris. Stat. 21–24; Reply 9–10. As Mr. Morgan explained, the year prior to adoption of the Enacted Plan, the Democrat-controlled Legislature adopted, with strong support from black legislators, a House of

Delegates redistricting plan with 55% or higher BVAP in all majority-black districts, including in geographic areas covered by District 3. *See* Int.-Defs. Ex. 13 at 26. Because it is obviously reasonable to believe that black legislators did not want to *harm* black voters, there were very good reasons to believe that this level of BVAP is what these expert legislators believed was needed to avoid diminishing those voters' ability to elect preferred candidates. *See Georgia v. Ashcroft*, 539 U.S. 461, 484, 489–91 (2003) (finding "significant" the views of **"representatives . . . protected by the Voting Rights Act"** and deferring to black congressman's views regarding retrogression and appropriate BVAP levels under Section 5 (emphasis added)). Thus, this provided a "strong basis" or "good reason" to believe that diminution substantially below that 55% BVAP level would make it difficult to prove non-retrogression. *Ala.* Op. 22; *see* Juris. Stat. 34–38; Reply 10–11.

In this regard, Plaintiffs repeatedly fault the Legislature for its undisputed—and irrelevant—decision not to conduct a costly and debatable racial bloc voting analysis. *See* Pls. Br. 11–12. But Plaintiffs' own racial bloc voting analysis proves that such an analysis would not have provided the Legislature a reliable assessment of the nonretrogressive BVAP level in District 3. *See* Juris. Stat. 34–38; Reply 10–11. Plaintiffs' racial bloc voting analysis suggests that a *30%* BVAP level would be nonretrogressive—but there is no dispute that decreasing District 3's BVAP by *more than 23%* would almost certainly have been denied preclearance as retrogressive, even if such a dramatic decrease could find support in a racial bloc voting analysis. *See* Juris. Stat. 37–38; Reply 11. Therefore, a racial bloc voting analysis would have served no purpose and would not have supplied the Legislature with a "good reason[] to believe" that any particular BVAP level was nonretrogressive. *See* Juris. Stat. 37–38; Reply 11. And, of course, *Alabama*'s deferential standard does not require a legislature to expend its limited resources on

such an unhelpful analysis, but instead made painstakingly clear that a legislature may rely on "controverted claims" and "unclear" evidence in formulating "good reasons to believe" that its actions are appropriate under Section 5. *Ala.* Op. 22.

Neither Plaintiffs nor Defendants dispute that this Court applied an incorrect legal standard to the strict-scrutiny question here. *See* Pls. Br. 8–12; Defs. Br. 8–11. Plaintiffs nonetheless attempt to save the Court's analysis by arguing that it applied a "reasonably necessary" standard that was "close" to the *Alabama* standard. Pls. Br. 12. But even if Plaintiffs had properly characterized the Court's standard, it still would fail under *Alabama*, which *reversed* a three-judge court's use of a "reasonably necessary" standard as a matter of law. *See Ala.* Op. 22–23. For this reason as well, *Alabama* confirms that the Court should enter judgment dismissing Plaintiffs' claim.

* * * * * *

Plaintiffs make a passing request that the Court set a remedial deadline of September 1, 2015 if it determines anew that the Enacted Plan violates *Shaw*. *See* Pls. Br. 13. Although this request goes beyond the issues on which the Court requested briefing, *see* 3/31/15 Order, Intervenor-Defendants briefly address it. As the Court has recognized, setting a remedial deadline during the pendency of a direct appeal deprives the Legislature, the Court, and the parties of "the views and instruction" of the Supreme Court and therefore is "wasteful" of legislative and judicial resources. Mem. Op. 4 (DE 137); *see also id.* at 5 ("[T]he interest of all is served by allowing the parties and the Court to proceed with the benefit of the views and instruction of the Supreme Court."). Given that the Supreme Court's Term expires on June 30, it will not decide this case on any second direct appeal by Intervenor-Defendants until after September 1.

Moreover, the Legislature is currently not in session and is not scheduled to convene in regular session again until January 2016, *see* Va. Const. art. VI, § 6, so setting a September 1 remedial deadline would impose significant costs on the Legislature and Virginia taxpayers, *see* Mem. Op. 4–5. Thus, while September 1 was an appropriate deadline to allow the Supreme Court to take action in the *first* direct appeal, *see id.*, it is not an appropriate deadline at this juncture. Rather, if the Court finds a *Shaw* violation, it should decide any appropriate remedial deadline as events unfold and to allow sufficient time to secure the "the views and instruction" of the Supreme Court in any second appeal. *Id.* at 4.

CONCLUSION

The Court should adhere to *Alabama* and enter judgment dismissing Plaintiffs' claim.

Dated: April 23, 2015

Respectfully submitted,

/s/ Jonathan A. Berry
Michael A. Carvin (*pro hac vice*)
John M. Gore (*pro hac vice*)
Jonathan A. Berry (VSB #81864)
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
Tel: (202) 879-3939
Fax: (202) 626-1700
Email: macarvin@jonesday.com
Email: jmgore@jonesday.com
Email: jberry@jonesday.com

Counsel for Intervenor-Defendants Virginia Representatives

CERTIFICATE OF SERVICE

I certify that on April 23, 2015, a copy of the INTERVENOR-DEFENDANTS' RESPONSE BRIEF REGARDING *ALABAMA LEGISLATIVE BLACK CAUCUS V. ALABAMA* was filed electronically with the Clerk of Court using the ECF system, which will send notification to the following ECF participants:

John K. Roche, Esq.
Mark Erik Elias, Esq.
John Devaney, Esq.
PERKINS COIE, LLP
700 13th Street, N.W., Suite 600
Washington, D.C. 20005-3960
Tel. (202) 434-1627
Fax (202) 654-9106
JRoche@perkinscoie.com
MElias@perkinscoie.com
JDevaney@perkinscoie.com

Kevin J. Hamilton, Esq.
PERKINS COIE, LLP
1201 Third Avenue, Ste. 4800
Seattle, WA 98101-3099
Tel. (202) 359-8000
Fax (202) 359-9000
KHamilton@perkinscoie.com

Counsel for Plaintiffs

Mike F. Melis
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
Telephone: (804) 786-2071
Fax: (804) 371-2087
mmelis@oag.state.va.us

Counsel for Defendants

Dated: April 23, 2015

/s/ Jonathan A. Berry
Jonathan A. Berry

Counsel for Intervenor-Defendants Virginia Representatives

EXHIBIT A

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ALABAMA LEGISLATIVE BLACK CAUCUS ET AL. *v.* ALABAMA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

No. 13–895. Argued November 12, 2014—Decided March 25, 2015*

In 2012 Alabama redrew the boundaries of the State's 105 House districts and 35 Senate districts. In doing so, while Alabama sought to achieve numerous traditional districting objectives—*e.g.,* compactness, not splitting counties or precincts, minimizing change, and protecting incumbents—it placed yet greater importance on two goals: (1) minimizing a district's deviation from precisely equal population, by keeping any deviation less than 1% of the theoretical ideal; and (2) seeking to avoid retrogression with respect to racial minorities' "ability to elect their preferred candidates of choice" under §5 of the Voting Rights Act of 1965, 52 U. S. C. §10304(b), by maintaining roughly the same black population percentage in existing majority-minority districts.

Appellants—Alabama Legislative Black Caucus (Caucus), Alabama Democratic Conference (Conference), and others—claim that Alabama's new district boundaries create a "racial gerrymander" in violation of the Fourteenth Amendment's Equal Protection Clause. After a bench trial, the three-judge District Court ruled (2 to 1) for the State. It recognized that electoral districting violates the Equal Protection Clause when race is the "predominant" consideration in deciding "to place a significant number of voters within or without a particular district," *Miller* v. *Johnson*, 515 U. S. 900, 913, 916, and the use of race is not "narrowly tailored to serve a compelling state interest," *Shaw* v. *Hunt*, 517 U. S. 899, 902 (*Shaw II*).

In ruling against appellants, it made four critical determinations:

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*Together with No. 13–1138, *Alabama Democratic Conference et al.* v. *Alabama et al.*, also on appeal from the same court.

Syllabus

(1) that both appellants had argued "that the Acts *as a whole* constitute racial gerrymanders," and that the Conference had also argued that the State had racially gerrymandered Senate Districts 7, 11, 22, and 26; (2) that the Conference lacked standing to make its racial gerrymandering claims; (3) that, in any event, appellants' claims must fail because race "was not the predominant motivating factor" in making the redistricting decisions; and (4) that, even were it wrong about standing and predominance, these claims must fail because any predominant use of race was "narrowly tailored" to serve a "compelling state interest" in avoiding retrogression under §5.

Held:

1. The District Court's analysis of the racial gerrymandering claim as referring to the State "as a whole," rather than district-by-district, was legally erroneous. Pp. 5–12.

(a) This Court has consistently described a claim of racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*, see, *e.g.*, *Shaw* v. *Reno*, 509 U. S. 630, 649 (*Shaw I*), and has described the plaintiff's evidentiary burden similarly, see *Miller*, *supra*, at 916. The Court's district-specific language makes sense in light of the personal nature of the harms that underlie a racial gerrymandering claim, see *Bush* v. *Vera*, 517 U. S. 952, 957; *Shaw I, supra,* at 648. Pp. 5–6.

(b) The District Court found the fact that racial criteria had not predominated in the drawing of some Alabama districts sufficient to defeat a claim of racial gerrymandering with respect to the State *as an undifferentiated whole*. But a showing that race-based criteria did not significantly affect the drawing of *some* Alabama districts would have done little to defeat a claim that race-based criteria predominantly affected the drawing of *other* Alabama districts. Thus, the District Court's undifferentiated statewide analysis is insufficient, and the District Court must on remand consider racial gerrymandering with respect to the individual districts challenged by appellants. Pp. 7–8.

(c) The Caucus and the Conference did not waive the right to further consideration of a district-by-district analysis. The record indicates that plaintiffs' evidence and arguments embody the claim that individual majority-minority districts were racially gerrymandered, and those are the districts that the District Court must reconsider. Although plaintiffs relied heavily upon statewide evidence to prove that race predominated in the drawing of individual district lines, neither the use of statewide evidence nor the effort to show widespread effect can transform a racial gerrymandering claim about a set of individual districts into a separate, general claim that the leg-

islature racially gerrymandered the State "as" an undifferentiated "whole." Pp. 8–12.

2. The District Court also erred in deciding, *sua sponte,* that the Conference lacked standing. It believed that the "record" did "not clearly identify the districts in which the individual members of the [Conference] reside." But the Conference's post-trial brief and the testimony of a Conference representative support an inference that the organization has members in all of the majority-minority districts, which is sufficient to meet the Conference's burden of establishing standing. At the very least, the Conference reasonably believed that, in the absence of a state challenge or a court request for more detailed information, it need not provide additional information such as a specific membership list. While the District Court had an independent obligation to confirm its jurisdiction, in these circumstances elementary principles of procedural fairness required the District Court, rather than acting *sua sponte*, to give the Conference an opportunity to provide evidence of member residence. On remand, the District Court should permit the Conference to file its membership list and the State to respond, as appropriate. Pp. 12–15.

3. The District Court also did not properly calculate "predominance" in its alternative holding that "[r]ace was not the predominant motivating factor" in the creation of any of the challenged districts. It reached its conclusion in part because it placed in the balance, among other nonracial factors, legislative efforts to create districts of approximately equal population. An equal population goal, however, is not one of the "traditional" factors to be weighed against the use of race to determine whether race "predominates," see *Miller*, *supra*, at 916. Rather, it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to *how* equal population objectives will be met. Had the District Court not taken a contrary view of the law, its "predominance" conclusions, including those concerning the four districts that the Conference specifically challenged, might well have been different. For example, there is strong, perhaps overwhelming, evidence that race did predominate as a factor when the legislature drew the boundaries of Senate District 26. Pp. 15–19.

4. The District Court's final alternative holding—that "the [challenged] Districts would satisfy strict scrutiny"—rests upon a misperception of the law. Section 5 does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice. Pp. 19–23.

(a) The statute's language, 52 U. S. C. §§10304(b), (d), and Department of Justice Guidelines make clear that §5 is satisfied if mi-

Syllabus

nority voters retain the ability to elect their preferred candidates. The history of §5 further supports this view, as Congress adopted the language in §5 to reject this Court's decision in *Georgia* v. *Ashcroft*, 539 U. S. 461, and to accept the views of Justice Souter's dissent—that, in a §5 retrogression case, courts should ask whether a new voting provision would likely deprive minority voters of their ability to elect a candidate of their choice, and that courts should not mechanically rely upon numerical percentages but should take account of all significant circumstances, *id.,* at 493, 498, 505, 509. Here, both the District Court and the legislature relied heavily upon a mechanically numerical view as to what counts as forbidden retrogression. Pp. 19–22.

(b) In saying this, this Court does not insist that a state legislature, when redistricting, determine *precisely* what percent minority population §5 demands. A court's analysis of the narrow tailoring requirement insists only that the legislature have a "strong basis in evidence" in support of the (race-based) choice that it has made. Brief for United States as *Amicus Curiae* 29. Here, however, the District Court and the legislature both asked the wrong question with respect to narrow tailoring. They asked how to maintain the present minority percentages in majority-minority districts, instead of asking the extent to which they must preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice. Because asking the wrong question may well have led to the wrong answer, the Court cannot accept the District Court's conclusion. Pp. 22–23.

989 F. Supp. 2d 1227, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined. THOMAS, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

Nos. 13–895 and 13–1138

ALABAMA LEGISLATIVE BLACK CAUCUS, ET AL., APPELLANTS
13–895 *v.*
ALABAMA ET AL.

ALABAMA DEMOCRATIC CONFERENCE, ET AL., APPELLANTS
13–1138 *v.*
ALABAMA ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

[March 25, 2015]

JUSTICE BREYER delivered the opinion of the Court.

The Alabama Legislative Black Caucus and the Alabama Democratic Conference appeal a three-judge Federal District Court decision rejecting their challenges to the lawfulness of Alabama's 2012 redistricting of its State House of Representatives and State Senate. The appeals focus upon the appellants' claims that new district boundaries create "racial gerrymanders" in violation of the Fourteenth Amendment's Equal Protection Clause. See, *e.g.*, *Shaw* v. *Hunt*, 517 U. S. 899, 907–908 (1996) (*Shaw II*) (Fourteenth Amendment forbids use of race as "'predominant'" district boundary-drawing "'factor'" unless boundaries are "narrowly tailored" to achieve a "'compelling state interest'" (citations omitted)). We find that the

District Court applied incorrect legal standards in evaluating the claims. We consequently vacate its decision and remand the cases for further proceedings.

I

The Alabama Constitution requires the legislature to reapportion its State House and Senate electoral districts following each decennial census. Ala. Const., Art. IX, §§199–200. In 2012 Alabama redrew the boundaries of the State's 105 House districts and 35 Senate districts. 2012 Ala. Acts no. 602 (House plan); *id.,* at no. 603 (Senate plan) (Acts). In doing so, Alabama sought to achieve numerous traditional districting objectives, such as compactness, not splitting counties or precincts, minimizing change, and protecting incumbents. But it placed yet greater importance on achieving two other goals. See Alabama Legislature Reapportionment Committee Guidelines in No. 12–cv–691, Doc. 30–4, pp. 3–5 (Committee Guidelines).

First, it sought to minimize the extent to which a district might deviate from the theoretical ideal of precisely equal population. In particular, it set as a goal creating a set of districts in which no district would deviate from the theoretical, precisely equal ideal by more than 1%—*i.e.,* a more rigorous deviation standard than our precedents have found necessary under the Constitution. See *Brown* v. *Thomson*, 462 U. S. 835, 842 (1983) (5% deviation from ideal generally permissible). No one here doubts the desirability of a State's efforts generally to come close to a one-person, one-vote ideal.

Second, it sought to ensure compliance with federal law, and, in particular, the Voting Rights Act of 1965. 79 Stat. 439, as amended, 52 U. S. C. §10301 *et seq*. At the time of the redistricting Alabama was a covered jurisdiction under that Act. Accordingly §5 of the Act required Alabama to demonstrate that an electoral change, such as redistrict-

ing, would not bring about retrogression in respect to racial minorities' "ability . . . to elect their preferred candidates of choice." 52 U. S. C. §10304(b). Specifically, Alabama believed that, to avoid retrogression under §5, it was required to maintain roughly the same black population percentage in existing majority-minority districts. See Appendix B, *infra*.

Compliance with these two goals posed particular difficulties with respect to many of the State's 35 majority-minority districts (8 in the Senate, 27 in the House). That is because many of these districts were (compared with the average district) underpopulated. In order for Senate District 26, for example, to meet the State's no-more-than-1% population-deviation objective, the State would have to add about 16,000 individuals to the district. And, prior to redistricting, 72.75% of District 26's population was black. Accordingly, Alabama's plan added 15,785 new individuals, and only 36 of those newly added individuals were white.

This suit, as it appears before us, focuses in large part upon Alabama's efforts to achieve these two goals. The Caucus and the Conference basically claim that the State, in adding so many new minority voters to majority-minority districts (and to others), went too far. They allege the State created a constitutionally forbidden "racial gerrymander"—a gerrymander that (*e.g.*, when the State adds more minority voters than needed for a minority group to elect a candidate of its choice) might, among other things, harm the very minority voters that Acts such as the Voting Rights Act sought to help.

After a bench trial, the Federal District Court held in favor of the State, *i.e.*, against the Caucus and the Conference, with respect to their racial gerrymandering claims as well as with respect to several other legal claims that the Caucus and the Conference had made. With respect to racial gerrymandering, the District Court recognized that

electoral districting violates the Equal Protection Clause when (1) race is the "dominant and controlling" or "predominant" consideration in deciding "to place a significant number of voters within or without a particular district," *Miller* v. *Johnson*, 515 U. S. 900, 913, 916 (1995), and (2) the use of race is not "narrowly tailored to serve a compelling state interest," *Shaw II*, 517 U. S., at 902; see also *Shaw* v. *Reno*, 509 U. S. 630, 649 (1993) (*Shaw I*) (Constitution forbids "separat[ion of] voters into different districts on the basis of race" when the separation "lacks sufficient justification"); *Bush* v. *Vera*, 517 U. S. 952, 958–959, 976 (1996) (principal opinion of O'Connor, J.) (same). But, after trial the District Court held (2 to 1) that the Caucus and the Conference had failed to prove their racial gerrymandering claims. The Caucus along with the Conference (and several other plaintiffs) appealed. We noted probable jurisdiction with respect to the racial gerrymandering claims. 572 U. S. ___ (2014).

We shall focus upon four critical District Court determinations underlying its ultimate "no violation" conclusion. They concern:

1. *The Geographical Nature of the Racial Gerrymandering Claims.* The District Court characterized the appellants' claims as falling into two categories. In the District Court's view, both appellants had argued "that the Acts *as a whole* constitute racial gerrymanders," 989 F. Supp. 2d 1227, 1287 (MD Ala. 2013) (emphasis added), and one of the appellants (the Conference) had also argued that the State had racially gerrymandered four specific electoral districts, Senate Districts 7, 11, 22, and 26, *id.*, at 1288.
2. *Standing.* The District Court held that the Caucus had standing to argue its racial gerrymandering claim with respect to the State "as a whole." But the Conference lacked standing to make any of its

racial gerrymandering claims—the claim requiring consideration of the State "as a whole," and the claims requiring consideration of four individual Senate districts. *Id.*, at 1292.

3. *Racial Predominance.* The District Court held that, in any event, the appellants' claims must fail because race "was not the predominant motivating factor" either (a) "for the Acts as a whole" or (b) with respect to "Senate Districts 7, 11, 22, or 26." *Id.*, at 1293.
4. *Narrow Tailoring/Compelling State Interest.* The District Court also held that, even were it wrong about standing and predominance, the appellants' racial gerrymandering claims must fail. That is because any predominant use of race in the drawing of electoral boundaries was "narrowly tailored" to serve a "compelling state interest," *id.*, at 1306–1307, namely the interest in avoiding retrogression with respect to racial minorities' "ability to elect their preferred candidates of choice." §10304(b).

In our view, each of these determinations reflects an error about relevant law. And each error likely affected the District Court's conclusions—to the point where we must vacate the lower court's judgment and remand the cases to allow appellants to reargue their racial gerrymandering claims. In light of our opinion, all parties remain free to introduce such further evidence as the District Court shall reasonably find appropriate.

II

We begin by considering the geographical nature of the racial gerrymandering claims. The District Court repeatedly referred to the racial gerrymandering claims as claims that race improperly motivated the drawing of boundary lines of the State *considered as a whole*. See, *e.g.*, 989 F. Supp. 2d, at 1293 ("Race was not the predomi-

nant motivating factor for the Acts as a whole"); *id.*, at 1287 (construing plaintiffs' challenge as arguing that the "Acts as a whole constitute racial gerrymanders"); *id.*, at 1292 (describing the plaintiffs' challenge as a "claim of racial gerrymandering to the Acts as a whole"); cf. *supra*, at 4–5 (noting four exceptions).

A racial gerrymandering claim, however, applies to the boundaries of individual districts. It applies district-by-district. It does not apply to a State considered as an undifferentiated "whole." We have consistently described a claim of racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*. See, *e.g.*, *Shaw I*, 509 U. S., at 649 (violation consists of "separat[ing] voters *into different districts* on the basis of race" (emphasis added)); *Vera*, 517 U. S., at 965 (principal opinion) ("[Courts] must scrutinize *each challenged district* . . ." (emphasis added)). We have described the plaintiff's evidentiary burden similarly. See *Miller*, *supra*, at 916 (plaintiff must 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*" (emphasis added)).

Our district-specific language makes sense in light of the nature of the harms that underlie a racial gerrymandering claim. Those harms are personal. They include being "personally . . . subjected to [a] racial classification," *Vera*, *supra*, at 957 (principal opinion), as well as being represented by a legislator who believes his "primary obligation is to represent only the members" of a particular racial group, *Shaw I*, *supra*, at 648. They directly threaten a voter who lives in the *district* attacked. But they do not so keenly threaten a voter who lives elsewhere in the State. Indeed, the latter voter normally lacks standing to pursue a racial gerrymandering claim. *United States* v. *Hays*, 515 U. S. 737, 744–745 (1995).

Voters, of course, can present statewide *evidence* in order to prove racial gerrymandering in a particular district. See *Miller*, *supra*, at 916. And voters might make the claim that *every* individual district in a State suffers from racial gerrymandering. But this latter claim is not the claim that the District Court, when using the phrase "as a whole," considered here. Rather, the concept as used here suggests the existence of a legal unicorn, an animal that exists only in the legal imagination.

This is not a technical, linguistic point. Nor does it criticize what might seem, in effect, a slip of the pen. Rather, here the District Court's terminology mattered. That is because the District Court found that racial criteria had not predominated in the drawing of some Alabama districts. And it found that fact (the fact that race did not predominate in the drawing of some, or many districts) sufficient to defeat what it saw as the basic claim before it, namely a claim of racial gerrymandering with respect to the State *as an undifferentiated whole*. See, *e.g.*, 989 F. Supp. 2d, at 1294 (rejecting plaintiffs' challenge because "[the legislature] followed no bright-line rule" with respect to every majority-minority district); *id.*, at 1298–1299, 1301 (citing examples of majority-minority districts in which black population percentages were reduced and examples of majority-white districts in which precincts were split).

A showing that race-based criteria did not significantly affect the drawing of *some* Alabama districts, however, would have done little to defeat a claim that race-based criteria predominantly affected the drawing of *other* Alabama districts, such as Alabama's majority-minority districts primarily at issue here. See *id.*, at 1329 (Thompson, J., dissenting) ("[T]he drafters['] fail[ure] to achieve their sought-after percentage in one district does not detract one iota from the fact that they did achieve it in another"). Thus, the District Court's undifferentiated

statewide analysis is insufficient. And we must remand for consideration of racial gerrymandering with respect to the individual districts subject to the appellants' racial gerrymandering challenges.

The State and principal dissent argue that (but for four specifically mentioned districts) there were in effect no such districts. The Caucus and the Conference, the State and principal dissent say, did not seek a district-by-district analysis. And, the State and principal dissent conclude that the Caucus and the Conference have consequently waived the right to any further consideration. Brief for Appellees 14, 31; *post,* at 5–12 (opinion of SCALIA, J.).

We do not agree. We concede that the District Court's opinion suggests that it was the Caucus and the Conference that led the Court to consider racial gerrymandering of the State "as a whole." 989 F. Supp. 2d, at 1287. At least the District Court interpreted their filings to allege only that kind of claim. *Ibid*. But our review of the record indicates that the plaintiffs did not claim only that the legislature had racially gerrymandered the State "as" an undifferentiated "whole." Rather, their evidence and their arguments embody the claim that individual majority-minority districts were racially gerrymandered. And those are the districts that we believe the District Court must reconsider.

There are 35 majority-minority districts, 27 in the House and 8 in the Senate. The District Court's opinion itself refers to evidence that the legislature's redistricting committee, in order to satisfy what it believed the Voting Rights Act required, deliberately chose additional black voters to move into underpopulated majority-minority districts, *i.e.,* a specific set of individual districts. See, *e.g.*, 989 F. Supp. 2d, at 1274 (referring to Senator Dial's testimony that the Committee "could have used," but did not use, "white population within Jefferson County to repopu-

late the majority-black districts" because "doing so would have resulted in the retrogression of the majority-black districts and potentially created a problem for [Justice Department] preclearance"); *id.*, at 1276 (stating that Representative Jim McClendon, also committee cochair, "testified consistently with Senator Dial"); *id.*, at 1277 (noting that the committee's expert, Randolph Hinaman, testified that "he needed to add population" to majority-black districts "without significantly lowering the percentage of the population in each district that was majority-black").

The Caucus and the Conference presented much evidence at trial to show that that the legislature had deliberately moved black voters into these majority-minority districts—again, a specific set of districts—in order to prevent the percentage of minority voters in each district from declining. See, *e.g.*, Committee Guidelines 3–5; 1 Tr. 28–29, 36–37, 55, 63, 67–68, 77, 81, 96, 115, 124, 136, 138 (testimony of Senator Dial); Deposition of Gerald Dial in No. 12–cv–691 (May 21, 2013), Doc. 123–5, pp. 17, 39–41, 62, 100 (Dial Deposition); 3 Tr. 222 (testimony of Representative McClendon); *id.*, at 118–119, 145–146, 164, 182–183, 186–187 (testimony of Hinaman); Deposition of Randolph Hinaman in No. 12–cv–691 (June 25, 2013), Doc. 134–4, pp. 23–24, 101 (Hinaman Deposition).

In their post-trial Proposed Findings of Fact and Conclusions of Law, the plaintiffs stated that the evidence showed a racial gerrymander with respect to the majority of the majority-minority districts; they referred to the specific splitting of precinct and county lines in the drawing of many majority-minority districts; and they pointed to much district-specific evidence. *E.g.*, Alabama Legislative Black Caucus Plaintiffs' Notice of Filing Proposed Findings of Fact and Conclusions of Law in No. 12–cv–691, Doc. 194, pp. 9–10, 13–14, 30–35, 40 (Caucus Post-Trial Brief); Newton Plaintiffs' Notice of Filing Proposed

Findings of Fact and Conclusions of Law in No. 12–cv–691, Doc. 195, pp. 33–35, 56–61, 64–67, 69–74, 82–85, 108, 121–122 (Conference Post-Trial Brief); see also Appendix A, *infra* (organizing these citations by district).

We recognize that the plaintiffs relied heavily upon statewide evidence to prove that race predominated in the drawing of individual district lines. See generally Caucus Post-Trial Brief 1, 3–7, 48–50; Conference Post-Trial Brief 2, 44–45, 105–106. And they also sought to prove that the use of race to draw the boundaries of the majority-minority districts affected the boundaries of other districts as well. See, *e.g.*, 1 Tr. 36–37, 48, 55, 70–71, 93, 111, 124 (testimony of Dial); 3 Tr. 142, 162 (testimony of Hinaman); see generally Caucus Post-Trial Brief 8–16. Such evidence is perfectly relevant. We have said that the plaintiff's burden in a racial gerrymandering case is "to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U. S., at 916. Cf. *Easley* v. *Cromartie*, 532 U. S. 234, 258 (2001) (explaining the plaintiff's burden in cases, unlike these, in which the State argues that politics, not race, was its predominant motive). That Alabama expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote) provides evidence that race motivated the drawing of particular lines in multiple districts in the State. And neither the use of statewide evidence nor the effort to show widespread effect can transform a racial gerrymandering claim about a set of individual districts into a separate, general claim that the legislature racially gerrymandered the State "as" an undifferentiated "whole."

We, like the principal dissent, recognize that the plaintiffs could have presented their district-specific claims

more clearly, *post,* at 6–8, 10–12 (opinion of SCALIA, J.), but the dissent properly concedes that its objection would weaken had the Conference "developed such a claim in the course of discovery and trial." *Post,* at 6. And that is just what happened.

In the past few pages and in Appendix A, we set forth the many record references that establish this fact. The Caucus helps to explain the complaint omissions when it tells us that the plaintiffs unearthed the factual basis for their racial gerrymandering claims when they deposed the committee's redistricting expert. See Brief for Appellants in No. 13–895, pp. 12–13. The State neither disputes this procedural history nor objects that plaintiffs' pleadings failed to conform with the proof. Indeed, throughout, the plaintiffs litigated these claims not as if they were wholly separate entities but as if they were a team. See, *e.g.,* Caucus Post-Trial Brief 1 ("[We] support the additional claims made by the [Conference] plaintiffs"); but cf. *post*, at 3–12 (SCALIA, J., dissenting) (treating separately Conference claims from Caucus claims). Thus we, like the dissenting judge below (who also lived with these cases through trial), conclude that the record as a whole shows that the plaintiffs brought, and their argument rested significantly upon, district-specific claims. See 989 F. Supp. 2d, at 1313 (Thompson, J., dissenting) (construing plaintiffs as also challenging "each majority-Black House and Senate District").

The principal dissent adds that the Conference waived its district-specific claims on appeal. Cf. *post,* at 8. But that is not so. When asked specifically about its position at oral argument, the Conference stated that it was relying on statewide evidence to prove its district-specific challenges. Tr. of Oral Arg. 15–16. Its counsel said that "the exact same policy was applied in every black-majority district," *id.,* at 15, and "[b]y statewide, we simply mean a common policy applied to every district in the State," *id.,*

at 16. We accept the Conference's clarification, which is consistent with how it presented these claims below.

We consequently conclude that the District Court's analysis of racial gerrymandering of the State "as a whole" was legally erroneous. We find that the appellants did not waive their right to consideration of their claims as applied to particular districts. Accordingly, we remand the cases. See *Pullman-Standard* v. *Swint*, 456 U. S. 273, 291 (1982) (remand is required when the District Court "failed to make a finding because of an erroneous view of the law"); *Rapanos* v. *United States*, 547 U. S. 715, 757 (2006) (same).

III

We next consider the District Court's holding with respect to standing. The District Court, *sua sponte*, held that the Conference lacked standing—either to bring racial gerrymandering claims with respect to the four individual districts that the court specifically considered (*i.e.*, Senate Districts 7, 11, 22, and 26) or to bring a racial gerrymandering claim with respect to the "State as a whole." 989 F. Supp. 2d, at 1292.

The District Court recognized that ordinarily

> "[a]n association has standing to bring suit on behalf of its members *when its members would have standing to sue in their own right*, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individuals members' participation in the lawsuit." *Id.*, at 1291 (quoting *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 181 (2000); emphasis added).

It also recognized that a "member" of an association "would have standing to sue" in his or her "own right" when that member "resides in the district that he alleges

was the product of a racial gerrymander." 989 F. Supp. 2d, at 1291 (citing *Hays*, 515 U. S., at 744–745). But, the District Court nonetheless denied standing because it believed that the "record" did "not clearly identify the districts in which the individual members of the [Conference] reside," and the Conference had "not proved that it has members who have standing to pursue any district-specific claims of racial gerrymandering." 989 F. Supp. 2d, at 1292.

The District Court conceded that Dr. Joe Reed, a representative of the Conference, testified that the Conference "has members in almost every county in Alabama." *Ibid.* But, the District Court went on to say that "the counties in Alabama are split into many districts." *Ibid.* And the "Conference offered no testimony or evidence that it has members in all of the districts in Alabama or in any of the [four] specific districts that it challenged." *Ibid.*

The record, however, lacks adequate support for the District Court's conclusion. Dr. Reed's testimony supports, and nothing in that record undermines, the Conference's own statement, in its post-trial brief, that it is a "statewide political caucus founded in 1960." Conference Post-Trial Brief 3. It has the "purpose" of "endors[ing] candidates for political office who will be responsible to the needs of the blacks and other minorities and poor people." *Id.*, at 3–4. These two statements (the second of which the principal dissent ignores), taken together with Dr. Reed's testimony, support an inference that the organization has members in all of the State's majority-minority districts, other things being equal, which is sufficient to meet the Conference's burden of establishing standing. That is to say, it seems highly likely that a "statewide" organization with members in "almost every county," the purpose of which is to help "blacks and other minorities and poor people," will have members in each majority-minority district. But cf. *post,* at 3–5 (SCALIA, J., dissenting).

At the very least, the common sense inference is strong enough to lead the Conference reasonably to believe that, in the absence of a state challenge or a court request for more detailed information, it need not provide additional information such as a specific membership list. We have found nothing in the record, nor has the State referred us to anything in the record, that suggests the contrary. Cf. App. 204–205, 208 (State arguing lack of standing, not because of inadequate member residency but because an association "lives" nowhere and that the Conference should join individual members). The most the State argued was that "[n]one of the *individual* [p]laintiffs [who brought the case with the Conference] claims to live in" Senate District 11, *id.*, at 205 (emphasis added), but the Conference would likely not have understood that argument as a request that *it* provide a membership list. In fact, the Conference might have understood the argument as an indication that the State did *not* contest its membership in every district.

To be sure, the District Court had an independent obligation to confirm its jurisdiction, even in the absence of a state challenge. See *post,* at 4–5 (SCALIA, J., dissenting). But, in these circumstances, elementary principles of procedural fairness required that the District Court, rather than acting *sua sponte*, give the Conference an opportunity to provide evidence of member residence. Cf. *Warth* v. *Seldin*, 422 U. S. 490, 501–502 (1975) (explaining that a court may "allow or [r]equire" a plaintiff to supplement the record to show standing and that "[i]f, *after this opportunity*, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed" (emphasis added)). Moreover, we have no reason to believe that the Conference would have been unable to provide a list of members, at least with respect to the majority-minority districts, had it been asked. It has filed just such a list in this Court. See Affidavit of Joe L. Reed

Pursuant to this Court's Rule 32.3 (Lodging of Conference affidavit listing members residing in each majority-minority district in the State); see also *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 718 (2007) (accepting a lodged affidavit in similar circumstances). Thus, the District Court on remand should reconsider the Conference's standing by permitting the Conference to file its list of members and permitting the State to respond, as appropriate.

IV

The District Court held in the alternative that the claims of racial gerrymandering must fail because "[r]ace was not the predominant motivating factor" in the creation of any of the challenged districts. 989 F. Supp. 2d, at 1293. In our view, however, the District Court did not properly calculate "predominance." In particular, it judged race to lack "predominance" in part because it placed in the balance, among other nonracial factors, legislative efforts to create districts of approximately equal population. See, *e.g.*, *id.*, at 1305 (the "need to bring the neighboring districts into compliance with the requirement of one person, one vote *served as the primary motivating factor* for the changes to [Senate] District 22" (emphasis added)); *id.*, at 1297 (the "constitutional requirement of one person, one vote trumped every other districting principle"); *id.*, at 1296 (the "record establishes that the drafters of the new districts, above all, had to correct [for] severe malapportionment . . ."); *id.*, at 1306 (the "inclusion of additional precincts [in Senate District 26] is a reasonable response to the underpopulation of the District").

In our view, however, an equal population goal is not one factor among others to be weighed against the use of race to determine whether race "predominates." Rather, it is part of the redistricting background, taken as a given,

when determining whether race, or other factors, predominate in a legislator's determination as to *how* equal population objectives will be met.

To understand this conclusion, recall what "predominance" is about: A plaintiff pursuing a racial gerrymandering claim must 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." *Miller*, 515 U. S., at 916. To do so, the "plaintiff must prove that the legislature subordinated *traditional race-neutral districting principles* . . . to racial considerations." *Ibid.* (emphasis added).

Now consider the nature of those offsetting "traditional race-neutral districting principles." We have listed several, including "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests," *ibid.*, incumbency protection, and political affiliation, *Vera*, 517 U. S., at 964, 968 (principal opinion).

But we have not listed equal population objectives. And there is a reason for that omission. The reason that equal population objectives do not appear on this list of "traditional" criteria is that equal population objectives play a different role in a State's redistricting process. That role is not a minor one. Indeed, in light of the Constitution's demands, that role may often prove "predominant" in the ordinary sense of that word. But, as the United States points out, "predominance" in the context of a racial gerrymandering claim is special. It is not about whether a legislature believes that the need for equal population takes ultimate priority. Rather, it is, as we said, whether the legislature "placed" race "above traditional districting considerations in determining *which* persons were placed *in appropriately apportioned districts*." Brief for United States as *Amicus Curiae* 19 (some emphasis added). In other words, if the legislature must place 1,000 or so additional voters in a particular district

in order to achieve an equal population goal, the "predominance" question concerns *which* voters the legislature decides to choose, and specifically whether the legislature predominately uses race as opposed to other, "traditional" factors when doing so.

Consequently, we agree with the United States that the requirement that districts have approximately equal populations is a background rule against which redistricting takes place. *Id.*, at 12. It is not a factor to be treated like other nonracial factors when a court determines whether race predominated over other, "traditional" factors in the drawing of district boundaries.

Had the District Court not taken a contrary view of the law, its "predominance" conclusions, including those concerning the four districts that the Conference specifically challenged, might well have been different. For example, once the legislature's "equal population" objectives are put to the side—*i.e.*, seen as a background principle—then there is strong, perhaps overwhelming, evidence that race did predominate as a factor when the legislature drew the boundaries of Senate District 26, the one district that the parties have discussed here in depth.

The legislators in charge of creating the redistricting plan believed, and told their technical adviser, that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible. See *supra*, at 9–10 (compiling extensive record testimony in support of this point). There is considerable evidence that this goal had a direct and significant impact on the drawing of at least some of District 26's boundaries. See 3 Tr. 175–180 (testimony of Hinaman); Appendix C, *infra* (change of district's shape from rectangular to irregular). Of the 15,785 individuals that the new redistricting laws added to the population of District 26, just 36 were white—a remarkable feat given the local demographics. See, *e.g.,* 2 Tr. 127–128 (testimony of Senator Quinton

Ross); 3 Tr. 179 (testimony of Hinaman). Transgressing their own redistricting guidelines, Committee Guidelines 3–4, the drafters split seven precincts between the majority-black District 26 and the majority-white District 25, with the population in those precincts clearly divided on racial lines. See Exh. V in Support of Newton Plaintiffs' Opposition to Summary Judgment in No. 12–cv–691, Doc. 140–1, pp. 91–95. And the District Court conceded that race "was a factor in the drawing of District 26," and that the legislature "preserved" "the percentage of the population that was black." 989 F. Supp. 2d, at 1306.

We recognize that the District Court also found, with respect to District 26, that "preservi[ng] the core of the existing [d]istrict," following "county lines," and following "highway lines" played an important boundary-drawing role. *Ibid*. But the first of these (core preservation) is not directly relevant to the origin of the *new* district inhabitants; the second (county lines) seems of marginal importance since virtually all Senate District 26 boundaries departed from county lines; and the third (highways) was not mentioned in the legislative redistricting guidelines. Cf. Committee Guidelines 3–5.

All this is to say that, with respect to District 26 and likely others as well, had the District Court treated equal population goals as background factors, it might have concluded that race was the predominant boundary-drawing consideration. Thus, on remand, the District Court should reconsider its "no predominance" conclusions with respect to Senate District 26 and others to which our analysis is applicable.

Finally, we note that our discussion in this section is limited to correcting the District Court's misapplication of the "predominance" test for strict scrutiny discussed in *Miller*, 515 U. S., at 916. It does not express a view on the question of whether the intentional use of race in redistricting, even in the absence of proof that traditional

districting principles were subordinated to race, triggers strict scrutiny. See *Vera*, 517 U. S., at 996 (KENNEDY, J., concurring).

V

The District Court, in a yet further alternative holding, found that "[e]ven if the [State] subordinated traditional districting principles to racial considerations," the racial gerrymandering claims failed because, in any event, "the Districts would satisfy strict scrutiny." 989 F. Supp. 2d, at 1306. In the District Court's view, the "Acts are narrowly tailored to comply with Section 5" of the Voting Rights Act. *Id.*, at 1311. That provision "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.*" *Ibid.* (emphasis added). And, insofar as the State's redistricting embodied racial considerations, it did so in order to meet this §5 requirement.

In our view, however, this alternative holding rests upon a misperception of the law. Section 5, which covered particular States and certain other jurisdictions, does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice. That is precisely what the language of the statute says. It prohibits a covered jurisdiction from adopting any change that "has the purpose of or will have the effect of diminishing the ability of [the minority group] to elect their preferred candidates of choice." 52 U. S. C. §10304(b); see also §10304(d) (the "purpose of subsection (b) . . . is to protect the ability of such citizens to elect their preferred candidates of choice").

That is also just what Department of Justice Guidelines say. The Guidelines state specifically that the Department's preclearance determinations are not based

> "on any predetermined or fixed demographic percentages. . . . Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district. . . . [C]ensus data alone may not provide sufficient indicia of electoral behavior to make the requisite determination." Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7471 (2011).

Consistent with this view, the United States tells us that "Section 5" does not "requir[e] the State to maintain the same percentage of black voters in each of the majority-black districts as had existed in the prior districting plans." Brief for United States as *Amicus Curiae* 22. Rather, it "prohibits only those diminutions of a minority group's proportionate strength that strip the group within a district of its existing ability to elect its candidates of choice." *Id.*, at 22–23. We agree. Section 5 does not require maintaining the same population percentages in majority-minority districts as in the prior plan. Rather, §5 is satisfied if minority voters retain the ability to elect their preferred candidates.

The history of §5 further supports this view. In adopting the statutory language to which we referred above, Congress rejected this Court's decision in *Georgia* v. *Ashcroft*, 539 U. S. 461, 480 (2003) (holding that it is not necessarily retrogressive for a State to replace safe majority-minority districts with crossover or influence districts), and it adopted the views of the dissent. H. R. Rep. No. 109–478, pp. 68–69, and n. 183 (2006). While the thrust of Justice Souter's dissent was that, in a §5 retrogression case, courts should ask whether a new voting provision would likely deprive minority voters of their ability to elect a candidate of their choice—language that Congress adopted in revising §5—his dissent also made clear that

courts should not mechanically rely upon numerical percentages but should take account of all significant circumstances. *Georgia* v. *Ashcroft*, *supra*, at 493, 498, 505, 509. And while the revised language of §5 may raise some interpretive questions—*e.g.*, its application to coalition, crossover, and influence districts—it is clear that Congress did not mandate that a 1% reduction in a 70% black population district would be necessarily retrogressive. See Persily, The Promises and Pitfalls of the New Voting Rights Act, 117 Yale L. J. 174, 218 (2007). Indeed, Alabama's mechanical interpretation of §5 can raise serious constitutional concerns. See *Miller*, *supra*, at 926.

The record makes clear that both the District Court and the legislature relied heavily upon a mechanically numerical view as to what counts as forbidden retrogression. See Appendix B, *infra*. And the difference between that view and the more purpose-oriented view reflected in the statute's language can matter. Imagine a majority-minority district with a 70% black population. Assume also that voting in that district, like that in the State itself, is racially polarized. And assume that the district has long elected to office black voters' preferred candidate. Other things being equal, it would seem highly unlikely that a redistricting plan that, while increasing the numerical size of the district, reduced the percentage of the black population from, say, 70% to 65% would have a significant impact on the black voters' ability to elect their preferred candidate. And, for that reason, it would be difficult to explain just why a plan that uses racial criteria predominately to maintain the black population at 70% is "narrowly tailored" to achieve a "compelling state interest," namely the interest in preventing §5 retrogression. The circumstances of this hypothetical example, we add, are close to those characterizing Senate District 26, as set forth in the District Court's opinion and throughout the record. See, *e.g.*, 1 Tr. 131–132 (testimony of Dial); 3 Tr.

180 (testimony of Hinaman).

In saying this, we do not insist that a legislature guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive. The law cannot insist that a state legislature, when redistricting, determine *precisely* what percent minority population §5 demands. The standards of §5 are complex; they often require evaluation of controverted claims about voting behavior; the evidence may be unclear; and, with respect to any particular district, judges may disagree about the proper outcome. The law cannot lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) retrogressive under §5 should the legislature place a few too few. See *Vera*, 517 U. S., at 977 (principal opinion). Thus, we agree with the United States that a court's analysis of the narrow tailoring requirement insists only that the legislature have a "strong basis in evidence" in support of the (race-based) choice that it has made. Brief for United States as *Amicus Curiae* 29 (citing *Ricci* v. *DeStefano*, 557 U. S. 557, 585 (2009)). This standard, as the United States points out, "does not demand that a State's actions actually be necessary to achieve a compelling state interest in order to be constitutionally valid." Brief for United States as *Amicus Curiae* 29. And legislators "may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance." *Ibid.* (emphasis added).

Here the District Court enunciated a narrow tailoring standard close to the one we have just mentioned. It said that a plan is "narrowly tailored . . . when the race-based action taken was *reasonably necessary*" to achieve a compelling interest. 989 F. Supp. 2d, at 1307 (emphasis added).

And it held that preventing retrogression is a compelling interest. *Id.*, at 1306–1307. While we do not here decide whether, given *Shelby County* v. *Holder*, 570 U. S. ___ (2013), continued compliance with §5 remains a compelling interest, we conclude that the District Court and the legislature asked the wrong question with respect to narrow tailoring. They asked: "How can we maintain present minority percentages in majority-minority districts?" But given §5's language, its purpose, the Justice Department Guidelines, and the relevant precedent, they should have asked: "To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?" Asking the wrong question may well have led to the wrong answer. Hence, we cannot accept the District Court's "compelling interest/narrow tailoring" conclusion.

* * *

For these reasons, the judgment of the District Court is vacated. We note that appellants have also raised additional questions in their jurisdictional statements, relating to their one-person, one-vote claims (Caucus) and vote dilution claims (Conference), which were also rejected by the District Court. We do not pass upon these claims. The District Court remains free to reconsider the claims should it find reconsideration appropriate. And the parties are free to raise them, including as modified by the District Court, on any further appeal.

The cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Appendixes
A

Majority-minority District	**Instances in Plaintiffs' Post-Trial Briefs Arguing that Traditional Race-Neutral Districting Principles Were Subordinated to Race**
HOUSE	
HD 52, 54–60	Caucus Post-Trial Brief 30; Conference Post-Trial Brief 56–57, 60, 82–83, 121–122
HD 53	Caucus Post-Trial Brief 33–35; Conference Post-Trial Brief 59–61
HD 68	Conference Post-Trial Brief 70, 84–85
HD 69	Conference Post-Trial Brief 66–67, 85
HD 70	Conference Post-Trial Brief 85
HD 71	Conference Post-Trial Brief 83–85
HD 72	Caucus Post-Trial Brief 40; Conference Post-Trial Brief 83–85
HD 76–78	Conference Post-Trial Brief 65–66
SENATE*	
SD 18–20	Conference Post-Trial Brief 56–59
SD 23–24	Caucus Post-Trial Brief 9–10, 40; Conference Post-Trial Brief 69–74
SD 33	Caucus Post-Trial Brief 13–14

* Senate District 26 excluded from this list

B

State's Use of Incorrect Retrogression Standard

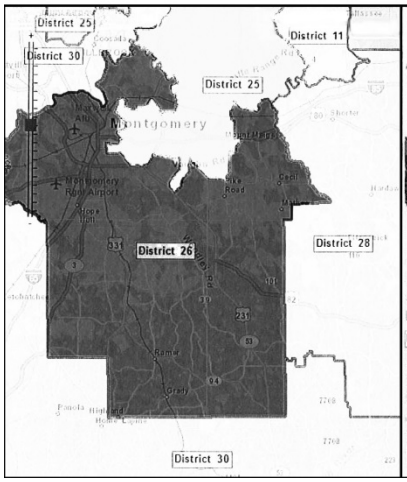
The following citations reflect instances in either the District Court opinion or in the record showing that the State believed that §5 forbids, not just *substantial* reductions, but *any* reduction in the percentage of black inhabitants of a majority-minority district.

District Court Findings	989 F. Supp. 2d, at 1307; *id.*, at 1273; *id.*, at 1247	
Evidence in the Record	Senator Gerald Dial	1 Tr. 28–29, 36–37, 55, 81, 96, 136, 138
		Dial Deposition 17, 39–41, 81, 100
	Representative Jim McClendon	3 Tr. 222
	Randolph Hinaman	3 Tr. 118–119, 145–146, 149–150, 164, 182–183, 187
		Hinaman Deposition 23–24, 101; but see *id.*, at 24–25, 101

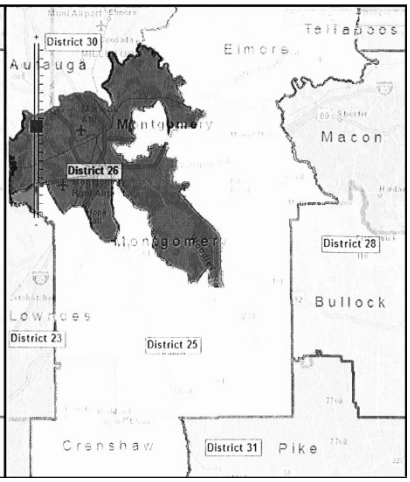
Appendix C to opinion of the Court

C

2001 Districting Plan



2012 Districting Plan



SUPREME COURT OF THE UNITED STATES

Nos. 13–895 and 13–1138

ALABAMA LEGISLATIVE BLACK CAUCUS, ET AL., APPELLANTS
13–895 *v.*
ALABAMA ET AL.

ALABAMA DEMOCRATIC CONFERENCE, ET AL., APPELLANTS
13–1138 *v.*
ALABAMA ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

[March 25, 2015]

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

Today, the Court issues a sweeping holding that will have profound implications for the constitutional ideal of one person, one vote, for the future of the Voting Rights Act of 1965, and for the primacy of the State in managing its own elections. If the Court's destination seems fantastical, just wait until you see the journey.

Two groups of plaintiffs, the Alabama Democratic Conference and the Alabama Legislative Black Caucus, brought separate challenges to the way in which Alabama drew its state legislative districts following the 2010 census. These cases were consolidated before a three-judge District Court. Even after a full trial, the District Court lamented that "[t]he filings and arguments made by the plaintiffs on these claims were mystifying at best." 989 F. Supp. 2d 1227, 1287 (MD Ala. 2013). Nevertheless, the

District Court understood both groups of plaintiffs to argue, as relevant here, only that "the Acts as a whole constitute racial gerrymanders." *Id.,* at 1287. It also understood the Democratic Conference to argue that "Senate Districts 7, 11, 22, and 26 constitute racial gerrymanders," *id.,* at 1288, but held that the Democratic Conference lacked standing to bring "*any* district-specific claims of racial gerrymandering," *id.,* at 1292 (emphasis added). It then found for Alabama on the merits.

The Court rightly concludes that our racial gerrymandering jurisprudence does not allow for statewide claims. *Ante*, at 5–12. However, rather than holding appellants to the misguided legal theory they presented to the District Court, it allows them to take a mulligan, remanding the case with orders that the District Court consider whether some (all?) of Alabama's 35 majority-minority districts result from impermissible racial gerrymandering. In doing this, the Court disregards the detailed findings and thoroughly reasoned conclusions of the District Court—in particular its determination, reached after watching the development of the case from complaint to trial, that no appellant proved (or even pleaded) district-specific claims with respect to the majority-minority districts. Worse still, the Court ignores the Democratic Conference's express waiver of these claims before this Court. It does this on the basis of a few stray comments, cherry-picked from district-court filings that are more Rorschach brief than Brandeis brief, in which the vague outline of what could be district-specific racial-gerrymandering claims begins to take shape only with the careful, post-hoc nudging of appellate counsel.

Racial gerrymandering strikes at the heart of our democratic process, undermining the electorate's confidence in its government as representative of a cohesive body politic in which all citizens are equal before the law. It is therefore understandable, if not excusable, that the Court balks

at denying merits review simply because appellants pursued a flawed litigation strategy. But allowing appellants a second bite at the apple invites lower courts similarly to depart from the premise that ours is an adversarial system whenever they deem the stakes sufficiently high. Because I do not believe that Article III empowers this Court to act as standby counsel for sympathetic litigants, I dissent.

I. The Alabama Democratic Conference

The District Court concluded that the Democratic Conference lacked standing to bring district-specific claims. It did so on the basis of the Conference's failure to present any evidence that it had members who voted in the challenged districts, and because the individual Conference plaintiffs did not claim to vote in them. 989 F. Supp. 2d, at 1292.

A voter has standing to bring a racial-gerrymandering claim only if he votes in a gerrymandered district, or if specific evidence demonstrates that he has suffered the special harms that attend racial gerrymandering. *United States* v. *Hays*, 515 U. S. 737, 744–745 (1995). However, the Democratic Conference only claimed to have "chapters and members in *almost* all counties in the state." Newton Plaintiffs' Proposed Findings of Fact and Conclusions of Law in No. 12–cv–691, Doc. 195–1, pp. 3–4 (Democratic Conference Post-Trial Brief) (emphasis added). Yet the Court concludes that this fact, combined with the Conference's self-description as a "'statewide political caucus'" that endorses candidates for political office, "supports an inference that the organization has members in all of the State's majority-minority districts, other things being equal." *Ante,* at 13. The Court provides no support for this theory of jurisdiction by illogical inference, perhaps because this Court has rejected other attempts to peddle more-likely-than-not standing. See *Summers* v. *Earth*

Island Institute, 555 U. S. 488, 497 (2009) (rejecting a test for organizational standing that asks "whether, accepting [an] organization's self-description of the activities of its members, there is a statistical probability that some of those members are threatened with concrete injury").

The inference to be drawn from the Conference's statements cuts in precisely the opposite direction. What is at issue here is not just counties but voting districts within counties. If the Conference has members in *almost* every county, then there must be counties in which it does not have members; and we have no basis for concluding (or inferring) that those counties do not contain all of the majority-minority voting districts. Morever, even in those counties in which the Conference does have members, we have no basis for concluding (or inferring) that those members vote in majority-minority districts. The Conference had plenty of opportunities, including at trial, to demonstrate that this was the case, and failed to do so. This failure lies with the Democratic Conference, and the consequences should be borne by it, not by the people of Alabama, who must now shoulder the expense of further litigation and the uncertainty that attends a resuscitated constitutional challenge to their legislative districts.

Incredibly, the Court thinks that "elementary principles of procedural fairness" *require* giving the Democratic Conference the opportunity to prove on appeal what it neglected to prove at trial. *Ante,* at 14. It observes that the Conference had no reason to believe it should provide such information because "the State did *not* contest its membership in every district," and the opinion cites an affidavit lodged *with this Court* providing a list of the Conference's members in each majority-minority district in Alabama. *Ibid.* I cannot imagine why the absence of a state challenge would matter. Whether or not there was such a challenge, it was the Conference's responsibility, as "[t]he party invoking federal jurisdiction," to establish

standing. See *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 561 (1992). That responsibility was enforceable, challenge or no, by the court: "The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 230–231 (1990) (citations omitted). And because standing is not a "mere pleading requiremen[t] but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation." *Defenders of Wildlife, supra*, at 561.

The Court points to *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 718 (2007), as support for its decision to sandbag Alabama with the Democratic Conference's out-of-time (indeed, out-of-court) lodging in this Court. The circumstances in that case, however, are far afield. The organization of parents in that case had established organizational standing in the lower court by showing that it had members with children who would be subject to the school district's "integration tiebreaker," which was applied at ninth grade. Brief for Respondents, O. T. 2006, No. 05–908, p. 16. By the time the case reached this Court, however, the youngest of these children had entered high school, and so would no longer be subject to the challenged policy. *Ibid.* Accordingly, we accepted a lodging that provided names of additional, younger children in order to show that the organization had not *lost* standing as a result of the long delay that often accompanies federal litigation. Here, by contrast, the Democratic Conference's lodging in the Supreme Court is its first attempt to show that it has members in the majority-minority districts. This is too little, too late.

But that is just the start. Even if the Democratic Con-

ference *had standing to bring* district-specific racial-gerrymandering claims, there remains the question whether it *did* bring them. Its complaint alleged three counts: (1) Violation of §2 of the Voting Rights Act, (2) Racial gerrymandering in violation of the Equal Protection Clause, and (3) §1983 violations of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. Complaint in No. 2:12–cv–1081, Doc. 1, pp. 17–18. The racial gerrymandering count alleged that "Alabama Acts 2012-602 and 2012-603 were drawn for the purpose and effect of minimizing the opportunity of minority voters to participate effectively in the political process," and that this "racial gerrymandering by Alabama Acts 2012-602 and 2012-603 violates the rights of Plaintiffs." *Id.,* at 17. It made no reference to specific districts that were racially gerrymandered; indeed, the only particular jurisdictions mentioned *anywhere* in the complaint were Senate District 11, Senate District 22, Madison County Senate Districts, House District 73, and Jefferson and Montgomery County House Districts. None of the Senate Districts is majority-minority. Nor is House District 73. Jefferson County does, admittedly, contain 8 of the 27 majority-minority House Districts in Alabama, and Montgomery County contains another 4, making a total of 12. But they also contain 14 majority-white House Districts between them. In light of this, it is difficult to understand the Court's statement that appellants' "evidence and . . . arguments embody the claim that individual majority-minority districts were racially gerrymandered." *Ante,* at 8.

That observation would, of course, make sense if the Democratic Conference had developed such a claim in the course of discovery and trial. But in its post-trial Proposed Findings of Fact and Conclusions of Law, the Conference hewed to its original charge of statewide racial gerrymandering—or, rather, it did so as much as it reasonably could without actually proposing that the Court

find *any* racial gerrymandering, statewide or otherwise. Instead, the Conference chose only to pursue claims that Alabama violated §2 of the Voting Rights Act under two theories. See Democratic Conference Post-Trial Brief 91–103 (alleging a violation of the results prong of Voting Rights Act §2) and 103–124 (alleging a violation of the purpose prong of Voting Rights Act §2).

To be sure, the Conference employed language and presented factual claims at various points in its 126-page post-trial brief that are evocative of a claim of racial gerrymandering. But in clinging to these stray comments to support its conclusion that the Conference made district-specific racial-gerrymandering claims, *ante,* at 9–10, the Court ignores the context in which these comments appear—the context of a clear Voting Rights Act §2 claim. Voting Rights Act claims and racial-gerrymandering claims share some of the same elements. See *League of United Latin American Citizens* v. *Perry,* 548 U. S. 399, 514 (2006) (SCALIA, J., concurring in judgment in part and dissenting in part). Thus, allegations made in the course of arguing a §2 claim will often be indistinguishable from allegations that would be made in support of a racial-gerrymandering claim. The appearance of such allegations in one of the Conference's briefs might support reversal if this case came to us on appeal from the District Court's grant of a motion to dismiss. See *Johnson* v. *City of Shelby*, 574 U. S. ___, ___ (2014) (*per curiam*) (slip op., at 1) (noting that the Federal Rules of Civil Procedure "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted"). But here the District Court held a full trial before concluding that the Conference failed to make or prove any district-specific racial-gerrymandering claims with respect to the majority-minority districts. In this posture, and on this record, I cannot agree with the Court that the Conference's district-specific evidence, clearly made in the

course of arguing a §2 theory, should be read to give rise to district-specific claims of racial gerrymandering with respect to Alabama's majority-minority districts.

The Court attempts to shift responsibility for the Democratic Conference's ill-fated statewide theory from the Conference to the District Court, implying that it was the "legally erroneous" analysis of the District Court, *ante,* at 12, rather than the arguments made by the Conference, that conjured this "legal unicorn," *ante,* at 7, so that the Conference did not forfeit the claims that the Court now attributes to it, *ante,* at 12. I suspect this will come as a great surprise to the Conference. Whatever may have been presented to the District Court, the Conference unequivocally stated in its opening brief: "Appellants challenge Alabama's race-based statewide redistricting policy, *not* the design of any one particular election district." Brief for Appellants in No. 13–1138, p. 2 (emphasis added). It drove the point home in its reply brief: "[I]f the Court were to apply a predominant-motive and narrow-tailoring analysis, that analysis should be applied to the state's *policy*, not to the design of each particular district one-by-one." Reply Brief in No. 11–1138, p. 7. How could anything be clearer? As the Court observes, the Conference attempted to walk back this unqualified description of its case at oral argument. *Ante*, at 11–12. Its assertion that what it *really* meant to challenge was the policy as applied to every district (*not* every majority-minority district, mind you) is not "clarification," *ante*, at 12, but an entirely new argument—indeed, the same argument it expressly disclaimed in its briefing. "We will not revive a forfeited argument simply because the petitioner gestures toward it in its reply brief." *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U. S. ___, ___, n. 2 (2014) (slip op., at 5, n. 2); we certainly should not do so when the issue is first presented at oral argument.

II. The Alabama Legislative Black Caucus

The Court does not bother to disentangle the independent claims brought by the Black Caucus from those of the Democratic Conference, but it strongly implies that both parties asserted racial-gerrymandering claims with respect to Alabama's 35 majority-minority districts. As we have described, the Democratic Conference brought no such claims; and the Black Caucus's filings provide even weaker support for the Court's conclusion.

The Black Caucus complaint contained three counts: (1) Violation of One Person, One Vote, see *Reynolds* v. *Sims*, 377 U. S. 533 (1964); (2) Dilution and Isolation of Black Voting Strength in violation of §2 of the Voting Rights Act; and (3) Partisan Gerrymandering. Complaint in No. 2:12–cv–691, Doc. 1, pp. 15–22. The failure to raise *any* racial-gerrymandering claim was not a mere oversight or the consequence of inartful pleading. Indeed, in its amended complaint the Black Caucus specifically cited this Court's leading racial-gerrymandering case for the proposition that "traditional or neutral districting principles may not be subordinated in a dominant fashion by *either racial or partisan interests* absent a compelling state interest for doing so." Amended Complaint in No. 2:12–cv–691, Doc. 60, p. 23 (citing *Shaw* v. *Reno*, 509 U. S. 630, 642 (1993); emphasis added). This quote appears in the first paragraph under the "Partisan Gerrymandering" heading, and claims of subordination to *racial* interests are notably absent from the Black Caucus complaint.

Racial gerrymandering was not completely ignored, however. In a brief introductory paragraph to the amended complaint, before addressing jurisdiction and venue, the Black Caucus alleged that "Acts 2012-602 and 2012-603 are racial gerrymanders that unnecessarily minimize population deviations and violate the whole-county provisions of the Alabama Constitution with both the purpose and effect of minimizing black voting strength and isolat-

ing from influence in the Alabama Legislature legislators chosen by African Americans." Amended Complaint, at 3. This was the first and last mention of racial gerrymandering, and like the Democratic Conference's complaint, it focused exclusively on the districting maps as a whole rather than individual districts. Moreover, even this allegation appears primarily concerned with the use of racially motivated districting as a means of violating one person, one vote (by splitting counties), and §2 of the Voting Rights Act (by minimizing and isolating black voters and legislators).

To the extent the Black Caucus cited particular districts in the body of its complaint, it did so only with respect to its enumerated one-person, one-vote, Voting Rights Act, and partisan-gerrymandering counts. See, *e.g., id.,* at 13–14 (alleging that the "deviation restriction and disregard of the 'whole county' requirements . . . facilitated the Republican majority's efforts to gerrymander the district boundaries in Acts 2012–602 and 2012–603 for partisan purposes. By packing the majority-black House and Senate districts, the plans remove reliable Democratic voters from adjacent majority-white districts . . ."); *id.*, at 36 ("The partisan purpose of [one] gerrymander was to remove predominately black Madison County precincts to SD 1, avoiding a potential crossover district"); *id.*, at 44–45 (asserting that "splitting Jefferson County among 11 House and Senate districts" and "increasing the size of its local legislative delegation and the number of other counties whose residents elect members" of the delegation "dilut[es] the votes of Jefferson County residents" by diminishing their ability to control county-level legislation in the state legislature). And even these claims were made with a statewide scope in mind. *Id.*, at 55 ("Viewed in their entirety, the plans in Acts 2012-602 and 2012-603 have the purpose and effect of minimizing the opportunities for black and white voters who support the Democratic

Party to elect candidates of their choice").

Here again, discovery and trial failed to produce any clear claims with respect to the majority-minority districts. In a curious inversion of the Democratic Conference's practice of pleading racial gerrymandering and then effectively abandoning the claims, the Black Caucus, which failed to plead racial gerrymandering, did clearly advance the theory after the trial. See Alabama Legislative Black Caucus Plaintiffs' Post-Trial Proposed Findings of Fact and Conclusions of Law in No. 2:12–cv–691, Doc. 194, pp. 48–51 (Black Caucus Post-Trial Brief). The Black Caucus asserted racial-gerrymandering claims in its post-trial brief, but they all had a clear statewide scope. It charged that Alabama "started their line drawing with the majority-black districts" so as to maximize the size of their black majorities, which "impacted the drawing of majority-white districts in nearly every part of the state." *Id.,* at 48–49. "[R]ace was the predominant factor in drafting both plans," *id.,* at 49, which "drove nearly every districting decision," "dilut[ing] the influence of black voters in the majority-white districts," *id.,* at 50.

The Black Caucus did present district-specific evidence in the course of developing its other legal theories. Although this included evidence that Alabama manipulated the racial composition of certain majority-minority districts, it also included evidence that Alabama manipulated racial distributions with respect to the districting maps as a whole, *id.,* at 6 ("Maintaining the same high black percentages had a predominant impact on the entire plan"), and with respect to majority-white districts, *id.,* at 10–11 ("Asked why [majority-white] SD 11 was drawn in a semi-donut-shape that splits St. Clair, Talladega, and Shelby Counties, Sen. Dial blamed that also on the need to preserve the black majorities in Jefferson County Senate districts"), and 43–44 ("Sen. Irons' quick, 'primative' [*sic*] analysis of the new [majority-white] SD 1 convinced her

that it was designed to 'shed' the minority population of Sen. Sanford's [majority-white] SD 7 to SD 1" in order to "crack a minority influence district"). The Black Caucus was attacking the legislative districts from every angle. Nothing gives rise to an inference that it ever homed in on majority-minority districts—or, for that matter, any particular set of districts. Indeed, the fair reading of the Black Caucus's filings is that it was presenting illustrative evidence in particular districts—majority-minority, minority-influence, and majority-white—in an effort to make out a claim of statewide racial gerrymandering. The fact that the Court now concludes that this is not a valid legal theory does not justify its repackaging the claims for a second round of litigation.

III. Conclusion

Frankly, I do not know what to make of appellants' arguments. They are pleaded with such opacity that, squinting hard enough, one can find them to contain just about anything. This, the Court believes, justifies demanding that the District Court go back and squint harder, so that it may divine some new means of construing the filings. This disposition is based, it seems, on the implicit premise that plaintiffs only plead legally correct theories. That is a silly premise. We should not reward the practice of litigation by obfuscation, especially when we are dealing with a well-established legal claim that numerous plaintiffs have successfully brought in the past. See, *e.g.,* Amended Complaint and Motion for Preliminary and Permanent Injunction in *Cromartie* v. *Hunt*, No. 4:96–cv–104 (EDNC), Doc. 21, p. 9 ("Under the March 1997 redistricting plan, the Twelfth District and First District have boundaries which were drawn pursuant to a predominantly racial motivation," which were "the fruit of [earlier] racially gerrymandered plans"). Even the complaint in *Shaw*, which established a cause of action for racial ger-

rymandering, displayed greater lucidity than appellants', alleging that defendants "creat[ed] two amorphous districts which embody a scheme for segregation of voters by race in order to meet a racial quota" "totally unrelated to considerations of compactness, contiguous, and geographic or jurisdictional communities of interest." Complaint and Motion for Preliminary and Permanent Injunction and for Temporary Restraining Order in *Shaw* v. *Barr*, No. 5:92–cv–202 (EDNC), Doc. 1, pp. 11–12.

The Court seems to acknowledge that appellants never focused their racial-gerrymandering claims on Alabama's majority-minority districts. While remanding to consider whether the majority-minority districts were racially gerrymandered, it admits that plaintiffs "basically claim that the State, in adding so many new minority voters to majority-minority districts (*and to others*), went too far." *Ante,* at 3 (emphasis added). It further concedes that appellants "relied heavily upon statewide evidence," and that they "also sought to prove that the use of race to draw the boundaries of the majority-minority districts affected the boundaries of other districts as well." *Ante,* at 10.

The only reason I see for the Court's selection of the majority-minority districts as the relevant set of districts for the District Court to consider on remand is that this was the set chosen by appellants after losing on the claim they actually presented in the District Court. By playing along with appellants' choose-your-own-adventure style of litigation, willingly turning back the page every time a strategic decision leads to a dead-end, the Court discourages careful litigation and punishes defendants who are denied both notice and repose. The consequences of this unprincipled decision will reverberate far beyond the narrow circumstances presented in this case.

Accordingly, I dissent.

SUPREME COURT OF THE UNITED STATES

Nos. 13–895 and 13–1138

ALABAMA LEGISLATIVE BLACK CAUCUS, ET AL., APPELLANTS
13–895 *v.*
ALABAMA ET AL.

ALABAMA DEMOCRATIC CONFERENCE, ET AL., APPELLANTS
13–1138 *v.*
ALABAMA ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

[March 25, 2015]

JUSTICE THOMAS, dissenting.

"[F]ew devices could be better designed to exacerbate racial tensions than the consciously segregated districting system currently being constructed in the name of the Voting Rights Act." *Holder* v. *Hall*, 512 U. S. 874, 907 (1994) (THOMAS, J., concurring in judgment). These consolidated cases are yet another installment in the "disastrous misadventure" of this Court's voting rights jurisprudence. *Id.,* at 893. We have somehow arrived at a place where the parties agree that Alabama's legislative districts should be fine-tuned to achieve some "optimal" result with respect to black voting power; the only disagreement is about what *percentage* of blacks should be placed in those optimized districts. This is nothing more than a fight over the "best" racial quota.

I join JUSTICE SCALIA's dissent. I write only to point out that, as this case painfully illustrates, our jurisprudence

in this area continues to be infected with error.

I

The Alabama Legislature faced a difficult situation in its 2010 redistricting efforts. It began with racially segregated district maps that were inherited from previous decades. The maps produced by the 2001 redistricting contained 27 majority-black House districts and 8 majority-black Senate districts—both at the time they were drawn, App. to Juris. Statement 47–48, and at the time of the 2010 Census, App. 103–108. Many of these majority-black districts were over 70% black when they were drawn in 2001, and even more were over 60% black. App. to Juris. Statement 47–48. Even after the 2010 Census, the population remained above 60% black in the majority of districts. App. 103–108.

Under the 2006 amendments to §5 of the Voting Rights Act of 1965, Alabama was also under a federal command to avoid drawing new districts that would "have the effect of diminishing the ability" of black voters "to elect their preferred candidates of choice." 52 U. S. C. §10304(b). To comply with §5, the legislature adopted a policy of maintaining the same percentage of black voters within each of those districts as existed in the 2001 plans. See *ante,* at 16. This, the districting committee thought, would preserve the ability of black voters to elect the same number of preferred candidates. App. to Juris. Statement 174–175. The Department of Justice (DOJ) apparently agreed. Acting under its authority to administer §5 of the Voting Rights Act, the DOJ precleared Alabama's plans.[1] *Id.,*

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[1] As I have previously explained, §5 of the Voting Rights Act is unconstitutional. See *Shelby County* v. *Holder*, 570 U. S. ___, ___ (2013) (THOMAS, J., concurring) (slip op., at 1). And §5 no longer applies to Alabama after the Court's decision in *Shelby County*. See *id.,* at ___ (slip op., at 24) (majority opinion). Because the appellants' claims are not properly before us, however, I express no opinion on whether

at 9.

Appellants—including the Alabama Legislative Black Caucus and the Alabama Democratic Conference—saw matters differently. They sued Alabama, and on appeal they argue that the State's redistricting plans are racially gerrymandered because many districts are highly packed with black voters. According to appellants, black voters would have more voting power if they were spread over more districts rather than concentrated in the same number of districts as in previous decades. The DOJ has entered the fray in support of appellants, arguing that the State's redistricting maps fail strict scrutiny because the State focused too heavily on a single racial characteristic—the number of black voters in majority-minority districts—which potentially resulted in impermissible packing of black voters.

Like the DOJ, today's majority sides with appellants, faulting Alabama for choosing the wrong percentage of blacks in the State's majority-black districts, or at least for arriving at that percentage using the wrong reasoning. In doing so, the Court—along with appellants and the DOJ—exacerbates a problem many years in the making. It seems fitting, then, to trace that history here. The practice of creating highly packed—"safe"—majority-minority districts is the product of our erroneous jurisprudence, which created a system that forces States to segregate voters into districts based on the color of their skin. Alabama's current legislative districts have their genesis in the "max-black" policy that the DOJ itself applied to §5 throughout the 1990's and early 2000's. The 2006 amendments to §5 then effectively locked in place Ala-

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compliance with §5 was a compelling governmental purpose at the time of Alabama's 2012 redistricting, nor do I suggest that Alabama would necessarily prevail if appellants had properly raised district-specific claims.

bama's max-black districts that were established during the 1990's and 2000's. These three problems—a jurisprudence requiring segregated districts, the distortion created by the DOJ's max-black policy, and the ossifying effects of the 2006 amendments—are the primary culprits in this case, not Alabama's redistricting policy. Nor does this Court have clean hands.

II

This Court created the current system of race-based redistricting by adopting expansive readings of §2 and §5 of the Voting Rights Act. Both §2 and §5 prohibit States from implementing voting laws that "den[y] or abridg[e] the right to vote on account of race or color." §§10304(a), 10301(a). But both provisions extend to only certain types of voting laws: any "voting qualification or prerequisite to voting, or standard, practice, or procedure." *Ibid.* As I have previously explained, the terms "'standard, practice, or procedure' . . . refer only to practices that affect minority citizens' access to the ballot," such as literacy tests. *Holder*, 512 U. S. at 914 (opinion concurring in judgment). They do not apply to "[d]istricting systems and electoral mechanisms that may affect the 'weight' given to a ballot duly cast and counted." *Ibid.* Yet this Court has adopted far-reaching interpretations of both provisions, holding that they encompass legislative redistricting and other actions that might "dilute" the strength of minority votes. See generally *Thornburg* v. *Gingles*, 478 U. S. 30 (1986) (§2 "vote dilution" challenge to legislative districting plan); see also *Allen* v. *State Bd. of Elections*, 393 U. S. 544, 583–587 (1969) (Harlan, J., concurring in part and dissenting in part).

The Court's interpretation of §2 and §5 have resulted in challenge after challenge to the drawing of voting districts. See, *e.g., Bartlett* v. *Strickland*, 556 U. S. 1 (2009); *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399

(2006); *Georgia* v. *Ashcroft*, 539 U. S. 461 (2003); *Reno* v. *Bossier Parish School Bd.*, 528 U. S. 320 (2000) (*Bossier II*); *Hunt* v. *Cromartie*, 526 U. S. 541 (1999); *Reno* v. *Bossier Parish School Bd.*, 520 U. S. 471 (1997) (*Bossier I*); *Bush* v. *Vera*, 517 U. S. 952 (1996); *Shaw* v. *Hunt*, 517 U. S. 899 (1996) (*Shaw II*); *Miller* v. *Johnson*, 515 U. S. 900 (1995); *United States* v. *Hays*, 515 U. S. 737 (1995); *Holder*, *supra*; *Johnson* v. *De Grandy*, 512 U. S. 997 (1994); *Growe* v. *Emison*, 507 U. S. 25 (1993); *Shaw* v. *Reno*, 509 U. S. 630 (1993) (*Shaw I*); *Voinovich* v. *Quilter*, 507 U. S. 146 (1993).

The consequences have been as predictable and as they are unfortunate. In pursuing "undiluted" or maximized minority voting power, "we have devised a remedial mechanism that encourages federal courts to segregate voters into racially designated districts to ensure minority electoral success." *Holder*, *supra,* at 892 (THOMAS, J., concurring in judgment). Section 5, the provision at issue here, has been applied to require States that redistrict to maintain the number of pre-existing majority-minority districts, in which minority voters make up a large enough portion of the population to be able to elect their candidate of choice. See, *e.g., Miller*, *supra*, at 923–927 (rejecting the DOJ's policy of requiring States to increase the number of majority-black districts because maintaining the same number of majority-black districts would not violate §5).

In order to maintain these "racially 'safe burroughs,'" States or courts must perpetually "divid[e] the country into electoral districts along racial lines—an enterprise of segregating the races into political homelands." *Holder*, *supra,* at 905 (opinion of THOMAS, J.) (internal quotation marks omitted). The assumptions underlying this practice of creating and maintaining "safe minority districts"—"that members of [a] racial group must think alike and that their interests are so distinct that they must be provided a separate body of representatives"—remain "re-

pugnant to any nation that strives for the ideal of a color-blind Constitution." *Id.,* at 905–906. And, as predicted, the States' compliance efforts have "embroil[ed] the courts in a lengthy process of attempting to undo, or at least to minimize, the damage wrought by the system we created." *Id.,* at 905. It is this fateful system that has produced these cases.

III

A

In tandem with our flawed jurisprudence, the DOJ has played a significant role in creating Alabama's current redistricting problem. It did so by enforcing §5 in a manner that required States, including Alabama, to create supermajority-black voting districts or face denial of pre-clearance.

The details of this so-called "max-black" policy were highlighted in federal court during Georgia's 1991 congressional redistricting. See *Johnson* v. *Miller*, 864 F. Supp. 1354, 1360–1361 (SD Ga. 1994). On behalf of the Black Caucus of the Georgia General Assembly, the American Civil Liberties Union (ACLU) submitted a redistricting proposal to the Georgia Legislature that became known as the "max-black plan." *Id.,* at 1360. The ACLU's map created two new "black" districts and "further maximized black voting strength by pushing the percentage of black voters within its majority-black districts as high as possible." *Id.,* at 1361 (internal quotation marks omitted).

The DOJ denied several of Georgia's proposals on the ground that they did not include enough majority-black districts. *Id.*, at 1366. The plan it finally approved was substantially similar to the ACLU's max-black proposal, *id.,* at 1364–1366, creating three majority-black districts, with total black populations of 56.63%, 62.27%, and

64.07%, *id.,* at 1366, and n. 12.[2]

Georgia was not the only State subject to the DOJ's maximization policy. North Carolina, for example, submitted a congressional redistricting plan after the 1990 Census, but the DOJ rejected it because it did not create a new majority-minority district, and thus "appear[ed] to minimize minority voting strength." *Shaw* v. *Barr*, 808 F. Supp. 461, 463–464 (EDNC 1992) (quoting Letter from John R. Dunne, Assistant Attorney General of N. C., Civil Rights Div., to Tiare B. Smiley, Special Deputy Attorney General of N. C. 4 (Dec. 18, 1991)). The DOJ likewise pressured Louisiana to create a new majority-black district when the State sought approval of its congressional redistricting plan following the 1990 Census. See *Hays* v. *Louisiana*, 839 F. Supp. 1188, 1190 (WD La. 1993), vacated on other grounds by *Louisiana* v. *Hays*, 512 U. S. 1230 (1994).

Although we eventually rejected the DOJ's max-black policy, see *Miller*, *supra*, at 924–927, much damage to the States' congressional and legislative district maps had already been done. In those States that had enacted districting plans in accordance with the DOJ's max-black policy, the prohibition on retrogression under §5 meant that the legislatures were effectively required to maintain those max-black plans during any subsequent redistricting. That is what happened in Alabama.

B

Alabama's 2010 redistricting plans were modeled after max-black-inspired plans that the State put in place in the

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[2]The District Court found it "unclear whether DOJ's maximization policy was driven more by [the ACLU's] advocacy or DOJ's own misguided reading of the Voting Rights Act," and it concluded that the "considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment." *Johnson* v. *Miller,* 864 F. Supp. 1354, 1368 (SD Ga. 1994).

1990's under the DOJ's max-black policy. See generally *Kelley* v. *Bennett*, 96 F. Supp. 2d 1301 (MD Ala. 2000), vacated on other grounds by *Sinkfield* v. *Kelley*, 531 U. S. 28 (2000) (*per curiam*).

Following the 1990 Census, the Alabama Legislature began redrawing its state legislative districts. After several proposals failed in the legislature, a group of plaintiffs sued, and the State entered into a consent decree agreeing to use the "Reed-Buskey" plan. 96 F. Supp. 2d, at 1309. The primary designer of this plan was Dr. Joe Reed, the current chairman of appellant Alabama Democratic Conference. According to Dr. Reed, the previous plan from the 1980's was not "fair" because it did not achieve the number of "black-preferred" representatives that was proportionate to the percentage of blacks in the population. *Id.,* at 1310. And because of the DOJ's max-black policy, "it was widely assumed that a state could (and, according to DOJ, had to) draw district lines with the primary intent of maximizing election of black officials." *Id.*, at 1310, n. 14. "Dr. Reed thus set out to maximize the number of black representatives and senators elected to the legislature by maximizing the number of black-majority districts." *Id.,* at 1310. Illustrating this strategy, Alabama's letter to the DOJ seeking preclearance of the Reed-Buskey plan "emphasize[d] the Plan's deliberate creation of enough majority-black districts to assure nearly proportional representation in the legislature," *ibid.*, n. 14 and boasted that the plan had created four new majority-black districts and two additional majority-black Senate districts. *Ibid.*

Dr. Reed populated these districts with a percentage of black residents that achieved an optimal middle ground—a "happy medium"—between too many and too few. *Id.,* at 1311. Twenty-three of the twenty-seven majority-black House districts were between 60% and 70% black under Reed's plan, *id.,* at 1311, and Senate District 26—one of the districts at issue today—was pushed from 65% to 70%

black. *Id.,* at 1315.[3] A District Court struck down several districts created in the Reed-Buskey plan as unconstitutionally based on race. *Id.,* at 1324. This Court reversed, however, holding that the plaintiffs lacked standing because they did not live in the gerrymandered districts. *Sinkfield*, *supra,* at 30–31.

The Reed-Buskey plan thus went into effect and provided the template for the State's next redistricting efforts in 2001. See *Montiel* v. *Davis*, 215 F. Supp. 2d 1279, 1282 (SD Ala. 2002). The 2001 maps maintained the same number of majority-black districts as the Reed-Buskey plan had created: 27 House districts and 8 Senate districts. *Ibid.* And "to maintain the same relative percentages of black voters in those districts," the legislature "redrew the districts by shifting more black voters into the majority-black districts." App. to Juris. Statement 4. The State's letters requesting preclearance of the 2001 plans boasted that the maps maintained the same number of majority-black districts and the same (or higher) percentages of black voters within those districts, other than "slight reductions" that were "necessary to satisfy other legitimate, nondiscriminatory redistricting considerations." Letter from William H. Pryor, Alabama Attorney General, to Voting Section Chief, Civil Rights Division, Department of Justice 6–7 (Aug. 14, 2001) (Senate districts); Letter from William H. Pryor, Alabama Attorney

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[3] In this litigation, Dr. Reed and the Alabama Democratic Conference argue that the percentage of black residents needed to maintain the ability to elect a black-preferred candidate is lower than it was in the 2000's because black participation has increased over the last decade. Brief for Appellants in No. 13–1138, pp. 39–40. Although appellants disclaim any argument that the State must achieve an optimal percentage of black voters in majority-black districts, *id.*, at 35, it is clear that that is what they seek: a plan that maximizes voting strength by maintaining "safe" majority-minority districts while also spreading black voters into other districts where they can influence elections. *Id.*, at 17–18.

General, to Voting Section Chief, Civil Rights Division, Department of Justice 7, 9 (Sept. 4, 2001) (House districts).

Section 5 tied the State to those districts: Under this Court's §5 precedents, States are prohibited from enacting a redistricting plan that "would lead to a retrogression in the position of racial minorities." *Beer* v. *United States*, 425 U. S. 130, 141 (1976). In other words, the State could not retrogress from the previous plan if it wished to comply with §5.

IV

Alabama's quandary as it attempted to redraw its legislative districts after 2010 was exacerbated by the 2006 amendments to §5. Those amendments created an inflexible definition of "retrogression" that Alabama understandably took as requiring it to maintain the same percentages of minority voters in majority-minority districts. The amendments thus provide the last piece of the puzzle that explains why the State sought to maintain the same percentages of blacks in each majority-black district.

Congress passed the 2006 amendments in response to our attempt to define "retrogression" in *Georgia* v. *Ashcroft*, 539 U. S. 461. Prior to that decision, practically any reapportionment change could "be deemed 'retrogressive' under our vote dilution jurisprudence by a court inclined to find it so." *Bossier I*, 520 U. S., at 490–491 (THOMAS, J., concurring). "[A] court could strike down *any* reapportionment plan, either because it did not include enough majority-minority districts or because it did (and thereby diluted the minority vote in the remaining districts)." *Id.,* at 491. Our §5 jurisprudence thus "inevitably force[d] the courts to make political judgments regarding which type of apportionment best serves supposed minority interests—judgments courts are ill equipped to make." *Id.,* at 492.

We tried to pull the courts and the DOJ away from

making these sorts of judgments in *Georgia* v. *Ashcroft*, *supra*. Insofar as §5 applies to the drawing of voting districts, we held that a District Court had wrongly rejected Georgia's reapportionment plan, and we adopted a retrogression standard that gave States flexibility in determining the percentage of black voters in each district. *Id.,* at 479–481. As we explained, "a State may choose to create a certain number of 'safe' districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice." *Id.,* at 480. Alternatively, "a State may choose to create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice." *Ibid.* We noted that "spreading out minority voters over a greater number of districts creates more districts in which minority voters may have the opportunity to elect a candidate of their choice," even if success is not guaranteed, and even if it diminished the chance of electing a representative in some districts. *Id.,* at 481. Thus, States would be permitted to make judgments about how best to prevent retrogression in a minority group's voting power, including assessing the range of appropriate minority population percentages within each district. *Id.,* at 480–481.

In response, Congress amended §5 and effectively overruled *Georgia* v. *Ashcroft*. See 120 Stat. 577. The 2006 amendments added subsection (b), which provides:

> "Any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting that has the purpose or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of . . . this section." 52 U. S. C. §10304(b). See §5, 120 Stat. 577.

Thus, any change that has the effect of "diminishing the ability" of a minority group to "elect their preferred candidate of choice" is retrogressive.

Some were rightly worried that the 2006 amendments would impose too much inflexibility on the States as they sought to comply with §5. Richard Pildes, who argued on behalf of the Alabama Democratic Conference in these cases, testified in congressional hearings on the 2006 amendments. He explained that *Georgia* v. *Ashcroft* "recognizes room . . . for some modest flexibility in Section 5," and warned that if "Congress overturns *Georgia* v. *Ashcroft*, it will make even this limited amount of flexibility illegal." Hearing on the Continuing Need for Section 5 Pre-Clearance before the Senate Committee on the Judiciary, 109th Congress, 2d Sess., pp. 11–12 (2006). Pildes also observed that the proposed standard of "no 'diminished ability to elect' . . . has a rigidity and a mechanical quality that can lock into place minority districts in the south at populations that do not serve minority voters' interests." *Id.,* at 12. Although this testimony says nothing about how §5 ought to be interpreted, it tells us that the Alabama Democratic Conference's own attorney believes that the State was subject to a "rigi[d]" and "mechanical" standard in determining the number of black voters that must be maintained in a majority-black district.

V

All of this history explains Alabama's circumstances when it attempted to redistrict after the 2010 Census. The legislature began with the max-black district maps that it inherited from the days of Reed-Buskey. Using these inherited maps, combined with population data from the 2010 Census, many of the State's majority-black House and Senate districts were between 60% and 70% black, and some were over 70%. App. to Juris. Statement

103–108. And the State was prohibited from drawing new districts that would "have the effect of diminishing the ability" of blacks "to elect their preferred candidates of choice." §10304(b). The legislature thus adopted a policy of maintaining the same number of majority-black districts and roughly the same percentage of blacks within each of those districts. See *ante,* at 16.

The majority faults the State for taking this approach. I do not pretend that Alabama is blameless when it comes to its sordid history of racial politics. But, today the State is not the one that is culpable. Its redistricting effort was indeed tainted, but it was tainted by our voting rights jurisprudence and the uses to which the Voting Rights Act has been put. Long ago, the DOJ and special-interest groups like the ACLU hijacked the Act, and they have been using it ever since to achieve their vision of maximized black electoral strength, often at the expense of the voters they purport to help. States covered by §5 have been whipsawed, first required to create "safe" majority-black districts, then told not to "diminis[h]" the ability to elect, and now told they have been too rigid in preventing any "diminishing" of the ability to elect. *Ante,* at 17–18.

Worse, the majority's solution to the appellants' gerrymandering claims requires States to analyze race even *more* exhaustively, not less, by accounting for black voter registration and turnout statistics. *Ante,* at 18–19. The majority's command to analyze black voting patterns en route to adopting the "correct" racial quota does nothing to ease the conflict between our color-blind Constitution and the "consciously segregated districting system" the Court has required in the name of equality. *Holder*, 512 U. S., at 907. Although I dissent today on procedural grounds, I also continue to disagree with the Court's misguided and damaging jurisprudence.

EXHIBIT B

No. 14-___

IN THE

Supreme Court of the United States

ERIC CANTOR, ROBERT J. WITTMAN, BOB GOODLATTE, FRANK WOLF, RANDY J. FORBES, MORGAN GRIFFITH, SCOTT RIGELL & ROBERT HURT,
Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,
Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

JURISDICTIONAL STATEMENT

MICHAEL A. CARVIN
Counsel of Record
JOHN M. GORE
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

October 31, 2014

Counsel for Appellants Virginia Congressmen Eric Cantor, Robert J. Wittman, Bob Goodlatte, Frank Wolf, Randy J. Forbes, Morgan Griffith, Scott Rigell & Robert Hurt

QUESTIONS PRESENTED

The two-judge majority below held that Virginia Congressional District 3, which perpetuates a district created as a *Shaw v. Reno* remedy, now violates *Shaw*. The majority, however, never found that "race *rather than* politics" predominates in District 3, or required Plaintiffs to prove "at the least" that the General Assembly could have "achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" and bring about "significantly greater racial balance" than the Enacted Plan. *Easley v. Cromartie*, 532 U.S. 234, 243, 258 (2001) (emphasis original). Judge Payne dissented because the majority failed to show that Plaintiffs had carried their "demanding burden" to prove that race predominated in the drawing of District 3. J.S. App. 44a.

The questions presented are:

1. Did the court below err in failing to make the required finding that race rather than politics predominated in District 3, where there is no dispute that politics explains the Enacted Plan?

2. Did the court below err in relieving Plaintiffs of their burden to show an alternative plan that achieves the General Assembly's political goals, is comparably consistent with traditional districting principles, and brings about grater racial balance than the Enacted Plan?

3. Regardless of any other error, was the court below's finding of a *Shaw* violation based on clearly erroneous fact-finding?

4. Did the majority err in holding that strict scrutiny requires a legislature to adopt the least

restrictive means possible for complying with the Voting Rights Act, instead of a redistricting plan that substantially addresses such compliance?

PARTIES

The following were parties in the Court below:

Plaintiffs:

Dawn Curry Page (dismissed via stipulation Apr. 9, 2014)

Gloria Personhuballah

James Farkas

Defendants:

Virginia State Board Of Elections (dismissed via stipulation Nov. 21, 2013)

Kenneth T. Cuccinelli, II, Attorney General of Virginia (dismissed via stipulation Nov. 21, 2013)

Charlie Judd, Chairman of the Virginia State Board of Elections

Kimberly Bowers, Vice-Chair of the Virginia State Board of Elections

Don Palmer, Secretary of the Virginia State Board of Elections

Intervenor-Defendants:

Virginia Congressmen Eric Cantor, Robert J. Wittman, Bob Goodlatte, Frank Wolf, Randy J. Forbes, Morgan Griffith, Scott Rigell, and Robert Hurt

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JURISDICTIONAL STATEMENT

Appellants Virginia Congressmen Eric Cantor, Robert Wittman, Bob Goodlatte, Frank Wolf, Randy Forbes, Morgan Griffith, Scott Rigell, and Robert Hurt appeal the three-judge court's decision and order holding that Virginia Congressional District 3 violates *Shaw v. Reno*.

OPINIONS BELOW

The opinion of the three-judge court of the Eastern District of Virginia (J.S. App. A) is reported at 2014 WL 5019686 (E.D. Va. Oct. 7, 2014). The three-judge court's order (J.S. App. B) is unreported.

JURISDICTION

The three-judge court issued its opinion and order on October 7, 2014. J.S. App. A. Appellants filed their notice of appeal on October 30, 2014. *See* J.S. App. 100a. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment and Section 5 of the Voting Rights Act, which are reproduced at J.S. App. C–D.

STATEMENT

Because of the "presumption of good faith that must be accorded legislative enactments," courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Thus, plaintiffs alleging a racial gerrymander under *Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*),

bear the "demanding" threshold burden to show that race was the legislature's "predominant" consideration, such that "the legislature subordinated traditional race-neutral districting principles" to "racial considerations." *Miller*, 515 U.S. at 916.

Moreover, because "race and political affiliation" are often "highly correlated," plaintiffs must decouple the two and show that "race *rather than* politics" caused the alleged subordination. *Easley v. Cromartie*, 532 U.S. 234, 242–43 (2001) (emphasis in original). This decoupling requires showing "at the least" that the legislature "could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" and bring about "significantly greater racial balance" than the challenged district. *Id.* at 258.

The two-judge majority below failed to apply *both Easley* requirements. In so doing, it turned the General Assembly's equal treatment of majority-black Virginia Congressional District 3 ("Enacted District 3")—which perpetuated a *Shaw remedy*—into racial discrimination and a *Shaw violation*.

The majority's violation of *Easley*'s requirement to disentangle race and politics produced a clearly erroneous result. In a series of concessions the majority studiously ignores, Plaintiffs' only witness, expert Dr. Michael McDonald, admitted that it would have made "perfect sense" for the Legislature to adopt Enacted District 3 for *political* reasons even if every affected voter "was *white*." Trial Tr. 128 (emphasis added) ("Tr."). That is because—according to Dr. McDonald—the Republican-authored Enacted Plan's trades involving District 3 had a "clear

political effect" of benefitting "the Republican incumbents" in surrounding districts from which "[y]ou could infer" a "political purpose." *Id.* 122, 128. These concessions comported with *all* contemporaneous statements—including Dr. McDonald's pre-litigation law review article—universally describing the Enacted Plan *not* as a racial gerrymander, but as a "political gerrymander" that created "a 8-3 partisan division" in favor of Republicans and "protected all incumbents." Int.-Def. Ex. 55 at 816; J.S. App. 47a–52a, 65a–68a.

Moreover, in concessions the majority again disregards, Plaintiffs also acknowledged that their Alternative Plan fails the standard set forth in *Easley*. Dr. McDonald admitted that the Alternative Plan "subordinates traditional districting principles to race" to achieve a "50%" racial "quota" in District 3, Tr. 172–73, 180, so it does not achieve "significantly greater racial balance" than the Enacted Plan, *Easley*, 532 U.S. at 258. Dr. McDonald also agreed that the Alternative Plan undermines the Legislature's "political objectives," *id.*, because it transforms District 2, a 50/50 district represented by Republican Congressman Scott Rigell, into a "heavily Democratic" district, Tr. 119, 152–53. And Dr. McDonald acknowledged that the Alternative Plan performs "significant[ly]" *worse* than the Enacted Plan on the Legislature's preferred traditional principles of core preservation and incumbency protection. *Id.* 422–23.

Finally, although it is irrelevant because District 3 should not have been subjected to strict scrutiny, the majority applied strict scrutiny to District 3 and also misstated and misapplied the standards governing

such scrutiny. It adopted a least-restrictive-means test that contradicted this Court's holding that strict scrutiny requires only "a strong basis in evidence for concluding that" "districting that is based on race substantially addresses" potential Voting Rights Act violations. *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality op.).

Thus, the majority's conclusion that Enacted District 3 is unconstitutional is irreconcilable with this Court's precedents, and its order that the General Assembly enact a remedy within five months should be promptly reversed. Otherwise, the General Assembly faces the daunting prospect of overhauling the Commonwealth's only majority-black congressional district based on a two-judge opinion that invalidates equal treatment of that district and endorses an Alternative Plan that discriminates against black voters. The Court should note probable jurisdiction or summarily reverse.

A. District 3 As A *Shaw* Remedy

District 3 was created as Virginia's only majority-black congressional district in 1991. *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997) (three-judge court), *summ. aff'd*, 521 U.S. 1113 (1997). In 1997, a three-judge court invalidated that version of District 3 under *Shaw*. *Id.* at 1151. The court enjoined Virginia from conducting any election in District 3 until the General Assembly enacted "a new redistricting plan for said district which conforms to all requirements of law, including the Constitution of the United States." *Id.*

The General Assembly adopted a remedial plan in 1998 with 50.47% black voting-age population ("BVAP") in District 3. *See* Pl. Ex. 22 at 3. No party

challenged that version of District 3 under *Shaw*, and it was used for the 1998 and 2000 elections.

The General Assembly enacted a new plan (the "Benchmark Plan") in 2001. Benchmark District 3 was substantially similar to the 1998 version, *see* Int.-Def. Exs. 6, 7, and had a 53.1% BVAP, Pl. Ex. 27 at 14.

The Benchmark Plan was not subject to any *Shaw* challenge, even though Virginia voters mounted *Shaw* challenges to the 2001 House of Delegates and Senate plans. *See Wilkins v. West*, 264 Va. 447 (2002). Benchmark District 3 was surrounded by four districts—Districts 1, 2, 4, and 7—which elected Republicans in 2010. That year, first-time Republican Congressman Scott Rigell beat a Democratic incumbent in District 2, a closely divided district politically that had previously elected a Democrat in 2008 and a Republican in 2004 and 2006. Tr. 118–19, 258–61.

B. The Enacted Plan

The 2010 Census revealed population shifts that required a new congressional districting plan. In 2011, the Democratically-controlled Virginia Senate approved criteria for the plan, including achieving "equal population" and complying with the Voting Rights Act; drawing "contiguous" and "compact" districts; respecting "communities of interest"; and accommodating "incumbency considerations." Pl. Ex. 5 at 1–2.

After Republicans gained control of the General Assembly in 2012, Republican Delegate Bill Janis sponsored the bill that became the Enacted Plan. The Enacted Plan treated District 3 the same way as the majority-white districts by preserving its core

and making relatively minimal changes to benefit the incumbents in District 3 and adjacent districts. Tr. 121–28, 258–61; Int.-Def. Exs. 20, 21.

As Dr. McDonald testified, Enacted District 3 "closely resembles" Benchmark District 3. Tr. 171. Enacted District 3 retained the split localities in Benchmark District 3, Norfolk and Hampton. Int.-Def. Exs. 3, 6.

Enacted District 3 has a 56.3% BVAP. Pl. Ex. 6 at 5. The Enacted Plan received preclearance and was used in the 2012 election. Int.-Def. Ex. 1.

C. Plaintiffs' Lawsuit

Plaintiffs did not file suit until October 2, 2013, after this Court's decision in *Shelby County v. Holder*. Compl. ¶ 4. Plaintiffs' initial theory posited that, "in the wake of *Shelby County*, Section 5" no longer constitutes a compelling state interest and "cannot justify the use of race" in the pre-*Shelby County* Enacted Plan. *Id.* ¶ 43; *see* J.S. App. 34a n.21.

Plaintiffs' Complaint named officials of the State Board of Elections as Defendants. Compl. ¶ 11. Appellants intervened as Intervenor-Defendants. *See* J.S. App. 11a.

Plaintiffs eventually shifted their theory of the case to the claim that the Enacted Plan was not narrowly tailored to comply with Section 5, and produced their Alternative Plan. *Id.* 32a–34a & n.21. The Alternative Plan replicates most of the Enacted Plan's trades involving District 3, but shifts the boundary between Districts 2 and 3. Tr. 157. Alternative District 3 has a 50.2% BVAP. *Id.* 172.

In the opinion issued after trial, Judge Duncan, joined by Judge O'Grady, held that Enacted District 3 is a racial gerrymander not narrowly tailored to comply with Section 5, and ordered the General Assembly to "adopt[] a new redistricting plan" "no later than April 1, 2015." J.S. App. 92a. Judge Payne dissented because Plaintiffs had not "carried their demanding burden to prove" a *Shaw* violation. *Id.* 44a.

REASONS FOR NOTING PROBABLE JURISDICTION

It is undisputed that the General Assembly preserved majority-black District 3 in the same way that it preserved all other districts in the Commonwealth, which are majority-white. The General Assembly preserved all districts to accomplish the contemporaneously stated purposes of maintaining the partisan make-up of Virginia's congressional delegation, preserving the cores of all districts, and protecting incumbents. The majority thus found a *Shaw* violation—which precludes forming "minority" districts by subordinating the legislature's political goals and non-racial traditional principles, *see Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (*Shaw II*)—in a case where the General Assembly indisputably did *not* subordinate its political goals or preferred traditional principles to race but, instead, treated the majority-black district *the same* as the majority-white districts.

The majority arrived at this untenable holding by wholly ignoring the Court's directives in *Easley* and committing clear legal and factual errors. The Court should note probable jurisdiction or summarily reverse.

I. THE MAJORITY FAILED TO APPLY *EASLEY*

Shaw plaintiffs bear the "demanding" burden to show that the legislature "subordinated traditional race-neutral districting principles" to race. *Miller*, 515 U.S. at 916. In doing so, because "race and political affiliation" are often (as in Virginia) "highly correlated," *Shaw* plaintiffs must prove that "race *rather than* politics" was the "predominant factor" in subordinating these principles. *Easley*, 532 U.S. at 242–43 (emphasis in original).

The Court has not only made clear that plaintiffs bear this daunting burden, it has also clearly delineated *what* plaintiffs must specifically *show* "at the least" to *support* a finding that "race rather than politics" predominantly caused the alleged subordination of neutral principles. *Id.* at 243, 258. Simply put, plaintiffs must show that race is the explanatory variable by producing an alternative plan that is *not* driven by racial considerations but nonetheless achieves the legislature's political goals. If these political goals could be accomplished without creating an identifiable majority-minority district that subordinates neutral principles, this is powerful evidence that race caused the alleged subordination. Conversely, if the political goals can reasonably be accomplished only through the district(s) chosen by the legislature—*i.e.*, a minority district that purportedly subordinates traditional principles—then plaintiffs, by definition, cannot show that race, rather than politics, caused the alleged subordination. In such circumstances, race cannot be the predominant factor because the district would have been created even if racial considerations were

absent, in order to accomplish the desired political result.

Accordingly, to disprove that non-racial factors caused a minority district's alleged departures from traditional principles, plaintiffs need to eliminate "race" as an explanatory factor by producing an "alternative" that has a "significantly greater" non-minority population. *Id.* at 258. If this non-majority-minority district "is comparably consistent with traditional districting principles" and also "achieve[s]" the legislature's "political objectives" as well as the enacted majority-minority district, this shows that the legislature's departure from districting principles was caused by the effort to artificially create a minority district. *Id.* Specifically, it shows that race was the reason the legislature adopted the minority-district alternative over the race-neutral alternative, because the race-neutral alternative equally advances the non-racial factors influencing redistricting plans—*i.e.*, politics and traditional principles. Thus, *Easley* squarely held that *Shaw* plaintiffs must show "at the least" that the legislature "could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" and bring about "significantly greater racial balance" than the challenged district. *Id.*

Remarkably, in the face of the Court's clear directives, the majority found a *Shaw* violation even though Plaintiffs' (majority-black) Alternative District 3 concededly contravenes the Legislature's political objectives by converting a Republican incumbent's adjacent district into a "heavily Democratic" one; concededly contravenes the

Legislature's overriding neutral principles of core preservation and incumbency protection; and concededly embodies the racial flaws that purportedly infected the enacted district—in Dr. McDonald's words, "subordinat[ing] traditional districting principles to race" to achieve a "50%" black "quota." Tr. 119, 153, 172–73, 180.

Moreover, the majority not only violated *Easley's* specific instructions on *how* to assess whether race or politics explains the challenged district, but also even *Easley's* general requirement to *find* that "race rather than politics" was the cause. The absence of such a finding is hardly surprising since it could not be rationally made. The Legislature's perpetuation of the core of District 3, and *all* 2012 additions to the district, *concededly* both benefitted Republicans politically and *mimicked* the non-racial factors that drove *all* districts in the state—core preservation, incumbency protection, and maintaining the 8-3 Republican congressional representation that resulted from the 2010 elections.

Perhaps worst of all, the lower court's serial violation of *Easley's* explicit specific commands produces a ruling that turns *Shaw's* general principle of racial neutrality on its head. While *Shaw* condemned "segregat[ing]" voters into identifiable majority-minority districts by "subordinating" traditional principles to race, *Miller*, 515 U.S. 911–16, the majority *used* precisely such a majority-minority alternative as the principal proof that Enacted District 3 *shared* these defects, without any evaluation of whether a district where race did *not* predominate would have equally or better complied with non-racial districting principles or political

goals. Thus, the opinion below converts the *Shaw* inquiry from whether a majority-minority district subordinated traditional principles relative to one not infected by race into a "beauty contest" between two majority-minority districts where the "winner" is the one that (marginally) better complies with the *court's* view of proper districting principles and *Plaintiffs'* political goals, although it is concededly worse in terms of the Legislature's preferred districting principles and political objectives. This, of course, does nothing to further racial equality or neutrality, but simply substitutes one racially-driven district that contravenes the Legislature's political desires for one that furthers them. Indeed, by condemning preservation of a majority-minority district (with minor, politically beneficial alteration) even though precisely the same core-preservation, incumbency-protection and political factors were applied to preserve *every* majority-white district in the Commonwealth, the decision below contravenes *Shaw's* command of racial neutrality by prohibiting *equal* treatment of a district because of its racial composition.

1. The majority erred as a matter of law in failing to apply *Easley*'s clear requirements. *First*, the majority never found that "race *rather than* politics" predominated in Enacted District 3—even though "race and political affiliation" are "highly correlated" in Virginia. *Easley*, 532 U.S. at 242. Because *Shaw* does not prohibit "political gerrymandering," a legislature may subordinate traditional principles to gerrymander (or support) Democrats "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." *Hunt v. Cromartie*, 526 U.S. 541, 551

(1999) (emphasis in original). Another three-judge court recently applied this rule to grant summary judgment to defendants in a *Shaw* case because "the plaintiffs have not shown that the State moved African-American voters from one district to another because they were African-American and not simply because they were Democrats." *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 901 (D. Md. 2011) (three-judge court). This Court summarily affirmed. 133 S. Ct. 29 (2012).

The majority's eliding of this requirement is especially impermissible because it *acknowledged* that "partisan considerations, as well as a desire to protect incumbents" "inarguably" "played a role in drawing" Enacted District 3. J.S. App. 28a. It even recognized that this is a "mixed motive suit," *id.*, thereby underscoring the need to analyze *which* motive predominates.

The majority, however, conducted no such analysis. Instead, it found that politics *might* not have predominated because the Legislature's acknowledged political purposes "*need not* in any way refute the fact that race was the legislature's predominant consideration." *Id.* (emphasis added). But the truism that politics "need not" trump race is no substitute for the requisite finding that it *did not*, particularly since consideration of *race* "need not in any way refute the fact that" *politics* was "the legislature's predominant consideration." *Id.* Indeed, that race and politics are invariably present in redistricting and "highly correlated" is precisely why this Court requires plaintiffs to prove *which* factor predominated. *Easley*, 532 U.S. at 242. Platitudes like "need not" and race cannot be used "as a proxy"

for politics, J.S. App. 16a n.10, 28a, simply beg the question; they do not resolve it.

In all events, the majority *could not* have made the required finding because the record squarely forecloses it. It is *undisputed* that:

- All contemporaneous commentators—Republican supporters, Democratic opponents, and Plaintiffs' expert—universally described the Enacted Plan as a "political gerrymander" that maintained "a 8-3 partisan division" in favor of Republicans and "protected all incumbents." Int.-Def. Ex. 55 at 816; Tr. 129, 137; J.S. App. 47a–52a, 65a–68a;
- *Every* piece of electoral data confirms that the Enacted Plan has this "clear political *effect*." Tr. 122–128 (emphasis added);
- *Plaintiffs'* expert agreed that it would have made "perfect sense" to adopt the Enacted Plan for *political* reasons even if every affected voter "was white." *Id.* 128;
- The Legislature's treatment of District 3—preserving its core with minimal politically-motivated changes—was *identical* to its treatment of the majority-white districts, thus eliminating the assertion that race predominated in Enacted District 3;
- Delegate Janis, the Plan's principal sponsor, repeatedly stated that protecting incumbents and perpetuating the 8-3 split were the Enacted Plan's goals;
- Delegate Janis disclosed that the incumbents made "specific and detailed recommendations"

for their own districts, which were uniformly followed. J.S. App. 53a–60a;

- No alternative plan generated at the time or in litigation preserved the 8-3 split and protected all incumbents; and
- Any effort to significantly adjust District 3's racial composition would spread Democrats into the adjacent districts and harm Republican incumbents (as well as black electoral opportunities in District 3).

2. In addition to failing to *find* racial predominance over politics, the majority also violated *Easley* by not using the clearly prescribed method for *assessing* such predominance. Although *Easley* required Plaintiffs to show "at the least" an alternative plan that achieves the Legislature's "political objectives" and "traditional districting principles" while bringing about "significantly greater racial balance" than the Enacted Plan, 532 U.S. at 258, the majority found a violation even though there was *no* race-neutral alternative, and Plaintiffs' racially-motivated Alternative Plan *concededly* did not serve Republican political objectives (or adhere to the Legislature's neutral principles).

First, Plaintiffs' Alternative Plan admittedly *subverted* the Legislature's political objectives. Even Dr. McDonald admitted what the undisputed electoral data undeniably proved: the Alternative Plan undermines the "political goals of having an 8/3 incumbency protection plan," Tr. 180, because it creates a 7-4 partisan division by turning District 2, a 50/50 district currently represented by Republican Congressman Rigell, into a "heavily Democratic"

district, *id.* at 119, 152–53, 304; Int.-Def. Ex. 22; J.S. App. 85a.

Second, Plaintiffs' Alternative Plan did not have a significantly different racial composition than the Enacted Plan, and thus provided no basis for analyzing whether the Legislature's preservation of a majority-black district had the non-racial virtues of better complying with its political goals and preferred traditional principles than a majority-white alternative. One cannot possibly know whether the majority-black composition of District 3 either subordinated neutral principles or was motivated by politics unless one examines how a District 3 *without* such a composition would perform on those factors. Plaintiffs, however, produced an Alternative Plan that Dr. McDonald *conceded* "subordinates traditional districting principles to race" to achieve a "50%" racial "quota" in District 3. Tr. 172–73, 180. Accordingly, Plaintiffs' Alternative Plan was inherently unable to show that the subordination purportedly caused by the Legislature's alleged race-consciousness would have been avoided absent such race-consciousness, since the Alternative Plan itself subordinates neutral principles to race (albeit in a way that undermines the Legislature's goals of preserving cores and protecting Republican incumbents).

Thus, the Alternative Plan does not prove or remedy a *Shaw* violation: *Shaw* concerns *eradicating* racial predominance in redistricting, not substituting one racially predominant district for another. *Easley*, 532 U.S. at 258. Stated differently, the Legislature's preference for *its* majority-black District 3 over Plaintiffs' majority-black District 3 was *necessarily*

attributable to the *non-racial* factors of core preservation and politics, since the alternatives are not materially different in terms of race.

Plaintiffs' failure to provide a race-neutral alternative is no coincidence: the severe changes required to bring about the "significantly greater racial balance" of transforming majority-black District 3 into a non-racial district, *id.*, would have spread Democratic voters to adjacent districts and, thus, significantly *harmed* at least most of the Republican incumbents surrounding District 3 (and District 3's incumbent). Moreover, these sweeping changes indisputably would have undermined the Legislature's preferred traditional principles of core preservation and incumbency protection. *See id.*

3. In short, the Alternative Plan cannot show either that racial considerations played *any* role in subordinating traditional principles (because there is no race-neutral alternative) or that race predominated over politics in causing any such departures (because the Alternative Plan does not accomplish the Legislature's political objectives). This is fatal error because it violates not only *Easley*'s clear command, but *Shaw*'s admonition that racial considerations in redistricting violate the Constitution only if they "subordinate[]" traditional principles. *Miller*, 515 U.S. at 916.

The majority's error in this regard is exemplified (and exacerbated) by its treatment of the only direct evidence that purportedly suggests racial predominance: Delegate Janis's unremarkable statements that "one of the paramount concerns" in drafting the Enacted Plan was making sure "not [to] retrogress minority voting influence" in District 3,

which would have violated Section 5. J.S. App. 2a, 19a. Even assuming (wrongly) that complying with Section 5 is an improper "racial" consideration, *but see infra* Part II, such a racial *consideration* offends *Shaw* only if it causes a *departure* from non-racial principles, *Miller*, 515 U.S. at 916. But here, Section 5's requirement to preserve minority voting strength *coincided* with the Legislature's race-neutral desire to preserve District 3 just as it preserved all majority-white districts, in order to preserve the 8-3 partisan split (and district cores). Thus, Section 5's command to preserve District 3 did not require any *departure* from the Legislature's goals, and *Shaw* obviously does not *require* so departing from a race-neutral "district preservation" scheme, by treating the majority-black district *worse* in this regard.

II. THE MAJORITY ERRED IN FAILING TO REQUIRE PROOF THAT RACE RATHER THAN POLITICS PREDOMINATED

A more detailed discussion of the facts further illustrates the majority's error in failing to find that "race *rather than* politics" predominates in Enacted District 3. *Easley*, 532 U.S. at 243 (emphasis in original).

1. The undisputed evidence more than bears out Dr. McDonald's concessions about the Enacted Plan's political effect—and demonstrates that the majority could *not* have found racial predominance. The 2010 elections resulted in the 8-3 partisan split in Virginia's congressional delegation—and *preserving* District 3's core helped to freeze that split in place. Also, all of the relatively minor *changes* to District 3 were "politically beneficial" to the Republican incumbents in adjacent districts because they moved

Democrats out of, and Republicans into, those districts. Tr. 122–28.

For example, prior to the Enacted Plan, District 2 represented by Republican Congressman Rigell was a closely divided district where Barack Obama and John McCain each captured 49.5% of the vote in 2008. Int.-Def. Ex. 20. The Enacted Plan increased District 2's Republican vote share by 0.3%. *Id.* The same pattern adhered in the other three Republican districts surrounding District 3: District 1 became 1% more Republican; District 4 became 1.5% more Republican; and District 7 became 2.4% more Republican. *Id.* And District 3, which increased in BVAP by 3.2%, increased in Democratic vote share by 3.3%. *Id.*

Thus, while the majority was technically correct that the trades with District 3 had a racial effect, J.S. App. 30a–31a, it ignored that those trades had this clear *political* effect. Indeed, the political effect of the swaps is *identical* to their racial effect. The areas moved between Districts 2 and 3 had approximately a 17 percent difference in Democratic vote share and an 18 percent difference in BVAP. Tr. 261. The area moved between Districts 4 and 3 had a Democratic vote share difference of 33 percent and a BVAP difference of 34 percent. *Id.* 264. And in the areas moved between District 7 and District 3, the Democratic vote share difference was approximately 49 percent, while the BVAP difference was 50 percent. *Id.* 264–65. Thus, contrary to the majority's assertion, the Legislature's plan here, just as in *Easley*, "furthered the race-neutral political goal of incumbency protection to the same extent as it

increased the proportion of minorities within the district." J.S. App. 29a.

The fact that politics explains Enacted District 3 is unsurprising because Delegate Janis *expressly said so*, in a display of candor rarely seen among legislators engaged in redistricting. *See id.* 53a–60a. Delegate Janis said his overriding objective was "to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 election," when voters elected 8 Republicans and 3 Democrats (as opposed to the 5-6 split resulting in 2008). *Id.* 53a. Accordingly, the Enacted Plan preserved "the core of the existing" districts. *Id.* In addition, any minimal changes to the districts would not be politically harmful to the incumbents because Delegate Janis not only sought "the input of the existing congressional delegation, both Republican and Democrat," Int.-Def. Ex. 9 at 14, but directly *adhered* to their input in how their districts should be drawn.

As Delegate Janis candidly, repeatedly noted, "the district boundary lines were drawn in part on specific and detailed recommendations" from "each of the eleven members currently elected to [C]ongress," including Congressman Scott in District 3. *Id.* 8. After the Enacted Plan was drawn, Delegate Janis "spoke[] with each" incumbent and "showed them a map of the lines." *Id.* "[E]ach member of the congressional delegation both Republican and Democrat has told me that the lines" conform to "the recommendations that they provided me, and they support the lines for how their district is drawn." *Id.* 9–10; Pl. Ex. 43 at 5–6, 13–14, 20–30, 38.

In light of this obvious political purpose and effect, *every* contemporaneous commentator—including Dr. McDonald and the Enacted Plan's Democratic opponents—described the Enacted Plan as a "partisan gerrymander" that preserved the 8-3 split in favor of Republicans and "protected all incumbents." Int.-Def. Ex. 55 at 816; J.S. App. 47a–52a, 65a–68a.

2. In the face of these extraordinarily candid statements acknowledging that the *goal* was preserving the 8-3 ratio created by the 2010 elections and further acknowledging that the *means* for accomplishing this was to precisely follow the incumbents' own recommendations on how to draw their districts, the majority resorted to irrelevant nit-picking. The majority discounted Delegate Janis's statements on the unelaborated view that they are "rather ambiguous," and attempted to limit those statements because Delegate Janis did not personally consider "partisan performance" statistics or show "the *entire* 2012 Plan" to incumbents. J.S. App. 18a–19a, 30a (emphasis added). Delegate Janis, however, had no need to consider "partisan performance" statistics because the incumbents who effectively drew their own districts considered such performance, and their self-interested approval of their own districts added up to a *statewide* incumbency protection plan across "the entire" Enacted Plan. *Id.* And, of course, the sponsor's statements are not remotely "ambiguous," *id.* 30a, about a legislative purpose to protect all incumbents, particularly since objective electoral data confirmed that the Plan would have precisely such an "effect" (as it did in the 2012 elections), which is why there

was a bipartisan and media consensus that the Plan was intended to achieve such a result.

3. Confronted with Delegate Janis's irrefutable admissions that politics drove the Enacted Plan and the absence of any "explicit admission of predominant racial purpose" (or any racial purpose), J.S. App. 88a, the majority sought to spin garden-variety statements into "concessions" of racial predominance analogous to those in *Shaw II*, 517 U.S. at 906. Specifically, the majority contended that a racial purpose is shown by Delegate Janis's statements that "one of the paramount concerns" was not to violate Section 5 by "retrogress[ing] minority voting influence" in District 3, and the Senate Criteria's recognition of the "priority" of such federal law over state law. J.S. App. 7a, 19a.

But this routine acknowledgement of the Supremacy Clause cannot constitute an admission to violating the Equal Protection Clause. If professing adherence to, and acknowledging the priority of, the Voting Rights Act constitutes a racial admission triggering strict scrutiny, then *every* legislative and *judicial* redistricting, particularly in Section 5 jurisdictions, must be subjected to such scrutiny because they all mimic Delegate Janis's truisms. *See, e.g.*, *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 636 (D.S.C. 2002) (three-judge court) (a court drawing a redistricting plan must ensure that it "does not lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise"); *Abrams v. Johnson*, 521 U.S. 74, 96 (1997). Contrary to the majority's reasoning, these basic acknowledgements that correctly identify the Voting Rights Act's

requirements are not, under *Shaw II*, somehow an admission of proscribed racial purpose. Were it otherwise, compliance with the Voting Rights Act would be converted from a "compelling" *justification after* plaintiffs have established that race predominated, into a "compelling" *admission* that race predominates, turning plaintiffs' *prima facie* burden into a pre-ordained formality.

Indeed, in *Shaw II*, the Section 5 submission acknowledged that the "*overriding* purpose was" to create "two congressional districts with effective black majorities," and the plan's principal draftsman "testified that creating two majority-black districts was the 'principal reason'" for the plan. 517 U.S. at 906 (emphasis in original). And these avowed racial considerations clearly and concededly subordinated traditional principles: the challenged district was "the least geographically compact district in the Nation," and the State itself contended (in the initial Section 5 submission denied Justice Department preclearance) that the challenged district would offend "neutral districting principles." *Id.* at 906, 912–13. The *Shaw II* finding of racial predominance rested on this direct evidence not, as here, any acknowledgement of the need for Section 5 compliance. Nor could there have been any such acknowledgement in *Shaw II*, since Section 5's *non-retrogression* mandate could not possibly be violated by *failing to add* new majority-black districts, *id.* at 913; these additions only furthered the Justice Department's impermissible "policy of maximizing the number of majority-black districts," *id.* Here, in contrast, it is obvious and undisputed that Section 5 plainly did require non-retrogression in District 3. Delegate Janis's correct acknowledgement of that

federal-law requirement cannot constitute a "direct" admission under *Shaw* lest legislatures (and courts) be prohibited from even acknowledging the federal mandates for redistricting. J.S. App. 60a–61a.

Relatedly, the majority suggested that race predominated over politics because Section 5 was (correctly) viewed as "mandatory" while political considerations are merely "permissive." *Id.* 30a. Again, this would mean that race *always* predominates because the Voting Rights Act is always mandatory, while politics (and most traditional principles) are not. Moreover, it is demonstrably untrue because sometimes, as here, politics and Section 5 do not conflict, but lead to the *same* result—indeed, the "mandatory" preservation of District 3 as a majority-black district as the Legislature drew it was the *only* way to avoid harming the Republican incumbents in the surrounding four districts. *See infra* Part III. Similarly, unlike *Shaw II*, *preserving* District 3's shape and population directly furthers the traditional principles of core preservation and incumbency protection *uniformly* applied to all districts, while North Carolina's *creation* of a new district was *concededly* at odds with the traditional principles used elsewhere in the state, including "protecting incumbents." *Shaw II*, 517 U.S. at 907. Thus, at worst, in stark contrast to *Shaw II*, the references to mandatory non-retrogression here suggest that race was "a motivation," but not one at odds with, much less predominating over, race-neutral goals. *Easley*, 532 U.S. at 241.

In short, all of the direct evidence is that both parties stated that the Enacted Plan was motivated

by politics and incumbency protection, and there is *none* suggesting that race was predominant.[1]

III. THE MAJORITY ERRED IN FAILING TO APPLY THE *EASLEY* STANDARD

As explained, *see supra* Part I, the majority *again* departed from *Easley* when it relieved Plaintiffs of the burden to prove "at the least" that "the legislature could have achieved its legitimate political objectives in alternative ways that are comparably

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[1] The majority referred to two other pieces of putative "direct evidence," but neither is direct or evidence of racial predominance. *First*, the majority contended that defense expert John Morgan "confirmed that the legislature adopted" a 55% BVAP "floor" for Enacted District 3. J.S. App. 37a; *see also id.* 17a. But if Mr. Morgan had said this, it would not reflect the Legislature's purpose because, as the majority itself affirmatively notes, Mr. Morgan "did not work with or talk to any members of the Virginia legislature" regarding the Enacted Plan. *Id.* 18a n.11. Anyway, Mr. Morgan never suggested any 55% quota; he simply noted that the *state* redistricting plan that the Legislature enacted in *2011* contained 55% BVAP districts and enjoyed bipartisan and biracial support, which would have provided the Legislature with a strong basis for believing that a district with a similar BVAP, far from overconcentrating black voters, was a legitimate option for achieving Section 5 preclearance. *See id.* 63a–65a.

Second, the majority contorted into a defense "concession" a statement from Appellants' summary judgment brief describing a concession *by Plaintiffs* that race was considered to achieve Section 5 *compliance*, thus foreclosing any finding that the Plan was based on "an *improper* consideration of race." Int.-Def. Mem. 15 (emphasis added); J.S. App. 16a. Even if the sentence could bear the majority's preferred reading, it was not uttered by Defendants, and statements made in litigation by strangers to the redistricting process two years after the fact are plainly irrelevant. J.S. App. 45a–46a.

consistent with traditional districting principles" and bring about "significantly greater racial balance" than the Enacted Plan, 532 U.S. at 258.

1. The majority offered no coherent rationale for violating *Easley*. *First*, the majority suggested that the *Easley* burden is not triggered unless the defense presents "overwhelming evidence" of a political explanation for the challenged plan, including "trial testimony by state legislators." J.S. App. 29a. But *Easley* "*generally*" requires *all* plaintiffs to disprove politics where it highly correlates with race, *id.* at 258 (emphasis added); it is not triggered only in certain circumstances depending on defendants' evidence; much less does it require "trial testimony by state legislators" to trigger this burden. The absence of any need for trial testimony is particularly obvious where, as here, the *contemporaneous* legislative history, by Republican supporters and Democratic opponents, evinces a clear 8-3 incumbency protection purpose, *see supra* Part II, (which is presumably why *Plaintiffs* offered no trial testimony by legislators to support their racial theory). Defendants obviously are not required to waive legislative privilege, *Tenney v. Brandhove*, 341 U.S. 367 (1951); *EEOC v. Wash. Sub. San. Comm'n*, 631 F.3d 174 (4th Cir. 2011), in order to trigger the *Easley* burden, particularly if trial testimony would merely echo the contemporaneous statements. Indeed, such post-hoc testimony is far less probative of "the legislature's actual purpose" for the legislation than statements that were actually "before the General Assembly when it enacted" the challenged legislation. *Shaw II*, 517 U.S. at 908 n.4 & 910; *Hunt*, 526 U.S. at 549 (political data and expert

testimony are "more important" than after-the-fact legislator testimony).

Indeed, *Easley* itself in no way depended on legislator testimony to trigger this burden. 532 U.S. at 258. The page from *Easley* the majority cites does *not* refer to legislator testimony, but instead to the political explanation offered by "the State." *Id.* And that page emphasizes that, as in this case, the trial in *Easley* "was not lengthy and the key evidence consisted primarily of documents and expert testimony." *Id.* Similarly here, the record contains "overwhelming evidence," J.S. App. 29a—including "documents[,] expert testimony[,]" Dr. McDonald's concessions, and contemporaneous statements, *Easley*, 532 U.S. at 242—proving a political explanation for the Enacted Plan.

Second, the majority, in its response to the dissent's criticism that Plaintiffs' Alternative Plan produced only a 7-4 Republican ratio (by converting Republican incumbent Rigell's district into a "heavily Democratic" one), blithely suggested that the criticism "relies on an *assumption* that the legislature's objective was to create an 8-3 incumbency protection plan." J.S. App. 13a n.9 (emphasis added). But the "assumption" that the Republican-controlled Legislature wanted to protect Republican incumbents is compelled by common sense and is the very assumption underlying *Easley*. *See* 532 U.S. at 242, 258. And it is not even an "assumption" here because Delegate Janis repeatedly disclosed this objective, every contemporaneous commentator (including Dr. McDonald) acknowledged it, and the Enacted Plan has the clear

effect of maintaining the 8-3 split. *See* J.S. App. 49a, 65a–68a.[2]

2. The majority's eschewing of the *Easley* standard is unsurprising because Plaintiffs' own concessions foreclose the conclusion that the Alternative Plan satisfied it. As noted, *see supra* Part I, Plaintiffs conceded that the Alternative Plan *both* subordinates traditional principles to achieve a "50%" "quota" and undermines "the General Assembly's political goals of having an 8/3 incumbency protection plan." Tr. 172–73, 180. In fact, the Alternative Plan's reduction of District 3's BVAP to the "50%" "quota" turns District 2 from an evenly divided "49.5% percent Democratic" district into a 54.9% "heavily Democratic" district, creating a 7-4 partisan division. Tr. 153; Int.-Def. Ex. 22; J.S. App. 85a. The Alternative Plan thus decreases District 3's BVAP by 6% not to eliminate District 3's racial identifiability, but to increase District 2's Democratic vote share by 5.3%. *See* J.S. App. 85a; Int-Def. Ex. 22.

3. In addition to concededly flunking both of these requirements, the Alternative Plan also fails *Easley*'s third prong because it is not as "consistent with traditional districting principles" as the Enacted

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[2] The majority also said that Plaintiffs' burden under *Easley* to show how the General Assembly "could have achieved its political objectives in alternative ways" may be satisfied by something other than an "alternative *plan*." J.S. App. 13a n.9 (emphasis added). While this may theoretically be true, Plaintiffs' chosen alternative here *is* an alternative plan, and it is quite difficult to even *envision* an "alternative" other than a plan, particularly since neither Plaintiffs nor the majority hinted at what such a theoretical, non-plan "alternative" might be. *Id.* 85a–86a.

Plan. *Easley*, 532 U.S. at 258. The majority substituted its judgment for the Legislature's and concluded that the Alternative Plan was superior to the Enacted Plan because it contained one fewer locality split, J.S. App. 25a, even though that marginal improvement is accomplished "at the expense of protecting incumbents" and preserving cores, *id.* 86a.

But the Legislature must "balance competing" traditional principles—and courts are not permitted to upset that balance in *Shaw* cases. *Miller*, 515 U.S. at 915; *Wilkins*, 264 Va. at 463–64. Even Dr. McDonald agreed that "no principle" says that avoiding locality splits is "more important than" core preservation or incumbency protection—and that it would have been "reasonable to choose the Enacted Plan over the Alternative Plan" if the Legislature preferred those principles over respecting localities. Tr. 222–23.

The Legislature's preference was more than reasonable. Although not insignificant, respecting localities has not been an important redistricting principle in Virginia for decades. The Virginia Constitution was amended in 1970 to *eliminate* respect for "political subdivisions" as a traditional principle. Int.-Def. Ex. 55 at 782. In 2000, the Legislature identified by statute certain important traditional principles, but respecting localities was not among them. *See* Va. Code Ann. § 24.2-305. The Virginia Supreme Court, in a *Shaw* case, listed "preservation of existing districts" and "incumbency" as traditional principles, but did not mention respecting political boundaries. *Wilkins*, 264 Va. at 464. Anyway, Dr. McDonald conceded that the

Enacted Plan "scored highly" and outperformed the Benchmark Plan on locality splits, J.S. App. 77a, further underscoring the reasonableness of the Legislature's trade-off of one fewer locality split for increased core preservation and incumbency protection.

Moreover, preserving District 3's core made unusually good sense here because District 3 "conform[ed] to all requirements of law" when it was adopted as a *Shaw remedy*, *Moon*, 952 F. Supp. at 1151, had not been challenged under *Shaw* in the 2001 *Wilkins* case, and was politically beneficial to Republican incumbents in surrounding districts, Tr. 122–28.

As Dr. McDonald agreed, the Enacted Plan performs better than the Alternative Plan on incumbency protection, *id.* 152, and core preservation. In fact, Dr. McDonald conceded that the Enacted Plan performs "*significant[ly]*" better than the Alternative Plan on core preservation. *Id.* 422–23 (emphasis added). The Enacted Plan preserves between 71.2% and 96.2% of the cores of all districts, and 83.1% of District 3's core. Int.-Def. Ex. 27. The Alternative Plan preserves only 69.2% of District 3's core, the lowest core-preservation percentage of any district in the Alternative or Enacted Plans. *Id.*; Tr. 422.

The majority nonetheless contended that the Enacted Plan did not sufficiently preserve District 3's core because it moved more than the bare minimum number of people needed to achieve population equality in that District (if it is unrealistically viewed without regard to the population needs of *other* districts). *See* J.S. App. 26a, 78a–79a. But the

stated policy was not to make only those changes required by population equality, but to preserve the cores of districts (with additional minor swaps to bolster incumbents politically). It is undisputed that District 3 fulfilled those criteria as well as its majority-white counterparts, since more of its core was preserved than two such districts and, as noted, the additional swaps bolstered incumbents. Int.-Def. Ex. 27; Tr. 122–28. In contrast, the Alternative Plan preserves *less* of the core of District 3 than of *every majority-white* district, *see* Int.-Def. Ex. 27, and moves more than *twice* as many people—384,498—in and out of District 3 than the Enacted Plan, Pl. Ex. 29 at 8–9.

4. The majority fell back to conjuring three traditional principles in an attempt to show that race predominated in Enacted District 3, *see* J.S. App. 21a–27a, but this effort failed. First, the majority suggested that Enacted District 3 is not "compact," J.S. App. 21a, but any problems with District 3's shape were *inherited* from the *Shaw* remedial plan and the Benchmark Plan whose compactness had *never* been challenged, and *had* to be maintained under the uniform core-preservation and incumbency-protection principles applied to all other (majority-white) districts. Moreover, its compactness is not materially different than other districts because it scores only *.01* less than the second-least compact (and majority-white) district. *Id.* 75a. Dr. McDonald conceded that these differences "are relatively small" and "not significant under any professional standard." Tr. 217. He also admitted that compactness measures like those the majority invoked are "inherently manipulable" and that there

is no "professional standard" for judging compactness. *Id.*

Further, the majority described Enacted District 3 as somehow "non-contiguous" because it uses "water contiguity," though it simultaneously recognizes that water contiguity is "legal[]" in Virginia. J.S. App. 22a. The majority also took issue with the Enacted Plan's splitting of VTDs, *id.* 24a, notwithstanding Dr. McDonald's concession that avoiding VTD splits is not a traditional principle, Tr. 218–22. The majority nonetheless condemned the Legislature for availing itself of these permissible methods because they were purportedly used for racial reasons. J.S. App. 21a–27a. But *Shaw* does not condemn racially-influenced line-drawing that *comports* with traditional principles, only that which *subordinates* such principles. *Miller*, 515 U.S. at 916. Anyway, Alternative District 3 *also* uses water contiguity, Pl. Ex. 49, and has the *same number* of VTD splits affecting population as the Enacted Plan, *see* Int-Def. Ex. 26; J.S. App. 76a–77a.

IV. THE MAJORITY CLEARLY ERRED IN FINDING A *SHAW* VIOLATION

Even assuming that the majority's analysis is not legal error under *Easley*, it surely is clearly erroneous fact-finding. *See Easley*, 532 U.S. at 242–58 (overturning three-judge court's *Shaw* finding as clearly erroneous). In addition to the legally insufficient facts described above, the majority also relied on a VTD analysis that is even *less* defensible than the analysis this Court rejected as a matter of law in *Easley*. *See id.* at 245–48.

The majority cited Dr. McDonald's VTD analysis, without elaboration, as somehow suggesting that the

Legislature in 2012 placed predominantly black, highly Democratic VTDs into District 3, but did not do so for similarly-situated Democratic VTDs that were "largely white," thus purportedly evincing a *racial* purpose. J.S. App. 31a. Specifically, Dr. McDonald identified VTDs "in the localities that comprise or are adjacent to the [Enacted] Third District" that have a "Democratic performance greater than 55%." Pl. Ex. 28, at 7–8; Tr. 87–90. He observed that the average BVAP in the 189 such VTDs in District 3 is 59.5% and in the 116 such VTDs in adjacent localities is 43.5%, and claims that this 16% BVAP difference somehow shows "that race trumped politics" in the drawing of District 3. Tr. 88.

This analysis suffers from "major deficiencies." J.S App. 72a. At the threshold, it "proves" only what the Legislature affirmatively *stated* it was doing—preserving the core of District 3—but says nothing about whether the Legislature's 2012 alteration of District 3 was racial rather than political. *159* of Dr. McDonald's *189* 55%-Democratic VTDs in District 3 *already* were included in *Benchmark* District 3 (and their average BVAP is 60%, higher than the average BVAP in VTDs added to District 3 in 2012). *Id.* Of course, VTDs in the majority-black Benchmark district necessarily have a much higher BVAP than those located in the majority-white Benchmark districts. Reducing this disparity would have required moving VTDs in "the middle" of District 3, which could only be done, as Dr. McDonald conceded, by "dismantl[ing] District 3 and chang[ing] its form quite dramatically." Tr. 154. But this would have violated core preservation and incumbency protection and, as noted, the 2012 Plan's VTD swaps at the

margins of Benchmark District 3 had a political effect identical to their racial effect. *See supra* Part II.

In any event, even Dr. McDonald's analysis of VTDs largely in Benchmark District 3 reveals a *political* pattern no different from their *racial* pattern. Specifically, based on Dr. McDonald's own analysis and not Mr. Morgan's analysis the majority (falsely) contends is incorrect, "while the highly Democratic VTDs within [District 3] had a BVAP *16* percentage points greater, they also performed *15.5* percentage points better for Democrat[s]" than the VTDs in adjacent localities. J.S. App. 73a (emphases added). Thus, just as in *Easley*, Plaintiffs' analysis does not show that "the excluded white precincts were as reliably Democratic as the African-American precincts that were included in" District 3, or rebut the hypothesis that the Legislature, "by placing reliable Democratic precincts within a district without regard to race, end[ed] up with a district containing more heavily African-American precincts, but the reasons w[ere] political rather than racial." *Easley*, 532 U.S. at 245–46.

Moreover, Dr. McDonald defined the excluded VTDs as any VTDs in "*localities*" adjacent to Enacted District 3, regardless of whether the *VTDs* are adjacent to District 3. J.S. App. 71a–72a. Some of the VTDs are up to *thirty miles away* from District 3's boundary. *Id.* 72a. Thus, again just as in *Easley*, this analysis is facially deficient because it simply ignores whether any of the "excluded white-reliably-Democratic precincts were located near enough to [District 3's] boundaries or each other for the legislature as a practical matter" to have included

them, "without sacrificing other important political goals." *Easley*, 532 U.S. at 246.

V. THE MAJORITY MISAPPLIED THE NARROW TAILORING REQUIREMENT

Although it is irrelevant because the finding that race predominated is legally erroneous, the majority's strict scrutiny analysis is also plainly wrong as a matter of law. The majority recognized that compliance with Section 5 is a compelling state interest—but held that a redistricting plan is not narrowly tailored if it "did more than was necessary to avoid 'a retrogression in the position of racial minorities.'" J.S. App. 35a (quoting *Bush*, 517 U.S. at 983).

The majority's selective quotation completely misconstrues *Bush*. There, this Court *rejected* a least-restrictive-means test, and held that narrow tailoring is shown where "the districting that is based on race '*substantially addresses* the [Voting Rights Act] violation.'" 517 U.S. at 977 (plurality op.) (emphasis added) (quoting *Shaw I*, 509 U.S. at 656; *Shaw II*, 517 U.S. at 968). Thus, the enacted district need not "defeat rival compact districts designed by plaintiffs' experts in endless 'beauty contests.'" *Id.* To the contrary, this Court adheres "to [its] longstanding recognition of the importance in our federal system of each State's sovereign interest in" redistricting. *Id.* at 978. States thus retain "flexibility" in how they "respect" traditional

principles and simultaneously undertake "reasonable efforts to avoid" Voting Rights Act liability. *Id.*[3]

In short, the *state* gets to choose how to best "substantially address" Section 5 compliance and may do so in a way that better comports with its non-racial districting goals—it is not put in a racial straitjacket where it must provide the *lowest possible* BVAP needed to avoid retrogression, particularly where, as here, the Legislature's chosen compliance method comports with traditional principles as well as the lower BVAP alternative.

The majority's least-restrictive-means test, in contrast, would interject *more* race-consciousness into redistricting because it would require states to precisely replicate the benchmark BVAP (or plaintiffs' preferred BVAP), even if that comes at the cost of non-racial factors. Here, for example, attaching talismanic significance to the 3.2% increase over the Benchmark BVAP does nothing to further *Shaw*'s objectives because there is *nothing* in the record to suggest that the *increase* subordinated

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[3] The majority also contorted *Bush*'s specific holding on narrow tailoring. J.S. App. 37a. The district in *Bush* was 35.1% *minority*-black and not even *plurality*-black, but instead plurality-Hispanic. 517 U.S. at 983. Yet the legislature added *15.8%* BVAP to transform it into a majority-black district, ostensibly in the name of avoiding retrogression. *Id.* But obviously such a dramatic conversion to a first-time majority-black district was not non-retrogressive "maintenance," but an improper "substantial augmentation" of BVAP. *Id.* Here, the Legislature *preserved* an existing majority-black district and increased its BVAP by *3.2%* in a manner that advanced the General Assembly's political goals and preferred traditional principles.

traditional principles to race. *See Miller*, 515 U.S. at 916. To the contrary, the Enacted Plan with 56.3% BVAP in District 3 performed *better* than the Benchmark Plan with 53.1% BVAP in District 3 on *both* politics and principles such as locality splits. *See* Pl. Ex. 4 at 11; Int.-Def. Ex. 20. For this reason, Plaintiffs had to reduce District 3's BVAP to 50.2% to achieve the Alternative Plan's marginal improvement of one locality split. J.S. App. 25a. Moreover, as noted, the swaps creating the 3.2% increase affirmatively served the Legislature's political and incumbency protection goals. Accordingly, the Legislature had more than ample reason to believe that its alternative was a far better way to "substantially address" Section 5 compliance than a 53.1% alternative that *increased* the subordination of traditional principles to race.

Similarly, the Legislature had very strong reasons to comply with Section 5 through its preferred method, rather than plaintiffs' *post-hoc* litigation alternative of a 50.2% district. In addition to the dispositive facts that the Legislature was never presented with such an alternative and that it violated incumbency protection, use of this alternative would have greatly complicated Virginia's Section 5 burden and endangered Justice Department preclearance. In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), the Court considered a plan that "'unpacked' the most heavily concentrated majority-minority districts" to create new districts with BVAPs slightly above and below 50%. *Id.* at 470; *see also Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 56 (D.D.C. 2002). Contrary to the Justice Department's position, this Court held that those changes were not retrogressive. 539 U.S. at 491.

Congress amended Section 5 three years later precisely to overturn *Ashcroft*, which "misconstrued and narrowed the protections offered by Section 5." 42 U.S.C. § 1973c note, Findings (b)(6). Thus, the 2006 version of Section 5 prohibited any change that would "diminish[]" minority voters' ability to elect their "candidates of choice." 42 U.S.C. § 1973c(b). Accordingly, if Virginia had followed Georgia's lead in *Ashcroft* by reducing BVAP to the 50% range, it would have faced the daunting burden to prove to the Justice Department that the decrease complied with the 2006 Amendment designed to *overturn Ashcroft* and otherwise did not diminish black voters' ability to elect their candidates of choice. This would have required more extensive and expensive expert testimony and proof than Virginia provided for the Enacted Plan, and also jeopardized preclearance because it is very difficult, in the real world, to *prove* that diminished BVAP does not result in diminished ability to elect.

This is because there is rarely a pattern of relevant elections under which the majority's "racial bloc voting analysis," J.S. App. 38a, can prove no diminution. Because the elections in Benchmark District 3 were not probative, experts such as Dr. McDonald rely on election contests such as those involving President Obama, but these statewide races provide facially misleading results concerning how little BVAP is needed to avoid diminishing black electoral abilities. Here, for example, Dr. McDonald's racial bloc voting analysis concededly "shows" that a *30%* BVAP level in District 3 would avoid diminution. Tr. 196. In the real world, however, a reduction from 53.1% BVAP to 30% BVAP would almost certainly be denied preclearance. Yet under the majority's least-

restrictive-means rule, the Legislature would be *required* to produce such a plan—and neither the Enacted Plan nor the Alternative Plan would be narrowly tailored. *See id.*

The majority also contended that the Legislature applied a 55% racial "threshold" or quota in District 3, J.S. App. 37a—but, as explained, there was no quota in the Enacted Plan, *see supra* p. 24 n.1.[4]

VI. THE COURT SHOULD RESOLVE THIS CASE AS SOON AS POSSIBLE

The Court at a minimum should note probable jurisdiction and set oral argument as soon as practicable. The majority ordered the Legislature to adopt a remedial plan by April 1, 2015, only five months from now but 19 months before the 2016 election. The enactment of a remedial plan would require significant time and resources, particularly since the majority's opinion and the racially discriminatory Alternative Plan provide scant guidance for how the Legislature can fix the perceived errors in Virginia's only congressional district where blacks can elect their preferred representative. It also would prove a wasted exercise if the Court reverses the majority's flawed decision.

Moreover, the Court is currently resolving a *Shaw* case presenting issues regarding the preservation of

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[4] The majority also invoked the myth that "African-American voters accounted for over 90% of the voting age residents added to" Enacted District 3. J.S. App. 36a n.22. Yet none of the areas moved into District 3 had a BVAP anywhere near 90%, many were not even majority black, and the combined effect of these moves was to increase District 3's BVAP by only 3.2%. Pl. Ex. 27 at 14; Tr. 300–03.

majority-black districts, *see Ala. Dem. Conference v. Ala.*, No. 13-1138, and it may promote judicial efficiency to resolve these cases simultaneously.

Indeed, given the time constraints and the majority's glaring legal errors, the best course is to summarily reverse the judgment below. Already during this redistricting cycle, the Court has summarily affirmed the rejection of *Shaw* claims in two cases that rest on the application of *Easley* that Appellants advocate. *See Fletcher*, 133 S. Ct. 29; *Backus v. State*, 857 F. Supp. 2d 553 (D.S.C. 2012), *summ. aff'd*, 133 S. Ct. 156 (2012); *see also Tolan v. Cotton*, 134 S. Ct. 1861, 1867–68 (2014) (summary reversal appropriate to "correct a clear misapprehension" of the Court's precedents); *Upham v. Seamon*, 456 U.S. 37, 40–41 (1982) (per curiam) (granting summary reversal in redistricting case); *Lance v. Dennis*, 546 U.S. 459, 462–63 (2006) (per curiam) (same).

For these reasons, Appellants have filed this jurisdictional statement only 24 days after the three-judge court's opinion, and seek resolution of this case during this Term.

CONCLUSION

The Court should summarily reverse or, at a minimum, note probable jurisdiction.

Respectfully submitted,

MICHAEL A. CARVIN
Counsel of Record
JOHN M. GORE
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Appellants Eric Cantor, Robert J. Wittman, Bob Goodlatte, Frank Wolf, Randy J. Forbes, Morgan Griffith, Scott Rigell & Robert Hurt

October 31, 2014

EXHIBIT C

No. 14-518

IN THE

Supreme Court of the United States

ERIC CANTOR, ROBERT J. WITTMAN, BOB GOODLATTE, FRANK WOLF, RANDY J. FORBES, MORGAN GRIFFITH, SCOTT RIGELL & ROBERT HURT,
Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,
Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM

MICHAEL A. CARVIN
Counsel of Record
JOHN M. GORE
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

December 22, 2014

Counsel for Appellants Virginia Congressmen Eric Cantor, Robert J. Wittman, Bob Goodlatte, Frank Wolf, Randy J. Forbes, Morgan Griffith, Scott Rigell & Robert Hurt

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BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM

Plaintiffs' Motion confirms that the Court should note probable jurisdiction or summarily reverse, because it simply repeats the majority's fundamental mistakes without refuting Appellants' criticisms. The majority's reasoning (echoed by the Motion) is as follows: a Legislature purportedly acknowledges a "racial" purpose by (correctly) reciting Section 5's non-retrogression mandate and purportedly acknowledges that this racial purpose subordinates politics and traditional principles to race by (correctly) recognizing that this federal mandate is superior to voluntary race-neutral districting and political goals. As Appellants explained, however, this tautology's fatal problem is that, for race to *predominate*, there must be some *conflict* between race and race-neutral districting and political goals. But here the allegedly racial purpose of preserving a majority-black district at the same black voting-age population ("BVAP") is indisputably *coextensive* with Virginia's "core preservation" principle applied to *all* districts and the political goal of maintaining 8 Republican incumbents' re-election prospects.

The objectives of avoiding retrogression *and* core preservation/incumbency protection *and* maintaining Republicans' 2010 electoral success were concededly *all* furthered by preserving District 3's basic shape and demographics. So it is irrelevant whether "race" "ranked higher" than these race-neutral goals, Mot. 7–11, because these principles all headed in the same direction.

Accordingly, Plaintiffs and the majority at most showed that race was "a factor" in the Plan. But, as

Plaintiffs note, this is of no moment because this Court has frequently "acknowledged" that "redistricting almost always involves racial considerations" and "every districting plan has a racial component." *Id.* 30. Consideration of race becomes unconstitutional only if race "subordinates" generally applied race-neutral principles and "race *rather than* politics *predominantly*" causes such subordination. *Easley v. Cromartie*, 532 U.S. 234, 243 (2001) (emphasis added). No such finding was made or possible because District 3 was treated the *same* as all other districts, where "race" or "Section 5" was *not* a factor. Just like those majority-white districts, District 3 was largely preserved and any changes were politically beneficial to affected incumbents. Neither the majority nor Plaintiffs suggest otherwise.

Consequently, affirming the majority's condemnation of District 3 even though it did not depart from the traditional and political factors applied to *all* other districts would pervert *Shaw v. Reno*, 509 U.S. 630 (1993), by requiring that majority-black districts be treated *differently* than their majority-white counterparts. And it would gut *Easley*'s requirement that plaintiffs show that racial concerns *altered* the lines the Legislature would have drawn absent such concerns, by proving that the lines are explained by race, rather than traditional and political principles.

Moreover, Plaintiffs do not even contend that they satisfy *Easley*'s prescribed methodology for proving racial predominance; *i.e.*, producing an alternative plan where race does not predominate but that equally achieves the Legislature's districting and

political goals. J.S. 24–25. Plaintiffs cannot so contend because their Alternative Plan concededly is "significantly" worse at preserving District 3's core and would not serve Republican political interests since it converts District 2 into a "heavily Democratic" district. Tr. 119, 152–53, 422–23.

Thus, there is *no* evidence that there was *any way* for the Legislature to achieve its political and core-preservation goals *except* through Enacted District 3. Worse still, there is no evidence of how a District 3 *untainted* by racial predominance would serve these neutral goals, because race *does* predominate in Plaintiffs' District 3, since it concededly "subordinates traditional districting principles" to achieve a 50.1% black "quota." Tr. 172–73, 180.

Plaintiffs seek to excuse this basic failure by arguing that they need not satisfy *Easley*'s requirements where, as purportedly occurred here, the Legislature does not *say* politics was more important than the Voting Rights Act ("VRA"). But this contradicts both *Easley*'s plain language and its basic requirement that plaintiffs prove that racial considerations had *consequences* that would not have resulted from race-neutral principles or politics.

At an absolute minimum, the decision below quite plausibly departs from *Shaw* and *Easley*, so it raises a "substantial question" that cannot be summarily affirmed. *In re Primus*, 436 U.S. 412, 414 (1978).

I. PLAINTIFFS FAIL TO REHABILITATE THE MAJORITY'S MISAPPLICATION OF *SHAW* AND *EASLEY*

Like the majority, Plaintiffs erect a cathedral around Delegate Janis's routine and accurate statements that Section 5 required the Legislature to

"avoid retrogression in District 3" and that this *federal mandate* took precedence over *voluntary state* principles (or politics). Mot. 7–15. Even if these statements were an admission that preserving District 3's BVAP was of utmost importance (*but see* n.2, *infra*), that is of no moment because it is undisputed that there is no conflict between Section 5's requirement to preserve District 3 and the Legislature's general policy of preserving *all* districts for core-preservation and political purposes. Since there is no conflict, it is impossible for "race" to *subordinate* those neutral policies.

Plaintiffs do not dispute that politics and the Legislature's core-preservation principles were coextensive with Section 5's non-retrogression command. Most generally, Plaintiffs nowhere hint at any disagreement with Appellants' assertion that District 3 was treated precisely the same as all majority-white districts, which were preserved in a way that enhanced incumbents' re-election prospects. Standing alone, the fact that all majority-white districts *not* subject to Section 5 were preserved demonstrates that Section 5 was not even the "but-for" reason for preserving District 3.

More specifically, Plaintiffs nowhere contend that adhering to the alleged BVAP "floor"—whether the Benchmark 53.1% or 55%—was inconsistent with Republican political interests or the concededly most important principle of core preservation. Plaintiffs acknowledge that the Legislature "rank ordered core preservation" *first* among discretionary state policies and do not dispute that Enacted District 3 performs "significantly" better on that factor than any alternative. Mot. 21. Indeed, Plaintiffs contend that "core

preservation" was implemented in a way that protected incumbents and preserved the 2010 election results, which produced an 8-3 Republican delegation. Remarkably, Plaintiffs agree that "Del. Janis spelled out precisely how he applied the 'will of the Virginia electorate'" criterion; *i.e.*, by preserving the "core of the existing congressional districts" with "minimal" changes. *Id.* 12. Since all agree that the predominant non-racial factors were "preserving cores" to enshrine the results of the 2010 election, seeking a 53.1% or 56.3% BVAP in District 3 could not have subordinated those factors, because it is undisputed that the enacted 56.3% District better served core preservation and Republican incumbents than any alternative.

Indeed, Plaintiffs' own arguments reinforce that District 3 directly served core-preservation and Republican political goals. First, Plaintiffs' complaints about District 3's compactness and boundary splits, *see* Mot. 7–23, are *necessary consequences* of preserving District 3, because *all* such "flaws" were inherited from Benchmark District 3 (which perpetuated a *Shaw remedy*), *see* J.S. 30–31. Accordingly, these "flaws" would have occurred without Section 5 because District 3 would have been preserved anyway, under the core-preservation and incumbency-protection factors that drove all districts.

Second, Plaintiffs' contention that Delegate Janis's predominant goal was to ensure that District 3 not have "*less* percentage of [BVAP] than" Benchmark District 3 (53.1%), Mot. 9, confirms that Enacted District 3's *augmentation* of the BVAP to 56.3% could not have been driven by this "racial" goal. Thus, the augmentation must be explained by the political ef-

fect of the swaps with adjacent districts, which, it remains undisputed, all benefitted the affected Republican incumbents. J.S. 17–19.

2. For these same reasons, District 3's racial composition cannot be attributed to race rather than politics because it is the best (and, as far as the record shows, the *only*) way of returning 8 Republicans to Congress. Plaintiffs do not dispute that Enacted District 3 directly serves this political goal, that all changes to District 3 were politically beneficial and had a political effect indistinguishable from their racial effect, or that District 3's configuration would have made "perfect sense" if everyone involved were "white." Tr. 128; J.S. 17–24.

Plaintiffs nonetheless assert, with a straight face, that race must have predominated over politics because, for the first time in American history, the Legislature did not want to return all incumbents from their party to Congress and was therefore unconcerned that any different version of District 3 would cost Republicans a seat. Mot. 10–11. Even the majority rejected this "remarkable" assertion, holding that it is "*inarguably correct* that partisan political considerations, as well as a desire to protect incumbents, played a role" in this "mixed-motive" case. J.S. App. 28a (emphasis added). Accordingly, summarily affirming the actual decision below would enshrine the rule that *Shaw* plaintiffs successfully prove that race predominated over political incumbent protection that was "inarguably" a "motive" even when they provide no hint of how the Legislature could accomplish this goal *without* the challenged district (because all alternatives result in *fewer* Republican incumbents, J.S. 26–27). But that rule would eviscer-

ate *Easley*, which is why Plaintiffs seek to rewrite the holding to a finding that politics played *no* role.

Any such assertion, however, directly contradicts not only the majority's finding, but also the undisputed evidence that Plaintiffs *confirm*. As noted, Plaintiffs agree that the Legislature sought to preserve the "will of the Virginia electorate as it was expressed in the November 2010 elections" by ensuring only "minimal" changes to the districts, and do not dispute that all changes scrupulously followed the "recommendations" provided to Janis by "each of the eleven" incumbents, all of whom "support[ed] the lines" for their districts (and were, unsurprisingly, re-elected in 2012). J.S. 19. Consequently, Plaintiffs are reduced to the semantic quibbles that Janis did not utter the phrase "8-3" when he avowedly preserved the districts that had produced that 8-3 split, and that the incumbent recommendations he followed were purportedly based on disinterested advice about "communities of interest," not re-election concerns. Mot. 13. Even if one believed that incumbents would recommend *detrimental* changes, "communities of interest" in Virginia include "communities" defined by "*political beliefs, voting trends and incumbency considerations*," so the incumbents could have made politically beneficial suggestions under Plaintiffs' theory. Pl. Ex. 5 at 2 (emphasis added).

3. Worse still, the Motion confirms Plaintiffs' failure to prove that race predominated over politics through *Easley*'s required alternative-plan methodology. *See* 532 U.S. at 258. Plaintiffs concededly fail this requirement because their Alternative Plan converts District 2 into a "heavily Democratic" district and performs "significantly" worse on the *Legisla-*

ture's most important non-federal districting principles—preserving "cores" in order to protect all incumbents. Tr. 119, 152–53, 422–23.

The Alternative Plan also flunks *Easley*'s requirement to bring about "significantly greater racial balance" because its District 3 concededly "subordinates traditional districting principles to race" to achieve a 50.1% black "quota." Tr. 172–73, 180. Plaintiffs nevertheless contend, again with a straight face, that this requirement is satisfied because the "percentages of Black and White voters within and among the districts [are] more balanced" under their 50.1% quota than the 56.3% Enacted District 3. Mot. 29–30. Thus, under Plaintiffs' test, a 55% or 53.1% BVAP District 3 satisfies *Easley*, although Plaintiffs elsewhere contend that those percentages are impermissible quotas. *Id.* 15–18. But Plaintiffs' 50.1% quota is no better, since it subordinates both *Plaintiffs*' preferred "traditional districting principles" and the *Legislature's* principal goal of core preservation. Plaintiffs' test not only eliminates the word "significantly" from *Easley*, it does nothing to illuminate *Easley*'s "critical" question, 532 U.S. at 252, of whether race caused the challenged district to be different than it would have been *absent* race. Since Plaintiffs' alternative concededly *violates Shaw*, it cannot expose or remedy a *Shaw* violation.

Recognizing these fatal defects, Plaintiffs argue that *Easley's* instruction for what *Shaw* plaintiffs must show "at the least," *id.* at 258, virtually never applies: it obtains only when there is little or no "direct evidence" of racial considerations, Mot. 25–26. But *Easley* never hints at a "direct evidence" exception and, indeed, states that such "direct" evidence

that the "Legislature considered race" or desired a "racial balance" must be supplemented with an alternative showing because such legislative statements "say[] little or nothing about whether race played a *predominant* role comparatively speaking." 532 U.S. at 253. For this reason, *Easley* is not distinguishable even under Plaintiffs' interpretation, because there was "direct evidence" in *Easley* that is indistinguishable or worse than that here. *See id.*[1]

4. In short, assuming *arguendo* that Delegate Janis's correct recitation of Section 5 reflects a legislative purpose to achieve 53.1% (or 55%) BVAP,[2] that

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[1] Plaintiffs do not even respond to Appellants' demonstration that Dr. McDonald's VTD analysis was worse than that rejected as a matter of law in *Easley*. J.S. 31–34. Instead, Plaintiffs seek to defend a *subset* of Dr. McDonald's analysis—*swapped* VTD's—but this defense simply mimics his basic error. *See* Mot. 23. Specifically, Plaintiffs cherry-pick "highly Democratic" swapped VTDs, while consideration of *all* swapped VTDs establishes (it is undisputed) that the political effect of these swaps is indistinguishable from their racial effect. J.S. 17–20.

[2] The cited statements do not, however, reflect an impermissible racial purpose. *See* J.S. 28, 34. Plaintiffs cite cases where a legislature's desire to create a majority-minority district evinced an improper racial purpose, but only because it "was not required under a correct reading" of the VRA. *Shaw v. Hunt*, 517 U.S. 899, 911 (1996) (Mot. 9); *Bush v. Vera*, 517 U.S. 952 (1996) (Mot. 10). Here, it is undisputed that Janis's recitation that Section 5 prohibits "retrogression" in District 3 was *correct*. And Plaintiffs do not dispute either that Janis's statements *echo* every *judicial* redistricting or that resting liability on a *correct* reading of Section 5 would convert VRA compliance from a compelling justification for racial considerations into a compelling admission that race predominated. J.S. 22.

Moreover, unable to defend the majority's deceptive quotes "showing" a 55% BVAP threshold, J.S. 24 n.1; J.S. App. 18a

cannot support a *Shaw* violation because there is no evidence that achieving these racial percentages conflicted with, or subordinated, the race-neutral principles that concededly applied to all districts. Consequently, the majority committed clear legal error by neither explaining how (or even conclusorily finding that) race predominated over non-racial and political policies that "inarguably" "motiv[ated]" the Legislature and by eschewing *Easley*'s alternative-showing requirement. Thus, the majority's departure from this Court's precedent does not turn on any factual disputes and summary affirmance would fundamentally alter plaintiffs' burden under *Shaw* and *Easley*.

II. PLAINTIFFS FAIL TO REHABILITATE THE MAJORITY'S NARROW TAILORING ANALYSIS

Plaintiffs merely repeat the majority's errors on narrow tailoring. Plaintiffs claim that the majority did not, under a "least restrictive means" test, condemn Enacted District 3 because it increases BVAP from 53.1% to 56.3%. Mot. 31. But the majority squarely held that "narrow tailoring" "demands . . . the *least-race-conscious measure needed* to remedy a violation" and found that the Legislature impermissibly "did more than was necessary to avoid a retrogression" because it "increased [District 3's] BVAP." J.S. App. 35a–38a (emphasis added).

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n.11, Plaintiffs instead misleadingly quote statements of Senator Vogel, *see* Mot. 15–16, concerning the *Virginia Senate* redistricting plan made one legislative session *before* adoption of the Enacted Plan, Int.-Def. Ex. 32 at 18.

Moreover, Plaintiffs do not dispute that so prohibiting BVAP *increases* will generally *magnify* race-consciousness by placing the Legislature in a racial straitjacket or that, here, a 53.1% BVAP would have subordinated core preservation and incumbency protection *more* than the Legislature's 56.3% BVAP. J.S. 36–37. It is also undisputed that *lowering* BVAP to the "no retrogression" point purportedly established by "racial bloc voting analysis" would require *30%* BVAP in District 3, which would indisputably be denied preclearance. *Id.*

At a minimum, the Court cannot summarily affirm the majority's prohibition of any BVAP higher than the Benchmark and/or "racial bloc voting" number, because that would condemn districts in virtually all Section 5 jurisdictions, which have not followed this new rule. *See*, *e.g.*, *Ala. Dem. Conf. v. Ala.*, No. 13-1138 (U.S. argued Nov. 12, 2014).

III. APPELLANTS HAVE STANDING

The district court granted Appellants intervention in accordance with myriad prior cases. *Wright v. Rockefeller*, 376 U.S. 52 (1964) (intervention of congressman to defend redistricting plan); *King v. Ill. State Bd. of Elections*, 410 F.3d 404 (7th Cir. 2005) (same); *Hall v. Virginia*, 276 F. Supp. 2d 528 (E.D. Va. 2003) (Virginia congressmen), *aff'd*, 385 F.3d 421 (4th Cir. 2004). Plaintiffs did not oppose intervention when Appellants' cognizable interests faced only potential injury from a remedial order, but now argue Appellants have no such interests when they face *certain* harm from such an order. *See* Mot. 5–7.

This eleventh-hour effort fails: as *defendants* seeking to *preserve* the Enacted Plan, Appellants' harm flows not from the *Plan*, but from the majority's

order requiring changes to the Plan. Accordingly, Appellants have standing to appeal if they "likely" face an "injury" caused by the *order*, redressable by appellate reversal. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013). The injury may be minimal and "contingent" on future events. *Clinton v. City of New York*, 524 U.S. 417, 430 (1998).

Here, Appellants' injury is not contingent or merely likely, but *certain*. Plaintiffs do not dispute that the majority's order necessarily requires changing at least one district where an Appellant resides. The majority concluded that the Legislature retained too many black (overwhelmingly Democratic) voters in District 3. *See* J.S. App. 9a. Any remedy must therefore move such voters *out* of District 3 and into one or more of the surrounding Republican districts, and an equal number of (white) voters into District 3. Thus, any remedial plan approved by the "Republican[-]majority" Legislature (and *Democratic* governor), Mot. 6, or the court will necessarily alter districts.

Such changes to an Appellant's district will be particularly injurious because they will undo his "recommendations" for his district, Int.-Def. Ex. 9 at 10, and replace a portion of "his base electorate" with unfavorable Democratic voters, *King*, 410 F.3d at 409 n.3; *see Meese v. Keene*, 481 U.S. 465, 474–75 (1987) (standing based on harms to "chances for reelection"). This Democratic shift will also harm the Appellants as Republican voters. *See King*, 410 F.3d at 409 n.3. Moreover, Plaintiffs' Alternative Plan, which will be at least a starting point for any remedy, harms Appellant Rigell by turning 50/50 District 2 into a "heavily Democratic" district. Tr. 119, 152–53; J.S. 3.

These harms to Appellants as representatives and voters are precisely the kind of "direct stake[s]" that confer standing to appeal. *Hollingsworth*, 133 S. Ct. at 2662. Indeed, this Court has recognized standing to appeal based on far less certain injuries, such as from an order vacating a defense verdict and granting a new trial. *Clinton*, 524 U.S. at 430.

United States v. Hays, 515 U.S. 737 (1995) (Mot. 7), confirms these points. Just as a plaintiff is injured by a redistricting plan if he resides in the district affected by the alleged unconstitutionality, Appellants are injured by the majority's command to alter District 3 because they reside in districts that will necessarily be affected by that order. Even though it involves intervention, *Johnson v. Mortham*, 915 F. Supp. 1529 (N.D. Fla. 1995) (Mot. 7), also confirms Appellants' standing. The court there granted intervention to a congresswoman in a district challenged under *Shaw* based on her "personal interest in her office" and in "keeping District Three intact." *Id.* at 1538. Appellants here have an identical "interest" in "keeping District Three" and their own districts "intact." That the *Johnson* court denied intervention to congressmen whose districts did *not* border the challenged district and faced only "speculative" harm, *id.*, is irrelevant because at least one bordering-district Appellant faces *certain* harm from the order.

CONCLUSION

The Court should summarily reverse or note probable jurisdiction.

Respectfully submitted,

MICHAEL A. CARVIN
Counsel of Record
JOHN M. GORE
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

December 22, 2014

Counsel for Appellants Eric Cantor, Robert J. Wittman, Bob Goodlatte, Frank Wolf, Randy J. Forbes, Morgan Griffith, Scott Rigell & Robert Hurt