No. ______

# 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*

## JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED

1. Whether the district court conducted a proper "holistic" analysis of the majority-minority Virginia House of Delegates districts under the prior decision in this case, *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017), even though it ignored a host of evidence, including:

   a. the overwhelming majority of district lines, which were carried over unchanged from the prior map;

   b. the geographic location of population disparities, which imposed severe redistricting constraints and directly impacted which voters were moved into and out of the majority-minority districts; and

   c. the degree of constraint the House's Voting Rights Act compliance goals imposed in implementation, which was minimal.

2. Whether the *Bethune-Hill* "predominance" test is satisfied merely by a lengthy description of ordinary Voting Rights Act compliance measures.

3. Whether the district court erred in relying on expert analysis it previously rejected as unreliable and irrelevant and expert analysis that lacked any objective or coherent methodology.

4. Whether the district court committed clear error in ignoring the entirety of the House's evidentiary presentation under the guise of credibility determinations unsupported by the record and

predicated on expert testimony that should not have been credited or even admitted.

5. Whether Virginia's choice to draw 11 "safe" majority-minority districts of around or above 55% black voting-age population ("BVAP") was narrowly tailored in light of:

a. the discretion the Voting Rights Act afforded covered jurisdictions to "choose to create a certain number of 'safe' districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice," *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003), or

b. the requirement the Voting Rights Act, as amended, imposed on covered jurisdictions "to prove the absence of racially polarized voting" to justify BVAP reductions towards or below 50% BVAP, *id.* at 500 n.3 (Souter, J., dissenting).

6. Whether the district court erred in ignoring the district-specific evidence before the House in 2011 justifying safe districts at or above 55% BVAP.

## PARTIES TO THE PROCEEDING

The Plaintiffs below are: 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.

The Defendants below are: 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.

The Intervenor-Defendants below are: Virginia House of Delegates, M. Kirkland Cox in his official capacity as Speaker of the Virginia House.

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## JURISDICTIONAL STATEMENT

Appellants the Virginia House of Delegates and Speaker M. Kirkland Cox appeal to the Supreme Court from the permanent injunction of the Eastern District of Virginia entered on June 26, 2018, forbidding the use of Virginia House Districts HD69, HD70, HD71, HD74, HD77, HD80, HD89, HD90, HD92, and HD95 under the Fourteenth Amendment to the United States Constitution. This Court has jurisdiction, and this appeal presents multiple substantial federal questions.

## OPINION BELOW

The three-judge court's yet-to-be-published opinion is available at 2018 WL 3133819 and J.S.App.1-201. The court's 2015 decision is available at 141 F. Supp. 3d 505 and J.S.App.204-356.

## JURISDICTION

This appeal is from the district court's permanent injunction, J.S.App.202, and the Court has jurisdiction under 28 U.S.C. §1253. Appellants filed their notice of appeal on July 6, 2018. J.S.App.357.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Fourteenth Amendment and §§2 and 5 of the Voting Rights Act, 52 U.S.C. §§10301, 10304, which are reproduced at J.S.App.359-64.

## STATEMENT OF THE CASE

A. In 2011, the Virginia General Assembly passed a districting plan for its House of Delegates districts that garnered overwhelming bipartisan support including from all but two members of the House Black Caucus. Like all Virginia House plans since 1991, the 2011 plan contained 12 majority-black districts. In an effort to satisfy Voting Rights Act (VRA) §5, "legislators concluded that each of the 12 districts needed to contain a" black voting-age population ("BVAP") of "at least 55%," a target that "was used in structuring the districts." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 795-96 (2017).

That goal was founded on input from the House Black Caucus, and a broad consensus supported it. Delegate Lionel Spruill, the Black Caucus Vice Chair, stated on the House floor in 2011 that "mostly every member of the Black Caucus" had input, as did NAACP leaders in Suffolk, Chesapeake, and Virginia Beach. Plaintiffs' Exhibit ("PEX") 35 at 142, 146-47, 149. Delegate Rosalyn Dance, another Black Caucus leader, advocated for the plan, stating "it does provide the 55 percent voting strength that I was concerned about as I looked at the model and looked at the trending as far as what has happened over the last 10 years." PEX35 at 157; *see also* J.S.App.101. That percentage was necessary, she argued, because of comparatively low black turnout reflected in "the statistics that we're working with." PEX33 at 45. Delegates Spruill and Chris Jones, the plan sponsor, also identified in 2011 multiple recent defeats of minority-preferred candidates in majority-black districts, including House Districts HD74 and HD69, as the basis for drawing

55% BVAP districts. PEX32 at 23; PEX33 at 45; PEX35 at 41-42, 144-45.

No member of the Black Caucus either opposed the 55% BVAP target or disputed that "mostly every member of the Black Caucus" had input. J.S.App.101.

To be sure, two white Democratic delegates argued for BVAP reductions in majority-black districts to create minority influence districts. PEX35 at 64, 74, 79-80, 126-27. Delegate Spruill vehemently disagreed, observing that even districts with black majorities had not always performed. PEX35 at 144-45. The House responded to his speech with "Applause." *Id.* at 149. Delegate David Englin, a Democratic member from Alexandria, argued that "to suggest that Democrats voting for this plan are trying to harm minorities or not sufficiently standing up for minorities is an affront and an offense that is not borne out by the facts." Intervenors' Exhibit ("IEX") 4 at 12.

The plan passed with near-unanimous support from both political parties and the House Black Caucus. The Department of Justice Voting Rights Section precleared the plan.

B. In December 2014, residents (the "Plaintiffs") of the majority-black districts (the "Challenged Districts") brought this case under the Equal Protection Clause, alleging a single cause of action under the racial-gerrymandering theory first recognized in *Shaw v. Reno*, 509 U.S. 630 (1993). A three-judge district court convened pursuant to 28 U.S.C. §2284(a). The Virginia House of Delegates and its Speaker (collectively, the "House"), intervened and assumed responsibility for defending the plan.

1. In 2015, after a four-day trial, a divided district court ruled for the House. J.S.App.204. District Judges Robert Payne and Gerald Bruce Lee found no Fourteenth Amendment violation because the 55% BVAP goal did not conflict with the House's non-racial districting criteria, except in HD75. The majority found that district narrowly tailored under VRA §5 because the House had "'good reasons' for holding the BVAP in HD 75 just above 55% to ensure that the district *remained* a performing Section 5 district for minority-preferred candidates." J.S.App.311.

Circuit Judge Barbara Milano Keenan dissented, arguing that the 55% BVAP goal "establishes [racial] predominance as a matter of law." J.S.App.342.

2. This Court affirmed in part and vacated in part. *Bethune-Hill*, 137 S. Ct. at 802. It affirmed the lower court's judgment on HD75, concluding that "[r]edrawing this district presented a difficult task, and the result reflected the good-faith efforts of Delegate Jones and his colleagues to achieve an informed bipartisan consensus." *Id.* at 801. The Court, however, found two errors in the district court's predominance analysis: (1) it required Plaintiffs to establish "an actual conflict between the enacted plan and traditional redistricting principles," *id.* at 797-98, and (2) "it considered the legislature's racial motive only to the extent that the challengers identified deviations from traditional redistricting criteria that were attributable to race and not to some other factor," *id.* at 799-800.

The Court remanded. It instructed the lower court to consider whether predominance might be shown "in the absence of an actual conflict," *id.* at 799, and to

conduct a "holistic analysis" to "take account of the districtwide context," rather than "divorce any portion of the lines…from the rest of the district." *Id.* at 800. The lower court, it held, "must consider all of the lines of the district at issue." *Id.*

3. In October 2017, the district court conducted a second trial, and, on June 26, 2018, it issued a second split decision, this time concluding that race predominated in all 11 remaining Challenged Districts and that none was narrowly tailored. J.S.App.1.

Circuit Judge Keenan and District Judge Arenda Wright Allen (who replaced Judge Lee) predicated their predominance finding on several legal principles. First, the majority disregarded the House's evidence of high core retention in the Challenged Districts, concluding that "a district with 90% core retention still may have selected the remaining 10% of its population based exclusively on race." J.S.App.81-82. Second, the court disregarded the House's evidence of coordinated population movements in response to geographically lopsided population disparities in the Commonwealth, finding that information legally irrelevant under this Court's holding that an equal-population goal is "not one factor among others to be weighed" in the predominance inquiry, but rather "is part of the redistricting background, taken as a given." *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270 (2015). J.S.App.80-81. Third, the majority opinion found it irrelevant whether or not a "district begins with a BVAP over 55%" or whether "particular district lines were…necessary to achieve the 55% figure." J.S.App.19.

The court then proceeded to credit Plaintiffs' expert and fact witnesses in every respect and discredit the House's expert and fact witnesses in every respect. While conceding "that the legislature relied on traditional districting criteria in making certain line-drawing decisions" and that there were "race-neutral explanations for specific district lines," J.S.App.82, the court neither discussed nor weighed any of them. It discussed only what it perceived to be the House's racial motives and found race predominant across the board. It emphasized that "the 11 remaining challenged districts in this case were inextricably intertwined" because some black residents were transferred from districts with higher BVAP (the court called these "donor" districts) to those with lower BVAP (the court identified these as recipient districts). J.S.App.83.

Turning to strict scrutiny, the court found that the use of one target, 55% BVAP, for all districts "strongly suggests that the legislature did not engage in narrow tailoring." J.S.App.87. The court then concluded from a racial polarized voting analysis by Plaintiffs' expert, Dr. Maxwell Palmer, that "a 55% BVAP was not required in any of the 11 remaining challenged districts" because lower BVAP levels would enable voters to elect Democratic Party candidates. J.S.App.90-93. The court also found it irrelevant that there was no evidence in 2011 to justify BVAP reductions under VRA §5's retrogression prohibition because "it is the intervenors' burden to justify their predominant use of race." J.S.App.95.

The court therefore found the 11 remaining Challenged Districts unconstitutional and enjoined their use in future elections. J.S.App.202.

Judge Payne dissented. J.S.App.98-201. He analyzed both the racial and race-neutral goals line by line, district by district, and concluded that race did not predominate in any of the Challenged Districts.

The House filed a timely notice of appeal. The House's standing to appeal is well established. *See, e.g.*, *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 194 (1972); *Karcher v. May*, 484 U.S. 72, 77-83 (1987).

## REASONS FOR NOTING PROBABLE JURISDICTION

The Court should note probable jurisdiction and reverse.

### I. Race Was Not Predominant

A racial-gerrymandering plaintiff "bears the burden to show…that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Bethune-Hill*, 137 S. Ct. at 797 (quotations and edits omitted). "To satisfy this burden, the plaintiff must prove that the legislature subordinated traditional race-neutral districting principles to racial considerations." *Id.* (quotations omitted).

The district court's remand task was "to determine in the first instance the extent to which, under the proper legal standard, race directed the shape of these 11 districts." *Id.* at 800. This requires a "holistic analysis" of the 55% BVAP target's effect on "all of the lines of the district at issue." *Id.* at 800. "A holistic

analysis is necessary to give [the] evidence its proper weight." *Id.*

But the district court did not apply that holistic standard. It looked at only some lines, ignored others, weighed only race-related evidence, ignored all other evidence, and did not use "demanding" scrutiny, *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (quotations omitted), to distinguish run-of-the-mill VRA compliance from suspect racial sorting. The court's errors infected its analysis of each Challenged District.

A. The district court applied erroneous legal principles for assessing predominance and, as a result, failed to give the "evidence its proper weight." *Bethune-Hill*, 137 S. Ct. at 800.

1. The district court did not consider "all of the lines." *Id.* at 800. It disregarded all lines retained from the prior map and considered only those changed, even though it conceded this might omit 90% of each district from review. J.S.App.81-82. This overt rejection of this Court's plain-as-day command—all means *all*—was a different rendition of the court's initial error in considering only lines exhibiting "a deviation from, or conflict with, traditional redistricting principles." *Bethune-Hill*, 137 S. Ct. at 799. Both errors equally ignore "the district as a whole." *Id.* at 800. As *Bethune-Hill* explained, "any explanation for a particular portion of the lines…must take account of the districtwide context." *Id.* at 800. Because choices to move and retain constituents are made together in one process, reviewing the portions moved apart from those retained is a myopic analysis of decisions "in isolation." *Id.*

Moreover, the choice to retain residents, just as much as the choice to move them, is a legislative policy choice "to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Core retention is a traditional districting principle, *see Karcher v. Daggett*, 462 U.S. 725, 740 (1983), that other three-judge panels—in conflict with the decision below—have weighed heavily in the predominance inquiry, *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 590 (N.D. Ill. 2011); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 432 (S.D.N.Y.), *aff'd*, 543 U.S. 997 (2004); *Robertson v. Bartels*, 148 F. Supp. 2d 443, 454-56 (D.N.J. 2001).

The district court erroneously gave no weight to the "high degree of individual district core retention" in each Challenged District, IEX14 ¶¶76-79, and considered only between 18% and 38% of each district, i.e., the percentage changed, *see* IEX15 at 15. The fact witnesses testified that continuity was their priority in drawing the Challenged Districts. 2 Tr. 517:7-8, 695:6-9. And Dr. Palmer testified that, under his statistical analysis, the most predictive factor—more than race—of whether or not a voting district or "VTD" was included "in a challenged district" is "whether the VTD was in the benchmark version of the district." 2 Tr. 448:25-449:15. Thus, the court's district-by-district analysis erroneously ignored what all evidence identified as the predominant factor.

2. The district court erroneously disregarded the geographic location of population disparities in assessing population movements, J.S.App.81, even though that evidence may explain why a legislature

moved a district one direction and not another. For example, a legislature may move an underpopulated district east rather than west if its eastern neighboring district is overpopulated and its western neighboring district is underpopulated. And, if an underpopulated district borders a district at perfect population that, in turn, is bordered by an overpopulated district, the legislature may use the middle district as a funnel to achieve equality, removing perhaps thousands of residents from the middle district and replacing them with new residents, even though it was at equality. *See* J.S.App.148-49. Indeed, the geography of population loss and gain can result in highly complex maneuvering of dozens of districts in concert, creating a "ripple effect" spanning the state or moving circularly in regions.

These dynamics belong in a "holistic" inquiry because "[d]istricts share borders…, and a legislature may pursue a common redistricting policy toward multiple districts." *Bethune-Hill*, 137 S. Ct. at 800. Assessing districting moves apart from these dynamics is like second-guessing why a single square on a Rubik's cube is maneuvered without considering its connection to other squares.

Here, the district court made that mistake in viewing the Challenged Districts as an "inextricably intertwined" system of "donors" and recipients of black residents. J.S.App.83. That theory took the Challenged Districts in isolation, as if the House redistricted them separately from other districts. But the map-drawers actually viewed the districts as part of an integrated flow together with majority-white districts to address geographically lopsided population disparities—not

principally as donors or recipients of *black* residents. For example, a series of integrated moves brought excess population from Chesterfield County into the underpopulated Challenged Districts centered in downtown Richmond and excess population near Williamsburg into underpopulated Challenged Districts centered in Newport News and Hampton. Through those movements, so-called "donors" HD74, HD70, and HD95 were part of coordinated efforts to bring population to so-called recipients HD69, HD71, and HD92, which were underpopulated. Though these moves ultimately resulted in districts above 55% BVAP, numerous other avenues to that goal existed. *See infra* §I.A.3. The geographic limitations were more constraining and predominantly motivated the line-drawing.

The district court did not find otherwise. Rather, it erroneously read this Court's *Alabama* holding that "an equal population goal is not one factor among others to be weighed against the use of race," 135 S. Ct. at 1270, to render these dynamics legally irrelevant, J.S.App.81. But *Alabama* held only that the goal to equalize population alone says nothing about "*which* voters the legislature decides to choose" to move into or out of a district. 135 S. Ct. at 1271. In contrast, the geographic *location* of population disparities is central to that question. A "ripple effect" does not result merely from a population-equalization goal; it reflects motive to preserve district cores, compactness and contiguity, incumbencies, and communities of interest. This is because the alternative is to draw bizarre tentacles from underpopulated to overpopulated areas, bypassing intervening districts at perfect population—thereby sacrificing traditional criteria. Thus, in declining to

consider the legislature's solutions to geographic challenges, the court erroneously weighed only race and ignored these predominant factors.

3. The district court erroneously declined to consider whether or not districting decisions with racial impact were "necessary to achieve the 55% figure," J.S.App.19, and thus failed to link districting moves to "actual considerations that provided the essential basis for the lines drawn," *Bethune-Hill*, 137 S. Ct. at 792. As the United States argued in *Bethune-Hill*, assessing whether a racial target predominated means assessing how constraining it was in implementation; race does not predominate if "local demographics are such that any reasonably compact districts that respect political boundaries" meets the target or if "a racial target is but one factor." Brief for the United States, *Bethune-Hill v. Va. State Bd. of Elections*, 12-13 (No. 15-680) ("U.S. Br.").

In other words, residents are not evenly dispersed by race, and a mere disparate racial impact implies, at most, "being aware of racial considerations," not "being motivated by them." *Miller*, 515 U.S. at 916. If there were many ways to achieve a selected VRA-compliance target, non-racial goals dictated why one was chosen over others. By contrast, in cases like *Alabama*, where a majority-minority district saw the addition of "15,785 individuals" of whom "just 36 were white," 135 S. Ct. at 1271, the disparity in population movement suggests a severely constraining VRA compliance target necessitating laser-focused racial sorting.

But the district court imputed racial motive to all moves with racial impact, in spite of overwhelming evidence that the 55% BVAP target was supported by

local demographics and hardly constraining. Plaintiffs' expert, Dr. Jonathan Rodden, admitted that, "in most instances," there were "other ways to get" to 55% BVAP, 2 Tr. 162:24-163, J.S.App.112, which is unremarkable when 10 of the 11 Challenged Districts were near or above 55% BVAP prior to redistricting. Indeed, over 158,000 black voting-age persons living in the same cities and counties as the Challenged Districts were placed in majority-white districts, not in the Challenged Districts. PEX71 at 59-60. This was enough persons for four additional 55% BVAP districts.

Consequently, there are no "stark splits in the racial composition of populations moved into and out of" the Challenged Districts. *Bethune-Hill*, 137 S. Ct. at 800. The average BVAP of territory moved into the Challenged Districts was 47.85%; the average BVAP moved out was 41.7%. PEX50 Table 8. The BVAP of territory moved from majority-white districts to Challenged Districts was under 50% in 14 of the 16 such shifts. PEX71 at 60. Of the locality splits Plaintiffs' expert identified, over half (12 of 21) place territory of below 50% BVAP in Challenged Districts. PEX71 at 57-60.

Of the 24 VTDs split between a Challenged District and majority-white district, 13 placed territory of 50% or less BVAP into a Challenged District. PEX71 at 55. For example, the VTD splits between Challenged District HD63 and majority-white districts placed 3,800 black voters in majority-white districts and 2,895 black voters in HD63, PEX71 at 52; the splits between Challenged District HD89 and majority-white districts placed 8,300 black voters in majority-white districts and 1,938 black voters in HD89, PEX71 at 54; and the

splits between Challenged District HD80 and majority-white district HD79 placed 1,371 black voters in HD79 and 265 black voters in HD80, *id.* The plan placed 52,126 black voters in Virginia Beach in majority-white districts and 11,051 in Challenged District HD90, PEX71 at 59; it placed 9,914 black voters in split Richmond "unincorporated places" in majority-white districts and 9,038 in Challenged Districts, PEX71 at 58; it placed 2,389 black voters in Hopewell in majority-white HD62 and 3,395 in majority-black HD63, PEX71 at 57.

Over 45% of black voters in Chesapeake, 43% of black voters in Suffolk, 28% of black voters in Portsmouth, and 27% of black voters in Norfolk were placed in majority-white districts. PEX71 at 59. While many black residents did end up in Challenged Districts, the demographics did not require racially predominant redistricting to preserve districts at 55% BVAP. The target was not constraining; other criteria predominated.

Ignoring all this, the district court emphasized that territory split between a Challenged District and non-challenged district typically "allocated to challenged districts…a higher BVAP percentage than the portions allocated to non-challenged districts." J.S.App.24 (quotations omitted). But that is hardly surprising or meaningful when the state intentionally drew VRA districts. Unless VRA compliance is inherently suspect, the inquiry must be into the *degree* of difference and constraint. The court ignored that factor and the overwhelming evidence against predominance.

4. The district court did not apply a "demanding" standard. *Easley*, 532 U.S. at 241. To the extent its

findings are even near accurate, it simply described ordinary VRA compliance, which is not inherently suspect.

In entertaining this case two terms ago, this Court had the opportunity to find VRA compliance presumptively unconstitutional, since it was then clear "that the 55% BVAP figure was used in structuring the districts." *Bethune-Hill*, 137 S. Ct. at 795 (quotations omitted). In calling instead for a "holistic" analysis, the Court drew a distinction between ordinary VRA compliance and suspect racial predominance. As the United States observed in *Bethune-Hill*, "traditional districting principles are embedded in the VRA's standards," U.S. Br. at 14 n.4, so the VRA does not ordinarily require subordinating neutral goals to race. Accordingly, the predominance test must be geared towards identifying those unusual cases where "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines," *Miller*, 515 U.S. at 913, not merely towards describing VRA compliance.

The district court's opinion, however, is simply a drawn-out way of saying "that the 55% BVAP figure was used in structuring the districts." In finding that BVAP is normally higher in VRA districts than majority-white districts, that there is a correlation between a precinct's racial composition and its likelihood of placement in a VRA district, and that BVAP dropped in Challenged Districts with higher BVAP (i.e., potentially "packed" districts) and rose in Challenged Districts with lower BVAP (i.e., potentially "cracked" districts), the district court identified evidence present in virtually all jurisdictions that face

VRA issues. By subjecting the House's plan to strict scrutiny, the district court's decision renders every majority-minority district in the nation presumptively unconstitutional. That is the rule *Bethune-Hill* rejected.

B. The district court committed clear error in weighing the evidence. It is implausible that every House fact witness was dishonest, that every House expert used bad methodology, that race predominated in every Challenged District, and that no Challenged District needed to be above 55% BVAP under VRA §5—and, at the same time, that every fact witness for Plaintiffs was honest and accurate, every expert witness for Plaintiffs used reliable methodology, and every factual inference was in their favor. In other words, the district court spurned a "holistic" analysis weighing the "race-neutral explanations for specific district lines" it conceded exist, J.S.App.82, considered only racial explanations, and transparently attempted to shield its one-sided conclusions from review by labeling them findings of fact and credibility. That is paradigmatic clear error.

In exceptional case like this, it is "definite" that "a mistake has been committed." *Easley*, 532 U.S. at 242 (quotations omitted). And, while this Court "will not lightly overturn the concurrent findings of the two lower courts," here "there is no intermediate court, and [this Court is] the only court of review." *Id.* at 242-43.

1. The district court erred in its treatment of expert testimony.

Most obviously, it erroneously relied on expert analysis it previously rejected by a unanimous vote.

Plaintiffs' expert at the first trial, Dr. Ansolabehere, prepared a statistical analysis concluding that a VTD's racial composition is a better predictor than its political composition of its likelihood of being included in a Challenged District. But the district court rejected it because of technical flaws and because the analysis failed to account for traditional districting criteria to be weighed against racial goals. J.S.App.296. Judge Keenan's dissent "agree[d] with the majority's criticism of Dr. Ansolabehere" on this basis. J.S.App.355 n.48. But the second opinion relied heavily on the same analysis and a materially identical one by Dr. Palmer, which also did not account for traditional criteria. J.S.App.20-25. The court's diametrically contradictory conclusion conflicts with its prior opinion and the three-judge panel decision in *Backus v. South Carolina*, 857 F. Supp. 2d 553, 565 (D.S.C. 2012), which rejected a similar analysis. It is clear error and violates the law of the case doctrine. *See, e.g., United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993); *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987); J.S.App.117-120.[1] Further, these analyses included HD75, the district this Court upheld, in their calculations, which skewed the result.

Additionally, the court erred in admitting, crediting, and relying heavily upon so-called expert testimony amounting to "subjective belief" and "speculation," not reliable methodology. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993). Dr. Rodden created "dot-density" maps purporting to show racial demographics

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[1] The sole traditional criterion these analyses accounted for was core retention, and, as discussed above, they identified core retention as more predictive than race.

by representing white residents with white dots and black residents with black dots. His report and testimony consisted of his interpretation of those dots. But his "methodology" was nothing but a "visual walkthrough" of the maps and "personal opinions and speculation" about legislative motive with color-commentary. *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 861 (9th Cir. 2014); *United States v. Brewer*, 783 F.2d 841, 843 (9th Cir. 1986) (finding expert testimony unnecessary to view photographs because a factfinder can assess what a picture depicts). His "I-know-it-when-I-see-it" approach, *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1106-07 (7th Cir. 1994), did not involve an itemized set of metrics he considered or any indication of how he measured them or how each compares across a consistent data set. He instead discussed criteria ad hoc, randomly stating, for example, that HD70 is "quite non-compact" without a measurement, PEX69 at 30, or assessing other districts' compactness. He offered a journalistic narrative about motive and credibility—a topic beyond the competency of expert testimony, *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 546-47 (S.D.N.Y. 2004); *United States v. Hill*, 749 F.3d 1250, 1260 (10th Cir. 2014)—not methodologically sound conclusions.

And those few opinions amenable to objective review were debunked. Dr. Rodden's report stated that "[i]t is not possible to draw five districts that meet the 55 percent target without including the African-American section of Hopewell," PEX69 at 11, but John Morgan, the House's map-drawing consultant, created an alternative plan doing just that, 2 Tr. 712:9-713:1. Similarly, it took Mr. Morgan ten minutes to draw four

alternative configurations of HD95 all exceeding the 55% BVAP target and directly refuting Dr. Rodden's contention that it could only exceed 55% in the configuration the legislature chose. 2 Tr. 686:5-18. Dr. Rodden eventually conceded these errors, *see* J.S.App.114-15, and retreated to the position that "if it's possible to achieve 55 percent without" the selected configuration then "that's stronger evidence of racial predominance" because the legislature "did it anyway." 2 Tr. 352:20-24. But "anyway" connotes non-racial reasons. Besides, Dr. Rodden was offered as an expert to provide a reliable methodology, not an attorney to advocate the legal conclusion of predominance, which is not a measurable social-science concept. J.S.App.109-114.

Dr. Rodden's presentation was, in addition, an erroneous way to assess legislative motive because map-drawers do not look at dots when they redistrict, so Dr. Rodden's pictures did not reflect what anyone saw or thought in the 2011 redistricting. The dots in Dr. Rodden's map are placed randomly within census blocks, and he omitted the block lines, leaving it a mystery how far each dot is from the residents it purports to signify. And Dr. Rodden provided no corresponding numerical data, so only by eyeballing the maps can one guess how many individuals are represented in any space. 2 Tr. 329:17-18. But map-drawers build districts with census blocks and numbers, not by grabbing isolated individuals or dots, so Dr. Rodden's method did not reverse engineer any actual motive.

2. The district court erred in transparently attempting to "insulate [its] findings from review by

denominating them credibility determinations." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575-76 (1985). The House sponsored extensive testimony in both 2015 and 2017 from Delegate Chris Jones, the principal architect of the plan, and in 2017 from John Morgan, the consultant assisting Delegate Jones. They testified at length regarding redistricting motive, and their testimony was highly probative to the "actual considerations" for district lines. *Bethune-Hill*, 137 S. Ct. at 799. The district court did not weigh these considerations holistically; it ignored them, finding neither witness believable—even though the court's first opinion credited Delegate Jones and his testimony formed the basis of this Court's initial decision. *See id.* at 797. The court's determinations are "founded on factual inferences that the evidence did not permit." *Doe v. Menefee*, 391 F.3d 147, 164 (2d Cir. 2004) (Sotomayor, J.).

The court discredited Mr. Morgan principally because he was not called in the first trial. J.S.App.32-33. But, because a witness does not choose when to be called, that timing is irrelevant to his credibility.[2] The court also perceived conflicts between Mr. Morgan's testimony and Dr. Rodden's, but, as discussed, the latter's testimony should never have been credited—or even admitted. J.S.App.105. The court, in addition, found that Mr. Morgan could not have been accurate in saying he had election-return data at the census-block

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[2] Mr. Morgan was called at the second trial because only then had this Court ordered an examination of "all of the lines" and only then had Plaintiffs presented Dr. Rodden's extensive speculation at the lowest levels of geography, calling for a rebuttal at that level. J.S.App.103.

level when it is reported at the VTD level. J.S.App.34-35. But Mr. Morgan did not claim that he had data to identify, on a political basis, where to split VTDs, but simply that he coded all census blocks in a VTD with the same political data—which all trial experts admitted is possible—and tried to place as little of a VTD as possible in a district where that political makeup would be disadvantageous. J.S.App.106-07. Nothing in the record conflicted with this testimony, and Dr. Rodden agreed that consultants use political data at the block level in that manner. 2 Tr. 957:6-12.

Likewise, the district court discredited Delegate Jones because of small discrepancies between his testimony in 2015 and 2017. J.S.App.35-36. For example, Delegate Jones testified in 2015 that he believed a portion of HD89 included a small business owned by the incumbent when, in fact, one location of that business was just on the other side of the street and another was in a different section of the district. Similarly, he testified in 2015 that an odd contortion in HD63 was intended to exclude a potential primary opponent to the incumbent, when the incumbent testified in 2017 that it was to include a constituent she wanted in her district. These and similar discrepancies were immaterial, unrelated to racial considerations, and hardly the basis to discredit the entirety of Delegate Jones's testimony.

The district court also found Delegate Jones's testimony that Black Caucus members had input in the plan to conflict with the testimony of Black Caucus member witnesses who claimed in 2017 they had no input in the redistricting. J.S.App.36-37. But dispositive video evidence corroborates Delegate Jones.

Video-recorded speeches on the floor in 2011 state that "mostly every member of the Black Caucus" was consulted. PEX35 at 142, 146–47.[3] All Black Caucus trial witnesses were present then. None rose to refute this representation. Crediting their testimony over Jones's was clear error. *See Anderson*, 470 U.S. at 575 (stating that credibility determinations are vulnerable where "[d]ocuments or objective evidence…contradict the witness' story"); *see also Menefee*, 391 F.3d at 164; *Matter of Complaint of Luhr Bros., Inc.*, 157 F.3d 333, 339-43 (5th Cir. 1998); *Ray v. Clements*, 700 F.3d 993, 1016-17 (7th Cir. 2012); *Bishopp v. District of Columbia*, 788 F.2d 781, 785-86 (D.C. Cir. 1986).

## II. The Challenged Districts Are Narrowly Tailored

The district court erred in finding none of the Challenged Districts narrowly tailored under VRA §5. A district is narrowly tailored "when the legislature has good reasons to believe it must use race in order to satisfy the Voting Rights Act." *Bethune-Hill*, 137 S. Ct. at 801 (quotations omitted).

Virginia was a VRA §4 covered jurisdiction and its redistricting plan was required to be precleared judicially or administratively under VRA §5. *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 323 (2000). Unlike VRA §2—which applies nationwide and requires minority-opportunity districts only if "preconditions," including racially polarized voting, are proven, *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017)—VRA §5

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[3] House members in 2011 understood they were creating a court record. PEX35 at 142-43; PEX40 at 34.

applied only where Congress had "reliable evidence of actual voting discrimination," *South Carolina v. Katzenbach*, 383 U.S. 301, 329 (1966), to justify shifting the burden to the state to prove "the absence of backsliding," *Reno*, 528 U.S. at 335. So, unlike jurisdictions that can safely ignore race absent "good reasons" to fear the §2 preconditions might be proven, *Cooper*, 137 S. Ct. at 1470, §5's preconditions applied in Virginia by operation of law. Its plan was presumptively retrogressive unless proven otherwise.

It is undisputed that the 2001 House plan, the "status quo" benchmark, *Reno*, 528 U.S. at 323, contained 12 ability-to-elect districts, and BVAP levels in 11 of 12 of those were near or above 55%. Legally bound to ensure the absence of retrogression, Virginia had to use race in "structuring the districts." *Bethune-Hill*, 137 S. Ct. at 795 (quotations omitted).

Virginia's options to accomplish that compelling state interest, *see League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 518 (2006) (Scalia, J., concurring), were limited because Congress amended §5 in 2006 to tighten the preclearance prerequisites. The amendment reversed this Court's decision in *Georgia v. Ashcroft*, which had held that §5 could be satisfied by "influence districts"—"where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." 539 U.S. 461, 482 (2003). According to the majority, "a State may choose to create a certain number of 'safe' districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice," or "a State may choose to create a greater number of districts in which it is

likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice." *Id.* at 480. Because "[e]ither option will present the minority group with its own array of electoral risks and benefits," "Section 5 does not dictate that a State must pick one of these methods of redistricting over another." 539 U.S. at 480 (quotations omitted).

But, in reversing the *Ashcroft* decision, Congress "adopted the views of the dissent" of Justices Souter, Stevens, Ginsburg, and Breyer. *Alabama*, 135 S. Ct. at 1273. While observing that not all "shifts from majority-minority to coalition districts" are retrogressive, that opinion contended that a state choosing that shift "bears the burden of proving that nonminority voters will reliably vote along with the majority." *Ashcroft*, 539 U.S. at 492 (Souter, J., dissenting). "If the State's evidence fails to convince a factfinder 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, a reduction in supermajority districts must be treated as potentially and fatally retrogressive, the burden of persuasion always being on the State." 539 U.S. at 493. Accordingly, it concluded BVAP reductions towards 50% are retrogressive without persuasive proof of "the absence of racially polarized voting." *Id.* at 500 n.3.

By act of Congress, that view became the law and bound Virginia in 2011.[4]

### A. Safe Districts Around or Above 55% BVAP Are Narrowly Tailored

The district court concluded that the Challenged Districts are racial gerrymanders because they are safe districts around or above 55% BVAP and not influence districts around or below 50% BVAP. J.S.App.90-94. But only by ignoring §5 altogether could the court conclude that Virginia lacked "good reasons" to do exactly what the *Ashcroft* majority said is permitted and exactly what the now-controlling *Ashcroft* dissent said is required. The court did not address §5's presumptions that voting is polarized, that "super-majority" districts must be maintained, and that, if nothing else, a state has discretion to draw "safe" districts. Its analysis is riddled with legal and factual error.

1. The district court first ignored the point of agreement among all *Ashcroft* opinions that "a State may choose to create a certain number of 'safe' districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice." 539 U.S. at 480-81. Thus, while *Ashcroft* "gave

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[4] Although the Court has since concluded that Virginia and other jurisdictions were subjects of an unconstitutional coverage formula, *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 550 (2013), compliance was a compelling interest in 2011, *see Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1310 (2016). To the extent members of this Court believe the VRA is flawed or has been incorrectly interpreted, Virginia "is not the one that is culpable." *Alabama*, 135 S. Ct. at 1288 (Thomas, J., dissenting).

States flexibility in determining the percentage of black voters in each districts," *Alabama*, 135 S. Ct. at 1286 (Thomas, J., dissenting), the district court assumed that safe districts would be insufficiently tailored if influence districts could have performed. J.S.App.90-94. But, where there are multiple legitimate avenues to VRA compliance, the narrow-tailoring inquiry must account for that flexibility and deem race-based measures tailored so long as they are appropriate to the ultimate end. Otherwise, no means could ever be narrowly tailored: one means would prove another unnecessary and vice versa.

The question is therefore not whether Virginia could have satisfied the VRA differently, but whether the method it chose was "beyond what was reasonably necessary." *Shaw v. Hunt*, 517 U.S. 899, 912 (1996). In that respect, this case is unlike those in which states have taken action unrelated to the VRA—such as creating a new ability-to-elect district where §5 preserves only the status quo, *id.*, or maintaining minority VAP rigidly at levels exceeding 70% when a 65% minority VAP would not affect electoral outcomes, *Alabama*, 135 S. Ct. at 1273. Here, by contrast, the House chose one compliance method (12 "safe" seats) over another (a higher number of influence seats). In finding this choice insufficiently tailored, the district court denied that states are "permitted to make judgments about how best to prevent retrogression." *Alabama*, 135 S. Ct. at 1286 (Thomas, J., dissenting). No Justice in *Ashcroft* took that view.

Furthermore, the district court did not identify a means of complying with §5 "without using racial classifications." *Fisher v. Univ. of Texas at Austin*, 570

U.S. 297, 312 (2013). Instead, the court faulted the House for not drawing districts at lower BVAP levels. But lower BVAP does not signify less attention to race. As Justice Kennedy observed in his *Ashcroft* concurrence, 539 U.S. at 491-92, and the Court held in *Bartlett v. Strickland*, 556 U.S. 1, 22 (2009), drawing minority influence districts is no less race-based than drawing majority-minority districts. In fact, *Bartlett* rejected a reading of VRA §2 that would require influence districts because that requirement would "unnecessarily infuse race into virtually every redistricting" and place the statute in constitutional doubt. 556 U.S. at 21.

So this is not a case where one avenue towards a compelling interest is insufficiently tailored because a race-neutral avenue is available. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986). The court instead deemed one avenue insufficiently tailored by identifying an equally—if not more—race-conscious avenue. That is illogical and legally baseless.

It also infuses an illogical gloss onto the Fourteenth Amendment, which does not pick one set of "electoral risks and benefits" over another any more than the VRA does. *Ashcroft*, 539 U.S. at 480 (quotations omitted). In 2011, the Virginia House made a deliberate, well-reasoned choice on this question. Delegates Spruill, Dance, and Jones argued for safe 55% BVAP seats, and two other delegates advocated for BVAP reductions to create influence seats. PEX35 at 100-141; PEX35 at 161-64. None of the trial witnesses spoke on the floor urging BVAP reductions. The House, including all trial witnesses, instead voted for 12 "safe" districts.

That was not a choice to deny equal protection over a choice to afford it. Nor was it a choice to wade into an area of suspect classifications over a choice to avoid them altogether. Rather, faced with the federal-law imperative to preserve minority representation—against a presumption of retrogression—the House made a legitimate "political decision" regarding the "effective exercise of the franchise" as to which there may be "an infinite number" of alternatives. *Holder v. Hall*, 512 U.S. 874, 898, 900 (1994) (Thomas, J., concurring). This case is about coopting the federal courts to reverse that informed political decision and hand a political victory to the small minority of delegates who had differing political goals. Whether or not that is "beyond the ordinary sphere of federal judges" to do under the VRA, *id.* at 901, it surely is not appropriate under the Equal Protection Clause, which does not define an ideal form of minority representation.

Rather, the equal-protection question is whether a less race-conscious avenue to satisfy §5 was available. One was not.

2. Indeed, the House's choice was legally restricted because the §5 amendment tilted the scales in favor of safe districts. Because the benchmark plan contained 12 ability-to-elect districts, the Virginia House had the choice either (1) to draw 12 ability-to-elect districts with sufficient BVAP to elect black-preferred candidates without white crossover votes or (2) "to prove the absence of racially polarized voting" to justify BVAP reductions. *Ashcroft*, 539 U.S. at 500 n.3 (Souter, J., dissenting).

The latter showing would have required "competent, comprehensive information regarding white crossover voting or levels of polarization in individual districts across the State," *id.* at 500 (quotations omitted), which Virginia did not have and could not have obtained. There are too few House of Delegates contested elections to perform that analysis. 1 Tr. 761:1-15. Nor is it possible to assess whether black registration is on par with white registration because voter registration and turnout records in Virginia do not reference race. 1 Tr. 727:3-10. And the Virginia Assembly holds odd-year elections that have different voting patterns from even-year elections, rendering data from congressional and presidential elections unhelpful in assessing voting patterns. 1 Tr. 516:2-19. Faced with the burden of disproving polarized voting—and the shortest time frame of any state to redistrict—the House would have walked into a preclearance proceeding empty-handed, hoping the Voting Rights Section or District of Columbia District Court would simply assume BVAP reductions to be non-retrogressive. That assumption was legally untenable.

Thus, §5 required 12 safe districts. And that is all the more obvious because the Black Caucus members without exception in 2011 supported districts of 55% BVAP or higher. Delegate Dance represented that she "looked at the model and looked at the trending as far as what has happened over the last 10 years," that black turnout was disproportionately low, and that she supported the plan because "it does provide the 55 percent voting strength that I was concerned about." PEX35 at 137. Delegate Spruill represented on the House floor that "mostly every member of the Black Caucus" was consulted, along with NAACP leaders in

Suffolk, Chesapeake, and Virginia Beach, and that they supported 55% districts in light of concerns specific to their districts and regions. PEX35 at 142, 146-47. No Black Caucus member disputed this in 2011. This meant, not only that the House had good reasons to draw safe districts under the §5 "effect" element, but also that it had good reasons to honor the Black Caucus members' input under the §5 "intent" element, under which Virginia had to prove the *absence* of discriminatory intent.

Moreover, the House had evidence specific to each district and region, similar to the evidence this Court found to justify a 55% BVAP in HD75. *See Bethune-Hill*, 137 S. Ct. at 799-802. For example, Delegate Dance told the House that black turnout in Petersburg, the population center of her district, HD63, was disproportionately low. PEX33 at 45. Delegate Spruill expressed concern that, in 2005 and 2009 elections in HD74 and HD69, the minority community failed to elect its preferred candidates when white delegates defeated multiple black delegates in multi-way primaries, which split the black vote, 1 Tr. 457:19–458:5; PEX35 at 144-45, and he had extensive input in the South Hampton Roads Challenged Districts, his home region. The delegates were also aware of minority-preferred-candidate losses in recent memory in other districts, including HD63 and HD90. Additionally, the delegates discussed HD71, observing that, although incumbent member Jennifer McClellan likely did not need 55% BVAP for reelection, a future candidate in an open race would not have her incumbency advantage and would face an electoral uphill battle, especially given the BVAP plummet over the decade from over 55% BVAP to about 46% BVAP.

IEX15 at 13; 2 Tr. 698:22-25. The House, furthermore, had the benefit of a polarized voting analysis created during the prior redistricting cycle's litigation, and that report concluded that "voting for the Virginia legislature has customarily been marked by racial polarization" and that, accordingly, "districts 55% to 62% in black VAP cannot be considered packed." IEX103 Ex. A at 16, 23, 36, 43. All of this evidence weighed heavily against crossover districts and supported districts of 55% BVAP or higher.

Thus, because uncertainty under the amended statute cut against—and the Black Caucus uniformly advocated against—BVAP reductions, the House had every reason to believe they would be retrogressive and no way to prove otherwise. The House had impeccable reasons to draw safe districts.

### B. The District Court's Analysis Erroneously Focuses on Optics, Not §5's Requirements

By ignoring §5's substantive requirements, the district court found the Challenged Districts insufficiently tailored without finding either that the House's VRA efforts were "quite far removed" from the statute, *Miller*, 515 U.S. at 926, or that race-blind means of §5 compliance were available, *Fisher*, 570 U.S. at 312. The court instead focused on peripherals and faulted the House for not undertaking busywork exercises that were useless, superficial, or impossible.

1. The court complained that Delegate Jones did not "compile" "recent election results," information on "the 2011 state Senate map," and "other plans that were precleared or rejected by the Department of Justice." J.S.App.88. But the 2011 state Senate map

was neither created nor precleared when the House was redistricting, and no "other plans" would be of use because no 2010-cycle plans existed and the 2006 amendments did not apply in prior cycles. Besides, this information is irrelevant to prove the "the absence of racially polarized voting" in Virginia. *Ashcroft*, 539 U.S. at 500 n.3 (Souter, J., dissenting). In addition, that Delegate Jones did not "compile" election results was irrelevant when he and his colleagues were aware of them. 1 Tr. 462:9-11. The district court wrongly invalidated the Challenged Districts for the House's failure to "compile a comprehensive administrative record," which is not required. *Bethune-Hill*, 137 S. Ct. at 802 (quotations omitted).

Importantly, this is not like a case where a state claiming a compelling interest in remedying the effects of prior discrimination must make "findings" to justify that goal. *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989). Congress and the Department of Justice made the controlling findings in setting and applying the §4 coverage formula, *Katzenbach*, 383 U.S. at 329, and Virginia could reasonably rely on Congress's determination, *Harris*, 136 S. Ct. at 1310; *see also Croson*, 488 U.S. at 491 ("Congress may authorize, pursuant to section 5 [of the Fourteenth Amendment], state action that would be foreclosed to the states acting alone") (quotations omitted). Because §5 presumed Virginia's redistricting plan would be retrogressive, Virginia had no reason to gather evidence to re-prove Congress's findings before using racial data to avoid the "backsliding" §5 prohibited. *Reno*, 528 U.S. at 875.

2. The district court's contention that narrow tailoring required different BVAP goals for each district similarly faults the House for paying insufficient attention to cosmetics. J.S.App.88. Every district is subject to a majority-vote requirement, and the House had proof of crossover voting in none of them. The number 55% is the lowest number available to create "supermajority" districts. *Ashcroft*, 539 U.S. at 493 (Souter, J., dissenting). Large BVAP drops below 55% would plainly have been retrogressive: the *Ashcroft* dissent would have denied preclearance to districts in the Georgia Senate's redistricting plan that dropped, respectively, from 60.58% to 50.31% BVAP, from 55.43% to 50.66% BVAP, and from 62.45% to 50.80% BVAP. 539 U.S. at 472-73. And small differences are not functionally significant because data is imprecise and election prediction is inherently speculative. *See* Amicus Brief of Political Scientists Thomas L. Brunell et al., *Bethune-Hill v. Va. State. Bd. of Elections*, 14-28 (15-680). Arriving at, say, 54% for one district and 57% for its neighbor would not carry any electoral significance and, if anything, would be more race-conscious by infusing every redistricting move with the concern for achieving some ideal golden mean. *Cf. Bartlett*, 556 U.S. at 21-22.

Further, the 55% BVAP target operated to keep the districts away from extremes. According to the court's findings, districts with high BVAPs over 60% saw BVAP drops and districts with the lowest BVAPs saw modest increases. J.S.App.83. This was not a "mechanical" rule forbidding even small BVAP drops with no likely effect on election outcomes. *Alabama*, 135 S. Ct. at 1267. The rule was tailored to avoid the twin evils of "cracking" and "packing."

3. The court erroneously concluded that the House could have satisfied its burden with a polarized-voting analysis like the one Plaintiffs' expert, Dr. Palmer, presented in the 2017 trial. J.S.App.90-95. Setting aside the court's erroneous assumption that the House was legally required to try to preclear influence districts if possible, Dr. Palmer's analysis could not have justified influence districts even had the House wanted them. That is plain because Souter's *Ashcroft* dissent and the district-court opinion it would have affirmed rejected a materially identical one that focused "on statistics about…Democrats," not minority voting strength. 539 U.S. at 507-08 (Souter, J., dissenting).

Dr. Palmer's analysis considered only "endogenous" general-election results from the 2008 presidential race between Barack Obama and John McCain and the 2009 statewide gubernatorial race, and Dr. Palmer averaged that data before reaching his ultimate conclusion about minority ability to elect. According to the now-controlling *Ashcroft* dissent, that does not prove non-retrogression because "the minority group may well have no impact whatever on which Democratic candidate is selected to run." 539 U.S. at 507-08. Justice Souter also rejected evidence on statewide elections as insufficient because those races have minimal bearing on the results in specific legislative districts, *id.*, and federal even-year presidential data—which is useless for Virginia House candidates, 2 Tr. 909:10-16, and involved Barack Obama, a "political superstar[]" whose success "hardly proves" what is needed for black-supported candidates to win House races, *see, e.g.*, *Nipper v. Chiles*, 795 F. Supp. 1525, 1535 n.8 (M.D. Fla. 1992); *Nipper v. Smith*, 39

F.3d 1494, 1505 n.2, 1547 (11th Cir. 1994)—are even less relevant. Conducting Dr. Palmer's analysis in 2011 would have been yet another useless exercise.

What's more, Dr. Palmer's analysis shows racially polarized voting in Challenged Districts in the 2009 gubernatorial race. PEX71 at 48; 2 Tr. 451:5-452:4. Presenting evidence of polarized voting would not "prove the *absence* of racially polarized voting." *Ashcroft*, 539 U.S. at 550 n.3 (emphasis added). Dr. Palmer only concluded that 55% BVAP was not "necessary" by averaging statewide results with even-year elections involving Barack Obama. That trick would not have satisfied Virginia's preclearance requirement in 2011.

4. As discussed above, the court erroneously discredited Delegate Jones's testimony that the House relied on Black Caucus members' knowledge of their own districts and advocacy in support of at least 55% BVAP in each. Besides conflicting with contemporaneous video evidence showing that "mostly every member of the Black Caucus" was consulted, that district-specific concerns supported the 55% BVAP figure, and that Delegate Dance personally "looked at the model and looked at the trending" in assessing turnout and demographics, PEX35 at 41, 142, 146-47, 157, PEX33 at 45, the court's findings are legally wrong because the evidence before the House in 2011 is the legally relevant information. The House could rely only on what the Black Caucus members said in 2011, not on their directly contradictory statements in 2017. Members were entitled to trust their colleagues and did not have to account for the possibility that, six years later, they would change their stories.

Similarly, the trial witnesses' 2017 testimony against the 55% BVAP target was not before the Department of Justice in the 2011 preclearance process. In preclearance, Voting Rights Section staff interview individuals in local communities to collect information regarding proposed changes to voting methods, the basis for the proposals, and the anticipated effects. Publicly available documents produced under the Freedom of Information Act reveal strong support for the 55% BVAP target, including representations to the Department of Justice that "members of the Black Caucus were 'tickled pink' with the proposed plan." J.S.App.365. While that information could not be introduced into evidence because of Department of Justice redactions, *see* Fed. R. Evid. 106, the Court should refer this issue to the Solicitor General to ascertain whether any opposition to the 55% BVAP target was expressed in the preclearance process, including by individuals who testified at trial.

## CONCLUSION

The Court should note probable jurisdiction and reverse.

Respectfully submitted,

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