No. 18-281

In the Supreme Court of the United States

VIRGINIA HOUSE OF DELEGATES & M. KIRKLAND COX, SPEAKER OF THE VIRGINIA HOUSE OF DELEGATES, APPELLANTS,

v.

GOLDEN BETHUNE-HILL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF STATE APPELLEES

MARK R. HERRING
Attorney General

STEPHEN A. COBB
Deputy Attorney General

TOBY J. HEYTENS
Solicitor General
Counsel of Record

MATTHEW R. MCGUIRE
Principal Deputy Solicitor General

MICHELLE S. KALLEN
Deputy Solicitor General

BRITTANY M. JONES
Attorney

OFFICE OF THE ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7240 – Telephone
(804) 371-0200 – Facsimile
SolicitorGeneral@oag.state.va.us

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether appellants have standing to bring this appeal.

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INTRODUCTION

Two points of black-letter law and a straightforward application of this Court's precedent resolve this case.

The black-letter law is:

- Standing rules apply only to parties playing offense, not defense; and
- As the party playing offense, an appellant must have "standing to appeal." *Wittman* v. *Personhuballah*, 136 S. Ct. 1732, 1735 (2016).

The only appellants here are the lower chamber of Virginia's bicameral state legislature and its speaker (together, the House). The House does not represent the Commonwealth of Virginia, and a component of state government has no standing to appeal that is separate from the State of which it is a part. Accordingly, this Court lacks jurisdiction, and the appeal should be dismissed.

OPINION BELOW

The opinion of the district court (J.S. App. 1a–201a) is reported at 326 F. Supp. 3d 128.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 2284(a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1253. As explained below, this Court lacks jurisdiction because no notice of appeal was ever filed by a party with standing to do so.

STATUTE INVOLVED

The relevant provisions of Virginia law are set out in an appendix to this brief.

STATEMENT

This litigation has already lasted more than four years, including two trials and a previous trip to this Court.

1. In December 2014, twelve Virginia voters filed suit, alleging that the state legislative districts in which they live were unconstitutional racial gerrymanders under this Court's decision in *Shaw* v. *Reno*, 509 U.S. 630 (1993). J.S. App. 6a; JA 1. The named defendants were two Virginia state agencies and four state elections officials sued in their official capacities. J.S. iii (listing parties). Because the action "challeng[ed] the constitutionality of . . . the apportionment of [a] statewide legislative body," a three-judge district court was convened pursuant to 28 U.S.C. § 2284(a). J.S. App. 7a.

On January 23, 2015—before the defendants had filed a single substantive pleading or their attorneys had even entered an appearance—the Virginia House of Delegates (the lower chamber of Virginia's bicameral state legislature) and its then-Speaker William J. Howell (collectively, the House) moved to intervene and simultaneously filed a proposed answer.[1] The

[1] From the beginning, counsel for the intervenor-defendants made clear that they "represent the House of Delegates" as an institution but not any of the House's individual members. See 2/24/15 Tr. 9:7–9 ("We represent the House of Delegates. We do not

memorandum in support of that motion cited the House's status as "*the legislative body* that actually drew the redistricting plan at issue" and asserted that the movants were seeking intervention "to protect *their interest* in the subject matter of this litigation" and "to make sure that *their voices* are heard." JA 2964, 2966–67 (emphasis added). Neither the motion nor the memorandum said that the House sought to represent the defendants or to protect the interests of Virginia as a whole. Plaintiffs did not "object[]" to intervention, JA 2971, and defendants took no position, JA 2970. The district court granted the motion in February 2015. JA 5.

2. Under state law, Virginia's elected Attorney General has the exclusive responsibility to provide "[a]ll legal service in civil matters" for each of the named defendants, as well as for "the Commonwealth" itself. Va. Code Ann. § 2.2–507(A); see *id.* (referencing "every state department, . . . board, . . . [and] official").

Virginia law does not, however, require the Attorney General to personally represent the Commonwealth and its officials in every case or at every stage of litigation. Instead, the Attorney General "may employ special counsel" where, "in the opinion of the

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necessarily represent any individual member other than the speaker."); *id.* at 10:5–6 (counsel acknowledging that he "ha[d] not spoken to any of the actual 12 members" whose districts were being challenged and that "we are not presently representing them"); see also note 12, *infra* (explaining that, throughout this litigation, the Speaker has been participating solely in his leadership capacity rather than in his capacity as an individual member).

Attorney General, it is impracticable or uneconomical for such legal service to be rendered by him or one of his assistants." Va. Code Ann. § 2.2–507(C). The House never asked to have its nongovernmental lawyers designated under that provision, and, from the start, their filings have been labeled as being on behalf of the House and its Speaker rather than the named defendants or the Commonwealth as a whole. The Attorney General originally retained special counsel for this case, who filed an answer on behalf of the defendants, JA 6–7, and also participated in discovery.

In June 2015, the Attorney General's special counsel filed a trial brief arguing that the challenged districts were constitutional and that the plaintiff voters would not be able to show that the districts triggered or failed strict scrutiny. JA 3860–89. That same brief also explained that, although the defendants had already "began to mount a defense," the House and its Speaker had "quickly intervened" and were already actively "defending the plan they created and enacted." JA 3860. So "[t]o avoid duplicating efforts, conserve state and judicial resources in the defense of this action, and avoid potentially contradictory defenses that could undermine one another," the special counsel's brief stated that "Defendants, representing . . . the Commonwealth, will allow Defendant-Interveners[] to lead the defense of this matter." JA 3860–61.

3. The three-judge district court held a four-day bench trial in July 2015. The Attorney General's special counsel attended all phases of the trial on behalf

of the defendants, joining all of the evidence and arguments made by the House. See JA 1535 (noting appearance of former Virginia Attorney General Tony F. Troy). Three months later, the district court upheld all of the challenged districts by a 2-1 vote. J.S. App. 204a–356a.

4. Their constitutional arguments having been rejected, the plaintiff voters appealed to this Court. The Court noted probable jurisdiction, see *Bethune-Hill* v. *Virginia State Bd. of Elections*, 136 S. Ct. 2406 (2016) (mem.), and set the case for full briefing and argument.

Once the appeal was before the Court on the merits, Virginia's Solicitor General advised the Court that the defendants would "not be filing a brief in this appeal." JA 2973. The letter noted that "the Defendants allowed the Intervenor-Appellees"—that is, the House and its Speaker—"to carry the burden of litigation" in the district court and stated that the defendants would continue to do so during that appeal "to avoid unnecessary duplication of expense to Virginia taxpayers." JA 2973 (bracket omitted). After full briefing and argument, this Court reversed the district court's decision with respect to 11 of the 12 challenged districts. *Bethune-Hill* v. *Virginia State Bd. of Elections*, 137 S. Ct. 788 (2017). At that point, the case had been pending for more than two years, and only two elections remained before the next constitutionally mandated round of redistricting.

5. The case returned to the district court, which held a second four-day bench trial in October 2017. As before, counsel for the Attorney General attended all

phases of the trial, joining all of the evidence and arguments made by the intervenor-defendants. See, *e.g.*, JA 2977 (noting appearance by then-Assistant Solicitor General); JA 3772 (noting appearance by then-Deputy Solicitor General). By the time post-trial briefing concluded in late November 2017, another election had come and gone under the challenged map. See Va. Code Ann. § 24.2–215 ("The members of the House of Delegates shall be elected at the general election in November 1995, and every two years thereafter for terms of two years . . . .").

6. On June 26, 2018, the district court issued its second liability opinion. By a 2-1 vote, the court found "[o]verwhelming evidence . . . that . . . the state ha[d] sorted voters into districts based on the color of their skin," J.S. App. 97a, and enjoined "[t]he Commonwealth of Virginia . . . from conducting any elections . . . for the office of Delegate . . . in the Challenged Districts until a new redistricting plan is adopted," *id.* at 203a.

The district court's liability determination was supported by extensive, case-specific factual findings. The court found "as a matter of fact that the legislature employed a mandatory 55% [Black Voting Age Population (BVAP)] floor in constructing all 12 challenged districts," J.S. App. 18a–19a, and that it "arbitrarily applied the same racial mandate to 12 vastly dissimilar districts," *id.* at 97a. While emphasizing that the "interconnectedness between districts" meant "that the fates of the 11 remaining challenged districts . . . were inextricably intertwined," J.S. App. 83a, the

district court also made lengthy factual findings about each of the 11 districts, *id.* at 38a–80a.

The district court also resolved several critical credibility issues in favor of the plaintiffs. In particular, the court specifically found that one of the House's witnesses "did not present credible testimony," J.S. App. 35a, and it "g[a]ve little weight" to the testimony of another House witness, citing the witness's "very poor memory" and "his inability to account for material inconsistencies in his testimony," *id.* at 38a. "These adverse credibility findings," the district court emphasized, were "not limited to particular assertions of these witnesses, but instead wholly undermine the content of [their] testimony." *Id.* at 82a. For that reason, the district court agreed with the dissenting judge that its "credibility findings [were] 'outcome determinative' in this case." *Id.*

7. Federal law permits a direct appeal to this Court "from an order granting or denying . . . an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. § 1253. Because the district court had not yet imposed a remedy, its decision was interlocutory and the deadline for filing an appeal was July 26, 2018—30 days after the district court's decision. 28 U.S.C. § 2101(b).

Ten days after the district court's liability ruling, the House purported to file its own appeal to this Court. J.S. App. 357a. The notice of appeal was filed on behalf of "the Virginia House of Delegates and

M. Kirkland Cox, in his official capacity as Speaker of the Virginia House of Delegates," *id.*, and was signed by private counsel in their capacity as "Counsel for Defendants-Intervenors Virginia House of Delegates and Virginia House of Delegates Speaker M. Kirkland Cox," *id.* at 358a.

On July 19, 2018, Virginia's Attorney General announced—both publicly and in a filing with the district court—that the Commonwealth would not appeal the district court's liability ruling. The Attorney General noted (1) "the high bar to overcoming the [district court's] extensive factual findings," (2) "the significant time and expense that have already gone into this case and that would only be further increased by an appeal," and (3) "the compelling interest in promptly remedying what [the court] has concluded is an unconstitutional racial gerrymander."[2] For those reasons, the Attorney General "determined that continued litigation would not be in the best interest of the Commonwealth or its citizens and that an appeal to the United States Supreme Court is thus unwarranted." First Stay Opposition at 1. One week later, the time for appealing the district court's liability order expired.

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[2] Defs.' Opp. to Intervenor-Defs.' Mot. to Stay Inj. Pending Appeal Under 28 U.S.C. § 1253 (First Stay Opposition) 1–2 (district court docket 247), accord *Herring Urges General Assembly to Eliminate Racial Gerrymandering in House of Delegates Districts as Quickly as Possible* (July 19, 2018), https://www.oag.state.va.us/media-center/news-releases/1233-july-19-2018-herring-urges-general-assembly-to-eliminate-racial-gerrymandering-in-house-of-delegates-districts-as-quickly-as-possible (same).

8. The House's attempts to appeal the district court's liability ruling have adversely impacted the remedial phase and could soon begin to impact Virginia's 2019 elections.

On July 6, 2018—the same day it filed its notice of appeal—the House asked the district court to stay its liability ruling pending that appeal. JA 88 (entries 236 and 237). The district court denied that motion, JA 96 (entry 256), and the House did not seek a stay from this Court. That same month, the plaintiffs filed a motion seeking nearly $4 million in attorney's fees and expenses as the prevailing party. JA 89 (entry 240). In responding to that motion, the Attorney General emphasized the uncertainty created by the House's attempted appeal and the likelihood of additional fee petitions by the plaintiffs (including a fee petition arising from this appeal). See Defs.' Opp. to Pls.' Mot. for Att'y's Fees and Litigation Expenses 2–3 (district court docket 253); see also *Brat* v. *Personhuballah*, 883 F.3d 475, 481–82 (4th Cir. 2018) (concluding that intervenors like the House cannot be held liable for attorney's fees).

In November and December 2018, the House asked the district court and then this Court to stay the remedial phase because of this Court's decision to schedule full briefing and argument. In other filings, the House has also repeatedly urged the district court to abandon the remedial phase altogether because of

this appeal.[3] Although all of those requests have been denied, they consumed time and resources for the district court and the parties.

The uncertainty continues to this day. On January 10, 2019—less than three weeks before the filing of this brief—the district court heard oral argument on proposed remedial plans. Even though this Court had denied the House's latest stay request just two days earlier, the House continued to argue that the district court should suspend the remedial phase pending this Court's review.[4] As soon as the district court approves a final remedial plan, state election officials will begin working overtime to ensure that Virginia's June 2019 primaries and November 2019 general election are not adversely impacted. The existence of this appeal only adds to the uncertainty and the potential for voter confusion.

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[3] See Def.-Intervenors' Objs. to Proposed Remedial Plans 1 (Nov. 11, 2018) ("There is no reason to proceed with further remedial proceedings because a map issued at this time will be of no use."); Def.-Intervenors' Objs. to Special Master's Proposed Remedial Plan 1 (Dec. 14, 2018) (same); Def.-Intervenors' Suppl. Objs. to Special Master's Proposed Remedial Plan 6 (Jan. 4, 2019) ("The Court should . . . stay its proceedings entirely and wait for the Supreme Court to review its injunction."); Def.-Intervenors' Suppl. Mem. Regarding Special Master's Modules 5 (Jan. 17, 2019) ("The Court should stay its hand pending resolution of the appeal at the Supreme Court.").

[4] On January 22, 2019, the district court directed the special master to prepare a final report implementing a specific remedial plan chosen by the district court. See Order (Jan. 22, 2019) (district court docket 353). The special master's final report is to be filed on January 29, and any objections to that report will be due on February 1.

SUMMARY OF ARGUMENT

A. This Court has squarely held that "status as an intervenor below, whether permissive or as of right, does not confer standing sufficient to keep the case alive in the absence of the State on [an] appeal." *Diamond* v. *Charles*, 476 U.S. 54, 68 (1986). Instead, "an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is *contingent* upon a showing by the intervenor that [it] fulfills the requirements of Art. III." *Id.* (emphasis added); accord *Wittman* v. *Personhuballah*, 136 S. Ct. 1732, 1736 (2016) (making the same point). As the only appealing party, the House thus bears the burden—for the first time in this litigation—of establishing its own "standing to appeal." *Hollingsworth* v. *Perry*, 570 U.S. 693, 705 (2013).

B. "[A] State," of course, "has standing to defend the constitutionality of its statute." *Diamond*, 476 U.S. at 62. But the House neither sought nor was granted intervention to represent the Commonwealth of Virginia, and the first time it ever suggested it could do so was after the Attorney General challenged its standing to appeal. Nor does the House have the authority to speak for Virginia as a whole, much less for the two state agencies and four state officials who are the actual defendants here. To the contrary, Virginia law has specifically provided—for more than 80 years—that its elected Attorney General shall provide "[a]ll legal service in civil matters for the Commonwealth" and for "every state department, . . . board, . . . [and] official." Va. Code Ann. § 2.2–507(A); accord U.S. Br. 11–12.

C. A single chamber of a bicameral state legislature has no standing to vindicate the constitutionality of state law that is separate from the State of which it is a part—any more than the other legislative chamber, the governor, or other subsets of state government have such standing. A judicial decision that specific redistricting legislation is inconsistent with the Federal Constitution does not take away a state legislative chamber's ability to participate in redistricting. Nor does such a decision "nullify" the votes cast in favor of such legislation any more than any other judicial decision concluding that a particular state law violates the Federal Constitution.

D. It is common ground that Virginia's elected Attorney General would have been able to bring an appeal on behalf of the Commonwealth in this case. And neither this Court nor the States would benefit from a rule that would permit more than one person or entity to appeal on behalf of a single State. To the contrary, both the Court and the States would best be served by the premise that States, like the Federal Government, "usually should speak with one voice before this Court." *United States* v. *Providence Journal Co.*, 485 U.S. 693, 706 (1988).

E. Concluding that the House lacks standing to appeal here would not risk leaving state laws without a proper defense. A State's attorney general generally has no power—and Virginia's Attorney General has never asserted the ability—simply to enjoin the operation of one of the State's laws. And when such laws are challenged in court, entities like the House are free to

intervene in defense of the law, because intervention is different from standing and no standing is needed to play defense. The standing question here arises only because a federal court has concluded, after a full trial, that a state law violates the Federal Constitution *and* the person who state law designates to make such decisions has further concluded that an appeal would not be in the interests of the State or its citizens.

A State wishing to ensure that its laws are defended until all possible avenues for appeal have been exhausted would have ample ways to do so. A State could impose an absolute "duty to defend" on its highest legal officer, as some States have done. Alternatively, the State could provide that if its Attorney General declines to defend the constitutionality of a particular statute, another person or entity gains the ability to represent the State in federal court. Or a State could require its Attorney General to take all possible appeals and permit other interested parties to participate as amicus curiae in such appeals. But where, as here (and is common), state law gives one person the exclusive authority to represent "the State's interests" in federal court, *Karcher* v. *May*, 484 U.S. 72, 82 (1987), no other person or entity has standing to bring an appeal to vindicate those interests.

ARGUMENT

The House's "status as an intervenor below, whether permissive or as of right, does not confer standing to keep the case alive in the absence of the State on this appeal." *Diamond* v. *Charles*, 476 U.S. 54,

68 (1986). Instead, "an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that [it] fulfills the requirements of Art. III." *Id.*

The House can make no such showing. Nothing in Virginia law authorizes the House to represent the Commonwealth (much less the defendants), and the House lacks standing to appeal in its own right. Accordingly, this appeal should be dismissed for lack of jurisdiction.

I. This appeal is the first time the House has needed to establish its own standing

The House repeatedly insists that the Attorney General has been tardy in raising objections to its standing—even to the point of forfeiting any ability to do so now. See, *e.g.*, Appellants' Br. 29–30 (asserting that the Attorney General's current objections to the House's standing are "too late" and that entertaining them would "vitiate basic forfeiture principles").

That argument fails for two reasons. For one thing, questions about standing *cannot* be waived or forfeited because they implicate this Court's subject-matter jurisdiction. See, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

At any rate, there was no delay. The standing issue here did not arise until the House, acting alone, attempted to appeal the district court's liability ruling to this Court. And, since then, the Attorney General has been clear that the House lacks standing to do so. See

First Stay Opposition at 2 ("No stay should be granted because the Intervenor-Defendants lack standing to appeal.").

1. Despite the House's use of the phrase six times during its opening brief, there is no "standing to defend" for purposes of Article III. Appellants' Br. 19 (twice), 22, 24, 29, 30. Rather, as this Court has repeatedly explained, the constitutional standing inquiry focuses exclusively on "the party invoking the power of the court." *Hollingsworth* v. *Perry*, 570 U.S. 693, 700 (2013); accord *Wittman* v. *Personhuballah*, 136 S. Ct. 1732, 1736 (2016) (stating that Article III "requires a party invoking a federal court's jurisdiction to demonstrate standing"). That is why, for example, a federal district court may enter a default judgment even when no defendant appears. See Fed. R. Civ. P. 55; *In re Metro Ry. Receivership*, 208 U.S. 90, 108 (1908) ("Jurisdiction does not depend upon the fact that the defendant denies the existence of the claim made, or its amount or validity. If it were otherwise, then . . . the Federal court might be without jurisdiction . . . whenever a judgment was entered by default."). And it is why this Court may—without violating Article III—appoint a complete stranger to defend a lower court's judgment when the party that won below fails to appear or declines to do so. See, *e.g.*, *Lucia* v. *SEC*, 138 S. Ct. 2044, 2050–51 & n.2 (2018); *McLane Co.* v. *EEOC*, 137 S. Ct. 1159,

1166 (2017); *Mata* v. *Lynch*, 135 S. Ct. 2150, 2154 & n.2 (2015).[5]

2. This litigation began when the plaintiff voters filed a complaint in federal district court. As the parties invoking the power of the district court, the voters plainly had standing to seek relief from the harms flowing from residing in unconstitutionally drawn districts. See *Shaw* v. *Reno*, 509 U.S. 630 (1993); accord *Hollingsworth*, 570 U.S. at 705 (noting absence of standing issue before the district court because the suit was initiated by private parties who claimed that state law violated their personal constitutional rights).

The same was true during the previous appeal to this Court. "Article III demands that an actual controversy persist throughout all stages of litigation," which means that "[s]tanding must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Hollingsworth*, 570 U.S. at 705 (internal quotation marks omitted). But it was the plaintiffs who were "seeking appellate review" last time because they had lost in the district court. See J.S. App. 204a, 383a; accord *Bethune-Hill* v. *Virginia State Bd. of Elections*, 137 S. Ct. 788, 788

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[5] A handful of this Court's previous decisions contain the specific words "standing to defend." But those decisions have invariably done so in reference to the party initiating the lawsuit or appeal. See, *e.g.*, *Diamond*, 476 U.S. at 62 (emphasizing that this Court would have had appellate jurisdiction had the State appealed from a lower-court decision invalidating one of its statutes because "a State has standing to defend the constitutionality of its statute"). We are aware of no decision of this Court holding that a party needs standing solely to play defense.

(2017) (listing plaintiffs as appellants). Accordingly, it was still the plaintiffs who were invoking the power of the Court during that appeal and the plaintiffs' injuries that supplied the necessary standing.

The same was true on remand before the district court: At that point, the plaintiffs were still "[t]he challengers," *Bethune-Hill*, 137 S. Ct. at 801, so the plaintiffs' alleged injuries continued to supply the necessary standing.

3. Things have changed. When the district court "declared [the challenged districts] unconstitutional," the plaintiffs "no longer had any injury to redress—they had won." *Hollingsworth*, 570 U.S. at 705. As the only party currently seeking "the exercise of jurisdiction in [its] favor," it is now the House's "burden"—for the first time—to show that it "is a proper party to invoke" this Court's jurisdiction. *United States* v. *Hays*, 515 U.S. 737, 743 (1995) (internal quotation marks and citations omitted); accord *Kokkonen* v. *Guardians Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (noting that "the burden" lies with "the party asserting jurisdiction").

4. The House's status as an intervening party does not, without more, permit the House to initiate an appeal to this Court. To the contrary, this Court has *repeatedly* held that "status as an intervenor below, whether permissive or as of right, does not confer standing sufficient to keep [a] case alive in the absence of" the party on whose side intervention was originally granted. *Diamond*, 476 U.S. at 68; accord *Wittman*,

136 S. Ct. at 1736 (same); *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 65 (1997) (same).

The Court has put its money where its mouth is. Take *Hollingsworth*, for example. In that case, the intervenors conducted the entire defense in the district court because the relevant California "officials refused to defend the law," *Hollingsworth*, 570 U.S. at 702, and the State's Attorney General actively argued that it was unconstitutional, see *Perry* v. *Schwarzenegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010) (case below) ("With the exception of the Attorney General, who concedes that Proposition 8 is unconstitutional, the government defendants refused to take a position on the merits of plaintiffs' claims and declined to defend Proposition 8.") (citation omitted).[6] Yet even though the dissenting Justices in that case—like the House here—argued that the initiative proponents were "the most proper party to defend th[e] interest[s]" at stake, *Hollingsworth*, 570 U.S. at 727 (Kennedy, J., dissenting), the Court held that the intervenors lacked standing to appeal from the district court to the court of appeals, see *id.* at 715.

The same was true in *Wittman*. That appeal, like this one, involved a redistricting plan in Virginia.

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[6] Here, in contrast, counsel for the Attorney General appeared at all stages of the trial and argued that the districts were constitutional. See pp. 4–6, *supra*. The Attorney General also assumed exclusive responsibility for responding to plaintiffs' recent request for nearly $4 million (and counting) in attorney's fees, which ultimately will be paid by the Commonwealth as a whole rather than the House or its non-governmental lawyers. See p. 9, *supra*.

There—as here—non-parties "intervened to help defend the Enacted Plan," *Wittman*, 136 S. Ct. at 1735, and participated extensively before the district court, see, *e.g.*, Intervenor-Defs. Virginia Representatives' Mem. in Supp. of Mot. for Summ. J., *Page* v. *Virginia State Bd. of Elections*, 58 F. Supp. 3d 533 (E.D. Va. 2014) (No. 3:13cv678). There—as here—"the Commonwealth of Virginia did not appeal" after the district court invalidated a district as "an unconstitutional racial gerrymander," and the intervenors attempted to appeal. *Wittman*, 136 S. Ct. at 1735. There—as here—this Court postponed consideration of jurisdiction and directed the parties to brief whether the intervenors had standing to appeal. *Id.* And there—as in *Hollingsworth*—the Court dismissed the intervenors' appeal after concluding that they "lack[ed] standing to pursue the appeal." *Id.* at 1734.[7]

The foundational case in this area (*Diamond*) is to the same effect. As the lower-court opinions in that case reveal, the intervening party participated extensively in the courts below, filing his own motion for summary judgment and separately participating in both briefing and oral argument before the Seventh Circuit. See *Charles* v. *Daley*, 749 F.2d 452, 454, 456 (7th Cir. 1984) (decision below in *Diamond*, *supra*).

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[7] To be sure, the specific reason why there was no standing to appeal in *Wittman* is not the same reason why there is no standing to appeal here. See Parts II & III, *infra*. But the Court's standing holding in *Wittman* would have been unnecessary had the appellants' status as intervenors below—or their extensive participation before the district court—been enough to confer standing to appeal.

This Court never questioned the validity of Diamond's intervention or participation in the lower courts. Instead, the Court emphasized that Diamond's "status as an intervenor below" did not resolve the *separate* question of whether he had "standing sufficient to keep the case alive in the absence of the State on this appeal." *Diamond*, 476 U.S. at 68. And because the Court determined that Diamond lacked standing to appeal in his own right, see *id.* at 64–68, 69–71, it dismissed his appeal for lack of jurisdiction, *id.* at 71.

* * *

In seeking to appeal to this Court, the House is—for the first time in this litigation—the entity "invoking the power of" a federal court. *Hollingsworth*, 570 U.S. at 700. As a result, it is now the House's burden to establish that it "fulfills the requirements of Art. III." *Diamond*, 476 U.S. at 68. The House cannot do so.

II. The House has no authority to appeal on behalf of Virginia

The House briefly suggests that it "has standing because it is 'authorized by state law to represent the State's interest' in redistricting litigation." Appellants' Br. 28 (quoting *Hollingsworth*, 570 U.S. at 709); see *Diamond*, 476 U.S. at 62 ("a State has standing to defend the constitutionality of its statute"). But that is not the grounds on which the House sought or was granted intervention, and this Court's precedent confirms it is too late for the House to shift gears now. And even if the House had sought leave to do so, nothing in Virginia

law would have authorized the House to represent the Commonwealth, much less the named defendants.

1. The memorandum that the House filed in support of its motion to intervene could hardly have been clearer: The House and its then-Speaker sought intervention as a "*legislative body*" and did so "to protect *their interest* in the subject matter of this litigation" and "to make sure that *their voices* are heard." JA 2964, 2966–67 (emphasis added); accord JA 2969. At no point before the district court did the House seek leave to represent the Commonwealth, its citizens, or anyone other than itself.[8] Cf. 2/24/15 Tr. 9:7, 9:23–24 (counsel for the House stating during an initial status conference: "[W]e represent the House of Delegates" and that "[c]learly, the House of Delegates has an interest in preserving the plan that it passed").[9]

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[8] Had the House done so, the Attorney General would immediately have objected. Accord JA 3861 (emphasizing that the Attorney General, not the House, represents both the "Defendants" and "the Commonwealth" in this matter).

[9] The same is true of the single-chamber resolution that the House asserts constitutes its "express authorization" to participate in this litigation. Appellants' Br. 28. That resolution authorizes the House's Speaker "to employ legal counsel to represent *the House of Delegates*" and "to defend the responsibilities, authority, and prerogatives of *the House of Delegates*." H.D. Res. No. 566, 2014 Spec. Sess. I 1554–55 (emphasis added) (resolution available at https://tinyurl.com/yb8grorq). In any event, in Virginia (as elsewhere) resolutions passed by a single legislative chamber do not constitute "laws." See Va. Const. art. IV, § 11 (bicameralism); Va. Const. art. V, § 6(a) (presentment); accord *Field* v. *May*, 3 S.E. 707, 709 (Va. 1887) ("The resolution in question, while it purports to be a resolution of the general assembly, never passed the senate, and never became a law."). To conclude otherwise would grant

This Court rejected a similar maneuver in *Karcher* v. *May*, 484 U.S. 72 (1987). In that case, the then-presiding officers of the New Jersey state legislature were granted leave to intervene and participated in the lower courts "in their official capacities as presiding officers of the New Jersey Legislature." *Id.* at 81. Before this Court, however, the intervenors attempted to establish standing to appeal on various other grounds, including their capacities "as individual legislators" or representatives of the particular legislative session that enacted the challenged law. *Id.* This Court rejected that attempt, holding that a party who participates in a lower court in one capacity may not then seek to appeal in a different capacity. See *id.* at 78 ("Karcher and Orechio's intervention as presiding legislative officers does not entitle them to appeal in their other individual and professional capacities."); accord *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 548–49 (1986) ("Having failed to assert his parental interest in the District Court . . . Mr. Youngman has no right to prosecute his appeal in his capacity as a parent.").

Nearly everything the Court said in *Karcher* on this point applies here too. As in *Karcher*, the House and its Speaker's intervention request "represented . . . that they were intervening on behalf of the legislature" rather than the Commonwealth as a whole. 484 U.S. at 79; pp. 2–3, *supra*. As in *Karcher*, the district

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purely ceremonial resolutions—such as the commendation of "the American Legion Post 74 baseball team" for their "second consecutive state title," H.D. Res. No. 567, 2014 Spec. Sess. I 1555–56—the status of operative state law.

court granted intervention to the House and its Speaker without indicating that they were participating in any other capacity. See *Karcher*, 484 U.S. at 80; JA 2972. And, as in *Karcher*, "the notice of appeal to this Court identifies the appellants" as the House and its Speaker rather than the Commonwealth of Virginia, and "[e]ven the jurisdictional statement refers to the appellants as 'the Legislature.'" *Karcher*, 484 U.S. at 80–81; see J.S. 7; J.S. App. 357a–58a.

2. The reason the House has never previously claimed to be speaking on behalf of the named defendants or Virginia itself is obvious: state law gives it no ability to do so. Accord U.S. Br. 11–12. Indeed, Virginia law has been clear for at least 182 years—well before the Civil War—that the Attorney General has the exclusive authority to represent the Commonwealth in cases like this one.

During its 1835-36 session, the Virginia General Assembly enacted a statute stating that "[i]t shall be the duty of the attorney general to appear in all causes in which the commonwealth is a party," and specifying a number of courts in which that obligation attached. 1835–36 Va. Acts, ch. 43, §§ 1–2, p. 33. In 1874, the General Assembly revised that legislation to provide that the Attorney General "shall appear as counsel for the state in all cases in which the commonwealth is interested," while still specifying particular state courts to which the rule of exclusive representation applied. Va. Code ch. CLXI, § 2, pp. 1074–75 (1874).

During its 1877-78 session, the General Assembly removed any doubt that the Attorney General's

exclusive power to represent the Commonwealth also applied to this Court. That legislation provided: "He shall appear as counsel for the state in all cases in which the commonwealth is interested depending in [*sic*] . . . the supreme court of the United States . . . ." 1877–88 Va. Acts ch. 183 ¶1 § 2, p. 174. Other than changes in capitalization, that basic language remained unchanged for nearly sixty years. See Va. Code ch. 24, § 376, p. 91 (1930).

In 1936, Virginia's General Assembly altered the language to make even clearer that the Attorney General's power to represent the Commonwealth is exclusive of anyone else. In language that has remained unchanged for more than 80 years, the General Assembly declared that, unless otherwise provided by statute: "*All* legal service in civil matters for the Commonwealth . . . , including the conduct of all civil litigation in which [it is] interested, shall be rendered and performed by the Attorney General." 1936 Va. Acts ch. 47, § 3, p. 73 (1936) (emphasis added); accord Va. Code Ann. § 2.2–507(A) (same).

3. The House does not identify anything in Virginia law authorizing it to speak for the Commonwealth in this matter. Instead, the House claims that this Court's decision in *Karcher* recognizes (or creates) such authority. The House is mistaken.

a. In *Karcher*, the New Jersey legislature enacted a moment-of-silence law over the governor's veto and the State's attorney general announced he would not defend it in court. 484 U.S. at 74–75. When suit was filed, the then-presiding officers of the New Jersey

state legislature (Karcher and Orechio) "sought and obtained permission to intervene" and "carried the entire burden of defending the statute" before the district court. *Id.* at 75. The district court declared the statute unconstitutional, the Third Circuit affirmed, and Karcher and Orechio appealed to this Court. *Id.* at 75–76. By that point, however, Karcher and Orechio had lost their leadership posts and their successors told the Court that they "were withdrawing the legislature's appeal." *Id.* at 76.

The Court first held that Karcher and Orechio lacked standing to appeal to this Court. *Karcher*, 484 U.S. at 77–81.[10] It then faced a familiar dilemma: whether to vacate a lower court's judgment after a case becomes non-justiciable on appeal. Unsurprisingly, Karcher and Orechio favored complete vacatur, because it would have given them the same thing they sought in their unsuccessful appeal: eliminating the district court's order declaring the moment-of-silence law unconstitutional.

In a single short paragraph, this Court rejected Karcher and Orechio's attempt to win by losing. The Court noted that Karcher and Orechio's last-minute assertion that they should never have been allowed to intervene was "directly contrary to [their] explicit representations to the District Court" and also "appear[ed] to be wrong as a matter of New Jersey law."

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[10] As explained earlier, the Court concluded that Karcher and Orechio had intervened solely in their former capacities as presiding officers and rejected their belated attempts to identify new grounds on which to save their appeal. See pp. 22–23, *supra*.

Karcher, 484 U.S. at 81–82. The Court closed its discussion with a sentence containing the language on which the House relies here:

> Since the New Jersey Legislature had authority under state law to represent the State's interests in both the District Court and the Court of Appeals, we need not vacate the judgments below for lack of a proper defendant-appellant.

Id. at 82.

b. The fact that the House's appeal does not suffer from the specific "flaw that ultimately doomed the legislators in *Karcher*," Appellants' Br. 29, is true but irrelevant. The language from *Karcher* on which the House relies is contained in the portion of the opinion addressing whether to vacate the lower-court judgments—*not* the part about whether Karcher and Orechio had standing to appeal to this Court.

In fact, *Karcher* never addressed the question that would have been analogous to the one here: whether, having been granted intervention in the district court, Karcher and Orechio had standing to appeal to the court of appeals. Instead, the claim that the Court considered and rejected in *Karcher* was that *both* of "the *judgments* below must be vacated because no proper party-defendant *ever intervened*" in the first place. 484 U.S. at 81 (emphasis added). But as this Court has repeatedly explained, the question of whether a person or entity may *intervene* in an already existing suit is fundamentally different from whether that same person or entity may *initiate* an appeal. See pp. 17–19,

supra. The argument rejected in *Karcher* involved the former question (intervention); this case involves the latter (appeal).[11]

c. Moreover, even if *Karcher*'s passing reference to "the Court of Appeals" reflected the view that the presiding officers in that case had standing to appeal to the court of appeals, it still would not support the House's standing to appeal here. Cf. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) ("drive-by jurisdictional rulings . . . have no precedential effect"). Such a statement would, at most, reflect a case-specific conclusion about New Jersey law—one that Karcher

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[11] To be sure, a single Justice concurring only in the judgment attempted to characterize the Court's decision as implicitly "acknowledg[ing]" that the presiding officers had standing to appeal because "[o]therwise, there would never have been a valid appeal to the Court of Appeals, in which event, we would not leave standing the judgment of that court, as we now do." *Karcher*, 484 U.S. at 84 (White, J., concurring in the judgment). Compare *Arizonans for Official English*, 520 U.S. at 65 (describing *Karcher* as "recogniz[ing] that state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests," but ultimately resolving case based on mootness, not standing), with *Hollingsworth*, 570 U.S. at 709 (describing *Karcher* as having held that Karcher and Orechio "could intervene"). But the Court's eight-Justice opinion never addressed that issue, which is unsurprising because none of the parties (including Karcher and Orechio) addressed it either. Cf. U.S. Br. at 13 n.9, *Karcher*, *supra* (No. 85-1551) ("Because we conclude that Karcher has no standing to appeal to this Court, we do not address whether the two houses of the New Jersey legislature and their representatives had standing to appeal to the court of appeals."). That silence is unsurprising: Because Karcher and Orechio lost in *both* the district court and the court of appeals, it would have done them no good to vacate solely the court of appeals' decision.

and Orechio specifically proffered before their last-minute bait-and-switch. See *Karcher*, 484 U.S. at 81–82 (noting that Karcher and Orechio's argument on appeal was "directly contrary to appellants' explicit representations to the District Court"). Here, by contrast, no one—much less the party now challenging standing to appeal—has heretofore argued that Virginia law gives a single chamber of its bicameral state legislature "authority . . . to represent the State's interests" in federal court. *Id.* at 82.

Before the district court, the House claimed that *Karcher* stands for the sweeping proposition that if a State's own courts *ever* permit legislative bodies "to intervene as parties-respondent on behalf of the legislature in defense of a legislative enactment," federal courts must conclusively presume that those same legislative bodies also have state-law authority to appeal decisions invalidating those laws to this Court. Defs.-Intervenors' Reply Br. in Supp. of Mot. for Stay 6–7 (district court docket 249) (quoting *Karcher*, 484 U.S. at 82); see Appellants' Br. 29 (noting that "Virginia's courts have permitted the House and its Speaker to intervene in lawsuits challenging the validity of state laws").

As we explained in our motion to dismiss, that argument "cannot be right." State Appellees' Mot. to Dismiss 9. It ignores any variations in what state law actually says about who has authority to represent the State's interests in court. It ignores the deference that federal courts owe States as independent sovereigns in our federal system. And it ignores all the reasons why

States might choose to follow the federal example and draw a sharp distinction between ability to intervene and authority to appeal. See *id.* at 10 (noting that "the House has identified no case in which a Virginia court has permitted a legislative body or its presiding officer *to initiate* a legal proceeding . . . on behalf of the Commonwealth"); accord U.S. Br. 12. The States would be ill-served by a rule reducing (a) the decision to permit intervention by subunits of state government in *already* ongoing proceeding, and (b) the decision to allow those same subunits to *initiate* an appeal on behalf of the State into an all-or-nothing choice—particularly where, as here, the cost of the intervenors' lawyers (to say nothing of the plaintiffs' lawyers) is being paid by the State itself.

III. The House has no standing to appeal that is separate from the State of which it is a part

"It is important at the outset to define the question before" the Court. *Renico* v. *Lett*, 559 U.S. 766, 772 (2010). The appellants in this case are not voters, candidates, or officeholders who live in or adjacent to any of the challenged districts.[12] Nor has this appeal been

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[12] The second named appellant is M. Kirkland Cox, who currently serves as the Speaker of the House of Delegates. As appellants acknowledge, Speaker Cox is participating in this suit solely "in his official capacity as Speaker of the Virginia House." J.S. iii. This is shown by, among other things, the mid-litigation substitution of the current Speaker for his predecessor when the speakership changed hands. See JA 3891 (Notice of Substitution Under Rule 25(d)); Fed. R. Civ. P. 25(d) (providing for the "automatic[ ] substitut[ion]" of an "officer's successor" in cases "when a public

brought by the Virginia state legislature as a whole. Cf. *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664 (2015) (noting that "[t]he Arizona Legislature . . . commenced this action after authorizing votes in both of its chambers"); *Karcher*, 484 U.S. at 81 (emphasizing that "the party-intervenor at each point in the proceedings below was the incumbent legislature, on behalf of the State, and not the particular legislative body that enacted the moment-of-silence law").

Instead, the question here is whether a single chamber of a bicameral state legislature has standing to appeal the invalidation of a state law that is separate from the standing of the State of which that chamber is a part. See Part II, *supra* (explaining why the House may not speak for Virginia in this matter).

The answer is no.

1. "[T]he first and foremost of standing's three elements" is that the party seeking relief must demonstrate its own "injury in fact." *Spokeo, Inc.* v. *Robbins*, 136 S. Ct. 1540, 1547 (2016) (internal quotation marks, brackets, and citation omitted). "To establish injury," the House "must show that [it] suffered 'an invasion of a legally protected interest' that is 'concrete and particularized.'" *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560).

2. The House's brief never settles on a single "injury" that gives it standing to appeal in its own right. At various times, the House appears to rely on:

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officer who is a party in an official capacity . . . ceases to hold office").

(a) injury as a body that *wrote* the challenged legislation; (b) injury as a body that is the *subject* of the challenged legislation; or (c) injury as a body that will be *uniquely impacted* by the legislation's invalidation. None of those purported injuries is sufficient to give the House its own standing to appeal.

a. To begin with what seems to be common ground: A judicial decision invalidating a state law on constitutional grounds does not impose a separate Article III injury on each part of the state government whose participation was necessary to the law's enactment and enforcement. To be sure, the House's concurrence was necessary to enact the redistricting legislation that was invalidated in part by the district court. But the same is true of the state senate, see Va. Const. art. IV, § 11 (bicameralism), and the governor, Va. Const. art. V, § 6(a) (presentment). And the House makes no attempt to defend the view that all of those actors should be able to unilaterally appeal (or, presumably, initiate a declaratory judgment action) whenever doubts are raised about the constitutionality of a state law. See U.S. Br. 15 (noting that "[t]he House's . . . view, under which its claimed injury rests on the dilution of its lawmaking power, would open the door to any number of lawsuits by state legislative bodies and the Houses of Congress").

b. Seeking to avoid that untoward result, the House offers up various limiting principles in an attempt to preserve its standing to appeal here. None is persuasive.

i. The House repeatedly invokes its status as "the legislative body that actually drew the redistricting plan at issue." JA 2966–67; see Appellants' Br. 22–23, 28. The House cites no authority finding standing based on such an injury-to-the-author theory. It is unclear what the House means when it says a 100-member legislative body—collectively—"wrote" something, and such an approach seems particularly ill-suited to a State that has no official legislative history.[13] What if (as is common) a bill was originally written and enacted by one legislative chamber but then amended by the other chamber before final passage? And what if (as appears to have happened here) the proposed legislation was largely *drafted* by a third party, such as a lobbyist, consultant, or staffer? See J.S. App. 9, 32–35 (describing the testimony of "a redistricting consultant who testified that he played a significant role in the drawing of the 2011 plan"). The House's injury-to-the-author theory should thus be rejected.

ii. The House insists that this legislation is different because it is the "legislative chamber whose districts have been invalidated" and those districts determine the House's "very constitution" or "basic representational make-up." Appellants' Br. 25, 28.

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[13] See Virginia Div. of Leg. Servs., Legislative Resource Center, Legislative History, http://dls.virginia.gov/lrc/leghist.htm ("legislative intent is not officially recorded in Virginia"); A Guide to Legal Research in Virginia 3.202(E), at 21 (8th ed. 2017) (Joyce Manna Janto, ed.) (stating that Virginia's *House Journal* and *Senate Journal* "do not contain committee reports, the text of bills, or floor debates").

That argument has numerous—and fatal—problems. As the federal government explains, the House's argument "is at odds with this Court's cases and is not readily limitable to the redistricting context." U.S. Br. 15. Such a theory would, for example, seemingly allow the House to "litigate election-related challenges affecting individual candidates, or appeal judgments passing on the constitutionality of election-related laws, or even appeal judgments about laws that involve hot-button political issues and thus affect candidates' electoral prospects." U.S. Br. 15–16. It also would presumably grant a wide variety of *other* governmental entities—think, for example, of administrative agencies, boards, commissions, and the like—independent institutional standing to appeal judicial decisions threatening to impact their "basic . . . make-up." Appellants' Br. 25.

More fundamentally, the House's claim that it has institutional standing to defend its "basic representational make-up," Appellants' Br. 25, gets things backwards. The district lines that were invalidated on constitutional grounds by the district court "do not restrain the House as an institution, but instead have an indirect effect on which candidates happen to be elected." U.S. Br. 16. And the Virginia House of Delegates—as an institution—has no judicially cognizable interest in influencing *who* the Commonwealth's citizens choose to represent them in the House itself. Cf. *Moore* v. *United States House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in result) ("In my view no officers of the United States,

of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest.").[14]

iii. The House also argues that redistricting legislation is unique, either because of "the legislature's primacy in redistricting," Appellants' Br. 24, or because "the commands of the Constitution" means that "there must be *some* map for the upcoming election," Appellants' Br. 27. Those arguments fail too.

To begin, the House does not have the exclusive authority to draw districts. As the House acknowledges, the state senate is also a required participant in redistricting legislation, see Appellants' Br. 27, and the senate has never been a party to this suit. Cf. *Arizona State Legislature*, 135 S. Ct. at 2664 (noting participation by both legislative chambers); *Karcher*, 484 U.S. at

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[14] At various points, the House also references "its members' relationships with constituents," "divided constituencies," and the prospect of "fac[ing] election under different court-drawn maps." Appellants' Br. 22–24. But *all* of those interests impact the House's individual members rather than the House as an institution. See also Chatterfield Amicus Br. 12–14 (identifying a number of asserted harms that judicial invalidation of redistricting legislation may impose on individual legislators, including "reduction in legislators' or their successors' reelection chances"). And *none* of the "dozens of members" mentioned on page 25 of the House's brief are parties to this case or to this appeal, see J.S. iii; note 12, *supra,* and the House neither sought nor was granted permission to intervene on behalf of anyone other than itself. See pp. 21–23, *supra*. This appeal thus presents no occasion or need to decide whether (and if so under what circumstances) individual members of a state legislative chamber would have standing to appeal a decision invalidating a districting map. Accord U.S. Br. 18; see also *Wittman*, 136 S. Ct. at 1737 (reserving several questions about individual-legislator standing).

81 (same). And the House's careful pruning of *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), shears language acknowledging the role of other actors in redistricting, such as the governor. Compare Appellants' Br. 26 (quoting *Gaffney* as saying that redistricting is "the task of local legislatures"), with *Gaffney*, 412 U.S. at 751 ("We have repeatedly recognized that state reapportionment is the task of local legislatures or of those organs of state government selected to perform it."); see also *Vesilind* v. *Virginia State Bd. of Elections*, 813 S.E.2d 739, 745 (Va. 2018) (noting that a former Virginia governor vetoed a previous redistricting plan).

Nor is redistricting legislation unique in the way the House asserts. See U.S. Br. 15 (noting that the House's theory of standing "is not readily limitable to the redistricting context"). To the contrary, any number of federal and state laws could be characterized as constitutionally (or practically) necessary given "the commands of the constitution." Appellants' Br. 27. Think, for example, of laws implementing the Constitution's command that elections for members of the United States House of Representatives must occur every two years, see U.S. Const. art. I, § 2, cl. 1, and whose "Times, Places, and Manner" must be "prescribed in each State by the Legislature thereof," U.S. Const. art. I, § 4, cl. 1. Or the requirement that a census must be conducted every ten years. U.S. Const. art. I, § 2, cl. 3. Or the obligation to provide attorneys for indigent criminal defendants. U.S. Const. amend. VI; *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). Or laws

regulating matters essential to public safety, social order, or the operation of state government.

To be sure, there must be a map for the upcoming elections, and courts are properly hesitant—even after finding a constitutional violation—to draw such a map themselves. That is why the district court gave Virginia's political branches an opportunity to draw a new map after the old one was invalidated in part on constitutional grounds. J.S. App. 97a. But none of that means that the constituent parts of the political branches each have their own judicially cognizable interest in taking an appeal if those efforts fail. And granting the House standing to appeal here on a redistricting-is-special theory would be tantamount to saying that no fewer than four state actors—the House, the state senate, and the governor (on behalf of themselves) and the Attorney General (on behalf of the Commonwealth itself)—*all* would have had standing to invoke this Court's appellate jurisdiction in this case. See Part IV, *infra* (explaining why such a result would be a bad idea).

3. As it has done since the Attorney General first challenged its standing to appeal, the House insists that this Court's 46-year-old summary reversal in *Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187 (1972) (per curiam), simply resolves the standing problem here. Appellants' Br. 25; accord J.S. 7. That case cannot bear the weight the House seeks to place on it.

For one thing, *Beens* predates this Court's entire modern standing jurisprudence—and it shows. Accord

U.S. Br. 16 ("*Beens* may no longer be good law.").[15] Most notably, *Beens* specifically endorsed and relied on a proposition that the Court expressly rejected 14 years later in *Diamond*, viewing the question of whether an entity may intervene in defense of the current legal status quo as *resolving* whether that same entity also has standing to appeal an adverse judgment. Compare *Beens*, 406 U.S. at 194 ("That the senate is an appropriate legal entity for purpose of intervention and, *as a consequence*, of an appeal in a case of this kind is settled by our affirmance" in a case that itself involved only intervention (emphasis added)),[16] with *Diamond*, 476 U.S. at 68 ("[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that [it] fulfills the requirements of Art.

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[15] The last time this Court cited *Beens* was nearly three decades ago, and it was for a substantive point that had nothing to do with standing. See *Missouri* v. *Jenkins*, 495 U.S. 33, 52 (1990) ("By no means should a district court grant local government *carte blanche* . . . , but local officials should at least have the opportunity to devise their own solutions to these problems. *Cf. Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187, 196 (1972) (*per curiam*)."). It does not appear that this Court has ever cited *Beens* for any point about standing.

[16] The decision cited in *Beens* was *Jordan* v. *Silver*, 381 U.S. 415 (1965) (per curiam), which summarily affirmed a district court decision that had, among other things, granted a motion to intervene filed by the California State Senate. See *Beens*, 406 U.S. at 194 (quoting *Silver* v. *Jordan*, 241 F. Supp. 576, 579 (S.D. Cal. 1964)). As *Jordan*'s caption readily reveals, the appellant in that case was California's Secretary of State as represented by its Attorney General rather than the intervening state legislature. See 381 U.S. at 415.

III."); accord U.S. Br. 17 (observing that *Diamond* specifically "rejected" the equation of intervention and ability to appeal on which the Court had relied in *Beens*).

At any rate, *Beens* was also materially different from this case. See U.S. Br. 16 (noting that "*Beens* focused primarily on the scope of a Minnesota Senate resolution"). The reason why "the [Minnesota] senate [was] directly affected by the District Court's orders" in *Beens*, 406 U.S. at 194, was because those orders had altered the size of the state senate itself. As the Court emphasized at the very start of its opinion, the appeal in *Beens* was not about the issue presented here—that is, *whether* the district lines must be redrawn. See *Beens*, 406 U.S. at 188 ("The appeals do not challenge the District Court's conclusion that the legislature is now malapportioned."). Instead, *Beens* involved a challenge to the district court's remedial order, which "reduce[d] the number of legislative districts to 35, the number of senators by almost 50%, and the number of representatives by nearly 25%." *Id.*

As the Federal Government explains, "[t]hat sort of fundamental change—shrinking the overall size of a collective legislative body—has a distinct and more direct effect on the body itself than a mere shift in district lines." U.S. Br. 17. Only the former type of change, for example, is certain to have numerous effects on the *internal* operations of the legislative body, with impacts ranging from matters like leadership elections and other voting rules to things like basic committee structure. See Va. Const. art. IV, § 7 (providing that

"[e]ach house shall select its officers and settle its rules of procedure"). So "[e]ven assuming that *Beens*' passing statement on standing remains good law, it should not be extended to the abstract and dubious institutional injury asserted here." U.S. Br. 17.

4. Nor do the other decisions briefly referenced by the House (Appellants' Br. 27–28) establish its standing to appeal here. In *Arizona State Legislature*, for example, this Court held that an entire state legislature had standing to raise the claim that it had been deprived of its "exclusive, constitutionally guarded role" of drawing districts by a state constitutional amendment that "would completely nullify any vote by the Legislature, now or in the future, purporting to adopt a redistricting plan." 135 S. Ct. at 2663, 2665 (internal quotation marks and citation omitted). But see *id.* at 2695–97 (Scalia, J., joined by Thomas, J., dissenting) (arguing that there was no standing in *Arizona State Legislature*). And as *Arizona State Legislature* itself notes, this Court's decision in *Coleman* v. *Miller*, 307 U.S. 433 (1939), establishes only "that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Arizona State Legislature*, 135 S. Ct. at 2665 (internal quotation marks and citation omitted). But see *id.* at 2696–97 (Scalia, J., joined by Thomas, J., dissenting) (describing *Coleman* as a

"peculiar decision" that itself "may well stand for nothing" about standing).[17]

Those holdings are not applicable here. The House does not assert—because it cannot assert—that it has an "exclusive, constitutionally guarded role" in drawing districts. *Arizona State Legislature*, 135 S. Ct. at 2663. And a judicial decision enjoining the operation of particular aspects of specific redistricting legislation on federal constitutional grounds no more "nullifies" the votes cast in support of that legislation than any other type of judicial decision concluding that a statute is unconstitutional.

The last decision cited by the House—*INS* v. *Chadha*, 462 U.S. 919 (1983)—is even further afield. As its caption reveals, *Chadha* involved an appeal filed by the Executive Branch. And the *Chadha* Court specifically *declined* to base its standing-to-appeal holding on the presence of the legislative chambers seeking to defend the constitutionality of a federal law, relying instead on the presence of an appeal by the Executive. See *id.* at 929–31 (finding appellate jurisdiction based

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[17] See also Tara Leigh Grove, *Government Standing and the Fallacy of Institutional Injury* at 36–42 (forthcoming 167 U. Pa. L. Rev. (2019)), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3134464 (arguing that "*Coleman* is better understood as a case in which the Supreme Court applied a (now-outdated) rule of appellate standing to hear a federal constitutional challenge from a state court"); accord *Barnes* v. *Kline*, 759 F.2d 21, 62, 63 n.16 (D.C. Cir. 1984) (Bork, J., dissenting) (explaining that "Chief Justice Hughes' opinion for the majority [in *Coleman*] made it clear that the Court accorded standing to obtain review of a federal constitutional question only because there existed a legal interest accepted as sufficient for standing by the highest state court").

on No. 80-1832, the appeal brought by the INS, rather than Nos. 80-2170 or 80-2171, the petitions for a writ of certiorari brought by the House of Representatives and the Senate).

As the House notes, see Appellants' Br. 27, the *Chadha* Court also concluded that the United States House of Representatives and Senate were "proper 'parties' within the meaning of that term in 28 U.S.C. § 1254(1)." *Chadha*, 462 U.S. at 930 n.5.[18] But the intervenors in *Wittman*, *Hollingsworth*, and *Diamond* were all "parties" too and that was not enough to "confer standing sufficient to keep the case alive in the absence of the State on this appeal." *Diamond*, 476 U.S. at 68. And, unlike in *Chadha*, here the state official charged with "render[ing] and perform[ing]" "[a]ll legal service in civil matters for the Commonwealth," Va. Code Ann. § 2.2–507(A), expressly declined to invoke this Court's jurisdiction.

IV. Like the Federal Government, States should speak with one voice before this Court

It is common ground that at least one person—the Attorney General—would have had the authority to appeal on behalf of Virginia in this case. And neither this Court nor the States would benefit from the

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[18] The Court also stated that the presence of the legislative bodies helped ensure that the appeal had "concrete adverseness" and was thus "a justiciable case or controversy" notwithstanding the Executive Branch's agreement with Chadha that the one-house veto was unconstitutional. *Chadha*, 462 U.S. at 931 n.6 & 939; accord *United States* v. *Windsor*, 570 U.S. 744, 758–60 (2013) (discussing this aspect of *Chadha*).

cacophony that would follow if multiple people or entities could appeal decisions involving the laws of a single State.

1. The federal example is illuminating. More than 150 years ago, this Court unanimously held that "in causes where the United States is a party, and is represented by the Attorney-General or the Assistant Attorney-General, or special counsel employed by the Attorney-General, no counsel can be heard in opposition on behalf of any other of the departments of the government." *The Gray Jacket*, 72 U.S. 370, 371 (1866); accord *The Confiscation Cases*, 74 U.S. 454, 459 (1868) (same). Instead, the Court has emphasized that "the United States usually should speak with one voice before this Court." *United States* v. *Providence Journal Co.*, 485 U.S. 693, 706 (1988).

The Court has identified a number of "salutory policies" underlying this "one voice" rule. *Providence Journal Co.*, 485 U.S. at 706. "Without the centralization of the decision whether to seek certiorari," for example, "this Court might well be deluged with petitions from every federal prosecutor, agency, or instrumentality, urging as the position of the United States, a variety of inconsistent positions shaped by the immediate demands of the case *sub judice*, rather than by longer term interests in the development of the law." *Id.* For that reason, "this Court relies on the Solicitor General to exercise . . . independent judgment and to decline to authorize petitions for review in this Court in the majority of cases the Government lost in the courts of appeals." *Id.* at 702 n.7.

Not fragmenting the Federal Government's litigating authority "also serves the Government well." *Federal Election Comm'n* v. *NRA Political Victory Fund*, 513 U.S. 88, 96 (1994). "[T]the Government's litigation conduct in a case is apt to differ from that of a private litigant," *United States* v. *Mendoza*, 464 U.S. 154, 161 (1984), and "[w]hether review of a decision adverse to the Government . . . should be sought depends on a number of factors which do not lend themselves to easy categorization." *NRA Political Victory Fund*, 513 U.S. at 96. "In particular, whereas a private client is likely to focus exclusively on whether he can prevail," the Government may appropriately consider "a variety of factors," including "the limited resources of the government," "before authorizing an appeal." *Mendoza*, 464 U.S. at 161. "The Government as a whole is apt to fare better if these decisions are concentrated in a single official." *NRA Political Victory Fund*, 513 U.S. at 96.

2. The same basic considerations apply to the States. Indeed, this case vividly illustrates the concerns with allowing a State's "one voice" to be fragmented before this Court.

This Court would be ill-served by a regime that would routinely permit multiple state actors to seek its review whenever a state law (whether redistricting legislation or otherwise) is invalidated on constitutional grounds. States would be ill-served by a rule that would make it impossible for them to make appeal decisions that reflect "the limited resources of the Government," *Mendoza*, 464 U.S. at 161—particularly

where, as here, the State is going to have to pay the challenging party's attorney's fees if an appeal fails. See First Stay Opposition at 1–2 (citing, among other things, "the significant time and expense that have already gone into this case and that would only be further increased by an appeal"); p. 9, *supra*. And a State's ultimate sovereigns—their citizens—would be ill-served by a rule that would make it impossible for their government to "speak with one voice . . . that reflects not the parochial interests of a particular" part of state government "but the common interests of the Government and therefore of all the people." *Providence Journal Co.*, 485 U.S. at 706; see First Stay Opposition at 2 (citing "the compelling interest in promptly remedying what [the court] has concluded is an unconstitutional racial gerrymander").

V. States have ample measures to ensure their laws are appropriately defended, including on appeal

The House and its amici repeatedly suggest that finding that the House lacks standing to appeal here would give executive branch officials a veto over laws they do not like and leave state legislatures powerless to ensure that laws are adequately defended. See, *e.g.*, Appellants' Br. 30. Not so.

1. Virginia's Attorney General has not "vetoed" anything. Quite the contrary: the Attorney General spent more than three years arguing that the challenged districts were constitutional, and there is no

claim that the House was prevented from mounting a vigorous defense in the district court.[19]

So what changed? What changed is that an Article III court held a four-day bench trial and issued a comprehensive opinion finding "[o]verwhelming evidence" that the challenged districts were unconstitutional and enjoining their use going forward. J.S. App. 97a. Mindful of this Court's repeated admonition that a "trial is the main event . . . and not simply a tryout on the road to appellate review." *Davila* v. *Davis*, 137 S. Ct. 2058, 2066 (2017) (internal quotation marks and citation omitted), the Attorney General then considered the traditional "variety of factors," *Mendoza*, 464 U.S. at 161, and "determined that continued litigation would not be in the best interest of the Commonwealth or its citizens and that an appeal to the United States Supreme Court is thus unwarranted." First Stay Opposition at 1.

It is no answer to say (as the House repeatedly does) that Virginia's Attorney General is an elected official. For one thing, the same thing is true in the vast majority of States,[20] and it is also true of every member

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[19] Even if the Attorney General *had* argued that the challenged districts were unconstitutional, the House would still have been able to present its own defense before the district court because intervention is not standing and no standing is needed to play defense. See pp. 14–17, *supra*. The same would be true if "divided government produces an impasse that necessitates judicial map-drawing." Appellants' Br. 26.

[20] See 37 Council of State Gov'ts, The Book of the States 268 tbl.4.19 (2005) (noting that the Attorney General is popularly elected in 43 States).

of the House and of its Speaker. More importantly, the Attorney General—unlike the members of the House—was elected by the citizenry as a whole and to a position whose essential characteristics involve providing "[a]ll legal service in civil matters for the Commonwealth." Va. Code Ann. § 2.2–507. So when Virginia's Attorney General determined that an appeal "would not be in the best interest of the Commonwealth or its citizens," First Stay Opposition at 1, he was making a call that state law expressly authorized him to make and that the majority of citizens of the Commonwealth elected him to make.[21] And when (not if) some of Virginia's citizens disagree with the litigation decisions made by their elected officials, that is fundamentally a political dispute that is properly resolved at the ballot box or through the political process rather than by having courts decide that some subset of state government is also entitled to speak for the State in federal court. See U.S. Br. 15.

2. A State could well decide that that is enough to ensure that its laws are appropriately defended. After all, if an Article III judge has ruled that a challenged state action violates someone's federal rights *and* the person who state law empowers to make litigation decisions on a State's behalf determines that no appeal is warranted, one could reasonably conclude that is how the system is supposed to work. Cf. *Providence Journal Co.*, 485 U.S. at 703 (emphasizing that

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[21] Virginia's current Attorney General was first elected in November 2013, before this litigation began, and was re-elected in November 2017, while this litigation was pending.

"[i]n this very case, before the consent of the Solicitor General ever became relevant, members of the Judiciary had decided that the District Court erred in adjudging the defendants in contempt").

Other States may, of course, choose differently. See Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 Yale L.J. 2100, 2107 (2015) (explaining that "state law is supreme when it comes to the powers and duties of state attorneys general," including when it comes to "state-level duties to defend"). Most obviously, a State could require its Attorney General to defend the constitutionality of all state laws and take all available appeals to do so. Cf. Miss. Code Ann. § 7–5–1 (West 2012) ("The Attorney General . . . shall intervene and argue the constitutionality of any statute when notified of a challenge thereto . . . .").

Other options are available as well. For example, state law could provide that if the Attorney General declines to defend one of its laws or to take all possible appeals, another "agent[ ]" becomes authorized "to represent [the State] in federal court." *Hollingsworth*, 570 U.S. at 717; see, *e.g.*, 71 Pa. Cons. Stat. § 732–402(3)(i) (West 1981) (stating that "[t]he chief counsel [of an independent agency may] . . . initiate appropriate proceedings or defend the agency when an action or matter has been referred to the Attorney General and the Attorney General refuses or fails to initiate appropriate proceedings or defend the agency"); N.C. Gen. Stat. § 120–32.6(b) (2017) (providing that the state legislature "shall be deemed the State of North Carolina"

for purposes of defending the constitutionality of state law).

More modest solutions are available as well. For example, a State could require its Attorney General to enforce a statute and take all proper appeals, while permitting others to participate as amicus curiae to defend it when the Attorney General decides not to do so. See *United States* v. *Windsor*, 570 U.S. 744, 756–60 (2013) (holding that such a procedure satisfies Article III); *Chadha*, 462 U.S. at 931 & n.6, 939–40 (same). But regardless of where a particular State chooses to land on the spectrum between discretion and valor in defending the constitutionality of state laws to the last possible breath, there are ample ways for it to implement that choice.

* * *

The drawing of fair legislative districts is critically important to our democracy. So it is certainly understandable that the House and its Speaker—just like the governor, individual legislators, candidates, political parties, and voters—"have a keen interest in" the issues presented by this litigation. *Hollingsworth*, 570 U.S. at 700. But Virginia law is clear that in the Commonwealth, like in most States, the ultimate authority "to speak for the State in federal court" rests with its elected Attorney General. *Id.* at 710. Having spent more than three years defending the challenged districts, the Attorney General determined that "the State's interest[s]," *id.* at 712, would best be served by bringing this long-running and expensive litigation to

a close so that the unconstitutional racial gerrymanders identified in the district court's opinion may promptly be remedied before the final election to be held before the next census. Others may, of course, disagree with that decision. But no other person or entity—including the House or its Speaker—has been given the power to override it.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction.

Respectfully submitted.

MARK R. HERRING
Attorney General

STEPHEN A. COBB
Deputy Attorney General

TOBY J. HEYTENS
Solicitor General
Counsel of Record

MATTHEW R. MCGUIRE
Principal Deputy
Solicitor General

MICHELLE S. KALLEN
Deputy Solicitor General

BRITTANY M. JONES
Attorney

OFFICE OF THE ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7240 – Telephone
(804) 371-0200 – Facsimile
SolicitorGeneral@oag.state.va.us

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