No. 15-680

In the Supreme Court of the United States

GOLDEN BETHUNE-HILL, ET AL., APPELLANTS

v.

VIRGINIA STATE BOARD OF ELECTIONS, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING VACATUR IN PART AND AFFIRMANCE IN PART

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
VANITA GUPTA
Principal Deputy Assistant Attorney General
IRVING L. GORNSTEIN
Counselor to the Solicitor General
ELIZABETH B. PRELOGAR
Assistant to the Solicitor General
TOVAH R. CALDERON
CHRISTINE H. KU
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court adopted and applied an incorrect legal standard in concluding that the Virginia legislature did not predominantly rely on race when drawing 12 challenged districts in its 2011 House of Delegates redistricting plan.

2. Whether the district court correctly concluded that the Virginia legislature's use of race in drawing District 75 in the 2011 plan was narrowly tailored to achieve the compelling interest of complying with the Voting Rights Act of 1965.

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INTEREST OF THE UNITED STATES

This case concerns the constitutionality of a redistricting plan that the Virginia legislature maintains was designed, in part, to comply with the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 *et seq.* (Supp. II 2014). The United States, through the Attorney General, has primary responsibility for enforcing the VRA. Accordingly, the United States has a substantial interest in the proper interpretation of the VRA and the related constitutional protection against the unjustified use of race in redistricting.

STATEMENT

1. When drawing legislative districts, States must balance a complex array of often competing concerns while adhering to constitutional and statutory mandates. See, *e.g.*, *Miller* v. *Johnson*, 515 U.S. 900, 915-916 (1995). Among other requirements, the Equal Protec-

tion Clause prohibits an unjustified, predominant use of race in drawing districts. See *Shaw* v. *Reno*, 509 U.S. 630, 642 (1993) (*Shaw I*). Given the "sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments," courts must "exercise extraordinary caution" before concluding that district lines were drawn based on race. *Miller*, 515 U.S. at 916. But if race "was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district"—*i.e.*, if race was the "dominant and controlling rationale" for a district's lines—then that use of race withstands constitutional scrutiny only if it is narrowly tailored to serve a compelling state interest. *Id.* at 913, 916, 920.

At the time of the redistricting measures at issue here, Section 5 of the VRA required covered jurisdictions, including Virginia, to obtain preclearance of districting changes by showing that they had neither the purpose nor the effect of discriminating based on race. 52 U.S.C. 10304(a) (Supp. II 2014).[1] To comply with the VRA, Virginia had to show that the map would not result in retrogression of a minority group's ability "to elect [its] preferred candidates." 52 U.S.C. 10304(b) (Supp. II 2014). To determine whether the redistricting plan was retrogressive, federal authorities would compare the new plan against the existing, or "benchmark," plan, using updated census data in each and conducting a functional analysis of the minority community's ability to elect. *Guidance Concerning Redis-*

[1] In *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), this Court held that the coverage formula in Section 4(b) of the VRA could no longer be used to require preclearance under Section 5. *Id.* at 2631. Thus, Virginia is not currently subject to Section 5.

tricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470-7471 (Feb. 9, 2011) (*2011 Guidance*). That determination focused not on "any predetermined or fixed demographic percentages," but rather on localized electoral conditions and behavior, such as voter turnout, voting patterns, and voter registration. *Id.* at 7471.

2. Following the 2010 census, Virginia began the redistricting process for its state legislative districts. J.S. App. 3a. State legislator Chris Jones drew the 2011 House of Delegates map (2011 plan). *Id.* at 3a-4a. As part of that process, he identified 12 minority ability-to-elect districts in the benchmark plan. *Id.* at 19a. Jones and other legislators believed that those districts needed to have a black voting-age population (BVAP) of at least 55% in the 2011 plan, purportedly to avoid "unwarranted retrogression" under Section 5. *Ibid.*; see *id.* at 87a-88a. In the benchmark plan, nine of the 12 districts had BVAPs exceeding 55%, but three did not. *Id.* at 19a; see J.A. 669. Most of the 12 districts were also underpopulated, requiring significant movement of population to correct the malapportionment. J.A. 669. In the 2011 plan, each of the 12 districts was ultimately drawn with a BVAP exceeding 55%. J.S. App. 23a. The Attorney General precleared the plan in June 2011. J.S. App. 26a-27a.

3. a. Appellants are 12 registered voters, each of whom resides in one of the districts drawn with a BVAP exceeding 55%. J.S. App. 4a. Appellants sued various state agencies and officials, asserting racial gerrymandering claims. *Ibid.* Appellees are the Virginia House of Delegates and its Speaker, who intervened as defendants and carried the burden of litigation in support of the 2011 plan. *Id.* at 5a.

b. Following a bench trial, a three-judge district court upheld the 2011 plan. J.S. App. 1a-130a.

The district court first assessed whether "racial considerations predominated over—or 'subordinated'—traditional redistricting criteria" in each of the challenged districts. J.S. App. 28a. The court stated that adoption of a 55% BVAP target constituted "significant evidence" of racial predominance. *Id.* at 30a.[2] But the court rejected "a per se rule" that the use of a racial target that is "prioritized * * * in importance" above other criteria "automatically satisfies [the] predominance standard." *Id.* at 29a-30a (internal quotation marks omitted). The court emphasized that "the significance of the racial floor is its impact on the creation of the district." *Id.* at 30a.

The district court further concluded that race cannot predominate unless there exists "*actual* conflict between traditional redistricting criteria and race." J.S. App. 30a (citation omitted). The court reasoned that districts must facially embody "racial classifications," *id.* at 37a, because "a map that reflects neutral conventions on its face eliminates the *assumption* of expressive and representative harm found in *Shaw I*," *id.* at 43a.

To implement that understanding of the predominance standard, the district court evaluated each

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[2] The parties disputed whether the 55% threshold was a target or rule and whether black Hispanics should be counted when assessing whether the target was achieved. J.S. App. 19a-23a. The district court concluded that those disputes ultimately were irrelevant because the parties agreed "that the 55% BVAP figure was used in structuring the districts" and that including or excluding black Hispanics yielded only "minute[ly]" different BVAP percentages. *Id.* at 19a, 23a.

challenged district in three steps. J.S. App. 50a-51a. First, the court analyzed whether the districts were in "compliance with traditional, neutral districting criteria," including "compactness, contiguity," and "adherence to boundaries provided by political subdivisions." *Id.* at 50a; see *id.* at 53a-62a. Second, examining only "those aspects of [the districts] that appear[ed] to constitute 'deviations' from neutral criteria," the court sought to ascertain whether non-racial considerations, "such as protection of incumbents," could explain the deviations. *Id.* at 50a-51a; see *id.* at 67a-71a. Finally, the court weighed "whether the deviations attributable to race" predominated over "all other districting criteria employed by the legislature." *Id.* at 71a; see *id.* at 71a-75a. Applying that three-step analysis, the district court concluded that race did not predominate in 11 of the 12 challenged districts. *Id.* at 91a-96a, 106a-130a.

The district court found that race did predominate in District 75 because "[a]chieving a 55% BVAP floor required drastic maneuvering that is reflected on the face of the district." J.S. App. 100a (internal quotation marks omitted). Although appellees "ascrib[ed] a political purpose" to the deviations, the court concluded that race had been used as a proxy for political affiliation and that political goals were "secondary to, and only satisfied by, adherence to the 55% BVAP floor." *Id.* at 100a-101a.

Applying strict scrutiny, the district court upheld District 75 because the use of race was narrowly tailored to comply with Section 5 of the VRA. J.S. App. 102a-106a. The court held that VRA compliance constitutes a compelling interest, *id.* at 76a, and that Virginia "had a strong basis in evidence" to believe

"that its actions were reasonably necessary to achieve actual compliance" with Section 5, *id.* at 82a. The court determined that the 55% BVAP target was derived from a functional analysis of electoral conditions and voting patterns in District 75, including an analysis of the contested 2005 primary and general elections. *Id.* at 102a-103a. Thus, the court concluded that "legislators had good reason to believe that maintaining a 55% BVAP level" in that district "was necessary to prevent actual retrogression." *Id.* at 105a.

c. Judge Keenan dissented. J.S. App. 130a-147a. She would have held that the 55% BVAP target demonstrated racial predominance in all districts by "operat[ing] as a filter through which all line-drawing decisions had to pass." *Id.* at 138a. She further disagreed with the majority's requirement that race conflict with traditional districting criteria, reasoning that "the incidence of constitutional harm is not limited to the presence of a district that is odd in shape." *Id.* at 141a. The majority had erred, she concluded, by "rel[ying] on shape and other traditional districting factors to uphold the 2011 plan," rather than finding predominance based on "the use of a one-size-fits-all racial quota." *Id.* at 140a.

Judge Keenan further would have concluded that the use of a 55% BVAP target was unjustified. J.S. App. 143a-147a. She characterized the evidence that the target had been derived from a functional analysis in District 75 as "general and conclusory." *Id.* at 144a. And she could discern no justification for using the target in the other challenged districts. *Id.* at 145a. She therefore would have invalidated the 2011 plan. *Id.* at 147a.

SUMMARY OF ARGUMENT

The district court adopted and applied an erroneous standard for assessing racial predominance when it upheld the 2011 plan. The court's finding of no predominance in 11 of the 12 challenged districts therefore should be vacated. The court's judgment as to District 75 should be affirmed, however, because any predominant use of race in drawing that district satisfies strict scrutiny.

I. A. The Equal Protection Clause prohibits the unjustified sorting of individuals into separate districts based on race. That standard is demanding and requires proof that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without" the district, *Alabama Legislative Black Caucus* v. *Alabama*, 135 S. Ct. 1257, 1267 (2015) (*Alabama*) (citation omitted), in "subordinat[ion] [of] traditional race-neutral districting principles," *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995). As the district court correctly recognized, a legislature's adoption and prioritization of a racial target does not alone establish predominance. Rather, a plaintiff must additionally prove that the target was the predominant factor driving a challenged district's boundaries. Courts accordingly must examine whether the target had a "direct and significant impact on" the district's configuration, *Alabama*, 135 S. Ct. at 1271, such that "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines," *Miller*, 515 U.S. at 913.

B. The district court misunderstood and misapplied the predominance standard in two respects.

1. First, the district court erred in holding that race cannot predominate unless it conflicts with traditional districting criteria. The court wrongly reasoned that a predominant reliance on race does not produce cognizable injury unless a district deviates from neutral principles on its face. But the equal protection harm stems from the racial classification, not its outward manifestation. In the vast majority of cases, a conflict may be necessary evidence to establish racial predominance, both because a legislature that predominantly relies on race usually will need to depart from traditional districting criteria to doggedly pursue racial goals and because there will rarely be direct evidence or other circumstantial evidence sufficient, by itself, to establish that race-based decisionmaking overwhelmed the line-drawing process. But the district court's erroneous test should not stand in the way of a plaintiff who, despite those obstacles, can carry her burden of establishing predominance in the absence of a conflict.

2. The district court further erred by focusing only on the portions of the districts that conflicted with traditional districting criteria and considering each deviation in isolation to assess its cause. That analysis ignored that the racial target may have been the predominant factor motivating the placement of lines that did not appear irregular. And it also prevented the court from conducting the kind of holistic analysis that could uncover a pattern of movement of people inside and outside the district that is explainable only in racial terms.

3. Because the district court applied an incorrect legal standard, this Court should vacate its judgment concluding that race did not predominate in 11 of the

challenged districts. The record suggests that the failure to conduct the proper inquiry may have affected the finding of no predominance in at least some of the districts. The trial court is best positioned to weigh the evidence and conduct the necessary fact-intensive analysis, and it should have the opportunity to reevaluate the districts under the correct legal test.

II. This Court should affirm the district court's judgment upholding District 75, however, because any predominant use of race in configuring that district satisfies strict scrutiny. At the time of the 2011 redistricting, Virginia had a compelling interest in considering race to avoid retrogression in violation of Section 5 of the VRA. The use of race in drawing District 75 was narrowly tailored, moreover, because Virginia had a strong basis in evidence to conclude, based on a functional analysis of voting conditions and behavior in that district, that a 55% BVAP was necessary there to maintain the ability to elect. The district court accordingly correctly rejected appellants' challenge to District 75.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY REFUSED TO EQUATE A RACIAL TARGET WITH PREDOMINANCE BUT ERRED IN REQUIRING PROOF OF A CONFLICT WITH TRADITIONAL REDISTRICTING PRINCIPLES AND IN FAILING TO CONDUCT THE NECESSARY HOLISTIC INQUIRY

A. The Predominance Test Is A Demanding Standard That Is Not Satisfied By The Mere Existence Of A Racial Target

1. In *Shaw I*, this Court held that the Constitution prohibits unjustifiably using race to "separat[e] voters

into districts." *Miller* v. *Johnson*, 515 U.S. 900, 911 (1995). In contrast to a constitutional vote dilution claim, which addresses purposeful efforts to achieve a discriminatory dilutive effect, *Rogers* v. *Lodge*, 458 U.S. 613, 617 (1982), the harms stemming from a racial gerrymander "include being personally subjected to a racial classification, as well as being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group," *Alabama*, 135 S. Ct. at 1265 (brackets, ellipses, citations, and internal quotation marks omitted). The "analytically distinct" racial gerrymandering claim thus focuses on the line-drawing process because the constitutional injury springs from being unjustifiably sorted by race. *Shaw I*, 509 U.S. at 652; see *id.* at 650.

In assessing a racial gerrymandering claim, strict scrutiny applies if "race was the *predominant* factor motivating the legislature's decision to place a significant number of voters within or without" the district. *Alabama*, 135 S. Ct. at 1267 (emphasis added) (quoting *Miller*, 515 U.S. at 916). That too is unlike a constitutional vote dilution claim, which requires proof only that race was a motivating factor in a decision having a dilutive effect. See *Rogers*, 458 U.S. at 617-618 (adopting standard announced in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-266 (1977)).

Because a legislature "always is *aware* of race when it draws district lines," *Shaw I*, 509 U.S. at 646, mere "consciousness of race" does not establish predominance, *Bush* v. *Vera*, 517 U.S. 952, 958 (1996) (plurality opinion). Rather, "a plaintiff must prove that the legislature subordinated traditional race-neutral

districting principles * * * to racial considerations." *Miller*, 515 U.S. at 916. Subordination occurs when "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Id.* at 913; see *Shaw* v. *Hunt*, 517 U.S. 899, 905 (1996) (*Shaw II*).

To establish racial predominance, a plaintiff can rely on "direct evidence going to legislative purpose" or "circumstantial evidence of a district's shape and demographics." *Miller*, 515 U.S. at 916. "In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to segregate voters on the basis of race." *Shaw I*, 509 U.S. at 646-647 (brackets, ellipses, citation, and internal quotation marks omitted). But when a district "is not so bizarre on its face that it discloses a racial design, the proof will be more difficult." *Miller*, 515 U.S. at 914 (citation and brackets omitted). To assess whether race predominated, this Court has examined a variety of evidence considered in its totality, including statements by the "principal draftsman," *Shaw II*, 517 U.S. at 906; substantial deviations from traditional districting criteria, such as compactness and respect for political subdivisions, *e.g.*, *id.* at 905-906; stark racial demographics in the movement of persons in and out of the district that would be unusual if unintentional, *e.g.*, *Alabama*, 135 S. Ct. at 1271; a legislature's access to racial data and its lack of access to other data at the level of detail necessary to explain districting choices, *Vera*, 517 U.S. at 962 (plurality opinion); and whether alternative explanations for the district's configuration are implausible or incomplete, *e.g.*, *Alabama*, 135 S. Ct. at 1271-1272. The "eviden-

tiary difficulty" in discerning racial predominance, "together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller*, 515 U.S. at 916.

2. Because a plaintiff must show that race predominantly dictated the movement of people into separate districts, the district court correctly recognized that the existence of a racial target does not, by itself, establish predominance. J.S. App. 30a. A racial target may end up playing little or no role in how district lines are actually constructed. And even when a racial target is one motivating factor in the drawing of some lines, race may still not predominate over other nonracial factors in the design of the district as a whole. Appellants therefore err insofar as they suggest (Br. 20-21) that the predominance standard is satisfied merely by evidence that a racial target was used in drawing the districts, without a showing that the target predominantly drove those lines.

To be sure, a jurisdiction's decision to "adopt[] and appl[y] a policy of prioritizing mechanical racial targets above all other districting criteria * * * provides evidence that race motivated the drawing of particular lines." *Alabama*, 135 S. Ct. at 1267. But to establish predominance, a plaintiff must further show that the target "had a direct and significant impact on" the district's configuration, *id.* at 1271, such that "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing [the] district lines," *Miller*, 515

U.S. at 913. Neither the mere existence nor the mere use of a racial target suffices to make that showing.

For example, if local demographics are such that any reasonably compact district that respects political boundaries and other relevant districting principles will exceed a racial target, then race will not predominate because the actual lines will be determined by non-racial considerations. Similarly, if a racial target is but one factor in the drawing of district boundaries and the legislature also places substantial weight on non-racial factors, race will not predominate because it will not be the "dominant and controlling" rationale for the district's lines. *Miller*, 515 U.S. at 913.

Notably, a per se rule that a racial target establishes predominance would conflict with *Alabama*. There, the State adopted a policy of maintaining the BVAP percentages in majority-minority districts in the benchmark plan without reduction and "prioritiz[ed]" that policy "above all other districting criteria." 135 S. Ct. at 1267; see *id.* at 1263. This Court recognized that the unwarranted policy provided evidence of race-based decisionmaking, but it declined to find that race had *necessarily* predominated in every district in which the policy applied. *Id.* at 1267, 1270-1272. As the Court explained, predominance does not hinge on which factors "take[] ultimate priority" in redistricting, but turns instead on which factors dictate the legislature's decision to draw particular district lines. *Id.* at 1271. In all cases, the inquiry must focus on "*which* voters the legislature decides to choose" when sorting individuals into separate districts and "whether the legislature predominantly uses race as opposed to other, 'traditional' factors when doing so." *Ibid.* *Alabama* makes clear that the existence and

prioritization of a racial target alone cannot resolve that inquiry.[3]

A contrary rule would threaten intrusive judicial scrutiny of redistricting plans as a matter of course. Legislatures may permissibly take race into account when pursuing legitimate districting goals. Compliance with the VRA in particular will often involve consideration of race as one factor in drawing a district, but a State's effort to comply cannot properly be characterized as a racial gerrymander when the State relies on multiple criteria and race does not overwhelm the line-drawing process. See, *e.g.*, *DeWitt* v. *Wilson*, 856 F. Supp. 1409, 1411, 1415 (E.D. Cal. 1994), summarily aff'd in part and dismissed in part, 515 U.S. 1170 (1995).[4] Similarly, an effort to create a majority-minority district by definition involves a racial goal exceeding 50%, but that target alone does not establish that a jurisdiction has subordinated traditional districting criteria and predominantly relied

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[3] Appellants therefore are incorrect to suggest (Br. 24) that racial predominance may be established based on redistricting guidelines that list VRA compliance "as the second most important criterion after population equality." By recognizing that the VRA is a binding requirement that must accordingly be prioritized, such guidelines simply demonstrate "obedience to the Supremacy Clause," *Voinovich* v. *Quilter*, 507 U.S. 146, 159 (1993), not a predominant racial motive.

[4] Notably, some traditional redistricting principles are embedded in the VRA's standards. For example, retrogression analysis considers "the geographic compactness of a jurisdiction's minority population." *2011 Guidance* 7472. Similarly, the standard articulated in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), for evaluating a claim under Section 2 of the VRA requires consideration of whether the minority community is sufficiently compact. *Id.* at 50.

on race when drawing the district's lines. See *Vera*, 517 U.S. at 958-959 (plurality opinion).

Indeed, if every effort to comply with the VRA or every district drawn to be majority-minority automatically triggered strict scrutiny, the risk of federal-court overinvolvement in redistricting would skyrocket, "represent[ing] a serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915. Such a rule could also discourage voluntary compliance with the VRA, as jurisdictions might conclude that invasive federal-court superintendence of those compliance efforts outweighs the litigation risks associated with refusing to create compliant districts in the first instance.

The demanding predominance standard—which requires proof that race was the dominant and controlling rationale driving the placement of voters in districts—rightly guards against such routine disruption and displacement of state and local districting decisions. It thus ensures that States "have discretion to exercise the political judgment necessary to balance competing interests" in the redistricting process, *Miller*, 515 U.S. at 915, and that the law does not "lay a trap for an unwary legislature" in its attempts to satisfy constitutional and statutory requirements, *Alabama*, 135 S. Ct. at 1273-1274.

B. The District Court Erred By Requiring A Conflict Between Race And Traditional Districting Principles And By Neglecting To Consider Whether The 55% BVAP Target Drove Each Challenged District's Boundaries Considered As A Whole

Although the district court correctly recognized that the stringent predominance standard cannot be satisfied simply by relying on the legislature's adop-

tion and prioritization of a racial target, the court miscomprehended and misapplied the predominance test in two respects.

1. First, the district court erred in requiring proof of an "*actual* conflict between traditional redistricting criteria and race" as a necessary condition for proving racial predominance. J.S. App. 30a (citation omitted). The court sought to justify that requirement on the ground that only such a conflict can demonstrate that districts "reflect racial classifications" "*on their face.*" *Id.* at 37a. In the court's view, the absence of a facially apparent conflict "eliminates the *assumption* of expressive and representative harm found in *Shaw I* without necessarily imposing any other constitutionally cognizable harms in its stead." *Id.* at 43a; see *id.* at 34a (stating that the harm from racial sorting "evaporates" if the district complies with traditional principles).

That "conception of the constitutional violation misapprehends * * * *Shaw [I]* and the equal protection precedent upon which *Shaw [I]* relied." *Miller*, 515 U.S. at 911. The injury underlying a racial gerrymandering claim stems from the racial classification itself, not the classification's outward manifestation. See *id.* at 913 (observing that the "racial purpose of state action, not its stark manifestation" is "the constitutional violation"). If a plaintiff can prove that the State predominantly and unjustifiably relied on race in drawing district lines, therefore, a cognizable injury exists even if that classification did not contort the district's shape or otherwise violate traditional redistricting principles. See *id.* at 910-914.

Indeed, the district court's requirement of a conflict cannot be reconciled with the thrust of the

Court's decision in *Miller*. There, the Court rejected the argument "that a district must be bizarre on its face before there is a constitutional violation." 515 U.S. at 912; see *Vera*, 517 U.S. at 962 (plurality opinion) (observing that the constitutional mandate is not "regularity of district shape," but equal protection). "Shape is relevant," the *Miller* Court explained, "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 predominated. 515 U.S. at 913. That analysis equally applies to foreclose the district court's rule that race predominates only when a district contains "facially evident deviations from neutral districting conventions." J.S. App. 33a. As an *analytical* matter, such deviations are not an inherent aspect of the constitutional harm or an essential element of a racial gerrymandering claim.

The district court grounded its conflict requirement in this Court's repeated observation that race predominates only when "the legislature subordinated traditional race-neutral districting principles * * * to racial considerations." *Miller*, 515 U.S. at 916; see J.S. App. 30a. But at least as a theoretical matter, there need not be any conflict for race to subordinate traditional districting factors. Rather, subordination occurs when race dwarfs other considerations and functions as the overriding factor determining the placement of district lines. See *Shaw II*, 517 U.S. at 906-907 (rejecting the argument that predominance cannot occur "where a State respects or complies with traditional districting principles," because the legislature's ability to "address[] th[o]se interests d[id] not in any way refute the fact that race was the legisla-

ture's predominant consideration" on the facts of the case) (brackets, citation, and internal quotation marks omitted).

Although the district court's conflict requirement is legally erroneous, that error may have limited significance. As a practical matter, in the vast majority of cases, predominance will not exist, and cannot be proven, in the absence of significant deviations from traditional districting criteria. A legislature that is determined to sort voters by race will usually find it necessary to violate neutral redistricting principles in drawing significant portions of a district's lines. In addition, plaintiffs are unlikely to be able to carry their evidentiary burden of establishing predominance in the absence of proof of a conflict with traditional districting criteria. There will rarely be "smoking gun" direct evidence or other circumstantial evidence that is sufficient by itself to show that race predominantly drove the placement of district lines. Without that kind of evidence, plaintiffs may need to identify significant deviations from neutral criteria that can be explained only along racial lines to show that race predominated, rather than merely contributed to the line-drawing process as one element of a multi-faceted redistricting approach. For these reasons, it is hardly surprising that, in every case in which this Court has found that race predominated or remanded for a determination of predominance, there was proof that some district lines substantially deviated from traditional redistricting principles. See *Alabama*, 135 S. Ct. at 1271; *Vera*, 517 U.S. at 962, 966, 974 (plurality opinion); *Shaw II*, 517 U.S. at 905-906; *Miller*, 515 U.S. at 917; *Shaw I*, 509 U.S. at 635-636.

Nonetheless, plaintiffs who can establish racial predominance in the absence of a conflict should not be "confined in their proof to evidence regarding the district's geometry" or face an "artificial rule" linking constitutional injury to their district's shape. *Miller*, 515 U.S. at 913, 915. For example, if the evidence shows that a jurisdiction set a particularly high racial target—*e.g.*, 70% BVAP—and the mapmaker states that he moved large numbers of voters in and out of the district to satisfy that target, with those moved in being almost all black and those moved out being almost all white, a court could conclude that race predominated, even if the district were relatively compact and consistent with other traditional redistricting principles. See *Alabama*, 135 S. Ct. at 1263 (indicating that stark demographic evidence is significant when observing that the legislature sought to maintain a BVAP of 72.75% in a challenged district and drew the district to add 15,785 new individuals, only 36 of whom were white).

Alternatively, a showing that the legislature relied on racial data and did not have access to or did not consider non-racial information that might otherwise explain the challenged district's lines could establish predominance in the absence of a conflict with traditional districting criteria. See, *e.g.*, *Vera*, 517 U.S. at 966-967 (plurality opinion) (emphasizing that the State had detailed racial data available but not other data implicating traditional districting principles); *Page* v. *Virginia State Bd. of Elections*, No. 13-cv-678, 2015 WL 3604029, at *14 (E.D. Va. June 5, 2015) (relying on mapmaker's statement that he did not consider partisan performance as evidence indicating racial predominance), appeal dismissed *sub nom. Wittman* v. *Person-*

huballah, 136 S. Ct. 1732 (2016). The district court's contrary rule requiring proof of a conflict to establish predominance in all cases is erroneous.

2. The district court committed a second related error that has more practical significance. The court did not simply require proof of a conflict with traditional redistricting criteria as a gatekeeping device that would then allow consideration of whether a racial target was the predominant factor affecting other, non-conflicting lines. The court instead stated that it would confine its analysis of predominant motive solely to district lines that "appear to constitute 'deviations' from neutral criteria." J.S. App. 50a. And the court further analyzed the reasons for each such deviation it identified in isolation, without considering the possible explanations for those lines in the context of the district as a whole.

The district court's single-minded focus on apparent deviations excluded consideration of relevant evidence and impaired the court's ability to properly assess the evidence it did evaluate. The court wholly failed to consider whether and to what extent the 55% BVAP target was the predominant motive for the placement of lines that did *not* facially depart from traditional districting principles. Yet that evidence was plainly relevant in deciding whether the district as a whole was predominantly drawn based on racial considerations.

The district court's approach also prevented the kind of holistic analysis that may uncover racial predominance when it would not otherwise be apparent. Imagine, for example, that a legislature makes dramatic changes to a district's boundaries involving significant population swaps. The lines drawing vot-

ers in to the district facially conflict with traditional districting criteria, but the lines drawing voters out facially conform to those criteria. A court that analyzes only the lines that appear to deviate from traditional criteria and considers them in isolation could conclude that non-racial factors explain the conflict. In contrast, examination of *all* changes to the district—including the lines that are not irregular—could reveal a stark pattern of moving voters of one race in and voters of another race out that is explainable only in racial terms. The court's approach thus risked obscuring evidence of a predominant racial motive that might have been exposed had the court examined all aspects of a district's boundaries and analyzed what they showed when considered as an integrated whole.[5]

A proper predominance analysis required the district court to evaluate the 55% BVAP target's role in the overall design—and not just the apparent deviations—of each challenged district to determine

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[5] In this case, the district court's focus on isolated portions of each district caused it to overlook other evidence that might have established racial predominance, but repetition of that error in future cases could cause courts to find predominance too readily if race drove *some* deviations, even if race did not dwarf other districting considerations when looking at the district as a whole. As *Alabama* explained, the predominance analysis "applies district-by-district," 135 S. Ct. at 1265—not piece-by-piece. The inquiry therefore must consider whether race was the controlling factor in moving a substantial number of voters in the context of the district as a whole, not whether racial considerations impacted isolated lines here and there. Only a holistic analysis can reveal whether race had a "direct *and significant* impact on" the district's boundaries, in subordination of other districting considerations. *Id.* at 1271 (emphasis added).

whether that target was actually the "predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Alabama*, 135 S. Ct. at 1267. Because the court did not conduct that analysis and wrongly required a conflict with traditional districting criteria, the court's conclusion that race did not predominate in 11 of the challenged districts is based on an erroneous legal standard.

C. This Case Should Be Remanded For Application Of The Correct Predominance Standard

When a district court applies an incorrect legal standard, the Court's usual practice is to vacate and remand for application of the correct legal standard. See *Alabama*, 135 S. Ct. at 1272 (remanding for a district-by-district analysis after concluding that the district court had applied an erroneous predominance standard); *Shaw I*, 509 U.S. at 658 (remanding for application of the legal framework announced by the Court); see generally *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-292 (1982). Because this is not the unusual case in which "the record permits only one resolution of the factual issue" under the proper legal standard, *Swint*, 456 U.S. at 292, the Court should follow its regular practice here by remanding for the fact-intensive application of the correct predominance standard.

The record below contains evidence suggesting that the district court's failure to conduct the requisite analysis may have affected its determination that race did not predominate in at least some of the challenged districts. Most of those districts were underpopulated, some significantly, before the 2011 redistricting process began. J.A. 669. Appellants presented evi-

dence that thousands of individuals were moved not only in, but also out of the challenged districts, and that in some districts there were striking disparities in the BVAP of areas added and removed. J.A. 669, 672-679. Appellants further presented evidence of split voting districts (VTDs), which was significant because reliable political data are not available at a sufficiently granular level to provide guidance in selecting some portions of VTDs over others, whereas racial data *are* available in geographic units small enough to inform VTD splits. See *Vera*, 517 U.S. at 961 (plurality opinion); see also J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 Geo. Mason L. Rev. 431, 449 (2000) (noting availability of racial, but not political, data at the census block level). Yet the court paid virtually no attention to the racial composition of significant areas added to or removed from the challenged districts or the extent of those moves in the context of the districts as a whole.

The district court's errors may not change the outcome in some districts because the evidence may remain insufficient to prove that race was the dominant and controlling factor. But the trial court is best positioned to weigh the evidence and make the necessary factual findings, and it should have the opportunity to do so under the correct legal standard.

1. District 71 provides an example where the district court's erroneous analysis may have affected its finding of no predominance. The court observed that District 71 "does not substantially disregard traditional, neutral districting principles," which it believed "suffic[ed] * * * to find that these principles were not subordinated to race." J.S. App. 114a. But in reaching that conclusion the court ignored relevant

demographic evidence concerning the district's overall design. Although District 71 was underpopulated by 5816 people, the legislature *removed* an additional 11,293 individuals and then added 17,421 individuals back into the district. J.A. 669, 1257. Those swaps involved a significant BVAP differential—the highest of all the challenged districts by far—with outgoing populations averaging 21.3% BVAP while incoming populations averaged 72.1% BVAP. J.A. 672-673. And the swaps had a significant impact on the racial composition of District 71: In the benchmark plan, the district's BVAP was 46.3%, but that percentage rose substantially in the 2011 plan, hitting the target on the nose at 55.3%. J.A. 669. The court did not discuss or analyze the reasons for those population swaps, and it should consider their significance in reassessing predominance on remand.

The district court's analysis of District 71's limited facial deviations from traditional districting criteria was also incomplete. The court noted that District 71 contains "a set of 'horns' on the eastern side," J.S. App. 112a, and acknowledged appellants' argument that those lines advanced a racial goal, particularly given the incumbent's testimony that other changes to the district could not be made "because it would push the BVAP below 55 percent," *id.* at 113a (brackets, citation, and internal quotation marks omitted). But the court dismissed that claim, instead concluding that the horns were explained by an effort to draw a particular legislator's home out of the district. *Id.* at 112a.

In reaching that conclusion, the district court looked at the horns in isolation, without considering their significance in the context of the district as a

whole. For example, the court did not compare the BVAP of the Henrico County VTD drawn into the district in one of the horns (83%) with the BVAP of the three Henrico County VTDs drawn out of the district along its relatively compact northwestern border (9%).[6] While the court believed that excluding those three overwhelmingly white VTDs advanced neutral districting principles by making the district "more Richmond centric," J.S. App. 111a-112a (citation omitted), a comparison with the overwhelmingly black VTD drawn in would have revealed that the swaps actually added *more* non-Richmond-based individuals to the district, see PX 63, at 49, 52 (combined total population in the three Henrico County VTDs excluded was 4567, while population in the new Henrico County VTD drawn in was 5221). Had the court engaged in a more holistic inquiry, therefore, it might not have concluded that the horns were explained by the goal of excluding a particular legislator's home. J.S. App. 112a.[7]

This evidence does not necessarily demonstrate that race predominated in the design of District 71 as a whole. Some of the line-drawing decisions made the

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[6] See J.A. 1558 (showing that Ratcliffe in Henrico County was added to the district while Summit Court, Hilliard, and Stratford Hall in Henrico County were removed); PX 63, at 49-50, 52-53 (listing voting-age population in those districts in total and broken down by race).

[7] Notably, the legislator's home was separated by several VTDs from the ones the legislature ultimately chose to include in the northernmost horn, and there appeared to be other ways to avoid that home that would have been more consistent with the goals of avoiding county splits and centering the district in Richmond. See J.A. 1558. Thus, it is not apparent that the horn's configuration could be explained by an effort to avoid the legislator's home.

district more compact, aligned it better with the James River, or avoided pairing incumbents. J.S. App. 111a-113a. And perhaps the demographic changes were simply a byproduct of efforts to shift away from underpopulated benchmark districts on the south and west toward overpopulated benchmark districts on the east. Even if efforts to achieve the 55% BVAP target played a role in those decisions, that role might not have been sufficiently significant to conclude that race was the predominant districting consideration, subordinating traditional criteria. The district court may determine on remand that race did not predominate in drawing District 71, but it should conduct that inquiry under the correct legal standard.

2. District 95 provides another example where the district court paid insufficient attention to the movement of voters within and without the district in assessing predominance. District 95 began the cycle as the most underpopulated of the challenged districts and was bordered by many VTDs that were overwhelmingly white. See J.A. 944. Although the application of traditional districting criteria therefore might have significantly reduced the benchmark district's BVAP of 61.6%, the district ultimately emerged with a BVAP of 60%, achieved through irregular lines that the district court recognized "depart[ed] from any observable neutral criteria." J.S. App. 128a; see J.A. 669.

In assessing those deviations, the district court did not even acknowledge the existence of the 55% BVAP target, let alone consider whether it dictated District 95's lines. See J.S. App. 129a-130a. Instead, the court attributed the deviations to politics, concluding that the district was drawn to contain Democratic VTDs

and avoid Republican VTDs. *Id.* at 129a. But the court did not scrutinize whether that political explanation was consistent with the five VTD splits created in the contorted appendage of the district purportedly drawn to capture Democratic-leaning areas. See J.A. 666-667. The court noted that the mapmaker "had access to political performance data as well as racial data." J.S. App. 129a. But election results are tabulated at the VTD level, so a mapmaker does not have access to reliable political performance data when choosing which portions of a *split* VTD to include in a district. When a VTD is split along census block lines, however, a mapmaker does have access to reliable data about the racial composition of each portion. And the record below indicated that the portions of the five newly split VTDs that were included in District 95 had a significantly higher BVAP percentage than the portions that were excluded. See J.A. 786-787, 912, 1563; PX 63, at 118-119. Although the record might not establish that race predominated in the overall design of District 95, the court should revisit that issue on remand with greater attention to the movement of people in and out of the district and the evidence indicating that race rather than politics explained those lines.

3. In other districts, the district court's misapprehension of the relevant legal standard may not have affected its finding of no racial predominance. District 69 provides an example. In asserting that race predominated in District 69, appellants principally rely (Br. 13, 35-37) on the existence of the 55% BVAP target and testimony by one legislator that the district had to satisfy that target. But the record contains no evidence indicating that the target controlled which

voters were moved in or out. See J.S. App. 106a-108a. Although appellants contend (Br. 36) that District 69's boundaries were expanded "outward" to add black voters, the record shows that the district's BVAP decreased from 56.3% to 55.2% in the redistricting process and that the areas added had both high and low BVAP levels. See J.A. 669; J.A. 1557 (areas added); J.A. 1482 (BVAP of areas added).

Moreover, the changes to District 69 made it more compact, J.S. App. 106a-107a, and the general movement of people followed a clear non-racial pattern, with areas in Chesterfield County drawn out and replaced with areas in Richmond City, J.A. 1557. Many of those changes reunified VTDs that had been split in the prior plan and eliminated the benchmark district's irregular boundaries. See *ibid.* Given that evidence, it seems unlikely that appellants can establish that the 55% BVAP target had a "direct and significant" impact on District 69, *Alabama*, 135 S. Ct. at 1271, such that race was the "dominant and controlling rationale" for the district's design, see *Miller*, 515 U.S. at 913.

The district court should nevertheless reconsider its finding of no predominance under the correct legal standard, with whatever further factual analysis is necessary to evaluate the impact of the 55% BVAP target on the configuration of each district as a whole. Accordingly, this Court should vacate the district court's judgment as to the 11 districts in which the court held that race did not predominate and remand for further consideration.

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT DISTRICT 75 SATISFIES STRICT SCRUTINY

This Court should affirm the district court's judgment upholding District 75 because the court correctly

found that the use of race in drawing that district satisfies strict scrutiny. It is accordingly unnecessary to consider whether the court properly found that race predominated in drawing District 75 because any predominant use of race was narrowly tailored to Virginia's compelling interest in complying with Section 5 of the VRA. See *United States* v. *Paradise*, 480 U.S. 149, 166-167 (1987) (opinion of Brennan, J.) (declining to decide whether court-ordered race-conscious relief was subject to strict scrutiny because that standard was in any event satisfied).

A. A predominant use of race in drawing district boundaries satisfies strict scrutiny if it is narrowly tailored to achieve a compelling state interest. See *Miller*, 515 U.S. at 920. That standard is met when a State has "a strong basis in evidence in support of the (race-based) choice that it has made." *Alabama*, 135 S. Ct. at 1274 (citation and internal quotation marks omitted). To avoid trapping States between competing constitutional and statutory mandates, the Court has recognized that "legislators may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance." *Ibid.* (citation and internal quotation marks omitted). The analysis thus reflects the proper deference due to States in redistricting, which is a core state function. See *Easley* v. *Cromartie*, 532 U.S. 234, 242 (2001).

B. The district court correctly determined that Virginia had the requisite strong basis in evidence to believe that its use of race in drawing District 75 was

required to advance its compelling interest in complying with Section 5.

1. As eight Justices of the Court have previously recognized, compliance with Section 5 constitutes a compelling state interest. See *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 518 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part, joined in relevant part by Roberts, C.J., Thomas & Alito, J.J.); *id.* at 475 n.12 (Stevens, J., concurring in part and dissenting in part, joined in relevant part by Breyer, J.); *id.* at 485 n.2 (Souter, J., concurring in part and dissenting in part, joined by Ginsburg, J.).[8] No party disputes that point here. And rightly so: To conclude otherwise would place States "in the impossible position of having to choose between compliance with" a federal law that had repeatedly been upheld as constitutional "and compliance with the Equal Protection Clause." *Id.* at 518 (Scalia, J., concurring in the judgment in part and dissenting in part). Thus, because Virginia was subject to Section 5 at the time of the 2011 redistricting, it had a compelling interest in considering race to avoid a VRA violation.[9]

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[8] In addition, the Court has assumed that States have a compelling interest in avoiding a violation of Section 2 of the VRA. See, *e.g.*, *Abrams* v. *Johnson*, 521 U.S. 74, 91 (1997); *Shaw II*, 517 U.S. at 915; *Vera*, 517 U.S. at 978 (plurality opinion); see also *Vera*, 517 U.S. at 990 (O'Connor, J., concurring) (recognizing that compliance with Section 2 is a compelling interest).

[9] Although this Court subsequently held in *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), that the coverage formula in Section 4(b) of the VRA could no longer be used as a basis for requiring preclearance under Section 5, *id.* at 2631, that change in the law does not affect the analysis. Cf. *Harris* v. *Arizona Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1310 (2016) (rejecting the argu-

2. The district court correctly determined that Virginia's use of race in drawing District 75 was narrowly tailored to comply with Section 5.

To be narrowly tailored to VRA compliance, a predominant use of race in redistricting must be based on a proper understanding of what the statute requires. Thus, in seeking to comply with Section 5, a State must consider whether districting changes are necessary to maintain a minority group's ability "to elect [its] preferred candidates," 52 U.S.C. 10304(b) (Supp. II 2014), as determined using "a functional analysis," *2011 Guidance* 7471. See *Alabama*, 135 S. Ct. at 1272-1273. But the narrow-tailoring standard does not "insist that a state legislature, when redistricting, determine *precisely* what percent minority population [Section] 5 demands." *Id.* at 1273. A contrary rule would expect the impossible from any jurisdiction and force smaller jurisdictions with limited resources, such as school boards or city councils, to invest in expensive analyses for every redistricting plan, equivalent to those presented in litigation by political scientists or statisticians. Even if a court later finds that a jurisdiction's racial target was not strictly required to satisfy Section 5, therefore, the target will be narrowly tailored if the jurisdiction had a strong basis in evidence to support its analysis.

Here, Virginia's use of race in drawing District 75 was narrowly tailored because the legislature had good reason to believe that it needed to maintain a 55% BVAP in the district to preserve the minority community's existing ability to elect its preferred candidates. The district court found that the 55%

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ment that Arizona's attempt in 2010 to comply with Section 5 could not be a legitimate interest because of *Shelby County*).

target was derived from a functional analysis of electoral conditions in District 75 itself. J.S. App. 102a.[10] As appellants' expert acknowledged, District 75 exhibited a high rate of racial polarization in voting, which supported the need to maintain District 75 as an ability-to-elect district. J.A. 655. Delegate Jones, who drew the map, analyzed voter turnout and other data from the incumbent legislator's most recent contested primary and general elections in District 75, when the BVAP level was 55%, and determined that they were "close races," further supporting the view that the district should maintain a 55% BVAP to ensure the ability to elect. J.S. App. 102a; see *id.* at 102a-104a; see also J.A. 669, 1855-1856, 1948-1949, 1972. In selecting that target, Jones also relied on information about district-specific characteristics—localized assessments drawn from knowledge of actual constituents, rather than stereotypes. He met several times with the incumbent to discuss District 75's configuration and the BVAP needed to avoid retrogression. J.A. 1854. And he also took into account the district's large prison population, which affected the BVAP necessary to maintain the ability to elect because it included

[10] After deriving the 55% BVAP target based on an analysis of District 75, the legislature applied that target "across the board" to all 12 challenged districts. J.S. App. 25a. That one-size-fits-all use of the target in *other* districts may not have been justified. See *Alabama*, 135 S. Ct. at 1272; see also U.S. Amicus Br. 32-33, *Wittman*, *supra* (No. 14-1504) (explaining that Virginia's mechanical use of the 55% BVAP target in its congressional plan was not narrowly tailored because it was not based on a functional analysis of the challenged congressional district). But that does not call into question the proper use of the target in District 75, which served as the target's source.

thousands of black individuals who would not be eligible to vote under state law. J.A. 1854, 1976-1977; J.S. App. 102a-103a.

This evidence establishes that Virginia had the requisite evidentiary basis to believe that its use of race in drawing District 75 was justified. The adoption of a 55% BVAP threshold in that district was not based on a "mechanical interpretation of [Section] 5" or the mistaken view that the VRA always requires maintaining the benchmark district's BVAP without alteration, *Alabama*, 135 S. Ct. at 1272-1273, but was instead based on a functional analysis of voter turnout, results from contested elections, and district-specific characteristics. Virginia accordingly had a "strong basis in evidence in support of the" districting choices it made in District 75. *Id.* at 1274 (citation and internal quotation marks omitted).

C. In articulating the narrow-tailoring standard, the district court correctly stated that "the question a court must ask * * * is whether the legislature has shown that it had 'good reasons' to believe—*i.e.*, that it had a strong basis in evidence for believing—that its actions were reasonably necessary to achieve actual compliance with federal antidiscrimination standards based on a constitutional reading of those standards." J.S. App. 82a. But the court also adopted an additional requirement that the legislature further "show[] that the district is one that a reasonable legislator could believe entailed only reasonable and minor deviations from neutral districting conventions." *Id.* at 84a. Appellants are correct to assert (Br. 56-57) that the court erred in imposing that additional requirement. All the legislature was required to show was that it had good reason to believe that the district it drew was

necessary to comply with Section 5 under a proper understanding of the statute's requirements. See *Alabama*, 135 S. Ct. at 1273-1274.

The district court's error in imposing a heightened burden on appellees, however, did not affect the correctness of its conclusion that District 75 satisfied strict scrutiny. As discussed above, and as the district court found, Virginia had good reason to believe that drawing the district with a 55% BVAP was necessary to comply with Section 5. In context, that showing sufficed to establish that the district does not violate equal protection.

CONCLUSION

The Court should affirm the district court's judgment as to District 75, vacate the district court's judgment as to the other challenged districts, and remand the case for further consideration.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
VANITA GUPTA
Principal Deputy Assistant Attorney General
IRVING L. GORNSTEIN
Counselor to the Solicitor General
ELIZABETH B. PRELOGAR
Assistant to the Solicitor General
TOVAH R. CALDERON
CHRISTINE H. KU
Attorneys

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