No. 15-680

IN THE

Supreme Court of the United States

GOLDEN BETHUNE-HILL, CHRISTA BROOKS, CHAUNCEY BROWN, ATOY CARRINGTON, DAVINDA DAVIS, ALFREDA GORDON, CHERRELLE HURT, THOMAS CALHOUN, TAVARRIS SPINKS, MATTIE MAE URQUHART, VIVIAN WILLIAMSON, AND SHEPPARD ROLAND WINSTON
Appellants,

v.

VIRGINIA STATE BOARD OF ELECTIONS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

KEVIN J. HAMILTON
ABHA KHANNA
RYAN SPEAR
WILLIAM B. STAFFORD
PERKINS COIE LLP
1201 Third Avenue
Suite 4900
Seattle, WA 98101-3099
(206) 359-8000

MARC E. ELIAS
Counsel of Record
BRUCE V. SPIVA
ARIA C. BRANCH
PERKINS COIE LLP
700 Thirteenth Street, N.W.
Suite 600
Washington, D.C. 20005-3960
(202) 654-6200
MElias@perkinscoie.com

Counsel for Appellants Golden Bethune-Hill, Christa Brooks, Chauncey Brown, Atoy Carrington, Davinda Davis, Alfreda Gordon, Cherrelle Hurt, Thomas Calhoun, Tavarris Spinks, Mattie Mae Urquhart, Vivian Williamson, and Sheppard Roland Winston

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

The majority below found that the Challenged Districts were drawn to comply with a strict racial quota of at least 55% Black Voting Age Population ("BVAP"). The lead mapdrawer admitted that he steadfastly adhered to that overtly racial rule. Other delegates testified that the quota pervaded the redistricting process. And the General Assembly rejected alternative plans and proposed revisions that violated the 55% rule. None of this is disputed.

Appellees argue that their race-based redistricting has no constitutional significance because, in hindsight, some of the Challenged Districts can be reconciled with "traditional districting principles." This Court flatly rejected that view in *Shaw v. Hunt*, 517 U.S. 899 (1996) ("*Shaw II*"), and for good reason. Under Appellees' proposed rule, legislators could *admittedly* sort voters by race yet evade judicial scrutiny so long as their lawyers could concoct post hoc excuses for district lines based on malleable and ill-defined "neutral" criteria. Indeed, that is precisely what happened here. The Equal Protection Clause does not tolerate that result.

I. PLAINTIFFS NEED NOT PROVE VIOLATIONS OF NEUTRAL DISTRICTING PRINCIPLES TO SHOW THAT RACE PREDOMINATED

According to the majority, race does not predominate in the redistricting process even if the legislature openly declares that race predominated. Instead, race predominates only if plaintiffs also demonstrate "'*actual* conflict'" between the legislature's stated racial goals and race-neutral districting principles.

J.S. App. 30a (quoting *Page v. Virginia State Bd. of Elections*, No. 3:13CV678, 2015 WL 3604029, at *27 (E.D. Va. June 5, 2015) (Payne, J, dissenting)). Appellees insist that the majority's reasoning "followed settled law." Mot. at 20.

To the contrary: the majority's reasoning is virtually identical to the *dissent* in *Shaw II*. *See* 517 U.S. at 906-07 ("In his dissent, Justice Stevens argues that strict scrutiny does not apply where a State 'respects' or 'compl[ies] with traditional districting principles.' . . . *That, however, is not the standard announced and applied in* Miller.") (quoting 517 U.S. at 930-31 (Stevens, J., dissenting)) (emphasis added). *Shaw II* reinforced *Miller*'s unambiguous holding that plaintiffs may establish racial predominance "*either* through 'circumstantial evidence of a district's shape and demographics' *or* through, *more direct evidence going to legislative purpose*.'" *Id.* at 905 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)) (emphasis added); *see also Miller*, 515 U.S. at 915 (plaintiffs are not "confined in their proof to evidence regarding the district's geometry and makeup"). If plaintiffs need not present *any* evidence regarding a "district's shape and demographics," then surely they need not prove that every line in every challenged district is attributable solely to race—especially if the legislature admits that it sorted voters by race. But that is precisely what the majority required here.

And the majority's error is more than evidentiary. Like Appellees, the majority assumes that there is no constitutional harm unless the legislature's (admitted) reliance on race caused "substantial" deviations from traditional districting criteria. But the Equal Protection Clause condemns unjustified race-based state action—not misshapen districts. "[I]t [is] the presumed racial

purpose of State action, *not its stark manifestation*, that [is] the constitutional violation." *Miller*, 515 U.S. at 913 (emphasis added); *see also id*. (shape is not "a necessary element of the constitutional wrong" but simply "circumstantial evidence" that race "was the legislature's dominant and controlling rationale in drawing its district lines").

Thus, while *Miller* permits the parties to engage in a battle of competing inferences from circumstantial evidence, it does not instruct courts to ignore "more direct evidence going to legislative purpose." *Id*. at 916. If a legislature admittedly uses a fixed racial target to determine whether "to place a significant number of voters within or without a particular district," *id.*, it cannot avoid constitutional scrutiny because it also complied with some race-neutral districting principles along the way, *id.* at 915. *See also, e.g*., *Shaw v. Hunt*, 861 F. Supp. 408, 431 (E.D.N.C. 1994) ("If the line-drawing process is shown to have been infected by such a deliberate racial purpose, strict scrutiny cannot be avoided simply by demonstrating that the shape and location of the districts can rationally be explained by reference to some districting principle other than race, for the intentional classification of voters by race, though perhaps disguised, is still likely to reflect the impermissible racial stereotypes, illegitimate notions of racial inferiority and simple racial politics that strict scrutiny is designed to smoke out.") (internal quotation marks and citation omitted), *rev'd on other grounds*, 517 U.S. 899 (1996).[1]

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[1] Appellees claim that no court has ever held that race predominated where districts are drawn in "substantial compliance" with neutral criteria. Mot. at 19. They are wrong. In *Clark v. Putnam County*, 293 F.3d 1261, 1270-71 (11th Cir. 2002), for example, the court held that race predominated where the

II. THE 55% BVAP TARGET HAD A DIRECT AND SIGNIFICANT IMPACT ON DISTRICT LINES

Just as the majority misunderstands this Court's canonical racial gerrymandering cases, so too it misunderstands this Court's recent decision in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1271 (2015). The majority acknowledges that *Alabama* "could not be clearer that use of racial BVAP floors constitutes . . . significant evidence . . . of predominance." J.S. App. 30a. Nevertheless, it deems the use of a rigid racial quota in this case "largely irrelevant." *Id.* at 107a.

Appellees try to obscure that error by arguing that using racial quotas "is *how states comply* with the Voting Rights Act." Mot. at 21. But even if that is true, it is irrelevant to the predominance analysis. Legislatures may use numerical targets if they are narrowly tailored to achieve a compelling government interest. That does not undercut *Alabama*'s holding that the use of rigid racial quotas is "strong" evidence that race predominated. *Alabama*, 135 S. Ct. at 1271. And where race predominates—as it did here—strict scrutiny applies.[2]

Appellees also defend the use of a one-size-fits-all quota on the ground that any district-specific analysis of racial voting patterns "would be more race-

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challenged districts were "relatively compact" and exhibited only "small" "irregularities in natural boundaries."

[2] Appellees lean heavily on *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977), to argue otherwise, but that case predates *Shaw* and "does not apply to a claim that the State has separated voters on the basis of race." *Miller*, 515 U.S. at 915.

conscious than applying one floor to all." Mot. at 23. In other words, Appellees argue that their use of a mechanical racial target is evidence that race did *not* predominate. This Court held precisely the opposite in *Alabama*.

Lastly, Appellees pretend that the 55% BVAP floor had no actual effect on district boundaries. But that argument conflicts with the very opinion Appellees ask this Court to affirm. The majority below made clear that the 55% BVAP floor "*was used in structuring the districts*[.]" J.S. App. 19a (emphasis added). The record supports that view. At trial, delegates testified that the General Assembly refused to consider versions of the Challenged Districts that did not comply with the 55% BVAP rule. *See* J.S. 19 n.4. Contemporaneous email communications showed that Delegate Jones rejected proposals that violated that rule. *See* Pl. Ex. 30 at 1. And two delegates revealed how they were forced to cede areas they had previously represented to comply with the rule. *Id.* at 24-25. Thus, while the General Assembly's purported race-neutral goals gave way time and again,[3] the 55% BVAP rule was never compromised. As Judge Keenan observed, the 55% BVAP rule "operated as a filter through which all line-drawing decisions had to pass." J.S. App. 138a (Keenan, J., dissenting).

In short, Appellees are not being candid when they suggest that the 55% rule had no effect on the General Assembly's redistricting decisions. The General Assembly adopted the 55% rule. The General Assembly

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[3] *See, e.g.*, J.S. App. 121a (District 80 "makes little rational sense as a geographical unit"); *id*. at 92a, 96a, 128a (significant increase in number of locality and VTD splits in Districts 63, 75, and 95); Pl. Ex. 17 (ten incumbents paired).

implemented the 55% rule. And the Challenged Districts, each of which meet or exceed the 55% threshold, eloquently testify to the preeminent importance of that rigid racial quota.[4]

III. CIRCUMSTANTIAL EVIDENCE FURTHER ESTABLISHES RACIAL PREDOMINANCE

Even if circumstantial evidence were a threshold requirement, Appellees mischaracterize both the majority opinion and the record below in contending that Appellants showed no "derogation of traditional criteria in eight districts." Mot. at 21. In fact, Appellants presented circumstantial evidence as to each Challenged District. The majority found deviations from neutral criteria sufficient to warrant further examination in at least eight Challenged Districts. *See* J.S. App. 91a-130a (deviations found in Districts 63, 75, 70, 71, 74, 77, 80, and 95). It addressed "potential deviations" in two additional districts. *See id.* at 107a (District 69), 126a (District 90). In addition to the deviations acknowledged by the majority, Appellants presented undisputed expert testimony that the General Assembly swapped low BVAP areas for high BVAP areas to ensure that all Challenged Districts met the 55% BVAP target, *see* Pl. Ex. 50 at 27-37—precisely the kind of evidence credited in *Alabama*, 135 S. Ct. at 1266-67.[5]

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[4] Contrary to Appellees' suggestion, Mot. at i, 21, Appellees do not advocate a "per se" rule. But on this specific factual record, the Court could determine that any one piece of evidence advanced by Appellants (including the General Assembly's non-negotiable 55% BVAP rule) is, standing alone, sufficient to establish predominance.

[5] Appellees' contention that Appellants have waived any challenge to the majority's consideration of expert testimony is

In short, there was ample circumstantial evidence regarding each district's "shape and demographics." *Miller*, 515 U.S. at 916. Indeed, in most instances the majority acknowledged that evidence. The error lies primarily in the majority's faulty legal analysis, which allowed it to disregard such evidence wherever there was any possible race-neutral explanation for any deviation in a district. Under the majority's test, Appellants were not just required to prove that race was the General Assembly's predominant purpose; they were required to "prove that racial considerations subordinated *all* other neutral and race-neutral districting criteria" in the drawing of each and every district boundary. J.S. App. 96a (emphasis added). *See also id.* 111a ("[T]he legislature's pursuit of [the 55% BVAP floor] is not the 'predominate' [sic] criterion employed unless it subordinates *all* others.") (emphasis added).

Moreover, the "neutral" explanations that can effectively cancel out evidence of race-based redistricting are remarkably fluid. The majority openly admits there is no "standard" for determining compactness or contiguity, J.S. App. 54a, 57a, and that various race-neutral justifications can "form a 'backstop' for one another." *Id.* at 59a, 60a. In other words, these factors are so inherently malleable that they can be manipulated to explain away even the most egregious race-based districting schemes.

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baseless. Appellees themselves rely on Appellants' expert testimony in their Motion, Mot. at 10, and the way the majority treated specific evidence in reaching its overall conclusions is "'fairly included' in the question[s] presented in the jurisdictional statement." *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 94 n.9 (1982); *see also City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 214 n.8 (2005).

The majority's analysis of "core retention" illustrates the point. Appellees argue, as they did below, that many of the Challenged Districts "maintain[ed] their configurations and constituencies." Mot. at 1. Appellants proved this justification false with respect to several districts that were *not* underpopulated yet replaced thousands of voters with different populations of different racial composition. *See, e.g.*, Pl. Ex. 50, tbls. 4, 5, 8 (District 70 added 26,000 people and removed 26,000 people, resulting in increased BVAP in nearby District 71); *id.* (District 74 added 16,000 people to similar effect). The majority recognized *Alabama*'s admonition against reliance upon core retention in the predominance inquiry. J.S. App. 74a. But where Appellants disproved the General Assembly's purported focus on core retention, they were chastised. *See* J.S. App. 109a ("Redistricting, by its very nature, involves the changing of districts."). And where Appellees defended district deviations on grounds of core retention, the majority weighed this factor against finding racial predominance. *See id*. at 117a. The takeaway, then, is that core retention "is not a meaningful answer" to a racial sorting claim, *id.* at 74a, except when it is, *see id.* at 117a, and the legislature's failure to adhere to this criterion despite its reliance upon it is not "suspicious," *id.* at 109a.

Nor are the "neutral" criteria Appellants must effectively disprove limited to "traditional districting principles" or even the majority's eleven categories. J.S. App. 53a-71a. As long as district deviations could be attributed to *any* consideration other than race, plaintiffs cannot meet their burden to show predominance. *See id*. at 93a (finding, in District 63, that Appellants failed to explain away "the artificial border provided by I-85," although no party advanced this as an explanation for the irregular boundary).

Appellees cannot cite a single case endorsing this "any excuse will do" approach to predominance. The majority's warped view of circumstantial evidence mandates reversal.

IV. RACE PREDOMINATED OVER POLITICS

Even Appellees admit that at least three districts reflect gross deviations from neutral districting principles. Mot. at 28. But they contend that in the face of alleged "political considerations," Appellants cannot establish racial predominance. *Id.* This argument fails on every level.

Appellees' contention that Appellants were required to provide an alternative map that met all of the legislature's purported political objectives advanced during litigation is specious. First, *Easley v. Cromartie*, 532 U.S. 234 (2001), addressed only those instances where "racial identification" and "political affiliation" are highly correlated. *Id*. at 258. But here, these variables *are not* highly correlated: "In every area BVAP is a statistically significant predictor of the likelihood that a VTD ends up in one of the Challenged Districts." Pl. Ex. 50 at 43. "Party," by contrast, "is not." *Id.*[6]

Second, the record belies any claim that politics drove the redistricting process. The General Assembly's official criteria expressly subordinated political considerations to racial ones, Pl. Ex. 16, Delegate Jones denied any partisan motive, Tr. 483:1-2, and the General Assembly specifically stated that even decisions that seemed overtly political were, in fact, driven

[6] The majority's criticism that this expert testimony fails to account for factors other than race and politics, *see* J.S. App. 89a, has little bearing where Appellees' argument rests on the alleged predominance of politics over race.

by race, *see* Pl. Ex. 17 (the reason "why" certain incumbents were paired was "population/demographic changes" and the "requirements of the federal Voting Rights Act"). Appellees cannot have it both ways, disclaiming political motives during the redistricting process and then claiming the map is, in fact, a "political gerrymander" in litigation, Mot. at 29 n.22.

Indeed, Appellees effectively concede that, to the extent politics was a consideration, it was one of several factors explaining district lines. *See, e.g.*, Mot. at 28-29 (referring to incumbent protection, river crossings, and naval base). Appellees insist an alternative map is required where the state defends on the basis of *any* neutral principles. *Id.* at 29 n.22. But this Court has never held that an alternative map is the *sine qua non* of a successful *Shaw* claim and indeed has held that race predominated in numerous cases in which plaintiffs produced no alternative map. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 969-70 (1996); *Miller*, 515 U.S. at 919.

V. NONE OF THE CHALLENGED DISTRICTS ARE NARROWLY TAILORED

Appellees fail to even mention the majority's narrow tailoring standard. J.S. App. 79a-86a. And for good reason: it has no basis in this Court's precedent, *see* J.S. 33, and fails as a result.

Appellees refer to "copious evidence that allowing districts to fall to a raw majority would be retrogressive." Mot. at 30. But this "evidence" amounts to little more than vague concerns some delegates expressed about the continued ability of minorities (in general) to elect their candidates of choice. To set the record straight: minorities in each Challenged District have elected their candidates of choice in every general

election for at least a decade (and in many districts, since the early 1990s), whether the BVAP was as low as 46.3% or as high as 62.7%. Pl. Ex. 50, tbl. 4. And even if vague concerns warranted the predominant use of race, they provide no basis for an across-the-board 55% BVAP quota.

Appellees next baldly state that the General Assembly's "uncertainty" regarding "the minimum BVAP levels required to avoid retrogression" justifies its failure to narrowly tailor its use of race. Mot. at 31-32. But *Alabama* requires a "strong basis in evidence," 135 S. Ct. at 1274, and thus directly refutes Appellees' cynical claim that in the absence of perfect data the only proper analysis is no analysis at all.

Finally, Appellees' claim that the higher BVAP thresholds at issue in *Alabama* render that case inapplicable, Mot. at 33-34, only reinforces Appellees' "mechanical[] rel[iance] upon numerical percentages" to the exclusion of all other "significant circumstances." *Alabama*, 135 S. Ct. at 1273. The question of how much is too much is entirely a function of fact; in an area with high crossover voting and low polarization, for instance, 55% BVAP could be deemed just as excessive as 70% BVAP would be in a highly polarized area. But the General Assembly made no inquiry into these facts. Instead, they "asked the wrong question with respect to narrow tailoring," *id.* at 1274, specifically: "How can we achieve at least 55% BVAP in all majority-minority districts?" Here, as in *Alabama*, "[a]sking the wrong question . . . led to the wrong answer." *Id.*

CONCLUSION

The Court should summarily reverse or note probable jurisdiction.[7]

Respectfully submitted,

KEVIN J. HAMILTON
ABHA KHANNA
RYAN SPEAR
WILLIAM B. STAFFORD
PERKINS COIE LLP
1201 Third Avenue
Suite 4900
Seattle, WA 98101-3099
(206) 359-8000

MARC E. ELIAS
Counsel of Record
BRUCE V. SPIVA
ARIA C. BRANCH
PERKINS COIE LLP
700 Thirteenth Street, N.W.
Suite 600
Washington, D.C. 20005-3960
(202) 654-6200
MElias@perkinscoie.com

Counsel for Appellants Golden Bethune-Hill, Christa Brooks, Chauncey Brown, Atoy Carrington, Davinda Davis, Alfreda Gordon, Cherrelle Hurt, Thomas Calhoun, Tavarris Spinks, Mattie Mae Urquhart, Vivian Williamson, and Sheppard Roland Winston

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[7] If the Court notes probable jurisdiction, Appellees have forfeited any objection to Appellants' request that this case be heard this Term. J.S. 35-36.