No. 18-281

In the Supreme Court of the United States

VIRGINIA HOUSE OF DELEGATES &
M. KIRKLAND COX, SPEAKER OF THE
VIRGINIA HOUSE OF DELEGATES, APPELLANTS,

v.

GOLDEN BETHUNE-HILL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

STATE APPELLEES' MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

The named defendants in the court below—appellees Virginia State Board of Elections, Virginia Department of Elections, James B. Alcorn, Christopher E. Piper, Clara Belle Wheeler, and Singleton B. McAllister (state officials)—move to dismiss the appeal filed by appellants-intervenors Virginia House of Delegates and M. Kirkland Cox because the appellants-intervenors lack standing to appeal.[1]

INTRODUCTION

This Court has squarely held that "status as an intervenor below, whether permissive or as of right, does not confer standing sufficient to keep the case alive in the absence of the State on [an] appeal." *Diamond* v. *Charles*, 476 U.S. 54, 68 (1986). Instead, "an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is *contingent* upon a showing by the intervenor that [it] fulfills the requirements of Art. III." *Id.* (emphasis added); accord *Wittman* v. *Personhuballah*, 136 S. Ct. 1732, 1736 (2016) (making the same point). The intervenors here can make no such showing.

[1] Under this Court's Rule 18.2, the state officials are still "parties" and thus "entitled to file documents in this Court." "But status as a 'party' does not equate with status as an appellant," and the Court has already rejected the idea that that Rule permits a party who lacks standing to "piggyback" on the standing that would have been possessed by a party who elected not to appeal. See *Diamond* v. *Charles*, 476 U.S. 54, 63–64 (1986) (discussing then-Rule 10.4).

"[A] State must be able to designate agents to represent it in federal court," and "[t]hat agent is typically the State's attorney general." *Hollingsworth* v. *Perry*, 570 U.S. 693, 710 (2013). Like many States, Virginia law makes a broad designation, stating that its Attorney General "shall . . . render[ ] and perform[ ]" "*[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) (emphasis added).

The Attorney General has fulfilled that statutory responsibility here. Counsel from the Attorney General's Office appeared at all stages of both trials on behalf of the defendants, joining in all of the evidence offered and arguments made by the intervenor-defendants.[2] After a full second trial—during which both sides had the opportunity to present evidence and argument under the correct legal standards—the district court issued a comprehensive decision finding "[o]verwhelming evidence" that the current map "sort[s] voters into districts based on the color of their skin" in a manner "plainly . . . at odds with the guarantees of the Equal Protection Clause." J.S. App. 97a. Having carefully considered the traditional "variety of factors"

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[2] The Attorney General also assumed exclusive responsibility for responding to plaintiffs' recent request for nearly $4 million (and counting) in attorney's fees, which ultimately will be paid by the Commonwealth rather than the intervenors or their non-governmental lawyers.

that go into the decision about whether to appeal, *United States* v. *Mendoza*, 464 U.S. 154, 161 (1984), the Attorney General determined that continued litigation would not be in the best interest of the Commonwealth or its citizens and that an appeal to this Court is thus unwarranted.[3]

A single house of the Virginia state legislature—the Virginia House of Delegates and its speaker M. Kirkland Cox (together, the House)—seek to override the Attorney General's decision by appealing the district court's order to this Court. But nothing in Virginia law authorizes the House "to represent *the State's* interests," *Karcher* v. *May*, 484 U.S. 72, 82 (1987) (emphasis added), and any claimed injury to the House itself cannot confer standing to appeal. The appeal should thus be dismissed for lack of jurisdiction.

ARGUMENT

1. "[I]t is not enough that the party invoking the power of the court have a keen interest in the issue." *Hollingsworth* v. *Perry*, 570 U.S. 693, 700 (2013). Instead, the "party must also have standing." *Id.* (internal quotation marks omitted). Nor are questions of

[3] Here, the relevant considerations include the high bar to overcoming the district court's extensive factual findings; the substantial time and expense (including attorney's fees) that have already gone into this case and would only be magnified by another appeal; the need to ensure an orderly process for Virginia's upcoming 2019 elections (whose official process will begin in January and whose primaries will be held in June); and the fact that the rapidly approaching 2020 census means that those elections will be the last to be held before the next round of constitutionally mandated redistricting.

standing resolved once and for all when a case is first filed in a trial court. To the contrary, "Article III demands that an 'actual controversy' persist throughout *all* stages of litigation." *Id.* at 705 (emphasis added) (quoting *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 90 (2013)). And that, in turn, means that "standing 'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'" *Id.* (quoting *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997)).

2. There has been no standing problem until this point. The plaintiffs were "the party" who first "invok[ed] the power of" the district court, *Hollingsworth*, 570 U.S. at 700, and they plainly had standing to seek relief from the harms that flowed from residing in unconstitutionally drawn districts. See *Shaw* v. *Reno*, 509 U.S. 630 (1993); accord *Hollingsworth*, 570 U.S. at 705 (noting absence of standing issue before the district court because the suit was initiated by private parties who claimed that state law violated their personal constitutional rights).

There likewise was no standing issue when this case previously was appealed to this Court. See *Bethune-Hill* v. *Virginia State Bd. of Elections*, 137 S. Ct. 788 (2017). Because the district court's previous ruling went against the plaintiffs, see *id.* at 796; *id.* at 788 (listing plaintiffs as appellants), it was the plaintiffs who were "invoking the power of" this Court during that appeal. *Hollingsworth*, 570 U.S. at 700. The same was true on remand before the district court: At that point, the plaintiffs were still "[t]he challengers,"

Bethune-Hill, 137 S. Ct. at 801, so the plaintiffs' alleged injuries continued to supply the necessary standing.

3. Things have changed. Now that the district court has "declared [the challenged districts] unconstitutional," the plaintiffs "no longer ha[ve] any injury to redress—they ha[ve] won." *Hollingsworth*, 570 U.S. at 705. As a result, the grounds on which Article III standing has to this point existed—the injury to the plaintiffs—cannot support a second appeal to this Court.

4. There is no question that the defendants would have had standing to appeal. "[A] State has standing to defend the constitutionality of its statute," *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986), and the Attorney General is the person Virginia law specifically designates to represent "the Commonwealth," as well as the "department," the "board," and the state "official[s]" who are the named defendants. Va. Code Ann. § 2.2-507(A); see J.S. iii (listing defendants). So if the Attorney General had "invoked this Court's appellate jurisdiction . . . and sought review of [the district court's] decision" on behalf of the Commonwealth, "the 'case' or 'controversy' requirement would have been met." *Diamond*, 476 U.S. at 62.

But for the reasons already set forth, the Attorney General specifically decided against filing a notice of appeal. See note 3, *supra*. As a result, the House may not "invok[e] the power" of this Court unless it can

demonstrate its own "standing to appeal." *Hollingsworth*, 570 U.S. at 700, 715; accord *Diamond*, 476 U.S. at 68.[4]

5. The jurisdictional statement's only reference to standing reads, in its entirety:

> The House's standing to appeal is well-established. *See, e.g.*, *Sixty-Seventh Minn.* v. *Beens*, 406 U.S. 187, 194 (1972); *Karcher* v. *May*, 484 U.S. 72, 77–83 (1987).

J.S. 7. Not so.

a. Although "the State's attorney general" is "typically" its exclusive agent for such purposes, this Court has acknowledged that "state law may provide for other officials to speak for the State in federal court" as well. *Hollingsworth*, 570 U.S. at 710. The most notable example is *Karcher*, where the Court concluded that the presiding officers of the two chambers of New Jersey's state legislature "had [1] authority under state law [2] to represent the State's interests." 484 U.S. at 82; see also *Hollingsworth*, 570 U.S. at 709–10, 712 (discussing *Karcher* and likewise stating that "a legislator authorized by state law to represent the

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[4] To be sure, the House "assumed responsibility for defending the [challenged redistricting] plan" when the case was previously before this Court. *Bethune-Hill*, 137 S. Ct. at 796. But no standing is needed to *defend* a judgment—a fact confirmed by the Court's practice of appointing a complete stranger to the litigation when none of the parties is able or willing to do so. See, *e.g.*, *Lucia* v. *SEC*, 138 S. Ct. 2044, 2050–51 & n.2 (2018); *McLane Co.* v. *EEOC*, 137 S. Ct. 1159, 1166 (2017); *Mata* v. *Lynch*, 135 S. Ct. 2150, 2154 & n.2 (2015). Standing focuses on the side "invoking the power of" the court, *Hollingsworth*, 570 U.S. at 700, not the one seeking to preserve the current legal status quo.

State's interest may satisfy standing"); *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 65 (1997) (same).

The House cannot satisfy either half of the *Karcher* test. For one thing, the House has never claimed to represent "the State's interests." *Karcher*, 484 U.S. at 82. Instead, the House's motion to intervene invoked its unique status as "the legislative body that actually drew the redistricting plan at issue." Mem. of P. & A. in Supp. of Mot. to Intervene 3. This fact, the House argued, gave it a "substantial interest in defending the plan," *id.* at 5, that went above and beyond the interests of the defendant state officials who "had no involvement in the enactment of the challenged plan," *id.* at 4. To be sure, those interests are important. But the particular interests of one chamber of a bicameral state legislature are not synonymous with "the State's interests" as a whole. And, under existing precedent, a party only qualifies as the State's "agent" for purposes of establishing standing if it claims the ability "to speak for *the State* in federal court." *Hollingsworth*, 570 U.S. at 710 (emphasis added); see also *Karcher*, 484 U.S. at 81 (emphasizing "that the party-intervenor at each point in the proceedings below was the incumbent legislature, on behalf of the State*, and not the particular legislative body that enacted the [challenged] law*" (emphasis added)).

The House likewise cannot demonstrate that "state law" authorizes it to speak for (much less appeal on behalf of) Virginia in this matter. *Hollingsworth*, 570 U.S. at 710 (stating that authorization must come

from "state law"); *Arizonans for Official English*, 520 U.S. at 65 (same); *Karcher*, 484 U.S. at 82 (same). To the contrary, the Code of Virginia expressly provides that the Attorney General "shall . . . render[] and perform[]" "*[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) (emphasis added). The House has not identified anything in state law granting it authority to speak for the Commonwealth. Even before this Court, the House does not claim to be appealing on behalf of Virginia: rather, it asserts *its own* "standing to appeal." J.S. 7 ("The House's standing to appeal is well established.").[5]

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[5] Although it is unmentioned in the jurisdictional statement, press accounts suggest the House may have initially been relying on House Resolution No. 566, which was agreed to by the House of Delegates on September 18, 2014. See Dave Ress, *Redistricting Legal Battle Cost to Taxpayers: $4 Million and Rising*, Daily Press (July 13, 2018), https://tinyurl.com/y9mzd93y. (The resolution itself is available at https://tinyurl.com/yb8grorq.)

That resolution does not give the House standing to appeal. By its own terms, the resolution does not purport to authorize the House to represent "the State's interests." *Karcher*, 484 U.S. at 82. To the contrary, the resolution authorizes the Speaker "to employ legal counsel to represent *the House of Delegates*" and "to defend the responsibilities, authority, and prerogatives of *the House of Delegates*." H.D. Res. No. 566, 2014 Spec. Sess. I. 69–70, 77–78 (emphasis added). More fundamentally, it is black-letter law in Virginia (as elsewhere) that resolutions passed by a single legislative chamber do not constitute "law." See Va. Const. Art. IV, § 11 (providing that "[n]o law shall be enacted except by bill," which must be passed by "a majority of those voting in each house");

Before the district court, the House claimed that *Karcher* stands for the sweeping proposition that if a State's own courts *ever* permit legislative bodies "to intervene as parties-respondent on behalf of the legislature in defense of a legislative enactment" federal courts must conclusively presume that those same legislative bodies likewise have state-law authorization to *appeal* decisions invalidating those laws to this Court. See Defs.-Intervenors' Reply Br. in Support of Mot. for Stay 6–7 (quoting *Karcher*, 484 U.S. at 82).

That cannot be right. As this Court has emphasized, the ability to participate in defense of the legal status quo (which does not require that the intervening party have standing in the first place, see note 4, *supra*) is fundamentally different from the ability to initiate an appeal to challenge it. See *Diamond*, 476 U.S. at 68 (stating that "status as an intervenor below, whether permissive or as of right, does not confer standing sufficient to keep the case alive in the absence of the State on this appeal"). It is true that Virginia courts have sometimes permitted legislative bodies to intervene in already on-going legal proceedings *in defense* of a legislative enactment. See *Vesilind* v. *Virginia State Bd. of Elections*, 813 S.E.2d 739, 742 (Va. 2018); see also *Gilmore* v. *Landsidle*, 478 S.E.2d 307, 309 (Va. 1996) (permitting the House of Delegates'

Va. Const. Art. V, § 6(a) ("Every bill which passes the Senate and House of Delegates, before it becomes law, shall be presented to the Governor."); accord *Field* v. *Marye*, 3 S.E. 707, 709 (Va. 1887) ("The resolution in question, while it purports to be a resolution of the general assembly, never passed the senate, and never became a law.").

clerk "to intervene as a party respondent" in a mandamus action). But the House has identified no case in which a Virginia court has permitted a legislative body or its presiding officer *to initiate* a legal proceeding (either a new lawsuit or an appeal) on behalf of the Commonwealth. Cf. *Howell* v. *McAuliffe*, 788 S.E.2d 706, 711–12, 714–15 & n.6 (Va. 2016) (concluding that, under "the unprecedented circumstances of th[at] case," two individual legislators and four citizens had standing under state law to seek a writ of mandamus against the former governor in their capacity as "qualified voters" and specifically declining to address whether the legislators would have had standing "in their capacity as members of the General Assembly").[6]

Nor does *Karcher* establish any such proposition. The Court's primary holding in that case was that the by-then "*former* presiding officers of the New Jersey Legislature"—who had been permitted to intervene in the lower-court proceedings in their official capacities—*lacked* standing to appeal a lower-court judgment invalidating a state moment-of-silence law to

[6] In *Wilkins* v. *West*, 571 S.E.2d 100 (Va. 2002), voters brought several constitutional challenges to Virginia's then-existing state legislative districts, naming the Governor, the Secretary of the State Board of Elections, and six members of the General Assembly as defendants. *Id.* at 104 & n.1. The state trial court invalidated some of the districts, and the defendants (including the state legislators) appealed. See *id.* at 105. But even though the first-named appellant was the then-Speaker of the House of Delegates, what matters here is that the Speaker was one of the original defendants (as opposed to an intervenor) and he was represented by the Attorney General. *Id.* at 103.

this Court. *Karcher*, 484 U.S. at 74; see also *id.* at 77–81.

The Court then faced a familiar dilemma: whether to vacate a lower-court judgment after a case becomes non-justiciable on appeal. See generally *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). Having determined that the former presiding officers lacked standing to appeal to this Court, the Court rejected the officers' argument that it should "vacate[] the judgments below" on the theory that "no proper party-defendant ever *intervened* in the case" (which effectively would have provided the officers their requested relief). *Karcher*, 484 U.S. at 81 (emphasis added). In reaching that conclusion, the Court noted that "[t]he New Jersey Supreme Court" had previously "granted applications of the Speaker of the General Assembly and the President of the Senate to" do the very thing that had happened in *Karcher*: "to intervene as parties-respondent on behalf of the legislature in defense of a legislative enactment." *Id.* at 82 (citing *In re Forsythe*, 450 A.2d 499, 500 (N.J. 1982)). For that reason, the Court determined it "need not vacate the judgments below." *Id.*

None of that has anything do with the issue here. The question is not whether the Supreme Court of Virginia has ever permitted a chamber of the state legislature to intervene in already ongoing trial court litigation or to participate in an appeal that is already properly before a state appellate court—all agree that it has. Instead, the question is whether Virginia law grants a single house of the bicameral state legislature

the power to initiate judicial proceedings (or, more specifically, an appeal) on behalf of the Commonwealth. And, for the reasons explained previously, the answer is no.[7]

b. Before the district court, the House also claimed that it had standing to appeal because of its "concrete

[7] In its concluding sentence about this point, *Karcher* described New Jersey law as granting "the New Jersey Legislature . . . authority under state law to represent the State's interests in both the District Court and the Court of Appeals." 484 U.S. at 82. That reference to the court of appeals was unnecessary to the Court's decision because the district court had invalidated the law and the court of appeals had affirmed, *id.* at 76, meaning that the outcome would have been the same whether or not the state officials had standing to appeal from the district court to the court of appeals. Nor did the Court's passing reference to the state legislature's ability to represent the State before the court of appeals grapple with the profound difference between permitting a third-party to appear in support of a state law before an appellate court that has already acquired jurisdiction via appeal by an otherwise-proper party (the issue before the New Jersey Supreme Court in *Forsythe*, 450 A.2d at 500, the Virginia Supreme Court in *Vesilind*, 813 S.E.2d at 742, and this Court during the previous appeal in this case) and allowing that third-party to initiate an appeal in the first place. To the extent *Karcher*'s passing reference to "the Court of Appeals" was even "a ruling on the point rather than a dictum," it was precisely the sort of "drive-by jurisdictional ruling[]" that has "no precedential effect." *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 91 (1998). And, even on its own terms, this Court's language in *Karcher* viewed New Jersey law as granting to both houses of the state legislature the "authority . . . to represent the State's interest," *Karcher*, 484 U.S. at 82, rather than granting a single chamber the power to represent its own interests. See *id.* at 81 (emphasizing "that the party-intervenor at each point in the proceedings below was the incumbent legislature, on behalf of the State, *and not the particular legislative body that enacted the [challenged] law*" (emphasis added)).

and particularized interest in the boundaries of districts defining its own composition." Defs.-Intervenors' Reply Br. in Supp. of Mot. to Stay 3. The House has identified no decision of this Court finding standing to appeal on such a theory. What is more, such a claim cannot be squared with the fact that—unlike the power to choose its leaders and set its own internal rules, cf. Va. Const. Art. IV, § 7—a single chamber of the state legislature has no power to draw or maintain any particular district lines. This Court's one-person, one-vote decisions mandate that redistricting occur at least every ten years. And when redistricting occurs, neither chamber of the state legislature has the power simply to draw its own lines. To the contrary, redistricting legislation—like other legislation—requires the concurrence of both chambers and (absent a two-thirds majority in each House) the assent of the Governor. See, *e.g.*, *Vesilind*, 813 S.E.2d at 745 (noting that a former Virginia Governor vetoed a previous redistricting plan).

As it did before the district court, the House also cites this Court's 1972 summary reversal in *Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187 (1972) (per curiam). See J.S. 7. But *Beens* predates this Court's entire modern standing jurisprudence—and it shows.[8] The per curiam opinion's brief

[8] The last time this Court cited *Beens* was 28 years ago, and it was for a substantive point that had nothing to do with standing to appeal. See *Missouri* v. *Jenkins*, 495 U.S. 33, 52 (1990) ("By no means should a district court grant local government *carte blanche*, but local officials should at least have the opportunity to devise their own solutions to these problems. *Cf. Sixty-Seventh*

standing discussion never inquired whether state law authorized Minnesota's Office of Senate Counsel to represent "the State's interests," *Karcher*, 484 U.S. at 82, deeming it sufficient that "the senate is directly affected by the District Court's orders" and that the resolution in question referred to "apportionment 'and the orderly process of elections therefrom.'" *Beens*, 406 U.S. at 194. *Beens* also specifically endorsed a proposition that the Court expressly rejected 14 years later in *Diamond*, viewing the question of whether an entity may intervene in defense of the current legal status quo as *resolving* whether that entity may also appeal an adverse judgment. Compare *Beens*, 406 U.S. at 194 ("That the senate is an appropriate legal entity for purpose of intervention and, *as a consequence*, of an appeal in a case of this kind is settled by our affirmance" in a case that itself involved only intervention (emphasis added)),[9] with *Diamond*, 476 U.S. at 68 ("an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent

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Minnesota State Senate v. *Beens*, 406 U.S. 187, 196 (1972) (*per curiam*)."). It does not appear that this Court has ever cited *Beens* for any point about standing.

[9] The decision cited in *Beens* was *Jordan* v. *Silver*, 381 U.S. 415 (1965) (per curiam), which summarily affirmed a district court decision that had, among many other things, granted a motion to intervene filed by the California State Senate. See *Beens*, 406 U.S. at 194 (quoting *Silver* v. *Jordan*, 241 F. Supp. 576, 579 (S.D. Cal. 1964)). As *Jordan*'s caption reveals, the appellant in that case was California's Secretary of State as represented by its Attorney General rather than the intervening state legislature. See 381 U.S. at 415.

upon a showing by the intervenor that [it] fulfills the requirements of Art. III").

At any rate, *Beens* was also materially different from this case. The reason why "the [Minnesota] senate [was] directly affected by the District Court's orders" in *Beens*, 406 U.S. at 194, was because those orders had altered the size of the state Senate itself. As the Court emphasized at the very start of its opinion, the appeal in *Beens* was not about the issue presented here—that is, *whether* the district lines must be withdrawn. See *Beens*, 406 U.S. at 188 ("The appeals do not challenge the District Court's conclusion that the legislature is now malapportioned."). Instead, *Beens* involved a challenge to the district court's remedial order, which "reduce[d] the number of legislative districts to 35, the number of senators by almost 50%, and the number of representatives by nearly 25%." *Id.* That sort of change would, by necessity, profoundly impact the internal operations of each house—requiring new procedures from everything from voting rules to leadership elections to basic committee structure. For that reason, the *Beens* Court could appropriately conclude that the state senate was sufficiently "directly affected by the District Court's orders" to support Article III standing to appeal the remedial order. *Id.*

c. Nor do the other decisions cited by the House before the district court establish its standing to appeal here. Similar to *Beens*, *Arizona State Legislature* v. *Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), involved a state legislature's claim that it had been deprived of its "exclusive,

constitutionally guarded role" to draw districts via a state constitutional amendment that "would 'completely nullify' any vote by the Legislature, now or 'in the future,' purporting to adopt a restricting plan." *Id.* at 2663, 2665 (quoting *Raines* v. *Byrd*, 521 U.S. 811, 823–24 (1997)); see also *id.* at 2664 (emphasizing also that "[t]he Arizona Legislature . . . commenced th[at] action after authorizing votes in *both* of its chambers"). But see *id.* at 2695–97 (Scalia, J., joined by Thomas, J., dissenting) (arguing that there was no standing in *Arizona State Legislature*). And in *Arizona State Legislature* itself, this Court emphasized that *Coleman* v. *Miller*, 307 U.S. 433 (1939), establishes only "that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative act goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Arizona State Legislature*, 135 S. Ct. at 2665 (quoting *Raines*, 521 U.S. at 823); see also *id.* at 2696–97 (Scalia, J., joined by Thomas, J., dissenting) (describing *Coleman* as a "peculiar decision" that itself "may well stand for nothing" about standing). But a single chamber of the Virginia legislature can claim no "exclusive, constitutionally guaranteed role" in drawing its own districts, and an order invalidating redistricting legislation on constitutional grounds no more "nullifie[s]" the votes cast in support of that legislation than any other type of judicial decision concluding that a statute is unconstitutional. *Arizona State Legislature*, 135 S. Ct. at 2663, 2665.

The last two decisions cited by the House before the district court are even further afield. As their captions reveal, *INS* v. *Chadha*, 462 U.S. 919 (1983), and *United States* v. *Windsor*, 570 U.S. 744 (2013), involved appeals filed by the Executive Branch. Indeed, in both cases the Court *declined* to base its standing-to-appeal holdings on the presence of legislative chambers seeking to defend the constitutionality of a federal law, relying instead on the presence of an appeal by the Executive. See *Chadha*, 462 U.S. at 929–31 (finding appellate jurisdiction based on No. 80-1832, the appeal brought by the INS, rather than Nos. 80-2170 or 80-2171, the appeals brought by the House of Representatives and the Senate); *Windsor*, 570 U.S. at 757 (stating that "[i]n this case the United States retains a stake sufficient to support Article III jurisdiction on appeal and in proceedings before this Court" while making no such conclusion about the Bipartisan Legal Advisory Group of the House of Representatives). Here, in contrast, the state official charged with "render[ing] and perform[ing]" "*[a]ll* legal service in civil matters for the Commonwealth," Va. Code Ann. § 2.2-507(A) (emphasis added), has expressly declined to invoke this Court's jurisdiction.

* * *

The drawing of fair legislative districts is critically important to our democracy. So it is certainly understandable that the House and its Speaker—as well as the Governor, individual legislators, candidates, political parties, and voters—"have a keen interest in" the

issues presented by this litigation. *Hollingsworth*, 570 U.S. at 700. But Virginia law is clear that in the Commonwealth, like in most States, the ultimate authority "to speak for the State in federal court" rests with its elected Attorney General. *Id.* at 710. Having spent more than three years defending this case, the Attorney General has determined that "the State's interest[s]," *id.* at 712, would best be served by bringing this long-running and expensive litigation to a close so that the unconstitutional racial gerrymanders identified in the district court's opinion may promptly be remedied before the final election to be held under the current redistricting plan. Others may, of course, disagree with that decision. But no other person or entity—including the House or its Speaker—has been given the power to override it.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction.

Respectfully submitted.

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