No. 14-518

IN THE

Supreme Court of the United States

ERIC CANTOR, ROBERT J. WITTMAN, BOB GOODLATTE, FRANK WOLF, RANDY J. FORBES, MORGAN GRIFFITH, SCOTT RIGELL & ROBERT HURT,

Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

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

MOTION TO DISMISS OR AFFIRM

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

MARC E. ELIAS
Counsel of Record
JOHN M. DEVANEY
ELISABETH C. FROST
PERKINS COIE LLP
700 Thirteenth Street, N.W.
Suite 600
Washington, D.C. 20005-3960
(202) 654-6200
MElias@perkinscoie.com

Counsel for Appellees Gloria Personhuballah & James Farkas

December 4, 2014

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

QUESTIONS PRESENTED

The questions presented are as follows:

1. Whether Appellants lack standing because none reside in or represent the only congressional district whose constitutionality is at issue in this case.
2. Whether the three-judge panel correctly found that Virginia's Third Congressional District is a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATEMENT

Virginia's Third Congressional District ("CD3") is a bizarrely shaped district that starts north of Richmond and slides down the northern shore of the James River, ending abruptly at the James City border. It then jumps over James City, which is part of CD1, and lands in a horseshoe shape in Newport News. It leaps over southern and eastern Newport News in CD2 and stops in Hampton. CD3's second half starts anew on the southern shore of the James River, darting west to swallow Petersburg and then sliding east through Surry. It hops over Isle of Wright, which is in CD4, covers Portsmouth, and runs up into Norfolk, tearing CD2 in two on either side of Norfolk. Pl. Ex. 48. As currently constituted, CD3 closely resembles the 1991 district deemed an unconstitutional racial gerrymander in *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va.), *aff'd*, 521 U.S. 1113 (1997). In a description that could easily apply today, that court described CD3's predecessor as "a grasping claw." *Id*. at 1147. Then, as now, "[e]very one of the [district's] fingers which reaches . . . into the divided cities, uses . . . barren stretches of river, or other dubious connectors . . . in an effort to reach the black populations which it excises from the various cities." *Id*.; Pl. Ex. 48.

Since 1991, CD3 has been represented by Congressman Bobby Scott, who has been consistently supported by the majority of African-American voters in the district. Nevertheless, in the 2012 redistricting, the Black Voting Age Population ("BVAP") in CD3 *increased*, creating a district in which Congressman Scott won his last election with 81.3% of the vote. J.S. App. 36a. This was achieved by purposefully moving high-density BVAP areas into CD3, while excluding

lower-density BVAP areas. *See* Pl. Ex. 28 at 6-7; Tr. 87:18-89:23, 397:13-403:13. All of this was done, the Plan's architect Delegate Bill Janis admits, to meet a strict racial threshold that was predetermined without *any* evidence that it was necessary to avoid retrogression or otherwise comply with the Voting Rights Act ("VRA"). Pl. Ex. 45 at 7.

Three Virginia voters residing in CD3 filed this action on October 2, 2013, challenging the constitutionality of CD3 as a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment. Compl. ¶ 1. Appellants, current and former Republican congressmen from Virginia, intervened as Defendants two months later. The case went to trial in May 2014, during which neither the State Defendants nor Appellants presented any witnesses in defense of the Plan, save Appellants' expert. On October 7, 2014, the three-judge panel (the "Panel") issued an opinion finding that CD3 was an unconstitutional racial gerrymander and providing the General Assembly the opportunity to enact a remedial map by April 1, 2015. J.S. App. 42a. The State Defendants have not filed an appeal.

In their jurisdictional statement, Appellants construct a brazen revisionist history of this litigation, based largely on their contention that CD3 is a partisan, rather than racial, gerrymander. But this flatly contradicts the evidentiary record, including Del. Janis's repeated and unequivocal statements that achieving a particular racial composition in CD3 was his "primary focus," of "paramount concern[]," and considered "nonnegotiable." Pl. Ex. 43 at 10, 25. Moreover, the map-drawer denied that the unique features of CD3 were the result of a partisan purpose, stating without qualification: "I haven't looked at the

partisan performance. It was not one of the factors that I considered in the drawing of the district." Int.-Def. Ex. 9 at 14. Nevertheless, Appellants persist that this Court should reverse the Panel's decision based on little more than Appellants' *ipse dixit* that CD3 was really a partisan gerrymander. The Court should decline to do so for several reasons.

First, Appellants lack standing to pursue this appeal: none are representatives or claim to be residents of CD3, which is the only congressional district whose constitutionality is at issue. Any claim that they will be injured if Virginia's Republican-controlled General Assembly redraws CD3 is speculative at best.

But even if the Court were to find that it has jurisdiction, the appeal fails to raise a substantial federal question. Appellants' jurisdictional statement is rife with serious legal errors and misstatements about the record. The standard for a racial gerrymandering claim is well established. Plaintiffs bear the burden of proving race was the "predominant factor" motivating the districting decision in question. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). The burden then shifts to defendants to satisfy strict scrutiny. *Bush v. Vera*, 517 U.S. 952, 976 (1996). From the outset, Appellants attempt to rewrite this standard, arguing plaintiffs must show an "improper" consideration of race. J.S. 17, 24 n.1.[1] This is not the law. Rather, it is clear that plaintiffs may meet their burden of showing that race predominated where

[1] Based on this invented standard, Appellants conceded below that "compliance with Section 5 [of the VRA] was the General Assembly's predominant purpose . . . underlying District 3's racial composition in 2012." Int. Def. Mem. Supp. Summ. J. 15; *see also* J.S. App. 16a.

race-based districting decisions were made in the belief that they were necessary to comply with the VRA. *See*, *e.g.*, *Shaw v. Hunt*, 517 U.S. 899, 904-05 (1996) ("*Shaw II*").

The record is replete with evidence that race in fact predominated in drawing CD3. In addition to Del. Janis's statements discussed above, other legislators repeatedly indicated CD3 was drawn to meet a 55% BVAP floor, a blanket threshold corroborated by Virginia's Section 5 submission to the Department of Justice ("DOJ") and *even Appellants' own expert*. The district's bizarre shape, disregard of traditional redistricting criteria, and demographic characteristics only confirm what is demonstrated directly by the legislative record.

Given the enormity of the evidence against them, Appellants conjure a supposed legal error, arguing that *Easley v. Cromartie*, 532 U.S. 234 (2001), required Appellees to proffer an alternative map that precisely matched the 8-3 partisan distribution of the Enacted Plan. Given the complete dearth of evidence that the General Assembly drew CD3 to maintain this partisan balance, this argument is implausible on its face. It also misapplies *Easley*, which considered what evidence might be sufficient when a racial gerrymandering claim relies primarily on *circumstantial* evidence. Nowhere does *Easley* require a court to ignore unambiguous, direct evidence of a racial gerrymander.

Appellants' argument that the Panel misapplied the narrow tailoring requirement is equally flawed. Try as they might, Appellants cannot will away the fact that the General Assembly engaged in no analysis whatsoever to determine what was "reasonably

necessary to avoid retrogression" in CD3. *Shaw v. Reno*, 509 U.S. 630, 655 (1993) ("*Shaw I*").

For all of these reasons, the Court should dismiss this appeal or, in the alternative, summarily affirm the decision of the Panel below.

ARGUMENT

I. APPELLANTS LACK STANDING

The Court lacks jurisdiction to hear this appeal because Appellants lack standing to pursue it. Under Article III of the Constitution, federal courts have jurisdiction only over "cases" or "controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). This requirement is "an essential limit" to the federal judiciary's power, "ensur[ing] that [courts] act *as judges*, and do not engage in policymaking properly left to elected representatives." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013). "For there to be such a case or controversy, it is not enough that the party invoking the power of the court have a keen interest in the issue. That party must also have 'standing,' which requires, among other things, that it have suffered a concrete and particularized injury." *Id.*; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Court has "always insisted on strict compliance with this jurisdictional standing requirement," *Raines*, 521 U.S. at 819, which must be present at every stage of the litigation, including by "'persons seeking appellate review.'" *Hollingsworth*, 133 S. Ct. at 2661 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)).

Appellants are eight Republican politicians who, at the time of their intervention, were members of Virginia's congressional delegation. The lead Appellant, Eric Cantor, represented CD7, but was defeated in the

June 2014 primary, and resigned his seat two months later. The other Appellants represent the following districts: Robert J. Wittman–CD1; Bob Goodlatte–CD6; Frank Wolf–CD10; Randy J. Forbes–CD4; Morgan Griffith–CD9; Scott Rigell–CD2; Robert Hurt–CD5.

None of the Appellants reside in or represent CD3, the only district whose constitutionality is at issue here. Nor do Appellants have legal authority for redistricting or the conduct of elections in Virginia—those jobs belong to the state's General Assembly and Board of Elections, respectively, and the state's attorney has not sought review of the decision below. Thus, Appellants have not suffered any "direct injury" as a result of the Panel's decision, which "ha[s] not ordered [Appellants] to do or refrain from doing anything," and nothing in the record supports finding that Appellants may assert a judicially cognizable interest on the state's behalf. *Hollingsworth*, 133 S. Ct. at 2662, 2663-64.

The only injury Appellants can claim is wholly speculative—*i.e.*, that when the General Assembly remediates the racial gerrymander in CD3, Appellants' interests in Virginia's *other* congressional districts may suffer. Appellant Cantor, obviously, no longer has any such interest, having lost re-election and resigned his seat. Appellant Wolf, moreover, did not seek re-election in November and, as of January 2015, will no longer be a member of Congress. But the remaining Appellants have no more grounds to pursue this appeal. The possibility that a remedy would impair their interests is entirely speculative, and all the more so for those whose districts do not even border CD3. Indeed, both chambers of the General Assembly are controlled by a Republican majority; it is just as probable, if not more so, that a remedy will be in Appellants' political favor, rather than to their detriment.

The Court has found, under analogous circumstances, that voters who "do not live in the district that is the primary focus" in a racial gerrymandering case lack standing. *United States v. Hays*, 515 U.S. 737, 739 (1995). Applying this precedent, *Johnson v. Mortham*, 915 F. Supp. 1529, 1538 (N.D. Fla. 1995), found that congressional representatives who do not represent the district that is the subject of a *Shaw* challenge "have no more than a generalized interest in [the] litigation, since . . . the possibility of a remedy that would impair their interests in their congressional seats is no more than speculative." This case is no different, and Appellants' attempt to invoke the Court's jurisdiction should be rejected.

II. RACE WAS THE PREDOMINANT FACTOR IN DRAWING CD3

Despite Appellants' attempt to avoid the unambiguous evidence in the record, there can be no reasonable dispute that Appellees satisfied their burden of showing that CD3 was predominantly driven by race.

A. Del. Janis's Statements

Appellants gloss over—and sometimes affirmatively misstate—the record, repeatedly characterizing as "undisputed" conclusions that are directly refuted by the evidence. *See*, *e.g.*, J.S. 7, 13. Perhaps most glaring is Appellants' distortion of select statements of the Plan's sole author, Del. Janis, from which Appellants wildly extrapolate to claim that politics was the driving force behind CD3.[2] This conclusion is directly

[2] Appellants do not dispute that Del. Janis was the Plan's sole author and the most knowledgeable about its purpose. Del. Janis explained to the House of Delegates (the "House") that "this is my

contradicted by multiple explicit statements by Del. Janis that his primary purpose was to maintain a certain BVAP in CD3 in perceived service of the VRA. When HB5004, which would become the Enacted Plan, was up for its first vote in the House, Del. Janis explained that the two most important criteria he employed in drawing the Plan were adhering to the one-person, one-vote mandate of the Constitution and ensuring that CD3 had a certain racial composition, pointedly emphasizing that "there be no retrogression in minority voter influence" in the district. Pl. Ex. 43 at 3; *see also* Pl. Ex. 13 at 9.

Del. Janis left no doubt about the predominant role of race in his decision-making. In his opening pronouncement about the Plan on the House floor, he stated that "one of the *paramount concerns* in . . . drafting . . . was the constitutional and federal law mandate under the [VRA] that we not retrogress minority voting influence in [CD3]." Pl. Ex. 43 at 10 (emphasis added). He further emphasized the attention he had paid to race, explaining that, "I was *most especially focused* on making sure that [CD3] did not retrogress in its minority voting influence," *id*. at 14 (emphasis added); that "the *primary focus* of how the lines in HB5004 were drawn was to ensure that there be no retrogression [of Black voters] in [CD3]," *id*. (emphasis added); and that he considered this factor "nonnegotiable," *id*. at 25.

---

legislation. I looked at this legislation. I looked at the data." Pl. Ex. 43 at 14. Even the attorney for the House Republican Caucus remarked that Del. Janis was responsible for the Plan, describing him as "pretty Lone Ranger on this one." Pl. Ex. 53. As the Plan's sole author, Del. Janis's explanation of its purpose provides uniquely persuasive evidence that race predominated in drawing CD3.

In explaining how he drew CD3, Del. Janis explained that he simply looked at the BVAP numbers "to ensure that the new lines that were drawn for [CD3] would not retrogress in the sense that they would not have less percentage of [BVAP] under the proposed lines in 5004 than exist under the current lines." *Id*. at 10, 12-13; *see also* Pl. Ex. 13 at 8. In sum, Del. Janis repeatedly stated that his goal was to maintain a certain racial composition for CD3 and emphasized that he ensured that result by looking exclusively at racial data.

These are precisely the kinds of statements this Court has found compelling evidence that race predominated in a districting decision. In *Shaw II*, for example, the Court "'fail[ed] to see how the District Court could have reached any conclusion other than that race was the predominant factor'" based largely on strikingly similar statements. 517 U.S. at 906 (quoting *Miller*, 515 U.S. at 918). North Carolina's Section 5 submission stated that the plan's "*overriding* purpose was to comply with the dictates of the Attorney General[] . . . and to create two congressional districts with effective black voting majorities." *Id*. "This admission was confirmed by . . . the plan's principal draftsman, who testified that creating two majority-black districts was the 'principal reason' for Districts 1 and 12." *Id*. Notably, the fact that the plan was driven by the perceived need to comply with the VRA did not mitigate the Court's conclusion that race was the predominant factor. *Id*. at 904-05 (laws classifying citizens primarily on the basis of race are constitutionally suspect, "whether or not the reason for the racial classification is benign [or] the purpose [is] remedial"); *see also Shaw I*, 509 U.S. at 666 (White, J., dissenting) ("The State has made no mystery of its intent, which was to respond to the Attorney General's

objections by improving the minority group's prospects of electing a candidate of its choice"); *Miller*, 500 U.S. at 918 (finding race as predominant purpose where "the General Assembly . . . was driven by its overriding desire to comply with [DOJ's] maximization demands").

Similarly, in holding that there was "substantial direct evidence of the legislature's racial motivations" in *Bush*, 517 U.S. at 960, the Court relied on evidence similar to that at issue here. First, Texas's Section 5 submission stated that certain congressional districts "should be configured in such a way as to allow members of racial, ethnic, and language minorities to elect Congressional representatives." *Id*. (internal quotation marks and citation omitted). Second, the litigants conceded that the districts "were created for the purpose of enhancing the opportunity of minority voters to elect minority representatives." *Id*. at 961 (internal quotation marks and citation omitted). Finally, legislators testified that the decision to draw majority-minority districts "was made at the outset of the process and never seriously questioned." *Id*.

Unable to point to any direct evidence to refute Del. Janis's assertions, Appellants dismiss them as a "routine acknowledgement of the Supremacy Clause." J.S. 21. But Del. Janis's statements communicate far more than legal platitudes. They are precisely the type of statements this Court has repeatedly found decisive evidence that race predominated.

And Del. Janis did not stop there; not only did he expressly prioritize race, he also specifically disavowed any consideration of partisan performance. When asked whether he had "any knowledge as to how this plan improves the partisan performance of those incumbents in their own district[s]," Del. Janis

answered unequivocally: "*I haven't looked at the partisan performance. It was not one of the factors that I considered in the drawing of the district*." Int.-Def. Ex. 9 at 14 (emphasis added). This is entirely consistent with his description of his redistricting criteria, which never once mentioned partisan performance. *See* Pl. Ex. 43 at 3-7, 18-20.

Appellants elide over this unqualified admission by the Plan's sole author, going so far as to suggest that Del. Janis's "overriding objective" was to advance partisan objectives. J.S. 19. The record, however, does not begin to support this assertion.

Appellants first point to the legislative record to contend that Del. Janis's "overriding objective was 'to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 election,' when voters elected 8 Republicans and 3 Democrats (as opposed to the 5-6 split resulting in 2008)." *Id*. The term "overriding objective," however, is found *not* in the legislative record, but only Appellants' characterization. The record itself reveals that "respect[ing] . . . the will of the Virginia electorate" came "*[t]hird*" among Del. Janis's redistricting considerations, after non-retrogression and population equality. Pl. Ex. 43 at 3-4 (emphasis added); *see also id*. at 19 ("[T]he third criteria that we tried to apply was, to the greatest degree possible, we tried to respect the will of the Virginia electorate as it was expressed in the November 2010 congressional elections."). Where Appellants tout this statement as "a display of candor rarely seen among legislators engaging in redistricting," J.S. 19, their own distortion of the legislative record is all the more conspicuous. To the extent this statement reflects a partisan motive, the

fact that the Plan's author explicitly subordinated it to race definitively disproves that politics predominated the redistricting process.

Also absent from the record is any reference to the 8-3 partisan split Appellants contend was the driving force behind the Plan. Del. Janis spelled out precisely how he applied the "will of the Virginia electorate": "[W]hat that meant was we based the territory of each of these districts on the core of the existing congressional districts" in an attempt to make a "minimal amount of change or disruption to the current boundary lines." Pl. Ex. 43 at 4, 19. Indeed, because the "current boundary lines" were the same in 2008 and 2010, when they generated different partisan divides, Appellants' suggestion that Del. Janis sought to achieve a certain partisan balance falls flat. Moreover, as discussed *infra*, the Plan's removal of over 180,000 people from their existing districts to increase the population of CD3 by 63,976, Tr. 87:7-17, only demonstrates that, as promised, Del. Janis's interest in core preservation gave way to his concerted effort to maintain a specific racial composition in CD3.[3]

Extrapolating from Del. Janis's statement that "[w]e respected the will of the electorate by not placing . . . two congressmen in a district together," and by not "draw[ing] a congressman out of his existing district," Pl. Ex. 43 at 19-20, Appellants contend that the map-drawer sought to maintain Republican advantage and boost Republican performance. But Del. Janis was precise in his statement of intent: although he sought

[3] *See also Easley v. Cromartie*, 532 U.S. 234, 251 (2001) ("Nor do we see why 'core' makeup alone could help the court discern the relevant legislative motive. Nothing here suggests that only 'core' makeup could answer the 'political/racial' question that this Court previously found critical.").

to avoid pitting incumbents against one another, this, too, was only *after* he established a certain racial composition in CD3. Taken together, Del. Janis's statements support only one conclusion: partisan performance was disavowed as a factor altogether, and to the extent politics was considered, it was decidedly secondary to race.

In the face of these unambiguous statements, Appellants inexplicably contend that incumbent congressmen "effectively drew their own districts." J.S. 20. This assertion, however, contradicts both Del. Janis's testimony and Appellants' own assertions on the record. Del. Janis clearly stated that he spoke with congressmen only to seek their input about *communities of interest*. Pl. Ex. 43 at 20 ("[W]e also tried not to split local communities of interest based on the recommendations we received from the current members of the congressional delegation."); *id*. at 26 ("[W]hen looking for input as to how to best preserve local communities of interest . . . it was relevant and it was reasonable to seek input and recommendations from those current congressmen."); Int.-Def. Ex. 9 at 8 ("We tried to get input from them as to how best to draw the boundaries in order to preserve the local communities of interest within their district."). Del. Janis never even implied, much less stated, that congressmen drew their own districts.

In fact, Del. Janis only considered "the permissive criteria [] based on recommendations received from each of the 11 currently elected congressmen, both Republican and Democrat, about how best to preserve local communities of interest" *after* considering the "mandatory" criterion of non-retrogression. Pl. Ex. 43 at 19, 22-23. Indeed, Appellants acknowledge that the

Plan was only drawn "'in part'" on the congressmen's suggestions. J.S. 19 (quoting Int.-Def. Ex. 9 at 8).

Appellants' discovery responses, moreover, confirmed that their contributions to the Plan were minimal at best. The four congressmen who represented the districts surrounding CD3, and who would have benefitted most from packing Black voters into CD3 under Appellants' theory, had almost *no* input into Del. Janis's map. Rep. Wittman (CD1) never spoke to Del. Janis about redistricting, attended only one meeting about redistricting, which Del. Janis did not attend, and had no draft maps or redistricting-related communications in his possession. Pl. Ex. 39. Rep. Forbes (CD4) did not provide any feedback on the Enacted Plan when Del. Janis asked for it, never attended any meetings related to redistricting, and had no draft maps or communications with General Assembly members or staff about redistricting. Pl. Ex. 34. Certified discovery responses from Rep. Rigell (CD2) and Rep. Cantor (CD7) similarly attest that the congressmen had little to no input in the Enacted Plan. Pl. Exs. 33, 38. Appellants can hardly disclaim involvement during discovery and then proclaim usurpation of the redistricting process on appeal.

Remarkably, Appellants assert "all of the direct evidence is that both parties stated the Enacted Plan was motivated by politics and incumbency protection, and there is *none* suggesting that race was predominant." J.S. 23-24. The record, in fact, demonstrates precisely the opposite. Del. Janis could not have been clearer in his prioritization of race over all other criteria, including politics. As the Panel properly

found, the direct evidence easily establishes that race was the predominant purpose behind CD3.[4]

B. BVAP Threshold

In addition to Del. Janis's repeated statements that racial considerations predominated above all others, the Panel found it persuasive that the General Assembly used a "[r]acial [t]hreshold [a]s the [m]eans to [a]chieve Section 5 [c]ompliance," J.S. App. 17a, and for good reason. This Court has time and again treated "rigid racial quota[s]" with the highest skepticism. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989). Thus, districts that are "unexplainable on grounds other than the racial quotas established for those districts . . . are the product of presumptively unconstitutional racial gerrymandering." *Bush*, 517 U.S. at 976 (internal quotation marks, alteration, and citation omitted).

The Panel's conclusion that the General Assembly applied a racial threshold in creating CD3 was consistent not only with the legislative record and Virginia's Section 5 submission, but with *Appellants'* own expert analysis in this case.

First, when the General Assembly considered the Plan, Senator Jill Vogel argued that a 55% BVAP floor was necessary to comply with Section 5: "[W]hen it

---

[4] Appellants rely extensively on the statements of "contemporaneous commentators" to the redistricting process, J.S. 13, 20, 26, including an article written by Appellees' expert prior to his engagement in this case and statements by the Plan's opponents. Even Appellants cannot argue that these "commentaries" trump the unequivocal statements of the Plan's sole author. To find otherwise would suggest that the Court look to, for example, news stories "commenting" on legislation, instead of the legislative record, as evidence of legislative intent.

came to Section 5—I just want to be very clear about this—that we believed that that was not really a question that was subject to debate. The lowest amount of African Americans in any district that has been precleared by [DOJ] is 55.0." Int.-Def. Ex. 32 at 18. She further explained, "[w]e were just simply following what, I believe, is not subject to any question; that is, as of today, the lowest percentage that [DOJ] has ever approved is 55.0." *Id*. at 20.[5] Indeed, when asked on the House floor whether he had "any empirical evidence whatsoever that 55 percent African-American voting population is different than 51 percent or 50," or whether the 55% threshold was "just a number that has been pulled out of thin air," Del. Janis justified the use of a 55% BVAP floor as "weighing a certainty against an uncertainty." Pl. Ex. 45 at 7.

Second, Virginia's Section 5 submission consistently uses a 55% BVAP threshold to explain the Plan's impact on racial minorities. Describing the BVAP increase in CD3, the submission states that "both total and voting age populations are increased to over 55 percent." Pl. Ex. 6 at 2. It repeats this threshold number *three more times*, once for each of the legislature's other proposed plans. *Id*. at 3, 4.

Third, Appellants' own expert explained that the General Assembly adopted a 55% BVAP floor to avoid Section 5 liability. Mr. Morgan wrote that the General Assembly "found [the 55% BVAP floor] appropriate to comply with Section 5 for House [majority-minority] Districts." Int.-Def. Ex. 13 at 26-27. He found that

---

[5] As explained *infra*, in fact DOJ has frequently precleared districts with a BVAP below 55%, including prior versions of CD3 and all majority-minority districts in Virginia's 2011 senate plan.

"the General Assembly . . . had ample reason to believe that legislators of both parties, including black legislators, viewed the 55% black VAP . . . as appropriate to obtain Section 5 preclearance, even if it meant raising the Black VAP above the levels in the benchmark plan." *Id*. The General Assembly then "acted in accordance with that view for the congressional districts and adopted the Enacted Plan with the [CD3] Black VAP at 56.3%." *Id*. at 27; *see also* Tr. 351:20-352:19.

Incredibly, Appellants dismiss the notion of a racial threshold in a single footnote. J.S. 24 n.1. Yet Appellants embraced these legislative facts and Mr. Morgan's conclusions in their trial brief. *See* Def. Tr. Br. 26 (arguing "the General Assembly had 'a strong basis in evidence' to believe that Section 5 prohibited reducing [CD3's] BVAP below the benchmark level, and that 55% BVAP was a reasonable level for preserving the ability to elect," and it "acted accordingly when it adopted the Enacted Plan with 56.3% BVAP in [CD3]"). Appellants also quoted the legislative record showing that delegates demanded a 55% threshold. *Id*. at 25-26 (Del. Dance "advocated a 55% minimum BVAP for majority-black districts," stating in a public hearing "'*at least 55 percent performing*' was necessary to preserve black voters' ability to elect in House districts") (quoting Int.-Def. Ex. 30 at 13). And even after trial, Appellants argued that "[t]he General Assembly . . . had evidence that 55% BVAP was a reasonable threshold for obtaining . . . Section 5 preclearance," advancing the same evidence in support of such a threshold. Def. Post-Tr. Br. 32.

Of course, there is no justification for this 55% BVAP threshold. No one conducted a racial bloc voting

analysis to determine the number of Black voters needed to preserve their voting strength in CD3. Tr. 98:16-20, 99:3-6, 328:10-12, 354:18-23; Pl. Ex. 42, 43 at 15. The General Assembly's single-minded adherence to a racial threshold, adopted without any analysis of racial voting patterns or any basis whatsoever in fact, not only establishes that race was the Plan's predominant purpose, but also negates any argument that Appellants could satisfy strict scrutiny.

Appellants fail altogether to grapple with the evidence they themselves put forward at trial, inexplicably asserting, "there was no quota in the Enacted Plan." J.S. 38. But Appellants' newfound denial cannot erase the evidence in the record supporting the Panel's conclusion that race predominated.

C. Senate Criteria

The Virginia Senate's list of redistricting criteria, Pl. Ex. 5, confirms the racial purpose behind CD3. Below, Appellants argued that the "Senate Criteria identify the standards applied by the General Assembly in drawing new congressional districts in 2012," touting their "utility and credibility for assessing the Enacted Plan adopted by a Republican-controlled General Assembly in 2012." Def. Tr. Br. at 5, 18. Appellants' expert at trial confirmed, "the Senate Criteria treated compliance with the [VRA], including compliance with protections against unwarranted retrogression or dilution of racial or ethnic minority voting strength *as the highest priority* for the Enacted Plan after compliance with the constitutional equal protection guarantees." Tr. 332:23-333:5 (emphasis added); Int.-Def. Ex. 13 at 25.

Now, Appellants retreat from their reliance on the Criteria as a "preexisting 'framework' against which to judge the Enacted Plan," Def. Tr. Br. 18; *see also* J.S. 7a. Appellants' change of heart is understandable, as the Criteria provide further evidence that race predominated, listing, in order, the considerations for drawing the Plan: (1) population equality, (2) VRA, (3) contiguity and compactness, (4) single-member districts, and (5) communities of interest. Pl. Ex. 5 at 1. The Criteria explicitly state that the first two principles should be given priority in the event of any conflict. *Id*. at 2. Thus, the General Assembly's "highest priority for the Enacted Plan" after compliance with the one-person, one-vote mandate was ensuring a certain racial composition for CD3. Tr. 332-33.

D. Traditional Redistricting Principles

The General Assembly plainly subordinated traditional redistricting criteria, such as compactness, contiguity, and respect for political subdivisions, to racial considerations in crafting CD3. Nevertheless, Appellants argue that the Panel "conjur[ed]" these principles to find that race predominated. J.S. 30. It is Appellants, however, who search in vain for a magic wand to wave away the plain facts about the shape and configuration of the district.

The focus on race is evident in the shape of CD3. "[R]eapportionment is one area in which appearances do matter," *Shaw I*, 509 U.S. at 647, and a district's "bizarre" or "irregular" shape shows that racial considerations predominated, *see Miller*, 515 U.S. at 914. Districts that connect disparate communities by narrowly complying with contiguity requirements are often probative of a racial purpose. *See id*. at 917

(narrow land bridges that connected areas with high concentrations of Black residents showed that race was the predominant purpose); *Shaw II*, 517 U.S. at 903, 905-06 (district that snaked along freeway collecting areas with Black residents was evidence of racial purpose); *Moon*, 952 F. Supp. at 1147 (CD3 had bizarre shape indicating racial purpose).

Indeed, by every measure used in Virginia's Section 5 submission, CD5 is Virginia's least compact congressional district. Pl. Ex. 27 at 7; Pl. Ex. 4 at 10; Tr. 375:3-24. *See Shaw II*, 517 U.S. at 905-06 (race predominated where district's shape was "highly irregular and geographically non-compact"). This is no surprise given Del. Janis's admission that he did not consider compactness when drawing CD3, "didn't examine compactness scores," and was "not competent to offer an opinion about the relative compactness" of districts or plans. Pl. Ex. 14 at 8.

Appellants hardly dispute the objective flaws in CD3's shape. Instead, they contend that these flaws were inherited from the Benchmark district, "whose compactness had *never* been challenged." J.S. 30. But the lack of a judicial challenge to the Benchmark hardly exonerates CD3. Even if Benchmark CD3 had received a judicial seal of approval, it would have little bearing on the current case. Enacted CD3 exacerbated the district's problems in ways that echo the version deemed unconstitutional in *Moon*, for instance, by engulfing Petersburg and further splitting Norfolk. Appellants' attempt to dismiss the relevance of CD3's non-compact shape by asserting there is no "professional standard" for judging compactness, J.S. 31, would undermine both this Court's precedent, *Shaw I*, 509 U.S. at 647, and the requirements of the Virginia Constitution, Va. Const. art. II, § 6 ("Every

electoral district shall be composed of contiguous and compact territory.").

CD3 further stretches the limits of contiguity. Although the Panel found CD3 "legally contiguous" because Virginia law allows waterways to connect parts of districts, it recognized that CD3's tenuous use of water contiguity to bypass white communities and connect largely Black populations in Norfolk, Newport News, and Hampton "contributes to the overall conclusion that the district's boundaries were drawn with a focus on race." J.S. App. 22a-23a. CD3's adherence to the letter of the law in Virginia is of no moment where its manipulation of the contiguity requirement raises serious questions under the Fourteenth Amendment.

CD3 also splits more counties and cities—nine splits in all—than any other congressional district in Virginia and contributes to most of the splits of its neighboring districts. The district with the second highest number is CD1, with only five splits, two of which are due to CD1's boundary with CD3. Pl. Ex. 27 at 8-9; Tr. 76:10-79:3. CD3 also splits more voting precincts than any of Virginia's other congressional districts. Tr. 78:17-19. The Plan splits 20 voting precincts in all, of which CD3 participates in 14. Pl. Ex. 27 at 8-9.

Appellants' contention that protecting district cores explains CD3's composition grossly inflates core preservation's role. As noted, Del. Janis rank-ordered core preservation *third* after racial composition; indeed, the allegedly "preferred" principle of core preservation appears nowhere in the Senate Criteria that Appellants previously argued provides "a preexisting 'framework' against which to judge the Enacted Plan." Def. Tr. Br. 18. To the extent the

General Assembly considered district cores, it did little to respect them. CD3, for example, needed 63,976 additional residents to meet the ideal population, but instead of just adding people, the General Assembly first *removed* 58,782 residents from the District. Tr. 80:22-81:12. Indeed, the General Assembly removed over 180,000 people from their existing districts simply to increase the population of CD3 by 63,976. Tr. 87:7-17. This massive dissection of district populations, largely removing White voters so that Black voters could be added to CD3, demonstrates that preserving cores hardly trumped race as a consideration.

E. Voting Tabulation Districts ("VTDs")

The Panel was further persuaded that race predominated based on undisputed evidence provided by Appellees' expert Dr. McDonald that, among the high-performing Democratic VTDs that could have been placed within CD3, the General Assembly chose to include those with significantly higher BVAPs. J.S. App. 31a. Appellants mischaracterize Dr. McDonald's testimony, asserting that he "conceded" politics predominated, and that his VTD analysis "reveals a *political* pattern no different from their *racial* pattern." J.S. 32, 33. But saying it does not make it so, particularly where the record proves otherwise.

Dr. McDonald never testified that politics predominated, and his "concession" that packing Black residents into CD3 helped Republicans is hardly noteworthy, and in fact reveals a fundamental flaw in Appellants' legal theory. Just because a districting plan benefits a certain group does not mean the plan was drawn primarily for that purpose. Indeed, Appellants' expert made the equivalent "concession"

that the Plan's impact was consistent with race as the predominant factor behind CD3. Tr. at 357.

Based on all of the evidence, Dr. McDonald concluded that race, and not politics, explains CD3. In particular, Dr. McDonald analyzed VTDs in CD3 and adjacent localities that were strongly Democratic and showed that VTDs with higher BVAPs were included in CD3 while VTDs with lower BVAPs were not. Pl. Ex. 28 at 6-7; Tr. 87:18-89:23, 397:13-403:13. Dr. McDonald found that the difference in BVAP between those high-performing Democratic VTDs *dropped* from CD3 and those included in the District (36 percentage points) was much larger than the difference in Democratic performance (only 19.2 percentage points). Tr. 373:8-10; Int. Def. Ex. 50; Pl. Ex. 57. Appellants' assertion that the political effect of the VTD swaps is identical to their racial effect is simply not accurate.

III. THE PANEL PROPERLY APPLIED *EASLEY*

To distract from the overwhelming evidence that race predominated in drawing CD3, Appellants conjure a legal error, arguing that the Panel failed to properly apply *Easley v. Cromartie*, 532 U.S. 234 (2001). J.S. 8, 24. Appellants' argument misunderstands *Easley* and proposes a new standard that would require the Court to disregard entirely the mountain of evidence of race-based redistricting established above. Unlike in *Easley*, the evidence here leads to only one conclusion: race predominated over politics in the drawing of CD3.

A. The Panel Found that Race Predominated over Politics

Appellants' contention that the Panel "fail[ed] to make the required finding" under *Easley* "that race rather than politics predominated in District 3," J.S. i, hardly warrants a response. The opinion could not have been clearer, stating in no uncertain terms: "Plaintiffs have shown race predominated." J.S. App. 12a; *see also id*. at 32a (describing strict scrutiny analysis in light of "[t]he fact that race predominated when the legislature devised Virginia's Third Congressional District in 2012"); *id*. at 42a ("Plaintiffs have shown that race predominated in Virginia's 2012 Plan[.]"). The opinion repeats the same conclusion in multiple different ways. For instance, in "conclud[ing] that compliance with Section 5 of the VRA . . ., and accordingly, race, 'was the [legislature's] predominant purpose,'" *id*. at 4a, it cites Appellants' concession to that effect. It credits Del. Janis's explicit statements of race as the predominant purpose, "deem[ing] it appropriate to accept the explanation of the legislation's author as to its purpose." *Id*. at 20a. And it further examines the host of circumstantial evidence to support "the overall conclusion that the district's boundaries were drawn with a focus on race." *Id*. at 23a. Appellants' suggestion that a finding that "race predominated" permits the possibility that "some other factor instead of race predominated" defies both the plain language of the opinion and common sense.

In any event, the opinion devotes an entire section to its conclusion regarding the "Predominance of Race over Politics." *Id*. at 27a. It specifically finds that Appellants' "post-hoc political justifications" have no support in the direct or circumstantial evidence, *id*. at 29a, and determines that "it is clear" that respecting

the will of the Virginia electorate was "subordinate" to compliance with the VRA, *id*. at 30a. It concludes that the State's "explicit and repeated admissions of the predominance of race . . . when taken together with the circumstantial evidence of record, compel our conclusion that race was the legislature's paramount concern." *Id*. at 32a (internal quotation marks and citation omitted).

B. *Easley*'s Circumstantial Evidence Requirement Is Inapplicable

Hoping to divert the Court's attention from the record evidence, Appellants attempt to put Appellees' alternative map on trial. Appellants would have the Court believe that every racial gerrymandering claim rises and falls on the plaintiffs' alternative plan, regardless of any other evidence of racial purpose. Specifically, Appellants contend that, under *Easley*, racial gerrymandering plaintiffs must proffer an alternative plan that "achieves the General Assembly's political goals," J.S. i, which in this case Appellants allege followed "a clear 8-3 incumbency protection purpose," *id*. at 25. As explained *supra*, Appellants' contention that the Plan was drawn to create an 8-3 distribution is pure fiction through which Appellants improperly project *their own* "overriding" political objectives onto the legislative map-drawer.

This Court's precedent is clear that neither the parties nor the fact-finder are required to consider only circumstantial evidence in racial gerrymandering cases. *Miller*, 515 U.S. at 916 ("The plaintiff's burden is to show, *either* through circumstantial evidence . . . *or* more direct evidence going to legislative purpose, that race was the predominant factor motiving the legislature's decision to place a significant number of voters within or without a particular district.")

(emphasis added). As in any other case, when credible direct evidence of intent is available, it is more than reasonable for the court to base findings on it. In *Easley*, however, there was little direct evidence of intent, requiring the parties and the court to make their arguments and findings based on circumstantial evidence.

Thus, in finding that race predominated, the *Easley* district court relied primarily on expert analysis based on voter registration, the "unreliable" testimony of the defendants' expert, a legislator's "allu[sion] at the time of redistricting to a need for 'racial and partisan' balance," and an email reporting that a senator had "moved Greensboro Black community into the 12th." 532 U.S. at 241 (internal quotation marks and citation omitted). This Court reversed, holding that, on the largely circumstantial record, the plaintiffs had "not successfully shown that race, rather than politics, predominantly accounts for" the resulting map. *Id*. at 257. While the Court found that one email offered some "'direct' evidence" in support of the lower court's conclusion, it found it "less persuasive than the kinds of direct evidence we have found significant in other redistricting cases." *Id*. at 254. That kind of direct evidence is discussed at length *supra*, and is precisely the type of evidence upon which the Panel in this case relied.

In other words, this case is plainly distinguishable from *Easley*, in which the Court concluded its analysis by stating that "*[i]n a case such as this one*," plaintiffs "must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles." *Id*. at 258 (emphasis added). Appellants read far too much into

this passage, suggesting that it renders moot the previous twenty pages of the opinion. Such a reading is untenable. *Easley*'s approach necessarily applies where the Court must rely primarily on circumstantial evidence to approximate whether racial or political objectives drove the redistricting process. Where the *Easley* plaintiffs had presented little to no direct evidence that race was the predominant factor, the Court accordingly required an alternative plan as additional circumstantial proof.

Here, by contrast, Appellees presented the affirmative and unequivocal statements of the Plan's sole map-drawer that race predominated over politics, together with a plethora of supporting evidence. Where the map-drawer has unambiguously *rank-ordered* his redistricting criteria, expressly prioritizing CD3's racial composition over core preservation and incumbency protection, and *disavowed* consideration of political performance, no alternative map is required to retroactively disentangle racial and political motives. In light of the direct evidence available here, *Easley*'s circumstantial evidence requirement does not apply.

The Panel properly found as much, noting that compared to *Easley*, which included legislators as defendants, first-hand accounts of the plan's political purpose, and "overwhelming evidence in the record 'articulat[ing] a legitimate political explanation for [the state's] districting decision,'" Appellants' "post-hoc political justifications for the 2012 Plan in their briefs" hardly stacked up against the abundance of direct and circumstantial evidence of race as the predominant purpose. J.S. App. 29a (quoting *Easley*, 532 U.S. at 242). Appellants, for their part, admit that they are mere "strangers to the redistricting process"

whose after-the-fact litigation assertions about legislative motives "are plainly irrelevant," J.S. 24 n.1, further distinguishing this case from *Easley*.

Thus, contrary to Appellants' suggestion, *Easley* does not do away with the Court's holding that a plaintiff's burden can be established through direct evidence, or require the Court to close its eyes to all evidence of race-based redistricting other than an alternative plan, including the map-drawer's admission that race was the predominant purpose.

C. Appellees' Alternative Plan Further Shows that Race Predominated

Although not required by *Easley*, Appellees nonetheless submitted an alternative plan as additional circumstantial evidence that the General Assembly could have better achieved its stated redistricting goals while creating significantly greater racial balance. The Alternative Plan was drawn to make minimal changes to district boundaries, leaving the vast majority of the map unaffected out of respect for the General Assembly. Appellants do not dispute that, like the Enacted Plan, the Alternative Plan creates eleven equal-population congressional districts, and Alternative CD3 preserves Black voters' ability to elect candidates of their choice. Pl. Ex. 29 at 5; Pl. Ex. 30 at 4-6; Tr. 114:23-115:1. Alternative CD3 is more compact than Enacted CD3. Tr. 73:15-25, 347:13-348:18, 373:17-376:13. It also connects by land areas that had previously been connected only by water. Finally, the Alternative Plan splits fewer localities and decreases the number of residents affected by the splits by a whopping 240,080. Pl. Ex. 29 at 3-5. Thus, the Alternative Plan respects Virginia's traditional and constitutional districting criteria of

equal population, compactness, contiguity, and respecting local political boundaries *better* than the Enacted Plan.

Appellants contend that the Alternative Plan's preservation of district cores is worse than the Enacted Plan's. But, as explained above, preserving district cores was at best a low priority when drawing the Enacted Plan, and the Alternative Plan compares favorably to the Enacted Plan on this criterion. For instance, 69.2% of Alternative CD3's residents also lived in Benchmark CD3, and this percentage is consistent with the general range of core preservation established by the Enacted Plan (71.2% to 96.2%). Int.-Def. Ex. 13 at 24. Indeed, because the Alternative Plan primarily sought to change as few districts as possible, it did not change the Enacted Plan's approach to core protection for nine out of eleven districts. *Id.* On average, 84.5% percent of the residents in each district lived in the same district under the Benchmark Plan, only 1.5% less than—and "comparably consistent with"—the Enacted Plan. *Id.*; *Easley*, 532 U.S. at 258.

The Alternative Plan also creates significantly greater racial balance than the Enacted Plan. Tr. 116:1-117:5. As Appellants' expert explained, "significantly greater racial balance" could be defined as "a more even distribution of racial groups across districts" or "a more even distribution of racial groups within a district." Tr. 385:7-386:9. By those measures, the Alternative Plan, which includes a CD3 BVAP of 50.2%, has significantly greater racial balance than the Enacted Plan. Because there are fewer Black and more White voters in Alternative CD3 than Enacted CD3, and because the Alternative Plan adds Black voters to Alternative CD2, the Alternative

Plan makes the percentages of Black and White voters within and among the districts more balanced. Tr. 116:1-117:5.

Appellants' contention that the Alternative Plan must "eliminate District 3's racial identifiability" is both baseless and deeply problematic. J.S. 27. The Court "never has held that race-conscious state decisionmaking is impermissible in *all* circumstances," *Shaw I*, 509 U.S. at 642, and it has acknowledged that redistricting almost always involves racial considerations, *see Miller*, 515 U.S. at 916 ("Redistricting legislatures will . . . almost always be aware of racial demographics; but it does not follow that race predominates."). Moreover, the very notion of a "race-neutral alternative," J.S. 16, is ludicrous because every districting plan has a racial component, whether it involves drawing a majority-White district or a majority-minority district. Appellants' contention that an alternative plan achieves greater racial balance only when it turns a majority-minority district into a majority-White district inherently favors majority-White districts as the remedy for racial gerrymandering claims, a result that is not only unjust but directly at odds with Appellants' alleged interest in race neutrality. Indeed, under Appellants' theory, whether a district includes a 55% BVAP or a 95% BVAP, it is immune from constitutional challenge unless plaintiffs propose the elimination of the majority-minority district altogether.

Appellants further contend that the Alternative Plan does not serve the same political goals as the Enacted Plan. But, as explained above, the Plan's drafter did not consider partisan performance. Appellants cannot invent a *post-hoc* partisan justification for the Enacted Plan and then fault Appellees

for not adhering to their imagined goals of the actual map-drawer. To the extent it was a goal to avoid drawing incumbents into the same district, neither the Enacted Plan nor the Alternative Plan does so. Tr. 112:12-14.

In sum, the Alternative Plan offers further proof that Virginia could have improved the racial balance of the Plan by relying primarily on legitimate districting criteria articulated by the General Assembly rather than racial factors.

IV. THE PANEL PROPERLY APPLIED STRICT SCRUTINY

Appellants' assertion that the Panel misapplied the narrow tailoring requirement is similarly baseless. Again Appellants misconstrue the record, arguing that the Panel applied a "least-restrictive-means test," J.S. 4, 34, when it did no such thing. Indeed, those words appear nowhere in the opinion, which clearly applied the test established in *Shaw I*—and consistently applied by the Court in racial gerrymandering cases since—asking whether the "'State went beyond what was reasonably necessary to avoid retrogression.'" J.S. App. 35a (quoting *Shaw I*, 509 U.S. at 655); *see also id*. (citing *Miller*, 515 U.S. at 921; *Bush*, 517 U.S. at 983). The Panel found that test easily met here, noting that the defendants had failed to show that there was *any* basis—much less one supported by a "strong basis in evidence," as required by *Bush*, 517 U.S. at 978—for concluding that augmentation of CD3's BVAP was reasonably necessary to comply with the VRA. J.S. App. 37a. Appellants would do away with the narrow tailoring requirement entirely, and permit legislatures to engage in racial gerrymander-

ing with impunity, based on uninformed and unsupported assertions that packing minority voters into any district is necessary to comply with the VRA.

In arguing the Panel misapplied the narrow tailoring requirement, Appellants again assert that the Panel's finding that "the Legislature applied a 55% racial 'threshold' or quota in [CD3]," J.S. 38, was somehow in error. As previously explained, this is contrary to substantial evidence in the record, including statements made by legislators, Virginia's Section 5 submission, Appellants' own expert, and Appellants themselves. Appellants' changed approach is disingenuous but tactically unsurprising, given that districting based on a strict racial threshold, unsupported by evidence that such a threshold is reasonably necessary to avoid retrogression, by definition, fails strict scrutiny.

Oddly, at the same time Appellants argue there was no 55% BVAP threshold, they attempt to justify it, arguing that increasing the BVAP to 55% or higher was necessary to obtain DOJ preclearance. J.S. 36-37. This contention is simply wrong. To support it, Appellants construct a counterfactual world, hypothesizing about how DOJ would have responded "if Virginia had . . . reduc[ed] BVAP to the 50% range." J.S. 37. But not only does this fail to explain why the General Assembly's decision to increase the BVAP of CD3 to over 55% was narrowly tailored—a question on which defendants bore the burden below—it ignores the *actual history in Virginia*, where DOJ previously twice pre-cleared CD3 with BVAPs lower than 55% and, most recently, pre-cleared the State's 2011 Senate Plan, in which all five majority-minority districts were below this threshold. Pl. Exs. 20, 22, 30. Not only does this record provide no basis in evidence

whatsoever for believing that Section 5 required a 55% BVAP floor, the Section 5 guidance issued by DOJ explicitly rejects the notion. Def. Ex. 9; 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011).

Finally, it is plain from the face of the opinion that the Panel did not, as Appellants allege, "attach[] talismanic significance to the 3.2% increase over the Benchmark BVAP" in CD3. J.S. 35. Instead, the Panel carefully considered all of the evidence and properly concluded that the General Assembly—which admittedly engaged in *no* analysis to determine the number of Black voters needed to avoid retrogression—did not narrowly tailor its unabashed use of race in drawing CD3 so as to pass constitutional muster. In short, having failed to "t[ake] any steps" to narrowly tailor its use of race in drawing the district, *Moon*, 952 F. Supp. at 1150, the General Assembly's baseless decision to increase the number of Black voters cannot satisfy strict scrutiny.

V. THE COURT SHOULD DECLINE TO HEAR THIS CASE

In sum, Appellants have articulated no factual or legal error warranting this Court's consideration on a hearing. Appellants' suggestion, moreover, that the Court consider this case alongside *Alabama Democratic Conference v. Alabama*, No. 13-1138, not only ignores key differences between the cases, it directly contradicts the position they advanced below. After trial, the Panel specifically asked the parties whether its resolution of this case should await this Court's decision in *Alabama*. Appellants said no, as "there is good reason to doubt that the Supreme Court's decision" in *Alabama* "would have any effect on this case." Def. Post-Tr. Br. 37; *see also id*. ("[T]he

Court should resolve this case without awaiting the Supreme Court's decision in the Alabama case."). The Panel apparently agreed. Appellants' current attempt to bootstrap the *Alabama* case to upend the opinion below is not only disingenuous, it is barred by the doctrine of judicial estoppel. *See New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (purpose of doctrine is to "'prohibit[] parties from deliberately changing positions according to the exigencies of the moment'") (quoting *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993)).

CONCLUSION

Appellees respectfully submit that the appeal should be dismissed for lack of jurisdiction because Appellants lack standing to pursue it. In the alternative, the judgment of the three-judge panel should be summarily affirmed.

Respectfully submitted,

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

MARC E. ELIAS
Counsel of Record
JOHN M. DEVANEY
ELISABETH C. FROST
PERKINS COIE LLP
700 Thirteenth Street, N.W.
Suite 600
Washington, D.C. 20005-3960
(202) 654-6200
MElias@perkinscoie.com

Counsel for Appellees Gloria Personhuballah & James Farkas

December 4, 2014