No. 14-518

IN THE

Supreme Court of the United States

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

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,
Appellees.

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

BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM

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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

BLANK PAGE

BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. APPELLANTS HAVE STANDING

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

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

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

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

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

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

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

CONCLUSION

The Court should summarily reverse or note probable jurisdiction.

Respectfully submitted,

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

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