No. 15-1262

IN THE

Supreme Court of the United States

PATRICK MCCRORY, Governor of North Carolina, NORTH CAROLINA STATE BOARD OF ELECTIONS, and A. GRANT WHITNEY, JR., Chairman of the North Carolina Board of Elections,

Appellants,

v.

DAVID HARRIS & CHRISTINE BOWSER,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAVID H. GANS
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org
Counsel for Amicus Curiae
* Counsel of Record

October 19, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

Page(s)

Constitutional Provisions and Legislative Materials

TABLE OF AUTHORITIES – cont'd

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and the scope of the protections of the Fourteenth and Fifteenth Amendments.

INTRODUCTION AND SUMMARY OF ARGUMENT

To enforce the Fifteenth Amendment's guarantee of political equality, the Voting Rights Act requires states, in certain circumstances, to draw majority-minority districts to ensure that minority voters have the opportunity to elect representatives of their choice. The Act's requirement of equal opportunity cannot be invoked based on mere racial suppositions, however; rather, there must be hard evidence that such districts are necessary to ensure political equality—a showing, for example, that entrenched racial bloc voting by white majorities relegates cohesive minority voters to the status of political losers. Further,

---

[1]Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, *amicus curiae* states that all parties have consented to the filing of this brief.

because the touchstone of the Voting Rights Act is ensuring the equal political opportunity guaranteed by the Fifteenth Amendment, the Act does not require drawing majority-minority districts when minority citizens can "form coalitions with voters from other racial and ethnic groups" and therefore have "no need to be a majority within a single district in order to elect candidates of their choice." *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994). In such circumstances, in line with the Fifteenth Amendment's promise of a multiracial democracy, the Voting Rights Act does not require majority-minority districts, preferring instead that minorities "pull, haul, and trade to find common political ground." *Id.*

Here, however, in the wake of the 2010 Census, the North Carolina legislature redrew its congressional districts and created majority-minority districts in Congressional District 1 ("CD 1") and Congressional District 12 ("CD 12"), even though African American voters in those districts had been successful in electing their candidates of choice by forming coalitions with voters of other groups. Disregarding these electoral successes—achieved even though African American voting age population in previous versions of CD 1 and CD 12 was less than 50%—the legislature insisted that the African American voting age population ("BVAP") had to be at least 50% plus one person in both CD1 and CD12. Use of this fixed racial quota was, in the view of the lawmakers who drew the district lines, non-negotiable. Thus, these mapmakers subordinated traditional districting criteria and packed African Americans into both CD 1 and CD 12 to create majority-minority districts. In CD 1, the BVAP went from 47.6% to 52.65%, a figure well above the 50% quota; in CD 12, the BVAP went from 43.77% to 50.66%, a huge increase in the dis-

trict's minority voting age population. The resulting districts—which snake across the state in order to unite far flung minority communities—violate the guarantees of equality contained in the Fourteenth and Fifteenth Amendments, and turn the Voting Rights Act on its head.

The Fifteenth Amendment establishes a broad prohibition on racial discrimination in voting, "reaffirm[ing] the equality of races at the most basic level of the democratic process, the exercise of the voting franchise. A resolve so absolute required language as simple in command as it was comprehensive in reach." *Rice v. Cayetano*, 528 U.S. 495, 512 (2000). The Fifteenth Amendment not only outlaws state regulations that "deny" the right to vote on account of race, it also expressly outlaws state voting regulations that "abridge" that right. As the text and history of the Fifteenth Amendment show, the Framers of that Amendment recognized that a broad prohibition on all forms of racial discrimination in voting, coupled with a broad legislative enforcement power, were critical to ensuring "the colored man the full enjoyment of his right." Cong. Globe, 41st Cong., 2d Sess. 3670 (1870). Using a mechanical racial quota to overpack minorities into certain districts—and thereby curbing their influence elsewhere—violates the Amendment's command as surely as denial of access to the ballot itself. *See Ala. Legislative Black Caucus v. Alabama,* 135 S. Ct. 1257, 1263 (2015) (observing that "when the State adds more minority voters than needed for a minority group to elect a candidate of its choice," a racial gerrymander may "harm the very minority voters that Acts such as the Voting Rights Act sought to help").

This Court's cases construing the Fourteenth Amendment's guarantee of equal protection, too, es-

tablish that "a racially gerrymandered districting scheme . . . is constitutionally suspect." *Shaw v. Hunt*, 517 U.S. 899, 904 (1996) (hereinafter *Shaw II*). "[R]eapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters" and "threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody." *Shaw v. Reno*, 509 U.S. 630, 650, 657 (1993) (hereinafter *Shaw I*). When a plaintiff establishes "through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," *Miller v. Johnson*, 515 U.S. 900, 916 (1995), the racially gerrymandered districting plan must be held invalid unless the government can satisfy strict scrutiny, "our most rigorous and exacting standard of constitutional review." *Id.* at 920.

The district court properly applied these principles, finding the line drawing by the North Carolina legislature to be a "textbook example of racial predominance." *See* Juris. Statement App. ("J.S. App.") at 20a. As the district court held, "race was the only nonnegotiable criterion and . . . traditional districting principles were subordinated." *Id.* at 17a. Because the state legislature relied on an inflexible racial quota in drawing CD 1 and CD 12, "the quota operated as a filter through which all line-drawing decisions had to pass." *Id.* at 21a. In order to move "high concentrations of African American voters" into CD 1 and CD 12, while "exclud[ing] less heavily African Americans areas," *id.* at 24a, the legislature "not only subordinated traditional race-neutral principles

but disregarded certain principles such as respect for political subdivision and compactness," *id.* at 26a, "split[t]ing counties and precincts," *id.*, to reach the desired racial goal. This use of a mechanical racial target cannot be squared with the imperative of racial equality reflected in the Fourteenth and Fifteenth Amendments.

The mapmakers in the North Carolina legislature claimed that the fixed racial quota was necessary to comply with the protections of the Voting Rights Act, but the Act—which enforces the Fifteenth Amendment's broad ban on racial discrimination in voting—requires courts to "take account of all significant circumstances," not "mechanically rely upon numerical percentages." *Ala. Legislative Black Caucus*, 135 S. Ct. at 1273; *Johnson*, 512 U.S. at 1020-21 ("No single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength."). North Carolina's use of an inflexible racial quota perverts the Act and the constitutional principles it enforces, substituting racial stereotype for the "'intensely local appraisal'" of political reality that the Act demands. *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (quoting *Rogers v. Lodge*, 458 U.S. 613, 622 (1982)). North Carolina cannot satisfy strict scrutiny based on a caricature of the Act's protections. The judgment below should be affirmed.

ARGUMENT

I. THE FOURTEENTH AND FIFTEENTH AMENDMENTS FORBID RACIALLY GERRYMANDERED DISTRICTS.

In language "as simple in command as it [is] comprehensive in reach," *Rice*, 528 U.S. at 512, the Fifteenth Amendment provides that "[t]he right of

citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. "Fundamental in purpose and effect . . . the Amendment prohibits all provisions denying or abridging the voting franchise of any citizen or class of citizens on the basis of race." *Rice*, 528 U.S. at 512; *see Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2637 (2013) (Ginsburg, J., dissenting) (noting "the transformative effect the Fifteenth Amendment aimed to achieve").

Recognizing that "[i]t is difficult by any language to provide against every imaginary wrong or evil which may arise in the administration of the law of suffrage in the several States," Cong. Globe, 40th Cong., 3d Sess. 725 (1869), the Framers chose sweeping language requiring "the equality of races at the most basic level of the democratic process, the exercise of the voting franchise." *Rice*, 528 U.S. at 512. Striking broadly against all forms of racial discrimination in voting—whether denials or abridgments—the Framers explained that the Fifteenth Amendment would be "the capstone in the great temple of American freedom," Cong. Globe, 40th Cong., 3d Sess. 724 (1869), that would make "every citizen equal in rights and privileges," *id.* at 672.

Tragically, efforts to circumvent the Fifteenth Amendment's broad mandate of equality emerged almost immediately. "Manipulative devices and practices were soon employed to deny the vote to blacks," *Rice*, 528 U.S. at 513, or to "reduce or nullify minority voters' ability, as a group, 'to elect the candidate of their choice.'" *Shaw I,* 509 U.S. at 641 (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969)). As this Court in *Shaw I* noted, one of the "weapons in the States' arsenal was the racial gerrymander—'the

deliberate and arbitrary distortion of district boundaries . . . for racial purposes.' In the 1870s, for example, opponents of Reconstruction in Mississippi 'concentrated the bulk of the black population in a 'shoestring' congressional district running the length of the Mississippi River, leaving five others with white majorities.'" *Id.* at 640 (citations omitted). The state's manipulation of district boundaries, as one congressman observed, was designed for the purpose of "gerrymandering all the black voters as far as possible into one district so that the potency of their votes might not be felt as against the potency of white votes in the other districts." 13 Cong. Rec. H3442 (daily ed., Apr. 29, 1882).

Other states, too, relied on racial gerrymandering in order, in the words of one Texas newspaper, "to disenfranchise the blacks by indirection." Austin Statesman, Feb. 3, 1876, at 1, https://texashistory.unt.edu/ark:/67531/metapth277561/m1/1/. In the 1870s, North Carolina mapmakers packed African Americans into a single district—known as the Black Second—"effectively confin[ing] black control in a state that was approximately one-third African American to a maximum of one district in eight or nine." J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* 26 (1999). In 1882, the South Carolina legislature created a district, known as the "boa constrictor" district, that snaked across the state to include "all the precincts of black voters that could be strung together with the faintest connection of contiguous territory." *Flaws in the Solid South*, N.Y. Times, July 13, 1882, http://query.nytimes.com/mem/archive-free/pdf?res=9A05E2D9173DE533A25750C1A9619C94639FD7CF. Throughout the South, state govern-

ments packed African American voters into gerrymandered districts in order to undercut the Fifteenth Amendment's guarantee of equal political opportunity. *See* Chandler Davidson, *White Gerrymandering of Black Voters: A Response to Professor Everett*, 79 N.C. L. Rev. 1333, 1334 (2001) ("Briefly put, whites have ruthlessly, systematically, and pretty much without hindrance gerrymandered African-American voters in this country from Reconstruction to the modern era.").

This Court has since made clear that the Fifteenth Amendment prohibits any "contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color," *Lane v. Wilson*, 307 U.S. 268, 275 (1939), equally forbidding laws that deny the right to vote outright on account of race as well as those that abridge it. *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 333-34 (2000) (explaining that the "core meaning" of "'abridge'" is "'shorten'" (quoting *Webster's New International Dictionary* 7 (2d ed. 1950))); *id.* at 359 (Souter, J., concurring in part and dissenting in part) ("[A]bridgment necessarily means something more subtle and less drastic than the complete denial of the right to cast a ballot, denial being separately forbidden."). The Fifteenth Amendment, as construed by this Court, "nullifies sophisticated as well as simple-minded modes of discrimination." *Lane*, 307 U.S. at 275.

Thus, in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), this Court struck down racial gerrymandering by the City of Tuskegee, Alabama as a violation of the Fifteenth Amendment's commands. The city had attempted to redefine its boundaries "from a square to an uncouth twenty-eight-sided figure" for the purpose of "segregating white and colored voters." *Id.* at 340,

341. This Court had little difficulty concluding that "the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights." *Id.* at 347. *Gomillion* held that "the Fifteenth Amendment does not simply guarantee the individual's right to vote; it also limits the States' power to draw political boundaries." *City of Mobile v. Bolden*, 446 U.S. 55, 85 (1980) (Stevens, J., concurring); *see Holder v. Hall*, 512 U.S. 874, 958 (1994) (opinion of Stevens, J.) (observing that "the Court's first case addressing a voting practice other than access to the ballot arose under the Fifteenth Amendment").

Gomillion rested on the Fifteenth Amendment, but its result was equally "compelled by the Equal Protection Clause of the Fourteenth Amendment." *Bolden*, 446 U.S. at 86 (Stevens, J., concurring). Since *Gomillion*, this Court's cases have read the Fourteenth Amendment's more general requirement of equal protection to complement the Fifteenth Amendment's specific prohibition on all forms of racial discrimination in voting. *See Rogers v. Lodge*, 458 U.S. 613 (1982) (vote dilution); *Shaw I*, 509 U.S. at 642-49 (racial gerrymandering); *cf. Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (plurality opinion) ("If there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments."). Indeed, *Shaw I* was quite explicit in drawing on *Gomillion* and other "voting rights precedents" interpreting the Fifteenth Amendment. *Shaw I*, 509 U.S. at 644.

This Court's cases, whether decided under the Fourteenth Amendment or the Fifteenth Amend-

ment, have repeatedly affirmed that the Constitution does not tolerate racial discrimination in voting or the drawing of district lines. *See Rice*, 528 U.S. at 517 ("[T]he use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve."); *Shaw I*, 509 U.S. at 645 ("[D]istrict lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption."); *Gomillion*, 238 U.S. at 346 ("When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment."). As the next Sections show, the North Carolina legislature's use of a mechanical racial quota in drawing district lines violates these principles.

II. NORTH CAROLINA USED A RACIAL QUOTA TO DRAW LEGISLATIVE DISTRICTS AND MUST SATISFY STRICT SCRUTINY.

Under this Court's precedents, to bring a racial gerrymandering claim, a plaintiff must "'show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" *Ala. Legislative Black Caucus*, 135 S. Ct. at 1267 (quoting *Miller*, 515 U.S. at 916). "The 'predominance' question concerns *which* voters the legislature decides to choose, and specifically whether the legislature predominantly uses race as opposed to other, 'traditional' factors when doing so." *Id.* at 1271. When a state legislature uses race as the predominant factor, the districting plan must be held invalid unless the government can satisfy strict scruti-

ny, "our most rigorous and exacting standard of constitutional review." *Miller*, 515 U.S. at 920.

In *Alabama Legislative Black Caucus*, this Court elaborated on when the use of race is a predominant factor, making strict scrutiny applicable. There, the state legislature drew districts that sought to maintain the "existing racial percentages in each majority-minority district." 135 S. Ct. at 1271. This Court held that the state's use of "a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote)" was "strong, perhaps overwhelming, evidence that race did predominate" in the drawing of district lines. *Id.* at 1267, 1261. As the Court noted, the line-drawers surgically moved African American citizens into majority-minority districts to comply with the state's chosen mechanical racial target. *Id.* at 1271 (observing that "[o]f the 15,785 individuals that the new redistricting laws added to the population of District 26, just 36 were white").

As the evidence recounted by the district court confirms, the same predominant focus on race above all else occurred here. The state's mapmakers insisted that CD 1 and CD 12 be redrawn as majority-minority districts containing at least a 50% plus one person BVAP, even though "[f]or decades, African-Americans enjoyed tremendous success in electing their preferred candidates in former versions of CD 1 and CD 12 regardless of whether those districts contained a majority black voting age population." J.S. App. at 7a. To meet this racial quota, those in charge of drawing CD 1 and CD 12 "deliberately moved black voters," *Ala. Legislative Black Caucus*, 135 S. Ct. at 1266, in order to "include[] high concentrations of African-American voters" in the districts, J.S. App. at 24a, even though doing so required "disregard[ing]

. . . respect for political subdivisions and compactness." *Id.* at 26a; *see id.* at 26a-27a (noting mapmaker's testimony that "he would split counties and precincts when necessary to achieve a 50-percent-plus-one-person BVAP"). CD 1 splits 19 counties and 21 cities or towns, while CD 12 splits 6 counties as well as 13 cities and towns, *see* Appellees' Br. at 14, 24, producing two monstrously misshapen districts whose lines can only be explained by the legislature's desire to pack African Americans into these districts. *See Bush v. Vera*, 517 U.S. 952, 962 (1996) (plurality opinion) (finding predominance where "the State substantially neglected traditional districting criteria such as compactness," "was committed from the outset to creating majority-minority districts," and "manipulated district lines to exploit unprecedentedly detailed racial data"); Appellees' Br. at 14 (explaining that complying with the "State's overriding racial goals" required drawing CD 1 with "multiple grasping tendrils to capture disparate pockets of black voters"); *id.* at 22 (discussing CD 12's "tortured shape and race-based county splits"). The line-drawing here made previous versions of CD 1 and CD 12—already quite bizarre in shape—even worse. J.S. App. at 27a, 35a-36a.

In its defense of CD 1, North Carolina insists this evidence is insufficient to trigger strict scrutiny, claiming that plaintiffs have shown nothing more than a bare desire to create a majority-minority district. *See Bush,* 517 U.S. at 958 (observing that strict scrutiny does not apply "to all cases of intentional creation of majority-minority districts"). The State's argument vastly understates the critical role race played in the drawing of these district lines and the extent to which traditional districting principles were subordinated to race. Here, "[r]ace was the criterion

that, in the State's view, could not be compromised; respecting [traditional districting principles] came into play only after the race-based decision had been made." *Shaw II*, 517 U.S. at 907. As in *Bush*, the decision to make CD 1 a majority-minority district "was made at the outset of the process and never seriously questioned," even when doing so required drawing lines whose "bizarre, noncompact shape . . . was essentially dictated by racial considerations." *Bush*, 517 U.S. at 961, 973. As the district court aptly observed, CD 1 is a "textbook example" of racial predominance. J.S. App. at 20a.

In its defense of CD 12, North Carolina insists that it did not consider race at all, but simply sought to favor Republicans. Indeed, the state claims that "the principal architect of the district did not even look at racial demographics in drawing it." Appellants' Br. at 18. The district court rejected this farfetched theory, crediting testimony that "the goal was to increase BVAP in CD 12 to over 50 percent." J.S. App. at 33a. As the district court found, the "whopping increase," *id.* at 35a, in BVAP from 43.77 to 50.66 percent (similar to the increase in CD 1)—together with direct evidence that the legislature sought to "ramp up" BVAP in CD 12 and the legislature's disregard of traditional redistricting criteria—provided compelling evidence that race predominated over other redistricting criteria in the drawing of CD 12. *See id.* at 30-44a; Appellees' Br. at 18-31. Moreover, even if the legislature acted to further partisan ends, as the state claims, use of a racial quota is nonetheless deeply suspect under the Fourteenth and Fifteenth Amendments. Where, as here, "race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation." *Bush*, 517 U.S. at 968. "[T]he promise of the Reconstruction

Amendments[] that our Nation is to be free of state-sponsored discrimination," *id.*, demands no less.

North Carolina concedes that CD 12 cannot satisfy strict scrutiny. As the next section shows, the state's claim that CD 1 satisfies strict scrutiny because it was necessary to comply with the protections of the Voting Rights Act is without merit.

III. USE OF MECHANICAL RACIAL QUOTAS, IN PLACE OF EVIDENCE, TO DRAW DISTRICT LINES CANNOT BE SQUARED WITH THE VOTING RIGHTS ACT.

North Carolina insists that CD 1 satisfies the rigors of strict scrutiny, claiming that it had a good faith basis to believe that creating a majority-minority district in CD 1 was required by Section 2 of the Voting Rights Act. While it is no doubt true that the law gives states leeway to create majority-minority districts when there is a "strong basis in evidence" that the Act requires them, *see Ala. Legislative Black Caucus,* 135 S. Ct. at 1273-74, the State's argument fails here because African Americans in CD 1—even though they did not form a majority—had a strong record of success in electing candidates of their choice. The State's insistence that the Voting Rights Act required it to draw a bizarrely shaped, noncompact majority-minority district using a 50% plus one person BVAP racial quota—when African Americans in CD 1 had acted successfully to "pull, haul, and trade to find common political ground," *Johnson*, 512 U.S. at 1020—finds no support in the law itself, and "threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Shaw I*, 509 U.S. at 657.

Section 2 of the Voting Rights Act prohibits a state from enforcing an electoral policy or practice that "results in a denial or abridgment of the right of any citizen . . . to vote on account of race or color." 52 U.S.C. § 10301(a). It further provides that a violation is established when "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation" by racial minorities and that racial minorities "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

This Court has established three threshold conditions, which must be met, to establish liability in a vote dilution case under Section 2's results test: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the minority group must be "politically cohesive," and (3) the majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); *see Bartlett*, 556 U.S. at 16 (calling the *Gingles* requirements "the baseline of our § 2 jurisprudence"); *Growe v. Emison*, 507 U.S. 25, 40 (1993) (explaining that the *Gingles* preconditions "are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district" and that "the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population"). While the *Gingles* preconditions are not dispositive and the ultimate finding of vote dilution requires analysis of the totality of the circumstances, *see Johnson*, 512 U.S. at 1011-12, the

strict scrutiny analysis here begins and ends with the *Gingles* requirements.

North Carolina lacks a "strong basis in evidence," *Ala. Legislative Black Caucus,* 135 S. Ct. at 1273-74, for creating a majority-minority district in CD 1 for the simple reason that "[f]or decades, African-Americans enjoyed tremendous success in electing their preferred candidates in former versions of CD 1 . . . regardless of whether those districts contained a majority black voting age population," J.S. App. at 7a. Given this history of electoral success, North Carolina cannot conceivably demonstrate—as required by the third *Gingles* requirement—that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51. While no one doubts that racially polarized voting continues to be a problem both in North Carolina and elsewhere, *see, e.g.*, *Bartlett*, 556 U.S. at 25 (explaining that "racial discrimination and racially polarized voting are not ancient history" and that "[m]uch remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic process"); *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016) (observing that "[r]acially polarized voting . . . provide[s] an incentive for intentional discrimination in the regulation of elections"), the fact of the matter is that "African-American preferred candidates prevailed with remarkable consistency, winning at least 59 percent of the vote in each of the five general elections under the version of CD 1 created in 2001." J.S. App. at 8a-9a. Needlessly drawing CD 1 as a majority-minority district thus "disrupts nonracial bases of political identity and . . . intensifies the emphasis on race." *Bush*, 517 U.S. at 981.

It bears emphasis that "racial bloc voting . . . never can be assumed, but specifically must be proved." *Shaw I*, 509 U.S. at 653; *see Gingles*, 478 U.S. at 46 (observing that "the results test does not assume the existence of racial bloc voting; plaintiffs must prove it"). But here "there is no evidence that the general assembly conducted or considered any sort of particularized voting analysis during the 2011 redistricting process for CD 1." J.S. App. at 49a. The North Carolina legislature preferred instead to use a race-based demographic shortcut in place of evidence. This is exactly what the Voting Rights Act prohibits. "[T]he notion that it is possible to rely on a few census statistics to guarantee compliance with the obligations of the Voting Rights Act betrays the central statutory insight. By assuming that functional political cleavages can be measured purely by percentage of citizen voting-age population, the troublesome approach imposes racial stereotypes on a statute designed to combat them." Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act,* 43 Fla. St. U. L. Rev. 573, 576 (2016).

Indeed the facts of this case illustrate the need for careful judicial review to ensure that states, in fact, have a "strong basis in evidence" before drawing racially gerrymandered districts. In this case, minority citizens did not ask North Carolina to draw either CD 1 or CD 12 as a majority-minority district to guarantee them equal political opportunity. Quite the contrary. As the district court found, Republican Senator Robert Rucho, the chief architect in charge of redistricting on the Senate side, insisted that they "ramp up these districts to over 50 percent African American," J.S. App. at 34a, overriding concerns raised by the minority community that "African-Americans have been packed and bleached out from

the surrounding districts of other African-Americans." *See* Appellees' Mot. to Affirm at 27; *see also* Appellees' Br. at 43 (discussing Rep. Butterfield's testimony that the state's effort to "scoop up additional communities of African-American voters . . . meets the definition . . . of 'packing.' It's putting too many into a community in order to achieve a result.").

"The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433-34 (2006) (quoting *Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003)). The districts here turn the Voting Rights Act on its head, using race for the predominant purpose of packing African Americans into districts in which African American and white voters had previously acted together, in line with the promise of the Fourteenth and Fifteenth Amendments, to elect candidates of their choice. North Carolina thus lacks a "strong basis in evidence" for its claim that CD 1 was narrowly tailored to comply with the Voting Rights Act.

North Carolina relies heavily on this Court's decision in *Bartlett*, insisting that it supports drawing CD 1 as a majority-minority district with a 50% plus one person BVAP. *Bartlett* held that, to meet the first *Gingles* precondition and establish liability in a § 2 case, "a party . . . must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent." *Bartlett*, 556 U.S. at 19-20. But it did not require dismantling lawfully-drawn cross-over districts—districts in which minorities have achieved electoral success—and replacing them with majority-minority districts. On the contrary, *Bartlett* recognized that "a

legislative determination, based on proper factors, to create . . . crossover districts may serve to diminish the significance and influence of race by encouraging minority and majority voters to work together toward a common goal." *Id.* at 23. Indeed, the *Bartlett* Court made clear that the "[t]he Voting Rights Act was passed to foster this cooperation," *id.* at 25, and warned against reading the Voting Rights Act, as North Carolina does here, "to entrench racial differences." *Id.*

States have authority to draw majority-minority districts to effectuate the Constitution's and the Voting Rights Act's mandate of equal political opportunity, but they must do so on the basis of hard evidence, not racial quotas. That ensures the vitality of the Fifteenth Amendment's guarantee of equal political opportunity, "render[ing] equitable opportunity for minority communities without indulging in essentialism." Levitt, *supra*, at 587; s*ee Johnson*, 512 U.S. 1019-20 (refusing to interpret the Voting Rights Act "to promote and perpetuate efforts to devise majority-minority districts even in circumstances where they may not be necessary to achieve equal political and electoral opportunity"). Because North Carolina drew CD 1 and CD 12 on the basis of a racial BVAP quota, ignoring the previous electoral successes achieved by minorities in those districts, the judgment below invalidating these districts should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAVID H. GANS
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

October 19, 2016 * Counsel of Record