Nos. 13-895 and 13-1138

# In the Supreme Court of the United States

ALABAMA LEGISLATIVE BLACK CAUCUS, ET AL.,
APPELLANTS
*v.*
STATE OF ALABAMA, ET AL.

ALABAMA DEMOCRATIC CONFERENCE, ET AL.,
APPELLANTS
*v.*
STATE OF ALABAMA, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY**

DONALD B. VERRILLI, JR.
*Solicitor General*
*Counsel of Record*
MOLLY J. MORAN
*Acting Assistant Attorney General*
IAN HEATH GERSHENGORN
*Deputy Solicitor General*
RACHEL P. KOVNER
*Assistant to the Solicitor General*
DIANA K. FLYNN
TOVAH R. CALDERON
APRIL J. ANDERSON
BONNIE I. ROBIN-VERGEER
*Attorneys*

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

## QUESTIONS PRESENTED

This brief addresses the following questions:

1. Whether the district court erred when it rejected claims that Alabama's redistricting plans drew district lines based predominantly on race.

2. Whether the district court erred when it determined that Alabama's use of race, even as a predominant districting criterion, was nevertheless 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 involves the constitutionality of redistricting plans that Alabama has defended, in part, on the grounds that the plans were designed to comply with the Voting Rights Act of 1965 (VRA), Pub. L. No. 89-110, 79 Stat. 437 (42 U.S.C. 1973 *et seq.*) The United States, acting through the Department of Justice, has a direct role in the VRA's enforcement. Accordingly, the United States has a substantial interest in the proper interpretation of both the VRA and the

related constitutional protections against racial discrimination.

## STATEMENT

1. The drawing of legislative districts is a quintessential state sovereign function. See, *e.g.*, *Miller* v. *Johnson*, 515 U.S. 900, 915 (1995); *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964). Both the Constitution and federal statutory law, however, impose constraints on States' redistricting to prevent racial discrimination.

The Equal Protection Clause "prevent[s] the States from purposefully discriminating on the basis of race." *Shaw* v. *Reno*, 509 U.S. 630, 642 (1993) (*Shaw I*). State reapportionment statutes generally do not, by their terms, discriminate on the basis of race, because they typically draw lines between "tracts of land, or addresses," not between people. *Id.* at 646. But if race is the "dominant and controlling" or "predominant" consideration in a legislature's decision "to place a significant number of voters within or without a particular district," that use of race must be "narrowly tailored to serve a compelling state interest." *Shaw* v. *Hunt*, 517 U.S. 899, 902, 905 (1996) *(Shaw II)* (citation omitted); see also, *e.g.*, *Miller*, 515 U.S. at 913, 916. A plaintiff may show that race was the "predominant factor" in drawing a particular district "either through circumstantial evidence of a district's shape and demographics," or through more direct evidence showing that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Ibid.*

The VRA imposes additional obligations on States concerning the consideration of race in redistricting. Using its authority to enforce the Fourteenth and Fifteenth Amendments, Congress enacted the VRA to remove "the blight of racial discrimination in voting" that persisted after those amendments took effect. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). Section 2 of the VRA prohibits any jurisdiction from implementing voting practices that, based on the totality of circumstances, result in a racial minority or other protected class "hav[ing] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b).

In addition, Section 5 of the VRA created a preclearance regime for a limited set of jurisdictions identified in Section 4 of the Act. See 42 U.S.C. 1973b(b). Section 5 requires covered jurisdictions to obtain preclearance of changes to electoral practices, including districting changes, from either the Attorney General or the United States District Court for the District of Columbia. 42 U.S.C. 1973c(a). To obtain preclearance, a covered jurisdiction must demonstrate that a proposed change does not have the purpose and will not have the effect of discriminating based on race. *Ibid.* A measure cannot receive preclearance when it has the effect of "diminishing the ability of any citizens of the United States on account of race or color * * * to elect their preferred candidates of choice." 42 U.S.C. 1973c(b). At the time of the redistricting measures at issue in this case, Alabama was subject to Section 5. In *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), however, this Court held 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. In light of *Shelby County*, Alabama is not currently required to comply with Section 5.

2. Alabama's bicameral legislature is divided into 35 Senate districts and 105 House districts. 13-895 J.S. App. 17 (J.S. App). The legislature represents a population 67% of whom identify as white non-Hispanics and 26% of whom identify as black, according to the 2010 census. *Id.* at 15. African-Americans constitute a majority of the population in the south-central region of the State. *Id.* at 19.

In 2010, after an election cycle that gave Republicans control of both houses of Alabama's legislature, state legislators developed a plan for redistricting based on the decennial census data. J.S. App. 5. The data revealed that many of the existing districts were significantly malapportioned, requiring their boundaries to be redrawn in order to comply with constitutional requirements of equal apportionment. In particular, the 2010 census showed that 80 of the State's 105 House districts and 24 of the State's 35 Senate districts deviated from an equal population standard by more than 5 percent. *Id.* at 17-19. The malapportionment was particularly severe in Alabama's majority-black districts, all of which were underpopulated. *Id.* at 18-19. Indeed, nine of the 27 majority-black House districts and two of the eight majority-black Senate districts were underpopulated by more than 20%. *Ibid.* This malapportionment reflected both population shifts since the last census and the fact that the State's prior districting plans—adopted when both Houses of the legislature were controlled by Democrats—had generally underpopu-

lated majority-black districts and overpopulated nearby majority-white districts. *Id.* at 20; see *id.* at 15-17.

Alabama's legislature retained a consultant to draw district lines in accordance with principles the legislature established. The legislature determined that no district's population should exceed that of any other district by more than two percent. See J.S. App. 27-28. This rule required closer adherence to a "one person, one vote" standard than prior plans, which had permitted district populations to vary by as much as ten percent. *Ibid.*

The legislature also required that "districts be drawn in accordance with the [VRA], be contiguous and reasonably compact, be composed of as few counties as practicable, avoid contests between incumbent members whenever possible, and respect communities of interest." J.S. App. 27. In cases of conflict between objectives, the legislature designated the top priorities to be compliance with "one person, one vote" rules and compliance with the VRA. *Id.* at 27-28. The legislators with principal roles in the redistricting process and the legislature's consultant understood Section 5 of the VRA to prohibit the "reduction in the number of majority-black districts or a significant reduction in the percentage of blacks in the new districts as compared to the 2001 districts." *Id.* at 33.

The State's final redistricting plans contained the same number of majority-black districts as the State's prior plans. Most of those districts retained approximately the same percentage of black residents. See J.S. App. 47, 53. In some, the match was quite precise: 13 of the 27 majority-black House districts and three of the eight majority-black Senate districts came within one percentage point of maintaining the

same percentage of black residents. *Id.* at 228 (Thompson, J., dissenting); see *id.* at 47. House Districts 52 and 55—with total populations of just over 45,000—came within 2 and 12 black residents, respectively, of achieving an identical percentage of black residents. *Id.* at 208 (Thompson, J., dissenting). Other majority-black districts, however, saw significant changes in their ethnic composition, with the percentage of black residents in seven majority-black House districts and four majority-black Senate districts either increasing or decreasing by more than five percent. See Alabama Legislative Black Caucus Br. 5a-7a.

In repopulating the majority-black districts, the plans moved over 120,000 black residents into majority-black House districts and over 106,000 black residents into majority-black Senate districts. J.S. App. 195-197 (Thompson, J., dissenting). These figures represented, respectively, 19.7 percent and 15.8 percent of the State's black residents who did not already reside in majority-black districts for the legislative branch at issue. *Ibid.*

In largely party-line votes, both the House and Senate redistricting plans were enacted in May 2012. J.S. App. 58-59.

Because Alabama was covered by Section 5 of the VRA at the time of the plans' enactment, the plans were submitted to the Attorney General for preclearance. After analyzing the plans to determine whether they had the purpose or effect of denying or abridging the right to vote as proscribed by Section 5, see *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7470 (Feb. 9,

2011) (2011 Guidance), the Attorney General interposed no objection to the plans. J.S. App. 8.[1]

3. Appellants brought suit to challenge the redistricting plans. One suit was brought by the Alabama Legislative Black Caucus, an organization of African-American state legislators, along with several individual plaintiffs. 13-895 J.S. ii; J.S. App. 8. A second suit was brought by the Alabama Democratic Conference, an African-American political organization, joined by several individual plaintiffs. 13-1138 J.S. ii; J.S. App. 9. Each suit alleged, among other claims, that Alabama's redistricting plans drew district lines based predominantly on race, in violation of the Equal Protection Clause. See J.S. App. 13-14.

4. a. Following a bench trial, a three-judge district court rejected appellants' challenges, including their claims under the Equal Protection Clause. The court construed each of the lawsuits as alleging that the redistricting plans "as a whole constitute racial gerrymanders," and it understood the Democratic Conference appellants to also challenge four particular Senate districts on that ground. J.S. App. 128.

In addressing appellants' equal protection claims, the district court turned first to standing. It noted that a plaintiff bringing a racial gerrymandering claim must generally show that he or she resides in the district being challenged. J.S. App. 135-136. Applying this rule, it found that the Democratic Conference appellants lacked standing because they had not of-

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[1] Consistent with Section 5 of the VRA and accompanying regulations, the Attorney General did not consider whether the plans violated any statutory or constitutional provision other than Section 5, such as Section 2 of the VRA or the Equal Protection Clause. See 2011 Guidance 7470.

fered evidence that organization members resided in any of the challenged districts. *Id.* at 138. The court concluded, however, that the Black Caucus appellants had standing to challenge the redistricting plans because the Black Caucus—which is "composed of every African-American member of the [Alabama] House and Senate"—has members in all majority-black districts in the State. *Id.* at 136 (citation omitted).

Turning to the merits, the district court rejected appellants' equal protection challenges on the ground that "[r]ace was not the predominant motivating factor" for the redistricting "[a]cts as a whole." J.S. App. 140. The court reasoned that the legislature had sought to balance a number of objectives, including adhering to the State's equal-population requirements; complying with the VRA; protecting incumbents; and preserving communities of interest. *Id.* at 146-147. Race did not predominate among these objectives, the court concluded, because "the constitutional requirement of one person, one vote trumped every other districting principle." *Id.* at 151; see also *id.* at 147-152. The court further concluded that evidence that the legislature had generally "maintained the cores of existing districts, made districts more compact where possible, kept almost all of the incumbents within their districts, and respected communities of interest where possible" demonstrated that the legislature "was not predominantly motivated by racial considerations." *Id.* at 144. The court also noted that in some districts the black population had dropped substantially, indicating that the legislature had not prioritized maintaining the percentage of black residents above all other objectives. *Id.* at 154.

Although the district court had found the Democratic Conference appellants lacked standing, it conducted a district-by-district analysis of the four Senate districts that were the focus of the Democratic Conference challenge, only one of which was a majority-black district. The court found that race did not predominate with respect to those districts because population equality, partisan objectives, and protection of incumbents best explained the changes to those districts. See J.S. App. 166-173.

The district court also concluded that even if race had been the predominant factor in Alabama's redistricting plans, the use of race had been permissible because it was narrowly tailored to serve the compelling interest of compliance with Section 5 of the VRA. J.S. App. 173-174. The court explained that race had been used only to "preserve[], where feasible, the existing majority-black districts and maintain[] the relative percentages of black voters in those majority-black districts." *Id.* at 181-182. The court understood each of these objectives to be required by Section 5 of the VRA. *Id.* at 183. Because it found any use of race justified under Section 5, the court did not address Alabama's further contention that the State's use of race was justified to comply with Section 2 of the VRA.

b. Judge Thompson dissented. J.S. App. 188-275. Judge Thompson found substantial evidence that race had predominated in drawing at least a significant number of Alabama's majority-black districts. He emphasized that the legislators chiefly responsible for the redistricting had prioritized maintaining the same percentage of black voters in each majority-black district for the stated purpose of complying with Sec-

tion 5—a goal he described as maintaining "racial quotas." See *id.* at 192-194, 213-216. He noted that several districts came within a few individuals of the number needed to maintain the same percentage of black residents as existed under the prior redistricting plans. *Id.* at 230; see *id.* at 208.

Judge Thompson wrote that this level of precision required extraordinary measures. For example, malapportionment required a substantial repopulation of Senate District 26. Despite what Judge Thompson described as the "racially mixed demographics of the areas" surrounding the district, J.S. App. 239, of the 15,785 people added to the district, 14,806 were black, and only 36 were white, *id.* at 201. Judge Thompson also pointed to evidence that the legislature had disregarded certain incumbent preferences, moved certain districts, and split precincts. *Id.* at 232-243. Judge Thompson found the splitting of precincts particularly indicative of a "racial methodology," because data was available at the census block level for race but not for political affiliation, so that when the consultant split a "'massive' number of precincts," he "could not have done so based on how many Democrats or Republicans lived in each census block" but must have looked instead to "racial data." *Id.* at 234.

While acknowledging that not every majority-black district retained the same percentage of black residents, Judge Thompson concluded that the evidence of race-based gerrymandering required "an individual assessment for each district as [to] whether race was a predominant factor" in drawing the district's boundaries. J.S. App. 227.

Judge Thompson also dissented from the majority's conclusion that Section 5 of the VRA had justified any

use of race as a predominant factor in Alabama's redistricting. That view, he argued, misunderstood the VRA. Rather than barring every redistricting change which reduces the proportion of minority voters in a district, Judge Thompson wrote, Section 5 barred only changes that functionally diminished the ability of minority groups to elect their candidates of choice. J.S. App. 253-261. He also concluded that Alabama could not rely on Section 5 to justify its redistricting plans because, after the redistricting plans were enacted, this Court invalidated the coverage formula that had made Alabama subject to Section 5. *Id.* at 267-269 (discussing *Shelby County*). Like the majority, Judge Thompson did not address whether any use of race was justified to comply with Section 2 of the VRA.

## SUMMARY OF ARGUMENT

The district court misconstrued the Equal Protection Clause and the VRA when it upheld Alabama's 2012 redistricting plans in their entirety. The court's decision should be vacated, and the case should be remanded for the fact-intensive district-by-district analysis necessary to determine whether race predominated in the drawing of particular district lines and, if so, whether that use of race was narrowly tailored to comply with the VRA.

I. The district court made fundamental mistakes in analyzing whether Alabama used race as a predominant consideration in drawing legislative districts.

A. The district court erred in assessing only whether race was the predominant factor in Alabama's redistricting plans "as a whole," rather than performing a district-by-district analysis. When race is the "predominant factor" motivating a legislature to place

a significant number of residents inside any single legislative district, unless that use of race satisfies strict scrutiny, the voters within that district suffer a constitutional injury, even if race does not play a significant role in defining other districts within the State. Accordingly, courts must analyze whether traditional districting principles were subordinated to race in drawing particular districts—not just whether race predominated in a plan as a whole.

B. The district court further erred in concluding that race could not have predominated in Alabama's redistricting because Alabama prioritized compliance with the requirement of "one person, one vote" over other districting principles. The constitutional requirement that districts have approximately equal populations is a background rule that applies in every redistricting. Even if all the State's districts are of equal size, race predominates if race was used in disregard of traditional districting principles to determine which residents to allocate to particular districts.

C. Determining whether race predominated in drawing those districts that are properly challenged in the appellants' suits requires an analysis of each challenged district to assess the roles of race and of other considerations in drawing boundaries. Here, evidence suggests that race may have predominated in drawing some districts. Key legislators appear to have prioritized maintaining the same percentage of black residents in majority-black districts as had existed in the prior redistricting plans. And the precision with which the legislature achieved that objective strongly suggests an overreliance on race. Nevertheless, a remand is appropriate so that the district court may in the first instance make the fact-intensive determina-

tion of whether these results were achieved in disregard of traditional districting principles in individual districts.

II. The district court's alternative conclusion that any use of racial classifications in Alabama's plans satisfied strict scrutiny should also be vacated, because it rests on a misunderstanding of Section 5 of the VRA.

A. Contrary to the district court's view, Section 5 does not bar every districting change that reduces the percentage of minorities in a majority-minority district. Section 5 prohibits only changes that diminish a minority group's existing ability to elect a candidate of choice. The court therefore erred in concluding that Section 5 justified Alabama's effort to maintain the same percentage of black voters in each majority-black district, without analysis of whether that step was a narrowly tailored means of protecting black voters' ability to elect their candidates of choice in those districts.

B. 1. This Court's precedents counsel in favor of permitting the district court to determine, in the first instance, whether use of race in Alabama's redistricting would have been narrowly tailored to satisfy strict scrutiny, assuming that compliance with Sections 2 and 5 of the VRA constitutes a compelling interest. Adherence to that approach is particularly appropriate here because proceedings in the district court may obviate the need to decide whether Alabama can invoke Section 5 to justify its 2012 redistricting plans in the wake of *Shelby County*.

2. If this Court elects to address the strength of Alabama's interest in complying with the VRA before any remand, it should decide that at the time of Ala-

bama's 2012 redistricting, the narrowly tailored use of race to comply with Sections 2 and 5 of the VRA could satisfy strict scrutiny, notwithstanding the Court's subsequent decision in *Shelby County*. The strict scrutiny standard affords States some leeway to use narrowly tailored racial classifications when a strong basis in evidence supports the view that the classification is necessary to serve a compelling state interest. When the Alabama legislature enacted its redistricting plans in 2012, strong evidence supported its conclusion that compliance with Section 5 required that race be taken into account in drawing some district boundaries. And even apart from Section 5, strong evidence supported the conclusion that Section 2 required that race be taken into account.

3. On remand, the district court should determine whether race predominated over traditional districting principles in any of the challenged Alabama districts, and if so, whether that use of race was narrowly tailored to achieve compliance with the VRA. At least for some districts, it is questionable whether the State had a strong basis in evidence to believe that Section 5 required maintaining the same percentage of black voters as existed in the prior redistricting plan. But a determination of whether Alabama could properly use race as a predominant consideration in drawing any of the challenged districts will require resolution of open disputes of fact. The court will need to make findings regarding the population levels needed to preserve black voters' ability to elect their candidates of choice and concerning whether traditional districting principles were subordinated more than was necessary to achieve compliance with the VRA in particular dis-

tricts. These questions are appropriately resolved in the first instance by the district court on remand.

## ARGUMENT

### I. THE DISTRICT COURT FAILED TO PROPERLY DETERMINE WHETHER RACE PREDOMINATED IN DRAWING THE BOUNDARIES OF APPELLANTS' LEGISLATIVE DISTRICTS

The district court's judgment should be vacated because the court did not properly determine whether traditional districting principles were subordinated to race in drawing Alabama's districts. First, the court failed to undertake the required inquiry into whether race predominated in drawing the lines of the particular districts that the appellants had standing to challenge, instead determining that race did not predominate in the redistricting plans as a whole. Second, the court erred in concluding that race did not predominate because the legislature prioritized the creation of districts of approximately equal population over consideration of race. Here, evidence in the record indicates that race may have predominated in the drawing of at least some districts. Nevertheless, because a proper analysis of the challenged districts will require a fact-intensive review typically performed by district courts in the first instance, the case should be remanded.

#### A. The District Court Erred By Failing To Determine Whether Race Was The Predominant Consideration In Setting The Boundaries Of Individual Districts

The district court erred when it assessed the appellants' equal protection claims by determining whether race was the predominant factor motivating the drafting of the redistricting plans "as a whole." See, *e.g.*,

J.S. App. 128, 140. An equal protection violation occurs when "race was the predominant factor motivating the legislature's decision to place a significant number of voters *within or without a particular district*," *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995) (emphasis added), whether or not race was the predominant factor for an entire statewide plan. Accordingly, when confronted with challenges to the use of race in redistricting, a court "must scrutinize *each challenged district* to determine whether * * * race predominated over legitimate districting considerations." *Bush* v. *Vera*, 517 U.S. 952, 963 (1996) (plurality opinion) (emphasis added). This Court has performed these district-by-district assessments even in the presence of evidence that the plan drafters had overarching statewide goals relating to race. See *id.* at 965-975; see also, *e.g.*, *Miller*, 515 U.S. at 917; *Shaw* v. *Hunt*, 517 U.S. 899, 904-907 (1996) (*Shaw II*); *Hunt* v. *Cromartie*, 526 U.S. 541, 547 (1999).

This district-by-district analysis is dictated by the nature of the constitutional harm at issue. When a voter is placed in a particular district drawn predominantly based on race, absent a narrowly tailored compelling interest, the voter suffers "fundamental injury" from governmental "racial classification." *Shaw II,* 517 U.S. at 908 (quoting *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 661 (1987)); see also *Vera*, 517 U.S. at 957 (plurality opinion) (describing *Shaw* harm as being "personally * * * subjected to [a] racial classification"). The voter also suffers a "representational harm[]," *United States* v. *Hays*, 515 U.S. 737, 747 (1995), because legislators elected in districts drawn along racial lines "are more likely to believe that their primary obligation is to represent only the members

of" a particular racial group, "rather than the constituency as a whole," *Shaw* v. *Reno*, 509 U.S. 630, 648 (1993) (*Shaw I*). A voter in a district drawn based predominantly on race suffers these injuries whether or not race was used so pervasively in *other* districts that race predominated in the plan as a whole.

An analysis of whether race predominates in a plan "as a whole" is overbroad, as well, because it enables plaintiffs to challenge districts in which they do not themselves reside. When plaintiffs live in a district where race has predominated over traditional districting principles, they "have standing to challenge that part of" the redistricting plan, *Shaw II*, 517 U.S. at 904, because they have "been denied equal treatment because of the legislature's reliance on racial criteria." *Hays*, 515 U.S. at 745. Permitting challenges to a plan "in its entirety," however, would enable plaintiffs to challenge district lines that cause the plaintiffs themselves no cognizable injury, because "where a plaintiff does not live in" a district drawn along racial lines, "he or she does not suffer those special harms" that confer standing. *Id.* at 745-746; see also *Sinkfield* v. *Kelley*, 531 U.S. 28, 30-31 (2000) (per curiam) (rejecting "[a]ppellees' suggestion * * * that an unconstitutional use of race in drawing the boundaries of majority-minority districts necessarily involves an unconstitutional use of race in drawing the boundaries of neighboring majority-white districts").

This Court has adhered to a district-by-district approach even in prior cases in which there has been direct evidence of statewide race-related objectives. See *Vera*, 517 U.S. at 960-961, 970 (plurality opinion) (case involving "substantial direct evidence of the legislature's racial motivations" including explicit dec-

larations of intent to maximize the number of black majority districts); *Miller*, 515 U.S. at 910 (case where evidence of race-based districting was "practically stipulated by the parties") (citation omitted). That approach remains sound. It reflects the constraints of standing. And it ensures accurate adjudication, because while the record contains evidence that the legislature maintained the same percentage of black residents in certain majority-black districts in possible disregard of traditional districting principles, see, *e.g.*, J.S. App. 231-234 (Thompson, J., dissenting), legislators did not maintain the same percentage of black voters in every majority-black district, see *id.* at 227-228 (Thompson, J., dissenting). Thus, as the dissent below recognized, *id.* at 227, district-by-district review is appropriate to determine whether race predominated in the particular districts that the appellants have standing to challenge.

### B. The District Court Erred By Concluding That Race Could Not Predominate If The Legislature Drew Districts Containing Approximately Equal Populations

The district court also erred in concluding that race could not have predominated in Alabama's drawing of district lines simply because "the constitutional requirement of one person, one vote trumped every other districting principle" in the 2012 redistricting. J.S. App. 151; see also *id.* at 147-148, 170.

That reasoning cannot be squared with this Court's decisions. The constitutional requirement that legislative seats "be apportioned on a population basis," *Reynolds* v. *Sims,* 377 U.S. 533, 568 (1964), trumps other districting objectives in *every* decennial redistricting—including each redistricting at issue in this Court's prior cases concerning race-based gerryman-

dering. See, *e.g.*, *Miller*, 515 U.S. at 920; *Vera*, 517 U.S. at 976 (plurality opinion); *Shaw II*, 517 U.S. at 906. Yet none of those cases treated compliance with one person, one vote as determinative of whether race predominated in the plans before the Court. Instead, the critical question was whether race had been placed above traditional districting considerations in determining *which* persons were placed in appropriately apportioned districts. See, *e.g.*, *Miller*, 515 U.S. at 916 (explaining that "a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations"); *Shaw I*, 509 U.S. at 647. And several cases affirmed that race *did* predominate despite the absence of any suggestion that the States had failed in their obligation to draw districts "as nearly of equal population as is practicable," *Sims,* 377 U.S. at 577. See *Miller,* 515 U.S. at 917-920; *Shaw II,* 517 U.S. at 906-907. In sum, this Court's cases establish that race predominates over traditional districting principles if it is the primary criterion used in determining which citizens to allocate to a particular district—irrespective of whether that district was appropriately apportioned.

The district court's departure from this approach would fail to protect against the harms of unconstitutional racial classifications. This Court has explained that the "central purpose" of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race," *Shaw I*, 509 U.S. at 642, and voters are harmed if race predominates in drawing the districts in which

voters are placed without compelling and narrowly tailored justification. Yet the district court's rule would permit States to use race predominantly without justification, so long as they established districts of equal size. The district court's misapprehension of the framework for determining whether race predominates in a redistricting requires the district court's conclusion that race did not predominate in Alabama's redistricting to be vacated.

### C. This Case Should Be Remanded For Application Of This Court's Precedents

A determination of whether race predominated in individual districts requires fact-intensive analysis that is best performed by the district court in the first instance. The record below contains evidence suggesting that race did predominate in the drawing of some majority-black districts. Key legislators regarded the maintenance of existing black population percentages in majority-black districts as necessary to comply with Section 5. See J.S. App. 27-28. For some districts, that objective was achieved with extraordinary precision. See *id.* at 208 (Thompson, J., dissenting) (noting districts within 2, 12, and 13 individuals of maintaining the same percentage of black voters). In addition, voters were moved into some districts in a manner that seemed guided by race: For example, in one district, only 36 out of 15,785 voters added to correct malapportionment were white. *Id.* at 201 (Thompson, J., dissenting). Further, the record contains evidence that suggests traditional districting principles were sometimes set aside. See *id.* at 231-234 (Thompson, J., dissenting). Analysis of the evidence concerning each district is nevertheless required because some majority-black districts deviated

significantly from the goal of maintaining the same percentage of black residents, see *id.* at 154, and because in some districts the percentage of black residents may have remained relatively constant based on boundaries drawn in a manner consistent with traditional districting principles. Cf. *id.* at 144 (noting evidence the legislature had generally "maintained the cores of existing districts, made districts more compact where possible, kept almost all of the incumbents within their districts, and respected communities of interest where possible").

This Court's cases suggest that the better course is for the district court to engage in the fact-intensive application of equal protection principles to particular districts in the first instance. See *Shaw I*, 509 U.S. at 658 (articulating governing legal framework and then remanding case to district court for initial application); cf. *Cromartie*, 526 U.S. at 553-554 ("[W]e are fully aware that the District Court is more familiar with the evidence than this Court, and is likewise better suited to assess the General Assembly's motivations."). The Court should vacate the district court's opinion and remand for a district-by-district basis assessment of whether race predominated in the districts subject to challenge.

## II. THE DISTRICT COURT ERRED IN ITS STRICT SCRUTINY ANALYSIS BECAUSE IT MISUNDERSTOOD THE REQUIREMENTS OF THE VOTING RIGHTS ACT

The district court concluded that, in the alternative, any use by Alabama of race as a predominant consideration in redistricting was justified under strict scrutiny, because it served the compelling interest of complying with the VRA. As explained below

(pp. 28-34, *infra*), compliance with both Section 2 and Section 5 of the VRA was a compelling governmental interest when Alabama adopted its 2012 redistricting plans. But the district court's conclusion that Alabama's use of race was required to comply with Section 5 misreads that provision, and the court failed to conduct any analysis of whether Alabama's use of race was required to comply with Section 2. The appropriate course under these circumstances is to remand the case for determination in the first instance of whether Alabama's use of race in any specific districts in which race predominated over traditional districting considerations was narrowly tailored to comply with the VRA.

### A. The District Court's Strict Scrutiny Analysis Rested On A Misunderstanding Of The Voting Rights Act

The district court's strict scrutiny analysis should be vacated, because it rested on a mistaken understanding of Section 5. In particular, the district court was incorrect to conclude that Section 5 required the State to maintain the same percentage of black voters in each of the majority-black districts as had existed in the prior districting plans. Section 5 does not impose a categorical bar on "substantially reduc[ing] the relative percentages of black voters" in existing majority-black districts, see J.S. App. 183, much less does it require the precise maintenance of those relative percentages. Thus, assuming compliance with Section 5 would be a compelling interest, see pp. 28-34, *infra*, the district court's analysis does not support the conclusion that the challenged districts were a narrowly tailored means of advancing that interest.

Section 5 prohibits only those diminutions of a minority group's proportionate strength that strip the

group within a district of its existing ability to elect its candidates of choice. This Court has explained that Section 5's objective "has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States,* 425 U.S. 130, 141 (1976). Section 5 achieves this result by foreclosing districting changes that diminish minorities' ability to "elect their choices" of candidates. *Ibid.* (citation omitted) (describing inquiry as "whether the ability of minority groups to participate in the political process *and to elect their choices to office* is augmented, diminished, or not affected" by an electoral change) (emphasis added; prior emphasis omitted) (quoting H.R. Rep. No. 196, 94th Cong., 1st Sess. 60 (1975)); *Vera*, 517 U.S. at 983 (plurality opinion) (describing Section 5 as "mandat[ing] that the minority's *opportunity* to elect representatives of its choice not be diminished"). In construing this standard, the Court has rejected the view that Section 5 bars every change that reduces the minority population in a majority-minority district. See *City of Richmond* v. *United States*, 422 U.S. 358, 370-372 (1975) (rejecting Section 5 challenge to annexation plan that decreased the percentage of black voters within city in light of changed method of election).

Although the district court viewed 2006 amendments to the VRA as altering this standard to prohibit any reduction in the percentage of minorities in majority-minority districts, the 2006 amendments did not have this effect. Congress amended the relevant portion of Section 5 after this Court in *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003), departed from the abil-

ity-to-elect standard, concluding that instead "a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice" in determining whether an electoral change was retrogressive. *Id.* at 480. Congress disapproved of this decision, see Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(6), 120 Stat. 578, and reinstituted the ability-to-elect standard by providing that a voting practice "abridges the right to vote" if it "will have the effect of diminishing the ability of any citizens of the United States on account of race or color * * * to elect their preferred candidates of choice." 42 U.S.C. 1973c(b); see also 42 U.S.C. 1973c(d) (stating that added provision's purpose "is to protect the ability of such citizens to elect their preferred candidates of choice"). Because these revisions simply reinstituted the standard in effect prior to *Ashcroft*, they did not impose a standard—without any precedent in the pre-*Ashcroft* era—that bars any reduction of the percentage of minority voters in a majority-minority district. Indeed, leading proponents of those amendments explicitly disavowed such a reading. See, *e.g.* 152 Cong. Rec. 15,318 (2006) (statement of Sen. Leahy) (reducing the number of minorities in a district is perfectly consistent with * * * Section 5 as long as other factors demonstrate that minorities retain their ability to elect their preferred candidates"); *id.* at 15,322 (statement of Sen. Feingold) (concurring with Sen. Leahy).

Even if the statutory text were ambiguous, the district court's interpretation of Section 5 would be untenable. First, it is "implausible" that Congress

aimed to compel the maintenance of minority populations well above the level needed to elect a candidate of choice. See J.S. App. 253 (Thompson, J., dissenting). Such a rule would require the preservation of districts akin to the "packed" districts historically created to undercut minority groups' political participation. See, *e.g.*, *Johnson* v. *De Grandy*, 512 U.S. 997, 1007 (1994) (describing "packing"); *Shaw I*, 509 U.S. at 640 (describing "concentrating" black voters during Reconstruction). In addition, by requiring heightened consciousness of race in redistricting even when unnecessary to preserve the political stature of minority communities, such a rule might raise constitutional questions. Cf. *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 446 (2006) (*LULAC*) (opinion of Kennedy, J.) (noting that a reading of statute that "would unnecessarily infuse race into virtually every redistricting" would "rais[e] serious constitutional questions").

The district court believed that its view was consistent with the interpretation of Section 5 adopted by the Department of Justice (DOJ). J.S. App. 183; see also *id.* at 100, 149, 175. The district court, however, was mistaken. DOJ has issued guidance explaining that in determining "whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General *does not rely on any predetermined or fixed demographic percentages* at any point in the assessment." 2011 Guidance 7471 (emphasis added). Instead, the guidance calls for a functional analysis of whether a proposed plan continues a minority group's ability to elect. That approach encompasses not only consideration of population statistics but also consideration of "voting patterns

within the jurisdiction, voter registration and turnout information, and other similar information." *Ibid.* DOJ's position is longstanding. See *Texas* v. *United States*, 831 F. Supp. 2d 244, 265 n.26 (D.D.C. 2011) (noting consistency of DOJ guidance); see also *Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c*, 66 Fed. Reg. 5412, 5413 (Jan. 18, 2001).[2] Because the district court's strict scrutiny analysis rested on an erroneous construction of Alabama's statutory obligations, it must be vacated.

**B. This Case Should Be Remanded For An Appropriate Strict Scrutiny Analysis**

1. This Court's precedents indicate that the appropriate course in light of the district court's error is to allow the district court to determine in the first instance, using a correct construction of the VRA, whether any predominant use of race in Alabama's districting was narrowly tailored to serve a compelling governmental interest. See *Shaw I*, 509 U.S. at 658 (remanding case for analysis of questions including whether consideration of race was justified based on

[2] The Attorney General's decision not to interpose objections to Alabama's redistricting plans does not suggest that Alabama was correct in its understanding that maintenance of certain percentages of black voters in majority-black districts was required by Section 5. In reviewing plans under Section 5, DOJ's review is limited to whether a proposal results in retrogressive effect or reflects a discriminatory purpose prohibited by Section 5. Preclearance accordingly does not constitute a determination that changes in a districting plan were *necessary* to comply with Section 5. Nor does preclearance constitute "certification that the voting change satisfies any other requirement of the law beyond that of [S]ection 5," 28 C.F.R. 51.49, including other parts of the VRA or constitutional provisions. 2011 Guidance 7470.

the VRA without first deciding whether VRA compliance was compelling interest); see also *Abrams* v. *Johnson*, 521 U.S. 74, 91 (1997) (assuming but not deciding that VRA compliance was compelling interest); *Shaw II*, 517 U.S. at 915 (same).

Adherence to that approach is particularly appropriate here. Although the dissenting judge concluded that Alabama lacked a compelling interest in complying with Section 5 of the VRA in light of this Court's *Shelby County* decision, proceedings on remand may clarify that an appropriate disposition of this case will not require a resolution of that question. There will be no need to reach that question unless the district court on remand first concludes that race did predominate over traditional districting criteria in the drawing of any of the challenged districts. Even then, there will be no need to reach the question unless the district court concludes that the State had a strong basis in the evidence to believe that Section 5—properly construed—required the State to maintain the particular percentages of black voters it maintained in those districts. If the composition of the districts cannot be justified as narrowly tailored under a correct understanding of Section 5, then the districts will be invalid whether or not the State's reliance on Section 5 would have provided a compelling interest sufficient to justify appropriately drawn districts.

Indeed, the status of Section 5 for redistricting plans based on the 2010 census will only be relevant if the State would have lacked a strong basis in evidence to believe that Section 2 required the same result as Section 5. To establish a violation of Section 2, a plaintiff must show that a minority group "is sufficiently large and geographically compact to constitute

a majority in a single member district"; that the minority group is "politically cohesive"; and that the majority "votes sufficiently as a bloc to enable it * * * to defeat the minority's preferred candidate." *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986); see also *Growe* v. *Emison*, 507 U.S. 25, 40-41 (1993). If a plaintiff establishes these conditions, a court considers whether, under "the totality of the circumstances," members of the minority group have been denied an "equal opportunity" to "participate in the political process and to elect representatives of their choice." *Abrams*, 521 U.S. at 91 (quoting 42 U.S.C. 1973(b)). Because the districts alleged to have been racially gerrymandered in this case were all majority-minority districts and there was evidence of both minority group cohesiveness and racial bloc voting, there is a substantial chance that the obligations of Section 2 and Section 5 in Alabama's redistricting are coextensive. These circumstances counsel in favor of adherence to the Court's prior approach of reserving judgment concerning compliance with the VRA as a compelling interest.

2. a. If the Court elects to consider at this stage whether, at the time of Alabama's redistricting, strict scrutiny permitted the narrowly tailored consideration of race to comply with the VRA, the Court should answer in the affirmative. The strict scrutiny standard allows States to employ racial classifications that are narrowly tailored to achieve compelling interests. See, *e.g., Shaw I*, 509 U.S. at 642. To meet this standard, a State must show that it had "a strong basis in evidence" to conclude that the use of race was necessary to serve a compelling interest. *Shaw II*, 517 U.S. at 908 n.4; *Shaw I*, 509 U.S. at 656; *LULAC*, 548 U.S.

at 519 (Scalia, J., concurring in the judgment in part and dissenting in part); see also *Ricci* v. *DeStefano*, 557 U.S. 557, 585 (2009) (applying strong-basis-in-evidence standard in Title VII context).

The "strong basis in evidence" standard gives States some margin of safety in determining whether the use of race is needed to comply with a statutory mandate or other compelling objective. While the "strong basis in evidence" requirement demands more than legislators' good-faith belief that the use of race is justified, see *Ricci*, 557 U.S. at 563, it does not demand that a State's actions actually be necessary to achieve a compelling state interest in order to be constitutionally valid, see *id.* at 580-581; *Vera*, 517 U.S. at 977 (plurality opinion). 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. See *Ricci*, 557 U.S. at 582-583 (contrasting standard requiring "a provable, actual violation" of statute in absence of racial classification with "strong basis in evidence" standard). Because constitutional and statutory duties "are not always harmonious," *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion), a more rigorous standard would "'trap[]" public officials "between the competing hazards of liability'" for failing to comply with a statute on the one hand, or violating the Constitution, on the other, *Vera*, 517 U.S. at 977 (plurality opinion) (citation omitted).

b. When Alabama enacted its 2012 redistricting statute, Alabama had a strong basis in evidence for its conclusion that it had a compelling interest in consid-

ering race to avoid a violation of the VRA. This Court has assumed that States have a compelling interest in avoiding a violation of Section 2. See, *e.g.*, *Abrams*, 521 U.S. at 91; *Shaw II,* 517 U.S. at 915; *Vera*, 517 U.S. at 978 (plurality opinion); see also *id.* at 990 (O'Connor, J. concurring). That assumption is unaffected by this Court's decision in *Shelby County*. And with respect to Section 5, in *LULAC*, eight Justices agreed that compliance with that provision was a compelling state interest, reflecting that if compliance with a statute that had been upheld as a valid exercise of federal power did not constitute a "compelling state interest[]" for constitutional purposes, States would be placed "in the impossible position of having to choose between compliance with [federal law] and compliance with the Equal Protection Clause." 548 U.S. at 518 (Scalia, J., concurring in the judgment in part and dissenting in part, joined in relevant part by Roberts, C.J., Thomas & Alito, J.J.); see also *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.).

Appellants do not here dispute that compliance with Section 2 and Section 5 of the VRA could be a compelling state interest for Alabama, but the dissent below concluded that compliance with Section 5 of the VRA could not be because, after Alabama passed its redistricting plan in 2012, this Court held that the existing coverage formula in Section 4(b) of the VRA could not be used as a basis for making Section 5 mandatory for any State. See *Shelby Cnty.* v. *Holder*, 133 S. Ct. 2612 (2013).

This view misunderstands the nature of compelling interest analysis. As noted above, for Alabama to have been justified in complying with Section 5 in its redistricting, Alabama needed only a "strong basis in evidence" for the conclusion that doing so was required to serve the compelling interest of compliance with federal law. See *Ricci*, 557 U.S. at 582-583; cf. *Vera*, 517 U.S. at 977 (plurality opinion) ("If the state has a 'strong basis in evidence,' for concluding that creation of a majority-minority district is reasonably necessary to comply with" the VRA "and the districting that is based on race 'substantially addresses' the VRA violation, it satisfies strict scrutiny.") (citation omitted). This standard does not demand Alabama's compliance with Section 5 to have "in fact" been legally required. See *Ricci*, 557 U.S. at 580.

Alabama had the requisite "strong basis in evidence" to believe that Section 4 required it to comply with Section 5, notwithstanding this Court's later decision in *Shelby County*. Section 4—which made compliance with Section 5 mandatory for Alabama—was "presumed constitutional" as an Act of Congress. *Vera*, 517 U.S. at 992 (O'Connor, J., concurring) (citing *Fairbank* v. *United States*, 181 U.S. 283, 285 (1901)). Further, both Sections 4 and 5 had been repeatedly upheld by this Court. See, *e.g.*, *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 282-285 (1999); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328-333 (1966). And after the VRA was reauthorized by large majorities of both houses of Congress in 2006, all courts, until this Court's decision in *Shelby County*, again upheld the relevant provisions. See *Shelby Cnty.* v. *Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011), aff'd, 679 F.3d 848 (D.C. Cir. 2012), rev'd, 133 S. Ct. 2612 (2013);

*Northwest Austin Mun. Util. Dist. No. One* v. *Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008) (three-judge court), rev'd on other grounds, 557 U.S. 193 (2009). The presumption of constitutionality of federal statutes, and the long history of decisions upholding the relevant portions of the VRA, provided Alabama with a strong basis in evidence to conclude that compliance with Section 5 was required.

A contrary holding would place States in the impossible bind that this Court sought to avoid when it adopted the "strong basis in evidence" standard. States engaged in core sovereign functions would be required to strike precisely the balance that a court would ultimately strike years later in balancing "not always harmonious" constitutional and statutory mandates—with the certainty of a constitutional or statutory violation if they guessed wrong. See *Wygant*, 476 U.S. at 277 (plurality opinion). This Court has rejected the argument that strict scrutiny requires "the States 'to get things just right'" in this way. *Vera*, 517 U.S. at 978 (plurality opinion) (citation omitted). Rather, consistent with the "longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its redistricting plan" this Court has explained that in implementing the strict-scrutiny standard, "deference is due to [States'] reasonable fears of, and to their reasonable efforts to avoid, [Section] 2 liability." *Ibid.*

A requirement that States "get things just right" in balancing statutory and constitutional obligations would be particularly problematic in the districting context, because redistricting is a core state function. See, *e.g.*, *Chapman* v. *Meier*, 420 U.S. 1, 27 (1975). Because "[f]ederal-court review of districting legisla-

tion represents a serious intrusion on the most vital of local functions," *Miller*, 515 U.S. at 915, see also, *e.g.*, *LULAC*, 548 U.S. at 414-415 (plurality opinion); *Abrams*, 521 U.S. at 101, it is appropriate that constitutional standards give States some leeway to reasonably reconcile constitutional and statutory mandates, see *McDaniel* v. *Sanchez*, 452 U.S. 130, 138-139 (1981) (explaining greater flexibility accorded to legislatures than courts in implementing guarantee of "one-person, one-vote").

In addition, strong reliance interests are at stake. This Court has recognized that in determining when redistricting is required, the interests protected by the Equal Protection Clause must be balanced against citizens' interests in political stability. Thus, while the Equal Protection Clause requires that legislative districts be equally apportioned, States are not required to draw such districts more than once per census period, *Sims*, 377 U.S. at 577, because of the "need for stability and continuity in the organization of the legislative system," *id.* at 583; see also *LULAC*, 548 U.S. at 421 (opinion of Kennedy, J.) (describing legal fiction that plans are constitutionally apportioned through the decade as "a presumption that is necessary to avoid constant redistricting, with accompanying costs and instability"). The same balancing counsels against requiring mid-decade redistricting changes based on the change in the law brought about by *Shelby County*. Such a requirement would undermine the "stability and continuity" of state governance in the 16 States that adopted districting plans in compliance with Section 5 following the 2010 census, see *Status of Statewide Redistricting Plans*, http://www.justice.gov/crt/about/vot/sec_5/statewides.php (last

visited Aug. 14, 2014), in addition to the thousands of covered local jurisdictions.

3. To satisfy strict scrutiny, any use of race as a predominant consideration in drawing the boundaries of legislative districts must be narrowly tailored. See, *e.g.*, *Vera*, 517 U.S. at 977 (plurality opinion); *Miller*, 515 U.S. at 920. Use of race is narrowly tailored to achieve compliance with the VRA if it "substantially addresses" a reasonably perceived statutory violation, *Vera*, 517 U.S. at 977 (plurality opinion) (quoting *Shaw II*, 517 U.S. at 918), and does not "subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid" the violation, *id.* at 979.

This case should be remanded for application of the narrow tailoring standard, because application of the standard here requires the resolution of factual questions that the district court did not decide. Most notably, because Section 2 and Section 5 constrain only electoral practices that deny or abridge the ability of minority voters to elect their candidates of choice, a narrow tailoring analysis requires resolving disputed questions concerning the population levels needed to preserve black voters' ability to elect candidates of choice. See J.S. App. 106-107, 164-165 (describing conflicting evidence regarding necessary population levels in Alabama before the district court). At least some of Alabama's majority-black districts were sustained at a higher population level than appears to be supported by the ability-to-elect evidence presented below. See J.S. App. 47-48 (noting districts with black populations in excess of 70 percent). Nonetheless, it is appropriate for the district court to determine in the first instance whether the use of race as a predomi-

nant consideration in drawing any particular district's lines was a narrowly tailored means of complying with the VRA.

## CONCLUSION

The district court's decision should be vacated, and this case should be remanded for further consideration.

Respectfully submitted.

DONALD B. VERRILLI, JR.
*Solicitor General*
MOLLY J. MORAN
*Acting Assistant Attorney General*
IAN HEATH GERSHENGORN
*Deputy Solicitor General*
RACHEL P. KOVNER
*Assistant to the Solicitor General*
DIANA K. FLYNN
TOVAH R. CALDERON
APRIL J. ANDERSON
BONNIE I. ROBIN-VERGEER
*Attorneys*

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