No. 18-1134

IN THE

Supreme Court of the United States

VIRGINIA HOUSE OF DELEGATES,
M. KIRKLAND COX,

Appellants,

v.

GOLDEN BETHUNE-HILL, *et al.*,

Appellees.

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

---

MOTION TO DISMISS OR AFFIRM

KEVIN J. HAMILTON
ABHA KHANNA
RYAN SPEAR
WILLIAM B. STAFFORD
PERKINS COIE LLP
1201 Third Avenue
Suite 4900
Seattle, WA 98101-3099
(206) 359-8000

MARC E. ELIAS
Counsel of Record
BRUCE SPIVA
ARIA BRANCH
PERKINS COIE LLP
700 Thirteenth Street, N.W.
Suite 600
Washington, D.C. 20005-3960
(202) 654-6200
MElias@perkinscoie.com

Counsel for Appellees

April 1, 2019

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

QUESTION PRESENTED

The question presented is as follows:

1. Whether the district court abused its discretion by adopting a remedial districting plan when the Commonwealth of Virginia failed to do so after the district court concluded that Virginia House of Delegates Districts 63, 69, 70, 71, 74, 77, 80, 89, 90, 92, and 95 are racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT	1
ARGUMENT	7
I. APPELLANTS DO NOT HAVE STANDING	7
II. APPELLANTS FAIL TO ACKNOWLEDGE THE DEFERENTIAL STANDARD OF REVIEW GOVERNING THEIR APPEAL	12
III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADOPTING THE REMEDIAL PLAN	13
A. The Remedial Plan Comports with Traditional Redistricting Criteria	14
B. Appellants Fail to Prove that the District Court Used Race as the Predominant Factor in Adopting a Remedial Plan	17
1. Appellants Do Not and Cannot Demonstrate that the District Court Harbored an Improper Racial Motive	17
2. The District Court Did Not Commit Clear Error by Crediting the Sworn Testimony of the Court-Appointed Special Master	18

TABLE OF CONTENTS—Continued

Page

C. The District Court Did Not Abuse Its Discretion by Limiting Changes to the Challenged Districts and Some Immediately Adjacent Districts 28

D. The District Court Appropriately Ensured that It Did Not Adopt a Remedy that Violated the Voting Rights Act 30

CONCLUSION 32

APPENDIX

APPENDIX A: SPECIAL MASTER REMEDIAL MAPS:

PENINSULA – Newport News/Hampton.. 1a

NORFOLK/PORTSMOUTH/CHESAPEAKE.. 2a

TABLE OF AUTHORITIES

CASES Page(s)

Abbott v. Perez,
138 S. Ct. 2305 (2018) 18

Abrams v. Johnson,
521 U.S. 74 (1997) 24, 31

Anderson v. City of Bessemer City,
470 U.S. 564 (1985) 13

Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n,
135 S. Ct. 2652 (2015) 23

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 7, 8

Bd. of Estimate of City of New York v. Morris,
489 U.S. 688 (1989) 23

Below v. Gardner,
963 A.2d 785 (N.H. 2002) 25

Bethune-Hill v. Va. State Bd. of Elections,
141 F. Supp. 3d 505 (E.D. Va. 2015) 22

Bethune-Hill v. Va. State Bd. of Elections,
326 F. Supp. 3d 128 (E.D. Va. 2018) 22

Bethune-Hill v. Virginia State Bd. of Elections,
137 S. Ct. 788 (2017) 22

Common Cause v. Rucho,
279 F. Supp. 3d 587 (M.D.N.C.), *vacated and remanded on other grounds*,
138 S. Ct. 2679 (2018) 30

TABLE OF AUTHORITIES—Continued

Page(s)

Connor v. Finch,
431 U.S. 407 (1977) 13

Cooper v. Harris,
137 S. Ct. 1455 (2017) 13

Corbett v. Sullivan,
202 F. Supp. 2d 972 (E.D. Mo. 2002) 25

Davis v. Bandemer,
478 U.S. 109 (1986) 24

Dillard v. Town of Louisville,
730 F. Supp. 1546 (M.D. Ala. 1990) 24

Garza v. Cty. of Los Angeles,
756 F. Supp. 1298 (C.D. Cal. 1990) 23

Hollingsworth v. Perry,
570 U.S. 693 (2013) 8, 12

Johnson v. Miller,
929 F. Supp. 1529 (S.D. Ga. 1996) 32

Large v. Fremont Cty., Wyo.,
670 F.3d 1133 (10th Cir. 2012) 13

Larios v. Cox,
306 F. Supp. 2d 1214 (N.D. Ga. 2004) 25

League of United Latin Am. Citizens v. Perry,
548 U.S. 399 (2006) 23

Miller v. Johnson,
515 U.S. 900 (1995) 23

Morris v. Bd. of Estimate,
831 F.2d 384 (2d Cir.), *opinion corrected*,
842 F.2d 23 (2d Cir. 1987) 23

TABLE OF AUTHORITIES—Continued

Page(s)

Nation v. San Juan Cty.,
No. 2:12-CV-00039, 2017 WL 6547635
(D. Utah Dec. 21, 2017) 23

North Carolina v. Covington,
138 S. Ct. 2548 (2018).................... 12-13, 31, 32

Personhuballah v. Alcorn,
155 F. Supp. 3d 552 (E.D. Va. 2016)... 2, 5, 23, 25

Peterson v. Borst,
789 N.E.2d 460 (Ind. 2003)....................... 24-25

Shaw v. Hunt,
517 U.S. 899 (1996).................................. 23

Smith v. Clark,
189 F. Supp. 2d 529 (S.D. Miss. 2002)..... 25

Spokeo, Inc. v. Robins,
136 S. Ct. 1540 (2016)............................... 8

Thornburg v. Gingles,
478 U.S. 30 (1986).................................... 23

Upham v. Seamon,
456 U.S. 37 (1982).................................... 28-29

Va. House of Delegates v. Bethune-Hill,
139 S. Ct. 914 (2019)................................ 2

White v. Weiser,
412 U.S. 783 (1973)............................... 4, 29, 30

Wittman v. Personhuballah,
136 S. Ct. 1732 (2016)......................... 10, 11, 12

Wyche v. Madison Par. Police Jury,
635 F.2d 1151 (5th Cir. 1981).................. 24

TABLE OF AUTHORITIES—Continued

Page(s)

Wyche v. Madison Par. Police Jury, 769 F.2d 265 (5th Cir. 1985)..................... 24

CONSTITUTION

U.S. Const. art. III....................................... 8

U.S. Const. amend. XIV 4, 5, 17, 30

STATUTES

Va. Code Ann. § 2.2-507(A) 8

RULES

Fed. R. Civ. P. 25(d)...................................... 9

OTHER AUTHORITIES

Brief for Appellees, *Va. House of Delegates v. Bethune-Hill et al.*, No. 18-281 (U.S. Jan. 28, 2019) 8

Commonwealth of Virginia Division of Legislative Services, *Redistricting 2010*, http://redistricting.dls.virginia.gov/2010/RedistrictingPlans.aspx#46,list (last visited Mar. 28, 2019) 15

Hearing Tr. (1/10/19), *Bethune-Hill et al. v. Va. State Board of Elections et al.*, No. 3:14-cv-852 .... 19, 21

Jurisdictional Statement, *North Carolina v. Covington*, No. 17-1364, 2018 WL 1532754 (U.S.) (Mar. 26, 2018) 31, 32

TABLE OF AUTHORITIES—Continued

Page(s)

Reply Brief for Appellants, *Va. House of Dele-gates v. Bethune-Hill, et al.*, No. 18-281 (Feb. 27, 2019)................................ 9, 11, 12

Va. House Bill 7002, 2nd Special Sess. (2018)... 9

STATEMENT

This is the third time that Virginia's House of Delegates districting plan has come before the Court this redistricting cycle. In the first appeal, this Court held that the three-judge panel below had applied the wrong legal standard to Plaintiffs-Appellees' ("Appellees") claims. It vacated the decision in part and remanded for the district court to apply the correct standard to Appellees' claim that House Districts 63, 69, 70, 71, 74, 77, 80, 89, 90, 92, and 95 (the "Challenged Districts") are unconstitutional racial gerrymanders.

On June 26, 2018, the district court struck down Virginia's House of Delegates ("House") districting plan as unconstitutional, holding that race predominated in the construction of the eleven Challenged Districts and that the use of race was not narrowly tailored to serve a compelling government interest.

Although Appellees and other voters had already endured four elections under an unconstitutional districting plan, the district court did not rush into a remedial process. Rather, it gave Virginia's political branches four months—until October 30, 2018—to implement its order by adopting a constitutional remedial plan. *See* Dkt. No. 235 at 2. The district court could not wait forever because Virginia holds House elections in off years, and it was necessary to leave sufficient time to adopt a remedial plan in advance of the 2019 elections.

The political branches failed to act. While multiple remedial plans were proposed in the House, none were passed (or indeed, even voted on by the House). When Appellants informed the district court that no remedy would be adopted by the political branches before the

October deadline, *see* Dkt. No. 275, the district court initiated the remedial process.

The district court had previously solicited the parties to propose special master candidates who would assist the district court in adopting a remedial plan in the event the political branches failed to meet the October 30 deadline. *See* Dkt. No. 263. Ultimately, the district court selected Dr. Bernard Grofman, who had assisted the Eastern District of Virginia in preparing a remedial congressional districting plan for Virginia two years earlier. *See Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 555–56 (E.D. Va. 2016). As noted by the *Personhuballah* court, Dr. Grofman "has participated in over twenty redistricting cases as an expert witness or special master, and has been cited in more than a dozen Supreme Court decisions." *Id.* at 556 n.1. And given his recent experience in *Personhuballah*, Dr. Grofman was intimately familiar with the Commonwealth, its geography, and the 2011 redistricting cycle.

Thereafter, the district court invited parties and non-parties to submit remedial districting proposals of their own. Appellees, Appellants, and multiple non-parties submitted proposed remedial plans. *See, e.g.*, Dkt. Nos. 286, 291, 292. For their part, Appellants submitted a failed legislative proposal, which was admittedly drawn to achieve political ends. *See infra* at 23-26.[1]

[1] Meanwhile, Appellants filed an appeal of the district court's merits opinion. This Court denied Appellants' application for an emergency stay pending appeal. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 914 (2019). The Court heard oral argument on March 18, 2019.

On December 7, 2018, the special master filed a preliminary report. *See* Dkt. No. 323. In his report, the special master determined that none of the plans proposed to the district court were appropriate remedies. He thus prepared his own remedial proposal. Rather than give the district court a single option for its consideration, he gave the district court more flexibility. The district court's order affected four distinct regions of the Commonwealth. *See id.* at 7. The special master drew multiple "modules"—different ways of drawing an effective remedy—for each region. *Id.* at 7-8. This would give the district court the ability to better understand tradeoffs and to combine its preferred set of modules into a final remedial plan. *Id.* at 7-10.

Over the course of the next month, the parties submitted multiple rounds of briefing on the special master's proposals. *See, e.g.*, Dkt. Nos. 325-29, 335-37. On January 10, 2019, the district court held a full-day hearing to give the parties and interested non-parties an opportunity to be heard on the remedial plans submitted for the district court's consideration and the special master's proposals. J.S. App. 7. At the hearing, the special master testified under oath and at length about his methodology and was subject to examination by the parties. *Id.*

The district court thereafter ordered the special master to submit a final report. J.S. App. 7. Upon reviewing the final report, the district court ordered the special master to submit a final remedial plan incorporating four specific modules. *Id.*

On February 14, 2019, the district court issued an order adopting a final remedial plan, accompanied by a memorandum opinion (the "Opinion") explaining its rationale for adopting that plan. *See* J.S. App. 1-40.

The district court began by noting that the "foundational purpose of the 2011 redistricting in Virginia was to redistribute population among the 100 House of Delegates districts to achieve the constitutional requirement of equal population based on the results of the 2010 census." J.S. App. 7. The district court adopted the same maximum population deviation of plus or minus one percent used in the 2011 enacted plan. J.S. App. 8.

Having addressed the "background principle of population equality," the district court turned its attention to remedying "the Equal Protection violations that [it] had identified in the 2011 plan." J.S. App. 9. It did so by adopting a plan drawn "consistent with traditional districting criteria" recognized in Virginia. *Id.*

In adopting a remedial plan, the district court specifically noted that it was "mindful that redistricting 'is primarily a matter for legislative consideration and determination.'" J.S. App. 10 (quoting *White v. Weiser*, 412 U.S. 783, 794 (1973)). Thus, the district court limited changes to those reasonably needed to cure the constitutional defects in the enacted plan. *Id.* To that end, while the eleven unconstitutional districts are scattered across the state and adjoin numerous other districts, the district court sought to minimize the number of districts affected by the need to remedy the eleven Challenged Districts. J.S. App. 10-11. It did so by limiting changes in its remedial plan to *only* the Challenged Districts and some—but not all—of the immediately adjacent districts. J.S. App. 19 n.12; *see also* J.S. App. at 43-46.

Finally, the district court considered "compliance with Section 2 of the VRA [Voting Rights Act] as an 'equitable factor' in [its] redistricting process, and [then] 'implement[ed] a plan that complies with federal

policy disfavoring discrimination against minority voters.'" J.S. App. 11-12 (quoting *Personhuballah*, 155 F. Supp. 3d at 564). That is, the district court adopted a map that comported with traditional districting principles, and then—as a backstop—ensured that the resulting map did not inadvertently result in vote dilution under Section 2 of the Voting Rights Act. *Id.*

With these principles in mind, the district court turned to its evaluation of the special master's methodology. As summarized by the district court, the special master utilized nine criteria in crafting remedial plan alternatives for the district court's consideration:

(1) population equality;

(2) avoiding dilution in the voting strength of minorities . . . in compliance with Section 2 of the VRA and the Equal Protection Clause;

(3) avoiding using race as a predominant consideration;

(4) contiguity;

(5) avoiding splits of political subdivisions such as cities and counties;

(6) compactness;

(7) avoiding changes to the 2011 plan not required to remedy the identified constitutional violations, by limiting changes to the invalidated districts and immediately adjacent districts and by minimizing the number of non-challenged districts so affected;

(8) partisan neutrality;

(9) avoiding incumbency pairings, to the extent feasible.

J.S. App. 14-15 (citing J.S. App. 66-69). Of these, "Dr. Grofman was 'especially attentive to issues of contiguity, compactness, and avoiding splitting of existing political subunit boundaries,' because those political units represent identifiable communities of interest." *Id.* (citing J.S. App. 72-73 & nn. 20-22, 53-54, 165).

In using these neutral criteria, Dr. Grofman "sought to confine the impact of his proposals in recognition of [the district court's] limited remedial role" in two respects. J.S. App. 16. First, in the course of remedying the Challenged Districts, he limited changes only to those districts that were "located adjacent to invalidated districts." J.S. App. 17. Second, Dr. Grofman only altered adjoining non-challenged districts that "contained a portion of a city or county that also was included in one of the invalidated districts." *Id.*

Having thoroughly reviewed Dr. Grofman's qualifications, his reports, and his testimony under oath, the district court concluded that he "was a credible witness and that he used an appropriate methodology." J.S. App. 16.

As they do here, Appellants attacked the special master's credibility, claiming that—contrary to his sworn testimony—he redrew the Challenged Districts to comport with a 55% BVAP "ceiling." J.S. App. 16-17. The district court considered that argument, along with Dr. Grofman's sworn testimony "that he never sought to achieve a predetermined BVAP level in any of the proposed districts." J.S. App. 17. Based on its review of the record and Dr. Grofman's credibility, the district court rejected Appellants' arguments and "credit[ed] Dr. Grofman's explanations regarding the

manner in which he considered race in constructing his proposals." *Id.*

The district court further found that "[n]othing in the record suggests that Dr. Grofman acted with animus toward any incumbents, or toward any party." J.S. App. 17-18. Rather, the district court found that the special master's remedial proposals were constructed "without regard to partisan outcome in the non-challenged districts, and that he treated all incumbents equally." J.S. App. 18.

The district court then addressed its rationale for selecting certain of the modules proposed by the special master. J.S. App. 19-37. As even a cursory review of the Opinion shows, the district court selected particular modules based on its assessment of which modules best remedied the constitutional violations it had found and comported with traditional redistricting principles. *Id.*

Appellants now appeal. At the outset, the Court should dismiss their appeal because they lack standing to invoke the Court's jurisdiction. But even assuming Appellants have standing, the absence of a substantial question warrants dismissal. Alternatively, Appellants fall far short of showing that the district court abused its discretion in adopting a remedial plan, and its well-supported remedial order should be summarily affirmed.

ARGUMENT

I. APPELLANTS DO NOT HAVE STANDING

Appellants, the House and its Speaker in his official capacity, do not have standing because they have suffered no cognizable injury. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (standing "must be met by persons seeking appellate

review"). Article III requires (1) an injury in fact that is (2) fairly traceable to the challenged conduct and (3) likely to be redressed through a favorable judicial decision. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Because Appellants identify no *institutional* injury, they fail to demonstrate this "first and foremost" requirement to invoke the power of this Court. *Arizonans*, 520 U.S. at 64.

Appellants lack standing for all the same reasons Appellees have explained at length in Appellants' appeal of the district court's merits opinion (No. 18-281).[2]

Appellants do not represent the Commonwealth of Virginia, as they are not authorized to bring this appeal under Virginia law on behalf of the Commonwealth. Rather, Virginia law confers authority only upon the Commonwealth's Attorney General to provide "[a]ll legal service in civil matters for the Commonwealth . . . and every state department, institution, division, commission, board, bureau, agency, entity, official, court, or judge, including the conduct of all civil litigation in which any of them are interested." Va. Code Ann. § 2.2-507(A); *cf. Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013) (state designates who may represent it in federal court).

Appellants do not even represent the legislative branch of Virginia, which consists of the House of Delegates *and* the Senate. This is illustrated by the fact that Appellants have failed to offer a piece of enacted remedial legislation. Rather, their brief advo-

---

[2] Appellants assert they have standing for reasons set out in their briefing in case number 18-281. Appellees incorporate their briefing on standing in that case by reference. *See generally* Brief for Appellees at 12-17, *Va. House of Delegates v. Bethune-Hill et al.*, No. 18-281 (U.S. Jan. 28, 2019).

cates for adoption of House Bill 7002, one of multiple remedial plans proposed in the House that failed to even garner a vote on the House floor.

Additionally, Appellants do not "represent [the House's] members," as Appellants claimed for the first time in their reply brief in their merits appeal. Reply Brief for Appellants at 6, *Va. House of Delegates v. Bethune-Hill, et al.*, No. 18-281 (Feb. 27, 2019) ("Appellants' Reply Brief"). The only specific "member" Appellants reference is Speaker Cox, J.S. 3, but Appellants' jurisdictional statement makes clear that Cox is a party in this matter only in his *official* capacity as Speaker of the Virginia House of Delegates. *See* J.S. iii. Indeed, Speaker Cox became an intervenor not through any affirmative action on his part, but through the automatic operation of Federal Rule of Civil Procedure 25(d). *See* Dkt. No. 251 at 1 ("By operation of Rule 25(d), Speaker Cox was 'automatically substituted as a party'" upon assuming the office of Speaker) (quoting Fed. R. Civ. P. 25(d)).[3]

Nor do Appellants represent other unidentified members of the House, as demonstrated by the fact that multiple members testified *against* Appellants at trial. Appellants can hardly claim to represent the

[3] Appellants complain that the district court found it necessary to alter Speaker Cox's district. (District 66). J.S. 33-34. But even if he were a party in his individual capacity (which he is not), and even if there were record evidence of a state policy of leaving the district lines of particular "important" incumbents untouched (which there is not), the district court *had* to alter District 66. It adjoins a Challenged District, contains part of a county also found in an unconstitutional district, J.S. App. 102, and the changes made to District 66 thus "emerged from decisions as to how best to remedy the constitutional infirmities in the unconstitutional districts," J.S. App. 217.

House's members for purposes of generating standing when many of those members publicly and actively oppose its litigation position. Whenever the lines of a districting plan change, some incumbents may be delighted with the result, and others not. Ultimately, Appellants' claim to represent the individual interests of a few preferred members is not only untrue as a matter of record, it makes no sense as a matter of law; the House as an institution cannot pick and choose which members' interests it chooses to advance.

Even if Appellants did represent the parochial interests of some individual legislators, such legislators suffer no cognizable harm simply because the lines of the districts they represent change. The Court already found in *Wittman* that an intervenor-legislator does *not* have standing in these circumstances. There, Intervenors-Congressmembers identified their injury as the changes a remedial plan made to their existing districts, altering their constituent bases. *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736–37 (2016). This Court held that the *Wittman* intervenors did *not* have standing in the absence of any showing that the particular changes made to those districts amounted to a cognizable injury. *Id.*

In fact, Appellants are institutional parties and so they must prove an injury specific to the *House*. But the House as an institution has no interest in any particular district lines. Here, the district court's remedial plan leaves untouched 75 of 100 House districts. A remedial plan that reorganizes some district lines into a different configuration does not harm the *House* in any cognizable way.

Nonetheless, Appellants claim that the House suffers a legally cognizable injury simply because a change to the lines in a fraction of the districts will mean that a

fraction of incumbents represent a somewhat different collection of voters. Appellants' Reply Brief at 3-4. This is no injury and it works no fundamental change to the structure of the House. District lines change at least once after every decennial census. This is par for the course.

Appellants agree that the House endures "comparable injuries" after each decennial census, *id.* at 4, laying bare the unbounded nature of Appellants' theory of injury. All sorts of things happen in legislative districts that change the composition of the electorate. School district funding decisions cause families to move into and out of districts. Legislation creating incentives for major corporations to locate facilities may dramatically change a local population. Local government decisions establishing low income housing or rezoning do the same. If a single chamber of a legislature has standing to challenge or defend actions that will foreseeably alter a single district's electorate, it is hard to imagine where the limits of this standing theory would lie.

Indeed, Appellants' same standing theory would apply with equal force to the U.S. House of Representatives. That is, the House of Representatives—or more accurately, whatever political party then controlling that body—would have standing to challenge state districting laws and judicial decisions that changed the composition of congressional districts, irrespective of the impact of those changes on individual members.[4] The House of Representatives, just like a state legisla-

---

[4] By Appellants' logic, while the *Wittman* intervenors (individual congressional representatives) lacked standing, the U.S. House of Representatives and then-Speaker Paul Ryan would have been able to invoke this Court's jurisdiction.

tive body, would have "enduring interests in its own composition and constituencies." Appellants' Reply Brief at 3.

This Court's precedents do not recognize this sort of amorphous and unbounded kind of "injury." *See Wittman*, 136 S. Ct. at 1737 ("party invoking the court's jurisdiction cannot simply allege a nonobvious harm, without more"). The standing doctrine exists precisely to ensure that the courts are presented with a clear "case or controversy" between two adverse parties, rather than serving as a forum for third parties that "have a keen interest in the issue" before the court, but no legally cognizable interest. *Hollingsworth*, 570 U.S. at 700.

Because Appellants lack standing, this appeal must be dismissed.

II. APPELLANTS FAIL TO ACKNOWLEDGE THE DEFERENTIAL STANDARD OF REVIEW GOVERNING THEIR APPEAL

Appellants' jurisdictional statement does not even acknowledge, let alone grapple with, the deferential standard of review governing this appeal.

As the district court noted in adopting a remedial plan in this case, drawing a remedial plan is "complex" and requires balancing various districting considerations and often competing traditional redistricting criteria. *See, e.g.*, J.S. App. 13. Accordingly, when this Court reviews a districting plan that has been adopted by a district court to remedy a constitutional violation, it does so with due deference to the balance struck by the district court. When a district court adopts a remedial map—including when it adopts a remedial plan proposed by a court-appointed special master—this Court reviews only for abuse of discretion. *North*

Carolina v. Covington, 138 S. Ct. 2548, 2554 (2018) ("[T]he District Court's appointment of a Special Master in this case was not an abuse of discretion . . . [and] [n]either was the District Court's decision to adopt the Special Master's recommended remedy for the racially gerrymandered districts.").[5]

Moreover, to the extent that the district court's remedial order turns on its credibility determinations, the standard of review is even more deferential. Gauging witness credibility is a classic prerogative of the trial court and, accordingly, "can virtually never be clear error." *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985). Appellate courts "give singular deference to a trial court's judgments about the credibility of witnesses . . . because the various cues that 'bear so heavily on the listener's understanding of and belief in what is said' are lost on an appellate court later sifting through a paper record." *Cooper v. Harris*, 137 S. Ct. 1455, 1474 (2017) (quoting *Anderson*, 470 U.S. at 575).

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADOPTING THE REMEDIAL PLAN

Stripped to its essence, the premise of Appellants' appeal is that the special master impermissibly used race as the predominant factor in proposing remedial plans, repeatedly lied about doing so under oath, and

---

[5] *See also Connor v. Finch*, 431 U.S. 407, 414 (1977) ("The essential question here is whether the District Court properly exercised its equitable discretion in reconciling the requirements of the Constitution with the goals of state political policy."); *Large v. Fremont Cty., Wyo.*, 670 F.3d 1133, 1139 (10th Cir. 2012) ("Our ultimate review of the appropriateness of the district court's chosen remedy, however, is only for abuse of discretion.").

the district court then committed clear error by finding his testimony credible. Appellants further contend that the district court abused its discretion because instead of adopting proposals by the court-appointed special master, it should have adopted a partisan legislative proposal that was not passed by the House, and which was drawn expressly to advance specific political outcomes in particular districts. To describe Appellants' position is to refute it.

Appellants do not and cannot cite to a single case in which this Court held that a district court erred by adopting a remedial districting plan in remotely comparable circumstances. Appellants' brief turns a blind eye to the remedial districts adopted by the district court and grossly distorts the special master's reports.

A. The Remedial Plan Comports with Traditional Redistricting Criteria

At the outset, while Appellants argue that the special master was motivated predominantly by race, it is beyond dispute that the remedial plan adopted by the district court more closely adheres to traditional redistricting criteria than does the enacted plan.

The district court's Opinion (J.S. App. 1-40) and the special master's Report (J.S. App. 41-224) speak for themselves in this regard. The district court did not and could not draw on a blank slate. Acting in due deference to the Commonwealth, the district court used the 2011 version of the affected districts as the starting point for a remedy. Even so, and even as it limited changes to a mere 25 (of 100) districts, the district court's final remedial plan markedly improves adherence to traditional redistricting criteria.

Consistent with the special master's focus on redrawing the Challenged Districts to adhere to county lines

where possible (J.S. App. 111-12), the remedial plan splits fewer counties and voting tabulation districts. The remedial plan splits seven fewer counties than the enacted plan, and splits 18 fewer voting tabulation districts.[6]

Similarly, the remedial plan, on average, markedly improves the compactness of the Challenged Districts. Compactness is a traditional redistricting principle. One of the features of the unconstitutional Challenged Districts was the way in which district lines were contorted in service of the legislature's racial goals. The average Reock score of the Challenged Districts in the enacted plan is .37—compared to .31 under the enacted plan.[7]

The district court, in adopting specific proposed modules for integration into a final remedial plan, repeatedly emphasized that it was selecting options that served traditional redistricting criteria. For example, in the Petersburg region, the district court selected a module that "allocate[d] 20 segments of cities and counties to the five districts in the Petersburg region, while, in the 2011 map, the political subdivisions were divided into 28 segments in these districts." J.S. App. 21. Likewise, the district court selected its preferred Petersburg module because it "substantially increases the compactness scores of" the Challenged District in the region, while "[a]ll the non-challenged districts in the region either maintain nearly identical

[6] These data are publicly available at Division of Legislative Services, *Redistricting 2010*, http://redistricting.dls.virginia.gov/2010/RedistrictingPlans.aspx#46,list (last visited Mar. 28, 2019).

[7] Under the Reock measure, the higher number indicates a more compact district.

compactness scores, or improve in compactness compared with the 2011 plan." J.S. App. 21-22.

The district court took the same approach to altering the districts adjoining the Challenged Districts when necessary to effect the remedy. For example, in the Peninsula region, the district court adopted a module that placed District 94 wholly within the city of Newport News, whereas previously that district had been split between four separate municipalities. J.S. App. 31.

Time and again, the district court emphasized that its remedial choices were driven by its adherence to traditional districting criteria while still balancing "competing considerations." J.S. App. 25-26. In the Richmond area, for example, the district court recognized the inherent difficulty of redrawing Richmond using traditional districting principles, given that the enacted plan had split the city into five different districts, and the district court strove to ensure that all incumbents were retained in their districts. *Id.*

The eye test confirms what these data points suggest—the district court adopted a remedial plan that makes circumscribed changes to the affected districts while still markedly improving their adherence to traditional redistricting principles.

Indeed, the before-and-after pictures of many Challenged Districts are striking. There is perhaps no better illustration than the way in which the special master remedied the Peninsula and Norfolk regions. In the enacted plan, District 95 was marked by a narrow, northward snaking tendril. *See* Appendix 1a The special master eliminated the tendril while retaining the surrounding districts as compact, county-based districts that followed the footprint of

the enacted plan. Likewise, in the Norfolk region, the special master remedied the twisting and elongated contours of Challenged Districts 77 and 80 by redrawing them as compact districts. *See* Appendix 2a.

Simply put, on their face, the remedial districts support the district court's stated rationale for adopting them: "To remedy [identified] Equal Protection violations, we now draw a plan consistent with traditional districting criteria." J.S. App. 9. Appellants' strained efforts to suggest that the district court's remedial plan was instead driven by predominantly racial considerations falls flat when one actually compares the remedial plan to the enacted plan it replaces.

B. Appellants Fail to Prove that the District Court Used Race as the Predominant Factor in Adopting a Remedial Plan

Appellants ask this Court to hold that the remedial plan adopted by the district court is unconstitutional because it is predominantly motivated by race without constitutional justification. This assertion is baseless. Appellants cannot demonstrate that the district court abused its discretion.

1. Appellants Do Not and Cannot Demonstrate that the District Court Harbored an Improper Racial Motive

Appellants' brief is premised on the contention that the *special master* harbored an illegitimate racial motive. But the remedial plan at issue was not adopted by the special master. Rather, it was adopted by the district court for reasons set out in its Opinion, which did *not* include the predominant use of race.

Appellants do not and cannot argue that the *district court* used race as the predominant factor in selecting a remedial plan. *Cf. Abbott v. Perez*, 138 S. Ct. 2305, 2328 (2018) ("[n]o one" would seriously suggest that courts would "act[] with invidious intent" in drawing remedial plans).

In other words, *even if* the special master originally drew potential remedial modules with an impermissible emphasis on racial considerations (which he did not, as explained below), there is no evidence that the *district court* that adopted a remedial plan did so using race as the predominant factor. That is particularly true here, given that the special master did not propose a particular remedial plan—he proposed various regional "modules" for the district court's consideration. The district court explained at length why it adopted the specific modules it did in each region, how the selected modules best remedied the identified constitutional violations in each region, and how each selected module comported with traditional districting principles. J.S. App. 19-37. Appellants flatly ignore the district court's lengthy articulation of the actual reasons why it adopted the remedial plan it did.

2. The District Court Did Not Commit Clear Error by Crediting the Sworn Testimony of the Court-Appointed Special Master

Appellants claim that "[t]he special master used a 55% BVAP figure as a fixed, predetermined, and non-negotiable number to structure the districts he drew." J.S. 13. Not so.

In his final report, the special master explained that this claim "completely mischaracterizes" his methodology. J.S. App. 198. The special master explained that

he drew districts "according to neutral criteria without concern for race," *id.*, and only then confirmed that those districts "did not inadvertently result in violation of Section 2 of the Voting Rights Act in the way they were reconfigured," J.S. App. 194. The special master did not set out to comply with a preordained racial target. Rather, "in the configurations [he] drew, once [he] imposed traditional districting criteria, black voting age proportions in redrawn unconstitutional districts naturally fell below 55%." J.S. App. 198-99.

Dr. Grofman repeated that point clearly under oath, testifying that he "certainly did not" purposefully "set out to draw districts at or below 55 percent as a racial target." *Bethune-Hill et al. v. Va. State Board of Elections et al.*, No. 3:14-cv-852 (1/10/19 Hearing Tr. 71:11-13) ("Hearing Tr."). Rather, he explained that there was "no magic number that [he] sought to achieve," and that he instead drew various remedial proposals using traditional districting principles, *then* conducted an analysis "to determine that African-American voters would maintain their opportunity to elect preferred candidates in the challenged districts," and concluded "that there was no danger in that regard based on the districts [he] had drawn," *id.* at 71:15-72:6.

"After a thorough evaluation of Dr. Grofman's qualifications, report, and testimony," the district court found "that Dr. Grofman was a credible witness and that he used an appropriate methodology." J.S. App. 16. It considered and rejected Appellants' claim that the special master had—and repeatedly lied about—a secret racial motive: "We reject the intervenors' assertion that Dr. Grofman's methodology used race improperly as the predominant criterion by applying a 55% BVAP 'ceiling' to the invalidated districts." *Id.* It

instead credited the special master's testimony that he did what he said he did—that "he never sought to achieve a predetermined BVAP level in any of the proposed districts" and considered race only after drawing potential remedial districts in the sense of "ensur[ing] that the new districts had not inadvertently resulted in minority vote dilution." J.S. App. 17.

This credibility determination is subject to considerable deference. Appellants do not remotely establish that it is clearly erroneous.

First, Appellants complain that the special master only denied "intentionally maneuvering lines below" a 55% BVAP target *after* Appellants accused him of doing so. J.S 15. This is wrong as a factual matter and makes little sense regardless. In his original report, the special master set out his methodology clearly. He drew districts to comply with traditional redistricting criteria, considering race only *after* he drew districts to ensure the resulting districts would not unintentionally violate Section 2 of the Voting Rights Act. Dkt. No. 323 at 49; *see also id.* at 46 ("I would emphasize that, in my line drawing, I have not ever sought to achieve any particular predetermined percentage of black voting age population within a district."). The special master *never* said that he drew districts using a 55% BVAP ceiling.

As Appellants note, the special master referenced the fact that his modules did not contain districts with a BVAP in excess of 55%, and rejected remedial proposals containing districts with a BVAP exceeding 55%, but Appellants take these statements grossly out of context. In the course of rejecting remedial plans proposed by the parties, the special master set out multiple, independent reasons why he could not recommend that the district court adopt those proposals. *See*

Dkt. No. 323 at 119-30. Among other things, the special master found that those plans contained multiple districts in which BVAP exceeded 55%. *See, e.g.*, *id.* at 121-22. This does not mean the special master deployed a 55% BVAP ceiling to draw *his* proposed remedial modules. Rather, he explained, he had found that if one used his methodology—limiting changes to the Challenged Districts and immediately adjacent districts while minimizing split county lines—the resulting districts would not fall above 55% BVAP. The fact that other proposed remedial plans *did* have multiple districts over 55% BVAP suggested to the special master that race may have been used by the proposing party in a way that was not narrowly tailored. *Compare id.* at 46-47, *with id.* at 121-23.

Thus, Appellants mischaracterize the special master's references to 55% BVAP—as he has repeatedly explained in written reports and in sworn testimony. *See, e.g.*, J.S. App. 198 (explaining that Appellants "completely mischaracterize[] [his] references to a 55% black voting age population in [his] Report of December 7"); Dkt. No. 331 at 25 (same); Hearing Tr. 71:11-13 (testifying under oath that he did not use a 55% BVAP "ceiling" to draw remedial districts).[8]

---

[8] Similarly, Appellants paint a false picture that the remedial districts proposed by the special master all fell just "fractions of a percent" below 55% BVAP, thereby evincing his supposed used of a 55% BVAP "ceiling." J.S. 16. In reality, the BVAP percentages of the Challenged Districts vary considerably. Multiple remedial districts have a BVAP well below 50%, while others have percentages ranging throughout the low 50s. http://redistricting.dls.virginia.gov/2010/data/house%20plans/final_remedial_plan/final%20remedial%20plan.pdf. As further explained *infra* at 28, it is no surprise that remedial districts often do not vary *drastically* from the versions in the enacted plan—the special master was constrained to start with the 2011

Second, Appellants claim that the district court erred in crediting the special master's testimony when it failed to credit testimony of "the House's witnesses" who claimed at trial "that race did not predominate" in the enacted map. J.S. 2. This claim is also wrong as a matter of fact and law. As a matter of fact, unlike the special master, the House witnesses conceded that they used a 55% BVAP target to draw the Challenged Districts. As a result, the district court twice found "as a matter of fact that the legislature employed a mandatory 55% BVAP floor in constructing all 12 challenged districts." *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 144–45 (E.D. Va. 2018); *see also Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 519 (E.D. Va. 2015) ("*Bethune I*"), ("[A]ll the parties agree—and the Court finds—that the "55% BVAP figure was used in structuring the districts[.]"); *aff'd in part, vacated in part*, 137 S. Ct. 788 (2017). This Court's ruling in *Bethune I* expressly incorporated that finding. *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 795-96 (2017).

In any event, Appellants cite no authority for the proposition that if a court finds one witness credible, it must find all witnesses credible. Any such rule would be patently absurd and would entirely undermine district courts' authority and obligation to assess the credibility of each witness individually. The district court did not commit clear error in finding that a neutral third party with no reason to lie did not lie.[9]

---

version of the districts. The fact that the district court did not redraft the remedial districts entirely evinces its circumscribed approach to the remedial process, not the special master's use of a 55% BVAP ceiling.

[9] The district court here is far from alone in finding Dr. Grofman credible. His testimony has been credited by numerous

Third, Appellants claim that their own proposed remedial plan, supposedly "configured without racial intent," J.S. 19, somehow demonstrates that the special master *did* utilize race as the predominant factor in his various proposals, *id.* Appellants' reliance on their own remedial plan is misplaced. Appellants tout their own remedial proposal as the "most accurate[]" way to draw a remedial plan "without racial intent" and note

---

federal courts, including in one case where the court rejected the same kind of attack on Dr. Grofman that Appellees lodge here. *See, e.g.*, *Nation v. San Juan Cty.*, No. 2:12-CV-00039, 2017 WL 6547635, at *10 (D. Utah Dec. 21, 2017) (finding the allegations that Grofman, the Special Master in the case, "lied to the court, to the parties, and to the public about his consideration of race are conclusory and entirely unsubstantiated"); *Personhuballah*, 155 F. Supp. 3d at 556 (appointing Grofman as a Special Master and finding that one of his plans "best remedies the constitutional violation"); *Garza v. Cty. of Los Angeles*, 756 F. Supp. 1298, 1332 (C.D. Cal. 1990) (recognizing Grofman as "an expert witness in racial or ethnic vote dilution in numerous federal court cases"). Indeed, this Court—and others—have repeatedly relied on Grofman's expertise in a host of different voting rights contexts. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2662 (2015) (citing with approval a law review article co-authored by Grofman); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 487–88 (2006) (same); *Shaw v. Hunt*, 517 U.S. 899, 912 (1996) (quoting and relying on Grofman's book); *Miller v. Johnson*, 515 U.S. 900, 924 (1995) (relying on a book by Grofman); *Thornburg v. Gingles*, 478 U.S. 30, 48, 49, 62 (same) (1986); *id.* at 52-54 (affirming in part the district court which relied on expert testimony by Grofman); *Davis v. Bandemer*, 478 U.S. 109, 129 n.10 (1986) (citing with approval a law review article authored by Grofman); *Morris v. Bd. of Estimate*, 831 F.2d 384, 390 (2d Cir. 1987) (quoting and relying on academic literature by Grofman), *opinion corrected*, 842 F.2d 23 (2d Cir. 1987), *aff'd sub nom. Bd. of Estimate of City of New York v. Morris*, 489 U.S. 688 (1989); *Dillard v. Town of Louisville*, 730 F. Supp. 1546, 1547 n.2 (M.D. Ala. 1990) (quoting and relying on a law review article authored by Grofman).

that the majority of the Challenged Districts in that proposal exceeded 55% BVAP. J.S. 19-20. The flaws in this argument run deep.

As an initial matter, Appellants' proposal is not entitled to any deference. It is a failed legislative plan that did not even garner a floor vote in the House, let alone get enacted by both chambers of the General Assembly and signed by the Governor. Dkt. No. 323 at 2 (citing *Abrams v. Johnson*, 521 U.S. 74, 85 (1997)).

Moreover, Appellants candidly acknowledged that political considerations were the overriding concern animating the proposal. Appellants constructed their remedial proposal "to preserve the political makeup of neighboring districts" so as to "preserve the composition the legislature established in 2011." Dkt. No. 291 at 8. That is, Appellants drew their "remedial" plan to achieve specific partisan outcomes in specific districts. They complain that unlike them, the district court did *not* prioritize "incumbency protection" over traditional redistricting criteria. J.S. 35.

But it is well-established that courts may not consider politics when drawing remedial maps or design those maps to achieve partisan ends. *See Wyche v. Madison Par. Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985) ("Many factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts."); *Larios v. Cox*, 306 F. Supp. 2d 1214, 1218 (N.D. Ga. 2004) ("[I]n the process of adopting reapportionment plans, the courts are 'forbidden to take into account the purely political considerations that might be appropriate for legislative bodies.'") (quoting *Wyche v. Madison Par. Police Jury*, 635 F.2d 1151, 1160 (5th Cir. 1981)); *Peterson v. Borst*, 789 N.E.2d 460, 463 (Ind. 2003) ("A court . . .

must . . . determine whether adoption of one of the plans would improperly introduce political considerations into the judicial process."); *Smith v. Clark*, 189 F. Supp. 2d 529, 537 (S.D. Miss. 2002) ("[P]olitical considerations are inappropriate for a federal court to consider when drafting a congressional redistricting plan."); *Corbett v. Sullivan*, 202 F. Supp. 2d 972, 973-74 (E.D. Mo. 2002) (noting that plan adopted by the court "does not consider the political consequences because that is not the proper role for a Court"); *Below v. Gardner*, 963 A.2d 785, 793 (N.H. 2002) ("[P]olitical considerations may be permissible in legislatively-implemented redistricting plans, [but] they have no place in a court-ordered remedial plan.").

Indeed, based on this long line of authority, the Eastern District of Virginia rejected a similar claim advanced by congressional intervenors when adopting a remedy for the racial gerrymander of Virginia's Third Congressional District. *See Personhuballah*, 155 F. Supp. 3d at 563-64 (rejecting claim that "adopting a plan consistent with the General Assembly's policies requires maintaining" the existing political performance of districts). In short, the racial composition of the Challenged Districts in Appellants' proposed remedial plan does not indicate that the special master impermissibly used race and then lied about it; it is indicative only of the political machinations that drove the construction of Appellants' "remedial" plan.

Even assuming, contrary to the district court's lengthy factual findings in its merits opinion, that the overriding purpose of the 2011 plan was "protecting incumbents and honoring their wishes," J.S. 34, Appellants cannot show the district court abused its

discretion by following the law rather than Appellants' personal political goals.[10]

Fourth, Appellants note that other parties submitted proposed remedial plans in which the BVAP of some Challenged Districts exceeded 55%. J.S. 18. But what is at issue is the district court's intention in adopting a remedial plan—not the intent of other parties as manifested in proposals the district court did not adopt. Appellees, for example, took a different remedial approach from the special master, balanced traditional districting principles differently than the special master, and submitted remedial proposals in which three districts had more than 55% BVAP. But Appellees have absolutely no basis whatsoever to dispute the special master's repeated statements that *he* did not deploy a 55% BVAP ceiling or that sub-55% BVAP districts naturally resulted from his own methodological approach to balancing traditional redistricting criteria. The fact that Appellees may have utilized and balanced traditional districting criteria in a different way than the special master says nothing about the district court's intent in adopting a remedial plan.

Fifth, Appellants point to a handful of specific boundary lines in particular districts that they claim evince the special master's secret racial motives. Appellants' strained attempts to create a false equivalency between their unconstitutional racial gerrymander and the district court's remedial plan fail.

Appellants' rhetoric far outstrips the reality. For example, Appellants point to three voting tabulation districts split between the border of District 91 and 92,

---

[10] While the district court declined Appellants' invitation to rig the remedial plan to protect incumbents, it did take pains to avoid unnecessarily pairing incumbents. J.S. App. 15-16.

which they assert manifests "race-intensive maneuvering" that supposedly "disfigured HD91." J.S. 22-23. This is not remotely so. District 91—which lies at the edge of a peninsula that is indeed adjacent to an "enormous body of water" (the Atlantic Ocean), J.S. 23—is precisely as compact under the remedial plan as under the enacted plan (.60 on the Reock score). *Compare* J.S. App. 132, *with* J.S. App. 136; *see also* Appendix 1a. Moreover, as to supposed "race-intensive maneuvering," the special master explained "that these particular splits were for compactness improvement purposes, and not at all for race conscious districting." J.S. App. 202 n.71. Indeed, one need only look at a map to see that the remedial plan does not manifest the stark pattern of racial sorting that led the district court to strike the Challenged Districts in the enacted plan. *See* J.S. App. 225.[11]

---

[11] Appellants' various other examples of the special master's supposed predominant use of race similarly collapse under scrutiny. For example, Appellants argue that it was "no easy feat" for the special master to drop the BVAP of District 90 below 55% and that he resorted to splitting "a black community on its eastern border with HD 83" to do so. J.S. 25. This makes no sense—the BVAP of remedial District 90 is 41.93%, far below the supposed 55% BVAP "ceiling." J.S. App. 141. And the border between District 83 and 90 is attributable to the special master following VTD borders, not racial considerations. *See* Dkt. No. 355-02. Likewise, Appellants claim that the northern edge of District 74 reflects an effort to "carve out black population to meet the 55% target," J.S. 24, but the special master explained that these district contours instead were caused by an "irregularly shaped VTD and the constraints to draw a district in which it was not necessary to pair the incumbent of district 74 with any other incumbent." J.S. App. 211 n.78.

C. The District Court Did Not Abuse Its Discretion by Limiting Changes to the Challenged Districts and Some Immediately Adjacent Districts

Appellants also claim that the district court somehow went too far in adopting a narrow and circumscribed remedial plan. This argument is also unsupported by the factual record or legal precedent.

The district court found 11 districts unconstitutional. In remedying the constitutional violations, the district court recognized that it was constrained to use the unconstitutional 2011 version of the district map as its starting point, rather than reverting to the 2001 version or starting on a blank slate. It proceeded accordingly.

The 11 unconstitutional districts are bordered by 22 additional districts. J.S. App. 43. The district court limited its changes to *25* total districts (i.e., the Challenged Districts and some but not all of the bordering districts). J.S. App. 19 n.12. It explicitly sought to implement its remedial mandate narrowly and to avoid "excessive and unnecessary changes" to non-challenged districts. J.S. App. 19. Indeed, Appellants' main complaint is that the district court did not adopt a remedial plan that changed *more* districts that were not implicated by the district court's decision on the merits. J.S. 34-35.

Appellants cannot and do not cite any case in which this Court has rejected a remedial plan so narrowly circumscribed to the constitutional violation as this one. Appellants cite *Upham v. Seamon*, 456 U.S. 37 (1982), but in that case the district court altered districts in Dallas County, Texas—in the northeast part of the state—even though the challenged districts

in question were in *south* Texas, *id.* at 38-39, i.e. hundreds of miles away. Likewise, Appellants cite *White v. Weiser*, 412 U.S. 783 (1973), which was a one-person, one-vote case, but there the district court went astray by altering district configurations where it was not necessary to do so to effect a remedy by achieving population equality, *id.* at 795-97. Indeed, these cases only support the district court's narrow approach to the remedial plan.

The district court recognized and relied on this line of authority by limiting changes to surrounding districts while still remedying the broad constitutional violation it had found. J.S. App. 10-11. Appellants complain that the district court should have changed relatively more districts but done so in a way that moved relatively fewer voters between districts. However, they cite no legal authority to support the proposition that the district court abused its discretion by striking the balance as it did. The district court had to cure the constitutional violation, use traditional redistricting criteria to do so, and avoid changing the existing map for reasons unrelated to the remedy. Doing so is more art than science, and deep-in-the-weeds questions about how best to effect a remedy are matters firmly committed to the district court's discretion.

Finally, Appellants complain that the special master supposedly invented a new redistricting principle known as "fracking," which was not "grounded in Virginia state policy or the trial record." J.S. 35. This is nonsense. As the special master explained, he simply utilized his own terminology for the practice of splitting a county border in the same district more than once. J.S. App. 214. The undesirability of splitting political subdivisions is well-recognized by the

Commonwealth of Virginia, Pls'. Ex. 16, and under the law, J.S. App. 214 (citing *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 649 (M.D.N.C.), *vacated and remanded on other grounds*, 138 S. Ct. 2679 (2018)).

This Court has made clear in no uncertain terms that a "District Court should defer to state policy in fashioning relief only where that policy is consistent with constitutional norms . . . [and] should not, in the name of state policy, refrain from providing remedies fully adequate to redress constitutional violations which have been adjudicated and must be rectified." *White*, 412 U.S. at 797. Where Appellants are left to argue that the district court should have changed *more* non-Challenged Districts than it did, there is no straight-faced argument that the district court abused its discretion in adopting the remedial plan.

D. The District Court Appropriately Ensured that It Did Not Adopt a Remedy that Violated the Voting Rights Act

Finally, Appellants argue that the district court erred in adopting the remedial plan because its supposed use of race was not narrowly tailored. Appellants' narrow tailoring argument is predicated on their erroneous claim that the district court employed a 55% BVAP ceiling to redraw the Challenged Districts. It fails for this reason alone.

Instead, what the district court in fact did is what it explicitly said it did. As the last step in its process, it "ensure[d] that in remedying the identified Equal Protection violations, [it did] not select a plan under which black voters' rights are diminished when compared with the unconstitutional 2011 plan." J.S. App. 11; *see also* J.S. 17 (describing and crediting

special master's testimony "that only after redrawing the invalidated districts according to traditional districting criteria did he seek to ensure that the new districts had not inadvertently resulted in minority vote dilution").

Appellants decry the fact that the district court took basic steps to ensure it was not inadvertently engaging in vote dilution while remedying the racial gerrymander. J.S. 30. But this is precisely how district courts *should* approach remedying a racial gerrymander. *See Covington*, 138 S. Ct. at 2554 (rejecting claim that race predominated in remedial plan based on the "District Court's allowance that the Special Master could 'consider data identifying the race of individuals or voters to the extent necessary to ensure that his plan cures the unconstitutional racial gerrymanders'") (citation omitted); *see also Abrams*, 521 U.S. at 90 (noting that "[o]n its face, § 2 does not apply to a court-ordered remedial redistricting plan," but assuming without deciding that "courts should comply with [Section 2] when exercising their equitable powers to redistrict"); *Johnson v. Miller*, 929 F. Supp. 1529, 1562 (S.D. Ga. 1996) (court-ordered plan should not violate Section 2 of the Voting Rights Act).

In fact, the Court recently considered and rejected the same argument Appellants advance here. In *Covington*, a three-judge panel adopted a special master-drawn remedial plan after striking down the enacted plan as an unconstitutional racial gerrymander. It ensured that the remedial plan did not inadvertently result in vote dilution. The State of North Carolina complained that the special master crafted an "expressly race-conscious" remedial plan that resulted in the creation of additional "crossover districts." Jurisdictional Statement at 34, *North*

Carolina v. Covington, No. 17-1364, 2018 WL 1532754 (U.S.), Jurisdictional Statement 34 (Mar. 26, 2018). This Court (in relevant part) summarily affirmed, holding the district court did not err by adopting a remedial plan that considered race to the extent necessary to ensure that the plan was lawful and cured the racial gerrymander. *Covington*, 138 S. Ct. at 2554.

Appellants lodge the same basic complaint—arguing that the district court adopted an "overtly race-conscious remedial map" because the district court noted that its remedial plan would not dilute the votes of African-American voters. J.S. 30-31. Appellants' present appeal recycles the same arguments that failed in *Covington*, and the same outcome should result here. The Court should summarily reject these arguments again.

CONCLUSION

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

Respectfully submitted,

KEVIN J. HAMILTON
ABHA KHANNA
RYAN SPEAR
WILLIAM B. STAFFORD
PERKINS COIE LLP
1201 Third Avenue
Suite 4900
Seattle, WA 98101-3099
(206) 359-8000

MARC E. ELIAS
Counsel of Record
BRUCE SPIVA
ARIA BRANCH
PERKINS COIE LLP
700 Thirteenth Street, N.W.
Suite 600
Washington, D.C. 20005-3960
(202) 654-6200
MElias@perkinscoie.com

Counsel for Appellees

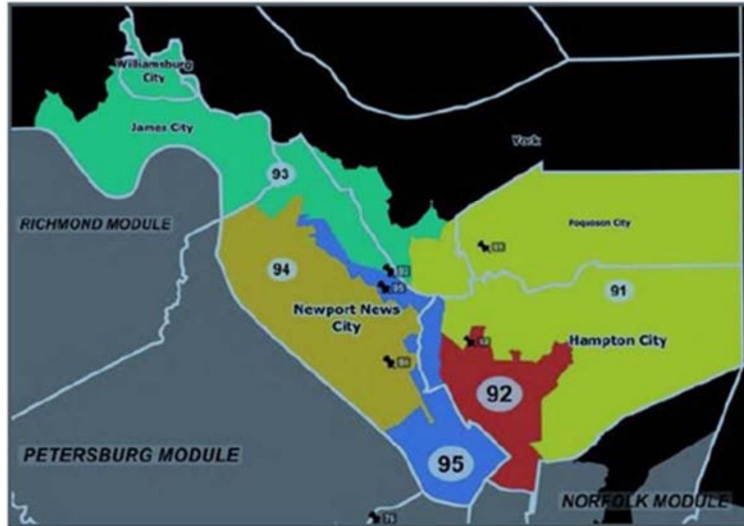
April 1, 2019

APPENDIX

APPENDIX

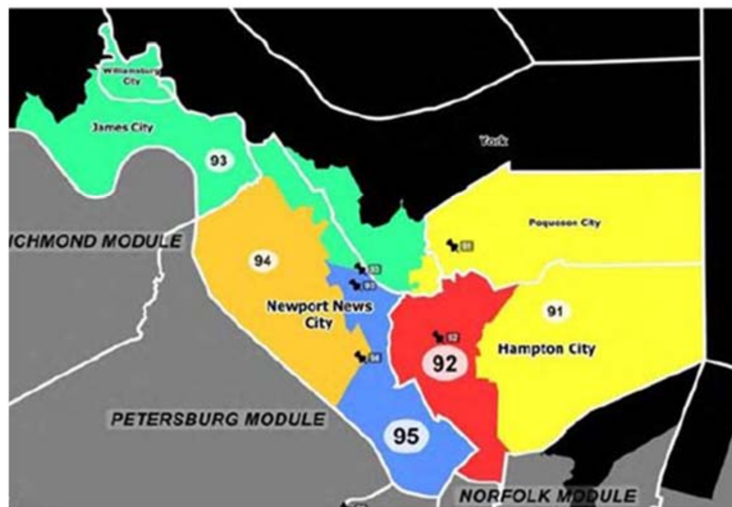
PENINSULA – Newport News/Hampton

PENINSULA ENACTED 2011 Map



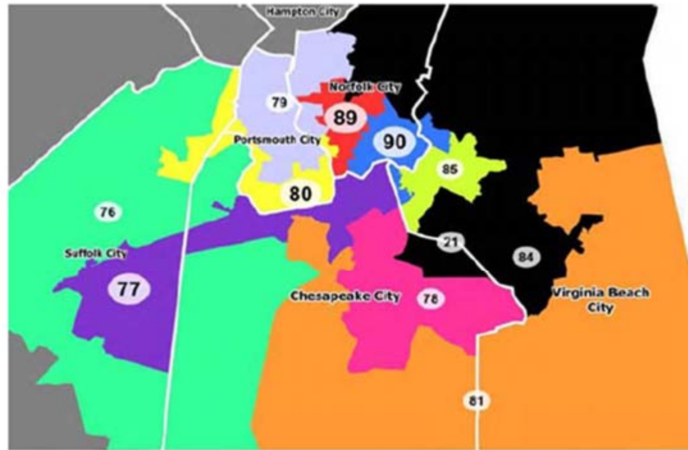
PENINSULA – Newport News/Hampton

PENINSULA 2 Map



NORFOLK/PORTSMOUTH/CHESAPEAKE

NORFOLK ENACTED 2011 Map



NORFOLK/PORTSMOUTH/CHESAPEAKE

NORFOLK 1A Map