No. 11-1404

IN THE

Supreme Court of the United States

VANDROTH BACKUS, WILLIE HARRISON BROWN, CHARLESANN BUTTONE, BOOKER MANIGAULT, EDWARD MCKNIGHT, MOSES MIMS, JR., AND ROOSEVELT WALLACE,
Appellants,

v.

THE STATE OF SOUTH CAROLINA, NIKKI R. HALEY, in her capacity as Governor, JOHN E. COURSON, in his capacity as President Pro Tempore of the Senate, ROBERT W. HARRELL, JR., in his capacity as Speaker of the House of Representatives; MARCI ANDINO, in her capacity as Executive Director of the Election Commission, JOHN H. HUDGENS, III, Chairman, NICOLE S. WHITE, MARILYN BOWERS, MARK BENSON, and THOMAS WARING, in their capacity as Commissioners of the Election Commission,
Respondents.

On Appeal from a Three-Judge United States District Court in the District of South Carolina

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

I. The three-judge court's interpretation of the "predominant factor" test immunizes even invidious racial districting from judicial review.

The undisputed evidence considered by the court below showed that key South Carolina lawmakers, including the chairs of the House of Representative's Election Law Subcommittee and Judiciary Committee, adopted an absolute policy of maintaining or increasing the black voting age population ("BVAP") of majority-minority districts. The three-judge court below credited Representative Bakari Sellers' testimony about this "hard-line" policy, noting that "Representative Sellers's testimony strongly suggested race was a factor in drawing many districts lines." J.S. App. at 18a. Nowhere in the record or their motion to dismiss or affirm do Respondents dispute that South Carolina followed this racially motivated policy.

Respondents, however, argue that none of this evidence matters, because, regardless of the actual motive underlying South Carolina's districting decisions, the boundaries selected by the legislature could theoretically be explained by some mixture of race-neutral criteria. Resp'ts' Mot. at 26-31. But if this is a correct understanding of this Court's Equal Protection cases, then even where a plaintiff succeeds in showing a districting scheme was adopted for race-based reasons, a state could evade liability through a showing that district lines ostensibly adhered to some "traditional, race-neutral criteria." *See* Resp'ts' Mot. at 20 ("*[a]dditionally* [to prove race-based motive], a plaintiff *also* is *always* required to prove that the legislature subordinated traditional race-neutral principles, such as compactness, contiguity, main-

taining cores of districts, and respect for political subdivisions or communities of interest, to race when drawing district boundaries") (emphasis added). Under this formulation of the "predominant factor" doctrine, the legislature could adopt a districting plan with the express motive of maximally "packing" black voters into a few districts for the purpose of limiting the Democratic Party's ability to appeal to white voters and yet, as long as the legislature's plan formally adhered to "traditional, race-neutral criteria"—no matter how pretextual—the plan would be immune to constitutional challenge.

Such a theory is not and could not possibly be the law. Respondents—and the court below—have confused one type of proof of racial motivation (oddly-shaped district boundaries that depart from traditional criteria) for the ultimate fact that leads to legal liability—unjustified racially discriminatory purpose. As *Miller v. Johnson*, notes, "[s]hape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Miller*, 515 U.S. 900, 913 (1995). Under Respondents' formulation, a districting scheme can segregate voters by race—even for the express purpose of doing so—as long as the legislature is able to disguise this purpose with boundary lines that comply with some "traditional, race-neutral criteria."

In this case, the legislature's justification for its race-based action was not even pretextual—it was completely post hoc. Respondents contend that as a Section 5 jurisdiction, the Voting Rights Act ("VRA")

"explicitly requires" the state to engage in racial districting to avoid retrogression. Resp'ts' Mot. at 14, 24 n.9. But the legislature had no data before it at the time of redistricting that suggested packing black voters into districts was necessary to ensure VRA compliance. The only data the legislature had before it showed these districts were already electing minority-preferred candidates. The only analysis of the House redistricting plan that the state conducted was *after* this case had gone to trial, by the state's expert witness. This witness testified that the mere existence of racial polarization justified racial districting to increase and maintain majority-black districts, J.S. App. at 81a-82a, even where black voters currently elect candidates of choice in spite of polarization. While the VRA authorizes remedial racial districting, this Court has consistently and strictly policed the use of race to ensure it is *necessary* to effectuate the purpose of the Act: to protect the franchise while "foster[ing] our transformation to a society that is no longer fixated on race." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433-34 (2006).

Respondents' expert also suggested it was "almost impossible" to determine whether the state's redistricting plan was motivated by race because it was his expert opinion that race and politics are so entangled that the legislature might have been making a political decision. J.S. App. at 75a-78a. But if testimony that it is impossible to determine whether a state's districting decisions were motivated by race or partisanship were sufficient to rebut a credible claim of racial gerrymandering, it would be impossible to enforce this Court's decisions imposing strict limits on racial gerrymandering. While this Court has split over the justiciability of partisan gerrymandering, it

has never equivocated in subjecting the use of race as a proxy for partisanship to strict scrutiny. *Bush v. Vera*, 517 U.S. 952, 968 (1996). Moreover, Respondents' partisan gerrymander excuse fails since it was conceded below that no partisan data was available to lawmakers drafting the scheme. South Carolina's legislature had racial data, but not partisan data, before it during the redistricting process. South Carolina either used race as a proxy for partisan political objectives or used race for other purposes, in either case, without meeting its burden to show that the VRA required racial districting.

The practical effect of Respondents' position would give state legislatures *carte blanche* to racially segregate voters into election districts. Modern districting technology makes it easy to draw segregative boundaries capable of justification under at least some "traditional, race-neutral criteria." Richard Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 Yale L. J. 2505, 2553-2554 (1997). If an election district plan's consistency with "traditional, race-neutral criteria" were sufficient in and of itself to defeat a claim of purposeful racial segregation, then legislative leaders could freely use those criteria to "frustrat[e] potentially successful efforts at coalition building across racial lines," *United Jewish Organizations v. Carey*, 430 U.S. 144, 173 (1977) (Brennan, J., concurring), simply by choosing the mixture of "race-neutral" criteria—county lines, communities of interest, protection of incumbents, etc.—that also maximally segregates voters. Under Respondents' view, direct evidence of racially discriminatory legislative motive is irrelevant, because district boundaries' consistency with *some* traditional, race-neutral criteria always suffices to launder an impermissible racial purpose. Were that the

law, it would establish an irrebutable presumption of race-neutral purpose whenever districts corresponded with traditional districting principles.

Equal Protection doctrine does not make it so easy for legislators to hide their tracks. Since Appellants presented evidence that essential lawmakers in the redistricting process implemented a racially discriminatory districting scheme, the state was obligated to rebut this inference of impermissible racial purpose rather than simply arguing the district lines adopted turned out to be consistent with some mixture of "traditional, race-neutral criteria." This formal consistency cannot be accepted as conclusive proof that race was not the "predominant factor," without emptying this Court's racial redistricting precedents of all content and consequence. Any other formulation turns "strict scrutiny" of race-based decision-making in the redistricting context into a dead letter—especially where the use of race is not required by the VRA or where the state is using race as a proxy for partisanship or as a means for perpetuating the racial polarization of the electorate through district design.

II. Under *Mt. Healthy* and *Arlington Heights*, proof that key lawmakers had a racially discriminatory purpose in crafting an election districting plan creates a presumption that the legislature's decision was motivated by race.

Respondents assert, without citation, that this Court's well-established framework for burden-shifting established in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) ("*Arlington Heights*") and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S.

274 (1977) ("*Mt. Healthy*") does not apply to racial discrimination claims in the drawing of election districts. Resp'ts' Mot. at 21-23.

That assertion is incorrect and deeply confused. Neither *Arlington Heights* nor *Mt. Healthy* was limited to some narrow subcategory of Equal Protection cases or confined to any specific constitutional theory. Instead, *Arlington Heights* and *Mt. Healthy* spring from a commonsense division of labor in proving causation that "protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights." *Mt. Healthy*, 429 U.S. at 287. The principal underlying this framework is that, while governmental officials normally deserve judicial deference in how they balance the factors bearing on a political decision, "racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." *Arlington Heights*, 429 U.S. at 265-66. Once plaintiffs carry an initial burden of showing racial motivations played *some* role, the government must show the decision was not tainted by these forbidden motives. This burden is the government's because the government, after all, is in the best position to explain why the decision was motivated by non-racial factors that led to a decision that otherwise appears to have been racially motivated.

Respondents mistakenly suggest this familiar framework is inconsistent with this Court's "predominant factor" test in "racial gerrymandering" cases. Resp'ts' Mot. at 19-24. But no inconsistency exists between the *Arlington Heights/Mt. Healthy* framework of proof and the "predominant factor" test. The

former imposes on plaintiffs the ordinary Equal Protection burden to show that "the State has used race as a basis for separating voters into districts." *Miller*, 515 U.S. at 911. The "predominant factor" test does not purport to assign to plaintiffs the initial burden of proving race-based government action and the secondary burden of also disproving all plausible race-neutral explanations for the government's conduct. Were this formulation the rule, it would render Equal Protection burden-shifting analysis meaningless. Nothing in *Miller* or any other "racial gerrymandering" decision of this Court supports placing the additional burden of proving that a forbidden racial motive was the cause of the legislature's action once plaintiffs succeed in carrying their initial burden of proving that *some* legislators had a racial motivation in adopting a districting plan.

In *Easley v. Cromartie*, 532 U.S. 234 (2001), for instance, this Court held that plaintiffs failed to carry their initial burden of showing North Carolina's districting plan was motivated by racial considerations. While the *Cromartie* plaintiffs had shown some correlation between a voter's race and the location of district boundaries, the Court noted that the data was equally consistent with the explanation that the legislature was motivated by partisan rather than racial considerations. *Id.* at 244-53. Significantly, the *Cromartie* plaintiffs offered only two pieces of "'direct' evidence of discriminatory intent"—a reference by a state senator to the "need for racial and partisan balance" and a statement by a legislative staffer that "the Black community" in one jurisdiction had been moved into another congressional district. *Id.* at 253-54. As this Court noted, the senator's statements merely indicated that the legislature was aware of the racial implications of its decisions, not

that race motivated those decisions. *Id.* Having held that the plaintiffs failed to carry their initial burden to show racial motivation (as opposed to mere awareness), this Court had no occasion to examine the legal consequences of plaintiffs proving that some legislators had racial motivations for adopting the scheme.

Contrary to Respondents' unsupported contention, Appellants never suggested that "if race is a factor in a redistricting plan, it is necessarily discriminatory and the burden then shifts to the state...."[1] Resp'ts' Mot. at 21. Appellants expressly acknowledge that mere awareness of racial consequences does *not* shift any burden of proof to the government. J.S. at 24-26. Appellants rely instead on statements by key lawmakers that the state employed a de facto policy that the BVAP of certain districts—districts represented by black legislators—would never be reduced and, would, if possible, be *increased*. J.S. at 8-13. These statements go far beyond mere awareness of racial consequences: they evidence a purposeful effort to segregate voters by race as an end in itself. *See Bush*, 517 U.S. at 1001 (Thomas, J., concurring in the judgment) ("the intentional creation of a majority-minority district certainly means more than mere awareness that application of traditional, race-neutral districting principles will result in the

[1] Respondents also assert Appellants failed to raise this allegation below. Resp'ts' Mot. at 18. Contrary to these assertions, Appellants alleged that "Defendants' purpose in passing Act 72, either in whole or in part, was motivated by race and/or the goal of drawing districts with specific racial composition in each district." Resp'ts' Mot. App. at 198a (Am. Compel, ¶63(d)). The Amended Complaint alleges that race was not merely *a* factor but *the* motivating factor.

creation of a district in which a majority of the district's residents are members of a particular minority group"). Nothing in the "predominant factor" test suggests that this direct evidence of discriminatory *motive* fails to shift the burden of disproving causation to the government. Given this Court's repeated reliance on *Arlington Heights/Mt. Healthy* framework in other Equal Protection contexts where voting rights are at stake, *see, e.g., Hunter v. Underwood*, 471 U.S. 222, 231-32 (1985), it would be anomalous to carve out an island of Equal Protection doctrine where this framework does not apply. This Court's "racial gerrymandering" decisions certainly do not constitute such an island.

III. The undisputed facts and the three-judge court's opinion indicate that the South Carolina legislature's districting plan was racially motivated without sufficient justification.

Respondents assert Appellants have not shown "race was ... even a 'motivating' factor [contributing to the districting decisions of the South Carolina legislature]." Resp'ts' Mot. at 23. This bald assertion is belied by affidavits and testimony submitted by Appellants, which demonstrate that key lawmakers repeatedly asserted that it was the policy of the state to maintain and increase the BVAP of majority-minority districts.

This direct evidence of lawmakers' racially discriminatory motivation was undisputed at trial and accepted by the three-judge court. The court agreed the testimony of Rep. Sellers—one of only five House members on the Election Law Subcommittee responsible for drawing the original proposal—"strongly suggested that race was a factor in drawing many

districts lines." J.S. App. at 18a. In reaching this conclusion, the court was characterizing Rep. Sellers' testimony about key Republican lawmakers who repeatedly rejected proposed amendments solely on the ground that those amendments would lower the BVAP of some majority-minority districts. This testimony provided critical evidence of this systematic statewide policy in action.

The court's rejection of the adequacy of Rep. Sellers' testimony was rooted not in any factual finding, but in an erroneous conclusion of law. According to the court, Rep. Sellers' testimony about his fellow lawmakers' motives, while "certainly probative,...do not necessarily reflect the motivations of the body as a whole or even a majority of it." J.S. App. at 18a. This holding is in direct conflict with the *Arlington Heights/Mt. Healthy* framework. Having shown that key lawmakers were motivated by racial considerations, Appellants satisfied their initial burden. Having met this burden, Appellants were not required to interrogate or psychoanalyze each member of the legislature to demonstrate this racially discriminatory motive was the actual cause of the districting decision of the entire body.[2] *See Arlington Heights*, 429 U.S. at 265 (*"[Washington v.] Davis*, [426 U.S. 229 (1976)] does not require a plaintiff to prove that the challenged action rested

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[2] Appellants were denied discovery that would have allowed them to directly probe the motivation of key legislators pursuant to an order granting the *state* legislature the same absolute legislative immunity as Congress. J.S. at 34-35 n.8. Assuming the court below was correct in requiring Appellants to both show race-based action and disprove all competing causal explanations, the court's refusal to allow discovery made it impossible for Appellants to meet this standard.

solely on racially discriminatory purposes"). Instead, Respondents were obliged to offer some alternative, race-neutral explanation for their systematic policy of maintaining and increasing the BVAP of majority-minority districts. Because the court failed to recognize this legal obligation, its decision cannot be summarily affirmed.

IV. The three-judge court erred in holding that Appellants lacked standing to present evidence of racially discriminatory purpose regarding districts in which they do not reside.

Under this Court's decision in *Keyes v. School Dist. No. 1, Denver*, the three-judge court erred in refusing to consider evidence pertaining to districts other than those in which Appellants reside. J.S. App. at 8a, 17a-18a. Evidence of the legislature's racially discriminatory purpose toward any district is probative regarding the legislature's likely purpose with respect to other districts. *See Keyes*, 413 U.S. 189, 207-08 (1973).

In *Keyes*, this Court reasoned that "where, as here, *the case involves one school board*, a finding of intentional segregation on its part in one portion of a school system is highly relevant to the issue of the board's intent with respect to the other segregated schools in the system." *Id.* at 208 (emphasis added). Like *Keyes*, this case involves one legislative body: the South Carolina General Assembly. If the leadership and majority party of that body engaged in deliberate racial discrimination in drafting one part of state's districting system, then it defies logic and this Court's precedent to conclude that the same body

suddenly abandoned this motivation with respect to other parts of the same scheme *all contained in the same bill*. The three-judge court's confusion between the *Shaw* standing doctrine and this case improperly truncated its consideration of districts other than those in which Appellants reside. This case alleges a systematic, statewide use of race to design election districts without adequate or legitimate justification and for impermissible purposes. To deprive Appellants of some of their most compelling direct evidence of this racial motivation was further legal error that precludes summary affirmance.

CONCLUSION

For the reasons above and in Appellants' Jurisdictional Statement, this Court should note probable jurisdiction and either summarily reverse and remand for an adequate trial under appropriate constitutional standards or require full argument and briefing of the questions presented.

Respectfully submitted,

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