No. 14-___

IN THE

Supreme Court of the United States

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

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

JURISDICTIONAL STATEMENT

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

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

QUESTIONS PRESENTED

On remand from this Court, the two-judge majority below again 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). Instead, the majority held that race predominated because the legislative sponsor of the redistricting plan correctly noted that Section 5 of the Voting Rights Act prohibited "retrogression [of] minority influence" in District 3, and that this federal-law mandate was "paramount" over "permissive" state-law traditional districting principles. J.S. App. 2a. 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. *Id.* 47a.

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 greater 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 the Enacted Plan fails strict scrutiny because it increased District 3's black voting-age population percentage above the benchmark percentage, when the undisputed evidence establishes that the increase better complies with neutral principles than would reducing the percentage and no racial bloc voting analysis would support a reduction capable of realistically securing Section 5 preclearance?

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:

Current and former Virginia Congressmen Robert Wittman, Bob Goodlatte, Randy Forbes, Morgan Griffith, Scott Rigell, Robert Hurt, David Brat, Barbara Comstock, Eric Cantor, and Frank Wolf.

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JURISDICTIONAL STATEMENT

Appellants Robert Wittman, Bob Goodlatte, Randy Forbes, Morgan Griffith, Scott Rigell, Robert Hurt, David Brat, Barbara Comstock, Eric Cantor, and Frank Wolf appeal the three-judge court's opinion 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 2015 WL 3604029 (E.D. Va. June 5, 2015). The court's order (J.S. App. B) is unreported.

JURISDICTION

This Court vacated and remanded the three-judge court's first judgment in this case. *Cantor v. Personhubballah*, No. 14-518 (Mar. 30, 2015). The three-judge court's opinion and order on remand issued on June 5, 2015. J.S. App. A-B. Appellants filed their notice of appeal on June 18, 2015. J.S. App. E. 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 ("VRA"), 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, to prove a racial gerrymander under *Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*), plaintiffs bear the "demanding" burden, *Easley v. Cromartie*, 532 U.S. 234, 241 (2001), to "prove that the legislature subordinated *traditional race-neutral districting principles*"—including the "offsetting traditional race-neutral districting principles" of "incumbency protection" and "political affiliation"—to "racial considerations," *Ala. Leg. Black Caucus v. Ala.*, 135 S. Ct. 1257, 1270 (2015) (emphasis original). And because "race and political affiliation" are often "highly correlated," plaintiffs must show that "race *rather than* politics" caused the challenged subordination of traditional principles. *Easley*, 532 U.S. at 242-43 (emphasis original).

In other words, *Shaw* plaintiffs must show a *conflict* between race and traditional principles, including politics, that the legislature resolved by redistricting in a way that sacrificed traditional principles to race. *See Ala.*, 135 S. Ct. at 1270. This is "what 'predominance' is about": proving that race had "a *direct and significant impact* on the drawing" of the challenged district that "*significantly affect[ed]*" and "*change[d]*" its boundaries compared to what they would have been if race had not subordinated traditional principles. *Id.* at 1266, 1270-71 (emphases added).

This Court, moreover, has made painstakingly clear *how* plaintiffs must discharge their heavy *Shaw* burden. Plaintiffs must isolate race as the explanatory variable by adducing an alternative plan that "at the least" achieves the legislature's "legitimate political objectives" and preferred

"traditional districting principles" while bringing about "significantly greater racial balance" than the challenged district. *Easley*, 532 U.S. at 258.

The two-judge majority below failed to apply these requirements. In so doing, the majority turned the Legislature's equal treatment of majority-black Congressional District 3 ("Enacted District 3")—which perpetuated a *Shaw remedy*—into racial discrimination and a *Shaw violation*. The majority thus held that the Legislature violated *Shaw* even though it expressly found that the Legislature drew "the Third Congressional District in pursuit of the compelling state interest of compliance with Section 5." J.S. App. 37a.

The majority's fundamental error is particularly egregious because it *conceded* that "partisan politic[s]" and "a desire to protect incumbents" "inarguably" "played a role in drawing" Enacted District 3. *Id.* 31a. Moreover, 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. 48a-53a, 70a.

Moreover, in concessions the majority again disregards, Plaintiffs acknowledged that their Alternative Plan fails the *Easley* standard. 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, 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 goals," Tr. 180, because it transforms District 2, a 50/50 district represented by a Republican, into a "heavily Democratic" district, *id.* 119, 152-53, 184. And Dr. McDonald acknowledged that the Alternative Plan performs "significant[ly]" *worse* than the Enacted Plan on the Legislature's race-neutral incumbency-protection and core-preservation priorities. *Id.* 422-23.

Unable to find a *Shaw* violation within the clear parameters delineated by this Court, the majority held that race predominated because the Enacted Plan's sponsor correctly noted that Section 5 of the VRA prohibited "retrogression [of] minority influence" in District 3, and that this federal-law mandate was "paramount" over "permissive" state-law traditional principles. J.S. App. 2a. But on this view, *every* legislative or judicial redistricting in a jurisdiction covered by the VRA would automatically constitute a *prima facie Shaw* violation, because they all reflect the Supremacy Clause truism that the

federal VRA is superior to state-law principles. The majority's approach thus would improperly relieve *Shaw* plaintiffs of their demanding burden by turning Section 5 compliance from a compelling interest sufficient to *justify* racial subordination into a direct *admission* of such subordination.

Finally, although it is irrelevant because District 3 does not trigger strict scrutiny, the majority erred in concluding that the Enacted Plan fails strict scrutiny because the Legislature had "good reasons to believe" that the Plan was appropriate to comply with Section 5—indeed, it was the *best* way to comply while *minimizing* conflict with race-neutral principles. *Ala.*, 135 S. Ct. at 1274.

The majority's invalidation of Enacted District 3 contravenes this Court's precedents, and its order that the Legislature enact a remedy within three months should be reversed. Otherwise, the Legislature faces the prospect of overhauling Virginia'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 concededly *discriminates*. The Court should note probable jurisdiction or summarily reverse.

A. District 3: 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* and ordered the Legislature to enact "a new redistricting plan" that "conforms to all

requirements of law, including the Constitution." *Id.* at 1151.

The Legislature adopted a remedial plan with 50.47% black voting-age population ("BVAP") in District 3. Pl. Ex. 22 at 3. That version was not challenged under *Shaw* and was used for the 1998 and 2000 elections.

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

The Benchmark Plan was not challenged under *Shaw*, even though Virginia voters mounted *Shaw* challenges to the 2001 House of Delegates and Senate plans. *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 Rigell beat a Democratic incumbent in District 2, a closely divided district politically that had 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 VRA compliance; respecting "communities of interest"; and accommodating "incumbency considerations." Pl. Ex. 5 at 1-2.

After Republicans gained control of the Legislature 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. It has a 56.3% BVAP. Pl. Ex. 6 at 5. The Enacted Plan received preclearance and was used in the 2012 and 2014 elections. Int.-Def. Ex. 1.

C. Plaintiffs' Lawsuit

Plaintiffs did not file suit until October 2013, after this Court's decision in *Shelby County v. Holder*. Compl. ¶ 4. Plaintiffs initially posited that, "in the wake of *Shelby County*, Section 5 cannot justify the use of race" in the pre-*Shelby County* Enacted Plan. *Id.* ¶ 43. The eight Appellants then serving as members of Congress intervened as Intervenor-Defendants. *See* J.S. App. 3a-4a.

Plaintiffs eventually shifted to the theory that the Enacted Plan was not narrowly tailored to comply with Section 5. *Id.* 36a-38a. They produced an Alternative Plan that 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.

After trial, Judge Duncan, joined by Judge O'Grady, held that Enacted District 3 is an unconstitutional racial gerrymander. Mem. Op. (DE 109). Judge Payne dissented. *See id.* The eight original Appellants appealed to this Court, which vacated and remanded for further consideration in

light of *Alabama*. *See Cantor v. Personhubballah*, No. 14-518.

On remand, the three-judge court granted intervention to Representatives Brat and Comstock, who had been elected to Congress during the appeal. The majority thereafter issued a substantially similar opinion and ordered the Legislature to adopt a remedy by "September 1, 2015." J.S. App. 94a. Judge Payne again dissented. *See id.* 45a.

REASONS FOR NOTING PROBABLE JURISDICTION

It is undisputed that the Legislature preserved majority-black District 3 in the same way that it preserved all other districts in the Commonwealth, which are majority-white. The Legislature preserved all districts to accomplish the contemporaneously-stated purposes of maintaining the partisan make-up of Virginia's congressional delegation, protecting incumbents, and preserving the cores of all districts. The majority thus found a *Shaw* violation even though the Legislature 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. *Ala.*, 135 S. Ct. at 1270.

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

I. THE MAJORITY FAILED TO APPLY *ALABAMA* AND *EASLEY*

Shaw plaintiffs bear the demanding burden to prove that the legislature "subordinated" traditional

principles—including the "offsetting" "race-neutral districting principles" of "incumbency protection" and "political affiliation"—to "racial considerations." *Ala.*, 135 S. Ct. at 1270. Since "race" cannot even theoretically "subordinate" a traditional principle absent a *conflict* between the two, plaintiffs' threshold burden is to establish such a conflict. *Id.* In other words, *Shaw* can be violated only where race had "a *direct and significant impact* on the drawing" of the challenged district that "*significantly affect[ed]*" and "*change[d]*" the district's boundaries compared to what they would have been if race had not subordinated traditional principles. *Id.* at 1266, 1270-71 (emphases added). But such a racially-driven "impact" is possible only if a conflict between race and neutral principles exists because, absent such a conflict, race and traditional principles independently would have led the legislature to adopt the same redistricting plan. *Id.*

This requirement to show a conflict between race and traditional principles was particularly obvious and dispositive here. The majority *conceded* that "partisan politic[s]" and "a desire to protect incumbents" "inarguably" "played a role in drawing" the Enacted Plan in this "mixed motive suit." J.S. App. 31a. It therefore was particularly important to show that the alleged "racial" motive subordinated these neutral factors and thereby "changed" the District's boundaries, in order to "prove" that "race *rather than* politics" was the "predominant factor" in subordinating traditional principles. *Easley*, 532 U.S. at 242-43 (emphasis original).

1. Yet, remarkably, the majority found a *Shaw* violation without finding any *inconsistency* between

race and politics or protecting incumbents, much less that race predominated over these race-neutral factors. The reason there is no such finding is because none is possible: the *undisputed* evidence established that preserving the core of District 3, and all minor adjustments to it, directly furthered the Legislature's political and incumbency-protection goal of maintaining 8 Republican incumbents. Thus, even if the Legislature had a racial reason for preserving and making minor adjustments to District 3, it also had coextensive *non*-racial reasons. Since these race-neutral reasons *coincided* with any racial reason, it is not possible that race *subordinated* them. Race did not "affect" District 3's shape or demographics because the same shape and demographics would have resulted from politics and incumbency protection.

2. The majority also ignored *Easley*'s specific directive on *how* plaintiffs must prove that race predominated over non-racial factors. *Shaw* plaintiffs must produce an alternative plan that "at the least" achieves the legislature's "legitimate political objectives" and preferred "traditional districting principles" while bringing about "significantly greater racial balance" than the challenged district. *Id.* at 258. The reason for this requirement is obvious. If plaintiffs cannot produce an alternative free from racial predominance that achieves the legislature's political (and other traditional) objectives, they have failed to prove that politics is not the cause of the district's shape and demographics. If the political goals can reasonably be accomplished only through the district(s) chosen by the legislature, race cannot be the predominant factor because the district would have been created

even absent racial considerations, in order to accomplish the desired political result.

The majority, however, found a *Shaw* violation even though Plaintiffs produced no such alternative. To the contrary: 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 race-neutral incumbency-protection and core-preservation priorities; 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. Plaintiffs' failure to show that the Legislature's political objectives could be accomplished through *any* alternative means (much less a non-subordinating alternative) establishes that Enacted District 3 is the *only* means of accomplishing them (and therefore that politics necessarily predominates over race).

3. The majority nonetheless rested its finding that race "predominated" on the unremarkable fact that "race" was a *higher-ranked* criterion than the neutral criteria. J.S. App. 2a, 21a-23a. Specifically, the majority found that Delegate Janis's correct recitation that Section 5 prohibited "retrogression [of] minority voting influence" in District 3 was a racial purpose. *Id.* 2a, 21a-23a. It then opined that this "racial" purpose "predominated" because Janis correctly noted that this *federal* mandate was "nonnegotiable" and "paramount," while *state-law* neutral principles were merely "permissive." *Id.* 2a,

21a-23a. This tautology is facially erroneous and would automatically invalidate all redistricting in Section 5 jurisdictions, because *every* such jurisdiction acknowledges the truism that Section 5's *federal mandate* is paramount to *all* traditional principles, since all are "permissive."

First, even if the Legislature had announced that achieving a specific "racial balance" in District 3 was its paramount goal for reasons *unrelated* to Section 5, this would not suggest that it subordinated neutral principles to race. *Easley,* 532 U.S. at 253. Such "direct evidence" of a desired "racial balance" "say[s] little or nothing about whether race played a *predominant* role comparatively speaking." *Id.* (emphasis original). That comparative predominance analysis can only be resolved under the *Easley* methodology eschewed by the majority; *i.e.*, by determining whether plaintiffs have eliminated politics and traditional principles as explanatory variables by showing that those objectives conflicted with achieving the desired "racial balance" and could be accomplished through an alternative with a "significantly" different "racial balance."

Particularly since race and politics are so "highly correlated" in Virginia (and elsewhere), it is quite plausible that the BVAP resulting in Enacted District 3 directly furthers the Legislature's political interests and would be pursued absent any "racial" motive. If, as here, Plaintiffs do not satisfy their burden of negating that plausible scenario, they have not shown that "race rather than politics" explains the district, *regardless* of whether the Legislature rank-ordered "race" above "politics." It does not matter whether the racial factor is ranked above the non-

racial reason where, as here, they both head in the same direction, since there will be no need to choose *between* these *non-conflicting* factors. Indeed, finding that "race"—*i.e.*, Section 5 compliance—"predominated" because it was a "nonnegotiable" criterion "superior" to "permissive" neutral principles is just as illogical as finding that "race" did *not* predominate because the neutral "nonnegotiable" *constitutional* requirement of population equality is "superior" to Section 5's *statutory* requirements. *See Ala.*, 135 S. Ct. at 1270-72.

Second, it is particularly illogical and threatening to minority voting rights to engage in this rank-ordering analysis where, as here, race is ranked higher solely because the federal Section 5 mandate is "nonnegotiable" and superior to "permissive" principles. Under the majority's logic, every court or legislature that acknowledges the Supremacy Clause truism that the federal VRA is "paramount" to all "permissive" traditional principles is guilty of racial predominance in violation of *Shaw*. Thus, every redistricting in every jurisdiction with a cognizable minority population would be subject to strict scrutiny because all judicial and legislative line-drawers in those jurisdictions acknowledge that the race-conscious VRA mandates are "nonnegotiable" and "paramount" to permissive race-neutral principles. This, of course, is not the rule because, again, a *prima facie Shaw* violation requires showing (at a minimum) that these race-conscious VRA requirements *conflict* with neutral principles.

Third, the majority's analysis is at war with this Court's treatment of VRA compliance under *Shaw*. The Court treats VRA compliance as a governmental

interest so compelling that it even justifies subordination of neutral principles to race. J.S. App. 37a-38a. This rule recognizes that legislatures must be provided some way of complying with the potentially conflicting demands of the race-conscious VRA and the race-neutral Fourteenth Amendment. *See Ala.*, 135 S. Ct. at 1274. The majority turned this principle on its head. The majority squarely found, as a factual matter, that "the legislature drew the Third Congressional District in pursuit of the compelling state interest of compliance with Section 5." J.S. App. 37a. But it improperly converted this compelling interest sufficient to *justify* racial subordination into a direct *admission* of such subordination.

Far from reconciling the conflicting demands of the VRA and the Fourteenth Amendment, the majority's approach places them in irreconcilable conflict by treating any effort at VRA compliance as a *prima facie* Equal Protection violation, even if such compliance causes no departure from what race-neutral policies would have dictated. Importantly, this is true even if the legislature narrowly tailors its plan to achieve the compelling interest of VRA compliance. Such a "narrowly tailored" plan has the same *purpose* as the Legislature here—Section 5 compliance—and it is this "racial" purpose the majority says "must" be subjected to "strict scrutiny." *Id.* 36a-40a. Thus, even a legislature that correctly understands and implements Section 5's non-retrogression requirements has committed a *prima facie* violation, because Section 5 "predominates" over voluntary neutral principles. Under this regime, then, all *Shaw* cases bypass the demanding *prima facie* showing and turn entirely on whether

defendants have satisfied the "narrowly tailored" burden.

4. Finally, the majority violates this Court's precedent by converting *Shaw*'s racial-equality command into a requirement that minority districts be treated differently and worse than majority-white districts. It is undisputed that majority-black District 3 was treated the same as all of the other, majority-white congressional districts—the Enacted Plan makes only minor changes to district cores and those changes politically benefit incumbents. The fact that all majority-white districts not subject to Section 5 were preserved just like District 3 is virtually conclusive proof that Section 5's requirement to preserve minority voting strength was not inconsistent with the neutral principles governing all districts. Under the majority's backward logic, however, the Legislature was precluded from doing the same incumbency protection in District 3 that it voluntarily did in the majority-white districts, because Section 5's preservation command "predominated" over this "permissive" preservation policy.

Accordingly, the majority requires treating minority districts and incumbents worse than their white counterparts, because it precludes preserving such Section 5-protected districts in the same way as majority-white districts not protected by Section 5. Needless to say, the Fourteenth Amendment and *Shaw* cannot require treating certain districts worse because of their predominantly minority racial composition. *See Ala.*, 135 S. Ct. at 1270.

The majority then exacerbated this perversion of *Shaw* by using Plaintiffs' Alternative Plan—which

concededly "subordinates traditional districting principles" to achieve a 50% black "quota"—as the principal proof that District 3 shared these defects, without evaluating whether a district where race did *not* predominate would have equally complied with non-racial goals. Thus, the majority 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 race-neutral principles. This obviously does nothing to further racial neutrality, but simply substitutes one racially-driven district that contravenes the Legislature's political desires for one that furthers them.

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

A more detailed discussion of the facts confirms the majority's error in finding a *Shaw* violation without finding that race conflicted with "incumbency protection" and "political affiliation," *Ala.*, 135 S. Ct. at 1270, and that "race *rather than* politics" predominates in Enacted District 3, *Easley*, 532 U.S. at 243 (emphasis original); *see also Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) (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."

(emphasis original)); *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 901 (D. Md. 2011) (three-judge court) (summary judgment under *Shaw* because "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"), *summ. aff'd*, 133 S. Ct. 29 (2012).

The majority's eliding of these requirements is especially impermissible because it *acknowledged* that "partisan considerations" and "a desire to protect incumbents" "inarguably" "played a role" in this "mixed motive suit," J.S. App. 31a, thereby underscoring the need to analyze *which* motive predominates, *Ala.*, 135 S. Ct. at 1270.

The majority, however, conducted no such analysis, finding instead 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." J.S. App. 32a (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.

In all events, the majority *could not* have made the required finding. It is *undisputed* that:

- All contemporaneous commentators—including Plaintiffs' expert—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. 48a-53a, 66a-71a;

- *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;
- Delegate Janis repeatedly stated that protecting incumbents and perpetuating the 8-3 split were the Enacted Plan's goals;
- Janis disclosed that the plan uniformly followed incumbents' "specific and detailed recommendations" for their own districts. J.S. App. 56a;
- No alternative plan preserves the 8-3 split and protects 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).

1. The undisputed evidence more than confirms Dr. McDonald's concessions about the Enacted Plan's political effect—and underscores that the majority

could *not* have found racial predominance. The 2010 elections resulted in the 8-3 partisan split—and *preserving* District 3's core was needed to freeze that split. Also, the relatively minor *changes* to District 3 were all "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 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.*

Moreover, District 3 increased by 3.2% in BVAP and 3.3% in Democratic vote share. *Id.* Thus, while the majority was technically correct that the trades with District 3 had a racial effect, J.S. App. 32a, it ignored that they had a clear and *identical political* effect. The areas moved between Districts 2 and 3 had approximately a 17% difference in Democratic vote share and an 18% difference in BVAP. Tr. 261. The areas moved between Districts 4 and 3 had a Democratic vote share difference of 33% and a BVAP difference of 34%. *Id.* 264. And in the areas moved between District 7 and District 3, the Democratic vote share and BVAP differences were approximately 49% and 50%, respectively. *Id.* 264-65. Accordingly, 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. 32a.

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.* 54a-62a. 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.* 55a. Accordingly, the Enacted Plan preserved "the core of the existing" districts. *Id.* Moreover, any minimal changes were not politically harmful to incumbents because Delegate Janis *adhered* to "the input of the existing congressional delegation, both Republican and Democrat," in how their districts should be drawn. Int.-Def. Ex. 9 at 14.

Delegate Janis candidly 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.* at 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; J.S. App. 56a.

In light of this obvious political purpose and effect, *every* contemporaneous commentator—including Democratic opponents and Dr. McDonald—described the Enacted Plan as a "partisan gerrymander" that preserved the 8-3 split and "protected all incumbents." Int.-Def. Ex. 55 at 816; J.S. App. 55a-56a.

2. In the face of this extraordinary candor, the majority resorted to irrelevant nit-picking. It discounted Delegate Janis's statements on the unelaborated view that they are "rather ambiguous," and because Janis did not personally consider "partisan performance" statistics or show "the *entire* 2012 Plan" to incumbents. J.S. App. 33-34a (emphasis added). 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. And his statements are not remotely "ambiguous" about a purpose to protect all incumbents, particularly since objective electoral data confirmed that the Plan would have precisely such an "effect" (as it did in 2012 and 2014).

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), *id.* 91a, the majority sought to spin garden-variety statements into "concessions" analogous to those in *Shaw v. Hunt*, 517 U.S. 899, 906 (1996) (*Shaw II*). The majority contended that a racial purpose is shown by 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 "mandatory" federal law over "permissive" state law. J.S. App. 2a, 8a, 21a-23a. But, as explained, *see supra* Part I, such routine acknowledgements of the Supremacy Clause and correct recitations of Section 5's requirements cannot constitute admissions to violating the Equal Protection Clause, lest *every* legislative and *judicial* redistricting, particularly in Section 5 jurisdictions, be subjected to strict scrutiny. *See Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 636 (D.S.C. 2002) (three-judge court) (judicial redistricting must "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).

Moreover, in *Shaw II*, the Section 5 submission acknowledged that the "*overriding* purpose was" to create "two congressional districts with effective black majorities," and the draftsman "testified that creating two majority-black districts was the 'principal reason'" for the plan. 517 U.S. at 906 (emphasis original). These racial considerations concededly subordinated traditional principles: the challenged district was "the least geographically compact district in the Nation," and the State initially contended that the 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 be violated by *failing to add* new majority-black districts. *Id.* at 913. Here, in contrast, it is undisputed that Section 5 did require non-retrogression in District 3. Similarly, unlike *Shaw II*, *preserving* District 3's shape and population directly furthers the Legislature's race-neutral core-preservation and incumbency-protection priorities *uniformly* applied statewide, while North Carolina's *creation* of a new district was *concededly* contrary to the traditional principles used elsewhere in the state, including "protecting incumbents." *Id.* 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 conflicting with, much less predominating over, race-neutral goals. *Easley*, 532 U.S. at 241.[1]

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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. 41a. If Mr. Morgan had said this, it would not reflect the Legislature's purpose because, as the majority itself notes, he "did not work with or talk to any members of the Virginia legislature" regarding the Enacted Plan. *Id.* 21a n.16. Anyway, Mr. Morgan never suggested any 55% quota; he simply noted that the *state* redistricting plan enacted in *2011* contained 55% BVAP districts and enjoyed bipartisan and biracial support, which provided the Legislature 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.* 66a-67a.

Second, the majority contorted into a defense "concession" a statement from Appellants' summary judgment brief describing *Plaintiffs'* concession that race was considered to achieve Section 5 *compliance*, thus foreclosing any finding that the Plan

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

As explained, *see supra* Part I, the majority departed from *Easley* when it relieved Plaintiffs of the burden to produce an alternative plan that "at the least" achieves the legislature's "legitimate political objectives" and preferred "traditional districting principles" while bringing about "significantly greater racial balance" than the challenged district. 532 U.S. at 258.

1. The majority offered no coherent rationale for violating *Easley*. *First*, it 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. 33a. But *Easley* "*generally*" requires *all* plaintiffs "at the least" to disprove politics where it highly correlates with race, 532 U.S. at 258 (emphasis added), not merely in certain circumstances depending on defendants' evidence; much less does it require "trial testimony by state legislators." The absence of any need for trial testimony is particularly obvious where, as here, the *contemporaneous* legislative history evinces a clear 8-3 incumbency-protection purpose, *see supra* Part II—which is presumably why *Plaintiffs* offered no legislator testimony to support their racial theory.

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was based on "an *improper* consideration of race." Int.-Def. Mem. 15 (emphasis added); J.S. App. 20a-21a. Even if the sentence could bear the majority's preferred reading, it was not uttered by Defendants, and *post hoc* litigation statements by strangers to the redistricting process are plainly irrelevant. J.S. App. 48a n.34.

Defendants obviously are not required to waive legislative privilege, *Tenney v. Brandhove*, 341 U.S. 367 (1951), to trigger the *Easley* burden, particularly if trial testimony would merely echo available contemporaneous statements. Indeed, such post-hoc testimony is far less probative of "the legislature's actual purpose" than statements that were "before the General Assembly when it enacted" the Plan. *Shaw II*, 517 U.S. at 908 n.4 & 910; *Hunt*, 526 U.S. at 549 (political data and expert testimony "more important" than after-the-fact legislator testimony).

Indeed, *Easley* 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.* at 242. And that page emphasizes that the trial "was not lengthy and the key evidence consisted primarily of documents and expert testimony." *Id.* at 243. Similarly here, the record contains "overwhelming evidence," J.S. App. 33a—including documents, expert testimony, Dr. McDonald's concessions, and contemporaneous statements—proving a political explanation for the Enacted Plan.

Second, the majority blithely suggested that the dissent's criticism that Plaintiffs' Alternative Plan produced only a 7-4 Republican ratio "relies on an *assumption* that the legislature's objective was to create an 8-3 incumbency protection plan." *Id.* 16a n.12 (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" 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. 48a-53a; 68a-71a.[2]

2. The majority's eschewing of the *Easley* standard is unsurprising because Plaintiffs' own concessions demonstrate that the Alternative Plan failed it. As noted, *see supra* Part I, Plaintiffs conceded that the Alternative Plan *both* "subordinates traditional districting principles to race" to achieve a "50%" racial "quota" and undermines the Legislature's "political goals" of "an 8/3 incumbency protection plan," Tr. 172-73, 180. 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. *Id.* 153; Int.-Def. Ex. 22; J.S. App. 88a. The Alternative Plan thus decreases District 3's BVAP by 6% not to eliminate its racial identifiability, but to increase District 2's Democratic vote share by 5.4%. J.S. App. 88a; Int-Def. Ex. 22. This is unsurprising, since the Alternative Plan was drafted by a "liberal" advocacy organization—and Plaintiffs' litigation is

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[2] The majority also said that Plaintiffs' *Easley* burden may be satisfied by something other than an "alternative *plan*." J.S. App. 16a n.12 (emphasis added). While this may theoretically be true, Plaintiffs' chosen alternative *is* a plan, and it is quite difficult to *envision* an "alternative" other than a plan, particularly since the majority does not identify such a theoretical, non-plan "alternative." *Id.*

being financed by the National Democratic Redistricting Trust. Tr. 272.

3. The Alternative Plan also fails *Easley*'s third prong because it is not as "consistent with traditional districting principles" as the Enacted Plan. 532 U.S. at 258. At the outset, the Alternative Plan fails this requirement because—as Dr. McDonald conceded—it "undermines" the two race-neutral principles that the Legislature prioritized above all others: politics and incumbency protection. Tr. 180. It was the province of the Legislature to "balance" its priorities against "competing" 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.

Moreover, all other criticisms of the Enacted Plan's alleged departures from traditional principles *flowed from* the Legislature's prioritization of politics and incumbency protection. The Legislature pursued those goals by preserving the cores of all districts and making minimal changes to benefit incumbents. J.S. App. 55a. It therefore necessarily *perpetuated* any flaws in the shape and demographics inherited from the Benchmark Districts.

Moreover, preserving District 3's core made unusually good sense for the independent reasons that 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, Tr. 122-28.

As Dr. McDonald conceded, 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 missed these dispositive points entirely. Instead, the majority 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 (when unrealistically viewed without regard to the population needs of *other* districts). J.S. App. 28a. But the stated policy was not to make only those changes required by population equality, but to preserve the cores of districts (with 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 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 in and out of District 3 than the Enacted Plan, Pl. Ex. 29 at 8-9.

The majority further concluded that the Alternative Plan was superior to the Enacted Plan because it contained one fewer locality split. J.S. App. 27a-28a. But even that marginal improvement is accomplished "at the expense of" the *more important*, concededly motivating factors of politics and "protecting incumbents." *Id.* 89a. Moreover, Dr. McDonald agreed that "no principle" says that

avoiding locality splits is "more important than" incumbency protection or core preservation—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 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; respecting localities was not included. Va. Code Ann. § 24.2-305. The Virginia Supreme Court, in a *Shaw* case, listed "preservation of existing districts" and "incumbency," but not respecting political boundaries, as traditional principles. *Wilkins*, 264 Va. at 464. Anyway, Dr. McDonald conceded that the Enacted Plan "scored highly" and outperformed the Benchmark Plan on locality splits, Tr. 138, further underscoring the reasonableness of the Legislature's trade-off of one fewer locality split for the increased incumbency protection and core preservation that advanced its political objectives.

4. The majority resorted to conjuring three traditional principles in an attempt to show that race predominated in Enacted District 3. *See* J.S. App. 24a-27a. As explained, however, these principles were all at best secondary to the Legislature's political, incumbency-protection, and core-preservation priorities which caused the alleged violations the majority identified. First, the majority

suggested that Enacted District 3 is not "compact," *id.* 24a, but any problems with its shape were *inherited* from the *Shaw* remedy and 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.* 77a-79a. 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 recognized that water contiguity is "legal[]" in Virginia. J.S. App. 26a. The majority also took issue with the Enacted Plan's VTD splits, *id.* 27a, 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. 24a-30a. But *Shaw* does not condemn racially-influenced line-drawing that *comports* with traditional principles, only that which *subordinates* such principles. *Ala.*, 135 S. Ct. at 1270. 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. 79a-81a.

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

Even assuming that the majority's analysis is not legal error, it is clearly erroneous fact-finding. *See Easley*, 532 U.S. at 242-58 (overturning *Shaw* finding as clearly erroneous). In addition to the legally insufficient facts described above, the majority 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 as suggesting that the Legislature in 2012 placed predominantly black, highly Democratic VTDs into District 3, but not similarly-situated Democratic VTDs that were "largely white," thus purportedly evincing a *racial* purpose. J.S. App. 34a. 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 shows "that race trumped politics" in the drawing of District 3. Tr. 88.

This analysis suffers from "major deficiencies." J.S App. 75a. At the threshold, it "proves" only what the Legislature *stated* it was doing—preserving District 3's core—but says nothing about whether the 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 District 3 had a political effect identical to their racial effect. *See supra* Part II.

Moreover, even Dr. McDonald's analysis of VTDs largely in Benchmark District 3 reveals a *political* pattern no different from their *racial* pattern. 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. 75a-76a (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.

Finally, Dr. McDonald defined the excluded VTDs as any VTDs in "*localities*" adjacent to Enacted District 3. J.S. App. 74a-75a. Accordingly, some of the VTDs are up to *thirty miles away* from District 3's boundary. *Id.* 75a. Thus, again just as in *Easley*, Plaintiffs' analysis 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 cannot stand, the majority's strict scrutiny analysis is legally erroneous. The majority concluded that "the legislature drew the Third Congressional District in pursuit of the compelling state interest of compliance with Section 5," but adopted a narrow tailoring analysis irreconcilable with *Alabama*. J.S. App. 37a.

Narrow tailoring "insists only that the legislature have a strong basis in evidence in support of the (race-based) choice that it has made." *Ala.*, 135 S. Ct. at 1274. Legislatures "may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary." *Id.* (emphasis original).

This deferential standard "does not demand that a State's actions actually be necessary to achieve a compelling state interest" or that a legislature "guess precisely what percentage reduction a court or the

Justice Department might eventually find to be retrogressive." *Id.* "The standards of § 5 are complex; they often require evaluation of controverted claims about voting behavior; the evidence may be unclear; and, with respect to any particular district, judges may disagree about the proper outcome." *Id.* "The law cannot lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place too many minority voters in a district or (2) retrogressive under § 5 should the legislature place a few too few." *Id.*

Narrow tailoring thus accords legislatures significant discretion to choose from among a range of VRA-compliant redistricting options. *See id.* Most obviously, a legislature necessarily has a "good reason" to choose the Section 5-compliant plan that *least subordinates* neutral principles. Such an option *best* complies with *Shaw* by *minimizing* the potential conflict between the non-retrogression mandate and race-neutral principles.

The Legislature clearly had "good reasons to believe" that the Enacted Plan was appropriate to comply with Section 5. *Id.* First, Delegate Janis *correctly* interpreted Section 5 as prohibiting "retrogress[ing] minority voting influence" in District 3. *Compare* J.S. App. 2a, 21a-23a, *with Ala.*, 135 S. Ct. at 1274. Moreover, the year prior to adoption of the Enacted Plan, the Legislature adopted, with strong support from black legislators, a House of Delegates redistricting plan with 55% or higher BVAP in all majority-black districts, including in geographic areas covered by District 3. *See* Int.-Defs.

Ex. 13 at 26. Because black legislators did not want to *harm* black voters, there were very good reasons to believe that this level of BVAP, far from "packing," properly avoided diminishing those voters' ability to elect. *See Georgia v. Ashcroft*, 539 U.S. 461, 484, 489-91 (2003) (finding "significant" the views of "representatives . . . protected by the Voting Rights Act").

Most importantly, the Enacted Plan with 56.3% BVAP in District 3 performs *better* on the Legislature's political, incumbency-protection, and core-preservation priorities than *any* alternative proposed at the time or in litigation. The Enacted Plan outperformed 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—which came at the expense of the Legislature's political, incumbency-protection, and core-preservation priorities. J.S. App. 89a. Since the Enacted Plan's 3.2% BVAP increase affirmatively served its non-racial goals over the alternatives that undermined them, the 56.3% BVAP option optimally *reduced* conflict between race and neutral principles. *See Ala.*, 135 S. Ct. at 1270-74; *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality op.) (enacted district need not "defeat rival compact districts designed by plaintiffs' experts in endless 'beauty contests.'").[3]

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[3] The majority's analogy to *Bush*, J.S. App. 41a, is strained at best: the district in *Bush* was 35.1% *minority*-black and not even *plurality*-black, but instead plurality-Hispanic, 517 U.S. at 983.

Nonetheless, the majority again reasoned that the Enacted Plan was not narrowly tailored because it increased District 3's BVAP. J.S. App. 40a. But the notion that BVAP increases are not "narrowly tailored" because they are not the "least restrictive means" for Section 5 compliance is a legally incorrect test, as *Alabama* confirms, which is why the majority no longer *articulated* this as the test (but nonetheless continued to *apply* it). Mem. Op. 43 (DE 109); J.S. App. 39a-40a. Rather, *Alabama* confirms that the *Legislature* gets to choose *among permissible* non-retrogressive BVAP options, including those which slightly increase BVAP without "packing," particularly where the higher-BVAP option *better* complies with neutral principles. *See* 135 S. Ct. at 1274; J.S. App. 39a-40a. Using the Benchmark BVAP as a ceiling injects *more* race-consciousness by placing states in a racial straitjacket of precisely replicating or reducing BVAP—exactly the type of "trap for an unwary legislature" that *Alabama* forecloses. *Id.* This is particularly obvious here since *augmenting* District 3's BVAP could not have resulted from Delegate Janis's purported desire to avoid *reducing* that 53.1% BVAP, so was necessarily attributable to the incumbency-protection objective it directly furthered.

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 *creation* of a majority-black district was not non-retrogressive "maintenance," but 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 its political goals and race-neutral priorities.

The majority also reverted to its contention that the Enacted Plan is not narrowly tailored because the Legislature did not conduct a costly and debatable racial bloc voting analysis. J.S. App. 42a. But *Alabama* does not require such an analysis. *See* 135 S. Ct. at 1274. Moreover, it is clear that any such analysis to support *reduction* of the BVAP would have been irrelevant here, because such reduction was *foreclosed* by the neutral objectives since it inherently endangered incumbents. Had the Legislature performed Plaintiffs' voting analysis, it would have resulted in either a minor decrease to the 50.2% BVAP selected by Plaintiffs' Alternative or a dramatic reduction to *less than 30%* BVAP (the non-retrogression percentage resulting from Plaintiffs' voting analysis). Tr. 196. The first option indisputably endangers at least one incumbent and the second, 30% option would have required massive redrawing of many districts' lines and could never be *proven* to be non-retrogressive to the Justice Department. Since any voting analysis was only relevant to supporting a BVAP reduction that both exacerbated the *Shaw* violation by subordinating neutral incumbency protection and at least seriously jeopardized Section 5 preclearance, the Legislature had excellent reasons to eschew this purposeless waste of resources.

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

Counsel for Appellants Robert Wittman, Bob Goodlatte, Randy Forbes, Morgan Griffith, Scott Rigell, Robert Hurt, David Brat, Barbara Comstock, Eric Cantor & Frank Wolf

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