SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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VIRGINIA HOUSE OF DELEGATES,)
ET AL.,)
Appellants,)
v.) No. 18-281
GOLDEN BETHUNE-HILL, ET AL.,)
Appellees.)

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5 ET AL.,)

6 Appellants,)

7 v.) No. 18-281

8 GOLDEN BETHUNE-HILL, ET AL.,)

9 Appellees.)

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12 Washington, D.C.

13 Monday, March 18, 2019

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15 The above-entitled matter came on for

16 oral argument before the Supreme Court of the

17 United States at 10:06 a.m.

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1 APPEARANCES:

2 PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf

3 of the Appellants.

4 MORGAN L. RATNER, Assistant to the Solicitor General,

5 Department of Justice, Washington, D.C.; for the

6 United States, as amicus curiae, in support of

7 neither party.

8 TOBY J. HEYTENS, Solicitor General of Virginia,

9 Richmond, Virginia; on behalf of Appellees

10 Virginia State Board of Elections, et al.

11 MARC E. ELIAS, ESQ., Washington, D.C.; on behalf of

12 Appellees Golden Bethune-Hill, et al.

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1 P R O C E E D I N G S
2 (10:06 a.m.)
3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 18-281, the
5 Virginia House of Delegates versus
6 Bethune-Hill.
7 Mr. Clement.
8 ORAL ARGUMENT OF PAUL D. CLEMENT
9 ON BEHALF OF THE APPELLANTS
10 MR. CLEMENT: Mr. Chief Justice, and
11 may it please the Court:
12 In 2011, the Virginia House of
13 Delegates formulated a redistricting plan that
14 garnered overwhelming bipartisan support and
15 swift preclearance by the Justice Department.
16 That plan has governed the first four election
17 cycles of the decade and delivered on its
18 promise to provide African American voters with
19 the ability to elect their candidates of choice
20 in 12 districts that everybody agreed should be
21 majority-minority districts.
22 The basic choice for this Court will
23 be whether that plan, duly enacted by the
24 people of Virginia, will govern this last
25 election of the decade or if, instead, there

1 will be a court-imposed plan formulated by a
2 special master from out of state.
3 Now the Virginia attorney general, for
4 his part, would impose the court-ordered plan
5 on the people of Virginia on the theory that
6 the House of Delegates lacks appellate standing
7 to appeal.
8 That argument is deeply flawed and has
9 enormous consequences that go well beyond this
10 case but would be a particularly problematic
11 feature in the all-too-often context where
12 there is an impasse between the legislative
13 branch and the executive branch and there has
14 to be a court-ordered plan and the legislative
15 branch and the executive branch are often
16 adverse in that litigation over the
17 court-ordered plan.
18 JUSTICE GINSBURG: Mr. Clement, here,
19 it isn't even the legislative branch; it's one
20 house of the legislature.
21 MR. CLEMENT: That's right, Justice
22 Ginsburg, but I think particularly when you
23 understand that the law at issue here has its
24 object, one branch of the legislature, one
25 house of the legislature, the House of

1 Delegates, that that's exactly the right party
2 to bring this particular case or to
3 vindicate --
4 JUSTICE SOTOMAYOR: But it's not --
5 it's not a law that belongs to the one branch.
6 MR. CLEMENT: It's not a --
7 JUSTICE SOTOMAYOR: It has to be
8 approved by the Senate and signed by the
9 governor and survive a -- a -- a veto by the
10 governor if he or she chooses.
11 So it's really a law that doesn't
12 belong to the House. At best, it belongs to
13 the legislature as a whole or to the
14 government, the people of Virginia.
15 MR. CLEMENT: Justice Sotomayor, it
16 doesn't belong to the House alone, but it does,
17 in -- in -- in the parts that are challenged
18 here, affect the House and the House alone.
19 JUSTICE SOTOMAYOR: Please tell me
20 why. You -- it doesn't change the composition
21 of the House. It doesn't change any of the
22 legislative processes of the House in terms of
23 how you do things, the number of people
24 involved in doing them, the necessary votes, et
25 cetera.

1 It may change the -- the membership of
2 individuals, but it doesn't change the
3 processes of the legislature.
4 MR. CLEMENT: So I -- I beg to differ,
5 which is to say I think that when you have the
6 legislative districts, those are not just about
7 elections. Those are the basic way in which
8 the House chooses to organize itself, and they
9 affect day-to-day operations within the House
10 of Delegates.
11 If you watch the House of Delegates
12 proceeding, the first thing you notice is that
13 every member of the House of Delegates is
14 identified by where they come from. It's the
15 gentleman from Norfolk or the gentlewoman from
16 the city of Richmond.
17 JUSTICE SOTOMAYOR: There still will
18 be a gentlelady from Norfolk and a gentleman
19 from wherever. The identity may change in the
20 next election, but at least as currently
21 constituted, those people will not change.
22 And, yes, they may change later, but
23 there's no guarantee that the legislature ever
24 has the person they want to win an election in
25 the House.

1 MR. CLEMENT: Well, I don't think it
2 is guaranteed that there will be a gentleman
3 from Norfolk because, if you redistrict in a
4 way that essentially splits Norfolk four ways,
5 there may be no gentleperson from Norfolk.
6 And I think, more fundamentally, this
7 is the basic decision as to whether they're
8 going to be a representative government in
9 terms of compact districts, whether they're
10 going to be elongated.
11 JUSTICE GINSBURG: But Mr. --
12 MR. CLEMENT: I think that if --
13 JUSTICE GINSBURG: -- Mr. Clement, the
14 -- the change from the current representative
15 to another, that's a frequent occurrence. It
16 happens in every -- every time there's a new
17 census, different lines are drawn. Different
18 people will represent a constituency.
19 MR. CLEMENT: I -- I think that's
20 true. I mean, I -- I think there may well be
21 an injury for Article III purposes with every
22 decennial census. I don't think -- and, again,
23 I think the principle that we're arguing for is
24 not going to open up the House to be in front
25 of the courts in lots of different situations.

1 I think it really goes to this
2 fundamental question of how they're going to
3 constitute themselves.
4 JUSTICE SOTOMAYOR: Mr. Clement, what
5 are the --
6 JUSTICE ALITO: Mr. Clement, there are
7 two -- as I understand it, you're -- you're
8 claiming standing on two theories. One is --
9 and correct me if I'm wrong. One is that
10 you're representing the Commonwealth. The
11 other is that you're representing the House as
12 an institution.
13 Now, as to the first, Virginia says
14 that that was not the basis on which you
15 intervened below and that this is something new
16 that has come up. Is that correct? And, if
17 not, why?
18 MR. CLEMENT: I -- I don't think that
19 it is correct. I think that it is true that
20 when we intervened, we intervened to separately
21 represent the House of Delegates and the
22 Speaker in his institutional capacity. And the
23 state did not object to that intervention
24 motion.
25 So one thing I think it's clear to

1 understand is I don't take the State -- and
2 I'll obviously be corrected if I'm wrong -- but
3 I don't think -- take the State to be objecting
4 to the House of Delegates' ability to have
5 separate counsel or to be represented by
6 somebody other than the attorney general.
7 Now, as the -- so that was the basis
8 for the -- the intervention. As the litigation
9 went on, it became clear that, essentially, the
10 House of Delegates and their counsel were
11 representing the interests not just of the
12 House of Delegates but of the Commonwealth as a
13 whole.
14 JUSTICE ALITO: And -- and that's
15 based on what? On the arguments that were
16 made? The arguments that were made were
17 arguments that represented -- that went to the
18 represent -- the interests of the Commonwealth?
19 MR. CLEMENT: Yes, and the fact that
20 most pointedly and sort of, I think,
21 impressively in front of this Court, there was
22 no separate briefing at all. There was no
23 separate really appearance, other than a letter
24 that said that they were happy to let us carry
25 the water.

1 And I don't think it's an accident
2 that in this Court's first opinion, when it
3 used a shorthand to refer to the House of
4 Delegates and the Speaker in his institutional
5 capacity, this Court used the shorthand "the
6 State." We were the only party here defending
7 the constitutionality of the statute. We were
8 doing that with the acquiescence of the
9 attorney general.
10 And I think it's important -- one
11 other point I'd just like to make very clear is
12 that if you look at the authorizing statute
13 that the attorney general is relying on,
14 there's no separate provision for appeal.
15 So, as a matter of state statute, it's
16 not like the federal statutes where there are
17 very specific provisions separately addressing
18 appeal and the solicitor general's role.
19 It's --
20 JUSTICE ALITO: Well, I would be very
21 uncomfortable trying to decide whether, as a
22 matter of Virginia law, anybody other than the
23 attorney general can ever represent the
24 Commonwealth or whether the House, under some
25 circumstances, can also represent the

1 Commonwealth.
2 That's a question of Virginia law.
3 And if that issue were -- is before us, there
4 would be an argument for certifying that
5 question to the Supreme Court of Virginia for a
6 determination, because I -- I think it's a hard
7 one for us to make. The Supreme Court of
8 Virginia has allowed the House to intervene
9 under some circumstances, and we don't know
10 exactly what the theory was.
11 MR. CLEMENT: That -- that's true. I
12 think our ultimate -- our alternative argument
13 allows you to avoid having to decide that. And
14 I do think it is a straightforward way to
15 decide the standing question. And it is one
16 that is strongly suggested by the Beens case of
17 this Court.
18 JUSTICE KAGAN: Before you go to the
19 alternative argument --
20 MR. CLEMENT: Sure.
21 JUSTICE KAGAN: -- on the -- on the
22 representing the state, even supposing that
23 you're right, actually, it seems that you're
24 right, that throughout some part of this
25 litigation, the Attorney General's Office was

1 very happy to have the legislature do most of
2 the work, are you saying that that affects a
3 kind of permanent delegation to the legislature
4 to continue in that capacity, even if and when
5 the Attorney General's Office decides, you
6 know, actually, it -- something has changed,
7 there now comes a point where we want to resume
8 the head representative role?
9 MR. CLEMENT: The answer is yes. I
10 mean, I think that at a certain point, whether
11 you think about it in acquiescence, whether you
12 think about it in forfeiture, at that point,
13 they've forfeited the ability to insist that
14 they have the exclusive right to represent the
15 Commonwealth.
16 JUSTICE SOTOMAYOR: Mr. Clement, that
17 -- that's -- that's a pretty extreme statement
18 on your part. If I make the assumption that
19 Virginia law doesn't permit you to represent
20 the State, it's only an assumption for the sake
21 of argument, to now claim that they are saying
22 you can carry the water now, but I can't fire
23 you and carry my own water when I want to,
24 that's a pretty bold statement that we're going
25 to permit that kind of -- of forfeiture

1 basically argument or acquiescence argument to
2 be made.
3 MR. CLEMENT: Well, I -- I mean --
4 JUSTICE SOTOMAYOR: Where we're --
5 we're taking away from the people of Virginia
6 the right to say who's going to speak on their
7 behalf?
8 MR. CLEMENT: No, I -- I -- I think
9 what you're doing is you're recognizing as a
10 matter of federal law that at a certain point,
11 if, in the federal courts, the executive branch
12 has allowed the House of Delegates and its
13 counsel to represent the interests of the
14 Commonwealth as a whole, there are consequences
15 to that choice. And they can't pull the rug
16 out from that defense at the last minute when
17 it becomes politically expedient.
18 Now --
19 CHIEF JUSTICE ROBERTS: Mr. Clement,
20 I -- I'd like to move to the merits at this
21 point if that's all right. And when -- I'd
22 like your reaction to -- it seems to me the
23 elephant in the room here is the fact that we
24 have a standard that depends heavily on
25 credibility determinations in terms of

1 predominance.
2 And we have a situation the first time
3 around where, you know, Jones was found
4 credible. The experts were found not credible.
5 And then there's a shift and all of a sudden
6 Jones is incredible and the experts are
7 credible.
8 And when we have a standard of review
9 that asks whether the findings were clearly
10 erroneous, what are we supposed to do with
11 that? I mean, if the -- if the way the case
12 had come up was exactly flipped, we'd be
13 deferring to questions of credibility that go
14 one way, and now we're referring to them that
15 go the other way.
16 It -- they both can't be right. And
17 yet our review sort of depends on whoever gets
18 here last.
19 MR. CLEMENT: Well, I -- I -- I think
20 that's right, Mr. Chief Justice, and I'd say a
21 couple of things.
22 First of all, I think, in reviewing
23 this case, I don't think you have to ignore the
24 fact that there were contrary findings in the
25 first go-around.

1 I also think that, in a way, you can
2 sidestep the elephant in the room if you find a
3 legal error in the way that the district court
4 committed its or conducted its credibility
5 findings.
6 And, here, I think you do have that
7 with the double standard that they applied in
8 terms of, well, if you testified for the second
9 time on behalf of the plan, you are not
10 credible because you should have been here the
11 first time, but if you testified for the first
12 time in the second trial against the plan, then
13 it's perfectly excusable and we'll use your
14 testimony. Not only will we credit it, but
15 we'll use you -- your testimony to discredit
16 the other side.
17 I don't think you can have that kind
18 of double standard. I also think that it would
19 be helpful for this Court to provide some
20 guidance on this broader question because I
21 don't think that you can really simultaneously
22 say that you are going to give good faith to
23 the legislature, a presumption of good faith, a
24 presumption of constitutionality, and then say
25 that all of the witnesses from the legislative

1 branch and all of the people who have direct
2 knowledge as to how the map was drawn and
3 particularly how the VTDs were split, to then
4 determine that they are going to be incredible
5 as a blanket matter, I just don't think you can
6 have them both.
7 I think you end up not giving enough
8 deference. And I'm not saying you could never
9 find the government witnesses incredible, but I
10 think the standard has to be something far more
11 than you see on this record. And I think it
12 would be very helpful if this Court could
13 clarify that as a legal matter.
14 I --
15 JUSTICE BREYER: What's the
16 clarification?
17 MR. CLEMENT: The -- the --
18 JUSTICE BREYER: I'm not so worried
19 about this case, but, I mean, there -- there
20 are hundreds of thousands of trials, if not
21 millions, and a certain percentage of them are
22 reversed on appeal and they go back for a
23 second trial.
24 And what happens if the fact-finder in
25 the second trial is declared credible or all of

1 them, the witnesses and a different judge maybe
2 or maybe the same, and the first one said no,
3 it's the opposite, all right.
4 Now there are appellate courts all
5 over the world and this country who want to
6 know what to do. So what is it we're supposed
7 to do that's capable of being generalized? I
8 think that was the concern.
9 MR. CLEMENT: Well -- sure.
10 JUSTICE BREYER: That is a concern
11 anyway that I have.
12 MR. CLEMENT: So I -- so I would say
13 two things, Justice Breyer.
14 JUSTICE BREYER: I can think of one
15 thing to do, which is you forget about the
16 first trial. You go through here and you look
17 at it and say, is the determination of
18 credibility within the power of the judge who
19 made it?
20 MR. CLEMENT: So I -- I would say two
21 things, both of which are different from what
22 you said, Justice Breyer.
23 I mean, one is I do think in this kind
24 of second trial context -- I mean, I think
25 there's room for sort of a State Farm fox

1 principle that if you're coming out
2 diametrically opposed, you should at least
3 avert to the fact that you're doing that and
4 have to come up with some slightly-better-
5 than-normal reason to at least explain the
6 change.
7 But the second thing that I think
8 would be more limited to these redistricting
9 cases, and I think it's very important, is when
10 you have a context where the court has gone out
11 of its way to say that it's particularly
12 important to credit the good faith of the
13 legislatures engaged in a very difficult task,
14 I think you need a heightened standard before
15 you dismiss their testimony across the board.
16 And what you have in this case, I
17 think, is a perfect illustration of it. I
18 mean, the person who was the principal author
19 of the map, everybody agrees, was Delegate
20 Jones. The only person who knows the details
21 of why particular VTD splits was Mr. Morgan.
22 Now, if you say you're going to deem
23 their testimony not just incredible in certain
24 particulars but across the board, then you're
25 left with Hamlet without the prince.

1 I mean, you're -- you're -- you're --
2 you're left with a couple of --
3 JUSTICE BREYER: I see -- I see where
4 you're going. I have one other question I want
5 to get an answer from you because suppose you
6 do get standing. Suppose you're right -- no,
7 you're wrong about the first half, which is
8 that suppose that we find they're okay in
9 saying that race was used predominantly.
10 Then we get to the question of, well,
11 was there a good reason for that? And the
12 reason they say was compliance with Section 5.
13 And the -- the court here says no, it isn't,
14 that isn't a good reason, because what you did
15 is you took a 55 percent black voter standard
16 and you used it for all 12 districts.
17 Now they elaborated on that, but that
18 isn't a very good -- it can be a little bit
19 more tailored than that. Some districts, yes,
20 maybe. Some districts, no. But the House made
21 no effort whatsoever. They just used this
22 55 percent standard for all.
23 Now what do you say in response to
24 that?
25 MR. CLEMENT: So I -- I -- I want to

1 be very responsive to what I take to be sort of
2 a strict scrutiny question. I'd like to take
3 30 seconds if I could on your premise, which
4 we're already past predominance.
5 I would say that before you get
6 predominance and when you ask whether the
7 district court committed a legal error, you
8 have to take a hard look at HD 92, because they
9 applied the same legal analysis to all the
10 districts. They came out with the same result
11 as to every district. And I don't really think
12 that's what this Court had in mind last time in
13 remanding this, because these districts looked
14 very different, and HD 92 is an awfully hard
15 district to say that race predominated because
16 it went from a BVAP of 62.1 to 60.70.
17 So the 55 percent floor really had no
18 effect on the district. It went from three
19 split voting districts to zero split voting
20 districts, and it became more compact and
21 entirely within the City of Hampton.
22 But if you think, nonetheless, that
23 race predominated even as to HD 92, and you get
24 to strict scrutiny, then I think the problem
25 with the idea that there was a legal error here

1 in using the -- the target developed
2 principally in HD 75 and the other districts,
3 the reason that can't be a legal error is it
4 asks too much of the state legislature in
5 contexts like this, where you're dealing with
6 districts that are all in the same basic part
7 of the state, maybe that's a Northern Virginia
8 perspective on this problem, but these are all
9 districts that are closely related to each
10 other in southeastern Virginia.
11 But even more importantly, they all
12 have the same basic problem when the
13 legislature's confronting this district --
14 these districts, which is everybody I think
15 agrees that these districts performed very
16 differently in off-year House of Delegate
17 elections than in presidential elections.
18 So you can -- yeah, you can have the
19 district-specific information about how many
20 people voted for President Obama in these
21 districts, but I think everybody really agrees
22 that what you really need is to look at the
23 off-year elections, because there's much less
24 turnout, and that's where you have a problem
25 with more racially polarized voting.

1 Now, in those off-year elections, the
2 single-most important data point would be a
3 contested primary, because, especially in
4 districts that are going to be relatively
5 democratic where you really figure out whether
6 or not the African American voters get to vote
7 for their candidate of choice is in a contested
8 primary, because that's when you have an
9 African American candidate of choice going
10 head-to-head with a white Democrat.
11 And if the -- and that's why there
12 aren't that many of those. There's only two or
13 three of those in all of these districts over
14 the decade that precedes the redistricting.
15 And the one that everybody was focused
16 on and seemed to basically agree was the best
17 indicator of that was in HD 75. It was a
18 contested primary election in 2005, and in that
19 election, they -- they determined that you
20 needed a 55 percent BVAP.
21 JUSTICE KAGAN: Well, I'm not sure I
22 understand your answer, Mr. Clement, because,
23 if there's one thing that we've made clear
24 again and again, it's that the analysis ought
25 to be district by district. And for sure, as

1 you say, there might be things that many
2 districts or some districts share.
3 And you would -- you would be prudent
4 to look at those things that they share and to
5 say they share them. But there are also things
6 that the districts do not share. And -- and I
7 thought that what we have asked of legislatures
8 is that when they do this, they look at a
9 particular district and they do something, they
10 explain themselves with respect to that
11 particular district.
12 So, if what they do is they say, well,
13 this shares a feature of HD 75 and that would
14 push one way, but on the other hand, it may not
15 share another feature of HD 75, I mean, that's
16 the kind of analysis I would think that we've
17 called for, rather than just saying, we've done
18 it for HD 75, and, gosh, they're all in the
19 same part of the state, that's enough.
20 MR. CLEMENT: Well, Justice Kagan, I
21 don't think it was quite that cursory. And
22 there was -- there was some other information
23 from other districts, but I think the critical
24 thing is there was a consideration that all
25 these districts share similar problems in not

1 having -- it's not like there was this rich,
2 robust data set that they ignored because they
3 all share the problems of the same dynamic and
4 you don't have voter registration information
5 by race in any of the districts, so that's
6 another challenge.
7 And so they looked at what they had
8 and what they could go by, and then they
9 extrapolated. And it's not like the record is
10 bereft of evidence that the same principles
11 applied in different districts. I point you
12 to --
13 JUSTICE SOTOMAYOR: Well, it is odd,
14 Mr. Clement, that you say they didn't have
15 voting records because 95 is next to 92. And
16 what the district court did there was to look
17 at both individually and then their impact on
18 each.
19 You said we should look at 92, that
20 stayed more concentrated. But the district
21 court said you can't look at that -- you look
22 at that, but you have to look at it in
23 combination of the purpose it served. And the
24 purpose 92 served was to impact directly 95
25 because they took the blacks from 92 to make

1 more blacks in 95, and they did it in a way
2 that they drew lines in the middle of a street
3 with black houses on one side and white houses
4 on another side.
5 It's hard for me to imagine how race
6 isn't predominant when they're getting down to
7 the nitty-gritty on the basis of what side of a
8 street you live on. I don't know what
9 compactness means when you use a line split of
10 that nature. I don't know how you can look at
11 that and not think that race predominated.
12 MR. CLEMENT: So I -- I -- I think
13 that if -- even if you have a concern with the
14 way voting districts were split at the top of
15 95, far removed from the border with 92, that
16 doesn't give you a basis for invalidating HD
17 92.
18 And just to finish my answer to
19 Justice Kagan's question, I think if you look
20 at Joint Appendix page 451, you will see
21 Delegate Dance, the delegate from District 63,
22 and she's testifying on the House floor
23 contemporaneously that the 55 percent number
24 are the right numbers for the Richmond
25 districts.

1 So it's not like they didn't have
2 testimony at the time from members of the
3 African American caucus that said they were
4 right to apply these numbers across districts.
5 I will reserve my time.
6 CHIEF JUSTICE ROBERTS: Thank you --
7 JUSTICE KAVANAUGH: Mr. Clement --
8 CHIEF JUSTICE ROBERTS: I'm sorry --
9 thank you, counsel.
10 Ms. Ratner.
11 ORAL ARGUMENT OF MORGAN L. RATNER
12 FOR THE UNITED STATES, AS AMICUS CURIAE,
13 IN SUPPORT OF NEITHER PARTY
14 MS. RATNER: Mr. Chief Justice, and
15 may it please the Court:
16 I have two points on standing and two
17 on the merits.
18 On standing, the House as an
19 institution isn't harmed by changes to
20 individual district lines, and while states can
21 authorize legislatures to represent them in
22 court, Virginia hasn't done so.
23 JUSTICE ALITO: Well, on that first
24 point, injury in fact must be concrete, but it
25 doesn't have to be big.

1 MS. RATNER: That's correct.
2 JUSTICE ALITO: If something causes me
3 the loss of $5 or causes me to expend an hour
4 that I would rather do -- use for some other
5 purpose, that's injury in fact.
6 Is it -- is it conceivable that this
7 does not have even that kind of an
8 administrative impact on the House of
9 Delegates?
10 MS. RATNER: I think so, Your Honor,
11 because what we're talking about here is
12 potentially an effect for current incumbents in
13 their capacity as candidates for -- for
14 reelection prospects.
15 And so we're not talking about the
16 current House having any injury. The House, I
17 would think, is agnostic as to which
18 individuals are selected as its members.
19 JUSTICE ALITO: I mean, it's hard for
20 me to believe that doesn't cost them one dime.
21 I mean, maybe they -- they publish a map
22 showing the current districts, and they'd have
23 to publish a different map. Maybe they have to
24 print new stationery. Maybe they have to print
25 new labels for offices or for the desks of the

1 delegates. Injury in fact, as I said, does not
2 require a lot of injury. It has to be
3 concrete, but it doesn't have to be big.
4 MS. RATNER: At a minimum, though,
5 Justice Alito, it requires evidence of that
6 injury. And all that we have from the House
7 here is a statement of what this Court
8 described in Wittman against Personhuballah as
9 a non-obvious sort of injury. That's not
10 sufficient to support standing unless there's
11 evidence or affidavits saying just those types
12 of things --
13 JUSTICE KAGAN: But suppose --
14 JUSTICE ALITO: Well, when were they
15 supposed to do that? At what -- at what point
16 was the -- was their standing challenged so
17 that they would have an obligation to come
18 forward with evidence?
19 MS. RATNER: You know, it's a little
20 bit unusual given that this standing issue
21 first arises with respect to this appeal. They
22 could have introduced evidence when they
23 intervened. And I would think, at the latest,
24 the standing issue was challenged with respect
25 to seeking a stay, I believe in July. And so

1 there could have been some evidence introduced
2 at that point. So --
3 JUSTICE KAGAN: Ms. Ratner --
4 JUSTICE SOTOMAYOR: See --
5 JUSTICE KAGAN: -- suppose that you're
6 right that the legislature has no interest in
7 who is going to represent each district. But I
8 understood Mr. Clement to be making another
9 argument, which is the legislature does have an
10 interest in represent -- representational
11 processes working correctly and that what
12 something like this does is it confuses the
13 representational process. It essentially blurs
14 lines of accountability because nobody knows
15 who it is that they're supposed to be
16 representing. Are they supposed to be
17 representing their old constituents, or are
18 they supposed to be representing their new
19 constituents?
20 So there are divided loyalties.
21 There's blurred lines of accountability, and
22 that all of that is actually integral,
23 integral, to the way a representative
24 institution is supposed to work and -- and such
25 an institution ought to -- ought to take an

1 interest in those kinds of things.
2 MS. RATNER: So let me give you two
3 responses, Justice Kagan.
4 The -- the first is that I don't think
5 it's true that there are current blurred lines
6 of accountability. In fact, under the Virginia
7 constitution, Article II, Section 6, it's clear
8 that legislators represent their current
9 district.
10 So there's no sense in which there's
11 actually a divided constituency, unless we're
12 talking about a current legislator who
13 represents one district and sort of has her
14 mind on a future district in which she'll
15 campaign.
16 I think the second point is that, to
17 the extent we're talking about just there may
18 be generally less responsiveness or concern
19 about this as a procedural matter, I do think
20 then we're pushing more toward the type of
21 generalized grievance. It's not clear to me
22 why the House as a body would have a particular
23 interest in that beyond what voters and people
24 in the State of Virginia do.
25 I -- I think another way to illustrate

1 why this isn't really a House-specific injury
2 is by thinking of this not -- maybe not quite
3 as a zero-sum game, but certainly some current
4 members are going to be benefited by line
5 changes; others are going to be harmed.
6 And it seems a little bit strange to
7 say that the House has a dog in that fight.
8 JUSTICE KAVANAUGH: How do you
9 distinguish Beens, which seemed to deal with a
10 lot of these same issues?
11 MS. RATNER: Well, Beens, it's hard to
12 know exactly what to read into it because that
13 decision just talks about standing as
14 equivalent to intervention. And we know that
15 that's not appropriate.
16 But even putting that to the side, we
17 do think the type of injury that could have
18 been addressed there is different in kind, not
19 degree. And that's because when you --
20 JUSTICE KAVANAUGH: Why -- why do you
21 say "in kind"? Just because of reduction in
22 the size?
23 MS. RATNER: Because I think when you
24 change the size of an institution, particularly
25 when you slash it in half from 67 senators to

1 35 senators, there are going to be more of
2 these intuitive types of harms of the sort that
3 Justice Alito mentioned before.
4 There may be changes to committee
5 structures, to rules for voting, rules for a
6 quorum, and at least we can imagine some
7 institutional-specific harms there, whereas,
8 here, what we're really talking about are
9 changes in the 100 members who may sit in the
10 House's seats. And that's just not a harm that
11 the institution itself suffers. It's agnostic
12 as to that question.
13 CHIEF JUSTICE ROBERTS: Well, what
14 about the proposition that it does change the
15 nature of the entity if you are moving away
16 from compactness and contiguousness, for
17 example -- I guess the example is you may not
18 have representatives who really are -- this is
19 Richmond, that's what I represent, but they're
20 going to have part of Richmond, they're going
21 to have part of somebody else, and that changes
22 the nature of the dynamic in the -- in the
23 House?
24 MS. RATNER: Mr. Chief Justice, I
25 would give the same response that I gave to

1 Justice Alito before, which is, to the extent
2 that that's really what we're talking about,
3 there has to be some sort of evidentiary
4 showing for those types of standing
5 allegations.
6 There's never been an affidavit put in
7 or any evidence --
8 CHIEF JUSTICE ROBERTS: I don't think
9 it's in --
10 MS. RATNER: It -- it doesn't seem
11 intuitive at all that the new plan is
12 necessarily going to be less compact and
13 there's necessarily going to be some sort of
14 real-world change in the day-to-day operation
15 of the bodies. I just don't --
16 JUSTICE SOTOMAYOR: One could
17 speculate that, and I'm trying to get back to
18 that.
19 Justice Alito spoke about the cost of
20 changing maps. It seems to me that under any
21 law that could be attacked, a representative
22 body could claim a financial harm. Election
23 laws are passed by Congress all the time, and
24 we wouldn't say that both houses individually
25 could come in and challenge those election

1 laws.

2 I don't think we would anyway. I --

3 we would -- and yet those election laws could

4 require publication of different things and all

5 sorts of things that would change. That's not

6 a harm we would recognize.

7 So even if a particular legislature --

8 well, the particular legislature might have --

9 legislator might have standing if he or she

10 says, I campaigned differently with this

11 district as opposed to that district, but I

12 still don't see why that would give the House

13 standing.

14 MS. RATNER: So -- so a couple things.

15 CHIEF JUSTICE ROBERTS: Ms. Ratner,

16 why don't -- why don't you answer and then move

17 to the merits after that.

18 MS. RATNER: Okay. A couple things.

19 With respect to the first part of your

20 question, yes, we -- that's why the United

21 States is taking a position on standing here.

22 We worry that some of these theories and

23 speculation could have far-reaching, unintended

24 consequences. And that's why, at a minimum, we

25 would hope that the Court would adopt a very

1 cabined version of Beens if it wants to find
2 standing here.
3 As to your second point, the Court has
4 left open the question in Wittman against
5 Personhuballah whether an individual legislator
6 could have standing here.
7 Turning to the merits, we think that
8 the district court committed legal error here.
9 It applied across-the-board significance to a
10 racial target that really had varying effects
11 on these districts. And we think that it
12 didn't sufficiently discuss non-racial motives
13 for why --
14 JUSTICE SOTOMAYOR: You know, this is
15 being said in a very generalized way. But I --
16 this is a very long and carefully reasoned
17 opinion. Every single district, the judge
18 addressed, and it wasn't an overall statement
19 about this is -- this 55 is the only thing I'm
20 relying on. He went through every single
21 individual district and pointed to problems
22 with that district --
23 MS. RATNER: I understand that.
24 JUSTICE SOTOMAYOR: -- and with facts
25 that they -- I shouldn't say he, it was a

1 panel -- that they found convincing.

2 MS. RATNER: I understand that.

3 JUSTICE SOTOMAYOR: How do we get past

4 clear error?

5 MS. RATNER: So, Justice Sotomayor, we

6 think there's a legal error here, not -- we

7 haven't gone on to discuss the clear error

8 question. And I think that's most clear seen

9 at pages 83 to 84 of the jurisdictional

10 statement appendix, is where the court says,

11 these are all inextricably intertwined, they

12 all apply a 55 percent threshold.

13 And if you compare that to Footnote

14 25 --

15 JUSTICE SOTOMAYOR: But they do --

16 MS. RATNER: -- at page 34, that's

17 where the court relegates the House's expert on

18 traditional districting criteria. And we think

19 that that -- that imbalance really was borne

20 out with some of these districts, like District

21 92, which the House has already mentioned.

22 District 69 is another example I would

23 pour the -- point the Court toward, where

24 there's discussion -- I -- I grant you there's

25 discussion in the district court's decision of

1 here are a few different precincts, we could
2 imagine racial motives for these, but the
3 opinion does not talk about the clear
4 non-racial motives in that district, moving the
5 district up to align with the James River,
6 making it more compact, making it more
7 Richmond-centric, and that's not the
8 predominance analysis that this Court has
9 called for.
10 Thank you.
11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.
13 Mr. Heytens.
14 ORAL ARGUMENT OF TOBY J. HEYTENS
15 ON BEHALF OF APPELLEES VIRGINIA STATE BOARD
16 OF ELECTIONS, ET AL.
17 MR. HEYTENS: Mr. Chief Justice, and
18 may it please the Court:
19 There is only one sovereign whose law
20 was declared unconstitutional by the federal
21 district court. And what this Court is
22 essentially being asked to do is to referee a
23 dispute within the Virginia state government
24 about whether Virginia should appeal that
25 decision to this Court.

1 But Virginia law has been clear since
2 before the Civil War that the State's Attorney
3 General has the exclusive authority to make
4 that sort of litigation decision.
5 CHIEF JUSTICE ROBERTS: Well, here, in
6 the beginning, the State's Attorney General was
7 happy to have the House take over the
8 litigation.
9 MR. HEYTENS: I -- the State's
10 Attorney General did not oppose intervention, I
11 agree, Mr. Chief Justice, but I think that the
12 disposing of that is the trial brief that was
13 filed by the State's Attorney General. This is
14 at JA 3861, where the Attorney General made
15 very clear that the House -- excuse me, that
16 the Attorney General, on behalf of the six
17 named defendants and on behalf of the
18 Commonwealth, was allowing the defendant
19 intervenors to take the lead in the litigation,
20 but he did not say and has never said -- in
21 this nine-volume Joint Appendix, you will find
22 no statement by the House that they are
23 purporting to represent the Commonwealth of
24 Virginia, much less the six named defendants.
25 And you will find no acquiescence with

1 the Attorney General that anyone other than the
2 Attorney General represents the Commonwealth
3 and the six named defendants. I have two
4 points.
5 JUSTICE ALITO: Well, you -- you might
6 be right. And the statute that you point out
7 does say that it is the responsibility of the
8 Attorney General to represent the Commonwealth
9 in civil litigation. But I don't know whether
10 it's perfectly clear. And the House has been
11 permitted by the Virginia Supreme Court to
12 intervene. We don't know on exactly what
13 theory.
14 So, if the issue whether the House is
15 authorized under some circumstances and these
16 circumstances to represent the Commonwealth, if
17 that's open, I don't know why we shouldn't
18 certify that to the Virginia Supreme Court.
19 MR. HEYTENS: Justice Alito, I -- I
20 understand that concern, and I don't think the
21 Court has to get into it. I think part 2 of
22 this Court's opinion in Karcher just resolves
23 that because, if you look at the House's
24 intervention motion, if you look at their
25 statements before the district court, they

1 never once purported to intervene to represent
2 the state. So far as I can tell, the very
3 first time in this entire litigation that this
4 House -- that, excuse me, that the House ever
5 suggested that they could represent the State's
6 interest was after we challenged their standing
7 to appeal.
8 And Karcher in part 2 of its opinion
9 says as clear as possibly can, you're not
10 allowed to shift grounds when someone
11 challenges your standing to appeal. So I think
12 the Court does not need to get into that,
13 Justice Alito.
14 Let me go to the -- the question about
15 divided constituencies. There was a question
16 about that. I have two quick responses on
17 that.
18 I don't think that can be a viable
19 theory of standing for two separate reasons.
20 Reason number one, if that were true, then this
21 Court's decision in Wittman was unanimously
22 wrong because all three of the Congress members
23 in Wittman could have said, as a result of this
24 remedial map, I'm going to represent a new
25 constituency.

1 And the Court did not say they had
2 standing on that theory. The Court never even
3 entertained the idea they had standing on that
4 theory.
5 Reason number two, if you adopt that
6 theory of standing, it will have serious
7 federalism implications because you will be
8 taking away the states' ability to decide for
9 themselves.
10 JUSTICE BREYER: What do you suggest?
11 I mean, the way you want to with no standing,
12 you have a Democratic House, a Democratic
13 governor, and they don't like the plan. They
14 -- they don't like the court decision. They'll
15 appeal it. Or Republican, same party, same
16 thing.
17 But you get a Democratic House and a
18 Republican governor or a Republican House and
19 Democratic governor, and it could be the worst
20 plan in the world or it could be the best plan
21 in the world or the court could be wrong or the
22 court could be right. But one thing for sure,
23 nobody's going to be able to attack it. It's
24 the House's plan. If you say they can't attack
25 what the court did, then who can? The governor

1 won't because he likes it politically.
2 So who will?
3 MR. HEYTENS: Well, Justice Breyer, my
4 fundamental submission is that this is a "who
5 decides" question. This is a classic question
6 of who makes the decision on behalf of the
7 state, and Virginia has made one choice.
8 Now we're not suggesting that --
9 JUSTICE BREYER: But am I right in
10 saying where the government is divided between
11 the parties, then, in circumstances like this,
12 nobody will challenge it?
13 MR. HEYTENS: I -- I don't --
14 JUSTICE BREYER: But nobody can,
15 because we will have held nobody can, but where
16 the elections turn out that it's the same
17 governor party and the House party, it's all
18 different. Now it is possible to challenge it.
19 Now, if there's no -- I would like you
20 to say there's no way to challenge it or where
21 there's the difference, or if there is, tell me
22 what way.
23 MR. HEYTENS: Sure. Three thoughts, I
24 think, on that, Justice Breyer.
25 First and foremost, I think positing

1 that elected officials who are empowered to
2 exercise government power will make decisions
3 that way is inconsistent with the presumption
4 of good faith that this Court affords to
5 government.
6 This Court has repeatedly -- this
7 Court has -- I just think this Court should be
8 very hesitant to adopt a theory of Article III
9 standing that turns on whether the challenger
10 can allege that the decision was made for
11 political reasons.
12 I think that's number one.
13 CHIEF JUSTICE ROBERTS: Well, maybe
14 you don't need an allegation. You can just use
15 common sense that the legislature in fact --
16 well, you know what I mean. I mean, it --
17 it -- it -- I -- I haven't seen the case, I
18 don't think, where the Democratic legislature
19 has challenged an alleged gerrymander because
20 it was too favorable to Democrats or vice
21 versa.
22 MR. HEYTENS: Mr. Chief Justice, I
23 think there could be a lot of finger-pointing
24 on every side in this case. I mean --
25 JUSTICE BREYER: We're not alleging

1 anything. I'm just saying -- nor are the
2 parties. I'm just saying, is there a way to
3 challenge standing should what I say be
4 truthful, in fact?
5 MR. HEYTENS: So --
6 JUSTICE BREYER: Whether it's an
7 allegation, not an allegation, or not. Is
8 there any way to maintain -- can somebody
9 challenge?
10 MR. HEYTENS: I don't think the Court
11 needs to decide in this case.
12 JUSTICE BREYER: Yeah. But I'd like
13 to decide.
14 JUSTICE KAGAN: Mr. Heytens --
15 (Laughter.)
16 JUSTICE BREYER: So tell me who
17 you think -- who you think can challenge.
18 JUSTICE KAGAN: -- isn't one of --
19 isn't one of the points here is that it's a
20 matter of state law really. There are many
21 states that have responded to this exact
22 circumstance by allowing the legislature to
23 proceed and --
24 MR. HEYTENS: North Carolina.
25 JUSTICE KAGAN: -- and other states,

1 like Virginia, that have not. And in some
2 sense, this -- the question of whether somebody
3 should be able to get to court in this
4 partisan, divided circumstance is one that a
5 state can decide for itself.
6 MR. HEYTENS: Yes. And -- and,
7 Justice Breyer -- yes.
8 JUSTICE BREYER: I was looking for an
9 answer, honestly.
10 MR. HEYTENS: And -- and, Justice
11 Breyer, to return to your --
12 JUSTICE BREYER: And I now have one,
13 okay, thank you.
14 MR. HEYTENS: Well, I also don't think
15 this Court needs to decide in this case whether
16 an individual legislator or candidate would
17 have standing. The reason you don't need to
18 decide that is because no individual legislator
19 nor candidate ever tried to intervene in this
20 case.
21 This Court left that question open in
22 Wittman. As the federal government points out
23 in its brief, that question is still open here.
24 So you don't need -- to decide this case, you
25 do not need to definitively decide that no one

1 would have standing because this Court has no
2 occasion here to decide whether an individual
3 elects --
4 JUSTICE ALITO: Suppose there -- there
5 was an affidavit by some administrative officer
6 of the House that said this is going to cost us
7 $26 in administrative expenses. Would the
8 House have standing?
9 MR. HEYTENS: No.
10 JUSTICE ALITO: Why not? That's not
11 injury in fact?
12 MR. HEYTENS: It is an -- it is an
13 economic injury, but this Court has been clear
14 that what you need is a judicially cognizable
15 injury. And I don't think that would be a
16 judicially cognizable injury to the House qua
17 the House.
18 No one is disputing there's a
19 judicially cognizable injury here. No one is
20 disputing that someone could have appealed
21 here. But the judicially cognizable injury is
22 to the sovereign whose law was declared
23 unconstitutional, and that sovereign is the
24 Commonwealth of Virginia, not one of the
25 constituent parts of the state government.

1 That's our fundamental submission, is
2 that this is a matter of state law. Virginia
3 has a state --
4 JUSTICE ALITO: So you're talk -- then
5 you're really not talking about injury in fact;
6 you're talking about some other limitation on
7 -- and I can understand it. It's coming from
8 someplace else, but it doesn't have to do with
9 injury in fact.
10 MR. HEYTENS: Well, Justice Alito,
11 I've understood the judicially cognizable
12 injury to be part of the injury-in-fact
13 inquiry, that this Court has said it's not just
14 enough to have something that could be
15 described as an injury in general; it has to be
16 a judicially cognizable injury. And my view
17 would be that's not a judicially cognizable
18 injury to the House of Delegates apart from the
19 Commonwealth of Virginia.
20 JUSTICE KAVANAUGH: What do we -- what
21 do we do with Beens? If I were a lower court
22 judge, I would think Beens is controlling. So
23 are you asking to overrule Beens, distinguish
24 it in some way? What --
25 MR. HEYTENS: Justice Kavanaugh, we

1 are not asking you to overrule Beens. We're
2 asking you to say two things about Beens. The
3 first is to recognize that if Beens is still
4 good law, it, along with United States versus
5 SCRAP, which was decided one year after Beens,
6 is the outermost limit of standing that this
7 Court has ever recognized and that its
8 reasoning -- the reasoning of Beens itself,
9 which is limited, I admit, has been squarely
10 repudiated by this Court's subsequent
11 decisions. I'd say that's thing one.
12 Thing number two is to say that Beens
13 is fundamentally different because altering the
14 size of the body affects the structure and
15 nature of the body in a way that redrawing
16 lines doesn't.
17 Let me give you a concrete example.
18 Under the Virginia House of Delegates current
19 rules, all committees have 22 members, and only
20 one -- and a person can only be the chair of
21 one committee.
22 If you slash the body in half, you
23 would almost certainly have to revise both of
24 those rules because, otherwise, you'd be in a
25 situation where nearly 50 percent of the body

1 was a member of every single committee.

2 JUSTICE GORSUCH: But I -- I would

3 have thought that the response would be that

4 the members of the House have -- or Senate in

5 that case have no more interest in -- in that

6 than they would in this, that the people get to

7 decide how big their House is and what lines

8 are drawn.

9 MR. HEYTENS: May I?

10 CHIEF JUSTICE ROBERTS: Sure.

11 MR. HEYTENS: Again, Justice Gorsuch,

12 I think Beens is, at best, the outermost limit

13 of this Court's standing jurisprudence, and our

14 fundamental submission is you should not extend

15 it from the very specific situation presented

16 there to the much more common situation

17 presented here.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,

20 Mr. Heytens.

21 Mr. Elias.

22 ORAL ARGUMENT OF MARC E. ELIAS

23 ON BEHALF OF APPELLEES GOLDEN BETHUNE-HILL, ET AL.

24 MR. ELIAS: Mr. Chief Justice, and may

25 it please the Court:

1 It is not in dispute in this case that
2 the Commonwealth of Virginia adopted a
3 one-size-fits-all, 55 percent racial rule that
4 had a direct and significant input -- impact on
5 the drawing of district lines in each of the --
6 the 11 challenged districts. Voters were
7 placed within and without of the district based
8 on those lines.
9 CHIEF JUSTICE ROBERTS: Well, what the
10 solicitor general -- the federal government's
11 solicitor general says is that you're -- you're
12 right, but it's -- it was too extreme, that
13 they didn't look at other factors that had to
14 do with the redistricting but sort of the --
15 the flip side of the prior error, that -- that
16 they just looked at -- the court was wrong in
17 reviewing it to simply look at that same
18 statistical figure.
19 MR. ELIAS: Well, I don't think you
20 can fairly read the district court's lengthy
21 decision and say that it didn't look on a
22 district-by-district basis. Obviously, to use
23 a phrase that, Mr. Chief Justice, you used, the
24 elephant in the room in this case has been the
25 55 percent rule. So it would be odd for the --

1 for the opinion not to address that rule at the
2 outset. But it did, in fact, do a
3 district-by-district analysis.
4 CHIEF JUSTICE ROBERTS: Well, I
5 actually had a different elephant in mind --
6 (Laughter.)
7 CHIEF JUSTICE ROBERTS: -- which is
8 the fact that the prior judicial panel found,
9 you know, A, B, and C credible and D, E, and F
10 incredible, and then a different panel found
11 the exact opposite for the exact witnesses.
12 And that, I understand, is a basic
13 element, if you're looking at a case, the
14 clearly erroneous standard applies, but it
15 seems an awkward position for us to be in in
16 saying, well, these directly 180 degree
17 findings are clearly or not clearly erroneous,
18 when we would have found the exact same thing
19 the other way if that panel had been before us.
20 MR. ELIAS: So I'd offer two answers
21 to that, Mr. Chief Justice.
22 The first is a factual matter in this
23 case. After Bethune-Hill won, when this Court
24 remanded the case back to the district court,
25 the question that the district court faced was

1 what to do next. It was at the insistence of
2 the appellants in this case that the record be
3 reopened and that further testimony be heard.
4 And, in fact, if you look at ECF 146,
5 Note 4, the reason they gave why the record
6 needed to be reopened was so that the new judge
7 who had been assigned to the three-judge panel
8 could hear witnesses and make credibility
9 determinations.
10 So it is an odd circumstance, indeed,
11 for my friend to now be suggesting that
12 having -- having urged and successfully, over
13 our objection, I might add, reopened the record
14 so that the new member of the panel could hear
15 credibility determinations, to now be
16 complaining about the --
17 CHIEF JUSTICE ROBERTS: Right. No,
18 but I understand. But whether or not that's
19 significant depends on how much weight you give
20 to the new evidence. But, I mean, the reality
21 is that everything Jones said was the truth the
22 first time and now everything he says the
23 second time is not.
24 MR. ELIAS: Well --
25 CHIEF JUSTICE ROBERTS: And it just

1 seems to me that -- that -- you know, it
2 strikes me as a little awkward to apply the
3 very deferential, clearly erroneous standard
4 when you've got this other -- other findings
5 that are the exact opposite.
6 MR. ELIAS: So that brings me to the
7 second point, which is this Court in Cooper
8 faced a more extreme version of that, as you
9 recall, where you had the state court had found
10 one set of factual determinations with respect
11 to why the North Carolina map had been drawn a
12 certain way, and you had the federal court
13 using essentially the same -- in the same basic
14 set of facts, weigh the evidence the other.
15 And this Court had to decide what to do in that
16 instance and applied what was the appropriate
17 rule there and the appropriate rule here, which
18 is that the case before it is the -- is the
19 case for which -- that deferential, clear error
20 review is appropriate.
21 These three judges had the benefit not
22 just of the evidence in the second trial but
23 the evidence in the first trial. So who was in
24 a better position to -- to adjudge whether
25 Jones was credible? A -- three judges who saw

1 him once or three judges who could compare his
2 first testimony to his second, as well as the
3 testimony of additional witnesses?
4 Obviously, the second panel had more
5 information regarding Delegate Jones and the
6 experts and the other witnesses --
7 JUSTICE KAVANAUGH: Everyone agrees
8 here that there needed to be 12
9 majority-minority districts, right?
10 MR. ELIAS: We agree that there were
11 12 majority-minority districts under the
12 benchmark plan and under Section 5. They --
13 JUSTICE KAVANAUGH: So I'll take that
14 as a yes?
15 MR. ELIAS: Well, they had to do a
16 functional analysis, Your Honor, and -- and
17 what that meant is that they needed to prove
18 that there was not retrogression.
19 JUSTICE KAVANAUGH: Right.
20 MR. ELIAS: Whether retrogression
21 would leave them at 50.1 or 49.9 is part of the
22 inquiry that would have been done.
23 JUSTICE KAVANAUGH: If you have to
24 have a majority-minority district, and I
25 thought it was also widely agreed that a bare

1 majority would not be good enough for any of
2 these districts, and then you consult and you
3 consult with the Black Caucus and you consult
4 with others and everyone agrees it has to be
5 more than a bare majority, I'm wondering why 55
6 is such -- so problematic here, given that the
7 states have to have some flexibility -- I don't
8 -- pinpointing 53.5 versus 54.2 versus 55 when
9 they've done the kind of outreach and
10 consulting, everyone approves, the attorney
11 general -- the U.S. attorney general preclears.
12 I'd just like your response to all of that.
13 MR. ELIAS: Sure, Justice Kavanaugh.
14 I'd offer three responses.
15 The first is that I don't think it's
16 -- I don't think the trial record is, fairly
17 read, and the district court certainly did not
18 find, that Delegate Jones consulted the entire
19 Black Caucus.
20 His original testimony was he
21 consulted everyone. Then it was he consulted
22 some. Then it was --
23 JUSTICE KAVANAUGH: Is it -- is it
24 correct that the Black Caucus was supportive of
25 the plan?

1 MR. ELIAS: I think that members of
2 the Black Caucus testified in the second trial
3 that they were told that the -- and this is
4 their words -- the gospel according to Jones
5 was that every district had to be 55 percent.
6 And they -- for VRA compliance and they assumed
7 that was correct.
8 But, if you look at the testimony of
9 the African American members in the second
10 trial, they will say that they did not believe
11 that, in fact, their -- in order to have an
12 ability to elect district, it needed to be that
13 high.
14 The -- the second answer I'd give you
15 is I think it would be very instructive for
16 this Court to look at two things. The first is
17 the Senate plan, which hasn't gotten a lot of
18 play in the briefing, but the Senate plan was
19 being adopted at the same time. And the Senate
20 plan involved a number of African American
21 districts as well, five, and all five of those,
22 which cover the same geographic regions, were
23 under 55 percent BVAP.
24 So the idea that -- that Delegate
25 Jones had no information available to him that

1 suggests it could be below 55 percent is
2 contradicted by the fact that the Senate plan,
3 which was in the same bill and involved the
4 same geographic regions, all were under
5 55 percent.
6 The second thing that I think would be
7 useful for the Court to look at, both on the
8 question of predominance and on the question of
9 strict -- of strict scrutiny, is HD 75.
10 So HD 75 is the one of the 12
11 districts where they find predominance, but
12 strict scrutiny is -- is -- is met. So let's
13 look at the facts of HD 75.
14 HD 75 was above 55 percent before and
15 after the 2011 redistricting, so it -- it
16 wasn't materially increased or decreased. In
17 fact, the BVAP only changed from 53 -- 55.3 to
18 55.4.
19 So many of the arguments my friend
20 makes about how this district or that district
21 didn't change very much, well, it didn't change
22 very much in HD 75 either, and the Court found
23 predominance.
24 It retained 78.8 percent of its core,
25 another argument that my friend makes about,

1 well, look, but it was core retention. Well,
2 HD 75 was core retention and the Court found
3 predominance.
4 On its face, the district appears
5 relatively compact, the trial court found, but
6 yet it found predominance.
7 And, finally, Delegate Jones offered a
8 political explanation for why he did that draw,
9 again, something that is offered here.
10 The facts of HD 75 are not very
11 different in terms of a finding of predominance
12 than the districts that -- than District 92.
13 JUSTICE KAVANAUGH: But -- but, again,
14 if -- if a state faced with these facts said,
15 we're going to do 52 percent or 53 percent,
16 they would be hammered from the other side,
17 saying you are discriminating against African
18 American voters because you're not giving the
19 voters a sufficient opportunity to elect the
20 candidate of their choice.
21 And so they -- they do more here by
22 going with 55. And I guess, again, on the
23 state flexibility point, I'm just wondering how
24 a state can try to comply with the demands of
25 the Voting Rights Act on the one hand and, as

1 you started with, the demands of the Equal
2 Protection Clause on the other in this narrow
3 band between 51 and 55.
4 MR. ELIAS: Sure. So, Justice
5 Kavanaugh, let me -- let me -- let me
6 articulate it this way.
7 If the state creates a 55 percent
8 blanket rule because of how African Americans
9 in a rural area vote on the border of North
10 Carolina, and then generalize that to urban
11 centers throughout the Commonwealth, then it
12 has engaged in racial stereotyping that
13 triggers strict scrutiny.
14 Now, in HD 75, they were able to meet
15 that burden, but it is simply not -- this Court
16 in Alabama was clear. This Court in Cooper was
17 clear. And this Court in Bethune-Hill I were
18 clear -- was clear. If -- if the state engages
19 in that kind of -- of one-size-fits-all
20 mechanical floor or mechanical trigger, then
21 strict scrutiny applies.
22 Now --
23 JUSTICE KAGAN: Could I make sure I
24 understand what you're saying, Mr. Elias,
25 because what I've -- what -- what I've

1 understood is that the flexibility that Justice
2 Kavanaugh is talking about is critical, and
3 Alabama talked about this and Cooper talked
4 about this, but it's critical at the -- it's --
5 it's not -- it's critical at the point where
6 you ask whether the Voting Rights Act has
7 provided a sufficient justification --
8 MR. ELIAS: Right.
9 JUSTICE KAGAN: -- for the state to
10 get over strict scrutiny. And there, you know,
11 we don't expect the state to actually have the
12 exact number.
13 But it's -- it's not relevant to the
14 point of whether race has predominated in the
15 first place, is it?
16 MR. ELIAS: No, Your Honor. That --
17 JUSTICE KAVANAUGH: I've been assuming
18 predominance.
19 MR. ELIAS: Oh, I'm sorry.
20 JUSTICE KAVANAUGH: Yeah.
21 MR. ELIAS: Then I misunderstood.
22 So, in strict scrutiny, look, the
23 truth is that all the State of Virginia had to
24 do was come in with a good reason, and in this
25 case, they came in with no reason, and it's

1 really that -- it's really honestly that
2 simple.
3 JUSTICE KAVANAUGH: A good reason is
4 complying with the Voting Rights Act to ensure
5 that African American voters have the
6 opportunity to -- to elect the candidate of
7 their choice.
8 MR. ELIAS: But they -- but they
9 weren't --
10 JUSTICE KAVANAUGH: And it's
11 precleared by the U.S. Justice Department.
12 MR. ELIAS: Well, first of all, there
13 is nothing in the record that suggests that
14 they drew this plan to comply with Section 2 of
15 the Voting Rights Act. The sole -- the sole
16 argument in the record was that it was
17 necessary to comply with Section 5 of the
18 Voting Rights Act.
19 And Alabama -- this -- that -- that
20 case is Alabama. Alabama already said that a
21 misunderstanding, that you need a racial --
22 that you need a -- a -- a mechanical test to --
23 to meet preclearance misunderstood what was
24 required under Section 5.
25 It was not consistent with what DOJ

1 practice was. It was not consistent with what
2 DOJ guidelines were. The State of Virginia
3 could not have believed, if it had looked at
4 Section 5 guidance, that it needed this
5 55 percent rule state-wide to comply.
6 And, in fact, the Senate plan, which
7 was in the same bill, had --
8 JUSTICE KAVANAUGH: Well, DOJ
9 precleared it, though.
10 MR. ELIAS: DOJ precleared it, but DOJ
11 was not charged with looking at whether it was
12 a racial gerrymander or not. They were solely
13 charged with looking at whether or not it -- it
14 retrogressd.
15 The Alabama plan had been precleared
16 that was struck down by this Court.
17 JUSTICE KAGAN: Mr. Elias, if I could
18 go back to the predominance inquiry, one of Mr.
19 Clement's arguments, I think, is something
20 like, well, if you have this 55 percent
21 non-negotiable target, you know, that -- that
22 might be evidence for all districts, but it
23 doesn't get you over the bar for all districts
24 because there might be some districts that are
25 way over 55 percent, so that you can move

1 people in and move people out and never really
2 think about the 55 percent target in anything
3 that you're doing, and that what the Court got
4 wrong here was not recognizing that fact.
5 So why isn't that right?
6 MR. ELIAS: Well, for two reasons.
7 First of all, I think the Court
8 addressed district by district that there were,
9 in fact, black voters moved based on race on a
10 district-by-district basis.
11 And that's part of the reason why,
12 Justice Kagan, I pointed you to the facts of
13 HD 75, where predominance was found and BVAP
14 went from 55.3 to 55.4.
15 The -- the test is not whether BVAP
16 stayed the same. The question is, when you had
17 to add population as a whole, did you choose
18 voters based on race?
19 And if you look at Joint Appendix 2782
20 to 85, you can see the BVAP moved in and the
21 BVAP moved out in each of these districts. And
22 the numbers, frankly, are fairly startling.
23 HD 71, 9674 black voters were moved in, 2,000
24 black voters were moved out. HD 89, 8,000
25 black voters are moved in, 3900 black voters

1 are moved out.
2 CHIEF JUSTICE ROBERTS: Well, this is
3 in a context where you are required to consider
4 race to comply with Section 5 of the Voting
5 Rights Act.
6 MR. ELIAS: Correct. And had -- Your
7 Honor, had the state -- the Commonwealth of
8 Virginia done even a modicum of district-by-
9 district analysis, this would be a very
10 different case.
11 If it had done the same analysis that
12 the state Senate did, it would be -- we
13 wouldn't be here.
14 If it had done the same thing that --
15 that was done with respect to Delegate Tyler's
16 district in HD 75, we might have been here, and
17 I would have lost, as I did -- as we did the
18 last time when I challenged -- when we
19 challenged HD 75.
20 But, in these districts, it is
21 virtually uncontested and it is certainly not
22 clear error that in the -- that in the words of
23 the -- of the district court, the legislature
24 engaged in no analysis of any kind. And that's
25 JS AP 88. No analysis.

1 Thank you, Your Honor.
2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.
4 Mr. Clement, you have three minutes
5 remaining.
6 REBUTTAL ARGUMENT OF PAUL D. CLEMENT
7 ON BEHALF OF THE APPELLANTS
8 MR. CLEMENT: Thank you, Mr. Chief
9 Justice.
10 Just a couple quick points on standing
11 and on the merits.
12 First on standing, I don't think you
13 can underestimate the impact of this case and
14 the decision below and the remedial order that
15 follows on the House and the way it operates
16 day to day.
17 The remedial order reconfigured 25 of
18 the 100 seats. That's fully 25 percent of the
19 House's seats. That's much more than a
20 peppercorn. I don't think the solution is to
21 get 25 individual members here.
22 And I think it's a mistake to think of
23 the districts that basically set up the basic
24 representational structure of the House --
25 JUSTICE SOTOMAYOR: Mr. Clement, what

1 -- Mr. Clement, what do we do now? If we rule
2 in your favor and say that every House that has
3 -- creates a plan has standing, we invite
4 complete discord in a state over who represents
5 the interests of that law.
6 MR. CLEMENT: I don't think there's
7 any discord here.
8 JUSTICE SOTOMAYOR: So every --
9 MR. CLEMENT: As my friends on the
10 other --
11 JUSTICE SOTOMAYOR: -- every House
12 body can come in, so can their attorney
13 general, presumably, and possibly some
14 individual members. I mean, this is a radical
15 new step.
16 MR. CLEMENT: I -- I don't think it
17 has anything -- this case has anything to do
18 with whether the members are going to come
19 here. I don't think having 25 members with
20 standing is better than having the House,
21 especially when these basic lines that
22 determine how they're going to be organized are
23 critical.
24 I also don't see how you could not
25 recognize standing here without overruling your

1 decision in Beens. I mean, Beens may be a more
2 extreme version, but --
3 JUSTICE GINSBURG: It hasn't been
4 cited --
5 MR. CLEMENT: -- it's the same --
6 JUSTICE GINSBURG: -- Mr. Clement, in
7 30 years. Beens was of an age when there was a
8 much more relaxed view of standing than there
9 is now.
10 MR. CLEMENT: I -- I -- I don't think
11 that -- that decisions come with expiration
12 dates. The fact that you haven't cited it in
13 the last 30 years doesn't mean that you
14 wouldn't have to overrule it. And I don't
15 think you should.
16 And I think the important thing is
17 that even if there's a difference in degree --
18 as Justice Alito suggested, even a $5 injury is
19 injury in fact -- there's much more than that.
20 And it goes to the heart of how this House
21 organizes itself.
22 Just on the merits, two quick points.
23 First of all, I don't think -- I think
24 it would be a huge mistake on predominance to
25 just say this is clear error and be done with

1 it. The difference between the districts here
2 and the districts in Alabama are completely
3 stark.
4 You looked at a district in Alabama,
5 and they moved out 16,000 people and only 30 --
6 or in 16,000 people, only 36 of whom were
7 white. Here, with HD 69, there's a 1 percent
8 difference in the racial makeup of the people
9 who went in and out of the district, 44 versus
10 43 percent.
11 The -- you cannot say that race
12 predominated here, faithfully with this Court's
13 precedence about what predominance means.
14 And then, if you get to strict
15 scrutiny -- Justice Kavanaugh, you asked about
16 whether the African American Caucus supported
17 this law. All but two members of the African
18 American Caucus supported this law. One of the
19 two members who didn't was the district in HD
20 75. She didn't support the law because she
21 thought that the BVAP of 55 percent was too
22 low.
23 And that just shows you the dilemma
24 that -- that people face. And this is not a
25 case like Alabama where the state picked a

1 cartoonish figure and said, in order to avoid
2 retrogression, they have to stay at 75 percent.
3 This is a case where they picked
4 55 percent, which, frankly, is exactly the
5 right number to avoid retrogression in
6 contested primaries. Thank you, Your Honor.
7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel. The case is submitted.
9 (Whereupon, at 11:07 a.m., the case
10 was submitted.)
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