Nos. 13-895 and 13-1138

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In The
Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, *ET AL.*,
Appellants,
v.
ALABAMA, *ET AL.*,
Appellees.

ALABAMA DEMOCRATIC CONFERENCE, *ET AL.*,
Appellants,
v.
ALABAMA, *ET AL.*,
Appellees.

On Appeal from the
United States District Court
for the Middle District of Alabama

BRIEF OF *AMICUS CURIAE*
DALTON J. OLDHAM
IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST[1]

For the past 25 years, Dalton L. Oldham has represented individuals and several state and local governments in redistricting cases, both in defending state redistricting maps and in challenging redistricting maps. Mr. Oldham has spoken at numerous seminars and symposiums on redistricting, census and election law issues, National Conference of State Legislatures and American Bar Association. Mr. Oldham presented a paper at the Convention of the ABA on census adjustment and its potential effect on redistricting which was published together with other symposium papers in a volume titled: CENSUS 2000: CONSIDERATIONS AND STRATEGIES FOR STATE AND LOCAL GOVERNMENT (2000), Benjamin E. Griffith, (ed.). Mr. Oldham respectfully submits this brief in the hopes that his experience may elucidate some of the important issues raised by the parties.

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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 or his counsel made a monetary contribution toward its preparation or submission. Counsel for the parties granted general consent to the filing of amicus briefs on July 10, 2014 and August 15, 2014 (No. 13-895) and July 10, 2014 and August 5, 2014 (No. 13-1138).

SUMMARY OF THE ARGUMENT

Appellants in this case propose a new legal standard for Section 2 of the Voting Rights Act. This legal standard would pervert the Voting Rights Act from a statute intended to allow minorities to have an equal opportunity to elect candidates of their choice, into a statute that requires the absolute maximization of minority voting strength through both the creation of majority-minority districts and a maximization of influence districts. This standard would essentially require that all jurisdictions intentionally gerrymander for the maximum benefit of the political party generally supported by the minority in question. Such a standard would be a radical departure from all previous legitimate redistricting practices. It comports with neither the text nor intent of the statute, nor this Court's prior precedent regarding the Voting Rights Act and, if it did, it would not comply with the United States Constitution.

Regardless of how the Court may ultimately decide this case, it is absolutely imperative that the Court make clear that it is in no way adopting or validating the new standard proposed by the Appellants in this case.

ARGUMENT

I. HOW APPELLANTS' NEW STANDARD WOULD OPERATE IN ALABAMA AND OTHER JURISDICTIONS

Appellants' new standard suggests that the Voting Rights Act requires that a jurisdiction when faced with redistricting majority-minority districts or districts that have significant minority components, i.e. minority influence districts, the jurisdiction is required by the Voting Rights Act to only place the minimum amount population in the districts as is necessary to bring the districts above -5% of the ideal district population. Alabama Legislative Black Caucus Brief at 6. Alabama Democratic Conference Brief at i. [2]

Furthermore the Appellants suggest that a jurisdiction is required to engage in extensive study to determine the minimum percentage necessary to elect a minority candidate of choice in a majority-minority district.

Fundamentally, Appellants' new standard is that the Voting Rights Act requires a jurisdiction to

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[2] *See also* Alabama Legislative Black Caucus brief at 15 27, 34, 45 and 9 n. 22. As well as the overall deviations of the alternative redistricting schemes proposed in the legislature by members of the Black Caucus *infra*. *See also* Alabama Democratic Conference Brief at i "this goal, particularly when combined with the new goal of significantly reducing population deviation among districts, led the state to stark racial intentionality in district drawing...". *See also* 16.

provide proportional or near proportional representation for minorities in a jurisdiction with the minimum minority population necessary to elect these preferred candidates of the minority communities choice.[3] This minimum minority population is to be achieved by both intentionally underpopulating the minority districts and by placing the minimum minority population percentage in those districts necessary to elect the preferred candidate of choice. This of course produces a substantial minority population which appellants propose must be used to maximize minorities influence in other districts.[4]

These influence districts would likewise be intentionally underpopulated. *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga., 2004) (three-judge court) (sum. aff. *Cox v. Larios*, 542 U.S. 947 (2004)) is a crucial case because the facts before the district court in that case illustrated the actual power that population deviations under 10% can have if the population deviations can be manipulated to consistently provide an advantage to a specific group. A hypothetical is illustrative of the potential for mischief such a rule would create.

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[3] *See* Appellants' Alabama Legislative Black Caucus Brief at 61. *See also* Alabama Democratic Conference Brief at 10, 14, 32 -36

[4] Alabama Democratic Conference Brief at 2, 17-19, 33. *See also* Appellants' Alabama Legislative Black Caucus Brief at 9 which lists 8 influence districts (2 Senate, 6 House) "eliminated" by the state's redistricting plan. These districts had replacement versions in the Black Caucus' legislative alternatives listed infra.

Imagine a jurisdiction with 100,000 population and 100 districts with a 25% minority population. Theoretically you could evenly divide the districts between the majority population in the minority population by creating 75 districts of a thousand people each for the majority and 25 districts of a thousand people each for the minority. If you underpopulated the minority districts by 5%, each district would be composed of only 950 people, leaving 50 extra persons for each of the 25 districts requiring that the drafters of the map to locate the 1,250 extra minority voters to place in other districts. If the drafters so desired, under the theoretical 10% safe harbor, the drafters could underpopulate two more majority districts and place half of the 1250 extra minority voters in each of these two new underpopulated districts and have two 65% plus majority-minority districts. This extra population could also be placed in four or five so-called influence districts where, with a few allies, the minorities could elect candidates who are not the minority communities preferred choice and are not supported by the majority of the jurisdiction, but are of the same political party. This is why population deviation patterns, even when they are below 10%, matter. If you lower the minority percentage in each majority-minority district it has a similar effect. When this is done in the real world the geographic locations of the population prevent the kind of perfect homogeneous districts that were used above in order to keep the math simple and illustrate the point. However, this also means that in the real world there will be a significant minority population in many districts before any manipulation of deviation or population percentages takes place and

therefore more marginal manipulations can have far more material effects. When the two strategies are combined, as Appellants proposes here, then it is quite possible for a minority with only a few allies, that constitute far less than 50% of the voters, to control an elective body despite huge majorities voting against it.[5]

As the Alabama Legislative Black Caucus claims in its brief the:

> 2010 census revealed that the majority black districts were all underpopulated... the majority black senate districts on average were underpopulated by about 15% and the average majority black house district was underpopulated by about 16%.[6] The

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[5] This is exactly the racially driven deviation pattern employed by the Arizona Independent Redistricting Commission in Harris. *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042 (D. Ariz. 2014) (appeal docketed at *Harris v. Ariz. Indep. Redistricting Comm'n*, No. 14-232 (Aug. 28, 2014)

[6] *See Rodriguez v. Pataki*, 308 F.Supp.2d 346, (S.D.N.Y. 2004) (sum. aff. *Rodriguez v. Pataki*, 543 U.S. 997 (2004) (where patterns of deviation over-populate slow growth areas and under- populate fast growth areas, the pattern of deviation is not discriminatory.) Given that the majority-minority districts in Alabama are located in the central urban cores and rural areas of the state and that these areas have grown in the past two decades at a slower rate than the rest of the state and can reasonably be anticipated to do so in the next decade, the legislature of Alabama could have had a legitimate basis for intentionally over-populating the majority- minority districts. Because of the fact pattern mentioned in

> minimum number of additional people who would have to be added to each district turned in part on how much the legislature decided to permit a district to depart from the ideal size. In prior redistricting, Alabama had required districts to be within 5% of the size of an ideal district. In designing the post 2010 census districting plan, however, the framers decided instead to permit a deviation of only 1%. That decision significantly increased the number of additional individuals who would have to be added to an underpopulated district.

Alabama Legislative Black Caucus Br. at 6

As illustrated by Appellee's brief, the differences in the minority percentages in the majority-minority districts in the redistricting schemes proposed by African-American legislators for the 2014 election are not significantly different from the percentages in the enacted plan. Some districts are higher in the enacted plan and some districts are lower in the enacted plan. The principal complaint of Appellants' is that the State of Alabama "African-Americans in the majority-minority districts" and because these African-Americans were supposedly "packed" there was insufficient minority population to be placed in other districts where

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appellee's brief, most of the majority- minority districts have less population at this point in the decade than most other districts around the state. In view of this fact and this Court's summary affirmance of *Pataki*, the state's policy of equalizing the populations between districts is both legitimate and rational.

although candidates of the minority community's choice could not be elected non-Hispanic white Democrat candidates could be elected.[7] So if the differences in percentages are not creating the excess minority population necessary to fill these influence districts, how are the plans produced by Legislative Black Caucus able to do this? The answer is through manipulation of population deviation. None of the Appellants' plans actually meets the plus or minus 1% deviation standard adopted by the Alabama Legislature and they skew the population deviations to the benefit of the majority-minority and influence districts. This point is implicit in the question presented in the Alabama Democratic Conference brief "this goal, *particularly when combined with the new goal of significantly reducing population deviation among districts,* led the state to stark racial intentionality in district-drawing, packing more super majorities of black voters into already majority black districts..."[8] The Appellants themselves recognized in this statement that they could not achieve the results that Appellants sought—proportional representation in majority black districts and a maximization of black influence in as many remaining districts as possible—without intentional racially-based manipulation of the population deviation. Moreover the alternative redistricting schemes introduced into the Legislature by the Black Caucus illustrate the problem the two House of Representatives proposals at overall ranges of deviation of 10.00 and 9.96 percent. The two Senate alternatives were 9.69 and

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[7] *See* brief of Alabama Legislative Black Caucus at 9.

[8] *See* brief of Alabama Democratic Conference at i (emphasis added).

9.58 percent.[9] If the Alabama Legislative Black Caucus had been serious in its concern about the black voting age population percentage in each district as opposed to creating a map intended to maximize black influence as well as maximize the number of Democrats in the legislature, they would have drawn a map that complied with the plus or minus 1% population standard. As a result the alternative maps introduced in the Legislature proved little in appellants' case.

II. THE COURT'S PRECEDENT PREVENTS THE INTENTIONAL RACIAL MANIPULATION OF POPULATION DEVIATION IN ORDER TO FEED MINORITY INFLUENCE DISTRICTS THAT APPELLANTS SUGGEST ARE REQUIRED BY THE VOTING RIGHTS ACT.

In *Roman v. Sincock*, 377 U.S. 695, 710 (1964), this Court declared that the one person,one vote rule requires a court to:

> Ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur because of certain factors that are free

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[9] The McClammy House Alternative when stated in two digits past the decimal point rounds to 10% however it is actually a mere four people short. The Reed-Buskey House Alternative 4 had an overall range of deviation of 9.96%. Reed-Buskey Senate 2 was only slightly better, 9.69% and the Sanders Plan was 9.58%.

from any taint of arbitrariness or discrimination "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). The right to vote "includes the right to have the vote counted at full value without dilution or discount." *Id.* at 555 n.29 (quoting with approval *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)). Further:

> The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.

Gray v. Sanders, 372 U.S. 368, 381 (1963). *See also Baker v. Carr,* 369 U.S. 186 (1962)

These cases state the undeniable theme that population equality in redistricting should be encouraged. This principle currently culminates in the decision in *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga., 2004) (three-judge court) (sum. aff. *Cox v. Larios*, 542 U.S. 947 (2004) which established that if plaintiffs could prove a discriminatory pattern of population deviations, even if the overall range was less than 10%, and plaintiffs could prove, at the very least, that these population deviations did not come from any legitimate consistently applied rational state policy, then plaintiffs could state a violation of

the 14th Amendment's Equal Protection Clause for the violation of the one-person, one-vote principle.

In *Larios* the plaintiffs cited four reasons for the intentionally invidious discriminatory pattern of population deviations. One reason was that partisan politics created the discriminatory pattern of population deviations; the second reason was that regionalism drove the discriminatory pattern of population deviations; the third reason was that a bias in favor of the slow growth areas of the state as opposed to the fast growth areas of the state motivated the discriminatory pattern of population deviations; the fourth claim was that race was the reason for the discriminatory pattern of population deviations, which was styled as a racial gerrymandering claim and so described by the *Larios* court. *See generally Larios*, 300 F. Supp. 2d at 1325-31.

The reason the plaintiffs made all four of these claims was that there were districts which were exceptions to each of the four patterns, however each district that was an exception fell into one of the other three categories in the complaint. For instance there were districts in the South Georgia which were overpopulated but they were held by Republicans. *Id.* at 1326. There were other districts held by Republicans that were underpopulated but they would be in one of the slow growth areas. *Id.* The areas of inner-city Atlanta and South Georgia also correspond with most of the minority population in Georgia. *Id.* By including all four motivations there were no underpopulated or overpopulated districts that were not explained by the compliant.

The plaintiffs in their complaint in *Larios* asserted that race was as improper a motivation for the type of intentional discriminatory pattern of population deviation as was discrimination based on partisanship, regionalism, and discrimination against fast growth and slow growth areas. The court in *Larios* chose not to decide this race claim since it had already found for the plaintiffs based on other motivations. While the State of Georgia did not attempt the bold assertion that Appellants make in this case that an intentional racially motivated discriminatory pattern of deviation is required by the Voting Rights Act, the State of Georgia did assert that its motivations, including the racial ones, were legitimate rational state policies if the population deviations were kept below an overall range of deviation of 10%. *See Larios v. Cox*, 305 F. Supp. 2d 1335, 1339-40 (N.D. Ga. 2004). The similarity of the racial fact patterns is undeniable, clearly if race can be a legitimate rational state policy if the population deviation is below an overall range of 10% then the similarity of the racial fact patterns between *Larios* and in what Appellants propose in this case would implicitly, if not directly, overrule this important case.

Larios v. Cox has been a seminal case in the 2010 redistricting cycle. Many jurisdictions have adopted criteria and drawn their redistricting maps in order to comply with the principles enunciated in *Larios*. Even more jurisdictions have rejected redistricting maps proposed by minority organizations, minority caucuses and Democratic party groups which intentionally underpopulated majority minority or heavily minority districts in

order to use reliable minority voters to shore up non-Hispanic white Democratic candidates based upon the principles enunciated in *Larios*.[10] The advocates for these redistricting maps which intentionally underpopulate districts based on race and ethnicity has been that they are either required by Section 5 or Section 2 of the Voting Rights Act.

Despite these assertions the Department of Justice has refused to interpret the Voting Rights Act to require such population deviations. The Department of Justice has never required unequal population for preclearance in the 48 years of administering Section 5. In its *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, which explicitly "is not legally binding," the Department of Justice stated: "Preventing retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle." *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*; *Notice*, 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011). The Department has also acknowledged the obvious, that compliance with constitutional equal population requirements could

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[10] *Cf. Harris v. Arizona Independent Redistricting Commission*, No. 14-232, currently on appeal to this Court, where the Arizona redistricting commission intentionally underpopulated the districts with significant minority components claiming this was necessary in order to comply with the Voting Rights Act. *See Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1090-91 (D. Ariz. 2014) (Wake, J., dissenting). The conduct of the Arizona Independent Redistricting Commission is exactly the type of conduct appellants seek to require in Alabama.

result in unavoidable retrogression. Long ago the Department stated:

> Similarly, in the redistricting context, there may be instances *occasioned by demographic changes* in which reductions of minority percentages in single-member districts are unavoidable, even though "retrogressive," *i.e.*, districts where compliance with the one person, one vote standard necessitates the reduction of minority voting strength.

Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486, 488 (Jan. 6, 1987) (emphasis added). The current guidance is to the same effect. 76 Fed. Reg. at 7472. This concession to demographic change, where it happens, is dictated by the text of Section 5 itself, which does not forbid all retrogression in the minority's "ability to elect their preferred candidates of choice" Rather, to deny preclearance the text also requires that the retrogression be "on account of race or color or in contravention of the [language] guarantees." The "on account of" language was necessary to keep Section 5 validly within Congress's enforcement power. But whether or not it is constitutionally necessary, it is there. Retrogression because of relative population changes is not on account of race or language.

Furthermore, nothing in the text of the Voting Rights Act purports to require or authorize population inequality in legislative districting, directly or by implication. *See* 52 U.S.C. § 10304(a).

Section 17 of the Voting Rights Act forbids it in sweeping terms:

> Nothing in this Act shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision.[11]

Also the decisions of this Court would appear to incorporate the one person, one vote principle into its basic understanding of the requirements for a majority minority district required by the voting rights act. In *Thornburg v. Gingles* this Court stated that in order to state a claim under Section 2 of the Voting Rights Act "the minority group must be able to demonstrate that it is *sufficiently large* and geographically compact to constitute a majority in a single-member district." [12] sufficiently large can have no reasonable meaning other than as an intrinsic requirement under the voting rights act that any remedial district must meet the requirements of the 14th amendment equal protection clause's one person one vote principle. Justice Kennedy in his decision for the court and *LULAC v. Perry*[13] announced an analogous principle regarding compactness. In that case he made it clear that a district that was not sufficiently compact could not be deemed a district drawn in compliance with the voting rights act and therefore could not be counted

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[11] 52 U.S.C. §10311

[12] 478 U.S. 30, 50 (1986) (emphasis added; citations omitted)

[13] *League of Latin American Citizens(LULAC) v. Perry,* 548 U.S. 399 (2006)

toward proportional representation. The principle is even more applicable here because the one person, one vote requirement unlike the compactness requirement comes directly from the 14th amendment's Equal Protection Clause, whereas the Voting Rights Act is a statutory gloss on the exact same clause. Essentially the Voting Rights Act does not cause the Equal Protection Clause to be at war with itself. It also opens a Pandora's box.

If it is the case that one person, one vote does not apply to racially and ethnically drawn Voting Rights Act districts and it is to be treated as a federally required neutral redistricting criteria such as county and city lines then the obvious question becomes why stop at an overall range of 10%? In *Mahan v Howell*, 410 U.S. 315 (1973), this Court made clear that if a legitimate rational state policy is consistently applied, the deviations could constitute an overall range as high as 16.25%. The one thing that cannot be argued is the application of the racially and ethnically-based deviation will be *very consistent* since its purpose is to maximize both the racial/ethnic voting strength and in almost all cases Democratic party performance. This will become standard practice in all Democrat controlled jurisdictions and there may well be litigation to enforce it as a requirement in others.

Furthermore, the Constitution does not grant Congress power to enact legislation requiring or permitting population inequality among voting districts. The Fourteenth and Fifteenth Amendments grant Congress power to enforce by "appropriate legislation," which must be "plainly

adapted" to the end of enforcing equal protection of the laws or preventing abridgement of the right to vote on account of race, consistent with "the letter and spirit of the constitution." *Katzenbach v. Morgan*, 384 U.S. 641, 650-51 (1966).[14]

An intentional racial or ethnic pattern of deviation would constitute an impermissible use of race in the same manner as *Shaw v. Reno* and its progeny.[15] By definition the selection of under and overpopulated districts would be based predominantly on race and implicates the exact same harm identified in the *Shaw* cases and their progeny, the stereotyping of the races. However, in the case of population deviations, unlike any of the Shaw cases or its progeny, there is the actual individualized harm of vote dilution occurring to all the voters in the overpopulated districts. This actually implicates the discussion in *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) (*UJO*), where this Court suggested that if a jurisdiction by putatively complying with the voting rights act diluted the vote of voters who were not being protected by the voting rights act then the jurisdiction would not be required by the

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[14] Many of these exact same issues are presented in the *Harris v. Arizona Independent Redistricting Commission*, No. 14-232 (docketed Aug. 28, 2014) and is discussed by Judge Wake's dissent. *See Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1102-06 (D. Ariz. 2014) (Wake, J., dissenting)

[15] 509 U.S. 630 (1993) (*Shaw I*); *Shaw v. Hunt*, 517 U.S. 899 (1996) (*Shaw II*); *Miller v. Johnson,* 515 U.S. 900 (1995); *Abrams* v. *Johnson,* 521 U.S. 74 (1997); *Bush v. Vera,* 517 U.S. 952 (1996)

voting rights act to take that action and if they did the voters who were diluted would have a 14th amendment cause of action. Even though Justice Stevens dissented in *Shaw v. Reno* and all of its progeny he was quite clear that the situation in the UJO hypothetical would in fact state a 14th amendment cause of action.[16]. If the voting rights act permits otherwise unconstitutional numerical vote dilution, then it exceeds Congress's power to enforce the Fourteenth and Fifteenth Amendments' commands of equal voting rights.

Finally, intentional racial or ethnic manipulation of population deviations implicates exactly the same policy concern which this Court correctly alluded to in *Bartlett v. Strickland* when it said "it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 446 (Kennedy, J.); *see also Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring). That interpretation would result in a substantial increase in the number of mandatory districts drawn with race as "the predominant factor motivating the legislature's decision." *Miller v. Johnson*, 515 U.S. 900, 916(1995). The only difference would be that intentional racial or ethnic manipulation of population deviations will implicate a far greater number of districts, because of the large number of districts which will have to be overpopulated far from the geographic area that actually caused the problem, and create more vote dilution than the creation of crossover or influence districts even though influence and crossover

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[16] *Shaw I* 509 U.S. at 678.

districts will be the ultimate goal of the intentional population deviations manipulation. As is the case for the intentional manipulation of the population deviations based on race and ethnicity Appellants' suggestion that crossover or influence districts are required by the Voting Rights Act is also antithetical to this Court for our precedents as well as the intent and text of the act.

III. THE VOTING RIGHTS ACT DOES NOT REQUIRE THE CREATION OF INFLUENCE OR CROSSOVER DISTRICTS

This is not the first time that this Court has reviewed a version of Appellants' legal theory. In *Voinovich v. Quilter,* the Court faced exactly this type of claim.[17] The Democrats claimed that "the plan [drawn by Republicans] packed black voters by creating districts in which they would constitute a disproportionately large majority," thereby violating §2 of the Voting Rights Act. *Voinovich v. Quilter*, 507 U.S. 146, 149 (1993). In the Democrats' view, "the plan should have created a larger number of influence districts -- districts in which black voters would not constitute a majority but in which they could, with the help of a predictable number of crossover votes from white voters, elect their candidates of choice [i.e. NHW Democrats]." *Id.* at 149-50 The District Court found for the NHW Democrat plaintiffs; however this Court in a unanimous opinion reversed.

The Court refused to decide "whether influence dilution claims such as appellees' are

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[17] 507 U.S. 146 (1993)

viable under section 2."[18] The court noted that this case did not involve the usual vote dilution claims of "fragmentation of a minority group" (cracking) or that "Ohio's creation of majority black districts prevented black voters from constituting a majority in additional districts." (packing)[19] However, the Court did say that while the "first *Gingles* precondition—the requirement that the group be sufficiently large to constitute a majority in a single member district, would have to be modified," *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), — the other two preconditions would definitely apply if an influence claim were actionable.[20] The Court then noted that it was necessary for the plaintiffs' argument to assert "coalitional voting between whites and blacks" and that black interests could be adequately represented from "districts with only a 35% black population."[21] The Court used these factual concessions to find that plaintiffs failed to prove the polarized voting requirements of the *Gingles* preconditions.[22]

It appeared as a result of *Voinovich,* the argument that the failure to maximize NHW Democrat districts violates §2 was dead since, factually, the proof of polarized voting would necessarily defeat the argument that minorities could be adequately represented at such low

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[18] *Id* at 154.
[19] *Id* at 153.
[20] *Id* at 158.
[21] *Id* at 151-152. The choice of 35 percent is significant because it is in the range of the quota of black vote typically needed to draw a safe white Democrat district.
[22] *Id* at 158.

percentages and, conversely, the lack of polarized voting prevents the invocation of the protections of §2 of the Voting Rights Act. Ironically, this is exactly what the federal district court did in New Jersey.[23] Despite this, Democrats persisted with this theory which they pressed forward in the *LULAC* case. Justice Kennedy disposed of this theory in the exact same manner as had been done in *Voinovich.*[24]

Democrat proponents persisted with this legal theory and as a result this Court was forced to deal with the question of whether influence districts were a viable cause of action under §2 of the Voting Rights Act. In *Bartlett v. Strickland,*[25] a five to four decision, Justice Kennedy, writing for the Court, forcefully said that in order to state a claim for vote dilution under §2 a plaintiff must assert that a reasonably compact majority-minority district can be drawn in the area in question. Section 2 does not require the construction of influence districts.

Likewise, this would appear to be inconsistent with the requirements of the 2006 reauthorization of §5 of the voting rights act. By adopting these amendments, Congress legislatively reversed the United States Supreme Court's decision in *Bossier II* and any portion of *Ashcroft* allowing states to prefer coalition or influence districts over districts that allow minorities to elect their preferred candidates of choice. In so doing, Congress endorsed many of the arguments advanced by Justice Souter in the dissenting opinion *in Ashcroft. See* Report of the

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[23] *Page v Bartels*, 144 F. Supp. 2d 346 (D.N.J. 2001).
[24] *LULAC* at 443.
[25] 556 U.S. 1 (2009)

Senate Committee on the Judiciary, 109th Cong. Report 295, pp. 16-18 (hereinafter Senate Report) ("Any Discriminatory Purpose") and pp. 18-21 ("Preferred Candidate of Choice"); Report of the House Committee on the Judiciary, 109th Cong. Report 478 pp. 65-72. By expanding the statutory definition of "discriminatory purpose," Congress incorporated into § 5 the constitutional standard established in cases such as *Mobile v. Bolden,* 446 U.S. 55 (1980) *Washington* v. *Davis,* 426 U.S. 229 (1976) Senate Report p. 16, and *Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252 (1977) *("Village of Arlington Heights"). See* House Report, pp. 66-68. Consistent with this intent, the Senate Report cautioned that:

> [S]ome witnesses raised concerns that the amendment could be misinterpreted, and that the Justice Department or Federal Courts might compel the creation of so-called influence or coalition districts. The adopted language does not prevent state officials from declining to combine a group of minority voters with a group of white voters who tend to support the same parties and candidates in a district where candidates supported by minorities will reliably prevail. Although such an action may make it more difficult for that coalition of voters to elect their preferred candidate, *the Voting Rights Act . . is not designed to protect political parties, or to prevent statewide political realignment from being reflected in the redistricting process. Nor can any racial or political group claim a right under the*

> *Fourteenth Amendment to have its members placed as often as possible in districts where candidates of the party favored by that group's members will prevail* . . . .
>
> The language "any discriminatory purpose" does not permit a finding of discriminatory purpose based on a determination that the plan seeks partisan advantage , . or protects incumbents.

Senate Report pp. 18 (emphasis added).

Both the Senate and the House reports explain that amended § 5 is designed to prevent elected officials from "unpacking" majority-minority districts and changing them into "influence" or "coalition" districts. *See, e.g.,* Senate Report p. 19; House Report pp. 68-71. Amended § 5 does not "lock into place coalition or influence districts" or "the competitive position of a political party." Senate Report p. 21. Congress "explicitly reject[ed] all that logically follows from Justice O'Connor's statement [in *Ashcroft]*" that state legislatures "should not focus solely on the comparative ability of a minority groups to elect a candidate of choice." House Report p. 71. Instead, under the § 5 effects test, as amended, "the relevant analysis . . . is a comparison between the minority community's ability to elect their preferred candidate of choice before and after a voting change." *Id.*

In summary, following the 2006 reauthorization of § 5, it remains settled that a jurisdiction could lawfully enact redistricting plans

that increase the number of districts that allow a minority group to elect their preferred candidates of choice. Preclearance will now be denied if a redistricting plan has any discriminatory purpose. A discriminatory purpose may be established if a plan intentionally fails to create districts that allow minority voters to elect their preferred candidates of choice. Federal Register, Vol. 76, No. 27 p. 7471 (February 9, 2011) (citing *Busbee v. Smith,* 549 F. Supp. 494, 508 (D.D.C. 1982), *aff'd,* 459 U.S. 1166 (1983), *Garza and United States v. County of Los Angeles,* 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J. concurring and dissenting in part), *cert. denied,* 498 U. S . 1028 (1991)).

Discriminatory purpose is not established because a jurisdiction refuses to create "coalition" or "influence" districts or because a new redistricting plan realigns political power within a state. Jurisdictions may not substitute coalition or influence districts, supported by incumbents or the party favored by minorities, for districts that allow minority voters to elect their candidates of choice. Instead, under the "effect" clause, whether an objection will be made depends upon whether a new plan reduces the number of districts that allow minorities to elect their preferred candidates as compared to the benchmark.

In short, neither Section 2 nor Section 5 of the Voting Rights Act has required the creation of crossover or influence districts nor does the voting rights act require an intentional racial or ethnic manipulation of population deviations in order to maximize either minority districts or influence.

Indeed since Republican votes were critical at each stage of the passage of the voting rights act it would seem extremely odd that the act was intended as a statutory requirement for a perpetual Democratic gerrymander. Such an interpretation stretches all credulity. Furthermore such statutory interpretation would create an unnecessary constitutional doubt which the Court's standards of statutory interpretation required to be avoided.[26] The Court should be sensitive to the fact that African-Americans in Alabama faced no vote dilution as a result of this redistricting plan. Because the harm under the *Shaw v. Reno* standard is racial stereotyping[27] and not vote dilution the court needs

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[26] *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("Although [a regulatory agency's interpretations of its own statute] are normally entitled to deference, where, as here, an otherwise acceptable construction would raise serious constitutional problems . . . courts [must] construe the statute to avoid such problems unless such construction is plainly contrary to Congress' intent." (*citing NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) ("In a number of cases the Court has heeded the essence of Mr. Chief Justice Marshall's admonition in *Murray v. The Charming Betsy*, 2 L.Ed. 208 (1804), by holding that an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."))). *See also Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346 (2000) (Scalia, J., concurring, in part) (noting that "[where statutory intent is unclear], it is our practice to construe the text in such fashion as to avoid serious constitutional doubt").

[27] 509 U.S. 630 (1993). *Shaw* is often viewed by the press as part of the Supreme Court's "reverse discrimination" line of cases. O'Connor specifically disclaims this, noting

to take care that appellants, governmental jurisdictions and lower courts do not take any decision by this court in this case as carte blanche or

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that "appellants did not claim that the General Assembly's reapportionment plan unconstitutionally 'diluted' white voting strength." *Id* at 641. In fact, she uses this point to distinguish *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) (*UJO*). *Id* at 651-52. The factual difference between vote dilution cases, the *Shaw* line of cases, and all of the "reverse discrimination" cases is the harm. All of the reverse discrimination cases have involved admissions or selection, employment, or contracting where specific plaintiffs or groups of plaintiffs were directly injured by the racial classification. Vote dilution cases of all types have relied on the concept that one group of voters ballots are made more powerful than another group's ballots because of the structure of the election system. If this is the harm which constitutes a Fourteenth Amendment violation (as was asserted by the plaintiffs in *UJO*) then none of the so-called "black maximization" redistricting plans of the 1990s redistricting cycle could constitute dilution of white voting strength since none of the so called "black maximization" plans ever reached proportional representation. Essentially, white voters even under the most aggressive "black maximization" plans retained a disproportionate share of the electoral power. Therefore, Justice O'Connor identifies the harm as a general societal one that "reinforces societal stereotypes". Despite the Court's denial that this is a "reverse discrimination" case, a term the court has disclaimed before because the Court declares it simply to be discrimination no matter the identity of the group discriminated against; it is clear. given the citations to *Richmond v. J.A. Croson*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), that the "reverse discrimination" line of cases has informed the Court's thinking in the *Shaw* line of cases.

even a requirement to engage in real vote dilution against the majority of the voters in numerous jurisdictions across the country as a result an explicit rejection of appellants theory of the case is necessary in order to avoid a far greater harm.

CONCLUSION

As a result, this Court should explicitly reaffirm that a jurisdiction has the right to improve population equality if it chooses to do so and that the Voting Rights Act cannot be used as an excuse for increasing population deviations. Furthermore, the Court should reaffirm its prior holdings that the Voting Rights Act does not require or protect crossover influence districts.

Respectfully submitted,

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