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

MOTION TO DISMISS OR AFFIRM

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October 9, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

The question presented is as follows:

1. Whether the three-judge panel committed clear error in concluding that Virginia House of Delegates Districts 63, 69, 70, 71, 74, 77, 80, 89, 90, 92, and 95 are racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment?

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STATEMENT

This is the second time that Virginia's House of Delegates districting plan has come before the Court this redistricting cycle. In the first appeal, this Court held that the three-judge panel below (the "Panel") had applied the wrong legal standard to Appellees' claims. It therefore vacated the decision in part and remanded for the Panel to apply the correct standard to determine whether House Districts 63, 69, 70, 71, 74, 77, 80, 89, 90, 92, and 95 (the "Challenged Districts") are unconstitutional racial gerrymanders. Meanwhile, this Court affirmed the Panel's determination that, while race was the predominant factor in District 75, that use of race was narrowly tailored.

On remand, the Panel reopened discovery and held a second trial. After carefully considering the evidence, the Panel applied the correct legal standard and concluded that the Challenged Districts are unconstitutional. The result was unsurprising.

This case began with an admission by John Morgan, a redistricting consultant for Virginia's General Assembly, in a racial gerrymandering case challenging Virginia's Third Congressional District. Morgan testified that Virginia's General Assembly "enacted 'a House of Delegates redistricting plan with a 55% Black [Voting Age Population] as the floor for black-majority districts,'" and that it "acted in accordance with that view" when adopting its congressional plan. *Page v. Va. State Bd. of Elections* ("*Page II*"), No. 3:13cv678, 2015 WL 3604029, at *9 (E.D. Va. June 5, 2015) (quoting Morgan's expert report), *appeal dismissed sub nom. Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016). Based in part on Morgan's testimony about the legislature's use of this fixed racial threshold, the *Page II* court declared the Third

Congressional District unconstitutional. Having learned that a 55% Black Voting Age Population ("BVAP") floor was used to draw the Challenged Districts as well, Appellees filed this lawsuit.

Remarkably, much of the first trial in this case was consumed by Appellants' argument that there was no 55% BVAP floor applied to the Challenged Districts. Appellants also asserted that race could not predominate unless Plaintiffs established an "actual conflict" between the mapdrawers' racial goals and traditional redistricting principles.

On appeal, this Court rejected both arguments. The Court affirmed the finding that the 55% BVAP rule "was used in structuring the districts." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 795-96 (2017). The Court also rejected Appellants' claim that race could not predominate unless it resulted in a specific "deviation" manifesting "actual conflict" with traditional redistricting principles. *Id.* at 799-800.

Appellants therefore stood at a decided disadvantage on remand. The law of the case already provided strong evidence of racial predominance in the use of a fixed racial floor to structure 12 districts (the Challenged Districts and District 75). *See Cooper v. Harris*, 137 S. Ct. 1455, 1468-69 (2017) (when a legislature announces a "racial target that subordinated other districting criteria and produce[s] boundaries amplifying divisions between blacks and whites," a court "could hardly . . . conclude[] anything but" that "race predominated"). Moreover, while the 55% BVAP floor was narrowly tailored to one district—District 75—the General Assembly had applied that same racial target "across the board" to 11 other districts. *Bethune-Hill*, 137 S. Ct. at 796.

Accordingly, Appellants insisted on another round of discovery and a new trial to rehabilitate their case. In so doing, Appellants maintained that "[t]he District Court is best positioned to determine . . . both the questions of predominance and narrow tailoring" given its ability "to weigh testimony and assess credibility." Dkt. No. 146 at 9-10 n.4 (internal quotation marks omitted).

The Panel did just that—and found that Appellants' key witnesses were not credible. As to the primary mapdrawer, Delegate Chris Jones, the Panel was struck by the many instances in which his testimony from the first trial was proven inaccurate and/or thoroughly rebutted by testimony from the second trial. *See, e.g.*, J.S.App. 37-38 ("[W]hen faced at the second trial with new witnesses challenging material aspects of his previous testimony, . . . Jones was unable to produce convincing explanations for the discrepancies."). Likewise, in the second trial, Morgan testified that although Voting Tabulation Districts ("VTDs") "were split with exacting precision separating predominantly black and white residential areas," he had not considered race, and the resulting pattern of stark racial sorting was "mere happenstance." J.S.App. 33-34. The Panel found that testimony "simply is not credible." J.S.App. 34.

By contrast, Appellees presented additional testimony further illustrating the degree to which the 55% BVAP rule shaped the Challenged Districts. With the benefit of two trials, voluminous expert and lay testimony, and scores of trial exhibits, the Panel weighed the evidence, gauged credibility, and applied this Court's clarification of the proper legal standard. It found both direct and circumstantial evidence of the General Assembly's race-based motives with respect to

the Challenged Districts—evidence it summarized for dozens of pages. J.S.App. 16-86. The Panel further found that the General Assembly's use of a 55% BVAP floor in each Challenged District was not narrowly tailored to avoiding retrogression under Section 5 of the Voting Rights Act ("VRA"), as the General Assembly had engaged in no analysis "of *any* kind" to determine the percentage of black voters necessary to maintain an ability to elect their preferred candidates. J.S.App. 88.

Appellants do not attempt to address most of the evidence on which the Panel relied. Indeed, Appellants studiously avoid any reference to the Panel's detailed, district-specific findings regarding each Challenged District, which comprise most of the Panel's racial predominance analysis. J.S.App. 33-80. Instead, they mischaracterize the record and the Panel's findings and complain that the Panel should have credited their witnesses' testimony over Appellees'. Contrary to Appellants' mischaracterizations, the Panel's Opinion is firmly rooted in this Court's jurisprudence and well supported by the factual record. The Court should dismiss or summarily affirm.[1]

[1] Appellants intervened in this case. Although both they and the Virginia State Board of Elections defended the map below, the Board has not appealed and contends that Appellants lack standing to appeal independently. *See* Dkt. No. 246. Appellees agree. But even assuming Appellants have standing, the absence of a substantial question warrants dismissal. Alternatively, the Panel's well-supported judgment should be summarily affirmed.

ARGUMENT

I. Race Predominated in the Challenged Districts

A. The Panel's findings of racial predominance are amply supported by the record

The Panel's Opinion rests on extensive factual findings—derived from two trials, 12 expert reports, 17 witnesses, and nearly 200 exhibits. *See* J.S.App. 14 ("Our consideration of the legislature's true motivations in drawing the districts is highly fact-specific, and involves numerous credibility findings."). Those factual findings are subject to clear error review. *See Cooper*, 137 S. Ct. at 1465; *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) ("[W]e . . . will not reverse a lower court's finding of fact simply because we would have decided the case differently. Rather, a reviewing court must ask whether, on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed.") (internal quotation marks and citations omitted).

The Panel's Opinion was a straightforward application of this Court's recent decisions. J.S.App. 9-16. Specifically, the Panel recognized that "[a]lthough the application of a mandatory BVAP requirement for a district does not alone compel the conclusion that race predominated, such a requirement is evidence of the manner in which the legislature used race in drawing the district's boundaries." J.S.App. 10 (citing *Bethune-Hill*, 137 S. Ct. at 788, and *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1267 (2015)). "For example, if a legislature made line-drawing decisions for the predominant purpose of complying with such a BVAP requirement, and the evidence shows that these race-based decisions dwarfed any independent consid-

eration of traditional districting criteria, a court could conclude that the legislature 'relied on race in substantial disregard of customary and traditional districting practices.'" J.S.App. 11 (quoting *Miller v. Johnson*, 515 U.S. 900, 928 (1995) (O'Connor, J., concurring)).

As the Panel found, that is precisely what happened here. First, despite Appellants' persistent efforts to deny it, the fact that an inflexible 55% BVAP threshold was used to configure each of the Challenged Districts is "now settled." J.S.App. 18. Ensuring that all Challenged Districts met this requirement was no easy feat, as demonstrated by the pattern of deviations from traditional districting criteria among the Challenged Districts as a whole, *see, e.g.*, PX50 at 21-22 (2011 plan increased VTD splits among Challenged Districts and District 75 at more than twice the rate of increase in VTD splits found in 88 remaining districts); *id.* at 18 (average compactness of Challenged Districts and District 75 dropped five times as much as that of other districts), and individually, *see, e.g.*, J.S.App. 299 (District 63 suffered "the largest Reock compactness reduction of any district"); J.S.App. 336-37 (District 95 increased from 1 to 6 VTD splits and is now the least compact district).

The resulting pattern of racial sorting is "stark," to say the least. *Bethune-Hill*, 137 S. Ct. at 800. Cities, towns, VTDs, and even a military base were divided with *near uniformity* along racial lines, with higher BVAP areas moved to the Challenged Districts and lower BVAP areas moved to the non-challenged districts. PX71 at 4-16. African-American voters were moved into Challenged Districts at a higher rate than white voters, Democratic voters, and the population as a whole—and moved out at a lower rate than all these groups. *Id.* at 19-20. VTD splits tracked racial lines

with "exacting precision," J.S.App. 33, which is especially probative because only racial data—and not political data—are available below the VTD level, J.S.App. 26-27. Furthermore, race proved a far more powerful predictor than party of which VTDs were placed in the Challenged Districts, both among the Challenged Districts overall, *see* J.S.App. 28-32, and in individual districts, *see, e.g.*, PX51 at 32 (BVAP differential between VTDs included in and excluded from District 95 is 20 percentage points higher than partisan differential).

Appellees' expert further demonstrated that "unsplitting" several VTDs between Challenged Districts meant all the difference between satisfying the 55% BVAP threshold and falling fatally short of it. *See, e.g.*, PX71 at 12 (returning VTD 703 to its benchmark district would have dropped District 71's BVAP to 54.9%); *id.* (returning Brambleton VTD to its benchmark district would have dropped District 89's BVAP to 54.7%). The testimony of the lead mapdrawer and incumbent delegates confirmed that the nonnegotiable racial rule drove the placement of voters within and without the Challenged Districts. *See, e.g.*, 2nd Tr. 532:9-33:4 (with "certainty," the 55% BVAP rule required eastward expansion of District 71); *id.* 36:15-21, 39:14-20 (VTD 207 was removed from District 71 in service of the 55% BVAP rule).

Tellingly, the 11 Challenged Districts exhibit the same hallmarks of racial predominance found in District 75, where "race did predominate," *Bethune-Hill*, 137 S. Ct. at 794. As with District 75, direct testimony confirmed that mapdrawers sought to satisfy the 55% BVAP floor by, among other things, drawing "irregular borders," dividing political subdivision boundaries along racial lines, and "drastic[ally]

maneuvering" African-American populations. J.S.App. 304-07. Appellants argued that the racial disparities in and around District 75 resulted from population demands, member requests, and political concerns. J.S.App. 305-06. Those arguments fell flat in the analysis of District 75, *see, e.g.*, J.S.App. 306 ("[A]ttributing a political purpose to—or justification for—the 55% BVAP floor does not somehow render it a non-racial classification."), and they fared no better in the Panel's analysis of the Challenged Districts.

The record fully supported and, indeed, compelled the conclusion that race predominated in each Challenged District.

B. Appellants identify no legal error in the Panel's predominance analysis

Confronted with detailed factual findings, Appellants try to evade the clear error standard by ginning up "erroneous legal principles" in the Panel's predominance analysis. J.S. 8. But the "erroneous legal principles" Appellants identify are *all* based on this Court's explicit directions.

1. Appellants claim the Panel erred because it supposedly "did not consider 'all of the lines.'" J.S. 8 (quoting *Bethune-Hill*, 137 S. Ct. at 800). If Appellants mean to suggest that a court commits reversible legal error unless it explicitly discusses each and every boundary "line," they are incorrect. This Court never discusses "all of the lines" in a given district. *See, e.g.*, *Cooper*, 137 S. Ct. 1455; *Shaw v. Hunt* ("*Shaw II*"), 517 U.S. 899 (1996); *Miller*, 515 U.S. 900; *Shaw v. Reno* ("*Shaw I*"), 509 U.S. 630 (1993).

In any event, Appellants' selective quotation of this Court's previous decision is misleading. In the Panel's first opinion, at Appellants' urging, the Panel adopted

a novel predominance test in which (a) a district was not subject to scrutiny unless it manifested "deviations" from traditional redistricting criteria and (b) any review was limited to determining the reason for such "deviations." *Bethune-Hill*, 137 S. Ct. at 798-99. In rejecting that analysis, this Court emphasized that the ultimate question is "the legislature's predominant motive for the design of the district as a whole." *Id.* at 800. "Concentrating on particular portions in isolation may obscure the significance of relevant districtwide evidence, such as stark splits in the racial composition of population moved into and out of disparate parts of the district, or the use of an express racial target." *Id.* at 800. The proper "holistic" analysis, therefore, does not require the court to explicate every jot and tittle of a district but, instead, to examine the broader context of each district, including its overall demographics and the principles that drove its configuration.

Here, after explicitly referencing this Court's guidance on appeal, the Panel considered both statewide and district-specific evidence in exhaustive detail. *See* J.S.App. 16-86. For example, with respect to District 71, the Panel detailed (a) the benchmark version of the district and how it was altered in the 2011 redistricting; (b) the district's division of a Richmond neighborhood along racial lines; (c) testimony from the mapdrawer and the incumbent that the district's configuration was "required to ensure [it] had sufficient BVAP to meet the 55% number"; and (d) the 50 percentage point BVAP difference between the populations moved into and out of the district. J.S.App. 40-45. This is precisely the kind of holistic analysis this Court demanded.

In any event, Appellants fail to identify a single "line" that the Panel should have considered but did not. Instead, Appellants' real complaint is that the Panel gave insufficient weight to "core retention," which they claim was "the predominant factor" behind the Challenged Districts. J.S. 9. That claim fails.

First, Appellants' suggestion that core retention negates evidence of racial predominance makes no sense given the record. District 75 retained 78.8% of its core, and race predominated. *See* IDX15 at 16. That is a *higher* retention percentage than all but three Challenged Districts (Districts 63, 71, and 74, which retained about 80% of their cores).

Second, the record does not support Appellants' *post hoc* attempt to elevate core retention to the predominant consideration. The formal criteria adopted by the House of Delegates to govern redistricting place compliance with the VRA (which was equated with the 55% BVAP rule) above all other factors in importance other than population equality. PX16. "Core retention," meanwhile, appears exactly *nowhere* in the criteria. *Id.* The Panel did not commit clear error by rejecting Appellants' claim that the most important factor for each Challenged District went unmentioned in the criteria that guided redistricting. *See Bethune-Hill*, 137 S. Ct. at 799 ("The racial predominance inquiry concerns the actual considerations that provided the essential basis for the lines drawn, not *post hoc* justifications the legislature in theory could have used but in reality did not.").

Third, Appellants ignore this Court's admonition to consider "the significance of . . . stark splits in the racial composition of populations *moved into and out of* disparate parts of the district." *Id*. at 800 (emphasis added). This Court recently rejected a

similar argument that race did not predominate where the legislature focused on "preservi[ng] the core of the existing [d]istrict," noting that core retention "is not directly relevant to the origin of the *new* district inhabitants." *Alabama*, 135 S. Ct. at 1257 (internal quotation marks and citation omitted). Courts routinely find that race predominates where a district was drawn in the benchmark's footprint. *See Cooper*, 137 S. Ct. at 1474 (race predominated where legislature "further slimm[ed] the district and add[ed] a couple of knobs to its snakelike body").

Fourth, Appellants' claim that "core preservation" predominates if an undefined portion of a district's core is kept would lead to absurd results. Few mapdrawers rip up the benchmark map entirely. By Appellants' logic, a legislature could announce that a district wherein 80% of the core was "preserved" would be "filled" only with voters of a certain race, and race could not predominate.

Finally, in attempting to identify *some* evidentiary basis for this post-hoc argument, Appellants mischaracterize the testimony of Appellees' expert Dr. Palmer. J.S. 9. Dr. Palmer's analysis reveals that VTDs from the benchmark Challenged Districts were likely to remain in *a* Challenged District, not the *same* Challenged District, *see* PX71 at 21, further highlighting the General Assembly's approach of shuffling black voters between and among Challenged Districts in service of a single, uniform racial threshold.

2. Appellants next argue the Panel erred by (supposedly) "disregard[ing] the geographic location of population disparities in assessing population movements." J.S. 9. This Court squarely rejected that argument in *Alabama*, holding that population equality demands are not germane to the predominance

inquiry. *Alabama*, 135 S. Ct. at 1271 (population equality "is a background rule against which redistricting takes place[,] . . . not a factor to be treated like other nonracial factors when a court determines whether race predominated"). Accordingly, the Panel held here that "[a]lthough the need for population redistribution in the challenged districts was undisputed, the need for population equalization does not explain why the legislature selected certain boundary lines over others." J.S.App. 80-81. The Panel then found, as a matter of fact, that the General Assembly repeatedly selected populations based on racial considerations.

Appellants' attempt to distinguish *Alabama* fails. J.S. 11. Alabama advanced—and the district court credited—precisely the same argument Appellants advance here. *Compare Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1305-06 (M.D. Ala. 2013) (district configuration "was motivated as much by the effort to comply with the requirement of one person, one vote as by the effort to avoid retrogression" where challenged district was "sandwiched" between underpopulated majority-black districts and overpopulated districts and mapdrawers "repopulate[d] the majority-black districts" while drawing down the challenged district's footprint in adjoining county "to capture" population from overpopulated district), *with* J.S. 10 ("[I]f 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[.]"). This Court cited that analysis and held it "did not properly calculate 'predominance.'" *Alabama*, 135 S. Ct. at 1270. Appellants' claim, therefore, is foreclosed.

Moreover, Appellants' contention that the Panel disregarded geography ignores the Panel's findings.

The Panel found that race best explained the way the General Assembly addressed population inequality. J.S.App. 22 ("Given th[e] significant underpopulation in many of the challenged districts, *and the geographic distribution of white and black residents*," the 55% BVAP threshold "forced" the legislature "to consider the racial make-up of individual VTDs and, at times, to split VTDs according to the racial composition of particular census blocks.") (emphasis added). Ultimately, the Panel found that "the overall racial disparities in population movement, and the splits of VTDs and geographies along racial lines, are strong evidence of racial predominance in the challenged districts." J.S.App. 38. This was not error.

3. Appellants next claim that there are no "stark" racial differences between Challenged and non-challenged districts. J.S. 13. They do not dispute the accuracy of Appellees' experts' analyses regarding the "racial composition of populations moved into and out of" the Challenged Districts. *Bethune-Hill*, 137 S. Ct. at 800. Instead, they brush aside the consistent pattern of division by race as "no big deal." This claim rests on a selective recitation of the evidence and simple math errors.

It is undisputed that, at every level of political subdivision, "areas of higher concentrations of black voting-age people were put into the challenged districts and areas of lower concentrations were put into the non-challenged districts." 2nd Tr. 392:13-20; *see also* PX71 at 4-16. Indeed, in *all but one case* in which a VTD was split between a Challenged and non-challenged district, "the areas assigned to the challenged districts had higher BVAPs than the areas assigned to the non-challenged districts." J.S.App. 24.

Faced with those cold, hard numbers, Appellants' only recourse is to mischaracterize them and their impact.

First, Appellants understate the BVAP difference between territories moved into and out of the Challenged Districts by double counting the percentage of black voters moved from one Challenged District to another. *Compare* J.S. 13 *with* PX50 at 77.

Second, Appellants emphasize that several areas moved into the Challenged Districts included BVAPs of less than 50%. J.S. 13. But transfers of population with BVAP less than 50% can still increase a district's BVAP overall, if the BVAP moved in is relatively higher than the BVAP moved out. For example, in District 75, which concededly was redrawn to satisfy the 55% BVAP rule, the target was achieved by swapping areas with 27.1% BVAP for areas with 37.9% BVAP. *See* PX50 at 77.

Third, Appellants conflate the significance of BVAP percentages and absolute numbers in selectively highlighting VTD splits where fewer black voters were placed in a Challenged District than in neighboring majority-white districts. J.S. 13-14. Regardless of the *absolute number* of black voters shuffled among the districts, black voters overall comprised a much higher *percentage* of the populations placed in Challenged Districts. *See, e.g.*, PX71 at 52-55 (BVAP percentage point differences of 46.1 in Hopewell, 39.9 in Belmont, and 61.7 in John F. Kennedy). Indeed, the BVAP assigned to the Challenged Districts because of these splits is, on average, *24 percentage points* higher than that assigned to the non-challenged districts. *Id.* at 4; 2nd Tr. 374:17-25.

Even assuming no single VTD split presented a "stark" demographic difference, these racial differences are seen in *all but one* VTD split between Challenged and non-challenged districts. PX71 at 6. This consistent pattern of division by race is difficult to characterize as anything but "stark."

Fourth, Appellants congratulate themselves for excluding "over 158,000 black voting-age persons" from the Challenged Districts. J.S. 13. In other words, they argue that their failure to institute total segregation negates any claim of racial predominance. But predominance does not mandate that every black voter be drawn into a challenged district. If the mapdrawers had not been driven by an arbitrary 55% racial floor, many more black voters would have been placed in other districts and, together with the other "158,000 black voters," had greater voting strength across the map.

Fifth, Appellants argue that because it was possible for the General Assembly to meet the 55% BVAP floor in the Challenged Districts in other ways, it is impossible for race to have predominated. J.S. 12. That is a non sequitur. The fact that a state "could construct a plethora of potential maps that look consistent with traditional, race-neutral principles" does not inform whether race was the "overriding reason for choosing one map over others." *Bethune-Hill*, 137 S. Ct. at 799.

4. Lastly, Appellants offer a cynical misunderstanding of both the Panel's Opinion and the VRA. Contrary to Appellants' contention, the evidence of predominance did not "simply describe[] ordinary VRA compliance." Nor does the Opinion "render[] every majority-minority district in the nation presumptively unconstitutional." J.S. 15-16. Rather, the Opinion

illuminates the consistent, multiple ways in which the legislature's blunt racial rule overrode traditional districting principles and served as the sole "criterion that, in the State's view, could not be compromised." *Bethune-Hill*, 137 S. Ct. at 798 (quoting Shaw *II*, 517 U.S. at 907).

There are many ways states may properly consider race to comply with the VRA that do not trigger strict scrutiny. *See, e.g.*, Brief of the NAACP and Virginia NAACP as *Amici Curiae* Supporting Appellants at 22-24, *Bethune-Hill v. Va. State Bd. of Elections*, No. 15-680, 2016 WL 4937777 (Sept. 14, 2016). Here, however, the 55% BVAP rule operated as the *sole* proxy for VRA compliance. According to the map-drawer himself, this mechanical racial threshold "trump[ed] everything," 1st Tr. 402:20-24, and was achieved in each Challenged District regardless of its unique geography, demographics, or voting patterns. The admitted use of an inflexible racial threshold is hardly "normal VRA compliance." *See Alabama*, 135 S. Ct. at 1267 ("[A] policy of prioritizing mechanical racial targets above all other districting criteria . . . provides evidence that race motivated the drawing of particular lines in multiple districts in the State."); *Cooper*, 137 S. Ct. at 1469 (a legislature's use of a "racial target that subordinated other districting criteria and produce[s] boundaries amplifying divisions between blacks and whites" strongly supports a racial predominance finding). Where, as here, the "primary redistricting goal" was to achieve a preordained racial percentage and there is "considerable evidence that this goal had a direct and significant impact on the drawing" of district lines, *Alabama*, 135 S. Ct. at 1271, race predominates.

Appellants would have this Court believe that the Opinion simply recounts the extent to which Challenged Districts include a higher BVAP than non-challenged districts. That is untrue. Rather, the Opinion explains the precision with which districts were drawn along racial lines to achieve the nonnegotiable racial threshold. The careful "separat[ion of] voters into different districts on the basis of race" is the very essence of racial gerrymandering, *Shaw I*, 509 U.S. at 649, and "the story of racial gerrymandering" here "becomes much clearer" upon examination of the "racial and population densities" moved between and among districts, *Miller*, 515 U.S. at 917. It is no accident that the Challenged Districts, as a whole, are less compact and split more VTDs than the 88 majority-white districts. PX50 at 18-22. In fact, while the General Assembly's purported race-neutral goals gave way time and again, the 55% BVAP rule was never compromised.

To the contrary, that unyielding racial threshold dictated district lines from start to finish. Delegate Jones rejected alternative maps that did not guarantee at least 55% BVAP in every Challenged District, PX35 at 70, and proposals for specific districts that threatened to cause even minor deviations from that rule, PX30. The 55% BVAP rule was an immutable principle that drove the redistricting process and was uniformly achieved, often overriding other districting considerations. The Court should reject Appellants' cynical attempt to equate legitimate efforts at VRA compliance with the singularly race-based redistricting process here.

C. The Panel's credibility determinations are not clearly erroneous

Appellants remarkably contend that *all* the Panel's credibility determinations are clear error. They base this unsupported argument on their belief that "[i]t is implausible that" the Panel could find Appellees' witnesses credible and their witnesses not. J.S. 16. Even a cursory examination of the record proves otherwise.

Gauging witness credibility is a classic prerogative of the trial court and, accordingly, "can virtually never be clear error." *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985). Appellate courts "give singular deference to a trial court's judgments about the credibility of witnesses . . . because the various cues that 'bear so heavily on the listener's understanding of and belief in what is said' are lost on an appellate court later sifting through a paper record." *Cooper*, 137 S. Ct. at 1474 (quoting *Anderson*, 470 U.S. at 575).

Indeed, in arguing for a new evidentiary hearing on remand, Appellants specifically invoked the need for the Panel to assess witness credibility. *See* Dkt. No. 146 at 9 n.4 ("'The District Court is best positioned to determine in the first instance both the questions of predominance and narrow tailoring,' in part because it can weigh testimony and assess credibility, which Judge Wright Allen has not yet had the opportunity to do." (quoting *Bethune-Hill*, 137 S. Ct. at 800)); *see also* J.S.App. 19 n.13 ("[B]ecause this Court unanimously agreed to allow the presentation of new evidence, the Court also reopened the question of the credibility of the witnesses who testified at the second trial."). The fact that Intervenors don't agree with the credibility determinations that *they* invited does not establish clear error.

1. As an initial matter, Appellants' incredulousness that the Panel would find "every House expert used bad methodology," J.S. 16, is belied by their failure to even mention, let alone defend, their proffered experts. Nor is that surprising given the magnitude of those experts' shortcomings at trial.

Appellants' expert Dr. Katz, for instance, proposed a methodology that produced "illogical results," J.S.App. 31, examined an irrelevant set of elections in only a handful of Challenged Districts, J.S.App. 91 n.57, and "explicitly endorsed use of race . . . as the foundation for 'partisan' line-drawing decisions," J.S.App. 85, contrary to this Court's precedent, *see Cooper*, 137 S. Ct. at 1473 n.7 ("[T]he sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for . . . political[] characteristics.").

Appellants' expert Dr. Hood provided hypotheses without statistical support, J.S.App. 93 n.60, and failed to examine or report confidence intervals alongside his ecological inference estimates, *id.*, which both he and Dr. Katz agreed violated "standard practic[e] in political science," 2nd Tr. 810:24-811:17, 858:3-8. Dr. Hood's testimony was consistent with his dubious track record in other cases. *See, e.g.*, *Ne. Ohio Coal. for the Homeless v. Husted*, No. 2:06-CV-896, 2016 WL 3166251, at *24 & n.11 (S.D. Ohio June 7, 2016) (citing cases), *aff'd in part*, 837 F.3d 612 (6th Cir. 2016). The Panel had no basis to find Appellants' experts credible, and Appellants offer none here.

As for Appellees' experts, Appellants contend the Panel "erroneously" relied on the race vs. party analysis of Dr. Ansolabehere. J.S. 16-17. This argument fails on several counts. First, it overinflates the importance of that testimony, which was offered only in the first, not

the second, trial. Rather, upon *Appellants'* invitation to re-open the record, Dr. Palmer reexamined the race vs. party analyses provided by the various experts in the first trial, bolstered Dr. Ansolabehere's methodology, identified fundamental methodological errors in Dr. Katz's model, and concluded that race was a better predictor than party of inclusion in the Challenged Districts. PX71 at 20-24; J.S.App. 28-32. Appellants never objected to Dr. Palmer's testimony as improper.

Remarkably, Appellants now contend that the race vs. party analysis provided by Dr. Palmer *for the first time* in the second trial was prohibited by "law of the case" because it was "materially identical" to Dr. Ansolabehere's analysis in failing to "account for traditional criteria." J.S. 17. If the Panel was unable to revisit the legal and factual errors in its predominance analysis that resulted in vacatur (such as its evaluation of Dr. Ansolabehere's analysis)—and to hear new testimony such as that offered by Dr. Palmer—one wonders why the parties participated in a second trial at all.

In any event, Appellants' attacks on Dr. Ansolabehere fall flat. The original panel's view of Dr. Ansolabehere's race vs. party analysis is hardly "law of the case." This Court did not "review[] . . . and rel[y] upon" those findings in its opinion. *State Indus., Inc. v. Mor-Flo Indus., Inc.*, 948 F.2d 1573, 1576 (Fed. Cir. 1991); *see also In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895) (only those findings that were "before this [C]ourt, and disposed of by its decree" are "law of the case" on remand). Rather, this Court declined to examine factual findings underlying the original panel's legally erroneous conclusion regarding predominance and instead "vacate[d]" that portion of the opinion and remanded to the Panel to determine racial

predominance "in the first instance." *Bethune-Hill*, 137 S. Ct. at 795, 800.

The Panel thus properly concluded that "[g]iven that [its] prior findings were reached while applying an erroneous legal standard" they were "open to reconsideration." J.S.App. 19 n.13; *cf. Burns v. Uninet, Inc.*, 211 F.3d 1264 (4th Cir. 2000). Specifically, the original panel faulted Dr. Ansolabehere for examining only race and party, and not the "numerous and malleable" nonracial factors the original panel improperly "deploy[ed]" to cancel out evidence of racial predominance. *Bethune-Hill*, 137 S. Ct. at 799; *see* J.S.App. 295-96 ("The models that he employed do not, for example, consider economic factors, social factors, cultural factors, geographic factors, governmental jurisdictions and service delivery areas.") (internal quotation marks and citation omitted). Because the Panel had originally disregarded the race vs. party evidence based on an erroneous legal standard, it was appropriate to revisit that evidence on remand.

Appellants next contend that the Panel erred in admitting and crediting the expert testimony of Dr. Rodden, citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). But Appellants waived any objection to Dr. Rodden's testimony under *Daubert* when they stipulated to the admissibility of his expert report. *See* 2nd Tr. 24:22-25:5.[2]

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[2] In attempting to object to his testimony during trial, Appellants were reminded of that fact. *See* 2nd Tr. 156:14-18 (Q: "[W]hat's the effect of your having not objected to his report into evidence as it pertains to his ability to testify about the report?" A: "That's an interesting question, Your Honor. We may have, in fact, waived it."). The Panel rightly overruled the objection. *See United States v. Hammoud*, 381 F.3d 316, 335 (4th Cir. 2004) (stipulation on admissibility of evidence waives any objection),

Even if Appellants hadn't waived their objection to Dr. Rodden's testimony, their objection is unfounded. As an expert in the field of "geo-spatial data analysis," Dr. Rodden created "dot density maps" by using census data to determine the "geographic distribution of groups of voting-age white residents and voting-age black residents." J.S.App. 20-21; *see, e.g.*, Appendix 1a-5a. The Panel found these "visual depictions of racial sorting in the dot density maps . . . telling." J.S.App. 22. Indeed, these maps revealed the "striking precision" with which VTDs were split to separate "predominantly black neighborhoods from predominantly white neighborhoods," J.S.App. 57, in some cases "along small residential streets," including "multi-family housing occupied by black residents on one side of a street" in a Challenged District while "excluding white residents living on the other side of the same street," J.S.App. 60. These "visual depictions" led to the "unavoidable conclusion that the challenged districts were designed to capture black voters with precision." J.S.App. 23.

Appellants do not suggest the dot density maps are inaccurate. Indeed, Appellants' expert "conceded that Dr. Rodden used the proper methodology in constructing the dot density maps," J.S.App. 21 n.16, and Appellants' counsel stated they "have no problems with the Court seeing the maps," 2nd Tr. 156:19-20.

Instead, Appellants complain that the dot density maps are irrelevant to legislative intent. But all agree

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vacated on other grounds, 543 U.S. 1097 (2005); *United States v. Aptt*, 354 F.3d 1269, 1280 (10th Cir. 2004) ("A defendant is free to waive objections to evidence by stipulation . . . . In such contexts, admitting the stipulated evidence is so far from being error that it would be an 'impertinence' and 'gross error' for a court to interfere with the stipulation.") (citation omitted).

that the maps illustrate the objective results of the redistricting process, and it is indisputably proper for a court to infer intent from the map itself. *Cf. League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 435 (2006) (redistricting map "bears the mark of intentional discrimination that could give rise to an equal protection violation"); *see also* J.S.App. 72 ("We agree with Dr. Rodden's assessment that it was 'very unlikely' that the legislature would have achieved this precise racial split of the Granby VTD as a coincidental side effect of equalizing population.").

2. Not satisfied with attacking the Panel's Opinion, Appellants also attack the Panel's integrity by insinuating that it operated in bad faith. *See* J.S. 19-20 (accusing the Panel of "transparently attempting to insulate [its] findings from review by denominating them credibility determinations") (internal quotation marks and citation omitted). Here again, the record thoroughly undermines Appellants' argument.

Appellants first complain the Panel should have found the testimony of John Morgan more compelling. Morgan, called for the first time during the second trial, testified that he "played a substantial role in constructing the 2011 plan" and provided "considerable detail about his reasons for drawing dozens of lines covering all 11 challenged districts." J.S.App. 32. The Panel was appropriately skeptical of Appellants' "belated reliance on Morgan's testimony" because it smacked of an "attempt at post hoc rationalization." J.S.App. 33. *Cf. Cooper*, 137 S. Ct. at 1476 & n.11 (affirming credibility determination based on one witness's "consistent recollection" under "probing cross-examination" and the State's decision not to call a rebuttal witness "even though he was listed as a defense witness and present in the courtroom

throughout the trial") (internal quotation marks and citation omitted). Appellants' contention that they could not have known until the second trial that Morgan's testimony may be relevant is itself not credible; he testified that he was responsible in part for drawing the map being challenged.

Morgan provided ample additional reasons to disbelieve his testimony. His contention that he did not consider race when splitting VTDs in a manner that just so happened to divide white and black residents with near surgical precision is "implausible on its face." *Anderson*, 470 U.S. at 575. Morgan's explanation that he "coded all census blocks in a VTD with the same political data," J.S. 21, only breeds further suspicion; the data *could not* show him where Democrats and Republicans live within a given VTD, only where black voters and white voters live. *See Bush v. Vera*, 517 U.S. 952, 970-71 (1996) (given that districting software "provided only racial data at the block-by-block level," splits in VTDs "suggest[] that racial criteria predominated over other districting criteria in determining the district's boundaries"). Where different parts of a VTD appear uniform politically but vary racially, it is simply incredible that Morgan managed to divide nearly every VTD along racial lines without using race.

Appellants further fault the Panel for discrediting the testimony of Delegate Jones "even though the court's first opinion credited Delegate Jones." J.S. 20. But as Appellants acknowledge, the second trial brought to light statements by Delegate Jones in the first trial that were untrue. Appellants dismiss these supposedly "small discrepancies between his testimony in 2015 and 2017." J.S. 21. But the discrepancies were hardly immaterial; they undermined Delegate Jones's previous explanations for many line-drawing

decisions and the 55% BVAP threshold itself. For instance, in 2015, Delegate Jones testified that he split the Granby VTD to accommodate the incumbent's request to keep his local business in his district. 1st Tr. 344:23-345:9. The original panel credited that explanation for the district's awkward configuration. J.S.App. 333. In 2017, Dr. Rodden revealed that the incumbent's business was, in fact, located in a different (predominantly white) VTD that Jones had *removed* from the Challenged District. 2nd Tr. 258:3-12. Additionally, while Delegate Jones testified in 2015 to receiving "significant" and "extensive" input from specific incumbent delegates of the Challenged Districts, those same delegates testified in 2017 that they provided little to no input whatsoever, let alone expressed any need or desire for a 55% BVAP floor. *See* J.S.App. 36. "In the face of these denials, Jones' testimony at the second trial was far more equivocal than the first." *Id.*

Appellants contend the Panel should not have credited the testimony of the African-American delegates because they failed to object on the House floor to a speech by a single African-American delegate who apparently supported the Challenged Districts' configuration—and who Appellants failed to call to testify in support of Jones' account. *See Cooper*, 137 S. Ct. at 1476 n.11. The African-American delegates Appellants attempt to impugn, however, testified that, contrary to Delegate Jones' account, they were mere passive recipients of redistricting information, not active participants in the process. In the face of this testimony, Delegate Jones could hardly rely on his alleged conversations with African-American delegates to justify his race-based line-drawing. Indeed, had the Panel held firm to factual findings that were

debunked in the second trial, *that* would have been clear error.[3]

The bottom line is that the Panel was in the best position to assess the witnesses' testimony and credibility. It did just that. Appellants' quibbles, based on a cherrypicked paper record, do not justify an extraordinary *post hoc* credibility determination by this Court.

II. The Challenged Districts Are Not Narrowly Tailored

A. The Panel rightly concluded that Appellants failed to meet their narrow tailoring burden

To satisfy strict scrutiny, a state must establish "a strong basis in evidence in support of the (race-based) choice that it has made." *Alabama*, 135 S. Ct. at 1274 (internal quotation marks omitted). Courts assume that Section 5 compliance is a compelling state interest. Thus, the "strong basis in evidence" test is met when a state comes forward with "'good reasons to believe' that its use of race was required under Section 5, even if a court later determines that the state's action was not in fact necessary to comply with the statute." J.S.App. 15 (quoting *Alabama*, 135 S. Ct. at 1274).

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[3] Appellants fume that it is "implausible that every House fact witness was dishonest." J.S. 16. In fact, Appellants offered a total of six fact witnesses between the two trials, four of whom were delegates from non-challenged districts who had no insight into the mapdrawers' considerations when drawing the Challenged Districts. While these other witnesses may have added little to Appellants' case, it is untrue that the Panel found them "dishonest."

The key question here is whether Appellants' trial evidence established a "strong basis in evidence" that a 55% BVAP floor was needed to avoid retrogression in all 11 Challenged Districts. The answer is, unequivocally, "no."

A state cannot establish a strong basis in evidence without conducting a meaningful "legislative inquiry." *Abbott v. Perez*, 138 S. Ct. 2305, 2335 (2018) (use of race was not narrowly tailored because the State "pointed to no actual 'legislative inquiry' that would establish the need for its manipulation of the racial makeup of the district" and failed to make "a strong showing of a pre-enactment analysis with justifiable conclusions"); *see also Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice*, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011) (legislatures must engage in a "functional analysis of the electoral behavior within the particular . . . election district").

No such analysis occurred here. It is law of the case that the 55% BVAP rule was not based on an evaluation of local conditions in each Challenged District. Instead, Delegate Jones calculated that threshold "based largely on concerns pertaining to the re-election of [the incumbent] in [District] 75." *Bethune-Hill*, 137 S. Ct. at 796 (citation omitted). Then, "[r]ather than conducting an individualized assessment of each district, Jones applied the 55% figure from District 75 across the board to all the challenged districts," J.S.App. 89; *Bethune-Hill*, 137 S. Ct. at 796, all of which vary dramatically in terms of geography, demographics, and electoral history, J.S.App. 87.

To be sure, a state need not compile an "administrative record" to ensure that its line-drawing decisions

survive strict scrutiny. *Bethune-Hill*, 137 S. Ct. at 802 (citation omitted). But here Delegate Jones made *no* effort to obtain *any* evidence supporting the racial rule he imposed on 12 very different districts. *By his own admission*, Delegate Jones "did not compile recent election results in all the challenged districts"; "did not consider that the majority-minority districts in the 2011 state Senate map all had less than 55% BVAP"; and "did not conduct an analysis to determine whether white and black voters tended to vote for the same candidates, or exhibited polarized voting behavior, in any of the challenged districts." J.S.App. 88. As a result, Appellants

> produced no evidence at either trial showing that the legislature engaged in an analysis of *any* kind to determine the percentage of black voters necessary to comply with Section 5 in the 11 remaining challenged districts.

Id.

Faced with that fatal finding, Appellants insist that the analyses Delegate Jones did not do, and the evidence that he did not gather, are merely "cosmetics" and "busywork exercises." J.S. 31, 33. Hardly. They are exactly the kinds of inquiries that Appellants previously applauded Delegate Jones for undertaking with respect to District 75. *See* Brief for Appellees at 54, *Bethune-Hill v. Va. State Bd. of Elections*, No. 15-680, 2016 WL 6123732 (Oct. 17, 2016) (praising Delegate Jones for "examin[ing] precisely the kind of information that DOJ has said bears on retrogression," including "rates of electoral participation," "election history and voting patterns," and "minority turnout rates" in District 75). More importantly, these are exactly the kinds of inquiries that led this Court to hold that Appellants met their narrow tailoring

burden with respect to District 75. *See Bethune-Hill*, 137 S. Ct. at 801 (use of the 55% BVAP rule was narrowly tailored as applied to District 75 because Delegate Jones considered District 75's "turnout rates," "the results of the recent contested primary and general elections," District 75's "large population of disenfranchised black prisoners," and the fact that "white and black voters in the area tend to vote as blocs"). Appellants' current claim that such analyses are "useless," J.S. 31, are contrary to the law and their own prior briefing.[4]

In sum, the evidence shows that Appellants engaged in an unjustified, mechanical, one-size-fits-all approach to racial line-drawing. That is the very antithesis of narrow tailoring. *See* J.S.App. 95 ("Selecting a BVAP figure entirely without evidentiary foundation plainly does not satisfy [a State's strict scrutiny] burden."). Accordingly, the Panel easily concluded that Appellants' use of race was not narrowly tailored. *See* J.S.App. 96. On this record, that conclusion is unassailable.

B. Appellants cannot avoid the requirements of strict scrutiny

Because Appellants cannot establish a strong basis in evidence for their racial decisions, they try to show that they never bore that burden in the first place. Those efforts fail.

First, Appellants fault the Panel for "conclud[ing] that the Challenged Districts are racial gerrymanders

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[4] Appellants also assert that the 55% BVAP rule was "tailored to avoid the twin evils of 'cracking' and 'packing.'" J.S. 33. Appellants cite no evidence supporting that claim, and for good reason—there is none.

because they are safe districts around or above 55% BVAP and not influence districts around or below 50% BVAP." J.S. 25. Appellants' argument simply misses the mark. This case is not about whether states may create "safe" districts or "influence" districts. This case is about whether the Equal Protection Clause imposes outer limits on a state's race-based districting decisions. It does. *See, e.g.*, *Shaw I*, 509 U.S. at 655 (Section 5 does not "give . . . carte blanche to engage in racial gerrymandering in the name of nonretrogression"). As a result, a state must have a "strong basis in evidence" for the racial classifications that it adopts. *Alabama*, 135 S. Ct. at 1274.

Appellants dislike that legal regime; they would prefer one where courts "deem race-based measures tailored so long as they are appropriate to the ultimate end." J.S. 26. Whatever that novel standard means, it is not the standard this Court has articulated time and again. Appellants' mere disagreement with this Court's decisions does not justify this Court's review.

Equally important, Appellants' strawman description of the Panel's supposed "error" bears no resemblance to the Panel's actual analysis. The Panel did not mention "safe" seats or "influence" seats at all. Nor did it "fault[] the House for not drawing districts at lower BVAP levels." J.S.27.[5] And the Panel most certainly

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[5] The Panel did appropriately credit expert testimony showing that, in fact, black voters could easily elect their candidates of choice with less than 55% BVAP. *See* J.S.App. 90-94. The Panel considered that testimony because it helped show that the General Assembly had no basis in evidence for its indiscriminate application of the 55% BVAP floor. *See* J.S.App 95 ("We do not require that the legislature determine precisely what percent minority population § 5 demands nor did Dr. Palmer attempt to ascertain such a figure.") (internal quotation marks and citation omitted).

did not declare, as Appellants claim, that states are not "permitted to make judgments about how best to prevent retrogression.'" J.S. 26 (quoting *Alabama*, 135 S. Ct. at 1286 (Thomas, J., dissenting)). In fact, the Panel went out of its way to acknowledge the discretion afforded to legislatures. J.S.App. 96.

What the Panel *did* do was hold that the Challenged Districts were not narrowly tailored because—after two trials—Appellants failed to offer any evidence showing that it was even arguably necessary to apply the same arbitrary racial threshold to all 11 districts. That holding was hardly "illogical and legally baseless." J.S. 27. It was compelled by this Court's precedents. *See, e.g.*, *Cooper*, 137 S. Ct. at 1472 (this Court will not "approve a racial gerrymander whose necessity is supported by no evidence"); *see also Alabama*, 135 S. Ct. at 1273 (rejecting Alabama's "mechanically numerical view as to what counts as forbidden retrogression").

Second, Appellants assert that Justice Souter's dissent in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), actually *required* them to draw all 11 Challenged Districts with 55% BVAP or more. Specifically, Appellants claim that they could not have obtained preclearance of a redistricting plan that significantly reduced BVAP levels because Appellants "did not have and could not have obtained" the evidence that they would have needed to prove to the Department of Justice that such reductions were nonretrogressive. J.S. 29.

This is another transparent and unpersuasive attempt to avoid the "strong basis in evidence" requirement. Appellants cannot avoid their narrow tailoring burden simply by throwing up their hands and saying the requisite analysis is too hard. As the Panel rightly explained, it is Appellants' "burden to justify their

predominant use of race." J.S.App. 95. It follows that Appellants are "responsible for the state's failure to seek relevant information at the time of the redistricting that would support the legislature's race-based decision." *Id*. To hold otherwise would allow Appellants to "pack black voters into majority-minority districts in perpetuity, claiming ignorance of the fact that high BVAP concentrations were not necessary to comply with Section 5." *Id*.

Furthermore, Appellants' excuses for failing to analyze voting behaviors in the Challenged Districts are wholly unpersuasive. They say meaningful analysis would have been impossible because there are "too few House of Delegates contested elections" to analyze; because "voter registration and turnout records in Virginia do not reference race"; and because Virginia "holds odd-year elections . . . , rendering data from congressional and presidential elections unhelpful in assessing voting patterns." J.S. 29. Even if those excuses were facially plausible (they are not), they did not prevent Delegate Jones from conducting a more searching analysis for District 75. Appellants do not even try to explain why these excuses prevented them analyzing 11 Challenged Districts, but not the twelfth.

Third, Appellants seem to argue that no analysis was necessary because it was "obvious" that each Challenged District needed 55% BVAP or more to avoid retrogression. J.S. 29. That is pure revisionism. For example, Appellants claim that they "had evidence specific to each district and region, similar to the evidence this Court found to justify a 55% BVAP in HD 75." J.S. 30. But the Panel reached the opposite conclusion based on Delegate Jones' uncontroverted

testimony. J.S.App. 88. Appellants' rhetoric cannot rehabilitate the record.

Appellants also renew the argument that their racial rule was justified by statements from "Black Caucus members" who, in 2011, "supported districts of 55% BVAP or higher." J.S. 29; *see also* J.S. 30, 35. Tellingly, however, Appellants "did not produce a single member of the black caucus at either trial to [so] testify." J.S.App. 88-89. (Appellees, by contrast, offered the testimony of several African-American delegates that they did not believe the 55% BVAP threshold was necessary and never told Delegate Jones otherwise.) In any event, Appellants cannot establish a strong basis in evidence based solely on the self-interested advocacy of a few incumbents. *See Abbott*, 138 S. Ct. at 2334 ("A group that wants a State to create a district with a particular design may come to have an overly expansive understanding of what [the VRA] demands. So one group's demands alone cannot be enough.").

Lastly, Appellants note that they consulted a "polarized voting analysis created during the prior redistricting cycle's litigation" which "supported districts of 55% BVAP or higher." J.S. 31. But Delegate Jones admitted that he never read (and did not even have a copy of) the 2001 analysis at the time of the 2011 redistricting process. *See* 2nd Tr. 572:1-6. Furthermore, a single report based on data from the 1990s cannot provide a strong basis in evidence for race-based districting decisions made in 2011. Even the author of the 2001 report, Dr. James Loewen, admitted that his report could not be used to determine the level of BVAP needed to avoid retrogression in 2011. *See* Dkt. No. 220-1 at 171, 181-86.

In sum, Appellants did not have "impeccable reasons" to apply the same arbitrary racial threshold to 11 very different districts. J.S. 31. To the contrary, they "produced no evidence" of any plausible reasons whatsoever. J.S.App. 88. The Panel therefore correctly concluded that Appellants failed to meet their narrow tailoring burden.

CONCLUSION

The Court should dismiss the appeal, either on standing grounds or for the absence of a substantial question, or summarily affirm the judgment below.

Respectfully submitted,

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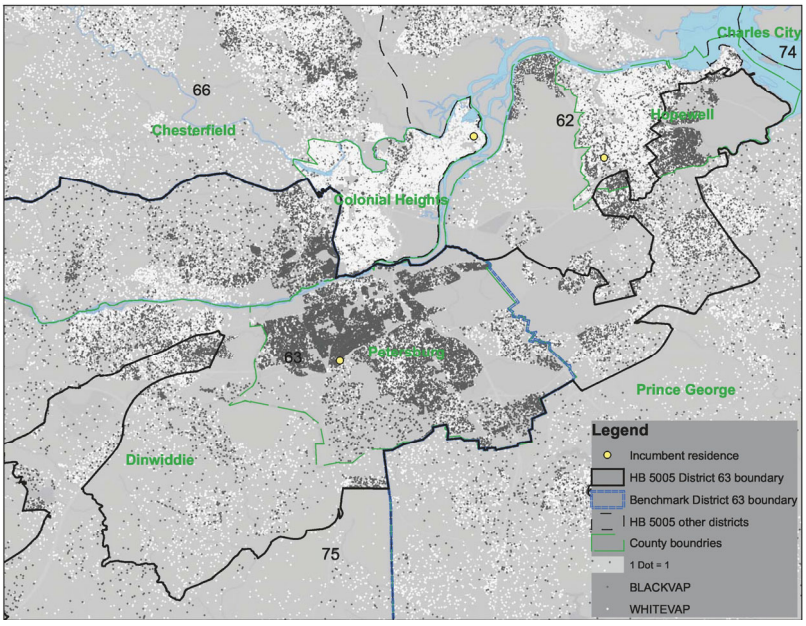
October 9, 2018

APPENDIX

APPENDIX



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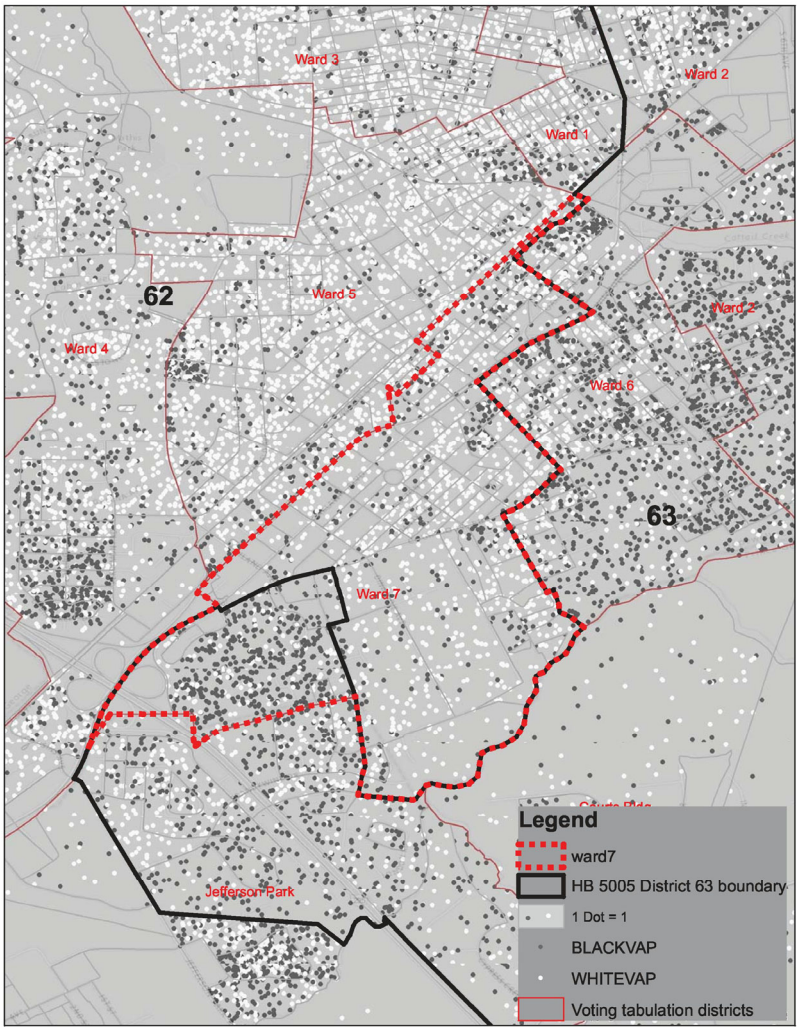
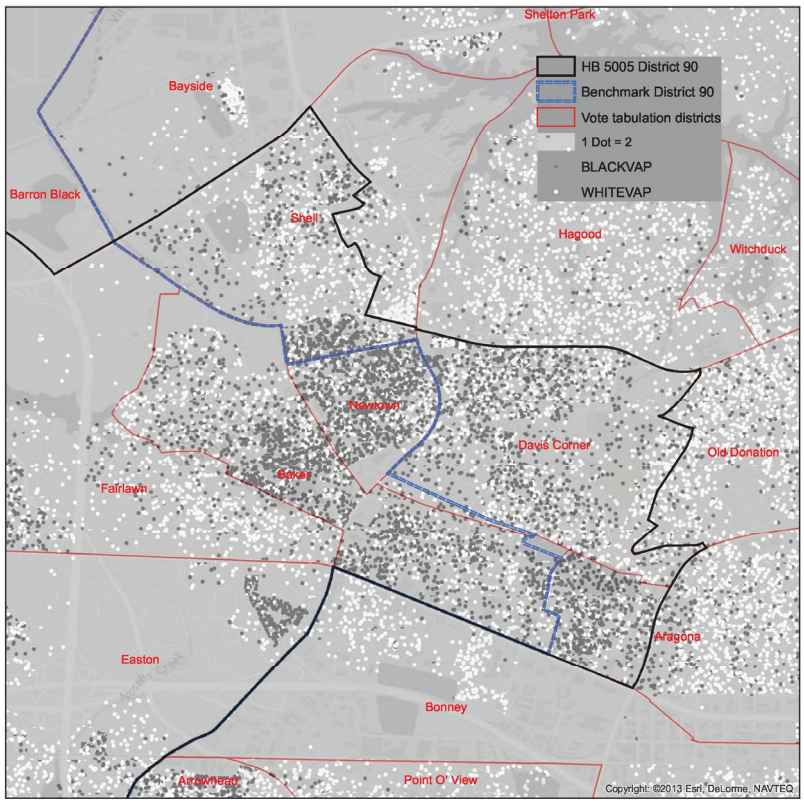


PX69 at 38 (District 63)

PX69 at 58 (District 89)



PX69 at 60 (District 90)

PX69 at 47 (District 95)