No. 18-281

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

BRIEF FOR APPELLEES

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

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

Counsel for Appellees

January 28, 2019

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

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATEMENT

When a legislature announces a "racial target that subordinated other districting criteria and produce[s] boundaries amplifying divisions between blacks and whites," a court "could hardly . . . conclude[] anything but" that "race predominated." *Cooper v. Harris*, 137 S. Ct. 1455, 1468-69 (2017). Here, the Virginia legislature imposed a nonnegotiable 55% Black Voting Age Population (BVAP) floor "across the board" to twelve very different House of Delegates districts. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 796 (2017) (quoting J.S.App.230). The results were stark: cities, VTDs, neighborhoods, and even a military base were divided with near uniformity along racial lines, while thousands of African-American voters were shuffled into and among the Challenged Districts in service of that fixed racial threshold. Race therefore predominated in all the Challenged Districts.

That use of race was not narrowly tailored. While a state is given some latitude in drawing districts to comply with the Voting Rights Act (VRA), it must conduct a "meaningful legislative inquiry" to justify its use of race. *Cooper*, 137 S. Ct. at 1471. Here, the district court ("Panel") found as a matter of fact that the mapdrawer did not conduct any "analysis of *any* kind to determine the percentage of black voters necessary to comply with Section 5 in the . . . challenged districts." J.S.App.88. Thus, not only did the legislature "ask[] the wrong question with respect to narrow tailoring," *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015), it conducted no inquiry whatsoever. That is the antithesis of narrow tailoring.

None of these findings amount to clear error. Indeed, based on the well-developed record in this

case, the Panel below "could hardly conclude anything but" that the Challenged Districts constitute racial gerrymanders in violation of the Equal Protection Clause.

I. LEGISLATIVE PROCESS

After the 2010 census, Virginia redrew its House districts. Delegate Chris Jones directed that effort. J.S.App.3. Jones was assisted by consultant John Morgan. Brief for Appellants (Br.) 11.

It is law of the case that Jones drew the Challenged Districts (Districts 63, 69, 70, 71, 74, 77, 80, 89, 90, 92, and 95) and District 75 to comply with the same mandatory 55% BVAP floor. *See Bethune-Hill*, 137 S. Ct. at 795-96. This Court has also already determined the origin of that mandatory racial target. Jones met with the incumbent of District 75, who expressed concern about her electoral prospects given factors unique to her district. *See id.* at 796. "The 55% figure 'was then applied across the board to all'" the remaining Challenged Districts. *Id*. (quoting J.S.App.230).

As Jones insisted that BVAP in the Challenged Districts "needed to be north of 55 percent" to comply with Section 5 of the VRA, JA299, other delegates understood it would be futile to propose plans that did not comply with the preordained 55% BVAP floor, JA1657; *see also* JA1606, 1642. In fact, Jones rejected proposals that did not satisfy the 55% BVAP rule, including a plan that would have drawn one Challenged District at 54.8% BVAP. *See* JA266-67. Although the district missed the racial target by a "measly .2%," Jones' commitment to the 55% BVAP floor was absolute. *Id.*

II. PROCEDURAL HISTORY

A. The First Trial

On October 7, 2014, a three-judge panel of the Eastern District of Virginia struck down Virginia's third congressional district as an unconstitutional racial gerrymander, based in part on the fact that the Virginia legislature used an "ad hoc . . . [55% BVAP] racial threshold[]" to draw that district. *Page v. Va. State Bd. of Elections* (*Page I*), 58 F. Supp. 3d 533, 553 (E.D. Va. 2014). The *Page* court relied upon the testimony of John Morgan to find that "the legislature enacted 'a House of Delegates redistricting plan with a 55% Black VAP as the floor for black-majority districts,'" and that it "acted in accordance with that view" when adopting its congressional plan. *Id.* at 543 (citation omitted). It further found that the legislature had no basis for deploying a 55% BVAP floor to draw a district that had long elected African Americans' preferred candidate by large margins. *Id.* at 552-53.[1]

Having learned that the Virginia legislature used a 55% BVAP floor to draw the House districts at issue here, and believing that use of such a racial target was unjustified for the same basic reasons set out in *Page*, Appellees filed suit.

The first trial in this matter was held in June 2015. While Appellants refused to concede the use of a fixed racial target, there was no credible dispute "that the 55% BVAP figure was used in structuring the

---

[1] The *Page* panel reaffirmed its opinion upon remand in light of *Alabama*. *See Page v. Va. State Bd. of Elections* (*Page II*), No. 3:13cv678, 2015 WL 3604029 (E.D. Va. June 5, 2015). On May 23, 2016, this Court dismissed the appeal of *Page II* because Appellants-Intervenors lacked standing. *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016).

[challenged] districts." J.S.App.223. Appellees, moreover, presented evidence that the legislature engaged in extensive racial sorting to ensure that all the Challenged Districts met the 55% BVAP threshold, which in turn distorted the boundaries of the Challenged Districts in many ways. *See* JA606-15.

Notwithstanding direct evidence of the legislature's racial motives, evidence of "stark splits in the racial composition of populations moved into and out of" the Challenged Districts, and "the use of an express racial target," *Bethune-Hill*, 137 S. Ct. at 800, a majority of the three-judge panel held that race did not predominate in the 11 districts at issue here. Instead, adopting a novel predominance test at the urging of Appellants, the Panel held that Appellees could meet their burden of showing race predominated only if race "*actual[ly]* conflict[s]" with neutral districting criteria, resulting in "deviations" unexplainable on any other grounds. J.S.App.235, 255-56. As a result, the Panel required Appellees to prove that race was the predominant factor in each and every specific line-drawing decision by proving that every imaginable "neutral" goal—whether proffered by the legislature as an explanation or not—was *not* a factor. On the strength of this novel test, the Panel held that race predominated only in District 75. The Panel further found that Jones had conducted a sufficiently tailored analysis to warrant the application of the 55% BVAP rule in District 75. J.S.App.309 ("[T]he 55% BVAP floor is grounded in a 'strong basis in evidence' because the primary *source* of the 55% BVAP threshold appears to have been an analysis of HD75 itself."). Thus, District 75 survived strict scrutiny.

B. The First Appeal

Appellees appealed, and this Court reversed the Panel's predominance finding as to the 11 Challenged Districts at issue here. As this Court explained, the way in which the Panel had approached predominance was fundamentally flawed. "The ultimate object of the inquiry . . . is the legislature's predominant motive for the design of the district as a whole." *Bethune-Hill*, 137 S. Ct. at 800. As a result, "[c]oncentrating on particular portions in isolation," as the majority did, "may obscure the significance of relevant districtwide evidence, such as stark splits in the racial composition of populations moved into and out of disparate parts of the district, or the use of an express racial target." *Id.*

This Court then upheld District 75 because the 55% BVAP rule was tailored to that district specifically. As the Court found, "[i]n light of Delegate Jones' careful assessment of local conditions and structures, the State had a strong basis in evidence to believe a 55% BVAP floor was required to avoid retrogression." *Id.*

This Court therefore affirmed the Panel's holding as to District 75, vacated the holding as to the remaining 11 Challenged Districts, and "entrusted to the District Court in the first instance" the task of applying the correct legal standards to those districts. *Id*. at 802.

C. Remand

As things stood on remand, Appellees were prepared to have their claims resolved through briefing alone. Appellants, on the other hand, insisted that the Panel reopen discovery and hold a new trial, arguing that the Panel was "'best positioned to determine in the first instance both the questions of predominance and narrow tailoring,' in part because it can weigh testimony and assess credibility." ECF 146 at 9-10 n.4

(quoting *Bethune-Hill*, 137 S. Ct. at 800). Appellants believed this was critical because a new member of the three-judge panel, Judge Wright Allen, needed to make her own credibility determinations based on live testimony. *Id.* The Panel sided with Appellants, reopened discovery, and scheduled a new trial. ECF 160.

The second trial was held in October 2017. Appellants offered a shorter version of Jones' prior testimony, new testimony from Morgan regarding his purported motives in drawing the map, testimony from delegates representing non-challenged districts who had no insight into the redrawing of the Challenged Districts, and cursory testimony from expert witnesses so uncompelling that Appellants do not so much as cite it in their brief.

For their part, Appellees identified two additional expert witnesses who illustrated further how the 55% BVAP rule had a direct and significant impact on the boundaries of the Challenged Districts. Appellees also called new fact witnesses who thoroughly undermined Jones' claim that the 55% BVAP rule originated with and was broadly supported by members of the Black Caucus.

On June 26, 2018, the Panel issued its decision, holding that race predominated in the 11 Challenged Districts and that Appellants failed to meet their burden of establishing that this use of race was narrowly tailored to a compelling government interest.

The Panel catalogued the overwhelming evidence of racial sorting that showed how adherence to the 55% BVAP target directly impacted the Challenged Districts, concluding that "the overall racial disparities in population movement, and the splits of VTDs and geographies along racial lines, are strong evidence of racial predominance in the challenged districts." J.S.App.38.

The Panel then embarked on a region-by-region and district-by-district analysis detailing a stark pattern of racial sorting between and among the Challenged Districts. *See* J.S.App.38-86. Having conducted a holistic analysis of the statewide, regionwide, and districtwide evidence, the Panel found that race predominated in each Challenged District. J.S.App.82-86.

The Panel further found that the use of race was not narrowly tailored in any of the Challenged Districts. That conclusion was based on an inexorable set of facts:

- The 55% BVAP rule was based on unique local conditions in District 75 and then applied across the board to the remaining 11 districts. J.S.App.88-89.
- These districts "were highly dissimilar in character." J.S.App.87.
- Whereas Jones had conducted a specific analysis of District 75, Appellants "produced no evidence at either trial showing that the legislature engaged in an analysis of *any* kind to determine the percentage of black voters necessary to comply with Section 5 in the 11 remaining challenged districts." J.S.App.88.
- Nor did Jones do any comparative analysis of District 75 and other Challenged Districts to determine whether—despite all appearances to the contrary—they were similar with regard to "factors relevant to black voters' ability to elect their preferred candidates." J.S.App.89.

In short, the Panel found that Jones conducted no meaningful analysis to determine whether it was necessary to draw any district other than District

75 at or above 55% BVAP to avoid liability under Section 5.

D. The Second Appeal

On July 6, 2018, Appellants filed a notice of appeal. In contrast, after four years of litigation, two trials, and one trip to this Court on appeal, the State Defendants (represented by the Virginia Attorney General) finally conceded defeat. ECF 246.

Thus, this matter comes before this Court on Appellants-Intervenors' appeal alone.

SUMMARY OF ARGUMENT

1. Appellants lack standing to pursue this appeal, as they fail to identify any cognizable injury.

Appellants contend that the Panel's order forces House members to represent "divided constituencies," "simultaneously representing the now unlawful district that elected them" while seeking reelection in a newly-drawn district. Br. 25. This is not a cognizable "injury"—it is what happens after every decennial census. This Court's opinion in *Wittman* makes clear that the mere fact that a legislator represents a district whose constituents will change by the next election does not confer standing. Even if this were an injury, it would belong to the individual affected delegates, not the House as an institution.

Appellants also claim that the Panel's decision "poses a serious and immediate threat" to the House's constitutional obligation to redistrict. Br. 26 (citation omitted). On the contrary, the Panel did what courts routinely do—it struck down an unlawful statute. It then allowed four months for the legislature to enact a remedial plan. A single chamber of the legislature does

not have standing simply because a court must enforce its order when the legislature fails to implement it.

Finally, as a matter of Virginia law, the Attorney General—not Appellants—has authority to represent the Commonwealth. Va. Code Ann. § 2.2-507(A). The Attorney General decided not to appeal the Panel's well-reasoned opinion.

2. Even if this Court had jurisdiction, there is no basis in law or fact to disturb the Panel's decision. The Panel's opinion represents a straightforward application of this Court's recent decisions. The Panel's analysis "is highly fact-specific, and involves numerous credibility findings based on [its] assessment of the testimony presented at trial." J.S.App.14.

The Panel detailed considerable direct evidence. As this Court put it previously: "It is undisputed that the boundary lines for the 12 districts at issue were drawn with a goal of ensuring that each district would have a [BVAP] of at least 55%." *Bethune-Hill*, 137 S. Ct. at 794. Jones refused to consider versions of the Challenged Districts that did not comport with the mandatory BVAP floor and made specific changes to district lines to serve that overriding racial goal. *See, e.g.*, J.S.App.41-43. Incumbent delegates of the Challenged Districts were forced to cede areas they had long represented because of Jones' insistence on a 55% BVAP floor. *See, e.g.*, J.S.App.39-43.

The circumstantial evidence drove the point home. The Panel's first opinion described a rogue's gallery of features frequently found to be strong circumstantial evidence of racial predominance, from "appendage[s]" to "hook[s]" to "turret[s]" to "pipe[s]." J.S.App.334, 299, 316, 333. The second opinion illustrated how heavily-black populations were swept into the Challenged

Districts, and artfully split between Challenged Districts, to ensure that all of them satisfied the racial floor. The Panel "reach[ed] the unavoidable conclusion that the challenged districts were designed to capture black voters with precision." J.S.App.23. The Panel's conclusions were bolstered by a host of expert evidence, which illustrated the predominant use of race through both visual representation and statistical analysis. J.S.App.20-32.

The Panel also heard from numerous fact witnesses. Some witnesses provided additional evidence of Jones' myopic focus on race in the Challenged Districts. Others directly undermined the explanations Jones proffered in the first trial for his line-drawing decisions. As the Panel summarized, "when faced at the second trial with new witnesses challenging material aspects of his previous testimony, and having had access to the transcript of his testimony at the first trial, Jones was unable to produce convincing explanations for the discrepancies." J.S.App.37-38.

In short, the Panel did exactly what this Court had instructed: it conducted a holistic analysis of all relevant evidence, including discrete "deviation[s]," "stark splits in the racial composition of populations moved into and out of disparate parts of the district, [and] the use of an express racial target." *Bethune-Hill*, 137 S. Ct. at 799, 800.

Confronted with compelling direct and circumstantial evidence of racial predominance, and incredible attempts to explain that evidence away, the Panel appropriately concluded that race predominated in each Challenged District.

On appeal, the Panel's "findings of fact—most notably, as to whether racial considerations predomi-

nated in drawing district lines—are subject to review only for clear error." *Cooper*, 137 S. Ct. at 1465. Under that standard, this Court "may not reverse just because [it] would have decided the matter differently." *Id.* (alterations, citation, and internal quotation marks omitted). Thus, a finding that is "'plausible' in light of the full record—even if another is equally or more so—must govern." *Id.*

Stripped to its essence, Appellants' argument is that the Panel should have drawn different inferences from the record and weighed the evidence more favorably for them. They posit that the Panel should have found Jones credible enough, notwithstanding the discrepancies and shifting explanations for his line-drawing decisions. They think it unfair that the Panel found some new witnesses credible but not Morgan. They were unconvinced by one of Appellees' experts.

But the Panel found otherwise. The Panel's predominance findings are based on its hard-won expertise in the minutia of Virginia's geography and the 2011 redistricting process. Those findings are fully supported by the record, and at the very least are "plausible" and thus not clearly erroneous.

3. The Panel's findings on narrow tailoring are equally unassailable. Indeed, they are all but compelled by the law of the case.

This Court upheld District 75 in the first appeal because Jones had conducted a "functional analysis" as to the necessary BVAP in that district. *Bethune-Hill*, 237 S. Ct. at 801. "The 55% figure 'was then applied across the board to all'" the remaining Challenged Districts. *Id.* at 796 (quoting J.S.App.230). On remand, the Panel found as a matter of fact that Jones had done no analysis "of *any* kind to determine the

percentage of black voters necessary to comply with Section 5 in the 11 . . . challenged districts." J.S.App.88. The Panel also found "as a matter of fact that a 55% BVAP was not required in any of the 11 remaining challenged districts for black voters to elect their preferred candidates." J.S.App.90-91.

Appellants thus have little to work with in their attempt to scrape together some valid justification for applying a single mechanical racial target to 11 very different Challenged Districts. Accordingly, Appellants' main thrust is that their strict scrutiny burden is not very burdensome—that the Commonwealth can segregate its citizens into districts based on race when faced with "extraordinary time pressure" or limited data. Br. 3. But a "strong basis in evidence" is hardly established by "no evidence," and states cannot pass legislation for predominantly racial reasons merely because of the press of time. To hold otherwise would turn the VRA on its head, transforming it into what amounts to a tool for perpetuating electoral racial segregation. *See Miller v. Johnson*, 515 U.S. 900, 927-28 (1995).

ARGUMENT

I. APPELLANTS DO NOT HAVE STANDING

Appellants, the House and its Speaker in his official capacity, Br. 13, 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 *institu-*

tional injury, they fail to demonstrate this "first and foremost" requirement to invoke the power of this Court. *Arizonans*, 520 U.S. at 64.

Appellants begin by focusing on their *intervention* below—not their *standing* before this Court. But their attempt to conflate intervention and standing does not withstand scrutiny. The *interest* required under Federal Rule of Civil Procedure 24 to intervene is not the *injury* required under Article III to have standing. To intervene, one need only have "an interest relating to the . . . transaction that is the subject of the action." Fed. R. Civ. P. 24(a)(2). But even "a keen interest" is not enough to "invok[e] the power of the court." *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013). Standing requires, at an "irreducible constitutional minimum," a "concrete and particularized" injury. *Spokeo*, 136 S. Ct. at 1547-48 (citation omitted).

Thus, Appellants do not have standing merely because they actively litigated the case below. *See Diamond v. Charles*, 476 U.S. 54, 68 (1986) ("[S]tatus as an intervenor below . . . does not confer standing."); *see also Wittman*, 136 S. Ct. at 1736-37 (intervenors lacked standing after Commonwealth of Virginia chose not to appeal adverse decision in congressional redistricting case).

While Appellants' fixation on intervention is misplaced, it is understandable. As to the relevant inquiry—whether Appellants can articulate a cognizable injury in fact—they come up decidedly empty. This is not for lack of trying. Appellants have offered shifting descriptions of their supposed injury since initiating this appeal. *See, e.g.*, ECF 249 at 2; Opposition to Appellees' Motions to Dismiss or Affirm at 13; Emergency Application for Stay Pending Resolution of Direct Appeal to This Court at 14. In their latest stab

at it, Appellants land on two main theories of injury. First, Appellants assert a "divided constituencies" injury—that redrawing the districts will require legislators to both represent their current constituents and seek reelection from additional constituents in a new district. Br. 25. Second, Appellants claim that the Panel's opinion threatens to eliminate the House's role in redistricting. *Id.* 26-27. Neither argument suffices. *See Wittman*, 136 S. Ct. at 1737 ("party invoking the court's jurisdiction cannot simply allege a nonobvious harm, without more").

For starters, as to the "divided constituency" theory, Appellants are institutional parties and so they must prove an injury to the *House*. But the *House* as an institution has no interest in any *particular* district lines. Appellants' briefing drives home this point: They highlight the "dozens of members" who will supposedly be forced to represent disparate constituencies if lines are redrawn. Br. 25; *see also id.* 19. But Appellants do not explain how requiring some members to run for reelection in redrawn districts harms the *House* in any way, nor could they.

Moreover, even individual legislators suffer no cognizable harm under the divided constituencies theory, which amounts to the peculiar claim that Virginia's representatives are injured through the "labor[]" of representing new constituents. Br. 24. Representing constituents is, after all, their job. Indeed, the same "injury" is borne by legislators whenever a state draws new districts, either by court order or by operation of the Census. This Court's holding in *Wittman*, moreover, indicates 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. 136 S. Ct. at 1736-37. The Court held that the *Wittman* intervenors did *not* have standing, particularly in the absence of any showing that the particular changes made to those districts amounted to a cognizable injury. *Id.* If "divided constituencies" alone were an injury that created standing, then *Wittman* was unanimously decided erroneously.

Next, Appellants contend that they have standing because a remedial plan will usurp the House's special role in redistricting. Br. 26. To the contrary, the Panel struck down one piece of legislation as unconstitutional, and then took steps to implement its order only after Appellants failed to enact remedial legislation themselves. ECF 275 at 5. If a legislative body "fails in th[e] task" of drawing its own remedial map, "the responsibility falls on the District Court." *Chapman v. Meier*, 420 U.S. 1, 27 (1975). Appellants do not cite any case in which a court has found legislative standing merely because a court took action to implement its orders in the face of legislative inaction.

For this reason, Appellants' reliance on *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972), is misplaced. In that malapportionment case, the district court issued an order that slashed the number of senators in the Minnesota State Senate from 67 to 37. *Id.* at 190-92. The institution *itself* suffered from the reduction in size, which would have fundamentally altered the nature of the body, and so was "directly affected by the District Court's orders." *Id.* at 194. This Court held that the *institutional* harm to the Senate made the Senate "an appropriate legal entity for

purpose of intervention and . . . of an appeal." *Id.*[2] *Beens* does not suggest that a legislative body has standing whenever a court strikes down a piece of legislation as unconstitutional and affords equitable relief to the plaintiffs, as happened here.

Appellants' last gasp is to argue they need not show any injury at all because Virginia law authorizes them to take this appeal on behalf of the Commonwealth. Br. 28. Not so. Rather, the Commonwealth's Attorney General provides "[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*, 570 U.S. at 710 (state designates who may represent it in federal court). Contrary to Appellants' suggestion, Br. 29, a one-time approval from a Virginia circuit court permitting the House to *intervene* in a state-court redistricting case does not give Apellants *standing* in federal court. *See Vesilind v. Va. State Bd. of Elections*, 813 S.E.2d 739, 742 (Va. 2018).

Finally, Appellants' attempt at impugning the integrity of Virginia's Attorney General (Br. 30) does not change the standing calculus. In fact, *this* Attorney General argued (in error) that other Republican legislators had standing to appeal in *Wittman*, Brief of Virginia State Board of Elections Appellees at 28-33, *Wittman v. Personhuballah*, No. 14-1504 (U.S. Jan. 27, 2016), and spent four years and hundreds of thousands of dollars unsuccessfully defending against

[2] The Court referenced both standing and intervention, without explaining how it distinguished those two doctrines. *See id.* at 193-94.

Appellees' claims here.[3] Deciding whether to appeal a litigation loss is precisely the sort of "conduct of . . . civil litigation" that is tasked to the Attorney General by the legislature. Va. Code Ann. § 2.2-507(A).

More fundamentally, the fact that the executive branch makes enforcement decisions about the laws that the legislature passes is a feature of our political system, not a flaw. Elected officials can (and do) make choices about where resources will be spent and what policies will be prioritized. It is unsurprising that elected officials who represent different branches of government may disagree at times about those choices. Such disagreement does not create standing.

Because Appellants lack standing, this appeal must be dismissed.

II. RACE PREDOMINATED IN THE CHALLENGED DISTRICTS

A. The Panel's Findings Of Racial Predominance Are Amply Supported By The Record

The Panel's opinion rests on extensive factual findings—derived from two trials, 12 expert reports, 17 witnesses, and 233 exhibits. *See* J.S.App.14 ("Our consideration of the legislature's true motivations in drawing the districts is highly fact-specific, and involves numerous credibility findings[.]"). Those factual findings—"most notably, as to whether racial considerations predominated in drawing district lines"—are subject to clear error review. *Cooper*, 137

[3] *See* https://www.oag.state.va.us/media-center/news-releases/1233-july-19-2018-herring-urges-general-assembly-to-eliminate-racial-gerrymandering-in-house-of-delegates-districts-as-quickly-as-possible.

S. Ct. at 1465; *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) ("[W]e . . . will not reverse a lower court's finding of fact simply because we would have decided the case differently. Rather, a reviewing court must ask whether, on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed.") (citations and internal quotation marks omitted).

The Panel did not err, let alone commit clear error. To the contrary, its opinion is a straightforward application of this Court's recent decisions. J.S.App.9-16. Specifically, the Panel recognized that "[a]lthough the application of a mandatory BVAP requirement for a district does not alone compel the conclusion that race predominated, such a requirement is evidence of the manner in which the legislature used race in drawing the district's boundaries." J.S.App.10 (citing *Bethune-Hill*, 137 S. Ct. at 788, 800, and *Alabama*, 135 S. Ct. at 1267). "For example, if a legislature made line-drawing decisions for the predominant purpose of complying with such a BVAP requirement, and the evidence shows that these race-based decisions dwarfed any independent consideration of traditional districting criteria, a court could conclude that the legislature 'relied on race in substantial disregard of customary and traditional districting practices.'" J.S.App.11 (quoting *Miller*, 515 U.S. at 928 (O'Connor, J., concurring)).

As the Panel found, that is precisely what happened here. First and foremost, despite Appellants' persistent efforts to deny it, the fact that an inflexible 55% BVAP threshold was used to configure each of the Challenged Districts is "now settled." J.S.App.18. Ensuring that all Challenged Districts achieved this goal was no easy feat, as demonstrated by the pattern of deviations from traditional districting criteria

among the Challenged Districts. *See, e.g.*, JA600-02 (Challenged Districts and District 75 increased in VTD splits at more than twice the rate of 88 remaining districts); JA598 (average compactness of Challenged Districts and District 75 dropped five times as much as that of other districts).

The resulting pattern of racial sorting is "stark," to say the least. *Bethune-Hill*, 137 S. Ct. at 800. Cities, towns, VTDs, and even a military base were divided with near uniformity along racial lines, with higher BVAP areas moved to the Challenged Districts and lower BVAP areas moved to the non-challenged districts. JA2744-50, 2766-68. African-American voters were moved into Challenged Districts at a higher rate than white voters, Democratic voters, and the population as a whole—and moved out at a lower rate than all these groups. JA2753-56. VTD splits tracked racial lines with "exacting precision," J.S.App.33, which is especially probative because only racial data—and not political data—are available below the VTD level, J.S.App.26-27. Among those splits, the BVAP assigned to the Challenged Districts was, on average, 24 percentage points higher than that assigned to non-challenged districts. JA2731-32, 3301. Furthermore, race proved a far more powerful predictor than party of which VTDs were placed in the Challenged Districts. JA2755-63; J.S.App.28-32.

Appellees' expert further demonstrated that splitting several VTDs between Challenged Districts made the difference between satisfying the 55% BVAP threshold and falling short of it. *See, e.g.*, JA2743-44 (returning VTD 703 to its benchmark district would have dropped District 71's BVAP to 54.9%); JA2745 (returning Brambleton VTD to its benchmark district would have dropped District 89's BVAP to 54.7%). The

testimony of the lead mapdrawer and incumbent delegates confirmed that the nonnegotiable racial rule drove the placement of voters within and without the Challenged Districts. *See, e.g.*, JA3442-43 (with "certainty," the 55% BVAP rule required eastward expansion of District 71).

None of this is in dispute. Instead, Appellants point to a "wealth of evidence" (spanning a single paragraph) that race did *not* predominate. Br. 33. This "wealth" amounts to meager riches indeed.

First, Appellants claim that "[n]one of the districts 'violat[ed] any of the state's adopted criteria,'" Br. 33, relying solely on Jones' say-so. The "face of the plan," however, contradicts the self-serving testimony of Appellants' star witness. *Id*. In fact, the House's purported race-neutral criteria gave way time and again.[4] Only the 55% BVAP rule was never once compromised. *See Covington v. North Carolina*, 316 F.R.D. 117, 139 (M.D.N.C. 2016) (even where traditional criteria "played some role in the eventual shape of the enacted district,

---

[4] *See, e.g.*, J.S.App.299 (District 63's "deviations . . . begin with the splitting of Dinwiddie County" and include large increases in county, city, and VTD splits); J.S.App.314-15 (increased VTD splits in District 69, which is not contiguous by land); J.S.App.318 (District 70 includes a "turret" that "appears to deviate from districting norms"); J.S.App.319 (increased VTD splits in District 71, which also shows "facially evident deviations"); J.S.App.323 (discussing District 74's irregular "ax-shape[]"); J.S.App.326 (District 77 is "thrust so far into HD76 as to nearly sever it in half," is not contiguous by land, and lacks a water crossing); J.S.App.329 (District 80 "makes little rational sense as a geographical unit"); J.S.App.333 (examining a "pipe" on District 89's border and other "deviations"); J.S.App.334 (noting District 90's "two extensions into Virginia Beach and lack of land contiguity"); J.S.App.337 (District 95 is the "least compact district on the map under the Reock metric").

what was never compromised was the . . . BVAP target"), *aff'd*, 137 S. Ct. 2211 (2017); *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 907 (1996) (race predominates where "[r]ace was the criterion that, in the State's view, could not be compromised" and traditional criteria "came into play only after the race-based decision had been made").

Second, Appellants note that the BVAPs of the Challenged Districts "did not uniformly converge on 55%, but ranged from 55.2% to 60.7%." Br. 33. But a racial target remains a racial target even if used as a floor and not a ceiling. Appellants also neglect to mention that the BVAP range among these same districts in the benchmark plan was three times greater. JA640.

Third, Appellants contend that any changes to the Challenged Districts from the benchmark plan were "minimal," since the legislature "prioritized preserving as much of each district's core as possible." Br. 33. This claim fails as both a factual and legal matter.

As an initial matter, Appellants' reliance on core retention is a *post hoc* defense. The formal criteria adopted by the House to govern redistricting place VRA compliance (equated with the 55% BVAP rule) above all other factors in importance other than population equality. JA164-66. "Core retention," meanwhile, appears nowhere in the criteria. *Id.* The Panel did not commit clear error by rejecting Appellants' claim that the most important redistricting factor was not mentioned in the criteria that guided redistricting. *See Bethune-Hill*, 137 S. Ct. at 799 ("The racial predominance inquiry concerns the actual considerations that provided the essential basis for the lines drawn, not *post hoc* justifications the legislature in theory could have used but in reality did not.").

Further, Appellants' argument fails as a matter of law. Core retention hardly negates evidence of racial predominance, as this case shows. Race predominated in District 75, which retained 78.8% of its core—a higher retention percentage than all but three Challenged Districts (Districts 63, 71, and 74, which retained about 80% of their cores). JA1117-18. And this Court recently rejected a similar argument where the legislature had "preserv[ed] the core of the existing district" because core retention "is not directly relevant to the origin of the *new* district inhabitants." *Alabama*, 135 S. Ct. at 1271 (citation omitted); *see also Cooper*, 137 S. Ct. at 1474 (race predominated where legislature "further slimm[ed] the district and add[ed] a couple of knobs to its snakelike body").

Finally, Appellants note that "both of the principal map-drawers testified at length" about their purported race-neutral motivations. Br. 33. But, as set forth below, that testimony was properly deemed not credible and their race-neutral justifications were thoroughly refuted. *See supra* II.B.

In sum, after two trials and multiple attempts, even Appellants' generous gloss on the record does not rebut the evidence of racial predominance. The record fully supported and, indeed, compelled the conclusion that race predominated in each Challenged District.

B. The Panel Applied The Correct Legal Standard And Its Factual Findings Are Not Clearly Erroneous

Try as they might to sidestep the clear error standard that governs this appeal, Appellants do not point to a single legal error in the Panel's analysis. Their attempts to divert this Court's attention from

the detailed factual findings that formed the basis of the Panel's conclusion are unavailing.

Appellants do not argue that the Panel committed legal error in assessing predominance. And for good reason: the Panel carefully followed the standards and instructions set forth by this Court in this very case. *See* J.S.App.9-16.

Instead, Appellants complain that the Panel's predominance analysis was "fatally flawed" in various ways. Br. 32. These purported "flaws," however, amount to nothing more than Appellants' disagreement with the Panel's weighing of the evidence, dissatisfaction with the law, and squabbles with the Panel's credibility findings.[5]

---

[5] The United States, for its part, purports to uncover in the Panel's opinion an "improper legal standard for racial predominance" that somehow eluded Appellants. U.S.Br. 18. The Court should disregard the United States' argument for that reason alone. *See Knetsch v. United States*, 364 U.S. 361, 370 (1960) (Court has "no reason to pass on" arguments advanced solely by amicus). Regardless, the United States identifies no legal error—it simply contends that the Panel's predominance analysis was not "sufficiently demanding." U.S.Br. 21. In other words, the United States disagrees with the Panel's weighing of the evidence. Not only is this no basis for reversing the Panel's factual findings as clearly erroneous, the arguments advanced by the United States ignore (a) this Court's precedent, *compare* U.S.Br. 22 (race cannot predominate in a "reasonably compact district that respects relevant districting principles"), *with Bethune-Hill*, 137 S. Ct. at 798 ("Race may predominate even when a reapportionment plan respects traditional principles[.]"); (b) the undisputed evidence, *compare* U.S.Br. 25-26 (faulting the Panel for not emphasizing "the degree to which each challenged district reflects other traditional districting criteria"), *with supra* n.4; and (c) the Panel's detailed district-specific analysis, *compare* U.S.Br. 30 (the Panel "failed to perform an independent analysis of racial predominance in each district"), *with* J.S.App.39-80.

1. First, Appellants contend the Panel "set out to lessen [Appellees'] burden from the start" by recognizing that the House Criteria governing the redistricting process prioritized VRA compliance. Br. 33-34. But in beginning its discussion with the "factual matters . . . relevant to our predominance analysis," J.S.App.17, the Panel's opinion mirrored, almost verbatim, the beginning of this Court's analysis in both *Alabama* and the first appeal in this case. *Compare* J.S.App.18 (noting that the House Criteria prioritized VRA compliance above all other goals) (quoting JA164-66), *with Bethune-Hill*, 137 S. Ct. at 795 (same), *and Alabama*, 135 S. Ct. at 1263 (citing to reapportionment committee guidelines to establish that the State prioritized population equality and VRA compliance above all else).

Moreover, the House Criteria's prioritization of VRA compliance is illuminating because the legislature used the 55% BVAP floor as its sole proxy to achieve that objective. *See* J.S.App.294 (mapdrawer believed the 55% BVAP floor was "necessary to avoid retrogression under federal law"). In *Wittman*, the United States agreed that "the specific means employed to achieve" VRA compliance (i.e., "use of a 55% BVAP floor") supported the district court's finding of racial predominance in Virginia's third congressional district. Brief for the United States as Amicus Curiae Supporting Appellees at 21, *Wittman v. Personhuballah*, No. 14-1504 (U.S. Feb. 3, 2016) (citation omitted); *see also id.* at 22 ("Statements showing that the legislature treated nonretrogression as the 'primary focus' and 'paramount concern[]' . . . took on significance because the legislature had interpreted Section 5 to require adherence to unsupported and mechanical racial targets.") (citation omitted). The same reasoning applies here.

2. The second "fatal flaw" advanced by Appellants is even more galling. Appellants profess outrage that the Panel "found it probative" that the legislature "employed a 55% BVAP threshold in drawing each of the challenged districts," Br. 34 (quoting J.S.App.18), asserting, without citation: "[U]nder this Court's precedent, that merely necessitates an *inquiry* into predominance; it is not itself probative 'evidence of the legislature's motive.'" *Id.* (quoting J.S.App.19). That view flatly contradicts this Court's precedent. *See, e.g.*, *Alabama*, 135 S. Ct. at 1267 ("That Alabama expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria . . . provides evidence that race motivated the drawing of particular lines in multiple districts in the State."); *Cooper*, 137 S. Ct. at 1468 ("Uncontested evidence in the record shows that the State's mapmakers . . . purposefully established a racial target[.]"). Indeed, just two Terms ago, this Court *required* the Panel to properly recognize the "significance of relevant districtwide evidence, such as . . . the use of an express racial target." *Bethune-Hill*, 137 S. Ct. at 800.

Consistent with that command, the Panel appropriately held that "[a]lthough the existence of the 55% threshold is not dispositive of the question of predominance, the fixed BVAP requirement nevertheless is evidence of the legislature's motive." J.S.App.19 (citing *Bethune-Hill*, 137 S. Ct. at 788, 800). Appellants can neither wish away the "existence of the 55% [BVAP] threshold" nor the case law that establishes its relevance.

3. Appellants' final salvo is aimed at the Panel's credibility determinations, including the Panel's evaluation of the evolving and inconsistent testimony from the key mapdrawers. Simply stated, Appellants argue

that it was unfair for the Panel to question their witnesses' credibility.

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*, 137 S. Ct. at 1474 (quoting *Anderson*, 470 U.S. at 575).

Notably, in arguing for a new evidentiary hearing on remand, Appellants themselves invoked the need for the Panel to assess credibility, particularly given "[t]he appointment of a new judge to the panel overseeing this case." ECF 146 at 9 n.4. The fact that Appellants disagree with the credibility determinations *they* invited does not establish clear error.

Appellants first fault the Panel for discrediting the testimony of Jones even though "the previous majority had *credited* Delegate Jones' testimony." Br. 35. But as Appellants acknowledge, the second trial revealed that statements by Jones in the first trial were untrue, undermining Jones' previous explanations for many line-drawing decisions and the 55% BVAP threshold itself. For instance, in 2015, Jones testified that he split the Granby VTD to accommodate the incumbent's request to keep his local business in his district. JA1827-28. The original panel credited that explanation for the district's awkward configuration. J.S.App.333. In 2017, Appellees' expert revealed that the incumbent's business was not, in fact, located in the Granby VTD and therefore could not explain its split along racial lines. JA3200. There were many other

examples. *Compare*, *e.g.*, JA1793 (testifying at first trial that VTD 207 was removed from District 71 because the former city council ward of the Republican incumbent of District 68 "abutted that precinct"), *with* JA3403-04 (testifying at second trial that VTD 207 was removed because the District 68 incumbent owned a restaurant there); *compare* JA1811 (testifying at first trial that the hook around New Hope in District 63 was intended to draw out a potential primary opponent of incumbent Delegate Dance), *with* JA3437-38 (Jones could not identify at second trial who the alleged primary opponent was or where he/she lived) *and* JA3078 (Dance testifying she never knew of or told Jones about any potential primary opponent in that area).

Additionally, while Jones testified in 2015 to receiving "significant" and "extensive" input from specific incumbent delegates of the Challenged Districts, those same delegates testified in 2017 that they provided little to no input, let alone expressed need for a 55% BVAP floor. *See* J.S.App.36. "In the face of these denials, Jones' testimony at the second trial was far more equivocal than the first." *Id.*

Appellants do little to rehabilitate Jones. Instead, they argue that a witness deemed "credible" at the first trial could not possibly be deemed "not credible" after the second. That is absurd. Credibility determinations are not cast in stone once the record is reopened, as Appellants themselves recognized in demanding a new trial, ECF 146 at 9 n.4.

In any event, Appellants overstate the first Panel's views of Jones' credibility. During the first trial, Jones denied that he had "a fixed number in mind for majority-minority district black voting-age population" or that there was a "hard rule that every

majority-minority district would be 55 percent." JA1769. The original Panel found otherwise. J.S.App.223, 227. In so doing, it noted a variety of evidence that rendered Jones' account incredible. J.S.App.225.

Likewise, Jones proffered a long list of explanations as to the origins of the 55% BVAP rule, much of which the original panel deemed not credible. *See* J.S.App.228 (rejecting supposed reliance on public testimony); J.S.App.229 (rejecting most of Jones' evolving testimony about origin of 55% BVAP rule).

Here, the Panel did not commit clear error by continuing to view with skepticism Jones' ever-changing explanations for the Challenged Districts and his inability to explain the discrepancies in his testimony over the course of two trials. J.S.App.38.

Appellants next complain the Panel should have found the testimony of John Morgan more compelling. Morgan, called for the first time during the second trial, testified that he "played a substantial role in constructing the 2011 plan" and provided "considerable detail about his reasons for drawing dozens of lines covering all 11 challenged districts." J.S.App.32. The Panel was appropriately skeptical of Appellants' "belated reliance on Morgan's testimony" because it smacked of an "attempt at post hoc rationalization." J.S.App.33. *Cf. Cooper*, 137 S. Ct. at 1476 & n.11 (affirming credibility determination based on defendants' failure to call mapdrawer to testify).

Further, far from bolstering Jones' credibility, Morgan undermined it. For instance, while Jones originally insisted that he had not used a hard-and-fast 55% BVAP floor, Morgan testified in *Page* that "the legislature enacted 'a House of Delegates redistricting plan with a 55% Black VAP as the floor for black-majority dis-

tricts.'" *Page II*, 2015 WL 3604029, at *9. After Jones testified (inaccurately) during the first trial that he had split the Granby VTD to accommodate the District 89 incumbent's funeral home business, JA1827, 3464-65, Morgan testified that, in fact, *he* had drawn that VTD split in pursuit of population equality, JA3650-51.

Morgan also testified that he did not consider race when splitting VTDs in a manner that just so happened to divide white and black residents with near surgical precision. But only racial data—and not political data—are available below the VTD level. *See* J.S.App.26-27. Thus, Morgan's claim that the stark racial sorting he accomplished was "mere happenstance" was "simply . . . not credible." J.S.App.33-34; *see also Bush v. Vera*, 517 U.S. 952, 970-71 (1996) (because "the districting software used by the State provided only racial data at the block-by-block level, the fact that [a district] . . . splits voter tabulation districts and even individual streets in many places suggests that racial criteria predominated over other districting criteria in determining the district's boundaries") (citation omitted).

Appellants offer no argument as to why Morgan's testimony was credible, instead complaining that it was unfair for the Panel to accuse Morgan of "post hoc rationalization" without also discrediting the testimony of Appellees' new witnesses on the same basis. Br. 36. That is an apples-to-oranges comparison. The African-American incumbents of Challenged Districts who testified for the first time in the second trial did not purport to explain the motivation behind the districts' boundaries; they merely rebutted Jones' inaccurate testimony about their roles in the line-

drawing process. *See* J.S.App.37.[6] The Panel had no more reason to discard their testimony as "post hoc rationalizations" than it did the testimony of the legislators Appellants offered for the first time during the second trial.[7]

Appellants next launch a half-hearted attack on the Panel's credibility findings regarding Appellees' experts. Notably absent from this discussion, however, is any mention of Appellants' own experts. Nor is that surprising given the magnitude of those experts' shortcomings at trial, including methodology that produced "illogical results," J.S.App.31, reliance on irrelevant data, J.S.App.91 n.57, and hypotheses asserted without statistical support, J.S.App.93 n.60. The Panel had no basis to find Appellants' experts credible, and Appellants offer none here.

As for Appellees' experts, Appellants contend the Panel erroneously credited the race-versus-party analysis of Dr. Ansolabehere. Br. 37. In so doing, they overstate the importance of that testimony, which was offered in the first trial. Upon Appellants' invitation to reopen the record, Dr. Palmer reexamined the race-versus-party analyses provided by the various experts

---

[6] Tellingly, of all the legislators Jones testified to having input in the line-drawing process in the first trial, *see, e.g.*, JA1793 (Loupassi), JA1817-19 (Spruill), not one came forward in the second trial to corroborate Jones' account.

[7] Appellants have little to say about these other legislators, perhaps because they, too, undermine the mapdrawers' credibility. For instance, Jones testified in the first trial that Delegate Peace had told him he "did not want to lose" certain "good Republican precincts." JA1803. But Peace testified at the second trial that he "can't imagine" he ever said that and that he "never even discussed with Delegate Jones any specific precincts at all." JA3768.

in the first trial, bolstered Dr. Ansolabehere's methodology, identified fundamental errors in Appellants' expert's model, and concluded that race was a better predictor than party of inclusion in the Challenged Districts. JA2755-63; J.S.App.28-32. Appellants never objected to Dr. Palmer's testimony as improper, and they do not even mention Dr. Palmer here.

Appellants also complain about Appellees' expert Dr. Rodden. As an expert in the field of "geo-spatial data analysis," Dr. Rodden created "dot density maps" by "us[ing] census data to determine the geographic distribution of groups of voting-age white residents and voting-age black residents." J.S.App.20-21. The Panel found those "visual depictions of racial sorting in the dot density maps . . . telling." J.S.App.22. The maps revealed the "striking precision" with which VTDs were split to separate "predominantly black neighborhoods from predominantly white neighborhoods," J.S.App.57, in some cases "along small residential streets," including "multi-family housing occupied by black residents on one side of a street" in a Challenged District while "excluding white residents living on the other side of the same street," J.S.App.60. These "visual depictions" therefore bolstered the "unavoidable conclusion that the challenged districts were designed to capture black voters with precision." J.S.App.23; *see Bush*, 517 U.S. at 975 (race predominated where "district lines correlate almost perfectly with race").

Appellants do not suggest the dot density maps are inaccurate. Indeed, Appellants' expert "conceded that Dr. Rodden used the proper methodology in constructing the dot density maps." J.S.App.21 n.16.

Instead, Appellants complain that the dot density maps "revealed only that minority voters are often

found in majority-minority districts." Br. 37. This contention is difficult to take seriously when viewed alongside the maps themselves, *see, e.g.*, JA2680, 2682, 2691, 2700-04, which reveal how district lines were twisted and turned to sort voters according to race.

Simply put, the Panel was in the best position to assess the witnesses' testimony and credibility. It did just that. Appellants' quibbles, based on a cherrypicked paper record, do not justify an extraordinary *post hoc* credibility determination by this Court.

C. District-Specific Evidence

Appellants' district-specific arguments suffer from the same flaws as their other arguments. Appellants do not argue that the Panel misunderstood or misrepresented any of the voluminous evidence it considered. Instead, they chide the Panel for not interpreting the evidence as they would have liked.

Again, the Panel's "findings of fact—most notably, as to whether racial considerations predominated in drawing district lines—are subject to review only for clear error." *Cooper*, 137 S. Ct. at 1464. Under that standard, a finding that is "'plausible' in light of the full record—even if another is equally or more so—must govern." *Id*. (citation omitted).

As explained below, the Panel's predominance findings are more than "plausible"; they are all but inescapable. Appellants therefore cannot establish clear error.

1. Richmond and Tri-City Region (Challenged Districts 63, 69, 70, 71, and 74)

Prior to redistricting, "the black population in Richmond had increasingly spread from the city limits

into the surrounding suburbs." J.S.App.39. Thus, "to achieve a 55% BVAP in all five challenged districts, the legislature made numerous decisions motivated by race[.]" *Id.* Those multiple race-based decisions led the Panel to conclude that race was the predominant factor in Districts 63, 69, 70, 71, and 74. The record amply supports that conclusion.

District 63. District 63 borders District 75 to the north. District 75 required a substantial infusion of African-American voters to meet the 55% BVAP floor. Accordingly, Jones redrew the border between Districts 63 and 75 by splitting in half Dinwiddie County (which had been wholly within District 63 under the benchmark plan), thereby moving high BVAP areas out of District 63 and into District 75. JA1510. The Panel recognized the split as an "avowedly racial decision." J.S.App.51 (citations omitted).

To ensure the Dinwiddie County split did not drop District 63's BVAP below 55%, Jones added a snake-like tentacle to District 63's northeastern corner that winds through Prince George County, picking up high BVAP areas there, and splits Hopewell to extract much of its BVAP. JA2679-80. Senator Dance, who represented District 63 at the time, confirmed that the purpose of that tentacle was to replace African-American voters that District 63 lost to the Dinwiddie County split. JA3075-77. The Panel correctly held that the evidence "corroborate[d] Dance's explanation." J.S.App.52.

This "drastic maneuvering" produced an unusually shaped district with little respect for neutral districting principles. J.S.App.51 (citations omitted). Indeed, District 63 suffered the largest Reock compactness reduction of any district. The number of split VTDs

also rose sharply from zero to eight. J.S.App.50. The Panel therefore concluded that race predominated.

Appellants argue that the "avowedly racial" split of Dinwiddie County is irrelevant because it was needed to add voters to District 75. Br. 48. But not only did Jones choose *which* voters to move from District 63 to District 75 based on race, this race-based decision necessitated the addition of a race-based tentacle in Prince George County to satisfy the 55% BVAP in District 63. J.S.App.51-53.[8]

Appellants also argue that the tentacle added to District 63 is not evidence of racial predominance because it "unwinded a water crossing" and therefore was not "for the sake of race alone." Br. 48. Even if "the legislature addressed [other] interests," however, that does not "refute the fact that race was the legislature's predominant consideration." *Shaw II*, 517 U.S. at 907.

District 71. Prior to redistricting, District 71 was a racially heterogeneous district with a BVAP of about 46%. It was also severely underpopulated. J.S.App.40. Thus, to achieve the 55% BVAP target while equalizing population, Jones had to radically reconfigure District 71 along racial lines. "[M]ore than 11,000 people with a 21.3% BVAP were moved *out* of District 71, and more than 17,000 people with a noticeably higher 72.1% BVAP were moved *into* District 71." J.S.App.40-41.

---

[8] In their discussion of the redrawn border, Appellants make a passing reference to the "hook that wraps around New Hope precinct," arguing that the hook "was drawn to honor Delegate Dance's request to retain a particular constituent." Br. 48-49. The Panel rejected that excuse because Dance testified that she never requested the "hook." J.S.App.51-52 n.35.

The Panel also identified "three line-drawing decisions [that] clearly illustrate the importance of race in the construction of District 71." J.S.App.41. First, Jones added "several heavily populated, high BVAP Richmond VTDs" to District 71's eastern edge. *Id.* Second, although Jones claimed that he sought to make District 71 more "Richmond-centric" by removing three predominantly white Henrico County VTDs, he also *added* another Henrico County VTD—the Ratcliffe VTD. "Ratcliffe, unlike the three predominantly white Henrico County VTDs removed from District 71, had an 83% BVAP." J.S.App.42. Third, as Delegate McClellan testified, Jones removed heavily Democratic VTD 207 from District 71 and transferred it to District 68, represented by Republican Manoli Loupassi, because VTD 207's low BVAP threatened to push District 71's BVAP below 55%. *Id*.

In response, Appellants try to wave away Jones' admission that "the 55% BVAP threshold impacted the way the district was drawn," arguing that "the same could be said of virtually every § 5 district in the country." Br. 40. But what cannot be said of "every § 5 district" is that the overall construction of the district was driven predominantly by an inflexible racial rule, which was plainly the case here: "Jones himself conceded that [District 71's] eastward move into District 70 was required to ensure that District 71 had sufficient BVAP to meet the 55% number." J.S.App.41-42.

In addition, Appellants fault the Panel for "suggest[ing] that adding a VTD from Henrico County defeated the legislature's Richmond-centric goal" because "the legislature in fact *removed* more Henrico County VTDs from HD71 than it added." Br. 41. That misses the point. The addition of Ratcliffe is relevant because it

shows that Delegate Jones eagerly abandoned his professed "Richmond-centric goal" when necessary to ensure compliance with the 55% rule.

Appellants also argue that the treatment of VTD 207 is not evidence of racial predominance because, according to Jones, he moved that VTD to District 68 as a "political favor" to Loupassi, the Republican incumbent in District 68. Br. 40. But the Panel rejected the facially implausible claim that Loupassi demanded the addition of a strongly Democratic Richmond precinct to his largely suburban district and instead credited Delegate McClellan's explanation. J.S.App.43 n.31. That was not clear error.

Lastly, Appellants criticize the Panel for failing to focus more on the fact that "HD71 improved its compactness, retained over 80% of its core, and sits in the same political subdivisions as in the benchmark map." Br. 40. That argument runs headlong into well-established law: "strict scrutiny cannot be avoided simply by demonstrating that the shape and location of the district[] can rationally be explained by reference to some districting principle other than race." *Clark v. Putnam County*, 293 F.3d 1261, 1270 (11th Cir. 2002) (citation omitted).

District 70. District 70 was not substantially underpopulated at the time of redistricting. Plus, at 61.8%, its BVAP exceeded the 55% floor by a healthy margin. J.S.App.46. Thus, "District 70 was treated as a BVAP 'donor' for other challenged districts, resulting in the transfer of high BVAP areas from District 70 to neighboring Districts 71 and 69, which needed both population and BVAP." *Id*. "In particular, . . . District 70 'donated' to District 71 high BVAP VTDs 701, 702, and part of 703," all of which had BVAP at or above 90%. *Id*. Meanwhile, "to the northwest, District 70

'donated' VTD 811 (76% BVAP) and VTD 903 (64% BVAP) to District 69." *Id.* To make up for the population lost by those donations, District 70 was then expanded outward to encompass several nearby suburban VTDs, which were the last remaining majority-black precincts in the region that were not already a part of a Challenged District. JA2673-74.

The evidence reflects District 70's "donor" status on a macro-level as well. Even though District 70 was not substantially underpopulated before redistricting, "nearly 26,000 people were moved out of District 70, and a different 26,000 were moved in." J.S.App.46. The racial pattern of that shift is clear: "The BVAP of areas moved out of District 70 was more than 16 percentage points higher than the BVAP of the areas moved in." *Id.* Based on this and other evidence, the Panel held that race predominated.

Appellants disagree, noting that the Panel's first opinion concluded that District 70 "represent[s] objectively identifiable communities of interest." Br. 39 (quoting J.S.App.317). In truth, however, District 70 pays little attention to communities of interest or other traditional criteria, carving off three VTDs from Richmond's Southside City Council ward from the rest of the city of Richmond, crossing both the James River and the Henrico County boundary to bring together two non-contiguous neighborhoods of Richmond, and drawing together a heterogeneous mix of urban, suburban, and exurban communities in a single district. JA2673-74.[9]

---

[9] Those facts are also sufficient to dispose of Appellants' off-the-cuff claim that Jones' overriding purpose in District 70 was to make it "better represent suburban interests." Br. 39 (quoting J.S.App.317).

Appellants also argue that the "turret" near the top of District 70 is "necessitat[ed]" by the incumbent's residence. Br. 40. But Delegate McQuinn resides in the *southern* part of the turret, JA2672, 2674, nowhere near the two heavily African-American VTDs, Central Gardens (BVAP 94%) and Masonic (BVAP 72%), in the *northern* part of the turret, JA2674.

District 69. Jones "offered little explanation for the line-drawing decisions in District 69, other than the fact that the district was underpopulated and that the incumbents in adjacent districts lived near one another." J.S.App.47-48. In contrast, Appellees offered extensive evidence about the areas moved into and out of District 69, and that evidence vividly "illustrate[s] the importance of race." J.S.App.48.

Appellants' primary defense of District 69 is that "the general movement of people followed a clear non-racial pattern." Br. 38-39 (internal citation and quotation marks omitted). That argument is undermined by the record.

District 69 had a benchmark BVAP of 56.3%, but was underpopulated by about 8,700 people. J.S.App.47. It therefore required a substantial infusion of voters. Jones did not add voters from the west because the voters in those areas were "largely white." J.S.App.48. Similarly, Jones did not bolster District 69's population with voters from District 71, to the north, because doing so risked dropping District 71's BVAP below 55%. JA2670-71. Thus, "despite the fact that District 70 was at equal population under the [benchmark] plan," Delegate Jones moved several precincts out of District 70 and into District 69. J.S.App.48. Combined

with other carefully calculated race-based changes,[10] those donated precincts were just enough to equalize District 69's population while keeping its BVAP above 55%. The Panel therefore correctly held that race predominated in District 69.

District 74. The Panel was equally justified in finding that race predominated in District 74; like District 70, it served as a donor district. J.S.App.54.

Jones moved about 16,000 voters out of District 74 and then moved roughly the same number back in. J.S.App.54. Tellingly, the average BVAP of areas moved out of District 74 and into other Challenged Districts was 69%. The average BVAP of areas moved into non-challenged districts was a mere 20.5%—a nearly 50-percentage point difference. JA645.

Appellants protest that District 74 did not only donate high-BVAP VTDs; it also "gained black voters by acquiring a high-BVAP VTD." Br. 41. That argument misunderstands the relevant inquiry. Appellees need not prove that Jones siphoned off every spare African-American voter from District 74 to prove that race predominated.

Repeating a familiar refrain, Appellants also argue that District 74 complies with some traditional criteria, including core preservation. Br. 41. But as this Court has made clear, "[r]ace may predominate even when a reapportionment plan respects traditional principles . . . if '[r]ace was the criterion that, in the State's

---

[10] For example, Jones split VTD 410 between Districts 69 and 68 on racial lines, including the more heavily African-American portion in District 69. JA3137. He also carefully split majority-white VTD 505 between Districts 69 and 71 to ensure that neither added too many white voters and both satisfied the 55% BVAP floor. JA3314-15.

view, could not be compromised,' and race-neutral considerations 'came into play only after the race-based decision had been made.'" *Bethune-Hill*, 137 S. Ct. at 798 (quoting *Shaw II*, 517 U.S. 907). That is exactly what happened here.

2. North Hampton Roads (Challenged Districts 92 and 95)

Prior to redistricting, Districts 92 and 95 were severely underpopulated, bordered by water, and "adjacent to large concentrations of white residents in other districts." J.S.App.57. Jones therefore "undertook several patently race-based maneuvers to equalize population in these districts" while ensuring that they remained at or above 55% BVAP. *Id*. Indeed, Jones candidly admitted as much before this suit began. JA447-48 (Apr. 5, 2011 House of Delegates Floor Debate) (when asked why districts near Districts 92 and 95 experienced a "decrease among blacks," Jones answered: "So what had to happen, the population had to be picked up, had to try to maintain the voting strength, for the black voting percentage.").

Accordingly, the Panel "easily," and rightly, "conclude[d] that race was the predominant factor in the construction of Districts 92 and 95." J.S.App.58.

District 95. District 95 had a high BVAP (61.6%) but was underpopulated by about 12,000 people. J.S.App.58. Thus, to equalize population without violating the 55% rule, Jones added a "lengthy, narrow appendage to the northwest edge of the district." *Id.*

This new appendage has all the tell-tale signs of racial gerrymandering. It "follow[s] a narrow corridor through white neighborhoods in order to reach a corridor of black residents along a major highway and an additional thoroughfare[,] . . . separating white and

black voters with remarkable precision" along the way. J.S.App.59 (citations and internal quotation marks omitted). It also splits the four northernmost VTDs "precisely at the point where black neighborhoods transitioned to white neighborhoods." JA2691. Indeed, Jones "drew the boundary in some cases along small residential streets, with the effect of including in District 95 multi-family housing occupied by black residents on one side of a street while excluding white residents living on the other side of the same street." J.S.App.60.

Notably, the appendage "caused a significant reduction in the compactness of District 95, leading to the worst compactness score in the entire 2011 plan." J.S.App.58. It also increased the number of split VTDs from one to five, splitting those VTDs on racial lines. J.S.App.59. In short, the evidence added up to a clear case of racial predominance.

Appellants argue that the appendage's purpose was political, i.e., to "improve the electoral chances of Republicans in HD93" and to "avoid[] pairing the HD93 and HD95 incumbents." Br. 43. But the Panel rejected that claim as a matter of fact. J.S.App.85. And even if it were true, the evidence makes clear that racial sorting was the *means* by which Jones pursued those goals. Indeed, "only population, race, and ethnicity data were available at the census block level to aid in the division of VTDs by census block, precluding any conclusion that [VTDs in the appendage] were split on any basis other than race." J.S.App.60.

District 92. The configuration of District 92 was "intimately connected" with the race-based decisions in District 95. J.S.App.62. "Like District 95, District 92 had a starting BVAP of over 60%, but was significantly underpopulated by about 9,000 people." *Id*. "Despite the severe underpopulation of both districts," however,

"District 92 received population exclusively from District 95." J.S.App.63.

More specifically, "[a]fter District 95 gained additional population and BVAP from its racially designed northward appendage, three VTDs with high BVAPs were moved from District 95 into District 92, totaling nearly 16,000 people." J.S.App.63. That transfer of thousands of voters in high BVAP VTDs "was sufficient on its own to rectify the population deficit in District 92," and so avoided the need to "expand the boundaries of District 92 into heavily white precincts, negatively impacting the BVAP level of District 92." *Id*.

In response, Appellants argue that race could not have predominated in District 92 because it appears to comply with traditional districting criteria. Br. 41-42. Again, as this Court has explained, that is not enough to shield a district from scrutiny.

Appellants also argue that the Panel improperly focused on race-based maneuvers "in a different district (HD95)." Br. 42. In fact, the Panel rightly focused on population movements *into* and *out of* District 92, including the influx of voters from District 95. *See, e.g.*, *Bethune-Hill*, 137 S. Ct. at 800 ("[C]ourts evaluating racial gerrymandering claims may . . . consider evidence pertaining to an area that is larger or smaller than the district at issue. . . . Districts share borders, after all, and a legislature may pursue a common redistricting policy toward multiple districts.").

3. South Hampton Roads (Challenged Districts 77, 80, 89, and 90)

In the South Hampton Roads region, as elsewhere, Jones "engaged in complicated population-shifting maneuvers to sweep concentrations of black residents

into one of the challenged districts, and to respond to the ripple effects of such population shifts throughout the region." J.S.App.64-65.

The results are plain to see. "Five cities in the region were split between a challenged and a non-challenged district." J.S.App.65. Remarkably, "one neighborhood in downtown Norfolk was divided into three districts, and included a half-mile stretch of roadway running through District 89, into 90, returning to 89, moving into 80, and ending in 90"—a "bizarre configuration" that "plainly disregarded traditional districting principles." *Id.*

Thus, after reviewing all the evidence, the Panel "conclude[d] that race predominated in the construction of Districts 77, 80, 89, and 90." J.S.App.66. Again, that was not clear error.

District 80. "District 80 was underpopulated by more than 9,000 people, and had a BVAP of 54.4%." J.S.App.66. It was "surrounded by largely white areas along the water and to the west of the district" and shared borders with Districts 89 and 77. J.S.App.66-67. District 89, for its part, "had a significant population deficit and an even lower BVAP than District 80." J.S.App.67.

To ensure that District 80 complied with the 55% BVAP rule, Jones pursued a familiar strategy. He added a bizarre new appendage to District 80's western border that creates a new water crossing and conspicuously winds around low BVAP precincts, including Silverwood (14.9%), Churchland (8.3%), and Fellowship (14.2%), to capture high BVAP precincts such as Yeates (56.3%) and Taylor Road (48.8%). JA897-98, 1514, 2696-97; *see also* J.S.App.329. The Panel rightly concluded that "this oddly shaped

westward extension . . . was constructed primarily on the basis of race." J.S.App.68.

Appellants argue that District 80 was reconfigured "largely" for political purposes, "including to benefit Delegate Joannou," who represented District 79 at the time. Br. 47. The Panel declined to credit that *post hoc* explanation based on the evidence and its credibility determinations. J.S.App.69 n.48. That was not clear error.

District 89. Like District 80, District 89 was underpopulated and had less than 55% BVAP prior to redistricting. Jones "therefore made several decisions to bolster both the overall population and the BVAP level of District 89, ultimately achieving a BVAP of only 55.5%." J.S.App.70.

For instance, Jones moved the heavily African-American Berkley VTD (more than 95% BVAP) from District 80 to District 89, adding a water crossing over the Elizabeth River to pick up that lone VTD and its 2,200 African-American voters. J.S.App.71. "In contrast to gaining the heavily black Berkley VTD on the south side of the district, District 89 lost the largely white Suburban Park VTD on the north side." J.S.App.72.

Jones also carefully and precisely split VTDs to accomplish his racial goals. For example, Jones divided the heavily African-American Brambleton VTD (96% BVAP) between Districts 89 and 90, adding about 1,000 African-American voters to District 89. Without that split, District 89 would not have met the 55% threshold. J.S.App.71. Similarly, Jones "split the Granby VTD, which bordered Suburban Park, with minute precision to include black residents in District 89 while excluding white Granby residents." J.S.App.72.

Based on this clear pattern of racial sorting, the Panel concluded that race predominated.

Appellants claim that the largely African-American Berkley VTD "came in at the request of its incumbent [Delegate Alexander], who owned a business there." Br. 47. But "an incumbent's preference is not mutually exclusive with a finding of racial predominance." J.S.App.69 n.48. Moreover, the record shows that Alexander also owned a business in the predominantly white Suburban Park VTD, which Jones *removed* from District 89, JA3464; J.S.App.72 n.51, showing that Jones was willing to accommodate incumbent interests only if they did not conflict with the 55% rule.

Appellants also complain that Jones added (unnamed) "heavily white VTDs" and that some VTD splits excluded African-American voters. Br. 47. But again, Appellees need not show that Jones excluded *all* white voters and included *all* African-American voters in the Challenged Districts to show predominance.

District 77. District 77 had a BVAP of 57.6% and was underpopulated by about 3,000 people. "Despite this relatively minor underpopulation, the legislature moved more than 18,000 people out of District 77, and replaced them with about 21,000 others." J.S.App.73-74. That massive population shift was the result of Jones' focus on achieving the 55% BVAP floor in all the region's Challenged Districts.

First, Jones removed four predominantly white VTDs from District 90 and added them to District 77. "This removal of white residents from District 90 was necessary for that district to attain a 55% BVAP." J.S.App.74.

Second, "[t]o compensate for this influx of white residents from District 90, District 77 lost four other majority-white VTDs." J.S.App.74. This nar-

rowed further the "already-narrow corridor linking the Chesapeake and Suffolk portions of the district . . . to a half-mile in width." *Id.* Nevertheless, Jones retained that narrow and irregular corridor, which "generate[d] the starkest possible segregation of blacks and whites," because "District 77 needed to retain the high BVAP" VTDs at the end of the corridor. J.S.App.74-75 (citation omitted). Based on this and other evidence, the Panel concluded that race predominated.

In response, Appellants again ask this Court to reweigh the evidence more to their liking. For example, they argue that much of District 77's reconfiguration was driven by a purported request by the incumbent delegate, Lionell Spruill, to reunite the old city of South Norfolk. Br. 44. The Panel rightly rejected that explanation because, among other things, "this reunification did not actually occur." J.S.App.75. To the contrary, "District 77 *lost* the low–BVAP Westover VTD, which also had been part of Old South Norfolk." *Id.*

Appellants also assert that the movement of predominantly white VTDs into and out of District 77 was "inconsequential" because District 77 would have met Jones' BVAP and population goals regardless. Br. 44. But they offer no evidence for that claim. In any case, the Panel took a different view of the facts regarding District 77, and Appellants' disagreement hardly renders the result clearly erroneous.

District 90. Before redistricting, District 90 had a BVAP of 56.9% and was underpopulated by about 9,000 people. J.S.App.77. "Consistent with the pattern seen elsewhere in South Hampton Roads, more than 18,000 people were moved out of District 90, and were replaced by nearly 28,000 others." *Id.*

Those maneuvers are largely described above. Most crucial was the removal of four majority-white VTDs. "The BVAP of District 90 would have dropped below 55% had District 90 retained the white population contained in these VTDs." J.S.App.78.

In addition, Jones split the largely African-American Brambleton VTD between Districts 90 and 89. As noted earlier, without that split, "District 89 could not have reached the 55% BVAP threshold." J.S.App.78. Jones also surgically split the Aragona, Shell, and Reon VTDs to "separate black and white populations" and meet the 55% threshold. J.S.App.79. Considering these and other race-based decisions, the Panel concluded that "race was the predominant factor in the drawing of District 90." J.S.App.80.

Appellants' arguments amount to nitpicking. Appellants rely heavily on Jones' claim that many changes were made at the request of District 90's incumbent, Delegate Howell. Br. 45. But at the second trial, Howell himself contradicted that *post hoc* excuse. J.S.App.79. Appellants also contend that the Panel should not have relied on the (obviously race-based) VTD splits discussed above. The law is against them. *See, e.g.*, *Cooper*, 137 S. Ct. at 1469 n.3 (race-based VTD splits are evidence of racial predominance).

III. THE CHALLENGED DISTRICTS ARE NOT NARROWLY TAILORED

The question here is whether the Panel erred in concluding that the legislature did not narrowly tailor its use of race in each of the 11 Challenged Districts. The answer is an emphatic "no."

The Panel held that Appellants did not carry their burden on strict scrutiny because Jones applied the 55% BVAP floor to every Challenged District without

analyzing whether it was appropriate in any district outside of District 75. That conclusion is fully supported by the evidence. Even Appellants virtually admit as much, conceding that Jones "focus[ed] on HD75 in determining what BVAP was necessary to avoid retrogression," and then "extrapolate[d]" to other districts. Br. 58-59. And, crucially, Jones' "extrapolation" was not grounded in a "strong basis in evidence," *Alabama*, 135 S. Ct. at 1274.[11]

Appellants' contention that Jones' unjustified use of an inflexible racial rule was, in fact, narrowly tailored ignores the record, mischaracterizes the Panel's opinion, and misunderstands this Court's precedents.

A. Appellants Point To No Legislative Inquiry Into Whether A 55% BVAP Floor Was Required In Any Of The Challenged Districts

To satisfy strict scrutiny, a State must establish "a strong basis in evidence in support of the (race-based) choice that it has made." *Alabama*, 135 S. Ct. at 1274 (citation and internal quotation marks omitted). Courts assume that Section 5 compliance is a compelling state interest. Thus, the "strong basis in evidence" test is met when a State presents "'good reasons to believe' that its use of race was required under Section 5." J.S.App.15 (quoting *Alabama*, 135 S. Ct. at 1274).

A state cannot establish a strong basis in evidence without first conducting a "meaningful legislative inquiry." *Abbott v. Perez*, 138 S. Ct. 2305, 2335 (2018) (quoting *Cooper*, 137 S. Ct. at 1471) (use of race not narrowly tailored where the State "pointed to no

[11] Neither the dissent below nor the United States disputes the Panel's conclusions with respect to narrow tailoring.

actual 'legislative inquiry' that would establish the need for its manipulation of the racial makeup of the district"); *Cooper*, 137 S. Ct. at 1472 (courts will not "approve a racial gerrymander whose necessity is supported by no evidence"). That inquiry must be based on a "careful assessment of local conditions and structures." *Bethune-Hill*, 137 S. Ct. at 801.

Here, however, it is law of the case that the 55% BVAP rule was *not* based on an assessment of local conditions in each Challenged District. Instead, Jones calculated that threshold "based largely on concerns pertaining to the re-election of [the incumbent] in [District] 75." *Bethune-Hill*, 137 S. Ct. at 796 (quoting J.S.App.229-30). Then, "[r]ather than conducting an individualized assessment of each district," J.S.App.89, he applied the 55% figure "'across the board to all twelve' districts." *Bethune-Hill*, 137 S. Ct. at 796 (quoting J.S.App.230); *see also id.* at 802 ("The findings regarding how the legislature arrived at the 55% BVAP target are well supported[.]").

This Court determined that, "[u]nder the facts found by the District Court, the legislature performed" a proper "functional analysis of District 75 when deciding upon the 55% BVAP target." *Id*. at 801. That analysis included consideration of District 75's "large population of disenfranchised black prisoners"; examination of District 75's electoral history, including analysis of turnout rates in the district; and meeting with the incumbent delegate "'probably half a dozen times to configure her district' in order to avoid retrogression." *Id.* (quoting J.S.App.310).

Contrary to Appellants' suggestion, Br. 53, this Court did not bless Jones' use of the 55% BVAP floor generally. Rather, it held that "[t]he record here supports the legislature's conclusion that [District 75] was

one instance where a 55% BVAP was necessary for black voters to have a functional working majority." *Bethune-Hill*, 137 S. Ct. at 802 (emphasis added).

The question, then, is whether a racial target tailored to the unique conditions of District 75 is somehow narrowly tailored to 11 other districts scattered around the state. Because Appellants "produced no evidence at either trial showing that the legislature engaged in an analysis of *any* kind to determine the percentage of black voters necessary to comply with Section 5 in the 11 remaining challenged districts," J.S.App.88, the Panel properly found the districts were not narrowly tailored, J.S.App.96. That conclusion was not clearly erroneous. *See Bethune-Hill*, 137 S. Ct. at 801.

Appellants now argue that Jones "conducted the same kind of 'functional analysis'" as to each Challenged District as he did in District 75. Br. 53. But this is flatly untrue "[u]nder the facts found by the District Court," *Bethune-Hill*, 137 S. Ct. at 801. The Panel instead found—based on its analysis of the record (J.S.App.88-90)—that Jones did *not* "undertake *any* individualized functional analysis in *any* of the 11 remaining challenged districts." J.S.App.96. Instead, even though "District 75 differed in important ways from many of the other challenged districts," Jones simply "assumed that the BVAP required in District 75 would be appropriate in all 12 challenged districts." J.S.App.90.

Appellants stretch the record to bolster their claims that, contrary to the Panel's findings, Delegate Jones conducted a functional analysis. For instance:

- Appellants assert that Jones "looked at the election results and the contested primaries for all members of the majority-minority districts."

Br. 54. But Jones admitted he did *not* compile recent election results from the Challenged Districts. J.S.App.88 (citing JA1920).

- Appellants assert that Jones "met extensively" with "virtually every member of the Black Caucus to get input." Br. 54. But "every member of the black caucus who testified stated that they never told Jones that a 55% BVAP was required in their districts." J.S.App.89. "In the face of these denials, Jones' testimony at the second trial was far more equivocal than the first." J.S.App.36.
- Similarly, Appellants point to an after-the-fact floor statement by one delegate regarding a plan that had already been proposed, which she explained at trial was based on *Jones'* representations to *her* about the necessity of a 55% BVAP floor. *Compare* Br. 10, 55 (citing JA346), *with* JA3072, 3078-79. As the delegate explained, the 55% BVAP rule was the "gospel" according to Jones. JA3096-97.
- Appellants recite vague concerns regarding registration and turnout among African-American voters. Br. 55. But Jones testified he did not examine any voter registration statistics or minority turnout rates in the Challenged Districts, with the exception of a single election in each of two districts. JA1929, 1931-33.
- Appellants cite Jones' testimony that "'no one was comfortable' using a bare majority-minority target in HD71." Br. 55. But Jones did not identify any actual person who told him this, JA1782, and District 71 incumbent Delegate McClellan expressed no such concerns, JA3019-20.

In short, Appellants' purported evidentiary basis for a "functional analysis" in any of the Challenged Districts is without support in either the record or the factual findings of the Panel.[12]

B. Appellants' Excuses For Failing To Perform A Functional Analysis Are Unavailing

At the same time Appellants try to scrape together evidence of a functional analysis in 11 different districts, Appellants offer a litany of excuses to justify the failure to perform any such analysis.

For instance, Appellants suggest the legislature did not have enough time to narrowly tailor its use of race in each of the Challenged Districts, complaining the House "had a mere six weeks" to engage in the "arduous task" of redistricting. Br. 53. Appellants can point to no authority suggesting that a legislature's burden to narrowly tailor its use of race is somehow lessened where it is pressed for time. On the contrary, where legislatures feel rushed, they are perhaps more likely to eschew their obligation to perform a functional analysis and rely on unsupported shortcuts like the across-the-board application of the 55% BVAP rule. Appellants, moreover, were no less rushed in drawing District 75 than they were in drawing the

[12] Notably, even though Appellants were well aware of the inescapable finding that District 75 was the origin of the 55% BVAP rule before the second trial, they do not cite a single piece of evidence from the second trial to support their assertion that the 55% rule was also narrowly tailored to the 11 other districts. Appellants specifically requested a second trial in part for the opportunity to supplement the existing record on the need for a 55% BVAP floor in the remaining districts. *See* ECF 146 at 8-9. Contrary to their expectations, the evidence did not support that proposition.

remaining Challenged Districts, yet that did not prevent them from performing a functional analysis there, nor did legislative time pressures factor into this Court's evaluation of narrow tailoring in that district. Contrary to Appellants' suggestion, time constraints do not justify racial gerrymanders.

Appellants further contend Jones could not have performed a proper functional analysis of the Challenged Districts "because the relevant data did not exist." Br. 59; *see also id*. 54 ("[T]he most reliable data for determining [what BVAP would avoid retrogression] with precision—*i.e.*, contested primary election data—simply did not exist.").

Appellants cite to no authority establishing that a proper analysis of racial voting patterns cannot be performed without the existence of one or more contested primaries. On the contrary, the Department of Justice, while cautioning that reliance on demographic or Census data alone is insufficient, has pointed to a variety of factors mapdrawers should consider in satisfying their §5 obligations, including "election history and voting patterns within the jurisdiction, voter registration and turnout information, and other similar information." *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice*, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011). The absence of contested primary election data does not excuse the application of a racial target unjustified by any evidence whatsoever.

As the Panel recognized, moreover, the data that *was* available to Jones provided no basis in evidence for an across-the-board 55% BVAP rule. Had Jones conducted an analysis of districts other than District 75, he would have learned that black-preferred "candidates were winning by large margins in all of the

challenged districts *except* District 75" prior to the 2011 redistricting. JA2765-66, 2807. Even a cursory review of election results in any district would have confirmed that a large number of white voters voted for black-preferred candidates. The significant cross-over voting across all Challenged Districts was readily apparent from the crushing margins of victory by black-preferred candidates far exceeding those districts' BVAP. *See* JA2807, 1445-1509. Indeed, even "[i]f all of the population needed in each underpopulated district were made up with White voters who unanimously voted against the African-American preferred candidates, the African-American preferred candidates would still win by large margins in every district except District 75." JA2765-66; *see also* JA2809.

Appellants complain that the statewide election data relied upon by Appellees' expert in assessing racially polarized voting "had little, if any, bearing" on whether minority voters would have the opportunity to elect their preferred candidates in the Challenged Districts. Br. 59. But Appellants themselves provided two expert reports relying on statewide election data. *See* JA2288-2312, 2321-43. Further, Appellees' expert demonstrated—and Appellants' experts did not dispute—that statewide elections in Virginia are, in fact, "highly correlated with" and "highly predictive of" House elections. JA2764, 3341; *see also* JA2787.

This Court should reject out of hand Appellants' startling claim that it is not possible for Virginia to conduct racial polarization analyses for House elections—the implication being that Virginia can redistrict based on race with impunity forever notwithstanding undisputed evidence that minority-preferred candidates consistently win by wide margins in the

Challenged Districts. As the Panel rightly observed, "[b]ecause it is the [Appellants'] burden to justify their predominant use of race, [Appellants] also are responsible for the state's failure to seek relevant information at the time of the redistricting that would support the legislature's race-based decision." J.S.App.95. To hold otherwise would allow Appellants and other map-drawers to "pack black voters into majority-minority districts in perpetuity, claiming ignorance of the fact that high BVAP concentrations were not necessary to comply with Section 5." *Id.*

Finally, Appellants repeat that "[t]he law cannot insist that a state legislature, when redistricting, determine *precisely* what percent minority population §5 demands." Br. 57 (quoting *Bethune-Hill*, 137 S. Ct. at 802). That is a red herring; the Panel below expressly did "not require that the legislature 'determine precisely what percent minority population § 5 demands.'" J.S.App.95 (quoting *Alabama*, 135 S. Ct. at 1273).

> Instead, we merely ask whether the legislature had "good reasons to believe" that its use of race was justified. Selecting a BVAP figure entirely without evidentiary foundation plainly does not satisfy this burden.

Id. (quoting *Alabama*, 135 S. Ct. at 1274). Appellants repeatedly assert that courts must not "ask too much from state officials charged with the sensitive duty of reapportioning legislative districts." Br. 22, 50, 57 (quoting *Bethune-Hill*, 137 S. Ct. at 802). But it is hardly asking too much of our legislators to ask them to do *something* when drawing districts on the basis of race.

* * *

This Court has stated the fundamental rule clearly and unambiguously: When race predominates, a State must come forward with a "strong basis in evidence" to justify its race-based decisions. *Alabama*, 135 S. Ct. at 1274. That rule ensures that States undertake a "meaningful legislative inquiry" before engaging in race-based redistricting, *Cooper*, 137 S. Ct. at 1471, and protects voters' fundamental right to be free from pernicious racial stereotypes. Here, Appellants advocate for a rule that would have the opposite result: the Challenged Districts should be immune to constitutional scrutiny, they argue, precisely because the mapdrawer chose not to conduct any meaningful analysis and simply assumed that all minority opportunity districts were similar enough to warrant the same rigid racial rule. Accepting that argument would stand this Court's VRA jurisprudence on its head.

CONCLUSION

Appellees respectfully submit that the appeal should be dismissed for lack of jurisdiction. In the alternative, the judgment of the District Court should be affirmed.

Respectfully submitted,

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

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

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

January 28, 2019