No. 14-___

IN THE

Supreme Court of the United States

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

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,
Appellees.

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

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

The two-judge majority below held that Virginia Congressional District 3, which perpetuates a district created as a *Shaw v. Reno* remedy, now violates *Shaw*. The majority, however, never found that "race *rather than* politics" predominates in District 3, or required Plaintiffs to prove "at the least" that the General Assembly could have "achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" and bring about "significantly greater racial balance" than the Enacted Plan. *Easley v. Cromartie*, 532 U.S. 234, 243, 258 (2001) (emphasis original). Judge Payne dissented because the majority failed to show that Plaintiffs had carried their "demanding burden" to prove that race predominated in the drawing of District 3. J.S. App. 44a.

The questions presented are:

1. Did the court below err in failing to make the required finding that race rather than politics predominated in District 3, where there is no dispute that politics explains the Enacted Plan?

2. Did the court below err in relieving Plaintiffs of their burden to show an alternative plan that achieves the General Assembly's political goals, is comparably consistent with traditional districting principles, and brings about grater racial balance than the Enacted Plan?

3. Regardless of any other error, was the court below's finding of a *Shaw* violation based on clearly erroneous fact-finding?

4. Did the majority err in holding that strict scrutiny requires a legislature to adopt the least

restrictive means possible for complying with the Voting Rights Act, instead of a redistricting plan that substantially addresses such compliance?

PARTIES

The following were parties in the Court below:

Plaintiffs:

Dawn Curry Page (dismissed via stipulation Apr. 9, 2014)

Gloria Personhuballah

James Farkas

Defendants:

Virginia State Board Of Elections (dismissed via stipulation Nov. 21, 2013)

Kenneth T. Cuccinelli, II, Attorney General of Virginia (dismissed via stipulation Nov. 21, 2013)

Charlie Judd, Chairman of the Virginia State Board of Elections

Kimberly Bowers, Vice-Chair of the Virginia State Board of Elections

Don Palmer, Secretary of the Virginia State Board of Elections

Intervenor-Defendants:

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

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JURISDICTIONAL STATEMENT

Appellants Virginia Congressmen Eric Cantor, Robert Wittman, Bob Goodlatte, Frank Wolf, Randy Forbes, Morgan Griffith, Scott Rigell, and Robert Hurt appeal the three-judge court's decision and order holding that Virginia Congressional District 3 violates *Shaw v. Reno*.

OPINIONS BELOW

The opinion of the three-judge court of the Eastern District of Virginia (J.S. App. A) is reported at 2014 WL 5019686 (E.D. Va. Oct. 7, 2014). The three-judge court's order (J.S. App. B) is unreported.

JURISDICTION

The three-judge court issued its opinion and order on October 7, 2014. J.S. App. A. Appellants filed their notice of appeal on October 30, 2014. *See* J.S. App. 100a. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment and Section 5 of the Voting Rights Act, which are reproduced at J.S. App. C–D.

STATEMENT

Because of the "presumption of good faith that must be accorded legislative enactments," courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Thus, plaintiffs alleging a racial gerrymander under *Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*),

bear the "demanding" threshold burden to show that race was the legislature's "predominant" consideration, such that "the legislature subordinated traditional race-neutral districting principles" to "racial considerations." *Miller*, 515 U.S. at 916.

Moreover, because "race and political affiliation" are often "highly correlated," plaintiffs must decouple the two and show that "race *rather than* politics" caused the alleged subordination. *Easley v. Cromartie*, 532 U.S. 234, 242–43 (2001) (emphasis in original). This decoupling requires showing "at the least" that the legislature "could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" and bring about "significantly greater racial balance" than the challenged district. *Id.* at 258.

The two-judge majority below failed to apply *both Easley* requirements. In so doing, it turned the General Assembly's equal treatment of majority-black Virginia Congressional District 3 ("Enacted District 3")—which perpetuated a *Shaw remedy*—into racial discrimination and a *Shaw violation*.

The majority's violation of *Easley*'s requirement to disentangle race and politics produced a clearly erroneous result. In a series of concessions the majority studiously ignores, Plaintiffs' only witness, expert Dr. Michael McDonald, admitted that it would have made "perfect sense" for the Legislature to adopt Enacted District 3 for *political* reasons even if every affected voter "was *white*." Trial Tr. 128 (emphasis added) ("Tr."). That is because—according to Dr. McDonald—the Republican-authored Enacted Plan's trades involving District 3 had a "clear

political effect" of benefitting "the Republican incumbents" in surrounding districts from which "[y]ou could infer" a "political purpose." *Id.* 122, 128. These concessions comported with *all* contemporaneous statements—including Dr. McDonald's pre-litigation law review article—universally describing the Enacted Plan *not* as a racial gerrymander, but as a "political gerrymander" that created "a 8-3 partisan division" in favor of Republicans and "protected all incumbents." Int.-Def. Ex. 55 at 816; J.S. App. 47a–52a, 65a–68a.

Moreover, in concessions the majority again disregards, Plaintiffs also acknowledged that their Alternative Plan fails the standard set forth in *Easley*. Dr. McDonald admitted that the Alternative Plan "subordinates traditional districting principles to race" to achieve a "50%" racial "quota" in District 3, Tr. 172–73, 180, so it does not achieve "significantly greater racial balance" than the Enacted Plan, *Easley*, 532 U.S. at 258. Dr. McDonald also agreed that the Alternative Plan undermines the Legislature's "political objectives," *id.*, because it transforms District 2, a 50/50 district represented by Republican Congressman Scott Rigell, into a "heavily Democratic" district, Tr. 119, 152–53. And Dr. McDonald acknowledged that the Alternative Plan performs "significant[ly]" *worse* than the Enacted Plan on the Legislature's preferred traditional principles of core preservation and incumbency protection. *Id.* 422–23.

Finally, although it is irrelevant because District 3 should not have been subjected to strict scrutiny, the majority applied strict scrutiny to District 3 and also misstated and misapplied the standards governing

such scrutiny. It adopted a least-restrictive-means test that contradicted this Court's holding that strict scrutiny requires only "a strong basis in evidence for concluding that" "districting that is based on race substantially addresses" potential Voting Rights Act violations. *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality op.).

Thus, the majority's conclusion that Enacted District 3 is unconstitutional is irreconcilable with this Court's precedents, and its order that the General Assembly enact a remedy within five months should be promptly reversed. Otherwise, the General Assembly faces the daunting prospect of overhauling the Commonwealth's only majority-black congressional district based on a two-judge opinion that invalidates equal treatment of that district and endorses an Alternative Plan that discriminates against black voters. The Court should note probable jurisdiction or summarily reverse.

A. District 3 As A *Shaw* Remedy

District 3 was created as Virginia's only majority-black congressional district in 1991. *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997) (three-judge court), *summ. aff'd*, 521 U.S. 1113 (1997). In 1997, a three-judge court invalidated that version of District 3 under *Shaw*. *Id.* at 1151. The court enjoined Virginia from conducting any election in District 3 until the General Assembly enacted "a new redistricting plan for said district which conforms to all requirements of law, including the Constitution of the United States." *Id.*

The General Assembly adopted a remedial plan in 1998 with 50.47% black voting-age population ("BVAP") in District 3. *See* Pl. Ex. 22 at 3. No party

challenged that version of District 3 under *Shaw*, and it was used for the 1998 and 2000 elections.

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

The Benchmark Plan was not subject to any *Shaw* challenge, even though Virginia voters mounted *Shaw* challenges to the 2001 House of Delegates and Senate plans. *See Wilkins v. West*, 264 Va. 447 (2002). Benchmark District 3 was surrounded by four districts—Districts 1, 2, 4, and 7—which elected Republicans in 2010. That year, first-time Republican Congressman Scott Rigell beat a Democratic incumbent in District 2, a closely divided district politically that had previously elected a Democrat in 2008 and a Republican in 2004 and 2006. Tr. 118–19, 258–61.

B. The Enacted Plan

The 2010 Census revealed population shifts that required a new congressional districting plan. In 2011, the Democratically-controlled Virginia Senate approved criteria for the plan, including achieving "equal population" and complying with the Voting Rights Act; drawing "contiguous" and "compact" districts; respecting "communities of interest"; and accommodating "incumbency considerations." Pl. Ex. 5 at 1–2.

After Republicans gained control of the General Assembly in 2012, Republican Delegate Bill Janis sponsored the bill that became the Enacted Plan. The Enacted Plan treated District 3 the same way as the majority-white districts by preserving its core

and making relatively minimal changes to benefit the incumbents in District 3 and adjacent districts. Tr. 121–28, 258–61; Int.-Def. Exs. 20, 21.

As Dr. McDonald testified, Enacted District 3 "closely resembles" Benchmark District 3. Tr. 171. Enacted District 3 retained the split localities in Benchmark District 3, Norfolk and Hampton. Int.-Def. Exs. 3, 6.

Enacted District 3 has a 56.3% BVAP. Pl. Ex. 6 at 5. The Enacted Plan received preclearance and was used in the 2012 election. Int.-Def. Ex. 1.

C. Plaintiffs' Lawsuit

Plaintiffs did not file suit until October 2, 2013, after this Court's decision in *Shelby County v. Holder*. Compl. ¶ 4. Plaintiffs' initial theory posited that, "in the wake of *Shelby County*, Section 5" no longer constitutes a compelling state interest and "cannot justify the use of race" in the pre-*Shelby County* Enacted Plan. *Id.* ¶ 43; *see* J.S. App. 34a n.21.

Plaintiffs' Complaint named officials of the State Board of Elections as Defendants. Compl. ¶ 11. Appellants intervened as Intervenor-Defendants. *See* J.S. App. 11a.

Plaintiffs eventually shifted their theory of the case to the claim that the Enacted Plan was not narrowly tailored to comply with Section 5, and produced their Alternative Plan. *Id.* 32a–34a & n.21. The Alternative Plan replicates most of the Enacted Plan's trades involving District 3, but shifts the boundary between Districts 2 and 3. Tr. 157. Alternative District 3 has a 50.2% BVAP. *Id.* 172.

In the opinion issued after trial, Judge Duncan, joined by Judge O'Grady, held that Enacted District 3 is a racial gerrymander not narrowly tailored to comply with Section 5, and ordered the General Assembly to "adopt[] a new redistricting plan" "no later than April 1, 2015." J.S. App. 92a. Judge Payne dissented because Plaintiffs had not "carried their demanding burden to prove" a *Shaw* violation. *Id.* 44a.

REASONS FOR NOTING PROBABLE JURISDICTION

It is undisputed that the General Assembly preserved majority-black District 3 in the same way that it preserved all other districts in the Commonwealth, which are majority-white. The General Assembly preserved all districts to accomplish the contemporaneously stated purposes of maintaining the partisan make-up of Virginia's congressional delegation, preserving the cores of all districts, and protecting incumbents. The majority thus found a *Shaw* violation—which precludes forming "minority" districts by subordinating the legislature's political goals and non-racial traditional principles, *see Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (*Shaw II*)—in a case where the General Assembly indisputably did *not* subordinate its political goals or preferred traditional principles to race but, instead, treated the majority-black district *the same* as the majority-white districts.

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

I. THE MAJORITY FAILED TO APPLY *EASLEY*

Shaw plaintiffs bear the "demanding" burden to show that the legislature "subordinated traditional race-neutral districting principles" to race. *Miller*, 515 U.S. at 916. In doing so, because "race and political affiliation" are often (as in Virginia) "highly correlated," *Shaw* plaintiffs must prove that "race *rather than* politics" was the "predominant factor" in subordinating these principles. *Easley*, 532 U.S. at 242–43 (emphasis in original).

The Court has not only made clear that plaintiffs bear this daunting burden, it has also clearly delineated *what* plaintiffs must specifically *show* "at the least" to *support* a finding that "race rather than politics" predominantly caused the alleged subordination of neutral principles. *Id.* at 243, 258. Simply put, plaintiffs must show that race is the explanatory variable by producing an alternative plan that is *not* driven by racial considerations but nonetheless achieves the legislature's political goals. If these political goals could be accomplished without creating an identifiable majority-minority district that subordinates neutral principles, this is powerful evidence that race caused the alleged subordination. Conversely, if the political goals can reasonably be accomplished only through the district(s) chosen by the legislature—*i.e.*, a minority district that purportedly subordinates traditional principles—then plaintiffs, by definition, cannot show that race, rather than politics, caused the alleged subordination. In such circumstances, race cannot be the predominant factor because the district would have been created even if racial considerations were

absent, in order to accomplish the desired political result.

Accordingly, to disprove that non-racial factors caused a minority district's alleged departures from traditional principles, plaintiffs need to eliminate "race" as an explanatory factor by producing an "alternative" that has a "significantly greater" non-minority population. *Id.* at 258. If this non-majority-minority district "is comparably consistent with traditional districting principles" and also "achieve[s]" the legislature's "political objectives" as well as the enacted majority-minority district, this shows that the legislature's departure from districting principles was caused by the effort to artificially create a minority district. *Id.* Specifically, it shows that race was the reason the legislature adopted the minority-district alternative over the race-neutral alternative, because the race-neutral alternative equally advances the non-racial factors influencing redistricting plans—*i.e.*, politics and traditional principles. Thus, *Easley* squarely held that *Shaw* plaintiffs must show "at the least" that the legislature "could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" and bring about "significantly greater racial balance" than the challenged district. *Id.*

Remarkably, in the face of the Court's clear directives, the majority found a *Shaw* violation even though Plaintiffs' (majority-black) Alternative District 3 concededly contravenes the Legislature's political objectives by converting a Republican incumbent's adjacent district into a "heavily Democratic" one; concededly contravenes the

Legislature's overriding neutral principles of core preservation and incumbency protection; and concededly embodies the racial flaws that purportedly infected the enacted district—in Dr. McDonald's words, "subordinat[ing] traditional districting principles to race" to achieve a "50%" black "quota." Tr. 119, 153, 172–73, 180.

Moreover, the majority not only violated *Easley's* specific instructions on *how* to assess whether race or politics explains the challenged district, but also even *Easley's* general requirement to *find* that "race rather than politics" was the cause. The absence of such a finding is hardly surprising since it could not be rationally made. The Legislature's perpetuation of the core of District 3, and *all* 2012 additions to the district, *concededly* both benefitted Republicans politically and *mimicked* the non-racial factors that drove *all* districts in the state—core preservation, incumbency protection, and maintaining the 8-3 Republican congressional representation that resulted from the 2010 elections.

Perhaps worst of all, the lower court's serial violation of *Easley's* explicit specific commands produces a ruling that turns *Shaw's* general principle of racial neutrality on its head. While *Shaw* condemned "segregat[ing]" voters into identifiable majority-minority districts by "subordinating" traditional principles to race, *Miller*, 515 U.S. 911–16, the majority *used* precisely such a majority-minority alternative as the principal proof that Enacted District 3 *shared* these defects, without any evaluation of whether a district where race did *not* predominate would have equally or better complied with non-racial districting principles or political

goals. Thus, the opinion below converts the *Shaw* inquiry from whether a majority-minority district subordinated traditional principles relative to one not infected by race into a "beauty contest" between two majority-minority districts where the "winner" is the one that (marginally) better complies with the *court's* view of proper districting principles and *Plaintiffs'* political goals, although it is concededly worse in terms of the Legislature's preferred districting principles and political objectives. This, of course, does nothing to further racial equality or neutrality, but simply substitutes one racially-driven district that contravenes the Legislature's political desires for one that furthers them. Indeed, by condemning preservation of a majority-minority district (with minor, politically beneficial alteration) even though precisely the same core-preservation, incumbency-protection and political factors were applied to preserve *every* majority-white district in the Commonwealth, the decision below contravenes *Shaw's* command of racial neutrality by prohibiting *equal* treatment of a district because of its racial composition.

1. The majority erred as a matter of law in failing to apply *Easley*'s clear requirements. *First*, the majority never found that "race *rather than* politics" predominated in Enacted District 3—even though "race and political affiliation" are "highly correlated" in Virginia. *Easley*, 532 U.S. at 242. Because *Shaw* does not prohibit "political gerrymandering," a legislature may subordinate traditional principles to gerrymander (or support) Democrats "even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." *Hunt v. Cromartie*, 526 U.S. 541, 551

(1999) (emphasis in original). Another three-judge court recently applied this rule to grant summary judgment to defendants in a *Shaw* case because "the plaintiffs have not shown that the State moved African-American voters from one district to another because they were African-American and not simply because they were Democrats." *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 901 (D. Md. 2011) (three-judge court). This Court summarily affirmed. 133 S. Ct. 29 (2012).

The majority's eliding of this requirement is especially impermissible because it *acknowledged* that "partisan considerations, as well as a desire to protect incumbents" "inarguably" "played a role in drawing" Enacted District 3. J.S. App. 28a. It even recognized that this is a "mixed motive suit," *id.*, thereby underscoring the need to analyze *which* motive predominates.

The majority, however, conducted no such analysis. Instead, it found that politics *might* not have predominated because the Legislature's acknowledged political purposes "*need not* in any way refute the fact that race was the legislature's predominant consideration." *Id.* (emphasis added). But the truism that politics "need not" trump race is no substitute for the requisite finding that it *did not*, particularly since consideration of *race* "need not in any way refute the fact that" *politics* was "the legislature's predominant consideration." *Id.* Indeed, that race and politics are invariably present in redistricting and "highly correlated" is precisely why this Court requires plaintiffs to prove *which* factor predominated. *Easley*, 532 U.S. at 242. Platitudes like "need not" and race cannot be used "as a proxy"

for politics, J.S. App. 16a n.10, 28a, simply beg the question; they do not resolve it.

In all events, the majority *could not* have made the required finding because the record squarely forecloses it. It is *undisputed* that:

- All contemporaneous commentators—Republican supporters, Democratic opponents, and Plaintiffs' expert—universally described the Enacted Plan as a "political gerrymander" that maintained "a 8-3 partisan division" in favor of Republicans and "protected all incumbents." Int.-Def. Ex. 55 at 816; Tr. 129, 137; J.S. App. 47a–52a, 65a–68a;
- *Every* piece of electoral data confirms that the Enacted Plan has this "clear political *effect*." Tr. 122–128 (emphasis added);
- *Plaintiffs'* expert agreed that it would have made "perfect sense" to adopt the Enacted Plan for *political* reasons even if every affected voter "was white." *Id.* 128;
- The Legislature's treatment of District 3—preserving its core with minimal politically-motivated changes—was *identical* to its treatment of the majority-white districts, thus eliminating the assertion that race predominated in Enacted District 3;
- Delegate Janis, the Plan's principal sponsor, repeatedly stated that protecting incumbents and perpetuating the 8-3 split were the Enacted Plan's goals;
- Delegate Janis disclosed that the incumbents made "specific and detailed recommendations"

for their own districts, which were uniformly followed. J.S. App. 53a–60a;

- No alternative plan generated at the time or in litigation preserved the 8-3 split and protected all incumbents; and
- Any effort to significantly adjust District 3's racial composition would spread Democrats into the adjacent districts and harm Republican incumbents (as well as black electoral opportunities in District 3).

2. In addition to failing to *find* racial predominance over politics, the majority also violated *Easley* by not using the clearly prescribed method for *assessing* such predominance. Although *Easley* required Plaintiffs to show "at the least" an alternative plan that achieves the Legislature's "political objectives" and "traditional districting principles" while bringing about "significantly greater racial balance" than the Enacted Plan, 532 U.S. at 258, the majority found a violation even though there was *no* race-neutral alternative, and Plaintiffs' racially-motivated Alternative Plan *concededly* did not serve Republican political objectives (or adhere to the Legislature's neutral principles).

First, Plaintiffs' Alternative Plan admittedly *subverted* the Legislature's political objectives. Even Dr. McDonald admitted what the undisputed electoral data undeniably proved: the Alternative Plan undermines the "political goals of having an 8/3 incumbency protection plan," Tr. 180, because it creates a 7-4 partisan division by turning District 2, a 50/50 district currently represented by Republican Congressman Rigell, into a "heavily Democratic"

district, *id.* at 119, 152–53, 304; Int.-Def. Ex. 22; J.S. App. 85a.

Second, Plaintiffs' Alternative Plan did not have a significantly different racial composition than the Enacted Plan, and thus provided no basis for analyzing whether the Legislature's preservation of a majority-black district had the non-racial virtues of better complying with its political goals and preferred traditional principles than a majority-white alternative. One cannot possibly know whether the majority-black composition of District 3 either subordinated neutral principles or was motivated by politics unless one examines how a District 3 *without* such a composition would perform on those factors. Plaintiffs, however, produced an Alternative Plan that Dr. McDonald *conceded* "subordinates traditional districting principles to race" to achieve a "50%" racial "quota" in District 3. Tr. 172–73, 180. Accordingly, Plaintiffs' Alternative Plan was inherently unable to show that the subordination purportedly caused by the Legislature's alleged race-consciousness would have been avoided absent such race-consciousness, since the Alternative Plan itself subordinates neutral principles to race (albeit in a way that undermines the Legislature's goals of preserving cores and protecting Republican incumbents).

Thus, the Alternative Plan does not prove or remedy a *Shaw* violation: *Shaw* concerns *eradicating* racial predominance in redistricting, not substituting one racially predominant district for another. *Easley*, 532 U.S. at 258. Stated differently, the Legislature's preference for *its* majority-black District 3 over Plaintiffs' majority-black District 3 was *necessarily*

attributable to the *non-racial* factors of core preservation and politics, since the alternatives are not materially different in terms of race.

Plaintiffs' failure to provide a race-neutral alternative is no coincidence: the severe changes required to bring about the "significantly greater racial balance" of transforming majority-black District 3 into a non-racial district, *id.*, would have spread Democratic voters to adjacent districts and, thus, significantly *harmed* at least most of the Republican incumbents surrounding District 3 (and District 3's incumbent). Moreover, these sweeping changes indisputably would have undermined the Legislature's preferred traditional principles of core preservation and incumbency protection. *See id.*

3. In short, the Alternative Plan cannot show either that racial considerations played *any* role in subordinating traditional principles (because there is no race-neutral alternative) or that race predominated over politics in causing any such departures (because the Alternative Plan does not accomplish the Legislature's political objectives). This is fatal error because it violates not only *Easley*'s clear command, but *Shaw*'s admonition that racial considerations in redistricting violate the Constitution only if they "subordinate[]" traditional principles. *Miller*, 515 U.S. at 916.

The majority's error in this regard is exemplified (and exacerbated) by its treatment of the only direct evidence that purportedly suggests racial predominance: Delegate Janis's unremarkable statements that "one of the paramount concerns" in drafting the Enacted Plan was making sure "not [to] retrogress minority voting influence" in District 3,

which would have violated Section 5. J.S. App. 2a, 19a. Even assuming (wrongly) that complying with Section 5 is an improper "racial" consideration, *but see infra* Part II, such a racial *consideration* offends *Shaw* only if it causes a *departure* from non-racial principles, *Miller*, 515 U.S. at 916. But here, Section 5's requirement to preserve minority voting strength *coincided* with the Legislature's race-neutral desire to preserve District 3 just as it preserved all majority-white districts, in order to preserve the 8-3 partisan split (and district cores). Thus, Section 5's command to preserve District 3 did not require any *departure* from the Legislature's goals, and *Shaw* obviously does not *require* so departing from a race-neutral "district preservation" scheme, by treating the majority-black district *worse* in this regard.

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

A more detailed discussion of the facts further illustrates the majority's error in failing to find that "race *rather than* politics" predominates in Enacted District 3. *Easley*, 532 U.S. at 243 (emphasis in original).

1. The undisputed evidence more than bears out Dr. McDonald's concessions about the Enacted Plan's political effect—and demonstrates that the majority could *not* have found racial predominance. The 2010 elections resulted in the 8-3 partisan split in Virginia's congressional delegation—and *preserving* District 3's core helped to freeze that split in place. Also, all of the relatively minor *changes* to District 3 were "politically beneficial" to the Republican incumbents in adjacent districts because they moved

Democrats out of, and Republicans into, those districts. Tr. 122–28.

For example, prior to the Enacted Plan, District 2 represented by Republican Congressman Rigell was a closely divided district where Barack Obama and John McCain each captured 49.5% of the vote in 2008. Int.-Def. Ex. 20. The Enacted Plan increased District 2's Republican vote share by 0.3%. *Id.* The same pattern adhered in the other three Republican districts surrounding District 3: District 1 became 1% more Republican; District 4 became 1.5% more Republican; and District 7 became 2.4% more Republican. *Id.* And District 3, which increased in BVAP by 3.2%, increased in Democratic vote share by 3.3%. *Id.*

Thus, while the majority was technically correct that the trades with District 3 had a racial effect, J.S. App. 30a–31a, it ignored that those trades had this clear *political* effect. Indeed, the political effect of the swaps is *identical* to their racial effect. The areas moved between Districts 2 and 3 had approximately a 17 percent difference in Democratic vote share and an 18 percent difference in BVAP. Tr. 261. The area moved between Districts 4 and 3 had a Democratic vote share difference of 33 percent and a BVAP difference of 34 percent. *Id.* 264. And in the areas moved between District 7 and District 3, the Democratic vote share difference was approximately 49 percent, while the BVAP difference was 50 percent. *Id.* 264–65. Thus, contrary to the majority's assertion, the Legislature's plan here, just as in *Easley*, "furthered the race-neutral political goal of incumbency protection to the same extent as it

increased the proportion of minorities within the district." J.S. App. 29a.

The fact that politics explains Enacted District 3 is unsurprising because Delegate Janis *expressly said so*, in a display of candor rarely seen among legislators engaged in redistricting. *See id.* 53a–60a. Delegate Janis said his overriding objective was "to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 election," when voters elected 8 Republicans and 3 Democrats (as opposed to the 5-6 split resulting in 2008). *Id.* 53a. Accordingly, the Enacted Plan preserved "the core of the existing" districts. *Id.* In addition, any minimal changes to the districts would not be politically harmful to the incumbents because Delegate Janis not only sought "the input of the existing congressional delegation, both Republican and Democrat," Int.-Def. Ex. 9 at 14, but directly *adhered* to their input in how their districts should be drawn.

As Delegate Janis candidly, repeatedly noted, "the district boundary lines were drawn in part on specific and detailed recommendations" from "each of the eleven members currently elected to [C]ongress," including Congressman Scott in District 3. *Id.* 8. After the Enacted Plan was drawn, Delegate Janis "spoke[] with each" incumbent and "showed them a map of the lines." *Id.* "[E]ach member of the congressional delegation both Republican and Democrat has told me that the lines" conform to "the recommendations that they provided me, and they support the lines for how their district is drawn." *Id.* 9–10; Pl. Ex. 43 at 5–6, 13–14, 20–30, 38.

In light of this obvious political purpose and effect, *every* contemporaneous commentator—including Dr. McDonald and the Enacted Plan's Democratic opponents—described the Enacted Plan as a "partisan gerrymander" that preserved the 8-3 split in favor of Republicans and "protected all incumbents." Int.-Def. Ex. 55 at 816; J.S. App. 47a–52a, 65a–68a.

2. In the face of these extraordinarily candid statements acknowledging that the *goal* was preserving the 8-3 ratio created by the 2010 elections and further acknowledging that the *means* for accomplishing this was to precisely follow the incumbents' own recommendations on how to draw their districts, the majority resorted to irrelevant nit-picking. The majority discounted Delegate Janis's statements on the unelaborated view that they are "rather ambiguous," and attempted to limit those statements because Delegate Janis did not personally consider "partisan performance" statistics or show "the *entire* 2012 Plan" to incumbents. J.S. App. 18a–19a, 30a (emphasis added). Delegate Janis, however, had no need to consider "partisan performance" statistics because the incumbents who effectively drew their own districts considered such performance, and their self-interested approval of their own districts added up to a *statewide* incumbency protection plan across "the entire" Enacted Plan. *Id.* And, of course, the sponsor's statements are not remotely "ambiguous," *id.* 30a, about a legislative purpose to protect all incumbents, particularly since objective electoral data confirmed that the Plan would have precisely such an "effect" (as it did in the 2012 elections), which is why there

was a bipartisan and media consensus that the Plan was intended to achieve such a result.

3. Confronted with Delegate Janis's irrefutable admissions that politics drove the Enacted Plan and the absence of any "explicit admission of predominant racial purpose" (or any racial purpose), J.S. App. 88a, the majority sought to spin garden-variety statements into "concessions" of racial predominance analogous to those in *Shaw II*, 517 U.S. at 906. Specifically, the majority contended that a racial purpose is shown by Delegate Janis's statements that "one of the paramount concerns" was not to violate Section 5 by "retrogress[ing] minority voting influence" in District 3, and the Senate Criteria's recognition of the "priority" of such federal law over state law. J.S. App. 7a, 19a.

But this routine acknowledgement of the Supremacy Clause cannot constitute an admission to violating the Equal Protection Clause. If professing adherence to, and acknowledging the priority of, the Voting Rights Act constitutes a racial admission triggering strict scrutiny, then *every* legislative and *judicial* redistricting, particularly in Section 5 jurisdictions, must be subjected to such scrutiny because they all mimic Delegate Janis's truisms. *See, e.g.*, *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 636 (D.S.C. 2002) (three-judge court) (a court drawing a redistricting plan must ensure that it "does not lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise"); *Abrams v. Johnson*, 521 U.S. 74, 96 (1997). Contrary to the majority's reasoning, these basic acknowledgements that correctly identify the Voting Rights Act's

requirements are not, under *Shaw II*, somehow an admission of proscribed racial purpose. Were it otherwise, compliance with the Voting Rights Act would be converted from a "compelling" *justification after* plaintiffs have established that race predominated, into a "compelling" *admission* that race predominates, turning plaintiffs' *prima facie* burden into a pre-ordained formality.

Indeed, in *Shaw II*, the Section 5 submission acknowledged that the "*overriding* purpose was" to create "two congressional districts with effective black majorities," and the plan's principal draftsman "testified that creating two majority-black districts was the 'principal reason'" for the plan. 517 U.S. at 906 (emphasis in original). And these avowed racial considerations clearly and concededly subordinated traditional principles: the challenged district was "the least geographically compact district in the Nation," and the State itself contended (in the initial Section 5 submission denied Justice Department preclearance) that the challenged district would offend "neutral districting principles." *Id.* at 906, 912–13. The *Shaw II* finding of racial predominance rested on this direct evidence not, as here, any acknowledgement of the need for Section 5 compliance. Nor could there have been any such acknowledgement in *Shaw II*, since Section 5's *non-retrogression* mandate could not possibly be violated by *failing to add* new majority-black districts, *id.* at 913; these additions only furthered the Justice Department's impermissible "policy of maximizing the number of majority-black districts," *id.* Here, in contrast, it is obvious and undisputed that Section 5 plainly did require non-retrogression in District 3. Delegate Janis's correct acknowledgement of that

federal-law requirement cannot constitute a "direct" admission under *Shaw* lest legislatures (and courts) be prohibited from even acknowledging the federal mandates for redistricting. J.S. App. 60a–61a.

Relatedly, the majority suggested that race predominated over politics because Section 5 was (correctly) viewed as "mandatory" while political considerations are merely "permissive." *Id.* 30a. Again, this would mean that race *always* predominates because the Voting Rights Act is always mandatory, while politics (and most traditional principles) are not. Moreover, it is demonstrably untrue because sometimes, as here, politics and Section 5 do not conflict, but lead to the *same* result—indeed, the "mandatory" preservation of District 3 as a majority-black district as the Legislature drew it was the *only* way to avoid harming the Republican incumbents in the surrounding four districts. *See infra* Part III. Similarly, unlike *Shaw II*, *preserving* District 3's shape and population directly furthers the traditional principles of core preservation and incumbency protection *uniformly* applied to all districts, while North Carolina's *creation* of a new district was *concededly* at odds with the traditional principles used elsewhere in the state, including "protecting incumbents." *Shaw II*, 517 U.S. at 907. Thus, at worst, in stark contrast to *Shaw II*, the references to mandatory non-retrogression here suggest that race was "a motivation," but not one at odds with, much less predominating over, race-neutral goals. *Easley*, 532 U.S. at 241.

In short, all of the direct evidence is that both parties stated that the Enacted Plan was motivated

by politics and incumbency protection, and there is *none* suggesting that race was predominant.[1]

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

As explained, *see supra* Part I, the majority *again* departed from *Easley* when it relieved Plaintiffs of the burden to prove "at the least" that "the legislature could have achieved its legitimate political objectives in alternative ways that are comparably

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[1] The majority referred to two other pieces of putative "direct evidence," but neither is direct or evidence of racial predominance. *First*, the majority contended that defense expert John Morgan "confirmed that the legislature adopted" a 55% BVAP "floor" for Enacted District 3. J.S. App. 37a; *see also id.* 17a. But if Mr. Morgan had said this, it would not reflect the Legislature's purpose because, as the majority itself affirmatively notes, Mr. Morgan "did not work with or talk to any members of the Virginia legislature" regarding the Enacted Plan. *Id.* 18a n.11. Anyway, Mr. Morgan never suggested any 55% quota; he simply noted that the *state* redistricting plan that the Legislature enacted in *2011* contained 55% BVAP districts and enjoyed bipartisan and biracial support, which would have provided the Legislature with a strong basis for believing that a district with a similar BVAP, far from overconcentrating black voters, was a legitimate option for achieving Section 5 preclearance. *See id.* 63a–65a.

Second, the majority contorted into a defense "concession" a statement from Appellants' summary judgment brief describing a concession *by Plaintiffs* that race was considered to achieve Section 5 *compliance*, thus foreclosing any finding that the Plan was based on "an *improper* consideration of race." Int.-Def. Mem. 15 (emphasis added); J.S. App. 16a. Even if the sentence could bear the majority's preferred reading, it was not uttered by Defendants, and statements made in litigation by strangers to the redistricting process two years after the fact are plainly irrelevant. J.S. App. 45a–46a.

consistent with traditional districting principles" and bring about "significantly greater racial balance" than the Enacted Plan, 532 U.S. at 258.

1. The majority offered no coherent rationale for violating *Easley*. *First*, the majority suggested that the *Easley* burden is not triggered unless the defense presents "overwhelming evidence" of a political explanation for the challenged plan, including "trial testimony by state legislators." J.S. App. 29a. But *Easley* "*generally*" requires *all* plaintiffs to disprove politics where it highly correlates with race, *id.* at 258 (emphasis added); it is not triggered only in certain circumstances depending on defendants' evidence; much less does it require "trial testimony by state legislators" to trigger this burden. The absence of any need for trial testimony is particularly obvious where, as here, the *contemporaneous* legislative history, by Republican supporters and Democratic opponents, evinces a clear 8-3 incumbency protection purpose, *see supra* Part II, (which is presumably why *Plaintiffs* offered no trial testimony by legislators to support their racial theory). Defendants obviously are not required to waive legislative privilege, *Tenney v. Brandhove*, 341 U.S. 367 (1951); *EEOC v. Wash. Sub. San. Comm'n*, 631 F.3d 174 (4th Cir. 2011), in order to trigger the *Easley* burden, particularly if trial testimony would merely echo the contemporaneous statements. Indeed, such post-hoc testimony is far less probative of "the legislature's actual purpose" for the legislation than statements that were actually "before the General Assembly when it enacted" the challenged legislation. *Shaw II*, 517 U.S. at 908 n.4 & 910; *Hunt*, 526 U.S. at 549 (political data and expert

testimony are "more important" than after-the-fact legislator testimony).

Indeed, *Easley* itself in no way depended on legislator testimony to trigger this burden. 532 U.S. at 258. The page from *Easley* the majority cites does *not* refer to legislator testimony, but instead to the political explanation offered by "the State." *Id.* And that page emphasizes that, as in this case, the trial in *Easley* "was not lengthy and the key evidence consisted primarily of documents and expert testimony." *Id.* Similarly here, the record contains "overwhelming evidence," J.S. App. 29a—including "documents[,] expert testimony[,]" Dr. McDonald's concessions, and contemporaneous statements, *Easley*, 532 U.S. at 242—proving a political explanation for the Enacted Plan.

Second, the majority, in its response to the dissent's criticism that Plaintiffs' Alternative Plan produced only a 7-4 Republican ratio (by converting Republican incumbent Rigell's district into a "heavily Democratic" one), blithely suggested that the criticism "relies on an *assumption* that the legislature's objective was to create an 8-3 incumbency protection plan." J.S. App. 13a n.9 (emphasis added). But the "assumption" that the Republican-controlled Legislature wanted to protect Republican incumbents is compelled by common sense and is the very assumption underlying *Easley*. *See* 532 U.S. at 242, 258. And it is not even an "assumption" here because Delegate Janis repeatedly disclosed this objective, every contemporaneous commentator (including Dr. McDonald) acknowledged it, and the Enacted Plan has the clear

effect of maintaining the 8-3 split. *See* J.S. App. 49a, 65a–68a.[2]

2. The majority's eschewing of the *Easley* standard is unsurprising because Plaintiffs' own concessions foreclose the conclusion that the Alternative Plan satisfied it. As noted, *see supra* Part I, Plaintiffs conceded that the Alternative Plan *both* subordinates traditional principles to achieve a "50%" "quota" and undermines "the General Assembly's political goals of having an 8/3 incumbency protection plan." Tr. 172–73, 180. In fact, the Alternative Plan's reduction of District 3's BVAP to the "50%" "quota" turns District 2 from an evenly divided "49.5% percent Democratic" district into a 54.9% "heavily Democratic" district, creating a 7-4 partisan division. Tr. 153; Int.-Def. Ex. 22; J.S. App. 85a. The Alternative Plan thus decreases District 3's BVAP by 6% not to eliminate District 3's racial identifiability, but to increase District 2's Democratic vote share by 5.3%. *See* J.S. App. 85a; Int-Def. Ex. 22.

3. In addition to concededly flunking both of these requirements, the Alternative Plan also fails *Easley*'s third prong because it is not as "consistent with traditional districting principles" as the Enacted

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[2] The majority also said that Plaintiffs' burden under *Easley* to show how the General Assembly "could have achieved its political objectives in alternative ways" may be satisfied by something other than an "alternative *plan*." J.S. App. 13a n.9 (emphasis added). While this may theoretically be true, Plaintiffs' chosen alternative here *is* an alternative plan, and it is quite difficult to even *envision* an "alternative" other than a plan, particularly since neither Plaintiffs nor the majority hinted at what such a theoretical, non-plan "alternative" might be. *Id.* 85a–86a.

Plan. *Easley*, 532 U.S. at 258. The majority substituted its judgment for the Legislature's and concluded that the Alternative Plan was superior to the Enacted Plan because it contained one fewer locality split, J.S. App. 25a, even though that marginal improvement is accomplished "at the expense of protecting incumbents" and preserving cores, *id.* 86a.

But the Legislature must "balance competing" traditional principles—and courts are not permitted to upset that balance in *Shaw* cases. *Miller*, 515 U.S. at 915; *Wilkins*, 264 Va. at 463–64. Even Dr. McDonald agreed that "no principle" says that avoiding locality splits is "more important than" core preservation or incumbency protection—and that it would have been "reasonable to choose the Enacted Plan over the Alternative Plan" if the Legislature preferred those principles over respecting localities. Tr. 222–23.

The Legislature's preference was more than reasonable. Although not insignificant, respecting localities has not been an important redistricting principle in Virginia for decades. The Virginia Constitution was amended in 1970 to *eliminate* respect for "political subdivisions" as a traditional principle. Int.-Def. Ex. 55 at 782. In 2000, the Legislature identified by statute certain important traditional principles, but respecting localities was not among them. *See* Va. Code Ann. § 24.2-305. The Virginia Supreme Court, in a *Shaw* case, listed "preservation of existing districts" and "incumbency" as traditional principles, but did not mention respecting political boundaries. *Wilkins*, 264 Va. at 464. Anyway, Dr. McDonald conceded that the

Enacted Plan "scored highly" and outperformed the Benchmark Plan on locality splits, J.S. App. 77a, further underscoring the reasonableness of the Legislature's trade-off of one fewer locality split for increased core preservation and incumbency protection.

Moreover, preserving District 3's core made unusually good sense here because District 3 "conform[ed] to all requirements of law" when it was adopted as a *Shaw remedy*, *Moon*, 952 F. Supp. at 1151, had not been challenged under *Shaw* in the 2001 *Wilkins* case, and was politically beneficial to Republican incumbents in surrounding districts, Tr. 122–28.

As Dr. McDonald agreed, the Enacted Plan performs better than the Alternative Plan on incumbency protection, *id.* 152, and core preservation. In fact, Dr. McDonald conceded that the Enacted Plan performs "*significant[ly]*" better than the Alternative Plan on core preservation. *Id.* 422–23 (emphasis added). The Enacted Plan preserves between 71.2% and 96.2% of the cores of all districts, and 83.1% of District 3's core. Int.-Def. Ex. 27. The Alternative Plan preserves only 69.2% of District 3's core, the lowest core-preservation percentage of any district in the Alternative or Enacted Plans. *Id.*; Tr. 422.

The majority nonetheless contended that the Enacted Plan did not sufficiently preserve District 3's core because it moved more than the bare minimum number of people needed to achieve population equality in that District (if it is unrealistically viewed without regard to the population needs of *other* districts). *See* J.S. App. 26a, 78a–79a. But the

stated policy was not to make only those changes required by population equality, but to preserve the cores of districts (with additional minor swaps to bolster incumbents politically). It is undisputed that District 3 fulfilled those criteria as well as its majority-white counterparts, since more of its core was preserved than two such districts and, as noted, the additional swaps bolstered incumbents. Int.-Def. Ex. 27; Tr. 122–28. In contrast, the Alternative Plan preserves *less* of the core of District 3 than of *every majority-white* district, *see* Int.-Def. Ex. 27, and moves more than *twice* as many people—384,498—in and out of District 3 than the Enacted Plan, Pl. Ex. 29 at 8–9.

4. The majority fell back to conjuring three traditional principles in an attempt to show that race predominated in Enacted District 3, *see* J.S. App. 21a–27a, but this effort failed. First, the majority suggested that Enacted District 3 is not "compact," J.S. App. 21a, but any problems with District 3's shape were *inherited* from the *Shaw* remedial plan and the Benchmark Plan whose compactness had *never* been challenged, and *had* to be maintained under the uniform core-preservation and incumbency-protection principles applied to all other (majority-white) districts. Moreover, its compactness is not materially different than other districts because it scores only *.01* less than the second-least compact (and majority-white) district. *Id.* 75a. Dr. McDonald conceded that these differences "are relatively small" and "not significant under any professional standard." Tr. 217. He also admitted that compactness measures like those the majority invoked are "inherently manipulable" and that there

is no "professional standard" for judging compactness. *Id.*

Further, the majority described Enacted District 3 as somehow "non-contiguous" because it uses "water contiguity," though it simultaneously recognizes that water contiguity is "legal[]" in Virginia. J.S. App. 22a. The majority also took issue with the Enacted Plan's splitting of VTDs, *id.* 24a, notwithstanding Dr. McDonald's concession that avoiding VTD splits is not a traditional principle, Tr. 218–22. The majority nonetheless condemned the Legislature for availing itself of these permissible methods because they were purportedly used for racial reasons. J.S. App. 21a–27a. But *Shaw* does not condemn racially-influenced line-drawing that *comports* with traditional principles, only that which *subordinates* such principles. *Miller*, 515 U.S. at 916. Anyway, Alternative District 3 *also* uses water contiguity, Pl. Ex. 49, and has the *same number* of VTD splits affecting population as the Enacted Plan, *see* Int-Def. Ex. 26; J.S. App. 76a–77a.

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

Even assuming that the majority's analysis is not legal error under *Easley*, it surely is clearly erroneous fact-finding. *See Easley*, 532 U.S. at 242–58 (overturning three-judge court's *Shaw* finding as clearly erroneous). In addition to the legally insufficient facts described above, the majority also relied on a VTD analysis that is even *less* defensible than the analysis this Court rejected as a matter of law in *Easley*. *See id.* at 245–48.

The majority cited Dr. McDonald's VTD analysis, without elaboration, as somehow suggesting that the

Legislature in 2012 placed predominantly black, highly Democratic VTDs into District 3, but did not do so for similarly-situated Democratic VTDs that were "largely white," thus purportedly evincing a *racial* purpose. J.S. App. 31a. Specifically, Dr. McDonald identified VTDs "in the localities that comprise or are adjacent to the [Enacted] Third District" that have a "Democratic performance greater than 55%." Pl. Ex. 28, at 7–8; Tr. 87–90. He observed that the average BVAP in the 189 such VTDs in District 3 is 59.5% and in the 116 such VTDs in adjacent localities is 43.5%, and claims that this 16% BVAP difference somehow shows "that race trumped politics" in the drawing of District 3. Tr. 88.

This analysis suffers from "major deficiencies." J.S App. 72a. At the threshold, it "proves" only what the Legislature affirmatively *stated* it was doing—preserving the core of District 3—but says nothing about whether the Legislature's 2012 alteration of District 3 was racial rather than political. *159* of Dr. McDonald's *189* 55%-Democratic VTDs in District 3 *already* were included in *Benchmark* District 3 (and their average BVAP is 60%, higher than the average BVAP in VTDs added to District 3 in 2012). *Id.* Of course, VTDs in the majority-black Benchmark district necessarily have a much higher BVAP than those located in the majority-white Benchmark districts. Reducing this disparity would have required moving VTDs in "the middle" of District 3, which could only be done, as Dr. McDonald conceded, by "dismantl[ing] District 3 and chang[ing] its form quite dramatically." Tr. 154. But this would have violated core preservation and incumbency protection and, as noted, the 2012 Plan's VTD swaps at the

margins of Benchmark District 3 had a political effect identical to their racial effect. *See supra* Part II.

In any event, even Dr. McDonald's analysis of VTDs largely in Benchmark District 3 reveals a *political* pattern no different from their *racial* pattern. Specifically, based on Dr. McDonald's own analysis and not Mr. Morgan's analysis the majority (falsely) contends is incorrect, "while the highly Democratic VTDs within [District 3] had a BVAP *16* percentage points greater, they also performed *15.5* percentage points better for Democrat[s]" than the VTDs in adjacent localities. J.S. App. 73a (emphases added). Thus, just as in *Easley*, Plaintiffs' analysis does not show that "the excluded white precincts were as reliably Democratic as the African-American precincts that were included in" District 3, or rebut the hypothesis that the Legislature, "by placing reliable Democratic precincts within a district without regard to race, end[ed] up with a district containing more heavily African-American precincts, but the reasons w[ere] political rather than racial." *Easley*, 532 U.S. at 245–46.

Moreover, Dr. McDonald defined the excluded VTDs as any VTDs in "*localities*" adjacent to Enacted District 3, regardless of whether the *VTDs* are adjacent to District 3. J.S. App. 71a–72a. Some of the VTDs are up to *thirty miles away* from District 3's boundary. *Id.* 72a. Thus, again just as in *Easley*, this analysis is facially deficient because it simply ignores whether any of the "excluded white-reliably-Democratic precincts were located near enough to [District 3's] boundaries or each other for the legislature as a practical matter" to have included

them, "without sacrificing other important political goals." *Easley*, 532 U.S. at 246.

V. THE MAJORITY MISAPPLIED THE NARROW TAILORING REQUIREMENT

Although it is irrelevant because the finding that race predominated is legally erroneous, the majority's strict scrutiny analysis is also plainly wrong as a matter of law. The majority recognized that compliance with Section 5 is a compelling state interest—but held that a redistricting plan is not narrowly tailored if it "did more than was necessary to avoid 'a retrogression in the position of racial minorities.'" J.S. App. 35a (quoting *Bush*, 517 U.S. at 983).

The majority's selective quotation completely misconstrues *Bush*. There, this Court *rejected* a least-restrictive-means test, and held that narrow tailoring is shown where "the districting that is based on race '*substantially addresses* the [Voting Rights Act] violation.'" 517 U.S. at 977 (plurality op.) (emphasis added) (quoting *Shaw I*, 509 U.S. at 656; *Shaw II*, 517 U.S. at 968). Thus, the enacted district need not "defeat rival compact districts designed by plaintiffs' experts in endless 'beauty contests.'" *Id.* To the contrary, this Court adheres "to [its] longstanding recognition of the importance in our federal system of each State's sovereign interest in" redistricting. *Id.* at 978. States thus retain "flexibility" in how they "respect" traditional

principles and simultaneously undertake "reasonable efforts to avoid" Voting Rights Act liability. *Id.*[3]

In short, the *state* gets to choose how to best "substantially address" Section 5 compliance and may do so in a way that better comports with its non-racial districting goals—it is not put in a racial straitjacket where it must provide the *lowest possible* BVAP needed to avoid retrogression, particularly where, as here, the Legislature's chosen compliance method comports with traditional principles as well as the lower BVAP alternative.

The majority's least-restrictive-means test, in contrast, would interject *more* race-consciousness into redistricting because it would require states to precisely replicate the benchmark BVAP (or plaintiffs' preferred BVAP), even if that comes at the cost of non-racial factors. Here, for example, attaching talismanic significance to the 3.2% increase over the Benchmark BVAP does nothing to further *Shaw*'s objectives because there is *nothing* in the record to suggest that the *increase* subordinated

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[3] The majority also contorted *Bush*'s specific holding on narrow tailoring. J.S. App. 37a. The district in *Bush* was 35.1% *minority*-black and not even *plurality*-black, but instead plurality-Hispanic. 517 U.S. at 983. Yet the legislature added *15.8%* BVAP to transform it into a majority-black district, ostensibly in the name of avoiding retrogression. *Id.* But obviously such a dramatic conversion to a first-time majority-black district was not non-retrogressive "maintenance," but an improper "substantial augmentation" of BVAP. *Id.* Here, the Legislature *preserved* an existing majority-black district and increased its BVAP by *3.2%* in a manner that advanced the General Assembly's political goals and preferred traditional principles.

traditional principles to race. *See Miller*, 515 U.S. at 916. To the contrary, the Enacted Plan with 56.3% BVAP in District 3 performed *better* than the Benchmark Plan with 53.1% BVAP in District 3 on *both* politics and principles such as locality splits. *See* Pl. Ex. 4 at 11; Int.-Def. Ex. 20. For this reason, Plaintiffs had to reduce District 3's BVAP to 50.2% to achieve the Alternative Plan's marginal improvement of one locality split. J.S. App. 25a. Moreover, as noted, the swaps creating the 3.2% increase affirmatively served the Legislature's political and incumbency protection goals. Accordingly, the Legislature had more than ample reason to believe that its alternative was a far better way to "substantially address" Section 5 compliance than a 53.1% alternative that *increased* the subordination of traditional principles to race.

Similarly, the Legislature had very strong reasons to comply with Section 5 through its preferred method, rather than plaintiffs' *post-hoc* litigation alternative of a 50.2% district. In addition to the dispositive facts that the Legislature was never presented with such an alternative and that it violated incumbency protection, use of this alternative would have greatly complicated Virginia's Section 5 burden and endangered Justice Department preclearance. In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), the Court considered a plan that "'unpacked' the most heavily concentrated majority-minority districts" to create new districts with BVAPs slightly above and below 50%. *Id.* at 470; *see also Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 56 (D.D.C. 2002). Contrary to the Justice Department's position, this Court held that those changes were not retrogressive. 539 U.S. at 491.

Congress amended Section 5 three years later precisely to overturn *Ashcroft*, which "misconstrued and narrowed the protections offered by Section 5." 42 U.S.C. § 1973c note, Findings (b)(6). Thus, the 2006 version of Section 5 prohibited any change that would "diminish[]" minority voters' ability to elect their "candidates of choice." 42 U.S.C. § 1973c(b). Accordingly, if Virginia had followed Georgia's lead in *Ashcroft* by reducing BVAP to the 50% range, it would have faced the daunting burden to prove to the Justice Department that the decrease complied with the 2006 Amendment designed to *overturn Ashcroft* and otherwise did not diminish black voters' ability to elect their candidates of choice. This would have required more extensive and expensive expert testimony and proof than Virginia provided for the Enacted Plan, and also jeopardized preclearance because it is very difficult, in the real world, to *prove* that diminished BVAP does not result in diminished ability to elect.

This is because there is rarely a pattern of relevant elections under which the majority's "racial bloc voting analysis," J.S. App. 38a, can prove no diminution. Because the elections in Benchmark District 3 were not probative, experts such as Dr. McDonald rely on election contests such as those involving President Obama, but these statewide races provide facially misleading results concerning how little BVAP is needed to avoid diminishing black electoral abilities. Here, for example, Dr. McDonald's racial bloc voting analysis concededly "shows" that a *30%* BVAP level in District 3 would avoid diminution. Tr. 196. In the real world, however, a reduction from 53.1% BVAP to 30% BVAP would almost certainly be denied preclearance. Yet under the majority's least-

restrictive-means rule, the Legislature would be *required* to produce such a plan—and neither the Enacted Plan nor the Alternative Plan would be narrowly tailored. *See id.*

The majority also contended that the Legislature applied a 55% racial "threshold" or quota in District 3, J.S. App. 37a—but, as explained, there was no quota in the Enacted Plan, *see supra* p. 24 n.1.[4]

VI. THE COURT SHOULD RESOLVE THIS CASE AS SOON AS POSSIBLE

The Court at a minimum should note probable jurisdiction and set oral argument as soon as practicable. The majority ordered the Legislature to adopt a remedial plan by April 1, 2015, only five months from now but 19 months before the 2016 election. The enactment of a remedial plan would require significant time and resources, particularly since the majority's opinion and the racially discriminatory Alternative Plan provide scant guidance for how the Legislature can fix the perceived errors in Virginia's only congressional district where blacks can elect their preferred representative. It also would prove a wasted exercise if the Court reverses the majority's flawed decision.

Moreover, the Court is currently resolving a *Shaw* case presenting issues regarding the preservation of

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[4] The majority also invoked the myth that "African-American voters accounted for over 90% of the voting age residents added to" Enacted District 3. J.S. App. 36a n.22. Yet none of the areas moved into District 3 had a BVAP anywhere near 90%, many were not even majority black, and the combined effect of these moves was to increase District 3's BVAP by only 3.2%. Pl. Ex. 27 at 14; Tr. 300–03.

majority-black districts, *see Ala. Dem. Conference v. Ala.*, No. 13-1138, and it may promote judicial efficiency to resolve these cases simultaneously.

Indeed, given the time constraints and the majority's glaring legal errors, the best course is to summarily reverse the judgment below. Already during this redistricting cycle, the Court has summarily affirmed the rejection of *Shaw* claims in two cases that rest on the application of *Easley* that Appellants advocate. *See Fletcher*, 133 S. Ct. 29; *Backus v. State*, 857 F. Supp. 2d 553 (D.S.C. 2012), *summ. aff'd*, 133 S. Ct. 156 (2012); *see also Tolan v. Cotton*, 134 S. Ct. 1861, 1867–68 (2014) (summary reversal appropriate to "correct a clear misapprehension" of the Court's precedents); *Upham v. Seamon*, 456 U.S. 37, 40–41 (1982) (per curiam) (granting summary reversal in redistricting case); *Lance v. Dennis*, 546 U.S. 459, 462–63 (2006) (per curiam) (same).

For these reasons, Appellants have filed this jurisdictional statement only 24 days after the three-judge court's opinion, and seek resolution of this case during this Term.

CONCLUSION

The Court should summarily reverse or, at a minimum, note probable jurisdiction.

Respectfully submitted,

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