No. 14-1504

In the Supreme Court of the United States

ROBERT J. WITTMAN, ET AL., APPELLANTS

v.

GLORIA PERSONHUBALLAH, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

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QUESTIONS PRESENTED

1. Whether appellants have standing to appeal the district court's judgment.

2. Whether the district court clearly erred or adopted an incorrect legal standard in concluding that the Virginia legislature predominantly relied on race in a manner that was not narrowly tailored when drawing District 3 in its 2012 congressional redistricting plan.

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INTEREST OF THE UNITED STATES

This case involves the constitutionality of a redistricting plan that was purportedly designed, in part, to comply with the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 *et seq*. The United States, through the Attorney General, has primary responsibility for enforcing the VRA. Accordingly, the United States has a substantial interest in the proper interpretation of the VRA and the related constitutional protection against racial discrimination. Because the United States litigates jurisdictional issues in suits against official defendants, it also has an interest in the standing question in this case.

STATEMENT

1. When drawing legislative districts, States must balance a complex array of factors while adhering to constitutional and statutory requirements. See, *e.g.*, *Miller* v. *Johnson*, 515 U.S. 900, 915-916 (1995). As

relevant here, the Equal Protection Clause forbids an unjustified predominant reliance on race in redistricting. See *Shaw* v. *Reno*, 509 U.S. 630, 642 (1993) (*Shaw I*). Given the "sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments," courts must "exercise extraordinary caution" before concluding that district lines were drawn based on race. *Miller*, 515 U.S. at 916. If race is the "predominant factor" in drawing a district, however, that use of race must be "narrowly tailored to serve a compelling state interest." *Shaw* v. *Hunt*, 517 U.S. 899, 902, 905 (1996) (*Shaw II*) (internal quotation marks omitted).

At the time of the redistricting measures at issue here, Section 5 of the VRA required covered jurisdictions, including Virginia, to establish that districting changes had neither the purpose nor the effect of discriminating based on race. 52 U.S.C. 10304(a).[1] To obtain preclearance, Virginia was required to demonstrate, *inter alia*, that the map would not result in retrogression by diminishing a minority group's ability "to elect [its] preferred candidates." 52 U.S.C. 10304(b). To determine whether a redistricting plan was retrogressive, the new voting plan was compared against the existing, or "benchmark," plan, using updated census data in each and conducting a functional analysis focused on whether the proposed plan maintained a minority group's ability to elect. *Guidance Concerning Redistricting Under Section 5 of the*

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[1] In *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), this Court held that the coverage formula in Section 4(b) of the VRA could no longer be used to require preclearance under Section 5. *Id.* at 2631. Thus, Virginia is not currently subject to Section 5.

Voting Rights Act, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011) (*2011 Guidance*).

2. a. Following the 2010 census, Virginia needed to redraw its congressional and state legislative districts to balance population disparities. J.S. App. 7a. Among the malapportioned districts was Congressional District 3, the only district in which minority voters had the ability to elect their preferred candidates. *Id.* at 7a, 28a. To repopulate District 3, which needed an additional 63,976 people, the 2012 congressional plan (2012 Plan) shuffled more than 180,000 individuals between districts. *Id.* at 30a. Specifically, the plan moved nearly 59,000 people—who were predominantly white—out of District 3, and brought over 120,000 people—who were predominantly black—into the district. *Ibid.* Those changes increased District 3's black voting-age population (BVAP) from 53.1% to 56.3%. *Id.* at 9a.

The 2012 Plan was authored by state legislator Bill Janis. J.S. App. 8a, 47a. In legislative hearings, Janis stated that he had followed several criteria in creating the plan, including equalizing population, complying with the VRA, preserving district cores, keeping localities and other jurisdictions together, and respecting communities of interest. J.A. 351-353.

According to Janis, "the primary focus of how the lines in [the 2012 Plan] were drawn was to ensure that there be no retrogression" in District 3. J.A. 370; see, *e.g.*, *ibid.* (characterizing nonretrogression as "one of the paramount concerns and considerations that was not permissive and nonnegotiable"). Janis acknowledged that he had not considered voting patterns to determine how demographic changes in District 3 affected minority voters' ability to elect their

preferred candidates. J.A. 359-360. Instead, Janis understood nonretrogression to require that the new map preserve the BVAP percentage in District 3 without reduction. See J.A. 119, 357. Janis further drew District 3 to increase the BVAP beyond 55%, which the legislature had adopted as a floor for majority-minority districts in the state legislative map. J.S. App. 20a; J.A. 106-107, 518, 527. When Janis was asked whether there was "any empirical evidence whatsoever that 55 percent [BVAP] is different than 51 percent," or whether a 55% floor was "just a number that has been pulled out of the air," he stated that a district with a 55% BVAP, in contrast to one with a 51% BVAP, was certain to obtain preclearance. J.A. 397-398; see J.S. App. 21a.

Janis stated that the 2012 Plan was also "drawn to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 elections," achieved "by not cutting out currently elected congressmen from their current districts nor drawing current congressmen into districts together." J.A. 352. Janis claimed he had consulted with Virginia's incumbent congressmen, "both Republican and Democrat, in a bipartisan manner." J.A. 372. But he clarified that he sought input only on each Member's specific district, and had not solicited recommendations regarding the plan as a whole. J.A. 374, 456. And Janis expressly disavowed having "any knowledge as to how the plan improves the partisan performance of those incumbents in their own district[s]." J.A. 456. Janis stated that he "ha[d]n't looked at the partisan performance" and that "[i]t was not one of the factors that [he] considered in the drawing of the district[s]." *Ibid.*

After the legislature adopted the 2012 Plan, Virginia sought preclearance under Section 5 of the VRA. J.S. App. 10a. The Attorney General precleared the plan in March 2012. *Ibid.*

3. a. Appellees are registered voters residing in District 3. J.S. App. 10a & n.9. They filed this suit alleging that District 3 was racially gerrymandered in violation of equal protection. *Id.* at 10a. Appellants are current and former Members of Congress from other districts in Virginia who intervened as defendants in support of the 2012 Plan. *Id.* at 3a-4a, 11a.[2]

b. Following a bench trial, a three-judge district court invalidated District 3, holding that it was drawn predominantly based on race in a manner not narrowly tailored to achieve VRA compliance. *Page* v. *Virginia State Bd. of Elections*, 58 F. Supp. 3d 533, 548-551 (E.D. Va. 2014). Appellants, but not Virginia, appealed pursuant to 28 U.S.C. 1253. J.S. App. 4a & n.7, 11a-12a & n.10. This Court vacated the district court's judgment and remanded for further consideration in light of *Alabama Legislative Black Caucus* v. *Alabama*, 135 S. Ct. 1257 (2015) (*Alabama*). See *Cantor* v. *Personhuballah*, 135 S. Ct. 1699 (2015).

c. On remand, the district court again concluded that race predominated in drawing District 3 and that the use of race was not narrowly tailored to comply with the VRA. J.S. App. 1a-44a.

The district court found that race predominated based on "direct evidence of legislative intent, including statements by the legislation's sole sponsor," in combination with circumstantial evidence that "tradi-

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[2] The district court did not specify whether the intervention was permissive or as of right. See 13-cv-678 Docket entry No. (Docket No.) 26 (Dec. 3, 2013); Docket No. 165 (May 11, 2015).

tional districting criteria were subordinated to race." J.S. App. 16a, 30a (brackets and citation omitted). With respect to direct evidence, the court cited Janis's statements that "his 'primary focus'" was "ensuring that [District 3] maintained at least as large a [BVAP percentage] as had been present in the district under the Benchmark Plan." *Id.* at 22a. The court further found that voters were placed within District 3 to satisfy a 55% BVAP floor, which was "not informed by an analysis of voter patterns," but which the legislature nevertheless viewed as an appropriate means of obtaining preclearance. *Id.* at 20a-21a. That use of race as "the single 'nonnegotiable' redistricting criterion," the court explained, supported a finding that race had predominated. *Id.* at 21a.

The district court concluded that circumstantial evidence provided "further support" for that finding. J.S. App. 23a-24a. The court noted that District 3 is "the least compact congressional district in Virginia" and has an "odd shape" that strategically uses water contiguity to "bypass white communities" and connect "a disparate chain" of "predominantly African-American populations." *Id.* at 25a-26a. Moreover, District 3 splits more local political boundaries and voting districts (VTDs) than any other congressional district in Virginia, with those splits serving to exclude white populations and bring black populations into the district. *Id.* at 27a. And the splits could not be explained as an effort to preserve district cores, the court observed, because the legislature had "moved over 180,000 people in and out of the districts surrounding [District 3] to achieve an overall population increase of only 63,976." *Id.* at 30a. "Tellingly," the court noted, "the populations moved out of [Dis-

trict 3] were predominantly white, while the populations moved into the District were predominantly African-American." *Ibid.*

The district court rejected the argument that political considerations drove District 3's design. J.S. App. 30a-36a. The court found no direct evidence that politics predominated; to the contrary, Janis had disclaimed reliance on "partisan performance," stating that "[i]t was not one of the factors that [he] considered in the drawing of the district." *Id.* at 34a. Moreover, the circumstantial evidence was more consistent with a finding of racial predominance because "[a]mong the pool of available VTDs that could have been placed within [District 3] that were highly Democratic performing, those with a higher BVAP were placed within [District 3], and those VTDs that were largely white and Democratic were left out." *Ibid.* (internal quotation marks omitted).

Having concluded that race predominated, the district court applied strict scrutiny and held that, although the legislature's effort to comply with the VRA constituted a "compelling state interest," the 2012 Plan was not "narrowly tailored to further that interest." J.S. App. 37a. The court observed that the legislature had "relied heavily on a mechanically numerical view as to what counts as forbidden retrogression" by adopting a 55% BVAP floor in District 3 and then using that threshold to "increas[e] the BVAP of a safe majority-minority district." *Id.* at 39a-42a. The court concluded that the legislature lacked a strong basis in evidence for believing that the VRA required augmentation of District 3's BVAP using the unsupported 55% racial target. *Id.* at 41a.

Judge Payne dissented. J.S. App. 45a-93a. He acknowledged that the majority had "applied the proper analytic framework as specified by *Alabama*," but he disagreed with the majority's view of the record. *Id.* at 45a. Judge Payne identified several errors he perceived in the majority's factfinding, including its determination that the legislature adopted a 55% BVAP floor in District 3 and its finding that appellees' expert witness was more credible than Virginia's expert. *Id.* at 66a-67a, 70a, 72a, 83a-85a; see *id.* at 21a n.16. Judge Payne would have found that "the redistricting decision here was driven by a desire to protect incumbents and by the application of traditional redistricting precepts." *Id.* at 46a. Thus, although he acknowledged that "race was considered," he did not believe race predominated. *Id.* at 46a-47a.

d. Shortly after the district court issued its opinion, and before any remedial plan was proposed or implemented, appellants filed this appeal. J.S. App. 103a-104a. Virginia declined to appeal.

4. The Virginia legislature subsequently convened to draw a new congressional map, but adjourned without enacting a plan. Appellants' Br. 12-13. The district court accordingly appointed a Special Master to help develop a remedial plan. 13-cv-678 Docket entry No. (Docket No.) 241, at 1 (Sept. 25, 2015). On January 7, 2016, the court ordered Virginia to implement one of the plans recommended by the Special Master. Docket No. 300.

SUMMARY OF ARGUMENT

I. Appellants, current and former Members of Congress in districts outside District 3 who intervened below, lack standing to bring this appeal. Because Virginia acquiesced in the district court's deci-

sion invalidating District 3, appellants must independently establish Article III standing to defend the constitutionality of the legislature's redistricting plan. Appellants cannot satisfy Article III's injury-in-fact requirement, however, because they cannot show that the court's decision affects any interest of theirs that is legally protected and judicially cognizable.

Appellants maintain (Br. 58) that they are harmed because a remedial redistricting plan will move "unfavorable Democratic voters" into the districts they represent, thereby decreasing their chances of reelection. But appellants have no legally protected interest in excluding voters from their districts on the basis of political affiliation. Appellants' desire to fence out those voters to enhance their odds of electoral success does not amount to a judicially cognizable harm. Nor does any decision from this Court support appellants' novel claim of injury. This Court should dismiss for lack of jurisdiction and reaffirm that voters in our democratic system choose their representatives—not the other way around.

II. If the Court reaches the merits, it should affirm the district court's judgment that Virginia predominantly relied on race in a manner that was not narrowly tailored when drawing District 3.

A. Although some of the district court's language was imprecise, the court applied the correct legal standard for racial predominance. Because mere consciousness of race in redistricting does not trigger strict scrutiny, statements acknowledging a legislature's obligation to comply with the VRA do not show that race predominated. The Court should reaffirm that point here. But the district court's opinion is not fairly read as concluding that race predominated

based on statements regarding the mandatory nature of VRA compliance. Rather, the court relied on the legislature's erroneous method of VRA compliance—namely, adoption of unsupported and mechanical racial targets for District 3. Because the court concluded that those targets were the principal factor determining which voters were placed in District 3, it did not commit legal error in finding racial predominance.

B. Nor is there any clear factual error in the district court's predominance finding. Direct evidence showed that the legislature erroneously believed that the VRA prohibited any reduction of District 3's BVAP and that the legislature adopted a 55% BVAP floor for the district, uninformed by any analysis of voter patterns. The plan's drafter stated that his primary focus in drawing the district was VRA compliance, achieved by using those unsupported racial targets. And circumstantial evidence of the district's shape and demographics further supported a finding of racial predominance. Direct and circumstantial evidence also supported the court's finding that District 3's boundaries were better explained by race than politics. Appellants identify no clear error in the court's evaluation of the evidence.

C. Because race predominated, strict scrutiny applies even if appellants are correct (Br. 26) that racial and political goals coincided and could theoretically have prompted the legislature to draw the same lines without relying on race. A racial gerrymandering claim does not depend on a showing that race and politics conflicted. The constitutional harm flows from the predominant use of race, and a plaintiff who makes that showing need not further establish that a

district's configuration necessarily differed from what it would have been in the absence of the impermissible racial motive.

D. The district court did not err in concluding that Virginia's predominant use of race in drawing District 3 was not narrowly tailored to the compelling state interest of complying with the VRA. Section 5 does not require jurisdictions to adhere to mechanical and factually unsupported racial targets, uninformed by a functional analysis of a minority group's ability to elect. Because Virginia lacked a strong basis in evidence to believe that it needed to increase District 3's BVAP using the 55% floor adopted by the legislature, its predominant use of race violated equal protection.

ARGUMENT

I. APPELLANTS LACK STANDING TO APPEAL

1. Article III of the Constitution limits federal-court jurisdiction to "Cases" and "Controversies." U.S. Const. Art. III, § 2. Standing to sue or defend is an "essential aspect" of the case-or-controversy requirement. *Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2661 (2013). To have standing, the party invoking the federal court's jurisdiction must establish injury-in-fact, causation, and redressability. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (*Defenders*). The application of those requirements "serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990).

To satisfy Article III's injury-in-fact requirement, a litigant must show "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent." *Defenders*, 504 U.S. at 560 (internal quotation marks omitted). Not every per-

ceived grievance qualifies; rather, "the alleged injury must be legally and judicially cognizable." *Raines* v. *Byrd*, 521 U.S. 811, 819 (1997). The Court has concluded, for example, that a parent has no legally protected interest in enforcement of a criminal statute requiring the payment of child support, because "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973). And candidates and voters have no judicially cognizable interest in preventing increases in campaign-contribution limits on the ground that it will create inequality for those with fewer resources because that "claim of injury" is "not to a legally cognizable right." *McConnell* v. *FEC*, 540 U.S. 93, 227 (2003), overruled in part on other grounds by *Citizens United* v. *FEC*, 558 U.S. 310 (2010). Some claimed injuries, the Court has explained, are simply "not appropriate[] to be considered judicially cognizable." *Allen* v. *Wright*, 468 U.S. 737, 752 (1984).

The requirement to show a judicially cognizable injury "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997) (*Arizonans*). A State whose law is invalidated "has standing to defend the constitutionality of [the] statute" on appeal because it has "a direct stake * * * in defending the standards embodied in" state law. *Diamond* v. *Charles*, 476 U.S. 54, 62, 65 (1986) (citation and internal quotation marks omitted). But if the State declines to appeal, there is no longer a case or controversy between it and the prevailing party. *Id.* at 64. In that circumstance, an intervenor may seek to "keep

the case alive" by pursuing an appeal, *id.* at 68, but the "intervenor cannot step into the shoes of the original party unless [he] independently" establishes Article III standing. *Arizonans*, 520 U.S. at 65. In short, the "decision to seek review" is "not to be placed in the hands of concerned bystanders," but rather must be confined to those whose legally protected and judicially cognizable interests are affected by the judgment. *Diamond*, 476 U.S. at 62 (internal quotation marks omitted).

2. Because Virginia declined to appeal the district court's decision finding that District 3 violates equal protection, appellants, who are current and former Members of Congress in districts surrounding District 3, may maintain this suit only if they independently have Article III standing. Appellants contend (Br. 58) that they are harmed by the judgment because any remedial redistricting plan will "replace a portion of the[ir] 'base electorate' with unfavorable Democratic voters" and thereby decrease their chances of reelection.[3] That argument is unavailing.

a. Appellants have no judicially cognizable interest in excluding voters they perceive to be undesirable from their districts. An incumbent holds office "as trustee for his constituents, not as a prerogative of personal power." *Raines*, 521 U.S. at 821; see *Moore*

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[3] Appellants also briefly suggest (Br. 58) that they have a cognizable injury because the remedial order will "undo [their] recommendations for [their] district[s]." To the extent appellants provided such input, but see p. 27, *infra*, they have no legal entitlement to the implementation of those recommendations. Cf. *Hollingsworth*, 133 S. Ct. at 2662-2663 (holding that proponents of ballot initiative lacked standing to defend it because they had no role in its enforcement once it was enacted into law).

v. *U.S. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in result) ("[N]o officers of the United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest," "[w]hatever the realities of private ambition and vainglory may be."). Elected officials who contemplate running for reelection therefore have no legally protected entitlement to a district with a particular political composition. As far as the *law* recognizes, voters choose their representatives—not the other way around.[4]

Nor can appellants establish a judicially cognizable interest by characterizing their injury at a high level of generality as a harm to their electoral chances. Not all perceived injuries that implicate the "ability to participate in the election process" qualify as "legally protected interest[s]." *McConnell*, 540 U.S. at 227. In *McConnell*, for example, the Court rejected the argument that voters and candidates had a cognizable interest in challenging campaign-contribution-limit increases that allegedly "deprive[d] them of an equal ability to participate in the election process based on their economic status" because that kind of "broad and diffuse injury" had "never [been] recognized [as] a legal right." *Ibid.* A candidate's claim that his elec-

[4] This Court has recognized that elected officials have standing to defend "something to which they *personally* are entitled—such as their seats as Members of Congress after their constituents ha[ve] elected *them*," *Raines*, 521 U.S. at 821, or back pay, *Powell* v. *McCormack*, 395 U.S. 486, 499-500 (1969). But those interests are distinct from—and provide no support for—the argument that incumbents contemplating a future term have a legally protected interest in adding favorable voters to their districts or fending off unfavorable ones.

toral chances will be harmed cannot be assessed without further considering the particular acts alleged to create that injury. When the grievance is simply the impact of having more "overwhelmingly Democratic" voters placed within the candidate's district (Appellants' Br. 57), he has not suffered an invasion of a legally protected interest.[5]

b. No case supports appellants' argument that candidates have a legally protected interest in excluding individuals from their district on the basis of political affiliation. In *Meese* v. *Keene*, 481 U.S. 465 (1987), a state senator alleged that a law classifying films he wished to exhibit as "political propaganda" caused him reputational harm that could impair his political career. *Id.* at 467. The Court held that he had standing to raise a First Amendment claim because the statute created a cognizable reputational injury that could be redressed by enjoining application of the "political propaganda" label. *Id.* at 475-477. There was no question that the reputational harm at issue in *Keene* was judicially cognizable; indeed, the government (as defendant) had conceded the point. See Appellants' Br. at 14, *Keene*, *supra* (No. 85-1180). Like any other citizen, Keene could assert standing based on injury to his professional reputation, and the fact that he was a

[5] Notably, Members of the Court have suggested that a severe partisan gerrymander imposes injury on those subject to the political classification. See *Vieth* v. *Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion); *id.* at 312 (Kennedy, J., concurring in the judgment); *id.* at 331 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting); *id.* at 367 (Breyer, J., dissenting). It would be anomalous to find that a *candidate* suffers a judicially cognizable injury when he is unable to fence voters out of his district on the basis of political classifications and thus is deprived of the opportunity to impose the very injury that *Vieth* deemed troubling.

legislator did not change that result. But *Keene* cannot be read to more broadly establish that all alleged injuries in the context of a reelection campaign—including those that have nothing to do with reputation—are legally protected.

Appellants' other cases likewise fail to support their theory of standing. The candidate in *Davis* v. *FEC*, 554 U.S. 724 (2008), had standing to challenge a campaign-finance law because the Federal Election Commission could pursue an enforcement action against him if he violated it; the candidate's injury arose from regulation of his speech and the threat of punishment, not from any cognizable interest in the political affiliation of his electorate. See *id.* at 733-735. Similarly, the Court's ballot-access and employment-discrimination cases recognize a legally protected interest in having an equal opportunity to compete in an election or a hiring process, but they nowhere suggest that a candidate's desire to exclude disfavored voters from his district is judicially cognizable. *E.g.*, *Clements* v. *Fashing*, 457 U.S. 957, 962 (1982); *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 764-766 (1976); *Storer* v. *Brown*, 415 U.S. 724, 730, 738 n.9 (1974).

Nor are appellants helped by the suggestion (Br. 57) that they have each suffered injury to their "interests as a Republican voter." Appellants cite no case for the extraordinary proposition that voters have a legally protected and judicially cognizable interest in the particular political composition of their districts. And for good reason. Because any alteration of one district necessarily affects surrounding districts, appellants' theory of standing would permit virtually anyone in the State to assert injury and so defend against a racial gerrymandering claim. That is the

very definition of "a 'generalized grievance,'" which "is insufficient to confer standing." *Hollingsworth*, 133 S. Ct. at 2662; see *Lance* v. *Coffman*, 549 U.S. 437, 439-442 (2007) (per curiam). In short, appellants' novel claim of injury has never been recognized as a basis for standing.

c. Two additional aspects of the redistricting context counsel against permitting appellants' purported injury to satisfy standing requirements. First, standing to defend should be particularly difficult to establish when the State itself has acquiesced in a judgment regarding its redistricting plan. Cf. *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015) (explaining that standing helps determine the "proper party" to assert claims). As this Court recently observed, the Court has "never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to." *Hollingsworth*, 133 S. Ct. at 2668. Given that redistricting is a quintessential state sovereign function, appellants' purported right to defend a redistricting plan that the State no longer defends warrants skeptical examination to "ensure[] that the Federal Judiciary respects the proper—and properly limited—role of the courts in a democratic society." *Id.* at 2667 (internal quotation marks omitted).

Second, the result of appellants' standing analysis—that individuals in other districts throughout the State could defend against a racial gerrymandering claim—is in significant tension with this Court's holding that generally only individuals within the challenged district have standing to bring a racial gerrymandering claim. See *Sinkfield* v. *Kelley*, 531

U.S. 28, 30-31 (2000) (per curiam); *United States* v. *Hays*, 515 U.S. 737, 739 (1995). It does not matter that the shape of surrounding districts are "necessarily influenced by the shape[] of the" challenged district. *Sinkfield*, 531 U.S. at 30. Nor does it matter that "the racial composition of [surrounding] district[s] might have been different had the legislature drawn the [challenged] district another way." *Id.* at 30-31. Those kinds of inevitable ripple effects do not provide individuals in neighboring districts with "a cognizable injury under the Fourteenth Amendment." *Hays*, 515 U.S. at 746.[6] Given that a plaintiff—whether as candidate or voter—has no legally protected interest in the composition of his district sufficient to *challenge* a different district as a racial gerrymander, it would be incongruous to nevertheless recognize such an injury to *defend* a different district against constitutional attack.

The Court should dismiss for lack of jurisdiction because appellants have no legally protected entitlement to a district of a particular partisan composition.

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[6] In *Swann* v. *Adams*, 385 U.S. 440, 443 (1967), this Court permitted voters to bring a population-equality challenge to a redistricting plan even though they resided in a district that was not significantly malapportioned. The Court emphasized, however, that the district court had "denied intervention to other plaintiffs, seemingly treating the appellants as representing other citizens in the State." *Ibid.* The standing analysis in *Swann* is properly confined to that unusual circumstance.

II. THE DISTRICT COURT DID NOT CLEARLY ERR OR ADOPT AN INCORRECT LEGAL STANDARD IN HOLDING THAT THE LEGISLATURE VIOLATED EQUAL PROTECTION IN DRAWING DISTRICT 3

If the Court concludes that appellants have standing, it should affirm the district court's judgment. The court did not clearly err in finding that District 3 was drawn predominantly based on race in a manner not narrowly tailored to achieve VRA compliance.

A. The Predominance Test Requires A Careful, Fact-Intensive Review Of The Record To Determine The Predominant Factor Motivating A District's Lines

1. When a district is challenged as a racial gerrymander, strict scrutiny applies if "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without" the district. *Alabama*, 135 S. Ct. at 1267 (quoting *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995)). To make that showing, a plaintiff may rely on "direct evidence going to legislative purpose" or "circumstantial evidence of a district's shape and demographics," which may demonstrate that race-neutral districting principles, such as compactness, contiguity, and respect for political subdivisions and communities of interest, were thoroughly subordinated to racial considerations. *Miller*, 515 U.S. at 916.

A legislature's mere "consciousness of race" does not trigger strict scrutiny, *Bush* v. *Vera*, 517 U.S. 952, 958 (1996) (plurality opinion); rather, "[t]he constitutional wrong occurs when race becomes the 'dominant and controlling' consideration." *Shaw II*, 517 U.S. at 905 (quoting *Miller*, 515 U.S. at 913). Because the "distinction between being aware of racial considerations and being motivated by them may be difficult to

make," the predominance inquiry requires a fact-intensive analysis of the record that carefully evaluates evidence of motive. *Miller*, 515 U.S. at 916. Courts conducting that analysis must presume that the legislature acted in good faith and must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Ibid.*

The predominance inquiry is appropriately demanding because redistricting decisions implicate a "complex interplay of forces," *Miller*, 515 U.S. at 915-916, including the need to reconcile traditional districting criteria with constitutional and statutory requirements. Compliance with the VRA in particular will inevitably involve considerations of race—but the VRA does not require jurisdictions to focus predominantly on race or to disregard or subjugate traditional redistricting principles when drawing district lines.[7] Because "[t]he law cannot lay a trap for an unwary legislature," *Alabama*, 135 S. Ct. at 1273-1274, a redistricting plan is not subject to strict scrutiny simply because a jurisdiction correctly understood it was required to comply with the VRA. If districting decisions are driven by non-racial criteria, then the mere fact that the jurisdiction sought to comply with the VRA will not show that race predominated. See, *e.g.*, *DeWitt* v. *Wilson*, 856 F. Supp. 1409, 1411, 1415 (E.D.

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[7] Indeed, some traditional redistricting principles are embedded in the VRA's standards. For example, "the geographic compactness of a jurisdiction's minority population" is a factor in retrogression analysis. *2011 Guidance* 7472. Similarly, Section 2 requires plaintiffs to establish that it is possible to draw a geographically compact majority-minority district. *Bartlett* v. *Strickland*, 556 U.S. 1, 12 (2009).

Cal. 1994), summarily aff'd in part and dismissed in part, 515 U.S. 1170 (1995).

2. Appellants contend (Br. 28-32) that the district court erred by basing its finding that race predominated on statements indicating that the legislature prioritized VRA compliance when drawing District 3. Appellants are correct that statements acknowledging the non-negotiable nature of VRA compliance do not show that race was the predominant consideration driving particular district boundaries. Under the Supremacy Clause, a State is obligated to prioritize VRA compliance over any inconsistent state-law redistricting criterion. See *Vera*, 517 U.S. at 991-992 (O'Connor, J., concurring). Thus, a legislator's statement recognizing the VRA as a binding requirement simply demonstrates "obedience to the Supremacy Clause," *Voinovich* v. *Quilter*, 507 U.S. 146, 159 (1993), not a predominant racial motive.

Appellants misread the district court's decision, however, by interpreting its predominance finding to rest on statements regarding the mandatory nature of VRA compliance. Although the court's opinion contains some language that, in isolation, could be interpreted to suggest (erroneously) that race predominates whenever a legislature prioritizes VRA compliance, see, *e.g.*, J.S. App. 21a-23a, it is evident from the decision as a whole that the court did not make that error. The court focused not merely on the legislature's general goal of complying with the VRA, but rather on the specific means employed to achieve that goal—namely, the legislature's effort to "maintain[] at least as large a [BVAP percentage] as had been present in the district under the Benchmark Plan," and its "use of a 55% BVAP floor" in District 3 that "was

not informed by an analysis of voter patterns." *Id.* at 21a-22a. Statements showing that the legislature treated nonretrogression as the "primary focus" and "paramount concern[]" in drawing District 3 took on significance because the legislature had interpreted Section 5 to require adherence to unsupported and mechanical racial targets. *Id.* at 22a (emphasis omitted). Those statements accordingly supported the court's conclusion that the legislature relied on those targets as a principal factor determining which voters were assigned to District 3.

Given the district court's imprecise language, litigants and lower courts would benefit from a reminder that statements identifying VRA compliance as a priority in redistricting are not, on their own, evidence that race predominated. But because the court did not premise its predominance finding on such statements standing alone, and instead considered them in conjunction with evidence that a rigid racial goal actually drove District 3's boundaries, no legal error affected the court's predominance analysis.

B. The District Court's Finding That Race Predominated Is Not Clearly Erroneous

While the split decision below confirms that the record is subject to different interpretations, the district court did not clearly err in finding that race predominated in drawing District 3. See *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). A lower court's factual findings may not be reversed as clearly erroneous simply because the reviewing court "would have decided the case differently." *Easley* v. *Cromartie*, 532 U.S. 234,

242 (2001) (*Cromartie II*) (citation omitted); see *Glossip* v. *Gross*, 135 S. Ct. 2726, 2739 (2015); *Amadeo* v. *Zant*, 486 U.S. 214, 223 (1988). Instead, a reviewing court may find clear error only if it is "left with the definite and firm conviction that a mistake has been committed" based "on the entire evidence." *Cromartie II*, 532 U.S. at 242 (citation omitted). That standard is not satisfied here.

The direct and circumstantial evidence fairly supports the district court's finding that race predominated in drawing District 3. First, as described above, the legislature adopted a mechanical racial target for the district, viewing a 55% BVAP floor, uninformed by any analysis of voter patterns, as an appropriate means of obtaining preclearance. J.S. App. 20a-21a.[8] Second, Janis—who was the plan's sole drafter—

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[8] Appellants dispute that factual finding (Br. 43-44), but show no clear error in the district court's analysis. As the court observed, the legislature employed an identical 55% BVAP floor in the state legislative plan, and legislators referred to that racial target in contemporaneous debates concerning the congressional plan. See J.S. App. 20a-21a; J.A. 397-398, 527, 533; *Bethune-Hill* v. *Virginia State Bd. of Elections*, No. 3:14CV852, 2015 WL 6440332, at *9 (E.D. Va. Oct. 22, 2015), appeal pending, No. 15-680 (filed Nov. 20, 2015) (finding that the Virginia legislature used a 55% BVAP floor in the state plan); see J.A. 398 (statement by Janis that drawing District 3 with a BVAP exceeding 55% was "certain[]" to obtain preclearance, whereas creating a different majority-minority district with a 51% BVAP was "uncertain" to "pass[] [VRA] requirements"). Reviewing all the relevant legislative history, the court reasonably inferred that the legislature applied the same 55% BVAP threshold in both plans. J.S. App. 20a-21a. Indeed, Virginia's expert drew the same inference. See *id.* at 20a; J.A. 518 (stating that the legislature viewed the 55% BVAP floor as "appropriate to obtain Section 5 preclearance" and "acted in accordance with that view for the congressional districts").

erroneously believed that nonretrogression principles required him to maintain the BVAP percentage in District 3 without reduction. *Id.* at 22a.[9] Third, Janis stated that the primary factor motivating District 3's boundaries was VRA compliance, which he implemented through the use of those racial targets. *Id.* at 21a-23a. The legislature's belief that District 3's BVAP could not dip below the benchmark district's 53.1%, and in fact needed to be augmented to satisfy the 55% BVAP floor, supports the court's finding that the legislature prioritized race in determining which individuals to bring within the district. See *Alabama*, 135 S. Ct. at 1267 (observing that a legislature's "policy of prioritizing mechanical racial targets above all other districting criteria," along with evidence of how the legislature applied that goal in drawing a particular district, provided strong support "that race motivated the drawing of" the district's lines).

Circumstantial evidence of District 3's shape and demographics further support the district court's finding that race predominated. First, District 3 is "the least compact congressional district in Virginia" and its "odd shape" reflects a "disparate chain of communities, predominantly African-American, loose-

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[9] Appellants incorrectly claim (Br. 44-45) that Janis acknowledged only the "Section 5 truism" that there could be no retrogression in District 3, and that he "never said" that he had to maintain District 3's BVAP without reduction. In fact, Janis said that one of his "paramount concerns" was "ensur[ing] that" District 3 "would not retrogress in the sense that [it] would not have less percentage of [BVAP] * * * than exist[s] under the current lines." J.A. 357. Janis also said that, "mindful that the [VRA] requires us not to retrogress that district, what these lines reflect is under the new proposed lines, we can have no less [BVAP] than percentages that we have under the existing lines." J.A. 119-120.

ly connected by the James River." J.S. App. 25a. Second, the district is contiguous only through the use of water, with boundaries drawn along the river to "bypass white communities and connect predominantly African-American populations." *Id.* at 26a. Third, the district splits more localities and VTDs "than any other district in Virginia," and the evidence showed that such splits "would not have been necessary if the legislature was not trying to bypass white communities." *Id.* at 27a (brackets and internal quotation marks omitted). Fourth, the district departs from principles of core preservation because the legislature moved nearly 59,000 "predominantly white" individuals *out* of the district—which was already underpopulated—in order to bring over 120,000 "predominantly African-American" individuals in. *Id.* at 30a.

Although that type of circumstantial evidence could be consistent with a political motivation depending on the facts of the case, the record here fairly supports the district court's finding that District 3's boundaries were better explained by race than partisanship. J.S. App. 30a-36a. The court could not infer that the legislature moved African-Americans into District 3 because of their political affiliation or their reliability in voting for a particular party, rather than based on race, because Janis stated that he had not "looked at the partisan performance" and "[i]t was not one of the factors that [he] considered in the drawing of the district." *Id.* at 34a. Nor could incumbent congressmen supply Janis's missing political motive: it was "undisputed" that they did not provide input on "the entire 2012 Plan," but rather simply confirmed that they were satisfied with the "proposed changes to the lines of their individual districts." *Id.* at 33a-34a. And

the court found Janis's statement about respecting the will of the Virginia electorate to be "ambiguous" and in any event subordinate to the use of mechanical racial targets. *Id.* at 33a. Finally, the court credited appellees' expert's testimony that "the nature of the population swaps and shifts used to create [District 3] suggests that less was done to further the goal of incumbency protection than to increase the proportion of minorities within the district." *Id.* at 34a. "[A]mong the pool of available VTDs that could have been placed within [District 3] that were highly Democratic performing," the court observed, "those with a higher BVAP were placed within [District 3], and those VTDs that were largely white and Democratic were left out." *Ibid.* (first set of brackets in original).

Appellants identify no clear error in the district court's conclusion that the circumstantial evidence was more consistent with a racial motive. They contend (Br. 46-49) that the court should have credited Virginia's expert when analyzing the racial and political consequences of the VTD swaps between District 3 and adjacent districts. But the court acted within its discretion in finding appellees' expert more credible. J.S. App. 34a & n.25; see *Bessemer City*, 470 U.S. at 575 (findings based on credibility determinations "demand[] even greater deference"). And in arguing that "politics explains District 3," appellants place undue weight on evidence concerning incumbent protection. Appellants' Br. 35-36 (capitalization altered). They contend (Br. 35) that Janis sought to "perpetuat[e]" the results from the November 2010 election, in which eight Republicans and three Democrats prevailed, but Janis stated that his method of protecting incumbents was simply to not "cut[] out currently

elected congressmen from their current districts nor draw[] current congressmen into districts together." J.A. 352. Moreover, Janis's statement that he did not consider partisan performance cuts sharply against appellants' claim that he strategically packed Democrats into District 3 to reduce the Democratic vote share in surrounding districts. Appellants are also wrong to maintain (Br. 39) that incumbents "effectively drew their own districts." Three of the four incumbents in districts immediately surrounding District 3—all appellants here—either did not identify Janis as someone with whom they had communicated regarding redistricting or indicated that they did not provide any feedback on the plan. See, *e.g.*, J.A. 304, 333, 339. Indeed, appellants describe themselves (Br. 46 n.4) as "strangers to the redistricting process." Moreover, Janis clarified that incumbents had not provided direction on the plan as a whole, J.A. 456—suggesting that, contrary to appellants' theory, incumbents could not have engineered partisan-driven population swaps across multiple districts. Appellants accordingly have not established that the court clearly erred in its predominance finding.

Appellants' effort to analogize this case to *Cromartie II* also fails. In *Cromartie II*, the direct evidence of a racial motive was quite weak; a legislator and a legislative aide had referred to race when discussing the plan, but there was no direct evidence suggesting that racial considerations predominated. See 532 U.S. at 252-254; see also *Hunt* v. *Cromartie*, 526 U.S. 541, 547 (1999) (*Cromartie I*) (observing that at the summary judgment stage the plaintiffs had not even relied on direct evidence, but rather "offered only circumstantial evidence in support of their

claim"). At the same time, there was direct evidence of a dominant political motive because two legislators responsible for drawing the plan offered testimony that they "drew [the] district lines with the intent to make [it] a strong Democratic district." *Cromartie I*, 526 U.S. at 549. The circumstantial evidence of racial shifts among districts did not aid the plaintiffs' case, moreover, because "racial identification correlate[d] highly with political affiliation" in the State. *Cromartie II*, 532 U.S. at 258. On that set of facts, the Court was right to conclude that political considerations offered a strong alternative explanation for the district's lines and that "[t]he evidence taken together * * * d[id] not show that racial considerations predominated." *Id.* at 257. But *Cromartie II* does not demonstrate clear error in the district court's finding of predominance here, where there is substantial direct evidence that mechanical racial targets were employed in determining District 3's boundaries and where the legislator responsible for drawing the plan expressly disclaimed reliance on "partisan performance" as a factor influencing the map. J.S. App. 34a.

C. Appellants Are Incorrect That Race Cannot Predominate If Race And Politics Are Coextensive

Appellants contend (Br. 25) that, even if race in fact predominated in the drawing of District 3, strict scrutiny should not apply because racial and political goals coincided, such that "traditional principles independently would have led the legislature to adopt the same redistricting plan" if it had (counterfactually) not relied on race. That "harmless error" theory lacks merit in this context.

1. *Shaw I* and its progeny foreclose appellants' claim (Br. 27) that a district drawn with a predomi-

nant racial motive may escape strict scrutiny so long as "the district would have been created even absent racial considerations, in order to accomplish [a] desired political result." In adjudicating racial gerrymandering claims, this Court has emphasized that the "racial purpose of state action, not its stark manifestation, * * * [i]s the constitutional violation." *Miller*, 515 U.S. at 913. Because the equal protection injury flows from "being personally subjected to a racial classification," *Alabama*, 135 S. Ct. at 1265 (brackets, ellipses, and internal quotation marks omitted), the constitutional inquiry focuses on the legislative process, not its political consequences. "The constitutional wrong occurs when race becomes the dominant and controlling consideration," *Shaw II*, 517 U.S. at 905 (internal quotation marks omitted)—and that wrong does not evaporate simply because the legislature could have used political affiliation to produce the same district lines. Cf. *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 320 n.54 (1978) (opinion of Powell, J.) (a defendant who relies solely on "an unlawful [racial] classification" cannot "hypothesize that it might have employed lawful means of achieving the same result"). A plaintiff therefore need not make a further showing that race conflicted with politics and that the district's configuration necessarily differed from what it would have been in the absence of the impermissible racial motive.

The absence of a conflict between racial and political goals may of course be relevant if, for example, there is evidence that political calculations drove the districting decisions and race was not actually the predominant factor. But this Court's precedents provide no support for appellants' further suggestion that

the *presence* of a conflict between race and politics is an essential ingredient of a racial gerrymandering claim. See, *e.g.*, *Vera*, 517 U.S. at 967-973 (plurality opinion) (subjecting a district to strict scrutiny even though reliance on race furthered the legislature's political goals because "[t]he record disclose[d] intensive and pervasive use of race"); *Shaw II*, 517 U.S. at 907 (invalidating a district even though it "effectuated" the legislature's partisan interests because the evidence showed that, although the goals were consistent, race predominated).

Indeed, appellants' argument conflicts with this Court's recognition that an equal protection violation can occur when a State relies on race as a proxy to achieve political goals. *Vera*, for example, emphasized that "to the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation." 517 U.S. at 968 (plurality opinion). And in *Miller*, the Court observed that the unsupported view that "individuals of the same race share a single political interest" is "the very stereotypical assumption[] the Equal Protection Clause forbids." 515 U.S. at 914. When a jurisdiction relies on race in that manner, it is no defense that racial and political motives coincided or that political calculations prompted the use of race-based decisionmaking. Nor is it relevant that a jurisdiction might have reached the same result by relying on nonracial factors. A conflict between race and politics therefore is not required to show racial predominance.

2. Appellants rest their argument that race and politics must conflict on this Court's observation that strict scrutiny is triggered when race "subordinate[s]" traditional districting criteria and "significantly af-

fect[s]" a district's lines. *Alabama*, 135 S. Ct. at 1266, 1272. But that language merely restates the predominance test. Other traditional districting factors need not be *inconsistent* with race; it is enough if "the legislature placed race above [them]." *Id.* at 1271 (internal quotation marks omitted).

Appellants further contend (Br. 20, 27, 40-42) that *Cromartie II* requires a plaintiff to offer an alternative plan that produces the same political effects as the challenged plan but has more racially balanced districts. As previously noted, *Cromartie II* was a case involving strong direct evidence of a political motive, weak direct evidence of a racial one, and a high correlation between race and political affiliation. "[I]n a case such as th[at] one," the Court held that a plaintiff seeking to prove racial predominance primarily through circumstantial evidence "must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" and that "br[ing] about significantly greater racial balance." 532 U.S. at 258. That demanding evidentiary showing was necessary to try to overcome evidence of a political explanation for the legislature's decisions. But *Cromartie II* did not require such a showing in *every* racial gerrymandering case. Here, because the direct evidence of a predominant racial motive is substantially clearer than it was in *Cromartie II* and because partisan performance was not a factor that the plan's drafter considered, appellees were not required to *additionally* prove that race predominated over politics through the kind of circumstantial showing discussed in *Cromartie II*.

D. The District Court Correctly Concluded That Virginia's Use Of Race Was Not Narrowly Tailored

1. To satisfy strict scrutiny, a predominant use of race in drawing district boundaries must be narrowly tailored to advance a compelling state interest. See *Miller*, 515 U.S. at 920.[10] That standard is satisfied when a State has a "strong basis in evidence in support of the (race-based) choice that it has made." *Alabama*, 135 S. Ct. at 1274 (internal quotation marks omitted). Moreover, to avoid trapping States between competing constitutional and statutory mandates, the Court has recognized that "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." *Ibid.* (internal quotation marks omitted). But because "mechanical interpretation of [Section] 5 can raise serious constitutional concerns," the narrow-tailoring analysis must be based on a proper understanding of what the VRA requires. *Id.* at 1273. If the legislature fails to consider the relevant question under Section 5—namely, whether districting changes are needed to maintain a minority

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[10] Because Virginia's use of race was not narrowly tailored, this Court should assume without deciding that compliance with Section 5 was a compelling state interest when Virginia drew the plan. See, *e.g.*, *Shaw II*, 517 U.S. at 915 (assuming without deciding that VRA compliance is a compelling interest); *Vera*, 517 U.S. at 977 (plurality opinion) (same). No party disputes that point here. In any event, jurisdictions previously subject to Section 5 certainly had a strong basis in evidence to believe they had a compelling interest in considering race to avoid a VRA violation. See U.S. Amicus Br. at 29-34, *Alabama*, *supra* (Nos. 13-895 and 13-1138).

group's ability to elect its preferred candidate—then the use of race cannot be justified as an effort to comply with the VRA. See *id.* at 1274.

2. The district court correctly concluded that Virginia's use of mechanical and factually unsupported racial targets for District 3 was not narrowly tailored to comply with Section 5. Section 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage." *Alabama*, 135 S. Ct. at 1272. Rather, it "is satisfied if minority voters retain the ability to elect their preferred candidates," *id.* at 1273, as determined by "a functional analysis." *2011 Guidance* 7471. Instead of engaging in that analysis, Virginia "relied heavily upon a mechanically numerical view as to what counts as forbidden retrogression," *Alabama*, 135 S. Ct. at 1273, without a "strong basis in evidence" to conclude that the VRA required adherence to those rigid racial targets. See J.S. App. 39a-40a.

Virginia's focus on "the wrong question" led it to "the wrong answer," *Alabama*, 135 S. Ct. at 1274, because, as the district court found, no evidence suggested that augmenting District 3's BVAP beyond a 55% floor was necessary to prevent retrogression. District 3 "had been a safe majority-minority district for two decades," and Virginia had shown "no basis," let alone a strong one, to justify increasing its BVAP to comply with the VRA. J.S. App. 41a. The use of the 55% BVAP threshold was not informed by any functional analysis of voting patterns; it rested instead on an erroneous interpretation of what Section 5 required. *Id.* at 20a-21a, 42a & n.29.[11] And Virginia's

[11] The Attorney General's decision not to interpose an objection to Virginia's plan does not suggest that Virginia was correct to

past experience disproved the legislature's assumption that a 55% BVAP was required to secure preclearance, as the Department of Justice had precleared prior plans even though minority ability-to-elect districts had BVAPs lower than that threshold. See J.A. 580-583, 626-627. Indeed, District 3 itself was precleared in 1998 with a BVAP of 50.47%. J.A. 580-581. Because Virginia failed to identify any "good reason" to believe its use of a mechanical and artificial racial target in District 3 was "necessary for statutory compliance," *Alabama*, 135 S. Ct. at 1274 (citation omitted), its reliance on race fails strict scrutiny.

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believe that Section 5 required increasing District 3's BVAP to satisfy a 55% floor. Review under Section 5 is limited to analyzing whether a jurisdiction has proven that a districting change neither results in retrogressive effect nor reflects a discriminatory purpose. *2011 Guidance* 7470. Preclearance accordingly does not constitute a determination that Section 5 *required* the particular districting changes, nor does it reflect a finding that the plan satisfies any other provision of law. 28 C.F.R. 51.49.

CONCLUSION

The Court should dismiss the case for lack of jurisdiction. Alternatively, the Court should affirm the district court's judgment.

Respectfully submitted.

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FEBRUARY 2016