NO. _____

In the Supreme Court of the United States

VIRGINIA HOUSE OF DELEGATES, M. KIRKLAND COX,
Appellants,

v.

GOLDEN BETHUNE-HILL, *et al.*,
Appellees.

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

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

In June 2018, a split three-judge district court invalidated 11 Virginia House of Delegates districts as unconstitutional racial gerrymanders, finding it highly probative that they were all drawn to achieve a black voting-age population ("BVAP") near or above 55%. It labeled about half of them BVAP "donors" and enjoined their future use because (in its view) the Virginia General Assembly reduced their BVAPs for predominantly racial reasons. At the remedial stage, the district court adopted a plan with 11 remedial districts having BVAPs uniformly *below* 55%, a result achieved by the court-appointed special master's careful racial fine-tuning—based on his view that any district with a BVAP above 55% would be an unacceptable remedy. The remedial map carefully segregates white and black communities and splits precincts along racial lines with the self-evident purpose of ratcheting BVAP down in all districts below the 55% target, a goal it uniformly achieves across all districts. No other participant in the remedial proceeding achieved that feat. Meanwhile, the remedial map carries forward more than half of the lines the district court's liability opinion expressly criticized as racially driven. It alters districts neither challenged nor held unconstitutional more than districts held unconstitutional, and it implements redistricting criteria the special master admits are his invention and lack any basis in state policy.

The questions presented are:

1. Whether the remedial districts are unconstitutional racial gerrymanders.

2. Whether the remedial plan properly remedies the supposed constitutional violations.

3. Whether the remedial plan properly adheres to lawful state policy.

PARTIES TO THE PROCEEDING

The following were parties in the court below:

Plaintiffs:

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

Defendants:

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

The Intervenor-Defendants:

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

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JURISDICTIONAL STATEMENT

In *Virginia House of Delegates v. Bethune-Hill*, jurisdiction postponed, No. 18-281 (Nov. 13, 2018), this Court is currently considering whether 11 Virginia House of Delegates districts are unconstitutional racial gerrymanders because the Virginia General Assembly maintained their black voting-age populations ("BVAPs") near or above 55% to comply with the Voting Rights Act. As briefing proceeded in that appeal, the district court plowed ahead to implement a remedial districting plan and, in doing so, simply replaced one racial target with another. In the court-appointed special master's proposed remedial modules (amounting to 36 possible remedial maps) not a single proposed district's BVAP *exceeded* 55%. That was no accident. The special master touted his plans as remedying what he believed was a "packing" violation precisely because none "contain any districts with more than a 55% black voting age population," and he rejected all other case participants' proposals precisely because each contained districts with BVAPs above 55%. The special master called this "a clear signal of a failure."

Confronted with that race-based approach and a completely race-blind plan proposed by the House, the district court chose the race-based approach and adopted one set of the special master's modules. Rather than scrutinize the special master's plan as it had scrutinized the 2011 plan, such as by vetting the special master's own inconsistent statements of intent and the surgical racial precision of his line drawing, the district court simply found the special master's

"demeanor" credible and accepted as true his unbelievable statements that race did not predominate. If that were the right approach to evaluating allegations and evidence of racial predominance, there should have been no liability phase: the House's witnesses also testified that race did not predominate, and the district court made every effort to disbelieve their testimony.

The turnabout from the district court's liability opinion is difficult to overstate. At the remedial phase, the district court found the special master's perfect achievement of a 55% BVAP ceiling the product of geography, calling it "a foreseeable consequence of applying traditional districting criteria." But that runs directly counter to the cornerstone premise of liability—that approximately half the challenged House districts had *excess* BVAP and served as BVAP *donors* to neighboring districts. It is therefore not "foreseeable" that, without racial predominance, all districts' BVAPs would fall below 55%. Under the district court's donor-recipient theory, some BVAPs should be higher than in 2011, since racial predominance took the form (said the district court) of BVAP reductions. Reducing BVAP further only aggravates that form of predominance. But that donor-recipient theory apparently outlived its useful shelf life as soon as the ink was dry on the liability opinion, and the district court promptly abandoned it. If nothing else, that lack of confidence in its own factual findings counsels for reversing on liability and closing this remedial project, which (as Judge Payne concluded in dissent) is unnecessary.

Indeed, the remedial project (just like the liability project) was an effort not at racial neutrality but at undermining the General Assembly's 2011 legislative policies, which received overwhelming bipartisan support. Whereas the General Assembly chose to create ability-to-elect districts, the court-ordered plan imposes minority-influence districts. That substitutes one racial decision with another and overrides what this Court's precedent calls a legitimate legislative choice of how to protect minority representation. Moreover, whereas the 2011 plan preserved incumbents' districts and prioritized constituency retention, the court-ordered plan does violence to those goals. The plan quite remarkably alters non-invalidated districts more than invalidated districts, and it alters more than any other district the one held by the Speaker of the House, which was not held to be a racial gerrymander. The district court uncannily managed to choose the combination of modules affording the maximum possible Democratic Party gain, spawning a series of news articles proclaiming, "[f]ederal judges have selected a Virginia House of Delegates redistricting map that appears to heavily favor Democrats."[1] The remedial map in no way "approximate[s]" the 2011 plan's legislative policies, as court-ordered remedial plans must. *Upham v. Seamon*, 456 U.S. 37, 42 (1982). It rather subjects the Commonwealth to a far worse constitutional infringement than what it purports to

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[1] Gregory S. Schneider, *Federal Judges Choose Va. Redistricting Map Favorable to Democrats*, Wash. Post (Jan. 23, 2019) https://www.washingtonpost.com/local/virginia-politics/federal-judges-choose-va-redistricting-map-favorable-to-democrats-six-gop-house-districts-would-get-bluer/2019/01/22/401b2618-1ebc-11e9-9145-3f74070bbdb9_story.html.

cure and imposes supposed good-government ideas concocted by a single University of California professor not answerable to popular will.

All of this goes to show that the district court was wrong on liability in the first instance, and the Court therefore should put this entire debacle behind Virginia by reversing on that threshold question. But, even if it affirms on liability, it should vacate the district court's remedial order and direct the court to conduct a second remedial phase—this time under the principle that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007). Because the district court was presented with a map that unquestionably does not discriminate on the basis of race, the race-blind map the House proposed, it should be ordered to adopt that map as its remedy, if one is needed.

OPINION BELOW

The three-judge court's unpublished opinion is available at 2019 WL 63333 and JS.App.1-38.[2]

JURISDICTION

This appeal is from the district court's permanent injunction, issued on February 14, 2019, mandating the use of a court-ordered redistricting map in future

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[2] Citation references "JS.App." are to the jurisdictional statement appendix in this appeal. Citation references "I.JS.App." are to the jurisdictional statement appendix in the liability appeal, No. 18-281. Citation references "JA" are to the joint appendix in the liability appeal. Citation references "Doc." are to the district court's numbered docket entries.

elections, JS.App.39, and the Court has jurisdiction under 28 U.S.C. §1253. Appellants filed their notice of appeal on February 25, 2019. JS.App.232.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the U.S. Constitution provides, in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 2011, the Virginia General Assembly passed a districting plan for its House of Delegates districts that garnered overwhelming bipartisan support including from all but two members of the House Black Caucus. A central legislative question in that redistricting was how to preserve the minority electoral equality guaranteed under Section 5 of the Voting Rights Act (VRA), 52 U.S.C. §10304. Two white Democratic delegates urged the body to reduce BVAP in areas with high concentrations of black residents to spread their influence across a maximum number of districts. Members of the House Black Caucus vehemently disagreed, advocating that the 12 majority-minority districts that had existed for two decades be preserved with BVAPs around or above 55%. *See, e.g.*, JA339-42; JA344-46. The House heard this debate and overwhelmingly voted with the Black Caucus, choosing

to give 12 districts "a functional working majority," *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 802 (2017), rather than to spread black voters thinly across a greater number of districts.

Four years later, individual residents of these 12 districts (the "Plaintiffs") challenged them as racial gerrymanders in violation of the Equal Protection Clause. In June 2018, after two trials and one intervening appeal to this Court—and the replacement of one district judge—the three-judge district court (Circuit Judge Keenan and District Judges Wright Allen and Payne) issued a 2–1 split decision in Plaintiffs' favor, enjoining 11 of these districts (after this Court rejected Plaintiffs' challenge to the twelfth). Nine of the districts had starting BVAPs above 55%, and the district court predicated its liability ruling on a "phenomenon" of "donor" and recipient districts. I.JS.App.55. BVAP, it said, was reduced in donors and transferred to recipients to achieve a 55% BVAP in each majority-minority district. I.JS.App.83; *see also* I.JS.App.28, I.JS.App.39, I.JS.App.46, I.JS.App.48, I.JS.App.54-56, I.JS.App.63. The House appealed, and this Court postponed consideration of jurisdiction on November 13, 2018, and scheduled argument for March 18, 2019.

Meanwhile, the district court afforded the General Assembly an opportunity to remedy the supposed violations with a new legislative plan. House members worked diligently to that end, and a working consensus began to emerge between Republican leadership, the House Black Caucus, and some members of the Democratic minority. But, when news of that consensus

came to light, Governor Ralph Northam, who previously stated his willingness to compromise, abruptly announced that he would not sign anything the House passed, even if endorsed by the House Black Caucus. Doc. 275, at 1-5. He, in fact, cancelled a fundraiser he planned for a Democratic delegate who stated public support for the bipartisan redistricting effort.

Given the impasse, the district court conducted remedial proceedings and retained a special master, Dr. Bernard Grofman of the University of California at Irvine, to propose and evaluate potential remedies. The court also invited proposals from the parties and any interested non-parties. The House and Plaintiffs both submitted two plans, and the NAACP and other non-parties submitted plans as well. Every plan submitted contained remedial districts with BVAPs exceeding 55%.

On December 7, 2018, the special master issued a report and multiple sets of proposals. Doc. 323. Rather than propose one or two alternative plans, he proposed multiple "modules" for each region of Virginia impacted by the district court's injunction. *Id.* at 7-8. These different modules could be combined in various ways to produce 36 distinct districting plans, resulting in alterations to between 21 and 26 total House districts. *Id.* at 12.

The special master's report stated that each module remedied the constitutional violation because none "contain any districts with more than a 55% black voting age population." *Id.* at 68, 91. The special master also stated that he analyzed the litigants'

proposals and could not recommend any of them because all "fail a narrow tailoring test in terms of avoiding the perpetuation of at least one district with a greater than 55% black voting age population." *Id.* at 129. The special master demanded "a clear justification for remedial districts with a black population above 55%, or ones that increase black population in an unconstitutional district over what it had been in the 2011 Enacted map." *Id.* at 122. He therefore concluded that, "[b]ecause a Court-adopted plan must be narrowly tailored, based *solely* on the black voting age percentages in the reconfigured remedial districts discussed above, I clearly cannot recommend" any of the litigants' proposals. *Id.* at 122-23. His report touted his plans as the only proposals that remedy the enjoined districts, which he called "racially packed." *Id.* at 13.

On December 14, the House filed objections, arguing, *inter alia*, that the special master improperly relied on race by setting a 55% BVAP ceiling. Doc. 327, at 7-12. The House argued that this amounted to racial predominance, at least under the predominance standard applied at the liability phase, and that drawing black voters out of these districts was not narrowly tailored to any compelling interest—since Plaintiffs did not plead or prove a "packing" claim under VRA §2, 52 U.S.C. §10301, and many districts were invalidated because (according to the liability opinion) the House had intentionally reduced BVAP. *Id.* at 13-19. The House also argued that the modules failed both to comply with valid state policy and to fully remedy the violations defined in the district court's liability ruling. *Id.* at 22-26.

In his responsive report, the special master abruptly changed his narrative.[3] He denied that he "sought to come as close as possible to a 55% value, while still remaining consistently below it." Doc. 331, at 26. He stated that he objected to all other participants' 55%+ BVAP districts, not for racial reasons, but because "such high levels of black voting age population did not normally result from the racial geography of the state." *Id.* at 25. He offered no concomitant criticism of those proposals' geographic district configurations or basis to suspect that all litigants had intentionally sought to achieve district BVAPs exceeding 55%.

On January 10, 2019, the district court conducted a hearing. There, the special master stated for the first time that he had not changed even a *single* line with racial intent. *See* 1/10/19 Hr'g Tr. 69-70. The court also entertained argument and evidentiary presentations. All participants objected to the special master's proposed remedial districts. Both the NAACP and the House objected that they did not go far enough to remedy the purported violations, and the House continued to advance the objection that they were themselves racial gerrymanders.

On February 14, 2019, the district court issued a 2–1 split decision and order adopting four of the special master's modules as its court-ordered remedial map. JS.App.1; JS.App.39. The combination it selected altered 25 districts, JS.App.19, and the district it changed the most was not one ruled unconstitutional,

[3] The special master, in fact, issued at least eight reports because many versions were plagued with technical errors both large and small, which bogged down the remedial proceedings.

but the one currently represented by the Speaker of the House. JS.App.231.

In response to the House's racial-predominance arguments, the district court credited the special master's testimony that he did not use race as the predominant factor. JS.App.16-17. The district court did not address the special master's statements indicating that he prioritized drawing districts with BVAPs below 55% and rejected all other remedial proposals for including districts above that racial target. Nor did the district court vet any of the lines the special master drew to compare his denial of racial intent with the objective evidence of his priorities. Instead, the district court simply stated that it found his "demeanor" credible. JS.App.17.

Judge Payne, who dissented from the liability ruling, dissented as well from the remedial ruling, arguing that, because the 2011 plan was constitutional, it need not be remedied. JS.App.38.

The House filed a timely notice of appeal on February 25, 2019. JS.App.232. The House's standing to appeal is shown in its briefing in case number 18-281. If anything, its standing has been confirmed, as the body is now subject to elections under a court-ordered scheme consummating the judicial invasion of its internal affairs.

REASONS FOR SUMMARILY REVERSING OR NOTING PROBABLE JURISDICTION

The district court was derelict, if not willfully blind, in its duty to scrutinize the special master's work and ensure that the plan it adopted adhere "to stricter standards" than those applicable to a legislatively enacted plan. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (quotation marks omitted). The "extraordinary caution" courts must apply "in adjudicating claims that a State has drawn district lines on the basis of race," *Miller v. Johnson*, 515 U.S. 900, 916 (1995), has no force here. That caution applies only because of "the presumption of good faith that must be accorded legislative enactments." *Id.* The special master is no legislature, and a court-implemented plan is no enactment. There is no presumption of good faith to overcome.

But the district court applied a *lower* standard of scrutiny than it applied at the liability stage. At that stage, it did not flinch at putting the screws to elected Virginia legislators and their agents, testing their every word against a mountain of record evidence developed over two discovery periods and two trials (which corroborates their testimony). It could have applied equivalent or enhanced scrutiny at the remedial stage because the record is teeming with evidence that the special master used a 55% BVAP figure as a fixed, predetermined, and non-negotiable number to structure the districts he drew and that it had an overwhelming impact on the districting decisions and lines. *See Cooper v. Harris*, 137 S. Ct. 1455, 1468 (2017). But, when the special master denied

this—against his own prior statements—the court simply accepted the denial, stating that it had reviewed the "witnesses' demeanor and the quality of recollection" and was satisfied. JS.App.17. If that were the right approach to vetting racial-gerrymandering allegations, then there should have been no remedial phase. Delegate Chris Jones and John Morgan denied racial predominance, and their testimony is strikingly similar to the special master's.[4]

The factual record shows that this four-year-old case has done nothing to remove racial considerations from House redistricting plans. It has, instead, compounded the problem—if there ever was one. As the House argues in its ongoing liability appeal, Plaintiffs' equal-protection theory has never been about racial neutrality, and Plaintiffs do not want (and the district court did not give them) a race-blind map. Such a map was before the court in one of the House's remedial proposals, but the district court gave it no serious consideration. Instead, the district court adopted a plan with a conscious policy of spreading minority residents into influence districts. Even if that policy could square with the Equal Protection Clause's bar on race-based redistricting, it would be valid only as a *legislative* choice. But, in 2011, the General Assembly rejected a policy of creating minority influence districts.

Moreover, the district court's remedial map shows disregard, if not disdain, for the General Assembly's

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[4] The House, of course, does not concede that any of its 2011 districts are unconstitutional. It assumes the validity of the district court's liability opinion here because it is the predicate of the remedial proceeding.

2011 policy choices. The map changes districts not invalidated more than those invalidated, and far and away the most impacted district is perfectly constitutional and is represented by the current House Speaker. The special master admitted that he gave no thought to retaining the cores of incumbents' districts and that some of the criteria he implemented—and the court imposed on the Commonwealth—are ideas he made up with no basis in state policy or the trial record. Meanwhile, the plan carries forward the majority of lines the district court's liability opinion expressly identified as manifesting (what it believed to be) improper racial intent. Thus, the plan the district court adopted maintains most of the racial intent it purported to discern in the 2011 plan and it *adds* to it the special master's own race-conscious line drawing. That is a recipe, not a cure, for racial gerrymandering.

ARGUMENT

I. The Special Master's Remedial Districts Are Unconstitutional Racial Gerrymanders

A. Race Predominated, at Least Under the District Court's Rendition of the Predominance Test

The special master used a 55% BVAP figure as a fixed, predetermined, and non-negotiable number to structure the districts he drew. Unlike the House in 2011, he used the target as a ceiling, not a floor, but that difference is irrelevant. Suspect racial motive includes an intent to place "a significant number of voters…*without* a particular district," *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (emphasis added),

and the special master's ceiling operated to remove black voting-age persons from districts he considered "packed," JS.App.53.

The special master's 55% ceiling is self-evident from his report. It justifies each proposed module on the ground that none "contain any districts with more than a 55% black voting age population." JS.App.113, 137. The special master also rejected all litigants' proposals, including Plaintiffs', because each contained districts with BVAPs exceeding 55%. He criticized each as failing "a narrow tailoring test in terms of avoiding the perpetuation of at least one district with a greater than 55% black voting age population." JS.App.170. The special master contended that "a clear justification" would be essential to his recommending "remedial districts with a black population above 55%, or ones that increase black population in an unconstitutional district over what it had been in the 2011 Enacted map." JS.App.163. He therefore concluded that, "[b]ecause a Court-adopted plan must be narrowly tailored, based *solely* on the black voting age percentages in the reconfigured remedial districts discussed above, I clearly cannot recommend" the plans of any case participants. JS.App.163. That in itself is evidence, if not proof, of racial predominance. *See Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017) ("[I]f race for its own sake is the overriding reason for choosing one map over others, race…may predominate.").

The special master's report also reflects an intended downward BVAP push in the line-drawing process. He repeatedly described his task as "remedying in a

narrowly tailored fashion the packing of African-American voting age population that was done in the 2011 Enacted map." JS.App.53; *see also* JS.App.66 (describing intent of "avoiding…packing of geographically concentrated minority populations"); JS.App.71 (same); JS.App.76 (same); JS.App.182 (same). He described his modules as "eliminating the arbitrary 55% BVAP threshold set by the General Assembly," JS.App.142 (quotation marks omitted), and opined that doing so "will necessarily reduce the minority population proportion within these districts," JS.App.53. As a result, he concluded, "this minority population will need to be added to districts adjacent to one or more of the unconstitutional districts." JS.App.53. Although the special master disclaimed a specific intent of affording "the African-American community" in those neighboring districts "a realistic opportunity to elect a candidate of choice," JS.App.53, his initial report did not disclaim an overt effort to draw remedial districts' BVAPs below 55%. *See generally* Doc. 323.

Only after the House objected to the special master's overtly race-based proposals did the special master deny intentionally maneuvering lines below that racial target. Those denials do not withstand scrutiny, at least under the liability-phase standard. When Delegate Jones denied that the General Assembly applied a rigid 55% target, the court compared these subjective understandings against statements made to other delegates and against the objective fact that (calculated the way the court believed BVAP should be calculated) all districts'

BVAPs exceeded 55% in the enacted plan.[5] *See* I.JS.App.224-27. Likewise here, every single district the special master proposed fell below 55% BVAP, many by only fractions of a percent. JS.App.230. And the special master touted this as an achievement and called avoiding "perpetuation" of districts above 55% BVAP a necessary condition of a valid remedial plan. JS.App.170. Given this vigorous race-based advocacy, it is unbelievable that he made no effort towards this target in his line drawing.

But the district court ignored these statements and credited the special master's raw denial of predominance. Aside from vague references to the special master's "demeanor," its basis for concluding that race did not predominate was that BVAP drops below 55% were "a foreseeable consequence of applying traditional districting criteria to 'the geography and demography' of Virginia." JS.App.17 (quoting 1/10/19 Hr'g Tr. 30, 32). But, at the liability phase, when the House's witnesses testified that geography, not racial intent, predominantly drove the districts' racial demographics, the district court compared that testimony against the objective record evidence and rejected it. *See, e.g.*, I.JS.App.33-35. Here, the district court ignored the record evidence and subjected the special master's testimony to no scrutiny at all. And, in fact, this geographic explanation for the districts' racial demographics is baseless.

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[5] It is, if nothing else, supremely ironic that the special master utilized the calculation of BVAP that Delegate Jones used, which the district court discredited at the liability stage, in portions of his remedial reports. *See* Doc. 342, at 2-4. Under that calculation, BVAPs of three districts in the 2011 plan fell below 55%.

1. The explanation is at odds with the district court's prior findings of fact, which found racial predominance in many districts because BVAP dropped—indicating that, but for the map-drawers' racial intent, BVAP would have been *higher*, not *lower*. If those findings are to be credited, which would be essential to affirmance on liability, Virginia's demographics and geography do not dictate districts uniformly below 55%. Meeting that target necessitates meticulous racial maneuvering.

The district court's liability opinion concluded that the 11 challenged districts "were inextricably intertwined" because some districts, "[d]ue to their starting population and BVAP,…were able to serve as 'donors' of BVAP," and others, "faced with deficits in these areas, received BVAP and population from" them. I.JS.App.83. The donor districts, according to the court, had a "*surplus* of BVAP," I.JS.App.39 (emphasis added), and racial predominance under the district court's findings meant intentionally ratcheting BVAP down, not up. *See, e.g.*, I.JS.App.46 (donor status of HD70 "result[ed] in the transfer of high BVAP areas from District 70 to neighboring Districts…."); I.JS.App.54 (donor status of HD74 resulted in transfer of high BVAP territory out and low BVAP territory in); I.JS.App.63 (same as to HD95). The court cited this "general phenomenon occurring between challenged districts with relatively high and low starting BVAP levels" as the basis of its predominance finding across all 11 districts. I.JS.App.55; I.JS.App.83. This donor-recipient theory is central to Plaintiffs' defense of the district court's liability order on appeal. *See, e.g.*, Appellees' Br. 36, *Va. House of Delegates v. Bethune-*

Hill, No. 18-281 (Jan. 28, 2019) (defending HD70 as a "donor" district because "[t]he BVAP of areas moved out of District 70 was more than 16 percentage points higher than the BVAP of the areas moved in"); *id.* at 39 (similar argument on HD74).

If all this is to be believed—and affirmed on appeal—it is not remotely "foreseeable" that drawing race-blind remedial districts will result in BVAP drops uniformly below 55%. Instead, the natural and probable consequence of race-neutral lines would be for donor districts' BVAPs to rise, and for recipient districts' BVAPs to fall, as compared to their 2011 analogues. Consequently, a race-neutral map should be expected to produce some naturally occurring districts above 55% BVAP (even 60% BVAP) and others below 55% BVAP (and even 50% BVAP). That would place the districts in the position they would have been in had the 2011 map-drawers not used racial data in the manner the district court identified. If those findings of fact are accurate, it is impossible that the special master's remedial districts all "naturally fell below 55%." JS.App.198-99.

2. No other remedial-phase participant achieved remedial districts with BVAPs uniformly below 55%. The district court considered five remedial proposals from the parties and non-parties, and none, including Plaintiffs' proposals, uniformly met that target. That Plaintiffs, who have inveighed for years against (what they call) the 2011 plan's "preordained 55% BVAP floor," Appellees' Br. 2, *Va. House of Delegates v. Bethune-Hill*, No. 18-281 (Jan. 28, 2019), were unable to propose a map—in two tries—with all districts'

BVAPs below 55% is telling, if not dispositive, on this point. In fact, BVAPs in some of Plaintiffs' proposals "actually increase black voting age population." JS.App.170. Moreover, the NAACP argued at the remedial phase that district BVAPs *should* be intentionally reduced, but even the NAACP's map could not match the special master's across-the-board ceiling. It is incredible that the special master's proposals would be the only proposals with remedial districts' BVAPs uniformly below 55%—unless he intended to achieve that result.

Indeed, the remedial map that most accurately reverse engineers how the 2011 map would have been configured without racial intent was the map introduced in the special legislative session by Delegate Robert Bell as HB7002, which the House subsequently submitted for the district court's consideration as a remedy. HB7002 followed the district court's memorandum opinion on liability line by line, precinct by precinct, undoing what the district court concluded were the effects of racial predominance. If, for example, the district court identified a split voting district, or "VTD," as racially motivated, HB7002 reunited it; if the district court identified a drop in a district's compactness as racially motivated, HB7002 increased its compactness. Doc. 291, at 3-7. Delegate Bell submitted a sworn declaration attesting that, in drawing the plan, he did not use or even look at racial data. Doc. 291-1. The map therefore approximates where the lines would have fallen without the racial intent the district court believed infected the 2011 districts. As was predictable, some districts' BVAPs ended up higher and some lower compared to the

invalidated districts. Six of the remedial districts' BVAPs in HB7002 exceed 55%.

The special master argued against all these remedial proposals, setting up his own as the baseline by which to judge them and conclude that no remedial district's BVAP should exceed 55%. But the cumulative showing of all other participants' remedies against the special master's is that 55% BVAP districts occur naturally under neutral criteria. In his initial report, the special master did not disagree. In arguing that a BVAP above 55% "is a clear signal of a failure," Doc. 323, at 121, the special master did not suggest that the remedial-phase participants intentionally hit a 55% BVAP target. (And that allegation would have been facially absurd when both Plaintiffs and the NAACP actively advocated purposeful BVAP reductions.) The "failure" the special master identified was the failure to do what he did: intentionally reduce BVAPs below 55% without exception.

3. The special master's 55% BVAP ceiling is further self-evident in the "direct and significant impact" it had "on the drawing of at least some" district lines. *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1271 (2015). The special master's lines depart from traditional criteria for self-evidently racial reasons and carve up communities along racial lines.

One example is his remedial version of HD63, covering the City of Petersburg and the near vicinity. HD63's BVAP in the benchmark plan (i.e., the pre-2011 plan) was 58.1% and in the 2011 plan 59.5%. John Morgan testified at the 2017 trial that there were many ways to configure HD63 above 55% BVAP. JA3603-04;

JA3638-39. By contrast, the special master produced a district below 55% BVAP. His rendition extends a bizarre tentacle off the north side of the district in a northwesterly direction, and this was plainly intended to avoid high density pockets of black voting-age person a more compact district would have subsumed. JS.App.225; JS.App.226.

Had the special master drawn a compact district, taking in population directly to the north and northwest of Petersburg City, the district would have exceeded 55% BVAP. That is a proven fact because the race-blind HB7002 creates that district. As shown in the appendix map comparing the two, JS.App.228, the proposed districts are strikingly similar: the yellow portion shows territory common to both proposals, encompassing all of Dinwiddie County and Petersburg City. The only difference is that, instead of the special master's northwesterly tentacle (shown in green), HB7002 includes the commonsensical box of territory directly to HD63's north (shown in red). That configuration renders HD63 considerably more compact than the special master's version; it also raises the district's BVAP above 55%. The special master reviewed and rejected the more compact version of HD63 because it fails his 55% test.

Worse still, the special master split a VTD called Winfrees Store with stunning racial precision. JS.App.225; JS.App.229. On the east of the VTD-splitting line is a predominantly black neighborhood (shown in the appendix map in dark green); on the west is a predominantly white neighborhood (shown in beige and light green). JS.App.229. The special

master's line tracks the racial divide with surgical perfection, cleaving the black and white neighborhoods, excluding the former and including the latter. By contrast, the Winfrees Store VTD was kept whole in the 2011 plan, the benchmark plan, and HB7002.

HD92 provides another example. Its benchmark and enacted BVAPs both exceeded 60%, and HB7002 proposes a race-blind configuration exceeding 55%. Were there any doubt that HD92's BVAP naturally falls above 55%, the House entered into the district-court record three more highly compact examples of how it might be configured entirely within Hampton City, and their BVAPs fall, respectively, at 58.73%, 60.28%, and 60.72%. Doc. 337-1, at 2-4.

But, in this region of high-density minority population, the special master managed to find perhaps the only possible configuration with a BVAP below 55%. JS.App.225. He did this by removing HD92 from the eastern portion of Hampton City and into the northern side of Hampton City, as shown in the appendix, JS.App.226, which identifies the portions removed from HD92 in red, those added in green, and those remaining the same in yellow. A racially coded map shows that this maneuver removed heavily black, high density precincts and picked up whiter and lower-density black precincts. JS.App.225. Moreover, the Special Master split three heavily black VTDs in a row, City Hall, Hampton Library, and East Hampton, diluting their presence in HD92. JS.App.229. Including them whole in HD92 would have elevated its BVAP above 55%. Instead, the Special Master achieved a 53% BVAP. In the process, he split downtown Hampton and

the city's black community in two, relegating a significant portion of it to HD91 with a 32% BVAP—which no one can credibly contend affords it a meaningful opportunity to elect its preferred candidates.

This race-intensive maneuvering disfigured HD91, which is now contiguous only by an enormous body of water unconnected by a bridge. JS.App.225; JS.App.226; JS.App.227. The district court's liability ruling criticized far less intrusive water crossings of much smaller rivers as evidencing racial predominance. I.JS.App.68; I.JS.App.71.

The special master's Richmond reconfiguration manifests further racial predominance. Three districts exceeded 55% in the benchmark plan, HD70 (61.8%), HD69 (56.3%), and HD74 (62.7%). HB7002 demonstrates that at least two districts in Richmond, drawn without racial data to achieve the configurations the district court believed would exist but for racial predominance, fall naturally above 55% BVAP: HD70 (61.8% BVAP) and HD71 (56.4% BVAP). And, if there were any doubt that compact districts in this region naturally fall above 55% BVAP, the House entered onto the district-court record yet another configuration, in which HD69 (59.29% BVAP), HD 71 (57.19%) and HD74 (62.45% BVAP), all exceed 55% BVAP. Doc. 337-5, at 2-4.

But, in the special master's plan, these districts' BVAPs skate just slightly under 55%: HD69 (54.38%), HD70 (52.29%), HD71 (54.01%), and HD74 (54.37%). JS.App.230. Given the regional demographics, it is implausible that this resulted from anything but racial

fine-tuning. The special master's plan treats the Richmond-area districts as a system, working white VAP into the system through HD70, which picks up white Richmond exurban areas in Chesterfield County, allowing it to trade territory with HD69, HD71, and HD74 to drop their BVAPs as well. *See* Doc. 357-1, at 6-10. For example, the special master moved overwhelmingly black VTDs near the James River from HD69 to HD71, VTDs 812 and 814 from HD70 to HD69, and VTDs 701 and 702 from HD71 and HD70. *See id.*; *see also* Doc. 336-2, at 4-7, 10-11. That trading between the remedial districts does little to nothing by way of improvement under traditional criteria, Doc. 336-3, at 2, and it does (as discussed below) very little to address the district court's criticisms of the enacted districts. All these maneuvers achieve is a 55% BVAP ceiling. And then, the special master apparently concluded that, since the districts met the racial ceiling, his work was done.

The special master utilized similar maneuvering in HD74, which saw changes to its highly populated northwest edges that carve out black population to meet the 55% target. Its BVAP lands at 54.37%. To accomplish this, the special master drew a mouth-shaped cavity into HD74's northwest edge. JS.App.225; Doc. 336-2, at 10. There is no apparent reason not to include that territory (a VTD called Greenwood) in HD74, except that it contains a black neighborhood that would have preserved HD74's BVAP above 55%.

Finally, there is overwhelming evidence of racial predominance in Norfolk, where any naturally drawn configuration will result in at least some district

BVAPs over 55%, as shown by HB7002. Bringing four districts in the enacted plan from above to below 55% BVAP was no easy feat. As in Hampton, the special master apparently accomplished this by cracking black communities across remedial and surrounding districts. His version of HD90 splits a black community on its eastern border with HD83 and a black community on its western border with HD89. Doc. 357, at 21. HD89 splits a black community on its southern border with HD77 and carefully drops black communities to its northeast, which the enacted plan contained. *Id.* at 20. HD80 splits several black neighborhoods with HD81. *Id.* at 16. HD77 picks up substantial white territory to the southwest and drops core territory elsewhere, swapping predominantly black and white neighborhoods at every turn. *Id.* at 13. These configurations result in bizarre neighboring districts that cannot be explained under traditional districting criteria. *See*, *e.g.*, JS.App.226 (comparison of HD79 in 2011 plan and court-ordered plan); Doc. 372-2 (showing other affected districts).

4. The special master's testimony about his use of race was internally inconsistent. Although he ultimately denied that race impacted so much as a *single* line, *see* 1/10/19 Hr'g Tr. 69-70, his reports concede that "racial considerations enter[ed] my line-drawing," albeit in unspecified ways. JS.App.53. The evolution of his story indicates what happened: the special master prepared his maps on the mistaken notion that his task was to reduce BVAPs below 55%, and he came up with the geographic explanation as a *post hoc* justification after realizing his error.

The special master entered the remedial phase with a report representing that his task was to remedy districts that "are racially packed." Doc. 323, at 13. He advertised his modules as the only tenable proposals because all other proposals included district BVAPs exceeding 55%, which was (in his view) "a clear signal of a failure." *Id.* at 121. His report unmistakably reflected the goal to keep BVAP below 55%. If anything, he feared his districts' BVAPs might draw criticism for being too high, so he justified the "substantial African-American populations" in some districts as resulting from "county boundaries" and "the existence of concentrated minority populations in various areas of the state." *Id.* at 10. He was oblivious that the district court had invalidated approximately half the districts because (it believed) BVAP was intentionally reduced.

After the House objected that the special master had applied a 55% ceiling and that race predominated under the liability-stage standard, the special master issued a second report with a cryptic denial, stating that he had not "sought to come as close as possible to a 55% value, while still remaining consistently below it." Doc. 331, at 26. What that puzzling statement meant was (and is) unclear.

The special master then recharacterized his objection to all other participants' 55%+ BVAP districts, claiming he objected only "because of my exploration of alternative configurations throughout the relevant areas of the state persuaded me that such high levels of black voting age population did not normally result from the racial geography of the

state…." *Id.* at 25. He did not, however, offer a view on how he was the only case participant to have come across this novel conclusion or how it squared with the district court's finding of donor districts. Nor did he explain why his particular view of "racial geography" should monopolize the field, given the infinite ways of carving up district territory. After all, if his objection to BVAPs at or over 55% were solely a matter of geography, the special master should have criticized the participants' geographic choices, not their resulting racial demographics out of context. BVAP, an incidental datum, is beside that point. Yet, as shown above, the geographic choices in HB7002 are routinely more commonsensical than the special master's.

Undeterred by any of this, the special master only doubled down in criticizing all districts above 55% as having "no claim to be a narrowly tailored remedy," issues of geography aside. *Id.* at 27. Moreover, the special master agreed with the NAACP's characterization of his plan as "eliminating the arbitrary 55% BVAP threshold set by the General Assembly in 2011," and he continued to tout his modules as appropriate because they alone achieved this goal. *Id.* at 10 (quotation marks omitted).

Then, at the remedial hearing, the special master completed this confusing course of statements by testifying that he had not altered even one line for racial reasons. *See* 1/10/19 Hr'g Tr. 69-70. He made no effort to square that representation with his initial report's statement that race had, in fact, "enter[ed] my line-drawing," Doc. 323, at 10-11, or his preoccupation with district BVAPs exceeding 55%.

These inconsistencies confirm what the special master's line drawing and demographic decisions—and his Freudian fixation with BVAPs even a smidgen above (but not a smidgen below) 55%—show: the goal was to ratchet BVAP from above to below 55%. That is how the special master saw his task, and that is what he did, without exception.

B. The Use of Race Was Not Narrowly Tailored

Racial predominance triggers the "strictest scrutiny." *Miller*, 515 U.S. at 915. That the special master's use of race was not narrowly tailored to a compelling interest is practically conceded in his belated, confusing, and incredible denials of a 55% BVAP ceiling. But it bears emphasizing that a BVAP ceiling of this nature has nothing to do with any legitimate, let alone compelling, purpose.

First, a BVAP ceiling is not tailored to any interest in remedying the asserted constitutional violation. The special master appears to have drawn his maps under the misimpression that Plaintiffs won a VRA §2 or Fifteenth Amendment "packing" claim. *See* JS.App.53; *see Voinovich v. Quilter*, 507 U.S. 146, 153 (1993) (discussing vote dilution by "packing"). But that has never been Plaintiffs' claim and is not what was adjudicated. The racial-gerrymandering "*Shaw*" theory is "analytically distinct" from racial vote-dilution theories, *Shaw v. Reno*, 509 U.S. 630, 652 (1993), and it does not depend on particular racial concentrations or voting strength. Instead, the theory turns on "racial motive." *Bethune-Hill*, 137 S. Ct. at 799.

Although some race-consciousness may be appropriate in some cases to "cure[]…unconstitutional racial gerrymanders," *North Carolina v. Covington*, 138 S. Ct. 2548, 2554 (2018) (quotation marks omitted), a 55% BVAP ceiling is not related, much less narrowly tailored, to that end. *See id.* (finding it significant that special master did not employ any racial targets). A 55% ceiling would only be appropriate—if ever—where the underlying racial predominance operated uniformly to raise minority voting-age population from what it would have been absent racial motive, as was the scenario in *Covington*. *See Covington v. North Carolina*, 316 F.R.D. 117, 131-38 (M.D.N.C. 2016) (describing creation of majority-minority districts that did not previously exist). But, as detailed above, the district court predicated racial-gerrymandering liability on the "general phenomenon" of BVAP reductions in "districts with relatively high…starting BVAP…." I.JS.App.55; I.JS.App.83. Because predominance in approximately half the districts was manifest (in the district court's view) through BVAP *reductions*, purposefully reducing BVAP further only extends the harm of predominance.

Second, a 55% BVAP ceiling is not narrowly tailored to avoiding racial vote dilution. Obviously, reducing BVAP does not avoid "cracking" the minority vote as prohibited by VRA §2. Nor is it tailored to avoiding racial "packing" because "packing" is legally defined as concentrating minority (here, black) voters in some districts so as to deprive them of additional "majority-black districts." *Voinovich*, 507 U.S. at 153-54. Far from creating new majority-minority districts, the special master's plan dramatically reduces them in favor of minority-influence districts. "Black voters in

such influence districts, of course, could not dictate electoral outcomes independently," *id.* at 154, and there is no compelling interest (at least for a court-ordered map) in maximizing influence districts. The ceiling has nothing to do with avoiding packing.

C. The District Court's Racial Fine-Tuning Is Merely a Sophisticated Way of Picking Racial (and Political) Winners and Losers

Compelled by no legal principle, the district court's overtly race-conscious remedial map does nothing but impose one set of racial and political preferences over another. In walking through the districts, the court took care to conclude that "the reduction in BVAP levels" across the board "will not dilute the voting strength of black voters" because Barack Obama could still win each district.[6] *See, e.g.*, JS.App.29; JS.App.32; JS.App.36. But no precept of law holds that members of any group (racial, political, or otherwise), should be included in a district at fine-tuned percentages. Nor is a court justified in employing *any* race consciousness in drawing districts below 50% BVAP, because VRA §2 does not require such districts. *Bartlett v. Strickland*, 556 U.S. 1, 25-26 (2009) (plurality opinion). This Court's precedent instead directs the question of what "concentration of minority voters" is appropriate in a given district to *legislative* discretion, given the absence of legal standards for these determinations. *Georgia v. Ashcroft*, 539 U.S. 461, 481 (2003). The record is clear

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[6] The House would be honored if Barack Obama would run for any seat in this historic legislative body. But, since Mr. Obama has not signaled any intent to do so, the emphasis on returns in elections he won seems, to say the least, unhelpful.

that, in 2011, the General Assembly heard competing arguments and decided to draw districts with a "functional working majority," *Bethune-Hill*, 137 S. Ct. at 802, not influence districts.

The district court's remedial opinion therefore has brought this jurisprudence full circle, flipping the VRA and Equal Protection Clause on their heads and awarding a determined and well-funded political group a political victory. After this Court's *Strickland* decision rejected a VRA §2 right to fine-tuned racial districts based on such considerations as "[w]hat percentage of white voters supported minority-preferred candidates in the past," "[h]ow reliable" those "crossover votes [might] be in future elections," and "[w]hat types of candidates have white and minority supported together in the past" and future, 556 U.S. at 17, Plaintiffs repackaged those very inquiries under the "*Shaw*" narrow-tailoring framework and asserted the right—not to race-blind districts—but to their preferred *use* of race. The district court bought that position hook, line, and sinker. Presented with HB7002, a race-blind plan, and the special master's overtly race-conscious plan, the district court accepted the race-conscious plan and added its own set of racial considerations to the mix. As the House has warned in the liability appeal, this case does not involve a race-conscious avenue towards a compelling interest against a race-neutral avenue; it involves one race-conscious avenue against an even more race-conscious avenue.

That, in turn, politicizes the VRA and Equal Protection Clauses by empowering a major political party that obtains near-uniform support from a racial

group to a districting scheme that spreads out its supporters at fine-tuned levels, defined by those supporters' opportunity—not to make their "own choice" of representatives—but to join coalitions defined on a partisan basis. *See Strickland*, 556 U.S. at 15. The resulting map, by necessary consequence, is rigged to favor that political party (but not necessarily the racial group), a fact not lost on anyone even remotely paying attention to this case. *See, e.g.*, Graham Moomaw, *Federal Court Picks Redrawn Va. House Map That Boosts Democrats' Chances of Taking Control*, Richmond Times-Dispatch (Jan. 23, 2019)[7]; Virginia Public Access Project, *How Court Plan Would Affect Partisan Lean of Some House Districts*, vpap.org (Jan. 23, 2019).[8] The special master admitted that this is the logical conclusion of his remedial approach. JS.App.53-54.

This politicization of the VRA under the guise of the Equal Protection Clause, aside from being absurd, only exacerbates the problem some Justices of this Court have expressed about minority vote-dilution claims—that they necessarily require a predicate political determination of "a theory of effective political participation," a question "beyond the ordinary sphere of judges." *Holder v. Hall*, 512 U.S. 874, 900-01 (1994) (Thomas, J., concurring in the judgment). Although not labeled a vote-dilution claim, Plaintiffs' racial-

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[7] https://www.richmond.com/news/virginia/government-politics/federal-court-picks-redrawn-va-house-map-that-boosts-democrats/article_6b727239-4d46-592d-99c7-f2b544c5e045.html.

[8] https://www.vpap.org/updates/3177-how-court-plan-would-partisan-lean-somehouse-districts/.

gerrymandering claim also requires this predicate political determination. Plaintiffs have never demanded, and the district court did not give them, a race-blind plan. They have always demanded, and the district court gave them, a highly race-conscious plan, fine-tuned to meet their preconceived "theory of effective political participation," which (unsurprisingly) is a theory of Democratic Party maximization.

The Court has repeatedly rejected this and related politicized theories under the VRA. *Holder*, 512 U.S. at 879-85; *Ashcroft*, 539 U.S. at 480; *Strickland*, 556 U.S. at 25-26; *Voinovich*, 507 U.S. at 153. Styling it as an equal-protection or remedial theory in no way improves it.

II. The District Court's Remedial Map Neither Remedies the Would-Be Violations nor Honors Neutral State Policy

The district court's remedial plan is also hopelessly flawed in being over- and under-inclusive as to its core remedial objective. That objective is, on the one hand, to cure the supposed constitutional violations and, on the other, to "follow the policies and preferences of the State" as much as otherwise possible. *White v. Weiser*, 412 U.S. 783, 795 (1973). The district court's remedy is amazing in that it does neither.

The plan in no way "approximated" the 2011 plan in terms of neutral criteria. *Upham v. Seamon*, 456 U.S. 37, 42 (1982). The single most changed district is the one represented by the current Speaker of the House, a district not touched by the district court's injunction. It is beyond preposterous that rendering the Speaker's

district unwinnable by its incumbent is among the "policies and preferences of the State." *White*, 412 U.S. at 795. But the special master's remedial map changes non-invalidated districts more than invalidated districts. This is a direct affront to the 2011 plan's high priority on protecting incumbents and honoring their wishes, which is expressed extensively in the trial record.

The special master represented in his report that he made no effort to protect incumbents beyond drawing their residencies into their own districts. JS.App.57; JS.App.65; JS.App.74. He apparently believed that further incumbency-protection efforts would involve "partisan" favoritism. *See, e.g.*, J.S.App.105. But incumbency interests are protected most directly by a policy of preserving the cores of existing districts, regardless of incumbents' or voters' partisan affiliations. The special master's plan does violence to existing districts not subject to the district court's injunction. It changes one non-enjoined district (the Speaker's) by nearly 60%, one by 50%, and eight more by 33% or more. JS.App.231.

The district court excused this violence because, to remedy the violation, surrounding districts must be impacted. JS.App.11; JS.App.14; JS.App.25. But it failed to explain why districts not covered by its injunction should change *more* than those covered. The district court also justified the special master's proposals on the ground that he changed a smaller "number" of districts than other proposals changed. JS.App.11. But it failed to explain why the number of districts has a talismanic quality. Far fewer total

voters are moved from one district to another under HB7002 than under the court-ordered map. Besides, if the number of districts changed is all-important, the district court should have chosen a set of modules that changed only 21 districts, an available option, but it chose a set that changed 25. JS.App.19.

The special master's plan thwarts state policy in other respects. For example, he represented that he prioritized avoiding "fracking," a concept he himself "coined" and did not identify as grounded in Virginia state policy or the trial record. JS.App.56; JS.App.96. And the special master prioritized political-subdivision lines over all other non-racial criteria—including incumbency protection and core retention—even though that was not the balance the General Assembly struck in 2011. JS.App.16. In fact, the 2011 criteria expressly disclaimed this policy, stating that "[l]ocal government jurisdiction and precinct lines may reflect communities of interest to be balanced, but they are entitled to no greater weight as a matter of state policy than other identifiable communities of interest." JA165.

At the same time, the remedial map is under-inclusive in that it does remarkably little to address the "direct and significant impact" the House's supposed racial motive had on district lines. *Alabama*, 135 S. Ct. at 1271. In striking down the 2011 majority-minority districts, the district court catalogued numerous criticisms of their configurations, contending that they manifested the General Assembly's suspect racial intent. These amounted to about 111 (depending on the count) districting maneuvers the district court

identified as implementing racial motive. *See* Doc. 337-6 (listing each criticism and whether proposed remedies resolve them).

Because there is no way to remedy the "racial motive" underpinning a racial-gerrymandering violation, *Bethune-Hill*, 137 S. Ct. at 799, the proper way to remedy it is to cure its "direct and significant impact" on lines, *Alabama*, 135 S. Ct. at 1271. But the special master's remedial plan remedies less than half of the 111 suspect lines. It therefore carries forward most of the districting decisions forming the basis of liability. *See* Doc. 337-6. For example, the court was concerned that a water crossing in HD80 was created for racial reasons, and its remedy maintains it. The court criticized VTD 410 as being racially split in HD69, but its remedy preserves the exact same split. The court criticized the General Assembly for altering HD70, which was not underpopulated, but its remedy alters nearly half the district, while somehow still retaining many portions the court found suspect. The Court criticized a narrow appendage in HD95, which allowed the district to "donate" BVAP to HD92, but its remedy carries forward this same configuration. The list of supposedly race-based lines left intact is extensive. *See id.*

In other words, the special master did not address the district court's opinion or tailor his remedy to the supposed violations. He went on a spree, imposing his notion of good-government districting ideas where they were not called for and leaving untouched the very lines the liability opinion condemned.

There was a better path before the court. HB7002 remedied most suspect district lines. It maintained district cores at a higher degree. It changed invalidated districts more than surrounding districts. And it was completely blind to race. That was the plan that most carefully approximated state policy, and the district court was legally obligated to adopt it. *Upham*, 456 U.S. at 42.

CONCLUSION

The district court's remedial order should be summarily vacated and its opinion reversed. Alternatively, the Court should note probable jurisdiction.

Respectfully submitted,

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