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

REPLY BRIEF FOR APPELLANTS

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I. APPELLEES FAIL TO REHABILITATE THE MAJORITY'S LEGAL ERRORS

A. The Undisputed Facts Foreclose Plaintiffs' Claim

Appellees' briefs confirm the absence of any material factual dispute. Appellees do not dispute:

- Enacted District 3 is the *only* alternative introduced in the Legislature or court that preserves the 8 Republican incumbents' re-election prospects.

- Plaintiffs' Alternative converted a Republican incumbent's district into a "heavily Democratic" district.

- The racial percentages of the VTDs added to, or already within, District 3 almost precisely mirror the Democratic percentages.

- District 3's shape and demographics would have made "perfect sense" for "political" reasons if everyone in the District was "white."

- Core preservation and respecting the will of the 2010 electorate were the *most important* neutral policies controlling the Enacted Plan.

- The cores of *all* districts were preserved in the same manner.

- The majority found that "protecting

> incumbents" and "partisan politics" "inarguably" "motiv[ated]" District 3's lines.

Opening Brief ("OB") 3-12, 35-36.

Since it is undisputed that a 56.3%-BVAP District 3 best serves the Legislature's most important traditional and political objectives, there can be no *Shaw* violation even assuming the Legislature misinterpreted Section 5 to preclude diminishing BVAP below 55% (or the Benchmark 53.1% BVAP). *Shaw* does not prohibit considerations of race in the *abstract*, but only if they lead to some action with real-world consequences; *i.e.*, a "direct and significant impact" on district lines by "subordinat[ing]" the "traditional districting principles" that would otherwise govern. *Ala. Leg. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270-71 (2015). Also, where, as here, the "State argues that politics, not race, was its predominant motive," *id.* at 1267, Plaintiffs must prove that "race *rather than* politics" was the "*predominant*" reason that traditional districting principles were subordinated. *Easley v. Cromartie*, 532 U.S. 234, 243 (2001) ("*Cromartie II*").

Neither showing is possible where, as here, the district with the alleged BVAP floor best complies with the most important principles governing all districts and best serves political objectives. Race is not the "but for," much less "predominant," cause of a district's facially neutral shape and demographics if they would have been the same absent race. While majority-minority districts may not be *created* at the expense of neutral or political objectives, such districts need not be *dismantled* at the expense of those objectives. Appellees' contrary rule would turn

Shaw on its head by requiring application of different principles to minority districts than to non-minority districts. OB 33.

B. *Alabama* And *Bush* Underscore The Majority's Errors

Appellees' overriding response is that *Shaw* prohibits preservation of majority-minority districts—or the benchmark BVAP—even absent any inconsistency between such Section 5 preservation and the core preservation and political objectives applied to majority-white districts, solely because Section 5 ranks higher in the "hierarchy" of districting principles than these discretionary principles. Pl. Br. ("PB") 21-27; Def. Br. ("DB") 35-38. Specifically, Appellees contend that *Alabama* and *Bush v. Vera*, 517 U.S. 952 (1996), establish that "direct evidence" of a BVAP floor or intentional creation of a majority-minority district establishes that race "predominated" over neutral principles even if, as here, the racial goal is co-extensive with those principles. Such "direct evidence" of Section 5's primacy also purportedly negates the need to disprove politics as an explanatory variable *in any way*, much less through an alternative plan that accomplishes the legislature's "legitimate political objectives." PB 49-53; DB 54-58; *Cromartie II*, 532 U.S. at 242. But *Alabama* and *Bush*, like all *Shaw* cases, establish just the opposite: race "predominate[s]" only if plaintiffs meet the "demanding burden" of proving both that race "*subordinates*" traditional principles and that politics or incumbency protection do not "explain" the district "as well" as "race." *Bush*, 517 U.S. at 967 (plurality); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) ("To make

[predominance] showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles."). Indeed, the mere existence of a BVAP floor *cannot* establish "predominance" because Section 5 *requires* such a floor (the percentage needed to avoid "diminishing" minorities' "ability to elect") and Section 5 cannot inherently violate *Shaw* because, as here, that floor is often consistent with neutral principles and politics. OB 28-32.

1. In *Alabama*, "a *primary* redistricting goal was to maintain existing racial percentages in *each*" of the 34 "majority-minority district[s]." 135 S. Ct. at 1271 (emphasis added). Under Appellees' "predominance" theory, this direct evidence of the "primary" BVAP-maintenance goal *ipso facto* establishes racial predominance in all such districts. *Alabama*, however, did not hint that "predominance" was established in all the districts subject to this goal. Rather, such predominance was (potentially) established only in districts where there was "considerable evidence that this goal had a direct and significant impact on" the boundaries. *Id.* That is because, to establish that "race was the predominant factor," the "plaintiff must prove that the Legislature *subordinated traditional race-neutral districting principles* to racial considerations." *Id.* at 1271.

Indeed, as the Solicitor General explained, Alabama's "no reduction" policy violated *Shaw* only if it "conflict[ed]" with and caused "the derogation of traditional districting criteria." *Ala.* Tr. 30, 32; *see id.* 27-37. Consequently, *Alabama* did not suggest that the district court on remand consider all 34 districts subjected to this BVAP-maintenance goal,

but only "District 26 and likely other" districts where this goal potentially caused "subordination" and had a "direct and significant impact" on lines. 135 S. Ct. at 1270.

2. In *Bush*, voluminous direct evidence from "state officials" "conceded" "that the challenged districts" were "created for the purpose of enhancing opportunities for minorities" and that "the State substantially neglected traditional districting criteria such as compactness, that it was committed from the outset to creating majority-minority districts, and that it manipulated district lines to exploit unprecedentedly detailed racial data." 517 U.S. at 961-62. But even this overwhelming direct (and circumstantial) evidence was insufficient to establish "predominance," because "direct evidence" is "merely one of several essential ingredients," and plaintiffs must prove that "traditional districting criteria [were] *subordinated to race*" to establish "predominance." *Id.* at 958, 962 (emphasis original).

Consequently, the *Bush* plurality emphasized that, to resolve whether "it was *race* that *led to* the neglect of traditional districting criteria," courts "*must* therefore consider what role other factors played . . . to determine whether race predominated." *Id.* at 963 (emphasis added). Specifically, if "incumbency protection might explain as well as, or better than, race a State's decision to depart from other traditional districting principles, such as compactness," no *prima facie* case is established even if the "voters being fought over . . . were African-American." *Id.* at 967-68. Such deliberate shifting of black voters does not "convert a political gerrymander into a racial gerrymander" "no matter

how conscious redistricters were of the correlation between race and party." *Id.* Thus, race predominated in *Bush* only because a detailed review of whether incumbency protection explained the departure from traditional principles "compel[led]" the "inescapable" "conclusion" that the "contours of" "challenged districts" were "unexplainable in terms other than race" and "racial quotas." *Id.* at 969-73.

Similarly, that racial predominance is established when "racially motivated gerrymandering had a qualitatively greater influence on the drawing of district lines than politically motivated gerrymandering," *id.* at 969, *refutes* Appellees' "rank ordering" theory. DB 45; *see* PB 21-27, 48. The question is not whether race is *ranked higher* than neutral objectives, but only whether "*district lines*" were "qualitatively *greater influence[d]*" by race, which must be established by, for example, showing that district lines were "tailored perfectly to maximize minority population" but "far from the shape" that "maximize[s] the Democratic vote." *Bush*, 517 U.S. at 971. Here, the majority made *no* finding that district lines departed from incumbency protection and political goals, much less had a qualitatively stronger correlation with race, precisely because it is undisputed that District 3 benefitted all adjacent Republican incumbents.

Even the concurring opinion in *Bush* rejects Appellees' position because it would apply strict scrutiny only where the "legislature affirmatively undertakes to create a majority-minority district that would not have existed *but for* the express use of racial classifications." *Id.* at 1001 (concurrence) (emphasis added). Where, as here, the majority-

minority district would have been preserved absent race (under the statewide core-preservation and incumbency-protection priorities), Plaintiffs have not proven that the district "would not have [been preserved] 'but for'" race.

This "but for" causation requirement inheres in the requirement that *Shaw* plaintiffs establish that the district was drawn "because of" race, particularly in "mixed motive" cases like this. *See Gross v. FBL Fin. Servs.*, 557 U.S. 167, 176, 178 (2009) (since ADEA prohibits adverse action "*because of*" age, plaintiff in mixed-motive case must prove "age was the 'but for' cause of the" action); *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 286 (1977) (no liability unless challenged action taken "because of" prohibited criterion).[1]

II. PLAINTIFFS FAILED TO PROVE THAT RACE SUBORDINATED TRADITIONAL PRINCIPLES

Appellees argue that District 3 subordinated traditional principles, but do not dispute that the

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[1] In *Shaw v. Hunt* ("*Shaw II*"), race was clearly the "but for" cause of challenged District 12, because the State was forced to create it by the Justice Department's illegitimate Section 5 "policy of maximizing the number of majority-black districts" after the State *rejected* a "second [black] district" in order to protect "white incumbents." 517 U.S. 899, 913 (1996); *id.* at 938 n.15 (Stevens, J. dissenting); *cf.* Gov. Br. ("GB") 32 n.10. While the State tried to *lessen* the negative effect on incumbents relative to *other* majority-black district options, creating *some* such district was *solely* a racial decision and "protecting Democratic incumbents came into play only after the race-based decision had been made." 517 U.S. at 907.

highest-ranking neutral principles were core preservation and the closely related policy of honoring the will of the 2010 electorate, which produced an 8-Republican and 3-Democrat delegation. PB 42-43; DB 5-6.

This concession is dispositive: since core preservation and incumbency protection were both the most important neutral principles and consistently applied to all districts, even where Section 5 was not a factor, preservation of District 3 was neither race-based nor a departure from neutral principles. Where, as here, the Legislature preserves the cores of all districts, treating the majority-minority district the *same* cannot be "predominantly racial." As in social science, the best way to determine which of two potential explanatory variables causes a result is to eliminate one and see if the same result occurs. Here, "race" (Section 5) is eliminated in Virginia's 10 majority-white districts, but the same core-preservation result occurs. Thus, race cannot be the "predominant" cause of District 3's preservation. The majority's contrary rule perversely demands race-based discrimination because it requires a different standard that deprives District 3 of the constituent consistency provided to the majority-white districts.

The Legislature's *preservation* of District 3 distinguishes other *Shaw* cases involving *creation* of new majority-minority districts. Such new districts disrupt the *status quo* and threaten incumbents, so it may be readily inferred that they subordinate traditional principles because, absent race, the State would not promote such disruption. *Shaw II*, 517 U.S. at 917. But such an inference is illogical where,

as here, core preservation is the "dominant and controlling" plan-wide criterion. *Miller*, 515 U.S. at 913-16.

Moreover, the majority simply ignored the dispositive role of core preservation when it criticized District 3's compactness, boundary splits, and water contiguity. OB 50-53. It remains undisputed that *all* these alleged flaws *necessarily* resulted from core preservation, because all were inherited from Benchmark District 3. Thus, the majority's preferred redistricting criteria were not subordinated to *race*, but to *core preservation*.

Unable to dispute this, Appellees proffer arguments so meritless that not even the majority advanced them. First, Appellees contend that subordinating compactness to core preservation is impermissible because the Fourteenth Amendment requires compactness to trump core preservation. PB 32-36. This assertion directly contravenes the basic principle that state legislatures, not the federal judiciary, prioritize among neutral principles. *Miller*, 515 U.S. at 915.

Moreover, the amorphous concept of "compactness" cannot be divorced from preserving cores. *Shaw* cases do not look at a district's shape in isolation, but whether the district "is *reasonably* compact and regular, taking into account traditional districting principles such as maintaining communities of interest." *Bush*, 517 U.S. at 977 (plurality); *Abrams v. Johnson*, 521 U.S. 74, 92 (1997) (Section 2 compactness examines whether district adheres to "traditional districting principles, such as maintaining communities of interest"). Here,

preserving District 3's core maintains the community of interest formed around residing in the same congressional district for almost two decades. JA 98. Anyway, District 3's compactness is materially indistinguishable from both Plaintiffs' Alternative and the majority-white District 11. OB 50-53.

Appellees next argue that District 3's core could *not* be preserved because it "perpetuates the racial gerrymander" found in *Moon*. PB 3. But the majority eschewed this argument, because District 3 actually perpetuates the *Moon remedy*, which, it was undisputed, "conform[ed] to . . . the Constitution." *Moon v. Meadows*, 952 F. Supp. 1141, 1151 (E.D. Va.), *summ. aff'd*, 521 U.S. 1113 (1997).

Finally, like the majority, Appellees illogically criticize the Legislature for not preserving District 3's core to the *maximum* extent possible, because it moved more people than needed to correct District 3's population shortfall (when irrationally viewed in isolation, without regard to, for example, adjacent District 2's need to gain substantial population). PB 36-37. But the question is not whether District 3's core was maximally preserved, but whether preserving it caused the compactness and district line issues, which there is no dispute it did. Moreover, the Legislature preserved District 3's core to roughly the same extent as the majority-white districts and far better than any alternative, including Plaintiffs' Alternative and the remedial plan. OB 52; Remedial Plan Core Preservation (DE 279-2).

III. PLAINTIFFS FAILED TO PROVE THAT RACE RATHER THAN POLITICS PREDOMINATED

Even if District 3 subordinated traditional principles, there is still no *prima facie* case because Plaintiffs failed to prove that "race *rather than* politics" caused such subordination. Even assuming Plaintiffs need not disprove politics as the motive through the "alternative" expressly required by *Cromartie II*, 532 U.S. at 258, they have to prove it *somehow*. This cannot be done, where, as here, *Plaintiffs*' evidence *alone* shows that politics necessitated District 3's shape and demographics, because (1) *their* proposed alternative, which decreased District 3's BVAP by only 3%, converted an adjacent toss-up district into a "heavily Democratic" one; (2) *their* expert's analysis demonstrated that all VTD swaps had a beneficial political effect indistinguishable from their racial effect; (3) *their* expert conceded both that Intervenor-Defendants' expert established the same thing and that District 3 would have made "perfect sense" for "political" reasons if all involved were "white." OB 3-12, 35-36.

The government concisely explained in *Cromartie II* why plaintiffs must decouple race and politics. It successfully contended that "when . . . race correlates highly with partisan voting behavior, it is predictable that a State that wants to create a district whose borders tend to concentrate members of a particular political party will, as a byproduct, create a district whose borders tend to concentrate members of a particular race." *Cromartie II* U.S. Br. 14. But "[i]f that alone were sufficient to support a finding that strict scrutiny applies[,] a State would have to forego

its otherwise lawful option of forming districts on the basis of partisan choices." *Id.* And it would have to do so "only in one category of cases-where race correlates highly with partisan voting behavior," even though incumbency protection is "'a legitimate state goal'" and "'political gerrymandering' should not be subjected to strict scrutiny." *Id.* (quoting *Bush*, 517 U.S. at 964). "Therefore, where race and partisan voting behavior correlate highly, and a State draws a district with mixed political, racial, and other motivations, a district court may not merely seize on isolated evidence tending to show the State's racial motivation in drawing the district to conclude that race was the predominant factor." *Id.* 14-15.

Here, since no one disputes that District 3 directly serves Republican political interests better than any alternative, the finding of *racial* predominance is irreconcilable with *Cromartie II*. First, as if directly anticipating the decision below, *Cromartie II* held that a district court's "findings" concerning the challenged "district's shape, its splitting of towns and counties, and its high African-American voting population" "cannot, *as a matter of law*, support the District Court's judgment" where, as here, there is "undisputed evidence that racial identification is highly correlated with political affiliation." 532 U.S. at 243 (emphasis added). Since the majority's racial predominance conclusion exclusively rests on just those findings, it is legally deficient.

Second, *Cromartie II* rejected the VTD analysis by the plaintiffs' expert because of fundamental flaws identical to the flaws in Dr. McDonald's VTD analysis here. OB 46-49. Appellees do not dispute this or that Dr. McDonald's *and* Mr. Morgan's analyses establish

that the VTD swaps had a political effect indistinguishable from their racial effect. PB 39-41. (Thus, Appellees' criticisms of Mr. Morgan, *id.* 39; DB 54-59, are irrelevant, OB 48-49.)

Third, *Cromartie II* held that an alternative plan furthering the Legislature's "legitimate political objectives" is necessary to show that race predominates, but the majority failed to require one. 532 U.S. at 258. The majority originally justified this ruling on the irrational grounds that, absent "*trial testimony*" from legislators, it could not indulge in the "assumption" that the Republican-controlled Legislature wanted to re-elect Republican incumbents. OB 40-41. Subsequently, the majority clarified that it did not even analyze the political effect of Plaintiffs' Alternative Plan, but looked at it "simply to disprove the claim that the population swaps involving the Third Congressional District—and the resulting locality splits—were necessary to achieve population parity" (even though no one made any such claim). Mem. Op. 19 (DE 299).

1. Since they cannot satisfy *Cromartie II*'s burden of proving that race trumps politics, Appellees contend they *need not* satisfy it. This is purportedly because "direct evidence" establishes that race predominates over politics, since "partisan politics" was "permissive" and "subordinate to the mandatory criteria of compliance with the VRA." J.S. App. 32a-35a; PB 49-53; DB 33-38. This assertion is contrary to not only the precedent described above, but *Cromartie II's* express statement that such direct evidence "says little or nothing about whether race played a *predominant* role comparatively speaking." 532 U.S. at 253. That is why, in the face of such

direct evidence, *Cromartie II* overturned a finding of racial predominance based on defendants' expert's analysis of the correlation between race and politics in "swapped" VTDs (though the district court had deemed this analysis "unreliable" and "not relevant") and the weaknesses in plaintiffs' expert's analysis of that issue. *Id.* at 251-53. Thus, direct evidence of a racial motive does not justify failing to decouple race and politics because that is the only way to determine *which* predominated. OB 42.

Moreover, *Cromartie II* does not establish an unworkable rule whereby plaintiffs' obligation to disprove a political explanation turns on whether the direct evidence of racial purpose is sort-of-strong, strong or really strong. We nonetheless note that the "direct evidence" here is cognizably weaker than that in *Cromartie II*. There, the avowed purpose for creating the challenged district was to preserve the congressional delegation's "*racial* balance," without any potential Section 5 justification, by, *inter alia*, moving "Greensboro['s] Black community." 532 U.S. at 241. Here, Section 5 indisputably required preserving District 3 as a "black opportunity" district and the legislative history "inarguably" articulated "political" and "incumbency protection" "motive[s]." OB 26-28. There is certainly no *serious* difference between the direct evidence here and in *Cromartie II*, sufficient to provide courts with a manageable standard for determining whether the racial "direct evidence" is sufficient to obviate the requirement to disprove politics.

There is also nothing to Appellees' notion that *Cromartie II*'s reference to "case[s] such as this one" limited the obligation to present a politically

equivalent alternative to cases with some unidentified quantum of "direct evidence of a racial motive." PB 51-52. Rather, the reference is to cases "where the State has articulated a legitimate political explanation for its districting decision," 532 U.S. at 242, as *Alabama*'s citation of *Cromartie II* confirms, 135 S. Ct. at 1267.

Anyway, Plaintiffs *did* offer an alternative, which *contravened* the "legitimate political objective" of preserving all Republican incumbents. Surely *Cromartie II* precludes affirmance where plaintiffs' *own* alternative proves that the legislature's district was the *only way* to accomplish its "legitimate political objectives."

Indeed, plaintiffs' alternative in *Cromartie II*—the legislature's "interim" plan used in the 1998 elections—was "somewhat more compact" than the challenged district and created a "safe" "60%" "Democratic seat" that easily re-elected the black Democratic incumbent purportedly being "protected." 532 U.S. at 246-50. Thus, the alternative provided persuasive evidence that the legislature's *addition* of black voters to the district, to achieve a gratuitous "safe as possible" "*63%* reliably Democratic" district, "likely was driven by race, not politics." *Id.*

2. Since *no* alternative to Enacted District 3 fulfills the Legislature's political objectives, Appellees are forced to make the almost-comical argument that the Legislature had *no political objective* and was *indifferent* to sacrificing a Republican incumbent. PB 41-47. But, as the Opening Brief established and Appellees cannot refute, the notion that the Republican Legislature was uniquely masochistic is

contrary to the majority's finding that it was "inarguably" "motivated" by "partisan politics" and "protecting incumbents," as well as the legislative history and the uniform commentary by the Legislature's Democrats, contemporaneous news accounts and Plaintiffs' expert. OB 35-36.

The majority's finding that politically "protecting incumbents" "inarguably" motivated the Legislature is not undermined by Appellees' cherry-picking of discovery responses (never mentioned by the majority) or their assertion that Janis had to *personally* analyze "partisan performance" statistics because the incumbents whose recommendations were scrupulously followed provided only politics-free input on "communities of interest." PB 42-44. First, "communities of interest" in Virginia include communities based on "*political* beliefs, *voting* trends and *incumbency* considerations." JA98 (emphasis added).

Moreover, the answer to all those counter-intuitive assertions appears on the page immediately preceding Janis' "partisan performance" statement, where a Democratic Senator reveals that "the Cook Report published" a map "several weeks ago" establishing that the "eleven" "congress people" had "come to an agreement" on a map "eerily close to the" Janis plan. JA455. Thus, absent an unbelievable coincidence where Janis *independently* developed a plan "eerily close to" that drawn earlier by the "congress people," the inescapable inference is that Janis merely *confirmed* that the *congressionally-developed* map reflected the members' desires for their districts.

3. Finally, Appellees repeatedly assert that the Legislature used "race as a proxy" for politics, but the majority did not and could not make any such finding. PB 47-49; DB 47-53. Again, the whole point of *Cromartie I* and *Cromartie II* is that a *Shaw* claim fails where, as here, the districts would make "perfect sense" politically absent race, because "a jurisdiction may engage in constitutional political gerrymandering, 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).

4. Thus, the decision below must be overturned because of its multiple legal errors, regardless whether its factual conclusions were "clearly erroneous." While the majority "found" that "race predominated," that finding was premised on its legally erroneous "hierarchy" notion and, as just described, was both based on facially improper evidence and unsupported by legally required evidence.

Anyway, the majority's finding "is no stronger than the evidence that underlies it." *Cromartie II*, 532 U.S. at 249. Because *Plaintiffs*' evidence and the *undisputed* facts contradict the notion that race trumped politics, the majority's predominance finding is clearly erroneous, particularly since "there is no intermediate court of review" here and the "not lengthy" trial "consisted [exclusively] of documents and expert testimony." *Id.* at 242. Whether viewed as a case of "clearly erroneous" fact-finding or legal error, *Cromartie II's* reversal of a racial predominance finding where the political predominance evidence was far weaker than here

compels reversal. Since "[o]ur legitimacy requires . . . adhere[nce] to *stare decisis*, especially in such sensitive political contexts as the present, where partisan controversy abounds," there cannot be a different rule for Republican incumbents than that established for Democratic incumbents in *Cromartie II*. *Bush*, 517 U.S. at 985 (plurality).

IV. THE LEGISLATIVE HISTORY REFUTES PLAINTIFFS' CLAIM

Even assuming that a BVAP floor with no effect on district lines establishes a presumptive *Shaw* violation, the majority still committed legal error. It held that race predominated because "compliance with Section 5 was [the Legislature's] predominant purpose," that "avoidance of retrogression in the Third Congressional District took primacy over other redistricting considerations because it was '*nonnegotiable*,'" that the Legislature's "principal focus" was "to ensure that there be no retrogression," and, most directly, that protecting incumbents was not predominant because this "goal was 'permissive' and subordinate to the mandatory criteria of [Section 5] compliance." J.S. App. 2a, 17a-19a, 21-23a, 33a-34a.

Both the State Appellees and the government concede that this is legal error because a redistricting plan's drafter's "preference for federal [VRA law] over state law" does "not raise an inference of intentional [racial] discrimination; it demonstrates obedience to the Supremacy Clause." *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993) (reversing finding of racially discriminatory redistricting as clearly erroneous); DB 37-38; GB 21. But they try to retroactively correct

this error by pretending that the majority found racial predominance because Janis improperly *implemented* the no-retrogression mandate by refusing to diminish BVAP. DB 35-38; GB 21-22. This revisionist history is demonstrably false: the majority *uniformly* stated that race "was the legislature's predominant purpose" because "compliance with Section 5" was "nonnegotiable," J.S. App. 20a n.15; *id.* 2a, 21a-23a, not because the Legislature *improperly* complied with Section 5. Indeed, the majority affirmatively refused to "parse legislative intent in search of 'proper' versus 'improper' motives underlying the use of race" because "[t]he fact that the legislature considered race a predominant concern *only* because it believed federal law compelled it to do so is of *no current legal consequence*." *Id.* 17a-18a & n.13 (emphasis added).

Equally obviously, Janis' reference to "not having *less*" than Benchmark District 3's *53.1%* BVAP *contradicts* the majority's invented notion of some *55%* BVAP floor. Since the Opening Brief refuted any claim that the 2012 Legislature erected such a floor, Appellees are forced to invoke the *2011* legislative history regarding state legislative districts. *See* PB 27-30; DB 33-38. But this evidence from a different legislature about different redistricting plans is so unprobative that not even the majority referenced it. Anyway, Appellees' new argument *supports* Morgan's inference that 55% BVAP was an "appropriate" (not *necessary*) option due to bi-racial support because it cites *black Democrat* Delegate Dance's assertion that this was the "minimum BVAP" needed to keep a black district "performing," JA 517-19; PB 29, and *refutes* any 55%

BVAP floor because that very Senate plan contained less-than-55% districts, PB 55.

Indeed, Janis' two references to not *reducing* District 3's *53.1%* BVAP directly support the conclusion that the Enacted Plan's *increase* of District 3's BVAP to *56.3%* had nothing to do with Janis' views on avoiding retrogression and everything to do with neutral incumbency-protection and political objectives. Since 53.1% BVAP would perfectly implement any "no diminution" policy, there was no "racial" reason to reject it. The only reason for rejecting it is the same reason the Legislature had for rejecting Plaintiffs' *50%* BVAP option—it would not protect incumbents to the same extent as the 56.3% alternative.

Thus, in this context, not diminishing BVAP below the *benchmark* level is no more racial than Section 5's requirement of not diminishing BVAP below the "minority percentages [needed] to maintain the minority's present ability to elect the candidate of choice." *Ala.*, 135 S. Ct. at 1274. Both options erect a mandatory BVAP floor and therefore are equally "racial." Indeed, *all* the alternatives with BVAPs below the Benchmark BVAP were *more* racial because all subordinated the neutral core-preservation principle while either concededly adhering to a 50% BVAP "quota" (Plaintiffs' Alternative), or severely diminishing District 3's BVAP to create *two* "black" districts (the Senate Democrats' Locke plan and the remedial plan) to achieve greater racial proportionality in a 19.7% black state. JA 148, 686-87; Final Report 29-65 (DE 272) ("Rep.").

V. THE MAJORITY MISAPPLIED STRICT SCRUTINY

1. While *increasing* District 3's BVAP was not *necessary* to garner preclearance, it remains undisputed that the Enacted Plan was the *best* way to minimize any tension between Section 5 and the Legislature's most important neutral principles. *See supra* Parts I-IV. *Shaw* does not require the *lowest possible* Section 5-compliant BVAP, especially not in preference to the level that best complies with traditional principles.

2. Appellees contend that a racial voting analysis would have allowed the Legislature to reduce District 3's BVAP. PB 53-56; DB 63-71; GB 33-34. But a voting analysis *designed to reduce BVAP* serves no *Shaw* purpose where, as here, any reduction *exacerbates* conflict with neutral principles. Anyway, the Legislature had "good reason" to believe any serious reduction in BVAP, particularly below 50%, would create daunting or insurmountable burdens to *proving* nonretrogression under the 2006 Amendment to Section 5. *Ala.*, 135 S. Ct. at 1274; OB 53-56. Thus, adhering to the Benchmark BVAP was the best way to prove nonretrogression. OB 53-56.

First, any reduction below 50% would mirror the Section 5 strategy upheld in *Georgia v. Ashcroft*—but the point of the 2006 Amendment was to overturn *Georgia* because it "misconstrued and narrowed the protections offered by Section 5." 52 U.S.C. § 10301 note, Findings (b)(6); *see Georgia v. Ashcroft*, 539 U.S. 461, 470, 487 (2003) (Georgia "unpacked" the most concentrated majority-minority districts to create new districts with BVAPs slightly above and below

50%). This is particularly true of a reduction to 41% BVAP because even proponents described that option as reducing District 3 to a "minority-*influenced*" district, JA395-97—precisely the result foreclosed by the 2006 Amendment's prohibition against "*diminish*[*ing*]" minorities' "ability" "to *elect*." 52 U.S.C. § 10304(b) (emphasis added). (This is presumably why even Plaintiffs' Alternative refused to reduce BVAP below 50%.)

Relatedly, no voting analysis could *prove* that a BVAP reduction did *not* diminish minorities' ability to elect because such analyses here are inherently unpersuasive and prove far too much. As established by *all* racial bloc voting analyses performed during the liability and remedial phases, the endogenous elections in District 3 prove nothing since they were *de facto* or *de jure* uncontested, and the only black-white contests before 2012 in the inherently less probative exogenous elections, *Thornburg v. Gingles*, 478 U.S. 30, 80-82 (1986), involved President Obama, who won in Virginia—with a 19.7% BVAP—and District 11, with a *12.3%* BVAP. JA131-35; Rep. 33-34. Any such "analysis" therefore dramatically understates the BVAP needed to elect an unknown black candidate in District 3.

Dr. McDonald's and the special master's analyses also fail to ask the right question under Section 5: whether the changes "*diminish[]*" the "ability to elect." Since Benchmark District 3 was an incredibly safe district with a *99%* chance of black success, reducing it to an "*equal* opportunity" district with a *50%* chance of success, Rep. 25, 29, 35-36, is an extraordinary 49% *diminishment* in "the minority's present ability to elect." *Ala.*, 135 S. Ct. at 1274.

Dr. McDonald's and the special master's analyses also prove too much because they purportedly show that a "*less than 30%*" BVAP avoids retrogression. PB 55-56 (emphases added); Rep. 29-65. But DOJ has *never* precleared such a dramatic reduction, and the Obama election "evidence" would be rejected as facially anomalous, which is why both Plaintiffs' Alternative and the remedial plan erect artificial BVAP floors *well above* this alleged ability-to-elect level. Rep. 44-52.

The government attempts to mislead the Court on this point, suggesting that it would have blithely accepted a reduction from 53.1% BVAP because District 3 "was precleared in 1998 with a BVAP of 50.47%." GB 34. But the 50.47% BVAP was a *13% increase* over the *37%* benchmark BVAP in "the last legally enforceable" district (the 1992 plan was invalidated in *Moon*). JA550; Pl.Tr.Ex. 23 at 26. Moreover, it precleared District 3 in 2002 with a nearly 3% BVAP increase to *53.2%*, giving the Legislature every reason to believe that a 3% BVAP increase in 2012 was "appropriate."

DOJ's actual practice also shows the difficulty of obtaining preclearance if minority percentages are reduced. For example, in Texas, notwithstanding the State's retrogression analysis, DOJ, because of *diminished* electoral *success*, successfully opposed *increases* in Hispanic citizen voting-age population (House District 117-58.8% to 63.8%; congressional District 23-58.4% to 58.5%) and a small decrease (HD 35-54.6% to 52.5%), and even unsuccessfully challenged a decrease from 77.5% to *72.1%* (HD41). *Texas v. United States*, 887 F. Supp. 2d 133, 154-55, 168, 238 (D.D.C. 2012) (three-judge court), *vacated*,

133 S. Ct. 2885 (2013).

VI. APPELLANTS HAVE STANDING

Contrary to Plaintiffs' and the government's contention, Appellants need not show that they *will* lose re-election or have a "right" or "legally cognizable interest" in not suffering the injury inflicted by the order below. PB 16-17; GB 13. Rather, it suffices that the order diminishes Appellants' "*chances* for reelection." *Meese v. Keene*, 481 U.S. 465, 474 (1987)[2]; *Bush v. Gore*, 531 U.S. 98 (2000); *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656 (1993). As the government recognizes, there is cognizable injury if the challenged action provides *less* "opportunity to compete in an election." GB 16. If the remedial plan's transformation of District 4 from a 48% to 60% Democratic district is not sufficient diminution of electoral opportunity, nothing is. Rep. 45, 52.

Defendant-appellants, moreover, need not show infringement of a legal "*right*" because their electoral "injury *in-fact*" creates a "direct stake in the outcome," regardless whether the injury constitutes a legal violation. *Diamond v. Charles*, 476 U.S. 54, 66 (1986). Indeed, *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989), and *Swann v. Adams*, 385 U.S. 440 (1967), prove as much. OB 57-63. The *Swann* appellants *concededly* had no right to, but merely preferred, "different treatment" of their district. 385 U.S. at 443; *see Elec. Fittings Corp. v. Thomas & Betts Co.*,

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[2] *Meese's* reference to "*harm [to] chances for reelection,*" establishes that *reputational* harm was not the basis for standing. 481 U.S. at 474 (emphasis added).

307 U.S. 241, 242-43 (1939) (*prevailing* defendant had standing to appeal because the judgment might impair success in unspecified future litigation). For this reason, the standing requirements for *Shaw plaintiffs* established in *United States v. Hays*, 515 U.S. 737 (1995), PB 11-13; GB 17-18, are inapposite, OB 60-63.

Plaintiffs' contrary view would irrationally foreclose incumbents from appealing judgments that *paired* them in the same district because incumbents have no "right" to avoid pairing and could move to a different district.[3]

Finally, the government's contention that Appellants bear a "particularly difficult" burden because the State "has acquiesced" in the judgment is precisely backwards. GB 17. Closing the courthouse doors based on state acquiescence would grant

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[3] For this reason, Appellants' standing is unaffected by Appellant Forbes' announcement of his candidacy in District 2. *See* Rachel Weiner, "Randy Forbes To Run In Different District Thanks To New Map," WASHINGTON POST, Feb. 8, 2016. That the remedial plan forced Appellant Forbes to choose between facing certain defeat in a super-majority-Democratic District 4 and running in District 2 is sufficient injury-in-fact to confer standing. That is particularly true because Appellant Forbes obviously would have preferred to run in Enacted District 4, where he has long resided and enjoys a substantial incumbency advantage. *Clements v. Fashing*, 457 U.S. 957, 962 (1982) (standing where "but for the sanctions of the constitutional provision they seek to challenge, they would engage in the very acts that would trigger the enforcement of the provision"); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 67 (1990) (employee challenging political-based employment decisions could sue despite securing lower-paying position through political-related activity).

politically motivated attorneys general veto power over state legislative enactments, and the Commonwealth here *agrees* that Appellants have standing. DB 28-33.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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