No. 14-1504

In The
# Supreme Court of the United States

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

*Appellants,*

v.

GLORIA PERSONHUBALLAH, *et al.*,

*Appellees.*

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

## *AMICUS CURIAE* BRIEF OF THE VIRGINIA STATE CONFERENCE OF THE NAACP IN SUPPORT OF APPELLEES

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## BRIEF OF VIRGINIA NAACP AS *AMICUS CURIAE* SUPPORTING APPELLEES

This brief is submitted on behalf of the Virginia State Conference of the National Association for the Advancement of Colored People ("Virginia NAACP") as *amicus curiae* in support of Appellees.[1]

## INTEREST OF *AMICUS CURIAE*

The National Association for the Advancement of Colored People is one of the oldest and largest civil rights organizations in the United States. The Virginia NAACP, headquartered in Richmond, is a non-partisan, non-profit membership organization with more than one hundred active branches and approximately 16,000 members throughout the Commonwealth of Virginia. It has a number of branches in Congressional District 3 as enacted in 2012, including in Richmond, Petersburg, Norfolk and Virginia Beach. One of the priorities of the Virginia NAACP is to advance and defend the voting rights of its members, including the right to be free from racial discrimination in voting and to elect candidates of their choice at every political level. To that end, the Virginia NAACP has engaged in a variety of public education and community outreach activities to help assure that minority

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[1] The parties have consented to the filing of *amicus curiae* briefs in support of either party. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

voters have an equal opportunity to participate in the election process.

Additionally, the Virginia NAACP has regularly engaged in litigation in Virginia state courts and in the Fourth Circuit to challenge congressional and legislative redistricting plans that dilute minority voting strength or improperly classify voters on the basis of race. Most recently, in May 2015, the Virginia NAACP sought limited intervention as a plaintiff in the remedy stage of this case. *Page v. Va. State Bd. of Elections*, No. 3:13-cv-00678, ECF No. 157 (E.D. Va. May 5, 2015) (Motion to Intervene). The Virginia NAACP sought this narrowly-proscribed participation because its members who live in Congressional District 3 and in adjacent districts were harmed by being assigned to a congressional district based on the color of their skin. These voters would further be affected by any remedy adopted to cure the constitutional defect in Congressional District 3 and have a position on how the District should be redrawn. *Amicus* sought to ensure that the voices of African-American voters contributed to the development of a constitutional remedy, and that those voices were heard in any subsequent disagreement over the remedy entered. ECF 158 at 6-8 (E.D. Va. May 5, 2015) (Memorandum in Support of Motion to Intervene).

A single judge—Judge Payne, the dissenting judge below—denied the Virginia NAACP's motion to intervene. ECF 169 (E.D. Va. May 26, 2015). That order wrongly rejected the Virginia NAACP's contention that it had a legally-cognizable right that would support intervention. *Id.* While the Virginia

NAACP was allowed, along with other organizations and members of the public, to submit proposed remedial plans, ECF 227 (E.D. Va. Sept. 18, 2015) (Brief in Support of Virginia NAACP's Proposed Congressional Redistricting Plan), Judge Payne's erroneous decision still limits the Virginia NAACP's ability to participate as a party in the briefing of this appeal. Despite that limitation, the Virginia NAACP, comprised of thousands of voters directly impacted by the Commonwealth's racial classification system, has a perspective on the merits of this case that will assist the Court in its analysis.

## SUMMARY OF THE ARGUMENT

Virginia's Third Congressional District was first created as a majority African-American district in 1991. *Page v. Va. State Bd. of Elections* No. 3:13-cv-00678, 2015 U.S. Dist. LEXIS 73514, *9 (E.D. Va. June 5, 2015) ("*Page II*"). At that point, no African American had been elected to Congress from the Commonwealth of Virginia since Reconstruction. *See Scott Cast in Sweeping Role,* RICHMOND TIMES-DISPATCH, Nov. 2, 1992, at B5. The district worked as designed, and in 1992, Bobby Scott became the first African American elected to Congress from Virginia in over a hundred years. *Id.* In the twenty years since its creation, African-American voters in the Third Congressional District have, without fail, continued to elect their candidate of choice to Congress. Despite that progress, white incumbent Congresspersons who do not live in the district at issue here and who do not have standing to pursue this appeal, seek to undo that progress and

freeze Virginia in history. This appeal must be dismissed for lack of jurisdiction.

In understanding the crux of the dispute here, though, it is important to note that in the face of evolving and sometimes subtle racial discrimination in voting, the Voting Rights Act of 1965, particularly Section 5, 42 U.S.C. 1973c, played a critical role in ensuring that minority voters both obtain and retain their ability to elect their candidates of choice. But such remedial legislation must be employed with care—while it is necessary to protect against legislative acts that would infringe upon the right to vote of racial or ethnic minorities, the government must also take care not to reinforce racial stereotypes that undermine this nation's progress toward racial equality and coalition-building. *Shaw v. Reno*, 509 U.S. 630, 648 (1993) ("If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury. By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.") (internal quotations omitted). This balancing act is not unique to the redistricting realm. Such care is required in countless legislative arenas, including employment and education, among others. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

The care required to avoid over-reliance on race in the redistricting process is even more

important where, as this Court has noted, "[t]hings have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Shelby Co. v. Holder,* 570 U.S. ___, 133 S. Ct. 2612, 2621 (2013); *see also, Nw. Austin Mun. Dist. No. 1 v. Holder*, 557 U.S. 193, 202 (2009). This Court further noted that "[t]hose conclusions are not ours alone. Congress said the same when it reauthorized the Act in 2006, writing that '[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices." *Shelby Co.*, 133 S. Ct. at 2625.

In addition to emphasizing the changes in the political landscape across that South that might lessen the need for race-based remedies, this Court has also recently reaffirmed its decades-long commitment to using race only narrowly and as needed in the redistricting process. *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. ___, 135 S. Ct. 1257 (2015) ("*ALBC*"). This Court rejected Alabama's use of a mechanical racial target in drawing legislative districts. *Id.* at 1267. Alabama claimed that in order to have its state legislative redistricting plans precleared, it had to maintain the same black voting age percentage in each district in which black voters had the ability to elect its candidate of choice. *Id.* at 1263. This Court also rejected the argument that a plan that uses "race

predominately to maintain the black population" at some fixed number in a district could ever be narrowly tailored to advancing a compelling state interest. *Id.* at 1273. This fixed and unnecessary focus on race was precisely the erroneous understanding of the Voting Rights Act that marred the 2011-2012 congressional redistricting process in Virginia, and rendered Congressional District 3 unconstitutional. *Page II*, 2015 U.S. Dist. LEXIS 73514, *23-31.

Black voters in parts of Virginia, particularly in the Norfolk and Virginia Beach areas, have made incredible progress in recent decades in building cross-racial coalitions and in electing the candidate of their choice—Congressman Bobby Scott—to national office. Rather than recognizing this progress, and drawing Congressional District 3 in as race-neutral a manner as possible, the General Assembly increased the black voting age population in the district from 53.1% to 56.3%. *Page II*, 2015 U.S. Dist. LEXIS 73514, *12. By moving white voters out of the district and black voters into the district, the legislature classified voters by race and made uninformed, harmful assumptions about the representational preferences of voters. This unjustified and offensive packing strategy also limited the ability of black voters to participate in and influence elections in surrounding districts, creating a system reminiscent of political apartheid. *Shaw*, 509 U.S. at 647. Instead of heeding the directives of this Court, what the Virginia General Assembly created in 2012 was "a gerrymander that (*e.g.*, when the State adds more minority voters than needed for a minority group to elect a candidate of

its choice) might, among other things, harm the very minority voters that Acts such as the Voting Rights Act sought to help." *ALBC*, 135 S. Ct. at 1263.

A federal court twice found that the 2012-enacted Congressional District 3 was a racial gerrymander that violated the Equal Protection Clause of the Fourteenth Amendment. *Page v. Va. State Bd. of Elections*, 58 F. Supp. 3d 533, 555 (E.D. Va. 2014), *vacated sub nom. Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015) ("*Page I*"); *Page II*, 2015 U.S. Dist. LEXIS 73514, *58. On the basis of the substantial record before it, and following this Court's guidance in *ALBC*, that court found that race predominated in configuration of the district, and that the use of race was not narrowly tailored to achieving a compelling state interest. *Page II*, 2015 U.S. Dist. LEXIS 73514, *58. That decision must be affirmed absent a finding that the lower court was clearly erroneous. *Easley v. Cromartie*, 532 U.S. 234, 237 (2001) ("*Cromartie II*").

## ARGUMENT

### I. Applicants Lack Standing to Pursue this Appeal

Federal courts are not constitutionally authorized to settle disputes unless an "actual controversy" between two parties with judicially cognizable interests exists throughout the duration of a case. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). When the constitutionality of a state law such as a redistricting plan is challenged in federal court, it is well settled that "a State has a

cognizable interest 'in the continued enforceability' of its laws" when a court has declared the state law unconstitutional, and that the State therefore has standing to appeal an adverse decision. *Id.* at 2664. The problem arises, however, when a party other than the State intervenes to defend the constitutionality of a law and seeks to appeal an adverse decision even when the State declines to appeal. In those circumstances, the court must decide whether that party has a judicially cognizable interest in continuing the litigation. *Id.* at 2663.

It is well established that a party must prove three elements necessary to satisfy the "case or controversy" requirement of Article III of the Constitution: the party must have suffered an "injury in fact" (an invasion of a legally-protected interest which is "concrete and particularized" and is "actual or imminent, not conjectural or hypothetical"); there must be a "causal connection" between the injury and the conduct complained of; and it must be "likely," and not merely "speculative," that the injury will be redressed by the relief requested. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

As Republican congresspersons who will allegedly have a more difficult time being re-elected if Virginia's racial gerrymander is undone, Appellants claim this gives them standing to defend the 2012 redistricting plan, where the State has chosen not to appeal. Speculative allegations such as the ones made by Appellants in the appeal in this case do not rise to the level of injury required to establish Article III standing. Just as a voter does

not have a right to vote for any particular candidate, *Burdick v. Takushi*, 927 F.2d 469, 473 (9th Cir. 1991), *aff'd*, 504 U.S. 428 (1992), it logically follows that an incumbent office holder has no legally-protected right to run in a safe electoral district. *See, e.g., Giles v. Ashcroft*, 193 F. Supp. 2d 258, 266 n. 6, 268 n. 9 (D.D.C. 2002) ("Giles' assertion that a gerrymandered Second District 'adversely affects the other three districts' in Mississippi does not allege a cognizable injury" and "[a]s a candidate for Congress, Giles also contends that [the challenged plan] burdens his campaign as voters are not aware of which district or precinct they live in, which candidates are running in their district, and to whom they should contribute money. This 'injury' is also insufficient to create standing."). For example, Appellant Forbes complains that under any remedial plan he will face a less certain path to re-election, and he also complains that any remedy of the constitutional violation below requires the shifting of black voters out of Congressional District 3 and into the surrounding districts represented by Republicans. App. Br. at 57-58. But neither of those complaints comes close to being the type of injury that this Court requires in order to wade into the controversy, *Lujan*, 504 U.S. at 562-64, and the latter complaint makes the same offensive, race-based assumptions that condemned Congressional District 3 in the first place. If Republican representatives have standing in the circumstances of this case to object to the addition of black voters to their districts, the domino effects on redistricting litigation and race relations in politics will be immeasurably detrimental.

Indeed, non-state parties defending a racial gerrymandering case ought to be held to the same high standard for proving standing as demanded of plaintiffs who bring racial gerrymandering cases. This Court recently emphasized that standard, noting:

> [o]ur district-specific language makes sense in light of the nature of the harms that underlie a racial gerrymandering claim. Those harms are personal. They include being "personally . . . subjected to [a] racial classification," as well as being represented by a legislator who believes his "primary obligation is to represent only the members" of a particular racial group. They directly threaten a voter who lives in the *district* attacked. But they do not so keenly threaten a voter who lives elsewhere in the State. Indeed, the latter voter normally lacks standing to pursue a racial gerrymandering claim.

*ALBC*, 135 S. Ct. at 1265 (internal citations omitted). Based on that well established principle, this Court has denied access to judicial relief to litigants who do not live in a challenged district and thus do not have a sufficiently serious injury. *Sinkfield v. Kelley*, 531 U.S. 28, 30 (2000); *United States v. Hays*, 515 U.S. 737, 744-45 (1995). The Congresspersons seeking to pursue this appeal should be held to no less a standard. They seek to gain politically from the harms inflicted upon black voters classified and segregated into a district

because they were black. The harm claimed by the intervenor Congresspersons, namely that they may have to appeal to black voters newly added to their district, is not a personal, cognizable harm. Elected officials must represent all of their constituents, regardless of race. As such, the appeal should be dismissed for lack of jurisdiction.

## II. Race Predominated in the Drawing of Congressional District 3

This Court's recent decision in *ALBC* leaves little room for doubt that the lower court correctly concluded, after examining all the facts, that Congressional District 3 violates the Equal Protection Clause. Where race is the predominant factor in district line drawing, strict scrutiny must be applied to a court's review of that district. *Miller v. Johnson*, 515 U.S. 900, 905 (1995). Race predominates where race is the "dominant and controlling ... consideration in deciding to place a significant number of voters within or without a particular district." *ALBC*, 135 S. Ct. at 1264. Other factors may play "an important boundary-drawing role," but that does not negate that race factored more than traditional districting criteria into "determining which persons were placed in appropriately apportioned districts. *Id.* at 1271.

A reviewing court can consider both the direct statements of legislators and mapdrawers, and indirect or circumstantial evidence relating to a district's shape and composition, to determine whether race predominated in the district lines. Just like "[t]he legislators in charge of creating the

redistricting plan [in Alabama] 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, the legislative leader in the instant case testified that drawing Congressional District 3 at the benchmark level was the primary "non-negotiable" goal. *Page II*, 2015 U.S. Dist. LEXIS 73514, *29-30. And while a jurisdiction may not, without being subject to strict scrutiny, use race as a proxy for partisanship, *Bush v. Vera*, 517 U.S. 952, 993 (1996), Appellants' claim that partisanship determined the boundaries of the challenged district is flatly contradicted by the record and the findings of the court below. Indeed, Delegate Janis, the primary legislative proponent of the congressional plan, stated unequivocally: "I haven't looked at the partisan performance. It was not one of the factors that I considered in the drawing of the district." *Page II*, 2015 U.S. Dist. LEXIS 73514, *46. These direct statements, much like the ones in *ALBC*, are more than sufficient to conclude that race predominated, but the court below found that indirect evidence also supported that conclusion.

Beyond the direct admissions of decision-makers, the court below also correctly identified several other factors that supported a conclusion that race predominated. *Page II*, 2015 U.S. Dist. LEXIS 73514, *31-49. The court noted that the shape, non-contiguousness, splits in political subdivisions, and population swaps utilized in crafting Congressional District 3 all indicated that traditional districting criteria were subordinated to race. *Id.* at *32-41. As in Alabama, the legislature

here "deliberately chose additional black voters to move into" Congressional District 3, instead of white voters, because of an alleged fear of retrogression. *Id.* at *12, 41; *ALBC*, 135 S. Ct. at 1266.

Appellants argue that preserving the core of the previous districts explains the irregular shape of the district, and that race did not predominate over that traditional redistricting criteria. App. Br. at 3. Following this Court's instruction in *ALBC* that core preservation is "not directly relevant to the origin of the new district inhabitants," 135 S. Ct. at 1271, the court below rejected that argument. The majority noted that:

> [f]ar from attempting to retain most of the Benchmark Plan's residents within the new district borders, the 2012 Plan moved over 180,000 people in and out of the districts surrounding the Third Congressional District to achieve an overall population increase of only 63,976 people. Tellingly, the populations moved out of the Third Congressional District were predominantly white, while the populations moved into the District were predominantly African-American. Moreover, the predominantly white populations moved out of the Third Congressional District totaled nearly 59,000 residents--a number very close to the total required increase of 63,976 people.

*Page II*, 2015 U.S. Dist. LEXIS 73514, *40-41 (internal citations omitted).

Finally, on the question of race predominating, Appellants are also wrong when they assert that this Court's decision in *Cromartie II* somehow provides a partisanship excuse for racial districting. That is not the case. *Cromartie II* involved racial gerrymandering claims from North Carolina that were in front of the Court for the fourth time, 532 U.S. at 237, and where the legislature had redistricted again in order to cure earlier-identified constitutional defects. *Id.* at 239. The Court said that plaintiffs, in proving that race predominated, would have to demonstrate that the legislature could have achieved its legitimate political objectives in an alternative way comparably consistent with traditional districting principles and that such an alternative would have brought about significantly greater racial balance, *id.* at 258, only "in a case such as this one," i.e., a remedial redistricting process, where plaintiffs did not have

> the kinds of direct evidence we have found significant in other redistricting cases. *See Vera*, *supra*, at 959 (1996) (O'Connor, J., principal opinion) (State conceded that one of its goals was to create a majority-minority district); *Miller*, *supra*, at 907 (State set out to create majority-minority district); *Shaw [v. Hunt*, 517 U.S. 899,] 906 (recounting testimony by Cohen that creating a majority-minority district was the

> "principal reason" for the 1992 version of District 12).

*Id.* at 254. That is, this Court did not, in *Cromartie II*, overrule its decade-long standard for a racial gerrymander and, more specifically, for proving that race predominated in drawing a particular district. It simply noted that, in a case where there had been remedial action to cure racial gerrymandering and evidence of racial predominance in the remedial plan was lacking, challengers alleging that race still predominated in the remedial district may be required to prove more in order to succeed. Such a situation is not the one faced here.

Another factor that distinguishes *Cromartie II* from the instant case is the splitting of voting tabulation districts (VTDs), more commonly known as precincts, in the formation of the challenged districts. Political data is only collected and produced at the VTD level, not the smaller census block level. *Vera*, 517 U.S. at 961. When a mapdrawer splits a precinct, the only reliable information he has is the Census Bureau's total population and racial demographics. *Id.* The district at issue in *Cromartie II* had very few split precincts—thus, the mapdrawer could have drawn the district based on accurate political data. This is not the case here, where the challenged district splits a large number of precincts, far more than in any other district in the state. In the instant case, 14 out of the 20 split VTDs in the 2012 enacted plan were in Congressional District 3—evidence that race, rather than politics, contributed to the decision about which voters to include and exclude in the

construction of the district. *Page II*, 2015 U.S. Dist. LEXIS 73514, *36-37.

Thus, in *Cromartie II*, there was a real question of whether race or politics predominated. It was given that setting, and where race and politics were highly correlated, that the Supreme Court concluded that proof that race predominated might require proof of an alternate plan that achieved the same partisan goals without the same racial impact. Given the extensive direct admissions that race predominated in this case, absent in *Cromartie II*, Plaintiffs did not need that further element of evidence to prove the predominance of race.

## III. Congressional District 3 Fails Strict Scrutiny Review

### *a. Section 5, Properly Interpreted, Does Not Compel Congressional District 3 as Drawn*

A plan that goes beyond that which is required by Section 5 would have certainly ensured preclearance, but that is not the strict scrutiny question that the Supreme Court has applied when determining whether there is a compelling government interest in complying with Section 5.

The Supreme Court has held that as compared to Section 2 of the VRA, Section 5 has a limited substantive goal: to ensure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities

with respect to their effective exercise of the electoral franchise. *Vera*, 517 U.S. at 982-83.

Just last year, this Court reaffirmed that compliance with Section 5 does not require a jurisdiction to maintain, let alone increase, the black voting age population in a district. The Court unequivocally stated that Section 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage." *ALBC*, 135 S. Ct. at 1272. Although the *ALBC* decision post-dated the 2011 redistricting process in Virginia, it merely reaffirmed a long line of precedent rejecting any misconceptions that Section 5 of the Voting Rights Act required the "maximization" of the number of minority districts, or the minority population within those districts.

Specifically, in 1995, in *Miller*, where the Department of Justice had refused to preclear a Georgia congressional redistricting plan until the number of majority African-American districts was increased, the Court still focused the strict scrutiny analysis on what was actually necessary to comply with Section 5, not what would ensure preclearance from the Department of Justice. 515 U.S. at 917-18. The Court held:

> It is, therefore, safe to say that the congressional plan enacted in the end was required in order to obtain preclearance. It does not follow, however, that the plan was required by the substantive provisions of the Voting Rights Act. We do not accept the

> contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues.

*Id.* at 921-22. In *Miller*, the state surely was acting reasonably, following two objections from the Department of Justice, to ensure preclearance. But compliance with Section 5 is the correct inquiry for a reviewing court to pursue, not ensuring preclearance, and compliance does not require a maximization of the number of majority-minority districts. *Id.* at 925.

Likewise, in the 1996 *Vera* case, the Court rejected Texas' contention that compliance with Section 5 required it to increase the black voting age population (hereinafter "BVAP") in a congressional district that elected an African-American representative from 35.1% BVAP to 50.1% BVAP. 517 U.S. at 983. The Court explicitly rejected the argument that Section 5 could be used to justify not only maintenance, but substantial augmentation, of the African-American population percentage in the congressional district challenged as a racially gerrymander. *Id.* Indeed, the state had shown no basis for concluding that the increase to a 50.9% African-American population in 1991 was necessary to ensure non-retrogression. *Id.* Thus, even without the clarification of *ALBC*, it should have been clear to the General Assembly that Section 5 did not require the Commonwealth to either mechanically maintain the BVAP in Congressional District 3, nor raise it to 56.3% BVAP.

*b. Congressional District 3 Was Not Narrowly Tailored to Advance a Compelling Governmental Interest*

Under strict scrutiny, the state must meet a heavy burden of justification in demonstrating "that its [racial classification] has been structured with precision and is tailored narrowly to serve legitimate objectives and that it has selected the less drastic means" for effectuating its objectives. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973); *see also*, *Fisher v. Univ. of Tex.*, 570 U.S. ___, 133 S. Ct. 2411, 2420 (2013). A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression. *Vera*, 517 U.S. at 983. As discussed in detail above, *infra* Section III(a), that is exactly what happened here. Virginia did not properly interpret the demands of Section 5 compliance, and applied a mechanical 55% requirement. That alone warrants the conclusion that the district is not narrowly tailored. Additionally, the burden of production shifts to the defending party to demonstrate that the plan was narrowly tailored. *Shaw II*, 517 U.S. at 908. Neither Appellants, nor the state defending in the court below, put on any affirmative evidence of narrow tailoring; additionally, both acknowledged that the legislature performed no racially polarized voting analysis. *Page II*, 2015 U.S. Dist. LEXIS 73514, *52-57. As such, as a matter of law, the decision below must be affirmed.

The Court has given jurisdictions ample advice as to what kinds of districts might run afoul

of the narrow tailoring requirement. In *Vera*, the Court condemned:

> districts are bizarrely shaped and far from compact, [where] those characteristics are pre-dominantly attributable to gerrymandering that was racially motivated and/or achieved by the use of race as a proxy. District 30, for example, reaches out to grab small and apparently isolated minority communities which, based on the evidence presented, could not possibly form part of a compact majority-minority district, and does so in order to make up for minority populations closer to its core that it shed in a further suspect use of race as a proxy to further neighboring incumbents' interests. *These characteristics defeat any claim that the districts are narrowly tailored.*

*Vera*, 517 U.S. at 979 (internal citations omitted) (emphasis added). Additionally, in *Shaw II*, the Court explained why North Carolina's grossly non-compact Congressional District 12 was not narrowly tailored, stating:

> if a geographically compact, cohesive minority population lives in south-central to southeastern North Carolina, as the Justice Department's objection letter suggested, District 12 that spans the Piedmont Crescent would not address that § 2 violation. ... District 12

> would not address the professed interest of relieving the vote dilution, much less be narrowly tailored to accomplish the goal.

*Shaw II*, 517 U.S. at 917. Thus, non-compactness condemns under strict scrutiny a district drawn for racial reasons.

In drafting the 2012 congressional redistricting plan, the General Assembly failed to consider the extent to which black voters were currently able to elect the candidates of their choice, choosing instead to inflexibly and mechanically increase BVAP in the challenged districts despite decades of increased participation by black voters and the repeated success of candidate of choice of black voters. It also failed to examine whether more compact districts could be drawn that would still satisfy the Voting Rights Act. Congressional District 3 is not narrowly tailored to advancing a compelling governmental interest.

Additionally, what the General Assembly has done in this case is precisely the kind of blunt, non-narrowly-tailored use of mechanical racial quotas that the Supreme Court has also rejected in the educational setting. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court clarified further how a racial classification system could avoid falling into a "quota" trap. 539 U.S. at 334. The Court explained that race may only be used, constitutionally, in a "flexible" and "nonmechanical" way because equal protection requires "individualized assessments." *Id.*

Those individualized assessments save legislative action subjected to strict scrutiny.

Given this long line of precedent urging the minimization of racial considerations in redistricting, what would a narrowly tailored construction of Congressional District 3 have looked like? Constitutional compliance with Section 5 of the Voting Rights Act back in 2011 and 2012, when the enacted plan was drawn, simply required that the General Assembly follow the straightforward Section 5 guidance issued by the Department of Justice on February 9, 2011. *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 27 Fed. Reg. 76, 7470-73 (Feb. 9, 2011). "In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district." *Id.* at 7470.

Constitutionally-acceptable compliance would have first required an identification of districts in which minority voters had the ability to elect their candidate of choice. *Id.* at 7471. In the congressional plan, the only such district was Congressional District 3, which was a district in which African-American voters had the demonstrated ability to elect their candidate of choice. Then, the legislature would have needed to examine the racial composition and shape of the

benchmark district. Given that Congressman Scott, in the last six elections prior to the 2012 redistricting process, ran unopposed in three of the elections, and won 70% of the vote in the 2010 election, *Page II*, 2015 U.S. Dist. LEXIS 73514, *55, there could have been no credible concern that the ability of black voters to elect their candidate of choice was at risk, even at 53.1%. As such, the General Assembly should have attempted to draw a more compact version of Congressional District 3—one that more strictly complied with the state constitutional demands that districts be compact and contiguous. Va. Const. art. II, § 6. After having drawn such an exemplar map or maps, or, even more simply, having received alternative maps in the legislative process, the legislature could have performed a simple functional analysis to determine whether the exemplar district would preserve the ability of black voters to elect their candidate of choice. That process—attempting to draw a district that more faithfully adhered to neutral, non-racial redistricting criteria—would have satisfied the jurisdiction's duty to narrowly tailor its use of race in drawing Congressional District 3, and it would not have required the Commonwealth to determine the precise point at which a district loses its ability to elect the candidate of choice of minority voters. *ALBC*, 135 S. Ct. at 1273-74. And had such an exemplar map indicated that black voters did not retain the ability to elect their candidates of choices in the more compact district, then the state likely would have had the "strong basis in evidence to use racial classifications" in the redrawing of the congressional districts. *Id.* at 1274.

## CONCLUSION

Racial assumptions absent a local analysis of what current voting conditions actually require in order to prevent retrogression are antithetical to the promises of the Fourteenth Amendment, and regress, rather than progress, race relations in the political realm. This is contrary to the very purpose of the Voting Rights Act of 1965.

For the reasons detailed above, *Amicus* respectfully urges this Court to uphold the decision below.

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Respectfully submitted,

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