No. 15-680

In the Supreme Court of the United States

GOLDEN BETHUNE-HILL, *et al.*,
Appellants,

v.

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

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

MOTION OF INTERVENOR-APPELLEES VIRGINIA HOUSE OF DELEGATES AND SPEAKER WILLIAM J. HOWELL TO DISMISS OR AFFIRM

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RESTATEMENT OF QUESTIONS PRESENTED

The questions presented are as follows:

1. Whether the court below erred in considering Appellants' *Shaw* claim despite their failure even to attempt to prove that the Virginia House of Delegates could achieve its race-neutral redistricting goals in a plan with significantly more racial balance, as required in *Easley v. Cromartie*, 532 U.S. 234, 258 (2001).

2. Whether the court below correctly required Appellants to prove that traditional districting principles were actually subordinated to race in the Virginia House redistricting plan before applying strict scrutiny.

3. Whether Appellants forfeited the argument that the use of a general numerical aspiration in redistricting is racial predominance *per se* by failing to raise it in district court. And, if there is no forfeiture, whether this Court should overturn decades of precedent allowing and requiring states to meet numerical racial targets in drawing voting districts.

4. Whether the court below erred in applying strict scrutiny to Virginia House District 75 even though the district saw minimal alteration from the benchmark district and did not incorporate majority-black precincts where doing so would conflict with the House's neutral goals.

5. Whether the Virginia House's decision to maintain BVAP in the Challenged Districts above bare majorities was narrowly tailored under Section 5 of the Voting Rights Act where the House was incapable of

proving a substantial reduction in racially polarized voting since 2001.

6. Whether the court below correctly concluded that the Virginia House's use of race in drawing House District 75 was narrowly tailored when the House maintained the district at 55% BVAP and was incapable of proving a substantial reduction in racially polarized voting since 2001.

7. Whether the Virginia House's use of race was narrowly tailored under Section 2 of the Voting Rights Act.

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STATEMENT

The Court rarely will encounter a more sound and measured exercise of a state's sovereign function in redistricting than it will in this case. In 2011, the Virginia House of Delegates passed a redistricting plan with near-unanimous support from both political parties and the House Black Caucus. The House preserved twelve majority-minority districts that have existed in the Commonwealth since 1991, making every effort to maintain their configurations and constituencies. It also protected the ability of minority communities in those districts to elect their preferred candidates by holding minority voting-age population above a bare majority.

Appellants seek to invalidate those districts under this Court's decision in *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (*Shaw I*). After a four-day bench trial and a meticulous review of the record, the district court declined that invitation. The court was, if anything, too indulgent with Appellants. They presented virtually no evidence of racial predominance, they disclaimed even the pretense of proving that the House's racial goals impacted the map in any meaningful way, and they submitted no alternative map to show that the House could have achieved its neutral goals with significantly greater racial balance. That last failure alone should have sunk Appellants' case. *See Easley v. Cromartie*, 532 U.S. 234, 258 (2001) (*Cromartie II*).

Having no basis to challenge the district court's factual findings, Appellants ask the Court to dramatically shift the legal terrain. They assert that the *Shaw* predominance test is met where a state is willing to allow its criteria to yield to the federal

mandates of the Voting Rights Act, regardless of whether it actually subordinates its criteria to race. This rule would subject every plan nationwide to strict scrutiny because state law and practice must always, in principle, be viewed as subordinate to federal law. Appellants also challenge the House's use of a general target of minority voting-age population. But this Court has repeatedly allowed and even required states to meet racial targets. This nation's entire voting-rights edifice depends on the premise that doing so is permissible. Appellants' proposed cure, in fact, is worse than the alleged disease: the House erred, they claim, by not using *twelve* specific and inflexible quotas. Race was, by their calculus, given short shrift.

Appellants have no case. There is nothing unusual about the House plan or the Challenged Districts. The House followed traditional and accepted practices. Unless the Court is willing to revisit decades of voting-rights law and invalidate an untold number of districts nationwide, it should affirm the decision below or, alternatively, dismiss this appeal.

STATEMENT OF FACTS

Since 1991, Virginia House redistricting plans have included twelve majority-minority districts. Four of these districts (HD69, HD70, HD71, and HD74) lie in and around urban and suburban Richmond, two (HD63 and HD75) lie in the Southside region, four (HD77, HD80, HD89, and HD90) lie in South Hampton Roads, and two (HD92 and HD95) lie in the Virginia Peninsula. By 2011, stark population shifts required that the House map be redrawn. The House needed to shift all districts to some degree, make drastic alterations to some, and transport others in their

entirety hundreds of miles to the burgeoning population hub of Northern Virginia.

Because Virginia conducts odd-year elections, the House was on the tightest deadline of any state to pass a new plan. The bipartisan House Committee on Privileges and Elections was responsible for managing the redistricting process. In March 2011, after conducting months of hearings across the Commonwealth, the Committee ratified redistricting criteria. JSA 16a-18a. The Committee adopted an equal-population goal of plus or minus 1% from the ideal (or a total deviation of 2%). The Committee also declared that districts would be "drawn in accordance with the laws of the United States" and no "policy or action that is contrary to the United States Constitution or the Voting Rights Act of 1965" would be permitted. JSA 17a. In other words, nullification, interposition, secession, and civil war were not viewed as options. According to the criteria, districts would also be compact and contiguous, they would be single-member districts, and they would be drawn to respect communities of interest.[1] Deviations from these criteria would be allowed to comply with federal law, but only "as is necessary" and "no more than is necessary." JSA 18a.

Delegate Chris Jones, a long-time member of the Committee, was selected by the Republican Caucus to prepare a map that would, hopefully, obtain broad

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[1] The Virginia Constitution and Virginia case law provide standards of compactness and contiguity that govern Virginia voting districts. *See Jamerson v. Womack*, 244 Va. 506, 512 (1992); *Wilkins v. West*, 264 Va. 447, 461-64 (2002).

support. Although the Republican Caucus had control of the House and the Governor's office, it did not make unseating Democratic Delegates a "goal." Trial Tr. 483:1-2. True, political disadvantage tilted against the Democratic Caucus where disadvantage was inevitable. But the "political thicket" of this redistricting most often took the form of partisan cooperation. Delegate Jones met with most Democratic and Republican Delegates to receive their input. Trial Tr. 380:25-381:14. He spent hundreds of hours considering their opinions in an effort to tailor districts to meet local needs and to secure widespread support for the plan. *See* Trial Tr. 385:20-21.

Delegate Jones also worked with members of the House Black Caucus, including the Black Caucus leader, Delegate Lionel Spruill. JSA 23a-25a. Delegate Spruill, in turn, received input from other Delegates and community organizations. JSA 25a. While Delegates Spruill and Jones were concerned about protecting the black community's ability to elect, they avoided entanglement with radical interpretations of the Voting Rights Act. Some Delegates, for instance, advocated a "max black" policy.[2] They contended that "additional majority-minority districts must be created where practical" and that the House should draw fourteen majority-minority districts. Pl's Ex. 35 at 64, 74, 79-80, 126-27; *see also* JSA 26a. One Delegate objected to the House's commitment to a 2% population deviation and advised that the House allow a broader deviation—possibly over 16%—so that it could provide the benefit of under-population, and intentional vote

[2] *See Miller v. Johnson*, 515 U.S. 900, 907 (1995).

enhancement, to racial minorities.[3] Pl's Ex. 35 at 96-97. Delegate Jones did not follow this advice.

Instead, Delegate Jones and the Black Caucus elected to preserve the same twelve majority-minority districts in substantially the same forms and representing substantially the same communities as before. The Challenged Districts retained, on average, eight of ten residents from their respective benchmark analogues. Int's Ex. 14 at 81. According to the district court, most are prototypes of sound districting. *See, e.g.*, JSA 127a ("the Court finds it hard to imagine a better example of a district that complies with traditional, neutral districting principles" than HD92); JSA 107a-108a (calling HD70 "coherent and generally compact"); JSA 111a (finding that HD71 is "quite compact and generally follows normal districting conventions"); JSA 126a (finding that HD90 "seems to largely comply with traditional neutral districting conventions"); JSA 107a (finding that HD69 improved upon the benchmark district); JSA 116a (same as to HD74); JSA 119a (same as to HD77). Redistricting is more than skin deep; so too was the district court's inquiry. *See, e.g.*, JSA 117a ("predominance is not merely a beauty contest centered on Reock-style compactness"). The court found that the Challenged Districts achieved an assortment of individualized goals. *See, e.g.*, JSA 125a (HD89 drawn to include funeral home owned by incumbent so that he could "more readily engage with…constituents"); JSA 94a (HD63 drawn to include incumbent's employees and their families); JSA 109a (HD70 drawn to preserve

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[3] *See Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1058 (D. Ariz. 2014), on appeal, No. 14-232.

distinct suburban and urban communities of interest); JSA 109a, 129a (HD70 and HD95 drawn to avoid pairing Democratic incumbents); JSA 118a, 126a, 127a (HD77, HD90, HD92 drawn to hew to natural and local-government boundaries).

Some of the Challenged Districts (like many other House districts) presented difficulties. The Hampton Roads region was sufficiently under-populated to require moving one entire district to Northern Virginia. This sent shockwaves across the surrounding districts. Riding those waves, HD80 became less regular than before to avoid pairing incumbents (Democratic and Republican), to preserve the voting bases of veteran Delegates, and to maneuver around a naval base. JSA 122a-123a. HD95 is situated on the Peninsula, which was also substantially underpopulated, and the district had to crawl north to avoid crossing the James River. It was configured to advantage Republican incumbents on the Peninsula, to draw an unpopular Delegate out of her district, to make a neighboring district competitive for Republicans, and to eliminate a river crossing in that area. JSA 129a-130a.

HD63 and HD75, located in Southside Virginia, presented problems for both minority-supported incumbents because they were islands of Democratic voters in a sea of increasingly conservative Republicans—and the entire region was under-populated. Then-Delegate Dance and Delegate Tyler requested configurations that would secure their reelection. Delegate Dance asked that a potential primary opponent be drawn out of her district. JSA 94a. Delegate Tyler sought a series of changes on the eastern border of hers. She had barely succeeded in

winning HD75 in 2005, and many black residents in the district are disenfranchised prisoners. *See* JSA 102a-103a. The census blocks removed from the eastern side of HD75 were a serious liability: they landed in the district of Delegate William Barlow, a veteran Democrat, and he lost the next general election to a Republican by over ten percentage points. JSA 68a n.22. In addition, neutral districting principles were applied in these districts. JSA 94a-95a (finding that HD63 became elongated to eliminate a river crossing in a neighboring district); JSA 96a-97a (finding that HD75 is "relatively compact").[4]

Federal law forbade the House from ignoring racial considerations altogether. *See* 52 U.S.C. §§ 10301, 10304. The Delegates had good cause for concern about the non-retrogression command of Section 5 of the Voting Rights Act and the vote-dilution prohibition of Section 2. The Black Caucus members were concerned about a trending decline in black voting-age population ("BVAP") in some districts that was likely to continue in the future. They were also concerned about low minority voter turnout and the failure in recent memory of the minority communities to elect their preferred candidates of choice in many Challenged Districts—including in multi-candidate Democratic

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[4] The House disputes the district court's finding of racial predominance in HD75. Over 88% of its constituents were retained; contiguous, predominantly black precincts were not included where doing so would conflict with neutral criteria; and Appellants' expert was unable to discern a meaningful differential between race and party as to the voters moved in and out of the districts. The House intends to advance this defense if litigation continues.

primaries where the black vote was split among multiple candidates, allowing white minorities to elect their preferred candidate. *E.g.*, Trial Tr. 71:21-72:4, 454:1-462:11, 462:12-21, 488:15-25, 490:2-492:11; Pl's Ex. 32 at 23; Pl's Ex. 33 at 45; Pl's Ex. 35 at 41-42, 144-45.

Avoiding retrogression was complicated by the absence of relevant information. Contested primaries provide the data necessary to determine the candidate truly preferred by minority voters.[5] But there are too few contemporaneous contested primaries in Virginia House races "to do a meaningful analysis." Trial Tr. 761:1-15. Voter registration records in Virginia do not reference race, so it is difficult to know whether black registration is on par with white registration. *See* Trial Tr. 727:3-10. And the Virginia Assembly holds odd-year elections that have different voting patterns from even-year elections, rendering data from congressional and presidential elections of minimal value. Trial Tr. 516:2-19. Indeed, Appellants presented expert testimony at trial that purported to identify minimum BVAP levels required for each district to maintain the minority's ability to elect, but the district court correctly refused to credit it because it lacked sufficient statistical support.[6] JSA 105a n.37. Even with the benefit of hindsight, a four-day trial, and the testimony of four

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[5] *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 444 (2006) (*LULAC*) (principal opinion). Citations to *LULAC* are to the principal opinion unless otherwise indicated.

[6] Appellants have not preserved a challenge to that finding for this appeal. *See Am. Nat'l Bank & Trust Co. of Chi. v. Haroco, Inc.*, 473 U.S. 606, 608 (1985).

experts, the district court made *no finding* of the minimum BVAP levels in the Challenged Districts necessary to preserve the minority's ability to elect. *See id.*

Faced with this uncertainty, a legislature might have been tempted to conclude that BVAP percentages must remain exactly the same between plans.[7] The House did not do so. The Delegates determined, based on their firsthand knowledge of the Challenged Districts, that a raw BVAP majority (*i.e.*, 50% +1) would be insufficient. But they were willing to reduce BVAP where doing so was unlikely to affect minority voting strength. They determined to hold BVAP in the Challenged Districts right around or above 55%.[8] At

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[7] *See Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1273 (2015) (*ALBC*).

[8] There continues to be a factual dispute over how this figure, 55%, was applied, and the House intends to press this issue if litigation continues. As the Court described in *Georgia v. Ashcroft*, there are different methods of calculating BVAP, depending on "whether the total number of blacks includes those people who self-identify as both black and a member of another minority group, such as Hispanic." 539 U.S. 461, 473 n.1 (2003). The U.S. Department of Justice does not (or at least in *Ashcroft* did not) count self-identifying Hispanics in its calculation. *Id.* Likewise, Delegate Jones's redistricting software was set to use "DOJ black." Trial Tr. 280:22-281:5. Under that calculation, three districts were drawn below 55% before the bill was presented to the House, as well as in the enacted plan. Delegate Jones "was surprised" to learn that the districts all were above 55%. Trial Tr. 281:6-7. In the proceedings below, the House argued that this was strong evidence that 55% was not "non-negotiable" as Appellants claim; it was viewed as "negotiable" and had in fact yielded to other considerations. The district court disagreed and found that the "proper count" of BVAP

the time of redistricting, nine of the twelve Challenged Districts were already above 55% BVAP. JSA 19a. Two others were at 54.4% and 52.5%, respectively. Int's Ex. 15 at 14. HD71, situated in rapidly gentrifying downtown Richmond, had fallen over the decade to 46% BVAP. Trial Tr. 291:2-293:10. The majority of voting-age individuals moved into nine of the districts, and roughly half in two others, were *not black*. Pl's Ex. 50 at 77-78. BVAP decreased in six districts; it increased in six. The final BVAP percentages in the Challenged Districts ranged from 55.2% to 60.7%. JSA 23a.[9]

Delegate Jones's plan received the support of the House Committee on Privileges and Elections and was brought to the House floor as HB5001. Both Democratic and Republican Delegates advocated for HB5001 in glowing terms. *See, e.g.*, Trial Tr. 386:1-387:13. The plan garnered unanimous support from Republican Delegates, supermajority support from Democratic Delegates, and supermajority support from the Black Caucus. *Id.* The "nay" votes did not reach double digits. Among the few dissenters was Delegate Tyler: 55% was, in her view, too low. Pl's Ex. 40 at 38-39.

Only two competing plans were proposed: HB5002 and HB5003. These plans did not comport with the Committee's commitment to a 2% population deviation,

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would have included self-identified Hispanics. JSA 23a. But the correct inquiry in a case alleging improper racial motive should have been into Delegate Jones's *subjective* understanding of what 55% meant—not into the objectively correct calculation.

[9] Under "DOJ black," *see supra* note 8, BVAP ranged from 54.6% to 59.8%. Int's Ex. 57.

and they paired dozens of incumbents. JSA 26a. The plans also allowed several of the Challenged Districts to fall below 50% BVAP, thereby inviting Section 2 litigation and preclearance denial. *Id.* Neither alternative plan was deemed worthy of any serious consideration in the House. Trial Tr. 376:22-379:17.

HB5001 included both the Virginia House and Senate redistricting plans. The Governor vetoed HB5001 because of a perceived partisan tilt in the Senate plan. The House remained in special session and made minor alterations in the House plan, including to HD71. After substantial revisions to the Senate plan, the combined plans were submitted to the Governor as HB5005, and he signed it. JSA 26a. The plan was then submitted to DOJ for preclearance. As part of the preclearance process, DOJ considers "whether minorities are overconcentrated in one or more districts." 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011). DOJ precleared the plan. JSA 26a-27a.

REASONS FOR GRANTING THE MOTION

In *Shaw I*, this Court condemned "effort[s] to segregate the races for purposes of voting, without regard for traditional districting principles." 509 U.S. at 642. The focus on "traditional districting principles"—and, by consequence, on this nation's tradition of geographic representation—serves three crucial functions. First, the neglect of traditional districting principles defines the parameters of a perceptible injury that federal courts can remedy. Individuals grouped into coherent voting districts based on their "actual shared interests," *Miller v. Johnson*, 515 U.S. 900, 916 (1995), have suffered no injury—let alone a constitutional injury. Second,

without showing a departure from traditional principles, a plaintiff cannot establish a causal link between the alleged improper motive and the map the plaintiff seeks to invalidate. Districts governed by a state's traditional criteria could have been configured in the same manner absent the alleged improper motive, so invalidating them would be an exercise in "futility." *Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971). Third, traditional districting principles provide objective guidelines to direct states' redistricting efforts. Otherwise, *Shaw* would make "the standards of reapportionment so difficult to satisfy that the reapportionment task [would] recurringly [be] removed from legislative hands and performed by federal courts." *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973). Accordingly, states "may avoid strict scrutiny altogether by respecting their own traditional districting principles." *Bush v. Vera*, 517 U.S. 952, 978 (1996) (principal opinion).[10]

The district court was therefore correct to reject the claims against HD69, HD70, HD71, HD74, HD77, HD89, HD90, and HD92. JSA 106a-127a. As to these districts, Appellants failed to meet their burden of showing that traditional principles were subordinated to *anything*. Appellants' purported "direct" evidence of racial predominance amounts to the mere repetition of two accusations: (1) the House sought to maintain the Challenged Districts at or above 55% BVAP, and (2) the House did not believe it could ignore federal law. The former, even if true, cannot alone establish predominance unless the Court rewrites decades of

[10] Citations to *Bush* are to the principal opinion unless otherwise indicated.

precedent. Appellants' reliance on the latter reduces *Shaw* to absurdity. Aside from this, Appellants have no creditable evidence of predominance for these districts.

The district court also correctly dismissed the challenges to HD63, HD80, and HD95, which became less compact and regular than before for predominantly non-racial reasons. JSA 91a-96a,120a-124a,128a. This was a routine application of the Court's repeated holding that the predominance of political goals over racial goals defeats a *Shaw* claim. *See, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) (*Cromartie I*). In fact, the district court erred as a matter of law in Appellants' favor by declining to hold them to the requirement of *Cromartie II*, 532 U.S. at 258, that a *Shaw* plaintiff produce an alternative plan showing how "the legislature could have achieved its legitimate political objectives in alternative ways." Appellants offered no alternative plan.

Besides failing the *Shaw* predominance test, Appellants' case against all districts fails on the narrow-tailoring inquiry. The dissenting opinion in *Ashcroft*, 539 U.S. at 492 (Souter, J., dissenting), which was adopted by Congress in 2006, would have denied Section 5 preclearance to districts where BVAP dropped from supermajority levels (60% and 55% in that case) to 50%, unless the state could prove a substantial reduction in racially polarized voting. The House could not do so at the time, and Appellants failed to do so three years after the fact. Thus, to avoid retrogression, the House was required to maintain BVAP levels meaningfully above 50%, and its choice of 55% was sound. At minimum, HD75, the only district subjected to strict scrutiny below, was narrowly

tailored because Appellants' own expert found "high rates of [racial] polarization" in HD75, even under an analysis designed to under-report racial bloc voting. JSA 104a (alteration in original). The House was therefore flatly prohibited from allowing this district's BVAP to fall.

I. The District Court Correctly Rejected the Challenge to Districts Drawn in Substantial Compliance with Traditional Districting Principles

A. Neglect of Traditional Criteria Is an Essential Element of a *Shaw* Claim

The district court found as fact that traditional criteria controlled the drawing of eight of the Challenged Districts. It correctly entered judgment against Appellants on those districts because a showing of "neglect of traditional districting criteria is…necessary" to prove a *Shaw* claim. *Bush*, 517 U.S. at 962.

This requirement lies at the heart of the constitutional injury identified in *Shaw I*: the subordination of traditional principles to race can result in "impermissible racial stereotypes" by grouping "in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin." 509 U.S. at 647. In contrast, where sound principles of geographic-based districting control the composition of voting districts, individuals are grouped according to "actual shared interests," *Miller*, 515 U.S. at 916, such as their "education, economic status, [and]

the community in which they live," *Shaw I*, 509 U.S. at 647. They have been neither stereotyped nor grouped as incoherent masses with no commonalities. Thus, where "race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can 'defeat a claim that a district has been gerrymandered on racial lines.'" *Miller*, 515 U.S. at 916 (quoting *Shaw I*, 509 U.S. at 647).

To unhinge *Shaw* from principles of geographic representation would reduce the "predominance" inquiry to a mind-reading exercise. *See* JS 20-21. *Shaw* would become an anomaly: "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." *Palmer*, 403 U.S. at 224; *see also Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 472 n.7 (1981) (principal opinion). Except in cases where a racial classification appears on the face of a statute, equal-protection standards require "both impermissible racial motivation and racially discriminatory impact." *Hunter v. Underwood*, 471 U.S. 222, 232 (1985); *see also Wayte v. United States*, 470 U.S. 598, 608-09 (1985). This framework, established in *Washington v. Davis*, 426 U.S. 229 (1976), and *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), applies "in [the] context of Equal Protection Clause challenge[s] to [alleged] racial gerrymander[ing]," *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488 (1997); *Cromartie I*, 526 U.S. at 546-47 & n.2; *Miller*, 515 U.S. at 905. Unless race is shown to have "a direct and significant impact on the drawing of at least some" district lines, resulting in flawed or deficient districts, a challenge to a state's subjective priorities lacks any anchor in a real-world harm

meriting the attention of the federal judiciary. *ALBC*, 135 S. Ct. at 1271.

Moreover, the claim would "fail[] for lack of causal connection between unconstitutional motive and resulting harm." *Hartman v. Moore*, 547 U.S. 250, 260 (2006). A majority-minority district that substantially complies with a state's ordinary criteria is, by definition, configured under the same principles governing all other districts statewide. It could have been configured in the same manner without the alleged improper motive. Indeed, "there is an element of futility" in invalidating a law because of "bad motives" rather than "because of its facial content or effect"; otherwise, the law "would presumably be valid as soon as the legislature…repassed it for different reasons." *Palmer*, 403 U.S. at 225; *see also LULAC*, 548 U.S. at 418 (citing *Hartman*, 547 U.S. at 259-60).

In addition, traditional districting principles "are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." *Shaw I*, 509 U.S. at 647. Without reference to objective factors, *Shaw* claims would devolve into "hassles over the adequacy of [alleged] admissions" that race took priority. *Hartman*, 547 U.S. at 264 n.10. Objective factors therefore allow state legislatures, rather than federal courts, to control the redistricting process through sound redistricting decisions, where a purely subjective test would nearly always allow litigation to reach discovery and trial. *See Miller*, 515 U.S. at 915 (citing *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). Without objective factors, "the standards of reapportionment" would be "so difficult" as to

effectively place federal courts in charge of redistricting. *Gaffney*, 412 U.S. at 749.

These settled principles resolve Appellants' first Question Presented: race cannot be deemed "the most important consideration" in redistricting absent proof that neutral principles were subordinated to race *in the map*, not merely in the minds of some legislators. JS i. Predictably, Appellants fail to cite a single case that supports their position to the contrary. Their principal reliance is on *Miller*, JS 11-12, but the Court there reaffirmed that "a legislature's compliance with traditional districting principles…may well suffice to refute a claim of racial gerrymandering." 515 U.S. at 919. The Court invalidated the plan only after determining that traditional principles were substantially disregarded. *Id.* at 919-20. Appellants cite *Miller*'s holding that a district need not be "bizarre on its face" to violate the Constitution. *Id.* at 912. But the court below did not require Appellants to prove that districts were bizarre; it required them to show disregard for traditional criteria. JSA 39a. That distinction, though lost on Appellants, follows directly from *Miller*. *See also Miller*, 515 U.S. at 928 (O'Connor, J., concurring).

Appellants also rely on language in *ALBC* concerning Alabama's "policy of prioritizing mechanical racial targets above all other districting criteria," but they fail to appreciate that *ALBC* referred to this fact as mere "*evidence* that race motivated *the drawing of particular lines* in multiple districts in the State." 135 S. Ct. at 1267 (emphases added). The Court—as in *Miller*—took care to satisfy itself that the "racial percentages" had "a direct and significant impact on

the drawing of at least some" boundaries in the plan, resulting in the "change of [the] district's shape from rectangular to irregular," the transfer of "15,785 individuals" of whom "just 36 were white," and the "[t]ransgressing [of] their own redistricting guidelines" by splitting precincts "clearly divided on racial lines." *Id.* at 1271. The Court remanded to allow a determination of the impact of race on "the boundaries of individual districts." *Id.* at 1265-66.[11]

Appellants' reliance on lower-court precedent is equally flawed. *Clark v. Putnam County*, 293 F.3d 1261, 1267-69 (11th Cir. 2002), involved a plan drawn to compile in two majority-minority districts "every contiguous census block available which would have the effect of increasing the black percentage," resulting in a "smokestack" and "pie slice" appearing on the face of the districts, along racial lines. *Moon v. Meadows*, 952 F. Supp. 1141, 1144-46 (E.D. Va. 1997), applied strict scrutiny to a district that was, in fact, "bizarre." *Smith v. Beasley*, 946 F. Supp. 1174, 1207 (D.S.C. 1996), concerned the creation of "new, non-compact and oddly shaped districts" that "wind 'in snakelike fashion' until enough black neighborhoods are included to create a black-majority district." *Page v. Virginia State Board of Elections*, No. 13-678, 2015 WL 3604029, at *11 (E.D. Va. June 5, 2015), concerned a district with "an odd shape and a composition of a disparate chain of

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[11] The U.S. Solicitor General advocated this result, noting that *Shaw* requires a showing of "derogation of traditional districting criteria" and that setting the Voting Rights Act as the most important criterion would not result in predominance if compliance did not "conflict" with neutral goals. Transcript of Oral Argument at 29-33, *ALBC* (No. 13-895).

communities, predominantly African-American, loosely connected by the James River."[12] *Hays v. Louisiana*, 839 F. Supp. 1188, 1198 (W.D. La. 1993), *vacated sub nom. Louisiana v. Hays*, 512 U.S. 1230 (1994), involved a plan that was alleged to be "highly irregular on its face." None of these cases invalidated any district that was drawn in substantial compliance with traditional criteria, and Appellants have cited no case reaching that result.

In contrast, numerous courts have aligned with the court below in rejecting challenges to districts drawn in substantial conformity to traditional criteria. *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), declined to invalidate districts drawn "in a manner that was consistent with traditional redistricting principles," even though the redistricting authority gave the Voting Rights Act "the highest possible consideration." *Id.* at 1411, 1413 (quotation omitted). There was no *Shaw* violation because there was "no conflict between the [Voting Rights] Act and the [state's] criteria," and the plan involved "a thoughtful and fair example of applying traditional redistricting principles." *Id.* at 1414-15 (quotation omitted). This Court summarily affirmed. 515 U.S. 1170 (1995). *Backus v. South Carolina*, 857 F. Supp. 2d 553 (D.S.C. 2012), declined to apply strict scrutiny to a plan, despite direct evidence of "predetermined demographic percentages" used in drawing Voting Rights Act districts, because there was no "in-depth explanation" of "where and how" race had superseded traditional criteria, which the court found were substantially applied. *Id.* at 564-

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[12] *Page* is under review in this Court. *See Wittman v. Personhuballah*, No. 14-1504.

65. This Court summarily affirmed. 133 S. Ct. 156 (2012). *Cano v. Davis*, 211 F. Supp. 2d 1208, 1221, 1225, 1230 (C.D. Cal. 2002), held that a *Shaw* plaintiff "must demonstrate both that the legislature was predominantly motivated by racial intent…and that it ignored traditional districting principles" and granted summary judgment where that standard was not met. This Court summarily affirmed. 537 U.S. 1100 (2003). *Quilter v. Voinovich*, 981 F. Supp. 1032, 1047 (N.D. Ohio 1997), placed the burden "on the plaintiffs to make a showing that the defendants substantially disregarded or neglected traditional districting principles" and rejected a challenged where this "threshold" was not met. This Court summarily affirmed. 523 U.S. 1043 (1998). *Committee for a Fair and Balanced Map v. Illinois State Board of Elections*, 835 F. Supp. 2d 563, 591-93 (N.D. Ill. 2011), rejected a challenge to a district drawn to meet a predetermined 50% threshold—even though voting was not racially polarized—because political and neutral goals "explain maintaining the odd shape of" the challenged district "as much, if not more, than race." *Harvell v. Blytheville School Dist. No. 5*, 126 F.3d 1038, 1040-42 (8th Cir. 1997), upheld districts drawn at "BVAP of 57.3% or higher" because the "plan preserve[d] communities with actual shared interests" and did "not reject traditional, non-racial districting criteria."

The district court therefore followed settled law, and Appellants have failed to identify a single case reaching the holding they advocate. This appeal does not raise a substantial question. *See, e.g.*, *Pekao Trading Corp. v. Bragalini*, 364 U.S. 478, 478 (1960)

(per curiam); *Town of Huntington, N.Y. v. Huntington Branch, NAACP*, 488 U.S. 15, 18 (1988) (per curiam).

B. Appellants Failed To Present Evidence of Predominance

Applying that standard, the district court found that Appellants did not show derogation of traditional criteria in eight districts. Its findings are subject to clear-error review. *Cromartie II*, 532 U.S. at 242. Appellants cite no reason to revisit them. While they claim to have "a host" of evidence of predominance, JS 3, their case actually amounts to merely repeating the same two allegations over and over again.

Appellants first emphasize the House's effort to maintain the Challenged Districts at roughly 55% BVAP. In their second Question Presented, they ask this Court to find that the "use of a one-size-fits-all 55% black voting age population floor" in itself "amount[s] to racial predominance." JS i. They candidly admit, however, that they forfeited this *per se* argument by failing to raise it below. JS 17. *See, e.g.*, *Phoenix Ry. Co. v. Landis*, 231 U.S. 578, 582 (1913).

Anyway, the question has already been answered in the negative. Drawing districts to reach "specific numerical quotas" by "increasing the percentage of [minority] voters in particular districts" is *how states comply* with the Voting Rights Act. *United Jewish Orgs. v. Carey*, 430 U.S. 144, 160, 162 (1977) (*UJO*) (principal opinion).[13] This Court has ratified or required that course of action in multiple cases

[13] Citations to *UJO* are to the principal opinion unless otherwise indicated.

beginning with *Beer v. United States*, 425 U.S. 130 (1976) (54% BVAP threshold),[14] and continuing consistently through *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009) (principal opinion) (50% minority CVAP threshold). In *UJO*, the Court observed that it is "[i]mplicit" in such decisions that "creating or preserving black majorities in particular districts" does not violate the Constitution. 430 U.S. at 161. Otherwise, the Voting Rights Act must be "held unconstitutional" to the "extent" the Court has interpreted it to reach redistricting. *Id.* at 161. The Court in *UJO* rejected that conclusion, reaffirmed its prior holdings, and found it "permissible for a State, employing sound districting principles…, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts…in which [minorities] will be in the majority." *Id.* at 168. The challenged districts in *UJO* were drawn to achieve "65% nonwhite majorities," and the Court upheld them. *Id.* at 162.

As in the *Shaw* cases, the difference identified in *UJO* between Voting Rights Act compliance and racial gerrymandering boiled down to the state's adherence to "sound districting principles"—which was not mutually exclusive with meeting the 65% target. *Id.* at 168. *Shaw I* therefore distinguished *UJO* because the plan in *UJO* "adhered to traditional districting principles"; the plan in *Shaw I* did not. 509 U.S. at 651.[15] Since

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[14] *See UJO*, 430 U.S. at 162.

[15] In *UJO*, U.S. Solicitor General Robert Bork urged this distinction, contending that "it would be anomalous indeed if the good faith (and ultimately successful) efforts…to comply with the Voting Rights Act…were held unconstitutional because those

Shaw I, majorities of this Court have twice reaffirmed that drawing districts to achieve thresholds does not itself amount to predominance. *See Cromartie II*, 532 U.S. at 241; *Bush*, 517 U.S. at 962 (O'Connor, J., Rehnquist, C.J.), *id.* at 1008-09 (Stevens, Ginsburg & Breyer, JJ.), *id.* at 1056 (Souter, J.). The Court last term in *ALBC* had the opportunity to condemn "racial percentages"; it did not and instead considered whether the racial percentages had "a direct and significant impact on the drawing of at least some" boundaries. 135 S. Ct. at 1271.

Appellants attempt to distinguish all of this—again, they have not preserved a direct challenge to any of it—by focusing their case on a supposed "one-size-fits-all" use of a racial goal for all districts. JS i. But that has no bearing on the predominance inquiry. Crafting unique, district-specific BVAP quotas—which would entail both a floor *and a ceiling*—for twelve districts would be more race-conscious than applying one floor to all. *Cf. Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring) (observing that race likely predominated in a carefully crafted plan to create a series of influence and majority-minority districts based on district-specific considerations). There is, in fact, no less race-conscious method available to redistrict under the Voting Rights Act than the method chosen by the

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efforts involved a consciousness of racial impact." Brief for the United States at 19, *UJO* (No. 75-104). The Solicitor General, however, found it "significant" that "the state's use of race-consciousness…did not prevent it from observing its normal 'neutral' criteria for redistricting." *Id.* at 44 n.41. "The use of race-consciousness to override or substantially distort a state's normal neutral criteria for redistricting would present a different case." *Id.*

House.[16] The *per se* prohibition against percentage floors that Appellants advocate therefore cannot coexist with 40 years of this Court's voting-rights precedent.

Without a *per se* rule, Appellants' case fails on the facts. Although one might have some basis to assume that the creation of a *new* district to achieve a racial threshold would necessarily involve a departure from traditional districting principles, *see LULAC*, 548 U.S. at 517 (Scalia, J., concurring in the judgment in part and dissenting in part), the House here declined overtures to create new majority-minority districts. The Challenged Districts were largely preserved in their previous forms, and eleven of twelve were above or nearly at 55% BVAP in the benchmark plan. The final district, HD71, had fallen below the 50% *Bartlett* floor, but the Court was unable to find any departures from traditional criteria in the district. JSA 111a-115a.[17] Without evidence of its "direct and significant impact on the drawing of at least some…boundaries," the 55% number means very little. *ALBC*, 135 S. Ct. at 1271.

But beyond that number, Appellants present *no* evidence of racial gerrymandering. Their only other supposed "direct evidence" shows that the House acknowledged the supremacy of "the United States

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[16] There may be other methods, *see, e.g.*, *LULAC*, 548 U.S. at 429 ("States retain broad discretion in drawing districts to comply with" the Voting Rights Act) (quotation omitted), but those methods are not less race-conscious.

[17] The House had evidence that HD71 would likely see a precipitous drop in BVAP between 2011 and 2021 because of changing demographics in downtown Richmond. Trial Tr. 291:2-293:10.

Constitution [and] the Voting Rights Act of 1965." JSA 17a. If states were required to disclaim federal law to avoid the inference of racial discrimination, then *Shaw* would place the Constitution at war with itself. *See Shaw I*, 509 U.S. at 639-41 (recounting the history of state intransigence motivating the adoption of the Fifteenth Amendment and, later, the Voting Rights Act). Appellants protest further that Virginia's preclearance submission was "preoccup[ied] with race"—has a preclearance submission ever *not* discussed race?—but the submission merely repeats that the Challenged Districts fall at or above 55% BVAP. JS 22. Likewise, the floor statements Appellants reference merely repeat that the Voting Rights Act is supreme federal law or that 55% BVAP was an appropriate aspiration. JS 23. Appellants' "direct evidence" is nothing but a broken record repeating the same two statements.

Appellants claim there is "district-specific" evidence of predominance, JS 23, but the district court had the benefit of a four-day trial with live witness testimony and rejected their arguments. Appellants disparage a precinct swap in HD71, but the district court found Delegate Jones's non-racial explanation for the swap "far more convincing" than theirs. *Compare* JS 25 *with* JSA 112a. Appellants protest precinct splits in HD71 in the original plan, HB5001. JS 25. But the district court found that these splits were cured in the final plan, HB5005, which is challenged here. JSA 115a. Appellants cite testimony by Delegate Dance about HD63 and conclude that race predominated in that district. JS 24. The district court heard the very same testimony and concluded that political and neutral considerations were predominant. JSA 91a-96a.

Appellants also cite irregular district boundaries in HD63 and HD80. JS 28-30. The district court carefully considered this evidence and, based on the record as a whole, concluded that political and incumbency-protection considerations account for the irregularity. JSA 96a, 124a; *see infra* § II.

Besides all that, Appellants' arguments fail because, despite their intimation that these are mere examples of "a host" of evidence in store for the Court, JS 3, Appellants' jurisdictional statement actually exhausts their *entire evidentiary showing*. As to most districts, Appellants presented no evidence, other than the 55% figure. *See, e.g.*, JSA 120a (Appellants "cannot hand the Court a stone and expect back a sculpture"); JSA 119a ("The Court is not in a position to guess based on the skimpy evidence submitted."); JSA 107a ("no evidence has been provided by the Plaintiffs to show" racial predominance); JSA 110a (same); JSA 115a-117a (same).[18]

In light of their abject failure on the facts, Appellants' allegation that the district court required them to "negate *all* other districting criteria" is contorted. JS i (fourth Question Presented). The district court correctly required only that Appellants show "substantial"—not complete—disregard for neutral criteria. JSA 39a (citing *Bush*, 517 U.S. at 962;

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[18] Appellants did present expert testimony, but the court below discredited it because the inferences drawn by the expert were based solely on demographics related to race and partisanship. Appellants' expert failed to consider neutral criteria. JSA 89a-90a. Appellants' jurisdictional statement did not preserve a challenge to that ruling.

Miller, 515 U.S. at 928 (O'Connor, J., concurring)). Appellants' standard, by contrast, is the mirror image: *any* use of race in drawing *any* line defeats all neutral criteria. And even under that standard, Appellants cannot win: when asked at trial whether the House's racial goals tainted its non-racial goals, Appellants' counsel conceded that "we don't have a lot of evidence on that."[19] Trial Tr. 833:4-6. Appellants' dispute is therefore neither with the House nor with the district court; it is with this Court's repeated holding that the *Shaw* burden is a "'demanding one.'" *Cromartie II*, 532 U.S. at 241 (quoting *Miller*, 515 U.S. at 928).[20]

Finally, Appellants' objection that the court "disregard[ed]" their direct evidence misstates the court's decision. JS i (third Question Presented). The court carefully considered Appellants' entire—"skimpy"—evidentiary presentation. *See* JSA 86a-130a. Appellants' case failed because their evidence, both direct and indirect, did not show predominance of race over neutral criteria in the Challenged Districts. Their argument on this score is nothing more than a restatement of their other arguments. *See* JS 15-17. It should fail for the reasons stated above.

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[19] For the same reason, *Shaw v. Hunt*, 517 U.S. 899, 906-07 (1996) (*Shaw II*), does not help Appellants. *Shaw II* rejected the notion that a district drawn in substantial disregard for neutral criteria can be cured by lip service to a few applications of traditional criteria. *Accord Bush*, 517 U.S. at 963. This case presents the opposite scenario.

[20] Appellants falsely claim that the district court weighed population equality with other factors in its predominance analysis. JS 16 n.3. It did nothing of the sort. *See* JSA 65a-66a.

II. The Court Correctly Rejected the Challenge to HD63, HD80, and HD95 Because Political Considerations Predominated

The district court also correctly rejected the challenges to HD63, HD80, and HD95. The court found that traditional criteria did not entirely control in these districts. All underwent significant changes from the benchmark plan and became less regular than in the 2001 map.[21] Yet "the neglect of traditional districting criteria is merely necessary, not sufficient. For strict scrutiny to apply, traditional districting criteria must be *subordinated to race*." *Bush*, 517 U.S. at 962; *see also Cromartie I*, 526 U.S. at 551. The district court correctly scoured the record to ascertain the predominant cause of alterations to these districts, and it found that non-racial considerations predominated. Its determination is subject to review for clear error. *Cromartie II*, 532 U.S. at 242. Appellants identify none.

As described above, the court found as fact that HD63's shape was predominantly the result of efforts to remove a river crossing, to draw a potential opponent of the incumbent out of the district, and to avoid pulling its Democratic-leaning constituents into neighboring Republican districts. JSA 91a-95a. HD80's shape was altered to avoid pairing veteran incumbent Delegates (Democratic and Republican), to preserve the voting bases of those Delegates, and to maneuver around a naval base. JSA 122a-123a. And HD95 was configured to advantage Republican incumbents on the

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[21] All of these districts were nonetheless compliant with Virginia's standards of compactness and contiguity. *See supra* note 1.

Peninsula, to draw an unpopular Delegate out of her district, to make a neighboring district competitive for Republicans, and to eliminate a river crossing. JSA129a-130a. Appellants' only evidence on these districts is that BVAP is at or above 55%. Without a *per se* rule, their claims against these districts must fail.

Besides, all of this analysis was unnecessary. The court should have dismissed the claims under *Cromartie II*, which held that, "where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries 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." 532 U.S. at 258.[22] Experts for both sides testified that race and partisan affiliation correlate in Virginia. Trial Tr. 224:6-17; 507:11-18; 661:19-22. There was therefore no need for the court to parse every line in these districts as it did. Appellants argued below that this requirement does not apply because they presented "direct evidence" that race was considered. *Cromartie II* does not admit that exception: there *was* direct evidence of racial considerations in *Cromartie II*. 532 U.S. at 253. The Court should affirm the decision below on this basis.

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[22] Although *Cromartie II* dealt with political considerations, its alternative-map requirement is equally applicable where the state defends on the basis of neutral principles. Otherwise, it would be easier to defend a political gerrymander than to defend sound redistricting. The entire case should be dismissed on this basis.

See, e.g., *Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015).[23]

III. All Challenged Districts Were Narrowly Tailored

Appellants' claims against all districts also fail on the narrow-tailoring inquiry. *See, e.g.*, *Miller*, 515 U.S. at 920-27. Eight justices of the Court have endorsed the position that compliance with Section 5 of the Voting Rights Act is a compelling state interest. *LULAC*, 548 U.S. at 518 (Scalia, J., Roberts, C.J., Thomas & Alito, JJ.); *id.* at 475 n.12 (Stevens & Breyer, JJ.); *id.* at 485 n.2 (Souter & Ginsburg, JJ.).[24]

A district is narrowly tailored under Section 5 when a legislature has a "strong basis in evidence" to believe race-based measures are necessary to preserve the minority community's ability to elect its candidate of choice. *ALBC*, 135 S. Ct. at 1273-74 (quotation omitted). The Virginia House had copious evidence that allowing districts to fall to a raw majority would be retrogressive. The Delegates were aware of low voter turnout among minorities, Pl's Ex. 33 at 45, and

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[23] For the first time in their post-trial reply brief, Appellants argued that two plans drafted in 2011, but never formally proposed, are their proposed alternatives. They made only passing reference to the plans and failed to show how they achieved any of the House's neutral goals. The argument is forfeited. *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2255 n.2 (2014).

[24] The House preserved the argument below that the districts are narrowly tailored under Section 2 of the Voting Rights Act. Because the district court only addressed Section 5, the House focuses here on that provision. It intends to continue to press a Section 2 defense if litigation continues.

declining BVAP in some districts likely to continue for the next decade, Pl's Ex. 35 at 41-42. The district court heard testimony of defeats of minority-preferred candidates in many of the Challenged Districts in recent memory. Trial Tr. 454:1-462:11, 488:14-25. That was significant given the lack of contested races and strong incumbent performance. *See, e.g.*, Trial Tr. 766:11-16. For the same reason, the Delegates were concerned about the ability of future, non-incumbent, minority-preferred candidates to win, and the success of incumbents by itself was not sufficient evidence of that ability. Pl's Ex. 32 at 14, 23.

The House's uncertainty on this score required it to maintain the Challenged Districts at supermajority BVAP levels. As amended to adopt the position of Justice Souter's dissent in *Georgia v. Ashcroft*, *see ALBC*, 135 S. Ct. at 1273, Section 5 treats "a reduction in supermajority districts" as "potentially and fatally retrogressive," at least where the minority voting population approaches a bare majority. 539 U.S. at 492-93 (Souter, J., dissenting). *Ashcroft* concerned three districts in Georgia's 2001 Senate redistricting plan that dropped, respectively, from 60.58% to 50.31% BVAP, from 55.43% to 50.66% BVAP, and from 62.45% to 50.80% BVAP. 539 U.S. at 472-73. Justice Souter's dissent would have denied preclearance to those districts, because the state could not satisfy its "burden of proving that nonminority voters will reliably vote along with the minority."[25] *Id.* at 492.

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[25] The *Ashcroft* majority would have allowed states discretion either to "create a certain number of 'safe' districts" or to create a higher "number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority

Virginia could not meet that burden. Appellants' expert at trial admitted that there was not sufficient data on Virginia House races "to do a meaningful analysis." Trial Tr. 761:1-15. Not surprisingly, the district court discredited Appellants' racially polarized voting analysis because it used general-election data from even-year elections and could not reliably predict voting patterns in odd-year House primaries. JSA 105a n.37. Thus, to this day no one has been able to prove the minimum BVAP levels required to avoid retrogression. The House was therefore required to maintain minority percentages in the Challenged Districts at supermajority levels. *Ashcroft*, 539 U.S. at 492 (Souter, J., dissenting). Because there is no discernible magic number, as Appellants assume, between 50% and 55% that can be adduced for each district, there was no meaningful basis available to distinguish between 55% and some number in the near vicinity.[26]

Requiring a more precise answer on this question would demand that states "guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive." *ALBC*, 135 S. Ct. at 1273. In fact, courts have frequently used rules of thumb as the House did, often arriving at

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voters will be able to elect candidates of their choice." *Id.* at 480. "Section 5 does not dictate that a State must pick one of these methods of redistricting over another." *Id.*

[26] An informative statistical analysis answering this question cannot, in fact, be prepared before a plan is finalized because endogenous elections provide the most informative data. Data from previous districts will be a mismatch to the precincts in the new districts. Trial Tr. 700:2-7, 701:20-702:10.

higher thresholds than 55%. One leading case adopted a 65% total-population threshold:

> This figure is derived by augmenting a simple majority with an additional 5% for young population, 5% for low voter registration and 5% for low voter turn-out, for a total increment of 15%. This leads to a total target figure of 65% of total population. Obviously if voting age population statistics are used, 5% would drop out of the formula, leaving something in the vicinity of 60% of voting age population as the target percentage.

Ketchum v. Byrne, 740 F.2d 1398, 1415 (7th Cir. 1984); *see also NAACP v. Austin*, 857 F. Supp. 560, 574 n.13 (E.D. Mich. 1994); *Jeffers v. Clinton*, 756 F. Supp. 1195, 1198 (E.D. Ark. 1990); *Smith v. Clinton*, 687 F. Supp. 1361, 1363 (E.D. Ark. 1988); *Neal v. Coleburn*, 689 F. Supp. 1426, 1438 (E.D. Va. 1988); *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1023 (8th Cir. 2006).

Appellants stake their entire narrow-tailoring argument on *ALBC*, 135 S. Ct. at 1272-74. But they fail to appreciate the difference between the 70% BVAP level discussed in *ALBC* and the far lower percentages here. The Court in *ALBC* suggested that "a 1% reduction in a 70% black population" or a reduction "from, say, 70% to 65%" may not be retrogressive. 135 S. Ct. at 1273. That is because there is nothing special about a 70% majority versus a 69% or 65% majority in a majority-rule contest. But there *is* something unique about the number 50%. Accordingly, as between a 60% or 55% majority and a 50% majority, Justice Souter's *Ashcroft* dissent detected meaningful retrogression—at least if "voting power" was the focus. 539 U.S. at 495

(Souter, J., dissenting). Those very numbers are at issue here, and voting power is the focus under the amended statute. Requiring the House to prove at preclearance that reducing supermajority districts to near 50% BVAP was not retrogressive only to require the House in *Shaw* litigation to prove that maintaining districts modestly above 50% was absolutely necessary would be more than "a trap for [the] unwary." *ALBC*, 135 S. Ct. at 1273-74. It would make redistricting impossible.[27]

At the very least, HD75, the only district subjected to strict scrutiny below, was narrowly tailored. Appellants' own expert found "high rates of [racial] polarization" in HD75, even under an analysis designed to under-report racially polarized voting. JSA 104a (alteration in original). Delegate Tyler barely succeeded in winning the seat in 2005. In a five-way primary election with two white contestants, she won by fewer than 330 votes. Trial Tr. 323:19-324:1. In the general election, she barely won a one-on-one election against a white candidate. Trial Tr. 324:2-3; *see also* JSA 102a (crediting this testimony). A meaningful portion of the minority population in this district is imprisoned and so counts in the district's BVAP but cannot vote. JSA 103a. Section 5 "requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice." *ALBC*, 135 S. Ct. at 1272. There was every

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[27] The *ALBC* plaintiffs cited the 2001 Alabama plan as an example of typical Voting Rights Act compliance because, rather than strictly maintain BVAP levels, Alabama in 2001 "said [in its preclearance submission] that the number for the ability to elect was a 55 percent black voting age population." Transcript of Oral Argument at 67, *ALBC* (No. 13-895).

reason for the House to believe that a supermajority district was required and no way to prove that it was not. The House was therefore flatly prohibited from allowing BVAP to fall. It correctly maintained BVAP at 55.4%, where it was at 55.3% in the benchmark plan. JSA 104a.

CONCLUSION

For the reasons stated above, the Court should summarily affirm the decision below or, alternatively, dismiss this appeal.

Respectfully submitted,

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