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

OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

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INTRODUCTION

Plaintiffs cannot explain how the special master plausibly could have achieved district BVAPs uniformly below 55%—often within fractions of a percent of that figure—without even trying. Nor can they identify any explanation for his rejection of all other proposed plans other than that his plan alone achieved that feat. Plaintiffs say nothing of the core premise of liability—i.e., that race predominated because districts with BVAPs well above 55% purportedly "donated" surplus BVAP to other districts to ensure that all could meet a 55% BVAP target. And no one—not the district court, not the special master, not Plaintiffs—has explained why it is "foreseeable," JS.App.17, that all remedial districts would naturally have BVAPs *below* 55% when the duly enacted 2011 plan was just *invalidated* because the House lowered BVAPs in various districts closer to (but still above) 55%.

Instead, Plaintiffs defend the judgment below by challenging established law. Whereas settled precedent holds that "district courts will be held to stricter standards than will a state legislature," *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (cleaned up), Plaintiffs propose that the district court's plan is immune from the very standards of racial neutrality that it was required to implement. Plaintiffs also rely on the district court's (inexplicable) conclusion that its remedy complies with traditional districting criteria, but this Court held in this case that "a conflict or inconsistency" with "traditional redistricting criteria is not…a mandatory precondition…to establish a claim of racial gerrymandering." *Bethune-Hill v. Va. State Bd.*

of Elections, 137 S. Ct. 788, 799 (2017). And despite the most basic principle of judicial impartiality that the same scrutiny should apply equally to all witnesses, Plaintiffs contend that unique trust is due special masters—but not the people's elected representatives, whom the district court cavalierly discredited. All of this is legally untenable, as is the district court's remedial order. It should be summarily reversed—and promptly so, as primaries for the 2019 House elections are scheduled to occur under the remedial map on June 11, 2019.

ARGUMENT

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

In creating a remedial districting scheme, "district courts will be held to stricter standards than will a state legislature." *Wise*, 437 U.S. at 540 (cleaned up). Among them is the rule that district courts may not without justification adopt lines that "would require subordinating…traditional districting policies and allowing race to predominate." *Abrams v. Johnson*, 521 U.S. 74, 91 (1997). "If race is the predominant motive in creating districts, strict scrutiny applies" even to a court-ordered plan, "and the districting plan must be narrowly tailored to serve a compelling governmental interest in order to survive." *Id.*

Plaintiffs could hardly be more wrong (at 17-18) in their contention that the district court's plan is *immune* from any standard of racial neutrality. A court's overriding remedial task is "providing remedies fully adequate to redress constitutional violations." *White v. Weiser*, 412 U.S. 783, 797 (1973). But a racial gerrymander cannot remedy a racial gerrymander, and courts are no more entitled than legislatures to infringe on individual rights through "[c]lassifications of citizens solely on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 643 (1993). Nor does it matter that the district court's "Opinion…did *not* include the predominant use of race," Pls. Mot. 17, since racial motive is suspect when it impacts "the drawing of individual district lines." *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1267 (2015). Because the court adopted the special master's plan without change, his motive controlled "the design of [each] district as a whole." *Bethune-Hill*, 137 S. Ct. at 800. In conducting predominance inquiries, this Court has looked to the motive of map-drawing consultants, *see Cooper v. Harris*, 137 S. Ct. 1455, 1467-68 (2017), and, in this case, to the "plan's architect, Delegate Chris Jones," *Bethune-Hill*, 137 S. Ct. at 806, even though neither a consultant nor a single legislator wields the intent of the body authorized to adopt the plan. The special master was hired to advise the district court and act as its agent, and the district court was not excused from vetting its own plan to ensure racial neutrality simply because it turned a blind eye to his motive. That rule

would reward the very negligence this Court has condemned in court-imposed remedies.[1]

And the district court here was, at best, negligent, leaving Plaintiffs no persuasive defense of its judgment. They resort to theatrics, expressing (at 13-14) amazement that the House would dare question the special master's credibility, even though the district court was not shy to test witness credibility, including the credibility of elected legislators, at the liability stage. At the 2015 trial, "the parties disputed whether the 55% figure 'was an aspiration or a target or a rule,'" and the district court disagreed with House witnesses in finding it was a rule. *Bethune-Hill*, 137 S. Ct. at 795 (citation omitted). At the 2017 trial, the district court rejected in full the testimony of Delegate Jones and the consultant John Morgan. The district court's choice to subject the House's witnesses, but not the special master, to scrutiny is legally erroneous and exactly backwards. The legislature enjoys a "presumption of good faith." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). The special master does not.

Next, Plaintiffs advance a straw-man argument against the "patently absurd" rule "that if a court finds one witness credible, it must find all witnesses

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[1] Plaintiffs' and the Virginia attorney general's standing arguments fail for reasons stated in the House's briefing in case 18-281. This remedial appeal vividly illustrates the defects of their arguments, since, for standing purposes, the Court must assume that the House is correct that the remedial map is an unconstitutional racial gerrymander. *Warth v. Seldin*, 422 U.S. 490, 502 (1975). The Court has power to assess such a flagrant defect in a map a lower court has imposed upon the House and the Commonwealth.

credible." Pls. Mot. 22. No such precept is proffered here. Instead, the relevant rule is that a court must apply the same scrutiny to all witnesses. Far from being "patently absurd," that rule is patently obvious.

Faced with a credibility dispute, the district court should have measured the special master's testimony against objective evidence. The district court compared Delegate Jones's testimony with his floor statements, I.JS.App.224-27, and Mr. Morgan's with district lines, *see, e.g.*, I.JS.App.33-35. There is no comparable scrutiny here. By Plaintiffs' own account, the district court simply labeled its own vetting "'thorough'" and found the special master "'credible.'" Pls. Mot. 19 (quoting JS.App.16). That is no defense of the district court.

The district court identified no evidence corroborating the special master's testimony. Plaintiffs ignore that omission and the elephant in the room: the core theory of liability was that many invalidated districts had a "surplus of BVAP" and served as BVAP "donors" to neighboring districts. I.JS.App.39. The word "donor" does not appear in Plaintiffs' motion to affirm, their remedial briefs below, the district court's remedial opinion, or any of the special master's eight reports. It is not "foreseeable" that all districts—even districts that started with BVAPs exceeding 60%—would fall below 55% BVAP in a race-neutral map. JS.App.17.

What *would* be foreseeable is that approximately half the district BVAPs (i.e., the "donors") should be *higher* than 55%, since racial considerations purportedly predominated in those districts through

BVAP reductions. That is what happened in other proposals, including Plaintiffs'. The district court ignored the probative value of their failure to achieve BVAPs uniformly below 55%, which confirms the special master's result was not foreseeable in a race-neutral plan and was likely intended.

The House's proposed plan, HB7002, was particularly probative of this, since it was the only remedial proposal tailored to the district court's liability opinion. *See* JS 19-20. Plaintiffs' four-page attack on that plan (at 23-26) evades the point: reverse engineering the 2011 map-drawing process as it would have been without racial motive produces many districts above 55% BVAP. Plaintiffs quarrel with the non-remedial criteria behind HB7002 (a quarrel addressed at § II *infra*), but they do not dispute that HB7002 addressed the district court's criticisms of the 2011 plan, was drawn with no attention to racial data, and produced many remedial districts above 55% BVAP. They therefore do not address its value as evidence that the special master's denials of a 55% BVAP ceiling are implausible.

The district court's failure to address that evidence is just one of many failings. It also ignored the inconsistencies in the special master's own statements, including his charge that remedial district BVAPs—including in Plaintiffs' proposals—above 55% are "a clear signal of a failure." Doc. 323, at 121. Plaintiffs brush these statements aside (at 21) as mere indicative "references to 55% BVAP," but they were frank condemnations. The special master did not, as Plaintiffs assert (at 26), take merely "a different

remedial approach" from the other participants; he openly decried their approaches as inherently flawed—and his alone as valid—precisely because each other participant proposed districts exceeding 55% BVAP. The House most certainly has a "basis" to "dispute the special master's repeated statements that *he* did not deploy a 55% BVAP ceiling," Pls. Mot. 26, when the special master identified that very ceiling as a precondition to a valid remedy.

The special master only introduced that contradiction into his story after the House challenged the ceiling as a legal flaw. Plaintiffs' arguments to the contrary take out of context the special master's assertion in his first report that "I have not ever sought to achieve any particular predetermined percentage of black voting age population within a district." Doc. 323, at 46; Pls. Mot. 20. The context makes clear that he was denying a target, not a ceiling—his disclaimer being that "a *lower* African-American Voting age percentage will permit narrowly tailored remedies in all of the legislative districts found to be unconstitutional," Doc. 323, at 45 (emphasis added), and that "there were always ways…to redraw unconstitutional districts…which involved *lower* (sometimes substantially *lower*) African-American voting age populations," *id.* at 46 (emphasis added); *see also id.* at 47 ("I did not find it necessary to seek to determine the absolute <u>minimum</u> percentage of African-American voting age population needed…." (emphasis in original)). His denial of a target itself implies a ceiling by indicating that he sought "lower" BVAPs and was, at the time, oblivious that the level of BVAP (high or low) is not germane to the "*Shaw*"

theory of racial gerrymandering. Though a mistake, it was not an entirely unreasonable one for someone new to the case, given the liability opinion's preoccupation with the 2011 plan's 55% floor.

Plaintiffs are equally unpersuasive (at 26-27) in dismissing the evidence of a 55% BVAP ceiling in district lines. Plaintiffs cannot explain the inexplicable racial split of the Winfrees Store precinct between HD63 and HD66. JS.App.225, JS.App.229. And, while they admit that the special master split three voting tabulation districts (VTDs) in a row between the border of HD91 and HD92, they change the subject to district compactness scores. Pls. Mot. 26-27. But the district court's liability opinion concluded that "racial splits of VTDs are persuasive evidence of the predominant use of race," I.JS.App.26, especially where several are split in a row, I.JS.App.33. District compactness scores neither excuse nor even address this signal of predominance. Likewise, Plaintiffs say (at 27 n.11) that "it makes no sense" that racial sorting occurred in HD90, since its BVAP "is 41.93%, far below the supposed 55% BVAP 'ceiling.'" But that position too would exonerate the 2011 plan, since most of the districts were far above 55% BVAP, the supposed racial floor. At the liability stage, the district court found these considerations irrelevant. I.JS.App.19.

Although some defenses the House asserts in its liability appeal might also acquit the remedial plan, a remedy is unnecessary and improper if those defenses are valid. The overarching problem here is the clear double standard, and that is a legal problem. Yet Plaintiffs double down on arguments rejected at the

liability phase by arguing that "the remedial plan adopted by the district court more closely adheres to traditional redistricting criteria than does the enacted plan." Pls. Mot. 14. They forget this Court's holding that challengers can "establish racial predominance in the absence of an actual conflict by presenting direct evidence of the legislative purpose and intent or other compelling circumstantial evidence." *Bethune-Hill*, 137 S. Ct. at 799. Besides, the special master's plan fails under traditional criteria. Plaintiffs ignore the tentacle of HD63, JS.App.225, JS.App.228, the water crossing on HD91, JS.App.226, the VTD splits in HD92, and numerous other inexplicable and unnecessary configurations. Plaintiffs focus (at 15) on "average" scores involving the "Challenged Districts," but ignore the monstrosities the special master created in *neighboring* districts. Doc. 327-2 (examples of bizarre districts in the special master's plan).

All of this—the liability opinion, the other proposals, the inconsistent testimony, and the district lines—cumulatively presented the district court with a mountain of objective evidence by which to test the special master's testimony. The district court ignored all of it. Plaintiffs thus are wrong to pin their hopes on the clear-error standard. The district court's failure to apply any scrutiny was legal error and exceeds any discretion it might otherwise enjoy. This alone calls for reversal.

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

The district court's remedial plan fails for the second reason that it neither remedies the supposed constitutional violations nor follows "the policies and preferences of the State." *White*, 412 U.S. at 795; *see also Perry v. Perez*, 565 U.S. 388, 393 (2012). Plaintiffs defend these flaws with evasion.

Contrary to their mischaracterizations (at 28), the House's "main complaint" is not that "*more* districts" should have been changed, but that the remedial plan changes non-invalidated districts more than invalidated ones—an undisputed fact. JS. 33-34. The remedy changes nearly 60% of the House Speaker's district, which was neither challenged nor held unconstitutional, yet saw more change than any district invalidated. JS.App.231. Although it is unremarkable that the "district court found it necessary to alter" other districts, Pls. Mot. 9 n.3, it is astounding that non-invalidated districts experienced more alterations than invalidated districts. A ripple effect is necessary in any redistricting, but, as the name implies, each ripple from the site of impact should be smaller than the prior and reflect less force than the impact itself. If that principle is violated, then, at the very least, some explanation is in order. Neither the district court nor Plaintiffs have one.

Settled law condemns this approach. The district court was obligated "to choose that plan which most closely approximated" the policies of the 2011 plan, *Upham v. Seamon*, 456 U.S. 37, 42 (1982), and a plan

that changes lawful districts more than those held unlawful flips that rule on its head. Plaintiffs focus (at 28-29) on distinguishing *Upham* and *White* on their facts but ignore their clear requirement of minimal disruption. Visiting more change on lawful districts than on those invalidated evidences the very gratuitous policymaking condemned in both decisions and others. It reflects a goal of imposing court-invented "principles that [supposedly] advance the interest of the collective public good," which is altogether different from—and inconsistent with—effectuating "the policy judgments in the Legislature's enacted map." *Perry*, 565 U.S. at 396 (quotations omitted).

The House's remedial proposal, HB7002, more "closely approximated" the 2011 plan's policies than the district court's plan and was the legally required remedy. *Upham*, 456 U.S. at 42. It moves fewer constituents and exacts more change on invalidated districts than on lawful districts.[2] The Court was therefore obligated to adopt HB7002 and barred from adopting any of the special master's proposals.

Plaintiffs challenge HB7002 by mischaracterizing its "overriding concern" as one "to achieve specific partisan outcomes." Pls. Mot. 24. That is false. The overriding concern was addressing, line by line, the liability opinion's criticisms of the 2011 districts, and the second concern was drawing race-blind districts. Doc. 291-1, ¶¶ 9-14. A far lower priority—after implementing traditional districting principles like

[2] The House does not argue that the district court should have "changed *more* districts," Pls. Mot. 28, but that it should have (because it could have) moved "[f]ar fewer total voters," JS 34-35.

compactness and contiguity, *id.* ¶ 17—was "to preserve" the "*competitive* districts as reflected in the 2011 plan." *Id.* ¶ 18 (emphasis added). This was not to achieve one-sided "partisan ends," Pls. Mot. 24, but to protect "important state interests" in maintaining the 2011 plan's competitive districts, *White*, 412 U.S. at 796. This Court's precedent expressly recognizes that the "*political impact*" of a districting scheme is among the state's policies to be honored in a remedial plan. *Id.* at 795-96 (emphasis added); *see also Perry*, 565 U.S. at 396 (rejecting district court's effort "to draw an interim map without regard to political considerations" present in the enacted plan (quotations omitted)). That HB7002 attempts to preserve in a fair and non-partisan way the political impact of the 2011 plan—itself the product of bi-partisan consensus—and that the district court's remedy eschews that goal in favor of political upheaval to the advantage of only one party, is yet another basis for reversal.

The political upheaval the district court's plan would inflict is all the more inexcusable because it carries forward the *majority* of districting decisions from 2011 that *were* found racially suspect. A plan that focuses principally on upending lawful choices and barely on correcting unlawful ones is a bizarre remedial creature indeed, but that is the plan before the Court. Plaintiffs have no defense of this defect and ignore the House's arguments. They stand unrebutted.

CONCLUSION

The district court's decision should be summarily reversed, or else the Court should note probable jurisdiction and reverse. In all events, the House respectfully requests that the Court render a final ruling in advance of the primaries of June 11, 2019.

Respectfully submitted,

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