No. 15-1262

IN THE

Supreme Court of the United States

PATRICK MCCRORY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF NORTH CAROLINA, *ET AL.*,
Appellants,
v.

DAVID HARRIS AND CHRISTINE BOWSER,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

BRIEF FOR THE CAMPAIGN LEGAL CENTER, THE LEAGUE OF WOMEN VOTERS, THE VOTING RIGHTS INSTITUTE, THE RACIAL JUSTICE PROJECT AT NEW YORK LAW SCHOOL, THE NATIONAL COUNCIL OF JEWISH WOMEN, AND THE NATIONAL ASSOCIATION OF SOCIAL WORKERS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTERESTS OF AMICI CURIAE [1]

Amicus curiae the Campaign Legal Center, Inc. ("CLC") is a nonpartisan, nonprofit organization that works in the area of election law, generally, and voting rights law, specifically, generating public policy proposals and participating in state and federal court litigation regarding voting rights. The CLC has served as *amicus curiae* or counsel in numerous voting rights and redistricting cases in this Court, including *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016); *Harris v. Arizona Independent Redistricting Commission*, 136 S. Ct. 1301 (2016); *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); and *Bartlett v. Strickland*, 556 U.S. 1 (2009). The CLC has a demonstrated interest in voting rights and redistricting law.

Amicus curiae the League of Women Voters of the United States (the "League") is a nonpartisan, community-based organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in close to 800

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Written consent from all parties to the filing of this brief is on file with the Clerk.

communities and in every state, with more than 150,000 members and supporters nationwide. The League promotes an open governmental system that is representative, accountable, and responsive. The League has been a leader in seeking reform of the redistricting process at the state, local, and federal levels for more than three decades.

Amicus curiae the Voting Rights Institute at Georgetown Law ("VRI") was founded in 2015 to train the next generation of lawyers and leaders and to litigate voting rights cases throughout the nation. VRI recruits and trains expert witnesses to assist in litigation development and presentation; promotes increased local and national focus on voting rights through events, publications, and the development of web-based tools; provides opportunities and platforms for research on voting rights; and offers opportunities for students, recent graduates, and fellows to engage in litigation and policy work in the field of voting rights.

Amicus curiae The New York Law School Racial Justice Project ("the Racial Justice Project") is a legal advocacy organization sponsored by New York Law School that is dedicated to protecting constitutional and civil rights. The Racial Justice Project seeks to increase public awareness of racism, racial injustice, and structural racial inequality in the areas of education, employment, political participation, and criminal justice. To accomplish its mission, the Racial Justice Project engages in litigation, training, and public education and other forms of advocacy that seek to ensure equal access and opportunity. The Racial Justice Project has a continued interest in the development of

jurisprudence that guards against racial discrimination and promotes social and political equality for all Americans. Accordingly, the Racial Justice Project has a substantial interest in the outcome of this litigation.

Amicus curiae The National Council of Jewish Women (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "Election laws, policies, and practices that ensure easy and equitable access and eliminate obstacles to the electoral process so that every vote counts and can be verified." Consistent with its Principles and Resolutions, NCJW joins this brief.

Amicus curiae The National Association of Social Workers ("NASW") is the largest association of professional social workers in the United States with over 130,000 members in 55 chapters. The North Carolina Chapter of NASW has 4,800 members. Among its activities, NASW develops policy statements on issues of importance to the social work profession. Consistent with those statements, NASW reaffirms that participation in electoral politics is consistent with fundamental social work values, such as self-determination, empowerment, democratic decision making, equal opportunity, inclusion, and the promotion of social justice. *See* NASW Policy Statement: Electoral Politics, in Social Work Speaks 90, 94 (10th ed. 2015).

SUMMARY OF ARGUMENT

The district court correctly held that two of North Carolina's congressional districts are unconstitutional racial gerrymanders. Appellants nonetheless attempt to defend the districts by offering two different, but equally unavailing, justifications. One district—they claim—is justified because the legislature believed in good faith that it was required under the Voting Rights Act ("VRA") to move tens of thousands of African Americans into a district that was already electing the African American candidate of choice with "remarkable consistency." J.S. App. 9a. The other district—they argue—had nothing to do with their understanding of the VRA (despite the fact that this is what they claimed at the time) and can be justified as a pure partisan gerrymander. This Court should reject Appellants' attempt to wield the VRA as a political weapon and should use this case as an opportunity to clarify this Court's jurisprudence on the intersection of race and politics in redistricting.

With respect to both districts, Appellants argue that Appellees' constitutional claims fail because in order to show that race predominated in the drawing of a district, a plaintiff must establish that race conflicts with other principles of redistricting, including a legislature's political goals. In Appellants' view, if racial considerations cause no departure from the lines that otherwise might have been drawn for practically any other reason, including political reasons, there can be no subordination of neutral redistricting principles. This conclusion underlies not only Appellants' proposed predominance analysis, but also their insistence that all

plaintiffs alleging a racial gerrymandering claim must produce an alternative plan that can equally achieve the legislature's political goals.

This position is untenable because it allows for the sorting of voters by race so long as the legislature does so neatly enough, and because it sanctions the impermissible use of race to achieve partisan gains under the guise of what is "required" by the VRA. Under Appellants' view, so long as the intentional use of race is coextensive with the legislature's political goals, there can be no successful racial gerrymandering claim. By effectively excusing racial stereotyping on the basis of its consistency with political ends, Appellants would grant legislatures free rein to openly use racial stereotypes in redistricting.

Appellants' insistence on an alternative plan that achieves a legislature's political goals while also bringing about significantly greater racial balance would likewise stymie racial gerrymandering claims predicated on direct evidence of racial discrimination. As this Court has recognized, such alternative plans serve a useful evidentiary function for racial gerrymandering claims when those claims are premised on *circumstantial* evidence that does not by itself indicate that race *rather than* politics predominated in the process. However, such a plan is unnecessary to ferret out evidence of racial discrimination when there is already *direct* evidence of such intent. To impose an alternative plan requirement upon all plaintiffs raising racial gerrymandering claims, even those relying on direct evidence, would simply adopt Appellants' erroneous predominance analysis in another form.

This Court should decline Appellants' invitation to permit legislatures to use racial quotas to achieve political goals by unnecessarily packing minority voters, all the while disingenuously claiming that they were only doing what the VRA requires.

ARGUMENT

I. The District Court Correctly Concluded that Race Was the Predominant Factor Motivating North Carolina's Redistricting Choices.

The district court correctly concluded that race was the predominant factor motivating North Carolina's redistricting choices with respect to Congressional Districts ("CDs") 1 and 12, and that the districts are not narrowly tailored to serve any compelling governmental interest.

As the district court explained, CD 1 "presents a textbook example of racial predominance." J.S. App. 20a. The court observed that "[i]t cannot seriously be disputed that the predominant focus of virtually every statement made, instruction given, and action taken in connection with the redistricting effort was to draw CD 1 with a [black voting age population ("BVAP")] of 50 percent plus one person." *Id.* at 28a. Indeed, the evidence showed that the mapdrawer, Dr. Hofeller, was instructed by the plan's architects, Senator Rucho and Representative Lewis, that he "had no discretion to go below 50-percent-plus-one person BVAP." *Id.* at 25a (citing JA 2802-03). *See Shaw v. Hunt*, 517 U.S. 899, 907 (1996) ("*Shaw II*") (holding race predominated where it "was the criterion that, in the State's view, could not be compromised," permitting other considerations "only

after the race-based decision had been made"); *see also* Appellees' Br. at 7-17.

Likewise, the district court correctly concluded, based on both direct and circumstantial evidence, that "race did indeed predominate in CD 12." J.S. App. 30a. The record evidence fully supports the district court's conclusion regarding CD 12. First, the district court cited public statements of the architects of the legislature's map, Senator Rucho and Representative Lewis, including a statement regarding the purposeful inclusion of Guilford County in CD 12 on account of that county's racial composition. *See id.* at 30a-33a. Second, the court credited the testimony of Congressman Watt, who recounted a conversation in which Senator Rucho told Congressman Watt that "his leadership had told him that they were going to ramp—or he must ramp up these districts to over 50 percent African-American, both the 1st and the 12th, and that it was going to be his job to go and convince the African-American community that that made sense." *Id.* at 34a (quotation marks omitted). Third, the district court concluded that traditional redistricting principles could not explain the district's shape. *Id.* at 35a-36a. For these and other reasons, *see* Appellees' Br. at 18-25, the district court correctly concluded that race predominated in the drawing of CD 12.

II. Appellants' Racial Gerrymander Cannot Be Resuscitated Either by Citing a Purported Motive to Comply with the Voting Rights Act or by Providing *Post Hoc* Partisan Rationales.

Appellants attempt to defend the bizarrely-shaped CD 1 and CD 12 by contending that the North Carolina

General Assembly was motivated by either a good-faith desire to comply with the VRA or by politics. The Court should reject both arguments and refuse to sanction North Carolina's purposeful packing of African American voters using mechanical thresholds and its use of the VRA to achieve political ends.

A. North Carolina Cannot Rely on a Misapplication of the VRA to Pack African American Voters in CD 1.

Appellants focus their arguments with respect to CD 1 on their erroneous belief that this Court's precedent interpreting Section 2 of the Voting Rights Act compelled them to create CD 1 as a majority-minority district. *See* Appellants' Br. at 47-59.[2]

For the reasons discussed by Appellees in their brief, Appellees' Brief at 36-50, the North Carolina General Assembly did not have any "strong basis in

[2] Appellants also argue that Appellees did not prove that race predominated even though it is uncontested that the General Assembly drew the district with the explicit goal of meeting a racial quota and that was the criteria that could not be compromised. Despite this, Appellants argue that "a plaintiff must prove—and a court must find—that the challenged district lines are inconsistent with traditional redistricting principles." Appellants' Br. at 45. This argument is not reconcilable with this Court's precedent on how to analyze predominance and would sanction racial sorting wherever it is done neatly enough. By asking the wrong question—what can explain the district rather than what actually motivated the legislature when drawing the district—Appellants arrive at the wrong answer.

evidence" for believing that it was required to increase CD 1's African American voting age population to 50 percent plus one. Moreover, the notion that the North Carolina General Assembly was motivated by a good faith desire to comply with the requirements of the VRA should be viewed with a healthy dose of skepticism, and through the lens of North Carolina's repeated (and recent) history of racial discrimination in redistricting and voting rights.

That history was most recently explored by the Fourth Circuit earlier this year, in a decision invalidating various provisions restricting African Americans' right to vote, which the General Assembly quickly enacted after being relieved of its obligation to obtain Section 5 preclearance following this Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). These provisions "target[ed] African Americans with almost surgical precision," *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016), *motion to stay mandate denied*, No. 16A168, 2016 WL 4535259 (U.S. Aug. 31, 2016), and were adopted only after "the legislature requested data on the use, by race, of a number of voting practices," *id.* Discussing the legislative process, the court observed that "this sequence of events—the General Assembly's eagerness to, at the historic moment of *Shelby County*'s issuance, rush through the legislative process the most restrictive voting law North Carolina has seen since the era of Jim Crow—bespeaks a certain purpose." *Id.* at 229.

The Fourth Circuit observed that there is substantial evidence "of instances since the 1980s in

which the North Carolina legislature has attempted to suppress and dilute the voting rights of African Americans." *Id.* at 223. For example, during this time period, "private plaintiffs brought fifty-five successful cases under § 2 of the Voting Rights Act." *Id.* at 224. Reviewing the sum of the evidence of North Carolina's history of racial discrimination, the Fourth Circuit observed that "[o]nly the robust protections of § 5 and suits by private plaintiffs under § 2 of the Voting Rights Act prevented these efforts from succeeding." *Id.* at 225.

Against that backdrop, the same General Assembly that enacted the "most restrictive voting laws North Carolina has seen since the era of Jim Crow," *id.* at 229, enacted the congressional redistricting legislation at issue in this case. While Appellants defend their use of a racial quota in drawing CD 1 by claiming that the General Assembly genuinely believed that the VRA required the state to move tens of thousands of African Americans into a non-majority-minority district that had been consistently electing the minority community's candidate of choice in order to make it a majority-minority district, there are strong reasons to doubt that this is a good faith explanation of the General Assembly's motives. Rather, the evidence suggests that the General Assembly deliberately misunderstood the VRA as requiring it to set a racial quota of 50 percent plus one because such a misunderstanding also served the General Assembly's political agenda.

The VRA certainly imposes no such requirement, as Appellees explain, *see* Appellees' Br. at 36-50. But more generally, North Carolina should not, under these circumstances, be afforded any of the "leeway" to which

states are normally entitled when engaged in good-faith efforts to comply with the VRA because the General Assembly was not engaged in a good-faith effort to comply with the VRA. Instead it was using the VRA, a law intended to protect minority voters, as political cover to purposefully pack African American voters into CD 1.

Indeed, Appellants *themselves* have called into question whether Senator Rucho and Representative Lewis were acting in good faith. Appellants have not just admitted, but affirmatively argued that these architects of the plan were dishonest in discussing their motivations for their line drawing. *See* Appellants' Br. at 35. If Appellants admit the General Assembly cannot be trusted to truthfully inform the public of its motivations, Appellants cannot seriously contend the legislature should be afforded significant leeway and a presumption of good faith where the General Assembly wrongly construed the VRA's requirements, adopting an interpretation that incidentally does nothing to promote minority voting strength.

This is particularly true in light of the fact that North Carolina's history—including the history of the General Assembly that drew these districts—is not one demonstrating a solicitous desire to protect minority voting strength. Rather, this history suggests that the General Assembly used the fig leaf of purported compliance with the VRA in order to achieve its goal of packing African American voters into as few districts as possible, which helped the party in power politically. While this Court has not yet settled on a metric by which to judge improper partisan considerations in

redistricting, *see Vieth v. Jubilerer*, 541 U.S. 267, 306-17 (2004) (Kennedy, J., concurring), it is clear that partisanship "cannot be accepted where politics as usual translates into race-based discrimination." *McCrory*, 831 F.3d at 225. That is exactly what happened here.

B. North Carolina Cannot Rely on *Post Hoc* Political Explanations to Defend CD 12.

With respect to CD 12, Appellants do not now claim any VRA justification, even though North Carolina explained in its Section 5 preclearance submission to the Department of Justice ("DOJ") that it "drew the new CD 12 based on . . . concern[s]" that DOJ had expressed in 1992 regarding the lack of a second majority-minority district. J.S. App. 32a-33a (quoting JA 478-79). Appellants have abandoned that rationale before this Court and instead rest their case on their purported political motivation to pack as many *Democrats* as possible into CD 12 to improve Republicans' chances in surrounding districts. *See* Appellants' Br. at 28-43. The district court correctly concluded that the legislature's claim that politics, not race, motivated the drawing of CD 12 was contradicted by the evidence. J.S. App. 38a-43a.

Appellants quibble with the evidence upon which the district court relied, but their arguments do not establish that the district court clearly erred in its evidentiary conclusions. In fact, Appellants ask this Court to conclude that the district court clearly erred based upon nothing more than the supposition of their litigation counsel that legislators who tell the public that districts are not being drawn for political reasons are being dishonest. *See* Appellants' Br. at 35 ("The reality

is that there are perfectly understandable partisan and political motivations for downplaying partisan and political motivations."). There is considerable irony in Appellants asking this Court to apply a "presumption of good faith" to the legislature's redistricting enactment, J.S. App. 20a (quotation marks omitted), while simultaneously asking this Court to disbelieve the legislators' public statements regarding their motivation for enacting the law, calling the needs for such disbelief a "cynical" "realit[y]," Appellants' Br. at 35.

In any event, *post hoc* explanations by the legislature that the lines it drew were based on partisan concerns cannot override evidence that race, not politics, was the primary motivation in drawing district lines. In considering Appellants' contention that CD 12 was motivated by politics, not race, the district court correctly concluded that the evidence showed that "the politics rationale on which the [appellants] so heavily rely was more of an afterthought than a clear objective." J.S. App. 40a. Nevertheless, Appellants contend that "if the legislature's political goals could be accomplished only by the district the legislature actually drew, then any racial considerations in its collective conscience did not actually impact the final districts." Appellants' Br. at 31.

Under Appellants' view, race must always be in actual conflict with a legislature's political goals in order to predominate. *See* Appellants' Br. at 45 (asserting that "race-neutral principles have not been 'subordinated' unless there is an actual conflict between those principles and the lines the legislature drew").

Appellants thus contend that "a plaintiff must prove—and a court must find—that the challenged district lines are inconsistent with traditional districting principles." *Id.* Where lines explicitly drawn on the basis of race can be later justified by reliance on politics, Appellants argue there can be no *Shaw* violation.

Appellants' position effectively eviscerates this Court's racial gerrymandering doctrine. Under Appellants' position, the predictable partisan benefits from a racial gerrymander would excuse even the most egregious direct evidence of racial discrimination. Appellants' new proposed standard for predominance—wherein race never predominates if it is coextensive with political goals—ignores the clear guidance of *Shaw* and its progeny. As this Court has recognized, racial gerrymanders often resemble partisan gerrymanders given the strong correlation between race and party. *Easley v. Cromartie*, 532 U.S., 234, 257 (2001) ("That is because race in this case correlates closely with political behavior."); *see also* Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 Harv. L. Rev. Forum 58, 61 (2014) (noting that "[w]hen party and race coincide, as . . . they do today, it is much harder to separate racial and partisan intent and effect"). Such a correlation, standing alone, is obviously insufficient to show a *Shaw* violation. *See Bush v. Vera*, 517 U.S. 952, 968 (1996) ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify."). However, by the same logic, such a correlation, standing

alone, should be equally insufficient to *defeat* a *Shaw* claim.

Just as it is possible to draw a compact district that discriminates on the basis of race, *see Miller v. Johnson*, 515 U.S. 900, 915 (1995), it is possible (and indeed likely) that a district drawn on the basis of race will also have partisan benefits. While this Court has held that the pursuit of political goals in districting, based on political data, does not violate the Equal Protection Clause "even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact," *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) (emphasis omitted), the Court has never held that purposeful racial gerrymandering is constitutional just because packing African American voters also benefits Republican legislators. The Court should decline Appellants' invitation to accept *post hoc* partisan rationalizations. A partisan explanation is not talismanic and the ultimate partisan benefits of a plan cannot save a blatant racial gerrymander such as CD 12.

C. Permitting the Purposeful Use of Race as a Proxy for Politics Offends the Constitution.

With respect to both CD 1 and CD 12, Appellants' proposed standard for predominance would actually sanction the use of race as a proxy for political affiliation, in violation of this Court's precedent. Under Appellants' theory, purposeful racial gerrymandering to achieve political ends is constitutional so long as it is effective. That cannot be the law.

As part of their predominance analysis, Appellants contend that the use of racial classifications is permissible so long as it is in service of partisan goals.

See Appellants' Br. at 45 (asserting that "[by] definition, race-neutral principles have not been 'subordinated' unless there is an actual conflict between those principles and the lines the legislature drew"). As long as lines drawn purposefully on the basis of race do not differ from lines that might have been drawn on the basis of politics, Appellants believe there is no *Shaw* violation.

This argument flies in the face of this Court's prohibition on the use of race as a proxy for political affiliation. This Court has repeatedly and emphatically held that the purposeful use of race to achieve partisan goals trades on impermissible racial stereotypes and violates the Equal Protection Clause. Indeed, "where the State assumes from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls,' it engages in racial stereotyping at odds with equal protection mandates." *Miller*, 515 U.S. at 920 (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)); *Easley*, 532 U.S. at 257 (reiterating that a legislature may not "defend its districting decisions based on a 'stereotype' about African-American voting behavior"); 532 U.S. at 266-67 (Thomas J., dissenting) ("It is not [a] defense that the legislature merely may have drawn the district based on the stereotype that blacks are reliable Democratic voters."); *cf. Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("Race cannot be a proxy for determining juror bias or competence.").

The use of racial classifications for political ends is precisely the type of line-drawing that "may balkanize us into competing racial factions . . . threaten[ing] to carry us further from the goal of a political system in

which race no longer matters." *Shaw v. Reno*, 509 U.S. 630, 657 (1993). Such racial stereotyping in order to achieve partisan goals not only employs unconstitutional assumptions and racial stereotypes, but also impermissibly targets and diminishes minority voting power. Accordingly, this Court has affirmed that partisan goals do not immunize purposeful attempts to limit minority voting power. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006) ("In essence the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation."). Racial gerrymandering is not constitutional simply because the legislature chooses to sort minority voters based on anticipated benefits to Republican legislators.

Appellants' position that *Shaw* violations only exist where racial and political motivations contradict one another, even where there is direct evidence of racial motivation, is incompatible with this Court's jurisprudence and should be rejected.

III. An Alternative Plan Is Unnecessary Where, as Here, Direct Evidence Establishes the Predominance of Race in Redistricting.

Appellants attempt to support their position by arguing that this Court's opinion in *Easley v. Cromartie* requires all *Shaw* plaintiffs to produce an alternative plan to demonstrate "at the least that the legislature could have achieved its legitimate political objections in alternative ways that . . . would have brought about significantly greater racial balance." Appellants' Br. at 31 (quoting *Easley*, 532 U.S. at 258) (emphasis omitted).

This is just another way of demanding that there be a conflict between race and politics for a *Shaw* claim to succeed. But *Easley* does not require an alternative plan in cases, such as this, where there is direct evidence of racial motivation. In arguing otherwise, Appellants distort an evidentiary rule useful in cases premised on circumstantial evidence, and attempt to transform it into a legal element of all *Shaw* claims.

Since the sort of "[o]utright admissions of impermissible racial motivation" that occurred here "are infrequent," *Hunt*, 526 U.S. at 553, this Court has developed a jurisprudence focused on how *Shaw* plaintiffs can prove their claims through circumstantial evidence. In particular, *Hunt* and *Easley* address how courts should resolve racial gerrymandering cases based primarily on circumstantial evidence that "tend[s] to support both a political and racial hypothesis" due to the strong correlation between race and political affiliation. *Id.* at 550; *see also id.* at 547 ("Appellees offered only circumstantial evidence in support of their claim."); *Easley*, 532 U.S. at 253-54 (finding the minor direct evidence insufficient and looking to circumstantial evidence of predominance).

In this subset of cases, where no direct evidence establishes the predominance of race, and race and party are highly correlated, an obvious factual issue arises as to which factor predominated. Thus, the Court has held that plaintiffs *in these cases* can overcome this factual barrier by providing an alternative plan that achieves the asserted political objectives with greater racial balance. *Easley* 532 U.S. at 258 (requiring an alternative plan "[i]n a case *such as this one* . . . where racial

identification correlates highly with political affiliation" (emphasis added)).

The Court's concern in *Easley* was evidentiary. *Id.* at 241 ("The issue in this case is evidentiary."). In light of the strong correlation between race and party, where direct evidence of racial discrimination is lacking, a *Shaw* plaintiff must put forth some evidence that race rather than party provided the basis for the district, in order to dispel the equally plausible partisan explanation. Such evidence is established by showing an alternative plan revealing a conflict between racial and partisan motivations. The *Easley* rule makes sense in its proper context as an evidentiary requirement to ferret out racial rather than political motives in circumstantial cases. However, this evidentiary concern is absent in cases, such as this one, where direct evidence already establishes that race was the predominant factor in the creation of a district. *Easley* does not stand for the proposition that once plaintiffs have met their burden of proving racial intent, they must additionally disprove all other potential *post hoc* explanations for the result.

Appellants' insistence on an alternative map as an element of a *Shaw* claim mirrors the flawed argument rejected by this Court in *Miller*. There, the district court found that race was the predominant factor in drawing a district based on direct evidence of intent. 515 U.S. at 910-11. Nonetheless, the appellants argued that "regardless of the legislature's purposes, a plaintiff must demonstrate that a district's shape is so bizarre that it is unexplainable other than on the basis of race." *Id.* at 910. This Court correctly rejected the argument, which sought to transform the bizarre shape evidentiary

holding in *Shaw* into an element of a racial gerrymandering claim: "Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake . . . was the legislature's dominant and controlling rationale in drawing its district lines." *Id.* at 913. Likewise, the alternative plan identified in *Easley* is relevant not because it is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it offers pivotal evidence when circumstantial evidence raises a factual issue as to whether race rather than politics motivated the district lines.

Ultimately, Appellants' position that *Easley* imposes an alternative plan requirement upon all *Shaw* plaintiffs is simply a reformulation of their erroneous predominance analysis. Appellants would have this Court demand a conflict between race and other redistricting principles, not simply as an evidentiary tool to disaggregate race and party in ambiguous cases, but rather as a means to override clear evidence of racial intent.

Where plaintiffs have properly shown as an evidentiary matter that legislators improperly used race as a proxy to achieve political gains, plaintiffs should not also be required to do the legislators' work for them in producing a map that achieves the legislature's questionable partisan gains by other means. Although this Court has not yet resolved how courts should assess the propriety of partisan considerations in redistricting, *see Vieth*, 541 U.S. at 306-17 (Kennedy, J., concurring),

partisanship is hardly so sacrosanct that it should be preserved above all other constitutional considerations.

Just as the Court should reject Appellants' flawed predominance standard, the Court should also decline to adopt Appellants' unnecessarily broad application of *Easley*'s alternative plan requirement.

CONCLUSION

For the foregoing reasons, the decision of the three-judge court should be affirmed.

Respectfully submitted,

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