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 *AMICI CURIAE* NATIONAL BLACK CHAMBER OF COMMERCE AND THE HISPANIC LEADERSHIP FUND IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Incorporated in Washington, D.C. and organized under Section 501(c)(3) of the Internal Revenue Code, the National Black Chamber of Commerce ('NBCC')[1] is dedicated "to economically empowering and sustaining African-American communities through entrepreneurship and capitalistic activity within the United States." *See About Us*, NATIONAL BLACK CHAMBER OF COMMERCE, *http://www.nationalbcc.org/about-us*. The NBCC advocates on behalf of 2.4 million African-American owned businesses in the United States.

The NBCC utilizes several avenues to achieve its goal of empowering African-American communities in the United States. First, the NBCC provides education to African-American communities concerning the fundamentals of capitalism. Second, the NBCC works with corporations to ensure compliance with Title VI of the 1964 Civil Rights Act at all levels of government. Third, the NBCC provides educational seminars to African-American business leaders on obtaining financial capital.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The Legacy Foundation, a 501(c)(3) charitable corporation incorporated in Iowa, paid for this brief. On September 9, 2016 and September 14, 2016, respectively, counsel for Appellants and counsel for Appellees gave their consent to the filing of amicus briefs in this case.

Fourth, the NBCC provides non-partisan information to Congress and federal agencies through expert testimony on issues of importance to the African-American community. An example of previous testimony is NBCC's president Harry Alford's testimony before the U.S. Commission for Civil Rights on the negative impact of Project Labor Agreements on African-American and Hispanic businesses. 98% of African-American and Hispanic construction companies are non-union shops and Project Labor Agreements negatively impact African-American and Hispanic owned businesses and workers.

The Hispanic Leadership Fund ('HLF'), is incorporated in Virginia and organized under Section 501(c)(4) of the Internal Revenue Code. HLF is a national Hispanic advocacy organization that is exclusively governed by Hispanics. As a social-welfare organization, HLF advocates for policies that strengthen working families and small businesses. HLF emphasizes those policies that particularly impact Hispanic families and small business owners.

SUMMARY OF THE ARGUMENT

Assuming that this Court subjects Virginia's House of Delegate Districts to strict scrutiny, the challenged districts at issue in this case are narrowly tailored. It is undisputed that the 12 majority-minority districts were drawn to comply with Section 5 of the Voting Rights Act ('VRA'). (Appellants' Br. at 3) (citing JA299); (Appellees' Br. at 50) (citing J.S.App.102-106). This Court has determined that compliance with Section 5 is a compelling interest.

First, the Constitution and the decisions of this Court recognize that redistricting is a sovereign and significant function vested in the state legislatures. This guarantees optimal citizen participation in republican governance.

Second, §§ 2 and 5 of the VRA do not divest legislatures of this discretion, rather, these sections allow states the discretion to determine the best method of compliance.

Third, the General Assembly had evidence that a 55% Black Voting Age Population ('BVAP') target was necessary for African-American residents of those districts to elect their preferred candidate of choice. §5 of the VRA prohibits legislatures from decreasing BVAP in majority-minority districts without evidence of a reduction in racial polarization. The Appellants want this Court to impose a requirement that legislatures cannot craft majority-minority districts of 55% without evidence that the racial polarization exists to justify 55%. This is a 'heads I win, tails you lose' approach to redistricting that this Court should reject.

Furthermore, in crafting remedial districts, courts have imposed a 65% majority-minority threshold. If Virginia has the discretion to comply with the VRA, then certainly 55% is narrowly tailored.

Fourth, in redistricting cases, this Court has shown a reluctance to impose mathematical precision in the crafting of districts. Adopting Appellants' standard would require precise political predictive judgments and mathematical precision to

determine what constitutes narrowly tailored.

Fifth, nearly all members of the Black Caucus in Virginia's House of Delegates supported the redistricting plan. Members analyzed the demographic data, past elections results, and population movement trends and determined that for Virginia's 12 majority-minority House districts to continue allowing African-Americans to elect their preferred candidate of choice, those districts needed approximately 55% BVAP. This is sufficiently narrowly tailored. To find that these districts were not narrowly tailored would allow Appellants to use this Court's decision in *Shaw v. Reno* and *Shaw v. Hunt* to take away the very discretion the VRA provides. Because nearly all members of the Black Caucus supported this plan and had substantive input in developing the plan, this is significant evidence that Virginia's House of Delegate map is not a racial gerrymander and is narrowly tailored.

Sixth, if this Court finds that Appellees have crafted a racial gerrymander, States will cease voluntarily complying with §2 of the VRA. This is because the burden of proof under a *Shaw* claim is on the State whereas the burden of proof under §2 of the VRA is on the plaintiff. This will be particularly harmful to Hispanics. Hispanics generally do not reside in geographically compact districts, are not politically cohesive, and racial bloc voting does not prevent Hispanics from electing their preferred candidate. Thus, it is very difficult for Hispanics to satisfy the *Gingles* preconditions. The evidence supports this fact because Hispanics do not enjoy high success rates in §2 litigation.

This will have the effect of decreasing Hispanic representation in Congress. Since 1998, most Hispanics in Congress come from majority-minority districts. Adopting Appellants' standard here and not permitting states to draw districts with the requisite discretion will have the unacceptable and unintended consequence of fewer majority-minority districts and lower Hispanic representation in Congress.

ARGUMENT

I. STATE LEGISLATURES HAVE DISCRETION IN CRAFTING DISTRICTS THAT ARE NARROWLY TAILORED TO SATISFY THE VOTING RIGHTS ACT.

The Constitution of the United States vests state legislatures with the discretion to craft legislative districts. The Voting Rights Act does not divest legislatures of this jurisdiction. In fact, this Court has previously ruled that states have discretion in determining how best to comply with the VRA.

Eight justices of this Court have previously ruled that compliance with Section 5 of the VRA is a compelling state interest. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 518 (2006) (hereinafter, '*LULAC*') (Scalia, J., Roberts, C.J., Thomas & Alito, JJ.); *id.* at 475 n.12 (Stevens and Breyer, JJ.); *id.* at 485 n.2 (Souter and Ginsburg, JJ.).

When analyzing whether a district is narrowly tailored to achieve the State's interest in complying

with the VRA, courts have recognized that legislatures have discretion.

Appellants, however, are attempting to use this Court's decision in *Shaw v. Reno*, 509 U.S. 630 (1993), to divest legislatures of the discretion the Constitution vests and this Court's decisions in the VRA confirm. *See* (Appellants' Br. at 57-58) (criticizing district court majority opinion for recognizing legislators' discretion in crafting narrowly tailored districts to comply with Section 5 of the VRA). This Court should reject that attempt.

A. Neither §§ 2 nor 5 Of The VRA Divests State Legislatures Of Their Constitutional Discretion In Crafting Districts.

Both the U.S. Constitution and Virginia's Constitution vest Virginia's General Assembly with the authority to craft legislative districts. *See* U.S. Const. art. I, § 4; *see* Va. Const. art. II, § 6. This Court has repeatedly confirmed what the Constitution says, that "reapportionment is primarily the duty and responsibility of the State . . . ." *See Chapman v. Meier,* 420 U.S. 1, 27 (1975). Redistricting is best left to the state legislatures because the crafting of district boundaries "is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance." *LULAC*, 548 U.S. 399, 416 (2006). In crafting these districts, courts must afford state legislatures the "[d]iscretion to exercise the political judgment necessary to balance competing interests." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). Therefore, federal courts are barred from

intervening in redistricting absent a violation of federal law. *See Voinovich v. Quilter*, 507 U.S. 146, 156 (1993); *see also Miller*, 515 U.S. at 928-29 (O'Connor, J., concurring) (stating that the Court's decision did not "throw into doubt the vast majority of the Nation's 435 congressional districts" including those districts where race was considered).

When this Court proceeds to determine whether a district is narrowly tailored to achieve the State's interest in compliance with the VRA, neither §§ 2 nor 5 divest legislatures of their discretion in crafting their districts. This Court has previously recognized that both §§ 2 and 5 "[a]llows States to choose their own method of complying with the Voting Rights Act . . . ." *Bartlett v. Strickland*, 556 U.S. 1, 23 (2009); *see also LULAC*, 548 U.S. at 519 (Scalia, J., concurring in part and dissenting in part) ("In determining whether a redistricting decision was reasonably necessary, a court must bear in mind that a State is permitted great flexibility in deciding how to comply with § 5's mandate."). The VRA requires only that states not diminish a minorities' ability to elect their preferred candidates of choice. Therefore, under the VRA, a State retains its discretion on how to comply with the Act. *See Voinovich*, 507 U.S. at 155-56 (holding that a state is not required to prove that a majority-minority district is required under §2 of the Voting Rights Act before crafting a majority-minority district and reiterating that in §2 litigation, the burden of proof is on the plaintiff).

But here Appellants are using the Equal Protection Clause to force Appellees to prove that

complying with Section 5 was necessary. *See, e.g.,* (Appellants' Br. at 57-58). Adopting Appellants' proposed standard, however, will place courts in the "untenable position of predicting many political variables and tying them to race-based assumptions" to determine what the absolute minimum level of minority voting age populations is necessary to elect the minority's preferred candidate of choice. *See Bartlett*, 556 U.S. at 17. In the §2 context, this problem is further compounded because §2 applies nationwide. *See id.* at 18. Thus, under Appellants' standard, if a legislature crafted a district to comply with §2, courts will be required to determine the lowest number of minorities necessary in a majority-minority district in order for a minority to elect their preferred candidate of choice for both the familiar two-party election contests at the federal level, as well as for the nonpartisan city commission and school board elections. *See id.*

The Constitution vested the democratically elected branch of government with crafting legislative districts precisely because the legislature is in the best position to evaluate whether communities have minorities who are able to form coalitions with other "racial and ethnic groups" to elect candidates of their choice. *See Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994). Appellants' standard would divest legislatures of this sovereign and significant responsibility and arrogate it to the courts. *See LULAC*, 548 U.S. at 416. Appellants' theory, therefore, is a step deeper into the "political thicket" of redistricting.

B. Appellants' Theory Conflicts With The VRA's Preference For Supermajority Districts.

Prior to reducing BVAP in majority-minority districts, the VRA requires the State to support its decision with evidence of a decrease in racial polarized voting.

Under Appellants' theory, however, for a district to maintain its BVAP and be narrowly tailored, the Appellants want the State to produce evidence that the district requires the BVAP percentage. This "heads I win, tails you lose" approach to redistricting is incorrect and must be rejected.

Furthermore, when courts devise remedial plans, they often use a 65% minority population guideline. Considering how courts have used guidelines, Virginia' 55% target must be narrowly tailored.

i. The Evidence Before The Virginia General Assembly Required The House To Maintain The 12 Majority-Minority Districts; To Do Otherwise Risked Retrogression.

Subsequent to the Loewen report, *see infra* at 10, and due to Virginia's off-year election calendar, the number of elections available for analysis was small. JA2020-21. The Virginia delegates reviewed evidence of population trends and previous election

results and determined that a target of 55% BVAP was necessary to comply with §5 of the VRA. *See infra* at 17.

From the previous round of a redistricting, an expert report was produced in the *Wilkins* litigation[2] that analyzed racial polarization and the ability of African-Americans to elect their preferred candidate of choice. The report concluded that districts between 55% and 62% are not packed because throughout the 1990s, African-Americans were unable to elect their preferred candidate of choice in any district below 52.5%. The report warned that decreasing BVAP in districts with 55% to 62% BVAP would jeopardize the ability of African-Americans in those districts to elect their preferred candidate of choice. *See* James W. Loewen, *Report on Factual and Statistical Issues Raised in "Bill of Complaint" filed by Douglas West, et al. With Comments on Expert Reports by Drs. David Lublin and Alan Lichtman* at 43 (Aug. 31, 2001) (reproduced at App. A., 4-5).

Importantly, when analyzing whether a district is narrowly tailored to comply with the VRA, the report made an important concession: determining the precise number of minority voting age population for a district is "not an exact science." *See id.* at 43. This comment is unremarkable considering that with election polls, there is generally a margin of error of plus or minus 3%. Therefore, to craft a narrowly tailored district to

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[2] *Wilkins v. West*, 264 Va. 447, 571 S.E.2d 100 (Va. 2002).

comply with §5 of the VRA, States must have some statistical cushion when crafting districts.

The House of Delegates was, however, without evidence that there was a reduction in racially polarized voting. §5 therefore prohibits a reduction of BVAP in the 12 majority-minority districts. Appellants' theory of the Equal Protection Clause, on the other hand, *requires* that for a district to be narrowly tailored, Virginia must prove that racially polarized voting exists such that the 55% target is necessary. (Appellants' Br. at 57-58). This is a classic "heads I win, tails you lose" approach to redistricting that is incorrect and must be rejected.

After the Supreme Court's ruling in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), Congress amended §5 of the VRA to adopt the views articulated in Justice Souter's dissent. *See Ala. Legis. Black Caucus v. Alabama,* 135 S. Ct. 1257, 1273 (2015). In his dissent, Justice Souter made clear that where there is evidence of high racial polarization in voting or where there is insufficient evidence of white crossover voting, "a reduction in supermajority districts must be treated as potentially and fatally retrogressive, the burden of persuasion always being on the State." *See Georgia*, 539 U.S. at 493 (Souter, J., dissenting). Therefore, any reduction in minority voting strength from the Benchmark level is evidence of retrogression, unless the jurisdiction can prove that this reduction did not harm the ability of the minority community to elect their preferred candidate of choice. *See Georgia*, 539 U.S. at 493.

Justice Souter's presumption, combined with Appellants' theory, is the classic "heads I win, tails you lose approach [and] cannot be correct." *See FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 471 (2007). Appellants contend that the Equal Protection Clause requires the reduction of BVAP from 55% to 50% unless the State can prove racially polarized voting at levels that make the 55% target necessary. (Appellants' Br. at 57-58). Adopting Appellants' theory places Virginia between a voting rights Scylla and an equal protection Charybdis that will subject states to incessant litigation. *See Ala. Legis. Black Caucus*, 135 S. Ct. at 1273-74 ("The law cannot 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) retrogressive under §5 should the legislature place *a few too few*.") (emphasis added). Furthermore, this Court's pronouncement in *Alabama Legislative Black Caucus* recognized what the *Loewen* report stated: that the precise level of minority voting age population in a district that is necessary for minorities to elect their preferred candidate of choice is not an exact science. App. A. 4.

Moreover,, this Court cannot adopt Appellants' standard without divesting states of their discretion to narrowly tailor districts to comply with §5. *See Bartlett*, 556 U.S. at 23 ("Much like § 5, § 2 allows States to choose their own method of complying with the Voting Rights Act.").

This Court should affirm the district court so Virginia can maintain its constitutionally vested

discretion to craft districts that are narrowly tailored to comply with §5.

ii. When Courts Become Involved In §2 Cases, Courts Regularly Impose Supermajority Remedial Districts.

When courts do become involved in redistricting, they routinely require the legislature to draw stronger majority-minority districts beyond the 55% target that the Virginia House of Delegates used. *See, e.g., Shirt v. Hazeltine,* 461 F.3d 1011, 1023-24 (8th Cir. 2006) (stating that the remedial plan in that case crafted districts that were greater than 65% Native-American and further noting that courts generally use a 65% guideline when crafting remedial districts in §2 cases, and concluding that §5 was not violated where the remedial plan created an additional Native American majority-minority district); *see also Ketchum v. Byrne,* 740 F.2d 1398, 1402 (7th Cir. 1984) (recognizing that there exists a 65% guideline in remedying Section 2 violations); *Neal v. Coleburn,* 689 F. Supp. 1426, 1438 (E.D. Va. 1988) (same). Additionally, §2 only protects those districts that are greater than 50% minority population. *See Bartlett*, 556 U.S. at 19-20. Courts have derived this 65% guideline from evidence based assumptions. Courts take a 50% +1 majority and add an additional "5% for young population, 5% for low voter registration and 5% for low voter turnout . . . ." *Ketchum*, 740 F.2d at 1415.

Virginia's 55% target is narrowly tailored. Courts often order remedial plans containing a

supermajority-minority district. This Court should not disturb the General Assembly's discretionary determination of a 55% BVAP target.

C. In Redistricting Cases, Courts Are Reluctant To Adopt Doctrines Imposing Mathematical Precision.

Appellants' proposal—that a majority-minority district is narrowly tailored only if it is just barely sufficient for the minority to elect their preferred candidate of choice (Appellants' Br. at 57)—is in tension with this Court's reluctance to demand mathematical precision under the Equal Protection Clause's One Person, One Vote jurisprudence.

This reluctance to demand precise numbers in §5 is consistent with this Court's reluctance of creating precise numerical numbers in the One Person, One Vote context. *See Roman v. Sincock,* 377 U.S. 695, 710 (1964) ("[I]t is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause."); *Mahan v. Howell*, 410 U.S. 315, 329 (1973) ("Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the Equal Protection Clause of the Fourteenth Amendment the mathematical formula that establishes what range of percentage deviations is permissible, and what is not."); *see also Ala. Legis. Black Caucus,* 135 S. Ct. at 1273 (stating that courts should not rely mechanically upon numerical percentages); *see also*

App. A., 4-5. It would be a strange result where the Equal Protection Clause under a *Shaw* claim would require a State to produce with mathematical precision the lowest number of minority voters required to be narrowly tailored, but then for a One Person, One Vote claim, hold that the Equal Protection Clause does not demand mathematical precision and affords legislatures the discretion to achieve traditional redistricting criteria.

D. The Virginia General Assembly Exercised Its Discretion In Adopting Twelve Majority-Minority Districts In Consultation With And The Approval Of The House Black Caucus.

The 12 majority-minority districts are narrowly tailored because the General Assembly analyzed the population trends and voting history of each district. The House of Delegates prudently determined that a 55% target was necessary for the African-American members residing in those districts to elect their preferred candidate of choice. *See Ala. Leg. Black Caucus*, 135 S. Ct. at 1273-74. This determination was made in consultation with and with the assent of the members of the Virginia House Black Caucus.

As Appellees correctly note, Delegate Chris Jones assiduously traversed the Commonwealth to obtain the opinions of "local elected officials, registrars, community leaders . . . [and] private citizens." JA278, 594 (Appellees' Br. at 7). As is discussed *infra* at 18, Democrats praised Delegate Chris Jones for his bipartisan efforts. (JA216-17). As

a result, a supermajority of Democrat Delegates and a supermajority of Delegates within the Black Caucus supported Delegate Jones's redistricting plan. JA1175.

Delegate Rosalyn Dance (D-63), of Petersburg, explained why the redistricting committee believed that the 55% BVAP was necessary. Delegate Dance supported the plan precisely because "it does support the 12 minority districts that we have now and it does provide the 55% voting strength that I was concerned about." (Dance 1, 0:34-0:45) (*available at* http://hispanicleadershipfund.org/wp-content/uploads/2016/10/PX-36-Dance.m4v) (last visited Oct. 24, 2016) . She stated that as an African-American, she was most concerned with compliance with the Voting Rights Act, and making sure that the 12 minority districts were strong. (Dance 2, 1:54-2:07) (*available at* http://hispanicleadershipfund.org/wp-content/uploads/2016/10/PX-34-Dance.m4v) (last visited Oct. 24, 2016). Delegate Dance stated that she and the redistricting committee arrived at the 55% target because she "looked at the model and looked at the trending as far as what happened over the last 10 years." (Dance 1, 0:46-0:51). The population trends that concerned Delegate Dance were the population shifts out of and around the districts. (Dance 2, 2:10-2:17). She stated that "to maintain those 12 districts, it required some movement and sometimes not perfect adjustments between precincts." (Dance 2, 2:18-2:27). Delegate Dance then provided an example of why the committee arrived at the 55% target:

> Delegate Tyler's area, the 75th because

> Delegate Tyler is an African-American that now finally sits in the minority seat that's been there for years. But there have been three tries by minorities in the past to win that seat and they were not able to do so and if that district is below that 55% voting strength, then I don't think she would be able to hold the seat that she now holds today.

(Dance 1, 0:59-1:27).

The 55% level of voting strength was an issue that greatly concerned Delegate Dance and she stated that the 55% target made her happy to support the plan. (Dance 1, 1:30-1:36). This goal provides African-Americans with a voice that enables them to choose the preferred candidate of their choice. (Dance 1, 2:20-2:35).

The use of a 55% target was not done in a manner to harm African-Americans. Delegate Lionell Spruill, Sr. (D-77), of Chesapeake, noted that Delegate Chris Jones listened to the concerns of the Black Caucus and answered mostly every concern of the Black Caucus. (Spruill 1, 1:25-1:35) (*available at* http://hispanicleadershipfund.org/wp-content/uploads/2016/10/PX-36-Spruill_Part_01.mp4). Delegate Spruill continued saying that the Black Caucus had input and because of this, Delegate Spruill told future plaintiffs:

> So when you go to court don't say

> they're trying to dilute the black vote[3] . . . So I ask you all to do this. Is that if you are going to look at and look out for the black community, we ask you all, look at who has come to us, look at who has worked with us to try to make sure that we maintained what we got. Who has been that person? That person has been Delegate Chris Jones.

(Spruill 1, 5:32-5:37; 9:59-10:16) (*available at* http://hispanicleadershipfund.org/wp-content/uploads/2016/10/PX-36-Spruill Part 02.mp4)

In fact, Democrat Delegate David Englin took great offense to anyone who suggested this plan was harmful to African-Americans. After reciting the

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[3] Delegate Spruill's first election victory was in 1993 where he first defeated a white Democrat in the primary. This election is discussed in the *Loewen* report. This lends more import to Delegate Spruill's statements, since he was involved in the *Wilkins* litigation and his 1993 election was one of those studied where the report concluded that if the African-American population in Spruill's district is reduced from majority to minority population, African-Americans may be unable to elect Delegate Spruill as their preferred candidate of choice. *See* App. A., 1-3. *See also* (Spruill 2, 0:14-1:57) (discussing the history of redistricting efforts in Chesapeake in the 1980s) (*available at* http://hispanicleadershipfund.org/wp-content/uploads/2016/10/PX-34-Spruill.m4v) (last visited Oct. 24, 2016).

litany of the plans' objective mathematical facts and how it was the best plan presented, (Englin, 2:15-4:02) (*available at* http://hispanicleadershipfund.org/wp-content/uploads/2016/10/DX-03-Englin.m4v) (last visited Oct. 24, 2016), he stated that to suggest that he and other Democrats who were supporting this redistricting plan were supporting a plan that was "bad for minorities" and were therefore "trying to harm minorities" or "not sufficiently standing up for minorities" is "an affront and offense that is not borne out by the facts." (Englin, 4:40-4:43; 5:07-5:20). To Delegate Englin, to say that the redistricting plan was harmful to minorities was offensive because:

> Members of this Democratic Caucus time and again have fought in subcommittee, in committee, on this floor, and in their communities, some people for decades in their communities, to advance and protect the rights and freedoms of minorities of all kinds.

(Englin, 4:50-5:07).

The Black Caucus Democrats and Democrat Delegate Englin all acknowledged that although the Republicans were not required to care "one iota" of what the Democrats wanted in drafting the plan, Delegate Englin stated that Democrats did have "a substantive role in developing the plan before us." (Englin, 4:10-4:24). Delegate Spruill too acknowledged that the Black Caucus was able to provide substantive input, saying that Delegate Chris Jones was the only person to come to the Black

Caucus to consult with them and address their concerns, saying that Chris Jones was fair, and that the Black Caucus got "two or three bones." (Spruill 1, 1:25-1:45); *see also* (Spruill 2, 3:55-4:04; 4:40-5:08) (*available at* http://hispanicleadershipfund.org/wp-content/uploads/2016/10/PX-34-Spruill.m4v) (last visited Oct. 24, 2016). Delegate Dance used this reasoning in stating that she thought Delegate Chris Jones' plan was the best compromise plan. She succinctly summarized how the plan was crafted:

> It is truly an example, I found to be, of bipartisanship because there were no grey lines. Whether you're a Democrat or a Republican and you're assigned to draw those lines, you would have found much difficulty . . . But I will say that it is one that had a lot of impact from both sides of the aisle. I know because I tried to reach out to all those that I could on my side of the aisle and I know that our chair Delegate Jones was willing to listen to anything and everything that we threw to him to consider as he developed his plan.

(Dance 2, 0:57-1:52).

In the end, although perhaps not perfect, the delegates were happy with their districts. Delegate Onzlee Ware (D-11), of Roanoke, and a member of the Black Caucus explained his support of how the plan crafted his district:

> They fixed my district from the atrocity that it was ten years ago. They made it

> compact. They made it contiguous. They made it a district of community interest. . . . For once in the history of . . . if we get something that we want, why should we be ashamed of it? Why should I be upset about the fact that I have a good district with African-American and white people in it?

See (Ware, 2:20-2:31; 3:49-4:03) (*available at* http://hispanicleadershipfund.org/wp-content/uploads/2016/10/PX-41-Ware.m4v) (last visited Oct. 24, 2016).

These floor speeches are probative evidence that there was no intentional discrimination on the part of the Virginia General Assembly when it adopted this plan. *See Voinovich*, 507 U.S. at 160 (rejecting an intentional discrimination claim in part because the redistricting chairman relied on the opinions of the Ohio NAACP, the Black Elected Democrats of Ohio, and other civil rights groups in crafting legislative districts and the NAACP supported the plan); *see Georgia*, 539 U.S. at 484 ("[I]t is also significant, though not dispositive, whether the representatives elected from the very districts created and protected by the Voting Rights Act support the new districting plan"); *see also id.* at 503 (Souter, J. dissenting) ("The District Court majority explained that the 'legislators' support is, in the end, far more probative of a lack of retrogressive *purpose* than of an absence of retrogressive *effect*.'") (emphasis in the original). Instead, this evidence demonstrates that there were substantial discussions between Democrats and Republicans, racial minorities and non-minorities, and these

discussions resulted in the enacted districts. That nearly all African-American Delegates supported this plan is significant evidence that Virginia's adopted House plan is not the product of intentional discrimination, nor does it have the effect of intentional discrimination.

Virginia had discretion in crafting the 12 majority-minority districts. It properly exercised this discretion in consulting with all House members, including those of the Black Caucus. As a result of this consultation, and after reviewing the available data, the House of Delegates determined that a 55% BVAP target was necessary for African-American residents in those districts to elect their preferred candidate of choice. This Court should not disturb the General Assembly's discretionary act.

II. HISPANICS ARE THE FASTEST GROWING DEMOGRAPHIC GROUP AND THIS WILL LIMIT THEIR REPRESENTATIVE GROWTH.

Appellants' standard under which the mere use of minority voting percentage targets triggers strict scrutiny, thus compelling the State legislature to prove that the district is narrowly tailored, is especially harmful to Hispanics.

Appellants' standard that the mere use of BVAP targets triggers strict scrutiny, (Appellants' Br. at 5), will force State legislators to halt voluntarily complying with §2 of the VRA. This is so because if the mere use of minority voting age targets in crafting majority-minority districts triggers strict scrutiny—a standard where the State

has the burden of proof—legislatures will opt to simply avoid voluntarily complying with §2 in crafting majority-minority districts. This will force plaintiffs to sue under §2 where plaintiffs have the burden of proof. *See Voinovich*, 507 U.S. at 155-56.

This will have the practical effect of decreasing the number of Hispanic majority-minority districts throughout the country, despite the fact that Hispanics are this country's fastest growing population. This also means that going into the next decade, there will likely be underrepresentation of Hispanics.

i. Hispanics Are The Fastest Growing Population Group In The United States.

Firstly, Hispanics are the fastest growing population group in the United States. *See* Melissa R. Michelson, *Majority-Latino Districts And Latino Political Power*, 5 Duke J. Const. Law & Pub. Pol'y 159, 172 (2010). The U.S. Census predicts that by 2050, Hispanics will represent one-third of the country's population. *See id*. A recent study by the Pew Research Center on Hispanic Trends demonstrates that in 2014, Hispanics comprised 17.3% of the U.S. population. *See Statistical Portrait of Hispanics in the United States*, Pew Research Center (April 19, 2016) (*available at* http://www.pewhispanic.org/2016/04/19/statistical-portrait-of-hispanics-in-the-united-states-key-charts/) (last visited Oct. 20, 2016). U.S. Census estimates from 2015 show that the Hispanic population will continue to grow from its current level of 55.3 million to 119 million in 2060. *See id.*

As the Hispanic population grows, states should be allowed to increase the number of Hispanic majority districts. *See Johnson*, 512 U.S. at 1000.

ii. Hispanic Majority Districts Are Necessary For Hispanics To Elect Their Preferred Candidates Of Choice.

Hispanic majority districts are necessary for Hispanics to elect their preferred candidate of choice. *See* Melissa R. Michelson, *Majority-Latino Districts And Latino Political Power*, 5 Duke J. Const. Law & Pub. Pol'y at 174-75. In 2008, Hispanics were 15.4% of the population. This means that in 2008 for the U.S. House of Representatives to reflect that population, there should be sixty-seven seats in the House. *See id*. at 166. But only twenty-five Hispanics were in the House, and of these twenty-five Hispanic congressional representatives, 19 were elected from majority-Hispanic districts. *See id*. at 166-67; *compare with See* Kim Geron and James S. Lai, *Beyond Symbolic Representation: A Comparison Of The Electoral Pathways and Policy Priorities of Asian Americans and Latino Elected Officials*, 9 Asian L.J. 41, 50 (2002) (noting that in 1998, there were 39 African-American representatives in the U.S. House, 23 of which were elected from African-American-majority districts and noting that in the same year, there were 19 Hispanics, 17 of which were from Hispanic majority districts). Currently, there are 32 Hispanic members in the U.S. House of Representatives. 23 are from Hispanic majority districts, with an additional three Representatives from districts containing 46.7%, 49.4%, and 49.8% Hispanic population. *See* Appendix B; *see also*

Alvaro Bedoya, Note, The Unforeseen Effects of *Georgia v. Ashcroft* on the Latino Community, 115 Yale L.J. 2112, 2136 (2006) ("Some scholars have placed the average population threshold necessary for Hispanics to have the ability to elect their candidate of choice between 55% and 60% Latino.").

Hispanic-majority districts are therefore needed for Hispanics to elect their preferred candidate of choice. This is because the Hispanic community's "lower levels of citizenship; lower levels of English-language proficiency; and the demographic nature of the Latino community, including lower median levels of age, income, and education" all contribute to low voter turnout. *See* Melissa R. Michelson, *Majority-Latino Districts And Latino Political Power*, 5 Duke J. Const. Law & Pub. Pol'y at 172-73. Low voter turnout limits the ability of Hispanics to win in districts where they do not constitute a majority or a supermajority. *See id.* at 174. Hispanic majority districts remain necessary for Hispanics to elect their candidate of choice. *See id.*

State legislatures must have the discretion to draw Hispanic-majority districts that adhere to traditional redistricting criteria. Subjecting each Hispanic-majority district to strict scrutiny will force States to avoid crafting those districts. This in turn will force Hispanics to file civil lawsuits under §2 of the VRA.

iii. If Hispanics Are Forced To Sue For Majority-Minority Districts Under §2, They Will Likely Not Prevail Because Of The Three Gingles Preconditions.

Hispanics already face a steep climb to prevail under §2, because to even have a chance at prevailing, they must first satisfy the three *Gingles* preconditions. *See Thornburg v. Gingles,* 478 U.S. 30, 50-51 (1986) (stating that for plaintiffs to prevail under §2, plaintiffs must first prove three preconditions; (1) that the minority population is sufficiently large and sufficiently compact to constitute a majority in a district; (2) that the minority is politically cohesive; and (3) there is racial bloc voting preventing the minority from electing their candidate of choice).

First, Hispanics generally do not live in geographically compact areas. *See* Kim Geron and James S. Lai, *Beyond Symbolic Representation: A Comparison Of The Electoral Pathways and Policy Priorities of Asian Americans and Latino Elected Officials*, 9 Asian L.J. 41, 46 (2002); *see also Alvaro Bedoya*, Note, The Unforeseen Effects of *Georgia v. Ashcroft* on the Latino Community, 115 Yale L.J. at 2139 ("This compactness requirement is more difficult for Hispanics to meet, given that they are more residentially dispersed than African-Americans.").

Second, Hispanics are not necessarily politically cohesive. In 2004, approximately 44% of Hispanic voters voted for Republican presidential nominee, George W. Bush. *See* Roberto Suro,

Richard Fry and Jeffrey S. Passel, *Hispanics and the 2004 Election: Population, Electorate and Voters* (June 27, 2005) (*available at* http://www.pewhispanic.org/2005/06/27/iv-how-latinos-voted-in-2004/ (last visited Oct. 20, 2016). In 2006, the ratio of Hispanic Democrats to Hispanic Republicans was 2.6 to 1. *See Majority-Latino Districts And Latino Political Power,* 5 Duke J. Const. Law & Pub. Pol'y at 168. On closer inspection, the lack of political cohesiveness expands on the basis of national origin. The ratio of Mexican American Democrats to Republicans is 2.9 to 1; Puerto Ricans prefer Democrats 3.2 to 1; and Cuban Americans prefer Republicans 1.5 to 1. *See id*. Furthermore, even though there is some evidence that Hispanics "prefer to vote for coethnic candidates, they do not constitute as cohesive a voting bloc as do African Americans . . . ." *See id*. at 171.

Third, and finally, although there is some evidence of racial bloc voting against Hispanics preferred candidate of choice, generally "several studies find that White voters are generally willing to vote for Latino candidates." *See id*. at 163.

Evidence supports that it is difficult for Hispanics to prevail in §2 litigation. Of the 96 §2 VRA cases involving Hispanic plaintiffs that were litigated from complaint to determination of liability, Hispanics prevailed independently only 7 times (7.2%). [4] Ellen D. Katz, et al., *Documenting*

[4] Of all successful §2 cases litigated from Complaint to determination liability, there were 14 cases that involved multiple minority groups. Ellen D. Katz, et

Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982 Ann Arbor, MI: University of Michigan Law School at 9 (2005). This is compared to the 268 cases brought by African-American plaintiffs in which they were successful in 103 of those cases. *See id*. From between 1982 to 2005, all §2 plaintiffs were successful only 37.2% of the time. *See* Br. of Ellen Katz and the Voting Rights Initiative as Amicus Curiae, *Shelby County v. Holder*, No. 12-96 at 1a (Appendix A) (U.S. Feb. 1, 2013).

Adopting Appellants' standard will particularly harm Hispanics. To ensure that Hispanics will continue to grow in political representation, this Court should reject Appellants' proposed standard and affirm the district court below.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court below.

Respectfully submitted,

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al. *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982* Ann Arbor, MI: University of Michigan Law School at 9 (2005). At best then, Hispanics prevailed in §2 litigation only 21 times out of 96 for a 21.8% winning percentage.

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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

APPENDIX

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Excerpt (Pages 38-39; 43) from
Virginia Redistricting:
Report on Factual and Statistical Issues Raised in
"Bill of Complaint" filed by Douglas West, et al.
With Comments on Expert Reports by Drs. David Lublin and Alan Lichtman
by James W. Loewen

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(Pages 38-39)

When created, District 74 was 56.1% black in VAP. For the first half of the 1990s no black candidate challenged the white incumbent, Robert Ball, perhaps because none thought he could be dislodged. As I have suggested for other unopposed white candidates, Ball probably was never the candidate of choice of the African American community. Gradually the district became blacker at a rate of almost a percentage point per year. In the Democratic primary of 6/13/95, Donald McEachin, African American, narrowly defeated Ball, winning just 51.5% of the votes cast. In 1995, District 74 was probably 61% black in VAP. If it had been 59.7% black in VAP, the election would have been a true cliffhanger — so again, a district 59.7% black in VAP can hardly be considered packed.

To be sure, in the ensuing general election, McEachin defeated a white Republican two to one, probably assisted by white Democrats. In 1997, McEachin trounced a trivial white candidate in the primary and a white independent in the general election. Since then, he has not faced opposition. Surely McEachin was reaping the same benefits of Virginia incumbency as white incumbents. The

question is: what happens the next time District 74 is open? I understand McEachin is not running for this seat next time. Will white voters mobilize behind a candidate of choice of the white community? It is possible, if the 1995 election — the last time the seat was open — offers any indication.

The complaint next singles out District 77, claiming its "lines meticulously take in precincts with heavy percentages of African American voters, excluding white voters in surrounding precincts," and noting that African American voters comprise "55.9% of the district's VAP." Dr. Lichtman likewise attacks District 77 (pages 11-13), implying that it is packed because it is 55.9% black in VAP. Consider the 11/5/91 general election for House District 77, as shown in Table 7. In this context, Willa Bazemore, black independent, lost to Thomas Forehand, white Democrat, by 5,070 votes to 5,685. Forehand won more than 99% of the white votes cast for this office. With virtually no white crossover support, Bazemore could not prevail, although the black community voted 88% to 12% in her favor. She lost by 600 votes, even though District 77 was 55.7% black in VAP at the time. She would have had no chance whatever in District 77 as redrawn by HB-2, which reduces its proportion black to 48.3% of the VAP. Nor would she if Dr. Lichtman's implicit suggestions for redrawing the district to some still lower proportion black were put into effect.

To be sure, after his confusing and narrow win over Eileen Olds in the Democratic primary in 1993, African American Lionell Spruill was able to win District 77 easily, and it no longer is a seat that whites seem to feel they can win. Spruill is reaping the same benefits of incumbency that Donald

McEachin (black) is reaping in District 74 and Frank Hall (white) is reaping in District 69. If District 77 is redistricted to make blacks a minority in the VAP, however, whites and blacks may return to the 1991 pattern. This would be particularly likely when it next becomes an open seat.

Districts 80 and 92 are the last to be described by Dr. Lichtman. Table 4 shows that there were no black-white primaries in these districts during the last decade. In District 80, African American Ken Melvin easily defeated a white independent and a white Republican in elections analyzed in Table 6. In District 92, African American Mary Christian easily defeated a white independent in an election analyzed in Table 5. These districts behave like jurisdictions where whites do not expect to win.

District 80 was 61.1% black in VAP; the new redistricting reduces it to 55.3%. District 92 was 66.2% black in VAP; the new redistricting reduces it to 59.3%. Such reductions in % black may make these districts more competitive and are hardly evidence of packing. Moreover, when the seats become open, the advantages of incumbency will no longer flow to the black candidates, which will also make the districts more competitive.

In election after election, Table 7 shows that when white voters felt they had a chance to win, they indulged in racial bloc voting, even in these

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(Page 43)

the black VAP voting for the white candidate (1.4%) times the % black in the VAP (x) yields the votes for the white candidate. Setting them equal:

.292x = .147; x = .503

We conclude, for African American voters to have a tossup chance, they must be 50.3% of the VAP at a minimum.

Would a District 49.9% Black Be Unwinnable?
Would A District 55% Black Be Packed?

Of course, this analysis cannot be an exact science and a point estimate like 50.3% is not justified. We might place a band around it, analogous to the "confidence interval" in introductory statistics courses. But our confidence interval does not derive solely from the statistical process of estimating the universe of political behavior from the known sample of past elections. In politics, much depends on the qualifications, character, personality, and even appearance of the candidates, on their style and amount of campaigning, on their stance on various issues, and on their political alliances, wealth, and abilities to raise funds.

I suggest that this estimate of 50.3% should be considered a minimum for several reasons. First, except for George Lovelace once for a partial term of

office in one seat, no candidate of choice of the African American community has won a seat in the Virginia legislature in the last ten years, except from districts more than 52.5% black in VAP. Second, the districts summarized in Table 7 already have black majorities ranging from 55% to 62% black in VAP, yet white candidates remain competitive. Therefore districts 55% to 62% black in VAP cannot be considered packed.

Because these districts range from 55% to 62% black in VAP, their black populations have already enjoyed a considerable "warming effect," leading to increased political mobilization. If the black proportion in the VAP in these districts were decreased toward 50.3%, some of this warming effect would be lost, decreasing the ability of black voters to elect candidates of their choice to the Virginia legislature.

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Appendix B

Hispanic Members Of Congress And Hispanic Population Percentage In Their Districts.

	Name	State – District	Dist. Hisp. Pop.
1	Raul Grijalva	AZ – 03	60.0%
2	Ruben Gallego	AZ – 07	62.8%
3	Lucille Roybal-Allard	CA – 40	87.6%
4	Xavier Becerra	CA – 34	64.2%
5	Grace Napolitano	CA – 32	63.4%
6	Devin Nunes	CA – 22	46.7%
7	Raul Ruiz	CA – 36	49.8%
8	Linda Sanchez	CA – 38	62.5%
9	Loretta Sanchez	CA – 46	67.3%
10	Jim Costa	CA – 16	60.4%
11	Tony Cardenas	CA – 29	68.8%
12	Juan Vargas	CA – 51	70.6%
13	Norma Torres	CA – 35	71.5%
14	David Valadao	CA – 21	74.7%
15	Pete Aguilar	CA – 31	51.8%
16	Mario Diaz-Balart	FL – 25	70.9%
17	Ileana Ros-Lehtinen	FL – 27	75.4%
18	Carlos Curbelo	FL – 26	69.7%
19	Raul Labrador	ID – 1	10.5%
20	Luis Gutierrez	IL – 4	70.1%
21	Albio Sires	NJ – 8	55.0%
22	Ben Ray Lujan	NM – 3	40.8%
23	Michelle Lujan Grisham	NM – 1	49.4%
24	Jose Serrano	NY – 15	66.0%
25	Nydia Velazquez	NY – 7	40.5%

Appendix B

Hispanic Members Of Congress And Hispanic Population Percentage In Their Districts.

26	Joaquin Castro	TX – 20	67.8%
27	Ruben Hinojosa	TX – 15	80.6%
28	Henry Cuellar	TX – 28	78.2%
29	Bill Flores	TX – 17	24.8%
30	Filemon Vela	TX – 34	83.0%
31	Jaime Herrera Beutler	WA – 3	09.4%
32	Alex Xavier Mooney	WV – 2	02.0%

Sources:

114th Congress, My Congressional District, 2015 American Community Survey 1-Year Estimates, UNITED STATES CENSUS BUREAU, http://www.census.gov/mycd/ (last visited Oct. 24, 2016).

Members, CONGRESSIONAL HISPANIC CAUCUS, http://congressionalhispaniccaucus-sanchez.house.gov/members (last visited Oct. 24, 2016).

Members, CONGRESSIONAL HISPANIC CONFERENCE, https://hispanicconference-mariodiazbalart.house.gov/membership (last visited Oct. 24, 2016).