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

APPELLANTS' BRIEF REGARDING STANDING

MICHAEL A. CARVIN
Counsel of Record
JOHN M. GORE
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

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Counsel for Appellants Robert J. Wittman, Bob Goodlatte, Randy J. Forbes, Morgan Griffith, Scott Rigell, Robert Hurt, David Brat, Barbara Comstock, Eric Cantor & Frank Wolf

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

APPELLANTS' BRIEF REGARDING STANDING

A party has Article III standing to appeal when it has "a direct stake in the outcome of a litigation." *Diamond v. Charles*, 476 U.S. 54, 66 (1986); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013). Such a direct stake arises when the judgment appealed causes the party "direct injury" that would be redressed by appellate reversal. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618, 624 (1989); *see also Swann v. Adams*, 385 U.S. 440 (1967). Such an injury may be "small," *Diamond*, 476 U.S. at 66-67, or even "contingent" on future events, *Clinton v. City of New York*, 524 U.S. 417, 430 (1998). The "presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. FAIR*, 547 U.S. 47, 52 n.2 (2006).

Appellants have "a direct stake in the outcome," *Diamond*, 476 U.S. at 66, because the judgment below inflicts "direct injury" on at least one of them, *ASARCO*, 490 U.S. at 618. In particular, the majority's holding that Enacted District 3's 56.3% black voting age population (BVAP) violates *Shaw v. Reno* necessarily requires a remedy that reduces that percentage by swapping black (and overwhelmingly Democratic) voters from District 3 with white (far less Democratic) voters from one or more of the four surrounding districts, *all* of which are represented by a Republican Appellant. Indeed, the Alternative Plan that Plaintiffs introduced at trial and *every* remedial plan proposed post-judgment turns at least one Republican district adjacent to District 3 into a majority-Democratic district—and virtually all redraw *multiple* districts currently represented by

Republican Appellants. The majority's decision thus directly harms at least one Appellant's "chances for reelection," *Meese v. Keene*, 481 U.S. 465, 474 (1987), and interests as a Republican voter and candidate, *see Swann*, 385 U.S. at 443.

It should also be noted that, because the Democratic Attorney General of Virginia has abandoned the defense of the Legislature's Enacted Plan, dismissing the appeal not only would allow a judgment that directly injures Appellants to stand, but also permit state officials to impose their partisan political preferences on litigants, the Legislature, and the public at large without appellate review. Appellants have standing, and the Court should note probable jurisdiction or summarily reverse.

BACKGROUND

A. District 3 And Surrounding Districts

District 3 has existed as Virginia's only majority-black congressional district since 1991. *See Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997), *summ. aff'd*, 521 U.S. 1113 (1997); Pl. Ex. 27 at 14. In 2010, District 3 was surrounded by four districts which each elected Republicans: Appellant Robert Wittman won reelection in District 1; Appellant Scott Rigell beat a Democratic incumbent in District 2, a closely divided district politically; Appellant Randy Forbes won reelection in District 4; and Appellant Eric Cantor won reelection in District 7.

The 2010 Census revealed population shifts that required a new congressional districting plan. After Republicans gained control of the Legislature in the 2011 elections, Delegate Bill Janis sponsored the bill that became the Enacted Plan. Janis candidly stated

that his overriding objective was "to respect to the greatest degree possible the will of the electorate as it was expressed in the November 2010 election," when voters elected 8 Republicans—including 4 Republicans in the districts surrounding District 3—and 3 Democrats. J.S. App. 53a.

To accomplish this objective, Janis not only sought, but directly adhered to, "the input of the existing congressional delegation, both Republican and Democrat," Int.-Def. Ex. 9 at 14, in how their districts should be drawn. Janis repeatedly noted that "the district boundary lines were drawn in part on specific and detailed recommendations" from "each of the eleven members currently elected to [C]ongress." *Id.* 8. After the Enacted Plan was drawn, Janis "spoke[] with each" incumbent and "showed them a map of the lines." *Id.* "[E]ach member of the congressional delegation both Republican and Democrat has told me that the lines" conform to "the recommendations that they provided me, and they support the lines for how their district is drawn." *Id.* 9-10; J.S. App. 56a.

Plaintiffs' sole witness at trial, Dr. Michael McDonald, conceded that the Enacted Plan's changes to District 3 had a "clear political effect" of benefitting "the Republican incumbents" in surrounding districts. Tr. 122, 128. The undisputed electoral data also confirmed that the Enacted Plan's changes to District 3 were "politically beneficial" to the Republican incumbents in adjacent districts because they moved Democrats out of, and Republicans into, those districts. *Id.* 122-28. For example, prior to the Enacted Plan, District 2 was a closely divided district where Barak Obama and John McCain each captured 49.5% of the vote in 2008.

Int.-Def. Ex. 20. The Enacted Plan increased District 2's Republican vote share by 0.3%. *Id.* The same pattern adhered in the other districts surrounding District 3: District 1 became 1% more Republican; District 4 became 1.5% more Republican; and District 7 became 2.4% more Republican. *Id.* All eight districts represented by an Appellant are plurality- or majority-Republican under the Enacted Plan. *See id.*

The 2012 and 2014 elections proceeded under the Enacted Plan. In both elections, all four districts surrounding District 3 elected Republicans. In 2014, District 1 reelected Appellant Wittman; District 2 reelected Appellant Rigell; District 4 reelected Appellant Forbes; and District 7 elected Appellant David Brat. All eight Appellants currently serving in Congress intend to seek reelection in 2016.

B. Plaintiffs' Lawsuit

Plaintiffs initiated a *Shaw* challenge to District 3 in October 2013. *See* Compl. (DE 1). The eight Appellants then serving as members of Congress moved to intervene as intervenor-defendants. *See* J.S. App. 3a-4a. Plaintiffs did not oppose that motion, and the three-judge court granted it. *See id.*

Plaintiffs sought to prove their *Shaw* claim in part through an Alternative Plan that replicates most of the Enacted Plan, but shifts the boundary between Districts 2 and 3. Tr. 157. The Alternative Plan reduces District 3's BVAP by 6%, to 50.2%. *Id.* 172. At the same time, it increases District 2's Democratic vote share by 5.4%. Int.-Def. Ex. 22. The Alternative Plan thus turns District 2 from an evenly divided "49.5% Democratic district" into a 54.9% Democratic district that even Dr. McDonald described as "heavily

Democratic." Tr. 153; Int.-Def. Ex. 22; J.S. App. 88a.

Following trial, the three-judge court issued a 2-1 split decision holding that Enacted District 3 violates *Shaw*. Mem. Op. (DE 109). The eight original Appellants appealed to this Court, which vacated and remanded for further consideration in light of *Ala. Leg. Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). *See Cantor v. Personhuballah*, No. 14-518.

On remand, the three-judge court granted intervention to Appellants David Brat and Barbara Comstock, who had been elected to Congress during the appeal. The majority thereafter issued a substantially similar opinion invalidating Enacted District 3 and enjoining any congressional elections in Virginia until a remedial plan is adopted. *See* J.S. App. 1a. All ten Appellants appealed to this Court. Defendants did not join the appeal.

C. Proposed Remedies

The three-judge court accorded the Legislature until September 1, 2015, to adopt a remedy. Governor McAuliffe called the Legislature into a special session to convene on August 17, 2015. That special session lasted a matter of hours before the Senate Democrats, joined by a single Republican, adjourned sine die. *See* "In Surprise Move, Senate Democrats Adjourn Special Session," Richmond Times-Dispatch (Aug. 17, 2015).

The three-judge court has opted to proceed toward a judicial remedy during the pendency of Appellants' appeal. The court directed parties and interested non-parties to submit proposed remedial plans by September 18, 2015. *See* Order (DE 207). The court has appointed Dr. Bernard Grofman as a special

master and directed him to submit a remedy to the court by October 30, 2015. *See* Order (DE 241).

All properly filed proposed remedial plans make at least one Republican district represented by an Appellant majority-Democratic. Appellants proposed two remedial plans, both of which increase District 2's Democratic vote share from 49.3% to 50.2%. *See* Int.-Def. Exs. I, S (DE 232-9, DE 232-19).

The other proposed remedial plans seek to undo the Legislature's 8-3 pro-Republican partisan split, and turn at least one Appellant's Republican district into a majority-Democratic district:

- Plaintiffs have abandoned the Alternative Plan in favor of a proposed remedial plan that creates a 6-5 partisan split by making District 2, currently represented by Appellant Rigell, 54.8% Democratic and District 4, currently represented by Appellant Forbes, 52.2% Democratic. App. 12a.
- Governor McAuliffe's proposed remedial plan redraws every congressional district in Virginia and turns Districts 4, 5, and 10—currently represented by Appellants Forbes, Hurt, and Comstock—into majority-Democratic districts with 66.7%, 52.3%, and 54.8% Democratic vote shares. App. 17a.
- The NAACP plan turns District 4 into a 68.2% super-majority Democratic district. App. 25a.
- The Petersen plan turns Districts 1, 2, and 10 into majority-Democratic districts. App. 27a. It also pairs Appellants Goodlatte, Hurt, and Griffith in District 6 and pairs Appellant Comstock and Congressman Gerry Connolly in

District 11. App. 28a.

- The Richmond First Club plan turns District 7 (which it renumbers District 5) and District 8 (which it renumbers District 1) into majority-Democratic districts. App. 29a. It also pairs Appellant Comstock and Congressman Don Beyer in District 1; Appellants Forbes and Rigell in District 4; Appellants Brat and Hurt in District 7; and Appellants Goodlatte and Griffith in District 8. App. 29a-30a.
- The Rapoport plan turns District 4 into a majority-Democratic district. App. 31a. It also pairs Appellants Rigell and Forbes in District 2. *Id.*[1]

ARGUMENT

I. APPELLANTS HAVE STANDING TO APPEAL BECAUSE THE JUDGMENT DIRECTLY INJURES THEM

This Court's precedent plainly establishes that an intervenor-defendant has standing to appeal a "judgment" that causes it "direct, specific, and concrete injury," where "the requisites of a case or controversy are also met." *ASARCO*, 490 U.S. at 623-24; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) ("irreducible constitutional minimum" of standing requires "injury in fact" and "causal

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[1] Bull Elephant Media and Donald Garrett also submitted proposed remedial plans, but those submissions do not comply with the three-judge court's order. In any event, by their proponents' own admission, those plans change at least one district represented by an Appellant. *See* DE 222, 238.

connection" likely to be "redressed by a favorable decision"). Appellants are directly injured by the judgment below and, thus, have standing to appeal it.

1. *ASARCO* began as a state-court suit brought by taxpayers claiming that mineral leases issued by the State of Arizona violated federal law. *See* 490 U.S. at 610. Some of the lessees intervened as defendants. *Id.* After the Arizona Supreme Court upheld the plaintiffs' claims, the intervenor-defendants sought review in this Court. *Id.* The State defendants did not join the petition for this Court's review. *Id.*

This Court held that the intervenor-defendants had standing to invoke the Court's jurisdiction even in the absence of the State defendants, and even though the state-court order did not require them to do or to refrain from doing anything. *See id.* at 617-624. The Court explained that the state-court decision "poses a serious and immediate threat to the continuing validity of th[e] leases." *Id.* Thus, the decision was "an adjudication of legal rights" "adverse" to the intervenor-defendants that caused an "actual or threatened injury that is sufficiently distinct and palpable to support their standing." *Id.* The Court further recognized that this injury-in-fact was redressable on appeal because "our reversal of the decision below would remove its disabling effects upon" the intervenor-defendants. *Id.* at 618-19.

ASARCO straightforwardly demonstrates that Appellants have standing to appeal because the majority's decision invalidating Enacted District 3 is an "adverse" "adjudication of legal rights" that imposes an injury-in-fact on at least one Appellant. *Id.* at 618. In fact, Appellants' injury-in-fact caused

by the majority's decision is even *more* "direct, specific, and concrete" than the injury this Court deemed sufficient to confer standing in *ASARCO*. *Id.* at 623-24. Here, there is not merely a "serious and immediate *threat* to the continuing validity of," but in fact an "actual" *invalidation* of, Enacted District 3. *Id.* at 618 (emphasis added).[2]

Moreover, the order necessarily requires a remedy that will harm at least one Appellant. The majority concluded that the Legislature retained too many black (overwhelmingly Democratic) voters in District 3. J.S. App. 1a-3a. Any remedy must therefore move such voters *out* of District 3 and into one or more of the surrounding Republican districts, and an equal number of non-black (and largely Republican) voters into District 3. *All* of these adjacent districts are represented by Appellants. Thus, any remedy for the *Shaw* violation found below will necessarily alter at least one Republican district where an Appellant has previously voted and been elected.

This remedial outcome is no mere "threat," but a *certainty*. *ASARCO*, 490 U.S. at 618. Because Appellants' districts surround District 3, any District 3 remedy necessarily alters the composition of districts that both previously elected an Appellant and expressly "conformed" to incumbent Appellants' detailed "recommendations" on how their districts should be drawn. *See supra* pp. 2-4. Moreover, both

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[2] As in *ASARCO*, this case otherwise presents "a cognizable case or controversy" because Appellants and Plaintiffs "remain adverse," and "valuable legal rights will be directly affected" by the Court's resolution of the appeal. 490 U.S. at 619.

the Alternative Plan and *all* proposed remedies transform at least one Republican Appellant's district into a majority-Democratic district. *See supra* pp. 6-7. For example, Plaintiffs' Alternative Plan, which will at least be a starting point for any remedy, harms Appellant Rigell by turning toss-up District 2 into a "heavily Democratic" district. Tr. 119, 152-53; J.S. 3. Plaintiffs' remedial plan is even more injurious to Appellants because it not only turns District 2 into a heavily Democratic district, but also turns Appellant Forbes's District 4 into a majority-Democratic district. *See supra* p. 6. Other proposed remedial plans are equally bad or worse, redrawing at least one Appellant's district—and often several Appellants' districts—into majority-Democratic districts and, in some instances, pairing two or more Appellants in the same district. *See supra* pp. 6-7.

Such changes will obviously injure every affected Appellant because they will undo his or her recommendations for the district, replace a portion of the "base electorate" with unfavorable Democratic voters, and harm the Appellant as a Republican candidate and voter. *King v. Illinois State Bd. of Elections*, 410 F.3d 404, 409 n.3 (7th Cir. 2005); *see Keene*, 481 U.S. at 474-75 (standing based on harm to "chances for reelection"). These injuries would clearly be redressed through a successful appeal because "reversal of the decision below would remove its disabling effects upon" Appellants and restore the Enacted Plan under which they were elected and which maximizes their chances for reelection. *ASARCO*, 490 U.S. at 618-19. Appellants therefore have shown a "direct, specific, and concrete injury" sufficient to "support their standing" to invoke "this

Court['s] review" of the judgment. *Id.* at 618, 624.

Indeed, the judgment challenged here will affect Appellants far more tangibly and directly than lower-court judgments that this Court routinely finds confer standing; *i.e.*, "the judgment of an appellate court setting aside a verdict for the defendant and remanding for a new trial." *Clinton*, 524 U.S. at 430. A judgment setting aside a pro-defense verdict can only "contingent[ly]" affect the defendant—he will be harmed only if he loses on remand. *Id.* In other words, the judgment affects the defendant's interests only because it converts a *certain* victory into a *potential* victory. Here, Appellants' harm is not contingent on the outcome of future proceedings or anything else; their interests are directly and immediately affected by the adverse judgment below because it necessitates prompt alteration of their existing districts.

2. Appellants' injury is more "direct, specific, and concrete" not only than the injury in *ASARCO*, 490 U.S. at 623-24, but also than injuries this Court has repeatedly upheld as sufficient to confer standing in the electoral context. For example, this Court held that a group of voters had standing both to bring an equal-population challenge to a Florida redistricting plan and to appeal an adverse judgment to this Court even though they resided in Dade County, which they "*concede[d]* has received constitutional treatment under the legislative plan." *Swann*, 385 U.S. at 443 (emphasis added). The Court concluded that these voters had standing because the district court rejected their proposed remedial plan "which would have accorded different treatment to Dade County in some respects as compared with the legislative plan,"

and had also "seemingly treat[ed] [them] as representing other citizens in the State." *Id.*

If these voters had standing to sue and to appeal even though the challenged plan did not directly affect their county, Appellants plainly have standing to appeal the majority's judgment that indisputably affects their districts. Any remedy will *necessarily* provide "different treatment" to their districts than that provided by the Enacted Plan. *Id.*

Moreover, this Court held that standing arose where a political candidate averred that "exhibition of films that have been classified as 'political propaganda' by the Department of Justice would substantially harm his chances for reelection and would adversely affect his reputation in the community." *Keene*, 481 U.S. at 474. Similarly, *FEC v. Akins*, 524 U.S. 11, 21 (1998), held that voters had standing to challenge the FEC's decision that a group was not a "political committee," which exempted the group from certain disclosure requirements and thereby deprived the voters of information regarding the group's donors, contributions, and expenditures. And *Davis v. FEC*, 554 U.S. 724 (2008), held that a candidate had standing to challenge a campaign finance law that had a far less direct effect on his electoral opportunities than that suffered by Appellants here. Specifically, the "self-financing" plaintiff candidate had standing to challenge a federal law because it "burdened his expenditure of personal funds by allowing his opponent to receive contributions on more favorable terms" and "most candidates who had the opportunity to receive expanded contributions had done so." *Id.* at 734-735. If the "burden" of enabling one's opponent to solicit

funds under more generous contribution limits is sufficient injury, *a fortiori* the burden of running in a different district with an electorate that has a cognizably greater presence of the opposing party's voters is quite sufficient.

As this reflects, the harm to Appellants from the majority's decision is far more "substantial" than the harms identified in these cases. *Keene*, 481 U.S. at 474. As noted, the electoral injury is far more concrete than the effect of an opponent's potentially enhanced war chest or voters' potential knowledge of and distaste for a candidate's involvement in a film the Government labels "propaganda." It is also far more tangible than the informational or "contingent" injuries in *Akins* and *Clinton*. Rather, by necessarily requiring changes to the political composition of at least one Appellant's district, the judgment below harms one or more Appellants' "chances for reelection," *Keene*, 481 U.S. at 474, and voting strength as Republican voters.

Finally, Appellants' injury is just as direct and concrete as the injury that conferred standing on the plaintiffs in *United States v. Hays*, 515 U.S. 737 (1995). Just as those plaintiffs' constitutional interests were injured by residing in a district that they alleged was different than that required by a proper interpretation of *Shaw*, so too are Appellants injured because, after any remedy, some will reside in districts they allege are different than those required by a proper interpretation of *Shaw*; *i.e.*, the Enacted Plan's *Shaw*-compliant districts. Just as a plaintiff is injured by a redistricting plan if he resides in the district affected by the alleged unconstitutionality, Appellants are injured by the

majority's command to alter District 3 because their districts will necessarily be affected by that order.

3. The district court granted Appellants intervention in accordance with myriad prior cases. *Wright v. Rockefeller*, 376 U.S. 52 (1964); *King*, 410 F.3d 404; *Hall v. Virginia*, 276 F. Supp. 2d 528 (E.D. Va. 2003), *aff'd*, 385 F.3d 421 (4th Cir. 2004). Plaintiffs did not oppose intervention when Appellants' interests faced only potential injury but now oppose standing when Appellants face *certain* harm from the adverse judgment. Pl. Mot. 6-8.

Plaintiffs' had it right the first time. Plaintiffs argue that an intervenor-defendant has standing to appeal only where the order directs it "to do or to refrain from doing" some action. *Id.* 7 (citing *Hollingsworth*, 133 S. Ct. at 2662). But an intervenor-defendant obviously also has standing to appeal an order that "directly affect[s]" its interests in ways other than compelling or restricting its action. *ASARCO*, 490 U.S. at 619. For example, when the order potentially invalidates lease rights, *id.* at 618-19, or diminishes promotion or other employment opportunities, *see Firefighters Local 1784 v. Stotts*, 467 U.S. 561 (1984); *Firefighters Local 93 v. City of Cleveland*, 478 U.S. 501 (1986); *Martin v. Wilks*, 490 U.S. 755 (1989), it directly harms appellants even though it does not command them to take or refrain from some action. *Hollingsworth* in no way alters this basic rule, but instead reaffirms that an appellant must merely "possess a direct stake in the outcome of the case." 133 S. Ct. at 2662.

Moreover, as discussed, *Hays* directly supports Appellants' standing. *See supra* pp. 13-14. Plaintiffs'

lone lower-court authority, *Johnson v. Mortham*, 915 F. Supp. 1529 (N.D. Fla. 1995) (Pl. Mot. 8), involves intervention and *supports* Appellants' standing.[3]

Finally, Plaintiffs' contention that Appellants' harm is "speculative" because the Republican-controlled Legislature *could* adopt "a remedy . . . to Appellants' political advantage," Pl. Mot. 8, is entirely backwards. *Plaintiffs'* rank speculation about how future events might moot a case cannot defeat Appellants' present standing. Otherwise, there would never be standing because the challenged law or practice could always *potentially* be repealed or changed to the appellant's advantage. That is particularly true here because the speculated legislative action is extraordinarily unlikely to occur—the Senate Democrats ended the Legislature's special session to consider legislative remedies almost as quickly as it began. Anyway, any remedial plan approved by the Legislature (and *Democratic* governor) would still have to cure the *Shaw* violation the majority found in District 3. Thus, like *all* remedies, any legislative remedy would invariably alter one or more of Appellants' districts and harm every affected Appellant as a candidate and voter.

CONCLUSION

Appellants have standing, and the Court should summarily reverse or note probable jurisdiction.

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[3] *Johnson* granted intervention to a congresswoman in a district challenged under *Shaw* based on her "personal interest in her office" and in "keeping District Three intact." 915 F. Supp. at 1538. Appellants have an identical "interest" in "keeping District Three" and (consequently) their own districts "intact."

Respectfully submitted,

MICHAEL A. CARVIN
Counsel of Record
JOHN M. GORE
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Appellants Robert J. Wittman, Bob Goodlatte, Randy J. Forbes, Morgan Griffith, Scott Rigell, Robert Hurt, David Brat, Barbara Comstock, Eric Cantor & Frank Wolf

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