No. 98-85

In the
Supreme Court of the United States

October Term, 1998

JAMES B. HUNT, JR., Governor of the State of North Carolina, *et al.*, *Appellants*,

v.

MARTIN CROMARTIE, *et al.*, *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF *AMICUS CURIAE* OF AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLANTS

TABLE OF CONTENTS

INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that commitment, the ACLU has been active in defending the equal right of racial and other minorities to participate in the electoral process. Specifically, the ACLU has participated in numerous voting cases before this Court, both as direct counsel, e.g., McCain v. Lybrand, 465 U.S. 236 (1984), Holder v. Hall, 512 U.S. 874 (1994), Abrams v. Johnson, 117 S.Ct. 1925 (1997), and as amicus

curiae, e.g., United States v. Hays, 115 S.Ct. 2431 (1995), Reno v. Bossier Parish School Board, 117 S.Ct. 1491 (1997).

SUMMARY OF ARGUMENT

Amicus respectfully suggests that this case offers an appropriate occasion for the Court to reconsider its redistricting cases that began with Shaw v. Reno, 509 U.S. 620 (1993). Majority-minority districts, which have been systematically challenged in the wake of Shaw, have been the key to the increase in black office holding since passage of the Voting Rights Act of 1965. By creating lenient standing rules for white voters and relieving them of the obligation to show that majority-minority districts have been drawn for a discriminatory purpose, Shaw and its progeny have transformed the Fourteenth Amendment from a law designed to prohibit discrimination against racial minorities to one that can now be used to dismantle majority-minority districts and allow whites once again to maximize their control of the electoral process.

The majority-minority districts created after the 1990 census were the most racially integrated districts in the country. Not only have they not caused segregation or other harm, but they have ameliorated to some extent the affliction of racial bloc voting and have thus bestowed a benefit upon the electorate and society as a whole.

In requiring strict scrutiny of majority-minority districts, the Shaw cases have singled nonwhites out for special, discriminatory treatment in the redistricting process. While whites are acknowledged to have a constitutionally protected right to organize politically, the comparable efforts of nonwhites alone are deemed constitutionally suspect. Such a result violates the concept of equal treatment under the Fourteenth Amendment.

Experience has shown that, contrary to this Court's intent, the Shaw standards, have proven both unworkable and unfair. Legislators no longer know when the consideration of race in redistricting is required, permissible, or impermissible. Because of the absence of clear and reliable standards, the federal courts have been drawn increasingly and unnecessarily into the redistricting process.

The decision below should be reversed because plaintiffs failed to prove a cognizable injury and that the legislature acted with a discriminatory purpose. To the extent that Shaw v. Reno and its progeny are inconsistent with reversal, those decisions should be reconsidered and reversed.

ARGUMENT

Introduction

This case provides the Court with an opportunity to reconsider its line of redistricting cases that began with Shaw v. Reno.[2] As described more fully below, the Shaw cases have created legal and political confusion. Legislators no longer know the extent to which race can or should be taken into account in drawing district lines. The result of that confusion has been to draw the federal courts increasingly, and unnecessarily, into the redistricting process. Shaw and its progeny have also created rules that give special preferences to whites and shackle racial minorities with special disadvantages in redistricting. Five years after Shaw we are witnessing a systematic attack on majority-minority districts, which threatens to erode the gains in minority political participation so laboriously accumulated since passage of the Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq.

This Court has acknowledged that states may legitimately consider race in redistricting for a variety of reasons--to overcome the effects of prior and continuing discrimination, to comply with the Fourteenth Amendment and the Voting Rights Act, or simply to recognize communities that have a particular racial or ethnic makeup to account for their common, shared interests. Amicus submits that, prior to the millennium census and the next round of redistricting, the Court should frankly admit that the Shaw cases demand reconsideration, and that federal judicial intrusion in redistricting is warranted only when the creation of majority-minority districts causes cognizable harm, such as the denial or abridgment of the right to vote or participate equally in the electoral process.[3]

The Voting Rights Act and the Importance of Majority-Minority Districts

On the eve of passage of the Voting Rights Act there were fewer than 100 black elected officials in the entire 11 states of the Old Confederacy. U.S. Commission on Civil Rights, Political Participation 15 (1968). By January, 1993 the number had increased to 4,924. Joint Center for Political and Economic Studies, Black Elected Officials: A National Roster xxiii (1993).[4] This increase was caused primarily by the creation of majority-minority districts pursuant to the preclearance provisions of Section 5 of the Act, 42 U.S.C. § 1973c, and the vote dilution provisions of Section 2 of the Act, 42 U.S.C. § 1973.[5] Any doubts in that regard were effectively eliminated by publication of Quiet Revolution in the South (C. Davidson & B. Grofman eds., 1994), the most comprehensive, systematic study ever undertaken of the Voting Rights Act.[6] In particular, that study supports three critical findings:

> First, the increase in the number of blacks elected to office in the South is a product of the increase in the number of majority-black districts and not of blacks winning in majority-white districts. Second, even today black populations well above 50 percent appear necessary if blacks are to have a realistic opportunity to elect representatives of their choice in the South. Third, the increase in the number of black districts in the South is primarily the result not of redistricting changes based on population shifts as reflected in the decennial census but, rather, of those required by the Voting Rights Act.

Lisa Handley & Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations" in Quiet Revolution at 335-36.

The impact of the Act has been particularly visible and dramatic at the congressional level. Fifteen new majority-minority congressional districts were created in the South in the 1980s and 1990s as a result of litigation, the threat of litigation, or the Section 5 preclearance process.[7]

The increase in majority black districts was followed by an increase in black elected officials. Seventeen of the majority-minority congressional districts--and none of the majority white districts--elected a black in 1992. 1990 U.S. Census, Population and Housing Profile, Congressional Districts of the 103rd Congress, C.Q. Weekly Report, V. 51, 3473-87.[8]

Challenges to the Voting Rights Act

The Voting Rights Act has undeniably been the victim of its own success. Following the 1992 elections the courts were flooded with challenges by white voters who claimed that the majority black districts were unconstitutional racial gerrymanders.[9] Lawsuits challenging congressional plans were filed in North Carolina (Shaw v. Barr, 808 F.Supp. at 465-66), Texas (Vera v. Richards, 861 F.Supp. at 1309), Louisiana (Hays v. Louisiana, 839 F.Supp. at 1190-91), Florida (Johnson v. Mortham, 926 F.Supp. 1460 (N.D.Fla. 1996)), New York (Diaz v. Silver, 932 F.Supp. 462 (E.D.N.Y. 1996)), Virginia (Moon v. Meadows, 952 F.Supp. 1141 (E.D.Va. 1997)), Georgia (Johnson v. Miller, 864 F.Supp. at 1359), Illinois (King v. State Board of Elections, 979 F.Supp. 582 (N.D.Ill. 1996)), South Carolina (Leonard v. Beasley, Civ. No. 3:96-CV-3540 (D.S.C.)), and Alabama (Rice v. Smith, CA No. 97-A-715-E (M.D.Ala.)).[10]

This litigation reflected a well established historical pattern. As this Court and others have poignantly observed, political mobilization in the black community, particularly in the South, has rarely gone unopposed since Reconstruction onwards. South Carolina v. Katzenbach, 383 U.S. 301, 310 (1966) (noting the adoption by various southern states beginning in 1890 of tests "specifically designed to prevent Negroes from voting"). See also J. Morgan Kousser, The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Part South, 1880-1910 (1974); Paul Lewinson, Race, Class, and Party: A History of Negro Suffrage and White Politics in the South (1932); Armand Derfner, "Racial Discrimination and the Right to Vote," 26 Vand. L. Rev. 523 (1973). In modern times the Voting Rights Act, which has been the single most effective tool of black enfranchisement in our nation's history, has become a natural lightning rod for this opposition. See, e.g., Frank R. Parker, Black Votes Count 34-5 (1987) (describing as a "massive resistance" campaign the efforts by Mississippi's white leadership to blunt the increase in black voter registration after passage of the 1965 Act).[11]

The first of the modern reverse discrimination cases to reach the Court following the 1990 census was Shaw v. Reno, a challenge to congressional redistricting in North Carolina and a precursor to this case.[12] In Shaw, the Court held that plaintiffs who alleged that districts were "bizarre" or "irrational" in shape, and were

"unexplainable on grounds other than race," stated a claim for relief under the equal protection clause of the Fourteenth Amendment. 509 U.S. at 643, 658.

Two years later the Court expanded on Shaw when it held that a bizarre district shape was not a prerequisite for a constitutional challenge but was simply one way of proving a suspect racial classification or purpose. See Miller v. Johnson, 115 S.Ct. at 2485. As the Court explained in Miller, a plaintiff could establish

> either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.

Id., at 2488. In sum, the plaintiffs' burden under Miller is to "show that the State has relied on race in substantial disregard of customary and traditional districting practices." Id. at 2497 (O'Connor, J., concurring).

Applying the rules in Shaw and Miller, the Court has struck down majority-minority districts in North Carolina (the 12th) (Shaw v. Hunt, 116 S.Ct. at 1907), Georgia (the 11th) (Miller v. Johnson, 115 S.Ct. at 2494) (the 2d) (Abrams v. Johnson, 117 S.Ct. at 1935), and Texas (the 18th, 29th, and 30th) (Bush v. Vera, 116 S.Ct. at 1951). Lower courts have done the same to majority-minority congressional districts in Florida (the 3d) (Johnson v. Mortham, 926 F.Supp. at 1495), Virginia (the 3d) (Moon v. Meadows, 952 F.Supp. at 1150), Louisiana (the 4th) (Hays v. Louisiana, 936 F.Supp. 360, 371 (W.D.La. 1996)), and New York (the 12th) (Diaz v. Silver, CV-95-2591 (E.D.N.Y. Feb. 26, 1997)).[13]

There is nothing sinister or unlawful about the desires or efforts of whites to elect candidates of their choice, including candidates of their own race. To the contrary, the "freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments." Kusper v. Pontikes, 414 U.S. 51, 56-7 (1973) (quoting NAACP v. Button, 371 U.S. 415, 430 (1963)). What is indefensible is that under the Shaw cases the freedom of whites to associate for the common advancement of political beliefs and ideas, including the right to construct and run in majority white districts, is deemed constitutionally protected, while the comparable efforts of blacks and other nonwhites are deemed constitutionally suspect.

Majority White and Majority Nonwhite Districts; Dual Racial

Standards

One principle that has emerged with disturbing clarity from the Shaw cases is that they "place at a dis advantage the very group, African Americans, whom the Civil War Amendments sought to help." Abrams v. Johnson, 117 S.Ct. at 1950 (Breyer, J., dissenting). The Court has never invalidated a majority white district on account of its bizarre shape, or because the jurisdiction subordinated its traditional redistricting principles to race, although there is a long and continuing history of protecting white incumbents through the creation of majority white districts, including those that are highly irregular in shape and disregard "traditional" districting principles.[14]

For example, the Congressional Quarterly has described District 4 in Tennessee (96% white) as "a long, sprawling district, extending nearly 300 miles . . . from east to west it touches four States--Mississippi, Alabama, Kentucky, and Virginia." Congressional Quarterly, Inc., Politics in America 1994: 103rd Congress 1418 (Phil Duncan ed., 1993). The 11th District in Virginia (81% white) has "a shape that vaguely recalls the human digestive tract." Id. at 1602. District 9 in Washington (85% white) has a "'Main Street' [which] is a sixty-mile stretch of Interstate 5." Id. at 1635. District 13 in Ohio (94% white) "centers around two distinct sets of communities . . . [t]he Ohio Turnpike is all that connects the two." Id. at 1210. Yet no court, even after Shaw, has held or suggested that any of these oddly shaped districts is constitutionally suspect.

To the contrary, such majority white districts have always been regarded as immune from challenge under the Court's often stated principle that a regular looking district shape was not a federal constitutional requirement. Gaffney v. Cummings, 412 U.S. 735, 752 n.18 (1973) (district "compactness or attractiveness has never been held to constitute an independent federal requirement"). Even Shaw v. Reno acknowledged that a compact district shape was "not . . . constitutionally required," 509 U.S. at 647, an acknowledgment that is difficult to reconcile with the Court's contradictory holding that "reapportionment is one area in which appearances do matter," id. at 647, and that the 12th District in North Carolina was subject to challenge because of its non-compact, or "extremely irregular," shape. Id. at 642.

In the Texas redistricting case, filed in 1994, the plaintiffs challenged 24 of the state's 30 congressional districts, 18 of which were majority white. Vera v. Richards, 861 F.Supp. at 1309. The district court invalidated just three districts, the only two that were majority black and one that was majority Hispanic. Id. at 1343-44. The court admitted that the other districts were irregular or bizarre in shape, but held that they were constitutional because they were "disfigured less to favor or disadvantage one race or ethnic group than to promote the re-election of incumbents." Id. at 1309. Thus, the oddly shaped majority white districts, designed to keep white incumbents in office, were tolerable as "political" gerrymanders, while the oddly shaped majority black districts, designed to provide black voters the equal opportunity to elect candidates of their choice, were intolerable as "racial" gerrymanders.

On appeal, this Court affirmed. According to the Court "political gerrymandering" was not subject to strict scrutiny. Bush v. Vera, 116 S.Ct. at 1954. For that reason "irregular district lines" could be drawn for "incumbency protection" and "to allocate seats proportionately to major political parties." Id. See also id. at 1972 ("[d]istricts not drawn for impermissible reasons or according to impermissible criteria may take any shape, even a bizarre one") (Kennedy, J., concurring). Amicus respectfully submits that the creation of a dual standard in redistricting depending on whether a district is majority white or nonwhite is inconsistent with fundamental notions of equal protection under the Fourteenth Amendment.[15]

The Shaw cases have also established special standing rules to facilitate challenges by white voters to majority-minority districts. The Court has described standing as "an essential and unchanging part of the case-or-controversy requirement of Article III," that includes, among other things, the requirement of "an 'injury in fact'--an invasion of a legally protected interest which is . . . concrete and particularized." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

In Shaw v. Reno, however, the plaintiffs "did not claim that the General Assembly's reapportionment plan unconstitutionally 'diluted' white voting strength." Shaw v. Reno, 509 U.S. at 641.[16] Even more dramatically, the three-judge court in Miller made an express finding that "the plaintiffs suffered no individual harm; the 1992 congressional redistricting plans had no adverse consequences for these white voters." Johnson v. Miller, 864 F.Supp. at 1370. The lack of a concrete and personal injury should have denied both the Shaw and Miller plaintiffs standing to bring their cases to federal court.

The Court nonetheless found that the plaintiffs in each case had standing because they alleged that their right to participate in a "color-blind" electoral process had been violated. Shaw v. Reno, 509 U.S. at 641; Miller v. Johnson, 115 S.Ct. at 2485-86 (the essence of plaintiffs' equal protection claim is not that their voting strength has been minimized or canceled out, but "that the State has used race as a basis for separating voters into districts"). The injury identified by the Court was in being "stereotyped" or "stigmatized" by a racial classification. Miller v. Johnson, 115 S.Ct. at 2486; Shaw v. Reno, 509 U.S. at 643.

In prior cases involving black plaintiffs, however, the Court held that a similar abstract, hypothetical, or stigmatic injury was not sufficient to confer standing to challenge discriminatory governmental action. For example, in Allen v. Wright, 468 U.S. 737, 754 (1984), the Court rejected a challenge by blacks to alleged discrimination by the Internal Revenue Service because "stigmatic injury, or denigration" suffered by members of a racial group when the Government discriminates on the basis of race was insufficient harm to confer standing. Allowing standing in the absence of direct injury would, according to the Court, "transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" Id. at 756 (quoting United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 687 (1973)).

Shaw and Miller have thus established a liberal rule of standing in the absence of direct injury for whites challenging majority-minority districts that is different from the restrictive rule of standing applied to blacks challenging official action as being discriminatory.

In addition, Shaw also relaxed the requirement that white plaintiffs prove the state intended to discriminate against them in enacting a challenged redistricting plan. The Shaw v. Reno plaintiffs did not claim that the state's plan was enacted for the purpose of diluting white voting strength. 509 U.S. at 641. Indeed, the legislature's admitted purpose in creating majority black districts was the entirely nondiscriminatory one of complying with the Voting Rights Act. Id. at 635, 655. The Court reasoned, however, that even though a districting plan was facially neutral, a racial classification was apparent or "express" where a majority black

district had a "bizarre" shape, and that accordingly "[n]o inquiry into legislative purpose is necessary." Id. at 642.[17] This is markedly different than the standard applied by the Court in other civil rights contexts.

Since Washington v. Davis, 426 U.S. 229 (1976), the Court has required proof of a discriminatory purpose to establish a violation of the Fourteenth Amendment. And in City of Mobile v. Bolden, 446 U.S. 55 (1980), the Court applied that rule to the voting context. In setting aside a constitutional challenge by black voters to municipal at-large elections, the Court stressed that "only if there is purposeful discrimination can there be a violation of the Equal Protection Clause." Id. at 66. Even proof that black voting strength in the city had been diluted was, according to the Court, "most assuredly insufficient to prove an unconstitutionally discriminatory purpose." Id. at 73. Accord, City of Memphis v. Greene, 451 U.S. 100, 119 (1981) ("the absence of proof of discriminatory intent forecloses any claim that the official action challenged in this case violates the Equal Protection Clause").[18]

Shaw/Miller's new cause of action based on bizarre district shape, new dual standard depending on whether a district is majority white or non-white, and absence of the requirements of showing a discriminatory purpose and effect now allow the Fourteenth Amendment, which was intended to prohibit discrimination against minorities, see The Slaughter-House Cases, 83 U.S. (16 Wall) 36, 81 (1873) (the Fourteenth Amendment was adopted to remedy "discrimination against the negroes as a class, or on account of their race"), to be used to destroy majority-minority districts and deprive blacks of equal political opportunities.

Mistaken Assumptions about Segregation

The underlying premise of the redistricting decisions is that creating nonwhite majority districts is a form of "segregation" which harms individuals and society. Shaw v. Reno, 509 U.S. at 641. Under this view, individuals are harmed because of "the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" Miller v. Johnson, 115 S.Ct. at 2486. Society is allegedly harmed because "'[r]acial gerrymandering . . . may balkanize us into competing racial factions.'" Id. As demonstrated below, each of these premises is seriously flawed.

The majority-minority districts in the South created after the 1990 census, far from being segregated, were the most racially integrated districts in the country. They contained an average of 45% non-black voters. Bositis, Redistricting and Representation at 28. No one familiar with Jim Crow could confuse the highly integrated redistricting plans of the 1990s with racial segregation under which blacks were not allowed to vote or run for office. As Justice Stevens has recognized, plans containing majority-minority districts are a form of "racial integration." Miller v. Johnson, 115 S.Ct. at 2498 (Stevens, J., dissenting). Moreover, the notion that majority black districts are "segregated," and that the only integrated districts are those in which whites are the majority, is precisely the sort of race based concept which the Court has consistently deplored.

The premises of Shaw and Miller are flawed for the further reason that race is not merely an "assumption" or "stereotype," it is also a social and political fact of American life.[19] See generally Nathan Glazer, "Reflections on Citizenship and Diversity," in Diversity and Citizenship: Rediscovering American Nationhood (Gary J. Jacobsohn & Susan Dunn eds., 1996). Indeed, it is the acknowledgment of that fact that led Congress to enact the Voting Rights Act. South Carolina v. Katzenbach, 383 U.S. at 337 (describing the purpose of the Act to insure that "millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live").

Lower courts applying the Act have reached the same conclusion. In Miller v. Johnson, for example, the trial court concluded that racial discrimination was such a pervasive feature of life in Georgia that it took judicial notice of it and dispensed with any requirement that it be proved. The district court also acknowledged that, on the basis of existing statewide racial bloc voting patterns, the Voting Rights Act required the creation of a majority black congressional district in the Atlanta metropolitan area to avoid dilution of black voting strength. Johnson v. Miller, 922 F.Supp. at 1568. Given the existence of racial bloc voting, treating blacks and whites as having different voting preferences is to acknowledge reality, not indulge stereotypes.

Nor is there any evidence that majority-minority districts have either caused or increased social or other harm. In 1982, opponents of the amendment of Section 2 claimed that the creation of majority-minority districts would "deepen the tensions, fragmentation and outright resentment among racial groups," Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess.

662 (1982) (statement of John H. Bunzel), "pit race against race," id. at 745 (statement of Michael Levin), "foster polarization," id. at 1328 (statement of Donald L. Horowitz), and "compel the worst tendencies toward race-based allegiances and divisions." Id. at 1449 (letter from William Van Alstyne). Congress considered and rejected these claims because there was no evidence to support them. It concluded that the amendment would not "be a divisive factor in local communities by emphasizing the role of racial politics." S.Rep. No. 417, 97th Cong., 2d Sess. 32-3 (1982). It found there was "an extensive, reliable and reassuring track record of court decisions using the very standard which the Committee bill would codify." Id.[20]

None of the Shaw cases, moreover, indicate that any of the theoretical harms suggested by the majority have in fact come to pass. In Miller v. Johnson, the witnesses at trial testified without contradiction that the challenged plan had not increased racial tension, caused segregation, imposed a racial stigma, deprived anyone of representation, caused harm, or guaranteed blacks congressional seats. Johnson v. Miller, Trial Transcript, Vol. III, p. 268; Vol. IV, pp. 194, 106, 239, 240, 242; Vol. VI, pp. 36, 38, 45, 47, 56, 58, 117, 120. The district court concluded that "the 1992 congressional redistricting plans had no adverse consequences for these white voters." Johnson v. Miller, 864 F.Supp. at 1370.

The district court reached a similar conclusion in Hays v. Louisiana. Although holding the state's congressional plan unconstitutional under Shaw, the district court nonetheless acknowledged "the great benefits that are derived by an increase in minority representation in government." 862 F.Supp. 119, 128 (W.D.La. 1994) (Shaw, J., concurring). Minority elected officials, the court wrote, "have shown that they perform admirably," that their efforts in government "provide positive role models for all black citizens," and that they "insure that the legal obstacles to minority advancement in all areas of life will be eliminated." Id. In a similar vein, one veteran civil rights lawyer has said that, based on his experience in Mississippi, "the creation of majority-minority districts and the subsequent election of minority candidates reduces white fear and harmful stereotyping of minority candidates, ameliorates the racial balkanization of American society, and promotes a political system in which race does not matter as much as it did before." Parker, 3 D. Col. L. Rev. at 19-20.

The Comparison with Affirmative Action

Prior to Shaw, the Court frequently noted that one of the essential purposes of redistricting was to "reconcile the competing claims of political, religious, ethnic, racial, occupational, and socioeconomic groups." Davis v. Bandemer, 478 U.S. at 147 (O'Connor, J., concurring). For that and other reasons, "legislators necessarily make judgments about the probability that the members of certain identifiable groups, whether racial, ethnic, economic, or religious, will vote in the same way." City of Mobile v. Bolden, 465 U.S. at 87 (Stevens, J., concurring). See United Jewish Organizations of Williamsburg, Inc. v. Carey, 430 U.S. 144, 176 n.4 (1977) ("[i]t would be naive to suppose that racial considerations do not enter into apportionment decisions").

Voting districts have regularly been drawn to accommodate the interests of racial or ethnic groups, such as Irish Catholics in San Francisco, Italian-Americans in South Philadelphia, Polish-Americans in Chicago, and Anglo-Saxons in North Georgia. Miller v. Johnson, 115 S.Ct. at 2505 (Ginsburg, J., dissenting); Busbee v. Smith, 549 F.Supp. at 502 (in the state's 1980 congressional plan "keeping the cohesive [majority white] mountain counties together was crucial"). The Court specifically rejected a challenge by white voters in 1977 to a New York plan that "deliberately used race in a purposeful manner" to create nonwhite majority state legislative districts in order to comply with the Voting Rights Act. United Jewish Organizations of Williamsburg, Inc. v. Carey, 430 U.S. at 165. The Court held that the use of race to insure fairness and inclusiveness in redistricting did not impose a racial stigma and was proper where white voting strength was not diluted. Id. at 179-80.

In requiring strict scrutiny of nonwhite majority districts, i.e., a showing that the districts are "narrowly tailored to achieve a compelling interest," Miller v. Johnson, 115 S.Ct. at 2490, the Miller majority drew heavily upon the affirmative action cases, indicating that majority-minority districts were simply another form of race based preferences. Miller v. Johnson, 115 S.Ct. at 2482.[21] Whether or not one thinks the affirmative action cases were rightly decided, their application to redistricting ignores the fundamental distinction between the race conscious allocation of limited employment or contractual opportunities and the far different task of reconciling the claims of political, ethnic, racial, and other groups in the redistricting process. See Shaw v. Reno, 509 U.S. at 675 ("efforts to remedy minority vote dilution are wholly unlike what typically has been labeled 'affirmative action'") (White, J., dissenting). If anything, the current challenges to affirmative action only highlight the importance of assuring equal opportunity in the political process.

In light of the Court's recent decisions, racial minorities are now the only group that is targeted for special disadvantages in redistricting. All other groups--political, religious, occupational, or socioeconomic--may organize themselves freely and press for recognition in the redistricting process. The efforts of non-whites alone are subject to the exacting and debilitating standards of strict scrutiny. See James U. Blacksher, "Dred Scott's Unwon Freedom: The Redistricting Cases As Badges of Slavery," 39 How. L. J. 633, 634 (1996) ("it is black and Latino citizens alone who may not choose to associate with each other freely and try to optimize their legislative influence in pursuit of a common political agenda") (footnote omitted). Such a result cannot be reconciled with the purposes of the Fourteenth Amendment. As Justice Stevens wrote in Shaw:

> If it is permissible to draw boundaries to provide adequate representation for rural voters, for union members, for Hasidic Jews, for Polish Americans, or for Republicans, it necessarily follows that it is permissible to do the same thing for members of the very minority group whose history in the United States gave birth to the Equal Protection Clause.

509 U.S. at 679 (Stevens, J., dissenting).

The Shaw /Miller Standards Are Unworkable

The Shaw/Miller standards have left legislators in a quandary as to when the consideration of race in redistricting is impermissible, permissible, or required. According to the Court, a legislature may properly "be aware of racial demographics," but it may not allow race to predominate in the redistricting process. Miller v. Johnson, 115 S.Ct. at 2488. A state "is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests." Id. at 2490. Redistricting may be performed "with consciousness of race." Bush v. Vera, 116 S.Ct. at 1951. Indeed, it would be "irresponsible" for a State to disregard the racial fairness provisions of the Voting Rights Act. Id. at 1969 (O'Connor, J., concurring). A state may therefore "create a majority-minority district without awaiting judicial findings" if it has a strong basis in evidence for avoiding a Voting Rights Act violation. Id. at 1970. Even the Court has acknowledged that it "may be difficult" to make and apply such distinctions. Miller v. Johnson, 115 S.Ct. at 2488.

The Justices who have disagreed with the Court's new decisions have at various times said that the Shaw standards are "unworkable," Abrams v. Johnson, 117 S.Ct. at 1949 (Breyer, J., dissenting), Bush v.Vera, 116 S.Ct. at 2011 ("[t]he Court has been unable to provide workable standards") (Souter, J. dissenting), are "a jurisprudential wilderness that lacks a definable constitutional core," Bush v. Vera, 116 S.Ct. at 1975 (Stevens, J., dissenting), and "render[ ] redistricting perilous work for state legislatures," Miller v. Johnson, 115 S.Ct. at 2507 (Ginsburg, J., dissenting). Justice Souter has recognized that "it is as impossible in theory as in practice to untangle racial considerations from the application of traditional districting principles in a society plagued by racial-bloc voting with a racial minority population of political significance." Id. at 2005-06 (dissenting).[22]

Because of the absence of clear and reliable standards the courts have increasingly been drawn into redistricting, which this Court has recognized "is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." Chapman v. Meier, 420 U.S. 1, 27 (1975). Accord, Growe v. Emison, 507 U.S. 25, 34 (1993). Faced with the prospect of being sued for a constitutional violation if they create majority-minority districts and sued for a Voting Rights Act violation if they do not, states will be strongly tempted to leave redistricting to the federal courts.[23] And those that do not will likely end up in court anyway. The flood of litigation generated by Shaw is itself proof of the accuracy of Justice Breyer's observation that, given the subjective nature of the applicable standards, "[a]ny redistricting plan will generate potentially injured plaintiffs, willing and able to carry on their political battles in a judicial forum." Abrams v. Johnson, 117 S.Ct. at 1950 (dissenting).

The Significance of Black Victories in 1996

In Abrams v. Johnson the Court cited the election of Cynthia McKinney and Sanford Bishop, the incumbents from the old 11th and 2d Districts in Georgia, to support its finding that whites had shown a "general willingness" to vote for black candidates and its conclusion that Section 2 did not require the creation of more than one majority black district in Georgia. 117 S.Ct. at 1936. Despite the white votes they received, the voting in McKinney's and Bishop's elections was in fact racially polarized.

In the Democratic primary, McKinney got only 13% of the white vote. She won the nomination because she got most of the black vote and whites mainly stayed home or voted in the Republican primary. White turnout was extremely low--only 11% of registered voters compared to 31% for blacks. As a consequence, the electorate in the Democratic primary was effectively majority black. Abrams v. Johnson, Nos. 95-1425 & 95-1460, Response of Appellants Lucious Abrams, Jr., et al., to Appellees' Motion to Supplement the Record on Appeal, p. 2.

Running in a heavily Democratic district in the general election, McKinney increased her percentage of the white vote, but voting was still along racial lines. Most blacks again voted for McKinney while approximately 70% of whites voted for her white Republican opponent. David A. Bositis, "The future of majority-minority districts and black and Hispanic legislative representation," in Redistricting and Minority Representation 12 (Bositis ed., 1998). The voting in the new 2d District was similarly polarized. In the general election Bishop got most of the black vote but approximately 65% of whites voted for his white opponent. Bositis, "The future of majority-minority districts" at 14.

McKinney has credited her victory to the fact that she was initially elected in a majority black district and had an opportunity to establish a track record of service to constituents of both races. Cynthia A. McKinney, "A Product of The Voting Rights Act," The Washington Post, Nov. 26, 1996, p. A15. Non-incumbent blacks, by contrast, who ran in majority white congressional districts in 1996 in Arkansas, Mississippi, and Texas all lost. Bositis, "The future of majority-minority districts" at 38-9. McKinney and Bishop were reelected in 1998, but again both were running with the strong advantage of incumbency. www2.state.ga.us/elections/federal.htm.

Given the persistent patterns of racial bloc voting over time in the South, it is prudent to suggest that the real test of the new majority white congressional districts which have elected minorities will come when non-incumbent minorities run for office. The recent elections may be a sign of a gradual thaw in voter attitudes. If so, they will underscore the value of highly integrated majority-minority districts to society and voters of all races in helping to ameliorate the affliction of racial bloc voting. But in the meantime, it is premature to claim that the electorate is suddenly color blind and that racial bloc voting no longer exists. See Bositis, "The future of majority-minority districts" at 15 ("[d]espite the noteworthy election of four black U.S. representatives in majority-white districts in 1996, there is little reason to believe that any significant barrier has been breached or that electoral politics in the United States have become de-racialized to any significant degree"); Pildes, 108 Harv. L. Rev. at 1361 (describing the color blind model of politics in the South as "among the great myths currently distorting public discussion").

Conclusion

For the reasons stated herein the judgment below should be reversed. To the extent that Shaw v. Reno and its progeny are inconsistent with that result, they should be reconsidered.

Respectfully submitted,

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NOTES:

1Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. This brief was not authored in whole or in part by counsel for a party and no person or entity, other than the

amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

The cases following Shaw are Miller v. Johnson, 115 S.Ct. 2475 (1995), Shaw v. Hunt, 116 S.Ct. 1894 (1996), Bush v. Vera, 116 S.Ct. 1941 (1996), and Abrams v. Johnson, 117 S.Ct. 1925 (1997).

3Two members of the Court have stated or implied that they would abandon Shaw. See Bush v. Vera, 116 S.Ct. at 1975 ("I would return to the well-traveled path that we left in Shaw I") (Stevens, J., dissenting); id. at 2011 ("while I take the commands of stare decisis very seriously, the problems with Shaw and its progeny are themselves very serious") (Souter, J., dissenting). Where "the lessons of experience" have shown a decision to be wrong or unworkable, the Court has not hesitated to overrule it. United States v. Scott, 437 U.S. 82, 101 (1978).

4This is not to suggest, however, that blacks in the South hold office in anything approaching their percent of the population. While blacks are 19.2% of the region's population, they are only 6.1% of its elected officials. National Roster at 1, 39, 93, 105, 175, 237, 319, 377, 399, 409, 439.

5This Court has recognized the tendency of at-large elections to submerge or dilute the voting strength of cohesive minority communities "by permitting the political majority to elect all representatives of the district." Rogers v. Lodge, 458 U.S. 613, 616 (1982). The use of majority-minority districts has been an obvious, and successful, way of countering the debilitating effects of at-large bloc voting by the majority. Thornburg v. Gingles, 478 U.S. 30, 50 (1986).

6Quiet Revolution was a collaborative effort by 27 political scientists, historians, and lawyers funded by the National Science Foundation. According to Professor Richard Pildes, Quiet Revolution is "[u]tterly free of ideological cant . . . [and] presents the most sober, comprehensive, and significant empirical study of the precise effects of the VRA ever undertaken." Richard H. Pildes, "The Politics of Race," 108 Harv. L. Rev. 1359, 1362 (1995).

7Vote dilution litigation in the 1980s produced majority black districts in Georgia (the 5th) (Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982)), Louisiana (the 2d) (Major v. Treen, 574 F. Supp. 325, 355 (E.D.La. 1983)), and Mississippi (the 2d) (Jordan v. Winter, 604 F. Supp. 807, 813 (N.D. Miss. 1984)). Similar litigation in the 1990s produced a majority black congressional district in Alabama (the 7th) (Wesch v. Hunt, 785 F. Supp. 1491, 1498-99 (S.D. Ala.)), two in Florida (the 3d and 17th), and a third (the 23d) in which blacks and Hispanics combined were the majority (DeGrandy v. Wetherell, 794 F. Supp. 1076, 1088 (N.D. Fla. 1992)), and one in South Carolina (the 6th) (Burton v. Sheheen, 793 F. Supp. 1329, 1367-69 (D.S.C. 1992)). During the 1990s Section 5 objections, or threatened objections, by the Attorney General also resulted in the creation of two additional majority black districts in Georgia (the 2d and 11th) (Johnson v. Miller, 864 F.Supp. 1354, 1366 (S.D.Ga. 1994)), one additional district in Louisiana (the 4th) (Hays v. Louisiana, 839 F. Supp. 1188, 1196 n.21 (W.D. La. 1993)), and two in North Carolina (the 1st and 12th) (Shaw v. Barr, 808 F.Supp. 461, 464 (E.D.N.C. 1992)). The threat of litigation or objections to preclearance by civil rights organizations was a factor in the creation of a second majority black district in Texas (the 13th) (Vera v. Richards, 861 F.Supp. 1304, 1315 (S.D.Tex. 1994)), and one in Virginia (the 3d). See Bill Wasson, "Wilder Plan Expected to Win Assembly OK," The Richmond News Leader, Dec. 3, 1991, p. 1. The two other majority-minority districts in the South were the 9th (majority black) in Memphis, and the 18th (majority black and Hispanic) in Texas. Michael Barone & Grant Ujifusa, The Almanac of American Politics 1974 (1973).

8There were also substantial increases in the number of majority-minority state legislative districts, and a corresponding increase in black legislators following the 1990 redistricting. In the South, the number of black state senators increased from 43 to 67, and the number of black house members from 159 to 213. David A. Bositis, Redistricting and Representation: The Creation of Majority-Minority Districts and the Evolving Party System in the South 46-7 (Joint Center for Political and Economic Studies, 1995).

9Since all districting is designed to advance the interests of particular voters or groups, e.g., incumbents, Democrats, farmers, coastal residents, suburbanites, etc., one leading expert has said that "[a]ll districting is 'gerrymandering.'" Robert G. Dixon, Jr., Democratic Representation: Reapportionment in Law and Politics 462 (1968). In Davis v. Bandemer, 478 U.S. 109, 132 (1986), this Court defined a gerrymander as an electoral arrangement that denies or degrades "a voter's or a group of voters' influence on the political process as a whole."

10Similar challenges were filed against majority black state legislative districts in South Carolina (Smith v. Beasley, 946 F.Supp. 1174, 1175 (D.S.C. 1996)), Florida (Scott v. U.S. Dept. of Justice, 920 F.Supp. 1248 (M.D.Fla. 1996)), Texas (Thomas v. Bush, No. A-95-CA 18655 (W.D.Tex.)), Georgia (Johnson v. Miller, 929 F.Supp. 1529 (S.D.Ga. 1996)), Louisiana (Currie v. Foster, No. 97-CV-368 (W.D.La.)), North Carolina (Daly v. High, No. 5:96 CV 86-V (W.D.N.C.)) and, Ohio (Quilter v. Voinovich, 912 F.Supp. 1006 (N.D.Oh. 1995)).

11Similar efforts in other southern states to thwart the civil rights acts of 1957, 1960, 1964, and 1965 are discussed in the various state chapters in Quiet Revolution.

12It is not surprising that the latest backlash erupted in the context of congressional redistricting. The creation of majority black districts for county commissions and city councils, while important at the local level and by no means uncontroversial, lacked the visibility and impact of the creation of majority black districts for Congress. Members of Congress, axiomatically, wield national political power, and the election of blacks to national office is more likely to galvanize attention and opposition. There was also the critical issue of the sheer number of blacks elected to Congress. Courts and social scientists have frequently commented on the "tipping phenomenon," where whites flee a neighborhood or the public schools when the perception takes hold that there has been "too much" integration. See, e.g., A. Leon Higginbotham, Jr., Gregory A. Clarick & Marcella David, "Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences," 62 Ford. L. Rev. 1593, 1632 n.194 (1994). The unprecedented success of black congressional candidates in the 1992 elections had a similar impact, at least for some.

13Not all the Shaw/Miller challenges have succeeded. The Court summarily affirmed without opinion lower court decisions rejecting challenges to congressional plans in California (DeWitt v. Wilson, 115 S.Ct. 2637 (1995)), and Illinois (King v. Illinois Board of Election, 118 S.Ct. 877 (1998)), aff'g, 979 F.Supp. 582, 619 (N.D.Ill. 1996), as well as a legislative plan in Ohio (Quilter v. Voinovich, 981 F.Supp. 1032 (N.D.Oh. 1997), aff'd, 118 S.Ct. 1358 (1998). The Court also affirmed the decision of the district court rejecting a challenge to a legislative redistricting settlement in Florida. Lawyer v. Department of Justice, 117 S.Ct. 2186 (1997).

14Gomillion v. Lightfoot, 364 U.S. 339 (1960), is not to the contrary. In Gomillion, the Court held that the redefinition of the city of Tuskegee's boundaries "was not an ordinary geographic redistricting measure" but was subject to challenge because it removed most of the city's black residents denying them "the right to vote in municipal elections." 364 U.S. at 341.

15Blacks have also frequently been denied the advantages of incumbency. In Johnson v. Miller, 922 F.Supp. 1552, 1565 (S.D.Ga. 1995), the district court took note of the state's historic policy of drawing district lines "so incumbents remain in their districts in a new plan and to avoid placing two incumbents in the same districts." In its remedial plan, however, the court placed a black incumbent (McKinney) in a new district and put a white incumbent in the district of another black incumbent (Bishop). Id.

16Nor, as Justice White pointed out, could they. Whites were 79% of the state's VAP but a majority in ten (83%) of its 12 congressional districts. Shaw v. Reno, 509 U.S. at 666-67 (White, J., dissenting). One commentator has described the Shaw plaintiffs "not as injured parties, but as spoilers, intent on eliminating the new majority-black districts as a matter of principle." Frank R. Parker, "The Constitutionality of Racial Redistricting: A Critique of Shaw v. Reno," 3 D. Col. L. Rev. 1, 9 (1995).

17The cases principally relied upon by the Court, Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979), and Arlington Heights v. Metropolitan Housing Development Corp. 429 U.S. 252 (1977), do not support its analysis. In Arlington Heights, the Court held that a severe discriminatory impact may support an inference of discriminatory purpose, but that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." 429 U.S. at 265. In Feeney, in a passage omitted in Shaw v. Reno, the Court held that "even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." 442 U.S. at 272. A fortiori, the cases relied upon by the Court do not support the proposition that a facially neutral classification that has no discriminatory impact can be unconstitutional absent proof of a discriminatory purpose.

18In light of Shaw, whites challenging discrimination under the Constitution also have a lower burden of proof than blacks challenging discrimination under the Voting Rights Act. Such a result is anomalous given the purpose of the Act to ease the standard of proof in statutory challenges. Thornburg v. Gingles, 478 U.S. at 43-4.

19This is very different from saying that race is a scientific fact. See Critical Race Theory: The Concept of "Race" in Natural and Social Science ix (E. Nathaniel Gates ed., 1997) (scientists are now agreed that "race" has "no scientifically verifiable referents").

20In the political sphere, where Congress has "a specially informed legislative competence," this Court has held that its duty is to determine only if there is "a basis upon which Congress might predicate a judgment" that a particular practice was a valid means of carrying out the commands of the Constitution. Katzenbach v. Morgan, 384 U.S. 641, 656 (1966). Accord, South Carolina v. Katzenbach, 383 U.S. at 337. There clearly was a basis upon which Congress could conclude that majority-minority districts did not cause social or other harm and were thus a valid means of implementing the Fourteenth and Fifteenth Amendments.

21In support of this proposition, Miller cited Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097, 2113 (1995) (subjecting to strict scrutiny "all racial classifications, imposed by whatever federal, state, or local governmental actor"), City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 494 (1989) (declaring unconstitutional a municipal set aside for minority contractors), and Wygant v. Jackson Board of Ed., 476 U.S. 267, 274 (1986) (invalidating teacher layoff provisions of an affirmative action agreement).

22The views of the dissenters are widely shared by others. See, e.g., Bernard Grofman & Lisa Handley, "1990s Issues in Voting Rights," 65 Miss. L. J. 205, 215 (1995) (Shaw "did not establish clearly manageable standards"); T. Alexander Aleinikoff & Samuel Issacharoff, "Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno," 92 Mich. L. Rev. 588, 651 (1993) ("[a]t the end of the day, Shaw remains an enigmatic decision"); Parker, 3 D. Col. L. Rev. at 43 (the Shaw standards are "vague and subjective"); Higginbotham, et al., 62 Ford. L. Rev. at 1603 (describing Shaw as "obscure"); Pamela S. Karlan, "All Over the Map: The Supreme Court's Voting Rights Trilogy," 1993 Sup. Ct. Rev. 245; J. Morgan Kousser, "Shaw v. Reno and the Real World of Redistricting and Representation," 26 Rut. L. J. 625 (1995).

23That is what Georgia did. After the remand in Miller v. Johnson, the legislature met in special session to redistrict the Congress. After several weeks of discussion and plan drawing, the legislature adjourned without taking action, leaving redistricting to the federal court. Abrams v. Johnson, 117 S.Ct. at 1929. The chair of the senate reapportionment committee lamented that "[n]obody knows what they're doing." Mark Sherman, "Redrawn Districts Expected To Face Challenge," Atlanta Journal & Constitution, Aug. 2, 1995, p. B6.