No. 15-680

IN THE
Supreme Court of the United States

GOLDEN BETHUNE-HILL, *ET AL.*,
Appellants,
v.

VIRGINIA STATE BOARD OF ELECTIONS, *ET AL.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF FOR THE CAMPAIGN LEGAL CENTER, THE LEAGUE OF WOMEN VOTERS, THE VOTING RIGHTS INSTITUTE, THE RACIAL JUSTICE PROJECT AT NEW YORK LAW SCHOOL, THE NATIONAL COUNCIL OF JEWISH WOMEN, AND THE NATIONAL ASSOCIATION OF SOCIAL WORKERS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTERESTS OF *AMICI CURIAE* [1]

Amicus curiae the Campaign Legal Center, Inc. ("CLC") is a nonpartisan, nonprofit organization that works in the area of election law, generally, and voting rights law, specifically, generating public policy proposals and participating in state and federal court litigation regarding voting rights. The CLC has served as *amicus curiae* or counsel in numerous voting rights and redistricting cases in this Court, including *Wittman v. Personhuballah*, No. 14-504; *Harris v. Arizona Independent Redistricting Commission*, 136 S. Ct. 1301 (2016); *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); and *Bartlett v. Strickland*, 556 U.S. 1 (2009). The CLC has a demonstrated interest in voting rights and redistricting law.

Amicus curiae the League of Women Voters of the United States (the "League") is a nonpartisan, community-based organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in close to 800

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Written consent from all parties to the filing of this brief is on file with the Clerk.

communities and in every state, with more than 150,000 members and supporters nationwide. The League promotes an open governmental system that is representative, accountable, and responsive. The League has been a leader in seeking reform of the redistricting process at the state, local, and federal levels for more than three decades.

Amicus curiae the Voting Rights Institute at Georgetown Law ("VRI") was founded in 2015 to train the next generation of lawyers and leaders and to litigate voting rights cases throughout the nation. VRI recruits and trains expert witnesses to assist in litigation development and presentation; promotes increased local and national focus on voting rights through events, publications, and the development of web-based tools; provides opportunities and platforms for research on voting rights; and offers opportunities for students, recent graduates, and fellows to engage in litigation and policy work in the field of voting rights.

Amicus curiae The New York Law School Racial Justice Project ("the Racial Justice Project") is a legal advocacy organization sponsored by New York Law School that is dedicated to protecting constitutional and civil rights. The Racial Justice Project seeks to increase public awareness of racism, racial injustice, and structural racial inequality in the areas of education, employment, political participation, and criminal justice. To accomplish its mission, the Racial Justice Project engages in litigation, training, and public education and other forms of advocacy that seek to ensure equal access and opportunity. The Racial Justice Project has a continued interest in the

development of jurisprudence that guards against racial discrimination and promotes social and political equality for all Americans. Accordingly, the Racial Justice Project has a substantial interest in the outcome of this litigation.

Amicus curiae the National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "[e]lection laws, policies, and practices that ensure easy and equitable access and eliminate obstacles to the electoral process so that every vote counts and can be verified." *See* www.ncjw.org/media/PDFs/NCJWResolutions20142017.pdf.

Amicus curiae The National Association of Social Workers ("NASW") is the largest association of professional social workers in the United States with over 130,000 members in 55 chapters. The Virginia Chapter of NASW has 2700 members. NASW develops policy statements on issues of importance to the social work profession. Consistent with those statements, NASW reaffirms that participation in electoral politics is consistent with fundamental social work values, such as self-determination, empowerment, democratic decision making, equal opportunity, inclusion, and the promotion of social justice. *See* NASW Policy Statement: Electoral Politics, in Social Work Speaks 90, 94 (10th ed. 2015).

SUMMARY OF ARGUMENT

The district court's holding below, and Appellees' position before this Court, is that race only predominates in districting where the plaintiff can demonstrate an actual conflict between racial considerations and other districting principles. The district court held that this is true even where there is direct evidence that the legislature explicitly prioritized race and imposed an across-the-board racial quota for the challenged districts. The district court's holding is contrary to this Court's precedent and undermines the principles underlying this Court's racial gerrymandering jurisprudence.

The Equal Protection Clause requires strict scrutiny where race was the predominant factor in shaping the boundaries of an electoral district. It is well-settled that plaintiffs can establish the predominance of race in the districting process by offering *either* direct evidence of legislative purpose *or* circumstantial evidence of a district's shape and demographics, or by offering both. The district court's holding ignored this fundamental precept and held that circumstantial evidence in the form of inexplicable deviations from traditional redistricting principles is always required to trigger strict scrutiny.

This approach has dangerous consequences for racial gerrymandering cases premised on direct evidence. The test used below to evaluate racial predominance would excuse virtually any race-based plan that appears to conform to neutral criteria such as compactness and contiguity. The test also would allow the incidental political benefits of a racial gerrymander

to excuse a plan—such as this one—motivated by race. If a plan's ultimate partisan effects can overcome direct evidence of racial intent, racial gerrymandering claims would largely be rendered a nullity.

The Virginia House of Delegates and Speaker William Howell (hereinafter "Appellees") ask this Court to compound the district court's errors by requiring plaintiffs in every racial gerrymandering case to produce an alternative plan that achieves the legislature's political goals while also bringing about significantly greater racial balance. Insistence on such a plan would unduly stymie racial gerrymandering claims predicated on direct evidence of racial discrimination. As this Court has recognized, such alternative plans serve a useful evidentiary function for racial gerrymandering claims when those claims are premised on *circumstantial* evidence. In the absence of direct evidence of racial motivation, and in light of the strong correlation between race and politics, evidence of a conflict between race and party may be useful to dispel an equally plausible alternative explanation of partisanship. However, such a plan is unnecessary to ferret out evidence that race predominated in districting decisions when there is already *direct* evidence of race-based intent. To impose an alternative plan requirement upon all plaintiffs raising racial gerrymandering claims, even those relying on direct evidence, would simply adopt the district court's erroneous predominance analysis in another form.

This Court should decline the district court's invitation to radically reshape racial gerrymandering

doctrine and permit avowedly race-based plans to escape strict scrutiny.

ARGUMENT

I. Direct Evidence Shows that Race Predominated in the Creation of the Challenged Districts.

The clear weight of the evidence in this case shows that race was the predominant factor in the legislature's choice of district lines. To prove that a racial gerrymander has taken place, the plaintiff must show "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Race predominates if "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Id.* Once a plaintiff establishes that race was the predominant factor in drawing a district's boundaries, the Equal Protection Clause requires the boundaries to be narrowly tailored to serve a compelling state interest. *Shaw v. Reno*, 509 U.S. 630, 686 (1993).

As established by *Shaw*, a plaintiff bringing a racial gerrymandering claim can establish that race predominated in the formation of a district either through direct evidence of legislative purpose (whether through express statements of racially-motivated intent or by demonstrating the presence of the factors set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)), or through circumstantial evidence based on a district's shape and demographics (or both). With respect to direct evidence of racial gerrymandering, the

Court has primarily looked to evidence of legislators' beliefs and communications. Where direct evidence establishes that "[r]ace was the criterion that, in the State's view, could not be compromised," *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) ("*Shaw II*"), the gerrymander is subject to strict scrutiny. Most recently, the Court found "strong, perhaps overwhelming, evidence" that race predominated when Alabama "expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote)." *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1267, 1271 (2015) ("*ALBC*").

A plaintiff also may offer circumstantial evidence to show that race predominated. *Miller*, 515 U.S. at 916. Circumstantial evidence can consist of alternative maps that show better conformance with traditional districting criteria and less racial gerrymandering, as well as "statistical and demographic evidence with respect to the precincts that were included within [the challenged district] and those that were placed in neighboring districts." *Hunt v. Cromartie*, 526 U.S. 541, 548 (1999). Because "[o]utright admissions of impermissible racial motivation are infrequent," *id.* at 553, plaintiffs often, but not always, must rely on such circumstantial evidence.

The plaintiffs in this case offered direct evidence that the legislature used race as a primary sorting mechanism in developing the challenged districts. The strong evidence in this case mirrors the direct evidence of racial motive found compelling in this Court's prior cases. Most recently, in *ALBC*, this Court relied on

evidence that "[t]he legislators in charge of creating the redistricting plan believed, and told their technical adviser, that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible." *Id.* at 1271. Moreover, the Alabama legislature—just like the Virginia House of Delegates—conducted no "functional analysis" of minority ability to elect, relying instead on "a mechanically numerical view as to what counts as forbidden retrogression." *Id.* at 1272-73 (internal quotation marks omitted). In this case, the prioritization of racial quotas—here, an across-the-board 55% quota for minority districts—was equally explicit and equally untethered from any meaningful analysis of what was required to avoid retrogression under the Voting Rights Act.[2]

As in *ALBC*, the creators of the plan challenged here prioritized the achievement of a threshold black voting age population (BVAP). Legislators adopted a mechanical requirement that each district meet a "55% BVAP floor." J.S. App. 87a. Indeed, the plan's principal author stated that compliance with the Voting Rights Act—which he and other legislators equated with the 55% threshold, *see* J.S. at 87a-88a—was "the most important thing[]" to him in drawing the plan apart from population equality. J.S. 23 (quoting Pl. Ex. 35 at 35:1-5, 15-18).

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[2] Likewise, in *Shaw II*, testimony from the principal draftsman of a redistricting plan that two districts were created to "assure black-voter majorities" provided strong "direct evidence of the legislature's objective." *Shaw II*, 517 U.S. at 906 (internal quotation marks omitted).

This racial target was the primary consideration in all line-drawing decisions at the district level. The district court found "that the 55% BVAP figure was used in structuring the districts." J.S. App. 19a. District 63 and District 71 present two prime examples. Delegate Dance testified that one portion of District 63 "went to Delegate Tyler to try to get her number . . . [o]f African-American voters up to 55 percent." J.S. App. 93a (quoting Trial Tr. 80:11-17 (Dance)). Delegate McClellan, the representative of District 71 during the redistricting process, testified that she could not keep "any portion" of one precinct removed from her district because doing so would "push the [BVAP] below 55 percent." J.S. App. 113a (quoting Trial Tr. 40:1-9 (McClellan)).[3]

Although the legislature's purported reason for seeking this racial target was compliance with the Voting Rights Act, *see* J.S. App. 19a, this compliance was sought through unnecessary and unsupported reliance on a racial quota with no real analysis of why a 55% threshold was necessary to preserve minority voting strength. The district court labeled testimony on the source of the 55% rule "a muddle." J.S. App. 23a. Delegate Jones, the plan's principal author, initially asserted that the number derived from public hearing testimony. J.S. App. 24a. The district court rejected this claim as unsupported by the trial record. *Id.* Another delegate testified that it seemed "the number was almost pulled out of thin air." *Id.* (quoting Trial Tr.

[3] The majority held that race did not predominate in the creation of either District 63 or District 71. J.S. App. 96a, 115a.

98:1-2 (Armstrong)). Ultimately, the district court concluded that legislators based the figure on "concerns" about protecting a delegate in a re-election race in District 75 and on other legislator feedback. J.S. App. 25a. However, as Judge Keenan noted in dissent, Delegate Jones provided only "general and conclusory" statements suggesting that he completed a functional analysis of District 75 and did not explain how that analysis led him to arrive at the figure. J.S. App. 144a-145a (Keenan, J., dissenting). Nor did he or other legislators ever justify applying that figure across the board to every challenged district. *Id.*

As Judge Keenan stated in her dissent from the judgment below, the record in this case offers "overwhelming, direct evidence of racial motivation." J.S. App. 140a (Keenan, J., dissenting). Ultimately, Judge Keenan correctly described the challenged districts "a textbook example of racial predominance, in which a uniform racial quota was the only criterion employed in the redistricting process that could not be compromised." J.S. App. 133a (Keenan, J., dissenting). Yet, the district court held that direct evidence of racial predominance was meaningless absent additional circumstantial evidence. This ruling is antithetical to all notions of normal evidentiary presumptions and cannot be sustained.

II. Compliance with Traditional, Neutral Criteria and Incidental Partisan Effects Cannot Override Direct Evidence of Racial Gerrymandering.

Where direct evidence establishes that race was the predominant factor in district drawing, the possibility that the same map could have been drawn in

accordance with traditional redistricting criteria does not inoculate the map from challenge. That is, courts are neither required nor supposed to ignore direct evidence that race predominated, and only invalidate districts that depart from traditional districting criteria. But that is exactly what the district court did here. It did so based on an erroneous belief that race must be demonstrably in conflict with traditional districting goals in order to predominate. *See* J.S. App. 30a-31a (demanding "*actual* conflict between traditional redistricting criteria and race that leads to the subordination of the former" (quoting *Page v. Virginia State Bd. of Elections*, No. 3:13CV678, 2015 WL 3604029, at *27 (E.D. Va. 2015) (Payne, J., dissenting))).

The district court incorrectly dismissed direct evidence of race-based districting as "largely irrelevant" wherever a district could be otherwise explained by neutral principles such as compactness or contiguity. *See* J.S. App. 107a-108a (describing District 69). Even where a district contained deviations from these traditional redistricting principles, the court excused deviations if they were justifiable *post hoc* by reference to other non-racial criteria, such as political considerations. *See* J.S. App. 93a-95a (discussing District 63).

The district court's view turns this Court's racial gerrymandering doctrine on its head and elevates circumstantial evidence over more compelling direct evidence of intent. The district court's new proposed standard for predominance—wherein race never predominates if its use is consistent with malleable

neutral principles or incidental (and inevitable) political effects—ignores the clear guidance of *Shaw* and its progeny. By asking the wrong question—what *can* explain the district rather than what *actually* motivated the legislature when drawing the district—the district court arrived at the wrong answer. The court need not engage in hypotheticals where, as here, there is direct evidence of intent to sort voters based on race.

A. The District Court Wrongly Allowed Compliance with Traditional, Neutral Criteria To Override Direct Evidence of Racial Gerrymandering.

In reviewing each district for the predominance of race, the district court looked first for its compliance with "traditional, neutral districting criteria, including, but not limited to, compactness, contiguity, nesting, and adherence to boundaries provided by political subdivisions and natural geographic features." J.S. App. 50a. If the court satisfied itself that neutral criteria were respected, it looked no further despite the direct evidence of intent. *See*, *e.g.*, J.S. App. 127a (concluding that race did not predominate in the creation of District 92 on the basis of the District's compliance with traditional principles). In other words, the district court treated cleanly drawn boundaries as *prima facie* evidence that race did not predominate. As Appellants note, "[t]he practical effect of the majority's test is to legalize the intentional sorting of voters on the basis of race as long as the legislature does it *neatly enough*." J.S. 6 (emphasis in original).

Contrary to the district court's contention that it "carefully examin[ed]" the basis for sorting voters in each district, J.S. App. 96a, 97a, the district court's focus on appearances only will certainly allow legislators to "'mask' racial sorting." J.S. App. 101a n.34. The district court's discussion of District 71 exemplifies its flawed approach. Delegate McClellan testified that she "couldn't keep 'any portion of [precinct] 207' because it would 'push the [BVAP] below 55 percent.'" J.S. App. 113a (quoting Trial Tr. 40:1-9 (McClellan) (first bracket added)). But given the district's conformance to neutral principles, the district court deemed this observation immaterial. J.S. App. 114a ("[I]t does not matter what Delegate McClellan's personal preferences were."). This approach directly violates this Court's holding in *Miller*. A plaintiff need not make a "threshold showing of bizarreness" regarding a district's shape or makeup to prove that race was the predominant factor in districting. *Miller*, 515 U.S. at 915. Rather, "it [is] the presumed racial *purpose* of state action, not its stark manifestation, that [is] the constitutional violation." *Id.* at 913 (emphasis added).

A district created on the basis of race, whether or not the line-drawing has some other, independent flaw, imposes the very harms *Shaw* claims are designed to prevent. Like districts with the overt appearance of racial influence, districts intentionally (and explicitly) crafted to meet racial quotas "reinforce[] the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the

polls." *Shaw*, 509 U.S. at 647. Such districts also send a "pernicious" message to elected representatives. *Id.* at 648. Representatives are led to believe that "their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Id.* When the authors of a plan baldly state that race is the most important consideration in districting, they create the very harms that *Shaw* prohibits.

Here, direct evidence demonstrates that the legislature was prepared to reject any outcome that did not comply with its racial sorting requirement. A deliberate gerrymander such as this must not be immunized from review because the legislature was able to achieve its non-negotiable racial quota while *also* appearing to conform to neutral districting principles.

B. The District Court Wrongly Allowed Incidental Partisan Effects To Override Direct Evidence of Racial Gerrymandering.

The district court also erred by concluding that *post hoc* partisan explanations undermine strong, direct evidence of racial gerrymandering. This Court has never indicated that *post hoc* partisan rationalizations can undercut demonstrable intent to sort voters based on race. It should decline to do so here.

As this Court has recognized, racial gerrymanders often resemble partisan gerrymanders given the strong correlation between race and party. *Easley v. Cromartie*, 532 U.S. 234, 257 (2001) ("That is because race in this case correlates closely with political behavior."); *see also* Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to*

Make It Harder to Vote in North Carolina and Elsewhere, 127 Harv. L. Rev. Forum 58, 61 (2014) (noting that "[w]hen party and race coincide, as . . . they do today, it is much harder to separate racial and partisan intent and effect"). Such a correlation, standing alone, is obviously insufficient to show a *Shaw* violation. *See Bush v. Vera*, 517 U.S. 952, 968 (1996) ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify."). However, by the same logic, such a correlation, standing alone, should be equally insufficient to *defeat* a *Shaw* claim.

Just as it is possible to draw a compact district that discriminates on the basis of race, *see Miller*, 515 U.S. at 915, it is possible (and indeed likely) that a district drawn on the basis of race will also have partisan benefits. While this Court has held that the pursuit of political goals in districting, based on political data, is not unconstitutional "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*, 526 U.S. at 551 (emphasis omitted), the Court has never held that purposeful racial gerrymandering is constitutional just because packing African-American voters into a few districts also benefits legislators electorally.

The key question in a *Shaw* claim is which criteria "could not be compromised." *Shaw II*, 517 U.S. at 907. "That the legislature addressed [other] interests does not in any way refute the fact that race was the legislature's predominant consideration. Race was the

criterion that, in the State's view, could not be compromised; respecting communities of interest and protecting Democratic incumbents came into play only after the race-based decision had been made." *Id.* In other words, the key inquiries are *why* the legislature drew the district and *how* it went about doing so. The fact that political goals can explain a district's boundaries after the fact, or that there is no conflict between race and politics, does not negate direct evidence demonstrating that race was the "criterion that, in the State's view, could not be compromised." *Id.* *See Bush*, 517 U.S. at 959, 963 (sustaining a decision that race predominated even though "incumbency protection influenced the redistricting plan to an unprecedented extent").

The district court incorrectly asked not what *actually* explained districting decisions, but what *could have* explained those decisions. *See* J.S. App. 111a (the "deviation [from neutral districting criteria] is explainable on the basis of 'incumbent pairing prevention'"); J.S. App. 95a ("[I]t appears that this aspect of HD 63's unusual shape can be explained on a neutral, racial, and political basis."). In at least one case, the court did not even find it necessary to decide whether race or incumbency was the actual cause of a deviation. *See* J.S. App. 125a (holding that race did not predominate even though "a couple of small deviations possibly could be attributable either to racial or to incumbency considerations"). Thus, while the district court paid lip service to the idea that the use of race as a proxy is unacceptable, noting that "if legislators attempt to 'pac[k] voters into a particular majority-minority district for the purpose of protection the

incumbent,' this would still constitute racial sorting," ultimately, the district court's decision condoned exactly this practice of racial sorting. J.S. App. 70a (internal citation omitted).

This district court's complete deference to Appellees' *post hoc* explanations made it practically impossible for Appellants to demonstrate that race predominated, despite the irrefutable evidence of a racial motive. For example, the district court conceded that District 80 "makes little rational sense as a geographical unit" and "'winds its way around low BVAP precincts . . . to capture high BVAP precincts.'" J.S. App. 121a (quoting Pls.' Post-Trial Brief at 19). The district also attained the 55% BVAP floor. J.S. App. 121a. The three-judge court had overwhelming cause to conclude that race impermissibly governed the drawing of District 80. Yet the district court instead credited a *post hoc* rationalization from Appellees that the district's deviations were incumbency protection devices. *See* J.S. App. 123a ("[I]t appears just as likely that precincts were selected for being highly Democratic . . . as it is that precincts were selected for being highly African-American."). The district court repeatedly overlooked direct evidence of racial target-setting and assumed that a partisan motive existed in the drawing of a district simply because the chosen boundaries had the *effect* of conferring a partisan benefit and could later be explained on that basis.

Only in District 75, where there was "no ambiguity about the basis upon which voters were sorted," did the district court conclude that race predominated. J.S. App. 99a. In District 75, the court had proof that

legislators actively used race as a proxy for political ends. In that extreme case, the district court found that racial considerations subordinated other districting principles. J.S. App. 100a. In other words, where race and political aims coincided, it was not enough for Appellants to offer direct evidence of predominant racial intent in districting decisions. The Appellants additionally had to prove that legislators used race-based sorting to accomplish political ends. This demands far more of plaintiffs than the traditional subordination inquiry, which asks only which criteria "could not be compromised." *Shaw II*, 517 U.S. at 907.

Given the strong correlation between race and partisanship, the district court's reasoning would permit virtually any purposeful use of race in redistricting so long as there were (as there are likely to be) overlapping incidental political benefits. The district court's test presumes that partisan motivation is the predominant factor in *every* redistricting plan in which race and party are linked unless the plaintiff can specifically demonstrate that the state used race as a proxy to accomplish its political ends. The Court should decline the district court's invitation to accept *post hoc* partisan rationalizations. A partisan explanation is not talismanic and the ultimate partisan benefits of a plan cannot save a blatant racial gerrymander.

III. An Alternative Plan Is Unnecessary Where, as Here, Direct Evidence Established the Predominance of Race in Redistricting.

Appellees also defend the outcome below by arguing that this Court's opinion in *Easley* requires

that plaintiffs must demonstrate "at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles." Mot. Of Intervenor-Appellees To Dismiss Or Affirm 29 (quoting *Easley*, 532 U.S. at 258). According to Appellees, an alternative map is required of all *Shaw* plaintiffs, regardless of whether the evidence presented is direct or circumstantial or whether the state defends the districts on the basis of neutral principles or political considerations. *Id.* This is just another way of demanding that there be a conflict between race and politics for a *Shaw* claim to succeed. But *Easley* does not require an alternative plan in cases, such as this, where there is direct evidence of racial discrimination. In arguing otherwise, Appellees distort an evidentiary rule useful in cases premised on circumstantial evidence, and attempt to transform it into a legal element of all *Shaw* claims.

Because "[o]utright admissions of impermissible racial motivation" like those that occurred here "are infrequent," *Hunt*, 526 U.S. at 553, this Court has developed a jurisprudence focused on how *Shaw* plaintiffs can prove their claims through circumstantial evidence. In particular, *Hunt* and *Easley* address how courts should resolve racial gerrymandering cases based primarily on circumstantial evidence that "tend[s] to support both a political and racial hypothesis" due to the strong correlation between race and political affiliation. *Hunt*, 526 U.S. at 550; *see also id.* at 547 ("Appellees offered only circumstantial evidence in support of their claim."); *Easley*, 532 U.S. at 253-54 (finding the minor direct evidence insufficient

and looking to circumstantial evidence of predominance).

In the subset of cases in which direct evidence does not establish the predominance of race, and race and party are highly correlated, an obvious factual issue arises as to which factor predominated. Thus, the Court has held that plaintiffs *in these cases* can overcome this factual barrier by providing an alternative plan that achieves the asserted political objectives with greater racial balance. *Easley*, 532 U.S. at 258 (requiring an alternative plan "[i]n a case *such as this one* . . . where racial identification correlates highly with political affiliation." (emphasis added)).

The Court's concern in *Easley* was evidentiary. *Id.* at 241 ("The issue in this case is evidentiary."). The plaintiffs' two pieces of direct evidence were insufficient to show predominance. *Id.* at 253 ("[The first piece of evidence] says little or nothing about whether race played a predominant role comparatively speaking"); *id.* at 254 ("[The second piece of evidence] is less persuasive than the kinds of direct evidence we have found significant in other redistricting cases."). In light of the strong correlation between race and party, where direct evidence of racial discrimination was lacking, the Court concluded that a *Shaw* plaintiff must put forth some evidence that race rather than party provided the basis for the district, in order to dispel the equally plausible partisan explanation. Such evidence is established by showing an alternative plan revealing a conflict between racial and partisan motivations.

The *Easley* rule makes perfect sense in its proper context as an evidentiary requirement to ferret out

racial rather than political motives in circumstantial cases. However, this evidentiary concern is absent in cases, such as this one, where direct evidence already establishes that race was the predominant factor in the creation of a district. *Easley* does not stand for the proposition that once plaintiffs have met their burden of proving racial intent, they must additionally disprove all other potential *post hoc* explanations for the result.

Appellees' insistence on an alternative map as an element of a *Shaw* claim mirrors the flawed argument rejected by this Court in *Miller*. There, the district court found that race was the predominant factor in drawing a district based on direct evidence of intent. 515 U.S. at 910-11. Nonetheless, the appellants argued that "regardless of the legislature's purposes, a plaintiff must demonstrate that a district's shape is so bizarre that it is unexplainable other than on the basis of race." *Id.* at 910. This Court correctly rejected the argument, which sought to transform the bizarre-shape evidentiary holding in *Shaw* into an element of a racial gerrymandering claim: "Shape 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 . . . was the legislature's dominant and controlling rationale in drawing its district lines." *Id.* at 913. Likewise, the alternative plan identified in *Easley* is relevant not because it is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it offers essential evidence when circumstantial evidence raises a factual issue as to whether race rather than politics motivated the district lines.

Ultimately, Appellees' position that *Easley* imposes an alternative plan requirement upon all *Shaw* plaintiffs is simply a reformulation of the district court's erroneous predominance analysis. Appellees would have this Court demand a conflict between race and other redistricting principles, not simply as an evidentiary tool to disaggregate race and party in ambiguous cases, but rather as a means to override clear evidence of racial intent. Just as it should reject the district court's flawed predominance standard, the Court should also decline to adopt Appellees' unnecessarily broad application of *Easley*'s alternative plan requirement.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed.

Respectfully submitted,

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