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.,** **Defendants.**	**Civil Action No.: 3:13-cv-678**

REPLY IN SUPPORT OF INTERVENOR-DEFENDANTS'
MOTION TO POSTPONE REMEDIAL DEADLINE UNTIL SEPTEMBER 1, 2015

Plaintiffs' and Defendants' Oppositions to Intervenor-Defendants' Motion To Postpone Remedial Deadline Until September 1, 2015 forcefully confirm that the Motion should be granted. The Motion was simply making the commonsense point that this Court should not mandate legislative *remedial* action because *liability* is still unresolved, and, in fact, this Court will probably have to reassess liability because the Supreme Court is likely to remand the case to be reassessed in light of the *Alabama* case pending before it. There does not seem to be any real disagreement on this practical point. Defendants concede that the Intervenor-Defendants are "probably correct[]" that the Supreme Court "is holding their appeal pending disposition" of the *Alabama* case. Defs.' Opp. 2 (DE 133). And Plaintiffs do not dispute that the Supreme Court is "holding" this case for *some* future event. Thus, it is seemingly undisputed that the Supreme Court will take some action on this case before the end of the Term, and it is quite likely that it will vacate this Court's liability finding so it can be reassessed by this Court in light of *Alabama* (or, less likely, so it can be directly reviewed by the Supreme Court). *See* Mem. 7–9 (DE 127).

It simply makes no sense to proceed on crafting a remedy based on a liability holding that will soon be vacated or subject to direct Supreme Court review. *See* Defs.' Opp. 11 ("[I]f the Supreme Court, by the end of its current term on June 30, reverses this Court's decision and vacates the injunction, the General Assembly would have engaged in an unnecessary redistricting effort.") (And, as our Memorandum noted, in the unlikely event that *summary affirmance* is granted in the next three months, there will be ample time for a remedy to be entered.) Thus, as Intervenor-Defendants have explained, the commonsense approach is to postpone the Court's remedial deadline until September 1, 2015 (or 60 days after any summary affirmance) in order both to avoid compelling the General Assembly to take action when liability has not been finally resolved and to allow the General Assembly, the Court, and the parties to benefit from any additional guidance the Supreme Court provides in *Alabama* or this case. *See* Mem. 7–9.

Moreover, Defendants request that the Court postpone the remedial deadline until April 15, *see* Defs.' Opp. 1, 12, and Plaintiffs "have no objection" to that request, Pls.' Opp. 7 n.2 (DE 134). Thus, there is no dispute as to *whether* the Court should postpone its remedial deadline, but rather only for *how long*. And Plaintiffs' and Defendants' arguments in support of their preferred, limited postponement in fact underscore that the Court should grant the postponement until September 1.

First, Plaintiffs and Defendants do not dispute that this Court possesses broad "inherent power" to "modify or vacate [its] decrees 'as events may shape the need.'" *Hudson v. Pittsylvania Cnty.*, No. 13-2160, slip op. at 6 (4th Cir. Dec 17, 2014) (Duncan, J.) (quoting *Holiday Inns, Inc. v. Holiday Inn*, 645 F.2d 239, 244 (4th Cir. 1981)) (quoted at Mot. 5). Yet they nonetheless contend that the Court must deny Intervenor-Defendants' request because, in

their view, Intervenor-Defendants have not satisfied the "traditional test for stays pending appeal." Defs.' Opp. 5; *see also* Pls.' Opp. 3. Intervenor-Defendants, however, have not sought a stay pending appeal, but instead a short postponement of the Court's remedial deadline pending guidance from the Supreme Court that Plaintiffs and Defendants do not dispute is forthcoming no later than June 30. *See* Mem. 7–9. (In any event, Intervenor-Defendants easily satisfy likelihood of success on the merits, for the reasons set forth in their Supreme Court filings. *See* Juris. Stat. (Ex. A); Opp. To Mot. To Dismiss (Ex. B).)

Moreover, Plaintiffs and Defendants have *confirmed* that a request to postpone the remedial deadline is not subject to the traditional test for stays pending appeal. Indeed, Defendants have requested—and Plaintiffs have waived any objection to—their own postponement without even invoking, much less demonstrating satisfaction of, the traditional test for stays pending appeal. *See, e.g.*, Defs.' Opp. 1, 12; Pls.' Opp. 7 n.2. Rather, Defendants have rested their request on the practicalities of the General Assembly's legislative calendar. *See, e.g.*, Defs.' Opp. 3–6. Similarly, as Intervenor-Defendants have explained, practical considerations regarding legislative and judicial efficiency militate in favor of postponing the remedial deadline until September 1 because the General Assembly will have had time to act on the Supreme Court's forthcoming guidance in *Alabama* and this case by then. *See* Mem. 5–9.

The basic practical point is that "the General Assembly"—and this Court—"would have engaged in an unnecessary redistricting effort" if the Supreme Court reverses or vacates the Court's decision by June 30. Defs.' Opp. 11. If the Supreme Court reverses or vacates the Court's decision any time after an April 1 or April 15 remedial deadline, any effort expended on a remedial plan will have been wasted because either this Court or the Supreme Court will be required to reassess liability before any remedy can be ordered. *See* Mem. 2, 5–9. This prospect

of the Supreme Court retroactively eliminating an April deadline strongly militates in favor of postponing the deadline until September 1. *See id.* This is particularly true because there is very little chance that the Supreme Court will affirm the extant liability decision in this case. If the Supreme Court is holding the appeal in this case pending the *Alabama* decision—which Defendants agree is "probably correct[]," Defs.' Opp. 2—this means that the Supreme Court will vacate the decision and remand the case for a reassessment of liability (or grant direct review). This reconsideration will either obviate the need for a remedial plan altogether or necessitate a new remedial deadline in light of any new finding of liability. *See* Mem. 7–8. Conversely, as Intervenor-Defendants have explained without rebuttal, a summary affirmance is highly unlikely here because the Supreme Court could have taken this action at the January 9 conference or shortly thereafter but declined to do so. *See id.* at 2.

Thus, the April 1 deadline puts the General Assembly to the unappealing choice between abandoning its duly-adopted Enacted Plan based on a decision that remains subject to vactur or reversal in the Supreme Court or running the risk that the Court will adopt a judicial remedy that pretermits the legislative process and could become nugatory under a later Supreme Court decision. *See id.* at 6–7. A postponement until September 1, in contrast, maximizes the range of the General Assembly's legislative options and therefore most fully vindicates the "longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its [own] redistricting plan." *Bush v. Vera*, 517 U.S. 952, 978 (1996) (plurality op.) (quoted at Defs.' Opp. 9).

Second, Defendants suggest that a September 1 deadline would be too late because a redistricting plan "should be in place by January 1, 2016, the day after which candidates may start collecting . . . signatures." Defs.' Opp. 10. Defendants, however, cite no authority for their

counterintuitive proposition that the Court could not craft a judicial remedy within the four months from September 1 to January 1. Nor could they, as courts routinely craft remedial plans in far shorter time—as Plaintiffs went to pains to point out earlier in the litigation. *See, e.g.*, *Larios v. Cox*, 314 F. Supp. 2d 1357, 1359, 1363–64 (N.D. Ga. 2012) (finding plan invalid on February 10, 2004, appointing special master on March 1, and approving special master's plan on March 25), *summ. aff'd*, 542 U.S. 947 (2004) (cited at Pls.' Br. On Remedies 6 (DE 30)); *Navajo Nation v. Ariz. Indep. Redistricting Comm'n*, 230 F. Supp. 2d 998, 1003–05 (D. Ariz. 2002) (crafting and adopting judicial plan in weeks) (cited at Pls.' Br. On Remedies 6); *Stephenson v. Bartlett*, 582 S.E.2d 247, 248–49 (N.C. 2003) (finding plan unconstitutional and adopting judicial plan over course of 11 days) (cited at Pls.' Br. On Remedies 6); *In re Constitutionality of S.J. Res. 2G, Spec. Apportionment Session*, 601 So. 2d 543, 544–45 (Fla. 1992) (nine days) (cited at Pls.' Br. On Remedies 6–7). And if a court can craft a judicial remedy within 4 months, it certainly can perform any appropriate judicial review of a legislatively-enacted remedial plan, *see* Pls.' Opp. 8–9; Defs.' Opp. 9, within that time.

Moreover, Defendants' premise that a remedial plan must be finalized and in place by January 1 is faulty. Indeed, the Enacted Plan was not adopted until January 28, 2012, and was still used for the 2012 election. Unlike in 2012, any remedial plan need not receive preclearance under Section 5, further shortening the lead time required to implement such a plan for the 2016 elections. *See, e.g.*, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). Plaintiffs themselves have indicated that a remedial plan need not be in place until the candidate filing deadlines in mid-March of the election year. *See* Pls.' Br. On Remedies 2.

For their part, Plaintiffs now attempt to bolster Defendants' preferred timeline by pointing out that, in this litigation's infancy in December 2013, Intervenor-Defendants argued

that there was not sufficient time to enter a remedy for the 2014 elections. *See* Pls.' Opp. 8 (citing Int.-Defs.' Brief On Remedies (DE 33)). But Plaintiffs' self-serving revisionist history is comparing apples and oranges. Intervenor-Defendants argued that there was not time in *December* to have *discovery, trial and remedy* for the 2014 elections, but the issue here is whether a *September 1* deadline provides time for a *remedy*. In December 2013, Plaintiffs had not produced their Alternative Plan, conducted discovery, made themselves available for depositions, or even survived a motion for summary judgment. *See* Int.-Defs.' Brief On Remedies 21–22. Also, they did not file suit until *after* the Enacted Plan had been used for the 2012 elections and more than 3 months after the Supreme Court's decision in *Shelby County*. *See id.* at 5; *see also* Op. 46 (DE 109). Plaintiffs nonetheless demanded that the Court reward their dilatoriness and complete those steps, conduct a trial, decide liability, allow the General Assembly an opportunity to enact a remedial plan, and adopt a judicial plan, all within 3 months. *See id.* Under those circumstances, Intervenor-Defendants rightly pointed out that the Court could not resolve the case on Plaintiffs' preferred timetable. *See* Int.-Defs.' Brief On Remedies 21–22. That correct position is entirely consistent with Intervenor-Defendants' correct position here that if the Supreme Court affirms the majority's liability decision, a September 1 deadline for the General Assembly to act leaves more than ample time for the Court to review the Legislature's plan or craft a judicial remedy if one becomes necessary. *See* Mem. 3, 9.

Third, Plaintiffs hyperbolically suggest that Intervenor-Defendants' request for a postponement is "barred by the doctrine of judicial estoppel" because Intervenor-Defendants previously took the position that the *Alabama* case was unlikely to modify the existing law. Pls.' Opp. 6. Intervenor-Defendants maintain that this case is even more straightforward than the *Alabama* case and should have been dismissed under the Supreme Court's controlling

precedents. *See* Juris. Stat. (Ex. A); Opp. To Mot. To Dismiss (Ex. B). But the Supreme Court has "probably" determined that its decision in the *Alabama* case, Defs.' Opp. 2, may "aid or control the determination of" this case, Supreme Court Practice § 5.I.9 (10th ed.); *see also* Mem. 8, perhaps precisely because the *Alabama* decision will *not* modify existing law and, thus, will confirm that dismissal of Plaintiffs' case is required. In all events, it now makes perfect sense to await the Supreme Court's decision in *Alabama* and any action in this case before requiring the General Assembly to begin crafting a remedial plan. *See* Mem. 8–9.

Finally, Plaintiffs suggest that the General Assembly is merely "invited, not required, to enact a remedial plan." Pls.' Opp. 10. But that is the entire point: this Court is required to *defer* to, not *pretermit*, the General Assembly's exercise of its vital "sovereign interest in implementing its [own] redistricting plan." *Bush*, 517 U.S. at 978 (plurality op.). As explained, postponing the remedial deadline until September 1 preserves the General Assembly's full range of legislative options, advances the public interest in orderly elections, guarantees that a constitutional plan will be in place for the 2016 elections, and avoids the risk of "a serious [federal-court] intrusion on the most vital of local functions." *Miller v. Johnson*, 515 U.S. 900, 915 (1995); *see also* Mem. 5–9.

CONCLUSION

The Court should postpone until September 1, 2015 its deadline for the General Assembly to adopt a remedial congressional redistricting plan.

Dated: February 12, 2015

Respectfully submitted,

/s/ Jonathan A. Berry

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CERTIFICATE OF SERVICE

I certify that on February 12, 2015, a copy of the REPLY IN SUPPORT OF INTERVENOR-DEFENDANTS' CONSENT MOTION TO POSTPONE REMEDIAL DEADLINE UNTIL SEPTEMBER 1, 2015 was filed electronically with the Clerk of Court using the ECF system, which will send notification to the following ECF participants:

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Dated: February 12, 2015

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EXHIBIT A

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

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October 31, 2014

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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

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

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,

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October 31, 2014

EXHIBIT B

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

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,

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