No. 18-281

In the
Supreme Court of the United States

VIRGINIA HOUSE OF DELEGATES, M. KIRKLAND COX,

Appellants,

v.

GOLDEN BETHUNE-HILL, et al.,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

In 2011, Virginia's General Assembly drew a new legislative map to restore population equality across all 100 districts in the House of Delegates. House delegates widely agreed that, to comply with §5 of the Voting Rights Act ("VRA"), the map needed to preserve the State's 12 majority-minority districts with a black voting-age population ("BVAP") of at least 55%. Nine districts already met that target in the benchmark map, and the remaining three were close. Thus, while the legislature considered race to the extent the VRA required, it substantially relied on traditional districting principles in drawing the 12 districts. In the end, the map garnered broad bipartisan support, and the U.S. Department of Justice precleared it. But after two election cycles, and after a change in party in the Governor's mansion, Appellees challenged the 12 majority-minority districts as racial gerrymanders. The House intervened and took the lead defending its districts, and a majority of a three-judge district court rejected Appellees' claims. Two Terms ago, this Court upheld one district and remanded for further consideration as to the others. On remand, after one of the two judges who had rejected Appellees' claims was replaced, the district court flipped. A new two-judge majority held all 11 districts unconstitutional. The House appealed, and the Court postponed the question of jurisdiction until a hearing on the merits.

The questions presented are:

1. Whether the House has standing to appeal.

2. Whether the 11 remaining majority-minority districts are unconstitutional racial gerrymanders.

PARTIES TO THE PROCEEDING

The following were parties in the court below:

Plaintiffs:

Golden Bethune-Hill, Christa Brooks, Chauncey Brown, Atoy Carrington, Alfreda Gordon, Cherrelle Hurt, Tavarris Spinks, Mattie Mae Urquhart, Sheppard Roland Winston, Thomas Calhoun, Wayne Dawkins, Atiba Muse, Nancy Ross

Defendants:

Virginia State Board of Elections, James B. Alcorn in his official capacity as Chairman of the Virginia State Board of Elections, Virginia Department of Elections, Christopher E. Piper in his official capacity as Commissioner of the Virginia Department of Elections, Clara Belle Wheeler in her capacity as Vice-Chair of the Virginia State Board of Elections, Singleton B. McAllister in her capacity as Secretary of the Virginia State Board of Elections

Intervenor-Defendants:

Virginia House of Delegates, M. Kirkland Cox in his official capacity as Speaker of the Virginia House

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INTRODUCTION

"Redistricting is never easy, and the task was especially complicated in [Virginia] in 2011." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018). Virginia is one of only a few jurisdictions to hold off-year elections for state office, including for all 100 seats in the House of Delegates. In February 2011, the State received once-a-decade census data, requiring the legislature to redraw all 100 House districts to restore population equality—and to complete the job quickly enough for candidates to assess their new districts, collect signatures to appear on the ballot, and campaign in primary and general elections. On top of the inherent political tension and time pressures, Virginia was then a covered jurisdiction under the Voting Rights Act ("VRA"). Thus, in addition to avoiding potential "vote dilution" claims under §2 of the VRA, the legislature had to prove to federal officials that its new plan avoided "retrogression" under §5. And the legislature had to achieve all that while not violating the Equal Protection Clause's proscription against undue consideration of race. Despite those obstacles, the legislature produced a plan that garnered overwhelming bipartisan support, including from all but two members of the House Black Caucus.

That bipartisan plan preserved the 12 majority-minority House districts from the 1991 and 2001 House maps. To ensure that black voters in those districts would maintain their ability to elect their preferred candidates (*i.e.*, to avoid retrogression and obtain preclearance under §5), the legislature sought to achieve a black voting-age population ("BVAP") of at least 55% in each district. That was not an

artificial, unrealistic, or particularly constraining number—nine districts met that target in the "benchmark" map, and the three others were close behind. Achieving that threshold thus would not (and did not) require the legislature to override traditional districting principles like core retention. The 55% target also was eminently sensible. While black voters theoretically could elect their preferred candidates with a slightly lower majority if enough other voters supported those candidates, there were no data to confirm that such "crossover" voting existed. Legislators thus widely agreed that targeting a 55% BVAP threshold would best prevent retrogression.

The U.S. Department of Justice ("DOJ") agreed. It precleared the map, which governed the next two elections without objection. But in 2014, after a Democratic Governor was sworn in, Appellees—12 voters in each of the majority-minority districts—belatedly filed suit alleging that all 12 districts were unconstitutional racial gerrymanders. Because the House has a direct and concrete interest in the constitutionality of the districts that it drew and that govern its operations and elections, the House intervened to defend the districts and to vindicate its constitutionally assigned role in Virginia's districting process. The House proceeded to conduct all aspects of the litigation with the acquiescence of both the district court and the parties.

Initially, a divided three-judge district court rejected Appellees' claims. Two Terms ago, this Court affirmed that decision as to one district and remanded for a more "holistic analysis" as to the remaining 11—all while reiterating that courts must proceed with

extraordinary caution in this sensitive area. That instruction was not heeded. On remand—after one judge from the original two-judge majority was replaced—the result flipped. The new majority, crediting evidence previously discredited and vice-versa, and resolving all doubts in Appellees' favor, concluded that race impermissibly motivated the drawing of all 11 districts, and that not one could survive strict scrutiny. After briefly giving the House an opportunity to redraw the map, which precipitated a veto threat from the Governor, the court named a political science professor from California a special master to prepare a new map for the 2019 elections, just before the map has to be redrawn again once the 2020 census data roll in.

The district court's decision cannot stand, as it all but eliminates what little breathing room legislatures have to balance the competing demands of the VRA and the Constitution. While all agree that race was *a* consideration here, it could hardly have been otherwise as Virginia was at the time a covered jurisdiction. And this is not a case in which the legislature created majority-minority districts out of thin air, or employed artificially high BVAP targets. The legislature simply did what §5 required: It employed all the available data, including real-world experience, to determine how to avoid retrogression and maintain districts that had long been majority-minority districts. At bottom, then, this case involves nothing more than a good-faith and eminently reasonable effort to comply under extraordinary time pressure with the demands that §5 (and equal population principles, §2, and the Equal Protection Clause) imposed. Indeed, this Court already

concluded as much when it rejected Appellees' challenge to one of the 12 districts and admonished them for asking too much of legislatures undertaking the sensitive task of redistricting. There is no reason to reach a different conclusion as to the remaining 11 districts.

OPINIONS BELOW

The district court's opinion is reported at 326 F. Supp. 3d 128. JS.App.1-201. The district court's original opinion is reported at 141 F. Supp. 3d 505. JS.App.204-356.

JURISDICTION

The district court issued its opinion on June 26, 2018, and Appellants timely appealed. This Court has jurisdiction under 28 U.S.C. §1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause and relevant provisions of the Voting Rights Act are reproduced at App.1a-6a.

STATEMENT OF THE CASE

A. Legal Background

The Equal Protection Clause "requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). This one-person, one-vote principle requires States to redraw their legislative districts after each decennial census to ensure that they remain "substantially equal in population." *Abbott*, 138 S. Ct. at 2314. This process is "never easy," *id.*, and it is particularly difficult in

Virginia because Virginia is one of a handful of States that holds off-year legislative elections. That means that Virginia holds elections the same year census data are released—*i.e.*, the first odd-numbered year of each decade. That release typically occurs in February, and within a matter of weeks, the legislature must prepare a new map for all 40 state Senate districts and all 100 House districts. *See* Va. Const. art. IV, §§2-3.

The legislature must do so, moreover, while walking the tightrope between the Constitution and the VRA. Although the Equal Protection Clause "restricts the consideration of race in the districting process," "compliance with the [VRA] ... pulls in the opposite direction." *Abbott*, 138 S. Ct. at 2314. Indeed, the VRA "often insists that districts be created precisely because of race." *Id.* For example, §2 may require a State to create and maintain a majority-minority district if a minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district" and is "politically cohesive," and the majority group votes "as a bloc." *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). Moreover, consideration of race is inescapable under §5, which prohibits a covered jurisdiction (which Virginia was in 2011[1]) "from making any districting changes unless it c[an] prove that they did not result in 'retrogression' with respect to the ability of racial minorities to elect the candidates of their choice." *Abbott*, 138 S. Ct. at 2315. Simultaneously,

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[1] In *Shelby County v. Holder*, 570 U.S. 529 (2013), this Court held that the coverage formula in §4(b) of the VRA could no longer be used to require preclearance under §5.

legislatures must ensure that this federally mandated consideration of race does not lead to racial gerrymandering in violation of the Equal Protection Clause. *See Shaw v. Reno* (*Shaw I*), 509 U.S. 630 (1993).

The safest way to navigate these competing demands is to adhere to traditional redistricting principles, such as "'compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests,' incumbency protection, and political affiliation." *Ala. Legislative Black Caucus v. Alabama* (*ALBC*), 135 S. Ct. 1257, 1270 (2015). Although compliance with such principles is not a federal constitutional requirement, *see Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973), many States—including Virginia—have made some or all of these criteria mandatory, *see, e.g.*, Va. Const. art. II, §6.

Given the "complex and delicately balanced requirements regarding the consideration of race," *Abbott*, 138 S. Ct. at 2314, this Court has made clear that "race consciousness does not lead inevitably to impermissible race discrimination," *Shaw I*, 509 U.S. at 646; *accord Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 800-02 (2017). And given the reality that "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions," *Miller v. Johnson*, 515 U.S. 900, 915 (1995), this Court has instructed that legislatures are entitled to "substantial deference" in drawing districts, *Brown v. Thomson*, 462 U.S. 835, 847-48 (1983).

Together, those principles have produced a two-part test: Race-conscious districting is subject to strict scrutiny only when "race is the 'dominant and controlling' or 'predominant' consideration in deciding 'to place a significant number of voters within or without a particular district.'" *ALBC*, 135 S. Ct. at 1264. And race-conscious districting satisfies strict scrutiny so long as the legislature had "good reasons," or a "strong basis in evidence," to believe that its consideration of race was required by the VRA. *Id.* at 1274 (emphasis omitted); *accord Bethune-Hill*, 137 S. Ct. at 801. That ensures that legislatures will not be condemned for "unconstitutional racial gerrymandering should [they] place a few too many minority voters in a district," but condemned under the VRA should they "place a few too few." *ALBC*, 135 S. Ct. at 1274.

B. Factual Background

1. The 2011 Redistricting Process

In 2011, the General Assembly had to redraw all the districts for the Virginia House and Senate to account for the 2010 census data. JS.App.2-3. The legislature began those efforts in 2010, holding public hearings throughout the Commonwealth to solicit input. JA1765. Redistricting then began in earnest in February 2011 when Virginia received data from the Census Bureau. JS.App.220; JA1767-68.

The bipartisan House Committee on Privileges and Elections began by ratifying the criteria it would follow. JS.App.17, 220-22. The Committee adopted an equal-population range of plus-or-minus 1% and declared that districts would be "drawn in accordance with the laws of the United States," including "the

Voting Rights Act." JS.App.220-21. The Committee further declared that districts would be compact and contiguous, single-member, and based on "the varied factors that can create or contribute to communities of interest," including "economic factors, social factors, cultural factors, geographic factors, governmental jurisdictions and service delivery areas, political beliefs, voting trends, and incumbency considerations," and "[l]ocal government jurisdiction and precinct lines." JS.App.221-22. Deviations from these criteria would be permitted only to the extent necessary to avoid "violation of applicable federal or state law." JS.App.222.

The House selected Delegate Chris Jones, a Republican from the Hampton Roads area, to lead its 2011 redistricting efforts. JS.App.3. Delegate Jones, who was widely respected on both sides of the aisle and "not known as an ideologue," had been the primary drafter of districts in Hampton Roads in the 2001 districting process and ultimately had become the "principal crafter" of the entire 2001 plan. JA1757, 1765, 3092, 3385, 3751. The 2001 process had been contentious, as the 12 majority-minority districts in that plan, which had existed in substantially the same form since 1991, were promptly challenged in state court as unconstitutional racial gerrymanders. The state trial court sided with the plaintiffs, *West v. Gilmore,* 2002 Va. Cir. LEXIS 37 (Va. Cir. Ct. 2002), but the Virginia Supreme Court reversed, concluding that race did not predominate, *Wilkins v. West*, 571 S.E.2d 100, 118 (Va. 2002).

Cognizant that the *Wilkins* plaintiffs had criticized the legislature for obtaining insufficient

public input, Delegate Jones arranged for public hearings in multiple regions. JA1765. The House organized eight joint public hearings with the Senate, during which the legislature "received a bevy of testimony from all walks of life; local-elected officials, registrars, community leaders, ... [and] private citizens." JA374, 579. Delegate Jones created a public portal where people could view and comment on the plan. JA1768-69. And he personally met with "[b]etween 75 and 80 of the members" on both sides of the aisle. JA1858, 3388.

In an abundance of caution, Delegate Jones revised features of the benchmark map that the trial court had criticized in *Wilkins*. For instance, the court had faulted HD64 and HD74 for including precincts separated from the rest of the district by the James River. *West*, 2002 Va. Cir. LEXIS at *36, *77. Delegate Jones thus included among his goals "to unwind th[ose] two river crossings." JA1849, 3435.

2. VRA Compliance

The VRA required Virginia to avoid dilution of minority voting strength and prevent retrogression. 52 U.S.C. §§10301, 10304(b). To that end, Delegate Jones worked closely with members of the House Black Caucus, meeting with Delegates Spruill, Dance, Tyler, McClellan, and others to discuss whether the plan should include the same 12 majority-minority districts as the benchmark plan, and if so, what BVAP was necessary to prevent retrogression.

During those discussions, the delegates strongly supported preservation of the 12 majority-minority districts and expressed concerns about the ability of black voters to elect their preferred candidates. For

example, they informed Delegate Jones of "lower registration" rates and "lower voter turnout" among black voters. JA1928; *see* JA346, 376. Some worried that a trend of declining BVAP in some districts was likely to continue. JA1596, 1782-83. Others told Delegate Jones that their past crossover support reflected their incumbency, not the absence of racially polarized voting, and thus asked him to ensure that black voters would remain "able to elect the candidate of their choice" when the incumbents "were not still around." JA1953.

While Delegate Jones gathered as much information as quickly as possible to determine what BVAP would avoid retrogression, the most reliable data for determining that number did not exist. In highly Democratic districts like the 12 majority-minority districts, contested primaries provide the best data for determining whether minority voters can elect their preferred candidates. But there are too few contested primaries in House elections "to do a meaningful analysis." JA2184. Moreover, Virginia's off-year elections have different voting patterns from even-year elections, rendering data from presidential or congressional elections of minimal value. JA1973-74. And voter registration records in Virginia do not reference race, making it impossible to pinpoint race-based differences in voter registration. JA2154.

In the end, Delegate Jones and his colleagues decided to preserve the same 12 majority-minority districts in substantially the same forms and representing substantially the same communities as in the benchmark plan. Unable to determine from the available data precisely what BVAP would satisfy the

VRA for each district, but confident from the information he had gathered that "it needed to be north of 50 percent," JA1782, Delegate Jones proceeded with a target of at least 55% in each district, JS.App.18. Achieving that goal would not require drastic measures or violations of traditional redistricting principles. Nine of the districts already had BVAPs above 55%, JS.App.5, and the other three were close behind at 54.4%, 52.5%, and 46.3%, JA640.

3. The 2011 Plan

Assisted by consultant John Morgan, Delegate Jones began adjusting the lines for the 100 House districts. JS.App.32. Most adjustments were made at the margins: Statewide, each district retained almost 70% of its core on average, and the average was even higher for the 12 majority-minority districts. JA1090-94. Of the changes that occurred, many were prompted by one-person, one-vote requirements, as population shifts over the preceding decade left southern Virginia underpopulated. JA1275. The population imbalances were so severe that three districts from southern Virginia had to be transported to northern Virginia, causing a "ripple effect" in the south. JA1797. Delegate Jones also made several adjustments to satisfy requests from delegates and voters. For instance, he adjusted "the boundary line between [HD]29 and [HD]10" in response to a request received through the online public portal. JA377-78.

In the final plan, the BVAPs of the 12 majority-minority districts ranged from 55.2% to 60.7%. JA640. Six had higher BVAPs than in the benchmark plan, and six had lower BVAPs. JA640. The average BVAP was within 0.1% of the number in the benchmark plan.

JA640. And the districts did not "violat[e] any of the state's adopted criteria." JA1796-97, 1804, 1812, 1821, 1825, 1829, 1834, 1838, 1851.

Only two alternative plans were proposed during the process: HB 5002 and HB 5003, both of which were designed by college students as part of a contest. JS.App.230; JA1854-55. Because both plans were facially incompatible with state and federal law, the House did not seriously consider either. JA1855-57. When Delegate Jones' plan was brought to the House floor, both Democratic and Republican delegates supported it in glowing terms. Delegate Dance, for example, commended the plan as "truly an example ... of bipartisanship" and complimented Delegate Jones for being "willing to listen to anything and everything." JA344-45. The plan garnered unanimous support from Republican delegates, supermajority support from Democratic delegates, and supermajority support from the Black Caucus. JA1121. One of the only two dissenters from the Black Caucus was Delegate Tyler, who thought her district's 55.4% BVAP was *too low*. JA483-84.

Governor McDonnell vetoed HB 5001 because of concerns about the contemporaneously passed Senate plan. JA995-98. While he "applaud[ed] the House for its bipartisan approach," he criticized the Senate for passing its plan on party lines. JA995. After minor revisions to the House plan and substantial revisions to the Senate plan, the General Assembly passed both plans "with broad bipartisan support," and the Governor signed them into law on April 29, 2011. JS.App.6 & n.7, 230-31. Virginia then submitted its plans to DOJ, which granted preclearance on June 17,

2011. JS.App.6, 231. Since then, every primary and general election this decade has been held under those plans. JS.App.231.

4. Initial District Court Proceedings

Almost four years after the 2011 House plan was enacted and after two complete election cycles (and, not coincidentally, a change at the Governor's mansion), Appellees filed this lawsuit against the Virginia State Board of Elections, the Virginia Department of Elections, and various election officers ("state defendants"). JS.App.6-7. Their complaint alleged that all 12 majority-minority districts are unconstitutional racial gerrymanders. JS.App.6. A three-judge court was convened pursuant to 22 U.S.C. §2284(a) by then-Fourth Circuit Chief Judge Traxler. JS.App.7; ECF 11. Shortly thereafter, the Virginia House of Delegates and its Speaker in his official capacity ("House") intervened as defendants. JS.App.7. Because none of the state defendants is responsible for drawing districts, and because those defendants "declin[ed] to present an independent substantive defense," the House assumed "primary responsibility of defending the 2011 plan." JS.App.7.

The district court held a bench trial in July 2015, and in October 2015, issued an opinion authored by Judge Payne and joined by Judge Lee rejecting Appellees' claims. JS.App.204-356. The majority first dispatched the legal premise on which Appellees had staked their case—that the mere use of a BVAP target triggers strict scrutiny. JS.App.251. The court then examined each district to determine whether Appellees had proven that consideration of race caused departures from traditional principles. The

court searched the record but found that Appellees had been so focused on attacking the mere use of a BVAP target that their district-specific evidence was nearly non-existent. JS.App.314-15.

Conversely, the court credited Delegate Jones' detailed testimony illustrating how "traditional, neutral districting criteria" explained each district. JS.App.298-338. Accordingly, the court found that race did not predominate in the design of 11 of the 12 challenged districts. JS.App.298-338. The court did find that race predominated in HD75, but it concluded that the district satisfied strict scrutiny because "legislators had good reason to believe that maintaining a 55% BVAP level in HD75 was necessary to prevent actual retrogression." JS.App.313.

Judge Keenan dissented. She would have held that race predominated in each challenged district, and that each failed strict scrutiny. JS.App.339-56.

5. This Court's Decision

This Court affirmed in part and vacated in part. On HD75, the Court found "no error in the District Court's conclusion that the State had sufficient grounds to determine that the race-based calculus it employed ... was necessary to avoid violating §5." *Bethune-Hill*, 137 S. Ct. at 801. Although the Court thought it "possible" that drawing HD75 with a lower BVAP may not have violated §5, it underscored that "[t]he law cannot insist that a state legislature, when redistricting, determine *precisely* what percent minority population §5 demands" to avoid retrogression. *Id.* at 802. In short, Appellees had "ask[ed] too much from state officials charged with the sensitive duty of reapportioning legislat[ures]." *Id.*

On the 11 remaining districts, the Court remanded after identifying two legal errors in the district court's predominance analysis. First, the Court concluded that plaintiffs do not necessarily have to show "an actual conflict between the enacted plan and traditional redistricting principles" to establish that race predominated. *Id.* at 797-98. The Court noted, however, that it had never "affirmed a predominance finding ... without evidence that some district lines deviated from traditional principles," and that plaintiffs would have difficulty prevailing without such evidence. *Id.* at 799. Second, the Court concluded that courts should not examine only district lines that "deviat[e] from traditional redistricting criteria"; instead, courts "must consider all of the lines of the district at issue." *Id.* at 799-800. The Court therefore remanded for the district court to conduct a "holistic analysis" that "take[s] account of the districtwide context." *Id.* In doing so, however, it reiterated that "courts must 'exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race.'" *Id.* at 797.

6. Remand Proceedings

After this Court's decision, Judge Lee retired, and Chief Judge Gregory named Judge Wright Allen his replacement on the three-judge court. JS.App.7 n.10. In October 2017, the newly-constituted court held a second bench trial, and in June 2018, Judge Keenan, who previously dissented as to all 12 districts (including HD75, which this Court affirmed), issued an opinion joined by Judge Wright Allen concluding that race predominated in all 11 of the remaining districts and that none survived strict scrutiny.

JS.App.1-98. Judge Payne, who authored the previous decision upholding the districts, dissented.

The majority first described "evidence of racial motive" that it found "in the plan as a whole," which consisted principally of the House's "conce[ssion] ... that the legislature was required to consider, and did consider, race ... to comply with the VRA," and "employed a 55% BVAP threshold." JS.App.18. The majority also relied on analysis from Appellees' three experts, including an expert whose analysis the court had unanimously *rejected* at the first trial. JS.App.18-32; *see also* JS.App.296, 355 n.48.

The majority then announced it would not credit *any* testimony from Delegate Jones, the "primary architect" of the 2011 plan; from consultant John Morgan, who "testified in considerable detail about his reasons for drawing dozens of lines covering all 11 challenged districts"; or from any of the House's experts. JS.App.3, 19 n.3, 32. Because Morgan did not testify at the first trial, the majority dismissed his testimony as "an attempt at post hoc rationalization." JS.App.33. As for Delegate Jones, the majority considered his "voluminous testimony" suspect because he could not remember certain details from a redistricting process that had occurred six-and-half years earlier, and because Appellees—who themselves had disclaimed any intent to "attack[] [Delegate Jones'] character for truthfulness," JA3750—produced a handful of Democratic House members who offered slightly different accounts of the process. JS.App.35-38. While none of those witnesses testified at the first

trial, the court credited their testimony rather than dismissing it as "post hoc rationalization."

Having refused to credit the House's evidence, the majority then found that race predominated in all 11 districts. JS.App.82. While the majority conceded "that the legislature relied on traditional districting criteria in making certain linedrawing decisions" and that there were "race-neutral explanations for specific district lines," JS.App.82, it hardly discussed that evidence. It instead relied on Appellees' circumstantial evidence to conclude that all population shifts into and out of each district—and even decisions to leave residents in the same district—*could be explained solely by race*. JS.App.38-80.

Turning to strict scrutiny, the court found that the use of one BVAP target for all 12 districts "strongly suggests that the legislature did not engage in narrow tailoring." JS.App.87. Relying on Appellees' expert's "ecological inference analysis," which used statewide-race election data rather than House election data, the majority opined that "a 55% BVAP was not required." JS.App.90-93. The majority found it irrelevant that no pertinent district-specific voting data existed in 2011, reasoning that "it is the intervenors' burden to justify their predominant use of race." JS.App.95.

Judge Payne issued a 95-page dissent, in which he concluded that Appellees failed to prove "that race predominated in any of the Challenged Districts." JS.App.124. In his view, the majority erred in discounting the House's witnesses, who were "vitally important witnesses with critical first-hand knowledge" whose testimony was "credible and supported by the record as a whole." JS.App.99. He

faulted the majority for ignoring all the race-neutral factors the mapmakers considered and found Appellees' "statewide evidence" "not compelling." JS.App.98, 123.

The majority permanently enjoined the use of the challenged districts in future elections and gave the General Assembly until October 30, 2018, to redraw the districts. JS.App.203. Before that deadline, however, the Governor announced that he would not sign any remedial map legislation. JA2975-76. The court then appointed a special master—a political science professor from the University of California, Irvine—to propose a new plan. ECF 275, 276.

SUMMARY OF ARGUMENT

In 2011, the Virginia legislature preserved the State's 12 majority-minority House districts in substantially the same form as they had existed since 1991 in order, *inter alia*, to comply with §5 of the VRA. Using the practically available evidence concerning voting patterns and demographics, the legislature concluded that targeting a BVAP floor of 55% in each district would ensure compliance with §5's non-retrogression mandate and would be readily achievable. Indeed, since most of the benchmark districts had BVAPs near 55%, the legislature was able to rely heavily on member input and traditional districting principles, rather than subordinating those considerations to race. The result was a map that received overwhelming bipartisan support.

The notion that such a map triggers, let alone fails, strict scrutiny beggars belief. The district court reached its contrary conclusions only by ignoring all the prior proceedings in the case, including this

Court's admonitions to exercise extraordinary caution and avoid asking too much of legislatures assigned the delicate task of drawing districts in covered jurisdictions. Indeed, far from heeding those cautionary notes, the court summarily discredited *all* the House's evidence while embracing arguments indistinguishable from those this Court rejected. The result is a decision that poses a clear threat to the core sovereign function of redistricting and converts VRA compliance into an impossible task.

I. The House has standing to bring this appeal. Indeed, as an intervenor-defendant, the House has been the real party in interest throughout, overseeing all aspects of the litigation in the district court, and it satisfies every prerequisite for standing, appellate or otherwise. The House plainly suffers injury in fact, both in the loss of its redistricting authority to the court and a special master and in the concrete reality that its members now represent unlawful districts and will face reelection in different court-drawn districts. The distinct injuries to the House are evident in the district court's order requiring the legislature—not any executive branch official—to redraw maps promptly or yield that authority to a special master. For these reasons, this Court has heard appeals filed by legislative intervenors in similar circumstances. Moreover, even apart from its own distinct injuries, the House has authority under state law to vindicate the undoubted injuries suffered by the State, which is sufficient to give it standing to defend and appeal.

Indeed, Virginia's attorney general appears to concede that the House had standing to defend the districts below and in this Court as appellee, where he

was content to remain a bystander. Nonetheless, he suggests that the House's concrete interests somehow disappear when it comes to appealing, and that he can exercise an appellate veto and prevent the real defendants (but not the plaintiffs) from appealing adverse decisions. That position is profoundly mistaken and would skew this Court's decision-making in redistricting cases while creating intolerable incentives for partisan gamesmanship by plaintiffs and elected officials. The Court should reject the attorney general's extraordinary effort to turn redistricting litigation into a heads-I-win-tails-you-lose proposition, in which an elected official can block the defense of an adverse decision that advantages his political party at the expense of the institutional prerogatives of the House.

II. The district court erred in concluding that Appellees have satisfied their demanding burden of proving that race predominated in the drawing of the 11 challenged districts. Race predominates in redistricting cases only if it dominates and controls line-drawing decisions and thereby subordinates traditional districting principles. That did not occur in Virginia in 2011. The legislature targeted a 55% BVAP floor not in the abstract or with any vote-dilutive intent, but to preserve pre-existing majority-minority districts that were already above or near that number, thereby ensuring compliance with §5's non-retrogression mandate and traditional districting criteria. Any fair reading of the record confirms that race did not overwhelm or dwarf other considerations, but rather served as one factor alongside them.

The district court concluded otherwise only by stubbornly refusing to credit any evidence of race neutrality, whether proffered by House witnesses or evident on the face of the map. Its reasoning is internally inconsistent, incoherent, and fundamentally disrespectful of the state sovereignty interests at stake. In short, it is not the holistic and cautious approach this Court called for two Terms ago.

III. Even assuming strict scrutiny applied, the challenged districts would pass the test, as HD75 did two Terms ago. This Court has long assumed that VRA compliance is a compelling interest, and to satisfy narrow tailoring, a legislature need only show that it had good reasons to believe that the VRA required it to consider race how it did. The legislature certainly had good reasons for utilizing a 55% BVAP target. Under §5, it had to avoid retrogression in the challenged districts, and targeting a BVAP above 50% by a reasonable margin was the most logical way to do so—particularly given that all but one district already had BVAPs above 50%. To be sure, §5 *may* (but may well not) have tolerated slightly lower BVAPs in some districts. But, as this Court emphasized last time, a legislature need not exercise a degree of precision that is only theoretical in the VRA context; a good-faith belief that its use of race is necessary for VRA compliance is enough. The legislature plainly had that.

The district court majority concluded otherwise only after committing the same mistakes Appellees made two Terms ago when attacking HD75. This Court upheld that district and, in the process, disabused notions that BVAP targets are inherently

suspect and that legislators must (or even could) determine BVAP targets with surgical precision. The majority's opinion is impossible to square with those principles, or with this Court's admonition that neither courts nor litigants may ask too much of state legislators performing the sensitive task of redistricting.

In the end, there is no basis to have courts and special masters redrawing maps that were drawn in good faith in the immediate wake of the 2010 census and have governed the last four election cycles, especially when those court-drawn maps are equally (if not more) race-conscious. Rather, this Court should reverse and allow the duly-enacted map to govern one last election before the legislature can address the 2020 census freed from the added complexities faced by covered jurisdictions.

ARGUMENT

I. The House Has Standing To Appeal.

The House plainly has standing to pursue this appeal, for it has always had a "personal stake in the outcome" of this case. *Baker v. Carr*, 369 U.S. 186, 205 (1962). Indeed, the House suffers its own distinct injuries in the redistricting context and is a proper party to represent the broader interests of the State under state law. Either way, the House has standing to defend the map the House drew and to appeal an adverse decision that requires the House to operate with unlawful districts and face election under different court-drawn maps.

No one seemed to doubt that the House, which authored the challenged map and would suffer the direct consequences of the court usurping the

redistricting process and forcing the House to operate with court-draw districts, was a proper party to intervene and the logical party to defend its districts. In fact, the House intervened in this litigation nearly four years ago precisely because Appellees' suit threatened to substantially "impair[]" the House's interests. JA2964. As its motion explained, the House "is the legislative body that actually drew the redistricting plan" pursuant to its "constitutional[]" authority and obligation to redistrict, and the House and its members' relationships with constituents are directly governed by the map. JA2966. The state defendants, by contrast, merely administer elections, so they could not adequately defend the "direct and substantial role" the House played in the redistricting process or its "obligation to preserve continuity of representation." JA2966.

Unsurprisingly, neither Appellees nor the state defendants objected to the House's intervention or otherwise suggested that the House lacked the "vital interest" it claimed in this litigation. JA2965; *see also* JA2970-71. Neither did the district court, which quickly allowed the House to intervene. JA2972. Ever since, the House "ha[s] borne the primary responsibility of defending the 2011 plan." JS.App.7. The state defendants, meanwhile, have "join[ed]" the House's defense, but "declin[ed] to present an independent substantive defense." JS.App.7. And the state defendants had no problem letting the House defend the constitutionality of the challenged districts when the *plaintiffs* appealed to this Court two Terms ago. In fact, in a letter to this Court on behalf of the attorney general two years ago, Virginia's solicitor general explained that he would not file a brief

because the state defendants "'d[id] not draw the districts'" and instead "merely 'implement elections'"; thus, the solicitor general continued, the House "will take the lead in this appeal in defending the redistricting litigation that they enacted." JA2973. That is the same position the state defendants continued to take in the district court on remand. *See* JA2974.

It would seem obvious, then, that the House has standing to appeal now that the district court has issued a decision obliterating the House's "vital interest[s]" in this case. Indeed, given that the district court, in conformity with this Court's cases recognizing the legislature's primacy in redistricting, gave the General Assembly the first opportunity to draw remedial maps, and that the House now faces the prospect of laboring with divided constituencies (the now-unlawful district they were elected to represent and the different district in which they would stand for reelection) for the balance of this legislative term, the House's standing to appeal, if anything, would seem more obvious than its standing to defend. Yet now, after years of sitting on the sidelines, Virginia's attorney general suddenly claims that the House's independent interest has evaporated, and that he alone has a monopoly over whether to appeal a decision that injures the House but appears to benefit the attorney general's political party. The attorney general's claim not only reflects (or at a bare minimum invites) gamesmanship of the worst sort, but is squarely refuted by this Court's precedent.

While a state attorney general is "typically" the actor who appeals "to defend the constitutionality" of

a state statute, *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013), the attorney general is certainly not the only one with standing to do so. It is well established that an intervenor may "keep the case alive" on appeal if the intervenor "independently" has standing. *Diamond v. Charles*, 476 U.S. 54, 68 (1986); *see also Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016). The House plainly has independent standing here. This Court concluded nearly 50 years ago that a legislative chamber whose districts have been invalidated and ordered reconstituted has standing to appeal. In *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972), the Minnesota State Senate intervened as a defendant in reapportionment litigation and filed a direct appeal to this Court after a three-judge district court issued orders reducing the number of state senate districts, thus requiring wholesale redistricting. *Id.* at 187-94. This Court emphatically rejected the appellees' argument that the senate lacked standing to seek redress for that injury, stating that "certainly the senate is directly affected by the District Court's orders." *Id.* at 194.

The House here is likewise "directly affected by the District Court's orders." Indeed, no party has remotely as direct a stake in the district lines that frame the basic representational make-up of the House than the House. In light of the district court's order, the House and the House alone will operate with unlawful districts and divided constituencies, with dozens of members simultaneously representing the now-unlawful district that elected them and looking to a different constituency in a different court-drawn district for reelection. That distinct institutional injury is one that the House is uniquely

positioned to vindicate on appeal. That the attorney general is indifferent to that injury is not terribly surprising, but there is no warrant for allowing that unaffected official to block the House's ability to vindicate its distinct interests on appeal.[2]

The attorney general's contrary position would mean that the House would not have an independent injury allowing it to participate in redistricting litigation even when divided government produces an impasse that necessitates judicial map-drawing. In that situation, it is commonplace for legislative bodies to participate adversely to the state executive branch and alongside all manner of affected private parties. *See, e.g.*, *id.* at 189-90, 192. The prospect that judicial proceedings over House maps in the case of a political impasse would take place without the one party most "directly affected by the District Court's orders" underscores the House's distinct injury and the deep flaws in the attorney general's position.

The decision below also "poses a serious and immediate threat," *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618 (1989), to the House's institutional interest in fulfilling its constitutional obligation to redistrict. This Court has repeatedly emphasized that redistricting is "the task of local legislatures," *Gaffney*, 412 U.S. at 751, and that remains the case in Virginia, *see* Va. Const. art. II, §6. In 2011, the legislature fulfilled its constitutional mandate by drawing,

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[2] The importance of districting and other rules for the time, place, and manner of elections to the body that stands for election is reflected in the Constitution, which ensures at the federal level that Congress will have the ultimate say when it comes to congressional elections. U.S. Const. art. I, §4, cl. 1.

debating, and ultimately enacting the 2011 plan. The decision below not only "completely nullified" those actions, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n* (*AIRC*), 135 S. Ct. 2652, 2665 (2015); *see also Coleman v. Miller*, 307 U.S. 433, 438 (1939), but transfers that authority to a court and a special master.

In this regard, the invalidation of redistricting legislation imposes a distinct injury on the legislature not present with other kinds of legislation. Given the commands of the Constitution, there must be *some* map for the upcoming election. While a federal court that invalidates a state-law clinic-access law will not replace it with a court-drafted clinic-access law, a federal court that invalidates a legislatively-drawn map will replace it with a court-drawn map (after a brief interval for possible legislative action, which itself underscores the distinct interest of and injury to the legislature).

To be sure, in this second regard (but not the first), the decision below injures the Virginia Senate too. But Article III does not require an exclusive injury; only a particularized injury. And this Court has already recognized that each branch of the legislature is a distinct institution with distinct interests that can give rise to standing. *See Beens*, 406 U.S. at 194; *INS v. Chadha*, 462 U.S. 919, 930, 939 & nn.5-6 (1983) (holding that House and Senate were both "proper parties" to seek certiorari in defense of one-house veto statute). Here, the House is the only chamber that suffers the distinct injury of having to proceed with unlawful districts and divided constituencies, and is the natural and logical party to

vindicate the General Assembly's injury in having its redistricting authority usurped by federal courts.

The House's distinct interests make this case nothing like the cases in which this Court has rejected intervenors' efforts to defend the constitutionality of state laws. The House is not a "concerned bystander[]," *Diamond*, 476 U.S. at 62, or a private citizen with "no 'personal stake' ... distinguishable from the general interest of every citizen of" Virginia, *Hollingsworth*, 570 U.S. at 707. It is the institution whose very constitution—and constitutional prerogative—has been altered by the decision below. And unlike in *Personhuballah*, where individual congressional representatives sought to defend a district that their institution did not draw, and that they neither resided in nor represented, 136 S. Ct. at 1736-37, the House is an "institutional [defendant] asserting an institutional injury," *AIRC*, 135 S. Ct. at 2664, pursuant to an express authorization of power from the House itself, *see* H.R. 566, 1st Spec. Sess. (Va. 2014).

Finally, apart from its distinct injuries, the House also has standing because it is "authorized by state law to represent the State's interest" in redistricting litigation. *Hollingsworth*, 570 U.S. at 709. The State itself always "has a cognizable interest 'in the continued enforceability' of its laws that is harmed by a judicial decision declaring a state law unconstitutional," and a State may "designate agents to represent it in federal court." *Id.* at 709-10; *see also* JA2973. *Karcher v. May*, 484 U.S. 72 (1987), is instructive. There, the Court concluded that New Jersey's General Assembly Speaker and Senate

President could defend the constitutionality of a state statute "in both the District Court and the Court of Appeals" after the state attorney general declined to do so. *Id.* at 75, 81-82. Notably, the district court in *Karcher* had declared the statute unconstitutional, so the legislators appealed to the Third Circuit themselves. In concluding that they had "authority under state law to represent the State's interests" in the Third Circuit, this Court emphasized that, in other cases, New Jersey's courts had "granted applications of the Speaker of the General Assembly and the President of the Senate to intervene as parties-respondent on behalf of the legislature in defense of a legislative enactment." *Id.* at 82.

Here, too, Virginia's courts have permitted the House and its Speaker to intervene in lawsuits challenging the validity of state laws. In fact, they have done so in lawsuits challenging the same districting map at issue here. *See Vesilind v. Va. State Bd. of Elections*, 813 S.E.2d 739, 742 (Va. 2018). Moreover, the House and its Speaker have always participated in this litigation in their official capacities, thereby avoiding the flaw that ultimately doomed the legislators in *Karcher*, who could not continue their challenge in this Court because they were "no longer hold[ing] th[e] offices" of Speaker and President. 484 U.S. at 81. The House thus has standing both in its own right and as a representative of the State's interests.

The state defendants' belated attempt to suggest otherwise is both too little and too late. If the state defendants really thought that only they had standing to defend the State's interests, then they should have

said so years ago when the House intervened and asserted its standing to defend the State's interests. To allow them to embrace that position at this late date not only would vitiate basic forfeiture principles, but would create perverse incentives.

In their view, the attorney general could effectively exercise retroactive veto power over duly-enacted redistricting legislation whenever willing plaintiffs challenged that legislation and obtained a favorable judgment. This is a case in point. Although the 2011 plan received bipartisan support in 2011—when Republicans held a majority in the House and a Republican served as Governor—the calculus shifted years later when a Democrat became Governor. The reason could hardly be clearer: If Appellees could succeed in judicially repealing the legislatively-enacted map, then the new Governor could veto any remedial map designed by the Republican-controlled House—*i.e.*, exactly what the Governor did here after the district court invalidated the challenged districts. *See* JA2975 ("I must unequivocally state that I will veto House Bill 7003 should it reach my desk"). A gubernatorial veto of new legislation is one thing, but an attorney general veto of duly-enacted and long-defended legislative maps is quite another, especially when the only obvious alternative is a judicially-drawn map likely to be more favorable to the attorney general's political party. The state defendants' position thus not only is legally wrong, but would foster partisan gamesmanship of the worst sort.

II. Race Did Not Predominate When The Legislature Preserved The State's Pre-Existing Majority-Minority Districts.

The threshold merits question is the same one this Court confronted two years ago: whether Appellees have satisfied their burden of proving that "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale" in designing the challenged districts. *Bethune-Hill*, 137 S. Ct. at 798. Although this Court declined to affirm the district court's decision answering that question in the negative last time, it equally declined challengers' invitation to answer it in the affirmative, instead remanding the case with instructions to conduct a "holistic analysis" rather than focusing only on the motivation behind "deviations from traditional redistricting criteria." *Id.* at 799-800. At the same time, the Court admonished that courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Id.* at 797. And the Court upheld HD75, the lone district on which it did reach the ultimate constitutional question, concluding that Appellees here "ask[ed] too much" of legislators "charged with the sensitive duty of reapportioning legislative districts." *Id.* at 802.

The newly-constituted district court heeded none of this Court's admonitions. Instead of according the legislature "substantial deference," *Brown*, 462 U.S. at 847-48, the court insisted that there was something constitutionally suspect about the legislature's "admission" that it sought to draw a map that complied with the VRA, and then summarily rejected

all of the House's evidence. Instead of conducting a holistic analysis of *all* aspects of the challenged districts, the court focused myopically on any movement of black voters and ignored race-neutral explanations for such shifts. And ultimately, the court essentially found that race *must* have predominated simply because each district exceeded the 55% BVAP target. That, of course, is precisely the reasoning the predominance inquiry forecloses.

Suffice it to say, the district court reached the right result the first time. Perhaps strict scrutiny is warranted when the legislature moves tens of thousands of voters to create majority-minority districts out of thin air, or employs wildly inflated BVAP targets. But this is a case in which the legislature confronted 12 pre-existing majority-minority districts and could and did set a BVAP target that would satisfy §5's retrogression demands *without* making race its predominant consideration. Indeed, most of the challenged districts already met that target, which not only made it an eminently reasonable target for avoiding retrogression, but also made it easy to satisfy without subordinating traditional districting criteria to race.

A. The District Court's Predominance Analysis Was Fatally Flawed from the Start.

Under any faithful application of this Court's precedent, Appellees bore a heavy burden. Not only was it their obligation to prove that "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale" in designing all of the challenged districts, *Bethune-Hill*,

137 S. Ct. at 798, but they were operating in an area where "the good faith of a state legislature must be presumed," *Miller*, 515 U.S. at 915. And while this Court has made clear that in theory a district could constitute a racial gerrymander without deviating from traditional districting principles, the Court pointedly noted that it has never "affirmed a predominance finding ... without evidence that some district lines deviated from traditional principles," and that in practice "it may be difficult for challengers to" prove predominance without such evidence. *Bethune-Hill*, 137 S. Ct. at 799.

Here, the House produced a wealth of evidence that it did not allow the 55% BVAP threshold to dominate or control the drawing of the challenged districts. That is evident on the face of the plan. None of the districts "violat[ed] any of the state's adopted criteria." JA1795-96, 1804, 1812, 1821, 1825, 1829, 1834, 1838, 1851. Their BVAPs did not uniformly converge on 55%, but ranged from 55.2% to 60.7%. JA640. For the most part, those figures reflected exceedingly minimal changes relative to the benchmark plan, which is unsurprising since the legislature prioritized preserving as much of each district's core as possible and preserved more of the core in the challenged districts than statewide. And both of the principal map-drawers testified at length about the race-neutral reasons various lines were drawn. Accordingly, Appellees should have faced a tall order indeed.

Instead, the district court set out to lessen their burden from the start. The court began by finding probative the bare fact that the legislature "conceded"

that it "consider[ed]" race "in order to comply with the VRA." JS.App.17. But as this Court explained the day before the majority released its opinion, that a covered jurisdiction considered race is probative of nothing more than that the jurisdiction was covered, as §5 "obviously demanded consideration of race." *Abbott*, 138 S. Ct. at 2315. Unless "obedience to the Supremacy Clause" is constitutionally suspect, *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993), simply announcing an intent to consider race as necessary to comply with the VRA cannot amount to evidence that race *predominated*. The court likewise found it probative that the legislature admitted that it "employed a 55% BVAP threshold in drawing each of the challenged districts." JS.App.18. Once again, under this Court's precedent, that merely necessitates an *inquiry* into predominance; it is not itself probative "evidence of the legislature's motive." JS.App.19. Compliance with the VRA requires a legislature both to consider race and to determine what BVAPs are likely to avoid retrogression and facilitate preclearance. When those numbers are based on the demographics of the districts and a reasonable theory of §5, they are not evidence that race predominated.

Having impugned the legislature's motives based on an "admission" compelled by the Supremacy Clause, the court proceeded to impugn the motives of the two individuals with principal responsibility for drawing the 2011 plan, Delegate Jones and his consultant John Morgan. While Delegate Jones was the "primary architect of the 2011 plan" and was selected for that role precisely because of his reputation as an honest broker, JS.App.3, and while "Morgan testified in considerable detail about his

reasons for drawing dozens of lines covering all 11 challenged districts," JS.App.32, the court refused to credit *any* of their testimony (or the testimony from the House's experts). Indeed, the court went out of its way to reiterate that its credibility determinations were "not limited to particular assertions of these witnesses, but instead wholly undermine the content of Jones' and Morgan's testimony." JS.App.82. The majority's excuses for these blanket findings are remarkable.

First, the newly-constituted majority faced the considerable problem that the previous majority had *credited* Delegate Jones' testimony. Indeed, that testimony played a critical role in this Court's decision affirming HD75's constitutionality. *See Bethune-Hill*, 137 S. Ct. at 801. The new majority forged ahead anyway, reasoning that it could reconsider all of the original majority's *factual* findings because those findings were made "while applying an erroneous *legal* standard." JS.App.19 n.13. But as the dissent observed, that reasoning suffers from the rather obvious flaw that "factual findings as to the credibility of witnesses are not in any way dependent upon the relevant substantive legal standard." JS.App.117 n.10, 119-120 n.12. No matter the legal import of a statement, such as that a line was drawn to accommodate a delegate or to address a judicial criticism of the 2001 map, that statement is either credible or not. Nonetheless, the majority relied on the altered legal standard not only to *discredit* witnesses found credible at the first trial, but to *credit* testimony found *not* credible in the first trial.

As for Delegate Jones, the majority dismissed his testimony because he purportedly had a "faded memory" by the second trial, and based on purported "discrepancies" between his first-trial testimony and testimony Appellees introduced at the second trial from a handful of Democratic delegates who did not testify at the first trial. JS.App.37-38. But even accepting that Delegate Jones may not have recalled with absolute certainty every detail of a districting process that had taken place six-and-a-half years earlier, that would hardly justify blanket rejection of *all* the testimony—including the testimony from the *first* trial, when memories were fresh—of the "primary architect" of the challenged districts. And the purported "discrepancies" the majority identified essentially amounted to two delegates disputing Delegate Jones' characterizations of six-and-a-half year-old conversations with them about the map as "significant" or "extensive." JS.App.36.

The majority's explanation for refusing to credit Morgan is equally unsustainable. The majority found it significant that the House "neglected to call Morgan to testify at the first trial," an oversight that purportedly "strongly suggest[ed]" "an attempt at post hoc rationalization." JS.App.33. But the majority then credited every new witness *Appellees* proffered for the first time at the second trial—including those used to discredit Delegate Jones—without accusing any of them of "post hoc rationalization." As Judge Payne observed with incredulity, if the House's failure to call Morgan during the first trial sufficed to discredit his testimony, surely it must also "discredit the belated testimony of the delegates on whom the

majority relies to discount Jones' testimony." JS.App.103.

The majority's flip-flops in *crediting* previously rejected testimony are equally incoherent. For example, the majority credited testimony from Dr. Stephen Ansolabehere, who opined that race rather than politics better explained why the legislature assigned individuals to districts. JS.App.20 n.14, 29. But in the district court's original opinion, all three judges unanimously *rejected* Dr. Ansolabehere's analysis, concluding that it failed to account for a host of districting factors. JS.App.296, 355 n.48. As Judge Payne noted in dissent, "that finding was not appealed," and "[i]t is therefore not appropriate to revisit" it. JS.App.117. In all events, the passage of time did not cure the multiple flaws that led *all* panel members to reject the testimony the first time.

The majority credited testimony from Dr. Jonathan Rodden, who conducted a "geo-spatial data analysis" that essentially involved looking at "white 'dots' ... and black 'dots'" on a map, JS.App.20-21, and "speculating about the motivations of the legislature" in deciding which voters to put where, JS.App.110. Setting aside that Dr. Rodden operated more like an "advocate" for Appellees than a "disinterested" expert, JS.App.109-10, his "dot density maps" revealed only that minority voters are often found in majority-minority districts. Of course, basic math confirms that rather obvious point—a point that has nothing to do with whether race predominated in a district's design. Yet the majority nevertheless credited Dr. Rodden—who has "[n]ever drafted a plan that's ever been considered by any political body," JA3108—while

summarily dismissing *all* testimony from the individuals who actually drew the 2011 plan.

B. District-Specific Evidence

As the foregoing reveals, the majority's predominance inquiry was fatally and fundamentally flawed, as the majority combined utterly unremarkable "admissions" and utterly unsustainable "credibility findings" to effectively deprive the legislature of its presumption of good faith and relieve Appellees of their burden to prove race predominated. Once *all* the record evidence is fully and fairly considered, free from those errors, there is no escaping "the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

1. Richmond (HD69, HD70, HD71, HD74)

The Richmond area contains four challenged districts, each remarkably similar to its benchmark version. In fact, all but one consists of the exact same cities and counties as its benchmark version. JA639. The lone exception is HD74, which contains one less county because it eliminated a river crossing. JA1512.

a. HD69 contains "a large, compact swath of Richmond below the Fan District and to the south of the James River." JS.App.314; *see* JA1510. The primary change in 2011 was to shift the district northeasterly toward the James River, adding several precincts that made the district more compact and "Richmond centric." JA1510, 1795. As the United States explained two Terms ago, it is "unlikely" that Appellees could prove that race predominated in HD69, as "the general movement of people followed a

clear non-racial pattern." U.S.Br.28. The reconfigurations "reunified" voting districts ("VTDs") "that had been split in the benchmark plan and eliminated the benchmark district's irregular boundaries." U.S.Br.28. Moreover, the final district retained over 83% of its residents, with its BVAP largely unchanged (55.2% versus 56.3%). JA640, 1090.

The majority nevertheless found the conclusion that race predominated "inescapable." JS.App.49. Among other things, it faulted the legislature for not "collecting largely white Chesterfield County precincts" from HD27. JS.App.48. But as Delegate Jones explained, that would have undermined the effort to make HD69 more Richmond-centric. JA1795. The majority found it probative that "the BVAP of the populations moved in and out of District 69 to achieve population equality was nearly identical." JS.App.49. At best, that is an argument that racial considerations in other districts affected HD69, but, as shown, all the Richmond districts are better explained by non-racial factors.

b. HD70's design likewise furthered traditional principles, "with most of the boundaries therein drawn on the basis of precinct and VTD lines." JS.App.316. As Delegate Jones testified, the changes from the benchmark version allowed the district "to better represent suburban interests" by ceding the "more Richmond-centered population to HD 69 and HD 71." JS.App.317; *see* JA1797. The district court, in its first opinion, agreed that the newly-configured district "represent[ed] objectively identifiable communities of interest." JS.App.317. The only seeming

discrepancy—which existed in the 2001 map—is the district's northern reach into Henrico County. But the incumbent delegate lives there, necessitating that "turret." JS.App.148.

In nonetheless insisting that race "plain[ly]" drove the line-drawing in HD70, the majority emphasized that the district had a "surplus BVAP" of 61.8% in the benchmark plan and a 56.4% BVAP in the 2011 plan. JS.App.46. But the majority simply ignored Delegate Jones' race-neutral explanation for these changes and the obvious community-of-interest considerations they furthered.

c. HD71 saw the largest BVAP increase of all the challenged districts, JA640, but the legislature still furthered traditional districting principles. Indeed, HD71 improved its compactness, JA638, retained over 80% of its core, JA1090, and sits in the same political subdivisions as in the benchmark map, JA639. Here, too, the district court ignored those considerations entirely, instead focusing solely on circumstantial evidence to conclude that "the legislature used race as the overriding criterion"—in part because Delegate Jones "conceded that the 55% BVAP threshold impacted the way the district was drawn." JS.App.40. But the same could be said of virtually every §5 district in the country.

The district court suggested that the legislature "disregarded traditional districting principles" because one VTD from Richmond's Fan neighborhood was transferred out of HD71. JS.App.42, 45. But the majority identified nothing to contradict Delegate Jones' testimony that he made that revision as a political favor for HD68's incumbent, not for race-

based reasons. JS.App.137. Finally, while the majority suggested that adding a VTD from Henrico County defeated the legislature's Richmond-centric goal, the legislature in fact *removed* more Henrico County VTDs from HD71 than it added. JS.App.42.

d. HD74 encompasses all of Charles City and extends west in a narrow strip along the northern border of Henrico County. JA1512. The district has retained the same "axe"-like shape since 1991, *see* JS.App.53, JA1067, and in the 2011 plan, it retained nearly 80% of its core, JA1090. The most notable change was the removal of a water crossing, JA1512, which Delegate Jones eliminated because it attracted criticism in *Wilkins*, JA1802; JS.App.324.

The majority "conclude[d] that race predominated" in HD74 largely based on its "irregular shape." JS.App.56. But the majority acknowledged that HD74 just "maintained the same bizarre shape" as in the benchmark plan. JS.App.54. The only other rationale it offered was that HD74 purportedly "donated" some black voters to other majority-minority districts. JS.App.55-56. But as the majority begrudgingly acknowledged in a footnote, the district also gained black voters by acquiring a high-BVAP VTD, JS.App.55 n.38, and ended with a BVAP 2.2% *above* the purportedly constraining 55% target, JA640.

2. North Hampton Roads (HD92, HD95)

a. Two challenged districts lie on a peninsula just north of the James River, in an area known as North Hampton Roads. As for HD92, in its first decision, the district court found "it hard to imagine a better example of a district that complies with traditional,

neutral districting principles." JS.App.335. The new majority likewise found no "actual conflict with traditional districting principles," acknowledging that HD92's "compactness score" improved and that "the number of split VTDs ... declined from three to zero." JS.App.62.

The new majority still "easily" concluded that "race predominated," positing that purportedly "race-based maneuvers" in a *different* district (HD95) allowed HD92 to "receive[]" black voters. JS.App.58, 62, 63. But the "ultimate object of the inquiry" is not "the legislature's predominant motive" in some *other* district, but rather "the district at issue." *Bethune-Hill*, 137 S. Ct. at 800. And there is no evidence that racial considerations dominated the construction of HD92—just the opposite. JS.App.171-72. Indeed, while the majority parroted testimony from Appellees' expert that "[a]ny approach [to HD92] that was even remotely based on traditional redistricting principles would have ended up adding a very substantial number of whites," JS.App.63, that pronouncement is irreconcilable with its concession that HD92 did not "conflict with traditional districting principles," JS.App.62.

b. Nor did race predominate in HD95, the so-called BVAP "donor" to HD92. JS.App.63. In the benchmark map, the North Hampton Roads region was home to the infamous "ferrymander," a small portion of HD64 separated from the rest of the district by the James River. JA1522, 1851-52. Delegate Jones eliminated that river crossing by having HD93—an unchallenged district, and the only contiguous district that was not overpopulated—absorb the precincts on

the peninsula. JA1520, 1522, 1851-53. HD95, in turn, extended northward to pick up a narrow area that was previously part of HD93. *Compare* JA1520 *with* JA1522; *see* JS.App.166-68.

The majority professed that it "cannot conceive of any race-neutral explanation for the added appendage" to HD95. JS.App.60 n.42, 61. Such an explanation is not only conceivable, but evident, as Delegate Jones provided two. First, he added these "heavily Democratic precincts" to HD95 to improve the electoral chances of Republicans in HD93. JS.App.166-67; JA3420-21. Second, the changes avoided pairing the HD93 and HD95 incumbents. JS.App.166-67.

3. South Hampton Roads (HD77, HD80, HD89, HD90)

The South Hampton Roads region, which sits below the James River, was one of Virginia's most underpopulated regions. JA1296. Indeed, the region was underpopulated by over 80,000 people, which required relocating an entire district (HD87) to northern Virginia. JA1815-16; *see* JS.App.64. Furthermore, the region is bounded on three sides by immutable geography—North Carolina to the south, the Atlantic Ocean to the east, and the Chesapeake Bay to the north. JA1815. Despite those constraints, Delegate Jones preserved the region's four pre-existing majority-minority districts without subordinating traditional districting principles to race.

a. HD77 is "in the Portsmouth area and was represented by Delegate Lionel Spruill during the 2011 redistricting process." JS.App.325. Although

underpopulated by some 3,000 people, its 57.6% BVAP in the benchmark plan increased to 58.8% in the 2011 plan—*i.e.*, away from the 55% target. JA640. The major adjustment was to add five precincts to the district's eastern portion. JA1513. Those five precincts are all in the city of Chesapeake and part of the South Norfolk community. In the 2001 plan, they were split among three districts. Delegate Spruill "requested" to "reunite the old city of South Norfolk," which had the added benefit of improving the district's adherence to "compactness, contiguity, [and] communities of interest." JA1818-19. Delegate Jones agreed, and also shortened the district's western arm by transferring the heavily Republican Airport precinct to his own HD76, which benefitted him politically. JA1819-20.

The majority nonetheless concluded that "race predominated." JS.App.73. First, the majority seized on HD77's unusual "general shape" and "low compactness score." JS.App.73. But like HD74, HD77 "already had an odd shape and an extremely low compactness score under the 2001 plan," JS.App.73, so no illicit "infer[ence]" can be drawn from "the legislature's decision to retain" that shape, JS.App.76. Next, the court noted that four "largely white" VTDs were "[i]nitially" moved into HD77 before four other majority-white VTDs were moved out. JS.App.74. But as Judge Payne recognized, these movements were inconsequential because HD77 "would have had considerable BVAP above the 55% target (and would have met the population target)" regardless. JS.App.191 n.53.

b. HD90 is the district from which HD77 acquired the precincts necessary to reunite South Norfolk. To correct the resulting population deficiency, HD90 added contiguous precincts from Virginia Beach and Norfolk City, improving its "compactness." JS.App.77. No additional cities, counties, or precincts were split in configuring HD90. 1A1211. Notwithstanding HD90's "consistencies with traditional districting criteria," the majority again perceived that "race predominated." JS.App.76-77. It first emphasized that four largely white VTDs shifted to HD77 and that, without that shift, HD90's BVAP "would have dropped below 55%." JS.App.78. But the majority refused to credit Delegate Jones' testimony that Delegate Spruill had requested the transfer of those four VTDs to HD77 for race-neutral reasons, faulting the House for not calling Delegate Spruill himself.

The majority next refused to credit Delegate Jones' testimony from the first trial that HD90's incumbent, Delegate Howell, had requested certain changes to HD90. In the majority's view, the testimony of Delegate Howell (whom Appellees never called at the first trial) at the second trial that he did not recall having have "extensive input," JS.App.79, into the district lines wholly discredited Delegate Jones' first-trial testimony as to what that input was.

Finally, the majority emphasized that the 2011 map split a VTD straddling the HD90/HD89 border in a manner that allowed HD89 to satisfy the 55% BVAP target, and that some other VTDs were split in a way that added BVAP to HD90. JS.App.78-79 As to the former, there were numerous ways for HD89 to achieve its target, indicating that race was not the

overriding factor. JS.App.186-87. As to the latter, Appellees' own expert's analysis confirmed that HD90's lines *excluded* large pockets of black voters. JA2703.

3. HD80, in the Portsmouth area, was likewise underpopulated by some 9,000 people. JA1205. Although its shape became more irregular, the underlying changes cannot plausibly be attributed predominantly to race. To start, the expansion options were limited, as the James River, the Atlantic Ocean, the Norfolk Naval Base, and the North Carolina border all imposed geographic constraints, and the district needed to "avoid pairing incumbents," including HD80 incumbent Delegate James and HD79 incumbent Delegate Joannou. JS.App.174-75. Delegate Joannou also requested the removal of some VTDs from his district, which became "an important factor" in reconfiguring HD80. JA3552-53.

Delegate Jones' solution was to add to HD80 precincts from HD79, which had been forced northeast to fill the space left behind by the relocated HD87. JA1831-32; *compare* JA1521 *with* JA1523. To reach those vacated precincts, the district had to skirt around the residences of the incumbents and avoid the heavily Republican precincts in HD76 that Delegate Jones did not want to surrender from his own district. JA2005-06. The resulting district "resemble[ed] a sideways 'S.'" JS.App.67. These changes, however, had only an incidental impact on HD80's BVAP: It increased by less than 2%. JA640. Moreover, while HD80 became less compact, the precincts it acquired from HD79 made that district more compact. JS.App.67.

The majority concluded that the district's unusual shape "cannot be explained" by traditional districting principles and further observed that white residents were moved out of HD80 at a higher rate than black residents. JS.App.66, 68. But the evidence reveals that the mapmakers designed HD80 largely for political reasons, including to benefit Delegate Joannou. Particularly given the well-established "correlation between race and politics," JS.App.158, the district's design cannot be attributed to race when all the evidence suggests otherwise.

d. The final challenged district in the region was HD89, which also was underpopulated and geographically constrained. JA640, 1515. Nonetheless, Delegate Jones retained over 82% of the district's core and kept it "entirely within the city of Norfolk." JS.App.69; JA1090. In finding "race ... the predominant factor," JS.App.70, the majority emphasized that HD89 added one majority-black VTD, removed a majority-white VTD, and split a handful of other VTDs. But the majority-black VTD came in at the request of its incumbent, who owned a business there. JS.App.182. And while one majority-white VTD was removed, HD89 "gained *numerous* heavily white VTDs." JS.App.182-83. Finally, to the extent the split VTDs show anything, it is that there was no clear pattern, as some splits *excluded* black voters from HD89—even though it "had the lowest BVAP of any challenged district" in the region, JS.App.70, 184-86.

4. Southside Virginia (HD63)

The last district, HD63, sits atop (constitutionally compliant) HD75 in Southside Virginia, which

extends from south of the James River to the border with North Carolina. JA1522. Despite what appear to be substantial modifications in sparsely populated precincts, *see* JA1510, HD63 retained 86.59% of its core, well above the statewide average, JA1090. The only additions to HD63 were on its eastern border, where it advanced to the James River to pick up precincts removed from HD74. JA1510, 1512. In connecting those precincts to its core, the district maneuvers around the majority-black precinct of Jefferson Park and avoids the residences of the incumbents from HD62 and HD66. JA1510. HD63 also ceded its four southernmost precincts and part of a fifth to HD75. JA1510. Ultimately, HD63's BVAP increased from 58.1% to 59.5%. JA640.

The majority nevertheless concluded that this exchange of precincts provided "overwhelming evidence ... that race predominated," as the precincts moved from HD63 to HD75 had higher BVAPs than the precincts left behind—purportedly forcing the legislature to move into HD74 for no other reason than to collect offsetting BVAP. JS.App.50. But adding population from HD63 to HD75—which needed population—could not have been done any other way: HD75 is directly to HD63's south. JA1510. Moreover, collecting territory from HD74 did not occur for the sake of race alone. Delegate Jones testified that the changes to HD63's eastern border unwinded a water crossing in HD74—as the map clearly shows. JS.App.157.

Finally, in what is probably the strangest-looking feature in all the challenged districts, the district lines create a "hook that wraps around New Hope precinct."

JS.App.93. That hook, which accounts for "the bulk of the splits in [the] district," JA1811, was drawn to honor Delegate Dance's request to retain a particular constituent. JA3080-81, 3409. Even the majority did not "characterize that hook as racially motivated." JS.App.155.

* * *

Once *all* the evidence is fully and fairly considered, it is plain that Appellees failed to meet their burden of proving that race predominated in the design of the challenged districts. Delegate Jones and his colleagues relied heavily on traditional districting principles, and although race may have been one factor among many, it did not overwhelm the process. If plaintiffs can establish a presumptive violation of the Equal Protection Clause by simply labeling every movement of black voters—movements that are inevitable in areas with ability-to-elect districts—a "donation" or "receipt" of BVAP, then it will be impossible for States to fulfill the core sovereign task of redistricting without facing judicial second-guessing. It may even "discourage voluntary compliance" with the VRA altogether. U.S.Br.15.

III. Each Of The Challenged Districts Would Satisfy Strict Scrutiny.

Although the majority never should have reached the strict-scrutiny analysis, each challenged district would satisfy that test—just as HD75 did two Terms ago. In affirming HD75, this Court made clear that legislatures may use experience-based rules of thumb, rather than elaborate empirical studies, to comply with the VRA. Demanding more would place legislatures—especially a body of part-time, citizen-

legislatures like the House of Delegates—in a position where compliance with the competing obligations imposed by federal law is a virtual impossibility. Thus, this Court admonished that courts must be careful not to "ask too much from state officials charged with the sensitive duty of reapportioning legislative districts." *Bethune-Hill*, 137 S. Ct. at 802. The district court invalidated all 11 of the State's longstanding majority-minority districts only by failing to heed that admonition.

A. Courts Cannot Ask Too Much of States Pursuing Their Compelling Interest in VRA Compliance.

As this Court's last decision in this case underscores, in the particular context of redistricting to avoid retrogression under §5, strict scrutiny is not fatal in fact. While the familiar compelling-interest/narrow-tailoring framework applies, the existence of a compelling interest is rarely contested. Although this Court has not definitively held that §5 compliance is a "compelling interest," seven Justices assumed as much the last time this case was before this Court. *See Bethune-Hill*, 137 S. Ct. at 801. As Appellees still "have never contested" that point, *id.* at 803 (Alito, J., concurring), the Court should do so again this time. Indeed, given that the next round of redistricting will occur outside the shadow of §5, it would be more than passing strange to definitively resolve an issue that this Court successfully side-stepped for the decades that the coverage formula held sway.

As for narrow tailoring, it is well settled that the legislature need not "show that its action was 'actually

... necessary' to avoid a statutory violation." *Id.* at 801. It must demonstrate only that it had "*good reasons* to believe' it must use race'" how it did to comply with the VRA. *Id.* In 2011, Virginia was a covered jurisdiction under §5 with an obligation to avoid retrogression, *Beer v. United States*, 425 U.S. 130, 141 (1976), which was measured by reference to the "benchmark" map—*i.e.*, the last legally enforceable map, 28 C.F.R. §51.54. There were 12 minority-majority districts in the benchmark map. The House thus had more than "good reasons" to believe that it needed to consider race to some degree in adjusting those districts for population changes while avoiding retrogression. At the same time, however, increasing the minority population "too much" vis-à-vis the benchmark map put the legislature at risk of claims that it engaged in racial gerrymandering or violated §2. *Gingles*, 478 U.S. at 46 n.11. It is little surprise, then, that this Court stressed that "[t]he law cannot insist that a state legislature, when redistricting, determine *precisely* what percent minority population §5 demands." *Bethune-Hill*, 137 S. Ct. at 801. Any other conclusion "would afford state legislatures too little breathing room, leaving them 'trapped between the competing hazards of liability' under the Voting Rights Act and the Equal Protection Clause." *Id.* at 802.

B. The Use of Race in Drawing the Challenged Districts Was Narrowly Tailored to Prevent Retrogression.

1. Applying that test, this Court has already held that the legislature "had sufficient grounds to determine" that a 55% BVAP threshold "was

necessary to avoid violating §5" in HD75. *Id.* at 801. In doing so, the Court endorsed the "functional analysis" Delegate Jones employed "when deciding upon the 55% BVAP target." *Id.* As the Court explained, Delegate Jones repeatedly met with the incumbent delegate from HD75, as well as with delegates from other majority-minority districts. *Id.* He considered results and turnout rates in recent elections, including in a rare recent primary election that had actually been contested. *Id.* And as with all 11 districts challenged here, Appellees never disputed that HD75 needed to be preserved as an ability-to-elect district, "or that white and black voters in the area tend to vote as blocs" at least in certain elections, *id.*; they contested only what the BVAP target should be. "In light of Delegate Jones' careful assessment of local conditions and structures," the Court concluded that "the State had a strong basis in evidence to believe a 55% BVAP floor was required to avoid retrogression." *Id.*

In rejecting Appellees' demand for further fine-tuning, the Court admonished them for "ask[ing] too much from state officials charged with the sensitive duty of reapportioning legislatures." *Id.* at 802. For example, while Appellees faulted Delegate Jones for failing to "memorialize" his assessment of HD75 in writing, the Court reiterated that legislatures need not "compile a comprehensive administrative record" to satisfy strict scrutiny. *Id.* Likewise, while the Court acknowledged that it was "possible" that drawing HD75 "with a BVAP below 55%" may not have violated §5, it reiterated that the relevant "question is whether the State had '*good reasons*' to believe a 55% BVAP floor was necessary to avoid

liability under §5," not whether that was actually the case. *Id.* Finally, while Appellees strenuously argued that the House's decision to target the same 55% BVAP threshold in all 12 districts rendered that target inherently suspect, this Court disagreed, explaining that it has not "condemn[ed] the use of BVAP targets," and that a 55% threshold is eminently reasonable given that "reducing the BVAP below 55% well might" "have a significant impact on the black voters' ability to elect their preferred candidate." *Id.*

2. All the same reasons compel the conclusion that the 11 districts challenged here satisfy scrutiny as well. Delegate Jones faced the same "difficult task," *id.* at 801, in redrawing all the pre-existing majority-minority districts, and he conducted the same kind of "functional analysis" as to all of them when determining how to avoid retrogression and to draw a map that would be precleared.

With all the districts, the map-drawing process was constrained by the fact that Virginia did not receive final census data until February 2011, yet had to get a new map in place in time for the 2011 elections. As a practical matter, that meant that the legislature had a mere six weeks to analyze the data, receive public input, collect requests from incumbents, make countless discretionary decisions about how to conduct the map-drawing process, and then engage in the arduous task of actually drawing all 100 districts. That map then had to pass both chambers and obtain gubernatorial approval. JA995-98. On top of all that, because Virginia was a covered jurisdiction, the plan had to be precleared with DOJ, which typically consumed 60 days or more. JA1768.

There was never any dispute (indeed, there is still no dispute) that all 12 of the districts "where minorities had constituted a majority of the voting-age population for many past elections[] qualified as 'ability-to-elect' districts." *Bethune-Hill*, 137 S. Ct. at 795. But while Delegate Jones gathered as much functional information as he could practically gather to determine what BVAP would avoid retrogression in those districts, the most reliable data for determining that number with precision—*i.e.*, contested primary election data—simply did not exist. And that problem could not be solved by analyzing more oft-contested congressional or presidential primaries because Virginia's off-year elections have distinct voting patterns. JA1973-74. Adding to the difficulties, voter registration records in Virginia do not reference race, making it impossible to pinpoint racial differences in voter registration. JA2154.

3. Cognizant of those limitations, Delegate Jones not only "look[ed] at the election results and the contested primaries" for all "members of the majority-minority districts," JA1920, but met extensively with incumbents and with virtually every member of the Black Caucus to get input. JA441. He found that delegates consistently "felt strongly that [the BVAP] needed to be north of 55 percent" in all 12 districts. JA1902. That number was supported by the demographics of the districts—nine exceeded 55% in the benchmark map, and the three others were close behind. And unlike "reducing a district's BVAP 'from, say, 70% to 65%," "reducing the BVAP below 55% well might" "have a significant impact on the black voters' ability to elect their preferred candidate." *Bethune-Hill*, 137 S. Ct. at 802.

The 55% figure was supported by the functional analysis this Court referenced in *Bethune-Hill*. For instance, delegates expressed concerns that bare majority districts would not suffice because black voters tend to have "lower registration" rates and "lower voter turnout." JA346, 376, 1928. As Delegate Dance from HD63 explained, "we need 55 percent at least ... [b]ecause a lot of us know that statistics show that we don't always vote." JA346. And while incumbents had recently won elections with comfortable margins in HD80, HD89 and HD77, delegates expressed concern that future, non-incumbent candidates would not be able to garner the crossover support that incumbents had enjoyed (which is why contested primaries provide the best insights). JA1952-53.

Anticipated population shifts buttressed targeting a BVAP of at least 55%. For example, "no one was comfortable" using a bare majority-minority target in HD71, the lone district that had dipped below 50% over the preceding decade, as rapid gentrification in the Richmond area portended continued decline in the district's BVAP over the coming decade. JA1782. In HD74 and HD69, the preferred candidates of black voters had lost elections in 2005 and 2009, respectively. JA443, 1924. Finally, while the most directly relevant data (*i.e.*, data from contested primaries in House elections) did not exist, data from other elections indicated that polarized voting persists across the relevant regions. Indeed, Appellees themselves have highlighted the persistence of racially polarized voting in HD70, HD90, HD92, HD95, and many other districts. JA2788.

In short, just as with HD75, the legislature plainly had the requisite "good reasons" to believe that keeping nine of the districts above 55% and raising the remaining three to that level was necessary to avoid a §5 violation. That is particularly so since "a reduction in supermajority districts must be treated as potentially and fatally retrogressive" if the State lacks evidence "that high racial polarization in voting is unlikely, or that high white crossover voting is likely, or that other political and demographic facts point to probable minority effectiveness." *Georgia v. Ashcroft*, 539 U.S. 461, 493 (2003) (Souter, J., dissenting). With no data to support such findings, the legislature simply could not risk reducing the majority-minority districts below the 55% threshold that most of them already satisfied.

C. The Majority's Strict Scrutiny Analysis Was Legally and Factually Unfounded.

Tellingly, neither Appellees nor the district court have ever disputed that the State had an obligation to avoid retrogression in all 12 districts. To the contrary, Appellees have insisted from the start that "[i]t is essential that these all be healthy performing majority-minority districts." JA2232. Instead, Appellees and the district court simply maintain that the legislature selected the wrong BVAP to accomplish that end in each district. Indeed, that is clear from the remedial map that the special master proposed after the district court invalidated the challenged districts. That map did not purport to eschew consideration of race; instead, it simply converts the 55% target BVAP *floor* into a 55% target BVAP *ceiling*. *See, e.g.*, ECF 323 at 121.

This case thus is not and has not ever been about *whether* government actors should have considered race. It is simply about *how* race is considered and whether state legislators or federal courts will draw the lines. "The law cannot insist that a state legislature, when redistricting, determine *precisely* what percent minority population §5 demands." *Bethune-Hill*, 137 S. Ct. at 802. By insisting on just that, Appellees and the district court once again "ask too much from state officials charged with the sensitive duty of reapportioning legislat[ures]." *Id.*

The district court began its strict scrutiny analysis by "find[ing] that the legislature's application of a single, 'mechanically numerical' 55% BVAP requirement to all 12 challenged districts strongly suggests that the legislature did not engage in narrow tailoring." JS.App.87 (quoting *ALBC*, 135 S. Ct. at 1273). That is exactly the same criticism Appellees leveled in this Court two Terms ago, trying to "liken the 55% BVAP floor here to the 'mechanically numerical view' of §5 this Court rejected in *Alabama*." *Bethune-Hill*, 137 S. Ct. at 802. Far from embracing that false equivalence, this Court rejected it, explaining that *ALBC* did not "condemn the use of BVAP targets," and certainly did not condemn an eminently reasonable target like 55%. *Id.* The Court then went on to analyze (and ultimately affirm) the legislature's use of that target in HD75 without employing any presumption—let alone a "strong" one—that it must be suspect since it was used in the other 11 districts as well.

The majority next accused the legislature of performing no "analysis of *any* kind to determine the

percentage of black voters necessary to comply with Section 5" in the remaining 11 districts, even stating that "Jones admitted as much." JS.App.88. That accusation is inexplicable, and reveals just how utterly divorced from the record the majority's decision is. Delegate Jones testified at length at both trials as to all the data and input he gathered to determine what BVAP was necessary to avoid retrogression in all 12 districts. Indeed, the majority was forced to admit as much in a footnote, but once again just dismissed all of his testimony as not credible—and even impugned the motives of the delegates who implored him to keep the BVAP above 55% to avoid retrogression. *See* JS.App.89 n.54.[3]

The majority faulted Delegate Jones for focusing on HD75 in determining what BVAP was necessary to avoid retrogression. But as he explained, he had very good reasons for paying particular attention to data from that district: HD75 was one of the few districts with a recent contested *primary*, making it one of the best sources of data for analyzing the critical question of whether black voters were able to elect *their* candidates of choice, and could do so when a current incumbent stepped down. Indeed, as his testimony reflected, Delegate Jones paid particular attention to *any* data that spoke to that question. To be sure, it would have been preferable to have such data from all

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[3] The district court faulted the House for not calling members of the Black Caucus who supported the BVAP target on the House floor to testify at trial. JS.App.88-89; *see, e.g.*, JA441, 450. But their contemporaneous floor statements were part of the record, and certainly did not need to be reiterated years later to be credited.

12 districts. But it is certainly well within the bounds of good faith to consider the data that actually exists, and to extrapolate to neighboring districts, rather than blindly guess what BVAP will avoid retrogression.

The majority's criticism of Delegate Jones for failing to perform an analysis of racially polarized voting to determine the extent of crossover voting was equally unfounded. Delegate Jones could not have performed such an analysis because the relevant data did not exist. Indeed, the analysis conducted by Dr. Palmer, on which the majority placed so much weight, admittedly did not rely on "House of Delegates elections results." JS.App.91 n.56. Instead, it was based solely on returns from the 2008 presidential election and the 2009 state gubernatorial race—elections that had little, if any, bearing on the legislature's obligation to ensure that minority voters would have the opportunity elect *their* candidates of choice, as opposed to reinforcing the unsurprising phenomenon that they tend to vote for Democratic candidates who survive the primary. *See Bartlett v. Strickland*, 556 U.S. 1, 15 (2009) (plurality op.) ("There is a difference between a racial minority group's 'own choice' and the choice made by a coalition."). And even putting the flaws in Dr. Palmer's study aside, this Court has already rejected the argument that citizen-legislatures must consider econometric studies in lieu of a functional analysis based on the demographics of benchmark districts and the experiences of colleagues who have stood for election in them.

As the foregoing confirms, the majority fundamentally failed to appreciate the exceedingly "difficult task" the legislature faced. *Bethune-Hill*, 137 S. Ct. at 802. There is no dispute—nor has there ever been—that the legislature had to target *some* BVAP threshold to avoid retrogression. Indeed, there is not even any dispute that the target had to exceed 50%. After considering the most relevant data available, the legislature arrived at a 55% threshold that garnered wide bipartisan support. Targeting that threshold did not require abandoning traditional districting criteria, or even subordinating it to race. To the contrary, most of the districts *already had* BVAPs above 55%, and the others were close behind. Particularly given the "breathing room" to which legislatures are entitled in this context, *id.*, the legislature's manifestly good-faith efforts to comply with the onerous demands that §5 imposed readily pass constitutional muster.

* * *

Nearly a decade ago, the House faced the unique time pressures imposed by the need to obtain preclearance for a House map designed for off-year elections. The House not only discharged that difficult task in timely fashion, but enacted a map that garnered bipartisan support. That map has governed the last four election cycles. There is no basis in law or logic at this late stage for replacing that duly-enacted map with a court-drawn map that considers race to a greater degree. If States really are entitled to "substantial deference" in drawing legislative maps, *Brown*, 462 U.S. at 847-48, then this Court should uphold Virginia's bipartisan-supported and duly-

enacted map, and defer further map-drawing until after the next census when Virginia will be free from the time pressures and mandatory race-consciousness imposed by §5 of the VRA.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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STATUTORY APPENDIX

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U.S. Const. amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,* and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a

member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Relevant Statutory Provisions Involved

52 U.S.C. §10301

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. §10304

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the first sentence of section 10303(b) of this title are in effect shall enact or seek to administer any

voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the second sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the third sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or

procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to

vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.