No. 14-1504

IN THE

Supreme Court of the United States

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

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

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QUESTIONS PRESENTED

The questions presented are as follows:

1. Whether Appellants lack standing because none of them 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.

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STATEMENT

This is the second time that Virginia's Third Congressional District ("CD3") has come before the Court this redistricting cycle. The three-judge panel below (the "Panel") has twice held that CD3 is an unconstitutional racial gerrymander. It did so on the strength of direct evidence, including explicit statements by the current Congressional Redistricting Plan's (the "Plan" or "Enacted Plan") architect, Delegate Bill Janis, that CD3 resulted from the exaltation of race above all other factors and the use of a predetermined 55% black voting age population ("BVAP") threshold without any evidence that it was necessary to comply with the Voting Rights Act ("VRA").

CD3's racial purpose manifests in its appearance. It 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 and lands in a horseshoe shape in Newport News. It leaps over southern and eastern Newport News and stops in Hampton. CD3 then starts anew on the southern shore of the James River, darting west to swallow Petersburg and then sliding east through Surry. It hops over the Isle of Wright, 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 applies 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 consistently won reelection by comfortable margins and received the support of most African-American voters in the district. Nevertheless, in the 2012 redistricting, the BVAP in CD3 increased above the 55% BVAP threshold, creating a district in which Congressman Scott won his last election with **81.3%** of the vote. J.S. App. 40a. The record showed that the Virginia General Assembly's explicit racial goals were 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.

In October 2013, three Virginia voters residing in CD3 filed this action challenging CD3 as a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment. Compl. ¶ 1. Appellants, current and former Republican congressmen, intervened as Defendants. The case went to trial in May 2014, during which neither the State Defendants[1] nor Appellants presented any witnesses in defense of the Plan, save for Appellants' expert, John Morgan. On October 7, 2014, the Panel ruled that CD3 was an unconstitutional racial gerrymander. The State Defendants did not appeal.

The Court made no substantive rulings with respect to Appellants' first appeal. Rather, after deciding *Alabama Legislative Black Caucus v. Alabama*, 135 S.

[1] Defendants are the Chair, Vice-Chair, and Secretary of the State Board of Elections, sued in their official capacity.

Ct. 1257 (2015), the Court remanded this case for further consideration.

On remand, the Panel asked the parties to brief the effect of *Alabama* on its prior decision. The Panel then issued its opinion reaffirming its prior decision and explaining why *Alabama* further bolstered its conclusion that CD3 was an unconstitutional racial gerrymander. Again, Appellants appealed. Again, the State Defendants did not.

The record fully supports the opinion below and is profoundly at odds with Appellants' effort to rewrite the record. On appeal, the Court reviews the Panel's factual findings only to determine whether they are "clearly erroneous." *Miller v. Johnson*, 515 U.S. 900, 917 (1995). In the face of this exacting standard governing their appeal, Appellants ask the Court to reverse based on little more than Appellants' unsupported claim that CD3 was really a partisan gerrymander.

This is revisionist history of the first order that flatly contradicts the evidentiary record below, 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, Del. Janis denied that the unique features of CD3 resulted from 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.

The Court should dismiss the appeal or summarily affirm the Panel's opinion.

First, Appellants lack standing to pursue this appeal: none of them 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 and in some cases specious—two Appellants are no longer congressional representatives.

Second, 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. A plaintiff must show that race was the "predominant" factor motivating the districting decision in question. *Alabama*, 135 S. Ct. at 1262. The defendant must then satisfy strict scrutiny by showing that the use of race was narrowly tailored to serve a compelling government interest. *See id.*; *see also Bush v. Vera*, 517 U.S. 952, 976 (1996). From the outset, Appellants attempt to rewrite this standard, arguing that plaintiffs must show an "improper" consideration of race. J.S. 24 n.1.[2] This is not the law. Rather, plaintiffs may meet their burden of showing that race predominated where race-based districting decisions were made in the belief

[2] 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. 19a. Appellants have run from this concession ever since. *See, e.g.*, J.S. 24 n.1 (asserting that their after-the-fact concessions about legislative motives "are plainly irrelevant").

that they were necessary to comply with the VRA. *See, e.g.*, *Alabama*, 135 S. Ct. at 1271; *Shaw v. Hunt*, 517 U.S. 899, 904-05 (1996) ("*Shaw II*").

The record is replete with evidence that race in fact predominated in the drawing of CD3. In addition to Del. Janis, other legislators repeatedly indicated that 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 its demographic characteristics only confirm what is demonstrated directly by the legislative record.

Given the overwhelming weight of the evidence against them, Appellants conjure a supposed legal error, arguing that the Panel "failed to apply" the law as articulated in *Alabama*. J.S. 2. This not only mischaracterizes the Panel's decision, it ignores the dissent below, which had no quarrel with the majority's legal analysis (only its factual findings). *See* J.S. 45a ("[T]he original majority opinion . . . applied the proper analytic framework as specified by *Alabama*. So[] too, do[es] the majority opinion . . . following remand.").

Appellants' argument that the Panel misapplied the narrow tailoring requirement is equally flawed. Appellants cannot wish away the fact that the General Assembly engaged in no analysis whatsoever to determine whether the VRA compelled its race-based approach. The General Assembly made the same mistake as did the legislature in *Alabama*. It "asked the wrong question" by focusing on how it could it draw CD3 to comply with an arbitrary, mechanical, racial threshold. *Alabama*, 135 S. Ct. at 1274. It failed to ask the *right* question: "To what extent must we

preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?" *Id.*

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. Federal courts have jurisdiction only over "cases" or "controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). This is "an essential limit" to the federal judiciary's power that requires more than "the party invoking the power of the court hav[ing] a keen interest in the issue." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013). Both plaintiffs *and* defendants must have because Article III standing because "standing to sue *or defend* is an aspect of the case or controversy requirement." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (emphasis added).

An intervenor need not establish independent Article III standing *if* there is another party with standing on the same side of the case. But if the party with standing chooses not to appeal, there is no case or controversy. *See Diamond v. Charles*, 476 U.S. 54, 63-64 (1986) ("By not appealing the judgment below, the State indicated its acceptance of that decision . . . . The State's . . . failure to invoke our jurisdiction leaves the Court without a 'case' or 'controversy' between appellees and the State.").

Thus, where, as here, an intervenor appeals alone, it must show that it has standing. *Hollingsworth*, 133

S. Ct. at 2659; *Arizonans*, 520 U.S. at 65 (an intervening party "cannot step into the shoes of the original party" unless the intervening party independently "fulfills the requirements of Article III").

To show standing in a racial gerrymandering case, a litigant must make a "district-specific" showing that it has suffered a "personal" harm. *Alabama*, 135 S. Ct. at 1265. For example, a racial gerrymandering plaintiff generally lacks standing unless he or she resides in the district being challenged. *Id.*

Here, Appellants are ten past and current members of Virginia's congressional delegation. Appellants represent the following districts: Robert J. Wittman–CD1, Bob Goodlatte–CD6, Barbara Comstock–CD10, Randy J. Forbes–CD4, Morgan Griffith–CD9, Scott Rigell–CD2, Robert Hurt–CD5, and David Brat—CD7. Appellants Eric Cantor and Frank Wolf are former representatives.

None of the Appellants reside in or represent CD3, the only district whose constitutionality is at issue. Nor do Appellants have special legal authority for redistricting or the conduct of Virginian elections—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" because of the Panel's decision, which "ha[s] not ordered [Appellants] to do or refrain from doing anything," and Appellants cannot 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., when the General Assembly remediates the racial gerrymander in CD3, Appellants'

interests in Virginia's other congressional districts may suffer. Appellants Cantor and Wolf, obviously, no longer have any such interest. But the remaining Appellants have no stronger 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, the General Assembly is controlled by a Republican majority; it is just as probable that a remedy will be to Appellants' political advantage, 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, the court in *Johnson v. Mortham*, 915 F. Supp. 1529, 1538 (N.D. Fla. 1995), found that congressional representatives who do not represent the challenged district "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

In any event, on the merits, the appeal should be dismissed because the record below makes clear that race was the predominant factor in drawing CD3. Appellants take an ostrich-like approach to the record, which fully supports the Panel's determination that the drawing of CD3 was predominantly driven by race. 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. 8, 17-18.

Appellants' rehashing of disputed facts ignores the standard of review. The Court reviews the Panel's determination that race predominated in drawing CD 3 to determine whether it is "clearly erroneous." *Miller*, 515 U.S. at 917. Here, the finding that race predominated is not only supported by the record—it is compelled by it.

A. The Legislature's Redistricting Criteria

The General Assembly adopted redistricting criteria stating that the two most important criteria Del. Janis employed in drawing the Plan were (1) adhering to the one-person, one-vote mandate and (2) complying with federal law, and in particular the VRA's prohibition on "retrogression or dilution of racial or ethnic minority voting strength." Pl. Ex. 5 at 1. These criteria never once mention partisan performance. *See id.* Virginia's written redistricting criteria are similar to those adopted by Alabama, which also listed "compliance with federal law, and, in particular, the Voting Rights Act of 1965" as the second most-important criteria after adherence to one-person, one vote. *Alabama*, 135 S. Ct. at 1263; *see also id.* at 1267.

B. Del. Janis's Statements

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.[3] Appellants

[3] Appellants do not dispute that Del. Janis was the Plan's sole author and the most knowledgeable about its purpose. Del. Janis

claim that it is "undisputed" that Delegate Janis "repeatedly stated that protecting incumbents and perpetuating the 8-3 split were the Enacted Plan's goals." J.S. 18. In fact, he didn't.

Appellants' conclusion is directly contradicted by multiple explicit statements by Del. Janis that his primary purpose was to achieve a certain BVAP percentage in CD3 in perceived service of the VRA. When HB 5004, 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 one-person, one-vote and ensuring that CD3 had a certain racial composition, pointedly emphasizing that "there [should] 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 emphasized the attention he had paid to race, explaining that he "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

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explained that "this is my legislation." Pl. Ex. 43 at 14. 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.

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.

Del. Janis also explained what he meant by "retrogression." 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 that he ensured that result by looking at racial data.

These are precisely the kinds of statements that the Court concluded in *Alabama* were "strong, perhaps overwhelming, evidence that race did predominate." *Alabama*, 135 S. Ct. at 1271 (describing how "the legislators in charge of creating the redistricting plan believed, and told their technical adviser, that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible").

In *Shaw II*, 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.* 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"); *Miller*, 500 U.S. at 918 (race was predominant purpose where "the General Assembly . . . was driven by its overriding desire to comply with [DOJ's] maximization demands").

In *Bush*, the Court relied on similar "substantial direct evidence of the legislature's racial motivations." 517 U.S. at 960. 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.* In those cases, as here, race predominated.

But the record evidence here is even stronger. Del. Janis not only stated that he prioritized race, he also expressly 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. This is consistent with his description of his redistricting criteria, which never once mention partisan performance. *See* Pl. Ex. 43 at 3-7, 18-20.

The Panel found it "appropriate to accept the explanation of the legislation's author as to its purpose." J.S. 23a. Appellants do not, suggesting implicitly that Del. Janis was being duplicitous when he disavowed a political purpose, claiming that his "overriding objective" was, in fact, to advance partisan objectives. J.S. 20. The record 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" is Appellants' own creation and is not found in the legislative record. The record instead reveals that "respect[ing] . . . the will of the Virginia electorate" came "[t]hird" among Del. Janis's redistricting considerations, after population equality and non-retrogression. Pl. Ex. 43 at 3-4; *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."). While Appellants tout this statement as "a display of candor rarely seen among legislators engaging in redistricting," J.S. 20, their own distortions are 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 drove 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.

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 to avoid pitting incumbents against one another, this goal, too, was taken into account 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 even if 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. 22. This assertion 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 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" only after considering the "mandatory" criterion of non-retrogression. Pl. Ex. 43 at 19, 22-23.

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 on

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, attended no meetings related to redistricting, and had no draft maps or communications with the General Assembly about redistricting. Pl. Ex. 34. Rep. Rigell (CD2) and Rep. Cantor (CD7) similarly attested that they had little to no input on 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 that it is "undisputed" that the Enacted Plan was motivated by politics and incumbency protection, and that there is no evidence suggesting that race was predominant." J.S. 17-18. The record demonstrates precisely the opposite. Del. Janis could not have been clearer in his prioritization of race over all other criteria. Appellants cannot establish it was "clear error" to conclude that the race was the predominant purpose behind CD3.[4]

[4] Appellants rely extensively on the statements of "contemporaneous commentators" to the redistricting process, J.S. 21, including an article written by Appellees' expert prior to his engagement in this case and statements by the Plan's opponents. Appellants cannot seriously argue that "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.

C. BVAP Threshold

In addition to Del. Janis's repeated statements that racial considerations predominated above all others, the Panel found it highly 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. 20a, and for good reason: It was the fact that the legislature in *Alabama* used a mechanical racial threshold that led the Court to conclude that the record there presented "strong, perhaps overwhelming, evidence that race did predominate." *Alabama*, 135 S. Ct. at 1271.

Alabama is just the most recent case in a long line of cases in which the Court has 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 also 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 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 . . . the lowest percentage that [DOJ] has ever approved is 55.0." *Id.* at 20.[5] Indeed, when Del. Janis was questioned 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 and explicitly 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 in a misguided attempt 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 "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

[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.

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.

Appellants do not attempt to challenge the Panel's factual finding that the General Assembly adopted and implemented a mechanical 55% BVAP threshold to draw CD3. But while their appellate strategy is to relegate the use of a racial threshold to a footnote, J.S. 23 n.1, 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, Appellants are fleeing their prior embrace of the 55% BVAP threshold because *Alabama* unequivocally rejected mechanical racial thresholds

unsupported by analysis. Here, *no one* conducted an analysis of racial voting patterns to determine the number of black voters needed to preserve their voting strength in CD3. Tr. 98:16-99:21, 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 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.

The General Assembly's use of a mechanical 55% BVAP threshold provides unequivocal evidence supporting the Panel's conclusion that race predominated.

D. Traditional Redistricting Principles

As set out above, this was a direct evidence case. There is no need to look to *circumstantial* evidence to confirm what Del. Janis stated expressly about his motives. Nonetheless, the circumstantial evidence fully supports the conclusion that the General Assembly subordinated traditional redistricting criteria, such as compactness, contiguity, and respect for political subdivisions, to racial considerations in crafting CD3.

The focus on race is evident in CD3's shape. "[R]eapportionment is one area in which appearances do matter," *Shaw v. Reno*, 509 U.S. 630, 647 (1993) ("*Shaw I*"), and a district's "bizarre" or "irregular" shape provides circumstantial evidence 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 (race predominated where narrow land bridges connected areas with high concentrations of black residents);

Shaw II, 517 U.S. at 903, 905-06 (race predominated where district snaked along freeway collecting areas with black residents); *Moon*, 952 F. Supp. at 1147 (race predominated in predecessor CD3 that had bizarre shape).

By every measure used in Virginia's Section 5 submission, CD3 is Virginia's least compact 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. 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 district hardly exonerates CD3. Even if Benchmark CD3 *had* received a judicial seal of approval, it would have little bearing on a challenge to the current district. 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 that there is no "professional standard" for judging compactness, J.S. 30, would undermine both the 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 also 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 predominantly African-American populations . . . contributes to the overall conclusion that the district's boundaries were drawn with a focus on race." J.S. App. 25a-26a. Adherence to the letter of the law is of no moment where manipulation of the contiguity requirement provides further evidence of the racial motivation behind CD3.

CD3 also splits more counties and cities—nine splits in all—than any other district 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 tabulation districts ("VTDs") than any other district. Tr. 78:17-19. The Plan splits 20 VTDs in all, of which CD3 participates in 14. Pl. Ex. 27 at 8-9. The General Assembly used these splits "strategically" as a means of bypassing white population centers to sweep more black communities into CD3. *See* J.S. App. 27a.

Appellants' contention that protecting district cores explains CD3's composition grossly inflates the role of core preservation. 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 CD3. 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. Racial Sorting of 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. 30a. Appellants mischaracterize Dr. McDonald's testimony, asserting that he "conceded" politics predominated and that his VTD analysis "reveals a *political* pattern no different from [the] *racial* pattern." J.S. 32.

But Dr. McDonald most assuredly never testified that politics predominated. 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, he 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 CD3 (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 not accurate. The Panel's factual determination that the General Assembly disproportionately moved high-BVAP VTDs *in*to CD 3 and largely white VTDs *out* of CD3 is not "clear error."

III. THE PANEL PROPERLY APPLIED THE PREDOMINANCE INQUIRY

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 misunderstand *Easley* and propose 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.

A. The Panel Found that Race Predominated over Politics

Appellants claim the Panel "fail[ed] to make the required finding . . . that race rather than politics predominated in District 3." J.S. i. This hardly

warrants a response. The opinion stated in no uncertain terms: "Plaintiffs have shown race predominated." J.S. App. 14a; *see also id.* at 36a ([R]ace predominated when the legislature devised Virginia's Third Congressional District"); *id.* at 43a ("Plaintiffs have shown that race predominated[.]"). The opinion repeats the same conclusion in multiple 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 19a, the opinion cites Appellants' concession to that effect. It credits Del. Janis's explicit statements of race as the predominant 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 26a.

Indeed, the opinion devotes an entire section to its conclusion regarding the "Predominance of Race over Politics." *Id.* at 30a. It specifically finds that Appellants' "post-hoc political justifications" have no support in the direct or circumstantial evidence. *Id.* at 29a. It concludes that the "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 36a (internal quotation marks and citation omitted).

Appellants' curious suggestion that the Panel's finding that "race predominated" does not mean that the Court found that "race predominated" is creative, but it defies both the plain language of the opinion and common sense.

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-ii, 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: The legislative map drawer expressly *disavowed* such objectives.

The Court's precedent is clear that the fact-finder is not required to consider only circumstantial evidence in racial gerrymandering cases. "The plaintiff's burden in a racial gerrymandering case is 'to show, *either* through circumstantial evidence of a district's shape and demographics *or* more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" *Alabama*, 135 S. Ct. at 1267 (quoting *Miller*, 515 U.S. at 916) (emphasis added).

Appellants' reliance on *Easley* is misplaced. In *Easley*, there was little direct evidence of racial motive, requiring the parties and the court to make their arguments and findings based on circumstantial evidence. 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). The 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 on*e," 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 applies where the legislature disavows racial motives and the Court must rely on circumstantial evidence to divine whether racial or political objectives truly drove redistricting. 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 unequivocal statements of the Plan's sole map drawer that race predominated over politics, together with a wealth 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 "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. 33a (quoting *Easley*, 532 U.S. at 242). As Appellants admit, as "strangers to the redistricting process," their assertions about legislative motives "are plainly irrelevant." J.S. 24 n.1.

Thus, *Easley* does not do away with the long-established rule, recently affirmed in *Alabama*, that a plaintiff's burden can be established through direct evidence nor does it require the Court to close its eyes to the mapdrawer's express admissions of race-based redistricting for lack of an alternative plan.

C. Appellees' Alternative Plan Further Shows that Race Predominated

Although not required by *Easley*, Appellees did submit an Alternative Plan as additional circumstantial evidence that the General Assembly could have better achieved its stated redistricting criteria while creating significantly greater racial balance. The Alternative Plan made minimal changes to district boundaries, leaving the vast majority of the map unaffected out of respect for the General Assembly. 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 240,080. Pl. Ex. 29 at 3-5. Thus, the Alternative Plan adheres to Virginia's traditional districting criteria of equal population, compactness, contiguity, and respect for 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 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, the Alternative Plan does not do 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' brief and half-hearted argument that the Panel misapplied the narrow tailoring requirement is baseless. Again Appellants misconstrue the record, arguing that the Panel applied a "least-restrictive-means test," J.S. 36, when those words appear nowhere in the opinion. Instead, the Panel expressly applied the test as articulated in *Alabama*—whether the General Assembly had "'a strong basis in evidence in support of' its use of race." J.S. 36a-37a (quoting *Alabama*, 135 S. Ct. at 1274).

The Panel found that the defendants had failed to show that there was any basis—much less a "strong" basis—for concluding that use of a 55% BVAP threshold and augmentation of CD3's BVAP was required to avoid retrogression. J.S. App. 39a-40a. Instead, the General Assembly went astray because—like in *Alabama*—the General Assembly "relied heavily on a mechanically numerical view as to what counts as forbidden retrogression without a 'strong basis in evidence' for doing so." J.S. 39a-40a.

Again, Appellants do not truly contest that the General Assembly used a 55% BVAP threshold. They further conceded that the General Assembly performed *no analysis* of whether avoiding retrogression required use of a 55% BVAP threshold (or augmentation of the BVAP of CD3 to 56.3%). *See* J.S. 37. The General Assembly did not perform any "'functional

analysis of the electoral behavior within'" CD3. *Alabama*, 135 S. Ct. at 1272 (quoting Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011)).

Nonetheless, Appellants argue that increasing the BVAP to 55% or higher was necessary to obtain DOJ preclearance. J.S. 34. This contention is simply wrong.[6] To support it, Appellants construct a counterfactual world, hypothesizing about how DOJ would have responded if Virginia had decreased the BVAP of CD3 to less than 30%. 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 Virginian history, where DOJ previously twice precleared CD3 with BVAPs lower than 55% and, most recently, precleared the State's 2011 senate plan, in which all five majority-minority districts were below this threshold. Pl. Exs. 20, 22, 30. This record provides no basis in evidence whatsoever for believing that Section 5 required a 55% BVAP floor.

Appellants cannot demonstrate a strong basis in evidence for the use of race. So instead, they effectively ask the Court to do away with the narrow tailoring requirement entirely and to permit legislatures to engage in racial gerrymandering with impunity, based on uninformed and unsupported

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[6] Indeed this Court, in *Alabama*, relied on DOJ's own articulation of the proper Section 5 analysis in reiterating that "Section 5 does not require maintaining the same population percentages in majority-minority districts as in the prior plan" but rather is "satisfied if minority voters retain the ability to elect their preferred candidates." 135 S. Ct. at 1273 (citing Brief for United States as Amicus Curiae 22).

assertions that packing minority voters into an existing majority-minority district is necessary to comply with the VRA. Appellants complain that the Panel placed the General Assembly in a "racial straightjacket." J.S. 36. Far from it. The Panel did not require justification of CD3's BVAP down to the last decimal. It held Appellants to their burden on strict scrutiny of pointing to specific and substantial evidence justifying the General Assembly's unabashedly race-based approach—and they could not do so and hardly tried. Strict scrutiny is not, as Appellants would have it, a shapeless and flabby standard of review that allows the government to justify the use of race by invoking the VRA talismanically without any analysis or evidence.

Because the General Assembly failed to "t[ake] any steps" to narrowly tailor its use of race in drawing the district, *Moon*, 952 F. Supp. at 1150, its predominant use of race cannot satisfy strict scrutiny.

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,

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