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

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION AND THE CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Amici respectfully restate the Questions Presented by the Appellants as follows.

This case involves a challenge to the redistricting plan for Virginia's House of Delegates. The three-judge court below upheld the plan, concluding that race did not predominate over other race-neutral districting principles. The Appellants contend, among other things, that the plan architects should have engaged in a more sophisticated analysis of electoral results that would have produced districts with only those African-American voters needed to produce a favorable election outcome. Their proposed solution would effectively trap those drafting redistricting plans between the "competing hazards of liability," *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 291 (1986) (O'Connor, J., concurring), of compliance with the Voting Rights Act and avoiding unconstitutional racial gerrymandering.

The Question Presented is:

Whether Section 2 of the Voting Rights Act should be applied in a way that requires close analysis of electoral results and corresponding sorting of voters even though such an application would entail far greater racial sorting than the alternative chosen by Virginia.

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INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for the rigorous enforcement of constitutional limitations on the activities of federal and state governments. Its work extends to cases involving redistricting and is reflected in SLF's filing of *amicus curiae* briefs in cases like *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), and *NW Austin Municipal Utility Dist. No. 1 v. Holder*, 557 U.S. 193 (2009).

The Center for Equal Opportunity (CEO) is a research and educational organization formed pursuant to Section 501(c)(3) of the Internal Revenue Code and devoted to issues of race and ethnicity. Its fundamental vision is straightforward: America has always been a multiethnic and multiracial nation, and it is becoming even more so. This makes it imperative that our national policies not divide our people according to skin color and national origin. Rather, these policies should emphasize and nurture the principles that unify us. *E pluribus unum* . . . out of many, one. CEO supports

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[1] All parties have consented to the filing of this brief by blanket consent or individual letter. See Sup. Ct. R. 37.3(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, its members, and its counsel has made monetary contribution to the preparation or submission of this brief. See Sup. Ct. R. 37.6.

color-blind public policies and seeks to block the expansion of racial preferences in all areas, including voting. It has participated as *amicus curiae* in past Voting Rights Act cases, including *Bartlett v. Strickland*, 556 U.S. 1 (2009), and *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006). In addition, officials from CEO testified before Congress several times in connection with the 2006 reauthorization of the Voting Rights Act.

Amici have a substantial interest in limiting or eliminating the use of race as a factor in redistricting, and contend that the Voting Rights Act cannot and should not be used in such a way that entails far greater racial sorting than the creation of majority-minority districts reasonably calculated to allow the minority community to elect the candidate of its choice.

SUMMARY OF ARGUMENT

In *Thornburg v. Gingles*, 478 U.S. 30 (1976), the Court established a test for determining when Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, would call for the creation of a majority-minority district. Subsequently, in *Bartlett v. Strickland*, 556 U.S. 1 (2009), the plurality concluded that Section 2 of the Voting Rights Act "does not mandate creating or preserving crossover districts." *Id*. at 23. Instead, Section 2 requires the creation of majority-minority districts when the *Gingles* conditions are met and allows for the creation of crossover districts. The plurality firmly grounded its

decision in the text of the statute, this Court's decisions, and the practical difficulties associated with the alternative. This case provides this Court with another opportunity to reaffirm the validity of the *Bartlett* plurality's reasoning.

From a practical perspective, this case presents an issue that follows from both *Gingles* and *Bartlett*: What is a majority-minority district in which the minority community has a reasonable opportunity to elect the candidate of its choice? The answer is one in which the minority is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. And, the end result according to Congress is a district in which the minority voters are able to "elect their preferred candidate of choice." 52 U.S.C. § 10304(d).

To mandate that those responsible for redistricting engage in a sophisticated analysis of racial voting patterns to ensure that no more minority voters than are absolutely needed to elect the minority community's preferred candidate are included in a district would require a significant degree of racial and political sorting. Courts are generally ill-equipped for that inquiry. More to the point, such racial sorting is, at best, hard to square with the Constitution. *Amici* urge this Court to not encourage further racial division in redistricting, which is all the Appellants offer it.

Moreover, Appellants would implicitly call for putting African-American voters into a district because of their race, and including white voters to balance things

out, again because of their race. The government should not consider race when it is drawing voting lines – the lines should be drawn where people live, not based on the color of their skin. With that said, *Amici* recognize that the Voting Rights Act and this Court's decisions appear to require that on some level, race be considered in the redistricting process. However, it is imperative to note that they also require that race not be considered too much or in the wrong way. The Appellants call for just that – the consideration of race to both an excessive extent and in the wrong way.

To the extent that the Voting Rights Act and this Court's precedents call for the consideration of race in redistricting, those calls should be interpreted narrowly and consistently with the Constitution. "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination . . . . This perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.). In the redistricting context, the harm stems from the fact that "[r]ace-based assignments 'embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts – their very worth as citizens – according to a criterion barred to the Government by history and the Constitution.'" *Miller v. Johnson*, 515 U.S. 900, 912 (1995) (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting)).

In answering the question of how governments should zig and zag in drawing voting districts, this Court's precedents support following a line that is simultaneously most consistent with the statutory text and the Constitution, and least race-conscious. And, likewise, the statutory text should be interpreted so that it avoids raising constitutional issues, that is, in a way that it avoids racial classifications and preferences which are presumptively unconstitutional. See, e.g., *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

On a more mundane level, race-based redistricting encourages racial essentialism, racial appeals, and identity politics generally. As it does, it discourages interracial coalition building and broader nonracial appeals. Accordingly, when redistricting officials are deciding when to zig and when to zag, that decision should not turn on the skin color of the person who lives in the house.

ARGUMENT

I. Introduction.

While congressional redistricting is tantamount to a zero-sum exercise, legislative redistricting has traditionally been done to a higher tolerance of population deviation among districts. See *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973) (allowing "minor deviations from mathematical equality" for state and local redistricting plans); see also *Brown v. Thomson*, 462 U.S.

835, 842 (1983) ("Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations."). That said, in the most recent round of legislative redistricting, a number of states, including Virginia, found a tighter tolerance appropriate. Even so, the presence of a tolerance of 2% or 5% means that population will have to be reallocated.

As a general matter, the reallocation of population will drag districts away from rural areas and toward urban and suburban areas. Further, *Amici* understand that all of the majority-minority districts in Virginia were underpopulated, some significantly. The plan's drafters had to try to preserve the majority-minority districts and repopulate them by drawing from overpopulated contiguous areas of the State.

II. The Voting Rights Act, its history, and this Court's precedents support the creation of majority-minority districts.

Congress enacted Section 2 of the Voting Rights Act to guarantee that a minority group is not denied, on account of race, color, or language minority status, the ability "to elect its candidate of choice on an equal basis with other voters[,]" *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993), and to prohibit voting qualifications, standards, practices and procedures that deny the right to vote. See 52 U.S.C. § 10301. Specifically, the statute bars voting qualifications, standards, practices

and procedures that "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of *race* . . . [,]" 52 U.S.C. § 10301(a) (emphasis added), and looks at whether a voting practice provides a minority with "less opportunity than other members of the electorate to . . . elect representatives of their choice." *Id*. at § 10301(b).

To be sure, the objective of Section 2 is not to ensure that a candidate supported by minority voters can be elected in a district. Nonetheless, when Congress spoke last, it sought to protect the ability of minority voters to "elect their preferred candidates of choice." See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5(d), 120 Stat. 577 (2006). And, the way to do that is by drawing majority-minority districts.

In *Gingles*, the Court considered a challenge to a multi-member districting plan that was said to dilute the votes of minority voters. It held that a single-member districting plan could be a remedy if three conditions were met. The first focused on the size of the minority community. The Court held that a group too small to be a district majority "cannot maintain that they would have been able to elect representatives of their choice." 478 U.S. at 50 n.17. In doing so, the *Gingles* Court concluded that the opportunity "to elect" protected by Section 2 is the ability of a protected class to elect a representative of its choice, by "dictat[ing] electoral outcomes *independently*." *Voinovich*, 507 U.S.

at 154 (emphasis added); see also *Gingles*, 478 U.S. at 67-68.

More specifically, the *Gingles* Court set forth the following test to determine when a vote dilution claim directed at a multi-member districting scheme may proceed – a minority group must (1) "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district[,]" (2) show that it is "politically cohesive," and (3) establish "that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." 478 U.S. at 50-51.

As noted, satisfaction of the *Gingles* test can, and has, resulted in the drawing of majority-minority districts. Notably, in the almost 40 years since *Gingles*, the majority-minority districts that could be drawn have been drawn. But, as this Court has explained, the statutory text and the Constitution demand that parties challenging a redistricting plan "show . . . that race was the *predominant* factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916 (emphasis added).

While Section 2, as interpreted by the *Gingles* Court allows for vote dilution claims under particular circumstances, the *Bartlett* plurality held that Section 2 of the Voting Rights Act does not require the creation of "crossover districts" – a district where the minority voting population "make[s] up less than a majority of the voting-age population . . . [but] is large enough to

elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Bartlett*, 556 U.S. at 13. Noting that it relied on the statutory language, this Court's precedents, and prudential considerations, the plurality "decline[d] to depart from the uniform interpretation of § 2 that has guided federal courts and state and local officials for more than 20 years." *Id*. at 19.

In particular, Congress has not wavered in its preference for majority-minority districts. This can be seen in two ways. First, when Congress amended the Voting Rights Act in 2006, one of the changes that it made was to reject this Court's reasoning in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). There, the Court held that Georgia's drawing of several crossover districts in its legislative plans did not mean that those plans resulted in retrogression in violation of Section 5. It explained that a state could comply with Section 5 by choosing to draw majority-minority districts or by "creat[ing] a greater number of districts in which it is likely – although perhaps not quite as likely as under the benchmark plan – that minority voters will be able to elect candidates of their choice" *Id*. at 480. But, Congress thought that the decision "significantly weakened" the Voting Rights Act's "effectiveness" because it "misconstrued Congress' original intent . . . and narrowed the protections afforded by Section 5 of such Act." See Fannie Marie Hamer, Rose Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, *supra* at § 2(b)(6).

Subsequently, in her *Bartlett* dissent, Justice Ginsburg encouraged Congress to change the statute to, arguably, require crossover districts. 556 U.S. at 44 (Ginsburg, J., dissenting) ("Today's decision returns the ball to Congress' court. The Legislature has just cause to clarify beyond debate the appropriate reading of § 2."). Congress has not acted on Justice Ginsburg's suggestion. In the absence of congressional action, this Court should proceed cautiously so as not to exceed the scope of the Voting Rights Act.

This rings especially true where neither the statutory text nor the legislative history supports the concept of crossover districts. As the Sixth Circuit Court of Appeals has pointed out, the Voting Rights Act speaks of "citizens" not "classes" of them; a violation is established when political processes are not equally open to the "members" of a protected class; and, one consideration is the extent to which the "members of a protected class" have been elected to office. *Nixon v. Kent Cty.*, 76 F.3d 1381, 1386-87 (6th Cir. 1996); see also 52 U.S.C. § 10301(b). The Sixth Circuit also noted that the only time the "aggregation of separately protected groups" is addressed in the Voting Rights Act, such aggregation is excluded for language minorities seeking to meet the numerical thresholds for foreign-language ballots. See *Nixon*, 76 F.3d at 1387 n.7. The committee reports for the 1975 amendments make no reference to an "aggregation" or coalition of voters, the "voluminous" legislative history for the 1982 amendments "contains no reference to a 'coalition' suit," and there is nothing to that effect since. See S. Rep. No. 295,

94th Cong., 1st Sess. (1975), reprinted in 1975 U.S.C.C.A.N. 774; S. Rep. No. 417, 97th Cong., 2d Sess. 28 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 205; Katharine I. Butler & Richard Murray, *Minority Vote Dilution Suits and the Problem of Two Minority Groups: Can a "Rainbow Coalition" Claim the Protection of the Voting Rights Act?*, 21 Pac. L.J. 619, 642 (1990) ("no reference" in "voluminous" 1982 legislative history); Rick G. Strange, *Application of Voting Rights Act to Communities Containing Two or More Minority Groups – When is the Whole Greater Than the Sum of the Parts?*, 20 Tex. Tech L. Rev. 95, 111-12 n.99 (1989) ("no answer" concerning coalition suits).

While the Voting Rights Act and this Court's decisions appear to require that race be considered in the redistricting process, in addition to those limits discussed herein, that consideration is constitutionally limited: Race may not be considered too much or in the wrong way. This case presents yet another iteration of the question where the line should be drawn. This case also presents an opportunity for this Court to answer that question by following the line that is simultaneously most consistent with the statutory text, least race-conscious, and avoids unconstitutional racial classifications and preferences. See generally, e.g., *Catholic Bishop of Chicago*, 440 U.S. 490.

III. Virginia created majority-minority districts that are reasonably likely to give minority voters an opportunity to elect the candidate of their choice.

The Appellants complain that the plan drafters created majority-minority districts that have an African-American voting-age population (BVAP) of 55% instead of a majority-minority district with a BVAP of, perhaps, 52 or 53%. They not only overlook the fact that a district with a BVAP of 55% is one that likely contains a working majority, they fail to explain where those shed BVAP voters will go.

Voting-age population (VAP) does not measure registration or participation rates. Some residents of voting age, like felons who have been disenfranchised, cannot register to vote, but they are included in the VAP. Others who can register to vote choose not to, but they too are included in the VAP. Finally, many of those who are registered to vote choose not to vote for a variety of reasons. The effect of these factors means that a BVAP of 55% is, in fact, less secure than it sounds.

Moreover, voter turnout is affected by factors other than BVAP. The quality of candidates, the state of political parties, and the strength of incumbents can all affect the willingness of voters to participate in an election. As it is, in the 2012 presidential election, some 67% of the nation's registered voters cast a ballot, and the turnout rate of African-American voters exceeded that of white voters. See William H. Frey, *Minority*

Turnout Determined the 2012 Election, Brookings Institution (May 10, 2013), https://www.brookings.edu/research/minority-turnout-determined-the-2012-election (citing, "the historically noteworthy finding that black turnout rates in 2012 exceeded that of whites for the first time"). The challenge for the Appellants is to justify the assumption that the same result will hold in future Virginia elections, which typically take place in off-presidential years.

IV. In evaluating redistricting claims and proposed remedies, courts should favor plans that are less reliant on racial balancing over those that require more of it.

In *Bartlett*, the plurality observed that interpreting Section 2 to require the creation of crossover districts would give rise to "serious constitutional concerns under the Equal Protection Clause." 556 U.S. at 21. The *Bartlett* holding that a majority of minority voters is required before Section 2 will require action effectively cabins the consideration of race in the redistricting process. So does assigning the burden of showing that race predominated over other race-neutral redistricting criteria to the plaintiff. This Court should reject the Appellants' invitation to "'unnecessarily infuse race into virtually every redistricting. . . .'" *Id*. (quoting *LULAC*, 548 U.S. at 446 (opinion of Kennedy, J.)).

A. Requiring a minority group to show that it can be a majority in a single-member district is minimally race-conscious.

In *Gingles*, this Court established a common-sense, minimally race-conscious test for drawing majority-minority districts. In particular, under that test, a reviewing court looks at whether a minority group can "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. at 50. As the plurality explained in *Bartlett*, requiring the minority group to show that it can be a majority in a single-member district is firmly grounded in the statutory language and by prudential considerations. 556 U.S. at 11.

In pertinent part, Section 2 of the Voting Rights Act focuses on voting qualifications, standards, practices, and procedures that give minorities "less opportunity than other members of the electorate to . . . elect representatives of their choice." 52 U.S.C. § 10301(b). Section 2 is not offended by voting practices that give minorities the same opportunity to participate as others. As the plurality explained in *Bartlett*, the African-American voters in North Carolina's District 18, who were only 39% of the voting-age population, had the same opportunity as any other group of voters constituting 39% of the whole. 556 U.S. at 9-10. In the same way, "Section 2 does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting [white] crossover voters." *Id*. at 15.

Moreover, a straightforward *Gingles* analysis is far easier for plan drafters and courts to apply. See *id*. at 17 ("The rule draws clear lines for courts and legislatures alike."). As the *Bartlett* plurality explained, "[d]etermining whether a § 2 claim would lie – i.e., determining whether potential districts could function as crossover districts – would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions." *Id*. More particularly, courts and legislators would have to answer questions like:

> What percentage of white voters supported minority-preferred candidates in the past? How reliable would the crossover votes be in future elections? What types of candidates have white and minority voters supported together in the past and will those trends continue? Were past crossover votes based on incumbency and did that depend on race? What are the historical turnout rates among white and minority voters and will they stay the same?

Id. To answer those questions, legislatures and courts would have to make predictive judgments based on political and racial data that may not be complete.[2]

The goal of the inquiry the Appellants seek would be to put no more minority voters in a district than needed to allow them to elect the candidate of their

[2] Redistricting commissions would face the same difficulties, and there is no reason to believe a commission would do any better than legislators or courts.

choice. The answer would differ for each district turning on, among other things, the degree of white crossover voting. And the solution for one district might not be the solution for another.

B. The first *Gingles* criterion aids in grounding representative districts where people live.

In addition to its being well grounded statutorily and prudentially, applying the first *Gingles* criterion has the benefit of drawing districts where people live. Put simply, if a geographically compact minority community is large enough to be a majority in a single-member district, a district should be drawn around it. And, it should make no difference whether that minority community is more than 50% African-American or some higher percentage. If the district is drawn where people live, that should suffice for the Voting Rights Act.

That may be easier to do in urban areas than in rural because population is more concentrated there. As a result, urban districts are generally more compact than rural ones. Whether urban or rural, though, drawing districts where people live implicitly recognizes communities of interest. In *Miller*, this Court included "respect for political subdivisions or communities defined by actual shared interests" in the list of traditional race-neutral redistricting considerations that should guide the process. 515 U.S. at 916. One would think that people who live in a

neighborhood, community, or region share some underlying interests even if they disagree politically.

C. The burden to show that race predominated over other traditional redistricting factors minimizes the intrusiveness of race in the process.

As noted above, the burden to show that race predominated over traditional redistricting principles rests on the plaintiff. Softening that burden in any way allows for additional federal litigation over redistricting that facilitates "a serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915. The views the United States set forth in its *amicus* brief offer only an invitation to soften the burden on redistricting plaintiffs and shift it to redistricting defendants. That invitation will further judicial intrusion into reapportionment, which is "primarily the duty and responsibility of the State." *Id*. (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)).

The United States starts well, but its suggestion of vacatur and remand is not well-grounded. As the United States notes, the Appellants "err insofar as they suggest that the predominance standard is satisfied merely by evidence that a racial target was used in drawing the districts, without a showing that the target predominantly drove those lines." Br. for the United States as *Amicus Curiae* Supporting Vacatur in Part and Affirmance in Part, No. 15-680, at 12 (citing Br. of Appellants at 20-21). But, vacatur and remand are not

warranted. In the first place, the three-judge court rendered its decision after a four-day bench trial that included the consideration of oral testimony and documentary exhibits. In addition the three-judge court took advantage of its opportunity to hear testimony to make credibility determinations that are entitled to respect on appeal. Vacatur and remand will simply grind the dust finer.

In addition, the complaints of the United States about the district court's reasoning are an exercise in nit-picking. It criticizes the district court for looking for an "*actual* conflict between traditional redistricting criteria and race." Br. for the United States at 16 (quoting J.S. App. at 30a). But, absent an actual conflict, the likelihood that race would predominate over those other criteria is slim to none. See *id*. at 18 (The claimed error "may have limited significance."). In addition, it shifts the burden to the State to show that it did not rely on racial data in an arena where race and politics are closely aligned. *Id*. at 19. That suggestion fails to accord the State the presumption of good faith to which it is entitled. Finally, when the United States asks the district court to look at every population shift that accompanied the reapportionment, it only adds to the intrusiveness that will give hope to future litigants who desire a BVAP of 51.7% instead of 52%.

The proper approach is that outlined in *Miller*:

> The distinction between being aware of racial considerations and being motivated by them

> may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise *extraordinary caution* in adjudicating claims that a state has drawn district lines on the basis of race.

515 U.S. at 916 (emphasis added). Neither the Appellants nor the United States offer the requisite degree of caution. Their proposed racially-motivated intrusion into a core state function should be rejected.

D. To implement relief in this and future cases like it will require an unconstitutional degree of racial microbalancing.

The alternative offered by the Appellants offers none of the advantages of limited race-consciousness and statutory consistency. To give Appellants the districts they want would require plan drafters to engage in precise racial and political calculations. Those calculations threaten to treat white voters as pawns for racial balancing. Drawing such districts is hard enough for legislators to do; the task should not be undertaken by courts.

Amici note that "[n]othing in § 2 grants special protection to a minority group's right to form political coalitions." *Bartlett*, 556 U.S. at 15. Rather, minority voters are entitled only to equal treatment, and they "are not immune from the obligation to pull, haul and

trade to find common political ground." *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994).

To the extent that the Appellants wish to maintain the same number of majority-minority districts that the General Assembly created, albeit with lower BVAP in each of them, they implicitly seek the creation of crossover, influence, or coalition districts. But, Section 2 "does not mandate creating or preserving crossover districts." *Bartlett*, 556 U.S. at 23 (plurality op.). Likewise, Section 2 does not require the creation of influence districts. *Id*. at 13 (citing *LULAC*, 548 U.S. at 445 (opinion of Kennedy, J.)). Accordingly, the Appellants' claim lacks any statutory support.

Moreover, to engage in the sophisticated analysis of voting results that the Appellants desire would require precise racial and political balancing. The district would have to remain both a majority-minority district and a performing Democratic district. Otherwise, the district would not "perform" as hoped. *Cf. Bartlett*, 556 U.S. at 16 (noting how the creation of crossover districts is in "serious tension" with the third *Gingles* criterion).

Leaving aside the political calculations, the racial ones would require adding African-Americans and approximately the same number of white people to maintain the total population balance. That number might have to be adjusted upward or downward to compensate for any racial difference in voting-age population. Finally, one would have to look at the political results

in the voting tabulation districts to make sure that Republican voters do not swamp the Democrats.

In this calculation, all that matters is the percentage of African-Americans in the district. The white voters put into the district are put there because of their race in order to balance out the political demographics. That is just as pernicious as putting African-Americans into a district because of their race. And, the largely zero-sum nature of legislative redistricting makes this practice all the more likely.

Finally, the calculations are time-bound because the distribution of voters and voting behavior changes with time. *Amici* note that all of the majority-minority districts in Virginia were underpopulated, some seriously, coming into the cycle. Each census shows how, within each state and most localities, the distribution of population has changed. At the very least, that population will need to be reallocated among the districts. Furthermore, voting turnout and behavior changes with the identity of candidates, the issues, and the fortunes of the parties.

Put simply, it is far more difficult, and requires far more racial tuning, to engage in a district-by-district analysis of racial voting patterns so that only the right number of African-American voters is placed in the district than it is to create a majority-minority district. Thus far, and in Virginia, *Amici* have presumed that only one large minority group is involved. If there is more than one such minority group, to say nothing of the nonminority group, gerrymandering will have to be

considered for all of them. That complicates the work of plan drafters and reviewing courts and drives it in a completely incoherent way.

E. Appellants' proposed solution promises nationwide chaos in redistricting.

In addition to entailing far more racial sorting, the Appellants' view promises nationwide chaos in redistricting. As the plurality noted in *Bartlett*, the nationwide scope of Section 2 "[h]eighten[ed its] concerns" with the judicial manageability of the standard. 556 U.S. at 18. In every district in the country that contains a minority population, those charged with drawing representative districts in states, counties, municipalities, and boards of education will not be able to look just for minority communities that might constitute a majority in a single-member district. They will have to look at each minority community and consider whether there are enough majority Democrats to put together with them in the hope that a majority will be produced.[3]

In any event, mandating that majority-minority districts contain no more minority voters than necessary is likely to result in far more Section 2 litigation. A redistricting official who does not put the right

[3] *Amici* note that, in the past, the received wisdom was that putting a significant number of minority voters, but not enough to gather the right number of crossover voters, in a district would be enough to win the Democratic primary and lose in the general election.

number of minority voters in a district or move the unneeded minority voters to the right district the minority community wants will be sued. And, the minority community is not always unified in this regard; those who disagree with the redistricting official's decisions will file suit, and those who agree will remain silent. In those lawsuits, courts will have to listen to experts tell them precisely how many minority voters are needed in the district to elect a Democrat.

In every one of these jurisdictions, courts will have to decide who is the kingmaker. They will get claims to kingmaker status from both minority groups and the majority. For a court to decide between them would entail the protection of one racial group instead of the other. That is hardly consistent with "the equal protection of the laws" to which the Constitution entitles each of us. U.S. Const. amend. XIV.

V. Appellants improperly seek to use the Voting Rights Act for political purposes.

The Appellants seek to put the Voting Rights Act to use in serving the institutional interests of the Democratic Party. This Court should not "transform the Voting Rights Act from a law that removes disadvantages based on race, into one that creates advantages for political coalitions that are not so defined." *Hall v. Virginia*, 385 F.3d 421, 431 (4th Cir. 2004).

That is not just upside down, it is inconsistent with the statute and this Court's decisions. In pertinent part, a violation of Section 2 is established if the

minority has "less opportunity" to participate in the political process. 52 U.S.C. § 10301(b). "Granting minorities a right to rearrange districts so that their political coalition will usually win has nothing to do with equal opportunity, but is preferential treatment afforded to no others." Michael A. Carvin & Louis K. Fisher, "*A Legislative Task*": *Why Four Types of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts*, 4 Election L.J. 2, 17 (2005) (citing *De Grandy*, 512 U.S. at 1020).

Nothing in the statute requires one race to have a greater opportunity than others.[4] "Nothing in § 2 grants special protection to a minority group's right to form political coalitions." *Bartlett*, 556 U.S. at 15. In *Bartlett*, the plurality observed that the minority voters who made up 39% of the district's voting-age population had the same ability to control the outcome of an election as any other group of voters "with the same relative voting strength." *Id*. at 14.

Significantly, the Appellants seek to further their own interests to the exclusion of the legislative majority. This is particularly true in the House of Delegates, where its plan received overwhelming support from both parties. In any event, a political minority loses its

[4] *Amici* recognize that "[s]tates that wish to draw crossover districts are free to do so where no other prohibition exists." *Bartlett*, 556 U.S. at 24. They note, however, that the creation of a less than majority-minority crossover, coalition, or influence district is a core political decision designed to maximize Democratic electoral prospects. It makes no sense whatsoever to require Republicans to do the political work of Democrats.

majority status as the result of an election. This Court should not reward political failure. *Cf. Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971) (finding no vote dilution claim when a minority group "along with all other Democrats, suffers the disaster of losing too many elections").

Separate and apart from that, the Voting Rights Act was meant to address race, not political party affiliation. President Lyndon Johnson focused on ending practical barriers to minority voting, which he identified and divided into three categories: (1) technical (e.g., poll taxes), (2) noncooperation, and (3) subjective (e.g., literacy tests). See Message from the President of the United States Related to the Right to Vote, 89th Cong., 1st Sess. (1965). When he spoke to a special joint-session of Congress, President Johnson observed, "[W]e met here tonight as Americans – *not as Democrats or Republicans* – we are met here as Americans to solve that problem" of assuring equal rights for African-Americans. *Id*. (emphasis added).

This Court should heed President Johnson's exhortation and refrain from doing political work for one party or the other. The political parties do not, or should not, need this Court's help.

CONCLUSION

For the reasons stated by the Appellees and this *amicus* brief, this Court should affirm the decision of

the United States District Court for the Eastern District of Virginia.

Respectfully submitted,

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