No. 18-1134

In The Supreme Court of the United States

VIRGINIA HOUSE OF DELEGATES,
M. KIRKLAND COX,

Appellants,

V.

GOLDEN BETHUNE-HILL, *ET AL.*,

Appellees.

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

BRIEF OF AMICUS CURIAE THE NATIONAL REPUBLICAN REDISTRICTING TRUST IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National Republican Redistricting Trust ("NRRT") is the primary organization tasked with coordinating and collaborating with national, state, and local groups for the upcoming decennial reapportionment.[1] The NRRT's mission is to: (1) ensure redistricting faithfully follows all state, federal, and constitutional mandates; (2) see that redistricting comports with traditional districting criteria to ensure that individual legislators represent their communities and not political parties; and (3) ensure that the redistricting process and the results therefrom make sense to the voters so that each citizen understands why their individual districts were drawn in a specific way. This case implicates the very core of NRRT's mission.

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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. No person other than Amicus Curiae made a monetary contribution to its preparation or submission. Counsel for each party consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

It is clear from the facts that the Virginia General Assembly sought to use race, not for some invidious purpose long abhorred by the Constitution and the American consciousness, but instead to extend certain voters the rights afforded them by the Voting Rights Act. If the Voting Rights Act ("the Act" or "VRA") is a constitutional use of congressional power, which this Court has long presumed, then legislatures should be free to reapportion in compliance with the Act without fear of unwarranted judicial interreference through the Act's *per se* application so long as the state followed its own race neutral criteria in seeking to effectuate the Act's ends. Similarly, guidance is desperately needed so that the lower courts are not tempted to replace a state's policy calculus with its own.

First, as this Court has stated time and again, reapportionment is the job of the states and therefore the states deserve clear and workable guidelines in order to meet the competing requirements of the VRA and the Equal Protection Clause of the Fourteenth Amendment. Further, given the impending decennial census and corresponding reapportionment, the judiciary stands to be overwhelmed by both racial and VRA claims should no additional clear guidance be given.

Second, the current racial gerrymandering standard is unclear and does not afford state legislatures the guidance or space under the Fourteenth Amendment and VRA to avoid strict scrutiny altogether or, should it be necessary to subordinate traditional districting criteria to racial

considerations, to meet the narrow tailoring requirements.

Third, the standard enunciated in *Bush v. Vera* presents a manageable solution to the competing demands of the VRA and the Fourteenth Amendment. It does this through two related but distinct avenues. First, the framework refocuses the predominance inquiry to a state's use, or misuse, of traditional districting criteria. Second, the standard further clarifies and solidifies the role traditional districting criteria play in determining if the state's action was narrowly tailored.

Without further guidance or clarification from the Court, states will enter into the next decennial reapportionment with no clear standard by which to judge their legislative enactments in this area. The only result, just as we have seen this decade, is ceaseless litigation and a hodgepodge of lower court decisions where one state's use of race was unconstitutional yet another state's use, even though factually indistinct, was not. Therefore, the Court should note probable jurisdiction to give both state legislatures and the lower courts a clear workable standard by which to evaluate their responsibilities under both the Fourteenth Amendment and the VRA.

ARGUMENT

The competing demands of the Voting Rights Act and the Fourteenth Amendment have placed state legislatures in the classic no-win scenario when it comes to reapportionment. Section 2 of the VRA mandates that a sufficiently large and geographically compact minority group that is

politically cohesive and is in danger of being consistently outvoted by a majority group should be able to elect the candidate of their choice. *See Thornburg v. Gingles*, 478 U.S. 30 (1986); *see also* 52 U.S.C.S § 10301. Section 5 mandates that a covered jurisdiction "demonstrate that an electoral change, such as redistricting, would not bring about retrogression in respect to racial minorities' ability to elect their preferred candidates of choice." *See Alabama Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1263 (2015); *see also* 52 U.S.C.S. § 10304(b).[2] While, at the same time, the Fourteenth Amendment mandates that, in the reapportionment context, racial considerations cannot predominate. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995). The multitudinous twists and turns in this area of the law calls to mind a Trappist monk's prayer:

> My Lord God, I have no idea where I am going. I do not see the road ahead of me. I cannot know for certain where it will end. Nor do I really know myself, and the fact that I am following your will does not mean that I am actually doing so. But I believe that the desire to please you does in fact please you.

Thomas Merton, *Thoughts in Solitude* 79 (1999). Such is the situation facing state legislatures when

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[2] The coverage formula under Section 4(b) was declared unconstitutional after Virginia's reapportionment plan was both passed and precleared. As such, this brief will proceed under the same assumption Virginia was forced to make when it enacted its apportionment plan, that preclearance under Section 5 is required.

they take up the constitutionally mandated task of decennial reapportionment. And, more to the point, such was the desire of the Virginia General Assembly when they sought to design districts that complied with the competing interests of the VRA and the Fourteenth Amendment.

Be that as it may, the questions presented to this Court in both this case, *Virginia House of Delegates, et al. v. Bethune-Hill*, No. 18-1134 (U.S. docketed Mar. 1, 2019) (*Bethune-Hill III*), and its companion case, *Virginia House of Delegates, et al. v. Bethune-Hill*, No. 18-281 (U.S. oral argument scheduled Mar. 18, 2019) (*Bethune-Hill II*), begs the question if there is a better way forward; a way that addresses the Court's concerns that racial classifications not play a predominant role in the state's districting decisions while at the same time acknowledging that the state must, under federal law, take race into account at least enough to be compliant with Sections 2 and 5 of the VRA.

I. Principles of Federalism Mandate that the States Be Given Some Leeway in this Area.

"[F]undamental concerns of federalism mandate that states be given some leeway so that they are not 'trapped between the competing hazards of liability.'" *Bush v. Vera*, 517 U.S. 952, 977 (1996) (O'Connor, J., plurality op.). "[F]ederalism and the slim judicial competence to draw district lines weigh heavily against judicial intervention in apportionment decisions; as a rule, the task should remain within the domain of state legislatures." *See Miller*, 515 U.S. at 934-35 (Ginsburg., J., dissenting); *see also id.*

at 915; *Reynolds v. Sims*, 377 U.S. 533, 586, (1964) ("Legislative reapportionment is primarily a matter for legislative consideration and determination . . . ."). But for the Supremacy Clause, the "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Shelby Cnty. v. Holder*, 570 U.S. 529, 543 (2013) (quoting *Bond v. United States*, 564 U.S. 211, 221 (2011)). "But the federal balance 'is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *Id.* at 543 (quoting *Bond*, 564 U.S. at 221 (internal quotation marks omitted)). This is because the Framers' intent was for the States to have "the power to regulate elections" under the Tenth Amendment. *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461-62 (1991)).

The current state of the law, as members of the Court have noted, creates a "perilous" situation for state legislatures. *See, e.g., Miller*, 515 U.S. at 948 (Ginsburg, J., dissenting); *see also Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018) (referring to the competing demands of the VRA and Fourteenth Amendment as a "legal obstacle course"). For instance, the *Miller* dissent maintained that the majority had created a situation in which a state legislature can "[n]o longer . . . avoid judicial oversight by giving . . . genuine and measurable consideration to traditional districting practices." *Id.* at 944 (Ginsburg, J., dissenting). The dissent goes on to explain the "perilous" situation state legislatures are placed in without the anchor of traditional districting practices "to provide a safe harbor." *Id.* at

948. The dissent's overarching concern[3] was that "[o]nly after litigation—under either the Voting Rights Act, the Court's new *Miller* standard, or both—will States now be assured that plans conscious of race are safe." *Id.* at 948.

Over the past 24 years, the *Miller* dissent—despite Justice O'Connor's view to the contrary—has proven to be the more prescient view of events. *See, e.g.*, *Vera*, 517 U.S. at 1045-46 ("The result of this failure to provide a practical standard for distinguishing between lawful and unlawful use of race has not only been inevitable confusion in state houses and courthouses, but a consequent shift in responsibility for setting district boundaries from state legislatures . . . to the courts . . . .") (Souter, J., Ginsburg, J., and Breyer, J., dissenting); *Abbott*, 138 S. Ct. at 2315 ("Since the Equal Protection Clause restricts consideration of race and the VRA demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to 'competing hazards of liability.'" (quoting *Vera*, 517 U.S. at 977). Interestingly, this was not the case for

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[3] Interestingly, Justice O'Connor—who presented the fifth vote in Miller—did not share the dissent's concern because, as her concurrence notes, the *Miller* majority *did not* substantively change the standard articulated in *Shaw I*. *See Miller*, 515 U.S. at 928-29 ("I understand the threshold standard the Court adopts—'that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations,'—to be a demanding one. To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices. Those practices provide a crucial frame of reference and therefore constitute a significant governing principle in cases of this kind." (internal citation omitted)).

the vast majority of the 2000 redistricting cycle, even though most commentators presumed that the *Shaw* standard would lead to endless litigation. *See* Nathaniel Persily, *Forty Years in the Political Thicket: Evaluating Judicial Review of the Redistricting Process Since Baker v. Carr*, Brookings, 22-23, (hereinafter, Persily)[4]. Professor Persily referred to this phenomenon as the "dog [that] didn't bark." *Id.* at 23. The reason the "dog didn't bark" is that the states assumed that traditional districting criteria—i.e. avoiding "bizarre" shapes—was necessary to avoiding liability under *Shaw*. *Id.* Furthermore, "[t]he *Shaw* standard, despite its many ambiguities, also turned out not to be as difficult to apply." *Id.*

The competing and conflicting decisions of this decade however, portend a large influx of race based redistricting litigation in the next decade. Just recently, plaintiffs brought suit in three states (Georgia, Alabama, and Louisiana) alleging VRA violations *seven years* after the last decennial reapportionment. *See Chestnut v. Merrill*, No. 2:18-cv-907 (N.D. Ala. 2018); *Dwight v. Kemp*, No. 1:18-cv-2869 (N.D. Ga. 2018); *Johnson v. Ardoin*, 3:18-cv-625 (M.D. La. 2018). Other suits that were brought much earlier on in the decade are either still ongoing, *see Bethune-Hill II*, No. 18-281; *Bethune-Hill III*, No. 18-1134, or only recently reached final decisions *years* after they were originally implemented. *See, e.g.*, *Abbott*, 138 S. Ct. at 2313-14. As these cases illustrate, states will inevitably be subjected to drawn out and expensive litigation with

[4] https://www.brookings.edu/wp-content/uploads/2012/04/crc_Persily.pdf

almost assured liability under the VRA, on the one hand, or the Equal Protection Clause, on the other. To place states in this position is to "offend" both principles of federalism and "traditional notions of fair play and substantial justice." *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 315 (1945); *see also Miller*, 515 U.S. at 934-35 (Ginsburg., J., dissenting). Because "[d]istrict lines are drawn to accommodate a myriad of factors—geographic, economic, historical, and political—and state legislatures, as arenas of compromise and electoral accountability, are best positioned to mediate competing claims; courts, with a mandate to adjudicate, are ill equipped for the task." *See id.* at 936 (Ginsburg, J., dissenting). As such, this Court should further clarify its precedents to give the legal guidance necessary to allow state legislatures the proper freedom to operate our federalist scheme.

II. There Is No Clear Standard to Meet the "Twin Demands" of the Fourteenth Amendment and the Voting Rights Act.

The Court has been adamant that both the "States and lower courts are entitled to more definite guidance as they toil with the twin demands of the Fourteenth Amendment and the VRA." *Bush v. Vera*, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring) (alteration omitted); *see also id.* at 1045-46 (Souter, J., Ginsburg, J. and Breyer, J., dissenting); *Miller*, 515 U.S. at 934 (Ginsburg, J., dissenting). And toil they have. On the eve of the next decennial reapportionment—more than two decades after Justice O'Connor squarely addressed the issue—there is no clear standard for the states or the courts

to comply with the dictates of both the VRA and the Fourteenth Amendment. *See Vera*, 517 U.S. at 990; *see also Abbott*, 138 S. Ct. 2305. The history of this Court's jurisprudence since *Shaw I* has created little, if any, room for a state legislature to act in good faith while conducting the "most vital of local functions": reapportionment.[5] *See Miller*, 515 U.S. at 915.

Recently, the Court adopted a "two-step analysis" to determine if there has been an impermissible racial gerrymander. *See Cooper v. Harris*, 137 S. Ct. 1455, 1464-65 (2017). "First, the plaintiff must prove that race was the predominant factor motivating the legislature's decision" through the showing that the legislature "subordinated" traditional districting factors to "racial considerations."[6] *Id.* Second, upon a showing of predominance the burden shifts to the state to show that the racial considerations were narrowly tailored to further a compelling interest. *Id.* at 1464. One such interest is presumed to be compliance with the

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[5] The history of jurisprudence in this area certainly predates *Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*). *See, e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960); *Wright v. Rockefeller*, 376 U.S. 52 (1964). However, the *Shaw* line of cases represent a clear starting point in this Court's jurisprudence on the relationship between both its racial gerrymandering cases, *see e.g.*, *Shaw I*, 509 U.S. 630 (1993), and their unique interplay with the Section 2, *see, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006), and Section 5, *see e.g., Beer v. United States*, 425 U.S. 130 (1976), of the VRA.

[6] As is discussed in depth *infra*, this step in the analysis is where the proverbial rubber meets the road and where the states are in desperate need of additional space to draft compliant districting plans. *See infra* at 12-16.

VRA. *Id.* However, simply invoking the Act is not enough, a "State must establish that it had 'good reasons' to think that it would transgress the Act if it did not draw race-based district lines." *Id.* It is only in application of the "'good reasons'" standard [that] gives States 'breathing room' to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed." *Id.* (citing *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788 (2017) (*Bethune-Hill I*)). The problem with this analysis is not that it is categorically unsound, rather it is simply incomplete. The problem facing the States is not that, once strict scrutiny applies, compliance with the VRA may serve as a compelling interest. The problem is that, in practice, simply seeking to comply with the VRA subjects states to strict scrutiny in the first instance.

Currently there exists no "safe harbor" articulated by the Court that will reasonably ensure that any state's reapportionment is not subjected to strict scrutiny for simply seeking to comply with the mandates of the VRA. *See Miller*, 515 U.S. at 949 (Ginsburg, J., dissenting). "The result of this failure to provide a practical standard for distinguishing between lawful and unlawful use of race has not only been inevitable confusion in state houses and courthouses, but a consequent shift in responsibility for setting district boundaries from state legislatures . . . to the courts . . . ." *Vera*, 517 U.S. at 1045-46 (Souter, J., Ginsburg, J. and Breyer, J., dissenting). The history of racial gerrymandering claims sheds some light as to how the problem arose and presents a possible way forward.

a. The Purpose of Traditional District Criteria in the Predominance Analysis Is to Keep Voting Rights Act Compliant Plans from Being Subject to Strict Scrutiny.

The Court recognized early on that a judicial rule that subjected the states to strict scrutiny simply for being "race conscious" was not manageable because it is expected that legislators will know the demographics of their states. *See, e.g., Shaw I*, 509 U.S. at 646. For the *Shaw I* court, it was the shape of the district lines themselves that was of paramount importance, not for their own sake, "but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." *Id.* at 647 ("Put differently, we believe that reapportionment is one area in which appearances do matter."). Therefore, the initial standard articulated in *Shaw I* was simply that "district lines *obviously* drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption", *id.* at 645 (emphasis in original), unless the "ostensibly neutral" district lines are instead merely an "obvious pretext for racial discrimination." *Id.* at 643-44. If traditional districting criteria are not met *or* compliance with the criteria serve merely as a pretext for an invidious purpose then, and only then, should strict scrutiny apply.

The resulting complexity and confusion arose, not as a direct result of the rule articulated in *Shaw I*, but instead in its apparent contradiction with the

dictates of the VRA. The Act requires *some* amount of race consciousness when legislatures draw districts.[7] *See, e.g.*, *Miller*, 515 U.S. at 935 (Ginsburg, J., dissenting) ("[T]o meet statutory requirements, state legislatures must sometimes consider race as a factor highly relevant to the drawing of district lines."). Section 2 of the VRA prohibits vote dilution, which is the creation of a "particular voting scheme as a purposeful device 'to minimize or cancel out the voting potential of racial or ethnic minorities.'" *Miller*, 515 U.S. at 911 (quoting *Mobile v. Bolden*, 446 U.S. 55, 66 (1980)). Similarly, previous to this Court's decision in *Shelby Cnty. v. Holder*, 570 U.S. 529, 549 (2013), many states, including Virginia, were covered jurisdictions subject to section 4(b)'s coverage formula. Covered jurisdictions were required to be "precleared" by the Department of Justice to avoid retrogression under Section 5 of the Act, which prohibits "those redistricting plans that would have the purpose or effect of worsening the position of minority groups." *Id.* Avoiding retrogression and vote dilution effectively mandate that legislatures take *per se* racial factors and information into account when drawing districts. *See generally Abbott*, 138 S. Ct. at 2315 (noting that "the VRA demands the consideration of race."). The fundamental question then became, at what point is strict scrutiny applied

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[7] A standard is crucial in this area of the law so that "[o]ne need not use Justice Stewart's classic definition of obscenity—'I know it when I see it'—as an ultimate standard . . . ." *Shaw I*, 509 U.S. at 647 (quoting *Karcher v. Daggett*, 462 U.S. 725, 755 (1983)). The confusion surrounding any standard in this area further illustrates that a judicial "fix" to this issue ought to be *legal* and *not factual* in nature.

in racial gerrymandering claims. In other words, how much use of race is too much?

The Court in *Miller* was squarely presented with the conflicting demands of the Fourteenth Amendment and the VRA. To address these competing demands the *Miller* Court, in line with *Shaw I*, placed the burden on plaintiffs to prove that race *predominated* in the legislature's decision making. *Miller*, 515 U.S. at 916. To make a showing of predominance "a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Id.* The *Miller* Court, however, created confusion by *apparently*—as long as one assumes that Justice O'Connor's concurrence does not control—lessening the importance of traditional districting criteria to the threshold question of whether strict scrutiny applies in the first instance. *See Miller*, 515 U.S. at 913. For example, the *Miller* Court attempted to "make clear that parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding the districts geometry and makeup nor required to make a threshold showing of bizarreness." *Id.* at 915; *see also Bethune-Hill I*, 137 S. Ct. at 799 ("[A] conflict of inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or mandatory precondition" for proving a racial gerrymandering claim.).

The key question created in *Miller*—a question that remains unresolved to this day—is the precise role traditional districting criteria plays in the predominance analysis. The caselaw is rife with the following two apparently contradictory positions: (1) to satisfy predominance a plaintiff, "must prove that

the legislature subordinated traditional race-neutral districting principles to racial considerations," *Miller*, 515 U.S. at 797; and (2) "Bizarreness"—*i.e.* non-compliance with traditional districting criteria—is merely "persuasive circumstantial evidence that race for its own sake . . . was the legislature's dominant rationale," *id.* at 913. If the threshold question is "subordination" of traditional districting criteria, then one would think that traditional districting criteria should serve as a threshold consideration and not merely "circumstantial evidence." The modern case law is of no help in this regard. *See, e.g.*, *Bethune-Hill I*, 137 S. Ct. 797; *Cooper*, 137 S. Ct. at 1464-65.

The Court in *Abbott v. Perez* appeared to recognize the unenviable position in which the case law has placed the states. "Redistricting is never easy" and it is "especially complicated" when a State is required to achieve population balance, comply with state law, and balance "complex . . . requirements regarding the consideration of race." *Abbott*, 138 S. Ct. at 2314. While "[t]he Equal Protection Clause forbids racial gerrymandering [and] intentional 'vote dilution' . . . its application is complicated" by the mandates of the Section 2 and Section 5 of the VRA. *Id.* The Act "pulls in the opposite direction" of the Equal Protection Clause by "insist[ing] that districts be created precisely because of race." *Id.* This tension makes states "vulnerable to 'competing hazards of liability.'" *Id.* at 2315. The *Abbott* Court considered the problem serious enough to remark that compliance in this area is a "legal obstacle course." In fact, as shown *supra*, this may be an understatement. The *Abbott* Court did not directly address the application of

traditional districting criteria as a means of avoiding the application of strict scrutiny. However, as discussed *infra* the Court's "good faith" analysis, and the coordinate presumption afforded state legislatures, presents an opportunity that fits neatly within the compliance framework articulated in *Vera*. As the Court has certainly identified that there is a problem, the question remains as to the proper solution.

III. The Court Should Adopt the *Bush v. Vera* Framework so that States Have Sufficient Space to Navigate the "Twin Demands" of the Constitution and the Voting Rights Act.

The framework[8] enunciated in *Bush v. Vera* sought to meet the "twin demands" placed upon the states by the competing interests of the Fourteenth Amendment and the VRA. *Vera*, 517 U.S. 952, 992 (O'Connor, J., concurring). First, as long as traditional districting criteria are not "subordinate[d] . . . to the use of race for its own sake and not as a proxy, States may intentionally create majority-minority districts, and may otherwise take

[8] It is important to note that Justice O'Connor maintained that this framework governed the plurality's decision, *see Vera*, 517 U.S. at 993 ("Today's decision . . . present[s] a workable framework for the achievement of these twin goals."), and was simply an extension of her view of the case law in *Shaw I* and *Miller*. *See Miller*, 515 U.S. at 928-29. In fact, Justice O'Connor understood that each decision in which she was on the majority comported itself with this framework. *See, e.g., Easley v. Cromartie*, 532 U.S. 234, 253-54 (2001) (*Cromartie II*). This is an understanding the states also seemed to hold. *See* Persily at 22-23.

race into consideration, without coming under strict scrutiny." *Id.* at 993. Second[9], the "state[s] interest in avoiding liability under VRA § 2 is compelling." *Id.* Third, the state action is narrowly tailored if the state pursued its compelling interest under the VRA by creating a district that "'substantially addresses' the potential liability and does not deviate substantially from a hypothetically court-drawn" district. *Id.* (internal citation omitted). Finally, "districts that . . . neglect traditional districting principles and deviate substantially from the hypothetical court-drawn district, *for predominantly racial reasons*, are unconstitutional." *Id.* (emphasis in original).

This framework coincides with this Court's precedents, both before *Vera,* and after. Furthermore, the framework allows the states the space needed to create districts that will not automatically be held up in litigation over the next decade.

a. Compliance with Traditional Districting Criteria Should Be Both a Sword and Shield for Legislatures in the Reapportionment Context

As discussed *supra*, one of the more hotly contested issues in the *Shaw* line of cases is the precise role that traditional districting criteria should play in a court's racial gerrymandering

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[9] The second element of the framework in Justice O'Connor's original formulation simply restates the test for a Section 2 violation under *Gingles*, which is not in serious dispute. *See, e.g.*, *Vera*, 515 U.S. at 993-94.

analysis. In order for States to have the room to properly legislate in this area, the Court should extend its precedents to clarify that traditional districting criteria are the measure of racial gerrymandering claims, both to preempt the application of strict scrutiny and then, should race predominate, prove narrow tailoring. As such, traditional districting criteria should serve as (1) a "shield" to prevent the application of strict scrutiny to legislative action that seeks to comply—through the use of traditional districting criteria and not as a proxy—with the VRA, and (2) a "sword" to defeat a claim should strict scrutiny apply. This approach is in keeping with this Court's precedents in this area.

i. If the Voting Rights Act is a Constitutional Use of Congressional Power then Compliance with the Act Cannot, Without More, Trigger Strict Scrutiny.

As a threshold matter, the constitutionality of Sections 2 and 5 of the VRA as applied to redistricting have been presumed by the Court. *See, e.g.*, *Miller*, 915 U.S. at 921; *but see Cooper*, 137 S. Ct. at 1485-86 (Thomas, J., concurring). As long as achieving the ends of the Act remains presumptively constitutional, then so to should the means of achieving those ends—the use of race in order to comply with the Act's mandates—be presumptively constitutional. The framework, unrefuted by this Court, allows for an elegant and clear solution to prevent the possible application of strict scrutiny to

nearly every case where compliance with the Act is a legislative goal.

"[S]o long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny." *Vera*, 517 U.S. at 943 (O'Connor, J., concurring). There are effectively two operative clauses to this part of the framework. First, is the universally accepted admonition against "subordinat[ing] traditional districting criteria" to the use of race for its own sake. *See, e.g.*, *Miller*, 515 U.S. at 916; *Shaw II*, 517 U.S. at 906; *Vera*, 517 U.S. at 958; *Cromartie II*, 532 U.S. at 241; *Alabama Legis. Black Caucus v. Alabama*, 135 S. Ct. at 1270; *Bethune-Hill I*, 137 S. Ct. at 797; *Cooper*, 137 S. Ct. at 1463. Second, is the less featured, yet no less applicable clause that "traditional districting criteria [may not be used] as a proxy" to further illegitimate race-based ends. *Vera*, 517 U.S. at 943. These two statements combined do no more and no less than outline the *evidence* that a plaintiff must present to rebut the presumption that race did not predominate the states' districting process.

No Court has argued for a rule where traditional districting criteria—that is to say the district shapes themselves—ends any inquiry into the legislative enactment. *See Miller*, 515 U.S. at 913 ("Our . . . holding in *Shaw* did not erect an artificial rule . . . ."). Confusion has arisen at a level much more basic, and much more fundamental, which is that a State's good faith attempt at compliance with the VRA is neither "the use of race for its own sake" nor is it "a proxy." *See Vera*, 517 U.S. at 943. This is both a

logical extension of the framework presented in *Vera* and the presumptive constitutionality of the VRA as applied to reapportionment.

Simply put, the predominance inquiry is *not* conducted *unless* there is evidence that race for its own sake—that is the use of race *not* in pursuit of VRA compliance—or as a proxy, was used to draw district lines. *See id.* at 943; *see also Shaw II*, 517 U.S. at 931 (Stevens, J. and Ginsburg, J., dissenting) ("Indeed the principal opinion in *Bush v. Vera* . . . makes clear that the deliberate consideration of race does not in and of itself invite constitutional suspicion" and therefore "*our precedents do not require the application of strict scrutiny*." (emphasis added)). In other words, if traditional districting criteria were complied with to the extent necessary to comply with the VRA, race *for its own sake* did not predominate the analysis. *See Alabama*, 135 S. Ct. at 1267 ("[P]rioritizing *mechanical* racial targets above all other districting criteria" is evidence of the use of race for its own sake or as a proxy (emphasis added)). This allows for the sensitivity that a court must treat the "complex interplay of forces that enter a legislature's redistricting calculus." *Abbott*, 138 S. Ct. at 2324. The Court in *Abbott* discussed this idea in more general terms.

"In assessing the sufficiency of a challenge to a districting plan, a court must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. And the good faith of the state legislature must be presumed." *Abbott*, 138 S. Ct. at 2324 (citing *Miller*, 515 U.S. at 915) (internal quotations, alterations, and citations omitted). The presumption of legislative good faith fits neatly within the *Vera* framework because they are

effectively saying the same thing. A state legislature may in good faith presume, as it must, that VRA compliance is required when drawing district lines. Insofar as that presumption is intact, the presumption extends to whatever subordination of traditional districting criteria was required to achieve compliance with the Act. *See Miller*, 515 U.S. at 915 (Although race-based decision making is inherently suspect, until a claimant makes a showing *sufficient to support that allegation* the good faith of a state legislature must be presumed." (emphasis added)); *see also id.* at 928 (O'Connor, J., concurring).

The flip side of this is, of course, that a court must similarly afford the state this same presumption. Frankly, this is really no different than the burden shifting that must take place under a court's predominance analysis. Only after a plaintiff rebuts the presumption of legislative good faith, through evidence of improper subordination, does the burden shift to the legislature to prove narrow tailoring. *See Miller*, 515 U.S. at 928 ("I understand the threshold standard the Court adopts . . . to be a demanding one. To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices.").

The Court's repeated emphasis on VRA compliance *vis-à-vis* narrow tailoring has created the impression—justified or not—that it is impossible for a state to draw districts in a way that differs from its traditional districting criteria in pursuit of the compliance with the Act. This is an impression that should be clarified for the benefit of state legislatures heading into the next decennial

reapportionment. To do otherwise is to invite the unending litigation. *See supra* at 5-16.

ii. If Racial Considerations Predominated, a State has a Compelling Interest in Compliance with the Voting Rights Act.

If a state "creat[es] a district that 'substantially addresses' the potential liability, and does not deviate substantially from a hypothetical court-drawn[10] . . . district for predominantly racial reasons, its districting plan will be deemed narrowly tailored." *Vera*, 517 U.S. at 995. Otherwise, districts that are "bizarrely shaped . . . and that otherwise neglect traditional districting principles . . . *for predominantly racial reasons*, are unconstitutional." *Id.* (emphasis in original). The evolution of this standard generally tracks the *Vera* framework. "In an effort to harmonize" the conflicting demands of the VRA and the Equal Protection Clause the Court has "assumed that compliance with the VRA may justify the consideration of race" that is compliance "with the VRA is a compelling state interest." *Abbott*, 138 S. Ct. at 2315. So long as there are "good reasons for believing" that the "State's consideration of race in making a districting decision" was necessary, that decision is narrowly tailored." *Id.*

The difference between the analysis under predominance and under strict scrutiny is simply one of degree. "Only if traditional districting criteria

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[10] The existence of a "hypothetical court-drawn" plan is not essential except that it allows the courts the benefit of an "exemplar" to compare to the legislative enactment.

are neglected *and* that neglect is predominantly due to the misuse of race does strict scrutiny apply." *Vera*, 517 U.S. at 993. Therefore, a legislature may neglect traditional districting criteria and "misuse" race *yet still* survive strict scrutiny if the following are true: (1) "a State has a strong basis in evidence for concluding that" the VRA required the race-based decision; (2) the state created a district that "'substantially addresses' the potential liability"; and (3) there is no substantial deviation from a court drawn plan for "*predominantly racial reasons*." *Vera,* 515 U.S. at 994 (emphasis in original). Only if each of the previous elements are met can a district survive strict scrutiny.

This is an analysis all too familiar to the courts because of the drift in attention from traditional districting criteria in the predominance analysis to its application in the narrow tailoring analysis. *Compare id.* at 995 and *Miller*, 515 U.S. at 915-916 *with Abbott*, 138 S. Ct. at 2315 *and Bethune-Hill I*, 580 U.S. at 797 *and Cooper*, 137 S. Ct. at 1464. Effectively, the *Vera* framework resets the proper emphasis of the inquiry, preventing the vast majority of state apportionment plans from being subject to strict scrutiny due to the legitimate use of race necessitated by VRA compliance. The flip side is that once strict scrutiny applies—once traditional districting criteria are subordinated in a way not required by the VRA—the state has a significantly stiffer burden to maintain.

CONCLUSION

For the aforementioned reasons, this Court should: (1) summarily reverse the district court on the merits in, *see Bethune-Hill II,* No. 18-281; (2) summarily reverse on the question of remedy here; or (3) note probable jurisdiction.

Respectfully submitted,

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