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

OPPOSITION TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

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STATEMENT

Deny it though they may, Appellees contend that the Virginia House of Delegates violated the Constitution simply by complying with the Voting Rights Act ("VRA").

As to the predominance test, Appellees assert the House went wrong in targeting a "racial threshold." Motion to Affirm ("Mot.") 17. But, as this Court's precedents, the United States' brief in the first appeal, and Appellees' admissions below make clear, the VRA requires districts that meet racial thresholds—because that is how vote dilution is prevented. Appellees dislike the target the House chose, and they dislike how Congress wrote and this Court has interpreted the VRA, but they cannot seriously claim the House's use of a threshold in structuring the Challenged Districts distinguishes this case from any other instance of VRA compliance.

As to the strict-scrutiny test, Appellees claim the House should have done more to justify its 55% black voting-age population ("BVAP") target. But they concede the House cannot be faulted "for not drawing districts at lower BVAP levels." Mot. 30 (quotations omitted). Appellees' call for additional evidence—from the state with the tightest time frame to redistrict—misses the point that districts required by the VRA must be narrowly tailored under the VRA.

This Court has repeatedly cautioned that states' VRA and constitutional obligations must not be construed as incompatible. But that is exactly what the decision below accomplishes. This case, the Court's last opportunity to address these issues before the 2021

redistricting, affords an opportunity for desperately needed clarity.

ARGUMENT

I. The District Court's Predominance Analysis Was Erroneous

The parties agree that there is a difference between "legitimate efforts at VRA compliance" and suspect "singularly race-based redistricting" and that the "predominance" test differentiates between the two. Mot. 17; *compare* Jurisdictional Statement ("J.S.") 14-16. This appeal presents the important question of where that line falls.

A. Appellees criticize the House's use of a "racial threshold," claiming it could have complied with the VRA in "many ways…that do not trigger strict scrutiny" without one. Mot. 16. Not so.

The VRA vote-dilution doctrine addresses "numerical superiority" at the polls, given that the group with the most votes wins the election, *Thornburg v. Gingles*, 478 U.S. 30, 48 (1986), which is why this Court interpreted VRA §2 to incorporate "an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area?" *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009). VRA §5 too, as amended, protects "effective voting power," *Georgia v. Ashcroft*, 539 U.S. 461, 493 (2003) (Souter, J., dissenting), which is why the federal court with jurisdiction over preclearance proceedings set a 65% minority VAP rule as the presumption of non-retrogression, *Texas v. United States*, 831 F. Supp. 2d 244, 263 (D.D.C. 2011). As the United States argued in the first appeal, rendering every minority VAP

target suspect would "risk…federal-court overinvolvement in redistricting" and "discourage voluntary compliance with the VRA." Brief for the United States, *Bethune-Hill v. Va. State Bd. of Elections*, 15 (No. 15-680). Indeed, Appellees admitted below that the VRA imposes numerical thresholds, stating that they "are not even remotely suggesting that any of these 12 districts should have had their BVAP lowered below [50] percent. We've never made that claim, we never will make that claim." 1 Tr. 818:10-15.

Consequently, the dispute here is not over the use of a racial target but over the House's choice of 55% against Appellees' preference of 50%, a difference of no practical electoral significance. *See* J.S. 33.

B. This Court has not condemned every "racial threshold." Its precedent instead calls for "holistic analysis" of "all of the lines of the district at issue." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 800 (2017). Appellees barely defend the decision below as a "holistic" analysis, but rather assert that, because it discussed redistricting facts, it suffices. This misses the point that *what* courts do and do not consider will determine what is and is not racial predominance.

1. For example, there is a meaningful difference between creating a new VRA district and preserving one drawn in prior decades. Although race might normally predominate in the former case, given that most lines will be chosen to meet a racial target, *see Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017), the goal of *preserving* a VRA district aligns with neutral purposes, such as maintaining a constituency, and

involves attention to race only at the margins, *see, e.g.*, *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 590-93 (N.D. Ill. 2011).

That difference, so critical in reality, went ignored below. Accordingly, Appellees can only claim that the district court found that an "unyielding racial threshold dictated district lines from start to finish," Mot. 17, because the district court created an artificial "start" and "finish."[1]

Appellees also respond (at 10) that core retention cannot be relevant because HD75, which the district court's first opinion subjected to strict scrutiny, had high core retention. But that conclusion was neither affirmed nor even addressed in this Court's first opinion because its holding that HD75 is narrowly tailored mooted the House's challenge to the predominance finding. *See* Appellees' Br., *Bethune-Hill v. Va. State Bd. of Elections*, 50 (No. 15-680) (raising the issue). Besides, the House's argument is not that "an undefined" level of core retention immunizes a district from strict scrutiny, Mot. 11, but rather that the goal of retaining cores is critical to a "holistic" analysis.

Further, Appellees are wrong (at 11) that this Court resolved this question in noting that core retention is "not directly relevant to the origin of the *new* district inhabitants." *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1271 (2015). In context, this

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[1] Contrary to Appellees' mischaracterizations (at 8), this issue concerns the legal relevance of core retention, not the specificity of the district court's findings.

only speculated what the district court "might have concluded" under a different legal standard and implied that core retention should be considered on remand. *Id.* at 1272. Regardless, this is dictum, and these issues merit direct consideration.[2]

2. Another salient consideration is the relationship between a selected racial target and local demographics. Whereas a majority-minority goal in rural Iowa would be constraining and suspect, it would likely operate in Montgomery, Alabama, as a guardrail, allowing the map-drawer to focus on other considerations. But the district court disregarded this inquiry, J.S.App.19, and ignored evidence that the 55% target was not constraining, including Dr. Rodden's admission that, "in most instances," there were "other ways to get" to 55%, J.S.App.112. Likewise, the fact that 158,000 black voting-age persons adjacent to the Challenged Districts landed in majority-white districts is not relevant to "congratulate" anyone, Mot. 15, but to prove that meeting the 55% target was an "easy feat," Mot. 6.

Appellees' contrary arguments are incoherent. They disclaim any objection to "higher BVAP" in VRA districts than in majority-white districts. Mot. 17. If so, they should agree with the House that the *degree* of difference, not merely higher BVAP, is what matters.

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[2] Appellees similarly err (at 11-12) in claiming *Alabama* forecloses the House's argument about the location of population deviations by citing one page of a 113-page district-court decision and assuming this Court's discussion was referencing that page. To the contrary, *Alabama*'s reasoning indicates that geographic disparities are relevant. *See* J.S. 11-12.

J.S. 14. But Appellees' evidence is that "areas assigned to the challenged districts had higher BVAPs than the areas assigned to the non-challenged districts." Mot. 13 (quotations omitted). That is ordinary VRA compliance. If "swapping areas with 27.1% BVAP for areas with 37.9% BVAP" or placing territory "*24 percentage points* higher" in the Challenged Districts is suspect, Mot. 14, the Court may as well invalidate the VRA now. That would be less expensive than discerning through years-long litigation that "areas assigned to [VRA districts] had higher BVAPs," a quotidian observation.

C. The district court's factual findings also threaten VRA compliance because they place redistricting authorities at the mercy of revisionism.

Contrary to Appellees' assertions (at 23), the district court placed its own "integrity" at issue by crediting witnesses' 2017 testimony against their contradictory 2011 video-recorded statements. In this respect, Appellees are flat wrong (at 25) in contending that only "a single African-American delegate" spoke out in 2011. Multiple Black Caucus members spoke for the plan, including Delegate Dance who stated in 2011 that *she* determined a 55% target was needed and that Black Caucus members had input, PEX35 at 157-58, and then testified to the contrary in 2017, 2 Tr. 120:22-121:16. Appellees are also wrong (at 25) to criticize the House for not calling Black Caucus members to testify when their 2011 testimony to the House was admitted as video evidence.[3]

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[3] Web links to some videos are available in the Amicus Brief of National Black Chamber of Commerce et al., *Bethune-Hill v. Va. State Bd. of Elections*, 16-21 (No. 15-680).

Appellees then perpetuate the district court's misstatements of testimony, including that John Morgan testified that his political data could "show him where Democrats and Republicans live within a given VTD [Voting District]," Mot. 24, when he said no such thing, J.S. 21. And Mr. Morgan did not "divide nearly every VTD along racial lines," Mot. 24, because Dr. Rodden's maps show that he repeatedly stopped just short of BVAP—hence, the 158,000 such persons omitted from the Challenged Districts—evidencing race-blind VTD splits, J.S.App.105.

II. The District Court's Narrow-Tailoring Analysis Was Erroneous

As the House's Jurisdictional Statement explained, the 55% target is narrowly tailored because VRA §5 required, or at least permitted, compliance through 12 safe seats at supermajority BVAP levels. Appellees *concede* this, arguing only that it "misses the mark" because "[t]he Panel did not…fault[] the House for not drawing districts at lower BVAP levels." Mot. 30 (quotations omitted). But VRA §5, by forbidding retrogression, required the Challenged Districts to be drawn at *some* BVAP level. So, if the House was justified in "not drawing districts at lower BVAP levels," what is left to dispute? This concession means the Challenged Districts are narrowly tailored under §5.

Anyway, Appellees' contention that, without the 55% target, black voters would have "greater voting strength across the map," Mot. 15, is advocacy for lower-BVAP influence districts. And, contrary to Appellees' personal preferences, the VRA treats the submergence of minority voters in majority-white

districts as dilution, not empowerment. J.S. 23-24. Further, the district court's conclusion that many districts were high-BVAP "donors," J.S.App.39, 83, indicates that dropping BVAP to achieve this mythical "greater voting strength across the map" would require intensive race-based maneuvering. So, yes, this case *is* "about whether states may create 'safe' districts or 'influence' districts." Mot. 30.

Appellees change the subject to the House's "narrow tailoring burden," Mot. 31, but they divorce the burden from the thing to be proved: what VRA §5 requires. The House *has* proved that targeting 55% is narrowly tailored because §5 required supermajority districts, and the House did not go "beyond what was reasonably necessary," *Shaw v. Reno*, 509 U.S. 630, 655 (1993), as 55% is below supermajority status, *see Thornburg*, 478 U.S. at 85-86, 89 (O'Connor, J., concurring) (describing 60% minority VAP "a somewhat precarious majority").

Undeterred, Appellees accuse the House of conducting no §5 analysis. This is triply wrong.

First, Appellees ignore their concession that the House correctly identified 12 ability-to-elect districts in the benchmark plan and determined that 12 ability-to-elect districts were necessary to avoid retrogression. *Bethune-Hill*, 137 S. Ct. at 795 ("The parties agree that the 12 districts at issue here…qualified as 'ability-to-elect' districts."). That is a difficult task requiring analysis, *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1308 (2016), and is the gravamen of the §5 inquiry because §5 looks to the plan as a whole, *Texas*, 831 F. Supp. 2d at 268. Only by ignoring the central feature of §5 compliance can Appellees say no analysis occurred.

Second, Appellees ignore the "good-faith efforts of Delegate Jones and his colleagues to achieve an informed bipartisan consensus." *Bethune-Hill*, 137 S. Ct. at 801. Video evidence, among other things, recorded those efforts. *See* J.S. 30. Appellees respond that "the Panel reached the opposite conclusion," Mot. 32, but that conclusion fails any standard of review because the videos speak for themselves, and the district court ignored them. And Appellees' argument (at 27) that this Court's holding on HD75 restricts the facts available for consideration contradicts this Court's directive that "it is proper for the District Court to determine in the first instance whether strict scrutiny is satisfied." *Bethune-Hill*, 137 S. Ct. at 800.

Third, Appellees wrongly ignore the §5 burden in accusing House members of "throwing up their hands and saying the requisite analysis is too hard." Mot. 31. That is false. The House analyzed the facts available, but there was uncertainty because relevant information—like racial voter registration and turnout data—was unavailable. The law responds to uncertainty neither by "throwing up [its] hands" nor by demanding superficial activity for the sake of appearances.[4] It rather responds with a burden: in the face of uncertainty, the criminal defendant goes free or the motion for summary judgment is denied. In the face of uncertainty, §5 demands higher BVAP, not lower BVAP. The House properly accounted for its §5 burden.

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[4] The district court's litany of supposedly relevant tasks was also not performed for HD75.

III. The House Has Standing

The House has standing to appeal. It has a concrete and particularized interest in legislation establishing its own composition that was injured by the court's injunction, and the injury is redressible on appeal. This Court recognized this particularized interest in *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 194 (1972), which held the Minnesota Senate had standing to appeal a district court's invalidation of its redistricting law and imposition of a new redistricting plan. As the Court held, "certainly the Senate is directly affected by the District Court's orders" invalidating its voting districts. *Id.*

State Appellees principally argue that *Beens* should be overruled as inconsistent with "modern standing jurisprudence." Motion to Dismiss ("State Mot.") 13-14. But there is no inconsistency. "That a legislative body has a personalized and concrete interest in its composition is far from a novel concept." *U.S. House of Representatives v. U.S. Dep't of Com.*, 11 F. Supp. 2d 76, 86 (D.D.C. 1998) (discussing *Beens*). Nor does the House need special legal authority to appeal because "private parties can litigate the constitutionality or validity of state statutes, with or without the state's participation, so long as each party has a sufficient personal stake in the outcome of the controversy…." *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 430 (6th Cir. 2008); *see, e.g.*, *Bryant v. Yellen*, 447 U.S. 352, 367-68 (1980). State Appellees are wrong (at 14) that an *additional* standing requirement applies to defend a state statute; under "modern standing jurisprudence," Mot. 13, the House's particularized interest in its own districts is sufficient.

Next, State Appellees contend (at 15) that *Beens* is "materially different" because the district court there changed the size of the legislative body. But *Beens*'s reliance on *Silver v. Jordan*, 241 F. Supp. 576 (S.D. Cal. 1964), *aff'd*, 381 U.S. 415 (1965), which involved a dispute over district lines—not the size of the body—indicates that this fact is immaterial. This is a difference in degree, not kind.

State Appellees' rule would place state legislatures at the mercy of state executives, often of different political parties, in redistricting litigation. State executives routinely abandon redistricting legislation for political reasons, thereby creating "two sets of 'plaintiffs' asserting unconstitutionality of the state apportionment system." Robert G. Dixon Jr., Democratic Representation: Reapportionment in Law and Politics 153 (1968). No precedent supports State Appellees' view that, although *any* district resident can be a plaintiff, *only* the state executive can defend. That rule would allow the executive to meddle with the composition of the legislature at will.

Moreover, Virginia law *does* authorize the House to defend state statutes. That is plain because, as State Appellees concede (at 9), the Virginia Supreme Court has approved the House's intervention in defense of legislation. *See Vesilind v. Va. State Bd. of Elections*, 813 S.E.2d 739, 742 (Va. 2018). That was sufficient in *Karcher v. May*, 484 U.S. 72 (1987), which held that the New Jersey legislature's "authority under state law" was established through the state supreme court's practice of "grant[ing] applications of the Speaker of the General Assembly and the President of the Senate to intervene as parties-respondent on behalf of the

legislature in defense of a legislative enactment." *Id.* at 82. The Court concluded this from a single redistricting case mentioning legislative intervention, *In re Forsythe*, 450 A.2d 499, 500 (N.J. 1982), and this Court must infer the same authority here. Notably, in *In re Forsythe*, the legislature defended the statute "with the Attorney General," 450 A.2d at 500, so it is of no significance—contrary to State Appellees' assertion (at 11-12)—that, in past Virginia state-court cases, the House intervened alongside the executive.

State Appellees ask, not only (at 12) that the Court disregard *Karcher*'s analysis—which this Court has cited as binding precedent, not "unnecessary" dictum (State Mot. 12 n.7), *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013)—but also (at 8-9) that it rule on undecided Virginia separation-of-powers issues. The Court's obvious lack of competence to do so is why, in *Karcher*, it looked to state-court practice, not abstract state-law arguments. Besides, State Appellees pay short shrift to the numerous cases finding legislative standing to defend legislation. *See Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664-65 (2015), *Coleman v. Miller*, 307 U.S. 433 (1939); *I.N.S. v. Chadha*, 462 U.S. 919, 929 (1983), *United States v. Windsor*, 570 U.S. 744, 761 (2013). They concoct (at 17) all sorts of flimsy distinctions, but offer no analogous case supporting *their* view. This unsupported argument is no basis for summary disposition.

CONCLUSION

The Court should note probable jurisdiction and reverse.

Respectfully submitted,

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