No. 15-1262

In the Supreme Court of the United States

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

Appellants,

v.

DAVID HARRIS and CHRISTINE BOWSER,

Appellees.

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

BRIEF AMICUS CURIAE OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF APPELLEES

KRISTEN CLARKE
JON M. GREENBAUM
EZRA D. ROSENBERG
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Ave, NW
Suite 400
Washington, DC 2005
jgreenbaum@lawyerscommittee.org
(202) 662-8315

BRADLEY S. PHILLIPS
Counsel of Record
JOHN F. MULLER
MUNGER, TOLLES & OLSON LLP
355 South Grand Ave
35th Floor
Los Angeles, CA 90028
brad.phillips@mto.com
(213) 683-9100

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

INTEREST OF AMICI CURIAE[1]

The Lawyers' Committee for Civil Rights Under Law was formed in 1963 at the request of President John F. Kennedy to involve private attorneys throughout the country in the effort to assure civil rights to all Americans. Protection of the voting rights of racial and language minorities is an important part of the Committee's work. The Committee has represented litigants in numerous voting rights cases throughout the nation over the past 50 years, including cases before this Court. *See, e.g.*, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013); *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612 (2013); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Young v. Fordice*, 520 U.S. 273 (1997); *Clark v. Roemer*, 500 U.S. 646 (1991); *Clinton v. Smith*, 488 U.S. 988 (1988); and *Connor v. Finch*, 431 U.S. 407 (1977). The Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, including *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015) ("*Alabama*"); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Shaw v. Reno*, 509 U.S. 630 (1993); *Thornburg v. Gingles*, 478 U.S. 30 (1986); and *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The Committee has an interest in the instant appeal because it raises

[1] No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel has made a monetary contribution intended to fund the preparation or submission of the brief. All parties have either filed with the Clerk a letter of blanket consent to the filing of briefs of amici curiae or given a written consent to the filing of this brief that accompanies this brief.

important voting rights issues that are central to its mission.

SUMMARY OF ARGUMENT

Substantial evidence amply supports the District Court's finding that North Carolina's First and Twelfth Congressional Districts were the product of a racial gerrymander in violation of *Shaw v. Reno*, 509 U.S. 630. The legal framework set forth in *Miller v. Johnson*, 515 U.S. 900 (1995), and *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, calls for affirming the District Court's conclusion that racial considerations were the legislature's predominant concern in creating the First and Twelfth Districts, triggering strict scrutiny, and that the design of the two districts does not withstand strict scrutiny review.

This case requires a straightforward application of *Miller* and *Alabama* and demonstrates that the framework established in those cases remains clear and workable. Under *Miller* and *Alabama*, redistricting plans that subordinate traditional districting principles in favor of racial considerations are subject to strict scrutiny. Evidence that traditional districting principles were subordinated is drawn first from an objective review of the challenged district's shape, compactness, contiguity, and demographic makeup. Courts may further consider evidence of legislative purpose, such as statements in the legislative record and post hoc testimony, in order to assess the extent to which the disregard for traditional districting principles is causally related to racial considerations.

The fact that members of the North Carolina General Assembly charged with redistricting announced intentions to create majority-minority districts is rel-

evant, but not conclusive, evidence with respect to the threshold question of whether the First and Twelfth Districts should be subject to strict scrutiny. The objective, geographic, and demographic evidence before the District Court, as well as direct evidence regarding how the General Assembly weighed traditional districting criteria in light of racial considerations, powerfully demonstrate that race was the predominant concern for the two districts.

A quick look at the First Congressional District, given its odd shape, lack of compactness, and conspicuous lack of respect for political subdivision boundaries, supports an inference of race-predominant districting, as does the fact that the district was redrawn in a manner that raised the African American share of its voting age population from 47.76 percent to a majority of 52.65 percent. These inferences are confirmed by direct testimony from the principal architect of the district, who explained, among other things, that he did not adhere to traditional districting criteria given that the most important consideration was drawing a majority-minority district.

The map of the Twelfth Congressional District, which strongly resembles a previous iteration of the Twelfth Congressional District this Court labeled a "serpentine district" in the 1990s, *Shaw v. Hunt*, 517 U.S. 899, 906 (1996) ("*Shaw II*"), gives rise to the same inference. The 2011 redistricting reduced the compactness of the Twelfth District, which was already the least compact district in North Carolina. At the same time, the redistricting shifted the African-American voting age population within the Twelfth District from 43.77 percent to a majority of 50.66 percent. Although this numerical shift, alone,

does not demonstrate that racial considerations predominated, when viewed in concert with the remainder of the evidence—including direct evidence that the principal architect sought to create a majority-minority district and then sought, along with members of the legislature, to obscure this fact—the District Court could reasonably conclude that racial considerations predominated.

The ample evidence of racial gerrymandering here makes it unnecessary for the Court to reach the question, left open by *Alabama*, of whether a legislature's decision to set a minority population target by itself triggers strict scrutiny. *See Alabama*, 135 S. Ct. at 1272. This Court has *never* applied strict scrutiny based solely upon a state's decision to achieve a particular racial percentage within a particular district. *See Alabama*, 135 S. Ct. at 1272 (citing *Bush v. Vera*, 517 U.S. 952, 996 (1996)); *Shaw*, 509 U.S. at 649. The Court's decision not to do so is consistent with its jurisprudence distinguishing election districts that are racial gerrymanders from those that are a product of only traditional redistricting considerations.

An election district's minority percentage is not mathematical evidence that its boundaries are distorted by racial considerations. Rather, it is the *implementation* of the State's racial target policy, and not that the State had targets *ab initio*, that ultimately determines whether particular districts are racial gerrymanders. A district may trigger strict scrutiny when it possesses highly irregular boundaries, widely dispersed pockets of minority populations, and/or extensive splits of political units. *See Shaw*, 509 U.S. at 645 (addressing North Carolina's Twelfth Congressional District). The mere fact that a state set a population target for a district is not a ba-

sis for subjecting that district to strict scrutiny if the district does not offend traditional districting principles, i.e., so long as the district unites a reasonably compact and contiguous minority population along local political boundaries, and the district is not dramatically irregular in its overall shape. It is the subordination of traditional districting principles, causally linked to racial considerations, that the Court subjects to strict scrutiny. There is no reason to conclude that establishing specific numerical targets is *per se* incompatible with traditional districting principles.

This Court's precedents in *Miller* and *Alabama* provide an effective framework for analyzing the facts in this case, and the District Court's factual findings are fully supported by this record. Accordingly, the District Court's decision should be affirmed under the existing *Miller* and *Alabama* framework.

ARGUMENT

A. *Miller* and *Alabama* Provide Clear and Enforceable Standards for this Case

This Court has repeatedly recognized that the framework first announced in *Miller v. Johnson*, 515 U.S. 900, is the touchstone for determining when state electoral districting plans trigger strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *See, e.g.*, *Alabama*, 135 S. Ct. at 1264; *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) ("*Cromartie II*"); *Bush*, 517 U.S. at 958. This framework remains a viable and effective standard for enforcing the Fourteenth Amendment's guarantee against racial discrimination in the realm of redistricting, and this Court need not depart from it.

The Equal Protection Clause prohibits states from classifying citizens by race, including by adopting

electoral redistricting schemes based on racial characteristics without adequate justification. *See Shaw*, 509 U.S. at 645. To demonstrate that a district violates the Equal Protection Clause, a plaintiff must first show that race was the predominant factor in how the legislature drew district lines. *Miller*, 515 U.S. at 915. If a plaintiff makes this showing, the court then employs its "strictest scrutiny" to determine whether the redistricting plan was narrowly tailored to further a compelling state interest. *Id.*

In determining whether racial considerations predominated, the constitutional inquiry begins with an objective geographic analysis of the district and its minority population. This analysis includes considering the compactness and dispersal of the minority population within a district, such as whether it is connected by artifices such as land bridges or relies on point contiguity that would not be employed under traditional redistricting principles. *See Shaw*, 509 U.S. at 646; *Miller*, 515 U.S. at 917. The analysis also includes looking for patterns of racially correlated splitting of political units that are normally kept intact. *See Bush*, 517 U.S. at 974. In short, the analysis begins by determining whether the geography of the challenged district appears to be a racially identifiable departure from what would normally be expected from a compact and contiguous district and whether something has distorted the district's configuration along racial lines.

The analysis starts with these objective factors because "reapportionment is one area in which appearances do matter." *Shaw*, 509 U.S. at 647. In some cases, this objective inquiry is enough to demonstrate that a state engaged in an unlawful racial gerrymander. *See id.* at 646-57 (citing *Gomillion v. Lightfoot*,

364 U.S. 339 (1960)). In many cases, however, the analysis requires looking into the legislative process to see if racial considerations are responsible for the district's configuration. This second inquiry searches for any contemporaneous statements of legislative purpose and post hoc testimony suggesting that race did indeed play an undue role in districting decisions. *See Miller*, 515 U.S. at 917-18.

The structure of the *Miller*/*Alabama* test is faithful to this Court's general framework for discerning when facially neutral laws have a discriminatory purpose in violation of the Fourteenth Amendment. *See Shaw*, 509 U.S. at 643 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977) ("*Arlington Heights*")). When searching for an invidious discriminatory purpose, "[t]he impact of the official action whether it 'bears more heavily on one race than another[]' . . . may provide an important starting point." *Arlington Heights*, 429 U.S. at 266 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). After analyzing the objective impact of a law, courts consider other evidence, including "legislative or administrative history . . . especially . . . contemporary statements by members of the decision-making body." *Arlington Heights*, 429 U.S. at 268. Therefore, inquiries into whether a facially neutral state action – redistricting or otherwise – was motivated by unjustified racial considerations begin with an objective analysis before probing the legislative record for indicia of improper purposes.

Accordingly, courts do not view any of *Miller*'s factors in isolation. On their own, statements of supposed legislative purpose and post hoc testimony about the legislative process neither prove nor disprove whether traditional districting principles – like

compactness, contiguity, and respect for political subdivisions – were improperly subordinated to racial considerations. In addition, contemporaneous legislative statements are often self-serving and disingenuous, and obtaining post hoc evidence may be difficult. *See id.*, 429 U.S. at 268. When coupled with other evidence that traditional districting principles were disregarded, however, legislative statements and post hoc testimony can illuminate whether traditional districting principles were compromised for racial reasons.

Evidence that a state set a minority population target for a district may be one consideration in finding that race was causally related to a departure from traditional districting principles. But it would short-circuit *Miller*'s carefully constructed analytical framework to treat a population target as a racial gerrymander *per se*. When a state professes to target a majority-minority district generally (a district with a 50 percent or greater minority population) or a specific percentage of minority population, there is no reason to conclude that these goals are necessarily incompatible with traditional districting principles. *See Shaw*, 509 U.S. at 646 ("[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes.").

An election district's minority percentage, therefore, is not, by itself, mathematical evidence of racially driven distortions of district boundaries. Reaching a 40 percent minority target might require extensive geographic contrivances in one region, whereas in another region a 60 percent minority district could be the natural result of following traditional districting

principles to the letter. In other regions, a state might have to violate traditional districting principles in order to *prevent* the creation of a 75 percent minority district. Needless to say, a district with a 70 percent minority population does not necessarily involve twice the racially driven boundary manipulations of a 35 percent minority district; divorced from context, neither figure in and of itself indicates that any unusual boundary manipulations occurred.

When a legislature adheres to the bounds of traditional districting criteria, some districts may be majority-minority and others majority-white, but for constitutional purposes they are just districts. There is no constitutional basis to deem majority-white election districts as normative, or to presuppose that majority-minority election districts deviate from the norm. Such a rule would abandon this Court's understanding of equal protection because it would create explicitly different rules for white and minority citizens by presuming that majority-minority districts have been racially gerrymandered while presuming that majority-white districts have not.

During the redistricting process, any state with a sizeable minority population will assuredly be aware of the racial consequences of its boundary changes, particularly where the racial composition of its districts has a predictable and substantial electoral impact. *See Miller*, 515 U.S. at 916 ("Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process."). It is unrealistic to expect that prohibiting states from explicitly acknowledging race in their redistricting decisions will prevent states from considering race at all. Because states will unavoidably be aware of race,

treating evidence of population targets as a *per se* racial classification would lead states to rely upon subterfuge and opacity in the redistricting process.

This Court has never applied strict scrutiny based solely upon a state's decision to achieve a particular racial percentage within a particular district. *See Alabama*, 135 S. Ct. at 1272 (citing *Bush*, 517 U.S. at 996); *Shaw*, 509 U.S. at 649. Rather, strict scrutiny may be triggered when a district has highly irregular boundaries, widely dispersed pockets of minority population, and extensive splits of political units. *See Shaw*, 509 U.S. at 645 (12th Congressional District in North Carolina); *Shaw II*, 517 U.S. 899 (same); *Cromartie II*, 532 U.S. 234 (same); *United States v. Hays*, 515 U.S. 737, 741-42 (1995) (2nd and 4th Congressional Districts in Louisiana); *Miller*, 515 U.S. 900 (11th Congressional District in Georgia); *Abrams v. Johnson*, 521 U.S. 74, 77-78 (1997) (2nd and 11th Congressional Districts in Georgia); *Bush*, 517 U.S. 952 (18th, 29th, and 30th Congressional Districts in Texas). *See also King v. Ill. Bd. of Elections*, 522 U.S. 1087 (1998) (summarily affirming three-judge court decision concerning 4th Congressional District in Illinois).

The *implementation* of a state's policy, and not the fact that the policy contained racial targets, ultimately determines whether a district is a racial gerrymander. That a state set a population target for a district is not a basis for subjecting that district to strict scrutiny if the challenged district does not offend traditional districting principles. For example, a state that sets a 55 percent "target" for a majority-minority district does not trigger strict scrutiny, so long as the district unites a reasonably compact mi-

nority population along local political boundaries, and the district is not dramatically irregular in shape.

It is the subordination of traditional districting principles, causally linked to racial considerations, that the Court has subjected to strict scrutiny. *See Miller*, 515 U.S. at 917. The districts that have been subjected to strict scrutiny under *Shaw* had the following common elements: they achieved a majority-minority population percentage by (a) uniting widely separated minority population concentration using geographical contrivances such as "land bridges," narrow fingers, wings or other unusually-shaped appendages or connectors that distorted the perimeter of the district, and/or (b) they split numerous political units such as counties, cities, or voting precincts in a racially disparate way. *See Bush*, 517 U.S. at 974; *Miller*, 515 U.S. at 917; *Shaw*, 509 U.S. 630.

If a population target alone were sufficient to trigger strict scrutiny, this would tend to become an all-inclusive tautology. Because actors are assumed (outside the criminal context) to intend the consequences of their voluntary actions, and multitudes of district configurations are typically available, any district with a sizable minority population could be viewed as having resulted from an attempt to meet a target, regardless of whether it was explicitly identified as such. It would be difficult to identify a principled distinction in this regard between a district drawn with a 35 percent minority population, for example, versus a 45 percent or 55 percent minority population. It cannot be the Court's intent to make every district with a sizable minority population subject to strict scrutiny, a conclusion that would invite endless and unnecessary constitutional litigation over the racial composition of electoral districts. Nor does

it make sense to force states to engage in a charade in which they are discouraged from disclosing their genuine redistricting criteria. *Shaw* explicitly acknowledged that officials inevitably are aware of race when they redistrict, and that such awareness is not on its own of constitutional import. *See Shaw*, 509 U.S. at 646 ("[T]he legislature always is *aware* of race when it draws district lines . . . . That sort of race consciousness does not lead inevitably to impermissible race discrimination.").

This Court likewise has provided a clear and enforceable standard when strict scrutiny applies. As the Court made clear in *Miller*, "[t]o satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Miller*, 515 U.S. at 920. Whether Voting Rights Act (VRA) compliance is a compelling interest—as this Court has long assumed, without deciding, *see, e.g.*, *Shaw II*, 517 U.S. at 915; *Bush*, 517 U.S. at 977—"compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws," *Miller*, 515 U.S. at 921.[2]

---

[2] Compliance with the VRA is, indeed, a compelling government interest. This Court has long recognized that the right to vote is sacrosanct and "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). When Congress enacted the VRA, it acted to confront discrimination relating to that sacred and fundamental right. A state's compliance with the VRA is thus almost by definition a compelling government interest. It is unsurprising, therefore, that members of this Court—including a majority of the current Court—have long assumed as much. *See, e.g.*, *Bush*, 517 U.S. at 977 (O'Connor, J., for the plurality, joined by Chief Justice Rehnquist and Justice Kenne-

In *Alabama*, the Court further elaborated this standard: "[A] court's analysis of the narrow tailoring requirement insists only that the legislature have a 'strong basis in evidence' in support of the (race-based) choice that it has made." *Alabama*, 135 S. Ct. at 1274. This standard "does not demand that a State's actions actually be necessary to achieve a compelling state interest in order to be constitutionally valid." *Id.* Legislators "may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance." *Id*. The precise division between what a court would hold is required by the VRA and what a litigant would have "good reason" to believe the court would hold is, of course, impossible to define. The Court's "strong basis in evidence" standard, however, is plainly articulated and has established roots in an-

---

dy) ("[W]e assume without deciding that compliance with the results test [of Section 2 of the VRA] . . . can be a compelling state interest."); *id.* at 992 (O'Connor, J., concurring ("In my view . . . the States have a compelling interest in complying with the results test [of the VRA] as this Court has interpreted it."); *id.* at 1033 (Stevens, J., dissenting, joined by Justices Ginsburg and Breyer ("The plurality begins with the perfectly obvious assumption[] that a State has a compelling interest in complying with § 2 of the Voting Rights Act."); *Shaw II* (Rehnquist, C.J.) (assuming but not deciding that VRA compliance can be a compelling interest); *League of United Latin Am. Citizens v. Perry* (*"LULAC"*), 548 U.S. 399, 518 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Chief Justice Roberts, Justice Thomas, and Justice Alito) ("I would hold that compliance with § 5 of the Voting Rights Act can be [a compelling state] interest.").

tidiscrimination law. *See, e.g.*, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986).

The *Miller*/*Alabama* test strikes a careful balance that furthers the Fourteenth Amendment's guarantee of fair political participation free of unjustified racial classification while adhering to judicial respect for state legislatures' undertaking the difficult task of redistricting. This framework remains an effective safeguard of constitutional rights. This Court need not either expand the circumstances under which an electoral district must be subjected to strict scrutiny or alter the standard governing such scrutiny.

B. *Miller* and *Alabama* Provide Adequate Guidance to Legislatures and District Courts

Not only do the standards set down in *Miller* effectively balance liberty and federalism values, but state legislatures have also internalized that balance in their redistricting processes. States have had little trouble following the set of rules laid down by *Miller*. The post-2000 redistricting cycle in fact generated hardly any *Shaw* litigation of note, because states were careful not to redistrict in a way that would run afoul of *Shaw* and *Miller*.

This Court has reviewed only two *Shaw* claims on the merits since *Cromartie II*. Most recently, in *Alabama*, the Court clarified that maintaining population equality across districts is a background constitutional requirement, and not a traditional districting principle for purposes of the *Miller* test. *Alabama,* 135 S. Ct. at 1270-71. The Court also explained that a racial gerrymandering claim "applies district-by-district. It does not apply to a State considered as an undifferentiated 'whole.'" *Id.* at 1265. The District Court majority erred in *Alabama* in concluding that

because race had not predominated in the drawing of *some* Alabama districts, the plaintiffs could not challenge the drawing of *any* Alabama district. *Id.* at 1265-66. This error, however, gives no indication that district courts generally have been unable to apply the *Miller* factors properly to a given district.

In the other case, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) ("*LULAC*"), the District Court had found that the challenged district did not constitute a racial gerrymander. *See Session v. Perry*, 298 F. Supp. 2d 451, 513 (E.D. Tex. 2004) (vacated on other grounds). While this Court found that Texas's redistricting plan violated Section 2 of the Voting Rights Act, it did not reverse the District Court's ruling on the plaintiffs' *Shaw* claim. *See LULAC*, 548 U.S. 442.

No departure from the *Miller*/*Alabama* test is required in this appeal. When the *Miller*/*Alabama* test is applied to the District Court's findings, the evidence shows that racial considerations predominated over traditional districting principles and, moreover, that such racial considerations were not narrowly tailored to achieve a compelling interest. *See infra* § C. Given the paucity of *Shaw* claims arising out of recent redistricting cycles and the relative ease with which lower courts have evaluated such claims, there is no reason for the principles of *Miller* or *Alabama* to be revisited or reformulated here.

C. The District Court Correctly Concluded that the First and Twelfth Congressional Districts Were Subject to Strict Scrutiny

The District Court analyzed whether strict scrutiny applied to the First and Twelfth Congressional Dis-

tricts under the proper standard. As it explained, quoting *Miller*:

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographic or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

J.S. App. at 16a-17a[3] (quoting *Miller*, 515 U.S. at 916) (citation omitted). The District Court's conclusion that, in each district, North Carolina subordinated traditional districting principles to racial factors is plainly supported by the evidence.

1. The First Congressional District

A simple glance at the First Congressional District strongly suggests that it is the product of racial gerrymandering. *See Karcher v. Daggett*, 462 U.S. 725, 762 (1983) (Stevens, J., concurring) ("[a] glance at the [congressional] map . . . shows district configurations well deserving the kind of descriptive adjectives . . . that have traditionally been used to describe acknowledged gerrymanders.") (citation omitted). The district extends an array of disparate tentacles

[3] "J.S. App." refers to the Appendix attached to the Appellants' Jurisdictional Statement.

out from a core of five counties. M.A. App. 1a.[4] Outside of those five contiguous counties, the district contains strips and pieces of an additional nineteen counties and splits twenty-one cities and towns. M.A. at 8. As the District Court noted, moreover, "the 2011 Congressional Redistricting Plan reduced the compactness of CD 1 significantly." J.S. App. 27a. The benchmark district, for instance, split only ten counties and sixteen cities. M.A. at 8. The fact that the district was redrawn in a manner that raised the African American voting age population from 47.76 percent to 52.65 percent, J.S. App. at 13a, further supports the inference that these objective departures from traditional districting principles may have been caused by racial considerations.

Direct evidence amply confirms this conclusion. The "principal architect" of the 2011 redistricting plan, J.S. App. at 10a, Dr. Thomas Hofeller, testified: "'[S]ometimes it wasn't possible to adhere to some of the traditional redistricting criteria in the creation of [CD 1]' because 'the most important thing was to . . . follow the instructions that I ha[d] been given by the two chairmen [to draw the district as majority-BVAP],'" J.S. App. at 21a (quoting Trial Tr. 626:19-627:1). It is difficult to imagine a clearer admission that traditional districting principles were subordinated to racial considerations. Dr. Hofeller further testified that "he would split counties and precincts when necessary to achieve a 50-percent-plus-one person BVAP in CD 1" and that he ignored mathematical measures of compactness. J.S. App. at 26a-27a.

---

[4] "M.A. App." refers to the Appendix attached to the Appellees' Motion to Affirm, and "M.A." refers to that motion.

The District Court emphasized that Dr. Hofeller was pursuing a racial quota of "50-percent-plus-one-person BVAP" in the First Congressional District. It did not hold, however, that the pursuit of a quota is sufficient to warrant finding that racial considerations predominated under *Miller*. J.S. App. at 25a & n.2. Instead, the District Court held that it need not address that question because of the evidence that, "[i]n order to achieve the goal of drawing CD 1 as a majority-BVAP district, Dr. Hofeller not only subordinated traditional race-neutral principles but disregarded certain principles such as respect for political subdivisions and compactness." J.S. App. at 26a; *see also* J.S. App. at 29a ("[T]raditional factors have been subordinated to race when '[r]ace was the criterion that, in the State's view, could not be compromised,' and when traditional, race-neutral criteria were considered 'only after the race-based decision had been made.'") (quoting *Shaw II*, 517 U.S. at 907).

Before the District Court, Appellants made the "passing argument that the legislature configured CD 1 to protect the incumbent and for partisan advantage." J.S. App. at 27a. But, as the District Court held, Appellants "proffer[ed] no evidence to support such a contention." *Id.* They still have not offered any such evidence. Neither have they meaningfully contested that race predominated over traditional race-neutral districting principles in the drawing of the First Congressional District.

2. The Twelfth Congressional District

The Twelfth Congressional District presents a dramatic visual of racial gerrymandering. As the District Court noted, "CD 12 is a 'serpentine district [that] has been dubbed the least geographically compact district in the Nation.'" J.S. App. 35a (quoting

Shaw II, 517 U.S. at 906). At trial, Dr. Hofeller conceded that the 2011 redistricting plan rendered it still less compact. J.S. App. at 36a. Under the 2001 benchmark plan, the Twelfth Congressional District had a Reock score—which measures compactness—of .116, "the lowest in the state by far," and considerably lower than .2, "one of the thresholds that [is] commonly use[d] . . . to say that a district is noncompact." J.S. App. 35a-36a (quoting Trail Tr. 354:8-13). From this low baseline, under the 2011 redistricting plan the district's Reock score actually "decreased to .071, remaining the lowest in the state by a good margin." J.S. App. at 35a. The District Court found that "[a] score of .071 is low by any measure." J.S. App. at 35a-36a. As Appellees have detailed, the redistricting plan split 13 cities and towns, and it did so along transparently racial lines. M.A. at 16.

The BVAP population in the Twelfth Congressional District, meanwhile, increased from 43.77 percent to 50.66 percent. J.S. App. at 35a. This shift, by itself, does not demonstrate that the increase in BVAP population was achieved at the expense of traditional race-neutral districting principles. Coupled with the other circumstantial indications that the district was not a product of traditional districting principles—"including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests," *Miller*, 515 U.S. at 916—this material and targeted increase provides further support for the inference that racial considerations predominated.

Direct evidence supports the same conclusion. Senator Rucho and Representative Lewis, the chairs of the Senate and House Redistricting Committees, respectively, issued a public statement that they in-

tended to create multiple "majority African American districts." J.S. App. at 30a-31a (quoting Defs.' Ex. 5.11 at 2). The District Court found as a matter of fact that this statement "refers to multiple districts that are now majority minority," namely the First and Twelfth Congressional Districts. *Id*. In a later public statement, Senator Rucho and Representative Lewis also stated that "[b]ecause of the presence of Guilford County in the Twelfth District [which is covered by section 5 of the VRA], we have drawn our proposed Twelfth District at a black voting age level that is above the percentage of black voting age population found in the current Twelfth District." *Id.* (quoting Pls.' Tr. Ex. 67 at 5). This statement, likewise, indicates at least a "level of intentionality," as the District Court found, in increasing the Twelfth District's BVAP. *Id.* at 32a. The District Court also did not clearly err in crediting testimony—uncontroverted by any contrary testimony and consistent with the above statements—that Senator Rucho told Congressman Watt that "the goal was to increase the BVAP in CD 12 to over 50 percent." *Id.* at 33a-35a.

The District Court's findings that racial considerations motivated districting decisions does not necessarily suggest that those considerations predominated above others. But viewed in light of the evidence as a whole—which suggests that traditional race-neutral concerns were not considered or were at least considered secondarily to a racial target which was the "general assembly's predominant intent"—the District Court could reasonably conclude that strict scrutiny applied under *Miller*. J.S. App. at 35a.

The District Court also did not clearly err in rejecting Appellants' argument that politics, rather than

race, predominated in the drawing of the Twelfth District. There was ample evidence supporting the District Court's decision to credit Dr. Hofeller's trial and deposition testimony that he considered race, rather than his other, inconsistent testimony, suggesting that he did not. In addition to the foregoing evidence as well as Dr. Hofeller's own admissions, the District Court could properly rely on evidence that Senator Rucho and Representative Lewis attempted to downplay the role of politics in the redistricting, expert testimony suggesting that race more than politics explained the new districts, and emails suggesting that the politics rationale was employed as a post hoc effort to deemphasize race. J.S. App. at 36a-43a. Once again, no single piece of evidence resolves Appellees' claim. But the District Court had ample reason to conclude that this evidence, considered together, favored the view that "the legislature drew District 12's boundaries because of race rather than because of political behavior." J.S. App. at 43a (quoting *Cromartie II*, 532 U.S. at 257).

D. The District Court Correctly Concluded that the First and Twelfth Congressional Districts Did Not Satisfy Strict Scrutiny

Appellants have never contested that the Twelfth Congressional District cannot survive strict scrutiny. As to the First Congressional District, they assert that Section 2 of the Voting Rights Act serves as a compelling interest necessitating the drawing of a majority-minority district. The District Court properly held that Appellants failed to satisfy its burden under strict scrutiny.

As the District Court held, Appellants have offered no basis in evidence—let alone a "strong basis in evidence," *Alabama*, 135 S. Ct. at 1274—to suggest that

the drawing a majority-minority district was "reasonably necessary" to achieve compliance with the Voting Rights Act. *Miller*, 515 U.S. at 921. Appellants have admitted that "African American voters have been able to elect their candidates of choice in the First District since the district was established in 1992," including for several elections when the district was majority white. J.S. App. at 49a (quoting Defs.' Memo. of Law in Opp. to Pl.'s Mot. for Sum. J.).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

KRISTEN CLARKE
JON M. GREENBAUM
EZRA D. ROSENBERG
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Ave, NW
Suite 400
Washington, DC 2005
jgreenbaum@lawyerscommittee.org
(202) 662-8315

BRADLEY S. PHILLIPS
JOHN F. MULLER
MUNGER, TOLLES & OLSON LLP
355 South Grand Ave
35th Floor
Los Angeles, CA 90028
brad.phillips@mto.com
(213) 683-9100

October 2016