No. 15-680

In The Supreme Court of the United States

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

***Appellants*,**

v.

VIRGINIA STATE BOARD OF ELECTIONS, et al.,

Appellees.

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

BRIEF OF THE NAACP AND VIRGINIA NAACP AS *AMICI CURIAE* SUPPORTING APPELLANTS

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BRIEF OF NAACP AND VIRGINIA NAACP AS *AMICI CURIAE* SUPPORTING APPELLANTS

This brief is submitted on behalf of the National Association for the Advancement of Colored People ("NAACP") and Virginia State Conference of the NAACP ("Virginia NAACP") as *amici curiae* in support of Appellants.[1]

INTEREST OF *AMICI CURIAE*

Founded in 1909 and with more than half a million members nationwide, the NAACP is one of the nation's oldest and largest grassroots civil rights organizations. Its state conference in Virginia, the Virginia NAACP, has more than one hundred active branches and approximately 16,000 members throughout the Commonwealth of Virginia. Both the NAACP and Virginia NAACP are nonpartisan, nonprofit membership organizations whose core missions include advancing and defending the rights of African-American voters to be free from racial discrimination in voting and to elect candidates of their choice to political office. In support of this mission, both organizations regularly engage in voter education, community-based advocacy, and litigation to protect African-American voters' equal opportunity to participate in the political process. This litigation has included racial gerrymandering

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[1] The parties have consented to the filing of *amicus curiae* briefs in support of either party. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

cases under the United States Constitution and Voting Rights Act of 1965, 52 U.S.C. §§ 10101-10702. Most recently, the Virginia NAACP has participated in the ongoing litigation challenging the constitutionality of Virginia's Congressional District 3 and the remedial phase that has followed. *See Wittman v. Personhuballah*, No. 14-504 (U.S. 2016) (participating as amicus curiae); *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552 (E.D. Va. 2016) (submitted proposed redistricting plan during remedy phase); *Page v. Va. State Bd. of Elections*, No. 3:13-cv-678, 2015 U.S. Dist. LEXIS 73514 (E.D. Va. June 5, 2015) (sought to intervene in remedy phase). The national NAACP oversees the litigation its state conferences engage in to combat racial gerrymandering. *See, e.g., Dickson v. Rucho*, 368 N.C. 481 (2015), *cert. pending*, No. 16-24 (U.S. 2016).

The NAACP and Virginia NAACP are exceptionally familiar with African-American communities and voting patterns in Virginia, and are experienced litigants in racial gerrymandering and other voting rights cases. Based on this knowledge, they conclude that the district court's decision, if not reversed, will harm African-American voters and undermine this Court's directive that the mechanical use of racial quotas in redistricting should be avoided. This decision, if left standing, would not only harm black voters in Virginia, but would provide persuasive authority for other jurisdictions across the country that might be inclined to misinterpret the Voting Rights Act and engage in racial gerrymandering. For these reasons, *Amici* urge the Court to grant Appellants' request to reverse the decision below.

SUMMARY OF THE ARGUMENT

Virginia's unconstitutional use of mechanical racial targets in its 2011 redistricting process segregates and stigmatizes the Commonwealth's African-American residents, undermines African-American voters' ability to effectively exercise their constitutional right to vote on equal terms, and requires the application of strict scrutiny to districts where mechanical racial targets drove the placement of district lines. That the Commonwealth imposed its unconstitutional scheme of racially segregated legislative districts in the name of the Voting Rights Act of 1965 is wrong, and its argument that it was legally compelled to do so is not supported by the facts of this case.

Majority-minority districts remain an important vehicle for empowering black communities that would otherwise be unable to elect their candidates of choice. When certain necessary preconditions are present, Section 2 of the Voting Rights Act requires majority-minority districts in communities with a recent history of racially polarized voting, where such voting patterns contributed to the defeat the candidates of choice of African-American voters. At the time of enactment of the challenged districts, Section 5 of the Voting Rights Act also required Virginia to avoid retrogression in the ability of African Americans to elect the candidates of their choice.

However, neither provision of the Voting Rights Act required the Commonwealth to employ a uniform numerical quota to maintain or increase the percentage black voting age population in the twelve

individual districts challenged here. Nor can all of the challenged districts be explained as naturally occurring majority-minority districts. Rather, the map drawers targeted African-American residents in outlying areas in varying proximity to the benchmark districts and drew them into the challenged districts to meet the mechanical racial target of 55% black voting age population in as many districts as possible, in some cases splitting precincts to do so. In addition to the harmful stigmas that accompany such racial segregation, employing racial quotas in redistricting harms black voters by limiting black voters' influence to a select number of districts, diminishing their ability to build voting strength in surrounding districts. This tactic is especially harmful where, as here, a state uses the Voting Rights Act to limit black voters' overall electoral power.

To ensure continued protection of the right to vote and to guarantee the other "most basic" rights that are founded on the right to vote, *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), it is important that this Court clearly delineate between, on the one hand, the Voting Rights Act protections that state legislatures engaged in redistricting must afford African-American voters and, on the other hand, the impermissible use of racial quotas. Just last year, this Court recognized that use of a one-size-fits-all racial target is strong evidence that race predominated in the redistricting process and that conducting a district-by-district analysis is necessary to determine whether the percentage black voting age population in each enacted district was necessary to allow black voters in the district to elect their candidate of choice. *Alabama Legislative Black*

Caucus v. Alabama, 135 S. Ct. 1257, 1257 (2015) ("*ALBC*"). Sadly, the use of such mechanical racial targets is common in several cases currently before this Court.[2] In this case, even where the lower court correctly concludes that race predominated, as in House District 75, the level of scrutiny it applied was not sufficiently strict.

The court below fatally misunderstood the fact-intensive, district-by-district inquiry required under this Court's racial gerrymandering jurisprudence, and did not uniformly apply the appropriate level of scrutiny. The district court's use of the incorrect legal standard for determining whether race predominated in the drawing of the challenged districts resulted in its misapplication of the standard to the facts of the case. The district court further erred as a matter of law in understanding what constitutes a compelling governmental interest. To protect the constitutional rights of Virginia's voters and to ensure that the misstatements of law contained in the opinion of the court below are not adopted by courts in other states, *Amici* respectfully ask this Court to grant Appellants' request to reverse the decision of the district court.

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[2] *See, e.g.*, *Harris v. McCrory*, No. 1:13-cv-949, 2016 U.S. Dist. LEXIS 14581 (M.D.N.C. Feb. 5, 2016), *probable juris. noted*, 136 S. Ct. 2512 (2016); *Dickson v. Rucho*, 368 N.C. 481 (2015), *cert. pending*, No. 16-24 (U.S. 2016); *Page v. Va. State Bd. of Elections*, No. 3:13-cv-678, 2015 U.S. Dist. LEXIS 73514 (E.D. Va. 2015), *appeal dismissed sub nom. Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016).

ARGUMENT

The decision of the court below must be reversed because it is legally erroneous in numerous ways that will perpetuate racial stereotypes and harms. Racial quotas in redistricting—including a mechanical racial target for African-American population in certain districts—fly in the face of this Court's racial gerrymandering jurisprudence and do an enormous disservice to the hard work *Amici* and others have done to build cross-racial coalitions in Virginia politics. By misapplying the test for racial predominance, the district court endorsed the disruption of important communities of interest and added elements of proof that will make it more challenging for litigants to prove that they have been sorted on the basis of their skin color. This error must be corrected. Moreover, the district court also erred in its analysis of what constitutes a compelling governmental interest in districts where race predominated. The court below applied such an untenable interpretation of the Voting Rights Act so as to completely discount the longterm goals of the Act (undermining racial bias in voting) and essentially defang the probing inquiry that strict scrutiny demands. All of these problems with the district court's analysis require reversal.

I. Employing racial quotas in redistricting, particularly under the guise of complying with the Voting Rights Act, harms African-American voters.

As this Court has recognized as recently as last year, "the harms that underlie a racial gerrymandering claim . . . are personal." *ALBC*, 135

S. Ct. at 1265. Using a fixed racial quota subjects voters to a racial classification and the risk of representation "by a legislator who believes his 'primary obligation is to represent only the members' of a particular racial group." *Id.* (quoting *Bush v. Vera*, 517 U.S. 952, 957 (1996); *Shaw v. Reno*, 509 U.S. 630, 648 (1993)).

These personal harms carry a particular sting when they are committed in the name of the Voting Rights Act. The clear and simple wrong the Voting Rights Act was intended to redress—the denial or abridgement of the franchise to voters of color—is not alleviated but rather perpetuated when legislatures draw racially segregated election districts where they are unnecessary to elect African-American voters' candidates of choice. To segregate in the name of the Voting Rights Act is disingenuous, legally erroneous, and undermines the very purpose of the Act.

Quota-based schemes of racial segregation have been found constitutionally suspect in a number of cases recently or currently before this Court—an alarmingly high number that betrays the implicit and explicit racial prejudices continuing to simmer throughout much of the South more than fifty years after the Voting Rights Act was signed into law. *E.g.*, *ALBC*, 135 S. Ct. 1257 (no decrease in BVAP permitted in any majority-minority district); *Harris v. McCrory*, No. 1:13-cv-949, 2016 U.S. Dist. LEXIS 14581 (M.D.N.C. Feb. 5, 2016), *probable juris. noted*, 136 S. Ct. 2512 (2016) (roughly 20% of districts statewide must be majority-minority, and all such districts must have BVAP of at least 50% plus one); *Dickson v. Rucho*, 368 N.C. 481 (2015), *cert. pending*,

No. 16-24 (U.S. 2016) (same); *Page v. Va. State Bd. of Elections*, No. 3:13-cv-678, 2015 U.S. Dist. LEXIS 73514 (E.D. Va. 2015), *appeal dismissed sub nom. Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016) (district that elects an African American must be drawn to have 55% BVAP).

Properly interpreted, the Voting Rights Act works in tandem with the United States Constitution to protect African-American communities and ensure their unimpeded progress toward electoral equality. On one hand, the Voting Rights Act calls for the drawing of majority-black districts in areas where racially polarized voting prevents African-American voters from electing their candidates of choice. *See Bartlett v. Strickland*, 556 U.S. 1, 11 (2009); *Vera*, 517 U.S. at 995 (O'Connor, J., concurring). This protection provides communities where racially polarized voting persists with an opportunity to exercise effective political power as they move toward electoral equality. On the other hand, where African-American voters have recently been successful in electing their candidates of choice, the Fourteenth Amendment prohibits legislatures from confining that electoral success to a limited number of districts segregated by race. *See Shaw v. Hunt*, 517 U.S. 899, 907-08 (1996); *Vera*, 517 U.S. at 995 (O'Connor, J., concurring). Retiring outdated numerical benchmarks based on race ensures that communities where African-American voters have achieved electoral success may continue to move forward.

Racial segregation in redistricting disrupts the right to vote on equal terms, and this disruption has a ripple effect through communities whose members

are assigned to districts based solely on the color of their skin. Use of racial quotas disregards and disturbs the on-the-ground political realities in affected communities—whether black voters have been able to elect their candidates of choice, whether cross-racial coalitions exist, which issues are important to residents of those communities, and where communities of interest exist within the affected jurisdiction—and treats all black voters as valuing the same issues, belonging to a single race-based community of interest, and needing continued and in some cases increased government intervention in their communities to elect candidates of choice. In addition to being stigmatizing and offensive, such blanket assumptions are often wrong.

For example, in Virginia, the percentage black voting age population was increased from below the 55% threshold to above the threshold in House Districts 71, 80, and 89, despite the fact that black voters had been successfully electing their candidates of choice in all three districts. All three districts had continuously elected the candidates of choice of black voters dating to at least 1999. Virginia State Board of Elections, Elections Database, House of Delegates, http://historical.elections.virginia.gov/elections/search/year_from:1999/year_to:2015/office_id:8 (last visited Sep. 13, 2016). In District 71, African-American candidate Jennifer McClellan was not the first African American to be elected in this district. She ran for the first time in 2005 and was unopposed, and has been re-elected every two years since. *Id.* (results narrowed to District 71). Likewise, in District 80, multiple African-American candidates have been elected. Matthew James ran

for the first time in 2009 and won by a wide margin, and has run unopposed ever since. *Id.* (results narrowed to District 80). In District 89, Kenneth Alexander was first elected in a special election in 2002 and was re-elected five times, three of which were unopposed, before he left the House of Delegates. *Id.* (results narrowed to District 89).

To push these districts above the 55% racial threshold even where black candidates were wildly successful, communities of interest were needlessly fractured. For example, in District 80, the Sleepy Hole, Nansemond, and Cypress boroughs in Suffolk were split apart, with the predominately black portions of their populations pulled away from their neighbors and into the district. Suffolk, VA, 2011 Redistricting Plan Presentation, at 29 (2011 Virginia House of Delegates Boundaries Overlayed On Top of the Proposed Borough Boundaries), http://www.suffolkva.us/docs/2011%20Redistricting%20Plan%20PPT%207-20-11.pdf (last visited Sep. 13, 2016). No part of Suffolk had previously been part of District 80. *See* Commonwealth of Virginia, Division of Legislative Services, Redistricting 2010, Map of District 80 in 2010, http://redistricting.dls.virginia.gov/2010/Data/House%20Districts%2011%20x%2017%20PDFs/80.pdf (last visited Sep. 13, 2016). In District 89, the Berkley precinct in Norfolk, which contains the Norfolk Naval Shipyard, *see* Commonwealth of Virginia, Division of Legislative Services, Redistricting 2010, Map of District 89 in 2011, http://redistricting.dls.virginia.gov/2010/Data%5C2011HouseMaps%5CHB5005%20-%20House%2089.pdf (last visited Sep. 13, 2016), was broken off from the bulk of the Norfolk Naval Base and other shipyards

now in District 80. The court below acknowledged that Berkley was heavily African American. *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 568 (E.D.Va. 2015). The Berkley precinct had previously been in the same district (District 80) with the naval base and other shipyard precincts, facilitating the effective representation of their common interests. *See* Commonwealth of Virginia, Division of Legislative Services, Redistricting 2010, Map of District 80 in 2010, http://redistricting.dls.virginia.gov/2010/Data/House%20Districts%2011%20x%2017%20PDFs/80.pdf. Thus, the complicated shifting of black populations to ensure that both Districts 80 and 89 had at least 55% BVAP in them required the destruction of communities of interest that were previously respected.

Imposing rigid racial quotas on these districts harms black voters by disregarding the communities of interest these districts contain and the success black voters have achieved in electing their candidates of choice. Such disregard denies black voters in these districts the dignity of being recognized as deeper than their skin color, and subjects them to needless limits on their electoral power. That is the very clear and simple wrong the Voting Rights Act was intended to redress.

Moreover, racial gerrymandering through the use of mechanical racial targets not only causes the real injuries to black voters discussed above, but this ruling, if left standing, could have enormous detrimental practical implications for voters of color in Virginia and across the country. Unreversed, the decision from the court below stands for the

proposition (and persuasive authority) that rigid racial targets, completely untethered from on-the-ground reality and need, can drive redistricting processes without triggering heightened scrutiny. Unreversed, this decision means that, even in places across the country where black voters have made substantial progress in building cross-racial coalitions and engaging in "the obligation to pull, haul, and trade to find common political ground," *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994), necessary to achieve political success, jurisdictions engaged in redistricting may unilaterally determine that some uniform (and unjustified) percentage of black voting age population is necessary to comply with the Voting Rights Act, and they may pack black voters into districts to meet that unreasonable population goal. In doing so, they may limit the number of districts drawn in which African Americans have the ability to elect their candidates of choice or otherwise be heard in the electoral process. They also may disrupt and frustrate the coalitions built in districts adjoining the district drawn to meet that racial goal. Ultimately, the strategy demonstrated by the use of mechanical racial quotas in redistricting limits black political participation in a way that is almost as nefarious as refusing to draw districts that afford any African-American representation at all, and clearly runs afoul of the intention behind the Voting Rights Act itself.

Unreversed, the decision below may also stand for the proposition that any district in Virginia must be drawn to 55% BVAP in order to comply with the Voting Rights Act. *Cf. Dickson v. Rucho*, 368 N.C. at 503-04 (applying the incorrect BVAP rule to each

district in the state). This is patently not the case, *ALBC*, 135 S. Ct. at 1273, and would inhibit the ability of the Virginia NAACP or other civil rights groups to seek relief under the Voting Rights Act in the few areas in the state where racially polarized voting does still present a problem for the election of local governmental bodies. A correct interpretation of the Voting Rights Act would require a civil rights litigant to demonstrate that it is possible to draw a 50% minority voting age population district in an area where the candidates of choice of voters of color are usually defeated by white bloc voting. *Bartlett v. Strickland*, 556 U.S. 1, 19 (2009). A local jurisdiction might read the decision below to require civil rights litigants to produce a district with 55% BVAP, especially if that county were formally covered under the Voting Rights Act. Such a heightened (and incorrect) standard would be harmful to such potential litigants.

Thus, for all these reasons, the personal harm and practical import of leaving the decision below standing necessitate reversal.

II. The district court improperly analyzed whether the 55% racial target and other evidence showed that the legislature subordinated traditional districting criteria to race.

ALBC directs courts to analyze whether a mechanical racial target was employed and affected the way that district lines are drawn. Ignoring that directive, the court below focused its analysis on whether the plaintiffs had shown the challenged districts were shaped bizarrely, and added a

requirement that for traditional redistricting criteria to have been subordinated to race, racial considerations and traditional criteria must have come into "actual conflict" during the redistricting process and it must be clear that racial considerations won in each case.

Last year, this Court articulated the appropriate test for racial predominance in the redistricting process: race predominates where the legislature "subordinated traditional race-neutral districting principles" to race-based considerations in its decision "to place a significant number of voters within or without a particular district." *ALBC*, 135 S. Ct. at 1270 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). When assigning voters to districts, "the 'predominance' question concerns *which* voters the legislature decides to choose, and specifically whether the legislature predominately uses race as opposed to other, 'traditional' factors when doing so." *Id.* at 1271. Such traditional factors include but are not limited to "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, incumbency protection, and political affiliation." *Id.* at 1270 (citations omitted). Subordination does not, however, require "actual conflict" where it is clear that race wins in that conflict every time.

Rather than apply this Court's standards as written, the district court suggested its own, modified standard for racial predominance: a three-part test that asks, (1) whether the district complies with traditional, neutral redistricting criteria, (2) whether portions of the district that appear to deviate from traditional, neutral criteria are

attributable to concerns about population equality or "political circumstances," and (3) under the totality of the evidence, "whether racial considerations qualitatively subordinated all other non-racial districting criteria." *Bethune-Hill*, 141 F. Supp. 3d at 533-534. Under this modified standard, the district court fixated on whether the shapes of the challenged districts appeared "bizarre"—effectively, whether each district passed the eyeball test—and whether race had come into "actual conflict," and won, with every possible race-neutral consideration during the redistricting process. *Id.* at 524. In each instance, the district court's analysis was fatally flawed.

As a primary matter, with regard to whether the district shapes appeared bizarre, the district court disregarded, *id.* at 531, this Court's holding in *Miller v. Johnson*, which does not require bizarreness to demonstrate racial predominance. *See* 515 U.S. at 915 ("In sum, we make clear that parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding the district's geometry and makeup nor required to make a threshold showing of bizarreness."). Rather, *Miller* supports a more nuanced consideration of racial predominance. Not only is direct evidence highly probative of racial predominance, *id.* at 917-20, but just as in *Miller*, here the direct evidence, when viewed in context of district shape and racial demographics, makes clear that race was a predominant factor in the House of Delegates redistricting process. Thus, the court below plainly erred in disregarding this Court's instructions in *Miller* on the relative weighting of

direct and circumstantial evidence of racial predominance.

Second, with regard to whether race came into "actual conflict" with race-neutral considerations during the redistricting process, the district court took its misunderstanding of *Miller* to an even higher level by adding this unnecessary element of proof. *Miller* clearly contemplates a situation where a district is not grossly non-compact, but race still predominates in the design of the district. *Miller*, 515 U.S. at 917 ("Although by comparison with other districts the geometric shape of the Eleventh District may not seem bizarre on its face, when its shape is considered in conjunction with its racial and population densities, the story of racial gerrymandering seen by the District Court becomes much clearer."). Thus, properly applied, the racial predominance test does not require "actual conflict" between racial and traditional redistricting interests, and it does not always require traditional redistricting interests such as compactness to be completely ignored. Instead, the proper racial predominance analysis looks to see whether traditional, race-neutral interests are consistently subordinated in district line placement, suggesting that race predominated over other interests. *See Vera*, 517 U.S. at 962 (plurality opinion) ("For strict scrutiny to apply, traditional districting criteria must be *subordinated to race*.") (citing *Miller*, 515 U.S. at 916). To require actual conflict between race and other considerations suggests an all-or-nothing binary, where competing considerations either conflict or exist in harmony. Such an expectation of the legislative redistricting process is unrealistic. *See Miller*, 515 U.S. at 916-17 (recognizing the

"complex interplay of forces that enter a legislature's redistricting calculus" when balancing competing factors).

Under the correct standard for racial predominance, the legislature's inflexible 55% racial target is strong direct evidence that the legislature "subordinated traditional race-neutral districting principles" to race-based considerations. *ALBC*, 135 S. Ct. at 1270; *see id.* at 1267 (direct evidence can include prioritization of a racial target over other redistricting criteria). Additionally, the population swaps the legislature employed are strong indirect evidence that race motivated the legislature's determination of "*which* voters . . . to choose" to move into and out of the challenged districts. *Id.* at 1271; *see Miller*, 515 U.S. at 916 (indirect evidence relating to a district's shape and demographics can support a finding that race predominated). Across the board, the legislature moved predominately white and mixed-race precincts out of the challenged districts, and moved heavily black precincts into the districts in their place, in some cases splitting precincts to isolate black populations. Appellants' Juris. Statement 27. These swaps are further evidence that the legislature's determination to meet its threshold of 55% black voting age population in as many districts as possible "had a direct and significant impact on the district boundaries." *ALBC*, 135 S. Ct. at 1271.

Looking again to districts 71 and 80 as examples, understanding where black voters live and the population swaps in each district makes clear that the precincts the legislature chose to move out of the district were predominately white and mixed-race,

while the precincts the legislature chose to move in were heavily black. In District 71, the legislature moved seven precincts in heavily white western Richmond and Henrico County out of the district, and moved in five precincts in the heavily black eastern part of the metropolitan area in their place.[3] In District 80, the legislature moved seven primarily white and mixed-race precincts in eastern Portsmouth and southwestern Norfolk out of the district, and drew a nearly point-contiguous district that snakes along High Street from the naval shipyard in southeastern Portsmouth to Interstate 664 in swampy Suffolk through predominately black and mixed-race neighborhoods.[4]

The Tidewater area in particular provides a stark example of how the legislature's 55% racial quota directly and significantly impacted the boundaries of four of the challenged districts, using the campus of historically black Norfolk State University as a

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[3] In District 71, the seven precincts moved out of the district were Henrico 107, Henrico 221, Henrico 114, Richmond 207, Richmond 301, and parts of Richmond 211 and Richmond 505, which had previously been part of the district and were split in the 2011 plan. The seven precincts moved into the district were Henrico 220, Richmond 204, Richmond 604, Richmond 701, Richmond 702, and parts of Richmond 309 (which had been split in the previous plan) and Richmond 703 (which had previously been kept whole but was split in 2011).

[4] In District 80, the seven precincts moved out of the district were Chesapeake 26, Norfolk 402, Norfolk 213, Portsmouth 7, and parts of Norfolk 411 and Norfolk 201 (which had been split in the previous plan) and Portsmouth 9 (which had previously been kept whole but was split in 2011). The seven precincts moved into the district were Chesapeake 35, Portsmouth 11, Portsmouth 33, Portsmouth 34, Portsmouth 38, Suffolk 103, and Suffolk 705.

finger on the scale and splitting apart communities of interest in Suffolk. In the Tidewater, benchmark districts 80 and 89 were below the 55% racial threshold. To increase those districts above the threshold, the legislature redrew those two districts in concert with bordering districts 77 and 90, shifting black population out of those districts into 80 and 89.

The benchmark for District 89 had 52.5% black voting age population. The benchmark for neighboring District 90 had 56.9% black voting age population. Thus, precincts with concentrations of black voters were moved out of District 90 and into the southeastern portion of District 89, which was increased to 56.3% black voting age population. In the process, the precinct that contains historically black Norfolk State University, where the NAACP has members, was split to ensure that District 90 would continue to meet the 55% racial threshold. As a result, when the district lines were drawn, a student living in Phillis Wheatley Hall on Norfolk State's campus had to leave her district every time she walked to the nearest on-campus dining hall. *Compare* Norfolk State Campus Map, https://www.nsu.edu/Assets/websites/parking/NSU-Campus-Map.pdf (last visited Sep. 13, 2016) (Phillis Wheatley Hall, to the west of Park Avenue) *with* Commonwealth of Virginia, Division of Legislative Services, Redistricting 2010, District Boundary Descriptions, District 89, at 3-4, http://redistricting.dls.virginia.gov/2010/Data/2011HouseDesc/House%2089.doc (last visited Sep. 13, 2016) (describing Park Avenue boundary delineation).

In District 80, the benchmark plan had 54.4% black voting age population. Taking majority-black precincts from neighboring District 89 to the northeast was not an option because of the need to similarly increase that district to above the 55% racial threshold. Thus, to meet the racial quota, legislators had to look west. There they ran into a mine-sweeping situation with two incumbent residences that had to be avoided, and ended up with a district that loops through black neighborhoods in southern Portsmouth before winding west to cannibalize Suffolk. In Suffolk, the district lines split three boroughs—including majority-black Cypress and heavily black Sleepy Hole—to add black voting age population sufficient to meet the 55% racial threshold. District 80 was enacted at 56.3% black voting age population.

District 77 similarly cannibalized heavily black Suffolk, as a result of an effort to keep a community of interest together two cities away, in Norfolk. The district as redrawn begins in southern Norfolk, where the incumbent had requested that the old city community of interest be kept together. *Bethune-Hill*, 141 F. Supp. 3d at 566-67. This community of interest included several predominately white precincts. *Id.* Including these precincts in the district at the African-American incumbent's request would have lowered the percentage black voting age population in the district. Thus, to maintain a black voting age population of more than 55%, the district was drawn to cut through southern Portsmouth and then reach far to the west across the Great Dismal Swamp into Suffolk, splitting that city's three majority-minority boroughs and splitting two precincts to add the necessary black voting age

population to the district. Suffolk, VA, 2011 Redistricting Plan Presentation, at 29 (2011 Virginia House of Delegates Boundaries Overlayed On Top of the Proposed Borough Boundaries), http://www.suffolkva.us/docs/2011%20Redistricting%20Plan%20PPT%207-20-11.pdf (last visited Sep. 13, 2016). As a result, the percentage black voting age population in the district was not lowered as the incumbent had contemplated but raised from 57.6% to 58.8%.

The practical application of the rigid 55% racial target in these Tidewater districts, particularly the breaking apart of communities of interest at Norfolk State and in Suffolk, illustrates how race predominated over traditional criteria in drawing the district lines. Respect for these important historical and cohesive communities of interest was subordinated to achieving a mechanical racial target, and as such, the facts here amply satisfy the proper racial predominance test.

III. Where race does not predominate, the intentional creation of majority-minority, crossover, and influence districts does not make those districts per se subject to strict scrutiny.

In this case and in the congressional case from 2011, *Page v. Va. State Bd. of Elections*, No. 3:13-cv-678, 2015 U.S. Dist. LEXIS 73514 at *27-28, Virginia used racial considerations as a blunt tool to limit African-American political participation, and such efforts cannot withstand constitutional scrutiny. However, it is equally important to ensure that in rejecting Virginia's cynical misapplication of

the Voting Rights Act, this Court does not develop a rule that would penalize jurisdictions that use race properly in redistricting. Not every majority-minority, crossover, or influence district designed to create opportunities for voters of color should be subject to strict scrutiny. In some instances, members of the affected community acknowledge that, although a majority-minority district is not necessary to elect black voters' candidates of choice, such a district is desirable because it would reflect a true community of interest—one bound together by more than race alone. An example of such a situation may involve the decision to keep a regional farming community or an urban city core together.

In other places, such as certain areas in southeastern Virginia, a majority-black district is the natural consequence of a compact concentration of black population sufficient to form a majority in a district. *See Shaw v. Reno*, 509 U.S. 630, 646 (1993) ("[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes."). In the case of crossover or influence districts, unequivocal data on local voting patterns may show that drawing or maintaining a district with black voting age population of less than 50%—and in many cases below 40%—is sufficient to enable black voters to elect their candidates of choice. Drawing such a district would enable the jurisdiction both to provide black voters with the opportunity to elect the candidates of their choice and only minimally factor race in the placement of district lines.

In drawing such districts, racial motivations cannot be said to have predominated over traditional redistricting criteria. A plurality of this Court has recognized as much, concluding that strict scrutiny "does [not] apply to all cases of intentional creation of majority-minority districts." *Vera*, 517 U.S. at 958 (plurality opinion). *But see ALBC*, 135 S. Ct. at 1272 (stating that the Court "does not express a view on the question of whether the intentional use of race in redistricting, even in the absence of proof that traditional districting principles were subordinated to race, triggers strict scrutiny"). Rather, regardless of the percentage black voting in population in a given district, where there is an ability to elect and permissible criteria such as compactness and communities of interest motivate the district boundaries, with race considered only as one additional factor of many, a legislature acts in accordance with the Constitution and Voting Rights Act when it enacts such districts. *See Vera*, 517 U.S. at 993 (O'Connor, J., concurring) ("[S]o long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny.").

Construing the racial predominance test to be over-inclusive could have a negative impact on minority opportunity districts. It could limit the ability of jurisdictions to listen to communities of color and develop thoughtful districts that both respect communities of interest and create new opportunities for political equality. For that reason, the correct limiting principle is the one set out in *ALBC*, 135 S. Ct. at 1270-71: where a jurisdiction

employs a mechanical racial target and it affects which voters are selected for inclusion or exclusion from districts, only then has race predominated and is strict scrutiny appropriate. This limiting principle will prevent practices like Virginia's, where blunt racial quotas ignore African-American political success and limit the potential for future coalition-building, and still respect the ability of jurisdictions acting in good faith to protect voting rights progress and create new opportunities where racially polarized voting still presents problems.

IV. The district court did not identify any "strong basis in evidence" supporting the legislature's decision to require 55% black voting age population in all twelve challenged districts.

When race predominates in the drawing of district lines, strict scrutiny is appropriate. To survive strict scrutiny, a redistricting plan must be narrowly tailored to a compelling governmental interest that provides a "'strong basis in evidence' in support of the (race-based) choice" the legislature has made. *ALBC*, 135 S. Ct. at 1274 (alteration in original). This Court in *ALBC* expressly stated that "Section 5 does not require maintaining the same population percentages in majority-minority districts as in the prior plan. Rather, §5 is satisfied *if minority voters retain the ability to elect their preferred candidates*." 135 S. Ct. at 1273 (emphasis added). Thus, the appropriate question for a legislature engaged in redistricting to ask on a district-by-district basis is: "To what extent must we preserve existing minority percentages in order to

maintain the minority's present ability to elect the candidate of its choice?" *Id.* at 1274.

After finding that race had predominated in the drawing of House District 75, the district court did no meaningful "functional analysis of the electoral behavior within the particular . . . election district." *Harris v. Ariz. Ind. Redistricting Comm'n*, 136 S. Ct. 1301, 1308 (2016) (quoting 76 Fed. Reg. 7471 (2011)). Instead, the district court excused the legislature's use of a 55% racial target in that district by looking at a single election cycle in 2005, in which current incumbent legislator Roslyn Tyler, an African-American, narrowly won. *Bethune-Hill*, 141 F. Supp. 3d at 558-59 & n. 36. But that was Tyler's first run for office in the district, a wide-open race as she sought to replace a white incumbent who had served as the district's representative for thirty-two years. Virginia State Board of Elections, Elections Database, House of Delegates, District 75, http://historical.elections.virginia.gov/elections/search/year_from:1970/year_to:2015/office_id:8/district_id:27377 (last visited Sep. 13, 2016). After Tyler won the 2005 election, she did not even draw a challenger in the two subsequent elections. The 2005 election results alone do not provide a "strong basis in evidence" for increasing or even maintaining the black voting age population in her district, and her subsequent runaway success as the candidate of choice of black voters in District 75 belies any need to "preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice." *ALBC*, 135 S. Ct. at 1274. Indeed, this Court has been clear that the results of one election alone are unlikely to satisfy the searching local inquiry into voting patterns required

under the Voting Rights Act. *Thornburg v. Gingles*, 478 U.S. 30, 57, 78-79 (1986). By failing to recognize and credit the repeated electoral success of black voters in District 75 electing their candidate of choice and instead "rel[ying] heavily upon a mechanically numerical view as to what counts as forbidden retrogression," the legislature committed the very narrow tailoring misstep this Court has repeatedly warned against. *ALBC*, 135 S. Ct. at 1273; *see also id.* at 1272 (explaining that Section 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage"); *Vera*, 517 U.S. at 983 (rejecting the argument that Section 5 could be used to justify maintenance or augmentation of BVAP percentage in a district challenged as a racially gerrymander where the state had shown no basis for concluding that the increase was necessary to ensure non-retrogression).

The failure to perform a meaningful functional analysis is not only legally erroneous, but it is harmful to communities of color. Those communities in Virginia and elsewhere will suffer if the decision below stands and is used as persuasive authority. The path to electoral success and equality is not always without its challenges. If every close election is viewed not as the great success it is, but rather as evidence justifying the further packing of black voters in as few districts as possible, then African Americans will face a longer struggle to build cross racial coalitions and achieve political equality in districts in which they are not a majority.

CONCLUSION

For the reasons articulated above, *Amici* respectfully request that the Court reverse the decision of the court below.

Respectfully submitted,

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