



1 IN THE SUPREME COURT OF THE UNITED STATES

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4 VIRGINIA HOUSE OF DELEGATES, )

5 ET AL., )

6 Appellants, )

7 v. ) No. 18-281

8 GOLDEN BETHUNE-HILL, ET AL., )

9 Appellees. )

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11

12 Washington, D.C.

13 Monday, March 18, 2019

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15 The above-entitled matter came on for oral  
16 argument before the Supreme Court of the United States  
17 at 10:06 a.m.

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1 APPEARANCES:

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3 of the Appellants.

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10 Virginia State Board of Elections, et al.

11 MARC E. ELIAS, ESQ., Washington, D.C.; on behalf of  
12 Appellees Golden Bethune-Hill, et al.

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1 P R O C E E D I N G S

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument first this morning in Case 18-281, the  
5 Virginia House of Delegates versus  
6 Bethune-Hill.

7 Mr. Clement.

8 ORAL ARGUMENT OF PAUL D. CLEMENT

9 ON BEHALF OF THE APPELLANTS

10 MR. CLEMENT: Mr. Chief Justice, and  
11 may it please the Court:

12 In 2011, the Virginia House of  
13 Delegates formulated a redistricting plan that  
14 garnered overwhelming bipartisan support and  
15 swift preclearance by the Justice Department.  
16 That plan has governed the first four election  
17 cycles of the decade and delivered on its  
18 promise to provide African American voters with  
19 the ability to elect their candidates of choice  
20 in 12 districts that everybody agreed should be  
21 majority-minority districts.

22 The basic choice for this Court will  
23 be whether that plan, duly enacted by the  
24 people of Virginia, will govern this last  
25 election of the decade or if, instead, there

1 will be a court-imposed plan formulated by a  
2 special master from out of state.

3 Now the Virginia attorney general, for  
4 his part, would impose the court-ordered plan  
5 on the people of Virginia on the theory that  
6 the House of Delegates lacks appellate standing  
7 to appeal. That argument is deeply flawed and  
8 has enormous consequences that go well beyond  
9 this case but would be a particularly  
10 problematic feature in the all-too-often  
11 context where there is an impasse between the  
12 legislative branch and the executive branch and  
13 there has to be a court-ordered plan and the  
14 legislative branch and the executive branch are  
15 often adverse in that litigation over the  
16 court-ordered plan.

17 JUSTICE GINSBURG: Mr. Clement, here,  
18 it isn't even the legislative branch; it's one  
19 house of the legislature.

20 MR. CLEMENT: That's right, Justice  
21 Ginsburg, but I think particularly when you  
22 understand that the law at issue here has its  
23 object, one branch of the legislature, one  
24 house of the legislature, the House of  
25 Delegates, that that's exactly the right party

1 to bring this particular case or to  
2 vindicate --

3 JUSTICE SOTOMAYOR: But it's not --  
4 it's not a law that belongs to the one branch.

5 MR. CLEMENT: It's not a --

6 JUSTICE SOTOMAYOR: It has to be  
7 approved by the Senate and signed by the  
8 governor and survive a -- a -- a veto by the  
9 governor if he or she chooses.

10 So it's really a law that doesn't  
11 belong to the House. At best, it belongs to  
12 the legislature as a whole or to the  
13 government, the people of Virginia.

14 MR. CLEMENT: Justice Sotomayor, it  
15 doesn't belong to the House alone, but it does,  
16 in -- in -- in the parts that are challenged  
17 here, affect the House and the House alone.

18 JUSTICE SOTOMAYOR: Please tell me  
19 why. You -- it doesn't change the composition  
20 of the House. It doesn't change any of the  
21 legislative processes of the House in terms of  
22 how you do things, the number of people  
23 involved in doing them, the necessary votes, et  
24 cetera.

25 It may change the -- the membership of

1 individuals, but it doesn't change the  
2 processes of the legislature.

3 MR. CLEMENT: So I -- I beg to differ,  
4 which is to say I think that when you have the  
5 legislative districts, those are not just about  
6 elections. Those are the basic way in which  
7 the House chooses to organize itself, and they  
8 affect day-to-day operations within the House  
9 of Delegates.

10 If you watch the House of Delegates  
11 proceeding, the first thing you notice is that  
12 every member of the House of Delegates is  
13 identified by where they come from. It's the  
14 gentleman from Norfolk or the gentlewoman from  
15 the city of Richmond.

16 JUSTICE SOTOMAYOR: There still will  
17 be a gentlelady from Norfolk and a gentleman  
18 from wherever. The identity may change in the  
19 next election, but at least as currently  
20 constituted, those people will not change.

21 And, yes, they may change later, but  
22 there's no guarantee that the legislature ever  
23 has the person they want to win an election in  
24 the House.

25 MR. CLEMENT: Well, I don't think it



1 is guaranteed that there will be a gentleman  
2 from Norfolk because, if you redistrict in a  
3 way that essentially splits Norfolk four ways,  
4 there may be no gentlepersion from Norfolk.

5 And I think, more fundamentally, this  
6 is the basic decision as to whether they're  
7 going to be a representative government in  
8 terms of compact districts, whether they're  
9 going to be elongated.

10 JUSTICE GINSBURG: But Mr. --

11 MR. CLEMENT: I think that --

12 JUSTICE GINSBURG: -- Mr. Clement, the  
13 -- the change from the current representative  
14 to another, that's a frequent occurrence. It  
15 happens in every -- every time there's a new  
16 census, different lines are drawn. Different  
17 people will represent a constituency.

18 MR. CLEMENT: I -- I think that's  
19 true. I mean, I -- I think there may well be  
20 an injury for Article III purposes with every  
21 decennial census. I don't think -- and, again,  
22 I think the principle that we're arguing for is  
23 not going to open up the House to be in front  
24 of the courts in lots of different situations.

25 I think it really goes to this

1 fundamental question of how they're going to  
2 constitute themselves.

3 JUSTICE SOTOMAYOR: Mr. Clement, what  
4 are the --

5 JUSTICE ALITO: Mr. Clement, there are  
6 two -- as I understand it, you're -- you're  
7 claiming standing on two theories. One is --  
8 and correct me if I'm wrong. One is that  
9 you're representing the Commonwealth. The  
10 other is that you're representing the House as  
11 an institution.

12 Now, as to the first, Virginia says  
13 that that was not the basis on which you  
14 intervened below and that this is something new  
15 that has come up. Is that correct? And, if  
16 not, why?

17 MR. CLEMENT: I -- I don't think that  
18 it is correct. I think that it is true that  
19 when we intervened, we intervened to separately  
20 represent the House of Delegates and the  
21 Speaker in his institutional capacity. And the  
22 state did not object to that intervention  
23 motion.

24 So one thing I think it's clear to  
25 understand is I don't take the State -- and

1 I'll obviously be corrected if I'm wrong -- but  
2 I don't think -- take the State to be objecting  
3 to the House of Delegates' ability to have  
4 separate counsel or to be represented by  
5 somebody other than the attorney general.

6 Now, as the -- so that was the basis  
7 for the -- the intervention. As the litigation  
8 went on, it became clear that, essentially, the  
9 House of Delegates and their counsel were  
10 representing the interests not just of the  
11 House of Delegates but of the Commonwealth as a  
12 whole.

13 JUSTICE ALITO: And -- and that's  
14 based on what? On the arguments that were  
15 made? The arguments that were made were  
16 arguments that represented -- that went to the  
17 represent -- the interests of the Commonwealth?

18 MR. CLEMENT: Yes and the fact that  
19 most pointedly and sort of, I think,  
20 impressively in front of this Court, there was  
21 no separate briefing at all. There was no  
22 separate really appearance, other than a letter  
23 that said that they were happy to let us carry  
24 the water.

25 And I don't think it's an accident

1 that in this Court's first opinion when it used  
2 a shorthand to refer to the House of Delegates  
3 and the Speaker in his institutional capacity,  
4 this Court used the shorthand "the State." We  
5 were the only party here defending the  
6 constitutionality of the statute. We were  
7 doing that with the acquiescence of the  
8 attorney general.

9 And I think it's important -- one  
10 other point I'd just like to make very clear is  
11 that if you look at the authorizing statute  
12 that the attorney general is relying on,  
13 there's no separate provision for appeal.

14 So, as a matter of state statute, it's  
15 not like the federal statutes where there are  
16 very specific provisions separately addressing  
17 appeal and the solicitor general's role.  
18 It's --

19 JUSTICE ALITO: Well, I would be very  
20 uncomfortable trying to decide whether, as a  
21 matter of Virginia law, anybody other than the  
22 attorney general can ever represent the  
23 Commonwealth or whether the House, under some  
24 circumstances, can also represent the  
25 Commonwealth.

1                   That's a question of Virginia law.  
2                   And if that issue were -- is before us, there  
3                   would be an argument for certifying that  
4                   question to the Supreme Court of Virginia for a  
5                   determination because I -- I think it's a hard  
6                   one for us to make. The Supreme Court of  
7                   Virginia has allowed the House to intervene  
8                   under some circumstances, and we don't know  
9                   exactly what the theory was.

10                   MR. CLEMENT: That -- that's true. I  
11                   think our ultimate -- our alternative argument  
12                   allows you to avoid having to decide that. And  
13                   I do think it is a straightforward way to  
14                   decide the standing question. And it is one  
15                   that is strongly suggested by the Beens case of  
16                   this Court.

17                   JUSTICE KAGAN: Before you go to the  
18                   alternative argument --

19                   MR. CLEMENT: Sure.

20                   JUSTICE KAGAN: -- on the -- on the  
21                   representing the state, even supposing that  
22                   you're right, actually, it seems that you're  
23                   right, that throughout some part of this  
24                   litigation, the Attorney General's Office was  
25                   very happy to have the legislature do most of

1 the work.

2 Are you saying that that affects a  
3 kind of permanent delegation to the legislature  
4 to continue in that capacity, even if and when  
5 the Attorney General's Office decides, you  
6 know, actually, it -- something has changed,  
7 there now comes a point where we want to resume  
8 the head representative role?

9 MR. CLEMENT: The answer is yes. I  
10 mean, I think that at a certain point, whether  
11 you think about it in acquiescence, whether you  
12 think about it in forfeiture, at that point,  
13 they forfeited the ability to insist that they  
14 have the exclusive right to represent the  
15 Commonwealth.

16 JUSTICE SOTOMAYOR: Mr. Clement, that  
17 -- that's -- that's a pretty extreme statement  
18 on your part. If I make the assumption that  
19 Virginia law doesn't permit you to represent  
20 the State, it's only an assumption for the sake  
21 of argument, to now claim that they are saying  
22 you can carry the water now, but I can't fire  
23 you and carry my own water when I want to,  
24 that's a pretty bold statement that we're going  
25 to permit that kind of -- of forfeiture

1 basically argument or acquiescence argument to  
2 be made.

3 MR. CLEMENT: Well, I -- I mean --

4 JUSTICE SOTOMAYOR: Where we're --  
5 we're taking away from the people of Virginia  
6 the right to say who's going to speak on their  
7 behalf?

8 MR. CLEMENT: No, I -- I -- I think  
9 what you're doing is you're recognizing as a  
10 matter of federal law that at a certain point,  
11 if in the federal courts the executive branch  
12 has allowed the House of Delegates and its  
13 counsel to represent the interests of the  
14 Commonwealth as a whole, there are consequences  
15 to that choice. And they can't pull the rug  
16 out from that defense at the last minute when  
17 it becomes politically expedient.

18 Now --

19 CHIEF JUSTICE ROBERTS: Mr. Clement,  
20 I -- I'd like to move to the merits at this  
21 point if that's all right. And when -- I'd  
22 like your reaction to -- it seems to me the  
23 elephant in the room here is the fact that we  
24 have a standard that depends heavily on  
25 credibility determinations in terms of

1 predominance.

2           And we have a situation the first time  
3 around where, you know, Jones was found  
4 credible. The experts were found not credible.  
5 And then there's a shift and all of a sudden  
6 Jones is incredible and the experts are  
7 credible.

8           And when we have a standard of review  
9 that asks whether the findings were clearly  
10 erroneous, what are we supposed to do with  
11 that? I mean, if the -- if the way the case  
12 had come up was exactly flipped, we'd be  
13 deferring to questions of credibility that go  
14 one way, and now we're referring to them that  
15 go the other way.

16           It -- they both can't be right. And  
17 yet our review sort of depends on whoever gets  
18 here last.

19           MR. CLEMENT: Well, I -- I -- I think  
20 that's right, Mr. Chief Justice, and I'd say a  
21 couple of things.

22           First of all, I think in reviewing  
23 this case, I don't think you have to ignore the  
24 fact that there were contrary findings in the  
25 first go-around.



1           I also think that, in a way, you can  
2 sidestep the elephant in the room if you find a  
3 legal error in the way that the district court  
4 committed its or conducted its credibility  
5 findings.

6           And, here, I think you do have that  
7 with the double standard that they applied in  
8 terms of, well, if you testified for the second  
9 time on behalf of the plan, you are not  
10 credible because you should have been here the  
11 first time, but if you testified for the first  
12 time in the second trial against the plan, then  
13 it's perfectly excusable and we'll use your  
14 testimony. Not only will we credit it, but  
15 we'll use your testimony to discredit the other  
16 side.

17           I don't think you can have that kind  
18 of double standard. I also think that it would  
19 be helpful for this Court to provide some  
20 guidance on this broader question because I  
21 don't think that you can really simultaneously  
22 say that you are going to give good faith to  
23 the legislature, a presumption of good faith, a  
24 presumption of constitutionality, and then say  
25 that all of the witnesses from the legislative

1 branch and all of the people who have direct  
2 knowledge as to how the map was drawn and  
3 particularly how the VTDs were split, to then  
4 determine that they are going to be incredible  
5 as a blanket matter, I just don't think you can  
6 have them both.

7 I think you end up not giving enough  
8 deference. And I'm not saying you could never  
9 find the government witnesses incredible, but I  
10 think the standard has to be something far more  
11 than you see on this record. And I think it  
12 would be very helpful if this Court could  
13 clarify that as a legal matter.

14 I --

15 JUSTICE BREYER: What's the  
16 clarification?

17 MR. CLEMENT: The -- the --

18 JUSTICE BREYER: I'm not so worried  
19 about this case, but, I mean, there -- there  
20 are hundreds of thousands of trials, if not  
21 millions, and a certain percentage of them are  
22 reversed on appeal and they go back for a  
23 second trial.

24 And what happens if the fact-finder in  
25 the second trial is declared credible or all of

1       them, the witnesses and a different judge maybe  
2       or maybe the same, and the first one said no,  
3       it's the opposite, all right.

4               Now there are appellate courts all  
5       over the world and this country who want to  
6       know what to do. So what is it we're supposed  
7       to do that's capable of being generalized? I  
8       think that was the concern.

9               MR. CLEMENT: Well -- sure.

10              JUSTICE BREYER: That is a concern  
11       anyway that I have.

12              MR. CLEMENT: So I -- so I would say  
13       two things, Justice Breyer.

14              JUSTICE BREYER: I can think of one  
15       thing to do, which is you forget about the  
16       first trial. You go through here and you look  
17       at it and say, is the determination of  
18       credibility within the power of the judge who  
19       made it?

20              MR. CLEMENT: So I -- I would say two  
21       things, both of which are different from what  
22       you said, Justice Breyer. I mean, one is I do  
23       think in this kind of second trial context -- I  
24       mean, I think there's room for sort of a State  
25       Farm fox principle that if you're coming out

1 diametrically opposed, you should at least  
2 avert to the fact that you're doing that and  
3 have to come up with some slightly-better-  
4 than-normal reason to at least explain the  
5 change.

6           But the second thing that I think  
7 would be more limited to these redistricting  
8 cases, and I think it's very important, is when  
9 you have a context where the court has gone out  
10 of its way to say that it's particularly  
11 important to credit the good faith of the  
12 legislatures engaged in a very difficult task,  
13 I think you need a heightened standard before  
14 you dismiss their testimony across the board.

15           And what you have in this case, I  
16 think, is a perfect illustration of it. I  
17 mean, the person who was the principal author  
18 of the map, everybody agrees, was Delegate  
19 Jones. The only person who knows the details  
20 of why particular VTD splits was Mr. Morgan.

21           Now, if you say you're going to deem  
22 their testimony not just incredible in certain  
23 particulars but across the board, then you're  
24 left with Hamlet without the prince.

25           I mean, you're -- you're -- you're --

1 you're left with a couple of --

2 JUSTICE BREYER: I see -- I see where  
3 you're going. I have one other question I want  
4 to get an answer from you because suppose you  
5 do get standing. Suppose you're right -- no,  
6 you're wrong about the first half, which is  
7 that suppose that we find they're okay in  
8 saying that race was used predominantly.

9 Then we get to the question of, well,  
10 was there a good reason for that? And the  
11 reason they say was compliance with Section 5.  
12 And the -- the court here says no, it isn't,  
13 that isn't a good reason, because what you did  
14 is you took a 55 percent black voter standard  
15 and you used it for all 12 districts.

16 Now they elaborated on that, but that  
17 isn't a very good -- it can be a little bit  
18 more tailored than that. Some districts, yes,  
19 maybe. Some districts, no. But the House made  
20 no effort whatsoever. They just used this  
21 55 percent standard for all.

22 Now what do you say in response to  
23 that?

24 MR. CLEMENT: So I -- I -- I want to  
25 be very responsive to what I take to be sort of

1 a strict scrutiny question. I'd like to take  
2 30 seconds if I could on your premise which  
3 we're already past predominance.

4 I would say that before you get  
5 predominance and when you ask whether the  
6 district court committed a legal error, you  
7 have to take a hard look at HD 92, because they  
8 applied the same legal analysis to all the  
9 districts. They came out with the same result  
10 as to every district. And I don't really think  
11 that's what this Court had in mind last time in  
12 remanding this, because these districts looked  
13 very different and HD 92 is an awfully hard  
14 district to say that race predominated because  
15 it went from a BVAP of 62.1 to 60.70.

16 So the 55 percent floor really had no  
17 effect on the district. It went from three  
18 split voting districts to zero split voting  
19 districts, and it became more compact and  
20 entirely within the City of Hampton.

21 But if you think, nonetheless, that  
22 race predominated even as to HD 92, and you get  
23 to strict scrutiny, then I think the problem  
24 with the idea that there was a legal error here  
25 in using the -- the target developed

1 principally in HD 75 and the other districts,  
2 the reason that can't be a legal error is it  
3 asks too much of the state legislature in  
4 contexts like this, where you're dealing with  
5 districts that are all in the same basic part  
6 of the state, maybe that's a Northern Virginia  
7 perspective on this problem, but these are all  
8 districts that are closely related to each  
9 other in southeastern Virginia.

10 But even more importantly, they all  
11 have the same basic problem when the  
12 legislature's confronting this district --  
13 these districts, which is everybody I think  
14 agrees that these districts performed very  
15 differently in off-year House of Delegate  
16 elections than in presidential elections.

17 So you can -- yeah, you can have the  
18 district-specific information about how many  
19 people voted for President Obama in these  
20 districts, but I think everybody really agrees  
21 that what you really need is to look at the  
22 off-year elections, because there's much less  
23 turnout, and that's where you have a problem  
24 with more racially polarized voting.

25 Now, in those off-year elections, the

1 single-most important data point would be a  
2 contested primary, because especially in  
3 districts that are going to be relatively  
4 democratic where you really figure out whether  
5 or not the African American voters get to vote  
6 for their candidate of choice is in a contested  
7 primary, because that's when you have an  
8 African American candidate of choice going  
9 head-to-head with a white Democrat.

10           And if the -- and that's why there  
11 aren't that many of those. There's only two or  
12 three of those in all of these districts over  
13 the decade that precedes the redistricting.

14           And the one that everybody was focused  
15 on and seemed to basically agree was the best  
16 indicator of that was in HD 75. It was a  
17 contested primary election in 2005, and in that  
18 election, they -- they determined that you  
19 needed a 55 percent --

20           JUSTICE KAGAN: Well, I'm not sure I  
21 understand your answer, Mr. Clement, because,  
22 if there's one thing that we've made clear  
23 again and again, it's that the analysis ought  
24 to be district by district. And for sure, as  
25 you say, there might be things that many



1 districts or some districts share.

2           And you would -- you would be prudent  
3 to look at those things that they share and to  
4 say they share them. But there are also things  
5 that the districts do not share. And -- and I  
6 thought that what we have asked of legislatures  
7 is that when they do this, they look at a  
8 particular district and they do something, they  
9 explain themselves with respect to that  
10 particular district.

11           So, if what they do is they say, well,  
12 this shares a feature of HD 75 and that would  
13 push one way, but on the other hand, it may not  
14 share another feature of HD 75, I mean, that's  
15 the kind of analysis I would think that we've  
16 called for, rather than just saying we've done  
17 it for HD 75, and, gosh, they're all in the  
18 same part of the state, that's enough.

19           MR. CLEMENT: Well, Justice Kagan, I  
20 don't think it was quite that cursory. And  
21 there was -- there was some other information  
22 from other districts, but I think the critical  
23 thing is there was a consideration that all  
24 these districts share similar problems in not  
25 having -- it's not like there was this rich,

1 robust data set that they ignored because they  
2 all share the problems of the same dynamic and  
3 you don't have voter registration information  
4 by race in any of the districts, so that's  
5 another challenge.

6 And so they looked at what they had  
7 and what they could go by, and then they  
8 extrapolated. And it's not like the record is  
9 bereft of evidence that the same principles  
10 applied in different districts. I point you  
11 to --

12 JUSTICE SOTOMAYOR: Well, it is odd,  
13 Mr. Clement, that you say they didn't have  
14 voting records because 95 is next to 92. And  
15 what the district court did there was to look  
16 at both individually and then their impact on  
17 each.

18 You said we should look at 92, that  
19 stayed more concentrated. But the district  
20 court said you can't look at that -- you look  
21 at that, but you have to look at it in  
22 combination of the purpose it served. And the  
23 purpose 92 served was to impact directly 95  
24 because they took the blacks from 92 to make  
25 more blacks in 95, and they did it in a way

1 that they drew lines in the middle of a street  
2 with black houses on one side and white houses  
3 on another side.

4 It's hard for me to imagine how race  
5 isn't predominant when they're getting down to  
6 the nitty-gritty on the basis of what side of a  
7 street you live on. I don't know what  
8 compactness means when you use a line split of  
9 that nature. I don't know how you can look at  
10 that and not think that race predominated.

11 MR. CLEMENT: So I -- I -- I think  
12 that if -- even if you have a concern with the  
13 way voting districts were split at the top of  
14 95, far removed from the border with 92, that  
15 doesn't give you a basis for invalidating HD  
16 92.

17 And just to finish my answer to  
18 Justice Kagan's question, I think if you look  
19 at Joint Appendix page 451, you will see  
20 Delegate Dance, the delegate from District 63,  
21 and she's testifying on the House floor  
22 contemporaneously that the 55 percent number  
23 are the right numbers for the Richmond  
24 districts.

25 So it's not like they didn't have

1 testimony at the time from members of the  
2 African American caucus that said they were  
3 right to apply these numbers across districts.

4 I will reserve my time.

5 CHIEF JUSTICE ROBERTS: Thank you --

6 JUSTICE KAVANAUGH: Mr. Clement --

7 CHIEF JUSTICE ROBERTS: I'm sorry --

8 thank you, counsel.

9 Ms. Ratner.

10 ORAL ARGUMENT OF MORGAN L. RATNER  
11 FOR THE UNITED STATES, AS AMICUS CURIAE,  
12 IN SUPPORT OF NEITHER PARTY

13 MS. RATNER: Mr. Chief Justice, and  
14 may it please the Court:

15 I have two points on standing and two  
16 on the merits. On standing, the House as an  
17 institution isn't harmed by changes to  
18 individual district lines, and while states can  
19 authorize legislatures to represent them in  
20 court, Virginia hasn't done so.

21 JUSTICE ALITO: Well, on that first  
22 point, injury in fact must be concrete, but it  
23 doesn't have to be big.

24 MS. RATNER: That's correct.

25 JUSTICE ALITO: If something causes me

1 the loss of \$5 or causes me to expend an hour  
2 that I would rather do -- use for some other  
3 purpose, that's injury in fact.

4 Is it -- is it conceivable that this  
5 does not have even that kind of an  
6 administrative impact on the House of  
7 Delegates?

8 MS. RATNER: I think so, Your Honor,  
9 because what we're talking about here is  
10 potentially an effect for current incumbents in  
11 their capacity as candidates for -- for  
12 reelection prospects.

13 And so we're not talking about the  
14 current House having any injury. The House, I  
15 would think, is agnostic as to which  
16 individuals are selected as its members.

17 JUSTICE ALITO: I mean, it's hard for  
18 me to believe that doesn't cost them one dime.  
19 I mean, maybe they -- they publish a map  
20 showing the current districts, and they'd have  
21 to publish a different map. Maybe they have to  
22 print new stationery. Maybe they have to print  
23 new labels for offices or for the desks of the  
24 delegates. Injury in fact, as I said, does not  
25 require a lot of injury. It has to be

1 concrete, but it doesn't have to be big.

2 MS. RATNER: At a minimum, though,  
3 Justice Alito, it requires evidence of that  
4 injury. And all that we have from the House  
5 here is a statement of what this Court  
6 described in Wittman against Personhuballah as  
7 a non-obvious sort of injury. That's not  
8 sufficient to support standing unless there's  
9 evidence or affidavits saying just those types  
10 of things --

11 JUSTICE KAGAN: But suppose --

12 JUSTICE ALITO: Well, when were they  
13 supposed to do that? At what -- at what point  
14 was the -- was their standing challenged so  
15 that they would have an obligation to come  
16 forward with evidence?

17 MS. RATNER: You know, it's a little  
18 bit unusual given that this standing issue  
19 first arises with respect to this appeal. They  
20 could have introduced evidence when they  
21 intervened. And I would think, at the latest,  
22 the standing issue was challenged with respect  
23 to seeking a stay, I believe in July. And so  
24 there could have been some evidence introduced  
25 at that point. So --

1 JUSTICE KAGAN: Ms. Ratner --

2 JUSTICE SOTOMAYOR: See --

3 JUSTICE KAGAN: -- suppose that you're  
4 right that the legislature has no interest in  
5 who is going to represent each district. But I  
6 understood Mr. Clement to be making another  
7 argument, which is the legislature does have an  
8 interest in represent -- representational  
9 processes working correctly and that what  
10 something like this does is it confuses the  
11 representational process. It essentially blurs  
12 lines of accountability because nobody knows  
13 who it is that they're supposed to be  
14 representing. Are they supposed to be  
15 representing their old constituents or are they  
16 supposed to be representing their new  
17 constituents?

18 So there are divided loyalties.  
19 There's blurred lines of accountability, and  
20 that all of that is actually integral,  
21 integral, to the way a representative  
22 institution is supposed to work and -- and such  
23 an institution ought to -- ought to take an  
24 interest in those kinds of things.

25 MS. RATNER: So let me give you two

1 responses, Justice Kagan.

2           The -- the first is that I don't think  
3 it's true that there are current blurred lines  
4 of accountability. In fact, under the Virginia  
5 constitution, Article II, Section 6, it's clear  
6 that legislators represent their current  
7 district.

8           So there's no sense in which there's  
9 actually a divided constituency, unless we're  
10 talking about a current legislator who  
11 represents one district and sort of has her  
12 mind on a future district in which she'll  
13 campaign.

14           I think the second point is that, to  
15 the extent we're talking about just there may  
16 be generally less responsiveness or concern  
17 about this as a procedural matter, I do think  
18 then we're pushing more toward the type of  
19 generalized grievance. It's not clear to me  
20 why the House as a body would have a particular  
21 interest in that beyond what voters and people  
22 in the State of Virginia do.

23           I -- I think another way to illustrate  
24 why this isn't really a House-specific injury  
25 is by thinking of this not -- maybe not quite



1 as a zero-sum game, but certainly some current  
2 members are going to be benefited by line  
3 changes; others are going to be harmed.

4 And it seems a little bit strange to  
5 say that the House has a dog in that fight.

6 JUSTICE KAVANAUGH: How do you  
7 distinguish Beens, which seemed to deal with a  
8 lot of these same issues?

9 MS. RATNER: Well, Beens, it's hard to  
10 know exactly what to read into it because that  
11 decision just talks about standing as  
12 equivalent to intervention. And we know that  
13 that's not appropriate.

14 But even putting that to the side, we  
15 do think the type of injury that could have  
16 been addressed there is different in kind, not  
17 degree. And that's because when you --

18 JUSTICE KAVANAUGH: Why -- why do you  
19 say "in kind"? Just because of reduction in  
20 the size?

21 MS. RATNER: Because I think when you  
22 change the size of an institution, particularly  
23 when you slash it in half from 67 senators to  
24 35 senators, there are going to be more of  
25 these intuitive types of harms of the sort that

1 Justice Alito mentioned before.

2           There may be changes to committee  
3 structures, to rules for voting, rules for a  
4 quorum, and at least we can imagine some  
5 institutional-specific harms there, whereas,  
6 here, what we're really talking about are  
7 changes in the 100 members who may sit in the  
8 House's seats. And that's just not a harm that  
9 the institution itself suffers. It's agnostic  
10 as to that question.

11           CHIEF JUSTICE ROBERTS: Well, what  
12 about the proposition that it does change the  
13 nature of the entity if you are moving away  
14 from compactness and contiguousness, for  
15 example -- I guess the example is you may not  
16 have representatives who really are -- this is  
17 Richmond, that's what I represent, but they're  
18 going to have part of Richmond, they're going  
19 to have part of somebody else, and that changes  
20 the nature of the dynamic in the -- in the  
21 House?

22           MS. RATNER: Mr. Chief Justice, I  
23 would give the same response that I gave to  
24 Justice Alito before, which is, to the extent  
25 that that's really what we're talking about,

1       there has to be some sort of evidentiary  
2       showing for those types of standing  
3       allegations.

4               There's never been an affidavit put in  
5       or any evidence --

6               CHIEF JUSTICE ROBERTS: I don't think  
7       it's in --

8               MS. RATNER: It -- it doesn't seem  
9       intuitive at all that the new plan is  
10       necessarily going to be less compact and  
11       there's necessarily going to be some sort of  
12       real-world change in the day-to-day operation  
13       of the bodies. I just don't --

14               JUSTICE SOTOMAYOR: One could  
15       speculate that, and I'm trying to get back to  
16       that.

17               Justice Alito spoke about the cost of  
18       changing maps. It seems to me that under any  
19       law that could be attacked, a representative  
20       body could claim a financial harm. Election  
21       laws are passed by Congress all the time, and  
22       we wouldn't say that both houses individually  
23       could come in and challenge those election  
24       laws.

25               I don't think we would anyway. I --

1 we would -- and yet those election laws could  
2 require publication of different things and all  
3 sorts of things that would change. That's not  
4 a harm we would recognize.

5 So even if a particular legislature --  
6 well, the particular legislature might have --  
7 legislator might have standing if he or she  
8 says, I campaigned differently with this  
9 district as opposed to that district, but I  
10 still don't see why that would give the House  
11 standing.

12 MS. RATNER: So -- so a couple things.

13 CHIEF JUSTICE ROBERTS: Ms. Ratner,  
14 why don't -- why don't you answer and then move  
15 to the merits after that.

16 MS. RATNER: Okay. A couple things.  
17 With respect to the first part of your  
18 question, yes, we -- that's why the United  
19 States is taking a position on standing here.  
20 We worry that some of these theories and  
21 speculation could have far-reaching, unintended  
22 consequences. And that's why, at a minimum, we  
23 would hope that the Court would adopt a very  
24 cabined version of Beens if it wants to find  
25 standing here.

1           As to your second point, the Court has  
2 left open the question in Wittman against  
3 Personhuballah whether an individual legislator  
4 could have standing here.

5           Turning to the merits, we think that  
6 the district court committed legal error here.  
7 It applied across-the-board significance to a  
8 racial target that really had varying effects  
9 on these districts. And we think that it  
10 didn't sufficiently discuss non-racial motives  
11 for why --

12           JUSTICE SOTOMAYOR: You know, this is  
13 being said in a very generalized way. But I --  
14 this is a very long and carefully reasoned  
15 opinion. Every single district, the judge  
16 addressed, and it wasn't an overall statement  
17 about this is -- this 55 is the only thing I'm  
18 relying on. He went through every single  
19 individual district and pointed to problems  
20 with that district --

21           MS. RATNER: I understand that.

22           JUSTICE SOTOMAYOR: -- and with facts  
23 that they -- I shouldn't say he, it was a  
24 panel -- that they found convincing.

25           MS. RATNER: I understand that.

1 JUSTICE SOTOMAYOR: How do we get past  
2 clear error?

3 MS. RATNER: So, Justice Sotomayor, we  
4 think there's a legal error here, not -- we  
5 haven't gone on to discuss the clear error  
6 question. And I think that's most clear seen  
7 at pages 83 to 84 of the jurisdictional  
8 statement appendix, is where the court says,  
9 these are all inextricably intertwined, they  
10 all apply a 55 percent threshold.

11 And if you compare that to Footnote  
12 25 --

13 JUSTICE SOTOMAYOR: But they do --

14 MS. RATNER: -- at page 34, that's  
15 where the court relegates the House's expert on  
16 traditional districting criteria. And we think  
17 that that -- that imbalance really was borne  
18 out with some of these districts, like District  
19 92, which the House has already mentioned.

20 District 69 is another example I would  
21 point -- point the Court toward, where there's  
22 discussion, I -- I grant you there's discussion  
23 in the district court's decision of here are a  
24 few different precincts, we could imagine  
25 racial motives for these, but the opinion does

1 not talk about the clear non-racial motives in  
2 that district, moving the district up to align  
3 with the James River, making it more compact,  
4 making it more Richmond-centric, and that's not  
5 the predominance analysis that this Court has  
6 called for.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 Mr. Heytens.

11 ORAL ARGUMENT OF TOBY J. HEYTENS  
12 ON BEHALF OF APPELLEES VIRGINIA STATE BOARD  
13 OF ELECTIONS, ET AL.

14 MR. HEYTENS: Mr. Chief Justice, and  
15 may it please the Court:

16 There is only one sovereign whose law  
17 was declared unconstitutional by the federal  
18 district court. And what this Court is  
19 essentially being asked to do is to referee a  
20 dispute within the Virginia state government  
21 about whether Virginia should appeal that  
22 decision to this Court.

23 But Virginia law has been clear since  
24 before the Civil War that the State's Attorney  
25 General has the exclusive authority to make

1 that sort of litigation decision.

2 CHIEF JUSTICE ROBERTS: Well, here, in  
3 the beginning, the State's Attorney General was  
4 happy to have the House take over the  
5 litigation.

6 MR. HEYTENS: I -- the State's  
7 Attorney General did not oppose intervention, I  
8 agree, Mr. Chief Justice, but I think that the  
9 disposing of that is the trial brief that was  
10 filed by the State's Attorney General. This is  
11 at JA 3861, where the Attorney General made  
12 very clear that the House -- excuse me, that  
13 the Attorney General on behalf of the six named  
14 defendants and on behalf of the Commonwealth  
15 was allowing the defendant intervenors to take  
16 the lead in the litigation, but he did not say  
17 and has never said -- in this nine-volume Joint  
18 Appendix, you will find no statement by the  
19 House that they are purporting to represent the  
20 Commonwealth of Virginia, much less the six  
21 named defendants.

22 And you will find no acquiescence with  
23 the Attorney General that anyone other than the  
24 Attorney General represents the Commonwealth  
25 and the six named defendants. I have two



1 points.

2 JUSTICE ALITO: Well, you -- you might  
3 be right. And the statute that you point out  
4 does say that it is the responsibility of the  
5 Attorney General to represent the Commonwealth  
6 in civil litigation, but I don't know whether  
7 it's perfectly clear. And the House has been  
8 permitted by the Virginia Supreme Court to  
9 intervene. We don't know on exactly what  
10 theory.

11 So, if the issue whether the House is  
12 authorized under some circumstances and these  
13 circumstances to represent the Commonwealth, if  
14 that's open, I don't know why we shouldn't  
15 certify that to the Virginia Supreme Court.

16 MR. HEYTENS: Justice Alito, I -- I  
17 understand that concern, and I don't think the  
18 Court has to get into it. I think part 2 of  
19 this Court's opinion in Karcher just resolves  
20 that because, if you look at the House's  
21 intervention motion, if you look at their  
22 statements before the district court, they  
23 never once purported to intervene to represent  
24 the state. So far as I can tell, the very  
25 first time in this entire litigation that this

1 House -- that, excuse me, that the House ever  
2 suggested that they could represent the State's  
3 interest was after we challenged their standing  
4 to appeal.

5 And Karcher in part 2 of its opinion  
6 says as clear as possibly can, you're not  
7 allowed to shift grounds when someone  
8 challenges your standing to appeal. So I think  
9 the Court does not need to get into that,  
10 Justice Alito.

11 Let me go to the -- the question about  
12 divided constituencies. There was a question  
13 about that. I have two quick responses on  
14 that.

15 I don't think that can be a viable  
16 theory of standing for two separate reasons.  
17 Reason number one, if that were true, then this  
18 Court's decision in Wittman was unanimously  
19 wrong because all three of the Congress members  
20 in Wittman could have said, as a result of this  
21 remedial map, I'm going to represent a new  
22 constituency.

23 And the Court did not say they had  
24 standing on that theory. The Court never even  
25 entertained the idea they had standing on that

1 theory.

2 Reason number two, if you adopt that  
3 theory of standing, it will have serious  
4 federalism implications because you will be  
5 taking away the states' ability to decide for  
6 themselves.

7 JUSTICE BREYER: What do you suggest?  
8 I mean, the way you want to with no standing,  
9 you have a Democratic House, a Democratic  
10 governor, and they don't like the plan. They  
11 -- they don't like the court decision. They'll  
12 appeal it. Or Republican, same party, same  
13 thing.

14 But you get a Democratic House and a  
15 Republican governor or a Republican House and  
16 Democratic governor, and it could be the worst  
17 plan in the world or it could be the best plan  
18 in the world or the court could be wrong or the  
19 court could be right. But one thing for sure,  
20 nobody's going to be able to attack it. It's  
21 the House's plan. If you say they can't attack  
22 what the court did, then who can? The governor  
23 won't because he likes it politically.

24 So who will?

25 MR. HEYTENS: Well, Justice Breyer, my

1 fundamental submission is that this is a "who  
2 decides" question. This is a classic question  
3 of who makes the decision on behalf of the  
4 state, and Virginia has made one choice.

5 Now we're not suggesting that --

6 JUSTICE BREYER: But am I right in  
7 saying where the government is divided between  
8 the parties, then, in circumstances like this,  
9 nobody will challenge it?

10 MR. HEYTENS: I -- I don't --

11 JUSTICE BREYER: But nobody can,  
12 because we will have held nobody can, but where  
13 the elections turn out that it's the same  
14 governor party and the House party, it's all  
15 different. Now it is possible to challenge it.

16 Now, if there's no -- I would like you  
17 to say there's no way to challenge it or where  
18 there's the difference, or if there is, tell me  
19 what way.

20 MR. HEYTENS: Sure. Three thoughts, I  
21 think, on that, Justice Breyer.

22 First and foremost, I think positing  
23 that elected officials who are empowered to  
24 exercise government power will make decisions  
25 that way is inconsistent with the presumption

1 of good faith that this Court affords to  
2 government.

3 This Court has repeatedly -- this  
4 Court has -- I just think this Court should be  
5 very hesitant to adopt a theory of Article III  
6 standing that turns on whether the challenger  
7 can allege that the decision was made for  
8 political reasons.

9 I think that's number one.

10 CHIEF JUSTICE ROBERTS: Well, maybe  
11 you don't need an allegation. You can just use  
12 common sense that the legislature in fact --  
13 well, you know what I mean. I mean, it --  
14 it -- it -- I -- I haven't seen the case, I  
15 don't think, where the Democratic legislature  
16 has challenged an alleged gerrymander because  
17 it was too favorable to Democrats or vice  
18 versa.

19 MR. HEYTENS: Mr. Chief Justice, I  
20 think there could be a lot of finger-pointing  
21 on every side in this case. I mean --

22 JUSTICE BREYER: We're not alleging  
23 anything. I'm just saying -- nor are the  
24 parties. I'm just saying, is there a way to  
25 challenge standing should what I say be

1 truthful, in fact?

2 MR. HEYTENS: So --

3 JUSTICE BREYER: Whether it's an  
4 allegation, not an allegation, or not. Is  
5 there any way to maintain -- can somebody  
6 challenge?

7 MR. HEYTENS: I don't think the Court  
8 needs to decide in this case.

9 JUSTICE BREYER: Yeah. But I'd like  
10 to decide.

11 JUSTICE KAGAN: Mr. Heytens --  
12 (Laughter.)

13 JUSTICE BREYER: So tell me who  
14 you think -- who you think can challenge.

15 JUSTICE KAGAN: -- isn't one of --  
16 isn't one of the points here is that it's a  
17 matter of state law really. There are many  
18 states that have responded to this exact  
19 circumstance by allowing the legislature to  
20 proceed.

21 MR. HEYTENS: North Carolina.

22 JUSTICE KAGAN: And other states like  
23 Virginia that have not. And in some sense,  
24 this -- the question of whether somebody should  
25 be able to get to court in this partisan,

1 divided circumstance is one that a state can  
2 decide for itself.

3 MR. HEYTENS: Yes. And -- and,  
4 Justice Breyer -- yes.

5 JUSTICE BREYER: I was looking for an  
6 answer, honestly.

7 MR. HEYTENS: And -- and, Justice  
8 Breyer, to return to your --

9 JUSTICE BREYER: And I now have one,  
10 okay, thank you.

11 MR. HEYTENS: Well, I also don't think  
12 this Court needs to decide in this case whether  
13 an individual legislator or candidate would  
14 have standing. The reason you don't need to  
15 decide that is because no individual legislator  
16 nor candidate ever tried to intervene in this  
17 case.

18 This Court left that question open in  
19 Wittman. As the federal government points out  
20 in its brief, that question is still open here.  
21 So you don't need -- to decide this case, you  
22 do not need to definitively decide that no one  
23 would have standing because this Court has no  
24 occasion here to decide whether an individual  
25 elects --

1                   JUSTICE ALITO:  Suppose there -- there  
2                   was an affidavit by some administrative officer  
3                   of the House that said this is going to cost us  
4                   \$26 in administrative expenses.  Would the  
5                   House have standing?

6                   MR. HEYTENS:  No.

7                   JUSTICE ALITO:  Why not?  That's not  
8                   injury in fact?

9                   MR. HEYTENS:  It is an -- it is an  
10                  economic injury, but this Court has been clear  
11                  that what you need is a judicially cognizable  
12                  injury.  And I don't think that would be a  
13                  judicially cognizable injury to the House qua  
14                  the House.

15                  No one is disputing there's a  
16                  judicially cognizable injury here.  No one is  
17                  disputing that someone could have appealed  
18                  here.  But the judicially cognizable injury is  
19                  to the sovereign whose law was declared  
20                  unconstitutional, and that sovereign is the  
21                  Commonwealth of Virginia, not one of the  
22                  constituent parts of the state government.

23                  That's our fundamental submission, is  
24                  that this is a matter of state law.  Virginia  
25                  has a state --



1           JUSTICE ALITO:  So you're talk -- then  
2  you're really not talking about injury in fact;  
3  you're talking about some other limitation on  
4  -- and I can understand it.  It's coming from  
5  someplace else, but it doesn't have to do with  
6  injury in fact.

7           MR. HEYTENS:  Well, Justice Alito,  
8  I've understood the judicially cognizable  
9  injury to be part of the injury-in-fact  
10  inquiry, that this Court has said it's not just  
11  enough to have something that could be  
12  described as an injury in general; it has to be  
13  a judicially cognizable injury.  And my view  
14  would be that's not a judicially cognizable  
15  injury to the House of Delegates apart from the  
16  Commonwealth of Virginia.

17           JUSTICE KAVANAUGH:  What do we -- what  
18  do we do with Beens?  If I were a lower court  
19  judge, I would think Beens is controlling.  So  
20  are you asking to overrule Beens, distinguish  
21  it in some way?  What --

22           MR. HEYTENS:  Justice Kavanaugh, we  
23  are not asking you to overrule Beens.  We're  
24  asking you to say two things about Beens.  The  
25  first is to recognize that if Beens is still

1 good law, it, along with United States versus  
2 SCRAP, which was decided one year after Beens,  
3 is the outermost limit of standing that this  
4 Court has ever recognized and that its  
5 reasoning -- the reasoning of Beens itself,  
6 which is limited, I admit, has been squarely  
7 repudiated by this Court's subsequent  
8 decisions. I'd say that's thing one.

9 Thing number two is to say that Beens  
10 is fundamentally different because altering the  
11 size of the body affects the structure and  
12 nature of the body in a way that redrawing  
13 lines doesn't.

14 Let me give you a concrete example.  
15 Under the Virginia House of Delegates current  
16 rules, all committees have 22 members, and only  
17 one -- and a person can only be the chair of  
18 one committee.

19 If you slash the body in half, you  
20 would almost certainly have to revise both of  
21 those rules because, otherwise, you'd be in a  
22 situation where nearly 50 percent of the body  
23 was a member of every single committee.

24 JUSTICE GORSUCH: But I -- I would  
25 have thought that the response would be that

1 the members of the House have -- or Senate in  
2 that case have no more interest in -- in that  
3 than they would in this, that the people get to  
4 decide how big their House is and what lines  
5 are drawn.

6 MR. HEYTENS: May I?

7 CHIEF JUSTICE ROBERTS: Sure.

8 MR. HEYTENS: Again, Justice Gorsuch,  
9 I think Beens is, at best, the outermost limit  
10 of this Court's standing jurisprudence, and our  
11 fundamental submission is you should not extend  
12 it from the very specific situation presented  
13 there to the much more common situation  
14 presented here.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 Mr. Heytens.

18 Mr. Elias.

19 ORAL ARGUMENT OF MARC E. ELIAS

20 ON BEHALF OF APPELLEES GOLDEN BETHUNE-HILL, ET AL.

21 MR. ELIAS: Mr. Chief Justice, and may  
22 it please the Court:

23 It is not in dispute in this case that  
24 the Commonwealth of Virginia adopted a  
25 one-size-fits-all, 55 percent racial rule that

1 had a direct and significant input -- impact on  
2 the drawing of district lines in each of the --  
3 the 11 challenged districts. Voters were  
4 placed within and without of the district based  
5 on those lines.

6 CHIEF JUSTICE ROBERTS: Well, what the  
7 solicitor general -- the federal government's  
8 solicitor general says is that you're -- you're  
9 right, but it's -- it was too extreme, that  
10 they didn't look at other factors that had to  
11 do with the redistricting but sort of the --  
12 the flip side of the prior error, that -- that  
13 they just looked at -- the court was wrong in  
14 reviewing it to simply look at that same  
15 statistical figure.

16 MR. ELIAS: Well, I don't think you  
17 can fairly read the district court's lengthy  
18 decision and say that it didn't look on a  
19 district-by-district basis. Obviously, to use  
20 a phrase that, Mr. Chief Justice, you used, the  
21 elephant in the room in this case has been the  
22 55 percent rule. So it would be odd for the --  
23 for the opinion not to address that rule at the  
24 outset. But it did, in fact, do a  
25 district-by-district analysis.

1 CHIEF JUSTICE ROBERTS: Well, I  
2 actually had a different elephant in mind --  
3 (Laughter.)

4 CHIEF JUSTICE ROBERTS: -- which is  
5 the fact that the prior judicial panel found,  
6 you know, A, B, and C credible and D, E, and F  
7 incredible, and then a different panel found  
8 the exact opposite for the exact witnesses.

9 And that, I understand, is a basic  
10 element, if you're looking at a case, the  
11 clearly erroneous standard applies, but it  
12 seems an awkward position for us to be in in  
13 saying, well, these directly 180 degree  
14 findings are clearly or not clearly erroneous,  
15 when we would have found the exact same thing  
16 the other way if that panel had been before us.

17 MR. ELIAS: So I'd offer two answers  
18 to that, Mr. Chief Justice.

19 The first is a factual matter in this  
20 case. After Bethune-Hill won, when this Court  
21 remanded the case back to the district court,  
22 the question that the district court faced was  
23 what to do next. It was at the insistence of  
24 the appellants in this case that the record be  
25 reopened and that further testimony be heard.

1                   And, in fact, if you look at ECF 146,  
2 Note 4, the reason they gave why the record  
3 needed to be reopened was so that the new judge  
4 who had been assigned to the three-judge panel  
5 could hear witnesses and make credibility  
6 determinations.

7                   So it is an odd circumstance, indeed,  
8 for my friend to now be suggesting that  
9 having -- having urged and successfully, over  
10 our objection, I might add, reopened the record  
11 so that the new member of the panel could hear  
12 credibility determinations, to now be  
13 complaining about the --

14                   CHIEF JUSTICE ROBERTS: Right. No,  
15 but I understand. But whether or not that's  
16 significant depends on how much weight you give  
17 to the new evidence. But, I mean, the reality  
18 is that everything Jones said was the truth the  
19 first time and now everything he says the  
20 second time is not.

21                   MR. ELIAS: Well --

22                   CHIEF JUSTICE ROBERTS: And it just  
23 seems to me that -- that -- you know, it  
24 strikes me as a little awkward to apply the  
25 very deferential, clearly erroneous standard

1 when you've got this other -- other findings  
2 that are the exact opposite.

3 MR. ELIAS: So that brings me to the  
4 second point, which is this Court in Cooper  
5 faced a more extreme version of that, as you  
6 recall, where you had the state court had found  
7 one set of factual determinations with respect  
8 to why the North Carolina map had been drawn a  
9 certain way, and you had the federal court  
10 using essentially the same -- in the same basic  
11 set of facts, weigh the evidence the other.  
12 And this Court had to decide what to do in that  
13 instance and applied what was the appropriate  
14 rule there and the appropriate rule here, which  
15 is that the case before it is the -- is the  
16 case for -- that deferential, clear error  
17 review is appropriate.

18 These three judges had the benefit not  
19 just of the evidence in the second trial but  
20 the evidence in the first trial. So who was in  
21 a better position to -- to adjudge whether  
22 Jones was credible? A -- three judges who saw  
23 him once or three judges who could compare his  
24 first testimony to his second, as well as the  
25 testimony of additional witnesses?

1           Obviously, the second panel had more  
2 information regarding Delegate Jones and the  
3 experts and the other witnesses --

4           JUSTICE KAVANAUGH: Everyone agrees  
5 here that there needed to be 12  
6 majority-minority districts, right?

7           MR. ELIAS: We agree that there were  
8 12 majority-minority districts under the  
9 benchmark plan and under Section 5.

10          JUSTICE KAVANAUGH: So I'll take that  
11 as a yes?

12          MR. ELIAS: Well, they had to do a  
13 functional analysis, Your Honor, and -- and  
14 what that meant is that they needed to prove  
15 that there was not retrogression.

16          JUSTICE KAVANAUGH: Right.

17          MR. ELIAS: Whether retrogression  
18 would leave them at 50.1 or 49.9 is part of the  
19 inquiry that would have been done.

20          JUSTICE KAVANAUGH: If you have to  
21 have a majority-minority district, and I  
22 thought it was also widely agreed that a bare  
23 majority would not be good enough for any of  
24 these districts, and then you consult and you  
25 consult with the Black Caucus and you consult



1 with others and everyone agrees it has to be  
2 more than a bare majority, I'm wondering why 55  
3 is such -- so problematic here, given that the  
4 states have to have some flexibility -- I don't  
5 -- pinpointing 53.5 versus 54.2 versus 55 when  
6 they've done the kind of outreach and  
7 consulting, everyone approves, the attorney  
8 general -- the U.S. attorney general  
9 pre-clears. I'd just like your response to all  
10 of that.

11 MR. ELIAS: Sure, Justice Kavanaugh.  
12 I'd offer three responses.

13 The first is that I don't think it's  
14 -- I don't think the trial record is, fairly  
15 read, and the district court certainly did not  
16 find, that Delegate Jones consulted the entire  
17 Black Caucus.

18 His original testimony was he  
19 consulted everyone. Then it was he consulted  
20 some. Then it was --

21 JUSTICE KAVANAUGH: Is it -- is it  
22 correct that the Black Caucus was supportive of  
23 the plan?

24 MR. ELIAS: I think that members of  
25 the Black Caucus testified in the second trial

1 that they were told that the -- and this is  
2 their words -- the gospel according to Jones  
3 was that every district had to be 55 percent.  
4 And they -- for VRA compliance and they assumed  
5 that was correct.

6 But, if you look at the testimony of  
7 the African American members in the second  
8 trial, they will say that they did not believe  
9 that, in fact, their -- in order to have an  
10 ability to elect district, it needed to be that  
11 high.

12 The -- the second answer I'd give you  
13 is I think it would be very instructive for  
14 this Court to look at two things. The first is  
15 the Senate plan, which hasn't gotten a lot of  
16 play in the briefing, but the Senate plan was  
17 being adopted at the same time. And the Senate  
18 plan involved a number of African American  
19 districts as well, five, and all five of those,  
20 which cover the same geographic regions, were  
21 under 55 percent BVAP.

22 So the idea that -- that Delegate  
23 Jones had no information available to him that  
24 suggests it could be below 55 percent is  
25 contradicted by the fact that the Senate plan,

1 which was in the same bill and involved the  
2 same geographic regions, all were under  
3 55 percent.

4 The second thing that I think would be  
5 useful for the Court to look at, both on the  
6 question of predominance and on the question of  
7 strict -- of strict scrutiny, is HD 75.

8 So HD 75 is the one of the 12  
9 districts where they find predominance, but  
10 strict scrutiny is -- is -- is met. So let's  
11 look at the facts of HD 75.

12 HD 75 was above 55 percent before and  
13 after the 2011 redistricting, so it -- it  
14 wasn't materially increased or decreased. In  
15 fact, the BVAP only changed from 53 -- 55.3 to  
16 55.4.

17 So many of the arguments my friend  
18 makes about how this district or that district  
19 didn't change very much, well, it didn't change  
20 very much in HD 75 either, and the Court found  
21 predominance.

22 It retained 78.8 percent of its core,  
23 another argument that my friend makes about,  
24 well, look, but it was core retention. Well,  
25 HD 75 was core retention and the Court found

1 predominance.

2           On its face, the district appears  
3 relatively compact, the trial court found, but  
4 yet it found predominance.

5           And, finally, Delegate Jones offered a  
6 political explanation for why he did that draw,  
7 again, something that is offered here.

8           The facts of HD 75 are not very  
9 different in terms of a finding of predominance  
10 than the districts that -- than District 92.

11           JUSTICE KAVANAUGH: But -- but, again,  
12 if -- if a state faced with these facts said,  
13 we're going to do 52 percent or 53 percent,  
14 they would be hammered from the other side,  
15 saying you are discriminating against African  
16 American voters because you're not giving the  
17 voters a sufficient opportunity to elect the  
18 candidate of their choice.

19           And so they -- they do more here by  
20 going with 55. And I guess, again, on the  
21 state flexibility point, I'm just wondering how  
22 a state can try to comply with the demands of  
23 the Voting Rights Act on the one hand and, as  
24 you started with, the demands of the Equal  
25 Protection Clause on the other in this narrow

1 band between 51 and 55.

2 MR. ELIAS: Sure. So, Justice  
3 Kavanaugh, let me -- let me -- let me  
4 articulate it this way.

5 If the state creates a 55 percent  
6 blanket rule because of how African Americans  
7 in a rural area vote on the border of North  
8 Carolina, and then generalized that to urban  
9 centers throughout the Commonwealth, then it  
10 has engaged in racial stereotyping that  
11 triggers strict scrutiny.

12 Now, in HD 75, they were able to meet  
13 that burden, but it is simply not -- this Court  
14 in Alabama was clear. This Court in Cooper was  
15 clear. And this Court in Bethune-Hill I were  
16 clear -- was clear. If -- if the state engages  
17 in that kind of -- of one-size-fits-all  
18 mechanical floor or mechanical trigger, then  
19 strict scrutiny applies.

20 Now --

21 JUSTICE KAGAN: Could I make sure I  
22 understand what you're saying, Mr. Elias,  
23 because what I've -- what -- what I've  
24 understood is that the flexibility that Justice  
25 Kavanaugh is talking about is critical, and

1 Alabama talked about this and Cooper talked  
2 about this, but it's critical at the -- it's --  
3 it's not -- it's critical at the point where  
4 you ask whether the Voting Rights Act has  
5 provided a sufficient justification --

6 MR. ELIAS: Right.

7 JUSTICE KAGAN: -- for the state to  
8 get over strict scrutiny. And there, you know,  
9 we don't expect the state to actually have the  
10 exact number.

11 But it's -- it's not relevant to the  
12 point of whether race has predominated in the  
13 first place, is it?

14 MR. ELIAS: No, Your Honor. That --

15 JUSTICE KAVANAUGH: I've been assuming  
16 predominance.

17 MR. ELIAS: Oh, I'm sorry. Then I  
18 misunderstood. So, in strict scrutiny, look,  
19 the truth is that all the State of Virginia had  
20 to do was come in with a good reason, and in  
21 this case, they came in with no reason, and  
22 it's really that -- it's really honestly that  
23 simple.

24 JUSTICE KAVANAUGH: A good reason is  
25 complying with the Voting Rights Act to ensure

1 that African American voters have the  
2 opportunity to -- to elect the candidate of  
3 their choice.

4 MR. ELIAS: But they -- but they  
5 weren't --

6 JUSTICE KAVANAUGH: And it's  
7 pre-cleared by the U.S. Justice Department.

8 MR. ELIAS: Well, first of all, there  
9 is nothing in the record that suggests that  
10 they drew this plan to comply with Section 2 of  
11 the Voting Rights Act. The sole -- the sole  
12 argument in the record was that it was  
13 necessary to comply with Section 5 of the  
14 Voting Rights Act.

15 And Alabama -- this -- that -- that  
16 case is Alabama. Alabama already said that a  
17 misunderstanding, that you need a racial --  
18 that you need a -- a -- a mechanical test to --  
19 to meet preclearance misunderstood what was  
20 required under Section 5.

21 It was not consistent with what DOJ  
22 practice was. It was not consistent with what  
23 DOJ guidelines were. The State of Virginia  
24 could not have believed, if it had looked at  
25 Section 5 guidance, that it needed this

1 55 percent rule state-wide to comply.

2 And, in fact, the Senate plan, which  
3 was in the same bill, had --

4 JUSTICE KAVANAUGH: Well, DOJ  
5 precleared it, though.

6 MR. ELIAS: DOJ precleared it, but DOJ  
7 was not charged with looking at whether it was  
8 a racial gerrymander or not. They were solely  
9 charged with looking at whether or not it -- it  
10 retrogressed.

11 The Alabama plan had been precleared  
12 that was struck down by this Court.

13 JUSTICE KAGAN: Mr. Elias, if I could  
14 go back to the predominance inquiry, one of Mr.  
15 Clement's arguments, I think, is something  
16 like, well, if you have this 55 percent  
17 non-negotiable target, you know, that -- that  
18 might be evidence for all districts, but it  
19 doesn't get you over the bar for all districts  
20 because there might be some districts that are  
21 way over 55 percent, so that you can move  
22 people in and move people out and never really  
23 think about the 55 percent target in anything  
24 that you're doing, and that what the Court got  
25 wrong here was not recognizing that fact.



1           So why isn't that right?

2           MR. ELIAS: Well, for two reasons.

3           First of all, I think the Court  
4 addressed district by district that there were,  
5 in fact, black voters moved based on race on a  
6 district-by-district basis.

7           And that's part of the reason why,  
8 Justice Kagan, I pointed you to the facts of  
9 HD 75 where predominance was found and BVAP  
10 went from 55.3 to 55.4.

11           The -- the test is not whether BVAP  
12 stayed the same. The question is, when you had  
13 to add population as a whole, did you choose  
14 voters based on race?

15           And if you look at Joint Appendix 2782  
16 to 85, you can see the BVAP moved in and the  
17 BVAP moved out in each of these districts. And  
18 the numbers, frankly, are fairly startling.  
19 HD 71, 9674 black voters were moved in, 2,000  
20 black voters were moved out. HD 89, 8,000  
21 black voters are moved in, 3900 black voters  
22 are moved out.

23           CHIEF JUSTICE ROBERTS: Well, this is  
24 in a context where you are required to consider  
25 race to comply with Section 5 of the Voting

1 Rights Act.

2 MR. ELIAS: Correct. And had -- Your  
3 Honor, had the state -- the Commonwealth of  
4 Virginia done even a modicum of  
5 district-by-district analysis, this would be a  
6 very different case.

7 If it had done the same analysis that  
8 the state Senate did, it would be -- we  
9 wouldn't be here.

10 If it had done the same thing that --  
11 that was done with respect to Delegate Tyler's  
12 district in HD 75, we might have been here, and  
13 I would have lost, as I did -- as we did the  
14 last time when I challenged -- when we  
15 challenged HD 75.

16 But, in these districts, it is  
17 virtually uncontested and it is certainly not  
18 clear error that in the -- that in the words of  
19 the -- of the district court, the legislature  
20 engaged in no analysis of any kind. And that's  
21 JS AP 88. No analysis.

22 Thank you, Your Honor.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25 Mr. Clement, you have three minutes

1 remaining.

2 REBUTTAL ARGUMENT OF PAUL D. CLEMENT  
3 ON BEHALF OF THE APPELLANTS

4 MR. CLEMENT: Thank you, Mr. Chief  
5 Justice.

6 Just a couple of quick points on  
7 standing and on the merits.

8 First on standing, I don't think you  
9 can underestimate the impact of this case and  
10 the decision below and the remedial order that  
11 follows on the House and the way it operates  
12 day-to-day.

13 The remedial order reconfigured 25 of  
14 the 100 seats. That's fully 25 percent of the  
15 House's seats. That's much more than a  
16 peppercorn. I don't think the solution is to  
17 get 25 individual members here.

18 And I think it's a mistake to think of  
19 the districts that basically set up the basic  
20 representational structure of the House --

21 JUSTICE SOTOMAYOR: Mr. Clement, what  
22 -- Mr. Clement, what do we do now? If we rule  
23 in your favor and say that every House that has  
24 -- creates a plan has standing, we invite  
25 complete discord in a state over who represents

1 the interests of that law.

2 MR. CLEMENT: I don't think there is  
3 any discord here.

4 JUSTICE SOTOMAYOR: So every --

5 MR. CLEMENT: As my friends on the  
6 other --

7 JUSTICE SOTOMAYOR: -- every House  
8 body can come in, so can their attorney  
9 general, presumably, and possibly some  
10 individual members. I mean, this is a radical  
11 new step.

12 MR. CLEMENT: I -- I don't think it  
13 has anything -- this case has anything to do  
14 with whether the members are going to come  
15 here. I don't think having 25 members with  
16 standing is better than having the House,  
17 especially when these basic lines that  
18 determine how they're going to be organized are  
19 critical.

20 I also don't see how you could not  
21 recognize standing here without overruling your  
22 decision in Beens. I mean, Beens may be a more  
23 extreme version, but --

24 JUSTICE GINSBURG: It hasn't been  
25 cited --

1 MR. CLEMENT: -- it's the same --

2 JUSTICE GINSBURG: -- Mr. Clement, in  
3 30 years. Beens was of an age when there was a  
4 much more relaxed view of standing than there  
5 is now.

6 MR. CLEMENT: I -- I -- I don't think  
7 that -- that decisions come with expiration  
8 dates. The fact that you haven't cited it in  
9 the last 30 years doesn't mean that you  
10 wouldn't have to overrule it. And I don't  
11 think you should.

12 And I think the important thing is  
13 that even if there's a difference in degree --  
14 as Justice Alito suggested, even a five dollar  
15 injury is injury in fact -- there's much more  
16 than that. And it goes to the heart of how  
17 this House organizes itself.

18 Just on the merits, two quick points.

19 First of all, I don't think -- I think  
20 it would be a huge mistake on predominance to  
21 just say this is clear error and be done with  
22 it. The difference between the districts here  
23 and the districts in Alabama are completely  
24 stark.

25 You looked at a district in Alabama,

1 and they moved out 16,000 people and only 30 --  
2 or in 16,000 people, only 36 of whom were  
3 white. Here with HD 69, there's a one percent  
4 difference in the racial makeup of the people  
5 who went in and out of the district, 44 versus  
6 43 percent.

7 The -- you cannot say that race  
8 predominated here, faithfully with this Court's  
9 precedence about what predominance means.

10 And then if you get to strict  
11 scrutiny -- Justice Kavanaugh, you asked about  
12 whether the African American Caucus supported  
13 this law. All but two members of the African  
14 American Caucus supported this law. One of the  
15 two members who didn't was the district in HD  
16 75. She didn't support the law because she  
17 thought that the BVAP of 55 percent was too  
18 low.

19 And that just shows you the dilemma  
20 that -- that people face. And this is not a  
21 case like Alabama where the state picked a  
22 cartoonish figure and said in order to avoid  
23 retrogression, they have to stay at 75 percent.

24 This is a case where they picked  
25 55 percent, which, frankly, is exactly the

1 right number to avoid retrogression in  
2 contested primaries. Thank you, Your Honor.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel. The case is submitted.

5 (Whereupon, at 11:07 a.m., the case  
6 was submitted.)

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## Official - Subject to Final Review

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