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 FOR APPELLEES

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QUESTION PRESENTED

In 2011, the Virginia General Assembly was confronted with the complex task of drawing a new map for its 100 House of Delegates districts to restore population equality after the decennial census. That task was further complicated by Virginia's status as a covered jurisdiction under the Voting Rights Act and its consequent need for preclearance. There was broad consensus that the new map needed to maintain the 12 pre-existing majority-minority districts with a black voting-age population (BVAP) of at least 55% to comply with the Voting Rights Act. That goal was supported by traditional redistricting principles, as the vast majority of the districts already had a BVAP near 55% (most higher, a few lower). The legislature did not seek to give every district a uniform BVAP; the ultimate BVAPs of the districts ranged from 55.2% to 60.7%. Nor did the legislature deviate from traditional districting principles to achieve its goal. To the contrary, the challenged districts retained, on average, more than 72% of their cores—a level above the statewide average. And the few seeming abnormalities in the districts' lines are readily explained by traditional criteria such as incumbency protection, increasing compactness and contiguity, or political considerations.

The question presented is:

Does the bare fact that the General Assembly sought to comply with the Voting Rights Act by targeting a BVAP of at least 55% when redrawing each of the 12 pre-existing majority-minority House of Delegates districts to restore population equality trigger strict scrutiny or violate the Equal Protection Clause?

PARTIES TO THE PROCEEDING

The following were parties in the court below:

Plaintiffs:

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

Defendants:

Virginia State Board of Elections, James B. Alcorn, Virginia Department of Elections, Edgardo Cortes, Clara Belle Wheeler, Singleton B. McAllister

Intervenor Defendants:

Virginia House of Delegates, William J. Howell

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INTRODUCTION

In early 2011, the Virginia General Assembly produced a districting plan for its House of Delegates districts that garnered overwhelming bipartisan support including from all but two members of the House Black Caucus. That was no small feat, given the political tension inherent in redistricting and the fact that Virginia was a covered jurisdiction under the Voting Rights Act (VRA). Thus, in addition to avoiding potential Section 2 claims, the legislature needed to prove that its plan avoided retrogression under Section 5 to obtain preclearance from the U.S. Department of Justice. The legislature needed to do that, moreover, in time for the 2011 off-year elections. The bipartisan-supported plan that the legislature produced preserved each of the State's 12 pre-existing majority-minority House districts, with black voting-age populations (BVAPs) ranging from 55.2% to 60.7%. For some districts, that was an increase, for others, it was a decrease, and for all, the legislature was able to achieve a BVAP of at least 55% without compromising traditional districting principles. And for nearly four years and multiple state elections, the 2011 bipartisan-supported plan stood unchallenged.

Now, Appellants belatedly seek to cast that plan aside as an unconstitutional racial gerrymander, solely because the legislature sought to achieve a BVAP of at least 55% in adjusting the lines of the 12 majority-minority districts. The district court correctly rejected that claim. This Court has never treated the bare use of a BVAP target as sufficient to trigger strict scrutiny of districting legislation—let alone to invalidate it—and there is no reason to start

now. This is not a case in which the legislature insisted on creating new majority-minority districts at all costs; nor did it insist on achieving a precise racial target without regard to whether traditional districting criteria supported that endeavor. Instead, the principal architect of the 2011 plan undertook a comprehensive functional analysis to determine the percentage below which the BVAP could not fall without risking retrogression in districts that everyone agreed must be maintained as majority-minority districts to ensure compliance with the VRA. And the legislature arrived at the eminently reasonable number of 55%—a threshold that was achievable without disregarding race-neutral districting criteria and that all parties agree was within a couple percentage points of the ideal.

As all of that underscores, in light of States' need to comply with multiple competing legal obligations, such targets can be entirely consistent with—and even supported by—a sound application of traditional districting principles. And when they are, the harms a racial gerrymandering claim seeks to remedy—the expressive and representational harms that result from grouping voters together solely on the basis of race—simply do not exist. Accordingly, the mere use of a BVAP target, standing alone, is insufficient to trigger strict scrutiny under, let alone violate, the Equal Protection Clause.

Indeed, for all their criticism of racial targets, Appellants do not dispute that States can *and sometimes should* employ such targets when drawing districts. Their quarrel is merely with the particular target the legislature selected. In other words, what

Appellants really seek is what this Court has repeatedly deemed inappropriate when it comes to the core sovereign function of drawing districts: to force the courts to second-guess every districting decision a State makes. This Court should reject Appellants' invitation to create such an unworkable and constitutionally suspect regime and affirm the district court's conclusion that Virginia's 2011 House of Delegates plan was the product of sound districting principles, not impermissible racial gerrymandering.

STATEMENT OF THE CASE

A. Legal Background

"[T]he Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). In light of the Nation's growing and shifting population, the one-person, one-vote guarantee of the Equal Protection Clause commands States to redraw their legislative districts after each decennial census to ensure continued population equality. This task is both divisive and demanding given the sheer number of state legislative districts. Virginia, for instance, has 40 state Senate and 100 House of Delegates districts. Because of the complexity and inherently political nature of the task, and because "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions," *Miller v. Johnson*, 515 U.S. 900, 915 (1995), "substantial deference is to be accorded" to a state legislature in drawing its districts, *Brown v. Thomson*, 462 U.S. 835, 847-48 (1983).

The difficulty of this every-decade task is compounded by the States' need to comply with the VRA as well as the Equal Protection Clause. The VRA demands that States take race into account in redrawing legislative districts to avoid violations and to obtain preclearance where necessary. For example, Section 2 may require a State to create and maintain a majority-minority district if a minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district" and is "politically cohesive," and the majority group votes "as a bloc." *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). And under Section 5, a covered jurisdiction (which Virginia was when the districts at issue were drawn[1]) must prove that its new district lines do not cause "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976).

But while States sometimes must use race in crafting districts to comply with the VRA, they must simultaneously comply with the Equal Protection Clause's prohibition on racial gerrymandering. In *Shaw v. Reno* (*Shaw I*), 509 U.S. 630 (1993), this Court recognized a racial gerrymandering cause of action under the Fourteenth Amendment, holding that the plaintiffs stated a claim by alleging that they were placed into a district solely because of their race. *Id.* at 658. The Court explained that sorting voters on the basis of race and race alone perpetuates demeaning

[1] In *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013), this Court held that the coverage formula in Section 4(b) of the VRA could no longer be used to require preclearance under Section 5.

stereotypes and deprives voters of representation based on their actual shared interests. *Id.* at 648. At the same time, however, the Court made clear that mere "race consciousness does not lead inevitably to impermissible race discrimination," or necessarily trigger strict scrutiny of districting legislation. *Id.* at 646. Instead, strict scrutiny applies only if the plaintiff proves that race was "the 'dominant and controlling' or 'predominant' consideration in deciding 'to place a significant number of voters within or without a particular district.'" *Ala. Legislative Black Caucus v. Alabama* (*ALBC*), 135 S. Ct. 1257, 1264 (2015).

Accordingly, the safest course for a State seeking to navigate the competing demands of the Equal Protection Clause and the VRA is to draw all of its districts to comply with traditional redistricting principles. States traditionally have adhered to several principles when redistricting, including "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, incumbency protection, and political affiliation." *Id.* at 1270 (citation omitted). By grouping together individuals with similar interests and concerns, "[t]hese conventions neutrally advance the values inherent in a geographic … system of representation, such as responsiveness, accountability, familiarity, ease of access, ease of administration, and political engagement." JS.App.51. While compliance with traditional districting principles is not constitutionally compelled, *Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973), compliance with such principles while undertaking the decennially required task of redistricting has

historically enabled States to satisfy the dual commands of the VRA and the Constitution.

B. Factual Background

1. The 2011 Redistricting Process

After the 2010 census, the General Assembly set out to redraw the legislative districts for the Virginia House of Delegates and Senate. JS.App.3. Because Virginia holds odd-year elections, the legislature began its 2011 redistricting efforts in 2010, holding public hearings throughout the Commonwealth to solicit input. JA1812. The redistricting process then began in earnest when Virginia received updated census data in February 2011. JS.App.16.

The bipartisan House Committee on Privileges and Elections ratified the criteria it would follow in approving a new plan. JA36-38. The Committee adopted an equal-population range of plus or minus 1% from absolute equality, and it declared that districts would be "drawn in accordance with the laws of the United States," including "the Voting Rights Act." JA36. Districts also would be compact and contiguous, single-member, and based on "the varied factors that can create or contribute to communities of interest." JA37. Those factors include "economic factors, social factors, cultural factors, geographic factors, governmental jurisdictions and service delivery areas, political beliefs, voting trends, and incumbency considerations," as well as "[l]ocal government jurisdiction and precinct lines." JA37. Deviations from these criteria would be permitted only to the extent necessary to avoid "violation of applicable federal or state law." JA38.

The House Speaker selected Delegate Chris Jones, a Republican from the Hampton Roads area, to lead the 2011 redistricting efforts for the House. JS.App.3. Delegate Jones had been deeply involved in the 2001 redistricting process, initially serving as the primary drafter of districts in Hampton Roads and later taking on the role of "principal crafter" of the entire plan. JA1804, 1812. The 2001 process had been a contentious one, as the 12 majority-minority districts in that plan, which had existed in substantially the same form since 1991, were promptly challenged in state court as the product of unconstitutional racial gerrymandering. The state trial court sided with the plaintiffs, *West v. Gilmore*, 2002 Va. Cir. LEXIS 37 (Va. Cir. Ct. 2002), but the Virginia Supreme Court reversed, concluding that race did not predominate over traditional districting principles in drawing any of the challenged districts, *Wilkins v. West*, 571 S.E.2d 100, 118 (Va. 2002).

Delegate Jones drew upon his 2001 experience as the 2011 process unfolded. JS.App.3. Cognizant that the *Wilkins* plaintiffs had criticized the legislature for not seeking enough public input, he arranged for public hearings in multiple regions. JA1812. The House also organized eight joint public hearings with the Senate, during which the legislature "received a bevy of testimony from all walks of life; local-elected officials, registrars, community leaders, … [and] private citizens." JA278, 594. And to facilitate ongoing communication with the public, Delegate Jones created "a public portal where people could actually see … the census information on the benchmark plan so they could make comments to us

on the communities of interest and the other items that were of importance to them." JA1815-16.

In an abundance of caution, Delegate Jones also revised features of the benchmark map that the state trial court had criticized. For instance, the court had faulted HD64 and HD74 for including precincts separated from the rest of the district by the James River. *West*, 2002 Va. Cir. LEXIS at *36, *77. Accordingly, "one of [Delegate Jones'] personal goals when [he] started the process of constructing the map in 2011 was to unwind th[ose] two river crossings." JA1849.

Delegate Jones also understood the importance of gathering information about local communities of interest from each district's incumbent delegate. To that end, he personally met with the vast majority of incumbents—"[b]etween 75 and 80 of the members," JA1905—on both sides of the aisle.

2. Voting Rights Act Compliance

Because the VRA required Virginia to avoid dilution of minority voting strength and ensure that minority voters would not experience a retrogression in their ability to elect their preferred candidates of choice, 52 U.S.C. §§10301, 10304(b), Delegate Jones also worked closely with members of the House Black Caucus. He met extensively with Delegates Spruill, Dance, Tyler, McClellan, and others to discuss whether the 2011 plan should include the same 12 majority-minority districts as the benchmark plan, and if so, what BVAP was necessary to prevent retrogression.

During those discussions, the delegates expressed several concerns about the ability of black voters to

elect their preferred candidates. For instance, they informed Delegate Jones of "lower registration" rates and "lower voter turnout" among black voters. JA1975; *see* JA218, 280. Some also worried that a trending decline in BVAP in some districts was likely to continue. JA1643, 1828-29. Others told Delegate Jones that their past crossover support was a function of their incumbency, not an absence of racially polarized voting, and thus asked him to ensure that black voters would remain "able to elect the candidate of their choice" when the incumbents "were not still around." JA1999-2000.

While Delegate Jones gathered as much information as he could to determine what BVAP would avoid retrogression in the majority-minority districts, the most reliable data for determining that number with precision simply do not exist. In highly Democratic districts like the 12 majority-minority districts, contested primaries provide the best data for determining whether minority voters can elect their preferred candidates. But there are too few contested primaries in House of Delegates elections "to do a meaningful analysis" of such data. JA2230-31. Moreover, Virginia's odd-year elections have different voting patterns from even-year elections, rendering data from presidential or congressional elections of minimal value. JA2020-21. Voter registration records in Virginia also do not reference race, making it impossible to pinpoint race-based differences in voter registration. JA2201.

In the end, Delegate Jones and the delegates he consulted decided to preserve the same 12 majority-minority districts in substantially the same forms and

representing substantially the same communities as in the benchmark plan. Unable to determine precisely what BVAP would satisfy the VRA for each district but confident from the information he had gathered that "it needed to be north of 50 percent," JA1829, Delegate Jones decided to proceed with an "aspirational threshold" or "rule of thumb" of achieving a BVAP of at least 55% in each district, JA1999-2000. Achieving that goal would not require any drastic measures or violation of traditional redistricting principles; nine of the 12 districts already had BVAPs above 55%, JS.App.19, and the other three were close behind at 54.4%, 52.5%, and 46.3%, JA1170.[2]

3. Creating and Enacting the 2011 Plan

Delegate Jones then began the process of adjusting the lines for the 100 House districts. Most adjustments were made at the margins: On average, each district retained almost 70% of its core, and that number was even higher in the 12 challenged districts. JA1148. Of the changes that occurred, many were prompted by one-person, one-vote requirements, as population shifts over the preceding decade had left most of southern Virginia underpopulated relative to northern Virginia. JA1325. The population imbalances were so severe that three districts from southern Virginia had to be transported to northern Virginia, causing a "ripple effect" in the south. JA1862-63. Delegate Jones also made several adjustments to satisfy requests from delegates and

[2] The BVAP figures in this brief include individuals who identified themselves as ethnically Hispanic but racially black. JS.App.20-23; *cf. Georgia v. Ashcroft*, 539 U.S. 461, 474 n.1 (2003).

voters. For instance, he adjusted "the boundary line between House [D]istrict 29 and House [D]istrict 10" in response to a request received through the online public portal, JA281-82, and he adjusted the boundaries of HD63 to accommodate the request of Delegate Dance, a Democrat, to remove a potential primary opponent from her district, JS.App.94.

In the final plan, the BVAPs of the 12 majority-minority districts ranged from 55.2% to 60.7%. JA669. Six of the districts had higher BVAPs than in the benchmark plan, and six had lower BVAPs. JA669. The average BVAP of the 12 districts was just 0.1% higher than the average BVAP in the benchmark plan. JA669. And the districts did not reflect any radical changes or "violat[e] any of the state's adopted criteria." JA1842, 1843, 1851, 1859, 1868, 1872, 1876, 1881, 1885, 1898.

Only two competing plans were proposed during the legislative process: HB 5002 and HB 5003, both of which were designed by college students as part of a contest held by the Governor's Independent Bipartisan Advisory Redistricting Commission. JS.App.16, 26; JA1901-02. HB 5002 paired more than 40 incumbents, contained only six majority-minority districts, and had a population deviation of more than 9%. JS.App.26. HB 5003 paired more than 30 incumbents, contained only nine or ten majority-minority districts, and also did not meet the population deviation criteria. *Id.* Because both plans were incompatible with state and federal law requirements, the House did not seriously consider either. JA1902-04.

Delegate Jones' plan was brought to the House floor as HB 5001. JS.App.26. Both Democratic and Republican delegates advocated for its adoption in glowing terms. Delegate Dance, for example, commended the plan as "truly an example … of bipartisanship" and complimented Delegate Jones for being "willing to listen to anything and everything." JA216-17. The plan garnered unanimous support from Republican delegates, supermajority support from Democratic delegates, and supermajority support from the Black Caucus. JA1175. One of the only two dissenters from the Black Caucus was Delegate Tyler, who thought her district's 55.4% BVAP was *too low*. JA481-82.

Governor McDonnell vetoed HB 5001 because of concerns about the contemporaneously passed Senate districting plan. JA1050-53. While he "applaud[ed] the House for its bipartisan approach," he criticized the Senate for passing its plan on party lines. JA1050. After minor revisions to the House plan and substantial revisions to the Senate plan, the General Assembly passed HB 5005, which was signed by the Governor and enacted on April 29, 2011. JS.App.26. To comply with the VRA, Virginia submitted the plan to the U.S. Department of Justice (DOJ), which granted preclearance on June 17, 2011. JS.App.26-27. The first general election under the 2011 plan was held on November 8, 2011, and several more primary and general elections have been held since then. JS.App.27.[3]

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[3] A map of each challenged district is available at JA1557-63. On each map, the crosshatched portion represents the

4. District Court Proceedings

Almost four years after the 2011 plan was enacted, and after two complete election cycles under the plan, Appellants filed suit in the Eastern District of Virginia alleging that all 12 majority-minority House districts were unconstitutional racial gerrymanders. JS.App.4.[4] The court granted their request for a three-judge district court. JS.App.4-5; *see* 28 U.S.C. §2284(a).

At trial, Appellants' evidence focused almost exclusively on whether the legislature used a 55% BVAP target when drawing the 12 majority-minority districts. JS.App.19. Their first three witnesses were Delegate McClellan, former Delegate (now Senator) Dance, and former Delegate Armstrong, all of whom testified that Delegate Jones employed a 55% rule. But notwithstanding some semantic spats over whether that figure was a "rule," an "aspiration," or a "target," Appellees never disputed that Delegate Jones targeted a threshold BVAP of approximately 55% in drawing the 12 majority-minority districts. JS.App.19. As the district court put it, "all the parties

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benchmark version of the district; the yellow portion represents the 2011 version; and the areas that are both crosshatched and yellow are common to both versions. Larger versions of those maps are available at Defendant-Intervenors' Trial Exhibit 94.

[4] Appellants named as defendants the Virginia State Board of Elections, the Virginia Department of Elections, and various individuals in their official capacities. JS.App.4. Because the named defendants are not responsible for drawing districts, the Virginia House of Delegates and Speaker William Howell intervened as defendants. JS.App.5. The intervenors have since taken responsibility for litigating the case, and they continue to do so here.

agree—and the Court finds—that the 55% BVAP figure was used in structuring the districts." JS.App.19.

The only other testimony Appellants presented was from an expert witness, Dr. Stephen Ansolabehere, who opined that race predominated in the drawing of the districts' lines. The district court discredited Dr. Ansolabehere's conclusions, however, finding that his analysis was "not reliable proof on the predominance issue" because, among other things, he did not consider the impact of accommodating incumbency considerations, communities of interest, geographic features, demographic patterns, or personal requests from delegates. JS.App.89-90; *see* JA1767-68, 1787-92. Appellants have not challenged that finding on appeal, leaving the record barren of evidence that targeting a BVAP of at least 55% caused any departures from traditional districting principles.

Conversely, Delegate Jones provided detailed testimony about his adherence to traditional principles, and he explained the race-neutral reasons for the few seeming oddities that existed. JA1802-2005. Appellees also presented testimony from three expert witnesses, all of whom criticized Dr. Ansolabehere's methodology and conclusions while presenting their own findings about the plan's compliance with sound districting practices. JA2006-2148, 2158-2213.

In an exhaustive 155-page opinion, a majority of the district court panel rejected Appellants' claims. The court first rejected the legal premise on which Appellants had staked their case—*i.e.*, that the use of a BVAP target, standing alone, suffices to trigger

strict scrutiny. JS.App.46. Instead, the court explained that strict scrutiny applies only when "the State has relied on race in substantial disregard of customary and traditional districting practices." JS.App.39 (quoting *Miller*, 515 U.S. at 928 (O'Connor, J., concurring)).

The court then examined each district to determine whether Appellants had proven that consideration of race caused departures from traditional principles. The court searched the record, but found that Appellants had been so focused on the 55% BVAP threshold that their district-specific evidence was nearly non-existent. *See, e.g.*, JS.App.107 ("Plaintiffs have offered no evidence to show subordination, relying instead on the erroneous view that proof of a 55% BVAP floor would be sufficient to carry their burden."); JS.App.119 ("The Court is not in a position to guess based on the skimpy evidence submitted."); JS.App.120 (Appellants "cannot hand the Court a stone and expect back a sculpture").

On the other hand, the court credited Delegate Jones' testimony illustrating how "traditional, neutral districting criteria" explained each district's boundaries. JS.App.91-130. Accordingly, the court found that race did not predominate in the design of 11 of the 12 challenged districts. *Id.* Although the court found that race was the predominant factor in HD75's design, it concluded that the use of race satisfied strict scrutiny because "legislators had good reason to believe that maintaining a 55% BVAP level in HD75 was necessary to prevent actual retrogression." JS.App.105.

Judge Keenan dissented and would have held that race predominated in each challenged district, and that the legislature's decision to target a BVAP of at least 55% did not satisfy strict scrutiny. JS.App.130-47.

SUMMARY OF ARGUMENT

Appellants' case rests almost entirely on the premise that the General Assembly's mere use of a BVAP threshold in drawing its districts is constitutionally suspect. That is simply not the law. A racial gerrymandering claim—or so-called *Shaw* claim—has always required proof not just that the legislature considered race, but that the legislature "subordinated traditional race-neutral districting principles … to racial considerations." *Miller*, 515 U.S. at 916. By definition, race-neutral principles have not been "subordinated" unless the legislature actually disregarded those principles in seeking to achieve its racial goal. Sometimes subordination may be evident on the face of a plan, such as when a legislature insists on creating a new majority-minority district no matter what traditional districting rules it must break to do so. Sometimes it may be evident from the racial target itself, such as when a legislature insists on achieving an exceptionally high BVAP without regard to a district's actual demographics. But when both the target the legislature sought to achieve and the districts the legislature drew are entirely consistent with sound districting principles and a good-faith effort to comply with the VRA, then there is nothing constitutionally suspect—let alone impermissible—about the legislature's mere use of a BVAP target in drawing a district.

Appellants' contrary rule has little to recommend it. This Court has interpreted the VRA to sometimes *require* States to use racial targets when drawing districts. Thus, subjecting districting legislation to strict scrutiny every time the legislature uses a racial target would put States in the impossible position of having to choose between the competing demands of the VRA and the Equal Protection Clause, with litigation under one or the other all but guaranteed. Moreover, applying strict scrutiny without regard to whether the legislature subordinated traditional districting principles to race would untether the *Shaw* claim from its legal moorings. The *Shaw* claim exists to remedy the expressive and representational harms a legislature inflicts when it groups voters solely on the basis of race, perpetuating the demeaning notion that voters with disparate interests should nonetheless share a representative because of the color of their skin. Those harms simply do not arise when districts unite voters with actual shared interests while trying to achieve a target that ensures VRA compliance. After all, a plaintiff alleging racial gerrymandering must prove *gerrymandering*.

Under the correct understanding of the law, the decision below should be affirmed. The district court correctly required Appellants to prove that the legislature disregarded traditional districting principles in seeking to achieve its BVAP goal, and Appellants fell far short of meeting that burden. Indeed, they barely even attempted to supply any such evidence. Instead, they rested their case almost exclusively on the erroneous premise that the legislature's mere decision to target a BVAP of at least 55% in adjusting the lines of the 12 existing majority-

minority State House districts was enough to sustain a *Shaw* claim. Even now, almost every piece of evidence they cite simply reinforces the undisputed fact that the legislature sought to comply with the VRA by targeting a BVAP of at least 55% in each district. Appellants identify next to nothing even suggesting that the legislature compromised neutral districting principles to achieve that goal. And the little evidence they did produce on that dispositive issue was rebutted by Appellees' wealth of evidence demonstrating that each and every apparent departure from traditional criteria was readily explained by factors other than race.

Moreover, even if Appellants could prove that race predominated in drawing any of the challenged districts, the legislature's use of race would easily satisfy strict scrutiny. Each of the districts was *already* a majority-minority district under the benchmark plan, and Appellants have conceded that the VRA required Virginia to maintain them as such. Thus, for all their talk about the evils of using BVAP targets in redistricting, Appellants appear to take no issue with the use of such targets; their only issue is with the particular target the legislature chose. This Court's cases squarely foreclose such second-guessing of state districting legislation—and rightly so, as States must maintain *some* path to exercising that core sovereign function without subjecting themselves to the prospect of federal court intervention throughout the decennial cycle. Perhaps the platonic ideal for the challenged districts was a 54% BVAP; perhaps it was 56% or 55%. That is not for Appellants or the courts to say. The only question is whether the legislature undertook a good-faith effort to perform

the kind of functional analysis that this Court's precedents require when selecting the threshold that the legislature believed would ensure VRA compliance without compromising traditional districting criteria. As the district court correctly concluded, the Virginia General Assembly unquestionably complied with that mandate in drawing its 2011 plan.

ARGUMENT

I. The Legislature's Mere Use Of A BVAP Target Does Not Trigger Strict Scrutiny.

Appellants' principal contention in this case—indeed, really, their sole contention—is that the mere use of a target BVAP threshold in drawing a district suffices to trigger strict scrutiny. That position is flatly inconsistent with this Court's precedents; it would completely decouple a *Shaw* claim from the injury it is intended to remedy; and it would put the VRA on a collision course with the Equal Protection Clause. Accordingly, the Court should reaffirm, as it did just two Terms ago, that strict scrutiny applies only when race *predominates* over traditional criteria in a State's drawing of its district lines.

A. This Court Has Never Applied Strict Scrutiny Absent Significant Deviations From Traditional Districting Principles.

Under this Court's redistricting cases, strict scrutiny applies only if race was "the 'dominant and controlling' or 'predominant' consideration in deciding 'to place a significant number of voters within or without a particular district.'" *ALBC*, 135 S. Ct. at 1264. The bare fact that a State targeted a threshold BVAP in drawing its districts does not suffice to meet that demanding standard.

That is clear from this Court's cases. In *ALBC*, for instance, the Court concluded that Alabama had "expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria." *Id.* at 1267. Yet the Court did not hold that strict scrutiny therefore necessarily applied. Instead, it treated the State's use of BVAP targets as *evidence* of race-based decisionmaking, but remanded for the district court to determine whether, considering the entirety of the evidence, "race was the predominant boundary-drawing consideration." *Id.* at 1271-72. In elaborating upon how to make that determination, the Court emphasized that strict scrutiny should apply only if plaintiffs proved that the BVAP targets had a "direct and significant" impact on the districts' actual lines. *Id.* at 1271. As the Court explained, predominance does not turn on whether the legislature had a particular BVAP in mind; it turns on whether the legislature neglected traditional principles to achieve that goal. *Id.* *ALBC* thus "makes clear that the existence and prioritization of a racial target alone cannot resolve that inquiry." U.S.Br.13-14.

Bush v. Vera, 517 U.S. 952 (1996), compels the same conclusion. There, the Court considered whether three districts intentionally created to exceed a 50% BVAP were unconstitutional racial gerrymanders. As the plurality explained, the "redistricters pursued unwaveringly the objective of creating a majority-African-American district." *Id.* at 966. That fact alone, however, was not enough to

trigger strict scrutiny.[5] Instead, the Court examined the district's boundaries to determine whether the BVAP target caused race to "predominate[] over legitimate districting considerations." *Id.* at 965. And the Court applied strict scrutiny only after its careful review revealed that traditional districting principles had been subordinated to race. *See, e.g.*, *id.* at 973 ("District 30's combination of a bizarre, noncompact shape and overwhelming evidence that that shape was essentially dictated by racial considerations … leads us to conclude that District 30 is subject to strict scrutiny.").

In fact, this Court has *never* applied strict scrutiny absent proof that racial considerations caused some district lines to "substantially deviate[] from traditional redistricting principles." U.S.Br.18. That is true not only of *ALBC* and *Vera*, but also of *Shaw I*, *Shaw II*, *Miller*, *Cromartie I*, and *Cromartie II*, which together comprise the entire universe of this Court's cases on the topic. What is more, this Court has summarily affirmed numerous district court decisions that did not apply strict scrutiny despite the legislature's admitted use of racial targets. *See, e.g.*, *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), *aff'd*, 515 U.S. 1170 (1995); *Backus v. South Carolina*, 857 F. Supp. 2d 553 (D.S.C. 2012), *aff'd*, 133 S. Ct. 156 (2012); *Cano v. Davis,* 211 F. Supp. 2d 1208 (C.D. Cal.

[5] Although the primary opinion in *Vera* garnered only three votes, six Justices agreed that the intentional creation of a majority-minority district does not, on its own, trigger strict scrutiny. *Vera*, 517 U.S. at 962 (O'Connor, J., joined by Rehnquist, C.J.), *id.* at 1008-09 (Stevens, J., joined by Ginsburg and Breyer, JJ.), *id.* at 1056 (Souter, J., joined by Ginsburg and Breyer, JJ.).

2002), *aff'd*, 537 U.S. 1100 (2003). To apply strict scrutiny every time a legislature employs a racial target would call all these decisions into doubt and would rewrite the standards that have long applied in racial gerrymandering cases.

Implicitly recognizing this problem with their core submission, Appellants alternatively argue that even if racial targets do not *automatically* trigger strict scrutiny, they should be treated as "strong, perhaps overwhelming evidence that race did predominate." Br.12 (quoting *ALBC*, 135 S. Ct. at 1271). But that, too, is a view this Court has never adopted.[6] And for good reason, as racial targets are not inherently incompatible with traditional districting criteria. To the contrary, there are plenty of circumstances in which a racial target can be entirely consistent with such criteria.

Indeed, that is a core premise of this Court's VRA jurisprudence. Whether a State must create or maintain a majority-minority district depends on whether a minority group is "geographically compact" and "politically cohesive." *Gingles*, 478 U.S. at 50-51. In other words, it depends on whether traditional districting criteria actually *support* the conclusion that a minority community (or group of communities)

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[6] That language, which Appellants repeatedly quote, actually comes from a passage of *ALBC* in which the Court was discussing all the *other* evidence that supported a predominance finding as to one particular district. *See ALBC*, 135 S. Ct. at 1271. For example, the Court catalogued various ways in which the plan's drafters "[t]ransgress[ed] their own redistricting guidelines" when drawing that particular district, including by splitting precincts on clear racial lines. *Id.*

should be part of a single district. If so, then a legislature can *and should* take that into account when drawing its districts. The same is true when it comes to the use of a racial target. To be sure, using a racial target "for its own sake" is constitutionally problematic. *Vera*, 517 U.S. at 931. But seeking to comply with the VRA by using a racial target that is consistent with the demographics of the area in question is entirely consistent with sound districting principles.

In short, "reapportionment is one area in which appearances do matter." *Shaw I*, 509 U.S. at 647. Accordingly, a racial target is not, in and of itself, "strong … evidence that race did predominate," Br.12, unless that target is so high, or the districts it produces are so bizarre, as to raise facial questions about the compatibility of the target with traditional districting criteria. Only then is there reason to suspect that the legislature has joined together "individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries." *Shaw I*, 509 U.S. at 647.

B. The BVAP Target Employed Here Was Consistent With Traditional Districting Criteria.

This is plainly not a case in which the legislature's mere use of a BVAP target supports an inference—let alone a "strong" inference, Br.12—that race predominated in drawing the challenged districts. If anything, the manner in which the legislature approached compliance with the VRA is strong evidence that race did *not* predominate.

At the outset, the legislature was not trying to create a brand new majority-minority district, let alone cobble together minority voters dispersed across the State. *See, e.g.*, *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 913 (1996). To the contrary, existing demographics and traditional districting principles fully supported these districts, which had been drawn as majority-minority districts for decades. Indeed, Appellants agreed that all 12 districts needed to be maintained as majority-minority districts to comply with the VRA. JA2279 ("It is essential that these all be healthy performing majority-minority districts."). There is thus no dispute that the legislature needed to employ *some* BVAP target; the only question was what target it should use. Nor is this a situation in which the particular target the legislature chose raises a red flag, such as the 70%-plus targets this Court confronted in *ALBC*. To the contrary, it is eminently reasonable for a legislature to conclude that "reduc[ing] the percentage of the black population from, say, [55%] to [50%] would have a significant impact on the black voters' ability to elect their preferred candidate." *ALBC*, 135 S. Ct. at 1273.

That conclusion was fully supported by the facts at hand here. Delegate Jones was not creating majority-minority districts out of whole cloth. He was dealing with districts that had been drawn as majority-minority districts for decades. Nine of the districts already had BVAPs above 55%, two others had BVAPs above 52%, and everyone—Appellants included—agreed that all 12 needed to have BVAPs of at least 50%, with some incumbents complaining that the 55% threshold was *too low*. The geography and demographics of the relevant regions thus have long

been such that they can support compact districts with BVAPs around 55% without compromising traditional districting criteria. And that proved true once again in 2011, as Delegate Jones was able to achieve a BVAP of at least 55% in each district while also retaining each district in substantially the same form and representing substantially the same communities as in the benchmark plan. In fact, the challenged districts retained an average of more than 72% of their cores—a number *higher* than the statewide average. JA1148.

Appellants make much of the fact that Delegate Jones chose to target the same threshold BVAP of at least 55% for all 12 majority-minority districts. But as the foregoing reflects, he did so for the most natural of reasons: because that threshold was supported by both a reasonable understanding of the VRA and the demographics of the relevant districts.[7] Moreover, the 55% figure was a threshold, not a target that Delegate Jones forced every district to hit on the nose. He did not even force every district to converge closer to 55%: A third of the districts moved further from that number. JA669. Nor did he add black voters to every district: The BVAP increased in six districts and decreased in the other six. JA669. And the ultimate result was 12 districts with varying BVAPs ranging from 55.2% to 60.7%. JA669.

In short, it is no surprise that targeting a BVAP of at least 55% did not produce districts "so bizarre on [their] face that [they are] 'unexplainable on grounds

[7] Employing the same threshold for all 12 districts was also particularly reasonable here given the limited district-specific data available. *See supra* pp.9-10.

other than race.'" *Shaw I*, 509 U.S. at 644. Because that target threshold was consistent with the demographics, geography, and history of the districts, the legislature did not need to "subordinate[] traditional race-neutral districting principles … to racial considerations" to reach it. *Miller*, 515 U.S. at 916.

C. District Lines That Comply With Traditional Districting Principles Do Not Inflict Harm Upon Voters.

Not only is Appellants' myopic focus on the mere use of racial targets inconsistent with this Court's precedents and the facts of this case; it also would decouple *Shaw* claims from the harms they are designed to remedy. Unlike an "analytically distinct" vote-dilution claim, which addresses actual reduction of voting power, a *Shaw* claim seeks to remedy the expressive and representational harms that result when an individual is placed into a district solely on the basis of race. *Shaw I*, 509 U.S. at 652. When a legislature forces together "individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries," it demeans those individuals by treating them as if they "think alike, share the same political interests, and will prefer the same candidates at the polls." *Id.* at 647. Being stereotyped in that way "causes fundamental injury to the individual rights of a person," *Shaw II*, 517 U.S. at 908, and it inflicts representational harms by leading elected officials to "believe that their primary obligation is to represent only the members of that [racial] group, rather than their constituency as

a whole," *Shaw I*, 509 U.S. at 648; *see also United States v. Hays*, 515 U.S. 737, 744 (1995).

The archetypal *Shaw* violation thus occurs when "a State concentrate[s] a dispersed minority population in a single district *by disregarding traditional districting principles* such as compactness, contiguity, and respect for political subdivisions." *Shaw I*, 509 U.S. at 647 (emphasis added). The district at issue in *Shaw I* was one such district: It wound "in snakelike fashion" through highly disparate regions of North Carolina, connecting widely divergent populations of voters in "tobacco country, financial centers, and manufacturing areas," not stopping "until it gobble[d] in enough enclaves of black neighborhoods." *Id.* at 635-36. Even the most basic districting principles were cast aside: "At one point the district remain[ed] contiguous only because it intersects at a single point with two other districts before crossing over them." *Id.* at 636. The voters drawn into the district had no discernible shared interests; they were grouped together solely because they were black. *Id.*

No such harm results when district lines conform to traditional principles and individuals are grouped according to their "actual shared interests." *Miller*, 515 U.S. at 916. Adherence to traditional districting principles respects the values "that animate all geographic … representation systems: that those who live near each other in the same communities, counties, and cities have something in common, something that warrants their representation as a reasonably defined geographical [unit]." JS.App.34. When a legislature honors those commonalities, it

does not inflict the expressive and representational harms that form the basis of a *Shaw* claim—even if it takes race into account. A plaintiff thus cannot prevail on a *Shaw* claim unless he has been placed into a district with others who share little in common other than skin color. Only then does a plaintiff suffer the harm for which a *Shaw* claim provides a remedy.

To take an example, if a legislature applies traditional principles and identifies two equally compliant precincts that it could add to a district to satisfy one-person, one-vote, using race as the tiebreaker does not convert what would otherwise be a permissible districting decision into a presumptively unconstitutional use of race. That is radically different from artificially assembling far-removed voters just to reach a racial objective. Allowing a *Shaw* claim to proceed in the former context would allow a plaintiff to prevail despite not experiencing the "racially discriminatory impact" required not just in *Shaw* claims, but in all racial discrimination claims under the Equal Protection Clause. *Hunter v. Underwood*, 471 U.S. 222, 232 (1985). That approach would work a sea change in equal protection doctrine, as this Court has never "held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." *Palmer v. Thompson*, 403 U.S. 217, 224 (1971). Instead, plaintiffs asserting equal protection claims have *always* been required to prove that the alleged racial motivations of the legislature inflict actual, concrete harm. *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367, 383 (1968). And if the lines that a legislature draws

do not actually produce districts distorted by the use of race, then there is no concrete harm to remedy.[8]

That requirement also ensures that federal courts intervene in state legislative affairs only when a meaningful remedy is available. There is "an element of futility" in invalidating a districting plan that complies with traditional principles, as "it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons." *Palmer*, 403 U.S. at 225; *see also League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 418 (2006) ("We should be skeptical, however, of a claim that seeks to invalidate a statute based on a legislature's unlawful motive but does so without reference to the content of the legislation enacted."). Moreover, requiring plaintiffs to prove that racial considerations had an actual impact on the map helps overcome the inherent difficulties of judging the motives of a multi-member body. When district lines disregard traditional principles and are "unexplainable on grounds other than race," *Shaw I*, 509 U.S. at 644, courts can safely assume that all legislators shared the same racial motive. But when district lines comply with traditional principles, it becomes impossible for courts to determine the

[8] The United States is thus wrong to suggest that, "as a theoretical matter," a *Shaw* claim could exist "in the absence of proof of a conflict with traditional districting criteria." U.S.Br.17-18. It is no accident that this Court has never allowed a *Shaw* claim to proceed absent "proof that some district lines substantially deviated from traditional redistricting principles." U.S.Br.18. If the consideration of race did not produce districts that are inconsistent with traditional districting criteria, then it did not produce the harms a *Shaw* claim seeks to remedy.

"motive" of the legislative body, which consists of multiple legislators who might have supported the plan for any number of reasons.

Appellants protest that requiring a showing of racial subordination would enable States to defeat *Shaw* claims by offering "post hoc justifications" for district lines that were actually motivated by race. Br.8. But that same criticism could be levied at all of this Court's antidiscrimination doctrine. In every case alleging unlawful discrimination, the factfinder must evaluate the evidence and decide whether "the legitimate reasons offered by the defendant were … its true reasons" or are merely "a pretext for discrimination." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). If *Shaw* plaintiffs believe that a legislator has offered only post hoc justifications for racially motivated conduct, they can impeach him on cross-examination or introduce evidence to undermine his claims. Three-judge district courts are more than up to the task of assessing witness credibility, and a State's proffered reasons will be rejected if they are pretextual. *See, e.g.*, *Hays v. Louisiana*, 839 F. Supp. 1188, 1201 (W.D. La. 1993).

Appellants also fail to recognize that a legislature's use of an unjustifiable racial target might give rise to a vote-dilution claim under Section 2 of the VRA, which entails a different analysis and seeks to remedy a different harm from a *Shaw* claim. *See, e.g., Voinovich v. Quilter*, 507 U.S. 146 (1993). Here, however, Appellants are not pursuing a vote-dilution claim. Instead, the only harms for which they seek relief are the expressive and representational harms

that result when a legislature "creates districts with residents who have little in common with each other except the color of their skin." *DeWitt*, 856 F. Supp. at 1412. Those harms simply do not exist when, as here, the district's lines "take into account geographic and political boundaries, age, economic status, and the community in which the people live." *Id.*

D. Applying Strict Scrutiny to All Racial Targets Would Undermine the Voting Rights Act.

Mechanically subjecting racial targets to strict scrutiny would place racial gerrymandering doctrine on a collision course with the VRA. Under Appellants' preferred rule, every single majority-minority district in the country would be presumed unconstitutional and required to satisfy strict scrutiny. Indeed, every district in which the legislature used *any* racial target—something that Appellants themselves do not dispute the State was *required* to do here—would be presumptively invalid. That would call into question the constitutionality of the VRA, trap States between competing obligations under the VRA and the Equal Protection Clause, and invite meddlesome federal intrusion into the core sovereign task of redistricting. Redistricting can be contentious and politically controversial, but it should not be impossible to undertake without inviting federal litigation under one theory or the other.

Under present doctrine, both Section 2 and Section 5 of the VRA can *require* the creation of majority-minority districts and the use of racial targets. *See, e.g.*, *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (plurality opinion). Treating the mere use of

racial targets as constitutionally suspect thus would raise grave doubts about the constitutionality of the VRA as interpreted by this Court. If what the VRA affirmatively commands were presumptively unconstitutional, then it would be difficult to see how the VRA could satisfy the standard of "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

Treating all uses of racial targets in drawing districts as constitutionally suspect also would trap legislatures "between the competing hazards of liability" under the VRA and the Equal Protection Clause. *Vera*, 517 U.S. at 977. A legislature seeking to comply with the VRA by using a BVAP target of 50% would leave itself vulnerable to a *Shaw* claim. Indeed, any time a legislature used *any* target BVAP—even a number *below* 50%—the resulting district would be treated as presumptively unconstitutional. That would make it all but impossible for States to attempt to address vote-dilution or retrogression concerns without triggering strict scrutiny. Conversely, a legislature that eschewed any consideration of race to avoid *Shaw* liability would invite a Section 2 claim.

Moreover, as the United States cautions, automatically applying strict scrutiny to any use of racial targets would "discourage voluntary compliance with the VRA." U.S.Br.15. States would quite rationally conclude that doing nothing to address the concerns of minority communities and defending against Section 2 claims (where the burden of proof is on the plaintiffs) is preferable to creating a majority-minority district and defending against *Shaw* claims

(where the automatic application of strict scrutiny would place the burden of proof on the State). And even where States did not get out of the business of drawing majority-minority districts, the disparate burdens of proof would encourage plaintiffs with potentially viable Section 2 vote-packing claims to bring *Shaw* claims instead. That would only confuse the doctrine further, as the remedy for a *Shaw* violation would not necessarily address the vote dilution that creates the real-world harm.

Still worse, such a rule would apply a presumption of unconstitutionality to a sovereign State exercising its inherent "power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991). Creating state legislative districts is a core exercise of state sovereignty. Forcing state legislators to defend their actions in federal court under strict scrutiny every time they endeavor to comply with the VRA would transform the most sovereign of tasks into one that will rarely escape federal review. *See* U.S.Br.15 ("[I]f every … district drawn to be majority-minority automatically triggered strict scrutiny, the risk of federal-court overinvolvement in redistricting would skyrocket.").

The prospect for abuse is obvious. Plaintiffs belonging to the minority party in a State could stand outside the federal courthouse with a vote-dilution complaint in one hand and a racial gerrymandering complaint in the other. As soon as a new districting plan is enacted, they could file whichever one applies, in the hopes that the federal judiciary will take over the task of drawing district maps. The automatic

application of strict scrutiny thus could transform the VRA from a remedy for "racial discrimination in voting," *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966), to a partisan tool for securing political victories in federal court.

Indeed, that day might have already arrived. If it seems odd that a plan that passed with near-unanimous support from both parties and the Black Caucus was belatedly challenged as racially discriminatory four years after the fact, a quick glance at the Governor's Mansion will clear up any confusion. In 2011, the minority party in the House of Delegates was satisfied with the redistricting plan—even if the plan benefitted the majority at the margins—because the minority party had neither the votes nor the veto power to obtain further concessions. After taking control of the state executive branch, the minority party saw an opportunity to alter the State's partisan balance by invalidating the current maps and then leveraging the newfound threat of a gubernatorial veto as new maps are drawn.

Shaw claims, which remain an important tool for combatting invidious racial discrimination, should not be subverted for such partisan aims. Indeed, a *Shaw* claim should be obvious—and inflict obvious injury—at the beginning of the decennial cycle when the map is first drawn. Allowing non-obvious *Shaw* claims to be brought to challenge districts that comply with traditional districting criteria will all but guarantee a constant stream of *Shaw* claims throughout the decennial cycle whenever changes in the Governor's mansion or other extraneous factors change the political calculus.

* * *

The use of a racial target in drawing districts does not require strict scrutiny unless the legislature disregarded traditional principles to achieve that goal. That rule is the only one that is consistent with this Court's cases, the only one that keeps *Shaw* claims tethered to the harms they seek to remedy, and the only one that averts a collision between the VRA and the Equal Protection Clause.

II. Appellants Failed To Meet Their Demanding Burden Of Proving That Race Predominated In The Drawing Of The Challenged Districts.

Applying those correct legal principles, the district court properly rejected Appellants' claims. Appellants made no effort at trial to prove that racial considerations caused the legislature to neglect traditional districting principles, "relying instead on the erroneous view that proof of a 55% BVAP floor would be sufficient to carry their burden." JS.App.107. Nor did Appellants bother to submit an alternative map that better adhered to traditional principles while still satisfying the legislature's goals and VRA obligations. Consequently, they failed to show that the legislature subordinated traditional principles to race. Their failure of proof is clear from their brief: As they proceed through each challenged district, they offer nothing but colorful descriptions of the district boundaries and unhelpful comparisons of BVAPs. But whether a district's BVAP increased (as it did in six districts) or decreased (as it did in six others) says nothing about *why* the legislature drew the lines it did, or whether "race was the predominant factor." *Miller*, 515 U.S. at 916.

The only evidence that spoke to that question was the testimony of Delegate Jones, who explained in meticulous detail why he drew the lines how he did: to avoid pairing incumbents, JA1895, to reunite communities, JA1884, to grant requests from delegates, JA1874, to eliminate water crossings, JA 1899, or to tip the partisan balance in an open district, JA1895. While Appellants *now* try to dismiss Delegate Jones' testimony as "self-serving" and "post hoc," Br.37, 40, they failed to do *anything* to try to discredit that testimony at trial. The time for questioning witness credibility or positing alternative theories has long passed. Appellants' claims of a nefarious scheme to shuffle voters in and out of districts on the basis of race debuted before this Court.

The district court, after evaluating the actual evidence presented below, credited Delegate Jones' testimony and—with the exception of HD75—rejected Appellants' claim that race predominated in the 2011 plan. This Court reviews those findings for clear error, and it cannot overturn them absent "the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). Appellants thus not only must point this Court to evidence of racial predominance sufficient to overcome "the presumption of good faith that must be accorded legislative enactments," *Miller*, 515 U.S. at 915, but also must show that the district court clearly erred in concluding that they did not meet that burden. Neither Appellants' supposed statewide evidence of racial predominance, *see* Br.20-29, nor their "skimpy"

district-specific evidence, *see* Br.30-56, comes close to satisfying that demanding standard.[9]

A. Statewide Evidence

Appellants purport to offer six pieces of "statewide evidence" of racial predominance, Br.20-29, but *five of the six* are just proof that the legislature targeted a BVAP of at least 55% to comply with the VRA—which no one disputes. The first piece of evidence, simply titled "The 55% BVAP Rule," Br.20, self-evidently falls into that category. So does the next item, the list of criteria adopted by the House Committee on Privileges and Elections. Br.24. Appellants complain that VRA compliance was high on that list, but that proves nothing more than the legislature's "obedience to the Supremacy Clause." *Voinovich*, 507 U.S. at 159. Indeed, it would be extremely shortsighted for a State to prioritize other criteria over VRA compliance given that failure to comply with the VRA is grounds for invalidation of districting legislation. Appellants' third piece of evidence is equally irrelevant; they simply note that Virginia's preclearance submission included an affirmation, in a section that *required* the State to identify the "minority impact" of its plan, that

[9] Nor is there any merit to the United States' contention that the district court applied an incorrect legal standard. *See* U.S.Br.15-22. The court did precisely what it was required to do: It examined each district for any seeming departures from traditional principles, and then examined the reasons for those seeming departures to determine whether they were race-neutral. The United States' quarrels with the district court's approach are a product of its incorrect view that a *Shaw* claim could exist "in the absence of proof of a conflict with traditional districting criteria," U.S.Br.17-18. *See supra* Part I.C.

the plan maintained 12 majority-minority districts with BVAPs above 55%. Br.25-26.

Appellants fare no better with Delegate Jones' statements, which they characterize as the "most telling" evidence of racial predominance. Br.26. The statements they cite simply confirm that he planned to ensure that all districts maintained a BVAP of at least 55%, and that he *might* have been *willing* to subordinate traditional principles *if it became necessary* to comply with the VRA. Nothing Delegate Jones said proves that the legislature actually resorted to that option; in fact, he testified repeatedly that his "consideration of compliance with the Voting Rights Act" did not require him to "violate any of the state's adopted criteria." JA1842, 1843, 1851, 1859, 1868, 1872, 1876, 1881, 1885, 1898. Appellants also point to "demographic evidence" that they claim proves that the legislature sought to "ensure all Challenged Districts met the 55% BVAP target." Br.28-29. But even if the data they cite supported their point, all that would show was the undisputed existence of a target threshold BVAP. As the district court thus correctly found, Appellants' data do "not provide any specific insights into" whether the legislature departed from traditional principles in achieving a BVAP of at least 55%. JS.App.89.

B. District-Specific Evidence

The only type of "statewide evidence" Appellants identify that actually has some relevance to the pertinent question—*i.e.*, whether the legislature subordinated traditional districting principles to race—is evidence that some of the challenged districts became less compact and split more precincts than in

the benchmark plan. Br.27-28. But that evidence does not speak to whether those seeming divergences from traditional criteria were *caused by race*. Proving that latter point is the purpose of holding a trial, where those who created the plan can explain why they drew the lines they drew, and the challengers can cross-examine them and call their own witnesses. The court can then assess the record evidence, make credibility determinations, and determine the legislature's true motivations. After just such a trial, the district court correctly found that, for 11 of the 12 districts, "race did not predominate." *E.g.*, JS.App.117.[10]

1. North Hampton Roads (HD92, HD95)

Two of the challenged districts lie on a peninsula just north of the James River, in an area referred to as North Hampton Roads. *See* JA1569. As for HD92, the district court found "it hard to imagine a better example of a district that complies with traditional, neutral districting principles." JS.App.127. That district increased in compactness, eliminated all precinct splits, and, at the request of Delegate Ward, reunified downtown Hampton by adding three precincts from HD95. JS.App.127; JA1884. Appellants can muster only the claim that HD92 absorbed those three "heavily African-American" precincts "to stay above 55% BVAP." Br.53. Not only is there nothing in the record to support that assertion

[10] Maps of the four regions discussed below are available at JA1567-68 (benchmark plan) and JA1569-70 (2011 plan). Larger, colored versions of the same maps are available at Defendant-Intervenors' Trial Exhibit 96 (benchmark plan) and 97 (2011 plan).

or cast doubt upon Delegate Jones' contrary testimony, but the BVAP of HD92 in the benchmark plan was high enough that it would have stayed above 55% even if *every single person* added to the district were white. *See* JA669, 1257. Race simply had no impact on HD92, let alone a predominate impact.

As for HD95, the court correctly found that its odd shape is explained by race-neutral districting principles. JS.App.129. In the benchmark map, the North Hampton Roads region was home to the infamous "ferrymander," a small portion of HD64 separated from the rest of the district by the James River. JA1569, 1898-99. Delegate Jones eliminated that river crossing, and HD93—the only contiguous district that was not overpopulated—absorbed the vacated precincts on the peninsula. JA1567, 1569, 1898-1900. In turn, HD95 extended into the narrow area that was previously part of HD93. *Compare* JA1567 *with* 1569; *see* JS.App.129.

In choosing which of HD93's former precincts to include in HD95, Delegate Jones sought to accomplish two political goals. First, he drew the district to include "heavily Democratic precincts" to improve the electoral chances of Republicans in the surrounding districts. JS.App.129. Second, he gave the district an "eastward 'zig'" and "westward 'zag'" "to avoid including the residence of Delegate Robin Abbott," who represented HD93. *Id.*; *see* JA1563. The district court found Delegate Jones' explanation credible and persuasive, and Appellants offered "no contradictory testimony." JS.App.129-30.

2. South Hampton Roads (HD77, HD80, HD89, HD90)

The South Hampton Roads region, which sits below the James River, was one of the most underpopulated regions in Virginia. JA1345. As Delegate Jones explained, the region was underpopulated by over 80,000 people, which necessitated collapsing an entire district (HD87) and relocating it to northern Virginia. JA1862-63. Complicating matters further, the region is bounded on three sides by immutable geography—North Carolina to the south, the Atlantic Ocean to the east, and the Chesapeake Bay to the north. JA1862. Despite those constraints, Delegate Jones managed to draw all four challenged districts in substantial compliance with traditional principles, with any seeming departures explained by non-racial factors.

HD77 is "in the Portsmouth area and was represented by Delegate Lionel Spruill during the 2011 redistricting process." JS.App.117. Its 57.6% BVAP in the benchmark plan increased to 58.8% in the 2011 plan—*i.e.*, away from the 55% mark that Appellants claim drove all decision-making. JA669. The major adjustment was to add five precincts to the district's eastern portion. JA1560. Those five precincts are all in the city of Chesapeake and part of a community known as South Norfolk. In the 2001 plan, they were split among three different districts. Delegate Spruill specifically "requested that we reunite the old city of South Norfolk," and Delegate Jones granted that request, which had the added benefit of improving the district's adherence to "compactness, contiguity, [and] communities of

interest." JA1865-66. Delegate Jones also shortened the district's western arm by transferring the heavily Republican Airport precinct to his own HD76, which benefitted him politically. JA1866-67.

Nothing in the record supports Appellants' efforts to characterize these changes as racially motivated; indeed, all five of the precincts added to reunite South Norfolk were majority-white precincts. JS.App.119. While Appellants point out that the precincts in the western portion of the district have high BVAPs, Br.45, all of those precincts were already part of HD77 in the benchmark plan. JA1560. Appellants provided no "evidence-based explanation to show how, if at all, the racial floor impacted the boundaries of HD 77 or why voters were placed there in the redistricting process." JS.App.120. As the court put it, "if the presumption of correctness and good faith has any meaning, it is applicable in this instance," as Appellants "failed to provide evidence as to the ways in which racial considerations might have had a 'direct and significant impact' on the District's formation." JS.App.120.

HD90 was the district from which HD77 acquired the precincts necessary to reunite South Norfolk. To correct the resulting population deficiency, HD90 added contiguous precincts from Virginia Beach and Norfolk City, increasing its compactness score in the process. No additional cities, counties, or precincts were split, and there is no correlation between the lines of the district and the lines of predominantly black neighborhoods. Appellants make no claim that the district violates traditional districting principles. Instead, they hypothesize that HD90 was "used as a

feeder district to increase the BVAP of surrounding Challenged Districts." Br.51. Creative as that theory may be, it is debunked by the fact that the district's BVAP was essentially unchanged, going from 56.9% to 56.6%, reflecting a net difference of just 150 black voters. JA669, 1263.

HD80, located in the Portsmouth area, was underpopulated by over 9,000 people. JA1257. Although its shape became more irregular in the 2011 plan, the underlying changes were unrelated to race. For one thing, the expansion options were limited, as "the James River, the Atlantic Ocean, and the Norfolk naval base" all imposed geographic constraints, and "the district needed to retain the residence of Delegate James while avoiding the residences" of two other delegates. JS.App.122. Delegate Jones' solution was to add precincts from HD79, which had been forced northeast to fill the space left behind by the collapsed HD87. JA1878-79; *compare* JA1568 *with* JA1570. To reach those vacated precincts, the district "had to wrap around the residences of the incumbents" and avoid the heavily Republican precincts in HD76 that Delegate Jones did not want to surrender from his own district. JS.App.122. The result was a narrow neck stretching westward, avoiding an incumbent's residence to the north and the Republican strongholds to the south. JS.App.122-23. These changes had only an incidental impact on HD80's BVAP, which increased by less than 2%. JA669. And although HD80 became less compact, the oddly shaped precincts it acquired from HD79 made *that* district far *more* compact.

Appellants nonetheless insist that the district's odd shape is "explainable entirely—and only—on the basis of race." Br.47. Their only support for that assertion, however, is the fact that the heavily Republican precincts the district avoided have low BVAPs. *Id.* But as the district court correctly recognized, "just because 'the most loyal Democrats happen to be black Democrats' does not mean that a political gerrymander is thereby transformed into a racial gerrymander." JS.App.123 (quoting *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999)). Appellants did nothing to move the needle on that race-versus-politics question, and they certainly did not provide an alternative map that would have achieved the legislature's "legitimate political objectives" in a way that would have brought about "significantly greater racial balance." *Easley v. Cromartie*, 532 U.S. 234, 258 (2001). Accordingly, the district court correctly found that HD80's shape resulted from "non-racial districting criteria, including incumbent pairing prevention and incumbency protection." JS.App.124.

The final challenged district in the region was HD89. Like the rest of the region, HD89 was significantly underpopulated and geographically constrained. JA669, 1562. Nonetheless, Delegate Jones kept the district "reasonably compact," with its borders "follow[ing] precinct lines within Norfolk." JS.App.124. While the district contains some precinct splits, *see* JA1562, the district court found that those splits were created to ensure the district "includes a funeral home owned by Delegate Alexander." JS.App.125. As Jones testified, "Virginia state legislators are 'part-time citizen legislators,'" and having a business within their district enables them

to "more readily engage with their constituents." JS.App.125. Fulfilling this personal request was plainly race-neutral. Appellants also claim that the Berkley precinct was added to the district solely because of its high BVAP, Br.49-50, but the Berkley precinct was removed from HD80, another district Appellants claim was gerrymandered to exceed 55%. *See* JA1561; Br.46-47. Appellants' accusation that Delegate Jones robbed Peter to pay Paul does little to advance their claim that he drew the lines to enrich *both* districts.

3. Richmond (HD69, HD70, HD71, HD74)

The Richmond area contains four challenged districts, all of which are remarkably similar to their benchmark versions. Indeed, each district consists of the exact same cities and counties as its benchmark version, JA668, with the exception of HD74, which contains one fewer county because it shed a precinct that had been separated from the rest of the district by the James River, JA1559. With respect to HD69 and HD70, Appellants do not identify a single deviation from traditional districting principles, much less one caused by racial considerations. And although HD71 and HD74 have certain deviations that require explanations, those explanations are not race-based.

HD69 contains "a large, compact swath of Richmond below the Fan District and to the south of the James River." JS.App.106; *see* JA1557. The primary change was to shift the district northeasterly toward the James River, adding several precincts that made the district more compact and more "Richmond

centric." JA1557, 1842. The district's only divergence from traditional districting principles—a river crossing—was also in the 2001 map and was necessary to include the incumbent delegate's residence in the district. JA1557. Appellants "offered no evidence to show subordination" during trial, JS.App.107, and their opening brief argues only that the district's "outward expansion" was "to capture African-American voters." Br.36-37. That would be irrelevant even if true because that expansion plainly complied with traditional principles, but in all events, it is not: The district's BVAP *decreased* by 1%. JA669.

HD70 is likewise compliant with traditional principles, "with most of the boundaries therein drawn on the basis of precinct and VTD lines." JS.App.108. As Delegate Jones testified, the changes from the benchmark version allowed the district "to better represent suburban interests" by ceding the "more Richmond-centered population to HD 69 and HD 71." JS.App.109; *see* JA1844. The district court found that those changes "represent objectively identifiable communities of interest." JS.App.109. The only seeming discrepancy—which also existed in the 2001 map—is the district's northern reach into Henrico County. But the incumbent delegate lives in that region, necessitating the "turret" that sits atop the district. JS.App.110. As the district court correctly found, "HD70 is largely explained by reference to traditional, neutral districting criteria," and the "only deviation therefrom" was to ensure that Delegate McQuinn remained in her own district. JS.App.111.

HD71 saw the largest BVAP increase of all the challenged districts, JA669, but it met that target

without subordinating any traditional districting principles. Indeed, HD71 improved its compactness, JA667, retained almost 80% of its core, JA1147, and sits in the same political subdivisions as in the benchmark map, JA668. The few discrepancies that exist were not caused by race, and the district court correctly found "that race did not predominate in the drawing of HD71." JS.App.115.[11]

Appellants now claim that Precinct 207 was transferred out of HD71 and into neighboring HD68 to prevent HD71's BVAP from dropping below 55%. That would be irrelevant even if it were true, as Appellants never explain how removing a single precinct from a district's outer edge violates any traditional principles. But in all events, Delegate Jones testified that Precinct 207 was added to HD68 to accommodate a request from Delegate Loupassi, who used to serve on the Richmond City Council and wanted his district to include territory "where he had strong support." JS.App.114; JA1839-41. Ultimately, the district court found that the removal of Precinct 207 was consistent with traditional districting criteria, and that, "as a matter of fact," "race did not predominate in the drawing of HD71." JS.App.115. Appellants do not come close to showing that this finding was clear error.[12]

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[11] The United States suggests that race might have been the predominant factor in the decision to add the Ratcliffe precinct to the district, U.S.Br.24-25, but it does not argue that the addition was inconsistent with traditional districting principles.

[12] Appellants try to make something of the fact that HB *5001* (the earlier, vetoed version of the plan) did not incorporate a

HD74 is the final Richmond-area district, encompassing all of Charles City and extending west in a narrow strip along the northern border of Henrico County. JA1559. The district has retained the same axe-like shape since 1991, *see* JA1121, and all of the minor changes to the district result from the sound application of traditional principles. The most notable change is the removal of a water crossing, JA1559, which Delegate Jones eliminated because it had garnered criticism in the *Wilkins* litigation, JA1849; JS.App.116. Delegate Jones also "thickened the neck" of the so-called "handle" by adding precincts along the northern border of Henrico County. JA1849-50; *see* JA1559. Appellants do not identify a single change to the district that diverges from traditional principles, let alone one caused by race.

4. Southside Virginia (HD63, HD75)

Districts 63 and 75 are stacked atop each other in Southside Virginia, which extends to the border with North Carolina. JA1569. The changes to these districts are exaggerated because they include large precincts in sparsely populated rural areas. JA2112-13. In fact, despite what appear to be substantial modifications, *see* JA1557, 1560, the two districts retained 80% and 78% of their cores, well above the statewide average of 70%. JA1147.

The only additions to HD63 were on its eastern border, where it advanced to the James River to pick

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request from the Richmond Registrar to eliminate certain precinct splits. Br.38-39, 41. But whatever the reason the request was not granted in HB 5001, the precinct splits were eliminated in HB *5005*, the plan that was actually enacted and is challenged here. JS.App.115 n.40.

up precincts removed from HD74 to eliminate a water crossing. JA1557, 1559. In connecting those precincts to its core, the district maneuvers *around* the majority-black precinct of Jefferson Park, JA1557, avoiding a potential packing claim and belying any suggestion that the additions to HD63 were racially motivated. The connecting portion also avoids the residences of the incumbent delegates from HD62 and HD66. *Id.* HD63 also ceded its four southernmost precincts and part of a fifth to HD75. JA1557. Appellants claim that this exchange of precincts was "indisputably" racial because the precincts that were moved out of HD63 had higher BVAPs than the ones left behind. Br.31. But adding population from HD63 to HD75 could not have been done any other way: HD75 is directly to HD63's south, and it accordingly received HD63's four southernmost precincts. Moreover, the BVAP of the precincts moved into HD75 was only 35%, so their addition actually moved HD75 *away* from 55%. Br.31.

Finally, in what is probably the strangest-looking feature in all the challenged districts—and yet one of the most obviously non-racial—the district lines create a "hook that wraps around New Hope precinct." JS.App.93. That hook, which accounts for "the bulk of the splits in [the] district," JA1858, was drawn because Delegate Dance "had a potential primary opponent she wanted to draw out of her district" without losing the New Hope precinct, where many of her employees lived. JA1857-58. The hook does not follow any discernible racial lines, *see* JA1486, and Appellants do not argue that it was drawn for racial reasons.

As for HD75, Delegate Jones added precincts in just about every direction to address a severe population deficiency. *See* JA1257, 1560. He added the precincts from HD63 to the north, as well as four precincts to the southwest to eliminate a preexisting county split. JA1855. The district also expanded to the northwest until it ran into the residence of the incumbent delegate in HD61. JA1560. Notably, in making these additions, Delegate Jones bypassed several neighboring precincts with high BVAPs. JA1486. In the northeast, Delegate Jones removed several precincts and replaced them with the Dendron precinct to accommodate a request from Delegate Tyler, who had received weak political support in the removed precincts. JA1855-57. None of the district's lines reflects racially motivated gerrymandering.

III. The Challenged Districts Would Satisfy Strict Scrutiny.

Although the district court determined that racial considerations subordinated traditional principles in the design of HD75, it also found that the legislature's use of race in drawing that district was narrowly tailored to serve its compelling interest in complying with Section 5 of the VRA. JS.App.102-06. Appellants' various challenges to that finding ignore this Court's repeated emphasis on the leeway to which States are entitled when walking the tightrope between the Constitution and the VRA. Working with available data in real time, Delegate Jones conducted a functional analysis of electoral conditions in HD75 and across the State and concluded that a BVAP of at least 55% was necessary to prevent retrogression.

HD75—and, for that matter, each of the challenged districts—satisfies strict scrutiny.

A. States Are Entitled to Leeway When Pursuing Their Compelling Interest in Complying With the Voting Rights Act.

When strict scrutiny applies to districting legislation, a State must prove that its use of race was "narrowly tailored to serve a compelling state interest." *Shaw II*, 517 U.S. at 902. Although this Court has not squarely held that compliance with the VRA is a "compelling interest," eight Justices in *LULAC* agreed that it is, *see LULAC*, 548 U.S. at 475 n.12, 485 n.2, 518, and Appellants do not argue otherwise. Indeed, to hold that States do *not* have a compelling interest in complying with the VRA would place States "in the impossible position of having to choose between compliance with" federal law "and compliance with the Equal Protection Clause." *Id.* at 518 (Scalia, J., concurring in the judgment in part and dissenting in part).

To satisfy narrow tailoring, a State need not prove that its use of race was *necessary* to achieve compliance with the VRA. Instead, a State need show only that it had "good reasons," or a "strong basis in evidence," to believe that the VRA required it to consider race how it did. *ALBC*, 135 S. Ct. at 1274. Nor must States "determine *precisely* what percent minority population" would best prevent retrogression. *Id.* at 1273. It is enough that a State had "good reasons," with "a strong basis in evidence," to make "the (race-based) choice that it" made. *Id.* at 1274. "A contrary rule would expect the impossible from any jurisdiction and force smaller jurisdictions

with limited resources … to invest in expensive analyses for every redistricting plan." U.S.Br.31.

Indeed, if States were not entitled to any play in the joints when determining whether and how the VRA requires them to use racial targets, they would have no choice but to make exceedingly detailed—yet ultimately speculative—predictions about future demographic patterns and voting behavior before they could even begin the process of drawing districts. *See Strickland*, 556 U.S. at 17-18. Making those detailed predictions would be especially onerous for Virginia's state legislative districts. Virginia holds state legislative elections in odd-numbered years, JA1815, sharply reducing the time it has to enact new districting maps after it receives updated census data. That data typically arrive in the February following the census year, and came even later into the month than usual in 2011 because of discrepancies that took the census bureau weeks to correct. JA1814-15. From there, the General Assembly must analyze the data, receive public input, collect requests from incumbents, make countless discretionary decisions about how to conduct the map-drawing process, and then engage in the arduous task of actually drawing new maps for both chambers.

The plans must then pass both chambers of the General Assembly and obtain gubernatorial approval, the latter of which was not immediately forthcoming in 2011, as Governor McDonnell vetoed the first set of maps. JA1050-53. And because Virginia was a covered jurisdiction under the VRA, it needed to preclear its plans with DOJ, which typically takes at least 60 days. JA1815. All of that had to be completed

not just in time for the November general elections, and not just in time for the June primary elections, but with enough lead time that candidates could know the districts in which they were eligible and collect the necessary signatures to be placed on the ballot. JA1816.

This compressed timeline underscores the importance of providing leeway to States engaged in good-faith efforts to draw districts that comply with the VRA. Requiring States to "get things just right" in determining what minority percentage will prevent retrogression would "lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) [a violation of the VRA] should the legislature place a few too few." *ALBC*, 135 S. Ct. at 1273-74. Instead, so long as the State adhered to correct legal principles, what is required is good faith. It is enough that the State had "good reasons," with "a strong basis in evidence," to make "the (race-based) choice that it" made. *Id*. at 1274.

B. District 75 Was Narrowly Tailored to Prevent Retrogression.

"Virginia's use of race in drawing District 75 was narrowly tailored because the legislature had good reason to believe that it needed to maintain a 55% BVAP in the district to preserve the minority community's existing ability to elect its preferred candidates." U.S.Br.31. When Virginia enacted the 2011 plan, Section 5 prohibited it from adopting any change to a voting standard, practice, or procedure that "will have the effect of diminishing the ability of

[members of a minority group] to elect their preferred candidates of choice." 52 U.S.C. §10304(b). While Section 5 does not require "maintaining the same population percentages in majority-minority districts as in the prior plan," it does require States to ensure that "minority voters retain the ability to elect their preferred candidates." *ALBC*, 135 S. Ct. 1273.

As the district court correctly found, the legislature had "good reasons" to believe it needed to maintain a BVAP of at least 55% in HD75 to prevent retrogression. JS.App.102. Determining what level of BVAP is necessary to prevent retrogression is an exceedingly complex task. *See Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003). In performing that task, Delegate Jones examined precisely the kind of information that DOJ has said bears on retrogression: "census data," "rates of electoral participation," "election history and voting patterns within the jurisdiction," and "voter registration and turnout information." JA16. He considered minority turnout rates, JA1979, past election results, JA1949, and the fact that a significant portion of HD75's black population consists of disenfranchised prisoners, JA1854.

He also met with HD75's incumbent Delegate Tyler "probably half a dozen times" to discuss how to ensure that the District's residents could still "elect a candidate of their choice." *Id.* Delegate Tyler was "very concerned" about low turnout rates among black voters in her district, JA1975-76, and requested that her district be drawn "much higher than 55 percent." JA1972. And as Delegate Jones recalled, Delegate Tyler had won her last contested primary "by less than

300 votes" and won the ensuing general election against a white candidate "by less than one and a half percent." JA1949, 1972. Delegate Jones also sought input from incumbents in other majority-minority districts, who reiterated the same concerns voiced by Delegate Tyler and "felt strongly that [the BVAP] needed to be north of 55 percent." JA1949; *see also* JA218, 280, 1643-44, 1828-29, 1975-76, 1999-2000.

In short, Delegate Jones did everything that reasonably could be expected to determine what BVAP would protect the ability of minority voters to elect their candidates of choice while still respecting traditional districting criteria. The information he collected provided ample support for a 55% threshold. At an absolute minimum, that information created enough "uncertainty" about retrogression to support Delegate Jones' "serious efforts to make certain that the [district] did in fact meet the criteria that the Department might reasonably apply" in preclearing the plan. *Harris v. Arizona Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1308 (2016). To require anything more would be to require States to "determine *precisely* what percent minority population" would best prevent retrogression—an impossibly demanding standard that this Court expressly rejected in *ALBC*. 135 S. Ct. at 1273-74.

Appellants' efforts to cast doubt on the district court's narrow tailoring analysis are non-starters. Appellants criticize the court for holding that a district is narrowly tailored only if "a reasonable legislator could believe [the district] entailed only reasonable and minor deviations from neutral districting conventions." JS.App.83-84; *see* Br.57. Appellees

agree that the court should not have imposed this additional requirement, but Appellees prevailed below despite being forced to satisfy that too-stringent standard, so "[t]he district court's error in imposing a heightened burden on appellees … did not affect the correctness of its conclusion that District 75 satisfied strict scrutiny." U.S.Br.34.

Appellants get no further by trying to liken this case to *ALBC*. Nothing in *ALBC* forbids, or even casts doubt upon, a legislature's decision to target a minimum BVAP. The Alabama legislature's mistake was its "misperception" that Section 5 required it to "maintain[] *the same* population percentages in majority-minority districts as in the prior plan." *ALBC*, 135 S. Ct. at 1272-73 (emphasis added). Effectuating that mistaken belief, the legislature went to great lengths to maintain BVAPs as high as 72.75%, without any apparent indication that doing so was necessary to preserve the ability of black voters to elect their candidates of choice. *Id.* at 1263, 1272-74.

This case could not be more different. The Virginia General Assembly did not set out to restore HD75's BVAP to its exact prior level. Nor did it target a BVAP far higher than would reasonably appear necessary to prevent retrogression. Instead, the legislature engaged in a good-faith functional analysis to determine what minimum BVAP was necessary to "maintain the minority's present ability to elect the candidate of its choice." *Id.* at 1274. And unlike with the inflated 72.75% figure Alabama used, "reduc[ing] the percentage of the black population from, say, [55%] to [50%] *would* have a significant impact on the black voters' ability to elect their preferred candidate."

Id. at 1273 (emphasis added). Indeed, the information Delegate Jones had foreclosed any other conclusion.

For much the same reasons, the 11 other districts also would satisfy scrutiny if it applied. Appellants have never disputed that each of the districts needed to target *some* BVAP above 50%. *See* JA2279. They just take issue with the particular number Delegate Jones chose, and his decision to employ the same threshold for all 12 districts. But nothing in the VRA prohibits a legislature from targeting the same threshold BVAP for all of its majority-minority districts, and the decision to do so was eminently reasonable here given the compressed timeframe and limited data available to engage in district-by-district analysis of precisely what BVAP would ensure compliance with the VRA.

The best data for assessing whether minority voters can elect their preferred candidates are not general election data, but rather primary election data, as majority and minority voters might support the same candidate in a general election but still prefer different candidates in the primary. *See LULAC*, 548 U.S. at 444 (Kennedy, J.). But there are too few contested primaries in Virginia House races "to do a meaningful analysis" of that critical data source. JA2230-31. Indeed, in the last election under the benchmark plan, only 3 of the 12 challenged districts had a contested primary. And that problem cannot be solved by analyzing contested congressional or presidential primaries because Virginia's odd-year elections have different voting patterns from even-year elections. JA2020-21. Adding to the difficulties, voter registration records in Virginia do not include

racial data, making it impossible to pinpoint racial differences in voter registration. JA2201.

Cognizant of those limitations on the available statistical data, Delegate Jones met extensively with incumbents and members of the Black Caucus to get their input. And they explained that a BVAP of just 50% would be insufficient given the "lower registration" rates and "lower voter turnout" among black voters. JA218, 280, 1975. They also expressed concern about whether future, non-incumbent candidates would be able to garner the same crossover support they had historically enjoyed. JA1999-2000. And they detailed district-specific idiosyncrasies that caused each of them to feel "strongly that [the BVAP of each district] needed to be north of 55 percent." JA1949. For example, rapid gentrification in the Richmond area portended a decrease in HD71's BVAP over the next several years. JA1828-29. As a result, "[n]obody was comfortable" leaving HD71 with only a bare majority BVAP. JA1829.

All this information gave Delegate Jones more than good reason to conclude that allowing *any* of the 12 pre-existing majority-minority districts to fall below 55% would lead to retrogression. Moreover, Delegate Jones was cognizant that "a reduction in supermajority districts must be treated as potentially and fatally retrogressive" if the State lacks evidence "that high racial polarization in voting is unlikely, or that high white crossover voting is likely, or that other political and demographic facts point to probable minority effectiveness." *Georgia*, 539 U.S. at 493 (Souter, J., dissenting). None of the evidence Delegate Jones collected could have carried the State's burden

of proof had the 2011 plan eliminated supermajority districts, so he wisely chose to maintain the benchmark plan's supermajority districts.

Appellants quibble with the results of Delegate Jones' efforts, insisting the BVAP should have been a little higher in one district or a little lower in another. But if the only dispute here is whether the BVAP of a given district should have been 54%, 55%, or 56%, then Appellants' repeated protests about the legislature's mere *use* of a BVAP target are much ado about nothing. What Appellants really seek is not to decrease the use of racial targets, but to increase their ability to use the courts to second-guess those targets—even years after the fact. Again, this Court has already rejected the untenable view that States must "determine *precisely* what percent minority population" would best achieve VRA compliance. *ALBC*, 135 S. Ct. at 1273-74. With the benefit of hindsight, highly paid experts, and all the time in the world, perhaps one could figure out exactly what BVAP is required for minority voters to retain the ability to elect their preferred candidates of choice. The Virginia General Assembly was working with far less than that, and yet it arrived at an answer that all parties agree was within a couple percentage points of the ideal. The Constitution demands nothing more.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

Respectfully submitted,

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