No. 18-281

IN THE

Supreme Court of the United States

VIRGINIA HOUSE OF DELEGATES, ET AL.,

Appellants,

—v.—

GOLDEN BETHUNE-HILL, ET AL.,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

KRISTEN CLARKE
JON M. GREENBAUM
EZRA D. ROSENBERG
JULIE HOUK
JENNIFER NWACHUKWU
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1500 K Street NW,
Suite 900
Washington, DC 20005
(202) 662-8600
jgreenbaum@
lawyerscommittee.org

MICHAEL C. KEATS
Counsel of Record
PATRICK ALBERGO
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON LLP
1 New York Plaza
New York, New York 10004
(212) 859-8914
mkeats@friedfrank.com

Counsel for Amicus Curiae

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions and Statutes

Other Authorities

STATEMENT OF INTEREST[1]

The Lawyers' Committee for Civil Rights Under Law was formed in 1963 at the request of President John F. Kennedy to involve private attorneys throughout the country in the effort to ensure civil rights to all Americans. Promoting and defending the voting rights of African Americans and other racial minorities is an important part of the Lawyers' Committee's work. The Lawyers' Committee has represented litigants in numerous voting rights cases throughout the nation over the past 50 years, including in cases before this Court. *See, e.g.*, *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S.Ct. 2247 (2013); *Shelby County v. Holder*, 133 S.Ct. 2612 (2013); *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Young v. Fordice*, 520 U.S. 273 (1997); *Clark v. Roemer*, 500 U.S. 646 (1991); *Clinton v. Smith*, 488 U.S. 988 (1988); and *Connor v. Finch*, 431 U.S. 407 (1977). The Lawyers' Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, including *Bethune-Hill v. Virginia State Bd. of Elections,* 137 S.Ct. 788 (2017); *Benisek v. Lamone*, 138 S.Ct. 1942 (2018); *Gill v. Whitford*, 138 S.Ct. 1916

---

[1] Appellants and Appellees Golden Bethune-Hill et al. have lodged blanket consents for the filing of *amicus* briefs with the Clerk. Appellee the State of Virginia has consented to the Lawyers' Committee's filing this brief. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity—other than *amicus*, their members, and their counsel—contributed monetarily to the preparation or submission of this brief.

(2018); *Evenwel v. Abbott*, 136 S.Ct. 1120 (2016); *Wittman v. Personhuballah*, 136 S.Ct. 1732 (2016); *Alabama Legislative Black Caucus v. Alabama*, 135 S.Ct. 1257 (2015); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Shaw v. Reno*, 509 U.S. 630 (1993); *Thornburg v. Gingles*, 478 U.S. 30 (1986); and *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The Lawyers' Committee has an interest in the instant appeal because it raises important voting rights issues that are central to its mission.

SUMMARY OF ARGUMENT

Substantial evidence amply supports the District Court's finding that the eleven challenged districts in Virginia's 2011 redistricting were the product of a racial gerrymander in violation of *Shaw v. Reno*, 509 U.S. 630 (1993), and represented the misuse of federal civil rights protections, specifically Section 5 of the Voting Rights Act, 52 U.S.C. § 10301(c). The legal framework set forth in *Miller v. Johnson*, 515 U.S. 900 (1995), and repeatedly reaffirmed, including in *Bethune-Hill v. Virginia State Board of Elections*, 137 S.Ct. 788 ("*Bethune-Hill I*"); *Alabama Legislative Black Caucus v. Alabama*, 135 S.Ct. 1257; *Cooper v. Harris*, 137 S.Ct. 1455 (2017); and *Abbott v. Perez*, 138 S.Ct. 2305 (2018), calls for affirmance of the District Court's conclusions that racial considerations were the Legislature's predominant concerns in creating the challenged districts, triggering strict scrutiny, and that the design of the challenged districts was not narrowly tailored to achieve compliance with Section 5 of the Voting Rights Act.

The Equal Protection Clause prohibits states from classifying citizens by race, including adopting electoral redistricting schemes based on racial characteristics without adequate justification. *See Shaw I*, 509 U.S. at 645. However, it is not the mere consideration of race as a factor in districting that is constitutionally suspect. Rather, it is the *predominance* of race as a factor. *Miller*, 515 U.S. at 915. As this Court has iterated, a districting decision is subject to strict scrutiny, only if "'[r]ace was the criterion that, in the State's view, could not be compromised,' and race-neutral considerations 'came into play only after the race-based decision had been made.'" *Bethune*-Hill, 137 S.Ct. at 798, quoting *Shaw v. Hunt,* 517 U.S. 899, 907 (1996) (*Shaw II*).

Indeed, this Court has never applied strict scrutiny solely upon a state's decision to achieve a particular racial percentage within a particular district. *See Alabama Legislative Black Caucus*, 135 S.Ct. at 1272 (citing *Bush v. Vera*, 517 U.S. 952, 996 (2015)); *Shaw*, 509 U.S. at 649; *Cooper,* 137 S.Ct. at 1468-69. This Court's decision in *Bethune-Hill I* is consistent with this precedent, as the remand of this case for determination of whether strict scrutiny applied would not have been necessary if the setting of the racial target was, in itself, sufficient to trigger strict scrutiny.

An "express racial target" is but one piece of "relevant districtwide evidence" that must be considered "holistically" with other evidence in the predominance inquiry. *Id.* at 799-800. That evidence also includes consideration of the "districtwide context" to determine "the legislature's predominant

motive for the design of the district *as a whole*." *Bethune-Hill I*, 137 S.Ct. at 800 (emphasis added). Parties may rely on evidence of compliance *vel non* with traditional districting principles or "more direct evidence going to legislative purpose" in proving whether race was the "'legislature's dominant and controlling rationale.'" *Bethune-Hill I,* 137 S.Ct. at 797*,* although as a practical matter, compliance with traditional districting principles may be decisive.

Here, Virginia legislators identified a particular minority population percentage as a redistricting target for the challenged districts, but this alone did not establish that the Legislature subordinated traditional race-neutral districting principles to racial considerations. The ample objective, geographic evidence of racial gerrymandering here formed the basis of the District Court's exhaustive holistic analysis, which produced the inescapable conclusion that the challenged districts were the product of a racial gerrymander. The District Court considered, along with many other factors, the Legislature's across-the-board 55 percent BVAP target, but it was *how* the target was conceived and implemented, not that it existed at all, that formed the basis of this conclusion.

ARGUMENT

I. THE FACTORING OF RACIAL CONSIDERATIONS INTO A DISTRICTING PLAN DOES NOT IN ITSELF TRIGGER STRICT SCRUTINY

The Equal Protection Clause prohibits states from classifying citizens by race, including adopting electoral redistricting schemes based on racial characteristics without adequate justification. *See Shaw I*, 509 U.S. at 645. However, "the legislature always is *aware* of race when it draws district lines . . . ." *Id.* at 626 (emphasis in original). *See also Miller*, 515 U.S. at 916 ("Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process."); *Shaw I*, 509 U.S. at 646 ("[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes.").

Accordingly, it is not the mere consideration of race as a factor in districting that is constitutionally suspect. Rather, it is the *predominance* of race as a factor. *Miller*, 515 U.S. at 915. As this Court has iterated, a districting decision is subject to strict scrutiny, only if "'[r]ace was the criterion that, in the State's view, could not be compromised,' and race-neutral considerations 'came into play only after the race-based decision had been made.'" *Bethune-Hill*, 137 S.Ct. at 798, quoting *Shaw II,* 517 U.S. 899, 907.

Indeed, this Court has never applied strict scrutiny solely upon a state's decision to achieve a particular racial percentage within a particular district. *See Alabama Legislative Black Caucus*, 135 S.Ct. at 1272 (citing *Vera*, 517 U.S. at 996); *Shaw*, 509 U.S. at 649; *Cooper,* 137 S.Ct. at 1468-69. This Court's decision in *Bethune-Hill I* is consistent with this precedent. There, this Court noted the "undisputed" fact that "the boundary lines for the 12 districts at issue were drawn with a goal of ensuring that each district would have a black voting-age population (BVAP) of at least 55%." *Bethune-Hill I*, 137 S.Ct. at 794. Nevertheless, this Court remanded the case to the district court for further fact-finding as to *whether* strict scrutiny applied as to 11 of the 12 districts, a remand that would not have been necessary if the setting of the target automatically triggered strict scrutiny.[2]

An "express racial target" is but one piece of "relevant districtwide evidence" that must be considered "holistically" with other evidence in the predominance inquiry. *Id.* at 799-800. That evidence also includes consideration of the "districtwide context" to determine "the legislature's predominant motive for the design of the district *as a whole*." *Bethune-Hill I*, 137 S.Ct. at 800 (emphasis added). Parties may rely on evidence of compliance *vel non* with traditional districting principles or "more direct evidence going to legislative purpose" in proving

---

[2] Justices Alito and Thomas in their separate opinions both construed the majority's opinion as supporting the proposition that the setting of a racial target does not automatically trigger strict scrutiny. *Bethune-Hill I,* 137 S.Ct. at 803-807.

whether race was the "'legislature's dominant and controlling rationale.'"

As this Court noted, "as a practical matter," "challengers will be unable to prove an unconstitutional racial gerrymander without evidence that the enacted plan conflicts with traditional redistricting criteria." *Bethune Hill I,* 137 S.Ct. at 799. Indeed, this Court has never affirmed a finding of predominance or remanded a claim of racial gerrymandering "without evidence that some district lines deviated from traditional principles." *Id.*

In any event, in accordance with *Miller, Vera,* and *Bethune-Hill I,* there are circumstances where a stated goal to draw a district with 55 % African-American population would not trigger strict scrutiny — so long as it was not the sole factor that could not be compromised relative to other legitimate districting factors. In other circumstances, the drawing of a majority-minority district might result from following traditional districting principles without considering race at all. When adhering to the bounds of traditional districting criteria, some districts may be majority-black and others majority-white, but for constitutional purposes they are just districts. There is no constitutional basis to deem majority-white election districts as normative, or to presuppose that majority-minority election districts deviate from the norm. Such a rule would abandon this Court's understanding of equal protection because it would create explicitly different rules for black and white citizens.

Here, Virginia legislators identified a particular minority population percentage as a redistricting target for the challenged districts, but this alone did not establish that the Legislature subordinated traditional race-neutral districting principles to racial considerations. Rather, it was evidence of many challenged districts' odd shapes, lack of contiguity, and exceptionally high number of local precinct splits, corroborated by testimony that race was a paramount redistricting criterion for the Legislature, that indicated that race predominated over all other legitimate districting factors, as the District Court found.

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE CHALLENGED DISTRICTS WERE SUBJECT TO STRICT SCRUTINY

The District Court correctly found that race was the predominant factor in how the Legislature drew each of the challenged districts. The District Court's holistic review of the evidence regarding the challenged districts substantially supported its finding that Virginia subordinated traditional districting principles to racial factors. There is no basis for arguing that the District Court's findings were clearly erroneous.

A. Expert Evidence Demonstrated that Racial Considerations Predominated

The plaintiffs called two experts whose testimony was credited by the District Court; each concluded that, based on their empirical analyses,

racial concerns predominated over traditional districting principles in the challenged districts. *Bethune-Hill v. Va. State Bd. of Elections,* 326 F. Supp. 3d 128, 145-51 (E.D. Va.).

Dr. Jonathan Rodden is a political science professor at Stanford University, where he also directs the Spatial Social Science Lab. *Id.* at 145; JONATHAN RODDEN, https://politicalscience.stanford.edu/people/jonathan-rodden. Dr. Rodden was called by the plaintiffs and accepted as an expert in the field of "geo-spatial analysis and its application to redistricting." *Bethune-Hill*, 326 F. Supp. 3d at 145 (internal quotation marks omitted). Based on Census data, Dr. Rodden created maps overlaid with black and white dots in each census block. *Id.* at 145-46. The number of each color of dot within each census block was proportional to the number of black and white residents there. *Id.*

Dr. Rodden used these maps to analyze how individual line-drawing decisions affected the placement of black and white voters. He concluded that many of the decisions that sorted voters by race "d[id] considerable violence to traditional districting principles." and took specific note of such decisions, including division of municipal boundaries or voting tabulation districts ("VTD"s). *Id.* at 146. Dr. Rodden testified that the Legislature frequently divided VTDs by race and used small residential roads as district boundary lines when those roads corresponded to a racial divide. *Id.* He also observed the use of a narrow bridge of largely white VTDs in District 80 to connect separate clusters of black voters and the removal from District 89 of a single census block of predominantly

white voters, who were assigned to a non-challenged district. *Id.* at 146-47; *see also* Section II.B, *infra*. "These visual depictions led Dr. Rodden to reach the unavoidable conclusion that the challenged districts were designed to capture black voters with precision." *Id.* at 147.

Second, the plaintiffs called Dr. Maxwell Palmer, an assistant professor of political science at Boston University, who "was accepted as an expert in the area of redistricting and data analysis as it pertains to redistricting." *Id.* at 145, 147. His testimony "focused on the manner in which VTDs and political subdivisions were split in the plan." *Id.* Dr. Palmer concluded that more VTDs were split in the 2011 plan compared to the 2001 plan, that splitting VTDs occurred more frequently in challenged districts vs. non-challenged districts, and that there is "substantial evidence" that race predominated in how VTDs, cities, and other places were split. *Id.* Specifically, Dr. Palmer found that "in 31 of the 32 VTDs that were split between challenged and non-challenged districts, the areas assigned to the challenged districts had higher BVAPs than the areas assigned to the non-challenged districts" and that the average BVAP of the sections assigned to challenged districts was 24% higher than the section assigned to non-challenged districts. *Id.*

Dr. Palmer also conducted a comparative analysis to examine whether movement of voters more closely correlated with political party preference than with race. *Id.* at 148. "[His] statistical analysis showed that black voters were moved from non-challenged districts into challenged districts at a

higher rate than white or Democratic voters." *Id.* As such, he concluded that race predominated over party preference in assigning VTDs to the challenged districts. *Id.* at 151. His expert testimony, along with Dr. Rodden's, demonstrated the Legislature's disregard for traditional districting principles in favor of racial considerations.

B. The Challenged Districts Utilized Odd, Non-Contiguous Shapes and Divided Neighborhoods to Enact a Racial Gerrymander

The trial evidence demonstrated that the Legislature utilized striking precision in how it carved up neighborhoods and precincts along racial lines and without regard for traditional districting principles. *E.g. id.* at 175 (noting that one precinct was separated "down the middle of a street" along racial lines).

The shape of District 80 provides an egregious example of the lengths the Legislature went to pack minority voters. A simple glance at the district clearly indicates that it is the product of racial gerrymandering. *See Karcher v. Daggett*, 462 U.S. 725, 762 (1983) (Stevens, J., concurring) ("A glance at the map . . . shows district configurations well deserving the kind of descriptive adjectives . . . that have traditionally been used to describe acknowledged gerrymanders.") (citation omitted).

Described by the District Court as the "lynchpin of the redistricting of South Hampton Roads," race-based contortions produced a district whose shape is

"bizarre on its face, resembling a sideways 'S.'" *Bethune-Hill*, 326 F. Supp. 3d at 166-67; *see also* App. A. This odd shape came about because District 80 had a 54.4% BVAP but was underpopulated at the time of the 2010 census. *Bethune-Hill*, 326 F. Supp. 3d at 166. However, the district was "surrounded by largely white areas" and by other challenged districts that had already been carefully constructed to pack minority voters. *Id.* at 166-67. To get the population up without sacrificing the BVAP target, the Legislature undertook a two-step process: it moved predominantly white areas into non-challenged District 79, and it used two VTDs as a bridge to bring black voters into District 80. *Id.* at 167.

The removed white areas cut out the eastward outer curve of the "S," while the "bridge" VTDs formed the inner curve of the "S." *See* App. A. The westward outer curve of the "S" comprised VTD 38 and the Taylor Road, Yeates, and Harbour View VTDs, all four of which had "large BVAP concentrations." *Bethune-Hill*, 326 F. Supp. 3d at 167; *see also id*. Dr. Rodden testified that the bridge "corresponded directly to race" and was designed to bring in black precincts while adding "the smallest possible number of whites." *Bethune-Hill*, 326 F. Supp. 3d at 167. The Legislature also split VTD 9 along starkly racial lines, assigning a portion with "over 98%" BVAP to District 80 and a portion with a BVAP "more than 30 percentage points lower" to non-challenged District 79. *Id.*

Delegate Jones claimed at the first trial that incumbent Delegate Matthew James gave "significant input" into this scheme. *Id.* at 167. However, Delegate

James "flatly contradicted this assertion at the second trial, testifying credibly that he had no input in the redistricting process." *Id.* When asked during the second trial about Delegate James' testimony, Delegate Jones said that "he could not 'answer [the question] directly' but that it was his 'understanding' that James had given input." *Id.* at 153.

These "massive population shifts" along "distinct racial patterns" caused a "significant reduction in compactness" and led the District Court to correctly conclude that race predominated in the construction of District 80. *Id.* at 167-68.

The remaining challenged districts also evinced subordination of traditional districting criteria to race. In the Richmond area, the District Court found that race was the predominant consideration in constructing the five challenged districts there—Districts 63, 69, 70, 71, and 74. *Id.* at 154. The Legislature followed a clear pattern: it sought and executed the best mechanism to pack each district to a 55% BVAP and thus minimize minority influence on the outside districts.

Specifically, districts with a higher BVAP, such as Districts 70 and 74, were treated as "donors" to challenged districts that came in below the 55% target. *Id*. For example, District 70 was not underpopulated, but because its 61.8% BVAP exceeded the target, "26,000 people were nonetheless shifted in a noticeable racial pattern," ensuring that adjacent District 69 hit the 55% mark and maximizing the power of non-minority voters by keeping them out of that district. *Id.* at 157.

Delegate Jones testified that he had removed several predominantly white precincts from District 71 based on the race-neutral goal of making it more "Richmond-centric"; however, as the District Court noted, he added a precinct from outside the city of Richmond with an 83% BVAP and split off and removed part of a precinct from urban Richmond with a 3% BVAP, even though the entirety of the split precinct had been located in District 71 for "at least 20 years." *Id.* at 156. As such, the District Court declined to credit this explanation, and it was free to reach its own conclusions regarding Delegate Jones' credibility.

The same pattern of splitting traditional political subdivisions along racial lines was apparent in the South Hampton Roads region, where "[f]ive cities . . . were split between a challenged and a non-challenged district," and in every case, the portion "allocated to a challenged district had a "substantially higher BVAP" than the portion assigned to a non-challenged district." *Id.* at 166.

In addition to splitting precincts along racial lines, the Legislature disregarded traditional criteria by employing geographic malformations to reach the mechanical 55% target. For instance, the District Court found that "the legislature added a long, narrow appendage to District 95, which on its face disregarded traditional districting criteria [and] split several VTDs, causing separation of predominantly black neighborhoods from predominantly white neighborhoods with striking precision." *Id.* at 162. This appendage caused District 95 to receive "the worst compactness score in the entire 2011 plan." *Id.*

at 163. In South Hampton Roads, "one neighborhood in downtown Norfolk was divided into three districts, and included a half-mile stretch of roadway running through District 89, into 90, returning to 89, moving into 80, and ending in 90." *Id.* at 166. The District Court correctly found that "[t]his bizarre configuration plainly disregarded traditional districting principles." *Id.*

The evidence also supported that racial predominance led to similar decision in District 89 ("adding . . . an appendage encompassing significant numbers of black residents, while carving a sliver out of the middle of the Granby VTD to exclude a narrow band of white residents"); District 77 (further narrowing a corridor to high BVAP areas); District 70 (employing an "east-west corridor [that] generated the starkest possible segregation of blacks and whites" (internal punctuation omitted)). *Id.* at 169-70.

Finally, the District Court discounted the proffered explanation that partisan advantage rather than race was the true motivator behind these decisions, noting that "political party performance was *not available* to the map-drawers at the census block level" and that even if the Legislature's true motive was partisan advantage, it "us[ed] race as a proxy for political affiliation," which triggers strict scrutiny under *Vera*. *Id.* at 175, 152 (citing *Vera*, 517 U.S. at 968 (principal opinion of O'Connor, J.) ("[T]o the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation.").

III. THE DISTRICT COURT CORRECTLY FOUND THAT THE CHALLENGED DISTRICTS WERE NOT NARROWLY TAILORED TO COMPLY WITH THE VOTING RIGHTS ACT

Having found that race predominated in the eleven challenged districts, the District Court then turned to the next stage of the *Miller* analysis: "whether the intervenors have shown that the 'districting legislation is narrowly tailored to achieve a compelling interest.'" *Id.* at 175 (citing *Bethune-Hill*, 137 S.Ct. at 801 (quoting *Miller*, 515 U.S. at 920)). The intervenors proffered compliance with Section 5 of the Voting Rights Act as their compelling state interest. This interest is undoubtedly compelling, and the District Court confined its analysis to the narrow tailoring prong, which requires a showing that "the legislature had a 'strong basis in evidence' for its predominant use of race in the challenged districts." *Bethune-Hill*, 326 F. Supp. 3d at 175-176 (quoting *Alabama*, 135 S.Ct. at 1274).

Here, the 55% BVAP target was tailored only to District 75. Delegate Jones admitted in his trial testimony that, first, "he did not compile recent election results in all the challenged districts," second, he "did not consider that the majority-minority districts in the 2011 state Senate map all had less than 55% BVAP," third, he "did not examine other plans that were precleared or rejected by the Department of Justice and [fourth, he] did not conduct an analysis to determine whether white and black voters . . . exhibited polarized voting behavior, in any of the challenged districts." *Id.* at 176.

Additionally, the appellants "did not produce a single member of the black caucus at either trial to testify that the 55% BVAP requirement was imposed to allow black voters in those districts to elect a candidate of their choice." *Id.* at 176-177. Indeed, "every member of the black caucus who testified stated that they never told Jones that a 55% BVAP was required in their districts." *Id.* at 177 n.54. This Court considered evidence of delegate Jones' consultation with incumbents in other majority-minority districts in its prior review of the District 75 functional analysis in *Bethune-Hill I*. Furthermore, "[Delegate] Jones conceded that he did not compare the other districts with District 75 on factors relevant to black voters' ability to elect their preferred candidates," and did not evaluate whether the other districts had large black non-voting prison populations to assess their needs as he did with District 75. *Id*. at 85. This Court also considered the Black non-voting prison population in reviewing the District 75 functional analysis in *Bethune-Hill I*. *See* 137 S.Ct. at 801.

The failure to conduct any functional analysis into the need for a 55% BVAP target to give black voters the ability to elect in the eleven challenged districts set those districts apart from the District 75 analysis in which this Court determined in *Bethune-Hill I*, that such a functional analysis was actually conducted. Delegate Jones simply "applied the 55% figure from District 75 across the board." *Id.* at 177; *Bethune-Hill I*, 137 S.Ct. at 796. In light of this, appellants barely attempt to argue that this analysis was tailored to any of the eleven challenged districts. Instead, they offer excuses, including that the use of

a 55% BVAP target tailored only to District 75 could nonetheless be permissibly applied to every district as an "extrapolat[ion]" of that number. Appellants' Brief at 59. But the twelve districts "were highly dissimilar in character," in terms of geography, "Democratic voting strength, electoral history, and the extent to which white and black voters supported the same candidates." *Bethune-Hill*, 326 F. Supp. 3d at 176.

Indeed, the District Court found that the evidence demonstrated that District 75 "required the highest BVAP level of any district" to enable minority voters to elect the candidate of their choice. *Id.* at 178. This is because District 75 voters were extremely polarized by race, with "only 16% of white voters" supporting the Democratic Party, the "overwhelming[]" choice of black voters. *Id.* White voters' support of Democratic Party ranged from 27% (District 63) to 70% (District 71) in the remaining challenged districts. *Id.*

Accordingly, the District Court correctly concluded that because "the legislature did not undertake *any* individualized functional analysis in *any* of the 11 remaining challenged districts" and "instead applied the 55% BVAP requirement from District 75 across the board to 11 greatly dissimilar districts, which black-preferred candidates would have won by significant margins with far lower BVAP percentages, each of the challenged districts were not narrowly tailored to advance a compelling government interest. *Id.* at 180 (emphasis in original).

The District Court properly conducted the holistic analysis prescribed by this Court by first finding that race predominated other factors in order to apply strict scrutiny, rather than presumptively invoking strict scrutiny because of the use of the 55% BVAP threshold. The majority then used the record from both trials to assess whether the Legislature had conducted a functional analysis for the remaining challenged districts as it had done for District 75, a process that this Court used in analyzing whether District 75 was narrowly tailored in *Bethune-Hill I*.

By finding that the Legislature failed to conduct functional analyses for the remaining challenged districts, the majority correctly determined that the Legislature did not have a "strong basis in evidence" to support the use of the 55% BVAP threshold in the remaining eleven districts. As such, the majority correctly determined that the use of race was not narrowly tailored and the decision below should be affirmed.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's decision.

Respectfully submitted,

KRISTEN CLARKE
JON M. GREENBAUM
EZRA D. ROSENBERG
JULIE HOUK
JENNIFER NWACHUKWU
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street NW, Suite 900
Washington, DC 20005
(202) 662-8600
jgreenbaum@lawyerscommittee.org

MICHAEL C. KEATS
Counsel of Record
PATRICK ALBERGO
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP
1 New York Plaza
New York, New York 10004
(212) 859-8914
mkeats@friedfrank.com

Counsel for Amicus Curiae

FEBRUARY 4, 2019