No. 14-1504

IN THE

Supreme Court of the United States

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

Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

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

BRIEF OPPOSING APPELLEES' MOTIONS TO DISMISS OR AFFIRM

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BRIEF OPPOSING APPELLEES' MOTIONS TO DISMISS OR AFFIRM

Appellees' Motions confirm that the Court should note probable jurisdiction or summarily reverse because they do not even attempt to respond to Appellants' demonstration of the majority's legal errors. Appellants' principal argument is that the majority committed basic legal error because it never found any inconsistency between the alleged racial purpose and the neutral factors of "partisan politics" and "protect[ing] incumbents" that "inarguably" "played a role" in drawing District 3 in this "mixed motive" case. J.S. App. 30a-31a. This is error because it is impossible for race to "subordinate" those neutral factors, or have a "direct and significant impact" on District 3's shape, absent such an inconsistency between racial and neutral factors. *Ala. Leg. Black Caucus v. Ala.*, 135 S. Ct. 1257, 1266-71 (2015). And, absent such an inconsistency, it is irrelevant that the legislature ranked Section 5's "mandatory" "racial" purpose higher than the "voluntary" neutral factors, because Section 5 and the neutral factors were coextensive and there was thus no occasion to choose between them. Therefore, the majority clearly violated the command of *Shaw* (and *Easley* and *Alabama*) by finding a Fourteenth Amendment violation without identifying such an inconsistency. *See id.*; J.S. 8-24.

In response, neither Appellee even hints at any potential inconsistency between race and politics or incumbency protection, thus confirming that it was impossible for "race *rather than* politics" to cause District 3's shape, since race and politics pointed in precisely the same direction. *Easley v. Cromartie*,

532 U.S. 234, 243 (2001). Moreover, Appellees simply echo the majority's erroneous notion that race "predominated" because Section 5's "mandatory" requirement ranked higher than "voluntary" neutral principles, without attempting to explain (1) how such rank-ordering could possibly "significantly affect" District 3's shape by "subordinating" neutral principles, when the lower-ranked voluntary factors are wholly coextensive with the "racial" requirements of the Voting Rights Act ("VRA") or (2) how such rank-ordering analysis would not *automatically* establish racial "predominance" in *every* case, since the mandatory federal VRA requirements *always* rank higher than voluntary neutral state principles. J.S. 8-24.

Apparently recognizing these fatal deficiencies, Appellees seek to rewrite the majority opinion as somehow embracing the extraordinarily counter-intuitive and historically unprecedented notion that Virginia's Republican legislature eschewed *any* consideration of politics or protecting Republican incumbents. Pl. Mot. 24-25; Def. Mot. 36-37. But this facially "remarkable" assertion is at war with the majority's express finding that politics and incumbency protection were "inarguably" "motives" for District 3's shape, so Appellees' revisionist theory cannot provide a basis for affirming the *majority's* contrary conclusions. Rather, summary affirmance would affirm a rule that race subordinates traditional principles even when subordination is impossible because race is coextensive with the neutral principles that "inarguably" "motivated" the legislature, solely because the legislature acknowledged the truism that the federal VRA is

"mandatory." Any such rule, however, impermissibly converts *Shaw* from a prohibition against using race in a way that changes a district by "subordinating" neutral principles into a prohibition against *considering* the race-conscious requirements of the VRA, even when they have no effect because they mimic coextensive neutral principles. Such a rule would also at least presumptively invalidate *all* redistricting because, to quote Plaintiffs-Appellees, this Court has "acknowledged" that "redistricting almost always involves racial considerations." Pl. Mot. 30, *Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015). Finally, this rule would perversely prohibit majority-minority districts from being drawn pursuant to the neutral principles driving all majority-white districts, because the higher-ranked, mandatory VRA requirements purportedly invalidate application of the coextensive neutral principles.

Relatedly, the majority erred by relieving Plaintiffs of the *Easley* burden to prove racial subordination by producing an alternative plan where race does not predominate but that equally achieves the Legislature's districting and political goals. J.S. 24-31. Again, Appellees nowhere dispute that Plaintiffs' Alternative flunks this test because it is concededly "significantly" worse at preserving District 3's core and disserves Republican political interests by converting 50/50 District 2 into a "heavily Democratic" district. Tr. 119, 152-53, 422-23.

Plaintiffs seek to excuse this basic failure by arguing that they need not satisfy *Easley* where, as purportedly occurred here, the Legislature does not *say* politics was more important than the VRA. But this contradicts *Easley*'s plain language and

Defendants-Appellees' admission that *Easley* applies where "'the State argues that politics, not race, was its predominant motive.'" Def. Mot. 39 (quoting *Ala.*, 135 S. Ct. at 1267). This is such a case. Post-Trial Br. (DE 106).

Thus, notwithstanding Appellees' strained contrary arguments, this is not a case where the majority merely engaged in clearly erroneous fact-finding (although it did do that and, as *Easley* demonstrates, such clear errors warrant plenary review, 532 U.S. at 242-58). Rather, the majority fundamentally altered *Shaw*, *Easley* and *Alabama*'s requirement that plaintiffs prove the district was "changed" through "subordination" of neutral principles into a prohibition against the *consideration* of race *necessitated* by the VRA, even where such considerations have no effect. At a minimum, whether *Shaw* and its progeny should be so revised/reinterpreted is a "substantial question" foreclosing summary affirmance. *In re Primus*, 436 U.S. 412, 414 (1978).

I. APPELLEES FAIL TO REHABILITATE THE MAJORITY'S MISAPPLICATION OF *EASLEY* AND *ALABAMA*

Like the majority, Plaintiffs invoke Delegate Janis's routine, accurate statements that Section 5 required the Legislature to "avoid retrogression in District 3" and that this *federal mandate* took precedence over *voluntary state* principles (or politics). Pl. Mot. 9-16. Even if these statements were an admission that preserving District 3's BVAP was of utmost importance (*but see* p.9, *infra*), that is immaterial because there is no conflict between Section 5's re-

quirement to preserve District 3 and the Legislature's general policy of preserving *all* districts for core-preservation, incumbency protection and political purposes. Since there is no *conflict*, race cannot *predominate*.

Appellees nowhere dispute that politics and core/incumbency preservation were coextensive with Section 5's non-retrogression command or that all majority-white districts not subject to Section 5 were preserved in the same way as District 3. This conclusively demonstrates that Section 5 was not even the "but-for" reason for preserving District 3.

More specifically, Appellees nowhere contend that adhering to the alleged BVAP "floor"—whether the Benchmark 53.1% or 55%—was inconsistent with Republican political interests or core preservation. Plaintiffs acknowledge that the Legislature "rank ordered core preservation" *first* among discretionary state policies and do not dispute that Enacted District 3 performs "significantly" better on that factor than any alternative. Pl. Mot. 22. Indeed, Plaintiffs agree that Janis sought to preserve the "will of the Virginia electorate" expressed in the 2010 elections by preserving, with "minimal" changes, the "core of the existing congressional districts" that produced an 8-3 Republican delegation. *Id.* 14. Since it is undisputed that Enacted District 3 *better* served the concededly paramount neutral factors of preserving cores and Republican incumbents than *any* alternative, its 56.3% BVAP could not possibly have *subordinated* these factors.

Plaintiffs' own arguments reinforce that District 3 directly served core-preservation and Republican po-

litical goals. First, Plaintiffs' complaints about compactness and boundary splits, *id.* 21-23, are *necessary consequences* of preserving District 3, because *all* such "flaws" were inherited from Benchmark District 3 (which perpetuated a *Shaw remedy*), J.S. 27-28. Accordingly, these "flaws" would have occurred without Section 5 because District 3 would have been preserved anyway, under the Plan-wide core-preservation and incumbency-protection factors.

Second, Plaintiffs' contention that Janis's predominant goal was to ensure that District 3 not have "*less* percentage of BVAP [than]" Benchmark District 3, Pl. Mot. 11, confirms that Enacted District 3's *augmentation* of the BVAP could not have been driven by this "racial" goal. Thus, it must be explained by the political effect of the swaps with adjacent districts, which, it remains undisputed, all benefitted the affected Republican incumbents. J.S. 17-19.

2. Thus, District 3's racial composition cannot be attributed to race rather than politics because it is the best (and, on the undisputed record, *only*) way of returning 8 Republicans to Congress. Plaintiffs do not dispute that Enacted District 3 directly serves this political goal or that its configuration would have made "perfect sense" if everyone involved were "white." Tr. 128; J.S. 17-24.

Plaintiffs nonetheless assert that race must have predominated because, for the first time in American history, the Legislature did not want to return the majority party's incumbents to Congress. Pl. Mot. 24-25. As noted, however, any such assertion directly contradicts the majority's express finding and the undisputed evidence. It also contradicts Plaintiffs'

concession that the Legislature sought to preserve the "will of the Virginia electorate as it was expressed in the November 2010 elections" by ensuring only "minimal" changes to the districts. J.S. 20. So all agree that the Legislature's neutral policy was to preserve the 8-3 split produced in 2010 through a strategy of minimal, politically beneficial alterations to existing districts—precisely what was done in District 3. Unable to deny this basic reality, Plaintiffs are reduced to the semantic quibbles that Janis did not utter the phrase "8-3" when he avowedly preserved the districts that had produced that split, and that the incumbent recommendations he uniformly followed were purportedly based on disinterested advice about "communities of interest." Pl. Mot. 15. Even assuming incumbents would recommend *detrimental* changes, "communities of interest" in Virginia include "communities" defined by "*political beliefs, voting trends and incumbency considerations*," so the incumbents could have made politically beneficial suggestions under Plaintiffs' theory. Pl. Ex. 5 at 2 (emphasis added).

3. As noted, Plaintiffs flunked *Easley*'s alternative-plan requirement because, it is undisputed, their Alternative Plan converts District 2 into a "heavily Democratic" district and performs "significantly" worse on the *Legislature's* preferred non-federal principles—preserving "cores" in order to protect all incumbents. Tr. 119, 152-53, 422-23.

The Alternative Plan also fails to achieve "significantly greater racial balance" because its District 3 concededly "subordinates traditional districting principles to race" to satisfy a 50.1% black "quota." *Id.* 172-73, 180. Plaintiffs nevertheless contend that this

requirement is met because the "percentages of black and white voters within and among the districts [are] more balanced" under their 50.1% quota than the 56.3% Enacted District. Pl. Mot. 30. Under this test, a 55% or 53.1% BVAP District 3 satisfies *Easley*, although Plaintiffs elsewhere contend that those percentages are impermissible quotas. *Id.* 15-18. And Plaintiffs' 50.1% quota is no better, since it subordinates both *Plaintiffs*' preferred traditional principles and the *Legislature's* principal core-preservation goal. Plaintiffs' test not only eliminates the word "significantly" from *Easley*, it does nothing to illuminate *Easley*'s "critical" question, 532 U.S. at 252, of whether race caused the challenged district to be different than it would have been absent race. Since Plaintiffs' alternative concededly *violates Shaw*, it cannot expose or remedy a *Shaw* violation.

Recognizing these fatal defects, Plaintiffs argue that *Easley's* instruction for what plaintiffs must show "at the least," *id.* at 258, virtually never applies, obtaining only when there is "little direct evidence" of racial considerations, Pl. Mot. 26. But *Easley* never hints at a "direct evidence" exception. To the contrary, it explains that "direct" evidence that the "legislature considered race" or desired a "racial balance" "says little or nothing about whether race played a *predominant* role comparatively speaking" and thus must be supplemented with an alternative plan. 532 U.S. at 253. Finally, the "direct evidence" in *Easley* was worse than anything here. *Id.*[1]

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[1] Plaintiffs do not respond to Appellants' demonstration that Dr. McDonald's VTD analysis was worse than that rejected as a

4. Finally, Janis's statements do not reflect an impermissible racial purpose. J.S. 20-23. Plaintiffs cite cases where a desire to create a majority-minority district evinced an improper racial purpose only because it "was not required under a correct reading" of the VRA. *Shaw v. Hunt*, 517 U.S. 899, 911 (1996) (Pl. Mot. 11); *Bush v. Vera*, 517 U.S. 952 (1996) (Pl. Mot. 12). Here, it is undisputed that Janis's frequent recitation that Section 5 prohibits "retrogression" in District 3 was *correct*. And Plaintiffs do not dispute either that Janis's statements *echo* every *judicial* redistricting or that resting *Shaw* liability on a *correct* reading of Section 5 would convert VRA compliance from a compelling justification for racial considerations into a compelling admission that race predominated. J.S. 12-14. [2]

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matter of law in *Easley*. J.S. 31-34. Instead, Plaintiffs seek to defend a *subset* of Dr. McDonald's analysis—*swapped* VTD's—but simply mimic his basic error. Pl. Mot. 23-24. Specifically, Plaintiffs cherry-pick "highly Democratic" swapped VTDs, while consideration of *all* swapped VTDs establishes that these swaps' political effect is indistinguishable from their racial effect. J.S. 19-20.

[2] The one Janis reference to BVAP (as opposed to "retrogression") was that he "took into consideration the "current percentage of voting age population," along with the "recommendations" of "Congressman Scott in District 3." Pl. Ex. 43 at 13 (Pl. Mot. 11). Particularly in this context, where any racial bloc voting analysis could not have demonstrated that a BVAP reduction was nonretrogressive, J.S. 37, considering such factors to assess retrogression was quite sensible. Moreover, unable to defend the majority's deceptive quotes "showing" a 55% BVAP threshold, J.S. 23 n.1; J.S. App. 21a n.16, Plaintiffs instead misleadingly quote statements of Senator Vogel, Pl. Mot. 17-18, concerning the *Virginia Senate* redistricting plan made one legislative ses-

Again, even if Janis's correct recitation of Section 5 reflects a legislative purpose to achieve 53.1% (or 55%) BVAP, that cannot support a *Shaw* violation because there is no evidence or finding that achieving these racial percentages conflicted with the race-neutral principles applied to all districts.

II. APPELLEES FAIL TO REHABILITATE THE NARROW TAILORING ERRORS

Appellees also fail to rehabilitate the majority's narrow tailoring errors. Plaintiffs note that "least restrictive means" "appear[s] nowhere in the opinion," Pl. Mot. 31—but Appellants never contended otherwise, J.S. 33-37. Rather, Appellants showed that, while the majority dropped this *verbiage* from its prior opinion after *Alabama* expressly rejected that test, it nonetheless continued to condemn District 3 because it increased BVAP above the Benchmark. *Id.*

Plaintiffs argue that the majority did not place the Legislature in a "racial straightjacket" because it "did not require justification of CD3's BVAP down to the last decimal." Pl. Mot. 33. But they nowhere dispute that the majority's analysis prohibits BVAP *increases* and, thus, *magnifies* race-consciousness. J.S. 34-36. Moreover, like the majority, Plaintiffs chide the Legislature for failing to perform a racial bloc voting analysis, Pl. Mot. 31-32—yet they do not dispute that their racial bloc voting analysis would require no more than *30%* BVAP in District 3, which would indisputably be denied preclearance, J.S. 37.

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sion *before* adoption of the Enacted Plan, Int.-Def. Ex. 32 at 18; Def. Mot. 14.

Finally, Plaintiffs nowhere dispute that the Enacted Plan with 56.3% BVAP was the *only* plan that achieved the Legislature's preferred race-neutral objectives. *Id.* 35. Plaintiffs are therefore contending that a legislature may not comply with *Shaw* by selecting the Section 5-compliant option that *least* subordinates traditional principles to race. J.S. 34-35. This Court, however, has foreclosed any such "trap for an unwary legislature." *Ala.*, 135 S. Ct. at 1274.

III. APPELLANTS HAVE STANDING

The district court granted Appellants intervention in accordance with myriad prior cases. *Wright v. Rockefeller*, 376 U.S. 52 (1964); *King v. Ill. State Bd. of Elections*, 410 F.3d 404 (7th Cir. 2005); *Hall v. Virginia*, 276 F. Supp. 2d 528 (E.D. Va. 2003), *aff'd*, 385 F.3d 421 (4th Cir. 2004). Plaintiffs did not oppose intervention when Appellants' cognizable interests faced only potential injury, but now oppose standing when Appellants face *certain* harm from the majority's order. Pl. Mot. 6-8.

This effort fails: as *defendants* seeking to *preserve* the Enacted Plan, Appellants' harm flows not from the *Plan*, but the majority's *order* requiring changes to the Plan. Accordingly, Appellants have standing to appeal because they "likely" face an "injury" caused by the *order*, redressable by appellate reversal. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013).

Indeed, Appellants' injury is not merely likely, but *certain*. Plaintiffs do not dispute that the order necessarily requires changing at least one district represented by an Appellant. The majority concluded that the Legislature retained too many black

(overwhelmingly Democratic) voters in District 3. J.S. App. 1a-3a. Any remedy must therefore move such voters *out* of District 3 and into one or more of the surrounding Republican districts, and an equal number of (white) voters into District 3. Thus, any remedy approved by the "Republican[-]majority" Legislature (and *Democratic* governor), Pl. Mot. 8, or the court, will necessarily alter districts where Appellants have previously been elected.

Such changes will be particularly injurious because they will undo an Appellant's recommendations for his district, replace a portion of "his base electorate" with unfavorable Democratic voters, and harm Appellants as Republican voters. *King*, 410 F.3d at 409 n.3; *see Meese v. Keene*, 481 U.S. 465, 474-75 (1987) (standing based on harms to "chances for reelection"). Moreover, Plaintiffs' Alternative Plan, which will at least be a starting point for any remedy, harms Appellant Rigell by turning District 2 "heavily Democratic." Tr. 119, 152-53; J.S. 3. These harms are precisely the kind of "direct stake[s]" that confer standing to appeal. *Hollingsworth*, 133 S. Ct. at 2662.

United States v. Hays, 515 U.S. 737 (1995) (Pl. Mot. 8), confirms these points. Just as a plaintiff is injured by a redistricting plan if he resides in the district affected by the alleged unconstitutionality, Appellants are injured by the majority's command to alter District 3 because they represent districts that will necessarily be affected by that order. Even though it involves intervention, *Johnson v. Mortham*, 915 F. Supp. 1529 (N.D. Fla. 1995) (Pl. Mot. 8), also confirms Appellants' standing. The court there granted intervention to a congresswoman in a district

challenged under *Shaw* based on her "personal interest in her office" and in "keeping District Three intact." *Id.* at 1538. Appellants have an identical "interest" in "keeping District Three" and their own districts "intact." That *Johnson* denied intervention to congressmen whose districts did *not* border the challenged district and faced "speculative" harm, *id.*, is irrelevant because at least one bordering-district Appellant faces *certain* harm here.

CONCLUSION

The Court should summarily reverse or note probable jurisdiction.

Respectfully submitted,

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