No. 18-1134

In the Supreme Court of the United States

VIRGINIA HOUSE OF DELEGATES, *et al.*,
Appellants,

v.

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

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

BRIEF OF *AMICUS CURIAE* FAIR LINES AMERICA FOUNDATION, INC. IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

1. Whether the District Court erred by using a metric that included Latino voters and was not used by the original mapdrawer when it determined the Virginia legislature used a 55% target.

2. Whether the District Court erred by relying on unreliable statistical estimates to determine whether the challenged districts could elect candidates of choice at population percentages below those drawn by the Virginia legislature.

3. Whether the evidence before the District Court was sufficient to impose on the considered judgment of the Virginia legislature.

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STATEMENT OF INTERESTS OF *AMICUS CURIAE*

Amicus Curiae is the Fair Lines America Foundation, Inc.[1] Fair Lines America Foundation is a nonprofit, nonpartisan organization that provides education in the fields of demography, political science, geographic information systems, and legal studies. Fair Lines America supports fair and legal redistricting through comprehensive data gathering, processing, and deployment; dissemination of relevant news and information; and strategic investments in redistricting-related reforms and litigation.

Fair Lines America Foundation's interest in this case focuses on the importance of courts using correct data when making determinations about districts. There are huge legal and compliance challenges when creating district plans and Fair Lines America Foundation helps educate jurisdictions about proper approaches. Ensuring that courts are clear about proper data usage is a critical issue, especially given the reliance of the District Court on data in this case.

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[1] Appellants, Appellees Golden Bethune-Hill et al., and Appellee the Commonwealth of Virginia have consented to the filing this brief. Pursuant to Rule 37.6, counsel for amicus authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity—other than amicus and their counsel—contributed monetarily to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Math problems often cause challenges for lawyers.[2] And redistricting cases require a lot of math.

Redistricting cases require courts to dig deep into the purposes of another branch of government and they must use numbers to do so. Statistics, deviations, and other numbers come into play in trying to determine if a legislative body allowed race to predominate when it created a particular plan. The cases about Virginia's districts raise important questions about what justifies the massive judicial intervention of overturning an existing redistricting plan.

Many redistricting and Voting Rights Act cases treat statistics as facts, without accounting for the rather-pliable nature of the numbers. This case is a perfect example of relying on statistics that are too uncertain for a Court to consider them as facts at all, let alone facts that support overturning a decision made by state policymakers.

As discussed below, the District Court made two related errors involving the numbers at issue in this case. First, it used an incorrect number for

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[2] As the Chief Justice of the United States noted several years ago, "I think there are a lot of people who go to law school because they're not good at math and can't think of anything else to do." The Hon. John Roberts, Transcript of Speech at Rice University (October 17, 2012) *available at* https://www.c-span.org/video/?308879-1/remarks-chief-justice-john-roberts

determining the 55% Black Voting Age Population (BVAP) threshold, because it included Latino individuals when the Department of Justice and the Virginia mapdrawer did not use such a number. A look at the proper number of BVAP as used by the Department of Justice and the plan's original author shows that several districts are *below* 55%, demonstrating a lack of reliance on that alleged target.

Second, the District Court placed too much weight on statistical estimates related to district performance. While estimates are used for this type of analysis in Voting Rights Act cases, Virginia does not track voter registration by race, so experts must rely on *estimates* of turnout by race to create *estimates* of what level of minority population may be necessary to create an ability-to-elect district. Given the testimony that at least 50% minority population would be required for an ability-to-elect district, the District Court essentially found that Virginia's plan was infected by racial predominance because it considered this uncertainty. The Virginia mapdrawers created a small cushion between the bare minimum percentage possibly required in a high-turnout year and a 54-55% maximum, which does not demonstrate racial predominance.

These separate but related errors require reversal of the District Court's decision. Given the practical realities of drawing plans and the many factors a court must consider, there is not sufficient evidence to find that Virginia considered race in an unconstitutional manner as it sought to comply with the requirements of the Voting Rights Act. This

Court should allow the redistricting plan adopted by the legislature to stand. At the very least, this Court should send this appeal back to the District Court for further consideration with direction to use the correct numbers in making its determinations.

ARGUMENT

I. THE DISTRICT COURT ERRED BY RELYING ON THE WRONG MEASUREMENT OF BLACK VOTING AGE POPULATION

A. Reporting by race and the Voting Rights Act.

For the first thirty years of the Voting Rights Act, the Census Bureau only reported a single racial category for each respondent. But beginning with the 2000 Census, that changed—respondents now had the option of selecting multiple racial categories for each individual. Each person could now report more accurately if they identified as having a combination of racial backgrounds.[3]

This new Census reporting led to the need for clarification in Voting Rights Act enforcement. Federal requirements classify individuals of Latino origin as an "ethnicity," which is a separate category

[3] Tiger Woods, for example, described his racial background in TV interviews following his 1997 win at The Masters as "Cablinasian." Associated Press, "Tiger Woods describes himself as 'Cablinasian'" (April 22, 1997) *available at* https://www.apnews.com/458b7710858579281e0f1b73be0da618

from "race." See *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58782 (October 30, 1997). A respondent could identify as Black and some other racial category and be counted in all relevant races, or could alternatively identify as Black and Latino and be counted in the racial and ethnic categories.

The separation led to some confusion in drawing district maps. For example, in its 2001 redistricting effort, the state of Georgia relied on individuals who identified as Black in combination with other races *and* ethnicities in its efforts to obtain preclearance of its district plans. As the District Court explained, "Consequently, for purposes of this matter, Georgia has counted its black population as including all black multi-racial Hispanic and non-Hispanic responses. In contrast, the Department of Justice, in accordance with a Guidance issued by the Department in January, 2001, has counted as black those non-Hispanic individuals who identify as black only, or as black and white, but not individuals who identified as black and another minority race." *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 38 (D. D.C. 2002) *rev'd by Georgia v. Ashcroft*, 539 U.S. 461, 123 S. Ct. 2498 (2003).

This Court ultimately determined the difference was not material to the Georgia case, explaining in a footnote to its opinion that it would use Georgia's numbers because those were the ones used by the state in creating its districting plans. *Georgia*, 539 U.S. at 473 n.1.

B. Virginia relied on other numbers when drawing its plan.

In this case, the trial testimony was clear: Virginia did not rely on a BVAP number that included all individuals who identified as black when drawing its plans. It specifically relied on the number used by the Department of Justice that *excluded* individuals who identified as Black and Latino on the Census.

The Department of Justice advised states prior to the 2011 round of redistricting that it would only use numbers for individuals who identified as Black and another race, but not Black and another ethnicity. *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7472-73 (February 9, 2011). Consistent with this direction, Delegate Chris Jones drew the relevant district maps on his own Maptitude system, using a racial number that did not include Latino individuals. JA 1771-72 filed in No. 18-281 (Jones testifying that he used "only" DOJ Black).

This map-drawing process led to districts that grouped around the 55% number at issue in this case, but not all of the majority-minority districts were above 55% using the DOJ Black number relied on by Delegate Jones. JA 1268-70 filed in No. 18-281 (statistical summaries). It was only after Delegate Jones gave his districting plans to the Division of Legislative Services that it generated reports showing that all of the districts in question were above 55%—much to Delegate Jones' surprise. JA 1771-72 filed in No. 18-281; see also JA 1951 filed in

No. 18-281 (Jones testifying that he first learned of the discrepancy "the day that the bill came out").

This difference occurred because the Division of Legislative Services (DLS) included in their BVAP calculations all individuals who identified as "Hispanic, Latino, or Spanish origin" and who also selected that they were racially Black. The chart below summarizes the information from the statistics sheets and notes districts that are actually less than 55% on the DOJ BVAP numbers used by Delegate Jones:

District	DOJ Black VAP	DLS Calculated Black VAP
063	59.0%	59.5%
069	**54.6%**	**55.2%**
070	55.7%	56.4%
071	**54.9%**	**55.3%**
074	56.8%	57.2%
077	58.2%	58.8%
080	55.8%	56.3%
089	**54.8%**	**55.5%**
090	55.6%	56.6%
092	59.8%	60.7%
095	59.0%	60.0%

The District Court's reliance on the numbers provided by the DLS make even less sense because its numbers double-count racial minorities, so that the totals add up to more than 100%. As testimony indicated, the DLS numbers include Latino individuals who also identify as Black twice—once in the calculated BVAP number and again in the Hispanic field. During the trial, Delegate Jones demonstrated, using District 71 as an example, that

adding up the DLS racial categories for that district results in a total that is *more* than the actual reported voting age population for the district. JA 1775-1776 in No. 18-281. This was because the DLS numbers double-counted individuals who identify as Latino and Black.

The idea that Delegate Jones relied exclusively on a 55% target is not supported by the record before the District Court, because Delegate Jones testified that the Division of Legislative Services number that included Black Hispanics was not available to him until *after* he drew his plans. JA 1771-72, 1951 filed in No. 18-281. And it would be illogical to use numbers that artificially inflate the minority population by double-counting a subset of Latino individuals.

Thus, like the state in *Georgia v. Ashcroft*, the number relied on by the plan's creator in Virginia was not a 55% target, but rather a lower number because that it what was available in Maptitude as used by Delegate Jones. 539 U.S. at 473 n.1.

II. THE DISTRICT COURT ERRED BY RELYING ON ESTIMATES WITHIN ESTIMATES ABOUT DISTRICT PERFORMANCE.

In order to secure preclearance, the Commonwealth of Virginia had to ensure that it did not diminish the ability of a minority group to elect their preferred candidate of choice. *Bethune-Hill v. Va. State Bd. of Elections ("Bethune-Hill I")*, 137 S.

Ct. 788, 801 (2017) (quoting 52 U.S.C. § 10304(b)). If racially polarized voting existed in a particular area, a higher BVAP may be necessary for the minority community to elect its candidate of choice. *Id.* As a result, a state's reliance on race in creating district plans with that higher BVAP can be narrowly tailored to the compelling interest of complying with the Voting Rights Act. *Id.* This Court earlier recognized that a target to comply with Section 5 of the Voting Rights Act may in fact be useful for a jurisdiction facing that possibility. *Id*. at 802.

The District Court found that the challenged districts in Virginia were not narrowly tailored, because the level of BVAP at which they were drawn was not required for the districts to maintain their ability-to-elect status. Specifically, it relied on Dr. Maxwell Palmer's analysis that lower levels of BVAP, including districts as low as 45%, would be sufficient to elect candidates of choice—meaning the 54-55% BVAP level in the challenged districts was not narrowly tailored to comply with the Voting Rights Act. *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 179 (E.D. Va. 2018). But the District Court failed to consider the major problems with relying on Dr. Palmer's analysis for this determination.[4]

[4] In addition, the 45% number is well below the requirement of Section 2 that a minority group must constitute a majority in a district required by this Court in *Bartlett v. Strickland*, 556 U.S. 1 (2009) (plurality), to comply with Section 2 of the Voting Rights Act.

A. How ability-to-elect is calculated.

When racial bloc voting[5] is detected using statistical models, the appropriate solution is to create ability-to-elect districts. Those have generally been recognized as districts with at least 50% population of a single minority race.[6] The secrecy of the ballot prevents a reviewing court from knowing exactly how members of a racial group voted, so courts must use statistical estimates to review possible voting behaviors. *Gingles*, 478 U.S. at 52-53.

But the precise level of what constitutes an ability-to-elect district can be challenging to determine, because a court must rely on statistical calculations and predictions that cannot take every aspect of voter behavior into account. As a result, policymakers may reasonably wish to increase the minority VAP beyond what is the absolute minimum as they try to account for these difficulties in estimating and predicting voter behavior. That is especially true when the gap between the 50% plus

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[5] Racial bloc voting is usually defined as a situation when a majority of voters from one racial minority group support one candidate and a majority of voters from the racial majority group support another candidate. See generally *Thornburg v. Gingles*, 478 U.S. 30 (1986).

[6] Appellees apparently do not contest this statement, as noted by the District Court in its earlier opinion: "counsel for Plaintiffs has claimed that there must be a floor of '50 percent plus one' under Section 2 of the VRA." *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 527 n.13 (E.D. Va. 2015)

one and the 54% DOJ BVAP statistics used in several districts is only a few percentage points.[7]

To create an estimate about how a majority-minority district might perform, an expert must know the voter turnout—the district must have a sufficient percentage of minority voters who actually turn out to vote in order to be able to elect a candidate of choice.

1. Census data suffers from accuracy problems.

Several numbers are available to an expert wishing to make an estimate regarding a district's possible performance. Data is available on total minority population, but that number includes individuals who are not eligible to vote because they are too young. Minority voting age population is a better number, but still includes individuals who are not eligible to vote because of past criminal history or non-citizen status.

Both total population and voting age population are also gathered from Census data, which is assumed to be accurate,[8] but which also is recognized to be imprecise. *Department of Commerce*, 525 U.S. at 316 (discussing minority voter undercount); D'Vera Cohn, *Imputation: Adding People to the Census* (Pew Research Center, May 4, 2011).

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[7] For example, using the ideal district size in Virginia House of approximately 80,000 individuals in total population, JA 1799 in No. 18-281, four percentage points is only 3,200 people.

[8] This Court has held that Census data must be used for Congressional apportionment. *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 316 (1999).

Census data also remains unchanged for the entirety of the decade between each decennial count, making it less accurate and less reliable over time as individuals relocate. The Census Bureau's own annual estimates demonstrate how inaccurate the total population and voting age population are at the end of a decade—the Bureau estimates that that Virginia now has 500,000 more people than it had at the time of the 2010 count. U.S. Census Bureau, Quickfacts for Virginia, https://www.census.gov/quickfacts/fact/table/va/PST045218

2. A better metric is voter registration and turnout by race.

Given the limitations of Census data, voter registration and turnout by race data allow for more precise modeling of possible voter behavior in a district. Unlike Census numbers, registration data includes only eligible voters. It is also current, because individual voter registrations are constantly updated and not static for the decade like the Census.

3. Making the calculation.

After identifying a turnout metric, an expert can then review various elections, model the candidate of choice of the minority community in those elections, and then estimate what level of population in a particular minority community is necessary to elect a candidate of choice. A reviewing court can then use those estimates to determine that a particular level of minority population was necessary to avoid

retrogression in a district. *Bethune Hill I*, 137 S.Ct. at 801.

B. The lack of precision in Virginia's numbers presents major problems in this case.

1. Lack of voter registration data requires estimating the key metric.

Like many states, Virginia does not track voter registration by race, requiring the experts in this case to utilize decade-old Census data to make estimates about possible district performance. JA 2763 in No. 18-281. In a state without voter registration information by race, an expert must first estimate the minority turnout numbers using Census data, then use the number created by that estimate to create a *further* estimate about possible district performance.

2. Estimates based on estimates are of extremely limited value.

Because voting age population is not the same universe as voters who actually turn out to vote, an expert's estimate that a district will perform as an ability-to-elect district based on Census data alone can only be precise if (1) all individuals who identify as a particular minority group are eligible to vote, (2) all eligible individuals from the particular minority group in fact register to vote, (3) all voters of the particular minority group turn out at the rate estimated by the expert. And all of those factors must hold true using data that are nine years old and have not been updated. The District Court

apparently failed to grasp this analytical process when it dismissed expert testimony on this point. See *Bethune-Hill*, 326 F. Supp. 3d at 178 n.60.

But the District Court missed an even deeper problem—even though there were statistical error rates included in Dr. Palmer's ability-to-elect analysis, those error rates assume reliable numbers on turnout were included in the statistical model he generated. In other words, the old programming adage of "Garbage In, Garbage Out" applies: if the estimated performance of a district is itself based on an estimate, the potential statistical error far greater than that reported by the expert, because it includes the error rate in the underlying estimate (turnout by race) *and* the error rate in the resulting estimate (ability-to-elect).

3. Virginia's decision to add more than the statistical minimum was reasonable.

Facing a situation where the only indicator that could indicate possible district performance was *estimated* district performance based on an *estimate* of minority voter turnout, it was not unreasonable for the Virginia legislature to aim slightly higher than the bare statistical minimum to ensure that ability-to-elect districts remained that way through the decade.

This Court recognized that states can use an approach that takes into account more than just raw statistical estimates in its earlier decision on District 75 in this case:

> Under the facts found by the District Court, the legislature performed that kind of functional analysis of District 75 when deciding upon the 55% BVAP target. Redrawing this district presented a difficult task, and the result reflected the good-faith efforts of Delegate Jones and his colleagues to achieve an informed bipartisan consensus. Delegate Jones met with Delegate Tyler "probably half a dozen times to configure her district" in order to avoid retrogression. . . . He discussed the district with incumbents from other majority-minority districts. He also considered turnout rates, the results of the recent contested primary and general elections in 2005, and the district's large population of disenfranchised black prisoners.

Bethune-Hill I, 137 S. Ct. at 801.

Maintaining a 54-55% BVAP level in each of the 11 challenged districts was a reasonable decision that allowed Virginia to ensure that its districts complied with the requirements of Section 5 of the Voting Rights Act. It also allowed Virginia to have greater confidence that those districts would not lose their status as ability-to-elect districts through the decade.

In sharp contrast to that reasoned decision, the District Court instead relied on one statistical analysis that creates an estimate that is based on a prior estimate. That uncertain and risky calculation should not defeat the considered judgment of the Virginia legislature regarding appropriate levels of

minority population to ensure districts maintain their status as ability-to-elect districts.

III. THIS COURT SHOULD DEFER TO THE JUDGMENT OF THE VIRGINIA LEGISLATURE AND UPHOLD THE REDISTRICTING PLANS.

This Court has previously recognized that the intrusion by federal courts into the extremely local function of redistricting is serious. *Miller v. Johnson*, 515 U.S. 900, 915 (1995). As a result, courts should presume the "good faith of the state legislature," *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018), and "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Bethune-Hill I*, 137 S. Ct. at 797 (quoting *Miller*, 515 U.S. at 916).

As explained above, the Virginia legislature made two reasonable decisions. First, it did not mechanically apply the supposed 55% BVAP target because the mapdrawer drew several districts *below* that number on the information available to him when he was drawing the plan. Second, instead of relying on extremely nuanced and malleable nature of estimates related to district performance, the legislature added sufficient BVAP to each district above the bare minimum required. This was to ensure that the districts would remain ability-to-elect districts and to ensure the Commonwealth complied with the Voting Rights Act.

Both of these decisions demonstrate that the Virginia legislature did not allow race to

predominate in its creation of the district plans. Instead, it made reasonable decisions in furtherance of the compelling government interest of compliance with the Voting Rights Act.

In light of the "extraordinary caution" required in this kind of case, this Court should reverse the District Court's ruling and uphold the Virginia redistricting plan.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's decision.

Respectfully submitted,

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