IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GOLDEN BETHUNE-HILL, et al,	)	
Plaintiffs,	)	
v.	)	
VIRGINIA STATE BOARD OF ELECTIONS, et al.,	)	Civil Action No. 3:14-cv-852-REP-AWA-BMK
Defendants,	)	

PLAINTIFFS' STATEMENT OF POSITION REGARDING FURTHER PROCEEDINGS

Plaintiffs respectfully submit this Statement of Position regarding the conduct of further proceedings in this case. On March 1, 2017, the United States Supreme Court concluded that this Court's Memorandum Opinion, ECF No. 108, applied an incorrect legal standard in determining that race did not predominate in 11 of the 12 Challenged Districts. In light of that conclusion, Plaintiffs maintain that this Court should order and consider merits briefing on the proper resolution of Plaintiffs' claims under the correct legal standard as applied to the existing evidentiary record, and promptly render its decision on remand without any further hearings. Below, Plaintiffs address each of the topics listed in this Court's April 6, 2017 Order, ECF No. 136.

A. Factual Findings

This Court ordered the parties to address "[t]he extent to which factual findings made in the MEMORANDUM OPINION (ECF No. 108) remain in effect following the decision of the Supreme Court of the United States." Order, ECF No. 136 ¶ 4(a). Plaintiffs' position is that while some factual findings remain in effect as law of the case, others are subject to review and reconsideration under the proper legal standard.

Some factual findings clearly remain in effect as law of the case. "[F]indings of fact reviewed in and relied upon in an appellate court's decision become the law of the case and, absent certain exceptional circumstances, may not be disturbed by a trial court on remand." *State Indus., Inc. v. Mor-Flo Indus., Inc.*, 948 F.2d 1573, 1576 (Fed. Cir. 1991).[1] Here, the Supreme Court reviewed and relied upon certain facts found by this Court. These facts fall into two categories: (1) facts discussed in Part I of the Supreme Court's Opinion, and (2) facts pertaining to House of Delegates District 75 ("District 75").

[1] *See also In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895) ("When a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.").

With respect to the former, the Supreme Court specifically noted, among other things, "'that the 55% BVAP figure was used in structuring the districts,'" "that the 55% criterion emerged from discussions among certain members of the House Black Caucus and the leader of the redistricting effort in the House, Delegate Chris Jones, 'based largely on concerns pertaining to the re-election of Delegate Tyler in [District] 75,'" and that "[t]he 55% figure 'was then applied across the board to all twelve' districts." Slip Opinion, ECF No. 128 ("Slip Op.") at 4 (quoting Mem. Op., ECF No. 108 at 22, 29-30). These facts, "[a]gainst" which the Supreme Court "consider[ed] the controlling legal principles in this case," *id.* at 6, are drawn largely from Section III of this Court's Memorandum Opinion, *see* ECF No. 108 at 19-31.

With respect to District 75, the Supreme Court held that "[u]nder the facts found by the District Court," the General Assembly performed a "functional analysis of District 75 when deciding upon the 55% BVAP target." Slip Op. at 14. Those factual findings include the finding that Delegate Jones met with Delegate Tyler and "incumbents from other majority-minority districts," and the finding that Delegate Jones considered "turnout rates, the results of the recent contested primary and general elections in 2005, and [District 75's] large population of disenfranchised black prisoners." *Id.* at 15. These facts, which the Supreme Court "reviewed only for clear error" and found "well supported," *id.* at 15, are drawn largely from Section IV.C.2 of this Court's Memorandum Opinion, *see* ECF No. 108 at 113-25.[2] Together, the factual findings discussed above remain in effect on remand because the Supreme Court expressly considered them in issuing its Opinion.

By contrast, the Supreme Court expressly refused to consider the factual findings underlying this Court's determination that race did not predominate in the remaining 11 districts. *See* Slip Op. at 12-13. These factual findings, found primarily in Sections IV.B, IV.C.1 and IV.C.3-12, *see* Mem. Op., ECF No. 108 at 101-13, 125-54, while not formally

[2] Although the Supreme Court did not explicitly reference the Court's factual findings underlying the conclusion that race predominated in District 75, the Supreme Court plainly relied on those factual findings in affirming this Court's "conclusion that the State had sufficient grounds" justifying "the race-based calculus it employed in District 75." Slip Op. at 14.

vacated, are subject to reevaluation in light of the Supreme Court's holding that the framework within which those facts were considered was legally erroneous. *Cf. Burns v. Uninet, Inc.*, 211 F.3d 1264 (4th Cir. 2000) ("If the trial judge correctly states the law, then his findings as to whether the facts meet the legal standard will be disturbed only if they are clearly erroneous. Our review would be more searching if the district court has committed an error of law, including one that infects a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.") (quoting *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1269-70 (7th Cir. 1991)) (internal quotation marks and citations omitted). All of those factual findings were necessarily based on or at least shaped by an incorrect legal framework. *See* Mem. Op., ECF No. 108 at 101 ("The foregoing legal framework for analyzing a racial sorting claim provides the guidepost for the statewide and district-by-district findings that follow."). Moreover, the Court's threshold decision as to which factual issues required resolution was informed by an erroneous understanding of what evidence is relevant to evaluating predominance. *See, e.g.*, Slip Op. at 11 ("[T]here may be cases where challengers will be able to establish racial predominance in the absence of an actual conflict by presenting direct evidence of the legislative purpose and intent or other compelling circumstantial evidence."). Thus, these factual findings are subject to review.

As a practical matter, this means that the Court may draw upon the existing factual findings to the degree appropriate under the correct legal standard. But these facts are not necessarily the universe of relevant factual findings on remand. For instance, the Court may deem it necessary to make further factual findings where its original racial predominance determination was limited by the assumption that race predominates only where the State does not respect or comply with traditional districting principles, *see* Slip. Op. at 9,[3] or where

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[3] *See, e.g.*, Mem. Op., ECF No. 108 at 136 ("HD 71 does not substantially disregard traditional, neutral districting principles, and that is sufficient for the Court to find that these principles were not subordinated to race. The existence of a 55% BVAP floor does not disturb that fact."); *id.* at 151 (making no findings pertaining

its original approach "led the [Court] to give insufficient weight to the 55% BVAP target and other relevant evidence that race predominated," such as "stark splits in the racial composition of populations moved into and out of disparate parts of the district," *id.* at 11, 12.[4] The Court may also consider some of its original factual findings no longer relevant if, for instance, they refer to "*post hoc* justifications the legislature in theory could have used but in reality did not," Slip Op. at 9,[5] or where the achievement of "some other factor" was understood to preclude a finding of racial predominance, *id.* at 11.[6] Additionally, the Court may conclude that some of its previous findings remain relevant and significant under the appropriate legal standard. *See, e.g.*, Mem. Op., ECF No. 108 at 109 (Dinwiddie County split "appears to be avowedly racial"); *id.* at 137 (District 74 "had Reock and Polsby-Popper scores of .16 and .10 under the Benchmark Plan, which remained almost identical – with scores of .16 and .12 – under the Enacted Plan"); *id.* at 144 (District 80 "winds its way around low BVAP precincts . . . to capture high BVAP precincts").[7]

In sum, Plaintiffs maintain that while the record is and should remain closed, *see infra* Section C, the Court can and should take from that record any and all facts it deems appropriate to resolve this case (to the extent they do not constitute law of the case), guided by the proper legal standard.

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to race in District 92 where "the Court finds it hard to imagine a better example of a district that complies with traditional, neutral districting principles").

[4] *See, e.g.*, Mem. Op., ECF No. 108 at 126 (finding testimony that District 69 had to satisfy the 55% BVAP floor "largely irrelevant" where incorporation of African-American voters made the district more compact); *id.* at 135 ("[I]f the 55% BVAP goal could be achieved without subordinating neutral principles on the whole, it does not matter what Delegate McClellan's personal preferences were."); *id.* at 131-136 (no mention in District 71 analysis that average BVAP of areas moved in was more than 50 percentage points higher than average BVAP of areas moved out); *id.* at 139 (no mention in District 74 analysis that average BVAP of areas moved into Challenged Districts was nearly 50 percentage points higher than average BVAP of areas moved into non-Challenged Districts).

[5] *See, e.g.,* Mem. Op., ECF No. 108 at 110 (noting that "the artificial border provided by I-85 may provide a clear boundary to voters and candidates alike that reside in Dinwiddie precinct and wish to know their House District").

[6] *See, e.g.,* Mem. Op., ECF No. 108 at 149 (finding no predominance where deviations "could be attributable either to racial or to incumbency considerations").

[7] The Court's credibility determinations, meanwhile, are similarly subject to re-evaluation, particularly where, for instance, two members of the Court expressed different views on the reliability of expert reports and analysis that are fully presented on the existing record. *See, e.g.*, Mem. Op., ECF No. 108 at 174-75.

B. Conclusions of Law

The Court further ordered the parties to address "[t]he extent to which conclusions of law in the MEMORANDUM OPINION (ECF No. 108) remain in effect following the decision of the Supreme Court of the United States." Order, ECF No. 136 ¶ 4(b). Plaintiffs submit that the Supreme Court has definitively answered this question.

The Supreme Court's Opinion makes clear that the Memorandum Opinion's conclusion that race did not predominate in 11 out of the 12 Challenged Districts was based on a "misappli[cation] [of] controlling law," Slip Op. at 7, and is therefore vacated. Thus, any conclusion to the effect that race did not predominate in 11 of the 12 Challenged Districts is no longer valid. *See id*. at 13 (ordering this Court to determine "the extent to which, under the proper standard, race directed the shape of these 11 districts"). To be clear, this Court's conclusions with respect to predominance in 11 of the 12 Challenged Districts must be revisited even if those conclusions are characterized as findings of "fact" in the Memorandum Opinion, *see, e.g.*, Mem. Op., ECF No. 108 at 113 (holding, "as a matter of fact," that race did not predominate in a particular district), for "the ultimate conclusion to be drawn from the basic facts . . . is actually a question of law." *Hicks v. U.S.*, 368 F.2d 626, 631 (4th Cir. 1966). Under the Supreme Court's reasoning and its instructions on remand, those conclusions must be analyzed anew under the correct legal standard. If the Court finds racial predominance with respect to any of these districts, it must determine whether Defendants and Intervenors have met their burden of showing that the State's race-based redistricting was narrowly tailored to a compelling interest.

The Supreme Court's Opinion further makes clear that the Memorandum Opinion's conclusion that "the State had sufficient grounds to determine that the race-based calculus it employed in District 75 was necessary to avoid violating § 5" is not erroneous and thus remains in effect. Slip Op. at 14.

C. Further Discovery and Evidentiary Hearings

The Court also ordered the parties to address "[t]he extent to which further discovery or further evidentiary proceedings may be necessary." Order, ECF No. 136 ¶ 4(c). Plaintiffs maintain that the record is closed and that no further evidentiary proceedings are necessary.

Where the purpose of an appellate court's remand is to have the district court revise its legal analysis, rather than to rectify a purportedly incomplete or inadequate factual record, a district court should decide the case on the existing record. *See Hennessy v. Schmidt*, 583 F.2d 302, 307 (7th Cir. 1978) ("What was required of the district court on remand . . . was to review the evidence in the record applying the correct standard or proof and applying the correct [legal] test. A new trial, or the taking of additional testimony, was neither required nor appropriate."). Here, the Supreme Court's vacatur and remand is based purely on "the controlling legal principles in this case." Slip Op. at 6. While it set forth the proper legal standard for evaluating racial predominance, it refused to consider or disturb the evidentiary record, let alone imply that the record was somehow insufficient. In fact, the record presented in the course of the four-day bench trial, "at which the parties presented oral testimony and offered numerous exhibits," Mem. Op., ECF No. 108 at 1, was robust; even the abridged compilation of that record selected by the parties on appeal comprised no fewer than six bound volumes totaling 2,321 pages, many of which could be folded outward to display detailed maps and data tables. *See* ECF Nos. 138-43.

Moreover, none of the factual circumstances have changed since the Court's bench trial. Nor did the Supreme Court's Opinion shift the legal landscape in some unforeseen way that might better inform what evidence the parties proffer. On the contrary, the Supreme Court simply "reaffirm[ed] the basic racial predominance analysis explained in *Miller* [*Miller v. Johnson*, 515 U.S. 900 (1995)] and *Shaw II* [*Shaw v. Hunt*, 517 U.S. 899 (1996)], and the basic narrow tailoring analysis explained in *Alabama* [*Alabama Legislative Black Caucus v. Alabama*, 575 U.S. __ (2015)]," Slip Op. at 16; *see also id.* ("The Court's holding in this case

is controlled by precedent."). The parties were thus on notice of the correct legal standard when considering what evidence to put forward at trial.

Equally important, allowing further discovery and evidentiary proceedings is a recipe for delay that will almost guarantee that the residents of Virginia will be forced to live under an unconstitutional districting system for at least another election cycle. Over two years after Plaintiffs first filed suit, despite diligently pursuing and preparing for a trial less than seven months after doing so, Plaintiffs stand without a final determination of their racial gerrymandering claims in 11 of 12 districts. Should the Court conclude, on remand, that some or all of those districts are unconstitutional, citizens within those districts will have suffered irreparable injury for the better part of a decade. Prior to a decision on the merits on remand, the Court is not in a position to decide whether or how it might effectuate a remedy should it find liability on the merits. Further delaying this case to allow new evidence and hearings after having had a full and fair trial would not only be duplicative and wasteful, it would favor no one – certainly not the aggrieved Virginia voters.

D. Amicus Brief of Political Scientists

Finally, the Court ordered the parties to address "[w]hether the analysis required by the decision of the Supreme Court of the United States would be assisted by expert evidence on the topics discussed in the BRIEF OF POLITICAL SCIENTISTS THOMAS L. BRUNELL, CHARLES S. BULLOCK III, AND RONALD KEITH GADDIE AS *AMICI CURIAE IN SUPPORT OF APPELLEES* filed in the Supreme Court of the United States." Order, ECF No. 136 ¶ 4(d). Plaintiffs maintain that this brief (the "Amicus Brief") has no bearing on the resolution of this case and thus should not inform further proceedings.

As an initial matter, a total of eight amicus briefs were filed with the Supreme Court in this case (not including the brief filed by the United States) – four in support of Plaintiffs/Appellants, one in support of neither party, and three in support of Intervenors/Appellees. The Supreme Court's Opinion cited none of them. There is no reason

to believe that any single amicus brief, especially one that was not filed before this Court and not mentioned by the Supreme Court, warrants this Court's special consideration on remand.

Nor is there any basis to invite new expert testimony on narrow tailoring, which is the only issue on which the Amicus Brief opines. It was and remains the burden of Defendants and Intervenors to prove narrow tailoring. This Court conducted a full trial, during which Defendants and Intervenors presented no fewer than three testifying experts. It would be inappropriate to reopen the record now to allow expert evidence Intervenors could have, but chose not to, offer.[8]

In any case, inviting further testimony along the lines in the Amicus Brief would be useless at best and misleading at worst because the premise of the Amicus Brief is false. According to the Amicus Brief, Plaintiffs "are demanding" that the State "precise[ly] guess[]" the "exact threshold required to ensure that minority voters' voting power is not undermined." Amicus Br. at 6, 8. Tellingly, the Amicus Brief does not include a single citation to Plaintiffs'/Appellants' merits brief for that claim. In fact, Plaintiffs argued that District 75 was not narrowly tailored because the mapdrawer lacked a "strong basis in evidence" for the 55% BVAP rule – the same standard recently articulated by the Supreme Court. *Alabama Leg. Black Caucus v. Ala.*, 135 S. Ct. 1257, 1274 (2015). Specifically, Plaintiffs pointed out that Delegate Jones said on the legislative record that he was "not aware of any . . . retrogress[ion] analysis regarding minority performance in any of the 12 majority-minority districts," but then testified to the contrary on the witness stand. Plaintiffs also pointed out that reliance upon vague assertions of other delegates does not constitute a strong basis in evidence, and that Delegate Jones' decision to look to a single election was insufficient under the governing standard. *See* Exhibit A, Brief for Appellants at 56-59, *Golden Bethune-Hill et al. v. Virginia State Board*

[8] Notably, Intervenors represented to the Court that they had consulted with Dr. Brunell and intended to call him as a testifying expert, *see* ECF No. 34 (Transcript of Feb. 24, 2015 Conference Call) at 27:14-17 ("Dr. Brunell is most certainly locked in and is prepared to testify on these dates and have his expert report done in the manner set forth in the proposed order."), but ultimately did not do so.

of Elections, et al., No. 15-680 (U.S. Sep. 7, 2016); Exhibit B, Reply Brief for Appellants at 19-22 *Golden Bethune-Hill et al. v. Virginia State Board of Elections, et al.*, No. 15-680 (U.S. Nov. 16, 2016).

Even if Plaintiffs had demanded a narrow tailoring standard at odds with *Alabama*, the Amicus Brief adds nothing to the Supreme Court's definitive ruling on the issue. Ultimately, the Amicus Brief argues that the narrow tailoring standard articulated in *Alabama* should stand, *see* Amicus Br. at 6 ("The wisdom of th[e] [*Alabama*] holding cannot be overstated."), and that Appellants' supposed effort to proffer a new standard should fail, *see id.* ("Appellants in this case are demanding exactly the kind of precise 'guessing' that [the Supreme] Court disclaimed [in *Alabama*]."). Again, Plaintiffs deny that they have ever argued for a narrow tailoring legal standard at odds with *Alabama*. Regardless, the Supreme Court has "reaffirm[ed] . . . the basic narrow tailoring analysis explained in *Alabama*." Slip Op. at 16. The Supreme Court hardly relied upon Amici in reaffirming the narrow tailoring standard of *Alabama*, and this Court similarly requires no assistance from Amici in resolving this matter pursuant to that standard. On the contrary, the Supreme Court held that this Court had properly applied the narrow tailoring standard in its analysis of District 75. In short, "the analysis required by the decision of the Supreme Court of the United States," Order, ECF No. 136 ¶ 4(d), is the same analysis already performed by this Court in its Memorandum Opinion without the benefit of the Amicus Brief.

Finally, not only is this type of post-trial expert testimony unnecessary and inappropriate, it would, once again, necessitate further delay. The introduction of new expert testimony would require engaging new experts, having those experts draft reports, deposing those experts, and cross-examining those experts in a fact-finding proceeding before the Court. There is no basis for such a significant delay, especially one prompted by an amicus brief that had no bearing on the Supreme Court's Opinion remanding this case for further proceedings.

* * *

Since the Supreme Court issued its Opinion more than six weeks ago, Plaintiffs have filed two motions requesting a briefing schedule for resolution on remand. Plaintiffs once again request that the Court accept briefing from the parties on how the Supreme Court Opinion should affect the outcome on the merits of this case, without reopening the record and without disturbing the factual findings relied upon by the Supreme Court. While the Court may find oral argument helpful after merits briefing is completed, Plaintiffs object to any further evidentiary hearings.

Finally, Plaintiffs strenuously oppose any further briefing as suggested by Paragraph (5) of the Court's April 6 order. *See* ECF No. 136 ¶ 5. As of May 1, a full two months after the Supreme Court issued its Opinion, this Court will have the benefit of three judges to consider 870 pages of trial transcript, 130 exhibits, the parties' six-volume compilation of that record before the Supreme Court, one Supreme Court opinion, and two rounds of simultaneous briefing from the parties to decide how to proceed on remand. If the parties disagree on any issues addressed herein, those disagreements will come to light in the responsive briefing and will be ripe for resolution by this Court. Setting a briefing schedule at that point to address once again issues raised in the present briefing would constitute an unnecessary waste of time and resources, all the more damaging in a case in which the fundamental rights of Virginia voters hang in the balance.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court set a briefing schedule on the proper resolution of the merits of this case on remand, without allowing further discovery or conducting any further evidentiary hearings, and render its decision on the merits consistent with the legal standard articulated by the Supreme Court.

Dated: April 17, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of April, 2017, I filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the counsel of record in this case.

Respectfully submitted,

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Exhibit A

No. 15-680

IN THE

Supreme Court of the United States

GOLDEN BETHUNE-HILL, CHRISTA BROOKS, CHAUNCEY BROWN, ATOY CARRINGTON, DAVINDA DAVIS, ALFREDA GORDON, CHERRELLE HURT, THOMAS CALHOUN, TAVARRIS SPINKS, MATTIE MAE URQUHART, VIVIAN WILLIAMSON, AND SHEPPARD ROLAND WINSTON,

Appellants,

v.

VIRGINIA STATE BOARD OF ELECTIONS, *et al.*,

Appellees.

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

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QUESTIONS PRESENTED

The questions presented are:

1. Did the court below err in holding that race cannot predominate even where it is the most important consideration in drawing a given district unless the use of race results in "actual conflict" with traditional redistricting criteria?

2. Did the court below err by concluding that the admitted use of a one-size-fits-all 55% black voting age population floor to draw twelve separate House of Delegates districts does not amount to racial predominance and trigger strict scrutiny?

3. Did the court below err in disregarding the admitted use of race in drawing district lines in favor of examining circumstantial evidence regarding the contours of the districts?

4. Did the court below err in holding that racial goals must negate *all* other districting criteria in order for race to predominate?

5. Did the court below err in concluding that the General Assembly's predominant use of race in drawing House District 75 was narrowly tailored to serve a compelling government interest?

PARTIES TO THE PROCEEDING

The following were parties in the court below:

Plaintiffs:

Golden Bethune-Hill, Christa Brooks, Chauncey Brown, Atoy Carrington, Davinda Davis, Alfreda Gordon, Cherrelle Hurt, Thomas Calhoun, Tavarris Spinks, Mattie Mae Urquhart, Vivian Williamson, and Sheppard Roland Winston.

Defendants:

Virginia State Board of Elections

James B. Alcorn, Chairman of the Virginia State Board of Elections

Virginia Department of Elections

Edgardo Cortes, Commissioner of the Virginia Department of Elections

Clara Belle Wheeler, Vice-Chair of the Virginia State Board of Elections

Singleton B. McAllister, Secretary of the Virginia State Board of Elections

Intervenor Defendants

Virginia House of Delegates

William J. Howell, Speaker of the Virginia House of Delegates

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BRIEF FOR APPELLANTS

Appellants Golden Bethune-Hill, Christa Brooks, Chauncey Brown, Atoy Carrington, Davinda Davis, Alfreda Gordon, Cherrelle Hurt, Thomas Calhoun, Tavarris Spinks, Mattie Mae Urquhart, Vivian Williamson, and Sheppard Roland Winston respectfully request that the Court reverse the opinion and order holding that Virginia House of Delegates Districts 63, 69, 70, 71, 74, 75, 77, 80, 89, 90, 92, and 95 are not unlawful racial gerrymanders in violation of the Fourteenth Amendment to the United States Constitution.

OPINION BELOW

The opinion of the three-judge court of the Eastern District of Virginia is reported at 2015 WL 6440332 (E.D. Va. Oct. 22, 2015) and is reprinted at Jurisdictional Statement Appendix ("J.S. App.") A. The court's order is unreported and is reprinted at J.S. App. B.

JURISDICTION

The court's opinion and order were issued on October 22, 2015. J.S. App. A-B. Appellants filed their notice of appeal on October 26, 2015. J.S. App. D. 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, which is reproduced at J.S. App. C.

STATEMENT

In March 2015, this Court condemned the "prioritiz[ation] [of] mechanical racial targets above all other districting criteria," particularly where a state's "mechanical[] rel[iance] upon numerical percentages" is untethered to any "strong basis in evidence" for sorting voters on the basis of race. *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1267, 1273-74 (2015) (citation omitted). Just seven months later, the panel below issued an opinion that upheld, 2-1, the Virginia General Assembly's use of a "fixed racial threshold" of 55% Black Voting Age Population ("BVAP"), "prioritized 'above all other districting criteria' in 'importance,'" and applied "across the board" to all twelve of the Commonwealth's majority-minority House of Delegates districts. J.S. App. 19a, 25a, 30a. The majority's analysis flouts the clear command of *Alabama* and undermines decades of racial gerrymandering jurisprudence dictating that assigning voters to districts primarily based on the color of their skin "demands close judicial scrutiny," *Shaw v. Reno* (*Shaw I*), 509 U.S. 630, 657 (1993).

* * *

After the 2010 census, Virginia was required to redraw its House of Delegates districts. Delegate Chris Jones directed that effort. Joint Appendix ("JA") 283-84.

On April 11, 2011, the General Assembly adopted HB 5001, which set out a redistricting plan for House districts (authored by Delegate Jones) and Senate districts (which originated in the Senate). JA 598. Governor McDonnell vetoed HB 5001 based on objections to the Senate plan. *See id.* The General Assembly subsequently adopted HB 5005, which

included a nearly identical House plan (again authored by Delegate Jones) and a significantly revised Senate plan. JA 598-99. Governor McDonnell signed HB 5005 (the "Enacted Plan") on April 29, 2011. JA 600.

Like the predecessor plan adopted in 2001 (the "Benchmark Plan"), the Enacted Plan includes twelve House districts in which African Americans constitute a majority of the voting age population: Districts 63, 69, 70, 71, 74, 75, 77, 80, 89, 90, 92, and 95 (the "Challenged Districts"). JA 541. Before the Enacted Plan was passed, BVAP in the Challenged Districts ranged from 46.3% to 62.7%. JA 549. Under the Enacted Plan, BVAP in each of the Challenged Districts exceeds 55%. *Id.*

This was no coincidence. Delegate Jones insisted throughout the redistricting process that BVAP in the Challenged Districts "needed to be north of 55 percent" to comply with Section 5 of the Voting Rights Act ("VRA"). JA 299. That message was heard loud and clear by his fellow delegates, who understood that the Challenged Districts "would have to be at least 55 percent [BVAP];" otherwise, the House Committee on Privileges and Elections "would not support the plan." JA 1657; *see also* JA 1606, 1642. Delegate Jones rejected draft plans that did not meet this racial target. *See, e.g.*, JA 138.

On October 7, 2014, a three-judge panel of the Eastern District of Virginia struck down Virginia's third congressional district as an unconstitutional racial gerrymander, based in part on the General Assembly's use of an "ad hoc . . . [55% BVAP] racial threshold[]" to draw that district. *Page v. Va. State Bd. of Elections* (*Page I*), 58 F. Supp. 3d 533, 543, 553 (E.D.

Va. 2014).[1] The *Page I* court relied upon the expert testimony of a consultant to the House of Delegates to find that "the legislature enacted 'a House of Delegates redistricting plan with a 55% Black VAP as the floor for black-majority districts,'" and that it "acted in accordance with that view" when adopting its congressional plan. *Page I*, 58 F. Supp. 3d at 543 (citation omitted).

Less than three months later, residents of the Challenged Districts filed this case, alleging that the same General Assembly that racially gerrymandered the third congressional district also racially gerrymandered the Challenged Districts. Compl. ¶¶ 2-3, 35, 39. The case went to trial in July 2015.

The panel issued its decision on October 22, 2015. The two-judge majority sided with Appellants on virtually all major factual disputes. In particular, the majority found that the 55% BVAP rule "was used in drawing the Challenged Districts," thereby resolving this "most important question" at trial:

> [T]he Court finds . . . that the 55% BVAP figure was used in structuring the districts and in assessing whether the redistricting plan satisfied constitutional standards and the VRA[.]

J.S. App. 19a; *see also id.* 87a ("[A] 55% BVAP floor was employed by Delegate Jones and the other

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[1] The *Page* panel reaffirmed its opinion upon remand in light of *Alabama*. *See Page v. Va. State Bd. of Elections* (*Page II*), No. 3:13cv678, 2015 WL 3604029 (E.D. Va. June 5, 2015). District Judge Robert E. Payne, the lead author of the majority opinion here, dissented in *Page I* and *Page II*. On May 23, 2016, this Court dismissed the appeal of *Page II* on standing grounds. *Wittman v. Personhuballah*, No. 14-1504, 136 S. Ct. 1732 (2016).

legislators who had a hand in crafting the Challenged Districts.").

The majority further found that testimony on the "source of the 55% rule" was "a muddle," J.S. App. 23a, but ultimately determined that it was based "largely" on concerns about the re-election of a single African-American delegate in a single district, as well as "feedback" from "various groups" that did not pertain to any particular district, *id.* 25a. "That [55% BVAP] figure was then applied across the board to all twelve of the Challenged Districts." *Id.*

The majority concluded, however, that race predominated in only one Challenged District (District 75). That conclusion rested on the majority's legal determination (first posited in the lead author's dissenting opinion in *Page II*) that, notwithstanding the use of a "fixed racial threshold" to draw district lines, J.S. App. 19a, predominance demands a showing of "'*actual* conflict between traditional redistricting criteria and race that leads to the subordination of the former.'" *Id.* 30a (quoting *Page II*, 2015 WL 3604029, at *27 (Payne, J., dissenting)). Pursuant to that view, the majority articulated a novel, three-step predominance test that focuses primarily on a district's "compliance with traditional, neutral districting criteria." *Id.* 50a-51a.

This appeal challenges the legal standard the majority developed and applied in evaluating racial predominance and its conclusion that the General Assembly's predominant use of race in a single district satisfied strict scrutiny.

SUMMARY OF ARGUMENT

The majority rightly found that the 55% BVAP floor "was used in structuring," "assessing," and "crafting" the Challenged Districts. J.S. App. 19a, 29a. It could hardly find otherwise given the repeated invocation of that racial rule throughout the redistricting process. The majority also rightly determined that the admitted use of a racial floor in drawing district lines constituted "significant evidence" of racial predominance in each of the Challenged Districts. *Id.* 30a.

Remarkably, however, that "significant evidence" played almost no role in the majority's actual predominance analysis. Thus, while the evidence presented made clear that (1) the General Assembly set out to achieve a predetermined 55% BVAP floor in each Challenged District, (2) the 55% BVAP rule "operated as a filter through which all line-drawing decisions had to pass," J.S. App. 138a (Keenan, J., dissenting), and (3) traditional districting principles repeatedly gave way to the 55% BVAP floor, which was uniformly achieved in every Challenged District, the majority found that race did not predominate in eleven of the twelve Challenged Districts.

In reaching that counterintuitive conclusion, the majority purported to improve upon, or "sharpen," the law of racial predominance. J.S. App. 28a. In fact, the majority's novel analysis thoroughly undermines this Court's racial gerrymandering jurisprudence and the equal protection principles it is designed to protect. Time and again, this Court has emphasized that race-based redistricting "demands close judicial scrutiny." *Shaw I*, 509 U.S. at 657. The majority's new test, in contrast, seems designed to insulate race-based

decisions from such scrutiny. Under that test, undisputed evidence that race was used to structure a district is insufficient; plaintiffs must also show that non-racial factors played no role. As a result, districts that exhibit no apparent deviations from "traditional, neutral districting criteria" are categorically immune from racial gerrymandering claims, even if there is overwhelming direct evidence that race predominated. Where deviations do appear, racial predominance is established only if those deviations are attributable solely to race.

This novel approach cannot stand. Most importantly, it ignores contemporaneous declarations of race-based redistricting, and it accords little weight to a state's admitted use of "mechanical racial targets" to sort voters by race. *Alabama*, 135 S. Ct. at 1267.

Furthermore, it undermines the very purpose of the Fourteenth Amendment's protection against racial gerrymandering. This Court has affirmed that people cannot be viewed first and foremost as a function of their race in determining whether to place them in one district or another, unless the state establishes a compelling interest to which that race-based decisionmaking is narrowly tailored. *See Miller v. Johnson,* 515 U.S. 900, 916 (1995). The majority's test, however, *allows* voters to be viewed as a function of race—no harm, no foul—as long as the State proffers some other justification (in addition to race) for why a district line was drawn a particular way. In other words, under the majority's test, ugly districts raise the specter of a constitutional harm, but explicitly race-based redistricting does not. That is not the law, nor should it be.

The majority's application of its new racial predominance test vividly illustrates that test's many

flaws. Direct evidence of "avowedly racial" line-drawing is ignored if the resulting district passes the eye test. Circumstantial evidence demonstrating that traditional districting standards were overridden in service of a predominant racial goal is brushed aside so long as the majority can identify *any* non-racial explanation for the State's line-drawing decisions, including post hoc justifications offered at trial. As a result, the majority's ever-expanding list of "neutral criteria" "form a 'backstop' for one another, . . . thus ensuring that neutral criteria are still predominating in the balance." J.S. App. 59a-60a.

The majority's narrow tailoring analysis fares no better. After determining that race *did* predominate in District 75, the majority credited Delegate Jones' bare assertion that he had a "strong basis in evidence" for subjecting the district to a predetermined 55% BVAP threshold. *Alabama*, 135 S. Ct. at 1274. Apparently satisfied that the mapdrawer uttered the words "functional analysis" on the witness stand (without any explanation or proof of what that entailed), the majority all but ignored *Alabama* by blatantly excusing the legislature's "mechanically numerical view as to what counts as forbidden retrogression." *Id.* at 1272-73 (citation omitted).

Ultimately, the majority's analysis turns a blind eye to the concrete harms of unjustified race-based districting. Here, the use of a rigid numerical floor thoroughly undermined the goals of the VRA by, for instance, rending white residents from districts where they had long joined forces with African-American voters to elect minority-preferred candidates because the BVAP in those districts was "too low," *see Bartlett v. Strickland*, 556 U.S. 1, 25 (2009) ("The Voting Rights Act was passed to foster this cooperation."), and

ensuring that African-American influence is limited to the Challenged Districts.

The majority opinion distorts this Court's precedents to excuse the General Assembly's constitutional violation, and in so doing, thoroughly (and wrongly) rewrites the law of racial gerrymandering. Those legal errors cannot stand.

ARGUMENT

The majority's elaborate, often byzantine analysis belies the relative simplicity of this case. The General Assembly repeatedly declared that the 55% BVAP floor was the only nonnegotiable criterion in drawing the Challenged Districts and configured them accordingly. Both the statewide and district-specific evidence confirmed that application of the 55% BVAP rule had a direct and significant impact on the drawing of each of the Challenged Districts. The General Assembly failed to narrowly tailor its admitted use of race in favor of a one-size-fits-all approach focused on meeting or exceeding 55% BVAP in every Challenged District. As a result, the General Assembly violated the Equal Protection Clause.

I. THE MAJORITY MISUNDERSTANDS AND MISAPPLIES THE LAW OF "RACIAL PREDOMINANCE"

Plaintiffs bringing a racial gerrymandering claim under the Equal Protection Clause must show that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916. The burden then shifts to defendants to satisfy strict scrutiny by demonstrating that the

race-based districting was narrowly tailored to a compelling government interest. *Id.* at 920.

To meet their burden, plaintiffs must show that the legislature "subordinated traditional race-neutral districting principles . . . to racial considerations" in drawing districts. *Id.* at 916. The legislature does this when it "'place[s]' race 'above traditional districting considerations in determining which persons were placed in appropriately apportioned districts.'" *Alabama*, 135 S. Ct. at 1271 (emphasis and citation omitted). Race predominates when it was "the 'dominant and controlling' consideration," and other factors were considered "only after the race-based decision had been made," *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 905, 907 (1996) (quoting *Miller*, 515 U.S. at 913)—i.e., when "[r]ace was the criterion that, in the State's view, could not be compromised," *id.* at 907.

Here, the majority found that the General Assembly used an express racial floor, that was "prioritized 'above all other districting criteria' in 'importance,'" to "structur[e] the [Challenged] [D]istricts." J.S. App. 30a (quoting *Alabama*, 135 S. Ct. at 1267). Nevertheless, the majority concluded that race predominated in only one Challenged District (District 75).

To justify its result, the majority wove out of whole cloth a new legal standard for establishing racial predominance. According to the majority, predominance demands a showing of "'*actual* conflict between traditional redistricting criteria and race that leads to the subordination of the former.'" *Id.* (quoting *Page II*, 2015 WL 3604029, at *27 (Payne, J., dissenting)).

Pursuant to this new standard, the majority articulated a three-step test for predominance that virtually ignores direct evidence of admitted racial

motivations and places primary—if not absolute—reliance on a district's physical appearance.

> First, the Court will review the district on the basis of its compliance with traditional, neutral districting criteria, including, but not limited to, compactness, contiguity, nesting, and adherence to boundaries provided by political subdivisions and natural geographic features.
>
> Second, the Court will examine those aspects of the Challenged District that appear to constitute "deviations" from neutral criteria . . . . [and] ascertain the underlying rationale for those deviations[, including] whether a deviation was caused in part or entirely by the need to comply with the one-person, one-vote precepts or by political circumstances such as protection of incumbents.
>
> Third, the Court will weigh the totality of the evidence and determine whether racial considerations qualitatively subordinated all other non-racial districting criteria.

J.S. App. 50a-51a (footnote omitted). Under this framework, district lines are immune from constitutional scrutiny if they can be explained on *any* conceivable non-racial grounds, even if—as here—the legislature unambiguously declares that its top priority is to sort voters by race according to a fixed racial threshold.

The majority's framework turns this Court's precedent on its head. Most strikingly, the majority dismisses as "largely irrelevant" the indiscriminate use of "mechanical racial targets" condemned in

Alabama. J.S. App. 107a. Indeed, it turns a blind eye to all direct evidence of race-based districting where a district otherwise comports with traditional districting principles, elevating circumstantial evidence of district geometry to a threshold requirement. It then compounds this error by demanding that race conflict with—and prevail against—each and every race-neutral explanation. The practical effect is to legalize the intentional sorting of voters on the basis of race as long as the legislature does it *neatly enough*. The majority thereby invites and excuses the very harm *Shaw* sought to prevent.

A. The Majority's Test Eviscerates *Alabama* by Deeming the Use of Mechanical Racial Targets "Largely Irrelevant"

In *Alabama*, the legislature "expressly adopted and applied a policy of prioritizing mechanical racial targets" when drawing majority-minority districts, based on the mistaken belief that the VRA required the maintenance of a predetermined BVAP percentage. 135 S. Ct. at 1263, 1267. This Court held that the use of such "mechanical racial targets" amounted to "strong, perhaps overwhelming, evidence that race did predominate." *Id.* at 1271.

Here, the majority paid lip service to that holding, *see* J.S. App. 30a ("The *Alabama* case could not be clearer that use of racial BVAP floors constitutes . . . significant evidence . . . of predominance."), but then failed to apply it. Instead, the majority created and applied a novel, three-part predominance test that relegates *all* direct evidence of racial purpose, including the use of a fixed racial threshold, to a tertiary consideration—if it is considered at all. *See id.* 71a, 73a ("[e]vidence of a racial floor" is considered

only in the "final step in the predominance inquiry"). Accordingly, "evidence of such thresholds" is significant *only* "when examining those districts that exhibit deviations from traditional, neutral districting principles," and then only if the legislature fails outright to offer a non-racial explanation for such deviations. *Id.* 46a, 50a-51a.

The majority's test thus reduces racial gerrymandering cases to a beauty contest in which districts that "do[] not substantially disregard traditional, neutral districting principles" are immune from constitutional scrutiny, and "*[t]he existence of a 55% BVAP floor does not disturb that fact*." J.S. App. 114a-15a (emphasis added). Indeed, if a district is visually appealing enough, use of a racial quota plays no role whatsoever in the predominance analysis. *See, e.g.*, *id.* 127a.

There are many illustrations of this error, but none starker than the analysis of District 69. The majority explicitly found that the General Assembly used the 55% rule to draw District 69, based in part on the undisputed testimony of a delegate with direct, personal knowledge "that HD 69 had to satisfy the 55% BVAP floor." J.S. App. 107a. Nevertheless, because District 69 appeared reasonably compact and contiguous, the majority dismissed that evidence as "largely irrelevant." *Id.* In fact, the majority stated that Appellees would have been entitled to summary judgment with respect to District 69. In other words, according to the majority, a legislative *admission* of race-based redistricting did not even create a factual dispute as to whether the legislature engaged in race-based redistricting. *Id.* 108a n.39.

In short, while *Alabama* requires courts to weigh heavily the legislative use of a "mechanical racial

target[]," 135 S. Ct. at 1267, the majority ignored that evidence altogether or treated it as "largely irrelevant," J.S. App. 107a. As a result, the majority "did not properly calculate 'predominance.'" *Alabama*, 135 S. Ct. at 1270. That error alone warrants reversal.

B. The Majority's Test Negates the Role of Direct Evidence in Racial Gerrymandering Cases

The majority's misapplication of *Alabama* speaks to a deeper flaw in its reasoning: a failure to grasp the significance of direct evidence of a legislature's overt racial goals.

According to the majority, the legislature's declaration that it drew districts to carry out its intent to sort voters by race is *not* enough to establish racial predominance. *See* J.S. App. 45a (a district may not be struck down under *Shaw* "on 'racial purpose' alone" or "solely because of the motivations of the men who voted for it") (quoting *Palmer v. Thompson*, 403 U.S. 217, 224 (1971)). But this Court emphatically rejected that view in *Miller*.

In *Miller*, the defendants argued—like the majority below—"that evidence of a legislature's deliberate classification of voters on the basis of race cannot alone suffice to state a claim under *Shaw*"; rather, "regardless of the legislature's purposes, a plaintiff must demonstrate that a district's shape is so bizarre that it is unexplainable other than on the basis of race." 515 U.S. at 910. The Court held that view "misapprehends . . . *Shaw* and the equal protection precedent upon which *Shaw* relied." *Id.* at 911; *see also Shaw II*, 517 U.S. at 906-07 (rejecting dissent's argument that "strict scrutiny does not apply where a State 'respects' or 'compl[ies] with traditional

districting principles,'" because that "is not the standard announced and applied in *Miller*"). As *Miller* explained:

> Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines.

515 U.S. at 913. Thus, plaintiffs may show that race predominated "*either* through circumstantial evidence of a district's shape and demographics *or more direct evidence going to legislative purpose*." *Id.* at 916 (emphasis added). Accordingly, many courts have held that racial predominance can be established by direct evidence alone. *See, e.g.*, *Backus v. South Carolina*, 857 F. Supp. 2d 553, 559 (D.S.C. 2012) ("Circumstantial evidence of a district's shape and demographics is only one way of proving a racial gerrymander."), *aff'd*, 133 S. Ct. 156 (2012); *Hays v. Louisiana*, 839 F. Supp. 1188, 1195, 1204 (W.D. La. 1993) (if "uncontroverted *direct* trial evidence establishes [a] racial classification" predominated, then a court "need not even consider the kind of indirect or inferential proof approbated in *Shaw*"), *vacated on other grounds*, 512 U.S. 1230 (1994).

In contrast, the majority's test elevates circumstantial evidence of a district's configuration to a threshold showing, requiring plaintiffs to show that a district "deviat[es] from traditional, neutral districting principles" to establish racial predominance. J.S. App. 46a. But *Miller* made clear that "parties alleging that a State has assigned voters

on the basis of race" are *not* "confined in their proof to evidence regarding the district's geometry and makeup." 515 U.S. at 915.

The majority's belief that there is no cognizable injury so long as a district generally comports with traditional districting principles betrays a fundamental misunderstanding of the constitutional harm that *Shaw* and its progeny are meant to avoid. *See* J.S. App. 34a ("[W]hen racial considerations do not entail the compromise of neutral districting norms, the basis for a racial sorting claim evaporates."). Racial classifications are "by their very nature odious to free people whose institutions are founded upon the doctrine of equality" because they "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Shaw I*, 509 U.S. at 643. Thus, a legislative declaration that voters were divvied among districts according to race is an acknowledgment that race had a "direct and significant impact" on redistricting, *Alabama*, 135 S. Ct. at 1271, and demands close judicial scrutiny even if it does not result in oddly shaped districts. After all, "it [is] the presumed racial purpose of state action, *not its stark manifestation*, that [is] the constitutional violation." *Miller*, 515 U.S. at 913 (emphasis added).

In sum, "strict scrutiny cannot be avoided simply by demonstrating that the shape and location of the districts can rationally be explained by reference to some districting principle other than race." *Clark v. Putnam Cty.*, 293 F. 3d 1261, 1270 (11th Cir. 2002) (citation omitted). A legislative concession that it "placed a significant number of voters within . . . a particular district," *Miller*, 515 U.S. at 916 (here, at least 33,063 black voters in each Challenged District, JA 583-84), primarily because of their race

demonstrates that race had a direct and significant impact on district lines.

C. The Majority's Test Erroneously Requires Plaintiffs to Prove that Race Was the Only Factor in the Legislature's Line-Drawing Decisions

The errors that flow from the majority's "*actual* conflict" test continue to unfold in its assessment of "deviations" from traditional districting principles. It is not enough that deviations be attributable to race to find race predominated; the racial explanation must cancel out "*all* other districting criteria." *See* J.S. App. 71a, 95a, 111a (emphasis added). In other words, plaintiffs cannot demonstrate race was the *predominant* factor unless they prove it was the *only* factor.

That is not the law. It is well-established that race may predominate even when non-racial factors are addressed. *See, e.g.*, *Alabama*, 135 S. Ct. at 1263 (legislature "sought to achieve numerous traditional districting objectives," but "placed yet greater importance" on avoiding retrogression); *Shaw II*, 517 U.S. at 907 ("That the legislature addressed [other] interests does not . . . refute the fact that race was the legislature's predominant consideration."); *Bush v. Vera*, 517 U.S. 952, 963 (1996) (race predominated even though "[s]everal factors other than race were at work in the drawing of the districts"); *Clark*, 293 F.3d at 1270 ("Race may be shown to have predominated even if . . . 'factors other than race are shown to have played a significant role in the precise location and shape of those districts.'") (citation omitted); *Page II*, 2015 WL 3604029, at *13 n.23 ("[W]hen racial

considerations predominated in the redistricting process, the mere coexistence of race-neutral redistricting factors does not cure the defect."); *Moon v. Meadows*, 952 F. Supp. 1141, 1146-48 (E.D. Va. 1997) (race predominated where "Legislature sought to protect and indeed enhance" district's BVAP ratio, even while considering political partisanship, incumbent protection, and communities of interest), *aff'd*, 521 U.S. 1113 (1997). Plaintiffs need not show that racial considerations eclipsed all others or anticipate and refute every conceivable non-racial justification generated during the litigation process.

The majority, however, requires just that, pitting evidence of race-based districting head-to-head against each and every possible race-neutral explanation—eleven in all—to determine predominance. J.S. App. 53a-71a (listing race neutral factors).[2] The majority openly recognizes, moreover, that these "traditional" districting criteria are oftentimes "surprisingly ethereal" and "admit[] of degrees," *id.* 54a, 57a, but their malleability only weighs in their favor. *See id.* 59a-60a ("[N]eutral criteria can often form a 'backstop' for one another when one criterion cannot be fully satisfied, *thus ensuring that neutral*

[2] Although the majority recognized *Alabama*'s holding that population equality "is not a traditional redistricting factor that is considered in the balancing that determines predominance," J.S. App. 65a, it nonetheless expressly considered population equality in its predominance test. *Id.* 51a (considering "whether a deviation was caused in part or entirely by the need to comply with one-person, one-vote precepts"); *id.* 65a (population equality "is relevant to assessing why a district may appear to deviate from neutral criteria"); *id.* 87a (population equality is "important in assessing why certain redistricting actions were taken").

criteria are still predominating in the balance.") (emphasis added).

The majority thus nimbly deflected all types of circumstantial evidence that supported a finding that race predominated. Where a district's shape "arouses some suspicion," the majority admonished Appellants that "predominance is not merely a beauty contest," and found another race-neutral justification for the odd configuration. J.S. App. 115a-17a (District 74). Where a deviation indicated a clear racial purpose for a district, the majority credited a post-hoc, race-neutral justification found nowhere on the legislative record. *Id*. 93a (District 63). When faced with multiple explanations for a particular deviation, the inquiry ended in favor of legislators' "good faith" and ignored direct evidence of racial purpose. *Id*. 120a (District 77). In short, the majority's baffling, shape-shifting analysis explained away almost every single deviation from traditional districting principles in the Challenged Districts.

This is simply not how courts analyze "circumstantial evidence of a district's shape and demographics." *Miller*, 515 U.S. at 916. The predominance inquiry is not a fencing match in which courts try to parry every blow to a district's configuration with various race-neutral justifications, including ones never mentioned during the redistricting process. Appellants presented—but the majority disregarded—just the kind of circumstantial evidence courts routinely rely on to find predominance. *See, e.g.*, *Alabama*, 135 S. Ct. at 1271; *Shaw II*, 517 U.S. at 905-06; *Page II*, 2015 WL 3604029, at *10-13.

II. THE MAJORITY'S APPLICATION OF ITS NOVEL PREDOMINANCE TEST HIGHLIGHTS AND COMPOUNDS THESE ERRORS

The evidence at trial overwhelmingly demonstrated that race predominated. The majority's failure to properly consider the evidence below only highlights—and further compounds—the fundamental flaws in its predominance test.

A. The Majority Erroneously Disregarded Statewide Evidence of Racial Predominance

While a racial gerrymandering claim "applies district-by-district," *Alabama*, 135 S. Ct. at 1265, statewide evidence is "perfectly relevant," *id.* at 1267, particularly where it reveals the legislature's racial motivation in drawing a "specific set of individual districts" like the Challenged Districts, *id.* at 1266.

At trial, Appellants presented abundant statewide evidence that the General Assembly's racial goals "domina[ted] and control[ed]" the redistricting process from the beginning. *Shaw II*, 517 U.S. at 905 (citation omitted). Pursuant to its invented standard, however, the majority either ignored that evidence or failed to give it the weight required by this Court's precedents.

1. The 55% BVAP Rule

The evidence conclusively established that the General Assembly "prioritiz[ed] mechanical racial targets" by requiring all Challenged Districts—regardless of their unique geography, history, and racial voting patterns—to meet or exceed the same 55% BVAP target. *Alabama*, 135 S. Ct. at 1267. The majority was unequivocal on this score, emphasizing

that the 55% BVAP floor was "fixed," J.S. App. 19a, and "used" to "structur[e]" and "craft[]" each of the Challenged Districts, *id.* 29a; *see also id.* 87a ("[A] 55% BVAP floor was employed by Delegate Jones and the other legislators who had a hand in crafting the Challenged Districts."); *id.* 115a n.40 ("[A] firm 55% BVAP rule was employed[.]").

The majority could hardly find otherwise given the lead mapdrawer's fervent defense of that racial target during the redistricting process, *see*, *e.g.*, JA 299 (Delegate Jones arguing that "the effective voting age population [in the Challenged Districts] needed to be *north of 55 percent*" in order to comply with the VRA) (emphasis added), undisputed testimony from three other participants in the redistricting process that the 55% BVAP target was a primary consideration,[3] and the expert report submitted in *Page II* in which the House's consultant stated that the General Assembly enacted "a House of Delegates redistricting plan with a 55% Black VAP as the floor for black-majority districts," *Page II*, 2015 WL 3604029, at *9 (quoting report). In short, the existence and immutability of the 55% rule is beyond dispute.

As the majority acknowledged, "a substantial amount of time at trial was devoted to questions

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[3] Delegate Jennifer McClellan testified that her "understanding . . . was that each of the majority minority districts would have to have a black voting-age population of at least 55 percent." JA 1606. Similarly, former delegate (now Senator) Rosalyn Dance testified that each of the Challenged Districts "had to be 55 percent or greater." JA 1642. And former delegate Ward Armstrong testified that he understood that "the minority-majority districts would have to be at least 55 percent black voting-age population or . . . the committee would not support the plan." JA 1657.

related to this factual topic." J.S. App. 19a. That is because Appellees zealously denied the existence of a fixed racial floor. *See, e.g.*, JA 1595 ("There wasn't any rule."); JA 1816 (Delegate Jones denying that he had "a fixed number in mind for majority-minority district black voting-age population" or that there "[w]as a hard rule that every majority-minority district would be 55 percent"); JA 1955 (Appellees objecting to demonstrative exhibit referring to the 55% "rule"). And for good reason. Appellees recognized that the application of a fixed, nonnegotiable racial floor to twelve districts across the Commonwealth severely compromised their defense of the Challenged Districts. *See Alabama*, 135 S. Ct. at 1267 ("That Alabama expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria . . . provides evidence that race motivated the drawing of particular lines in multiple districts in the State."); *see also Page II*, 2015 WL 3604029, at *9 (race predominated where legislators "were conscious of maintaining a 55% BVAP floor"); *Harris v. McCrory*, No. 1:13-cv-949, 2016 WL 482052, at *7 (M.D.N.C. Feb. 5, 2016) ("A . . . district necessarily is crafted because of race when a racial quota is the single filter through which all line-drawing decisions are made, and traditional redistricting principles are considered, if at all, solely insofar as they did not interfere with this quota."); *Smith v. Beasley*, 946 F. Supp. 1174, 1210 (D.S.C. 1996) (race predominated where legislature "insist[ed] that all majority-minority districts have at least 55% BVAP").

Indeed, while every "traditional, neutral" criterion gave way at some point in drawing the Challenged Districts, *see, e.g.*, J.S. App. 92a (District 63 not compact); *id*. 121a (District 80 lacks land contiguity

and includes no water crossing); *id*. 128a (District 95 split multiple precincts), the 55% BVAP rule was never once compromised. JA 669; *see also Covington v. North Carolina*, No. 1:15-cv-399, 2016 WL 4257351, at *17 (M.D.N.C. Aug. 11, 2016) ("[E]ven where county groupings or county lines played some role in the eventual shape of the enacted district, what was never compromised was the . . . BVAP target.").

The majority further found that this racial threshold was "applied across the board to all twelve of the Challenged Districts." J.S. App. 25a. Far from conducting an individualized assessment of minority voting opportunities in each district, the legislature viewed all Challenged Districts as a single unit, defined by a single racial metric. *Cf. Miller*, 515 U.S. at 911-12 ("When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'") (quoting *Shaw I*, 509 U.S. at 647). Thus, where one Challenged District had "excess" black voters, those voters were carefully siphoned to surrounding Challenged Districts to boost their BVAP above 55%. *See*, *e.g.*, *infra* II.B.1. In short, the Challenged Districts were treated differently from all others and uniformly among themselves, judged by an "across the board" racial percentage.

The majority conceded that this Court's precedent "could not be clearer that use of racial BVAP floors constitutes . . . significant evidence . . . of predominance," J.S. App. 30a, and that use of a "fixed racial threshold can have profound consequences for the Court's predominance . . . inquir[y]," *id.* 19a. But the majority failed to give that evidence the weight it

deserved. In fact, the use of a fixed racial threshold played almost no role whatsoever in the majority's analysis. *See*, *e.g.*, *id.* 107a (District 69: 55% BVAP floor "is largely irrelevant"); *id.* 114a-15a (District 71: existence of a 55% BVAP floor "does not disturb" predominance finding based on "traditional, neutral districting principles"); *id.* 127a (District 92: no mention of 55% BVAP floor). The majority's approach effectively nullified the impact of the undisputed racial threshold, warranting reversal as a matter of law.

2. House Criteria

Before any redistricting plans were introduced, the House Committee on Privileges and Elections adopted official criteria to govern the redistricting process. *See* JA 36-38. The second criterion after "Population Equality," titled "Voting Rights Act," requires that "[d]istricts shall be drawn" to avoid "the unwarranted retrogression or dilution of racial or ethnic minority voting strength." JA 36. All other factors—including compactness, incumbency, and "political beliefs"—are subordinate to that prime directive, as the General Assembly decreed that this factor "shall be given priority in the event of a conflict among the criteria." JA 37-38.

The predominance inquiry asks whether "the legislature 'placed' race 'above traditional districting considerations.'" *Alabama*, 135 S. Ct. at 1271 (citation omitted). That is precisely what the House Criteria do. Indeed, these criteria are virtually indistinguishable from the redistricting guidelines described in *Alabama*, which also listed "compliance with . . . the Voting Rights Act" as the second most important criterion after population equality. *Id.* at 1263.

The majority found that the House criteria "do[] not lend any weight in the predominance balance." J.S. App. 73a. But, as in *Alabama*, the General Assembly's prioritization of VRA compliance is illuminating because of the *means* the General Assembly used to achieve that objective. *See Alabama*, 135 S. Ct. at 1263 ("Alabama believed that, to avoid retrogression under § 5, it was required to maintain roughly the same black population percentage in existing majority-minority districts.").

Here, the 55% BVAP floor was used as a proxy for VRA compliance. *See* J.S. App. 19a ("[T]he 55% BVAP figure was used . . . in assessing whether the redistricting plan satisfied constitutional standards and the VRA[.]"); *id.* 87a (delegates believed the 55% BVAP floor was "necessary to avoid retrogression under federal law"). In fact, even the majority acknowledged that "if evidence is provided that demonstrates legislators held a false belief that certain artificial criteria — such as fixed BVAP floor [sic] — were necessary to comply with federal law, then statements by those particular legislators regarding compliance are relevant evidence in the predominance inquiry." *Id.* 73a-74a.

Remarkably, however, the House Criteria are given no weight in the analysis. This reflects the majority's erroneous fixation on circumstantial evidence of a district's appearance to the exclusion of all else, including direct evidence that the legislature prioritized a "false" understanding of the VRA.

3. Virginia's Preclearance Submission

Virginia's preclearance submission provided further evidence of race's central role in the redistricting process. In its "Statement of Minority Impact," JA 541,

Virginia identified the General Assembly's two racial goals: (1) "maintain[ing] 12 black majority districts . . . despite demographic changes," and (2) ensuring that "[a]ll 12 black majority districts were maintained . . . with greater than 55% black VAP," JA 600.

Courts have found that race predominated where, as here, a preclearance submission indicates legislative intent to achieve a fixed number of race-based districts. *See Bush*, 517 U.S. at 960 (submission noted "three new congressional districts should be configured in such a way as to allow members of . . . minorities to elect Congressional representatives") (citation omitted); *Shaw II*, 517 U.S. at 906 (submission described legislature's "*overriding* purpose . . . to create two congressional districts with effective black voting majorities") (citation omitted). Here, not only did the General Assembly determine in advance that there would be twelve majority-minority districts, it determined that those districts would achieve a specific racial target. *See Covington*, 2016 WL 4257351, at *13 ("[T]he overriding priority of the redistricting plan was to draw a predetermined race-based number of districts, each defined by race.").

The majority, however, *made no mention* of this evidence. Its failure to even consider direct evidence of racial predominance such as this warrants reversal.

4. Delegate Jones' Statements

Perhaps the most telling direct evidence of racial predominance comes from Delegate Jones, the "principal crafter" of the Challenged Districts. JA 1812. Delegate Jones often emphasized the primacy of race during the redistricting process. For example, he declared that "*the most important thing*[]" to him in drawing the Enacted Plan—not counting population

equality—was VRA compliance. JA 276 (emphasis added); *see also* Pls.' Ex. 15 at 11 ("Number 2 is the Voting Rights Act . . . . This insures that we will . . . maintain the number of existing majority/minority districts, and in these districts maintain the level of minority voting strength[.]"). At trial, Delegate Jones confirmed that his efforts at VRA compliance "trumped everything" except population equality. JA 1923-25. And as noted, Delegate Jones understood "VRA compliance" to mean "meeting or exceeding a fixed racial threshold in all Challenged Districts." *See* J.S. App. 19a, 87a.

Perplexingly, the majority refused to "accept the explanation of the legislation's author as to its purpose," *Page II*, 2015 WL 3604029, at *10, omitting this significant evidence from its predominance analysis.

5. Subordination of Traditional Districting Criteria

In contrast to the General Assembly's steadfast commitment to the 55% BVAP rule, traditional, neutral districting principles were sacrificed time and again. Appellants provided undisputed evidence showing that, together, the Challenged Districts deviated from traditional criteria more frequently and more drastically than the remaining 88 districts.

For instance, whereas the Enacted Plan as a whole is slightly less compact than the Benchmark Plan based on average Reock scores, the average compactness of the Challenged Districts dropped five times as much as that of the other 88 districts. JA 627; J.S. App. 90a-91a. *See Miller*, 515 U.S. at 913 (compactness "may be persuasive circumstantial evidence that race . . . was the legislature's dominant

and controlling rationale in drawing its district lines") (citation omitted).

The Enacted Plan also increased county boundary and Voting Tabulation District ("VTD") splits in the areas covered by the Challenged Districts. JA 629. Notably, whereas the Benchmark Plan split only 174 VTDs, the Enacted Plan splits 236. *Id*. Among the Challenged Districts, the number of VTDs split jumped from 30 to 52, a 73% increase, for an average of 4.3 split VTDs per Challenged District. *Id.* The remaining 88 districts, by comparison, saw a 25% increase in the number of split VTDs, yielding an average of 2.0 split VTDs per district. JA 630. *See Miller*, 515 U.S. at 908 (division of political subdivisions in "the plan as a whole" may be evidence of racial predominance).

These undisputed facts, either shrugged off or ignored by the majority, strongly suggest that the Challenged Districts were treated differently than all other districts.

6. Racial Sorting

Appellants' demographic evidence, moreover, demonstrated that the General Assembly resorted to extensive racial sorting to ensure that all of the Challenged Districts met the predetermined racial threshold. *See Miller*, 515 U.S. at 917 (when district's shape is considered "in conjunction with its racial and population densities, the story of racial gerrymandering . . . becomes much clearer"). There is no dispute that the BVAP of VTDs moved into the Challenged Districts is significantly higher (by at least 17 percentage points) than the BVAP of VTDs moved out of the Challenged Districts. JA 633-43. *See Alabama*, 135 S. Ct. at 1266-67 (discussing evidence

"that the legislature . . . deliberately moved black voters into . . . majority-minority districts . . . to prevent the percentage of minority voters in each district from declining."). The partisan differential, meanwhile, was less than half that amount. JA 637-38. Moreover, the average BVAP of VTDs moved among the Challenged Districts is 26 percentage points higher than the BVAP of VTDs moved out of the Challenged Districts. JA 639. Appellants thus presented undisputed evidence that the General Assembly swapped low BVAP areas for high BVAP areas to ensure all Challenged Districts met the 55% BVAP target, *see* JA 633-43—precisely the kind of evidence credited in *Alabama*, 135 S. Ct. at 1266-67.

But the majority brushed aside the glaring demographic differences between the (largely African-American) populations moved into—and the (largely white) populations moved out of—the Challenged Districts. It concluded that the excision of a significant number of white voters in exchange for a significant number of black voters does not "provide evidence that changes to the district were based on race" *unless* "a district exhibits unexplained deviations from neutral principles and the population changes for that district reflect 'remarkable feats' of racial math." J.S. App. 66a n.20 (quoting *Alabama*, 135 S. Ct. at 1271). In other words, the majority believes the type of demographic evidence *Alabama* highlighted is irrelevant unless the relative number of African-American and white voters swapped between districts mirrors the lone example provided in *Alabama*. This Court cannot have intended such a literal reading in exemplifying what constitutes "considerable evidence" that racial goals impacted district lines. *Alabama*, 135 S. Ct. at 1271.

B. The Majority Systematically Disregarded the Role of Race in Structuring Individual Districts

The district-specific evidence confirms that race predominated across all Challenged Districts, and provides concrete illustrative examples of the many ways in which the General Assembly's race-driven approach had a "direct and significant impact" on each Challenged District. *Alabama*, 135 S. Ct. at 1271. The majority's holding to the contrary exposes the deep-seated errors in its racial predominance test, which neutralizes direct evidence of racial motives and exonerates race-based districts where district lines happen to advance any other conceivable goal.

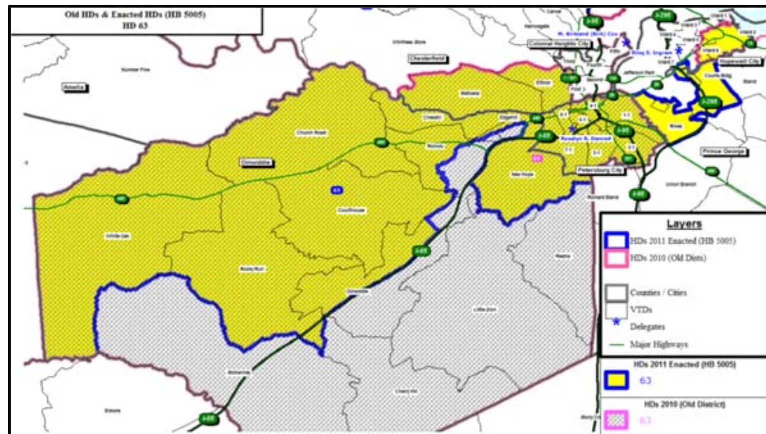
1. Districts 63 and 75

Delegate Roslyn Tyler, who represented District 75 during the redistricting process, asked Delegate Jones to increase the number of African-American voters in her district. J.S. App. 102a-03a. He agreed, even though it required "drastic maneuvering" to comply with her request. *Id.* 100a.

The most drastic change involved District 63, which borders District 75 to the north. At the time, District 63 contained all of Dinwiddie County. To increase BVAP in District 75, Delegate Jones reconfigured the border between Districts 63 and 75, slicing Dinwiddie County in half and moving high BVAP areas in the southern part of the county out of District 63 and into District 75. *See* Fig. 1 (JA 1557).

At the same time, Delegate Jones added a new, snake-like appendage to the northeastern corner of District 63, which winds through Prince George County, picking up high BVAP areas there and around the city of Hopewell. *See* Fig. 1.

Figure 1: District 63



The Dinwiddie County split indisputably was motivated by race. Former delegate (now Senator) Rosalyn Dance, who represented District 63 at the time, testified that Delegate Jones chopped Dinwiddie County in half "to try to get [District 75's] number . . . [o]f African American voters up to 55 percent." JA 1646. Circumstantial evidence tells the same story. Under the Enacted Plan, the northern Dinwiddie County VTDs of White Oak, Rocky Run, Courthouse, and Church Road remain in District 63. On average, the BVAP of those VTDs is 21%. By contrast, the southern Dinwiddie County VTDs of McKenney, Cherry Hill, Little Zion, and Reams, all of which were moved into District 75, have an average BVAP of 35%. *See* JA 919-20, 1481. As this shows, heavily African-American areas in Dinwiddie County were systematically moved out of District 63 and moved into District 75 to increase the BVAP of District 75.

Based largely on the "avowedly racial" motivation behind the Dinwiddie County split, J.S. App. 93a, the majority correctly held that "race was the

predomina[nt] criterion driving the formation and configuration of [District] 75." *Id.* 102a; *see also id.* 115a-16a, 118a. Remarkably, however, the majority reached a different conclusion with respect to the other half of the *same split*, inexplicably holding that race was *not* the predominant purpose of the Dinwiddie County split in District 63.

Those divergent holdings defy common sense. If Dinwiddie County was split to move African-American voters out of District 63 and into District 75 (as the majority found it was), and if the purpose of that split was "avowedly racial" (as the majority found it was), then the split is—and must be—equally indicative of racial predominance in both districts. *See*, *e.g., Miller*, 515 U.S. at 916 (race predominates when it "motivat[es] the legislature's decision to place a significant number of voters within *or without* a particular district") (emphasis added); *Shaw I,* 509 U.S. at 649 (race predominates when the legislature "separate[s] voters into different districts on the basis of race"). Indeed, elsewhere in its opinion, the majority recognized that "[a] district formed primarily to eject black voters would employ the same racial classification as a district formed primarily to include black voters." J.S. App. 116a.

The majority attempted to paper over this fundamental incoherence by reasoning that the Dinwiddie County split caused certain "sub-deviations" within District 63 that are attributable to non-racial factors, and that the consideration of those non-racial factors somehow outweighs the overriding racial purposes of the split. J.S. App. 93a-96a. This strained reasoning fails for at least three reasons.

First, District 63 and District 75 border each other. Thus, District 75 includes mirror images of the same

"sub-deviations." But those sub-deviations play no role in the majority's District 75 analysis or its conclusion that there is "no ambiguity" about the predominance of race in District 75. J.S. App. 99a. In contrast, the majority holds that the very same sub-deviations *preclude* a finding of racial predominance in District 63. The majority never explains its inconsistent treatment of the same lines. *See id.* 143a (Keenan, J., dissenting) (explaining majority should have subjected District 63 to strict scrutiny because "implementation of the 55% racial quota had a marked impact on the configuration of both Districts 63 and 75").

Second, the fixation on sub-deviations further illustrates the flaws in the majority's novel predominance test. Because the purpose behind the Dinwiddie County split was "avowedly racial," J.S. App. 93a, there was no need to go hunting for explanations for every sub-deviation within that split. Those sub-deviations would not have occurred but for the "avowedly racial" decision to split Dinwiddie County in the first place. *See Alabama*, 135 S. Ct. at 1271 (race predominates when race has a "direct and significant impact on the drawing of at least some of [the challenged district's] boundaries"). The mere fact that non-racial factors may have been considered when implementing an overriding racial goal is irrelevant. *See, e.g.*, *id.* at 1263 (race predominated when legislature "sought to achieve numerous traditional districting objectives," but "placed yet greater importance" on avoiding retrogression).

Third, even assuming that the District 63 sub-deviations are relevant (they are not), the majority's analysis does not withstand scrutiny. The majority identifies only one possible neutral explanation for the first sub-deviation (the split of Dinwiddie precinct):

"the artificial border provided by I-85 *may* provide a clear boundary to voters and candidates alike" who "wish to know their House district." J.S. App. 93a (emphasis added). But as the majority conceded, the use of I-85 was "not listed among the redistricting criteria, which undermines its explanatory value as a districting criterion." *Id.*; *see also Alabama*, 135 S. Ct. at 1271-72 (disparaging use of highway line as evidence that race did not predominate where highways were "not mentioned in the legislative redistricting guidelines"). Moreover, "there was no evidence that this precinct is comprised of distinct communities on either side of the highway." J.S. App. 93a.

Nonetheless, the majority "decline[d] to identify any particular rationale for this 'sub-deviation'" in the "absence of any further explanation by the Intervenors or the Plaintiffs" for this post-hoc justification. J.S. App. 93a. Not only is this a misapplication of the law, it is a remarkable misstatement of the record. Appellants *did* provide an explanation for the precinct split: It was part of the "avowedly racial" split of Dinwiddie County. *Id*.

The majority's analysis of the new appendage on District 63's northeastern corner is equally flawed. There is no real dispute about the inspiration and overriding purpose of that tentacle: It was added to replace African-American voters that were lost when Delegate Jones split Dinwiddie County, thereby ensuring that District 63 would comply with the 55% BVAP rule. As the majority put it: "Not only did [the new appendage] help satisfy the 55% threshold in District 75, it also helped maintain a substantial African-American population in District 63." J.S. App. 94a. Former delegate Dance confirmed that the

appendage allowed District 63 to "pick[] up parts of Prince George . . . to get more African-Americans" and also "picked up the concentration of African-Americans in Hopewell[.]" JA 1647-49. The circumstantial evidence tells the same story. The appendage reaches out to grab areas around Hopewell (Wards 2, 6, and part of 7) well over 60% BVAP. In contrast, the appendage avoids other areas around Hopewell (Wards 1, 3, 4, 5, and part of 7) with a mere 21.7% BVAP. *See* JA 674, 921-22.

Nonetheless, the majority held that the new appendage does not suggest racial predominance because it *also* "advanced other criteria, both neutral and political," J.S. App. 94a, and because plaintiffs failed to prove that the "racial considerations subordinated *all other criteria*," *id.* 95a (emphasis added). Here again, the result reveals the fundamental flaws in the majority's novel predominance test. The predominance inquiry does not require plaintiffs to disprove every conceivable non-racial explanation for every jot and tittle of a challenged district. And the mere fact that Delegate Jones "addressed [non-racial] interests" in the course of adding a snake-like appendage to capture additional African-American voters "does not in any way refute the fact that race was [his] predominant consideration." *Shaw II*, 517 U.S. at 907.

2. District 69

District 69 has a BVAP of 55.2%. JA 669. It is not happenstance that the district's BVAP is just over the nonnegotiable floor. Delegate Jennifer McClellan, who helped draw the Challenged Districts, offered unrebutted testimony that District 69 was drawn to comply with the 55% BVAP target. *See* JA 1603.

Circumstantial evidence confirms that non-racial factors were considered in District 69 "only after the race-based decision [to achieve 55% BVAP in all the Richmond area Challenged Districts] had been made." *Shaw II*, 517 U.S. at 907. Delegate Jones expanded the district outward to incorporate additional African-American voters to replace those that had to be removed from the district to compensate for District 71's insufficient BVAP. *See* JA 1557 (areas added); JA 1338 (BVAP of areas added); JA 674-75.

Yet the majority deemed Delegate Jones' reliance on the 55% rule "largely irrelevant." J.S. App. 107a. Indeed, it suggested that the fact that District 69 was drawn to comply with a non-negotiable racial floor did not even create a factual issue as to whether race predominated. *Id.* 108a n.39.

As with much of the majority's opinion, its analysis of District 69 illustrates the dangers of elevating form over substance. In essence, the majority holds that race could not have predominated in District 69 because the admitted use of a strict racial threshold caused no obvious deformities in district lines. J.S. App. 107a-08a. But bizarre lines are not necessary to prove racial predominance, as this Court has made plain. *See, e.g.*, *Miller*, 515 U.S. at 913 (it is "the presumed racial purpose of state action, not its stark manifestation, that [is] the constitutional violation"); *Covington*, 2016 WL 4257351, at *29 ("[T]he fact that a district is somewhat compact . . . does not foreclose the possibility that race was the predominant factor in the creation of the district.") (citing *Miller* and *Shaw II*).

Furthermore, as explained above, the 55% rule *did* have palpable effects on District 69, including the outward expansion to capture African-American

voters. While Appellees offered post hoc, non-racial explanations for those changes, the legislative record provides them no support. As the majority acknowledged elsewhere in its opinion, a "State cannot district predominantly on the basis of race and then insulate such racial line drawing by pointing to other non-racial goals advanced by the racial sort." J.S. App. 47a.

More fundamentally, the majority ignores that "the quota operated as a filter through which all line-drawing decisions had to pass." J.S. App. 138a (Kennan, J., dissenting). As a result, and as shown by the fact that District 69 barely exceeds the 55% BVAP threshold, every line-drawing decision, regardless of whether it resulted in gross deviations, was "necessarily . . . affected by race." *Id.* The majority's contrary conclusion invites legislative mapdrawers to "mask [their] racial sorting" with similar post hoc justifications. *Id.* 133a (Kennan, J., dissenting).

3. District 70

Delegate McClellan testified that District 70 was drawn to comply with the 55% BVAP rule. *See* JA 1603. And Appellants demonstrated that rule had a direct and significant impact on the district's boundaries. Because District 70 was not underpopulated, *see* JA 669, there was no need to add or remove voters for the sake of achieving population equality. Nevertheless, the Enacted Plan added about 26,000 people and removed about 26,000 people. *See* JA 669. The racial pattern is telling. The BVAP of the areas moved into District 70 was 43.8%, while the BVAP of the areas moved out was 59.9%, JA 672-73—*and all of the areas moved out were moved into other Challenged Districts*, JA 674. Thus, "extra" African-Americans voters were carefully siphoned out of District 70 to ensure that

other Challenged Districts—especially District 71—*also* complied with the 55% BVAP rule. JA 641-42.

The majority made no mention of the glaring racial patterns of this massive and unnecessary population swap. Instead, it reduced the analysis to a beauty contest, content to observe that, "[o]n its face, the district appears coherent and generally compact." J.S. App. 108a. It waved away Delegate Jones' admitted use of a strict racial quota to construct District 70, reasoning that "pursuit of [a specific racial composition] is not the 'predomina[nt]' criterion employed unless it subordinates all others." *Id.* 111a. As such, the majority abdicated its duty to examine the district for a potential constitutional violation in favor of judging a book by its cover.

4. District 71

The evidence of racial predominance in District 71 is extensive. Delegate McClellan, who represented District 71, testified that it was drawn to comply with the 55% BVAP rule. *See* JA 1603 (Delegate Jones instructed "[w]e would have to meet two criteria[:] . . . the one percent population deviation, and . . . a 55 percent [BVAP]").

She offered concrete examples of how racial considerations directly affected the district's boundaries. For example, she had hoped to keep precinct 207, which had been in her district for decades. *See* JA 1612. But because precinct 207 is heavily white, keeping it in District 71 would have dragged the district's BVAP below 55%. *See* JA 1612. As a result, it was moved to neighboring District 68.

Delegate McClellan also testified that she proposed "unsplitting" certain precincts at the request of local election officials. *See* JA 1621-24. But in trying to draw

a map that accomplished that goal, she inadvertently dropped District 71's BVAP below 55%. Delegate Jones therefore rejected her proposal. As she explained to one election official: "I spoke to Chris Jones . . . . Apparently, the changes we discussed . . . would have pushed the [BVAP] in the 71st District down to 54.8%. The target criteria was 55%, *so the change can't be made*." JA 139 (emphasis added).

The circumstantial evidence further demonstrates how race affected the lines. In 2009, Delegate McClellan handily defeated a white challenger with more than 80% of the vote, even though the district's BVAP was only 46.3%. *See* JA 669. Thus, there was no *political* or *legal* reason to increase the BVAP in District 71.

No matter. Delegate Jones insisted that District 71 meet or exceed the same BVAP threshold as every other Challenged District. To accomplish this goal, he removed whiter areas (like precinct 207) and added areas with higher BVAP (like the Ratcliffe precinct and VTDs 604, 701, and 702 on District 71's eastern border). As a result of that intentional racial sorting, the BVAP of areas moved into District 71 was 72.1%, over 50 percentage points higher than the BVAP of areas moved out. JA 672.

Courts routinely hold that this sort of racial sorting indicates racial predominance, especially when it is accompanied by direct evidence of race-based decisionmaking like Delegate McClellan's testimony. *See, e.g., Alabama*, 135 S. Ct. at 1271; *Page II*, 2015 WL 3604029, at *12 ("Tellingly, the populations moved out of the Third Congressional District were predominantly white, while the populations moved

into the District were predominantly African–American.”).

Not so here. The majority simply ignored the stark racial pattern of these population movements.

The majority also went to great lengths to concoct and credit benign explanations for Delegate Jones’ race-based decisions. With respect to precinct 207, the majority credited Delegate Jones’ claim that he moved that heavily Democratic precinct to District 68, represented by Republican Manoli Loupassi, because Delegate Loupassi once served on the Richmond City Council and precinct 207 “had been adjacent to his ward.” JA 1839-41. That self-serving explanation is unsupported by any other evidence. Moreover, it strains credulity to think that Delegate Loupassi wanted Delegate Jones to add a strongly Democratic precinct (which he had not previously represented) to his district simply because it held fond memories. In fact, as Delegate McClellan testified, precinct 207 was removed because keeping it would have dropped District 71’s BVAP below the 55% BVAP target.[4] This predominantly race-based decision imposed a concrete harm on the representational interests of the residents of precinct 207, who were forced to lose their chosen representative because of the color of their skin.

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[4] The majority also offered its own theories about Delegate Jones’ motives in removing precinct 207: “A local resident might wonder why the Fan straddled two House districts, but any observer of the map would *see* that precinct 207 was removed and replaced with precinct 204, making the district more compact.” J.S. App. 113a.

Similarly, in a footnote, the majority explained away Delegate McClellan's testimony about the refusal to "unsplit" certain precincts where doing so would have dropped BVAP in District 71 below 55% because the discussion referred to an earlier version of the House plan. *See* J.S. App. 20a n.7. That misses the point. The testimony definitively demonstrated the extent to which race "was the criterion that . . . could not be compromised" in drawing the Challenged Districts. *Shaw II*, 517 U.S. at 907. Whether these specific precincts ultimately were split or joined together, the fact remains that no districting decision could even be *considered* unless it complied with the 55% BVAP target. That is the very definition of predominance

Here again, the majority's analysis can be boiled down to a simple maxim: only appearances matter. So long as District 71's boundaries *could* be understood in terms of "traditional, neutral districting principles," that was "sufficient . . . to find that these principles were not subordinated to race," and thus that race did not predominate. J.S. App. 114a. That is, the mere existence of potential non-racial explanations is sufficient to negate explicit direct and circumstantial evidence of race-based redistricting.

Even more glaring is the majority's outright dismissal of the 55% BVAP rule—supposedly "significant" direct evidence of racial predominance, J.S. App. 30a—in its analysis of District 71. According to the majority, even if precinct 207 was removed to comply with the racial floor, the district's general conformity with some neutral principles obviates that race-based decision. *Id.* 113a-14a ("[I]f the 55% BVAP goal could be achieved without subordinating neutral principles on the whole, it does not matter what Delegate McClellan's personal preferences were."); *id.*

114a-15a ("HD 71 does not substantially disregard traditional, neutral districting principles, and that is sufficient for the Court to find that these principles were not subordinated to race. The existence of a 55% BVAP floor does not disturb that fact."). The majority's conclusion that race would not predominate even if it motivated the decision to place a significant number of voters within or without District 71 cannot be reconciled with this Court's determination that race predominates when it "motivat[es] the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916.

5. District 74

The majority's finding that race did not predominate in the formation of District 74 once again required careful tip-toeing around the undisputed record evidence.

The direct evidence of racial predominance alone is striking. Delegate McClellan testified that when she consulted with Delegate Jones about how District 74 and the other Challenged Districts in the Richmond area would be drawn, he informed her that any suggestions must yield four Richmond-area districts, each with a BVAP of 55% or higher. JA 1603; *see also Shaw II*, 517 U.S. at 907 (race predominates where "[r]ace was the criterion that, in the State's view, could not be compromised," such that traditional districting principles were applied "only after the race-based decision had been made"); *Covington*, 2016 WL 4257351, at *13 ("[T]he overriding priority of the redistricting plan was to draw a predetermined race-based number of districts, each defined by race.").

That race-based motivation is plain on the face of District 74. As the majority conceded, District 74 "certainly does not earn high marks in a qualitative predominance analysis." J.S. App. 117a. The district's non-compact, "ax-shaped" appearance alone "arouses some suspicion," *id.* 115a, to say the least; indeed, it is the second least compact district in the entire plan. JA 667.

Moreover, despite the fact that District 74 was not underpopulated, it underwent a massive population shift exhibiting a stark racial pattern, wherein "much of the black population ceded from HD 74 went to other Challenged Districts, such as HD 63 and HD 71." J.S. App. 116a. Delegate Dance testified that the reason the African-American population in Hopewell, for example, was moved from District 74 to District 63 was to replace the African-American voters that District 63 lost to District 75. *See* JA 1641; *see also* JA 1646-48; *supra* II.B.1. African-American voters were thus carefully shuffled among the Challenged Districts in the Richmond area to ensure that each district satisfied the nonnegotiable racial target that defined all of these districts "across the board," J.S. App. 25a.

The majority goes so far as to laud "the shifting of black population into HD 63 and HD 71" from District 74 because it supposedly "largely improved HD 74's compliance with neutral criteria, such as contiguity and compactness." J.S. App. 117a. This is both irrelevant and untrue. District 74's compactness did *not* improve, and the majority elsewhere conceded as much. *See id.* 115a (District 74's Reock and Polsby-Popper scores "remained almost identical"). Besides, the suggestion that neutral improvements were the legislature's lodestar is flatly contradicted by the fact

that the alterations made to District 74 resulted in drastic reductions of compactness in surrounding districts. For example, eliminating the river crossing in District 74 moved the predominantly African-American area of Hopewell into District 63, causing that district to suffer the greatest compactness reduction in the Enacted Plan. JA 667; *see also Covington*, 2016 WL 4257351, at *29-30 (finding racial predominance where, although certain districts were "not as sprawling or bizarre in shape as many of the other challenged districts," they compromised compactness and contiguity of surrounding districts).

Ultimately, the majority's myopic focus on neutral criteria misses the forest for the trees: the legislature meticulously reassigned African-American voters between and among the Richmond-area Challenged Districts to ensure each complied with a single, race-based metric. While that overriding racial goal affected the districts differently, it affected them all equally. The undisputed racial sorting of District 74 demands strict scrutiny.

6. District 77

Despite the fact that African-American voters in District 77 have easily elected their preferred candidates for years, JA 680, the BVAP of District 77 increased from 57.6% to 58.8%. JA 669. This complied with incumbent Delegate Lionel Spruill's specific request that his district contain at least 55% BVAP, JA 1999, and explains his praise on the House floor for Delegate Jones' plan, JA 348-49 ("What other plan, what other group has come to the black Caucus and [said], 'Hey, we have a plan to increase the black minority votes. We have a plan to make sure that you're safe.'").

District 77 is not compact. Its "jagged and elongated" shape is constitutionally "suspect." J.S. App. 118a. Indeed, a large chunk of District 77 juts west so that "half of the district is thrust so far into HD 76 as to nearly sever it in half." *Id.* The odd configuration of District 77 is directly attributable to race. For instance, almost every VTD included in the western appendage of District 77 has an exceedingly high BVAP, including Hollywood (96%), Southside (89.9%), and White Marsh (87.8%). *See* JA 925-26. Tellingly, the only VTD *dropped* from the western part of District 77 was Airport, with a mere 31.7% BVAP. *See id.*

The racial composition of the populations added to the eastern part of District 77 further demonstrates racial predominance. District 77 was underpopulated by only 3,000 people, yet the Enacted Plan moved 21,308 persons into and 18,608 persons out of the district. *See* JA 669. More heavily African-American VTDs were systematically added to District 77, whereas predominantly white VTDs were systematically moved to majority-white districts. *See* JA 672 (reflecting over 18 percentage point difference in BVAP of areas moved into and out of District 77).

Remarkably, the majority found that Appellants' proffered evidence was too "skimpy" to draw any conclusion about "whether race, politics, or other criteria predominated in the formation of HD 77." J.S. App. 119a-20a. This conclusion demonstrates how the majority's amorphous predominance test was wielded to explain away both direct and circumstantial evidence. The district's "low compactness score" and lack of land contiguity or water crossings, *id.*, combined with the racial demographics of its deviations from neutral districting principles, *see*

supra, indicate that racial considerations dictated district lines. The district's "attainment of the 55% BVAP floor" mandated of every Challenged District, *id.* 120a, and specifically urged by the incumbent delegate, confirms that race predominated. The majority's suggestion that the circumstantial evidence could be equally explained by "race, politics, or other criteria," *id.*, defies its own recognition that the undisputed racial threshold will "lend support to the argument that race, rather than politics, can be attributed for particular deviations from neutral principles," *id.* 73a. While the majority opinion purported to appreciate the "profound consequences" of a "fixed racial threshold," *id.* 19a, this "significant" evidence of racial predominance was of no consequence at all in its analysis of District 77.

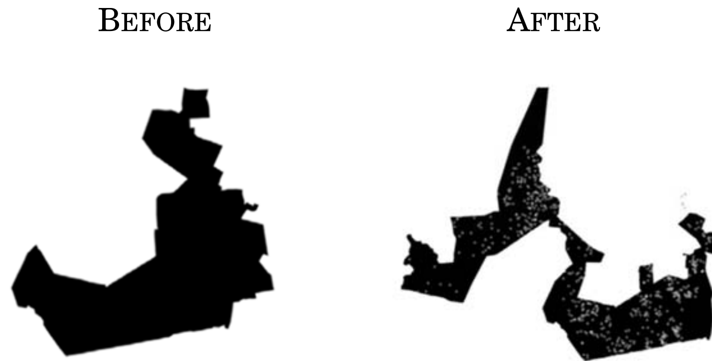
7. District 80

The majority's discussion of District 80 begins with detailed descriptions of the ways in which race predominated in the district's construction. Then, just as the case for racial predominance has been plainly established, the majority's discussion abruptly veers off in search of other considerations that could explain away that evidence. In wresting a conclusion that race did not predominate from the unruly record, the majority once again erred.

Like the other Challenged Districts, District 80 was subject to the 55% BVAP rule. As a result, its existing BVAP of 54.4% was unacceptable, even though District 80 had been represented by African-Americans' candidates of choice for "as long as [Delegate Jones] could remember." JA 1973. Accordingly, the BVAP of District 80 was increased to 56.3%. JA 669.

This was no easy feat. The district is "quite unusually configured," "makes little rational sense as a geographical unit," and suffered from a substantial drop in compactness in the Enacted Plan, resulting in the highest Schwartzberg score of all the Challenged Districts. J.S. App. 121a. Indeed, a cursory glance at District 80 before and after redistricting reveals its blatant deviations from neutral principles.

FIGURE 2: DISTRICT 80 BEFORE AND AFTER REDISTRICTING



The Enacted Plan increased the number of county and city splits in District 80 and replaced over 40% of the district's core. J.S. App. 121a. Additionally, "the district is split by water *twice* without any apparent crossing." *Id.*

These deviations are explainable entirely—and only—on the basis of race. The western part of District 80 "winds its way around low BVAP precincts like Silverwood (14.9%), Churchland (8.3%), and Fellowship (14.2%) to capture high BVAP precincts such as Yeates (56.3%) and Taylor Road (48.8%)." J.S. App. 121a. As the majority recognizes, "[c]onsidering

the district's attainment of the BVAP floor, this is the kind of detailed explanation that might lead the Court to find that racial considerations subordinated all others." *Id.*

But not so here. Instead the majority embarked on a search for "other 'dominant and controlling' considerations." J.S. App. 122a. After an exhaustive effort, it ultimately concluded that it was "just as likely" that precincts were selected for partisan considerations. *Id.* 123a. In fact, that conclusion is irreconcilable with the record evidence. Appellants' expert demonstrated that race was a stronger predictor than partisan composition in explaining which VTDs were placed into the Challenged Districts. *See* JA 644-45. In particular, while the BVAP in District 80 was increased, its Democratic vote share was decreased. JA 672-73. Further, the likelihood that a VTD was included in either District 77 or District 80 was strongly and positively correlated with BVAP, but the correlation with Democratic vote share was negative and not statistically significant. JA 676.

Even assuming that race and politics could equally explain District 80's odd configuration, the majority never explained its conclusion that incumbency protection and politics predominated over race where evidence of a racial floor can be used to "buttress a plaintiff's argument that race was the primary reason for a deviation where race and politics would otherwise seem equally plausible." J.S. App. 73a. Once again, the majority's district-specific analysis defies its own predominance test.

8. District 89

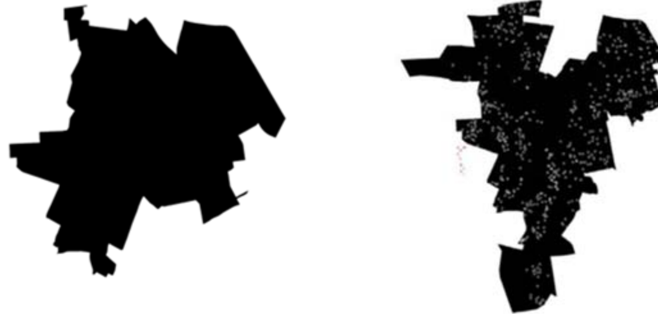
Although African-American voters in District 89 have easily elected their preferred candidate for years,

JA 680, the BVAP of District 89 was increased from 52.5% to 55.5%, JA 669. This was hardly an accident borne of neutral districting principles. Indeed, according to Delegate Jones, Delegate Alexander, who represented the district, advocated for applying the "55 percent aspirational threshold" in his district. JA 1999.

District 89 was accordingly reconfigured to satisfy this nonnegotiable criterion. The district's compactness scores plummeted by over 30%, J.S. App. 124a, largely as a result of several sprawling appendages and a new river crossing created to pick up one lone predominantly African-American population of voters across the Elizabeth River. JA 1701-02.

FIGURE 3: DISTRICT 89 BEFORE AND AFTER REDISTRICTING

BEFORE AFTER



The racial demographic evidence confirms that these deviations served the mapdrawers' overarching racial goal. Most telling, the district leapt across the water to encapsulate the Berkley VTD, with *95% BVAP*; in other words, of the 2,361 eligible voters in this precinct, just 63 are white. JA 923-24.

The majority was again unmoved by compelling evidence of racial sorting. For example, the majority explained away the fact that the Berkley VTD "contains a high BVAP percentage," by positing that it was added to the district because it "is also relatively close to Delegate Alexander's residence." J.S. App. 125a. This is, once again, irrelevant and untrue. The majority did not suggest that this drastic deviation was required in order to *capture* the incumbent's residence, only to encompass areas "relatively close" to his residence. In fact, Delegate Alexander lives in the "mainland" part of District 89, on the opposite side of the river from the Berkley VTD. *See* JA 1562. Similarly, the majority later points to "a funeral home owned by Delegate Alexander" to justify the deviation in District 89's northern border. J.S. App. 125a. Based on this evidence, the majority concluded that "the district's composition is predominantly attributable to traditional, neutral principles," *id.* 125a, implicitly adding proximity to incumbent residences and incumbent-owned funeral homes to the long list of purportedly "traditional, neutral principles" *id.*, that conveniently "form a 'backstop' for one another when one criterion cannot be fully satisfied, thus ensuring that neutral criteria are still predominating in the balance," *id.* 59a-60a.

Just as District 89 meanders to capture African-American voters, the majority's predominance analysis twists and turns to avoid the inexorable conclusion that race predominated. Ultimately, the record reveals no plausible basis for adding the Berkley VTD other than race. *See Alabama*, 135 S. Ct. at 1271 (race predominates when race has a "direct and significant impact on the drawing of at least some of [the challenged district's] boundaries"). This area provided just enough African-American voters to

nudge the district's BVAP over the fixed and nonnegotiable racial threshold. No more is needed to find that race predominated.

9. District 90

District 90 was drawn with a BVAP of 56.6%, thus meeting the General Assembly's preordained BVAP floor. JA 669. The record demonstrates that District 90 was—like District 70 in the Richmond area—used as a feeder district to increase the BVAP of surrounding Challenged Districts; specifically, neighboring District 89. The planned large scale dissection of African-American populations necessitated a conversation with Delegate Algie Howell, who represented District 90 at the time, about the 55% BVAP mandate. JA 2000.

District 90 was underpopulated by 9,000 people at the time of the redistricting process, but the General Assembly nevertheless removed 18,469 people from the district. *See* JA 669. Those sweeping alterations exhibited a now familiar racial pattern. The BVAP of the areas moved out of District 90 and into other Challenged Districts was over 15 percentage points higher than the BVAP of areas moved out of District 90 and into non-Challenged districts. JA 674. This siphoning off of African-American voters into other Challenged Districts is particularly stark with respect to District 89. For example, with a BVAP of 92%, the Union Chapel VTD was moved from District 90 to District 89, adding 1,510 African Americans (and 62 Whites) to District 89. JA 923-24.

Moreover, while the majority is quick to point out that the number of split VTDs in District 90 remained the same, J.S. App. 125a, it failed to recognize that new District 90 split *different* precincts than its

predecessor district. For example, in the Benchmark Plan, the predominantly African-American Brambleton VTD (95.7% BVAP) was kept whole in District 90. After redistricting, the Brambleton VTD was split between Districts 89 and 90 in order to increase District 89's BVAP above the 55% BVAP threshold. JA 923-24.

The majority makes much of the fact that District 90's southern appendage into Virginia Beach contains a lower BVAP than other parts of the district. *See* J.S. App. 126a. This fact must be viewed, however, within the context of the General Assembly's larger racial goals, which, in the Norfolk area, primarily meant increasing District 89's BVAP to meet the threshold, and maintaining District 90's BVAP at approximately the same level as in the Benchmark Plan. In other words, District 90 did not need to capture exceedingly high BVAP areas to satisfy the racial threshold.[5] Rather, the mapdrawer's primary focus was to shift African-American voters from District 90 to District 89. By viewing District 90 in a vacuum and analyzing it only based on its apparent "deviations" in physical appearance, the majority ignores the undisputed evidence of racial sorting that caused mapdrawers to place a "significant number of voters . . . without" the district, *Miller*, 515 U.S. at 916.

[5] In fact, the Virginia Beach precincts the majority identifies as having "some of the lowest BVAP percentages in the entire district," J.S. App. 126a, included College Park (48% BVAP) and Davis Corner (43% BVAP), JA 927-28. Thus even the precincts with the "lowest BVAP percentages" in District 90 had BVAPs sufficient to ensure the district did not fall below the "fixed racial threshold." J.S. App. 19a.

10. Districts 92 and 95

On the Peninsula, the General Assembly took two relatively compact districts, Districts 92 and 95, and did radical surgery to keep their BVAP percentages elevated above the 55% racial threshold.

Although African-American voters in both districts had easily elected their preferred candidates for years, *see* JA 680, Delegate Jones insisted on maintaining high BVAP percentages in these districts. When asked why majority-white districts in the area experienced a "decrease among blacks," Delegate Jones' answer was simple: "So what had to happen, the population had to be picked up, *had to try to maintain the voting strength for the black voting percentage*." JA 352 (emphasis added). In other words, the BVAP of surrounding districts was drained to "maintain" the BVAP of Districts 92 and 95. The record in this case bears that out.

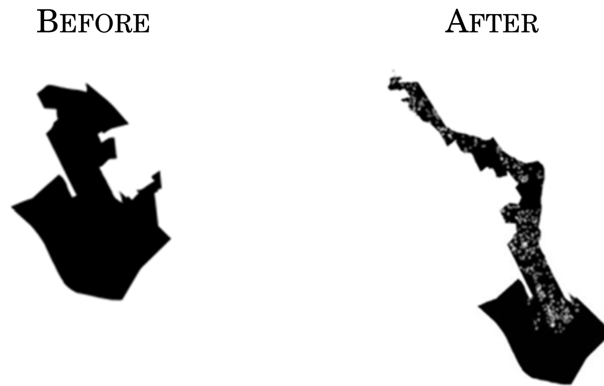
District 92 was substantially underpopulated at the start of redistricting. *See* JA 669. The Peninsula's geography made it hard for the General Assembly to achieve its racial goals. District 92 could not expand to the north, which had substantially lower BVAP. *See* JA 1491. So it had to move to the west in order to absorb heavily African-American portions of District 95 in order to stay above 55% BVAP. As a result, District 95 needed to be extended artfully to the northwest.

The boundaries of District 92 divide high-BVAP areas from lower-BVAP areas to the north and southeast. *See* JA 1491. And there is clear statistical evidence of racial sorting. The BVAP of areas moved *into* District 92 was 47.3%; the BVAP of areas moved *out* was 36.8%. JA 672. While District 92 may not

appear to be as offensive to the eye as other Challenged Districts, this race-based shuffling of voters had profound effects on District 95.

District 95 went from a relatively compact district in the Benchmark Plan to the least compact district in the entire enacted map, with a Reock score of 0.14. JA 625-27. Redistricting increased the district's number of VTD splits from one to six. J.S. App. 128a. The district's shape became extremely bizarre, as it "encompass[es] the full width of Newport News but soon departs from any observable neutral criteria." *Id*. Indeed, Appellees essentially conceded that District 95 was not drawn in accordance with neutral criteria. *Id*. 129a.

FIGURE 4: DISTRICT 95 BEFORE AND AFTER REDISTRICTING



Contrary to the evidence, however, the majority concluded that partisan considerations dominated in the drawing of the district. To arrive at this conclusion, the majority conveniently ignored the overwhelming evidence of racial sorting that took place in deciding whether to place voters within District 95 or its

neighboring non-Challenged districts. For example, the majority credited Appellees' argument that District 95 divided Newport News in such a way as to tilt District 93 in favor of Republicans. But the record shows that Newport News was divided along racial lines, with District 95 inheriting the high BVAP areas of the city while the predominantly white areas went to Districts 93 and 94. *See* JA 944 (showing the differences in racial densities of areas included in District 95 as compared to surrounding districts). By contrast, the partisan differences between the Newport News precincts that were included in District 95 and those included in neighboring non-Challenged districts were not nearly as stark. *See* JA 729 (BVAP differential is 55 percentage points, while partisan differential is 35 percentage points).

What is more, District 95 extends a long arm up in the Peninsula—splitting the Reservoir, Epes, Denbigh, Jenkins, Palmer, and Deer Park VTDs—and including only the heavily African-American portions of those split VTDs. JA 729-30 (average BVAP of VTD splits included in District 95 was 44.5% while the corresponding statistic for Districts 93 and 94 was 38.9%). The partisan composition of these VTD splits, meanwhile, was nearly identical, if not a reflection that slightly *more* Democrats were included in (non-Challenged) Districts 93 and 94 than in District 95. JA 730. Indeed, while there is an extremely high correlation between a VTD's BVAP and its likelihood of inclusion in Districts 92 or 95 in Hampton, Democratic vote share is negatively correlated with inclusion in these districts. JA 678.

Even if one assumed—in defiance of the record evidence—that race and partisan performance equally explained District 95's configuration in the abstract,

the existence of the 55% racial floor tips the scale in favor of a finding that race, not politics, predominated. J.S. App. 72a. Even if the legislature managed to attend to political goals along the way, its nonnegotiable 55% BVAP floor in all Challenged Districts could not and would not be sacrificed.

Finally, the majority rested its conclusion on the fact that District 95 bypasses high BVAP areas in the southern part of the Peninsula in favor of high BVAP areas in the northern part of the district. The reason for this is simple: the high BVAP areas in the south were included in District 92 to ensure that its BVAP reached the requisite threshold. The General Assembly had to look north for populations of voters that would keep District 95's BVAP sufficiently elevated. JA 674, 678. Once again, the majority failed to appreciate the complex interplay between the Challenged Districts, which were yoked together based on a single racial metric.

III. THE MAJORITY ERRED IN HOLDING THAT DISTRICT 75 WAS NARROWLY TAILORED

As noted above, the majority concluded (correctly) that race was the predominant purpose of District 75. But the majority concluded (incorrectly) that Delegate Jones' use of race was narrowly tailored, and hence lawful.

As an initial matter, the majority's legal framework for evaluating whether a district is narrowly tailored is dead wrong. The narrow tailoring inquiry is simple: did the legislature have a "'strong basis in evidence' in support of the (race-based) choice that it has made"? *Alabama*, 135 S. Ct. at 1274 (citation omitted). The

majority cites this standard in the first paragraph of its analysis. J.S. App. 80a.

Then, over the next six pages, it proceeds to invent a new standard of its own, ultimately concluding that "part of showing that a district is narrowly tailored" to avoid retrogression "entails showing that the district is one that a reasonable legislator could believe entailed only reasonable and minor deviations from neutral districting conventions." J.S. App. 83a-84a. That is, purely race-based and otherwise unjustified deviations from districting principles are excused as long as a reasonable legislator "could believe" those deviations are not "substantial." *Id.* 81a, 84a. This framework once again reflects the majority's myopic—and erroneous—focus on district deviations as the basis of the constitutional violation. More importantly, this standard was invented out of whole cloth and has no basis in this Court's precedent. The majority's narrow tailoring analysis fails based on this erroneous legal standard alone.

The majority's analysis also fails on its own merits. Despite testimony that the 55% BVAP figure "was 'pulled out of thin air,'" J.S. App. 24a (quoting JA 1661 (Armstrong)), the majority concluded that the rule "was based largely on concerns pertaining to the re-election of Delegate Tyler in HD 75," *id.* 25a.[6] The majority based that crucial holding on Delegate Jones' testimony "that he did not feel a 52% BVAP threshold across all districts would be acceptable 'based on . . . the functional analysis that I had done using the

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[6] Ironically, this was the *last* in a long list of explanations proffered by Delegate Jones as to the origins of the 55% BVAP threshold, the rest of which the majority deemed not credible. *See* J.S. App. 24a-25a.

Tyler primary, for example, and the Tyler general election in 2005.'" *Id.* 102a (quoting JA 1948); *see also id*. 102a-03a (citing Del. Jones' testimony that Del. Tyler "felt" her district "needed to be configured for . . . [minority voters] to elect a candidate of their choice").

The majority fails to explain how individual legislators' "feelings" about the demographics necessary to achieve re-election provide a "strong basis in evidence" for determining the demographics needed to maintain an ability to elect for minority voters. Remarkably, while the majority correctly recognizes that drawing a district according to "'member requests' or performance concerns" does not inoculate it from a finding of racial predominance, J.S. App. 98a-99a, its holding on narrow tailoring suggests that a member's unsupported performance concerns are sufficient to satisfy strict scrutiny.

Moreover, Delegate Jones' bald reference to his "functional analysis" is not even facially credible. At no point did he provide any details or evidence of his alleged analysis (other than a vague reference to a single election six years prior to redistricting, *see* J.S. App. 103a n.36), and, "critically, Jones failed to provide any explanation of how his 'functional' review led him to conclude that a 55% BVAP was required in District 75 to ensure compliance with the VRA." *Id.* 145a (Keenan, J., dissenting). This is hardly surprising in light of Delegate Jones' admission during the redistricting process that he did not engage in any in-depth analysis of any Challenged District, including District 75. *See* JA 288-89 ("DEL. ARMSTRONG: Can the gentleman tell me whether he or any persons that worked with him . . . took into account any retrogress[ion] analysis regarding

minority performance in any of the 12 majority-minority districts . . . ? DEL. JONES: . . . *I'm not aware of any*.") (emphasis added).

In short, because Delegate Jones could articulate *some* basis for believing *something* had to be done to allow minority voters in District 75 to elect their candidates of choice, the majority held that the use of a fixed racial threshold was narrowly tailored to an interest in actual compliance with Section 5 of the VRA. But this flies in the face of *Alabama*, as Delegate Jones relied on a "mechanically numerical view as to what counts as forbidden retrogression." 135 S. Ct. at 1273. At bottom, Delegate Jones adopted a 55% BVAP floor, and none of his vague assertions regarding Delegate Tyler's re-election prospects provide *any* basis, let alone a "strong basis in evidence," for subjecting District 75 to a non-negotiable and preordained racial floor of 55% BVAP. *See, e.g.*, *Page II*, 2015 WL 3604029, at *16-17 (legislature's 55% BVAP target was not narrowly tailored).

Finally, although the majority does not reach the issue for the eleven remaining districts, it tacitly admits that, if any were drawn with race as the predominant purpose, none would survive strict scrutiny. J.S. App. 25a (the 55% BVAP floor was "based largely on concerns" pertaining to District 75 and "then applied across the board to all twelve of the Challenged Districts"). Appellants agree. *See Smith v. Beasley*, 946 F. Supp. 1174, 1210 (D.S.C. 1996) (use of race was not narrowly tailored "because of the insistence that all majority-minority districts have at least 55% BVAP").

CONCLUSION

Appellants respectfully request that the Court reverse the majority opinion below.

Respectfully submitted,

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September 7, 2016

Exhibit B

No. 15-680

IN THE

Supreme Court of the United States

GOLDEN BETHUNE-HILL, CHRISTA BROOKS, CHAUNCEY BROWN, ATOY CARRINGTON, DAVINDA DAVIS, ALFREDA GORDON, CHERRELLE HURT, THOMAS CALHOUN, TAVARRIS SPINKS, MATTIE MAE URQUHART, VIVIAN WILLIAMSON, AND SHEPPARD ROLAND WINSTON,

Appellants,

v.

VIRGINIA STATE BOARD OF ELECTIONS, *et al.*,

Appellees.

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

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INTRODUCTION

Appellees argue that Appellants' case relies exclusively on the "bare fact" of the 55% Black Voting Age Population ("BVAP") threshold. Brief for Appellees ("Br.") 19. That is a strawman. In fact, Appellants argue that the General Assembly sorted voters by race to achieve a preordained BVAP floor across twelve very different districts *and that this nonnegotiable racial requirement affected the districts' contours in concrete ways*. Appellees cannot simply wish away Appellants' extensive argument and evidence regarding the actual impact of the racial threshold on the configuration of the Challenged Districts. *See, e.g.*, Plaintiffs' Post-Trial Brief 17 ("[D]irect and circumstantial evidence applicable to all of the Challenged Districts shows 'that race motivated the drawing of particular lines in multiple districts in the State.'") (quoting *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1267 (2015)); Brief for Appellants ("Opening Br.") 9 ("Both the statewide and district-specific evidence confirmed that application of the 55% BVAP rule had a direct and significant impact on the drawing of each of the Challenged Districts.").

Appellees' attempted misdirection only highlights their inability to confront the legal errors of the majority below and Appellants' exhaustive evidence of racial predominance. Indeed, once their strawman is cast aside, Appellees stand bereft of any argument on the actual legal and factual issues before the Court. Br. i (posing, as the lone Question Presented, whether the "bare fact" that the General Assembly "target[ed] a BVAP of at least 55%" in each Challenged District "trigger[s] strict scrutiny or violate[s] the Equal Protection Clause").

I. THE MAJORITY INVENTED AND APPLIED AN INCORRECT LEGAL STANDARD ON PREDOMINANCE

Appellees carefully avoid any discussion—let alone defense—of the majority's predominance test. Indeed, they never once quote the majority's "actual conflict" theory or even mention the majority's novel three-part inquiry into racial predominance. J.S. App. 30a, 50a-51a. This Court, however, must confront the errors in the majority's analysis.

Under the majority's test, only "those districts that exhibit deviations from traditional, neutral districting principles" are susceptible to a racial gerrymandering claim, J.S. App. 46a; districts that exhibit no obvious "deviations" are categorically immune from constitutional review. But that rule was expressly rejected by this Court in *Shaw v. Hunt* ("*Shaw II*"):

> In his dissent, Justice STEVENS argues that strict scrutiny does not apply where a state "respects" or "compl[ies] with traditional districting principles." *That, however, is not the standard announced and applied in* Miller[.]

517 U.S. 899, 906-07 (1996) (quoting 517 U.S. at 930-31 (Stevens, J., dissenting)) (emphasis added) (citation omitted). *Shaw II* reinforced *Miller*'s holding that racial predominance may be shown "*either* through 'circumstantial evidence of a district's shape and demographics' *or* through '*more direct evidence going to legislative purpose*.'" *Id.* at 905 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)) (emphasis added); *see also Miller*, 515 U.S. at 915 (plaintiffs are not "confined in their proof to evidence regarding the district's geometry and makeup"). The majority's insistence that *Miller*'s predominance inquiry was limited to

"facially evident deviations from neutral districting conventions [that] could only be explained on the basis of race," J.S. App. 33a, directly contradicts this Court's summary of the predominance standard in *Cromartie I*. *See Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) ("A facially neutral law . . . warrants strict scrutiny . . . if it can be proved that the law was motivated by a racial purpose or object, *or* if it is unexplainable on grounds other than race.") (emphasis added) (citations and internal quotation marks omitted).

The majority's error is more than evidentiary. The majority assumes that there is no constitutional harm unless the legislature's reliance on race caused substantial deviations from traditional districting criteria. Similarly, Appellees argue that there is no harm to voters who are sorted according to the color of their skin so long as the sorting is done neatly enough. Br. 16, 26-27. But the Equal Protection Clause condemns unjustified race-based state action—not misshapen districts. "[I]t [is] the presumed racial purpose of state action, *not its stark manifestation*, that [is] the constitutional violation." *Miller*, 515 U.S. at 913 (emphasis added). Thus, if a legislature uses a fixed racial threshold as "the 'dominant and controlling' or 'predominant' consideration in deciding 'to place a significant number of voters within or without a particular district,'" *Alabama*, 135 S. Ct. at 1264 (citation omitted), it cannot avoid constitutional scrutiny merely because it also complies with some traditional districting principles along the way. *See, e.g.*, *Shaw v. Hunt*, 861 F. Supp. 408, 431 (E.D.N.C. 1994) ("If the line-drawing process is shown to have been infected by such a deliberate racial purpose, strict scrutiny cannot be avoided simply by demonstrating that the shape and location of the districts can rationally be explained by reference to some districting principle other than

race, for the intentional classification of voters by race, though perhaps disguised, is still likely to reflect the impermissible racial stereotypes, illegitimate notions of racial inferiority and simple racial politics that strict scrutiny is designed to smoke out.") (citations and internal quotation marks omitted), *rev'd on other grounds*, 517 U.S. 899 (1996).

The majority's legal error is compounded by its analysis of the "underlying rationale for [district] deviations," J.S. App. 51a, which requires plaintiffs to show that racial explanations conflict with all conceivable non-racial explanations. *See id.* 96a (plaintiffs must prove that "racial considerations subordinated all other neutral and race-neutral districting criteria"); *id*. 111a ("[T]he legislature's pursuit of [the 55% BVAP floor] is not the 'predominate' criterion employed unless it subordinates all others."). As a result, plaintiffs must not only prove that race *was* the predominant factor in a line-drawing decision, but also that every imaginable "neutral" goal was *not* a factor.

The "neutral" explanations that can effectively cancel out evidence of race-based redistricting, moreover, are remarkably fluid. The majority openly admits there is no "standard" for assessing compactness or contiguity, J.S. App. 54a, 57a, and that various race-neutral justifications can "form a 'backstop' for one another," *id.* 59a-60a. In other words, these factors are so numerous and so inherently malleable that they can be manipulated to explain away even the most egregious race-based districting schemes.

Nor are the "neutral" criteria plaintiffs must disprove limited to "traditional districting principles" or even the majority's eleven categories. J.S. App. 53a-71a. According to the majority, *any* non-racial explanation

for misshapen lines can defeat a racial gerrymandering claim. *Id*. 93a (finding no racial predominance in light of "the artificial border provided by I-85" in District 63); *id.* 125a (same, where irregular boundaries captured area "relatively close" to incumbent's residence along with incumbent-owned funeral home).

Appellees cannot cite a single case endorsing this "any excuse will do" approach to predominance. The majority's novel and unsupported conception of the predominance standard mandates reversal.

II. APPELLEES DISREGARD THE SIGNIFICANCE OF THE 55% BVAP RULE IN THE CONFIGURATION OF THE CHALLENGED DISTRICTS

As noted above, the vast majority of Appellees' brief attacks an argument that no one makes—that the mere existence of a racial target triggers strict scrutiny. The parade of horribles Appellees envision arising from such a rule, moreover, reflects a cynical view of the Voting Rights Act ("VRA") and ignores the many ways states may properly use race in redistricting. *See*, *e.g.*, Brief of the NAACP and Virginia NAACP ("NAACP Br.") 22-24.

In truth, it is *Appellees'* position that threatens to gut the law of racial gerrymandering. Appellees claim that use of a mechanical racial quota says little (if anything) about whether race predominated. Br. 23. The Court has already rejected that view. *See Alabama*, 135 S. Ct. at 1271 (finding "strong, perhaps overwhelming, evidence that race did predominate" where "a primary redistricting goal was to maintain [the district's] existing racial percentage[]"and the legislature achieved that goal); *id.* at 1273 (legislature's reliance upon a "mechanically numerical view" of VRA

compliance "can raise serious constitutional questions"). And Appellees' theory is especially indefensible here. If unflinching devotion to a preordained racial quota in twelve very different districts is not evidence of racial predominance, then what is?

It is not hard to discern why Appellees scoff at the significance of the 55% BVAP rule; minimizing its significance allows them to wave away any and all evidence of race-based line-drawing that flows from that rule. That strategy is most evident in Appellees' two-paragraph rebuttal to Appellants' statewide evidence of racial predominance. Br. 37-38.

First, Appellees dismiss the House Criteria prioritizing VRA compliance over all other factors as merely a nod to the Supremacy Clause. Br. 37. But the 55% BVAP rule was the General Assembly's sole proxy for VRA compliance, meaning that the General Assembly determined in advance that the racial floor would be "placed . . . above traditional districting considerations," *Alabama*, 135 S. Ct. at 1271 (citation and internal quotation marks omitted), and "given priority in the event of a conflict among the criteria," JA 38. Even the majority below acknowledged that such pronouncements are "relevant evidence" where, as here, "legislators held a false belief that certain artificial criteria—such as [a] fixed BVAP floor—were necessary to comply with federal law." J.S. App. 73a-74a.[1]

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[1] The United States' dismissal of the House Criteria cannot be squared with its position in *Wittman* that "the specific means employed to achieve" VRA compliance (i.e., "use of a 55% BVAP floor") supported the district court's finding of racial predominance in Virginia's third congressional district. Brief for the United States 21, *Wittman v. Personhuballah*, No. 14-1504 (U.S. Feb. 3, 2016); *see also id*. 22 ("Statements showing that the legislature treated nonretrogression as the 'primary focus' and

Second, Appellees pretend that Virginia's preclearance submission simply *described* the Challenged Districts. Br. 38. In reality, it declared the legislature's *goal* of "draw[ing] a predetermined race-based number of districts, each defined by race." *Covington v. North Carolina*, 316 F.R.D. 117, 135 (M.D.N.C. 2016). *Cf.* NAACP Br. 8 ("[T]he Fourteenth Amendment prohibits legislatures from confining [African American] electoral success to a limited number of districts segregated by race."). The preclearance submission itself is hardly "irrelevant," Br. 37, as this Court regularly relies on preclearance submissions in its predominance analyses. *See* Opening Br. 26.

Third, Appellees discount Delegate Jones' statements on the House floor regarding the primacy of race. Br. 38. In his own words, the 55% BVAP floor "trumped everything," JA 1923-25, and was so important that it had to be achieved in each Challenged District regardless of its unique geography, demographics, or voting patterns. Delegate Jones' contemporaneous testimony makes clear that the 55% BVAP rule was the uniform, blunt instrument "use[d]" to define and "craft[]" all of the Challenged Districts. J.S. App. 29a.

Fourth, Appellees shrug off statistical evidence showing that high BVAP areas were consistently moved into and among the Challenged Districts while low BVAP areas were just as consistently moved out, arguing that proves nothing but the existence of the racial target. Br. 38-39. But the "separat[ion of] voters into different districts on the basis of race" is the

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'paramount concern[]' . . . took on significance because the legislature had interpreted Section 5 to require adherence to unsupported and mechanical racial targets.").

very essence of racial gerrymandering. *Shaw v. Reno* ("*Shaw I*"), 509 U.S. 630, 649 (1993). And, as this Court has explained, "the story of racial gerrymandering" often "becomes much clearer" upon examination of the "racial and population densities" moved between and among districts. *Miller*, 515 U.S. at 917; *see also Alabama*, 135 S. Ct. at 1271.

Finally, Appellees ignore Appellants' statewide evidence of deviations from traditional districting criteria, even though that evidence thoroughly undermines Appellees' claim that the 55% rule "caused [no] departures from" such criteria. Br. 14. The Challenged Districts, as a whole, are less compact and split more Voting Tabulation Districts ("VTDs") than the remaining 88 districts. Opening Br. 27-28. Especially given that only racial data—and not political data—are available below the VTD level, *see Bush v. Vera*, 517 U.S. 952, 961 (1996); Brief for the United States ("U.S. Br. 27"), that evidence strongly suggests that Delegate Jones' racial goals were achieved at the expense of traditional criteria like compactness and respect for political boundaries.

In fact, while the General Assembly's purported race-neutral goals gave way time and again, *see*, *e.g.*, J.S. App. 92a (District 63 not compact); *id*. 121a (District 80 lacks land contiguity and water crossing); *id*. 128a (District 95 split multiple precincts); JA 39 (ten incumbents paired), the 55% BVAP rule was never compromised.

To the contrary, that unyielding racial threshold dictated district lines from start to finish. Delegate Jones rejected alternative maps that did not guarantee at least 55% BVAP in every Challenged District, JA 299, and he rejected proposals for specific districts if they threatened to cause even minor deviations from that rule, JA 138-39. Far from a mere "aspiration" Delegate

Jones hoped to achieve if conditions permitted, the 55% BVAP rule was an immutable principle that drove the redistricting process and was uniformly achieved, regardless and in spite of other districting considerations.

Ultimately, the predominance analysis in this case is quite simple. Imagine that a legislature announced, at the outset of the redistricting process and repeatedly throughout the process, that it was determined to achieve a preordained compactness score (say, 0.2 on the Reock scale) in a specific subset of districts. Imagine further that (1) each district was, in fact, drawn to meet that threshold, sacrificing other districting considerations along the way; (2) the compactness scores of some districts were reduced as necessary to ensure neighboring districts met that threshold; and (3) proposed districts with Reock scores of 0.19 were rejected outright, regardless of the competing reason. There would be little doubt that compactness predominated in that redistricting process.

Similarly here, the General Assembly adopted an ex ante target of 55% BVAP for every Challenged District. And that 55% BVAP rule was the single, nonnegotiable criterion that dictated the configuration of the Challenged Districts. Race therefore predominated. *See Shaw II*, 517 U.S. at 907 (race predominates when "[r]ace was the criterion that, in the State's view, could not be compromised").

III. DISTRICT-SPECIFIC ANALYSES CONFIRM THAT RACE PREDOMINATED

A. Southside Virginia (Districts 63 and 75)

Appellees' discussion of Districts 63 and 75 is cursory and buried deep in their brief. Their desire to ignore these districts is understandable given the overwhelming evidence of racial predominance.

District 75 sits below District 63. Before redistricting, District 63 encompassed all of Dinwiddie County. Delegate Jones pushed District 75's northern border into the heart of Dinwiddie County, thereby transferring high BVAP areas in Dinwiddie County out of District 63 and into District 75. JA 1557.[2]

There is no real dispute as to *why* Delegate Jones "chopp[ed] Dinwiddie County in half" when he redrew District 75. J.S. App. 92a. As former delegate (now Senator) Rosalyn Dance testified, the purpose of that "drastic maneuvering" was "to try to get [District 75's] number . . . [o]f African American voters up to 55 percent." *Id*. 97a-98a. The majority agreed, holding that the Dinwiddie County split was "avowedly racial," *id*. 93a, and that "race was the predominate criterion driving the formation and configuration of HD 75," *id*. 102a. Appellees do not even mention that holding, let alone try to rebut it, leaving no dispute that race predominated in District 75.

The same facts show that race predominated in District 63 as well. Again, Delegate Jones used District 63 as a "donor district," moving African-American

[2] The average BVAP of the areas moved into District 75 was 35%—14% higher than the areas left in District 63. Opening Br. 31. Appellees suggest that this pattern does not evince a racial purpose because 35% is less than 55%. Br. 49. Appellees miss the point. When choosing precincts to move into District 75, Delegate Jones chose precincts from District 63 *and elsewhere*. Br. 50. Taken together, those precincts contained enough African-American voters to push District 75's BVAP above the 55% threshold. J.S. App. 97a. The areas extracted from District 63 represent a few crucial pieces of that complex puzzle. Appellees' attempt to reduce the redistricting process to a simple arithmetic problem belies the complex manipulation undertaken to achieve a precise racial percentage in each of the Challenged Districts. *Id*. 98a.

voters from the southern portion of District 63 into the northern portion of District 75 to achieve a preordained racial quota in District 75. J.S. App. 100a. That alone is enough to show that race predominated in District 63. *See*, *e.g.*, *Miller*, 515 U.S. at 916 (race predominates when it "motivat[es] the legislature's decision to place a significant number of voters within *or without* a particular district") (emphasis added).

The majority, however, concluded that the "avowedly racial" Dinwiddie County split indicated racial predominance on the District 75—but not the District 63—side of the split. J.S. App. 93a-95a. That conclusion has no basis in law or logic, Opening Br. 31-35, and, accordingly, Appellees make no effort to defend it.

The Dinwiddie County split is not the only evidence of race-based redistricting in District 63. Because Delegate Jones *removed* a substantial number of African-American voters from District 63 to increase the BVAP of District 75, he also had to *add* a substantial number of African-American voters to ensure that District 63 still met the 55% BVAP floor. He did so largely by grafting a new appendage on to the northeastern corner of District 63. As former delegate Dance explained, that appendage "picked up part of Prince George . . . *to get more African-Americans*" and also "picked up the concentration of African-Americans in Hopewell[.]" JA 1647-49 (emphasis added). Thus, the new appendage was necessitated by the "avowedly racial" Dinwiddie County split and served overtly racial goals.

Nonetheless, the majority held that the new appendage was not motivated by race because it also served "neutral" and "political" goals. J.S. App. 94a. That was error. *See, e.g.*, *Shaw II*, 517 U.S. at 907 (fact that

legislature "addressed [non-racial] interests" in the course of adding a snake-like appendage to capture additional African-American voters "does not in any way refute the fact that race was [the] predominant consideration"). Appellees admit as much by (again) declining to defend the majority's analysis.

Instead, Appellees offer their own half-hearted argument for why the new appendage does not suggest a racial purpose: it "maneuvers *around* the majority-black precinct of Jefferson Park." Br. 49. But that claim is both inaccurate and misleading. Appellees' claim is inaccurate because the appendage does *not* "maneuver[] around" Jefferson Park; it splits Jefferson Park, drawing high BVAP areas of Jefferson Park into District 63. JA 659, 938, 1481, 1557. Appellees' claim is misleading because it focuses only on what the appendage excludes, not what it includes. After splitting Jefferson Park (53.3% BVAP), the appendage continues to wind its way outward, capturing even more heavily African-American areas (60% BVAP or more) around Hopewell. Opening Br. 34-35. Thus, try as they might, Appellees cannot minimize the racial design of the new appendage.

B. Richmond Area (Districts 69, 70, 71, and 74)

With respect to the Richmond-area districts, Appellees focus on a few cherry-picked details to obscure how race infused the redistricting process from start to finish. Br. 45-48.

District 74 lies at the heart of the General Assembly's Richmond-area strategy. The district was not underpopulated. Nevertheless, Delegate Jones moved approximately 16,000 voters out of District 74, then moved approximately the same number of voters back

into the district. JA 669. Tellingly, this unnecessary population swap had the effect of increasing the BVAP in nearby districts, thereby ensuring that they complied with the 55% rule. JA 674; *see also* J.S. App. 116a (majority below explaining that "much of the black population ceded from HD 74 went to other Challenged Districts, such as HD 63 and HD 71"). Indeed, the average BVAP of areas moved out of District 74 and into other Challenged Districts is a whopping 69.0%. JA 674. The average BVAP of areas moved into non-challenged districts, by contrast, is a mere 20.5%—a nearly 50 percentage point difference. *See id*.

Unsurprisingly, all this population shifting affected District 74's configuration. To give but one concrete example, Delegate Dance testified that Delegate Jones moved African-American voters in the Hopewell area out of District 74 and into District 63 to replace the African-American voters that Delegate Jones moved out of District 63 and into District 75. JA 1646-48. It is hard to imagine more straightforward and compelling evidence of racially motivated line-drawing. Appellees simply ignore it.

Standing alone, the systematic dispersion of African-American voters from District 74 is strong evidence of racial predominance in the Richmond area. It is even more compelling when considered in light of the systematic infusion of African-American voters into District 71.

District 71 has been represented by Delegate Jennifer McClellan, an African American, since 2006. She has never lost an election, even as BVAP has declined in her district. In 2009, she defeated a white challenger with more than 80% of the vote, JA 680, even though District 71's BVAP was only 46.3%,

id. 669. Nevertheless, District 71 "saw the largest BVAP increase of all the challenged districts." Br. 46. Delegate Jones achieved that remarkable feat by systematically removing African-American voters from nearby districts (particularly District 74) and moving them into District 71. The statistics are striking. The average BVAP of the areas moved into District 71 (72.1%) is more than 50 percentage points higher than the average BVAP of the areas moved out of District 71 (21.3%). JA 672. Those stark racial patterns are powerful evidence of racial predominance. *See*, *e.g.*, *Alabama*, 135 S. Ct. at 1271 (racial patterns in population movements may indicate predominance).

Crucially, Appellees do not dispute that Delegate Jones shuffled voters around to achieve a particular (and unnecessary) racial composition in District 71. Instead, they argue that race could not have predominated in District 71 because Delegate Jones met his racial goals "without subordinating any traditional districting principles." Br. 46-47. But, as explained above, sorting voters by race for the sake of race implicates the Constitution—no matter how neatly it is done.

Districts 69 and 70 tell a similar story. District 70 played a donor role in the redrawn Richmond-area districts, while District 69 played a recipient role. District 70 was not underpopulated at the time of redistricting; nevertheless, Delegate Jones added about 26,000 people and removed about 26,000 people. JA 669. Again, the racial patterns are telling. The BVAP of the areas moved into District 70 is 43.8%, while the BVAP of the areas moved out is 59.9%, *id*. 672-73—*and all of the areas moved out were moved into other Challenged Districts*, *id*. 674. Much of the heavily African-American population moved out of District 70

was added to the outskirts of District 69, thereby ensuring that District 69's BVAP remained at or above 55%. JA 939, 1557-58. Thus, while District 70's BVAP dropped from 61.8% to 56.4%, *id*. 669, District 69's BVAP held steady at just above 55%, *id*. And after it was raided for African-American voters to shore up BVAP elsewhere, District 70's Reock score dropped from .47 to .40. JA 667.

Race predominates where "the overriding priority of the redistricting plan was to draw a predetermined race-based number of districts, each defined by race." *Covington*, 316 F.R.D. at 135. That is precisely the case here. Delegate Jones carefully siphoned African-American voters into, out of, and among the Richmond-area districts to comply with the 55% rule, with predictable effects on traditional districting principles. JA 641-42; *see also id*. 1603 (Delegate McClellan testifying that the "69th, 70th, and 71st and 74th districts [had] to meet a 55 percent black voting-age population"). Race therefore predominated.

C. South Hampton Roads (Districts 77, 80, 89, and 90)

Before redistricting, District 80's BVAP hovered just below the 55% threshold at 54.4%. JA 669. Nevertheless, to ensure strict compliance with the 55% rule, Delegate Jones made drastic changes. Principally, he tacked on an irregular westward appendage that "winds its way around low BVAP precincts" in order to capture high BVAP areas in Portsmouth and Suffolk. J.S. App. 121a. As a result, District 80's compactness dropped steeply. JA 667. The District also jumps over the Elizabeth River without any crossing. The majority below summed it up nicely, observing that District 80 is "quite unusually configured" and "makes

little rational sense as a geographical unit." J.S. App. 121a.

Appellees (like the majority below) argue that politics explain District 80's bizarre lines. That argument fails, and not just because it has no foundation in the legislative record. Appellants' expert evidence showed that race was the stronger predictor of voter movement into and out of District 80. JA 672 (while BVAP in District 80 *increased*, Democratic vote share *decreased*); *id.* 644-45, 678 (likelihood that a VTD was included in District 80 was strongly and positively correlated with BVAP, not Democratic vote share).

In District 89, BVAP was increased from 52.5% to 55.5% to meet the 55% threshold. JA 669. Again, achieving that racial goal had numerous impacts on the district's shape. For example, Delegate Jones extended District 89 over the Elizabeth River to include the heavily African-American precinct of Berkley (95% BVAP). JA 1562. While that plainly racial maneuver served to increase District 89's BVAP, it also reduced District 89's compactness scores by over 30%, J.S. App. 124a-125a, and fractured communities of interest in Norfolk by separating Berkley from its neighboring precincts on the western side of the Elizabeth River, which are in District 80. JA 1466.

The majority below airily dismissed the racial implications of the Berkley annexation because Berkley is "relatively close" to the incumbent's residence. J.S. App. 125a. Appellees do not adopt that unconvincing theory. Instead, they seem to argue that the annexation of Berkley cannot indicate racial motives because Berkley was moved from one majority-minority district to another. Br. 45. To describe that argument is to refute it.

Race also predominated in District 77. Appellees disagree, mainly on the ground that Delegate Jones added a few heavily white precincts to District 77 at the request of the incumbent delegate. Br. 42. Appellees conveniently ignore the *other* changes that Delegate Jones made to compensate for the addition of those white precincts. Among other things, Delegate Jones expanded the district further into Suffolk to add heavily African-American areas. That expansion significantly reduced District 77's compactness, J.S. App. 118a, and split the heavily African-American precincts of John F. Kennedy and Lakeside, fracturing several predominately African-American neighborhoods and communities of interest. JA 925-26, 1451; *see also* NAACP Br. 20.

Lastly, Delegate Jones once again used a "donor district"—District 90—to increase the BVAP of surrounding districts, thereby ensuring universal compliance with the 55% BVAP rule. And, once again, he sacrificed traditional districting criteria to achieve his racial goals—this time, with absurd results. Under the enacted plan, the predominantly African-American precinct of Brambleton (95.7% BVAP) is split between Districts 89 and 90. As a result, the historically black Norfolk State University campus is now divided between District 89 and 90. JA 1468; *see also* NAACP Br. 19 ("As a result, when the district lines were drawn, a student living in Phillis Wheatley Hall on Norfolk State's campus had to leave her district every time she walked to the nearest on-campus dining hall.").[3]

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[3] Appellees claim that District 90 could not have served as a donor district because its BVAP did not significantly decrease. Br. 42-43. That is a non sequitur. District 90's BVAP remained steady because Delegate Jones replaced the high BVAP areas

In short, as in the Richmond area, African-American voters in the South Hampton Roads area were carefully redistributed to ensure compliance with the 55% rule in every Challenged District. Traditional districting criteria were often abandoned, and, in any case, were considered only after the racial goal had been achieved.

D. North Hampton Roads (Districts 92 and 95)

Evidence of racial predominance abounds on the peninsula. District 95 went from a moderately compact district to the least compact district in the entire map. J.S. App. 128a. It now features a meandering tentacle that snakes its way northward in search of predominantly African-American areas. As the majority put it, much of the district "departs from any observable neutral criteria." J.S. App. 128a. Similarly, District 92 was extended northwest to absorb heavily African-American areas. JA 672, 1563.

Appellees toss out several baseless theories to explain the bizarre configurations of these districts. For instance, they argue that District 95 was reconfigured to eliminate the "ferrymander" in District 64 and to avoid the residence of Delegate Abbott in District 93. Br. 40. But neither goal required the contorted northern tentacle, which conspicuously reaches out to grab high BVAP areas. JA 944, 1563. Appellees also invoke politics, arguing that the district was drawn to include Democratic areas and exclude Republican areas. Br. 40. (The majority found that explanation "persuasive." J.S. App. 129a.) But both the majority

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moved to District 89 with high BVAP areas in Virginia Beach. JA 927-28.

and Appellees fail to notice that the district's sprawling tentacle carefully splits VTDs as it meanders its way north. *See* JA 786-87, 912-13. And while Delegate Jones could have assessed the *racial* ramifications of those VTD splits, he could not have assessed the *political* ramifications of those splits. U.S. Br. 27.

IV. DISTRICT 75 IS NOT NARROWLY TAILORED

Appellees proclaim that Delegate Jones dutifully performed the "exceedingly complex task" of "[d]etermining what level of BVAP is necessary to prevent retrogression" in District 75. Br. 54. This is remarkable given that, when asked on the House floor whether he or any of his colleagues "took into account *any* retrogress[ion] analysis regarding minority performance in *any* of the 12 majority-minority districts," Delegate Jones responded: "*I am not aware of any*." JA 288-89 (emphasis added).

At no point during the redistricting process did Delegate Jones offer the explanation embraced by the majority and Appellees here: that the 55% BVAP figure was the product of a functional analysis of the unique voting patterns and electoral history of District 75. Thus, it is hardly surprising that Appellees can point to no evidence—not a single document—supporting this alleged "functional analysis." Nonetheless, the majority was satisfied that, after misrepresenting the source of the 55% BVAP rule multiple times, *see* J.S. App. 24a-25a, Delegate Jones parroted the words "functional analysis" on the witness stand. This Court should not condone the majority's evisceration of the strict scrutiny standard.

Appellees' post hoc attempt to muster a "strong basis in evidence" for the 55% BVAP rule, moreover, fails on its face.

First, Appellees contend that Delegate Jones relied on Delegate Tyler, the incumbent in District 75, as the source of the 55% BVAP rule. But even if the unsupported concerns of an incumbent seeking to maximize her chances of re-election could satisfy Appellees' burden, *see* J.S. App. 98a-99a, Delegate Tyler professed no independent knowledge that a 55% BVAP rule was necessary for VRA compliance, testifying that her understanding on this point came from Delegate Spruill. *Id*. 24a. Delegate Spruill's view, it appears, was based on nothing more substantial than unidentified "feedback" that he received from unidentified "groups in Virginia." *Id.* 25a. Appellees cannot establish a "strong basis in evidence" based on the rumor mill.

Second, Appellees congratulate Delegate Jones on his alleged analysis of the 2005 primary and general election in District 75. Even if this analysis did take place—and the Court would search the legislative record in vain for any documentation of or reference to this analysis—it hardly provides a strong basis in evidence regarding the requirements of the VRA. After all, "a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election." *Thornburg v. Gingles*, 478 U.S. 30, 57 (1986); *see also* Brief for the United States 24, *McCrory v. Harris*, No. 15-1262 (U.S. Oct. 23, 2016). Indeed, if a single close election provides sufficient justification for packing minority voters into a district, then the efforts of minority voters to build coalitions across racial lines will be

effectively thwarted. *See* NAACP Br. 26; *cf. Bartlett v. Strickland*, 556 U.S. 1, 25 (2009).

After extolling the complex "functional analysis" Delegate Jones supposedly performed, Appellees reverse course to contend that he could *not* "do a meaningful analysis" since there were "too few contested primaries in Virginia House races." Br. 57. But this Court has never endorsed Appellees' contention that primary election data—and "not general election data"—are "best" for assessing minority performance. *Id.* Rather, "the most probative evidence" of minority electoral opportunity "is derived from elections involving black candidates." *Nipper v. Smith*, 39 F.3d 1494, 1540 (11th Cir. 1994); *see also Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1208 n.7 (5th Cir. 1989) (same); *Uno v. City of Holyoke*, 72 F.3d 973, 988 n.8 (1st Cir. 1995) (same); *Magnolia Bar Ass'n, Inc. v. Lee*, 994 F.2d 1143, 1149 (5th Cir. 1993) (same). And there was no dearth of such election data for District 75 or any other Challenged District, all showing the same thing: minorities in each Challenged District, including District 75, had elected their candidates of choice for at least a decade, whether the BVAP was as low as 46.3% or as high as 62.7%. *See* JA 669; http://www.vpap.org/offices/house-of-delegates-75/elections/?year_and_type=2005regular. Even if contested primary data were "best," Appellees cannot justify Delegate Jones' apparent refusal to examine any other available election data in the district. Indeed, Appellees' cynical claim that in the absence of perfect data the only proper analysis is no analysis at all flies in the face of this Court's insistence on a "strong basis in evidence," *Alabama*, 135 S. Ct. at 1274 (citation omitted).

Appellees next contend that Appellants supported the use of a BVAP threshold at trial. Appellees grossly misrepresent the record in this regard, fixating on a single statement of counsel during closing argument. JA 2279. But as indicated by the immediate context of that statement, Appellants never offered the Court BVAP percentages that "should" have been used. *See* JA 2279-80 (VRA compliance "hardly requires applying a minimum BVAP threshold well above that needed to win a majority of minority voters"). For good reason. That was not Appellants' burden. Indeed, Appellants affirmatively presented evidence that African Americans could elect their candidates of choice in at least some of the Challenged Districts regardless of whether those districts were majority BVAP. *See, e.g.*, Pls.' Post-Tr. Br. 36; *see also* JA 737-39, 1743-45. Simply put, the precise word choice used by counsel in a single line of closing argument does not relieve the Commonwealth of its burden of meeting strict scrutiny.

Finally, Appellees' claim that the higher BVAP thresholds applied in *Alabama* render that case inapplicable, Br. 56, only reinforces Appellees' "mechanical[] rel[iance] upon numerical percentages" to the exclusion of all other "significant circumstances." *Alabama*, 135 S. Ct. at 1273. The question of how much is too much is a function of fact; in an area with high crossover voting and low polarization, for instance, 55% BVAP could be deemed just as excessive as 70% BVAP would be in a highly polarized area. But the General Assembly made no inquiry into these facts. Instead, they "asked the wrong question with respect to narrow tailoring," *id.* at 1274, specifically: "How can we achieve at least 55% BVAP in all majority-minority districts?" Here, as in *Alabama*, "[a]sking the wrong question . . . led to the wrong answer." *Id.*

CONCLUSION

Appellants respectfully request that the Court reverse the majority's opinion below.

Respectfully submitted,

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