IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, et al.,	)	
Plaintiffs,	)	
v.	)	**2:12-CV-00691-WKW-MHT-WHP**
	)	**(Three Judge Court)**
THE STATE OF ALABAMA, et al.,	)	
Defendants.	)	
ALABAMA DEMOCRATIC CONFERENCE, et al.,	)	
Plaintiffs,	)	
v.	)	**2:12-CV-01081-WKW-MHT-WHP**
	)	**(Three Judge Court)**
STATE OF ALABAMA, et al.,	)	
Defendants.	)	

POST-REMAND BRIEF

JAMES H. ANDERSON
JOEL T. CALDWELL
Copeland, Franco, Screws & Gill, P.A.
P.O. Box 347
Montgomery, AL 36101-0347
(334) 834-1180/(334) 834-3172 Fax
anderson@copelandfranco.com
caldwell@copelandfranco.com

WILLIAM F. PATTY
THE GARDNER FIRM, P.C.
P.O. Box 991
Montgomery, AL. 36101-0991
(334) 416-8212/(334) 265-7134 (fax)
bpatty@thegardnerfirm.com

WALTER S. TURNER
2222 Narrow Lane Road
Montgomery, AL 36106
334-264-1616; wsthayer@juno.com

RICHARD H. PILDES
40 Washington Square South
New York, NY 10012-1005
pildesr@juris.law.nyu.edu
Pro hac vice admission pending

JOHN K. TANNER
3743 Military Road, NW
Washington, DC 20015
202-503-7696; john.k.tanner@gmail.com
Appearing pro hac vice

JOE M. REED
Joe M. Reed & Associates, LLC
524 S Union St.
Montgomery, AL 36104-4626
T(334) 834-2000; F (334) 834-2088
joe@joereedlaw.com

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POST-REMAND BRIEF

Plaintiffs Alabama Democratic Conference et al., through undersigned counsel, submit this brief in support of final judgment on their claims, in compliance with the opinion and instructions of the United States Supreme Court in the consolidated cases of *Alabama Legislative Black Caucus v. Alabama* and *Alabama Democratic Conference v. Alabama*, 135 S.Ct. 1257 (2015), which vacated and remanded this Court's December 20, 2013, opinion and judgment, 989 F.Supp.2d 1227 (M.D. Ala. 2013) (three-judge court). Based on the record, the additional

Supplemental Exhibits and documents attached to this brief pursuant to this Court's Post-Remand Scheduling Order, and the conclusions of law set out in the Supreme Court's opinion, the Alabama Democratic Conference (ADC) plaintiffs are entitled to final judgment declaring unconstitutional all 36 black-majority districts in Acts 2012-602 and 2012-603.

Introduction

As this challenge to Alabama's legislative redistricting plans returns to this Court, much has been decided already. There is no mystery about what Alabama did when designing its black-majority House and Senate districts. As the Supreme Court concluded, Alabama "expressly adopted and applied a policy of prioritizing mechanical race targets above all other districting criteria" when it redesigned its black-majority districts (BMDs) to re-create the prior black-population percentages (BPPs) in each and every one of these districts, to the extent feasible to do so. *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1267 (2015) (*Alabama*). The Supreme Court found that application of this policy involved "prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote)." *Id.* The issue is not what Alabama did, but whether Alabama had a legally adequate justification for doing what it did.

As the Supreme Court has now held, Alabama asked "the wrong question" when it used race to design each of its 36 black-majority House and Senate districts. Id. at 1274. Alabama was permitted under Section 5 of the Voting Rights Act (VRA) to take race into account to the extent necessary to preserve the African-American community's "present ability to elect the candidate of its choice." Id. But the Supreme Court concluded that is not what Alabama did. Instead, the Court held that Alabama, in designing each of its majority-black districts, took race

into account to answer an entirely different question: "How can we maintain present minority percentages in majority-minority districts." Id. The Court's decision thus establishes that, in invoking Section 5 to justify its use of race in designing each of the State's BMDs, Alabama misinterpreted and misapplied Section 5 in a fundamental respect.

For all its apparent complexity, this case is much simpler than it might previously have appeared. The Supreme Court's decision recognizes that the central failing in the way Alabama designed *each* BMD is that the State simply failed to ask, let alone answer, the legally relevant question. This is not a case, in other words, in which Alabama made a determination regarding the BPP needed to preserve the "ability to elect" in any or all of the States BMDs under current conditions, and the parties are now contesting whether that level is 51% or 54% or 58%. Instead, this is a case in which the State "mechanically" sought to maintain or increase a specific BPP in each and every BMD, to the extent at all feasible. Id. at 1273. In doing so, the State moved significant numbers of people into and out of the each BMD explicitly on the basis of race, as evident both from looking at the racial composition of the persons traded between districts and by the fact that the State engaged in systematic race-based splitting of election precincts.

But before Section 5 can be used to justify race-based districting, Alabama must ask and answer, at the very least, the legally relevant and appropriate question: what is necessary under current conditions to preserve the ability to elect. That is the principle upon which the Supreme Court's decision in this case rests. *See also Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (holding that Section 4 of the VRA is constitutional only if Congress adequately ties coverage formula to "current conditions"). Because the State so badly misconstrued its obligations under

Section 5, the Supreme Court's decision means that the VRA cannot provide a justification for the race-based districting in which Alabama engaged with respect to each of the BMDs.

Yet as the trial record shows, Alabama offered no other reason, beyond VRA compliance, for its use of race in designing the challenged districts. Consistently and repeatedly, that is the justification Alabama offered for setting the specific BPP targets it used in designing the BMDs. As a result, the posture of this case on remand is that Alabama has engaged in race-based districting, regarding all the State's BMDs, for no compelling or legitimate governmental interest. This case would be no different had Alabama determined that each BMD must be 80% BPP, to the extent feasible, on the view that Section 5 so required; once the Supreme Court held that Section 5 does not require that, the State would have no compelling interest in making its districts 80% BPP.

As demonstrated below, the record establishes that race was the predominant factor in the design of each majority-black House and Senate district. Strict scrutiny therefore applies and because the State fundamentally misinterpreted and misapplied Section 5, the use of race in each BMD does not serve a compelling purpose, nor is it narrowly tailored to legitimate compliance with Section 5.

As the Court's Post-Remand Scheduling Order instructs, this brief addresses only the substantive liability issues. The brief proceeds first by discussing the Supreme Court's decision and its application to Alabama's districting as a whole, and then proceeds to explain, as required by the Supreme Court, why race predominated in the State's drawing of each individual black majority district and why each of those districts fails under strict scrutiny.

I. The Supreme Court's Decision.

As the Supreme Court recognized, the ADC claims that each MBD was racially gerrymandered in violation of the Constitution. The Supreme Court provided the following detailed guidance as to the legal framework within which this Court must address those claims:

1. The Policy Alabama Applied in Designing the BMDs. The Supreme Court has concluded already that, in designing its BMDs, "Alabama expressly adopted and *applied* a policy of *prioritizing* mechanical racial targets above all other redistricting criteria (save one-person, one-vote) . . . ." (emphasis added). Id. at 1267. That policy "provides evidence that race motivated the drawing of particular lines in multiple districts in the State." Id. *See also id.* at 1273 (noting that "the record makes clear" that "the legislature relied heavily upon a mechanically numerical view" of what constitutes retrogression in designing these districts).

2. The Predominant-Motive Analysis. In determining whether race was the "predominant motivating factor" in the design of any specific BMD, the Supreme Court held that the issue is whether "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." Id. at 1267 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). "[T]he 'predominance' question concerns *which* voters the legislature decides to choose, and specifically whether the legislature predominantly uses race as opposed to other, 'traditional' factors when doing so." *Alabama*, at 1271.

Thus, as the Supreme Court instructed, to calculate properly '"predominance," this Court should not "place in the balance" the State's efforts to create districts of approximately equal population. Id. at 1270. This requirement of equal population is to be treated as "a background rule against which redistricting takes place." Id. at 1271. Given the State's equal-population

standard, this Court must assess whether race predominated in determining which voters to move into and out of the districts to meet the State's population goals. Had this Court applied the correct approach to the "predominant motive" analysis, this Court's conclusions "might well have been different." Id.

3. SD 26 As An Example of Proper Predominant-Motive Analysis. With respect to the one district the parties discussed "in depth" before the Supreme Court, SD 26, the Supreme Court concluded "there is strong, perhaps overwhelming, evidence that race did predominate as a factor" in the design of SD 26. Id. With respect to SD 26 "and likely others as well, had the District Court treated equal population goals as background factors, it might have concluded that race was the predominant boundary-drawing consideration." Id. at 1272. On remand, this Court must reconsider its predominance conclusions with respect to SD 26 "and others to which [the] analysis [used to evaluate SD 26] is applicable." Id.

4. Narrow Tailoring Analysis. To the extent race is the predominant factor with respect to any specific district, the Supreme Court recognized that the State bears the burden of proving that such use of race was narrowly tailored to complying with Section 5 of the VRA. *Id.* at 1272. *See also Miller v. Johnson*, 515 U.S. 900. 920 (1995). To meet that burden, the State, like the public employer in *Ricci v. De Stefano*, 557 U.S. 557, 585 (2009), must have a "strong basis in evidence" for the State's conclusion that Section 5 requires that specific use of race. *Alabama*, 135 S.Ct. at 1274 (quoting *Ricci*). Section 5 "prohibits only those diminutions of a minority group's proportionate strength *that strip the group within a district of its existing ability to elect its candidates of choice*." Id. at 1272-73 (*quoting* Brief of the United States as *Amicus Curiae*) (emphasis added). Thus, in applying narrow-tailoring analysis, this Court must ensure Alabama

has met its burden to prove that a "strong basis in evidence" exists in any particular district for the conclusion that the State's use of race was required to avoid stripping black voters of their existing ability to elect.

5. The Federal Constitutional Standard for Population Equality. The Supreme Court concluded that Alabama's 2% total population-deviation policy was "a more rigorous deviation standard than our precedents have found necessary under the Constitution." Id. at 1263 (citing *Brown v. Thomson*, 462 U.S. 835, 842 (1983). States have discretion to come closer to a one-person, one-vote ideal, but the Constitution does not require that.

6. Standing. The Supreme Court held that ADC must be given the opportunity to prove that it has standing to represent its members who reside in the challenged districts. Id. at 1268-1270.

As demonstrated below, proper application of these legal principles to the record in this case means that each BMD was designed in a way that violates the Constitution.

II. ADC Plaintiffs Have Standing and Race Was The Predominant-Factor In the Design of All the BMDs.

Pursuant to the Supreme Court's opinion and this Court Post-Remand Scheduling Order, ADC plaintiffs have submitted an affidavit testifying to the fact that ADC has members in all the challenged districts. The Scheduling Order permitted the State to file a response to that submission. The State has not done so. The ADC plaintiffs have established that they have standing under *Shaw v. Reno*, 509 U.S. 630 (1993) to challenge each of the BMDs.

Race was the predominant factor motivating the design of each of these BMDs, including the districts (approximately 25% overall) in which the BPP decreased.

A. The Predominant-Factor Standard

The Supreme Court's decision provides greater clarity as to how the predominant-motive analysis is to be performed with respect to the design of Alabama's BMDs. To begin with, both the Supreme Court and this Court recognized that Alabama placed the greatest importance on two goals in the redistricting process. *Alabama*, at 1263. First, Alabama decided to go beyond what the federal Constitution requires and adopt a 2% total-population deviation standard to meet its Equal Protection obligations. Id. at 1268-1270. Second, Alabama prioritized "maintain[ing] roughly the same black population percentage in existing majority-minority districts." Id. at 1263. As the Court noted, Alabama had "expressly *adopted* and *applied* a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote). . . ." Id. at 1267 (emphasis added).

The Supreme Court held that this Court "did not properly calculate 'predominance' because it had incorrectly "placed in the balance" Alabama's efforts to create equal-population districts. *Id.* at 1270. Because all districting must meet equal-population requirements, that objective is not relevant to the *Shaw-Miller* analysis and has no place in it. As the Court put it, "the 'predominance' question concerns *which* voters the legislature decides to choose, and specifically whether the legislature predominantly uses race as opposed to other, 'traditional' factors when doing so." *Id.* at 1271. The question is whether, in meeting its equal-population goals, Alabama deliberately used race as the predominant factor to place a significant number of voters within or without a particular district.

Thus, for purposes of the *Shaw-Miller* analysis, Alabama applied one relevant policy in designing the black-majority districts – meeting Alabama's racial-population percentage targets – that dominated over other policy objectives. As the Supreme Court concluded, that policy had

priority "above all other districting criteria. . . ." Id. at 1267. Indeed, re-creating the BPPs at their prior level in each district *had* to dominate over all other considerations because, as Alabama represented to the Supreme Court, the State believed the Supremacy Clause *required* the State to meet these BPPs in each and every BMD. Al. Br. 2, 16. That belief was wrong, but there is no doubt that it drove Alabama to re-create the BPPs, to the extent feasible, in each district as pure racial numbers.

The conclusion is thus inescapable that race predominated in the design of any district in which Alabama applied the approach the Supreme Court described: if "prioritizing" does not mean that, it is hard to understand what else it would mean. But the record contains no evidence that Alabama abandoned this policy in the design of any BMD.

In addition, the Supreme Court's opinion provides an even more detailed blueprint for how the predominance analysis is to proceed. Before the Court, the parties discussed one district in detail, SD 26; as noted above, the Court concluded that there was "strong, perhaps overwhelming evidence" that race predominated in the drawing of that district. Id. at 1271. The determinative evidence, according to the Court, consisted of four elements: (1) the State's general policy that it sought to "maintain existing racial percentages in each majority-minority district, insofar as feasible;" (2) evidence that this goal "had a direct and significant impact on the drawing of at least some" of the District's boundaries; (3) evidence that the redistricters transgressed their own redistricting guidelines by splitting precincts along racial lines; (4) evidence that the legislature did indeed succeed in preserving the black-population percentage in

the district.[1] Id. at 1271-72. The record, as described below, demonstrates the presence of the same elements in the design of each BMD.

The Supreme Court also provided guidance as to how *not* to perform the predominance analysis. The State cannot invoke purported compliance with traditional districting principles at a level of abstraction that does not specifically explain why particular voters were moved into or out of the BMDs. Id. at 1271-72. Similarly, to try to explain away the movement of voters by race, the State cannot invoke policies that it fails to apply in a consistent way. Id. *See, e.g. Page v. Virginia State Board of Elections*, Docket No. 3:13cv678 (E.D.Va. June 5, 2015), slip op. at 29 (in the predominant-motive analysis, "we consider irregularities in the application of [traditional districting principles] together"); *Doe ex rel. Doe v. Lower Merion Sch. Dist*., 665 F.3d 524, 554 (3d Cir. 2011) (finding no racially discriminatory purpose in part because "Plan 3R has been applied consistently, regardless of race . . . ."); *N.A.A.C.P., Inc. v. Austin*, 857 F. Supp. 560, 574-75 (E.D. Mich. 1994) (decreasing compactness is "a valid consideration if the State is minimizing it in a consistent, racially impartial manner); *In re Senate Joint Resolution of Legislative Apportionment* 1176, 83 So. 3d 597, 690 (Fla. 2012) (LEWIS, J., concurring) ("while a variety of different rationales and concepts may be available for application in redistricting, the rationales or concepts actually used must be applied consistently"). Nor can the State invoke ad hoc explanations not reflected in the state's general policies, such as those announced in the Redistricting Guidelines. *See Alabama Legislative Black Caucus v. Alabama*, 135 S.Ct. 1257, 1271-72 (2015) (rejecting following highway lines as a rationale for the design of SD 26).

[1] As is discussed in more detail below, for the 25% of districts in which the BPP decreased, there typically were not enough contiguous black residents left to re-populate those districts fully up to their prior BPP levels.

The Supreme Court's application of this analysis to Senate District 26 is particularly instructive. With respect to SD 26, the Supreme Court rejected the view previously held by this Court that Alabama could defeat plaintiffs' predominant-motive analysis by invoking a *general* goal to preserve the core of the existing district. As the Supreme Court held, the general aim of preserving the core of a district "is not directly relevant to the origin of the *new* district inhabitants. . . ." Id. It is the movement of those voters that must be explained. Next, the Court rejected the argument that following county lines could adequately explain the movement of voters by race into SD 26; the district's boundaries did not generally follow county lines. Id. As a result, the Court found any policy the State had of following county lines to be of "marginal importance;" such a policy therefore could not be sufficient to defeat the conclusion that race had been the predominant motive for moving significant numbers of black voters into SD 26. Id. Finally, the Supreme Court concluded this Court had given inappropriate weight to the State's purported policy of following highway lines; the Court noted that this objective was not mentioned in the legislative redistricting guidelines. Id. Ad hoc objectives the State might offer to explain specific district-design decisions simply carry too little weight, at best, to defeat the conclusion that race predominated in districts in which Alabama applied its general race-based targets and engaged in measures such as race-based splitting of precincts.

The Supreme Court's opinion provides detailed instructions on how the predominant-motive analysis is to proceed, given the evidence in the record and the conclusions the Supreme Court has reached already regarding that evidence. We now turn to applying these instructions to the State's BMDs.

B. The Application of the Predominant-Factor Standard

The record provides extensive direct evidence, as well as circumstantial evidence, that race was the predominant factor in designing each and every BMD. In applying the *Shaw/Miller* predominant factor analysis, the critical question is whether "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Miller*, 515 U.S. at 913. *Miller* holds that it is the deliberate classification alone, by race, that triggers strict scrutiny. Id. at 910 (rejecting Georgia's argument plaintiffs should have to prove more than this to state a claim). Race can predominate whether a district's geographic shape is reasonably compact or not. The "bizarreness" of a district's shape can be strong *circumstantial* evidence that race was used for its own sake, but such evidence is not necessary. Id. at 913. As *Miller* held, "parties may rely on evidence other than bizarreness to establish race-based districting." Id. *See also Bush* v. *Vera*, 517 U.S. 952, 980 (1996) (noting that *Miller* recognizes that "the ultimate constitutional values at stake involve the harms caused by the use of unjustified racial classifications, and that bizarreness is not necessary to trigger strict scrutiny."). *See also Hunt v. Cromartie*, 526 U.S. 541, 547 (1999) (plaintiffs can establish predominance "using direct or circumstantial evidence, or a combination of both."). Whether proved through direct or circumstantial evidence, the key question is whether "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Alabama* at 1267 (quoting *Miller*).

1. Common Policies Applied In Each Black-Majority District. As the Supreme Court recognized, all of the BMDs were drawn pursuant to the same policy, priorities, methods, techniques, and legal understandings. The Court also held that this "statewide evidence" of the

policies employed as a general or common matter to all the black-majority districts is "perfectly relevant" to determining whether race predominated in the design of any specific district. Id. at 1267. Emphasizing this point, the Court specifically further concluded: "That Alabama expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote) provides evidence that race motivated the drawing of particular lines in multiple districts." Id.

The record demonstrates that when the redistricters designed *each* black-majority Senate and House district, (1) race-based population targets were set; (2) meeting these targets took priority over all other districting objectives (other than one, vote, one person); (3) these districts were designed first, to make sure these racial-population targets were met, to the extent feasible; (4) no proposal for the design of any of these districts would be considered unless it met these BPP targets; (5) all other districting objectives were subordinated to ensuring that these racial targets met; (6) the redistricters considered nothing about the particular black voters it moved into these under-populated districts to re-create the BPPs other than their race.

The direct evidence on these points can be summarized briefly, because all three central actors, Senator Dial, Representative McClendon, and the consultant who drafted the districts, Randy Hinaman, gave the same, consistent testimony. First, as this Court previously found, the redistricters all understood avoiding retrogression to mean that "we could not in any plan reduce the number of black voters in any district that had been determined to be a majority black district." See, e.g., Tr. 1-27-29; 174-75; Tr. 3-118, 145; 183-187. Senator Dial testified that he was unwilling to lower the minority percentage in *any* district, because that is what avoiding "retrogression," in his view, required. Tr. 1-96. When black-majority districts needed to grow in

population, to meet the 2% population deviation standard, "they had to grow in the same percentage that they already have and not regress that district." Tr. 1-81. Indeed, to meet this policy objective of avoiding "retrogression," Senator Dial testified that the higher the BPP, the better for purposes of Section 5, as he understood it; he did not consider any black percentage too high for the districts he created. Tr. 1-56.[2]

Second, Senator Dial gave Randy Hinaman, the mapmaker, only two basic instructions (in addition to the 2% population-deviation standard): meet these BPP targets in each black-majority Senate district and do not pair incumbents. As Senator Dial testified: "That was basically it, yes," for the instructions he gave Hinaman. Tr. 1-69.

Third, the first thing the redistricters did in drafting the plans was to design the black-majority districts. Tr. 1 -35-36 (Dial); Tr. 3- 122; 146 (Hinaman); Tr. 3-221-23 (McClendon). Only after those districts were "properly" repopulated to meet the BPP targets did the redistricters turn to filling in the rest of the districts. Tr. 3-122: 23-3-123:3. That followed from the overwhelmingly priority the redistricters gave to meeting their BPP targets. Id. Indeed, as a matter of logic and common-sense, if the priority in drafting the plan is to make sure each BMD meets a specific BPP, then the most effective means to achieve that – probably the only means of realizing that policy – is to design those districts first and make sure they meet the BPP requirement before moving on to the other districts. That is precisely what the redistricters did. Tr. 1-36.

Fourth, meeting or exceeding the prior BPP in each of these districts was not one aim among many: it was *the* prioritized policy or factor or constraint that dominated over all others

[2] Tr. 1 = Trial Transcript Volume I.

(other than the population-equality requirement). Thus, Senator Dial repeatedly testified that he rejected any other plan, including specific ones that other Senators proposed for the BMDs, if those other plans would reduce the BPP in any black-majority district. That was *the* reason he gave for rejecting Senator Sanders' plan, Tr. 1-135, and the Reed-Buskey Senate plan. Tr. 1-126. The Sanders plan maintained the same number of majority black voting age percentages as in the prior plan (eight). But Senator Dial testified that the "only reason" he rejected this plan was that it did not – in addition --- maintain the high BPPs those districts previously had. Tr. 1-77. Even though SB 5, the Sanders plan, avoided measures like splitting Mobile County between districts, Senator Dial rejected this plan, in favor of one that did split counties like Mobile, because of the priority given to meeting or exceeding the racial-population targets. Id. Senator Dial consistently rejected moving district boundaries in any way that would have "regressed" a district. Tr. 1-71-72.

Similarly, Hinaman testified that, while changing each district as little as possible was "a goal," that goal was "certainly down on the list from one person, one vote and not retrogressing the minority districts. . . ." Tr. 3-162. That is, meeting the racial targets predominated over any "least-change" policy. In the same way, any aim to protect communities of interest gave way to the higher priority goal of meeting the racial-population targets. Tr. 1-28.[3]:

[3] As Senator Dial testified:

> Q: And also, [your goal] to the extent possible, to protect communities of interest?
>
> A: Yes, as much as possible.
>
> Q: And that's not always possible, is it?
>
> A: It becomes very difficult when you're trying to make sure that you do not regress any of the minority districts.

Even more significantly, the State had to subordinate the traditional Alabama districting principle of preserving county boundaries to the goal – thought to be federally required – of moving voters around to meet these racial-population targets. Yet Senator Dial testified that, to meet the higher-priority goal of hitting the State's racial-population targets, the redistricters had to override county boundaries on numerous occasions. Tr. 1:75: 8-11; 1-93:7-1-94:2. Hinaman similarly testified that he would split counties "based on the Voting Rights Act and not retrogressing a Majority/Minority district." APX 75, at 34.

Fifth, the redistricters did not examine or discuss what BPP or BVAP was necessary in any particular district to preserve the ability to elect. The districts were designed to re-create the BPPs, period, not on the basis of any judgment as to what was necessary in any particular district, in any region of the State, or in general to preserve the ability to elect. Tr. 1-28, 37, 56-57, 74-78, 81, 96, 136-37.

Hinaman testified, for example, that he never discussed with the Senate and House chairs the question of "what sort of black majority would be necessary in order for a black candidate to be elected or for black voters to have a viable opportunity to elect a candidate of their choice in a district." APX 75 at 139-40. Meeting the racial-population targets as mere numbers was the overriding consideration in drawing the black-majority districts. Tr. 3-142-43. The redistricters did not look at, or take into account, the actual rates of black political participation in these districts—even though Hinaman took political participation data into account in designing the white-majority districts. Tr. 3-180-81. The redistricters did not look at, or take into account, the actual election-return analysis in black-majority districts to see how they would be likely to

perform or to determine what population levels were necessary to protect the minority community's ability to elect candidates of choice under Section 5. Id. They did not look at, or take into account, the socio-economic status characteristics of the black people he moved into or out of those districts to see whether he was joining black communities of similar socio-economic status. Tr. 3-143-44. They did not look at, or take into account, anything that would indicate whether the populations he moved into or out of the black-majority districts did or did not have common interests. Tr. 3-144.

The redistricters were aware that designing the districts to re-create the prior BPP levels meant that the smaller number of black voters left in white-majority districts might have less significant political influence, through coalitions with white voters. But in the redistricters view, that was a consequence of fulfilling their highest priority, which was to recreate these BPP numbers.[4]

In focusing on bare numbers of black residents alone, the redistricters were equally explicit that they did not engage in any analysis of how the black-majority districts actually performed, or would be likely to perform, in elections. Hinaman testified that he made no judgment concerning what BBP might be needed to preserve the ability to elect candidates of

[4] As Senator Dial testified:

> [1-63] Q. So what you're saying, Senator, is that in pursuing your overriding goal of maintaining the large black majorities in the majority black districts, if that resulted in blacks being taken out of the majority white districts, diluting their influence in those majority white districts, that was just collateral damage? That was just an accident or the results you get because of pursuing the Voting Rights Act?
>
> A. That was because of the Voting Rights Act.
>
> Q. So we can blame the Voting Rights Act for the loss of black influence in the majority white districts?
>
> A. Absolutely.

choice, but instead sought to re-create the BPP figures in and of themselves. Tr. 3-149-50; 164; 180-87.[5]

Sixth, Hinaman testified that the only "normal" reasons he used to split a precinct between districts was to avoid "retrogressing a black Majority district" or to create a black-majority district, and to meet the population-deviation standard. APX 75, 117-18.

The State's position that Section 5 required it not to re-create the prior BPPs is also directly contrary to the State's actions in the prior, 2001 redistricting and the representations the State made to the United States Department of Justice in its 2001 Section 5 submission materials. ADC Supp. Ex. 2 and 3. As these documents state, in the 2001 House plan, the State reduced the BPP in 23 of the 27 BMDs. NPX 10 at 9. In many, the State reduced the BP dramatically: 19.6 points in HD 57; 16.1 points in HD 82; 12.5 points in HD 19; and 12.3 points in HD 103. Id. The State reduced the BPP by more than 5 points in more than half the districts. Id. In the 2001 Senate plan, the State reduced the BPP in *every* district and by as much as 10.2 points in SD 19 and 8.0 points in SD 33. NPX 10 at 12. Despite these often quite-large reductions, the Department of Justice pre-cleared the plans, as the 2012 redistricters surely knew.

In addition, in 2001 the State understood that the Section 5 standard was whether a reduction in black population nonetheless preserved for African-Americans a "reasonable opportunity to elect the representative of their choice." ADC Supp. Ex. 1-3. That was the standard – the correct one – the State in 2001 cited to the DOJ in representing that these substantial black-population reductions would not violate Section 5. Id.

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[5] Q. But [you] didn't even look how your black majority districts had performed in any election?

A. I was more concerned in drawing minority districts as to whether I was retrogressing the overall population, black percentage, than voter results.

In light of the undisputed direct evidence, if Alabama seeks to argue that it did *not* apply its common policy in any particular black-majority district, Alabama would bear the burden of proof to establish that fact. This case is much like a "common pattern or practice" case in the Title VII context. *See, e.g., Teamsters v. United States*, 431 U.S. 324 (1977). In such cases, once the plaintiffs establish that an employer relied on a general employment practice that violates Title VII, the "proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." Id. at 362. The "burden then rests on the employer to demonstrate that [an] individual applicant was denied an employment opportunity for lawful reasons." Id. The same principle should apply here: as the Supreme Court concluded, Alabama "expressly *adopted* and *applied* a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote). . . ." ." *Alabama Legislative Black Caucus v. Alabama*, 135 S.Ct. 1257, 1267 (2015) (emphasis added). That common policy or practice was applied in all the BMDs; Alabama defended this policy as required by Section 5, but did not introduce evidence or argue that it had *not* applied this policy in any specific BMD. If the State now seeks to argue that this policy was *not* applied in any district in which the BP decreased, the State must bear the burden of proving that fact.

The record provides no credible basis for concluding that the State abandoned its approach of prioritizing the maintenance of the BPPs in designing any particular district. Indeed, the State *could not* have abandoned this policy, on its own account. As Alabama's brief to the Supreme Court represented, the State believed the Supremacy Clause required the State to meet these BPPs in each and every black-majority Senate district. Alabama Supreme Court Br. 2, 16.

Because the State (wrongly) believed the VRA demanded that the State meet these BPP figures in each district, to the extent feasible, the State had to make meeting those racial targets the predominant factor, to which all state law districting policies had to be subordinated. Thus, the direct evidence in the record demonstrates that race was the predominant factor in the construction of each and every black-majority House and Senate district. "Race was the criterion that, in the State's view, could not be compromised . . . ." *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (emphasis added).

For purposes of triggering strict scrutiny with respect to SDs 18, 19, 20, 23, 24, 26, 28, and 33, that is sufficient. The application of the State's policy to each specific district is discussed below.

2. *Specific Black-Majority Senate Districts.*

a. An Overview.

Based on the 2010 Census, an ideally populated Senate district required 136,564 people. NPX-340. Those numbers revealed that the eight BMDs in the Senate were all under-populated. NPX-340: pp 1-2. But as Table 1 shows, six of the eight had sufficiently large black populations that black residents would have constituted the majority of an ideally populated district even if *no* additional black persons had been added to those districts. Indeed, two of these districts would have been more 60% BP without adding any black population. Moreover, the two remaining districts would have had black plurality populations over 49% had no additional black persons been added to them:[6]

[6] SD 18 was 34% white and SD 28 was 44% white. NPX-340 at 2.

Table 1

SD	Ideal Pop.	2010 BP in 2001 Districts	Existing B % of Ideal District
18	136,564	67,389	49.35%
19	136,564	78,149	57.23%
20	136,564	83,554	61.18%
23	136,564	72,489	53.08%
24	136,564	74,599	54.63%
26	136,564	87,714	64.23%
28	136,564	66,968	49.03%
33	136,564	72,572	53.14%

Thus in six districts, there was no need to add any black population to the district to leave it 53% BP or higher, though any race-neutral process of adding thousands of persons to bring these districts up to the population requirement would inevitably have added some black population in any event. In the remaining two districts, a total of a mere 1,314 additional black persons would have made each district majority black; a total of 10,400 would have made each district 53% BP.

But the state added ten times that number of black people to these districts, on net. The State added a total of 156,453 black people to these eight districts and removed 49,202 in drawing the new districts, for a net addition of 107,151 black persons to these districts.[7] In SD 28 and 33, the net number of black people added *exceeded* the size of the districts' under-populations, as Table 2 shows:

[7] These numbers are from the ADC Supp. Ex. 5.

Table 2

Senate District	Deviation from Target Population[8]	Net Number of Blacks Added[9]	Total Population Moved Into or Out of District[10]
18	-24,092	12,496	24,708
19	-27,399	10,141	31,063
20	-29,189	1,818	61,352
23	-24,625	15,194	52,738
24	-17,732	12,413	70,988
26	-15,898	14,722	55,863
28	-5,196	15,470	74,327
33	-24,649	24,897	44,275

It is also clear that the State added many thousands more people, in some of these districts, than necessary to bring the districts up to ideal population size. Yet in moving these tens of thousands of voters, the redistricters managed to achieve their expressly stated goal of re-creating or increasing the BPPs in each of these districts, to the extent feasible. As demonstrated below, in the two districts in which the BP declined meaningfully, HDs 19 and 20, that was because there simply were not enough black persons left in the area to get any closer to their racial-target population levels.

b. The Role of Racially-Split Precinct Analysis.

When redistricters are faced with under-populated districts, they have to extend the district boundaries to incorporate new population. They have to choose which boundaries of the district to move. In examining the way Alabama thus extended the eight black-majority Senate districts, this Court must therefore focus on the district boundaries. Where did the State choose

[8] These figures are taken from NPX-340.
[9] These numbers are from the ADC Supp. Ex. 5.
[10] These numbers are from the ADC Supp. Ex. 5.

to expand the boundaries of these districts and why did it do so in the manner it did? As the district-by-district analysis shows, the State used race-based means to move significant numbers of voters to meet its racial-population targets in these eight districts.

The circumstantial evidence which best confirms the direct evidence that race predominated in the design of these districts is the redistricters' systematic racial-splitting of precincts between white and black districts, with the predominantly black portions allocated to the BMD to meet the district's racial target, and the whiter portions being allocated to adjoining white-majority districts. In light of the Supreme Court's mandate that this Court reconsider its predominance analysis, it is important to emphasize the role the ADC argues that the evidence of racially-split precincts properly has in that analysis.

Census-block information (collected house by house) includes racial data for each block, but does not include political data on how voters register or vote. Thus, when using census-block data, Hinaman had only racial-demographic information to draw on with no information about how those blocks actually voted or performed in elections. See *Bush v. Vera*, 517 U.S. 952, 961–62 (1996) (describing these facts about precincts and census blocks). Thus, in the Supreme Court's determination In *Bush v. Vera* that race had been the predominant motive for the districts at issue, the Court identified as the "most significant" factor there the evidence of racially-split precincts:

> "Finally, and most significantly, the objective evidence provided by the district plans and demographic maps suggests strongly the predominance of race. Given that the districting software used by the State provided only racial data at the block-by-block level, the fact that District 30, unlike Johnson's original proposal, splits voter tabulation districts and even individual streets in many places suggests that racial criteria predominated over other districting criteria in determining the

> district's boundaries." Bush v. Vera, 517 U.S. 952, 970-71 (1996) (citation omitted).

Thus, if race was used to split precincts and place a significant number of voters within or without a particular district, that constitutes significant evidence, at least, that race is the predominant motive in the design of *that* district. Even if Alabama split many precincts for other reasons in other parts of the State, such as in the exclusively white- or white-majority districts this Court identified in its prior opinion, that would have no legal bearing on whether race was the predominant motive when precincts were split along racial lines in any *specific* district. Thus, as this Court found, Hinaman sometimes split precincts to comply with the 2% population-deviation guideline. *Alabama Legislative Black Caucus v. Alabama*, 989 F.Supp. 2d 1227, 1300 (M.D. Ala. 2013). But as the Supreme Court concluded, that does not answer the relevant question. The "'predominance'" question "concerns *which* voters the legislature decides to choose [to meet the population goal], and specifically whether the legislature uses race as opposed to other, 'traditional' factors when doing so." *Alabama*, at 1271.

Hinaman specifically testified that, when he re-populated the black-majority districts to meet his black-population targets, he reached out to find "black precincts" to do so:

> Q: Let me ask you this. When you are attempting to bring all majority black districts up to the size of the black majorities with 2010 census on top of 2001 plan – and you were reaching out to find black precincts, right?
>
> A: Yes, sir.

(Tr. 3-142: 14-18).

> A: But, yes, where it was something that I was concerned about retrogressing, I did look at the nature of the precincts I was adding, certainly.

(Tr. 3-143: 10-12).

In addition, Hinaman specifically also testified that he would go down to the census block level and split precincts by race – as the record demonstrates overwhelmingly that he did in repopulating all the BMDs – when he need to make sure he had not "retrogressed that number," that is, the BPP as reflected in the prior plan. (Tr. 3-144: 1-7).

He also testified that with the Maptitude system he used to draw districts, only a single click was necessary to include a whole county or to include the whole of a precinct. APX 75, pp. 111:14-112:29; 114:8-12; Tr. 3-167:10-14. Splitting thousands of precincts therefore required considerable additional effort; when he split a precinct, Hinaman had to click on each individual census block separately and move them one by one between districts. The division of voting precincts thus required a series of very specific, affirmative choices and decisions. Each decision involved dividing population on racial lines. C-40, pp. 71-72, 81; DX 404, bates State-DMc440. Hinaman expressly acknowledged that he sometimes split precincts along racial lines. Tr. 3-143:21-144:14; 3-145: 5-17; 3-179: 10-14; APX 75, p. 117:19-25. At trial, the ADC provided examples of how numerous precincts splits were entirely unnecessary in the constructions of SD 24 and SD 24. Doc. 195-1 at 72-74.

The district-specific evidence of racially-split precincts along the boundaries of each majority-black district is presented here for the same reasons as in *Vera.* To clarify any potential confusion from the earlier stage of this case, ADC's argument is *not* that the State systematically split more precincts statewide in black districts than in white districts or vice versa. In its prior opinion, the majority of this Court focused on that question and concluded the evidence did not show that the "majority-black districts suffered the brunt of the precinct splits. . . ." Doc. 203 at 143. But whether that is so or not is irrelevant to these *Shaw* claims. Similarly, the majority

appears to have thought this evidence was being offered only to prove that Alabama had acted with a racially discriminatory purpose. Id. (concluding that the lack of evidence of a statewide pattern of splitting precincts in black districts rather than white ones undermined any clam that the legislature had "acted with a racially discriminatory purpose when splitting precincts. . . ."). But again, this is not the issue with respect to the *Shaw* claims. The issue in *Shaw* cases, and in this case on remand, is whether race was a predominant factor in "the legislature's decision to place a significant number of voters within or without a particular district." ALBC, Slip. Op. at 16 (quoting Miller).

In *Bush v. Vera*, for example, the Court focused on the way Texas had made "intricate refinements on the basis of race" at the level of precincts (or voting-tabulation districts) along the boundaries of the three *specific* majority-minority districts challenged there. 961-62. The Court did not address whether precincts were split for other reasons in any other part of the State; that question is irrelevant under *Shaw*. Indeed, even if redistricters split *some* precincts along the borders of a majority-minority district for non-racial reasons, that would also not affect the *Shaw* analysis; as long as *some* precincts in a district were split for racial reasons, the legislature would have decided to "place a significant number of voters within or without a particular district" on the basis of race. Under the Court's precedents, that makes race the predominant factor.

The district-specific evidence of racially-split precincts along the boundaries of each majority-black district is presented here for the same reasons as in *Vera*. In each of these districts, Alabama "manipulated district lines to exploit unprecedentedly detailed racial data . . ." Id. at 962. The State did so to achieve their goal of meeting or exceeding the BPPs, to the extent

feasible, in each of these districts. As a result, race was the predominant motive, in each district, for moving a significant number of voters within or without that district.

The overall pattern of racially split precincts in all these districts also corroborates that race was the predominant factor for the racial pattern of precinct splits in any one particular district.

c. District-by-District Analysis.

Hinaman testified that in designing first the BMDs, he began in the southern part of Alabama and worked his way north. See generally, Tr. 3-122:23; 3-123-7; 3-123:12-3-126:25. This brief therefore addresses the Senate districts in that order.

SD 33 (Mobile)

In Mobile County, the prior version of SD 33 had been 64.85% BP. The district was under-populated by nearly 20%, or 24,649 people.[11] Yet in filling out this district, even if the State had added no additional black persons, SD 33 would have had a 53% BPP majority of an ideally populated district. Table 1. Of course, any race-neutral means of re-populating this district would have added more black people than zero. The population in Mobile County outside of SD 33, before the 2012 redistricting, was 23% black. NPX 340 at 2. Thus, any race-neutral means of re-populating SD 33 within Mobile County would have produced a district that was considerably more than 53% BPP.

But the State did not use race neutral means of determining *which* voters to add to meet SD 33's population target. Instead, the redistricters went about meeting their declared aim of re-

[11] For all Senate districts, all numbers concerning the prior districts and their deviation from ideal population after the 2010 Census are from NPX-340. All numbers concerning the numbers of voters added, removed, and who remained the same in each district by race are from ADC Supp. Ex. 5.

creating the district with a BP that would equal or exceed that of the prior version. Through racially sorting residents between SD 33 and the surrounding white-majority districts in Mobile County, the redistricters managed to fill out the district in a way that increased its BP from 64.85% to 71.64% BPP. NPX 340 at 2, NPX 10 at 12.

The redistricters moved a total of 42,767 persons into and out of SD 33. ADC Supp. Ex. 5. Of the ones added, 80% were black. Id. Of the ones removed, 84% were white. Indeed, although the district was under-populated, the State actually *removed* 8,065 whites from the district, in total, and 1,304 whites, in net.[12] ADC Supp. Ex. 5. As a result, the redistricters added a net of 24,999 persons. ADC Supp. Ex. 5. Remarkably, 24,897, of those net persons (99.59%) were black. Id.

The ADC map in Supp. Ex. 41B illustrates that the State chose to expand SD 33 to the south, rather than to the west. To the west, the census blocks were whiter than they were to the south. See NPX 340 at 2. In choosing to move south, the redistricters therefore brought into SD 33 large concentrations of predominantly black census blocks that previously had been in SD 35, as this map shows.

To provide a more precise picture of how the State racially sorted voters in SD 33 to meet his targets, Map ADC Supp. Ex. 41C shows the racial pattern of the way certain precincts were split along the boundary of SD 33 and the surrounding white-majority districts. Map ADC Suppl. Ex. 41B and 41C show this pattern at the southeastern part of SD 33, where there is an odd protuberance from SD 33 into SD 35. When the precincts were sliced, the whiter portions ended up in the white-majority districts and the blacker portions in SD 33. As the precinct map

[12] The other 1288 come from other minority categories. Id.

shows, in reaching out to pick up heavily black populations through that protuberance, the State did not just generally selectively reach out to areas that were predominantly black, the State went further and split the precincts in a racial pattern along the boundary between SD 33 and SD 35 and 34.

The detailed demographic breakdowns of the relevant precincts splits are in Appendix B at 7.

SD 23 and SD 24 (Western Black Belt)

These districts comprise the rural Western Black Belt. After the 2010 Census both were under-populated significantly: SD 23 was 24,625 persons below the new ideal population; SD 24 was 27,732 persons below. NPX 340 at 1.

In the process of redesigning SD 23, the State moved a total of 52,738 people into or out the prior SD 23 (37,824 people were added, 14,914 were removed). ADC Supp. Ex. 5. In SD 24, Alabama moved even more people into and out of the prior SD 24: 64,414 (42,487 people were added, 24,927 were removed). Id. Given that the ideal population was 136,564, that means almost 50% of this number were added or removed to SD 24 and almost 40% in SD 23.

While moving all these people into and out of these and surrounding districts, the redistricters hit their racial targets almost on the head in SD 23 and 24. Under the new Census, SD 23 had a 64.7% BPP prior to the redistricting; the new SD 23 was designed with a 64.8% BPP. NPX 10 at 12. The same pattern applies for SD 24. While the prior SD 24 had a 62.8% BPP, the new SD 24 managed to come out with a 63.2% BPP, thus achieving the redistricters stated goal of equaling or exceeding the prior BPP. These numbers speak for themselves. With tens of thousands of people being moved into and out of these districts, and the redistricters

expressly proclaiming their goal of meeting these racial targets, it defies logic to think these targets could have been met so exactly without race being a predominant factor in their design – as the redistricters testified, in effect, that it was.

Moreover, as Table 1 shows, both districts started with a large enough black population that, even had they been filled out with no additional black residents, they would still have remained BMDs. SD 23 would have been 53.08% and SD 24 54.63% BPP. Of course, doing that was neither required nor possible, but these numbers provide perspective on how the redistricters conceived their task.

In addition, simple race-neutral means were at hand to cure to the under-population. Adding all of Butler County to SD 23, for example, would have created a district with 132,886 residents (about 2,700 less than the ideal size), of whom 61.39% would have been black; adding all of Pickens County to the 2001 SD24 would have created a district with 138,578 (2014 persons more than the ideal size), of whom 82,810 (59.76%) would have been black. NPX 340 at 2, NPX 328. With these changes the population of the two districts could have been balanced within adjoining residents of Marengo County, which had been split between the two districts in the 2001 plan and was split in the 2012 plan.

Instead, in designing SD 23, the redistricters overrode the Alabama constitutional requirement to keep counties whole and instead split Clarke, Conecuh, Marengo, Monroe, and Washington Counties. APX 17, ADC Suppl. Ex. B-F. They also engaged in race-based districting to meet their rigid racial targets. For SD 23, the redistricters did in fact add Butler County, but they did not stop there. The State *removed* predominantly white areas from Autauga, Conecuh, Monroe, and Clarke Counties. The State also added predominantly black

areas from Clarke and Washington Counties from SD 22, and added additional black majority areas from Perry County from SD 24 and Lowndes County from SD 30. Id.

The maps at ADC Supp. 37B and 37C shows the way the redistricters moved SD 23 north into Perry County to pick up large black populations there at the expense of under-populated SD 24, even as they were removing white areas from SD 23. The map at ADC Supp. Ex. 37D illustrates that in the southeastern are of SD 23, the redistricters reached into Conecuh County to grab the predominantly black areas there, while leaving the predominantly white areas in white-majority SD 22. The map at ADC Supp. Ex. 37E demonstrates the way the redistricters in the southwestern part of the district reached into Washington County, to pick up highly concentrated black populations there; this map also illustrates the removal of predominantly white areas from Monroe and Conecuh Counties.

In addition, the split-precinct maps illustrate in more precise detail the pattern of racially-splitting precincts along the southern and southeastern boundaries with the adjoining white-majority SDs 22 and 31. ADC Supp. Ex. 37G illustrates eight racially-split precincts along this border, with the predominantly black census blocks in Conecuh and Monroe Counties put in the SD 23 and the less-black ones put into the adjoining white –majority districts. ADC Supp. Ex. 37H illustrates the racial-splitting of precincts pattern for another five precincts, including precincts by race across the county boundaries of Clarke and Washington Counties. See ADC Supp. Ex. 37H and APX 17. For, the racial-demographic breakdowns of how these splits moved black voters and white voters by race between SD 23 and adjoining districts, see Appendix B at 2-3. A total of at least 25 precincts portray this pattern of racially splitting precincts to move voters by race between these districts. Id.

For SD 24, the State reached up to Tuscaloosa through a contorted, bizarrely-shaped hook in the northeastern part of the district that brought the predominantly black parts of Tuscaloosa into SD 24 while keeping the whiter areas out. ADC Supp. EX. 38A, 38D, and 38E. The redistricters dramatically redrew the lines within Tuscaloosa, as they added large black-populated areas and removed white-populated areas. ADC Supp. Ex. 38D demonstrates this racial sorting vividly. The new boundaries within the City of Tuscaloosa are bizarre. ADC Supp. Ex. 38J.

In addition, the State moved north to add a portion of Pickens County to SD 24, but only the predominantly black portion (7,303 persons, of whom 5405 black (74.01%)). Map ADC Supp. Ex. 38D and Ex. 38G illustrates the clear racial sorting of Pickens County. Maps ADC Supp. Ex. 38H and38I shows that when the redistricters decided to expand SD 24 to the south, they selectively picked up predominantly black areas of Clarke, Choctaw, and Washington Counties. Finally, ADC Supp. Ex. 38H and 38I show the extraordinary racial selectivity in the oddly shaped additions to SD 24 in Choctaw County.

The illustrative precinct-split maps show that along the boundaries between SD 24 and SD 14, SD 24 and SD 21 and SD 5, the redistricters engaged in systematically racial sorting, in which predominantly black blocks in the precincts were added to SD 24, while the whiter areas were allocated to the surrounding white-majority districts. ADC Supp Ex. 38K, and 38L, and 38M.

The detailed demographic breakdowns of the relevant precincts splits are in Appendix B at 3-5.

SD 26 (Montgomery)

SD 26 is the one district the Supreme Court's opinion directly assessed and discussed. On the eve of the redistricting, SD 26 was 72.7% BPP, with the 2010 Census numbers. The district had to add 15,898 persons to meet its ideal size; there were, of course, numerous ways in which Alabama could have done so. If every additional resident of SD 26 needed to fill out the new SD 26 with nearly 16,000 additional voters had been white, the new district would still have been 64.3% black. *Ala. Leg. Black Caucus v. Alabama*, 989 F.Supp. 2d 1227, 1318, n.12 (M.D. 2013); APX 7.

But race predominated in the way the State went about moving thousands of people into and out of the district. The redistricters chose to re-design SD 26 in substantial fashion. In doing so, they added 33,029 people to it, removed 18,671, and thus moved 51,700 people altogether into and out of the district. ADC Supp. Ex. 5. The redistricters managed to do all that while realizing their stated goal of ensuring that the BPP remained the same or increased in the district. The new SD 26 was 75.1% black.

The Supreme Court's opinion discussed SD 26 in detail at *Alabama*, 135 S.Ct. at 1270-71:

> The legislators in charge of creating the redistricting plan believed, and told their technical adviser, that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible. See supra, at 9-10 (compiling extensive record testimony in support of this point). There is considerable evidence that this goal had a direct and significant impact on the drawing of at least some of District 26's boundaries. See 3 Tr. 175-180 (testimony of Hinaman); Appendix C, infra (change of district's shape from rectangular to irregular). Of the 15,785 individuals that the new redistricting laws added to the population of District 26, just 36 were white—a remarkable feat given the local demographics. See, e.g., 2 Tr. 127-128 (testimony of Senator Quinton Ross); 3 Tr. 179 (testimony of Hinaman).

> Transgressing their own redistricting guidelines, Committee Guidelines 3-4, the drafters split seven precincts between the majority-black District 26 and the majority-white District 25, with the population in those precincts clearly divided on racial lines. See Exh. V in Support of Newton Plaintiffs' Opposition to Summary Judgment in No. 12-cv-691, Doc. 140-1, pp. 91-95. And the District Court conceded that race "was a factor in the drawing of District 26," and that the legislature "preserved" "the percentage of the population that was black." 989 F. Supp. 2d, at 1306.
>
> We recognize that the District Court also found, with respect to District 26, that "preservi[ng] the core of the existing [d]istrict," following "county lines," and following "highway lines" played an important boundary-drawing role. Ibid. But the first of these (core preservation) is not directly relevant to the origin of the new district inhabitants; the second (county lines) seems of marginal importance since virtually all Senate District 26 boundaries departed from county lines; and the third (highways) was not mentioned in the legislative [1272] redistricting guidelines. Cf. Committee Guidelines 3-5.
>
> All this is to say that, with respect to District 26 and likely others as well, had the District Court treated equal population goals as background factors, it might have concluded that race was the predominant boundary-drawing consideration. Thus, on remand, the District Court should reconsider its "no predominance" conclusions with respect to Senate District 26 and others to which our analysis is applicable.

Alabama, 135 S. Ct. 1257, 1271-72 (2015). Hinaman testified more extensively about SD 26 than any of the other black-majority Senate districts.

The prior version of SD 26 occupied most of Montgomery County, including the entire southern half of the county.[13] Immediately to the south of SD 26 was Crenshaw County, with a population of 13,906.[14] Because of unrelated changes in the districting scheme, Crenshaw County was no longer part of any Senate district.[15] One obvious solution to both problems was

[13] APX 37.
[14] NPX 328, at 1.
[15] Tr. 3-123:1-3-130:18.

to add Crenshaw County to the adjoining SD 26, a step that would have largely solved the under-population problem in SD 26. But Crenshaw was only 23.39% black; adding it to SD 26 would have reduced SD 26 from 72.75% to 67.15% black.[16] Hinaman repeatedly explained that he was unwilling to add Crenshaw County to SD 26 because doing so would reduce the black percentage of the population in that district. At trial Senator Dial acknowledged that if *all* the population added to SD 26 had been white, it still would have been overwhelmingly black; but that simply was not good enough.[17]

Instead, the redistricters created a "land bridge"—through part of the old SD 26—between SD 25 and Crenshaw County. Tr.3-130: 9-12. By adding 13,906 people from Crenshaw County to SD 25, a 71% white-majority district, it was then possible to transfer an equal number of people from predominantly black portions of SD 25 in Montgomery County to SD 26.[18] But doing that alone could not have repopulated SD 26 with a virtually all-black population. There was not a portion of SD 25 that contained 14,806 blacks but only 36 whites. The only way to achieve that exceptional result was to swap predominantly white areas in SD 26 for predominantly black areas of SD 25; the *net* effect of such an exchange could be to add only blacks to SD 26. Thus, the redistricters transferred from *under-populate*d SD 26 to *over*populated SD 25 the southwest quarter of Montgomery County, an area in northwest corner

[16] The resulting district would have had a population of 134,572, of whom 91,039 would have been black. NPX 340 at 1, NPX 328 at 1.

[17] Tr. 1-131:16-132:5.

[18] Under the 2012 plan 13,906 persons were added to SD 25 from Crenshaw County, and a net total of 15,785 persons were added to SD 26 from SD 25. NPX. 328, NPX 340 at 1, C-40 at 82-93, ADC Supp. E. 5. That meant that SD 25 lost a net of 1,879 persons from the population it had prior to the addition of Crenshaw and transfer of population to SD 26. After all of this, SD 25 had a population of 135,492; so before these changes, the SD 25 population (partly in Montgomery County and partly in Elmore County) was 137,361. NPX 10 at 12. The ideal Senate district size under the 2010 census was 136,563.

of the county, and a portion of the center of the county.[19] Hinaman offered no non-racial explanation for removing these areas from under-populated SD 26.

By then replacing predominantly white portions of SD 26 with predominantly black areas from SD 25, the black population in SD 26 was increased from 72.75% to 75.22%. The resulting SD 26 is a strangely shaped configuration that the Supreme Court called "irregular" in contrast to the "rectangular" shape of the former district. See Map ADC Supp. Ex 39A.

As noted, even if no black persons had been added to repopulate SD 26, the district would have been 64% BPP. Senator Dial specifically testified that, at level, he knew the district would retain the ability to elect. But as with every other of the black-majority Senate district, Senator Dial nonetheless refused to permit lowering that BPP because, he asserted, Section 5 would not permit it. Tr. 1:67:20-68;1-69:16-19;1-131:4-1-132:5;1-136:8-1-138:20.

The way the redistricters did this is illustrated in the maps at ADC Supp. Ex. 39B and 39C. These two maps illustrate the census blocks the State added to SD 26 – and chose not to add – in the northeast corner of the district, where SD 26 hooks around SD 25. In the first map, predominantly black blocks in Montgomery are added right where the district juts out into SD 25; as the map shows, the redistricters were adding here overwhelmingly black census blocks while keeping the surrounding areas that were predominantly white in SD 25. The second map illustrates other parts of this area of the boundary between SD 26 and SD 25 where the redistricters did the same thing – selectively adding to SD 26 predominantly black areas while bypassing whiter areas that were then allocated to SD 25.

[19] *Compare* APX 37 *with* APX 39.

To demonstrate this pattern of race-based decisionmaking, ADC Supp. Ex. 39F shows how three adjoining precincts were racially split between SD 26 and 25 in this area. The redistricters sliced through these adjoining precincts, with the predominantly black portions of all three put into SD 26, and the whiter portions put into SD 25.

This Court previously noted, as SD 26 Senator Ross testified, without contradiction in the record, that predominantly white portions of precincts previously within SD 26 were moved into the adjoining white-majority SD 25, while the black portions of those precincts were retained in SD 26. *Ala. Leg. Black Caucus*, 989 F.Supp.2d at 1318.

The detailed demographic breakdowns of the relevant precincts splits for SD 26 are in Appendix B at 5.

SD 28 (Eastern Black Belt)

SD 28 was barely under-populated, by only 5,196 persons. NPX 340 at 2. As drawn in 2001, SD 28 included all of Macon, Bullock, Barbour, and Henry Counties, along with compact portions of Russell and Lee Counties. To comply with the State's population-equality standard, the district needed little revision.

Although the existing district was barely under-populated, Senator Dial testified that he told incumbent Senator Beasley that "his district is basically a minority district and had to grow . . ." Tr. 1-143: 16-17. Despite the small under-population of this district, it was redrawn dramatically. Overall, the State moved 69,322 people into and out of the district (37,937 were added, 31,385 were removed). ADC Supp. Ex. 5. On net, the State added 15,470 black people to the district, while subtracting 5,896 whites. Id.

In doing all of this, the redistricters reached their state objective of ensuring, to the extent feasible, the BPP remained the same or increased. The prior SD 28, under the 2010 Census, was 50.98% BPP. The new SD 28 is 59.83% BPP. The State thus increased the BPP here by almost 9 points.

The changes to SD 28 were done in the racially-selective pattern that characterizes the other BMDs. At the north of the district, the State shifted the boundaries within Lee County in a highly bizarre and contorted manner. In Russell County, the State removed white-populated areas and added black–populated areas to SD 28. ADC Supp. Ex. 40A-40-F. And SD 28 was extended down to pick up a bizarrely shaped area of Houston County that contained 23,362 persons -- of whom 16,029 (68.78%) were black. C-40 at 102.

The before-and-after maps show the racial sorting that accounts for the bizarre maneuvers through which SD 28 was extended into Lee and Russell Counties. As Map ADC Supp. Ex. 408 portrays, pieces of Lee County that were predominantly black were scooped into SD 28, while whiter, surrounding areas were bypassed. Similarly, when the redistricters grabbed pieces of Russell County for SD 28, they picked and chose predominantly black areas to bring into SD 28, even as they skipped over predominantly white areas in between. Maps ADC Supp. Ex. 40G and ADC Supp. Ex. 40D illustrate this.

Once again, the precinct split maps illustrate even more precisely the extreme level of racial sorting involved in these maneuvers. Indeed, for the extension into Lee County, Map ADC Supp. Ex. 40H there is clear, systematic splitting of precincts by race, including splitting of precincts by race across the county boundary lines. The whiter portions of these precincts are allocated to SD 27 and 13, while the blacker portions are brought into SD 28. Map ADC Supp.

40I illustrates the way in which as the redistricters extended SD 28 into a tiny piece of Houston County, they spliced the black and white areas of nine precincts – systematically allocating the blacker portions to SD 28 and the whiter portions to SD 29.

The detailed demographic breakdowns of the relevant precincts splits are in Appendix B at 5-6.

SD 18, 19, 20. (Birmingham area)

These are the three Birmingham-based Senate districts. Given the direct interactions between the design of these three, we discuss them together.[20] Combined, these three districts were under-populated by 80,680 people.[21] NPX 340 at 1. To meet the ideal population level, SD 18 had to add 24,092 people; SD 19 had to add 27,399; and SD 20 had to add 29,189. NPX 340; pp. 1-2. Although under-populated, both Districts 19 and 20 already had sufficient black population to comprise a majority (57% and 61%, respectively) of an ideally populated district; and in District 18 the black population alone comprised a 49.35% plurality of an ideally populated Senate district. See Table 1. The 2010 Census revealed 276,525 black residents of Jefferson County; the County's black population is 42% overall. NPX 328.

Yet the Senate plan, Act 2012-603, managed to put 90% of the county's black residents, 253,635, in the three black-majority districts. NPX 10 at 12. But in light of the overall under-population of these districts, Hinaman testified it was simply not possible to meet his BPP targets

[20] The districts are exceptional among the eight Jefferson County Senate districts in that they are the only Jefferson Senate districts fully confined within the boundaries of the county. The five Jefferson majority white districts (5, 14, 15, 16, and 17) all contain part of Jefferson County and parts of one or more additional counties. Majority black district 18 was under-populated and as drawn abuts the counties of Bibb, Shelby and Tuscaloosa, while under-populated SD 19 abuts Tuscaloosa County. Given that the drafters split the county in creating the white-majority districts, there is no explanation for the decision that the black-majority districts alone had to be confined to the County and could not be extended into adjacent counties.

[21] All 2001 population figures for the Senate districts are from NPX-340.

in all three districts at the same time; there simply were not enough black residents to go around. As put it in his deposition, APX 75, 102:17-25:

> Q: Did anyone instruct you as to any particular type of reduction that would be a matter of concern?
>
> A: No. But in some districts, it was obviously, for example, the Senate districts in Jefferson County, it was unavoidable because there was just not the African-American population to enter into those districts. The black percentage was going to go down no matter what. So there were certain areas where you couldn't help but lower the percentage."

The State systematically under-populated all three of these districts. All three fell close to 1% below ideal population. NPX 10 at 12. Even so, there still were not enough black residents to maintain the existing super-majorities. Thus, the redistricters came within 1 point of hitting his racial target for SD 18; but after that, the closest they could come to hitting their BPP targets in the other two districts fell 6.3 points short in SD 19 and 14.74 points short in SD 20. NPX 310 at 12. Of the eight black-majority Senate districts, these three are the only ones in which Hinaman did not succeed in meeting or exceeding the BPP in the prior plan. Id.

With respect to each of these districts, race was a predominant factor in "the legislature's decision to place a significant number of voters within or without a particular district." *Alabama*, 135 S.Ct. at 1270 (quoting Miller).

SD 18.

The record suggests that the redistricters began with SD 18 and made sure to try to meet his racial target there first. That might have been because SD 18 had the lowest BPP of the three districts. The BPP of SD 18 under the baseline plan was 59.93%; in the enacted plan the State drew, SD 18 came out at 59.11 BPP –within 0.81 points of the target. Because the State added a net of 22,786 persons to SD 18 to bring the district within 1% of the ideal size, it required an

intentional race-conscious effort to do this while also getting the BPP so close to the State's intended target.

Of those added to the district, 12,550 (55%) were black on net and 9,901 were white. These proportions reflect the fact that the black-populations outside the boundaries of the prior SD 18 (who were not already in black-majority SD 19 and 20) were geographically dispersed;

As noted above, SD 18 would have had a 49+% black plurality if only white persons had been added. In addition, 97% of the persons moved out of the existing district, 930 people, were white; only 12 blacks were moved out. ADC Supp. Ex. 5. The redistricters obviously did not want to add any more black residents to SD 18 than "necessary," because they had to try at the same time to meet their racial targets in SD 19 and 20, and they knew there was not going to be enough black residents to do that, as a practical matter, in any event.

To move nearly 23,000 net people into the district, while still coming as close as the State did at the same time to meeting its racial-target population figure, the redistricters had to make race a predominant factor in moving "significant numbers" of people into SD 18. Otherwise, given the demographics of the surrounding populations not in the other two black-majority districts, the BPP of SD 18 likely would have dropped.

Map ADC Supp. Ex. 34B shows the way a piece was added to SD 18 at the most northeast area of the district to pick up overwhelmingly black census blocks in the service of ensuring SD 18 came in "on target." Because the redistricters sought to meet their racial target in SD 18 first, they also moved voters by race from SD 20 – the black district in this area with the highest pre-2012 BPP – into SD 18.

The detailed demographic breakdowns of precincts splits along racial lines to repopulate SD 18 within 1 point of its "target level" are in Appendix B at 1.

SD 19.

SD 19 was under-populated, but already had sufficient black population to comprise a 57% BPP majority in an ideally populated Senate district, even had not a single black resident been added to the district. Nonetheless, the Dial and Hinaman did not abandon the effort to bring SD 19 as close as feasible to the supermajority target of 71.65% BP. But they were able to get SD 19 "only" up to 65.39% BP. As Hinaman testified, "inside *each* district my goal was to and our goal was to stay as close to the 2001 numbers as possible. . . ." APX 75, 23: 19-21 (emphasis added). That goal required the use of race as a predominant factor for the movement of "significant numbers" of people between SD 19 and adjoining ones. To bring SD 19 within 1% of ideal size, the redistricters added a net of 26,053 persons, a net of 10,165 blacks and 15,188 whites. Of the voters moved out of the existing district 1848, or 74%, were white. ADC Supp. Ex. 5.

In designing SD 19, along with SD 18 and 20, these three districts, the redistricters worked from an initial map that Senator Smitherman had provided. While Hinaman "endeavored to duplicate" that map, doing so was not straightforward; the map was simply a single sheet of paper, Exhibit 469, that "didn't have any demographic information, ." APX 75, 103:19-105:10. So the redistricters "had to eyeball it." Id. He answered: "Yes, sir." Id.

There was a "substantial area" in the west of the district that was almost 93% white, which Senator Smitherman's map had included in the proposed district. But the redistricters decided not to include these areas in the district; he put them instead in white-majority SD 5.

These three precincts totaled 3,527 persons, of whom 327 were black. APX 75, 104-05. He did not explain why he rejected Senator Smitherman's map in this instance.

Map ADC Supp. Ex. 35B shows the way the State expanded SD 19 into white-majority SD 17 to pick up predominantly black but not white census blocks and into black-majority SD 20 to pick up black-majority census blocks to coming as close as feasible to the supermajority racial target of 71.65% BPP for SD 19, consistent with the State's racial targets for SD 18 and 20.

Map ADC Supp. Ex. 35D illustrates the racial splitting of a precinct at the boundary between SD 19 and SD 17. Map ADC Supp. Ex. 35E shows a similar racial-splitting of precincts at the boundary between SD 19 and SD 5.

The detailed demographic breakdowns of precincts splits along racial lines to repopulate SD 18 within 1 point of its "target level" are in Appendix B 1.

SD 20.

Strict scrutiny is triggered when race is a predominant factor in "the legislature's decision to place a significant number of voters within or *without* a particular district." *Alabama*, 135 S.Ct. at 1270 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)) (emphasis added). In the case of SD 20, race was used to move nearly 14,000 black voters *out* of SD 20 and into black-majority SDs 18 and 19. The State essentially cannibalized SD 20 to meet his racial targets for SDs 18 and 19 as closely as possible.

Thus, the State *removed* 13,833 black residents from SD 20, although SD was under-populated by 29,189 persons. ADC Supp. Ex. 5; NPX-340. Remarkably, all but 15 of these black residents of SD were moved into either of the other two black-majority districts, SD 18 and 19. That is, the redistricters moved 13,818 black residents from SD 20 into either SD 18 or 19,

to meet the racial targets there. Moreover, the parts of SD 20 that he moved to SD 18 were 88.3% black. The parts of SD 20 the State moved to SD 19 were 76.2% black. ADC Supp. Ex. 5. Race was the predominant factor in the way the redistricters moved voters from the under-populated SD 20, as he tried to meet his racial-population targets in the surrounding districts.

Map ADC Supp. Ex. 36F shows the way blocks of overwhelmingly black populations were moved from SD 20 into SDs 18 and 19 to try to meet the racial targets there first.

Having moved nearly 14,000 blacks out of SD 20 into the other black-majority districts, the redistricters now had too few black residents left in contiguous areas to come very close to meeting the racial-target for SD 20 of 77.96%, the baseline figure. But nothing in the record suggests the redistricters abandoned the effort to design the district to come as close as feasible to hitting this number. As Hinaman testified, "inside *each* district my goal was to and our goal was to stay as close to the 2001 numbers as possible. . . ." APX 75, 23: 19-21(emphasis added). Thus, the redistricters used race-based approaches to get the numbers of SD 20 as close to its prior level as possible, given the goals he was also trying to satisfy in SD 18 and 19.

In redrawing SD 20, the redistricters created it, for example, with an odd hook in the northwestern area not reflected in the map Smitherman had handed to Dial. This hook bypasses white-majority areas and then swings back around to capture additional black residents to pull into the district. Maps ADC Supp. Ex. 36H and ADC Supp. Ex. 36G shows the race-based pattern of precinct splits, such as between SD 20 and SD 17, the redistricters used to do so. At the meandering boundary between SD 20 and SD 17 here, the district is sorting the black areas of the precincts into SD 20 and the white areas into SD 17.

The detailed demographic breakdowns of the relevant precincts splits are in Appendix B, at 1.

House Districts.

A. As this Court noted in its earlier decision, all 28 of the BMDs in the House were under-populated after the 2010 Census – 25 of them more than 5% under-populated. Those facts alone required the redistricters to move tens of thousands of voters to repopulate these districts. But in doing so, the redistricters did not just add additional people to these districts; they also removed tens of thousands of people from these districts. In more than 50% of these districts (15), the redistricters moved more than 20,000 people into or out of the district. ADC Suppl. EX. 4. Because the ideal district size was 45,521, NPX 332, that means that in these 15 districts, *at least* 44% of the residents in the re-drawn, 2012 districts were new. In some of the BMDs, the redistricters moved into and out of the district 10 times the number of people by which the district was underpopulated. Most dramatically, HD 76 was underpopulated by only 627 people, yet Hinaman added or removed 39,821 people into or out of the district. NPX 340 at 6, ADC Suppl. Ex. 4. The fewest people moved into or out of any district took place in HD 84, where 5,491 were moved. ADC Suppl. Ex. 4.

Table 3 presents the number of people by which each district was under-populated and the total number of people the redistricters moved into and out of the district in redrawing it:

Table 3

House District	**Number of People Below Target Population**[22]	**Total Population Added and Removed**[23]
19	-3,141	36,207

[22] These figures are taken from NPX-332.
[23] These figures are taken from ADC Supp. Ex. 5.

32	-6,721	12,130
52	-2,362	19,284
53	-10,143	New district created
54	-10,616	31,351
55	-9,949	28,143
56	-4,457	14,241
57	-9,322	21,590
58	-8,078	20,629
59	-12,683	24,426
60	-8,817	9,170
67	-7,643	7,200
68	-9,287	30,769
69	-7,949	24,373
70	-6,268	41,605
71	-7,427	41,412
72	-6,107	23,774
76	-627	43,084
77	-10,523	38,540
78	-14,641	44,637
82	-2,132	25,183
83	-4,482	18,466
84	-4,204	5,692
85	-3,092	10,034
97	-10,115	10,309
98	-7,690	24,806
99	-5,730	14,428
103	-4,910	12,324

Yet while reconstructing all of these districts and moving tens of thousands of people, the redistricters managed to do an extraordinary job in achieving their stated goal that the district-specific BPP increase or not be substantially reduced. In 20 of the 28 districts, they did exactly that. NPX 332, 361. In 13 of the districts, the drafters came within 1 percentage point of re-creating the prior BPP exactly. That is not surprising, because the redistricters expressly stated that their highest priority (as relevant here) – the one that took precedence over all districting principles, because the Supremacy Clause required that precedence – was to equal or exceed the

prior BPPs. Because, on their account, they had to subordinate keeping counties, cities, towns, precincts, and other districting objectives to meeting these racial targets, it is to be expected that they would be able to achieve such remarkable "success" with respect to the BPPs.

As a matter of logic and common sense, without even examining the district-specific maps and precinct splits, the only credible explanation for how the redistricters were able to move tens of thousands of voters into and out of these districts while also meeting these BPP targets so precisely is that meeting those targets had to predominate over other goals. Similarly, the only credible explanation for how the redistricters could have done this, across so many districts, is that they had to move significant numbers of people by race. For all these districts, it is simply inevitable that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Alabama,* 135 S.Ct. at 1270 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995). And the pattern across these districts illuminates what was done in each specific district. No consistently-applied redistricting principles, other than race, could have been predominant across all these districts through which Alabama managed to move tens of thousands of people, yet reproduce the BPPs so exactly.

In only 7 districts (25.9%), did the BPP decrease and in only 5 of them, by more than 5 points. But the State did not abandon the attempt to meet its racial-targets in these districts in which it fell short. As both the Supreme Court and this Court concluded earlier, the State's policy for all the BMDs was, *to the extent feasible*, not substantially reduce the BPP. *Alabama*, 135 S. Ct at 1271 (quoting initial decision). As this brief demonstrates below, the feasibility of meeting these targets was constrained in these districts by the fact that, as Hinaman testified, Tr. 3-162, he needed their black populations to meet his racial targets in adjoining districts. In

certain areas, it was not feasible simultaneously to meet the BPP targets in all the nearby districts. The record contains absolutely no evidence that the State suddenly abandoned its policy of moving black voters by race to meet these targets, to the extent feasible, in this handful of districts. As demonstrated below, the State still used race to come as close as possible to meeting his racial targets in these districts as well. Thus, race was still the predominant factor in moving significant numbers of people into and out of these districts, even if the State fell short a few points in being able to meet those targets.

HD 19 and 53 (Madison County):

These two districts are physically interlocking, as in a jigsaw puzzle. The evidence and testimony reveals that they were designed jointly as well.

Prior HD 53. The prior version of majority-black HD 53 had been in Jefferson County. As this Court's prior opinion found, Hinaman cannibalized this district's large black population and used it for the other 8 BMDs in Jefferson County. 989 F. Supp. 2d at 1249. But Hinaman engaged in that race-based transfer of this large population under the incorrect legal view that Section 5 required him to repopulate these other districts in a way that also re-created the districts' prior BPPs.

The findings in this Court's prior opinion necessarily establish that race was the predominant motive for the transfer *out* of HD 53 of its nearly 20,000 black residents into the surrounding BMDs. The Supreme Court has now established that this race-based transfer was based on a legally incorrect understanding of Section 5. *Shaw* applies, of course, when "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or *without* a particular district." *Alabama*, 135 S.Ct. at 1270 (quoting *Miller*)

(emphasis added). As a result, the race-based destruction of HD 53, and the race-based transfer of its black population to meet the racial targets in the other eight BMDs, are unconstitutional under *Shaw;* Alabama did not have a compelling justification for these actions and these actions were also not narrowly tailored to legitimate Section 5 compliance. The destruction of HD 53 is discussed further, below, when these brief addresses the Birmingham districts in more detail.

Having destroyed HD 53 in Birmingham, Hinaman understood he had to create a replacement black-majority district somewhere else, because Section 5 genuinely does require that the number of ability-to-elect districts not be reduced, to the extent feasible. He did so by re-creating HD 53 in Huntsville, in Madison County, where the black population had grown there enough to justify a second majority-black district, in addition to the existing HD 19.

But now Hinaman, still operating under his legally incorrect understanding of Section 5, made another misguided and unconstitutional decision. He concluded that when he created the new HD 53 in an entirely different part of the State, Section 5 required that he create it with the same BPP it had when the district was in Birmingham *because that had been the district's prior BPP*. At this point, Hinaman had to create the new HD 53 from scratch, of course, so he had to find approximately 45,521 people to make this district. In doing that, the redistricters put that population together in the new HD 53 in a way that made sure to meet their goal of keeping the BPP the same as the prior HD 53. They did so quite precisely: while the HD 53 in Birmingham had a 55.71% BP, he designed the new one in Huntsville with a 55.83% BP. NPX 340 at 5; NPX 310 at 9. In this bizarre sequence, Hinaman thus invoked his mistaken view of Section 5 to use racial transfers of people first to destroy HD 53, then to create a new one with the identical percentage of black people.

But to meet that 55.7% target, the redistricters did not have enough black people around the new HD 53 to do that. Thus, they had to go into HD 19, the other black-majority district, and move black residents from there into HD 53 to meet HD 53's racial target. Tr.3-163. As a result, race was the predominant factor in moving significant numbers of voters into HD 53, including from HD 19. In addition, the redistricters maneuvered the boundaries of HD 19 to bring the black population there as close to its prior level as he practically could, given that he was also raiding HD 19 of black people to meet his racial target in HD 53.

HD 53.

Map ADC Supp. Ex 9A shows that where HD 53 has various contortions that jut into the area of HD 19, these twists and turns are concentrating black persons into HD 53 that are being pulled out of former HD 19.

There are 4 precincts split between HD 53 and 19 as well. In those splits, HD 53 got 68% of the black persons (6,690 out of 9,907 black people). In addition, 9 precincts were split between HD 53 and the adjoining white-majority districts, HD 6, 10, and 21). In these splits, 89% of blacks were put into HD 53 (9,004 out of 10,164) rather than the white districts. Appendix A at 3 provides specific documentation of the numbers and precincts involved.

HD 19.

Because its black population had to be raided for HD 53, the BP went down in HD from 69.82% to 61.25%. NPX 340 at 2, NPX 310 at 9. This 8.6 point drop is the largest decrease in any of the BMDs. It is explained, of course, by the need to meet the racial target in HD 53. Hinaman testified expressly to this trade. In his words, he decided to reduce the BP in HD 19 for "the greater good" of meeting HD 53's target. Tr.3 -163: 2-5.

Hinaman obviously thought HD 19 still satisfied Section 5 – had he "regressed" HD 19 in any legally or practically significant sense, none of this would have made any sense. Thus, this example demonstrates that he did not actually think that a nearly 9 point reduction would constitute retrogression when a district would still be 61.25% BP; it also demonstrates that he believed a district could go down at least to 61.25% and still be an adequate Section 5 district. Yet there are 18 House districts and 6 Senate districts that Hinaman repopulated with black populations above this level. NPX 310 at 9.

HD 19 had been a compact district. Its borders became non-compact, first, in the areas in which it was fit together like a jigsaw puzzle with HD 53 to pull black population into HD 53. But Hinaman did not want the BP in HD 19 to drop any more than necessary for meeting the racial target in HD 53. So he also made HD 19 non-compact in its eastern half. As Map ADC Supp. Ex 6C shows, he did that to pull black population *into* HD 19 from the white-majority HD 21.

The split-precinct map, ADC Supp. Ex. 6D, shows this in more precise detail; the redistricters split the Chase Valley United Methodist precinct, where HD 19's eastern boundaries wander oddly, in order to pull the blacker portions into HD 19 and put the whiter portions in HD 21. Similarly, the borders become non-compact at the western border of HD 19 to split the Harvest Baptist Church precinct by race between HD 19 and the surrounding white-majority districts. In the 10 precincts split between HD 19 and white-majority HDs 6, 21, and 25, a total of 70% of the white residents were put into the white-majority districts and 56% of the black residents were placed into HD 19. Appendix A at 1.

Thus, the redistricters did not merely pull black voters by race out of HD 19 to serve HD 53. They also tried to keep the black-population of HD 19 as high as they could, despite this, by crafting meandering borders that selectively moved whites out of HD 19 into the surrounding white-majority districts. Given the limited black population in the area, they could not bring HD 19 back up to its prior BP level by adding large numbers of additional black people. So instead, they selectively moved whites *out* of the district in their effort to get as close as possible to meeting HD 19's racial target. ADC Supp. Ex. 4.

The contorted shapes of HDs 19 and 53 are a result of the redistricters simultaneously hitting their racial target for HD 53 on the head, while trying to keep up the black-population percentage in HD 19 as high as possible.

HD 32.

On the eve of the Census, this district was 59.34% BP and under-populated by 6,721 people. NPX 332 at 3. Hinaman moved 12,130 people into and out of the district. ADC Supp. Ex. 4. When he was done, he had kept the district within 1 point of his racial-population target; the district he created is 60.05% in BP. Managing to do that was an intricate matter.

The prior HD 32 had been somewhat elongated in shape. As the State moved these 11,160 people into and out of the district, it extended HD 32's elongation and rendered its borders uncouth. ADC Supp. Ex . 8A. As Map ADC Supp. Ex. 7B shows, the redistricters bumped out the district in three separate places along the western border to pick up heavily black areas. At the northern tip they did the same, as Map ADC Supp. Ex. 7C shows. The odd shapes of some of the district's northeastern boundaries likewise move in and out to pick up heavily concentrated black areas. Map ADC Supp. Ex. 7D. And the southern protrusion of the district

reaches down to pull heavily black areas out of adjoining white-majority HD 33.

The split precinct map, ADC Supp. Ex. 7F, shows that the oddly shapes of the northeastern piece of the district reflect the way the Anniston precinct was racially split to put the heavily black portions in HD 32 and the whiter areas in white-majority HDs 33, 35, 36, and 40. In this area, where the district wanders in and out of Calhoun County, 13 precincts were split. 77% of the black persons in these splits were put into HD 32. 60% of the white persons were put into the white-majority districts. Appendix A at 2-3 provides specific documentation of the numbers and precincts involved.

HD 52, 54-60 [Birmingham districts]:

In the 2012 plan, Birmingham is left with eight BMDs. In the prior plan, there had been nine BMDs in Birmingham. As discussed above, the redistricters acknowledged that they took the black population in HD 53 and moved it into these eight districts to meet the State's racial targets for these BMDs. This Court noted this fact as well: "Hinaman also moved House District 53, a majority-black district, from Jefferson County to the Huntsville area in Madison County because of the substantial underpopulation of the majority-black districts in Jefferson County." Ala. Leg. Black Caucus, 989 F.Supp. 2d at 1249. As a result of this move, Birmingham lost one of its BMDs.

On the eve of the 2012 redistricting, the nine BMDs in the prior plan were under-populated, even though the overall black population of Jefferson County had increased by 35,973 persons between 2000 and 2010 (the white population had declined by 15,917). NPX 328; NPX 329; NPX 323 at ¶ 62.[24]

[24] The County's Latino population increased by over 15,000. NPX 328 and 329.

Much of the black population growth was in adjacent districts, as the majority concentration spread to the northeast, particularly into HD 44 (29.43% black, up from 17.87%) and HD45 (35.63% black, up from 20.75%), and northwest into areas like the City of Pleasant Grove. NPX 332 at4-5, NPX 10 at 9. Sufficient black population existed to maintain nine majority-black districts.[25] Indeed, with three Senate districts with comfortable black majorities and three House districts being equal in population to one Senate district, the potential for nine majority black House districts is clear.

Nonetheless, the redistricters made the decision to destroy HD 53 and move it to Madison County. But it was the redistricters' understanding of Section 5 that justified their decision to do, as this Court has found already -- – an understanding that was legally incorrect. That misunderstanding led them to believe that they had to repopulate the districts *by race*, which was required only because of the State's view that it had to repopulate these districts in a way that kept them at their prior BPP levels. As the Supreme Court's opinion clarifies, these districts needed to be repopulated, but the predominant motive inquiry addresses *which* people the redistricters chose to use to do so.

As Table 4 shows, if no additional black persons had been added, six of these nine districts would have been between 54.36% BP and 64.04% BP. Only three districts, HD 53 at 43.29%, HD 54 at 43.50% BP and HD 59 at 48.36% BP, would have no longer have been majority black. To make those three districts majority black, only an additional 3,057 black

[25] The ADC introduced an alternative purely illustrative plan for Jefferson County that exceeded the legislature's 2% standard; however, each district is under-populated by more than one percent; however, each has sufficient black population for an ideal district with a black majority of at least 57.59%. NPX 301. Despite its different deviation standard, it shows that there was sufficient black population for nine majority black districts.

people would have needed to be added to HD 53; only 2,960 black people would have needed to be added to HD 54; and only 748 black persons would have had to be added to HD 59. By comparison, HDs 44 and 45 together have over 23,000 fewer black residents under the new plan. *See* C 30, C41. To meet either of those levels, HD 53 did not have to be cannibalized:[26]

Table 4

HD	Ideal Pop.	2010 BP	B % of Ideal
52	45,521	25,944	56.99%
53	45,521	19,704	43.29%
54	45,521	19,801	43.50%
55	45,521	26,162	57.47%
56	45,521	25,513	56.04%
57	45,521	24,767	54.36%
58	45,521	29,153	64.04%
59	45,521	22,012	48.36%
60	45,521	24,743	54.36%

But Hinaman didn't even pause to consider the possibility of repopulating these districts with predominantly white persons, because he was operating under his wrong-headed understanding of Section 5. To repopulate these districts with predominantly white neighborhoods, as he testified, would "retrogress" them. Thus, when he went to repopulate the districts, he specifically went looking for minority neighborhoods. But there were not such neighborhoods in the adjoining white districts; that was what led to his decision to cannibalize

[26] NPX 332, NPX 310 at12.

HD 53, then move it out of Birmingham. As he put it, the reason he recommended moving HD 53 was:

> Tr. 3-132: 22-3-133:5:
>
> A: Because everyone of the minority majority districts in Jefferson County were under-populated, some quite dramatically. And when we looked at it as a whole, they were around 70,000 folks short of ideal, those districts added together, which is basically a district and a half. *And looking at the map, I knew that most of the – if not all of the minority neighborhoods were already included in those districts.* So trying to repopulate them to get them back to deviation was going to retrogress most if not all of them . . . .(emphasis added).

Yet the redistricters did not want to stop at creating merely majority-black districts. They were determined to recreate the actual prior BPPs in all these districts. The BPP in some of these districts was extremely high, more than 65% in five of the eight. Nonetheless, the redistricters sought to re-create those numbers, as numbers. And by moving the black population, by race, from HD 53 into these other districts, the State was able to hit these racial targets with stunning exactitude.

In six of the eight districts, the State came within 1 point of meeting its racial targets precisely. NPX 320 at 4-5, NPX 310 at 9. In HD 59, the redistricters increased the BP by almost 10 points, from 67.03% to 76.72%; in HD 58, immediately to the east, they decreased the BP by 5.1 points, from 77.86% to the still supermajority level of 72.76%. Id.

These facts alone are enough to establish that race was the predominant motive for moving significant numbers of people into these eight districts, for the purpose of re-creating their prior BPPs, including at extremely high levels. As the State's witnesses testified, that is precisely why HD 53 was torn apart and moved 100 miles north to Madison County.

As further evidence of how deliberate an effort the State had to make to meet its racial targets so precisely in these districts, Table 5 shows that, in all these districts except HD 60, the redistricters moved many times the number of people into or out of the districts than the number of people needed to bring the district up to ideal size. As is the case throughout both the Senate and House plans, the redistricters moved tens of thousands of voters into and out of these Birmingham districts, yet managed to do so while hitting their racial targets so precisely. The evidence that race predominated as a factor in the re-creation of each of these districts is thus overwhelming.

Table 5 (from ADC Supp. Ex. 4)

House District	**Deviation from Target Population**[27]	**Total Population Moved Into or Out of District**
52	-2,362	19,284
54	-10,616	31,351
55	-9,949	28,143
56	-4,457	14,241
57	-9,322	21,590
58	-8,078	20,160
59	-12,683	24,426
60	-8,817	9,170

Given these facts concerning all the Birmingham districts, this brief provides a more concise account with respect to each than for other BMDs in the State, to illustrate still further how race was used to ensure the racial targets were met.

[27] These figures are taken from NPX-332.

HD 52

HD 52 was only 2,363 persons under the ideal population. NPX Ex.332 at 5. Adjacent to overpopulated HD 56, HD 52 could have drawn all of the necessary population from that district, while still retaining a black majority of at least 56.99%. NPX 332 at 4. Instead, the State moved more than 19,000 people into and out of this district, despite its minor under-population. ADC Suppl. Ex. 4. They managed to do while coming within 0.1 point of the district's prior BPP.

In this significant redesign of the district, Map 52 NE shows the district being pushed out to pick up predominantly black areas. ADC Supp. Ex. 8B.

Two precincts are split with white-majority HD 46, in which whites were predominantly moved out of HD 52 and into HD 46. Five precincts are split between HD 52 and the surrounding black-majority districts. This kind of splitting of precincts between the black districts in Birmingham played a significant part in the redistricters ability to hit their racial targets right on the nail in most of these districts, even as they were moving tens of thousands of voters between districts. Appendix A at 2. These splits show, further, the way in which race predominated in the design of these districts.

HD 54

Here the State moved more than 31,000 people into and out of this district, even though it was under-populated by 10,616 persons. ADC Suppl. Ex. 4. NPX 332 at 5. Once again, the redistricters managed to do while again coming within 0.1 point of the district's prior BPP.

As Map ADC Supp. Ex. 10B illustrates where this district pushed up into white-majority HD 44, the pieces added at the very north bring in blocks where black residents are predominantly concentrated.

Three precincts are split with white-majority HDs 44 and 45, in a pattern in which black persons were predominantly moved into HD 54 and whites into HDs 44 and 45. Appendix A at 3. Again, there is a great deal of precinct splitting with the black-majority districts, 13 splits in all. Once again, this kind of splitting of precincts between the black districts in Birmingham played a significant part in the redistricters ability to hit their racial targets exactly, even as they were moving tens of thousands of voters between districts. These splits show, further, the way in which race predominated in the design of these districts.

HD 55

HD 55 was adjacent to over-populated HD 15. DX 480. Rather than expand into that district, HD 55 actually gave up a white area to HD 16, to which it had not been adjacent in 2001. In all, the State moved more than 28,000 people into and out of the district, while it was under-populated by 9,949. ADC Suppl. Ex. 4, NPX 332 at 5. This time, the redistricters managed to do while coming even closer to the district's prior BPP – a mere 0.06 points away. NPX 332 at 5, NPX 10 at 9. In this district, 10 precincts were split, all with other BMDs, as evidence of the techniques the redistricters used to hit their racial targets in all the districts. C-41 at 106-108 . The district boundaries were somewhat irregular under the 2001 plan. Under the 2012 plan, the district is bizarre, an elongated object with jagged edges indicative of a block by block selection of population. ADC Supp. Ex. 10A.

HD 56

The State moved 14,241 persons into and out of this district, while it was under-populated by only 4,457 persons. NPX 332 at 5. Here the redistricters once again managed to hit their racial target on the head. They managed to move more than 13,000 people in and out while designing the district within 0.04 points of its prior BPP. ADC Suppl. 4, NPX 332 at 5, NPX 10 at 9.

Two precincts were split with white-majority HD 15 and 46, where predominantly white areas were moved into the white districts, even though HD 56 was under-populated. Again, two precincts were split with adjoining black-majority districts as the redistricters "perfectly" met their racial targets in each of these districts. C41 at 110-111; Appendix A at 4.

HD 57

The State moved more than 21,000 people into and out of this district; it had been underpopulated by 9,322 people. NPX 332 at 5. Yet once again, it is remarkable that the district managed to get reconstructed at nearly the identical BPP. The redistricters came within 0.01 point of the district's prior BPP. NPX 332, 5; NPX 10, 9

Map ADC Supp. Ex. 13C shows that where this district borders white-majority HD 15 along the lower western edge, the lines of HD 57 were moved out, with heavy black population areas pulled in, through contorted boundary maneuvering, into HD 57.

On the split precinct maps, Map ADC Supp. Ex. 13E shows that the some of the jagged boundaries with white-majority HD 15 reflect the fact that the Pleasant Grove First Baptist Church precinct was split in both of the western "pieces" of the district, with the predominantly black portions put in HD 57, the whiter portions in HD 15. Appendix A at 4. The odd-looking

west facing "open mouth" at the southwestern piece of the district reflects the way this same precinct was split again in this area, in the same racial pattern. ADC Supp. Ex. 13D; ADC Supp. Ex. 13A.

Here, the drafters split five precincts, four with adjoining BMDs. This was done in the service of meeting the racial targets in HD 57, as well as these other districts. C41 at 110-111.

HD 58

The State moved more than 20,000 people into and out of this district; it had been under-populated by 8,078 persons. This is the only district in which the BPP went down. The district remained an extremely high 72.76% BPP district, but that was a 5.1 point decrease from the prior district. NPX 10 at 9, NPX 332 at 5. At the same time, the district to the west, HD 55, went up 9.69 points in BPP. Id.

These two districts are mirror images of each other. In these two districts, black incumbents might have been allowed to swap black populations between the two districts. But if so, the redistricters still permitted such a swap only as long as it satisfied their priority of making sure that the BPP increase, stay the same, or not be "substantially reduced." *Alabama*, 135 S. Ct. 1257 at 1272. As the record makes clear, the redistricters would not accept any proposed district that did not meet this requirement. In this case, the redistricters apparently were prepared to accept this small reduction, while keeping the district at 72.76% BPP. Race still predominated as this district was redesigned. Nearly 20,000 people were moved in and out, ADC Supp. Ex. 4, but that had to be done in such a way as not to "substantially reduce," in this instance, HD 58's BPP. The resulting district has irregular boundaries. ADC Suppl. Ex. 14A.

Map ADC Supp. Ex. 14B shows that where the northern-most areas of the district border, in part, white-majority HD 44, and where those borders were expanded out in the redistricting, HD 58's contortions bring in heavy concentrations of black population to the district.

Seven of the 12 precinct splits in this district reflect transfers between the district and adjoining BMDs, including HD 59. C-41 at 112-116. The other 5 splits with white-majority districts reflects a pattern in which white residents are predominantly being moved out of HD 59 and black residents in from the white-majority districts. Appendix A at 4.

HD 59

The State moved 24,426 people into and out of this district; it had been under-populated by 12,683 people. ADC Supp. Ex. 4. As just noted, in this district the BPP increased substantially, by 9.69 points, as its neighbor, HD 58, went down by 5.1 points. NPX 332 at 5, NP 10 at 9.

Map ADC Supp. Ex. 15B helps explain the added protrusion into white-majority HD 44; that arm is reaching out to pull into HD 59 extremely heavy concentrations of black census blocks. Similarly, where the district was expanded to the southeast, the ins and outs of the lines are concentrating heavily black areas that are coming into the district from HD 58. ADC Suppl.EX 15C.

The district has 12 precinct splits, 11 of them with adjoining black-majority districts, many of which are with districts, such as HD 54, in which the redistricters met their racial targets precisely. C-41 at 113-116, Appendix A at 4-5.

HD 60

This is the only one of the BMDs in Birmingham in which the State moved only about the same number of people in or out as the number of people by which the district was under-populated. The district was under-populated by 8,817 people; the state moved 8,775 people into the district and removed only 395 people. ADC Supp. Ex. 4. Of the white/black people moved in, 75% were black. Id. The redistricters managed to come within 0.27 points of the district's prior BPP. NPX 332 at 5; NPX 10 at 9.

As ADC Supp. Ex. 16C shows, the arm of HD 60 that now reaches out to the southeast picks up areas of heavily black population concentrations. ADC Suppl. Ex. 16C. Along the northeast border, the district reaches up into white-majority HD 51 and grabs relatively black areas in Fultondale and Gardendale. C41 at 116-117.

Nine precincts were split here with other BMDs to ensure that the racial numbers were hit in all the districts. Id. Appendix A at 5. The racial balancing among the districts is reflected in the district's irregular boundaries. ADC Suppl. Ex. 16A.

HD 67-72 (Western Black Belt, Tuscaloosa County):

HD 67.

On the eve of the Census, this Dallas County based district was 69.14% BP and under-populated by 7,643 people. NPX 332 at 6. This is the only district in which Hinaman removed no one. He added 7,200 people to the district, of whom 69.0% were black. The district ended up with virtually exactly the same BPP as before, 69.15%. Id., NPX 10 at 9.

In the 2001 plan, HD 67 was entirely in Dallas County. Under the 2010 Census, the County had enough people to be within 3.7% of an ideally-sized district. NPX 328. As the

Supreme Court's opinion makes clear, that would have been sufficient for federal constitutional purposes.

To add enough population to meet the new 2% population-equality standard, Hinaman chose to expand the district northwest, into Perry County, as Map ADC Supp. Ex. 17C shows. In doing so, he brought in predominantly black census blocks from Perry County. C41 at 135-6. Moreover, to hit this target on the head so closely, he split three of the ten precincts in Perry County in ways that brought more black residents than white from Perry County into HD 67. Id.

Had the redistricters not been so determined to match the prior BPP, they would not have needed to expand into Perry County. The fundamental task of redistricting is to shift population from over-populated districts to under-populated ones. But taking population out of Perry County exacerbated the under-population there of HD 72, from which the population was taken: HD 72 was under-populated by 6,107 persons, or 13.42%. ADC Supp. Ex. 4. The more logical course would have been to take the population from racially mixed areas of adjacent HD 42 (Chilton County) or from rapidly growing Autauga County.[28] Had the remaining population taken from HD 42 been all white, the resulting HD 67 would have been 66.83% black in population at the ideal population.

HD 68.

Running through and splitting six counties, HD 68 is both extremely non-compact and contains constantly meandering borders along its western, southern, and part of its eastern borders. With a precariously thin neck running up through Clarke County into Marengo County,

[28] HD 42, with the unification of Dallas County, had a surplus greater than HD 67's deficit. NPX 332 at 4, 6.

it perhaps resembles some bottom-heavy creature running to the west. ADC Supp. Ex. 18A. The pattern of race-based sorting of people in this district is stark.

On the eve of the Census, this district was 62.55% BP and under-populated by 9,287 people. NPX 332 at 6. Yet Hinaman moved more than 30,000 people into and out of the district. ADC Supp. Ex. 4. When he was done, he had met his objective of equaling or increasing the prior BPP. The district ended up as 64.56% in BP. NPX 10 at 9.

To the north, Map ADC Supp. Ex. 18C shows that the strange-looking neck and head of this district is picking up predominantly or overwhelmingly black census blocks. To the south, Hinaman created one "leg" for the district, which moved it south to pick up heavily black areas; the meandering borders pop in and out in areas to pick up overwhelmingly black areas. ADC Suppl. Ex. 18D. The "back leg" at the southeastern part similarly reaches out and grabs predominantly black areas. ADC Suppl. E. 18B. Remarkably, the HD 68 portion of each of the six counties is majority-black in population – and the most heavily black portions are those drawn from the racially-spilt precincts in Baldwin (78.02%) and Washington (82.12%) at the very extremity of the district.

As Appendix A demonstrates, there are 33 precincts with patterns of racial splitting between black-majority HD 68 and surrounding white districts. As one illustration, Map ADC Supp. Ex. 18E shows the racial splitting of the Repton City Hall precinct. The line that divides this precinct between white-majority HD 90 and HD 68 is overwhelmingly racial in character, with all the heavily black areas being placed in HD 68 and the whiter portions into HD 90. Appendix A at 5-7.

HD 69.

On the eve of the Census, this district was 64.2% BP and under-populated by 7,949 people. NPX 332 at 6. Yet Hinaman moved nearly 24,000 people into and out of the district. ADC Supp. Ex. 4. When he was done, he had hit his target on the head: the district ended up where it began as 64.2% BP. NPX 332 at 6, NPX 310 at 9.

Some adjustment was of course necessary. But the addition of urban areas of Montgomery County was contrary to the State's rationale for re-drawing SD 26 in the way the State did, as discussed above; there, the redistricters argued that rural Crenshaw County should not be paired with urban Montgomery.[29] Here, the redistricters extended this rural district into the urban areas of Montgomery, in an effort to find black population to meet the racial target for HD 69. C41 at 143-145, ADC Suppl. EX. 19A, 19B.

The census blocks the redistricters added to this district where they pushed the district east into Montgomery County reach in and out to pick up predominantly black areas; small, odd-shaped protrusions reach out to grab overwhelmingly black areas. ADC Supp. Ex. 19B. The precinct-split map, , ADC Suppl. Ex.19 C, shows one of these protrusions in more detail; as that map shows, this area of HD 69 is reaching into the 5 D Ramer Library precinct to grab an overwhelmingly black area, while leaving the whiter areas of the precinct to white-majority HD 90.

[29] HD 67 had, of course, shed 4,235 black residents to make Dallas County whole, so that its thus adjusted 2001 boundaries no longer had sufficient population. As the ADC plaintiffs demonstrated at trial, however, the addition all or part of rural Butler County would have given HD 69 a solid black majority and maintained the rural character of the districts, Doc. 195 at 66-67; the racially mixed rural areas of southern Montgomery County also were available. *See* C41 at 182.

The intrusion of HD 69 into Montgomery County also complicated the redrawing of the Montgomery County districts. Indeed, the consequence was that the redistricters forced a House District from a county that had sufficient population for five districts wholly within the county, as discussed below.

As Appendix A at 7-8 demonstrates, there are five precincts with patterns of racial splitting between black-majority HD 69 and surrounding white districts.

HD 70.

Describing the shape of this non-compact Tuscaloosa district is not easy. But this highly contorted shape was necessary to enable the State to meet its racial target as precisely as it did. ADC Supp. Ex. 20A.

On the eve of the Census, this district was 61.83% BP and under-populated by 6,268 people. NPX 332 at 6. Yet Hinaman moved almost 41,000 people into and out of the district – a figure nearly equal to the size of an ideal district itself. ADC Supp. Ex. 4. When he was done, he had once again his racial-target precisely: the district ended up 62.03% BP, virtually exactly where it began. NPX 332 at 6, NPX 310 at 9.

The transfers were unnecessary except to achieve the racial target. HD 70, even within its under-populated 2001 lines, had sufficient black population to comprise a majority of an ideally populated district; indeed, the racially mixed nature of the surrounding areas ensured that the addition of any large area would only increase that majority by adding some black population. ADC Supp. Ex. 4; Appendix A at 14. HD 70, moreover, was adjacent to over-populated HDs 62 and 63, and HD 70 could have made up the deficit from HD 63, whose black population dropped from 14,054 to 6,070 primarily due to shifts to HD 70; or it could have made

that entire deficit up and more by keeping intact all or parts of the precincts split between HD 62 and HD 70, Holt Armory, Peterson Methodist and McFarland Mall. ADC Suppl. Ex. 20B-D; Appendix A at 8.

As Map 70 ADC Supp. Ex. 20C shows, the way the contortions in this district move in and out with adjoining white-majority HD 62 reflect the way that the blocks being added to HD 70 in its northeastern corner are overwhelmingly black ones, while the district is bypassing the whiter blocks. Similarly, as Map ADC Supp. Ex. 20B shows, when the district was changed to add additional blocks in this area, the blocks added were predominantly black.

As Appendix A demonstrates, the plan splits six precincts that are shared with white-majority HDs 62 and 63. There are six precincts with patterns of racial splitting between black-majority HD 70 and surrounding white districts. Appendix A at 8. ADC Supp. Ex. 20D illustrates one of these splits, along with the wiggling northern boundary of the district with white-majority HD 63. The Bama Mall precinct is split so that the white part of the precinct along the boundary is put into HD 63, while the blacker parts are put into HD 70. Id.

HD 71.

On the eve of the Census, this district was 64.28% BP and under-populated 7,427 by people. NPX 332 at 6. Even as under-populated, however, the district had sufficient black population to comprise a majority of an ideally populated district. ADC Supp. Ex. 4.

The State ended up moving more than 40,000 people into and out of the district – again, nearly the size of an ideal district itself. AC Suppl. Ex. 4. When done, the redistricters had met their objective of equaling or increasing the prior BPP. The district ended up as 66.9% in BP. NPX 310 at 9. Specifically, the State extended HD 71 into Pickens County in a northern,

bulbous extension (73.51% black); extended the northeastern portion of the district, taking 6,646 persons from the Stillman and McDonald Hughes precincts, 93.8% of whom were black; and extended southward into Choctaw County (81.42% black), depriving forlorn HD 68 of population. In all, the changes tilted HD 71 away from the I-59-centered orientation the district had had in 2001 and transformed a relatively compact district into an uncouth, illogical figure. ADC Supp. Ex. 21A, 21C and 21D. Appendix A at 8-9. The map at ADC Supp. Ex. 21D shows the way in which the Crossroads-Intersection-Halsell precinct was racially split, as part of this general pattern.

As Appendix A demonstrates, there are 23 split precincts in HD 71. C41 at 146-150. Thirteen of these are split between HD 71 and surrounding white-majority districts, such as HD 63, 65, and 61. Appendix A. The pattern of these splits allocates the blacker portions of the precincts to HD 71. Id.

In addition, 10 precincts are split between HD 71 and its adjoining black-majority districts, HD 70 and 72. C41 at 146-150. The splits with HD 70, in particular, enabled HD 70 to meet its racial target precisely on the head.

HD 71, moreover, was adjacent to HD 62 which was overpopulated by 9,501 persons and had 12,773 black residents. NPX 332 at 5. A simple shift into HD 62 would have satisfied the population equality standard and left the district more than 50% BP.[30] But instead of this simple adjustment, the State added parts of Pickens and Choctaw Counties, and changed populations in Marengo and Tuscaloosa Counties, as described.

[30] This could have been accomplished by leaving intact or otherwise splitting the Courthouse and Frierson Bldg.-Big Sandy precincts; for the splits concerning these precincts, see Appendix A. The redistricting task had been complicated, however, by the transfer of nearly 18,000 persons in Greene, Marengo and Sumter Counties from HD 72, which itself unnecessarily had lost population to HD 67, as discussed above.

HD 72.

On the eve of the Census, this district was 60.12% BP and under-populated by 6,107 people. NPX 332 at 6. Still, it had sufficient black population to comprise a majority of an ideally populated district. HD 72 was adjacent to three over-populated districts, HDs 42, 49 and 62. NPX 332 at 4, 5. Yet the redistricters moved nearly 24,000 people into and out of the district. ADC Supp. Ex. 4. On net, they added 5,566 blacks and 183 whites to this district. When they were done, the redistricters had met their objective of equaling or increasing the prior BPP. The district ended up as 64.5% in BP. NPX 10, at 9.

On the surface, this district is somewhat more compact than others in this area, but it manages five additional county splits in four counties: Greene (2), Marengo, Perry, and Sumter. DX 479. Each of the six county segments that comprise the district is majority black in population. Such departures from the race-neutral, constitutional requirement of adhering to county boundary lines is extraordinary.

As Appendix A at 9-10 demonstrates, there are six precincts with patterns of racial splitting between black-majority HD 72 and surrounding white districts, all along the boundary with white-majority HD 49, in Bibb County; the pattern here is that areas of predominantly white residents were moved *out* of under-populated HD 72 and into HD 49. NPX 332 at 4 (SD 49 overpopulated by 14.26%.).

Districts 76-78 (Montgomery County)

In Montgomery County, the redistricters began the process by doing the same thing to HD 73 that they did to HD 53 in Jefferson County. In Montgomery County, however, the State chose an over-populated district to dismantle: HD 73 was over-populated by 2,745 persons, or

6.03%, and was a strong black-plurality district, with 23,380 residents (48.44% black as over-populated, 51.36% of an ideal district). NPX 332 at 6, Appendix D. In contrast, white-majority HD 74 was under-populated by 9.83% (4,474), and contained 12,446 black residents who would have been available to maintain black majorities in HDs 76-78, had they been needed. NPX 332 at 6. As it was, each of the three majority-black districts in the county already had enough black residents to comprise majorities of an ideal district. As with HD 53, Hinaman explained that he chose to dismantle HD 73 because he had to do that to meet his racial targets in in HDs 76-78. This Court found that HD 73 was dismembered to avoid the State's understanding of retrogression in these other districts. 989 F. Supp. 2d at 1249.

The three majority-black districts in the county had very high BPPs, at nearly 70% and higher. HD 76 had a 69.54% BP; HD 77 had a 73.52% BP; and HD 78 had a 74.26% BP. NPX 332 at 6. The first of these, HD 76, was already close to the ideal district size; it was short by only 627 persons. Id. But HD 77 and 78 were substantially under-populated; the first needed to add 10,523 persons, and the second, 14,641 persons. Id. There were racially-mixed areas of *over*-populated majority-white districts right next to HDs 76-78.[31]

The question was *which* voters to add to fill out these districts. The State rejected the obvious option of shifting population from these over-populated white-majority districts to the adjacent under-populated black-majority districts; instead, the State chose the counter-intuitive

[31] Most of the growth in the area had been in HD 75 (Montgomery and Elmore Counties), which was 32.11 percent (14,619 persons) over the ideal, and HD 88 (Autauga and Elmore Counties), which was 24.12% (10,978 persons) over-populated. NPX 332 at 6, 7. The excess of HDs 75 and 78 almost exactly matched the deficit of HDs 76-78. HDs 73, 75 and 88 were over-populated by a total 28,342 persons, while HDs 74 and 76-78 were under-populated by 29,638, leaving a net under-population of 1,296 among the seven districts, or an average of 185 persons per district. Racially mixed areas of HD 75 were adjacent to HDs 76 and 77, and racially mixed areas of HD 88 were adjacent to HDs 77 and 78. C-41 at 157-158, 177-178.

option of dismantling HD 73, rather than, HD 74, because the State asserted that it had to meet the extremely high, prior BPPs in HD 76-78. Yet if the original black populations of HD 76-78 were already so high that all three would have remained majority black *even if not a single new black resident had been added to any of them.* A race-neutral means of filling out the districts would not, of course, have led to no new black residents being added – particularly given that the districts needed to add 10,523 people (HD 78) and 14,641 people (HD 78). But even in the most extreme scenario, the districts would have remained majority-black, as the numbers from NPX-332 show:

HD	Ideal Size	2010 B Pop.	Black % of Ideal District
76	45,521	31,219	68.58%
77	45,521	25,731	56.53%
78	45,521	22,930	50.37%

But in choosing *which* people to add to these districts, the redistricters used race-based means to move tens of thousands to people to meet the racial-population targets they had set, which meant trying to re-create the exceptionally high, prior BPPs in all three districts.

Based on their decision to repopulate these districts to avoid "retrogression," 74-75% of the people added to HD 77 and 78 *had to be black.* Having wrongly decided that Section 5 of the VRA "required" them to do that, the redistricters then had to search out tens of thousands of additional black persons to move into these districts. The way the redistricters did that was to destroy the near-majority black HD 73 – which had been electing a candidate of choice of the black community -- and move most of its black inhabitants into HDs 76 and 77. In addition, 1,144 black persons were also transferred from HD 73 to meet the super-majority racial target of 64.2% BPP in black-majority HD 69. AC Suppl. Ex. 4.

Overall, HD 73 began with 23,380 black persons and 21,938 of them were moved to black-majority HDs 69, 76, and 77.[32] APX 75, 142:3-7.

Thus, tens of thousands of black residents of HD 73 were transferred out in the effort to meet the extremely high racial-target population figures in HDs 69, 76, 77, and 78.[33] As Hinaman stated, "District 73 was cannibalized if you will to repopulate 77, 78, and 76 . . . ." APX 75, at 142. This Court found: "Hinaman moved House District 73, a majority-white House district [note – this was a black-plurality district], from Montgomery County to Shelby and Bibb Counties to avoid retrogression of the majority-black House districts in Montgomery County." 989 F. Supp. 2d at 1249.

As with HD 53, then, the findings in this Court's prior opinion necessarily establish that race was the predominant motive for moving tens of thousands of blacks by race out of HD 73 to attempt to meet the extremely high racial-population targets in HDs 76, 77, and 78. *Shaw* applies, of course, when "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or *without* a particular district." Ala. Leg. Black

[32] ADC Supp. Ex. 4.

Hse2010	Hse2012	TTLPOP	NH_WHT	NH_BLK	NH_WHT%	NH_BLK%
073	069	1388	70	1144	5.0%	82.4%
073	074	5363	4284	896	79.9%	16.7%
073	075	3135	2062	441	65.8%	14.1%
073	076	15460	5272	8034	34.1%	52.0%
073	077	22920	8959	12760	39.1%	55.7%

[33] The addition of black population to HD 69 was unnecessary and inconsistent with the State's rationale for not combining urban Montgomery with rural areas in SD 26.

Caucus, 135 S. Ct at 1270 (quoting *Miller*) (emphasis added). But this race-based transfer of people in these numbers is not narrowly tailored to Section 5's requirement that Alabama preserve the "ability to elect" in HDs 76-78. Thus, the destruction of HD 73 itself was unconstitutional and violated *Shaw*. The race-based transfer of its black residents to the black-majority districts necessarily does so as well.

Indeed, had Alabama not misapplied Section 5, the more logical candidate to transfer to Shelby County would have been white-majority HD 74.

Given this history, it should come as no surprise that race predominated when the three black-majority Montgomery districts were repopulated to come as close as practically possible to meet their extremely high racial population targets, after HD 73 had been torn apart to supply them.

HD 76

Though HD 76 was only under-populated by 627 people, the redistricters moved 39,821 people into and out of the district. ADC Supp. Ex. 4. In the course of doing so, they met their aim of equaling or exceeding the prior BPP in the district. HD 76 began as 69.54% BP; it ended with a 4.25 point increase, at 73.79% NP. NPX 332 at 6, NPX 310 at 9. Given how many people were moved into and out of the district, the district obviously changed configuration almost entirely, but managed to come in not only at, but somewhat above, the racial-population target for it. ADC Suppl. Ex. 23A.

As Map ADC Supp. Ex. 23C shows, the part of the district that looks like a dog's tail, at the northwest corner of the district, brings in heavily black areas of Montgomery to HD 76. The odd part of the district at the northeast corner is accounted for by the splitting of the 5M Bell

Road YMCA precinct, in which the blacker portions are put into HD 76 and the whiter ones into white-majority HDs 74 and 75. Map ADC Supp. Ex. 23D and 23E.

In addition to the racial split of the Bell Road precinct, there are 8 other split precincts in HD 76. Four of these were split with black-majority HD 69, to enable the redistricters to hit their target on the head in HD 69, as discussed above; these precinct splits moved 4,735 blacks and 439 whites into HD 69. The other four splits come from the cannibalized areas of HD 73. Appendix A at 10 provides the specific details.

HD 77

HD 77 was under-populated by 10,523 persons; the State moved 36,627 people into and out of the district when radically redrawing it. NPX 332 at 6, ADC Supp. Ex. 4. The district began as 73.52% BP and was re-designed at 67.04% BP, a decline of 6.48 points. NPX 332 at 6, NPX 10 at 9.

In the eastern piece of the district, as Map 77 E shows, the entire odd-shaped pieces that were added pick up heavily black population concentrations in Montgomery. In the western half of the district, Map ADC Supp. Ex. 24C shows how predominantly black areas that would otherwise be in white-majority HD 74 are brought in, through the zig-zagging perimeter, into HD 77.

As an illustration of one of these precinct splits, the Map 77 shows at the jagged mid-northern top of the district the way the 1B Vaughn Park Church of Christ precinct was split at *two* separate places to pull the predominantly black areas into HD 77 and to put the predominantly white areas into HD 74. ADC Suppl. Ex. 24D.

This is one of the 7 House districts in which the black population declined a bit. After meeting his racial targets in HDs 69 and 76, he might have needed the remaining black persons in Montgomery County to make sure the white-majority districts were able to meet their equal-population targets. Since Hinaman occasionally discussed his aim to be not "substantially reducing" the BPP, he might have felt that he had achieved that goal here and stopped further adding black persons. He fell a bit short, but created a 67% BP district nonetheless. *See* Appendix A at 10.

HD 78

HD 78 was under-populated by 14,641 persons; the State moved nearly the entire size of an ideal district, 40,706 in dramatically redrawing it. NPX 332 at 6; ADC Suppl. Ex. 4. The district began as 74.26 BP and was re-designed at 69.99% BP, a decline of 4.27 points. NPX 332 at 6, NPX 10 at 9.

In this dramatic reconfiguration, the north-eastern half of the new district is shown in Map ADC Supp. Ex. 25B. As that map shows, at places where the district's boundary has knobs and protrusions into white-majority HD 75 and 74, those twists and turns bring predominantly black areas into HD 78.

Map ADC Supp. Ex. 25C shows, in more detail, the racial splitting between HD 78 and 74 of the 4K Chisholm Community Center. *See* Appendix A at 10-11.

As with HD 77, this is one of the seven House districts in which the black population declined a bit. For same reasons as in HD 77, Hinaman fell a bit short, but created a 70% BP district nonetheless. NPX 10 at 9.

HD 82-85 (Eastern Black Belt):

HD 82 (Macon, Lee, Tallapoosa Counties).

HD 82 was under-populated by 2,132 persons but had sufficient black population to comprise 54.47% of an ideal district. Appendix D. The district was adjacent to racially mixed areas of over-populated HDs 31, 79, and 81. ADC Supp. Ex. 26B and C; NPX 332 3, 6 and 7.

In 2001, this was compact, but as redrawn the district has odd features. In the northwest (Tallapoosa County), there is an odd sort of contorted duckbill. ADC Supp. Ex. 26C.. Not only did the State reach out to pull Tallapoosa into the district, but it selectively picked up the parts of the area that were predominantly black and left the white areas to white-majority HD 81 – that is what accounts for the duck-bill shape, as this map illustrates. There is a second duckbill in the Lee County portion of the district, this one left by removal of white population from HD 79 HD. These features are accounted for by the State's race-based addition of areas to the district. ADC Suppl. Ex. 26B.

The split precinct map, ADC Supp. Ex. 26E , shows precisely the pattern of splitting the precinct by race that creates the "duck-bill" that Map ADC Supp. Ex. 26A shows from a more distant perspective. This area involves selectively carving up the Dadeville National Guard Armory precinct to put the whiter areas into white-majority HD 81 and the heavily black areas into HD 82. In the prior plan, this precinct, like all three Tallapoosa precincts, had been entirely in Tallapoosa County. This racial selectively explains why Hinaman created the duck-bill in the northwest.

Hinaman expanded HD 82 twice into Tallapoosa County, but he picked up two non-contiguous areas that were fairly distant from each other. Map ADC Supp. Ex. 26Dshows the

second piece of Tallapoosa that Hinaman grabbed. That piece takes a small area at the south of Tallapoosa County and grabs predominantly black areas there. In other words, the two non-contiguous areas of Tallapoosa that Hinaman brought into HD 82 both involved heavy concentrations of black residents.

The upshot of the changes to HD 82 was to increase the black percentage from 57.13% in 2001 to C-30 at 62.14 in 2012: the district's excrescences add 2,297 black persons in excess of the number needed to maintain a 57.13% majority in the now over-populated HD 82. NPX 332 at 7, C-41 at 172, Appendix D.

As Appendix A at 11 demonstrates, there are six precincts with patterns of racial splitting between black-majority HD 82 and surrounding white districts.

HD 83. (Lee, Russell Counties).

HD 83 was one of the more irregular districts under the 2001 plan, but the 2012 legislature maintained the existing irregularities and added new ones. HD 83 now is an extremely non-compact district, particularly in the Lee County areas. ADC Supp. Ex. 27A.

On the eve of the Census, this district was 56.92% BP and, although under-populated by 4,482 people, had sufficient black population to comprise a 51.31% majority of an ideal district. Appendix D; NPX 332 at 7. HD 83 was adjacent to racially mixed areas of HDs 79 and 80. C-30 at 6-7. ADC Supp. Ex. B-D. Yet the redistricters moved more than 17,000 people into and out of the district. Appendix D. When Hinaman was done, he brought the district in at less than one point, 57.52 %, of its prior BP. NPX 332 at 7, NPX 10 at 9. As elsewhere, significant numbers of voters had to be moved by race to accomplish that. Appendix D.

Map ADC Supp. Ex. 27C demonstrates how this took place. When Hinaman extended one "claw" into Lee County, he picked up predominantly black areas in doing so. Map ADC Supp. Ex. 27D shows that at the top of a second claws in Lee County, Hinaman moved in and out, picking up predominantly areas that were between 25-75% BP. In areas where he pushed the district out within Russell County to bring in new areas, he again pulled in areas that are predominantly black, as Maps ADC Supp. Ex 27B and 27E show.

As one illustration of how Hinaman moved significant numbers of people by race, in the western-most claw that Hinaman had extended into Lee County, he split Opelika B precinct between three House districts: white-majority HDs 79 and 38, along with HD 83. C41 at 165, 171 and 172. Hinaman put the overwhelmingly black census blocks into HD 83, while he left the white areas of the precinct in the white districts. Id.; ADC Supp. Ex. 27F.

As Appendix A at 11-12 demonstrates, there are 11 precincts with patterns of racial splitting between black-majority HD 83 and adjoining districts. These include precincts, including CVCC and Ladonia Fire Department, that were contained entirely in white-majority HD 80, but from which Hinaman moved 4,464 blacks and 748 whites into HD 83. Id.

HD 84. (Bullock, Barbour, Russell Counties).

On the eve of the Census, this district was 50.61% black in population, a level at which black voters consistently had elected candidates of their choice. NPX 332 at 7. The district was under-populated by 4,204 people, and needed to add 1,850 black residents – about 70% of the excess black population the State added to HD 82 - to maintain a black majority. Appendix D. The redistricters moved 5,491 people into and out of the district. ADC Suppl. Ex. 4. When

done, they had met their objective of equaling or increasing the prior BPP; the district rose to 57.52 % in BP. NPX 10 at 9.

As Map ADC Supp. 28B and 28C shows, the redistricters unexceptionally added the rest of Bullock County, making that county whole and adding substantial black population. The redistricters went on to expand the district to the north, into Russell County where, they picked up overwhelmingly black areas from HD 83, contributing to that district's grotesque shape. In Russell County, the redistricters added 3,324 black and 1,667 white persons to HD 84, while removing 305 whites and 195 blacks.

HD 85. (Henry, Houston Counties).

On the eve of the Census, this district was 47.94% BP and under-populated by 3,092 people. NPX 332 at7. Though not a majority-black district, it long had functioned as an effective ability-to-elect district. The State moved 9,426 people into and out of the district. Appendix D. When done, the redistricters had met their objective of equaling or increasing the black percentage to a majority of 50.05% BP. NPX 10 at 9. Eighty-four percent of the people removed from the district were white. ADC Supp. Ex. 4.

Under the 2001 plan, the district consisted of all of Henry County and a compact area of Houston County. The redistricters redesigned the Houston County portion in a crazy-quilt pattern. ADC Supp. Ex. 30 A. As Map ADC Supp. Ex. 29B shows, the redistricters went block by block to add relatively black areas and remove white areas. The split precinct map, ADC Supp. Ex. 29C, vividly demonstrates the extraordinary racial sorting that went on, virtually block by block, in the Houston County area of the district. This map shows 7 precincts in this area of the district in which the redistricters engaged in extremely detailed sorting of black voters in the

precincts into HD 85 and white voters into white-majority, adjoining districts HD 86 and 87. Id. Through the 9 precincts in total that were split by race, Hinaman moved a net of 2,311 blacks into the district and a net of 710 whites out. Appendix A at 12-13 provides the numerical details.

Section 5 of the VRA requires the preservation of the ability to elect. Just as Section 5 does not require that additional black-majority districts be created, it does not require that the racial population percentages be augmented of districts already performing as ability-to-elect districts. *Page v. Va. State Bd. of Elections*, (E.D. Va. June 5, 2015), Appendix C.

HD 97-99 and 103 (Mobile County):

Mobile County had four majority-black districts in the prior plan. NPX 332 at 9. All had high BPPs on the eve of the redistricting. Id. All were now under-populated, but given their high existing black populations, three of the districts, HDs 98, 99, and 103, would have remained as majority-black districts even had no white persons been added to fill them out. Appendix D. The fourth, HD 97, had sufficient black population to constitute 47.18% of an ideal sized district and thus needed to add 1,335 black persons to become a majority-black district. Id.

Hinaman, however, faced a particular problem here of his own creation. In his view, he had to create not just majority-minority districts, but districts that re-created the extremely high black populations of all these districts. That, he asserted, is what non-retrogression required. But there were not enough black residents in contiguous areas to go around; under the new, 2% population-deviation rule, the redistricters could not get all the districts simultaneously back up to their prior BPPs.

The record demonstrates that what Hinaman did was to start by meeting his racial target exactly in HD 97. He did that by moving black population into HD 97 from the other black-

majority districts, HD 96, 98, and 103, as well as moving black population from white-majority HD 105 into HD 97. As documented below, he split precincts racially between HD 97 and these surrounding districts in doing so.

Once Hinaman met his target exactly in HD 97, he then ran into the problem of the lack of sufficient contiguous black populations to meet the targets in the other three districts. As a result, even as Hinaman worked to move voters by race into these other three districts, and managed to make them all supermajority-black districts with black populations of 60-65%, the black populations nonetheless decreased in these three districts. NPX 332 at 9, NPX 10 at 9. As he did so, all of these four black-majority districts took on bizarre shapes, as population was transferred between them. ADC Supp. Ex. 30 A, 31 A, 32 A, 33 A.

Thus, of the seven House Districts in the State in which the black population decreased, three of those districts are these ones in Mobile. The Supreme Court's opinion, as well as this Court's prior opinion, noted that the black population had gone down in a few districts (around 25% of them overall). These Mobile districts provide the explanation for why that happened in these three districts; in this area, there simply were not enough black voters to go around to enable Hinaman at the same time (1) to add the necessary thousands of voters into these districts while also (2) preserving the BPPs in *all* the adjoining BMDs. Something had to give.

Hinaman specifically testified to the two constraints that precluded him from meeting his racial targets where he failed to do so. As he said, "Sometimes there's no way to avoid it [lowering the BPP]." Tr. 3-163. Yet in every district, he tried to design them "as close to the numbers as possible and practicable as they were in the 2001 plan." Tr. 3-164. Even when there were not enough black people to do so, he still tried to come as close as possible to the racial

targets. Second, he testified that he understood *Shaw v. Reno* limited the extent to which Alabama could use extremely bizarre district shapes to reach out to geographically distant, far-flung black communities and use them to bring one of these districts up to the exact BPP level it had before. Tr. 3-188; APX 75. at 84.

These constraints explain why the black population decreased in these three Mobile districts. But nothing in the record suggests Hinaman abandoned his effort even in these districts to "come as close as possible" to meeting those racial targets. And he used race-based means to do so, in all of these districts, including the three in which the BP dropped. Thus, for all of these districts, the record demonstrates racial predominance – the movement of significant numbers of people into and out of the districts by race – including in the districts in which the BP decreased.

HD 97.

Hinaman met his racial target on the head here. On the eve of the Census, this district was 60.66% BP; after redistricting, it was also 60.66% BP. NPX 332 at 10, NPX 10 at 9. The district was dramatically under-populated and needed to add 10,115 people. NPX 332 at 9. Hinaman moved 9,935 people into and out of the district to repopulate it. Appendix D. The record suggests Hinaman started with HD 97 because it had the lowest BPP of the four districts; met his racial target exactly there; and then did as best as he could to meet the racial targets in the districts from which he had intentionally moved black people into HD 97 to meet the target there first.

The district has an elongated, odd shape that resembles a bishop rising from his cathedra. ADC Suppl. EX. 30A. At the southwest corner of HD 97, ADC Suppl. Ex. 30D shows that Hinaman moved the district west, into HD 103, to pick up predominantly black areas there.

Farther north along the district's western edge, ADC Suppl. EX. D. shows that Hinaman extended the district into the most heavily black areas of Mobile, picking up large numbers of census blocks that were 75-100% black. The "bishop's head" was created by extending the district to the north, where it picked up heavily black census blocks as well. ADC Suppl. Ex. 30B. ADC Suppl. Ex. 30 C shows an extension to the south along Mobile Bay. The redistricters could simply have broadened the narrow corridor connecting this district to HD 101, but that would not have succeeded in recreating the prior BPP so exactly.[34] See DX 477. Hinaman split nine precincts by race along the borders of the district as he selectively moved black people into the district in the process of meeting his racial target population on the head. To illustrate one example, as Hinaman created the "bishop's head" area by moving HD 97 north, he split the Chickasaw Auditorium precinct so that the predominantly black areas went into HD 97 (or black-majority HD 98), while an area of the precinct put into white-majority HD 96 had relatively whiter census blocks. ADC Supp. Ex. 30E. Appendix A at 13 documents the 9 precincts with patterns of racial splitting in which Hinaman was disproportionately moving black residents from the surrounding black and white districts into HD 97, while also placing whiter areas of these split precincts into the adjoining white-majority district.

[34] HD 97, the most under-populated district, was virtually "landlocked" by the other black districts, with only a narrow corridor connecting it to HD 101, which had 10,642 black residents under the 2001 lines, or more than enough to create a black majority in HD 101. DX 477, NPX 332 at 9, and ADC Suppl. Ex. 32 C, 32F, 33B. Unlike other majority black districts, HD 97 had to take *some* population from another majority black district in order to reach the ideal population if it were to avoid the odd shaped and pinched connections that characterize certain other districts adopted by the State; both of the blocking districts, HD 99 to the west and HD 103 to the south, had abundant black population already under the 2001 lines (64% and 62%, respectively, vs. 54% for HD 98). NPX 332 at 9.

Rather than simply broaden the corridor to HD 101, however, Mr. Hinaman blocked it, adding substantial portions of black population from HD 101 and adjacent areas of HD 104 to HDs 99 and 103. ADC Suppl. Ex. 32C, 32F, 33B. He then proceeded to substantially redraw each of the majority black districts, giving each a bizarre shape and transferring population in and out of each district.

HD 98.

On the eve of the Census, this district was 65.22% BP and underpopulated by 7,690 people. NPX 332 at 9. Yet Hinaman moved close to 24,000 people into and out of the district. Appendix D. When he was done, the district ended up as 60.02% in BP, a decline of 5.20 points from its prior BP. NPX 10 at 9. He removed 3,685 black people, partly to meet his target in HD 97, but managed nonetheless to add 5,885 black people in as well. ADC Suppl. Ex. 4.

HD 98 had been a relatively compact district under the prior plan, but it now expands far to the north, with a narrow corridor between its southern and northern pieces. ADC Suppl. Ex. 31A, DX 477. As ADC Supp. Ex. 31D shows, in the southern part of the district, Hinaman expanded the district into Mobile to pick up heavy concentrations of black population. In the southeastern area, he did the same, as ADC Supp. Ex. 31C shows. The part of the district that was expanded through the narrow corridor running north also picks up areas of concentrated black population, as ADC Supp. Ex. 31C shows.

Hinaman did his best to pick up as much black population as possible, given the constraints, by splitting 13 precincts along racial lines. A clear example is illustrated in ADC Supp. Ex. 31C, where the district reaches out in odd, claw-like fashion, into white-majority HD 99. As this split precinct map shows, that odd shape is accounted for by the fact that the district is splitting the College Park Baptist Church precinct to put its heavily black areas into SD 98 and the white areas into HD 99. ADC Supp. Ex. 31E. As Appendix A at 13-14 demonstrates, there are 13 precincts with patterns of racial splitting for HD 98.

As noted above, some of these splits involve unnecessary exchanges of black majority areas between HD 98 and 97 to enable Hinaman to meet his goal of hitting the HD 97 "target" figure so exactly.

HD 99.

On the eve of the Census, this district was 73.35% black and underpopulated by 5,730 people. NPX 332 at 9. Yet Hinaman moved 13,651 people into and out of the district in redrawing it. ADC Supp. Ex. 4. When he was done, the district ended up as 65.61% in BP, a decline of 7.74 points from its prior BP. NPX 332 at 9, NPX 10 at 9.

Once again, in the prior plan, this was a district that was relatively compact. DX 477. The district now has essentially three bulk areas, with small pinched areas connecting them. ADC Supp. Ex. 32A. In the southeast, the district has a prong that juts down to pick up black a group of black-majority blocks of Mobile; in the west, the district pulls in such black blocks as are available; and in the southwest, the district creates notches to pick up black census blocks in the 50-75% range. ADC Supp. EX. 32B, 32 C. 32D.

Once again, in the prior plan, this was a district that was relatively compact. The district now has essentially three bulk areas, with small pinched areas connecting them. In the southeast, the district has a prong that juts down to pick up black areas of Mobile [but also bringing in a lot of white blocks?]; in the west, black areas of Mobile are also pulled in; in the southwest, the district creates notches to pick up black census blocks in the 50-75% range. [I'm having trouble understanding all the HD 99 maps. 99sw zoom – remove w majority areas and added black areas].

ADC Supp. Ex. shows in more detail why the district has the pattern of notches it does in the southwestern area. There Hinaman split two precincts by race, with the heavily black areas going into HD 99 and the whiter areas into the adjoining white-majority districts. Appendix A at 14. Even in these districts in which the BP declined, Hinaman was doing his best, including splitting precincts along racial lines, to get the BP in HD 99 back as close as possible to its prior level.

As Appendix A at 14 demonstrates, there are 13 precincts with patterns of racial splitting for HD 99.

HD 103.

On the eve of the Census, this district was 69.84% BP and underpopulated by 4,910 people. NP 332 at 9. Yet Hinaman moved over 12,000 people into and out of the district. ADC Supp. 4.When he was done, the district ended up as 69.84% in BP, a decline of 4.78 points from its prior BP. NPX 10 at 9.

HD 103 is an oddly shaped, elongated district, with odd features, including a hook at the northwest area, a small excrescence along the western edge, and erratic moves in and out of adjoining white-majority HD 105 in the south. ADC Supp. Ex. 33A. The maps explain the racial nature of these changes Hinaman made to the prior district.

Where the district was expanded to the south, the notches pick up heavily black areas of Mobile. ADC Supp. Ex. 33C. Similarly, when a bulb was extended to the west into white-majority HD 104, that protrusion picks up numerous census blocks in Mobile that are 75-100% BP. ADC Supp. Ex. 33D. The oddly-shaped northwestern piece of the district reached out into

white-majority HD 104 to pick up heavy concentrations of black residents there. ADC Suppl. Ex. 33B.

The split precinct map shows the change to the district that added the western "bulb" in more detail; that map illustrates how the First Independent Methodist precinct was split precisely so that areas of concentrated blocks that were more than 75% black were put into HD 103, while the whiter areas of that precinct were put into white-majority HD 104. ADC Supp. Ex. 33E. As Appendix A at 14-15 demonstrates, there are 10 precincts with patterns of racial splitting for HD 99.

3. Summary of the Application of the "Predominant Factor" Analysis to All 36 Districts

As the record demonstrates with respect to each of the 36 black-majority districts, "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." 135 S.Ct. at 1265 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). That evidence consists of the following:

(1) The direct, consistent testimony and evidence that the redistricters prioritized a mechanical policy of re-creating or exceeding the population-percentage based racial targets, to the extent feasible, in each of these districts. There is no evidence the State abandoned this policy in any particular district.

(2) The outcomes produced, which reflect the fact that while moving tens of thousands of voters into and out of these districts, the State succeeded in implementing the policy the redistricters adopted expressly. In HDs 32, 52, 53, 54, 55, 56, 57, 59, 60, 67, 68, 69, 70, 71, 72, 76, 82, 83, 84, 85, and 97, and in SDs 23, 24, 26, 28, and 33, the redistricters achieved their stated objective. In the few districts in which the black population declined, HDs 19, 58, 77, 78,

98, 99, and 103 and SDs 18, 19, and 20 the evidence demonstrates the black population declined only because there were not enough contiguous additional black persons to make it feasible to re-populate the districts all the way back up to their exact prior BPP. But in these districts, race was also the predominant factor in the effort to repopulate them as close as feasible to their prior BP levels. There is no credible basis on which the State could have achieved these racial targets so precisely, despite moving tens of thousands of people between districts, without race having been the predominant factor in *which voters* were moved to repopulate these districts.

(3) The consistent pattern, demonstrated in the maps that document which blocks were added to each district, that the redistricters used of extending the boundaries of the districts in a way that bypassed whiter or more racially mixed areas to pick up areas of more concentrated black populations as needed to meet the districts' racial targets. *See Miller*, 515 U.S. at 918 (the State " 'would not have added those portions of Effingham and Chatham Counties that are now in the [far southeastern extension of the] present Eleventh Congressional District but for the need to include additional black population in that district to offset the loss of black population caused by the shift of predominantly black portions of Bibb County in the Second Congressional District which occurred in response to the Department of Justice's March 20th, 1992, objection letter.' ").

(4) The highly irregular shapes at the borders of the districts, where those irregularities pull predominantly black areas into the district, in a way that enables the district to meet its assigned racial target.

(5) The systematic pattern of splitting precincts in a racial pattern between the 36 districts and surrounding districts. *See Id. (*"[t]o the extent that precincts in the Eleventh Congressional

District are split, a substantial reason for their being split was the objective of increasing the black population of that district.").

As a result, race was the predominant factor in each of the 36 House and Senate districts for sorting significant numbers of people into and out of these districts. It conceded further that

III. Alabama Lacks a Compelling Purpose for Its Use of Race in the Design of These Districts And, in Addition, Alabama's Use of Race is Not Narrowly Tailored.

Because race was the predominant factor in the design of each of the 36 majority-black districts and thus strict scrutiny applies. Strict scrutiny for the use of race in redistricting requires *both* (1) that there be a "strong basis in evidence" to justify the particular use of race under Section 5 *and* (2) that Alabama's actions be based on a legally correct interpretation of Section 5. *Alabama*, at (state must have "strong basis in evidence" and "good reasons"). With respect to the use of race in the design of each majority-black district, Alabama fails to meet either requirement. Moreover, under strict scrutiny, it is Alabama that bears the burden of proving its use of race was justified. *See Miller v. Johnson*, 515 U.S. 900, 920 (1995) (citing *Shaw v. Reno*, 509 U.S. 630, 653-57 (1993)); *see also Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2419 (2013) ("Strict scrutiny is a searching examination, and it is the government that bears the burden to prove 'that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate'") (alterations in original) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989)); *Johnson v. California*, 543 U.S. 499, 505 (2005) ("[u]nder strict scrutiny, the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests.'") (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995)).

A. Alabama Lacks a Compelling Interest For Its Use of Race in the Design of These Districts.

The Supreme Court has consistently assumed that the use of race to comply with Section 5 constitutes a compelling purpose. But as the Court has made clear, that means "a compelling interest in complying with *the properly interpreted* Voting Rights Act." *Shaw v. Hunt*, 517 at 909 n.4 (emphasis added). Thus, in *Miller v. Johnson*, the Court held unconstitutional Georgia's districts because "the plan challenged here was not required by the [Voting Rights] Act under a *correct reading of the statute.*" 515 U.S. 900, 921 (emphasis added). *See also Shaw v. Hunt*, 517 U.S. 899, 911 (1996) (noting that *Miller* held that the districts were "not required by a correct reading of Section 5 and therefore compliance with that law could not justify race-based districting.").

As these decisions establish, Alabama cannot have a compelling interest in complying with a legally incorrect reading of the Act. Indeed, these decisions also make clear that, even when the United States Department of Justice adopts a legally incorrect reading of the Act, and a State complies with DOJ's understanding, the State still cannot have a compelling interest. The DOJ interpretation of Section 5 must be a correct if a State is to be able to rely on that interpretation to justify race-based districting as serving a compelling governmental interest.

Thus, when the Department of Justice in the 1990s took the view that Section 5 required creating the maximum number of minority districts feasible, the Court held in *Miller* that States could not justify race-based districting as needed to comply with this incorrect interpretation. The Court concluded that it was "safe to say that the congressional plan enacted [by Georgia] in the end was required in order to obtain preclearance." 900 U.S. at 921. Yet even so, as the

Court concluded in the next sentence: "It does not follow, however, that the plan was required by the substantive provisions of the Act." Id. As the Court held: "We do not accept the contention that a State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues." Id. at 922. Thus, because Alabama's use of race is not required by Section 5's substantive provisions, the State's purported effort to comply with Section 5 cannot provide a compelling justification.

Strict scrutiny is required when race predominates in the design of a district precisely because of the profound harms the Court has identified that follow from the unjustified use of race. It is not necessary to recite the full range of those harms the Court has catalogued in these and related cases; as the Court has stated many times, when race is used in inappropriate or unjustified ways to design election districts, these districts "'cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial.'" *Bush v. Vera*, 517 U.S. at 999 (Kennedy, J. concurring (quoting *Shaw v. Hunt*, 526 U.S. at 980). The point of strict scrutiny is to avoid permitting States, in good faith or bad, from creating these constitutional harms. This essential purpose of strict scrutiny would be defeated were States permitted to invoke an incorrect interpretation of the Voting Rights Act as a compelling purpose. That is why the Supreme Court has never permitted States to do so. Just as a State cannot legally invoke a compelling interest in remedying "societal discrimination" as a justification for the use of race in government programs, *Croson*, 488 U.S. at 505 (1989), Alabama cannot invoke complying with a fundamentally flawed view of Section 5 as a compelling justification.

In this case, the Supreme Court has determined that Alabama relied on a fundamentally incorrect legal interpretation of Section 5. Alabama's critical failing here is a pure error of law.

Alabama simply misconstrued Section 5 and used race in the service of trying to implement that incorrect legal understanding. Instead of asking what black-populations levels would be necessary to preserve the ability to elect, as Section 5 actually requires, Alabama re-created the BPP levels of the prior district, to the extent feasible, for their own sake. There is no compelling purpose for the use of race in this way. Just as the Court held unconstitutional Georgia's use of race in *Miller* because that use was not "properly grounded in Section 5," *Shaw v. Hunt*¸ 717 U.S. at 913, Alabama's use of race in all its majority-black districts is not "properly grounded in Section 5."

Moreover, Alabama cannot even say – as Georgia could in *Miller* – that its use of race was required by the DOJ, even if not by Section 5. The Supreme Court's decision makes clear that *neither* Section 5 nor the DOJ implementation of Section 5 requires re-creating BPPs for their own sake. Indeed, the Court went even further and said that any such requirement "can raise constitutional concerns." Slip op. 21. If complying with the DOJ's incorrect interpretation of Section 5 cannot provide a compelling interest, surely Alabama's compliance with its own incorrect interpretation of the Section – one that is actually contrary to DOJ interpretation and implementation -- cannot provide a compelling interest for Alabama's use of race here.

Thus, no need exists for this Court to assess whether the districts are narrowly tailored to complying with a legally incorrect interpretation of Section 5. Even if the districts were perfectly tailored to complying with Alabama's incorrect interpretation of Section 5, they would still be unconstitutional.

B. The Use of Race is Also Not Narrowly Tailored.

This Court need not even reach the question of narrow tailoring because Alabama has not and cannot show that it had a "compelling interest" to justify its use of race pursuant to its legally erroneous understanding of Section 5's requirements. If this Court nonetheless concludes it is necessary to reach the narrow-tailoring question, the Court should also conclude that none of the districts is narrowly tailored. The "strong-basis-in-evidence" standard requires that the institution involved, here the Alabama legislature, have that strong basis in evidence "'*before* it embarks on an affirmative-action program,'" *Shaw v. Hunt*, 517 U.S. at 910 (quoting 517 U.S. at 910 (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 277 (plurality opinion)). If compliance with federal anti-discrimination laws, such as Section 5, is to provide an adequate justification under strict scrutiny, Alabama must have had a "strong basis in evidence" for its conclusion that it would be liable under Section 5 (or other anti-discrimination law) had it not used race in the way it did.

In the context of Section 5, this does not require "that a legislature guess precisely what percentage reduction a court of the Justice Department might eventually find to be retrogressive." *Alabama,* at 1273. But if narrow tailoring requires anything, it requires more than that Alabama simply aim to hit specific racial targets as mere numbers, with no thought at all about whether those targets remain necessary to preserve the minority community's ability to elect. Yet that, of course, is precisely what the Supreme Court has already concluded Alabama did here. As the Supreme Court concluded, Alabama "asked the wrong question with respect to narrow tailoring," because Alabama did not correctly understand the legal meaning of "retrogression." Id. at 1274. . *Before* it embarked on race-based districting of these districts,

Alabama had to have a strong basis in evidence for believing its use of race was necessary to preserve *the ability to elect* in any particular district. But Alabama did not have that evidence because that was not the question the redistricters asked in designing these districts. A reapportionment plan is not "narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw v. Reno*, 509 U.S. 630, 655 (1983). As the Supreme Court held, Alabama went well beyond that point by asking the wrong question altogether and asserting that retrogression meant not "substantially reducing" the BP in any district.

This is not a case, in other words, in which Alabama made the determination that a 53% BPP (or any other BPP) was required to preserve the ability to elect in any specific district, in any specific region of the state, or in general as a statewide matter. The ADC is not second guessing Alabama for not getting the ability to elect figure precisely right; Alabama's problem under strict scrutiny is that it simply did not ask this question at all before using race as a predominant factor in the design in each and every black-majority district.

In this case, Alabama did not make any considered judgment or analysis of the ability-to-elect issue. The record is clear on this point and no real dispute exists about it. As the redistricters testified consistently, they undertook no examination of the electoral viability of any district; they did not consider any factor such as voting age population, voter registration, socio-economic factors, or anything other than the black percentage of total population in that district – even when the district had been "moved" to another, non-contiguous county. Indeed, Sen. Dial admitted that the black percentage in Senate District 26 was far in excess of that necessary for the ability of black voters to elect a representative of their choice.

This Court need not reach the narrow-tailoring issue, but if it does, it should conclude that Alabama's use of race was not narrowly tailored, in any of the black-majority districts, to compliance with Section 5.

IV. The Court Should Reject Any Effort to Salvage Any One of These Districts Through Post-Hoc Ability-to-Elect Speculations.

Alabama might seek to argue, as it did in the Supreme Court, that "at least some of the majority-black districts have the right black population, regardless of how that population arrived there." AL Br. 26. In other words, had Alabama made ability-to-elect judgments, it would have re-populated at least some of these districts at the same BPP level as they ended up at under Alabama's actual policy of not substantially reducing the BPPs in all these districts. In other words, Alabama would have made "the same decision" had it employed the correct legal rule under Section 5.

Any counterfactual argument of this sort is inappropriate under strict scrutiny – and all the moreso in the context of racial redistricting. As already noted, strict scrutiny requires that Alabama have a "strong-basis-in-evidence" for its specific use of race "'*before* it embarks on" racial redistricting. *Hunt*, 517 U.S. at 910 (quoting 517 U.S. at 910 (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 277 (plurality opinion)). Because Alabama did not have that basis in advance for judging what was reasonably necessary to preserve the ability to elect, strict scrutiny precludes the State from invoking such an argument after the fact. In addition, Alabama has not created in this litigation even any after-the-fact record of what the ability-to-elect actually requires under current conditions. As this Court recognized in its prior opinion, the record supports no determination one way or the other regarding the BPP necessary to preserve the ability to elect in any specific district or region of the state or statewide. Under strict scrutiny,

Alabama would also, of course, bear the burden of proof on any such counterfactual argument that it would have made "the same decision" for any particular district. "To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Miller v. Johnson*, 515 U.S. 900, 920 (1995). But even more importantly, it defies logic to try to apply this approach to redistricting. Unlike an employment decision involving a single individual, redistricting involves hundreds of interlocking decisions. The counterfactual policy Alabama would have employed to get to the "same" outcome in district A would have to be a policy the state would have applied in a consistent, non-pretextual way to all the other districts in the state. A policy of keeping counties intact to the maximum extent possible might produce in district A the "same" black population level, but it would also change the design of that district along many other dimensions -- just as importantly, such a consistently-applied policy would also change the design of other districts as well. No intelligible way exists to apply this counterfactual approach to redistricting, or to "create" one district after the fact, in isolation from all the other districts in the plan. The Supreme Court has never applied such a counterfactual approach in any redistricting case.

Indeed, the Supreme Court in *Shelby County* rejected this form of argument when the Court held irrelevant to the facial challenge there whether Alabama or any one particular State or jurisdiction could conceivably be covered under a different Section 4 coverage formula. The same principle applies here. Alabama can take race into account to comply with the VRA, but it must do so based on what "current conditions" require to preserve the ability to elect.

* * *

Writing for the Court in *Miller v. Johnson*, Justice Kennedy stated: "It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids." 515 US at 927-28. But that, by their own direct, consistent, and uniform testimony is precisely what Alabama's redistricters did here in using race to design each black-majority district *not* for the purposes the VRA authorizes – to preserve the ability to elect – but for the purpose of simply re-creating, to the extent feasible, the BPPs in each district. As the direct and circumstantial evidence show, race was the predominant factor in the design of each BMD in the House and Senate plans. Because that use of race lacks the compelling justification and narrow tailoring that strict scrutiny requires, Alabama violated the Fourteenth Amendment in the way it designed each of these districts.

CONCLUSION

For the foregoing reason, this Court should hold that the Alabama Democratic Conference has standing to raise its claims in this action, and that State of Alabama violated the Fourteenth Amendment with respect to Senate Districts 18, 19, 20, 23, 24, 26, 28, and 33; and House Districts 19, 32, 52, 53, 54, 55, 56, 57, 58, 59, 60, 67, 68, 69, 70, 71, 72, 76, 77, 78, 82, 83, 84, 85, 97, 97, 99, and 103.

Consistent with this Court's Post-Remand Scheduling Order, this brief addresses the substantive liability phase of this case only and does not address any remedial issues.

Respectfully submitted this 12th day of June, 2015.

s/ James H. Anderson
JAMES H. ANDERSON [ASB-4440-R73J]
JOEL T. CALDWELL [ASB-4625-Z36E]
COPELAND, FRANCO, SCREWS & GILL, P.A.
P.O. Box 347
Montgomery, AL. 36101-0347
(334) 834-1180/(334) 834-3172 Fax
anderson@copelandfranco.com
caldwell@copelandfranco.com

WILLIAM F. PATTY [ASB-4197-P52W]
THE GARDNER FIRM, P.C.
P.O. Box 991
Montgomery, AL. 36101-0991
(334) 416-8212/(334) 265-7134 (fax)
bpatty@thegardnerfirm.com

WALTER S. TURNER [ASB-6307-R49W]
2222 Narrow Lane Road
Montgomery, AL 36106
334-264-1616; wsthayer@juno.com

JOHN K. TANNER [DC BAR # 318873]
3743 Military Road, NW
Washington, DC 20015
202-503-7696; john.k.tanner@gmail.com
Appearing pro hac vice

JOE M. REED [ASB-7499-D59J]
Joe M. Reed & Associates, LLC
524 S Union St.
Montgomery, AL 36104-4626
T(334) 834-2000; F (334) 834-2088
joe@joereedlaw.com

RICHARD H. PILDES
40 Washington Square South
New York, NY 10012-1005
pildesr@juris.law.nyu.edu
Pro hac vice admission pending

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 12, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to:

Luther Strange, Attorney General of Alabama
By: John J. Park, Jr.
Deputy Attorney General
Strickland, Brockington Lewis LLP
Midtown Proscenium Suite 2200
1170 Peachtree Street NE
Atlanta, GA 30309
Telephone: 678.347.2200 / Facsimile: 678.347.2210
Email: jjp@sbllaw.net

Andrew L. Brasher
James W. Davis
Misty S. Fairbanks Messick
William G. Parker, Jr.
Megan A. Kirkpatrick
Office of the Attorney General
State of Alabama
P.O. Box 300152
Montgomery, Alabama 36130-0152
Telephone: 334-242-7300/ Facsimile: 334-353-8440
Email: abrasher@ago.state.al.us; jimdavis@ago.state.al.us; mmessick@ago.state.al.us
mkirkpatrick@ago.state.al.us

David B. Byrne, Jr.
Legal Advisor to Governor Robert Bentley
OFFICE OF THE GOVERNOR
Alabama State Capitol
600 Dexter Avenue, Suite NB-5
Montgomery, AL. 36130
T: (334) 242-7120/F: (334) 242-2335
Email: david.byrne@governor.alabama.gov; pam.chesnutt@governor.alabama.gov

Algert S. Agricola, Jr.
RYALS, DONALDSON & AGRICOLA, P.C.
60 Commerce Street, Suite 1400
Montgomery, AL. 36104
T: (334) 834-5290/F: (334) 834-5297
Email: aagricola@rdafirm.com; aandrews@rdafirm.com

Edward Still
429 Green Springs Hwy., Suite 16-304
Birmingham, AL 35209
205-320-2882; fax 205-320-2882
Email: still@votelaw.com

James U. Blacksher
P.O. Box 636
Birmingham AL 35201
205-591-7238; Fax: 866-845-4395
Email: jblacksher@ns.sympatico.ca

U.W. Clemon
WHITE ARNOLD & DOWD P.C.
2025 Third Avenue North, Suite 500
Birmingham, AL 35203
Phone: (205)-323-1888; Fax: (205)-323-8907
Email: uwclemon@waadlaw.com

J. Dorman Walker, Jr.
Balch & Bingham, LLP
P.O. Box 78
Montgomery, AL 36101-0078
Phone: (334) 834-6500; Fax: (334) 269-3115
Email: dwalker@balch.com

s/ James H. Anderson
OF COUNSEL

APPENDIX A

HOUSE

House District/Precincts	White	Black
HD 19		
	White	**Black**
Blackburn Chapel CP Church	1,068	781
Chapman Middle School	6	113
Chase Valley United Methodist Church	1,528	949
Church of Christ Meridianville	30	72
Grace United Methodist Church	569	372
Harvest Baptist Church	2,093	1,292
Mad. Co. Teacher Resource Center	145	37
Meridianville First Baptist Church	377	378
Pineview Baptist Church	3,643	2,010
Sherwood Baptist Church	515	801
Total included in black district	**9,974**	**6,805**
Blackburn Chapel CP Church	122	23
Chapman Middle School	3,379	197
Chase Valley United Methodist Church	979	87
Church of Christ Meridianville	3,147	448
Grace United Methodist Church	3,141	1,436
Harvest Baptist Church	755	373
Mad. Co. Teacher Resource Center	4,184	747
Meridianville First Baptist Church	1,835	574
Pineview Baptist Church	2,738	805
Sherwood Baptist Church	2,523	716
Total included in white district	**22,803**	**5,406**
HD 32		
	White	**Black**
Calhoun County		
2d Presbyterian Mental Health/Golden Spr. Anniston	1,647	1,436
Eulaton/Bynum/West Park Baptist	1,929	328
Talladega County		
Bethel Baptist	323	1,041

Eastaboga Community Center-Old Lincoln	1,908	1,022
Malbra-Kingston Baptist-Central High	2,082	6,064
Old Mumford	133	409
Renfroe Fire Hall	950	966
Talladega National Guard	1,162	1,958
Waldo City Hall	28	29
Winterboro Volunteer Fire	422	1,214
Total included in black district	**10,584**	**14,467**
Calhoun County		
2d Presbyterian Mental Health/Golden Spr.	6,255	1,027
Anniston	1,954	244
Eulaton/Bynum/West Park Baptist	11,908	926
Talladega County		
Bethel Baptist	227	390
Eastaboga Community Center-Old Lincoln	4,632	754
Malbra-Kingston Baptist-Central High	310	48
Old Mumford	2,475	329
Renfroe Fire Hall	2,429	210
Talladega National Guard	5,458	1,278
Waldo City Hall	835	128
Winterboro Volunteer Fire	1,647	285
Total included in white district	**38,130**	**5,619**

HD 52	**White**	**Black**
Jefferson Co		
Birmingham Botanical	380	4
Shades Cahaba Elem	1,078	69
Total included in black district	**1,458**	**73**
Jefferson Co		
Birmingham Botanical	590	8
Shades Cahaba Elem Sch	2,583	100
Total included in white district	**3,173**	**108**

HD 53

	White	Black
Madison Co		
Eastside Comm Ctr	52	84
Fire and Rescue Acad	837	1,710
Ridgecrest School	1,289	1,079
Sr Ctr	1,353	1,032
University Place School	1,603	1,780
Westlaw Mid Sch	440	116
Total included in black district	**5,574**	**5,801**
Eastside Comm Ctr	419	63
Fire and Rescue Acad	506	68
Ridgecrest School	1,744	288
Sr Ctr	155	15
University Place	1,312	221
Westlaw Mid Sch	794	363
Total included in white district	**4,930**	**1,018**

HD 54

	White	Black
Jefferson Co		
Clearview Bapt Ch	642	628
Irondale Sr Cit Bldg	1,667	621
Mountain View Bapt Ch	584	410
Total included in black district	**2,893**	**1,659**
Jefferson Co		
Clearview Bapt Ch	3,496	801
Irondale Sr Cit Bldg	1,532	2,596
Mountain View Bapt Ch	4,759	1,440
Total included in white district	**9,787**	**4,837**

HD 56

	White	Black
Jefferson Co		
Canaan Bapt Ch	1,088	180
Hunter Street Bapt Ch	1,142	337

Total included in black district	**2,239**	**517**
Jefferson Co		
Canaan Bapt Ch	2,728	779
Hunter Street Bapt Ch	8,050	830
Total included in white district	**10,778**	**1,609**

HD 57

	White	**Black**
Jefferson Co		
Pleasant Grove First Bapt Ch	3,238	3,450
Total included in black district	**3,238**	**3,450**
Jefferson Co		
Pleasant Grove First Bapt Ch	2,223	631
Total included in white district	**2,223**	**631**

HD 58

	White	**Black**
Jefferson Co		
Clearview Bapt Ch	487	232
Pinson Unit Meth	100	334
Total included in black district	**587**	**566**
Jefferson Co		
Clearview Bapt Ch	3,496	801
Pinson Unit Meth	2,694	557
Total included in white district	**6,190**	**1,358**

HD 59

	White	**Black**
Jefferson Co		
Pinson United Meth	616	2,148
Total included in black district	**616**	**2,148**
Jefferson Co		
Pinson Unit Meth	2,694	557
Total included in white district	**2,694**	**557**

HD 60

	White	Black
Jefferson Co		
Fultondale Sr Citizen's Ctr	663	139
Gardendale Civi Ctr	297	295
Total included in black district	**960**	**434**

Jefferson Co		
Fultondale Sr Citizen's Ctr	3,136	316
Gardendale Civic Ctr	12,504	838
Total included in white district	**15,640**	**1,154**

HD 68

	White	Black
Baldwin Co		
Tensaw Volunteer Fire Dept	75	269
Vaughn Comm Ctr	97	395
Clarke Co		
BASHI Meth Ch	1,339	1,056
Fulton City Hall	28	45
Jackson City Hall	629	1,816
Old Engineers Bldg	210	279
Overstreet Grocery	79	287
Skipper Fire Station	112	180
Thomasville Nat Guard	264	1,146
Conecuh Co		
Brownsville Fire Dept	18	22
Castleberry Fire Dept	32	191
Lyeffion Fire Dept	88	51
Nazarene Bapt Ch	128	283
Repton City Hall	176	300
Second Mount Zion Ch	18	51
Marengo Co		
Cornerstone Ch	74	606
Dixon's Mill	133	1,224
Octagon	3	30
Thomaston	168	400
VFW	341	589
Monroe Co		
Days Inn/Ollie	177	244

Excel/Coleman	84	83
Frisco City FD	597	652
Mexia Fire Dept	291	223
Monroeville Armory	1,191	1,036
Monroeville Housing Auth	446	1,243
Oak Grove Bapt	13	9
Purdue Hill	67	41
Shiloh/Grimes	20	66
Washington Co		
Carson/Preswick	25	207
Cortelyou	9	176
McIntosh Comm Ctr	12	747
McIntosh Voting House	91	360
Total included in black district	**7,035**	**14,307**
Baldwin Co		
Tensaw Volunteer Fire Dept	10	2
Vaughn Comm Ctr	240	43
Clarke Co		
BASHI Meth Ch	1,671	226
Fulton City Hall	865	47
Jackson City Hall	209	47
Old Engineers Bldg.	2,281	786
Overstreet Grocery	228	50
Skipper Fire Station	3,050	797
Thomasville Nat Guard	131	11
Conecuh Co		
Brownsville Fire Dept	218	159
Castleberry Fire Dept	665	54
Lyeffion Fire Dept	312	88
Nazarene Bapt Ch	6	47
Repton City Hall	289	45
Second Mount Zion Ch	26	70
Marengo Co		
Cornerstone Ch	806	298
Dixon’s Mill	215	17
Octagon	169	48
Thomaston	156	30
VFW	280	28
Monroe Co		

Days Inn/Ollie	331	42
Excel/Coleman	3,006	263
Frisco City FD	91	0
Mexia Fire Dept	164	12
Monroeville Armory	439	41
Monreoville Housing Auth	46	0
Oak Grove Bapt	64	0
Purdue Hill	18	0
Shiloh/Grimes	25	1
Washington Co		
Carson/Preswick	270	56
Cortelyou	203	96
McIntosh Comm Ctr	18	8
McIntosh Voting House	401	82
Total included in white district	**16,903**	**3,494**

HD 69

	White	**Black**
Autauga County		
Booth Volunteer Fire Department	566	229
Safe Harbor Ministries	263	245
Montgomery County		
5B Snowdouns Womens Club	51	3
5D Ramer Library	2	61
5E Fitzpatrick Elementary	331	2276
Total included in black district	**1,213**	**2,812**

Autauga County		
Booth Volunteer Fire Department	630	133
Safe Harbor Ministries	5655	821
Montgomery County		
5B Snowdouns Womens Club	51	3
5D Ramer Library	437	269
5E Fitzpatrick Elementary	627	592
Total included in white district	**7,400**	**1,818**

HD 70

	White	Black
Bama Mall	2,375	3,142
Holt Armory	1,178	2,471
Jayces Park	2,536	3,857
MacFarland Mall	5,680	7,119
Peterson Methodist Church	27	301
University Mall	39	28
Total included in black district	**11,835**	**16,918**
Bama Mall	460	25
Holt Armory	1,525	354
Jayces Park	29	0
MacFarland Mall	2,330	613
Peterson Methodist Church	2,027	173
University Mall	248	153
Total included in white district	**6,619**	**1,318**

HD 71

	White	Black
Choctaw County		
Butler-Lavaca	11	120
Crossroads-Halsell	108	471
Lisman-Pushmataha	90	817
Riderwood-Rock Spring	21	140
Greene County		
West Greene Fire Department	11	1
Marengo County		
Jefferson	86	544
Rangeline	16	1
Pickens County		
Aliceville 2 National Guard Armory	217	1,155
Carrollton 4 Service Center	396	677
Tuscaloosa County		
Bama Mall	156	156
County Courthouse	45	116
Frierson-Big Sandy	1,037	706

Northport Community Center	2,291	1,700
Total included in black district	**4,485**	**6,604**
Choctaw County		
Butler-Lavaca	1,985	998
Crossroads-Halsell	15	0
Lisman-Pushmataha	47	61
Riderwood-Rock Spring	361	195
Greene County		
West Greene Fire Department	11	1
Marengo County		
Jefferson	75	3
Rangeline	243	74
Pickens County		
Aliceville 2 National Guard Armory	345	1,337
Carrollton 4 Service Center	371	176
Tuscaloosa County		
Bama Mall	460	25
County Courthouse	4,672	741
Frierson-Big Sandy	2,239	1,031
Northport Community Center	320	112
Total included in white district	**11,144**	**4,754**

HD 72

	White	**Black**
Bibb County		
Brent City Hall 13	1,096	2,435
Brent National Guard Armory	407	285
Eoline Fire Department 3	390	9
Eoline Fire Department 12	97	87
Rock Building 5	327	81
Rock Building 14	172	211
Total included in black district	2,489	3,108
Brent City Hall	63	4
Brent National Guard Armory	1,921	422
Eoline Fire Department 3	88	0

Eoline Fire Department 12	684	55
Rock Building 5	1,278	112
Rock Building 14	49	30
Total included in white district	**4083**	**623**

HD 76

	White	**Black**
5M Bell Road YMCA	1,879	1,918
Total included in black district	**1,879**	**1,918**
5m Bell Road YMCA	3,835	827
Total included in white district	**3,835**	**827**

HD 77

	White	**Black**
1B Vaughn Park Church of Christ	2,482	3,802
3A Capitol Heights Baptist Church	222	236
4N Highland Avenue Baptist Church	834	1,347
Total included in black district	**3,538**	**5,385**
1B Vaughn Park Church of Christ	2,578	512
3A Capitol Heights Baptist Church	2,013	876
4N Highland Avenue Baptist Church	4	0
Total included in white district	**4,595**	**1,388**

HD 78

	White	**Black**
3F Goodwyn Community Center	259	436
4K Chisholm Community Center	974	1,965
Total included in black district	**1,233**	**2,401**
3F Goodwyn Community Center	5,404	1,207
4K Chisholm Community Center	10	0
Total included in white district	**5,414**	**1,207**

HD 82

	White	Black
Lee County		
Auburn	4,688	3,865
Beauregard School	1,211	418
Opelika B	1,663	416
Tallapoosa County		
Dadeville National Guard Armory	850	1,389
Mary's Cross Road Voting House	85	164
Wall Street Community Center	507	817
Total included in black district	**9,004**	**7,069**

Lee County		
Auburn	33,614	5,261
Beauregard School	753	75
Opelika B	8,165	1,015
Tallapoosa County		
Dadeville National Guard Armory	920	170
Mary's Cross Road Voting House	138	118
Wall Street Community Center	229	51
Total included in white district	**43,829**	**6,690**

HD 83

	White	Black
Lee County		
Beauregard School	1,554	573
Lee County Snacks	1,274	696
Old Salem School	188	143
Opelika B	6,258	10,704
Smiths Station Senior Center	220	138
Russell County		
Austin Sumbry Park	495	271
Crawford Fire Department	1,292	482
CVCC Voting District	741	1,717
Ladonia Fire Department	7	61
National Guard Armory	1,257	2,747
Total included in black district	**13,286**	**17,532**

Lee County		
Beauregard School	1,554	573
Lee County Snacks	103	3
Old Salem School	1,402	142
Opelika B	8,165	1,015
Smiths Station Senior Center	5,261	1,080
Russell County		
Austin Sumbry Park	81	56
Crawford Fire Department	1,716	313
CVCC Voting District	16	9
Ladonia Fire Department	6,139	922
National Guard Armory	2,592	1,095
Total included in white district	**27,029**	**5,208**

HD 85

	White	**Black**
Doug Tew Community Center	2,181	2,040
Farm Center	495	767
Johnson Homes	314	4,403
Kinsey	378	920
Library	1,098	2,890
Lincoln Community Center	223	1,037
Vaughan Blumberg Center	1,503	1,493
Wiregrass Park	2,813	4,190
Total included in black district	**9,005**	**17,740**
Doug Tew Community Center	2,908	262
Farm Center	3,358	1,188
Johnson Homes	129	8
Kinsey	758	91
Library	3,278	270
Lincoln Community Center	687	122
Vaughan Blumberg Center	297	68
Wiregrass Park	2,456	497
Total included in white district	**13,871**	**2,506**

HD 97

	White	**Black**

Chickasaw Auditorium	2,743	1,143
Saraland Civic Center	161	101
Total included in black district	2,904	1,244
Chickasaw Auditorium	163	79
Saraland Civic Center	1,982	237
Total included in white district	**2,145**	**316**

HD 98

	White	**Black**
Chickasaw Auditorium	942	827
College Park Baptist Church	1,106	878
First Baptist Church of Axis	1,790	496
Havenwood Baptist Church	42	28
Little Welcome Baptist Church	185	1,238
Mt. Vernon Civic Center	415	859
Saraland Civic Center	1,246	118
Satsuma City Hall	369	403
Shelton Beach Road	2,234	593
Turnerville Community	1,167	96
Total included in black district	**9,496**	**5,536**
Chickasaw Auditorium	163	79
College Park Baptist Church	156	0
First Baptist Church of Axis	1,151	19
Havenwood Baptist Church	3,938	80
Little Welcome Baptist Church	87	19
Mt. Vernon Civic Center	520	111
Saraland Civic Center	1,982	237
Satsuma City Hall	3,167	168
Shelton Beach Road	695	27
Turnerville Community	2,994	86
Total included in white district	**14,853**	**826**

HD 99

	White	Black
Moffett Road Assembly of God	1,567	3,646
Azalea City Church of Christ	935	836
Friendship Missionary Baptist Church	99	208
Little Welcome Baptist Church	1,059	2,264
Semmes First Baptist Church	393	437
St. John United Methodist	1,571	2,572
University Church of Christ	508	927
Total included in black district	**6,140**	**10,870**
Moffett Road Assembly of God	387	181
Azalea City Church of Christ	694	133
Friendship Missionary Baptist Church	158	7
Little Welcome Baptist Church	87	19
Semmes First Baptist Church	5,277	746
St. John United Methodist	505	202
University Church of Christ	1,323	594
Total included in white district	**8,431**	**1,882**

HD 103

	White	Black
The Mug Café	14	84
Bay of the Holy Spirit Church	2,029	2,705
Kate Shepard School	316	304
First Independent Methodist	2	119
Dodge school	1	123
Hollingers Island School	1,482	95
St. Philip Neri Church	62	186
Total included in black district	**3,906**	**3,616**
The Mug Café	2,707	1,358
Bay of the Holy Spirit Church	1,626	739
Kate Shepard School	2,058	176
First Independent Methodist	3,815	1,117
Dodge school	5,018	1,370

Hollingers Island School	761	31
St. Philip Neri Church	3,252	181
Total included in white district	**19,237**	**4,972**

APPENDIX B

SENATE

Senate District/Precincts	White	Black
SD 18		
Homewood Pub Lib	399	399
Mtn Brook City Hall	844	60
B'ham Botanical Gardens	37	0
Total included in black district	**1,280**	**459**
Homewood Pub Lib	5,952	170
Mtn Brook City Hall	3,903	9
B'ham Botanical Gardens	933	12
Total included in white district	**10,788**	**191**
SD19		
Valley Creek Bapt Ch	327	130
Johns Comm Ctr	650	130
Maurice L West Comm Ctr	1,049	493
Hillview Fire Station #1	481	1,762
Total included in black district	**2,507**	**2,515**
Valley Creek Bapt Ch	2,381	300
Johns Comm Ctr	641	29
Maurice L West Comm Ctr	541	30
Hillview Fire Station #1	425	14
Total included in white district	**3,988**	**373**
SD 20		
Trussville 1st Bapt Ch	327	347
Mtn View Bapt Ch	5,216	1,849
Gardendale Civi Ctr	914	498
Pinson UMC	1,318	2,785
Fultondale 1st Bapt Ch	1,259	894
Total included in black district	**9,034**	**6,373**
Trussville 1st Bapt Ch	8,695	366
Mtn View Bapt Ch	127	1
Gardendale Civi Ctr	11,887	635
Pinson UMC	2,092	254
Fultondale 1st Bapt Ch	1,490	94
Total included in white district	**21,291**	**1,350**

SD23

Clarke Co.		
Jackson City Hall	634	1,819
Overstreet Grocery	79	287
Skipper Fire Station/Jackson Nat Guard/Jackson Fire Dept	123	184
Old Engineers Bldg	236	297
T'ville Nat Guard Armory	190	1,133
Fulton City Hall	152	303
Total included in black district	**1,414**	**4,023**
Jackson City Hall	204	44
Overstreet Grocery	228	50
Skipper Fire Station/Jackson Nat Guard/Jackson Fire Dept	3,039	793
Old Engineers Bldg	2,255	768
T'ville Nat Guard Armory	205	24
Fulton City Hall	841	48
Total included in white district	**6,772**	**1,727**
Conecuh Co.		
Belleville Bapt Ch	145	563
Castleberry Fire Dept-1	32	191
Paul Fire Dept	58	79
Herbert FD	60	36
Bermuda Comm House	79	91
Total included in black district	**374**	**960**
Belleville Bapt Ch	51	0
Castleberry Fire Dept-1	665	54
Paul Fire Dept	120	2
Herbert FD	129	7
Bermuda Comm House	200	51
Total included in white district	**1,165**	**114**
Monroe Co.		
Chrysler/Eliska/McGill	5	19
Perdue Hill Masonic Lodge	57	271
Purdue Hill	36	34
Bethel Bapt House	266	1,266
Days Inn/Ollie	18	71
Monroeville Armory	695	784
Mexia Hire Station	0	12
Monroeville Housing Auth	446	1,243
Monroe Beulah Ch	20	51

Shiloh/Grimes	23	66
Total included in black district	1,566	3,817
Chrysler/Eliska/McGill	560	110
Perdue Hill Masonic Lodge	141	39
Purdue Hill	49	7
Bethel Bapt House	38	0
Days Inn/Ollie	490	215
Monroeville Armory	935	293
Mexia Fire Station	699	99
Monroeville Housing Auth	46	0
Monroe Beulah Ch	119	19
Shiloh/Grimes	21	1
Total included in white district	**3,098**	**783**
Washington Co.		
Malcolm Voting House	6	18
Mcintosh Comm Ctr	30	755
Mcintosh Voting House	92	384
Cortelyou	127	272
Cardon/Preswick	25	207
Total included in black district	**280**	**1,636**
Malcolm Voting House	176	343
Mcintosh Comm Ctr	0	0
Mcintosh Voting House	400	58
Cortelyou	85	0
Carson/Preswick	270	56
Total included in white district	**931**	**457**
SD23 total included in black	**3,634**	**10,436**
SD23 total included in white district	**11,966**	**3,081**
SD 24		
Choctaw Co.		
Butler-Lavaca-Mt. Sterlin	1,855	1,111
Bogueloosa	702	251
Toxey-Gilbertown-Melvin-	388	344
Branch-Bladon Springs-	59	326
Silas-Souwilpalsney-Toomey	818	850
Lusk-Pleasant Valley-Ararat	14	41
Riderwood-Rock Springs	339	335
Total included in black district	**4,175**	**3,258**

Butler-Lavaca-Mt. Sterlin	141	7
Bogueloosa	391	29
Toxey-Gilbertown-Melvin-	385	36
Branch-Bladon Springs-	43	10
Silas-Souwilpalsney-Toomey	237	0
Lusk;Pleasant Valley-Ararat	755	32
Riderwood-Rock Springs	43	0
Total included in white district	**1,995**	**114**
Clarke Co.		
Bashi Methodist Ch	1,041	1,012
Total included in black district	**1,041**	**1,012**
Bashi Methodist Ch	1,969	270
Total included in white district	**1,969**	**270**
Hale Co.		
Havanna-A	70	52
Valley-B	23	34
Valley-C	8	14
Total included in black district	**101**	**100**
Havanna-A	47	6
Valley-B	29	7
Valley-C	44	13
Total included in white district	**120**	**26**
Pickens Co.		
Carrollton 4 Service Ctr	155	603
Total included in black district	**155**	**603**
Carrollton 4 Service Ctr	612	250
Total included in white district	**612**	**250**
Tuscaloosa Co.		
Jayces Park	1,948	3,681
Holt Armory	1,895	2,543
Peterson Meth Ch	331	340
McFaland Mall	5,600	6,923
Hillcrest HS	645	311
Fosters-Ralph Fire Dept	1,730	977
Total included in black district	**12,149**	**14,775**

Jayces Park	617	176
Holt Armory	808	282
Peterson Meth Ch	1,723	134
McFaland Mall	2,410	809
Hillcrest HS	6,463	2,385
Foster-Ralph Fire Dept	239	47
Total included in white district	12,260	3,833
SD24 total included in black	**17,621**	**19,748**
SD24 total included in white district	**16,956**	**4,493**

SD26

1A Cloverdale Comm Ctr	248	687
1B Vaughn Park Ch of Christ	2,273	3,322
1C Montg Museum of Fine Arts	941	2,651
1D Whitfield Memorial UMC	1,345	3,054
3F Goodwyn Comm Ctr	344	437
3G Alcazar Shrine Temple	336	1,755
5M Bell Road YMCA	251	532
Total included in black district	**5,738**	**12,438**
1A Cloverdale Comm Ctr	5,444	1,120
1B Vaughn Park Ch of Christ	2,787	992
1C Montg Museum of Fine Arts	2,085	1,335
1D Whitfield Memorial UMC	1,441	319
3F Goodwyn Comm Ctr	5,319	1,206
3G Alcazar Shrine Temple	709	609
5M Bell Road YMCA	5,463	2,213
Total included in white district	**23,248**	**7,794**

SD28

Houston Co.

Kinsey	774	969
Johnson Homes	278	4,367
Farm Ctr	223	666
Doug Tew Comm Ctr	1,385	1,626
Library	551	2,595
Lincoln Comm Ctr	202	1,027
Wiregrass Park	1,737	3,490
Vaughn Blumberg Ctr	1,167	1,329
Total included in black district	**6,317**	**16,069**

Kinsey	362	42
Johnson Homes	165	44
Farm Ctr	3,630	1,289
Doug Tew Comm Ctr	3,704	676
Library	3,990	556
Lincoln Comm Ctr	708	132
Wiregrass park	3,532	1,197
Vaughn Blumberg Ctr	633	232
Total included in white district	**16,724**	**4,168**
Lee Co.		
Waverly	32	180
Loachapoka	277	1,471
Auburn	918	2,578
Beuaregard School	42	25
Marvyn	167	240
Total included in black district	**1,436**	**4,494**
Waverly	198	53
Loachapoka	1,148	249
Auburn	39,384	6,548
Beuaregard School	3,514	1,042
Marvyn	195	48
Total included in white district	**44,439**	**7,940**
Russell Co.		
Roy Martin Ctr	1,601	1,115
Ladonia Fire Dept	7	61
Seale Courthouse	705	556
Nat Guard Armory	1,997	3,452
Austin Sumbry Park	294	279
Total included in black district	**4,604**	**5,463**
Roy Martin Ctr	4,724	818
Ladonia Fire Dept	6,139	922
Seale Courthouse	750	152
Nat Guard Armory	1,852	390
Austin Sumbry Park	282	48
Total included in white district	**13,747**	**2,330**
SD28 total included in black	**12,357**	**26,026**
SD28 total included in white	**74,910**	**14,438**

SD33		
Satsuma City Hall	0	0
Chickasaw Auditorium	1,942	1,594
Morningside Elem	922	3,647
Riverside Ch of the Nazarene	503	709
St. Andrews Episcopal Ch	1,438	1,496
Total included in black district	**4,805**	**7,446**
Satsuma City Hall	3,536	571
Chickasaw Auditorium	1,906	455
Morningside Elem	340	92
Riverside Ch of the Nazarene	425	38
St. Andrews Episcopal Ch	378	22
Total included in white district	**6,585**	**1,178**

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

DAWN CURRY PAGE, et al.,

Plaintiffs,

Civil Action No. 3:13cv678

v.

VIRGINIA STATE BOARD OF ELECTIONS, et al.,

Defendants.

MEMORANDUM OPINION

DUNCAN, Circuit Judge:

In the political landscape prior to the Supreme Court's June 25, 2013, decision in Shelby County, Alabama v. Holder, 133 S. Ct. 2612 (2013), the Virginia legislature undertook the task of crafting United States congressional districts with the overarching goal of compliance with the Voting Rights Act of 1965 ("VRA") as it was then interpreted. In describing the methodology used in drawing the abstract lines currently under consideration, Delegate William Janis, the architect of that legislation, explained it thus:

> I focused on the [Third] Congressional District and ensuring, based on recommendations that I received from Congressman Scott[, the representative from the Third Congressional District,] and from all 11 members of the congressional delegation, Republican and Democrat--one of the paramount concerns and

> considerations that was not permissive and nonnegotiable under federal law and under constitutional precedent is that the [Third] Congressional District not retrogress in minority voter influence.
>
> And that's how the lines were drawn . . . . [T]he primary focus of how the lines in [the redistricting legislation] were drawn was to ensure that there be no retrogression in the [Third] Congressional District. Because if that occurred, the plan would be unlikely to survive a challenge either through the Justice Department or the courts because it would not comply with the constitutionally mandated requirement that there be no retrogression in the minority voting influence in the [Third] Congressional District.

Pls.' Trial Ex. 43, at 25.[1] Delegate Janis's efforts were successful. His proposed legislation was approved by the United States Department of Justice ("DOJ"), which found that it did not effect any retrogression in the ability of minorities to elect their candidates of choice.[2] As we explain below, however, the Supreme Court's Shelby County decision significantly altered the status quo.

Before turning to a description of the history of the litigation and an analysis of the issues it presents, we wish to

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[1] Because of Delegate Janis's key role as sponsor of the legislation at issue, we cite his views frequently.

[2] As we discuss in greater detail below, in distinguishing the case before us from that in Shaw v. Hunt (Shaw II), 517 U.S. 899 (1996), the dissent finds it significant that the legislative goal of maintaining minority voting strength in the Third Congressional District was not also articulated in the preclearance submission. With respect, we do not.

emphasize at the outset what we hope will be clear throughout. We imply no criticism of Delegate Janis or Defendants, and do not question that all attempted to act appropriately under the circumstances as they understood them to be at the time. We must nevertheless determine whether the Virginia legislation passes constitutional muster, particularly in the wake of Shelby County.

I. THE LITIGATION

Plaintiffs Dawn Curry Page, Gloria Personhuballah, and James Farkas[3] ("Plaintiffs") brought this action against Defendants Charlie Judd, Kimberly Bowers, and Don Palmer--in their respective official capacities of Chairman, Vice-Chair, and Secretary of the Virginia State Board of Elections[4]--and Intervenor-Defendants Eric Cantor, Robert J. Wittman, Bob Goodlatte, Frank Wolf, Randy J. Forbes, Morgan Griffith, Scott Rigell, and Robert Hurt[5]--all Congressmen in the Commonwealth of

[3] Named Plaintiff Dawn Curry Page was dismissed from this case via stipulation of dismissal on April 9, 2014. (ECF No. 79).

[4] Original Defendants, the Virginia State Board of Elections and Kenneth T. Cuccinelli, II, Attorney General of Virginia, were dismissed from this case via stipulation of dismissal on November 21, 2013. (ECF No. 14).

[5] Virginia Representatives David Brat and Barbara Comstock moved to intervene as additional Intervenor-Defendants on April 13, 2015. (ECF No. 146). We granted this motion on May 11, 2015. (ECF No. 165).

Virginia--(collectively, "Defendants")[6] challenging the constitutionality of Virginia's Third Congressional District as a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. On October 7, 2014, this court issued a ruling in which we concluded that compliance with Section 5 of the VRA ("Section 5"), and accordingly, consideration of race, predominated in the drawing of the congressional district boundaries, and that the redistricting plan could not survive the strict scrutiny required of race-conscious districting because it was not narrowly tailored. Page v. Va. State Bd. of Elections, No. 3:13-cv-678, 2014 WL 5019686 (E.D. Va. Oct. 7, 2014), vacated sub nom. Cantor v. Personhuballah, 135 S. Ct. 1699 (2015).

Intervenor-Defendants appealed this decision to the United States Supreme Court,[7] and on March 30, 2015, the Court vacated our judgment and remanded this case to us for reconsideration in

[6] Because Plaintiffs do not seek different remedies against Defendants and Intervenor-Defendants, we refer to them collectively unless the basis for a distinction is apparent.

[7] Pursuant to 28 U.S.C. § 1253, "any party may appeal to the Supreme 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." Because Plaintiffs brought this action under Section 5, it was "heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28." 52 U.S.C. § 10304(a) (formerly cited as 42 U.S.C. § 1973c).

light of Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015). Cantor, 135 S. Ct. 1699. Obedient to the mandate, we have reconsidered this case and, once again, conclude that Virginia's Third Congressional District is unconstitutional. We incorporate in this opinion the parts of our now-vacated opinion that are consistent with the Supreme Court's decision in Alabama.

Resolution of the issues before us involves an analysis of the interplay between the VRA and Virginia law governing voting rights and the redistricting process. We therefore begin by laying out the framework that will guide that analysis. We then set out the factual background and procedural history of this litigation, before proceeding to the issues at hand.

A. Voting Rights Act Background

A brief description of the history and purpose of the VRA, and its impact on Virginia, is a useful predicate for the discussion that follows. The VRA, passed in 1965, "was originally perceived as a remedial provision directed specifically at eradicating discriminatory practices that restricted blacks' ability to register and vote in the segregated South." Holder v. Hall, 512 U.S. 874, 893 (1994) (Thomas, J., concurring). The VRA "is a complex scheme of stringent remedies aimed at areas where voting discrimination

has been most flagrant." South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966), abrogated by Shelby Cnty., 133 S. Ct. 2612.

Section 4 of the VRA outlines "a formula defining the States and political subdivisions to which [the statute's] . . . remedies apply." Id. This "coverage formula" includes states or political subdivisions with the following characteristics: 1) as of November 1964, they maintained a test or device as a prerequisite for voting or registration; and 2) 1964 census data indicated that less than 50% of the voting-age population was registered to vote. See 52 U.S.C. § 10303(b)(formerly cited as 42 U.S.C. § 1973b). Section 5 contains specific redistricting requirements for jurisdictions deemed covered under Section 4. See id. § 10304(a).

In November 1964, Virginia met the criteria to be classified as a "covered jurisdiction" under Section 5. See id. § 10303-10304. As such, Virginia was required to submit any changes to its election or voting laws to the DOJ for federal preapproval, a process called "preclearance." See id. § 10304(a). To obtain preclearance, Virginia had to demonstrate that a proposed change had neither the purpose nor effect "of denying or abridging the right to vote on account of race or color." Id.

The legal landscape changed dramatically in 2013, when the Supreme Court ruled that Section 4's coverage formula, described

above, was unconstitutional. Shelby Cnty., 133 S. Ct. at 2631. The Court concluded that the formula, although rational in practice and theory when the VRA was passed in 1965, was no longer justified by current voting conditions. Id. at 2627. As a result of the invalidation of the coverage formula under Section 4, Virginia is no longer obligated to comply with the preclearance requirements of Section 5. See id. at 2631.

B. Factual Background

We turn now to the Virginia constitutional and statutory scheme. The Virginia Constitution requires the state legislature to reapportion Virginia's United States congressional districts every ten years based on federal census data. Districts must be "contiguous and compact territory . . . constituted as to give, as nearly as practicable, representation in proportion to the population of the district." Va. Const. art. II, § 6.

Virginia's Third Congressional District was first created as a majority African-American district in 1991. See Va. Code §§ 24.1-17.303 (1991); 24.1-17.303 (1992); 24.2-302 (1993). At that time, the Third Congressional District had an African-American population of 63.98%, and a black voting-age population ("BVAP," the percentage of persons of voting age who identify as African-American) of 61.17%. Moon v. Meadows, 952 F. Supp. 1141, 1146 (E.D. Va.), aff'd, 521 U.S. 1113 (1997).

The 2010 federal census showed that Virginia's population grew 13% between 2000 and 2010. Pls.' Trial Ex. 1, at 18. Because the growth was unevenly distributed, Virginia had to redraw its congressional districts in order to balance population totals within each district. See id. Pursuant to that goal, Virginia's Senate Committee on Privileges and Elections adopted Committee Resolution No. 2, establishing goals and criteria concerning applicable legal requirements and policy objectives for redrawing Virginia's congressional districts. See Pls.' Trial Ex. 5. The criteria included: 1) population equality among districts; 2) compliance with the laws of the United States and Virginia, including protections against diluting racial minority voting strength and putting minority voters in a worse position than they were before the redistricting change ("retrogression"); 3) contiguous and compact districts; 4) single-member districts; and 5) consideration of communities of interest. Id. at 1-2. The Virginia Senate noted that, although "[a]ll of the foregoing criteria [would] be considered in the districting process[,] . . . population equality among districts and compliance with federal and state constitutional requirements and the [VRA] [would] be given priority in the event of conflict among the criteria." Id. at 2 (emphasis added).

Delegate Janis used the 2010 census data to draw a new plan for Virginia's United States congressional districts. Delegate Janis presented his plan, House Bill 5004, to the House of Delegates on April 6, 2011; the House adopted it six days later. Pls.' Trial Ex. 8, at 7. The Virginia Senate, however, rejected Delegate Janis's plan and replaced it with a plan sponsored by State Senator Mamie Locke. Id. The House and Senate were unable to reconcile the competing plans and the redistricting effort stalled. Id. at 8.

The November 2011 elections changed the composition of the Virginia Senate, and, in January 2012, the newly seated House and Senate adopted Delegate Janis's plan without any changes.[8] See id. Governor Bob McDonnell signed the plan into law on January 25, 2012. Id. at 9. The congressional districting plan ("2012 Plan") is codified at Va. Code Ann. § 24.2-302.2.

The 2012 Plan divides Virginia into eleven congressional districts. Plaintiffs describe the boundaries of the Third Congressional District as follows:

> The northwest corner of the district includes parts of Richmond and the north shore of the James River. It then crosses the James River for the first time and juts west to capture parts of Petersburg. The district again crosses to the north shore of the James River to include parts of Newport News, though this

[8] Delegate Janis's bill was renamed House Bill 251 but remained identical to the original House Bill 5004.

> portion of the district is not contiguous with any other part of the district. The district then hops over part of Congressional District 2 to include part of Hampton and crosses the James River and Chesapeake Bay to capture part of Norfolk, which is not contiguous with any other part of [the district].

(Compl. ¶ 34, ECF No. 1). A majority of the voting age population in the 2012 Plan's Third Congressional District is African-American. Whereas the BVAP of the previous iteration of the Third Congressional District ("Benchmark Plan"), formed after the 2000 census, was 53.1%, the BVAP of the 2012 Plan's Third Congressional District is 56.3%. Pls.' Trial Ex. 27, at 14. There is no indication that this increase of more than three percentage points was needed to ensure nonretrogression, however, because the 2012 Plan was not informed by a racial bloc voting or other, similar type of analysis. See Trial Tr. 198:5-8, 342:11-23, 354:18-355:2. A racial bloc voting analysis, which legislatures frequently use in redistricting, studies the electoral behavior of minority voters and ascertains how many African-American voters are needed in a congressional district to avoid diminishing minority voters' ability to elect their candidates of choice. Trial Tr. 62:21-63:7, 98:16-99:2; Pls.'s Trial Ex. 43, at 15.

Virginia submitted the 2012 Plan to the DOJ for Section 5 preclearance. As we have noted, the DOJ precleared the plan on March 14, 2012, finding that it did not effect any retrogression

in the ability of minorities to elect their candidates of choice. (Defs.' Mem. Supp. Mot. Summ. J. 7, ECF No. 37).

On June 25, 2013, the Supreme Court issued its decision in Shelby County. As a result, as we have explained, Section 5's requirements of review and preclearance for covered areas no longer apply to Virginia with respect to future changes to its voting and election laws. See Shelby Cnty., 133 S. Ct. at 2631.

C. Procedural History

Plaintiffs[9] brought this action on October 2, 2013, alleging that Virginia used the Section 5 preclearance requirements as a pretext to pack African-American voters into Virginia's Third Congressional District and reduce these voters' influence in other districts. (Compl. ¶¶ 3, 40, ECF No. 1). Plaintiffs sought a declaratory judgment that Virginia's Third Congressional District, as drawn in the 2012 Plan, is a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment. Id. at 10. Plaintiffs also sought to permanently enjoin Defendants from giving effect to the boundaries of the Third Congressional District, including barring Defendants from conducting elections for the United

[9] Named Plaintiffs are all United States citizens who are registered to vote in the Commonwealth of Virginia and reside in the Third Congressional District. (Compl. ¶¶ 7-9, ECF No. 1).

States House of Representatives based on the current Third Congressional District. Id.

Any action under Section 5 must "be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28." 52 U.S.C. § 10304(a) (formerly cited as 42 U.S.C. § 1973c); see also Allen v. State Bd. of Elections, 393 U.S. 544, 560-63 (1969). Because Plaintiffs' action "challeng[ed] the constitutionality of the apportionment of congressional districts" in Virginia, 28 U.S.C. § 2284(a), the Chief Judge of the United States Court of Appeals for the Fourth Circuit granted Plaintiffs' request for a hearing by a three-judge court on October 18, 2013. (ECF No. 10).

Virginia Congressmen Eric Cantor, Robert J. Wittman, Bob Goodlatte, Frank Wolf, Randy J. Forbes, Morgan Griffith, Scott Rigell, and Robert Hurt moved to intervene as Defendants in the case on November 25, 2013. (ECF No. 16). On December 20, 2013, all Defendants moved for summary judgment. (ECF Nos. 35, 38). We denied the motions on January 27, 2014. (ECF No. 50). A two-day bench trial began on May 21, 2014. (ECF Nos. 100, 101). We then ordered the parties to file post-trial briefs. (ECF No. 99). After reviewing those briefs, we determined on June 30, 2014, that further oral argument would not assist in the resolution of the issues before the Court. (ECF No. 108).

On October 7, 2014, we issued a ruling finding Virginia's Third Congressional District unconstitutional. (ECF Nos. 109, 110). On October 30, 2014, Intervenor-Defendants noticed their appeal to the Supreme Court.[10] (ECF No. 115). On January 27, 2015, while Intervenor-Defendants' appeal to the Supreme Court was pending, Intervenor-Defendants moved to postpone--until September 1, 2015--the remedial deadline of April 1, 2015, imposed by our order of October 7. (ECF No. 125). We entered an order granting this motion on February 23, 2015. (ECF No. 138).

On March 25, 2015, the Supreme Court issued its decision in Alabama. Relevant here, the Court held that the district court improperly concluded that race did not predominate in the challenged redistricting effort because "it placed in the balance, among other [traditional] nonracial factors, legislative efforts to create districts of approximately equal population." Alabama, 135 S. Ct. at 1270. While the Court noted that equal population objectives "may often prove 'predominant' in the ordinary sense of that word," the question of whether race predominated over traditional raced-neutral redistricting principles is a "special" inquiry: "It is not about whether a legislature believes that the need for equal

[10] Defendants did not appeal our decision.

population takes ultimate priority," but rather, whether the legislature placed race above nonracial considerations in determining which voters to allocate to certain districts in order achieve an equal population goal. Id. at 1270-71. The Court further observed that, had the district court properly treated the equal population goal as "a background rule against which redistricting takes place," its predominance conclusions may have been different--particularly given evidence that the legislature's goal of maintaining existing racial percentages in majority-minority districts significantly impacted the boundaries of one of the challenged districts. Id. at 1271.

In addition, the Court ruled that the district court's finding that the challenged districts would survive strict scrutiny rested upon a misperception of the requirements of Section 5.[11] Id. at 1272. The Court explained that Section 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage," but instead "requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice." Id. The Court concluded that,

[11] The Court expressly declined to "decide whether, given Shelby County . . . , continued compliance with § 5 remains a compelling interest." Alabama, 135 S. Ct. at 1274. Thus, the decision in Alabama impacts only that portion of our opinion discussing the narrow tailoring prong of the strict scrutiny analysis.

in "rel[ying] heavily upon a mechanically numerical view as to what counts as forbidden retrogression," the district court failed to ask the question critical to the narrow tailoring analysis: To what extent was the legislature required to "preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?" Id. at 1273-74.

On March 30, 2015, the Supreme Court vacated our judgment of October 7, 2014, and remanded the case for reconsideration under Alabama. Cantor, 135 S. Ct. 1699. On April 3, 2015, we ordered the parties to file briefs regarding the effect on this case, if any, of the Supreme Court's Alabama decision. (ECF No. 144). Having reviewed those briefs, this case is now ripe for disposition on remand.

II. ANALYSIS

To successfully challenge the constitutionality of the Third Congressional District under the Equal Protection Clause, Plaintiffs first bear the burden of proving that the legislature's predominant consideration in drawing its electoral boundaries was race. If they make this showing, the assignment of voters according to race triggers the court's "strictest scrutiny." Miller v. Johnson, 515 U.S. 900, 915 (1995). Then, the burden of production shifts to Defendants to demonstrate

that the redistricting plan was narrowly tailored to advance a compelling state interest. See Shaw II, 517 U.S. at 908.

For the reasons that follow, we find that Plaintiffs have shown race predominated. We find that the Third Congressional District cannot survive review under the exacting standard of strict scrutiny. While compliance with Section 5 was a compelling interest when the legislature acted, the redistricting plan was not narrowly tailored to further that interest. Accordingly, we are compelled to hold that the challenged Third Congressional District violates the Equal Protection Clause of the Fourteenth Amendment.

A. Race As the Predominant Consideration in Redistricting

As with any law that distinguishes among individuals on the basis of race, "equal protection principles govern a State's drawing of congressional districts." Miller, 515 U.S. at 905. "Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters . . . ." Shaw v. Reno (Shaw I), 509 U.S. 630, 657 (1993). As such, "race-based districting by our state legislatures demands close judicial scrutiny." Id.

To trigger strict scrutiny, Plaintiffs first bear the burden of proving that race was not only one of several factors

that the legislature considered in drawing the Third Congressional District, but that race "predominated." Bush v. Vera, 517 U.S. 952, 963 (1996). The Supreme Court has emphasized that this burden "is a 'demanding one,'" Easley v. Cromartie (Cromartie II), 532 U.S. 234, 241 (2001) (quoting Miller, 515 U.S. at 928 (O'Connor, J., concurring)):

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

Miller, 515 U.S. at 916. The Supreme Court has cited several specific factors as evidence of racial line drawing: statements by legislators indicating that race was a predominant factor in redistricting, see id., 515 U.S. at 917-18; evidence that race or percentage of race within a district was the single redistricting criterion that could not be compromised, see Shaw II, 517 U.S. at 906-07; creation of non-compact and oddly shaped districts beyond what is strictly necessary to avoid retrogression, see Shaw I, 509 U.S. at 646-48; use of land bridges in a deliberate attempt to bring African-American population into a district, see Miller, 515 U.S. at 917; and

creation of districts that exhibit disregard for city limits, local election precincts, and voting tabulation districts ("VTDs"), see Bush, 517 U.S. at 974. As we demonstrate below, all of these factors are present here.[12] Moreover, we do not view any of these factors in isolation. We consider direct evidence of legislative intent, including statements by the legislation's sole sponsor, in conjunction with the circumstantial evidence supporting whether the 2012 Plan complies with traditional redistricting principles.

1. Direct Evidence of Legislative Intent

When analyzing the legislative intent underlying a redistricting decision, we agree with the dissent that there is

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[12] In contending that Plaintiffs do not make this "initial" showing, the dissent notes, among other things, that Plaintiffs failed to produce an adequate alternative plan showing "that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles." Cromartie II, 532 U.S. at 258. While the dissent acknowledges "that the attacking party is not confined in its form of proof to submitting an alternative plan," post at 100, it makes much of the fact that the alternative plan proffered by Plaintiffs accomplishes a more favorable result for Democrats than does the Enacted Plan. However, the significance of the discrepancy between these political outcomes is overstated, and relies on an assumption that the legislature's political objective was to create an 8-3 incumbency protection plan. See Trial Tr. 180-81 (noting that the Alternative Plan would only undermine incumbency protection objectives if it was the legislature's political goal to have an 8-3 split, which is something "we don't have knowledge" of). This inference is not supported by the record, as we develop more fully below.

a "presumption of good faith that must be accorded legislative enactments." Miller, 515 U.S. at 916. This presumption "requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." Id. Such restraint is particularly warranted given the "complex interplay of forces that enter a legislature's redistricting calculus," id. at 915-16, making redistricting possibly "the most difficult task a legislative body ever undertakes," Smith v. Beasley, 946 F. Supp. 1174, 1207 (D.S.C. 1996) (three-judge court).

Nevertheless, "the good faith of the legislature does not excuse or cure the constitutional violation of separating voters according to race." Id. at 1208. Here, "[w]e do not question the good faith of the legislature in adopting [the 2012 Plan]" so long as "[t]he members did what they thought was required by [Section 5] and by the Department of Justice at the time." Id. At this stage of the analysis, we are concerned only with whether legislative statements indicate that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without [the Third Congressional District]." Miller, 515 U.S. at 916. We find such statements here, drawn from multiple sources.

We must also note, however, that it is inappropriate to confuse this presumption of good faith with an obligation to

parse legislative intent in search of "proper" versus "improper" motives underlying the use of race as the predominant factor in redistricting, as the dissent does here. The legislative record here is replete with statements indicating that race was the legislature's paramount concern in enacting the 2012 Plan. Yet the dissent urges us to consider such statements as mere legislative acknowledgments of the supremacy of federal law, specifically the VRA.[13] The dissent argues that subjecting a redistricting plan to strict scrutiny when it separates voters

[13] The dissent also makes much of the legislature's stated goal of compliance with the one-person-one-vote rule. Although the dissent is certainly correct to observe that the Supremacy Clause mandated compliance with this rule, the Supreme Court in Alabama made clear that "an equal population goal is not one factor among others to be weighed against the use of race to determine whether race 'predominates.' Rather, it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to how equal population objectives will be met." Alabama, 135 S. Ct. at 1270. Accordingly, we too take the legislature's stated population equality goals as a given, and focus instead on the direct evidence in the record that the legislature predominantly relied on race in its efforts to meet these equal population goals.

We further take issue with the dissent's contention that "[r]ace, like equal population, is a mandatory consideration," and therefore functions, like an equal population goal, as a background rule for redistricting. Post at 68. The fact that the legislature considered race a predominant concern only because it believed federal law compelled it to do so is of no current legal consequence. Instead, what matters for the purpose of our analysis here is that race did predominate in drawing the Third Congressional District, as revealed by the evidence we describe below.

according to race as a means to comply with Section 5 "trap[s] [legislatures] between the competing hazards of [VRA and Constitutional] liability," Bush, 517 U.S. at 992 (O'Connor, J., concurring),[14] but this is a red herring. While "[a]pplying traditional equal protection principles in the voting-rights context is 'a most delicate task,'" Shaw II, 517 U.S. at 905 (quoting Miller, 515 U.S. at 905)--and we certainly do not, as the dissent asserts, hold "that the intentional use of race in redistricting, taken alone, triggers strict scrutiny," post at 71--we must apply strict scrutiny when, as here, there is strong direct and circumstantial evidence that race was the only "nonnegotiable" criterion.

a. Defendants' Statements

Defendants concede that avoiding retrogression in the Third Congressional District and ensuring compliance with Section 5 was the legislature's primary priority in drawing the 2012 Plan. Defendants acknowledge that the legislature's top two priorities were "compliance with applicable federal and state laws,

[14] The dissent relies solely on Justice O'Connor's concurrence in Bush to make this argument. The language quoted by the dissent appears in the context of Justice O'Connor's assertion that compliance with Section 2 of the VRA is a compelling state interest, see Bush, 517 U.S. at 990-92 (O'Connor, J., concurring), but Justice O'Connor's opinion also specifically notes that using race as a proxy for VRA compliance should be subject to strict scrutiny, see id. at 993.

expressly including the [VRA,]" and population equality. (Defs.' Mem. Supp. Mot. Summ. J. 12, ECF No. 37). Moreover, Defendants "concede[] that compliance with Section 5 was [the legislature's] predominant purpose or compelling interest underlying District 3's racial composition in 2012." (Int-Defs.' Mem. Supp. Mot. Summ. J. 15, ECF No. 39). Of course, we do not view the language of the Intervenor-Defendants' summary judgment brief as a binding concession. Rather, we take it for what it is--a candid acknowledgement of the incontrovertible fact that the shape of the Third Congressional District was motivated by the desire to avoid minority retrogression in voting.[15]

b. Racial Threshold As the Means to Achieve Section 5 Compliance

Defendants' expert, John Morgan, also acknowledged that the legislature "adopted the [2012 Plan] with the [Third Congressional District] Black VAP at 56.3%" because legislators

[15] The dissent contends that we have abandoned our original finding that "there was an admission by the Defendants" that compliance with Section 5 was the legislature's predominant purpose in redistricting. See post at 54. However, having never made such a finding, we have no opportunity to abandon the same. As we make clear, we have never interpreted the Intervenor-Defendants' language as a binding concession. Instead, we simply point out here what the dissent is unable to gainsay: that the Defendants candidly recognized that Section 5 compliance was uppermost in the minds of Virginia's legislators when they drew the 2012 Plan.

were conscious of maintaining a 55% BVAP floor. Int. Defs.' Trial Ex. 13, at 27. In 2011, the legislature enacted "a House of Delegates redistricting plan with a 55% Black VAP as the floor for black-majority districts" with strong bipartisan support. Id. at 26. Given the success of this prior usage of a 55% BVAP floor, the legislature considered a 55% BVAP floor for the 2012 congressional redistricting "appropriate to obtain Section 5 preclearance, even if it meant raising the Black VAP above the [53.1%] level[] in the Benchmark plan." Id. at 26-27. The legislature therefore "acted in accordance with that view," id. at 27, when adopting the 2012 Plan, despite the fact that the use of a 55% BVAP floor in this instance was not informed by an analysis of voter patterns. Indeed, when asked on the House floor whether he had "any empirical evidence whatsoever that 55[% BVAP] is different than 51[%] or 50[%]," or whether the 55% floor was "just a number that has been pulled out of the air," Delegate Janis, the redistricting bill's author, characterized the use of a BVAP floor as "weighing a certainty against an uncertainty." Pls.' Trial Ex. 45, at 7.

c. Statements by the Author of the 2012 Congressional Maps

In addition to Defendants' statements, we credit explanations by Delegate Janis, the legislation's sole author, stating that he considered race the single "nonnegotiable"

redistricting criterion. Pls.' Trial Ex. 43, at 25. In disagreeing, the dissent attempts to discount the meaning of these statements by placing great reliance on remarks by legislative opponents characterizing the redistricting legislation as an incumbency protection plan, and by parsing Delegate Janis's statements regarding compliance with federal law generally from the necessary antecedent of relying on race to do so. In the face of Delegate Janis's clear words, we do not find these efforts persuasive.[16]

Delegate Janis emphasized that his "primary focus" in drawing Virginia's new congressional maps was ensuring that the Third Congressional District maintained at least as large a percentage of African-American voters as had been present in the

[16] Perhaps this is also the appropriate juncture at which to address the dissent's rejection of the credibility of Plaintiffs' expert, Dr. Michael McDonald, and endorsement of Defendants' expert, Mr. Morgan, which we find somewhat puzzling. We find it no more damning that Dr. McDonald has testified differently in different contexts than that Mr. Morgan has testified consistently on the same side. Nor is the exploration of issues in an academic piece, written before Dr. McDonald was retained by Plaintiffs and before he fully evaluated the evidence here, of particular relevance. We do, however, find significant the following facts: that Mr. Morgan proffers no academic work, that he does not have an advanced degree, that his undergraduate degree was in history, that he has never taken a course in statistics, that he has not performed a racial bloc voting analysis, that he did not work with or talk to any members of the Virginia legislature, and that he miscoded the entire city of Petersburg's VTDs. See Trial Tr. 334-35, 338-43, 361-65.

district under the Benchmark Plan. Pls.' Trial Ex. 43, at 25; see also Pls.' Trial Ex. 13, at 8 ("[W]e can have no less [percentage of African-American voters] than percentages that we have under the existing lines . . . .").

For example, at the second floor reading of the redistricting bill in Virginia's House of Delegates on April 12, 2011, Delegate Janis noted that "one of the paramount concerns in the drafting of the bill was [the VRA mandate] that [the legislature] not retrogress minority voting influence in the [Third] Congressional District." Pls.' Trial Ex. 43, at 10 (emphasis added). He continued to reiterate this sentiment, noting that he was "most especially focused on making sure that the [Third] Congressional District did not retrogress in its minority voting influence." Id. at 14-15 (emphasis added).

Delegate Janis also stated that the avoidance of retrogression in the Third Congressional District took primacy over other redistricting considerations because it was "nonnegotiable":

> [O]ne of the paramount concerns and considerations that was not permissive and nonnegotiable . . . is that the [Third] Congressional District not retrogress in minority voter influence. . . . [T]he primary focus of how the lines in House Bill 5004 were drawn was to ensure that there be no retrogression in the [Third] Congressional District. Because if that occurred, the plan would be unlikely to survive a challenge either through the Justice Department or the courts because it would not comply with the constitutionally mandated requirement that there be no retrogression in the

> minority voting influence in the [Third] Congressional District.

Id. at 25 (emphasis added). Unlike the dissent, we deem it appropriate to accept the explanation of the legislation's author as to its purpose. And there is further support.

2. Circumstantial Evidence of the Third Congressional District's Shape and Characteristics

In addition to the evidence of legislative intent, we also consider the extent to which the district boundaries manifest that legislative will.[17] Evidence of a "highly irregular" reapportionment plan "in which a State concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions," indicates that racial considerations predominated during the 2011-12

[17] At this juncture, we must take issue with the manner in which the dissent considers Plaintiffs' circumstantial evidence. When evaluating evidence of the Third Congressional District's shape, compactness, contiguity, political subdivision splits, and population swaps, the dissent considers each in isolation, concluding that no factor alone carries Plaintiffs' burden of showing that race predominated. In addition, the dissent implies that Plaintiffs must, for each of these factors, make a "necessary showing" that these circumstantial irregularities, considered individually, resulted from racial, rather than political, motivations. Post at 91. Precedent counsels, however, that courts must consider whether these circumstantial factors "together weigh in favor of the application of strict scrutiny." Bush, 517 U.S. at 962 (emphasis added). No one factor need be "independently sufficient" to show race predominated. Id.

redistricting cycle. Shaw I, 509 U.S. at 646-47. We consider each of these factors below.

a. Shape and Compactness

As the Supreme Court has recognized, "reapportionment is one area in which appearances do matter," Shaw I, 509 U.S. at 647, and the "obvious fact that the district's shape is highly irregular and geographically non-compact by any objective standard," Shaw II, 517 U.S. at 905-06 (internal quotation marks omitted), supports the conclusion that race was the predominant factor in drawing the challenged district. Moreover, compactness is one of two redistricting criteria required by the Virginia Constitution. Va. Const. art. II, § 6 ("Every electoral district shall be composed of contiguous and compact territory . . . .").

Because, as he explained to the Senate Committee on Privileges and Elections, Delegate Janis "didn't examine compactness scores" when drawing the 2012 congressional maps, Pls.' Trial Ex. 14, at 8, we begin with a visual, rather than mathematical, overview of the Third Congressional District's shape and compactness, see Karcher v. Daggett, 462 U.S. 725, 762 (1983) (Stevens, J., concurring) (without applying any mathematical measures of compactness, stating that "[a] glance at the [congressional] map shows district configurations well deserving the kind of descriptive adjectives . . . that have

traditionally been used to describe acknowledged gerrymanders" (citation omitted)).

Plaintiffs contend that the Third Congressional District is the least compact congressional district in Virginia. Trial Tr. 73:10-14. And, indeed, the maps of the district reflect both an odd shape and a composition of a disparate chain of communities, predominantly African-American, loosely connected by the James River. See Trial Tr. 42:13-16; Pls.' Trial Ex. 48. Defendants do not disagree. In fact, Defendants' expert, Mr. Morgan, concedes that the three primary statistical procedures used to measure the degree of compactness of a district all indicate that the Third Congressional District is the least compact congressional district in Virginia. See Trial Tr. 375:21-24, 376:9-13. While Defendants acknowledge the irregularity of shape and lack of compactness reflected by the Third Congressional District, they submit that a desire to protect Republican incumbents explains the District's shape, a contention we discuss later. See infra Part II.A.3; see also Trial Tr. 14:20-15:6.

b. Non-Contiguousness

In addition to requiring compactness, the Virginia Constitution also requires the legislature to consider contiguity when drawing congressional boundaries. See Va. Const. art. II, § 6. The Virginia Supreme Court has concluded

that "land masses separated by water may . . . satisfy the contiguity requirement in certain circumstances." Wilkins v. West, 571 S.E.2d 100, 109 (Va. 2002). While the Third Congressional District is not contiguous by land, it is legally contiguous because all segments of the district border the James River. Trial Tr. 74:22-75:5. Therefore, the Third Congressional District is legally contiguous under Virginia Law. See Wilkins, 571 S.E.2d at 109; Trial Tr. 221:12-14.

Yet contiguity and other traditional districting principles are "important not because they are constitutionally required," but rather "because they are objective factors" courts may consider in assessing racial gerrymandering claims. Shaw I, 509 U.S. at 647. To show that race predominated, Plaintiffs need not establish that the legislature disregarded every traditional districting principle. See Miller, 515 U.S. at 917 (holding that circumstantial evidence such as shape does not need to be sufficient, standing alone, to establish a racial gerrymandering claim). Rather, we consider irregularities in the application of these traditional principles together. Here, the record establishes that, in drawing the boundaries of the Third Congressional District, the legislature used water contiguity as a means to bypass white communities and connect predominantly African-American populations in areas such as Norfolk, Newport News, and Hampton. See Trial Tr. 75:15-76:1. Such

circumstantial evidence is one factor that contributes to the overall conclusion that the district's boundaries were drawn with a focus on race.

c. Splits in Political Subdivisions

"[R]espect for political subdivisions" is an important traditional districting principle. Shaw I, 509 U.S. at 647. A county or city is considered split by a congressional district when a district does not entirely contain that county or city within its borders. See Pls.' Trial Ex. 27, at 8. The Third Congressional District splits more local political boundaries than any other district in Virginia. Trial Tr. 76:18-20. It splits nine counties or cities, the highest number of any congressional district in the 2012 Plan. Pls.' Trial Ex. 27, at 9. Moreover, the boundaries of the Third Congressional District contribute to the majority of splits in its neighboring congressional districts. See id.

The Third Congressional District also splits more voting tabulation districts, or VTDs, than any of Virginia's other congressional districts. Trial Tr. 78:17-19; see also Pls.' Trial Ex. 27, at 10. A VTD is a Census Bureau term referring to what is commonly thought of as a voting precinct. Trial Tr. 78:5-8. In total, the 2012 Plan splits 20 VTDs; the Third Congressional District contributes to 14 of them. See Trial Tr. 78:20-21; Pls.' Trial Ex. 27, at 10. While some of these are

"technical splits" (i.e., a VTD split that does not involve population; for example, a split across water), such technical splits were used strategically here, as they would not have been necessary "if [the legislature was not] trying to bypass [white] communities using water" and bring predominantly African-American communities into the district. Trial Tr. 79-80.

The dissent contends that the population swaps involving the Third Congressional District--and resulting locality splits--were necessary to achieve population parity in accordance with the constitutional mandate of the one-person-one-vote rule,[18] see post at 92-93, and can also be explained by the traditional redistricting criterion of "preserving district cores,"[19] post at 84. The evidence does not substantiate either of these arguments. It is true that the Virginia legislature needed to add 63,976 people to the Third Congressional District to achieve population parity. See Trial Tr. 87. Yet, though the dissent asserts that "it is extremely unlikely that any combination of 'whole' localities in the vicinity of [the Benchmark Plan] could

[18] This principle, contained in Article I, Section 2 of the United States Constitution, requires all congressional districts to contain roughly equal populations. See Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

[19] A new district preserves district cores when it retains most of the previous benchmark district's residents within its boundaries. Trial Tr. 379:3-11.

have been added to the [Third Congressional] District to augment the population by exactly 63,976 people," post at 93, Plaintiffs' alternative plan maintains a majority-minority district and achieves the population increase needed for parity, while simultaneously minimizing locality splits and the number of people affected by such splits, see Pls.'s Trial Ex. 29, at 1. Although this alternative plan results in only one less locality split than the 2012 Plan, it reduces the number of people affected by the locality splits between the Third Congressional District and Second Congressional District by 240,080.[20] See Trial Tr. 112; Pls.' Trial Ex. 29, at 5, tbl.3. The alternative plan also reduces the number of VTD splits involving the Third Congressional District from 14 in the 2012 Plan to 11. Trial Tr. 111. Moreover, Plaintiffs' alternative plan, unlike the 2012 Plan, keeps the cities of Newport News, Hampton, and Norfolk intact.[21] See id. at 112. This is a

[20] The total population affected by the Third Congressional District's locality splits with the Second Congressional District in the 2012 Plan is 241,096, while the population affected by the splits between these districts in the alternative plan is only 1,016. Trial Tr. 112; Pls.' Trial Ex. 29, at 5, tbl.3.

[21] The fact that the 2012 Plan splits these cities, despite the demonstrated feasibility of achieving population parity while keeping them whole, further refutes the dissent's contention that the population swaps were based on a "desire to limit locality splits." Post at 93. Despite the fact that doing so was unnecessary, the legislature split Newport News and (Continued)

particularly important accomplishment because it reflects the fulfillment of a strong public sentiment, as expressed during 2010 redistricting forums,[22] against splitting localities, and in favor of keeping the integrity of cities like Hampton and Norfolk intact. See Pls.' Trial Ex. 29, at 5-6; Pls.' Trial Ex. 11-12.

The evidence similarly undercuts the dissent's contention that the boundaries of the Third Congressional District reflect an allegiance to the traditional redistricting principle of preserving district cores. Far from attempting to retain most of the Benchmark Plan's residents within the new district borders, the 2012 Plan moved over 180,000 people in and out of the districts surrounding the Third Congressional District to achieve an overall population increase of only 63,976 people. Trial Tr. 87. Tellingly, the populations moved out of the Third Congressional District were predominantly white, while the populations moved into the District were predominantly African-

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Hampton when it excluded certain low-BVAP VTDs from the Third Congressional District. See, e.g., Pl.'s Trial Ex. 27, at 17 (showing that VTDs in Newport News with BVAPs of 23.1% were excluded from the Third Congressional District). Similarly, the legislature's removal of predominantly white VTDs from the Third Congressional District contributed to otherwise unnecessary splits in Norfolk. See Trial Tr. 436-39.

[22] Virginia attached the transcripts of these hearings to its Section 5 submission. See Pls.' Trial Ex. 11-12.

American. Id. at 81:21-82:6. Moreover, the predominantly white populations moved out of the Third Congressional District totaled nearly 59,000 residents--a number very close to the total required increase of 63,976 people. See Pls.' Trial Ex. 27, at 15, tbl.6; Trial Tr. 87.

While "[t]he Constitution does not mandate regularity of district shape," Bush, 517 U.S. at 962, Plaintiffs' circumstantial evidence of the Third Congressional District's irregularities and inconsistencies with respect to the traditional districting criteria described above, coupled with clear statements of legislative intent, supports our conclusion that, in this case, "traditional districting criteria [were] subordinated to race," id. (emphasis omitted).

3. Predominance of Race over Politics

Defendants, as well as the dissent, rely heavily on isolated statements in the legislative record, made by opponents of Delegate Janis's bill, suggesting that incumbency protection and partisan politics motivated the 2011-12 redistricting efforts. See, e.g., Pls.' Trial Ex. 43, at 48-49 (opponent of Delegate Janis's plan stating that Janis "admitted today that one of the criteria that he used in development of the plan was incumbent protection," and deeming the redistricting effort "one for incumbency protection first, last, alpha, and omega"); id. at 27 (opponent of the 2012 Plan suggesting that Delegate Janis

used incumbency protection as a permissive redistricting criteria). The Supreme Court has made it clear, however, that the views of legislative opponents carry little legal weight in characterizing legislation. See, e.g., Shell Oil Co. v. Iowa Dep't of Revenue, 488 U.S. 19, 29 (1988) ("[T]he fears and doubts of the opposition are no authoritative guide to the construction of legislation." (alteration in original)); NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 66 (1964) ("[W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach."); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt."). The rationale for this authority is patent: a bill's opponents have every incentive to place a competing label on a statute they find objectionable.

Defendants and the dissent are inarguably correct that partisan political considerations, as well as a desire to protect incumbents, played a role in drawing district lines. It would be remarkable if they did not. However, in a "mixed motive suit"--in which a state's conceded goal of "produc[ing] majority-minority districts" is accompanied by "other goals, particularly incumbency protection"--race can be a predominant

factor in the drawing of a district without the districting revisions being "purely race-based."[23] Bush, 517 U.S. at 959 (emphasis omitted). Indeed, the Supreme Court has observed that "partisan politicking" may often play a role in a state's redistricting process, but the fact "[t]hat the legislature addressed these interests [need] not in any way refute the fact that race was the legislature's predominant consideration." Shaw II, 517 U.S. at 907.

The dissent's attempts to analogize this case to Cromartie II are unavailing. Cromartie II involved a challenged district in which "racial identification correlate[d] highly with political affiliation," and the plaintiffs were ultimately unable to show that "the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" because the challenged redistricting plan furthered the race-neutral political goal of incumbency protection to the same extent as it increased the proportion of minorities within the district, 532 U.S. at 258.

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[23] We do not, as the dissent implies, suggest that a different legal test applies to a "mixed motive suit." We simply observe that, when racial considerations predominated in the redistricting process, the mere coexistence of race-neutral redistricting factors does not cure the defect.

While it may be true, as the dissent observes, that Democratic votes in the Third Congressional District, and presumably many similarly situated districts, "can generally be predicted simply by taking the BVAP of a VTD and adding about 21 percentage points,"[24] post at 82, the evidence of political justification for the redistricting at issue in Cromartie II is quite different than that presented in this case. In Cromartie II, there was overwhelming evidence in the record "articulat[ing] a legitimate political explanation for [the State's] districting decision," 532 U.S. at 242, including unequivocal trial testimony by state legislators, see Cromartie I, 526 U.S. at 549. While Defendants have offered post-hoc political justifications for the 2012 Plan in their briefs, neither the legislative history as a whole, nor the circumstantial evidence, supports that view to the extent they suggest.

[24] Aside from the clear distinctions between Plaintiffs' case here and Cromartie II, the dissent's contention that the legislature used BVAP as a predictor for Democratic votes is precisely the sort of race-based consideration the Supreme Court has confirmed triggers strict scrutiny. See Bush, 517 U.S. at 968 ("[T]o the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation."); Shaw I, 509 U.S. at 653 ("[W]e unanimously reaffirmed that racial bloc voting and minority-group political cohesion never can be assumed, but specifically must be proved . . . .").

For example, Defendants point to a rather ambiguous statement by Delegate Janis that one goal of the 2012 Plan was to "respect . . . the will of the Virginia electorate." (Post-Trial Br. Int.-Defs.' and Defs.' at 12, ECF No. 106 (citing Pls.'. Trial Ex. 43, at 19)). Taken in context, however, it is clear that this goal was "permissive" and subordinate to the mandatory criteria of compliance with the VRA and satisfaction of the one-person-one-vote rule. See Pls.' Trial Ex. 43, at 18-19. In support of the argument that political concerns trumped racial ones, the dissent points to Delegate Janis's remarks that incumbent legislators confirmed their satisfaction with the lines of their respective congressional districts. See id. at 5-6. It is undisputed, however, that the incumbents were not shown the entire 2012 Plan when they were solicited for their input, but were instead shown only the proposed changes to the lines of their individual districts. See Int.-Defs.' Trial Ex. 9, at 9. Delegate Janis testified that he had not asked any congressional representatives "if any of them supported the [redistricting] plan in its totality," or "[spoken] with anyone who plan[ned] to run against those incumbents" regarding the redistricting plan. Id. at 14. Delegate Janis stated: "I haven't looked at the partisan performance. It was not one of the factors that I considered in the drawing of the district." Id.

Finally, the nature of the population swaps and shifts used to create the Third Congressional District suggests that less was done to further the goal of incumbency protection than to increase the proportion of minorities within the district. "[A]mong the pool of available VTDs that could have been placed within the Third Congressional District that were highly Democratic performing," those with a higher BVAP were placed within the Third Congressional District, and those VTDs that were largely white and Democratic were left out, and instead shifted into the Second Congressional District.[25] Trial Tr. 89.

The record before us presents a picture similar to that in Shaw II, in which the Supreme Court found the evidence sufficient to trigger strict scrutiny:

> First, the District Court had evidence of the district's shape and demographics. The court observed the obvious fact that the district's shape is highly irregular and geographically non-compact by any objective standard that can be conceived. In fact, the serpentine district has been dubbed the least geographically compact district in the Nation.

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[25] Defendants' expert, Mr. Morgan, contends that the majority-white populations excluded from the Third Congressional District during redistricting were predominantly Republican. See Int.-Defs.' Trial Ex. 13, at 13-14. The evidence at trial, however, revealed that Mr. Morgan's analysis was based upon several pieces of mistaken data, a critical error. See Trial Tr. 359:1-14; id. at 361:10-365:10 (indicating that Mr. Morgan had miscoded several VTDs as to whether they were part of the Third Congressional District); id. at 404:17-25 (stating that Mr. Morgan's coding mistakes were significant to the outcome of his analysis).

> The District Court also had direct evidence of the legislature's objective. The State's submission for preclearance expressly acknowledged that [the] overriding purpose was to comply with the dictates of [the DOJ] and to create two congressional districts with effective black voting majorities.

Shaw II, 517 U.S. at 905-06 (citations omitted) (internal quotation marks omitted). As we noted earlier, we do not find the dissent's attempts to distinguish Shaw II from the case at hand persuasive. As an initial matter, it is irrelevant that the challenged district in Shaw II was not only the least compact in the state, as is the Third Congressional District, but also the least compact district in the nation. Irregularities in shape need not be so extreme as to make the district an outlier nationwide; courts simply consider a "highly irregular and geographically non-compact" shape evidence of the predominance of race. Id. at 905-06. As the least compact and most bizarrely shaped district in the 2012 Plan, the Third Congressional District displays such characteristics. And again, we see no reason why it should make a difference whether Defendants' "explicit and repeated admissions," post at 102, of the predominance of race were made in the course of hearings on the House of Delegates floor, as here, or in the State's Section 5 preclearance submission, as in Shaw II. These specific and repeated references, when taken together with the circumstantial

evidence of record, compel our conclusion that race was the legislature's paramount concern.

B. Strict Scrutiny Analysis

The fact that race predominated when the legislature devised Virginia's Third Congressional District in 2012, however, does not automatically render the district constitutionally infirm. Rather, if race predominates, strict scrutiny applies, but the districting plan can still pass constitutional muster if narrowly tailored to serve a compelling governmental interest. See Abrams v. Johnson, 521 U.S. 74, 91 (1997); Miller, 515 U.S. at 920. While such scrutiny is not necessarily "strict in theory, but fatal in fact," Johnson v. California, 543 U.S. 499, 514 (2005) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995)), the state must establish the "most exact connection between justification and classification." Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (quoting Gratz v. Bollinger, 539 U.S. 244, 270 (2003)).

And because, as we address below, compliance with the VRA is a compelling state interest, the redistricting plan would not fail under the Equal Protection analysis if it had been narrowly tailored to that interest--that is, if "the legislature ha[d] a strong basis in evidence in support of" its use of race. Alabama, 135 S. Ct. at 1274 (internal quotation marks omitted).

While the legislature drew the Third Congressional District in pursuit of the compelling state interest of compliance with Section 5, Defendants have failed to show that the 2012 Plan was narrowly tailored to further that interest.[26]

1. Compelling Interest

The fact that Shelby County effectively relieved Virginia of its Section 5 obligations in 2013 does not answer the question of whether Section 5 compliance in 2012 was a compelling state interest. The appropriate inquiry is whether the legislature's reliance on racial considerations was, at the time of the redistricting decision, justified by a compelling state interest, not whether it can now be justified in hindsight. See Ala. Legislative Black Caucus v. Alabama, 989 F. Supp. 2d 1227, 1307-08 (M.D. Ala. 2013) (three-judge court) ("We evaluate the plans in the light of the legal standard that governed the Legislature when it acted, not based on a later decision of the Supreme Court that exempted [the State] from future coverage under section 5 of the [VRA]."), vacated on other grounds, 135 S. Ct. 1257.

[26] Indeed, Defendants do not contend otherwise. Defendants make only limited narrow tailoring arguments, but do not assert that any kind of racial voting analysis informed their decisions.

Although the Supreme Court has yet to decide whether VRA compliance is a compelling state interest, it has assumed as much for the purposes of subsequent analyses. See, e.g., Shaw II, 517 U.S. at 915 ("We assume, arguendo, for the purpose of resolving this suit, that compliance with § 2 [of the VRA] could be a compelling interest . . . ."); Bush, 517 U.S. at 977 ("[W]e assume without deciding that compliance with the results test [of the VRA] . . . can be a compelling state interest."). Particularly because the parties do not dispute that compliance with Section 5 was a compelling interest pre-Shelby County,[27] we likewise do not.

2. Narrow Tailoring

We now consider whether the 2012 Plan was "narrowly tailored to achieve that compelling interest." Shaw II, 517 U.S. at 908

[27] Plaintiffs make limited arguments that Section 5 compliance is no longer a compelling state interest. Plaintiffs first contend that Shelby County applies retroactively (See Pls.' Trial Br. at 21-23, ECF No. 86), relying on Citizens United v. Federal Election Commission, 558 U.S. 310 (2010), which implies only that the Supreme Court's decision that a particular interest does not qualify as a compelling state interest may have retroactive effect. The Supreme Court decided no such thing in Shelby County, so this assertion misses the mark. Plaintiffs also argue that compliance with Section 5 cannot be a compelling interest when the legislature conducted no analysis to determine whether an increase in the Third Congressional District's BVAP was necessary, but this point is relevant only to the narrow tailoring prong of the strict scrutiny analysis. (See Pls.' Trial Br. at 23-24, ECF No. 86; Pls.' Post-Trial Br. at 30, ECF No. 105).

(alteration omitted). The Supreme Court has repeatedly struck down redistricting plans that were not narrowly tailored to the goal of avoiding "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Bush, 517 U.S. at 983 (quoting Miller, 515 U.S. at 926); see also Shaw II, 517 U.S. at 915-18 (concluding that districts were not narrowly tailored to comply with the VRA). Indeed, "the [VRA] and our case law make clear that a reapportionment plan that satisfies [Section] 5 still may be enjoined as unconstitutional," as Section 5 does not "give covered jurisdictions carte blanche to engage in racial gerrymandering in the name of nonretrogression." Shaw I, 509 U.S. at 654-55.

In Alabama, the Court made clear that Section 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage" in majority-minority districts. 135 S. Ct. at 1272. Rather, Section 5 requires legislatures to ask the following question: "To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect its candidate of choice?" Id. at 1274. Although "we do not insist that a legislature guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive," the legislature must have a "strong basis in evidence" for its use

of racial classifications. Id. at 1273-74. Specifically, the Court in Alabama noted that it would be inappropriate for a legislature to "rel[y] heavily upon a mechanically numerical view as to what counts as forbidden retrogression." Id. at 1273. For example, a redistricting plan using racial criteria to maintain the population of African-American voters in a majority-minority district that "has long elected to office black voters' preferred candidate" would not likely be "'narrowly tailored' to achieve a 'compelling state interest[]'" without evidence that any reduction in the minority population would impact African-American voters' ability to elect their preferred candidate. Id. As we explain below, the legislature here--by increasing the BVAP of a safe majority-minority district and using a BVAP threshold--relied heavily on a mechanically numerical view as to what counts as forbidden retrogression without a "strong basis in evidence" for doing so.

a. BVAP Increase in a Safe Majority-Minority District

Although the Third Congressional District has been a safe majority-minority district for 20 years, the 2012 Plan increased the total number of its African-American voting age residents by

44,711.[28] See Pls.' Trial Ex. 27, at 11, 14; Trial Tr. 52:18-54:5. This change also increased the district's BVAP from 53.1% to 56.3%. Pls.' Trial Ex. 27, at 14.

Congressman Bobby Scott, a Democrat supported by the majority of African-American voters in the Third Congressional District, was first elected to represent the District in 1992. Pls.' Trial Ex. 21, at 33; Trial Tr. 52:18-24. In the six elections between 2002 to 2012, Congressman Scott ran unopposed in three; he ran opposed in the general elections in 2010 and 2012, but was reelected each time. Pls.' Trial Ex. 27, at 11; Trial Tr. 53:7-22. In 2010, Congressman Scott won 70% of the vote, while in 2012--under the redistricting plan at issue here--he won by an even larger margin, receiving 81.3% of the vote. Pls.' Trial Ex. 27, at 11; Trial Tr. 53:7-22.

In this respect, the legislature's decision to increase the BVAP of the Third Congressional District is similar to the redistricting plan invalidated by the Supreme Court in Bush. See 517 U.S. at 983. In Bush, a plurality of the Supreme Court held that increasing the BVAP from 35.1% to 50.9% was not narrowly tailored because the state's interest in avoiding retrogression in a district where African-American voters had

[28] African-American voters accounted for over 90% of the voting age residents added to the Third Congressional District. Pls.' Trial Ex. 27, at 14.

successfully elected their representatives of choice for two decades did not justify "substantial augmentation" of the BVAP. Id. Such an augmentation could not be narrowly tailored to the goal of complying with Section 5 because there was "no basis for concluding that the increase to a 50.9% African-American population . . . was necessary to ensure nonretrogression." Id. "Nonretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral success; it merely mandates that the minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions." Id. While the BVAP increase here is smaller than that in Bush, the principle is the same. Defendants show no basis for concluding that an augmentation of the Third Congressional District's BVAP to 56.3% was narrowly tailored when the district had been a safe majority-minority district for two decades.

b. BVAP Threshold

At trial, Defendants' expert, Mr. Morgan, confirmed that the legislature adopted a floor of 55% BVAP for the Third Congressional District throughout the 2011-12 redistricting cycle. See Int.-Defs.' Trial Ex. 13, at 26-27. This BVAP threshold was viewed as a proxy for the racial composition needed for a majority-minority district to achieve DOJ preclearance. See id. at 26. Thus, the legislature altered the

Third Congressional District's boundaries in order to meet or exceed that threshold. See id. at 26-27 (noting that legislators "viewed the 55% black VAP . . . as appropriate to obtain Section 5 preclearance, even if it meant raising the Black VAP above the levels in the benchmark plan").

Similar ad hoc uses of racial thresholds have been rejected under a narrow tailoring analysis by other three-judge courts. For example, one court invalidated a plan implementing a 55% threshold as arbitrary without supporting evidence. See Smith, 946 F. Supp. at 1210 (holding that narrow tailoring requires legislatures to consider the fact that a 55% BVAP will not be needed to elect a candidate of choice in districts where most minority citizens register and vote, and cautioning against "insist[ing] that all majority-minority districts have at least 55% BVAP with no evidence as to registration or voter turnout"). The legislature's use of a BVAP threshold, as opposed to a more sophisticated analysis of racial voting patterns, suggests that voting patterns in the Third Congressional District were not "considered individually." Id.[29] Considering the foregoing factors, we conclude that the 2012 Plan was not narrowly

[29] We pause to clarify that, while the legislature did not conduct a racial bloc voting analysis in enacting the 2012 Plan, we do not find that one is always necessary to support a narrow tailoring argument.

tailored to achieve compliance with Section 5, and therefore fails strict scrutiny.

III. REMEDY

Having found that the 2012 Plan violates the Equal Protection Clause, we now address the appropriate remedy. We are conscious of the powerful concerns for comity involved in interfering with the state's legislative responsibilities. As the Supreme Court has repeatedly recognized, "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." Wise v. Lipscomb, 437 U.S. 535, 539 (1978). As such, it is "appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise . . . its own plan." Id. at 540.

We also recognize that individuals in the Third Congressional District whose constitutional rights have been injured by improper racial gerrymandering have suffered significant harm. Those citizens "are entitled to vote as soon as possible for their representatives under a constitutional apportionment plan." Cosner v. Dalton, 522 F. Supp. 350, 364 (E.D. Va. 1981). Therefore, we will require that new districts be drawn forthwith to remedy the unconstitutional districts. In accordance with well-established precedent that a state should

have the first opportunity to create a constitutional redistricting plan, see, e.g., Wise, 437 U.S. at 539-40, we allow the legislature until September 1, 2015, to enact a remedial districting plan.

IV. CONCLUSION

Because Plaintiffs have shown that race predominated in Virginia's 2012 Plan, and because Defendants have failed to establish that this race-based redistricting satisfies strict scrutiny, we find that the 2012 Plan is unconstitutional, and will require the Commonwealth to draw a new congressional district plan.

Let the Clerk send a copy of this Memorandum Opinion to all counsel of record. An appropriate order shall issue.

It is so ORDERED.

/s/
Allyson K. Duncan
United States Circuit Judge

/s/
Liam O'Grady
United States District Judge

Richmond, Virginia
Date: June 5, 2015

PAYNE, Senior District Judge, Dissenting,

I, like the majority, have reassessed the record in perspective of Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015) ("Alabama," 135 S. Ct. at ___) and the Supreme Court's remand order. In my view, the original majority opinion, like the original dissent, applied the proper analytic framework as specified by Alabama.[30] So, too, do the majority opinion and the dissent following remand. And, although I respect very much the views of the record expressed by my good colleagues in the majority, I am unable to join them because I understand the record quite differently. Based on that understanding and for the reasons set forth below, I respectfully dissent.

I.

The majority and I do not differ on the fundamental legal principles that apply here. I think that we all recognize that "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions." Miller v. Johnson, 515 U.S. 900, 915 (1995). Accordingly, "[t]he courts . . . must be sensitive to the complex interplay of

[30] As the majority notes, the Defendants did not appeal our original decision. I find that to be of no moment given the change of political parties in Virginia's executive branch during the pendency of the case and considering the political implications of the case.

forces that enter a legislature's redistricting calculus." Id. at 915-16. Moreover, the redistricting enactments of a legislature are entitled to a presumption of good faith, and the judiciary must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." Id. at 916; see also Easley v. Cromartie, 532 U.S. 234, 257 (2001). I understand Miller and Easley to mean that courts must presume that a state legislature has not used race as the predominating factor in making its redistricting decisions because to do so would not be redistricting in good faith.

It is up to the Plaintiffs to dislodge that presumption by proving that the legislature subordinated traditional race-neutral redistricting principles to racial considerations and that race was the predominant factor in the redistricting decision at issue. Id. This is a "demanding" burden that cannot be satisfied by a mere showing that the legislature was conscious of the racial effects of redistricting or considered race as one factor among several; what is required is proof that the racial considerations were "dominant and controlling." Easley, 532 U.S. at 257. If the Plaintiffs meet their burden, then the challenged district will be subject to strict scrutiny, but "strict scrutiny does not apply merely because redistricting

is performed with consciousness of race." Bush v. Vera, 517 U.S. 952, 958 (1996).[31]

As I understand the record, the redistricting decision here was driven by a desire to protect incumbents and by the application of traditional redistricting precepts even though race was considered because the legislature had to be certain that the plan complied with federal law, including the Voting Rights Act of 1965[32] ("VRA") and, in particular, the non-retrogression provision of Section 5 of the VRA.[33] But, wholly

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[31] The majority comments that this case is a "mixed motive suit" involving both race-based and race-neutral redistricting factors. At the most basic level, and for the reasons explained below, I agree with that characterization as a general proposition. However, I do not find any basis in precedent to conclude that applying the "mixed motive suit" label changes anything in the basic analysis. The applicable test remains whether race predominated in the decision-making process.

[32] 42 U.S.C. §§ 1973-1973bb-1.

[33] In Hunt v. Cromartie, the Supreme Court observed that "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact." 526 U.S. 541, 551 (1999) (first emphasis added). In a footnote following that statement, the Court "recognized, however, that political gerrymandering claims are justiciable under the Equal Protection Clause although we [are] not in agreement as to the standards that would govern such a claim." Id. at n.7. Because the parties did not raise the issue of political gerrymandering or whether the Defendants' asserted interest in "incumbency protection" is permissible on these facts, I do not reach the issue here. I only find that (Continued)

apart from that conclusion, I do not believe that the Plaintiffs' have carried their demanding burden to prove that the predominant factor in creating Congressional District 3 ("C.D.3").

II.

The Plaintiffs, like the majority, base their conclusions on the predominance issue on: (1) the views of the Plaintiffs' expert witness, Dr. Michael P. McDonald; and (2) direct evidence consisting principally of statements made by the Delegate Bill Janis, the sponsor of the redistricting language, a legislative resolution, and the existence of a perceived racial quota.[34] My understanding of the record on these topics is set forth below.

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political considerations and traditional redistricting factors outweighed racial considerations based on the facts before the Court and, therefore, a claim of racial gerrymandering must fail.

[34] In the original Memorandum Opinion, the majority found that there was an admission by the Defendants that "compliance with Section 5 of the VRA . . ., and accordingly race 'was the [legislature's] predominant purpose . . . underlying [the Third Congressional District's] racial composition in 2012.'" Page v. Va. State Bd. of Elections, No. 3:13cv678, 2014 WL 5019686, at *7 (E.D. Va. Oct. 7, 2014) (Page, at *7). In dissent, I made the point that there was no such admission. Page, at *20 (A. The Perceived Admission)). On remand, the majority no longer relies on the perceived admission. Thus, in this dissent, it is no longer necessary to address that finding.

A. Dr. Michael P. McDonald: Generally

To prove that race was a predominant factor in the redistricting decision, the Plaintiffs relied principally upon their expert witness, Dr. Michael P. McDonald. In Section II.F below, I will address the details of McDonald's testimony and his report on which the Plaintiffs and the majority rely, but there is a more basic point about McDonald's credibility that I think needs to be addressed first and separately.

In this case, McDonald took the view that race was the predominant factor in the redistricting of C.D.3 but, in March 2013, before McDonald had been retained as an expert in this case, he was a co-author of a scholarly article published in the University of Richmond Law Review in which he made the case rather clearly that the animating consideration in the 2012 redistricting was the protection of incumbents. Micah Altman and Michael P. McDonald, A Half-Century of Virginia Redistricting Battles: Shifting From Rural Malapportionment to Voting Rights to Public Participation, 47 U. Rich. L. Rev. 771 (2013).

That article begins with the statement that:

> In the 2012 general election, Virginia Republican candidates for the United States House of Representatives won a combined 70,736 more votes than Democratic candidates out of the 3.7 million votes cast for the major party candidates, yet won eight of the

> state's eleven House seats. Thus, is the power of gerrymandering.

Id. at 772. The paragraph then continues to outline the various factors often considered in the redistricting process and, after reciting those factors, the article observed that "these administrative goals [traditional redistricting principles][35] are nominally devoid of political considerations, but such considerations are at the forefront for those who conduct redistricting." Id.

Later, the article explained that:

> While the General Assembly was able to reach a bipartisan compromise to redistrict the two [General Assembly] chambers controlled by different political parties, it was unable to reach agreement on a congressional plan. The sticking point was whether to protect all incumbents, giving the Republicans an 8-3 edge among the state's eleven districts, or to restore the African-American population to the Fourth Congressional District that had been shifted to the Third Congressional District during the last redistricting, yielding a Democratic-leaning Fourth Congressional District with 45% African-American voting-age population and reducing the Republicans' edge to 7-4. After the November 2011 elections, when Republicans gained a working majority in the Senate, the General Assembly passed the congressional plan that protected all incumbents including the eight Republicans.

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[35] At trial, McDonald confirmed that this term "administrative goals" meant "traditional redistricting principles." Trial Tr. 132.

Id. at 795-96.

McDonald was asked at trial about that statement in his article:

> Q. So the fight was about whether or not they were going to endanger Republican incumbent Forbes in District 4 by shifting BVAP from District 3 in a way that would turn it into a Democratic-leaning district, correct?
>
> A. Yes.
>
> Q. And it was because of that desire to protect the incumbent and maintain a Republican 8-3 advantage that the Republicans in the General Assembly opposed it, right?
>
> A. Right.

Trial Tr. 143-44.[36]

In his article, McDonald also said that:

> In the legislature, two competing plans emerged: one from Republicans, who favored a 8-3 partisan division of the state that protected all incumbents and one by the Democrats, which a 7-4 partisan division. The partisan contention involved the Fourth

[36] At trial McDonald sought to mitigate the effect of his answer by saying that there were footnotes in his article indicating that he simply was characterizing what was in the popular press at the time. Trial Tr. 144-45. McDonald was shown the articles which did not support his effort to ameliorate his testimony that he was merely quoting the press. McDonald Trial Tr., pp. 146-147. And, a reading of McDonald's article as a whole utterly refutes his effort to make such a point.

> Congressional District represented by Republican incumbent Randy Forbes. Democrats wished to fashion this district into a roughly 45% African-American district - sometimes called a 'minority-influenced' district - that would likely elect a Democrat while Republicans wish to preserve the districts' Republican character.

Intervenor-Defendants Ex. 55, pp. 19-20; see Trial Tr. 150-52.

McDonald was questioned at trial about those statements from his article:

> Q. The Republicans did not want to change District 3 by transferring BVAP[37] into District 4 for political reasons; correct?
>
> A. Mostly, yes.
>
> * * *
>
> Q. Both politics and incumbency protection are nonracial reasons; correct?
>
> A. Yes. They can be yes.
>
> Q. And you have no reason to think they weren't here.
>
> A. No, I do not.

Trial Tr. 151-52.

On cross-examination, McDonald was asked:

> Q. When you were looking at it as a disinterested academic, you determined that it was a political gerrymander by the General Assembly, correct?

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[37] The term "BVAP" is an acronym for Black Voting Age Population.

> A. Yes, we evaluated the partisan performance of the districts and had determined that the intent was to create an 8-3 Republican majority.

Id. at 129.

> He was then asked this question:
>
> Q. So they purposely enhanced Republican voting power or preserved it at eight for political purposes, correct?
>
> A. Yes.

Id. at 130.

McDonald was also questioned about a number of statements in the article respecting the basis for the adoption of the redistricting plan here at issue and about competing plans discussed in the article and then was asked whether "the basis for your conclusion [in the article] that the 8-3 [eight Republicans and three Democrats] was the result of conscious decision-making by the legislature because these other plans with similar characteristics had only produced a 6-5 Republican advantage?" to which McDonald answered: "we were using these comparisons to draw this conclusion, yes." Trial Tr. 136-37.[38]

[38] At trial, McDonald appended to several answers the phrase "but with a caveat." When asked what that caveat was, he explained that it was the rare instance "when candidates can win in districts that are of the other political persuasion." Trial Tr. 124. However, McDonald acknowledged later that neither he nor, to his knowledge, anyone else had done any analysis on the basis of that caveat. Id.

Certainly, if McDonald's careful study, as reported in his article, had shown that race was the predominant factor in the redistricting he would have said so. Instead, he said that incumbent protection drove the process and the results. And, his article devoted sixty pages (and 27,228 words) demonstrating that point and analyzing how other plans could have achieved a different political line up.

Having previously taken the view in a scholarly publication that the 2012 redistricting was driven by the desire to protect incumbents, it lies not in the mouth of McDonald now to say that race, not protection of incumbents, was the predominant reason for the 2012 redistricting. I simply cannot countenance, as a finder-of-fact, such a 180 degree reversal on a key issue. I conclude that McDonald's views, in whole and in its constituent parts, are not entitled to any credibility.

B. Statements Made By Delegate Janis

Delegate William Janis was the author of the redistricting plan at issue here. The Plaintiffs, and the majority, rely heavily on certain statements made by Janis in the floor debates over the plan to support their view that race was the predominant factor in the redistricting of C.D.3. I do not understand the statements made by Janis when considered as a whole, to support, much less prove, such a conclusion.

To understand what Janis had to say about the redistricting plan that he formulated, it is important to view what he said in context and to consider the statements as part of a cohesive whole. Of course, it is not possible here to recite all of the statements that Janis made in the floor debates. Thus, I will focus on the ones that seem to be most comprehensive. Unfortunately, that exercise will take some space but, it is, I think, an important one. I do not repeat here the passages already cited by the majority, but I have taken them into account in my assessment of what Janis meant in all the statements that he made considered as a whole.

When the bill was first presented in April 2011, Janis outlined the several criteria on which he had based the bill in which the plan was set out.[39] He began:

> First, and most importantly, the districts that were drawn to 3rd Congressional District conform [sic] to the mandates of the United States Constitution and the Constitution of Virginia, and specifically to comply with the one-person-one-vote rule, which occurs in both these Constitutional documents.

Pl's. 43, p. 3. Janis went on to explain that meeting those objectives was a significant challenge because of the "dramatic

[39] As the majority notes, the bill ultimately was enacted in 2012 without any significant change.

and non-uniform shifts in population in the Commonwealth over the past three years." Id.

Janis next explained that:

> [t]he second criteria [sic] that's applied in House Bill 5004 is that the districts were drawn to conform with all mandates of federal law, and, most notably, the Voting Rights Act. The Voting Rights Act mandates that there be no retrogression in minority voter influence in the 3rd Congressional District, and House Bill 5004 accomplishes that.

Id. Then, Janis recited that:

> [t]hird, the districts were drawn to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 elections. And these districts are based on the core of the existing congressional districts with the minimal amount of change or disruption to the current boundary lines, consistent with the need to expand or contract the territory of each district to reflect the results of the 2010 census and to ensure that each district had the right 727,365 benchmark.

Id. at 4. According to Janis:

> House Bill 5004 respects the will of the electorate by not cutting out currently elected congressmen from their current districts nor drawing current congressmen into districts together. And it attempts to do this while still making sure that we comply with the constitutional mandate and the federal law mandates.

Id. Janis' explanation continued with the observation that:

> We also attempt to keep together jurisdictions and localities, counties, cities, and towns. We try either to keep

> them intact or, in some cases, reunite counties, cities, or towns that were splintered in previous redistricting plans.
>
> * * *
>
> Whenever possible, the plan also seeks to preserve existing local communities of interest, and, in some cases, to reunite such communities that may have been fractured in the course of previous reapportionment plans, most notably, Reston in northern Virginia.

Id. at 5. Then Janis pointed out that the plan was based in part on the views of Virginia's Congressional representatives respecting the configuration of their districts, stating:

> The district boundary lines were drawn based in part on specific and detailed recommendations that were provided by each of the 11 current members of the United States Congress in the Virginia delegation.
>
> * * *
>
> I have personally spoken with each member of the Virginia congressional delegation, both Republican and Democrat, and they have each confirmed for me and assured me that the lines for their congressional district as they appear in this legislation conform to the recommendations that they provided.

Id. at 5-6. To summarize, Janis stated:

> That's why we drew the lines this way was to, [sic] to the greatest degree possible, conform with the United States Constitution and federal law and pursuant to the significant population shifts over the last ten years, to respect the core of the existing congressional district boundaries with the least amount of disruption in the

> continuity of representation on the part of the constituents of these districts.

Id. at 6.

After making his presentation, Janis received questions from Delegate Ward Armstrong, who was the House of Delegates Minority Leader and the principal spokesperson for the Democrats in the House of Delegates when it was considering the Congressional redistricting legislation. In one of those questions, Armstrong asked Janis to explain what criteria were used to arrive at the redistricting plan other than the VRA and the one-person-one-vote criteria. To that, Janis responded as follows:

> The first criteria [sic] that we applied was, it had to comply with all mandates of the United States Constitution and the Constitution of Virginia, more especially it must comply with the one-person-one-vote rule as interpreted by appropriate case law . . . .

Id. at 18.

> Second, that it was drawn to conform with all mandates of federal law, and most notably the Voting Rights Act and most specifically, that it follow a zero-variance rule, which is the 727,365 rule, and also that there be no retrogression in the minority voter influence in the 3rd Congressional District.
>
> Those are the mandatory criteria that are not permissive, that there is no discretion in the application of those.

Then, consistent with those criteria and the 2010 census data that mandated significant shifts in population between the various congressional districts, the third criteria that we tried to apply was, to the greatest degree possible, we tried to respect the will of the Virginia electorate as it was expressed in the November 2010 congressional elections.

And what that meant was we based the territory of each of the districts on the core of the existing congressional districts. We attempted -- I attempted to not disrupt those lines, to the minimum degree possible, consistent with the need to either expand or contract the territory of these districts.

We respected the will of the electorate by not placing -- one of the criteria was not placing two congressmen in a district together. And one of the criteria was that we would not take the district lines and draw a congressman out of his existing district.

The last criteria that we applied that was permissive was, to the greatest degree possible, consistent with the constitutional mandates, the federal law mandates, and the population shifts, we attempted to the greatest degree wherever possible not to split counties, cities, and towns, local jurisdictions, and to reunite wherever possible jurisdictions such as Allegheny County, Brunswick County, Caroline County, and the City of Covington.

And then we also tried not to split local communities of interest based on the recommendations we received from the current members of the congressional delegation.

Id. at 19-20.

Armstrong then queried why "it was of any significance whatsoever to contact incumbent members of the U.S. Congress and to gather their opinion on where the lines should be drawn." Id. at 26. To that, Janis responded:

> I didn't believe that it was the -- that the purpose of this legislation should be to overturn the will of the electorate as it was expressed in 2010.
>
> And you've got members of the current congressional delegation that have served for one year, and you've got members of the delegation that have served for 20 years, and everything in between. And when looking for input as to how to best preserve local communities of interest--local jurisdictions and localities are easy to see because they're on a map, but local communities of interest are not readily self-evident on a map - that it was relevant and it was reasonable to seek input and recommendations from those current congressmen because not only do they know the local communities of interest, but the local communities of interest know them and have elected them to public office.

Id.

In response to that explanation, Armstrong asked: "would the gentleman then admit that incumbency protection was one of the permissive criteria that he utilized in the development of HB 5004?" Id. at 27. Janis responded:

> Well, I would say that, as one member of the congressional delegation said, incumbency protection is how this has been described in every single newspaper report and every account in every newspaper was that this is an incumbency protection program.

* * *

> And it was -- I just didn't think that it was the place of the House of Delegates to thwart the will of the electorate as it was expressed last year by disrupting the current congressional boundaries. And what we tried to do was maintain the core of what those boundaries were under the existing lines.

Id. at 27-28.

Another delegate questioned Janis respecting what he meant by his references to "the will of the electorate based on the 2010 elections." Id. at 40. Janis responded:

> I would say to the gentleman that the voters went to the polls in November of 2010 and they elected 11 Congressmen, Republican and Democrat. Some of them they elected for the first time, some of them they elected for the fifth or sixth time.
>
> And these members of the congressional delegation, that one of the criteria that I applied here that is permissive in nature was that we were not going to deliberately -- this plan was not going to deliberately lump existing congressmen together and not cut existing congressmen out of their current congressional districts and that this plan was going to try to respect, to the greatest degree possible, consistent with the constitutional mandates and the federal law mandates, most especially the Voting Rights Act, with the core -- it would respect the core of the existing congressional districts.
>
> And that one of the permissive criteria that was applied was that this plan was not going to seek to deliberately re-engineer the map

> of Virginia in a way that was incompatible with the results of last year's election.

Id. at 40-41.

When considered in context and as a whole, I think that Janis's statements (including those cited by the majority) show that the predominant factor in the redistricting here at issue was protection of incumbents. Those statements also show that traditional redistricting factors played an important role as well. And, they show that, albeit necessarily considered in the process, race was not the predominant factor in the drawing of C.D.3 or otherwise in the redistricting.

With that view of the record, I cannot conclude that the Plaintiffs have met their demanding burden of proof to show that race was the predominant factor.

If, as the majority acknowledges, there were two factors animating "which persons were placed in appropriately apportioned districts" - incumbency protection and race - then it is necessary to determine how race was considered in order to decide whether it was the predominate factor. Alabama, 135 S. Ct. at 1271 (emphasis in original). Here, the record establishes that race was a factor only because federal law required it to be considered. Race, like equal population, is a mandatory consideration because both the Constitution and federal law provide "the background rule[s] against which

redistricting takes place." Id. But, there is a difference between a State's "paramount concern" with complying with federal law and a State's use of race as a "predominant criterion" for allocating voters between districts. Acknowledging the former, in my view, does not prove the latter.

C. Janis's Statements About The VRA And Non-Retrogression

The Plaintiffs, and the majority, take the view that Janis's specific reference to the non-retrogression requirement of the VRA and his subsequent reiterations of that requirement's importance in response to questioning in floor debates, see id. at 10, 14, and 25, prove that race was the predominant factor. And, I agree that the record is replete with evidence that it was "mandatory" that the redistricting plan "not retrogress in minority voting influence." But none of that lends support to a finding of predominance under Shaw because it merely recites the requirements of federal law. I believe that, taken in context, those comments only reflect a more general purpose to avoid violations of federal constitutional law, state constitutional law, and federal statutory law, rather than illustrating the use of race as the predominant factor "motivating the legislature's decision to place a significant number of voters within or without a particular district." Miller, 515 U.S. at 928.

It is a truism that "The Supremacy Clause obliges the States to comply with all constitutional exercises of Congress'

power." Bush v. Vera, 517 U.S. at 991-92; see also U.S. Const., Art. VI, cl. 2. The Supremacy Clause also binds the United States to the terms of the United States Constitution. U.S. Const., Art. VI, cl. 2. Notably, Janis's first stated goal included compliance with the United States Constitution, which is mandated by the Supremacy Clause. Id. His second stated goal, of which non-retrogression was an element, was also mandated by the Supremacy Clause.

In any redistricting, compliance with federal statutory and constitutional law is an absolute necessity. For a jurisdiction covered by Section 5 of the VRA, compliance with Section 5 is mandatory - a fact that applies with equal force whether or not a legislator openly acknowledges it. To construe a legislator's (or the legislature's) acknowledgement of the role of the Supremacy Clause as a de facto trigger for strict scrutiny of majority-minority jurisdictions is to place the legislatures and their legislators in a "trap[] between the competing hazards of liability." Bush v. Vera, 517 U.S. at 992 (O'Connor, J., concurring). Such an interpretation implies that legislatures are always subject to strict scrutiny.[40]

[40] This "trap" is similar to a narrow tailoring requirement that "condemn[s] [a] redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) (Continued)

The majority opinion's description of this valid principle, and very real problem, as a "red herring" is based on its misapprehension of what the sentence actually says. Thus, the majority says that "[t]he dissent argues that by subjecting a redistricting plan to strict scrutiny when it separates voters according to race as a means to comply with Section 5 trap[s] [legislatures] between competing hazards of [VRA and Constitutional] liability." That, of course, is not what the dissent actually says. The subject sentence actually says that "[t]o construe a legislator's (or the legislature's) acknowledgement of the role of the Supremacy Clause as a de facto trigger for strict scrutiny" places them in a trap like that in Bush. Thus, the sentence makes the point that it is not right to animate strict scrutiny because a legislator, or the legislature, acknowledges the role of the Supremacy Clause in redistricting. That is a far different matter than subjecting a redistricting plan to strict scrutiny because it predominantly separates voters according to race. The Supreme Court has never held that the intentional use of race in redistricting, taken alone, triggers strict scrutiny. See Alabama, 135 S. Ct. at 1272 (noting that the majority "does not express a view on the

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retrogressive under § 5 should the legislature place a few too few."). Alabama, 135 S. Ct. at 1274.

question of whether the intentional use of race in redistricting, even in the absence of proof that traditional districting principles were subordinated to race, triggers strict scrutiny").

To be sure, the Supremacy Clause and the application of Section 5 provide the potential for traditional redistricting criteria to be subordinated to race. But I read the Supreme Court's precedent as demanding actual conflict between traditional redistricting criteria and race that leads to the subordination of the former, rather than a merely hypothetical conflict that per force results in the conclusion that the traditional criteria have been subordinated to race. Cf. Miller, 515 U.S. at 928-29 ("Application of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts, where presumably the States have drawn the boundaries in accordance with their customary districting principles. That is so even though race may well have been considered in the redistricting process."). And, on the facts before us, where the Enacted Plan improves upon the Benchmark Plan in certain traditional criteria, see Pl's Exh. 43, at 5, and all Congressional incumbents have personally indicated their satisfaction that the Enacted Plan conforms with their political interests, see id. at 5-6, and both experts in this case agree that the General Assembly had political reasons to make the

changed embodied in the Enacted Plan regardless of the race of the affected voters, see Trial Tr. at 128-29 (McDonald), 266 (Morgan), I cannot conclude that Janis's statements about the VRA and non-retrogression show, or even tend to prove, that the traditional criteria were actually subordinated to race in the creation of the C.D.3.

D. The Senate Resolution

Like the Plaintiffs, the majority points to a Virginia Senate Resolution as evidence that race was given priority over all other redistricting considerations. The resolution provides that "population equality among districts and compliance with federal and state constitutional requirements and the Voting Rights Act of 1965 shall be given priority in the event of conflict among the [previously enumerated redistricting] criteria." Pl's Ex. 5, p. 2, ¶ VI (emphasis added).

As explained above, it is both necessary, and unremarkable, that a state legislature would recognize its obligations under, and the effect of, the Supremacy Clause. And, I do not see how the recognition of that obligation could support, or tend to prove, a finding that race was the predominant reason for the particular lines implemented in the Enacted Plan. More importantly for today's case, the resolution establishes a priority in the event of a conflict, and I can find nothing in the record to suggest that there was a conflict between, or

among, the criteria outlined in the resolution. Nor does it appear from the record that the legislature considered that there was conflict. Hence, there never arose a need to resort to the priority clause of the resolution.

E. The Perceived Racial Quota

Next, the Plaintiffs have argued, and the majority has found, that the General Assembly imposed a 55 percent Black Voting Age Population ("BVAP") quota for the C.D.3. The support for this view is a patchwork quilt of statements made by Morgan and Virginia's Section 5 pre-clearance submission to the Department of Justice. See Pl's Post-Trial Br. at 7-9. However, in the final analysis, I do not think that the statements by Morgan or the Section 5 submission carry the weight ascribed to them.

The Section 5 submission merely states, as a factual matter, that the proportion of African-Americans in the total and voting age population in C.D.3 had been increased to over 55 percent. See Pl's Exh. 6, at 2. That, to me, is an objective description of a legislative outcome, rather than a declaration of subjective legislative intent or any evidence of a predetermined quota.

Morgan's expert report stated that "the General Assembly enacted . . . a House of Delegates redistricting plan [a plan for seats in the General Assembly] with a 55% Black VAP as the

floor for black-majority districts subject to Justice Department preclearance under Section 5." Int. Def's Exh. 13, at 26. Again, this statement pertains to a different redistricting plan [the state House of Delegates plan], and gives no indication of whether the "floor" was a predetermined quota or an after-the-fact description of the districts that were contained in the enacted House of Delegates plan. Morgan went on to write that "the General Assembly had ample reason[41] to believe that legislators of both parties . . . viewed the 55% VAP for the House of Delegates districts as appropriate to obtain Section 5 preclearance," and that "[t]he General Assembly acted in accordance with that view for the congressional districts." Id. at 26-27. While these statements suggest that, in Morgan's view, the General Assembly looked favorably upon a plan with a BVAP greater than 55 percent, they do not go so far as to show that the legislature imposed a predetermined quota of 55 percent BVAP that predominated over every other redistricting criterion in effecting the Congressional redistricting here at issue.

[41] That was so, said Morgan, because the General Assembly previously had "enacted, with strong support of bipartisan and black legislators, a House of Delegates redistricting plan with a 55% BVAP as the floor for black-majority districts, subject to Justice Department preclearance under Section 5, including districts within the geography covered by Congressional District 3." Id.

Janis's public statements, on the other hand, suggest that the true starting point for the changes to C.D.3 was the recommendations provided by Virginian Congressmen before any assessment of the effect of those changes on the District's BVAP. Compare Pl's Exh. 13, at 11 (discussing input from Congressmen Scott and Forbes on the boundaries between C.D.3 and C.D. 4) with Int. Def's Exh. 10 (discussing analysis of previously proposed changes to verify that they did not lead to retrogression). Rather than indicating that race was the predominant factor or the subject of a hard quota, this sequence of legislative drafting suggests only that Janis was conscious of the possible effects on racial demographics and potential for Section 5 preclearance. And "strict scrutiny does not apply merely because redistricting is performed with consciousness of race." Bush v. Vera, 517 U.S. at 958.

Significantly, prominent opponents of the Enacted Plan opposed it because it provided incumbent protection, not because it was the product of adopting a racial quota. Senator Locke, the sponsor of a rival redistricting plan, stated on the floor of the Virginia Senate that, "I stand in opposition to this legislation, which clearly is designed to protect incumbents." Va. S. Sess. Tr., (Jan. 20, 2012), Pl's Exh. 47, at 15. Senator Locke later reiterated her belief that "this plan is not about the citizens of the [C]ommonwealth but about protecting

individuals who currently hold the office." Id. at 16. Delegate Armstrong, the minority leader in the Virginia House of Delegates, stated unequivocally, "The exercise is one for incumbency protection first, last, alpha, and omega." Va. HB 5004, 1st Spec. Sess. Tr. (Apr. 12, 2011), Pl's Exh. 43, at 48-49.

Delegate Morrissey compared the requests for redistricting input from incumbents to asking a professional football team where it would like the ball to be placed before a crucial play. Id. at 44-45. In Morrissey's view, "We're not here to protect [incumbent] Congressman Connelly [sic] or Congressman Herd [sic]. We're here to do the people's business and to protect their interest." Id. at 45. Because the redistricting bill protected incumbents, he was opposed to it.

Notwithstanding the fact that these opponents of the Enacted Plan had every reason to characterize the Enacted Plan in the harshest terms possible (i.e., as race driven or as the product of a racial quota), they did not do so. The record proves that was because they saw the plan as driven by the goal of incumbency protection rather than as racial gerrymandering.

I am aware of the decisions that give little, to no, weight to statements made by the opponents of legislation. See Shell Oil Co. v. Iowa Dep't of Revenue, 488 U.S. 19, 29 (1998); N.L.R.B. v. Fruit & Vegetable Packers, 377 U.S. 58, 66 (1964);

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-395 (1951). That authority exists because opponents are thought often to be motivated to make the worst possible case against the piece of legislation under debate and thus their views are of little effect in interpreting the legislation. Those authorities do not apply here to bar consideration of the opponent's views because we are not involved here in the interpretation of a law. Rather, we are seeking to determine which factors were most predominant in crafting the particular boundaries of C.D.3. And, I think, we can assume that the opponents would have condemned the Enacted Plan as race driven had they thought that to be the case. A "race driven" plan is surely as objectionable as an "incumbency driven" plan, and the majority agrees that the "bill's opponents have every incentive to place a competing label on a statute they find objectionable." So when the opponents labeled the Enacted Plan as an incumbency protection plan, we can take their views into account.

In that regard, it is important to recall that the most salient difference between the Enacted Plan and Senator Locke's alternative redistricting plan was not the proportion of African-Americans in C.D.3, but whether one of the districts then held by a Republican incumbent would be transformed into a

Democrat-leaning district. As the Plaintiff's own expert, McDonald, wrote last year:

> The sticking point was whether to protect all incumbents, giving the Republicans an 8-3 edge among the state's eleven districts, or to restore the African-American population to the Fourth Congressional District that had been shifted to the Third Congressional District during the last redistricting, yielding a Democratic-leaning Fourth Congressional District with 45% African American voting-age population and reducing the Republicans' edge to 7-4. After the November 2011 elections, when Republicans gained a working majority, in the Senate, the General Assembly passed the congressional plan that protected all incumbents including the eight Republicans.

McDonald, supra, at 796-97. This assessment, offered in a scholarly publication a year after the Enacted Plan was signed into law, severely damages the credibility of McDonald's subsequent testimony that "race trumped politics" in the drawing of the Enacted C.D.3. See Trial Tr. 88. Perhaps more importantly, however, McDonald's article demonstrates that even redistricting experts writing with the benefit of hindsight believed that the choice of redistricting plans was driven by issues of incumbency protection and partisan balance. Given that observation, there is ample reason to conclude that Janis and other legislators were animated in their redistricting decisions by incumbency protection and partisan advantage.

For those reasons, I do not consider that the Plaintiffs proved their racial quota argument.

F. McDonald's Opinions: Circumstantial Evidence

In their presentation of the circumstantial evidence thought to support proof of a racial gerrymander, the Plaintiffs have relied on McDonald's opinion and report.[42] And, as I understand it, the majority relies heavily on the exhibits prepared by McDonald and his testimony about them when assessing the Plaintiffs' circumstantial evidence thought to show that race was the predominant factor in drawing C.D.3.

In reaching his conclusion that the race was the predominant factor in the creation of the Enacted Plan and the drawing of C.D.3, McDonald analyzed the racial composition of populations that moved in and out of C.D.3, the compactness of the district, the overall shape of the district (including the use of water to bypass racial communities while maintaining technical contiguity), and the number of precinct and locality boundaries that were "split" by the Enacted Plan. See Trial Tr. 72. I will address each of these factors in turn.

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[42] McDonald's report and its exhibits (like that of the Defendants' expert, John Morgan) were admitted into evidence by agreement, notwithstanding that expert reports are hearsay and hence not admissible usually.

But, before doing so, I reiterate that, for the reasons set out in Section II.A, I would give no credence to any part of McDonald's testimony or report. However, because the Plaintiffs' case, like the majority opinion, depends on McDonald's views on these topics, I think it is wise to address them, wholly apart from my view of his credibility. Thus, I turn now to the elements of what the majority calls "Circumstantial Evidence of the Third Congressional District's Shape and Characteristics." In so doing, I discuss, as has the majority, each point individually but assess them as a whole.

1. Population Swaps – Racial Composition

The Enacted Plan incorporated a number of population swaps between C.D.3 and the surrounding Congressional districts. McDonald testified that the effect of these various swaps was to remove areas with a comparatively low BVAP from C.D.3 and add areas with a comparatively higher BVAP into C.D.3. Trial Tr. 82-87; Pl's Exh. 27, at 15, Table 6. Even if we assume that point to be accurate, it does little to prove that race was the predominant factor in the redistricting because, "[i]n a case . . . where majority-minority districts . . . are at issue and where racial identification correlates highly with political affiliation," Easley, 532 U.S. at 258, a simple analysis demonstrating that blacks are disproportionately likely to be moved into a particular legislative district is insufficient to

prove a claim of racial gerrymandering. As Morgan explained, the Enacted Plan treats District 3 the same way as the majority-white districts by preserving its essential core and making relatively minimal changes to benefit incumbents in District three and adjacent districts. Trial Tr. 256.

Neither party disputes that racial identification correlates highly with political affiliation in C.D.3 and surrounding areas. And, the record shows that the Democrat vote share of local voting tabulation districts (VTDs) can generally be predicted simply by taking the BVAP of a VTD and adding about 21 percentage points. See Pl's Exh. 57, Table 2 (reflecting the analysis of the Plaintiff's expert and showing that most VTDs have a Democrat vote share 20-22 points higher than their BVAP); Int. Def's Corrected Exh. 50, Table 1 (reflecting the analysis of the Defendants' expert and showing the same correlation between BVAP and Democrat vote performance).

The majority finds fault with this analysis because it is, in their view, "precisely the sort of race-biased consideration the Supreme Court has confirmed triggers strict scrutiny." (citing Bush v. Vera, 517 U.S. at 968; and Shaw I, 509 U.S. at 653). However, the analysis of racial correlation and political affiliation here is based on facts in the record: the Plaintiffs' own expert, the Defendants' expert, and the results of the most recent presidential election. Hence, this case does

not present the racial stereotyping that Bush and Shaw I rightly prohibit. And that fact-based correlation between race and political affiliation has significance. That is because the proven correlation requires that "the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles." Easley, 532 U.S. at 258.

It is not, I think, disputed by anyone that, at least, one of the political objectives articulated in the Virginia legislature was incumbent protection, which directly implicated the partisan performance of the various Congressional Districts. McDonald purportedly tested these "political considerations" to determine whether they could explain the changes to C.D.3, and concluded that "race trumped politics." See Trial Tr. 87-88. But McDonald's test is simply too crude to support such a conclusion, as McDonald's own follow-up analysis demonstrates.

McDonald initially created a set of VTDs drawn from every locality that was partially or completely contained within the Benchmark C.D.3. See Trial Tr. 88. To that set, he added the VTDs from every locality adjacent to the Benchmark C.D.3. Id. McDonald isolated those VTDs where Democrats averaged 55 percent of the vote or more, and then compared the "highly Democrat

VTDs" that were placed within the Enacted C.D.3 with those that were placed in other districts. Id. at 88-89. McDonald found that the highly Democrat VTDs placed within C.D.3. possessed a higher BVAP than their counterpart VTDs outside C.D.3. Id. at 89; Pl's Exh. 28, at 8 (finding an average BVAP of 59.5% for highly Democrat VTDs within the Enacted C.D.3 and an average BVAP of 43.5% for highly Democrat VTDs outside the Enacted C.D.3). From this finding, McDonald inferred that race predominated over politics in the selection of VTDs for inclusion in the Enacted C.D.3.

McDonald's analysis suffers from two major deficiencies. First, he made no distinction between VTDs that were already within the pre-existing boundaries of C.D.3 and VTDs that were outside the boundaries of C.D.3. McDonald's analysis assumes that, but for partisan performance, a VTD in the inner core of the old C.D.3 is no more likely to be included in the new C.D.3 than a VTD thirty miles outside the old C.D.3. This assumption can be valid only if the redistricting legislature gave no value to the goals of preserving district cores and protecting the pre-existing communities of interest formed within those cores. However, the record makes it clear that the legislature, in fact, did assign substantial value to those traditional districting criteria. And, the record shows that, of the 189 highly Democrat VTDs assigned to the Enacted C.D.3, 159 were

also included in the Benchmark C.D.3. Those 159 VTDs had an average BVAP of 60%. On this record, and considering the voting performance data from past presidential elections, it should not come as a surprise that a pre-existing majority-minority Congressional district would have a higher average BVAP in its highly Democrat VTDs than the surrounding localities, and evidence to that effect does not demonstrate that the changes to the Benchmark C.D.3, a pre-existing majority-minority district, were predominately motivated by race.

The second problem with McDonald's analysis and testimony is that, although the highly Democrat VTDs within C.D.3 had a higher average BVAP, they were also on average more highly Democrat. Plaintiffs' own Exhibit 57 shows that, while the highly Democrat VTDs within C.D.3 had a BVAP 16 percentage points greater, they also performed 15.5 percentage points better for Democrat candidates. Thus, placing those VTDs within C.D.3 and keeping them out of the surrounding Congressional districts would serve the purpose of protecting incumbents (the Democrat incumbent in C.D.3, the Republican incumbents in C.D.1, C.D.4, C.D.7, and especially C.D.2) to a greater degree than would be possible if the lower BVAP, less highly Democrat VTDs were also placed within C.D.3.

When their own evidence shows that the selection of highly Democrat VTDs does as much to further the race-neutral political

goal of incumbency protection as it does to increase the proportion of minorities within the district, the Plaintiffs cannot be said to have carried their burden to show that race predominated over politics, and certainly not through McDonald's VTD analysis.[43] As in Backus v. South Carolina,

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[43] The Plaintiffs have placed great importance on five highly Democrat VTDs that were removed from the Benchmark C.D.3. See Trial Tr. 411-14; Pl's Post-Trial Reply, at 7-9 & n.4. These VTDs, however, were substantially less Democrat (19.2 percentage points) than the highly Democratic VTDs added to Benchmark C.D.3, and in fact close to the 55% cutoff selected by the Plaintiffs as the definition of a highly Democrat VTD. See Pl's Exh. 57, Table 2. The Plaintiffs argue that, because the discrepancy in the BVAPs of the added and removed districts (35.9 percentage points) is greater than the discrepancy in the Democrat performance, those five VTDs prove that race predominated over politics.

I can find no basis in precedent for this argument, and as a matter of logic it is a thin reed. There is no dispute that the five VTDs in question are less highly Democrat than their counterparts that were added to the Benchmark C.D.3. There is also no dispute that they have substantially lower BVAPs. Both the Defendants' alleged goals of incumbency protection and the race factor that Plaintiffs allege would have been substantially furthered by these redistricting choices. When both goals are substantially served by a particular redistricting decision, that decision offers no insight into which goal predominated in the decision-making process. The implication of the Plaintiff's argument is that the Defendants should have compromised their ability to achieve their political goals in order to avoid an even larger racial impact. But that is not the test set forth in Easley, and so the five VTDs highlighted by the Plaintiffs do not prove their claim. In fact, the Supreme Court rejected a similar precinct-based argument in Easley itself. See 532 U.S. at 255 ("First, appellees suggest, without identifying any specific swap, that the legislature could have brought within District 12 several reliably Democratic, primarily white, precincts in Forsyth County. None of these precincts, however, (Continued)

another case in which McDonald's similar testimony was found wanting, this analysis "focuse[s] too much on changes that increased the BVAP in certain [VTDs] and not enough on how traditional race-neutral principles were subordinated to race in making those changes." 857 F. Supp. 2d 553 (D.S.C. 2012) (three-judge court), summ. aff'd, 133 S.Ct. 156 (2012).

2. Compactness

McDonald also based his opinion on the predominance of race in part on his analysis of C.D.3's compactness. Based on a visual inspection of the district's map and three different statistical measures of compactness (The "Reock" test, the "Polsby-Popper" test, and the "Schwartzberg" test), McDonald testified that C.D.3 "is the least compact district of any district in the Commonwealth of Virginia." Trial Tr. 73. While that assertion seems to be accurate as far as it goes, it does not speak directly to the question whether the district's lack of compactness is constitutionally suspect.

An observation that "the Third Congressional District is the least compact congressional district in Virginia" is no more illuminating than an observation that someone is the poorest in a room full of millionaires. A highly compact district in a

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is more reliably Democratic than the precincts immediately adjacent and within District 12.").

state that adheres closely to compactness principles may be both the least compact in the state and among the most compact in the nation. None of this is to say that compactness is not a crucial variable in finding circumstantial evidence of racial predominance. It is. But the majority's focus on the relative compactness of the district is misplaced.

The badge of "least compact" is especially uninformative here because in all three tests used by McDonald, C.D.3 is the least compact district by the slimmest of margins. See Pl's Exh. 27, at 7. On the Reock test, where lower scores are less compact, the scores of Virginia's Congressional Districts range from 0.19 to 0.37, and C.D.3 scores only 0.01 worse than the second-least compact district. Id. On the Polsby-Popper Test, where lower scores are less compact, the scores range from 0.08 to 0.26, and C.D.3 scores only 0.01 worse than the second-least compact district. Id. On the Schwartzberg test, where higher scores are less compact, the scores range from 1.76 to 3.07, and C.D.3 scores only 0.01 worse than the second-least compact district. Id.

But, as McDonald conceded during his testimony, even a difference of 0.03 on the Reock test, 0.03 on the Polsby-Popper test, and 1.03 on the Schwartzberg test does not hold comparative significance under any professional standard. See Trial Tr. 217 (testifying about differences in compactness

between Enacted C.D.3 and Plaintiff's alternative plan); Pl's Exh. 29, at 7 (quantifying those differences in compactness scores). Therefore, by McDonald's own logic, C.D.3 is not significantly less compact than some of the other Congressional districts in the Commonwealth of Virginia. Thus, McDonald's compactness contention does not advance the theory that race was the predominant factor in the creation of C.D.3. And, certainly it does not prove the point.

3. VTD And Locality Splits

McDonald also examined the number of VTDs and localities that were "split" by the boundaries of the Enacted C.D.3. He testified that C.D.3 split more VTDs and localities than any other Congressional District in Virginia. Trial Tr. 76-80. See also Pl's Exh. 27, at 8-11 (McDonald's expert report). Thereupon, McDonald concluded that C.D.3's position as the leading source of split localities and VTDs indicated that race was the predominant factor in the redistricting of C.D.3.

But, as with his testimony about compactness, McDonald's logic is too sweeping. Unless a state manages to avoid splitting any localities and VTDs (an almost impossible task when combined with the need to achieve perfect population equality between districts), one or more districts will inevitably participate in more splits than other districts. McDonald has not offered any cognizable principle or

professional standard that distinguishes between a reasonable distribution of splits between districts and a true outlier indicative of racial gerrymandering. His theorem fails for that reason alone.

Moreover, C.D.3 now splits fewer localities and VTDs than the version of C.D.3 that was struck down in 1997. See Pl's Exh. 27, at 8-11 (quoting statistics cited by Moon v. Meadows, 952 F.Supp. 1141, 1148 (E.D. Va. 1997)). Similarly, the Enacted Plan splits fewer localities and VTDs statewide than the redistricting plan struck down in 1997. Id. The Enacted Plan also splits fewer localities than the Benchmark Plan that was previously in place. Trial Tr. 321. Tellingly, McDonald previously wrote in his article that the Enacted Plan "scored highly" in his regard for its ability to limit the number of split political boundaries. See McDonald, supra, at 819-20.[44] On this record, I conclude that the number of VTD and locality splits are not probative of the theory that the splits were racially motivated.

[44] This is yet another illustration of the facile and malleable quality of McDonald's opinions. When opining before being retained in this case, McDonald's view on the "splits" issue was far different than the one he posits in this case.

4. Contiguity

McDonald conceded that C.D.3 was contiguous, but found fault with the fact that the district was not completely contiguous by land or bridge connections. Trial Tr. 74-76. Specifically, McDonald concluded that C.D.3's use of water connections across the James River to bypass white communities located between Newport News and Hampton showed that traditional redistricting principles had been subordinated to race. Id. at 75-76. However, McDonald made no attempt to analyze the political and partisan impact of excluding those white communities, and therefore did not make the necessary showing under Easley to demonstrate that these bypasses were created for racial rather than political reasons.

Furthermore, McDonald conceded upon cross-examination that water contiguity without a bridge is permissible in Virginia. Trial Tr. 221. The Virginia Senate Redistricting Criteria adopted in 2011 explicitly stated that, "Contiguity by water is sufficient." Pl's Exh. 5, at 1. And, the Supreme Court of Virginia has held that contiguity by water does not necessarily violate the Constitution of Virginia, reasoning that contiguity by land "is not necessary for exercising the right to vote, does not impact otherwise intact communities of interest, and, in today's world of mass media and technology, is not necessary for communication among the residents of the district or between

such residents and their elected representative." Wilkins v. West, 571 S.E.2d 100, 109, 264 Va. 447, 463 (Va. 2002). Under these circumstances, the Plaintiffs have not shown that contiguity by water is a violation of traditional redistricting principles in Virginia, let alone that the perceived impermissible form of contiguity was driven by race rather than politics.

5. Population Swaps - Volume

The Plaintiffs have also made an issue of the fact that, although the Benchmark C.D.3 was underpopulated by roughly 63,976 people, the population swaps used to bring the Enacted C.D.3 to par with the other Virginia Congressional Districts involved roughly 180,000 people. See Trial Tr. 80-81, 87. The majority too finds this to be evidence in support of a finding that race was the predominant factor in this redistricting.

However, to a large degree, this discrepancy is explained by the changes in Virginia's population over time and the need to minimize split localities. C.D.3 was not the only underpopulated district that needed to be augmented after the 2010 census. Congressional Districts 2, 5, 6, 8, and 9 were also underpopulated. Trial Tr. 248. District 2, which is adjacent to District 3 and located on the far eastern edge of the Commonwealth, was underpopulated by more than 81,000 people. Id. The goal of the population swaps involving C.D.3 was not

merely to augment that District's population, but to work in concert with other population swaps to achieve the near-perfect population parity that would satisfy the Constitutional mandate of one-man, one-vote.

The need to achieve population parity between districts was complicated by a simultaneous desire to limit locality splits. The Enacted Plan managed to add precisely 63,976 people to C.D.3 while reducing the number of split localities. See Trial Tr. 321. As a matter of logic, it is extremely unlikely that any combination of "whole" localities in the vicinity of Benchmark C.D.3 could have been added to the District to augment the population by exactly 63,976 people, and the Plaintiffs have made no effort to demonstrate the feasibility of that scenario. In order to hit its population target for C.D.3, the Virginia legislature had to either split additional localities or trade complete localities back and forth between districts to achieve the desired net transfer of population. The evidence shows that the Virginia legislature took the latter route, which allowed it to achieve its population target and actually reduce the number of split localities, albeit at the expense of involving more people in the population swaps between districts.

Finally, to the extent that any population swaps cannot be explained by the two factors above, there is nothing about their existence that by themselves indicate that the swaps were

racially motivated. That determination must be made on the basis of other evidence, and the other evidence is insufficient to that end.

6. The Shape Of C.D.3

The shape of a district, if it is bizarre, can be considered as tending to show that race was the predominant factor in drawing the district lines. See Shaw v. Hunt (Shaw II), 517 U.S. 899, 905-906 (1996); Karcher v. Daggett, 462 U.S. 725, 762 (1983); Miller, 519 U.S. at 914; Bush v. Vera, 517 U.S. at 980-81. The Plaintiffs and the majority take the view that C.D.3 is configured so as to fall within the reach of those decisions.

With respect, when I examined the map that shows all of the Virginia districts (Int. Def's. Ex. 02), I could not conclude that C.D.3 fits the mold of the decisions in which the shape of the district was given such probative effect. C.D.3 is somewhat irregular in shape, but that is true of many of Virginia's nine districts, especially C.D.'s 1, 2, 4 and 7, none of which are accused of being drawn on the basis of race. Moreover, the shape of proposed C.D.3 in the Plaintiffs' Alternative Map is hardly any less irregular than the current shape of C.D.3 or in the Enacted Plan. Thus, on this record, I conclude that the shape of C.D.3 does not tend to prove that race was the predominant factor in drawing the district.

G. The Credibility of John Morgan

The majority questions why I credit the testimony of the Defendants' expert, John Morgan, on a number of points. That question arises because, says the majority, Morgan has no advanced degree, his undergraduate degree was in history, he has never taken a course on statistics, he did not talk to or work with members of the Virginia legislature and he miscoded some VTD's in his analysis. The majority's query is a fair one and deserves an answer. So too does the record in this case.

To begin, the Plaintiffs accepted Morgan as an expert in demography and redistricting. Trial Tr., p. 241. Second, Morgan has been accepted as an expert in other federal court redistricting cases. Third, his resume shows extensive work in shaping statewide and congressional redistricting plans in nineteen states since 1991. Fourth, he has served as a consultant to redistricting boards or commissions in five states. Fifth, from 1991 to date (excluding a three year tour as Executive Director of GOPAC) he has been employed with Applied Research Associates, a consulting firm specializing in political and demographic analysis and its application to elections and redistricting. Morgan started as a research analyst, became Vice-President in 1999 and has served as the firm's President since 2007. Intervenor-Defendant's Ex. 1.

Sixth, Morgan's undisputed trial testimony shows that he has received formal training in the intricacies of redistricting from the National College of State Legislators, from Republican organizations, and from a vendor of software used in redistricting analysis. Trial Tr., p. 243-244. Seventh, Morgan has trained others in how to draw redistricting plans, and in the process has trained state legislators who are involved in the redistricting process as well as the National College of State Legislators. Trial Tr., p. 244. Eighth, although Morgan did not assist or advise in the development of the redistricting plan at issue here, he did work directly with the Virginia's General Assembly and its counsel in drawing the statewide redistricting plan in 2011. Ninth, I found him to be knowledgeable about all aspects of redistricting and the demographics related thereto and I found his analysis to make sense and to square with the other evidence in the case. Finally, I adjudged Morgan to be entirely truthful.

I recognize that Morgan made some mistakes in his original assignment of data about VTD's. Those mistakes occurred in the run up to trial when the parties were exchanging data. And, Morgan having candidly acknowledged them, and taken another look at his views in perspective of the correct data, explained that they did not affect his bottom line conclusions even if McDonald's views of the misassigned VTD's were accepted as true.

Trial Tr., pp. 391-92. And, in my view, the cross-examination of McDonald in the Plaintiffs' rebuttal case confirmed what Morgan said. Trial Tr., pp. 424-31. In assessing his credibility, I considered the mistake that Morgan made on the misassignment of data, but, because it was an understandable, and honest, mistake of the kind that often happens in the press of litigation, I did not conclude that it undercuts his credibility as a whole and certainly not in the areas cited in this opinion.[45]

H. Plaintiffs' Failure To Produce An Adequate Alternative Plan

As part of their effort to show that "the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles," Easley, 532 U.S. at 258, the Plaintiffs proffered an alternative redistricting plan ("Alternative Plan"). The Plaintiffs have not presented any other suggestions for how the legislature could have achieved its stated objectives. Therefore, the Plaintiffs cannot succeed on the merits of their claim unless the Alternative Plan substantially achieves the

[45] With all his background, training, and experience in demographics and redistricting, I just do not think Morgan's credibility suffers because he did not have an advanced degree, his undergraduate degree was in history, and he has not taken a course in statistics. I have set out above my views on the mistake cited by the majority and have noted his familiarity with Virginia's statewide redistricting.

same political objectives that the legislature achieved through the Enacted Plan and the Enacted C.D.3.

Morgan explained that, under the Benchmark Plan, Congressional District 2 "was a toss-up district," and that the legislature would have had reason to protect the Republican incumbent who had recently been elected in that district. Trial Tr. 258. McDonald agreed that District 2 was a toss-up district over the past ten years and under the Enacted Plan. Trial Tr. 119. Morgan went on to testify that the Plaintiff's Alternative Plan would increase the Democratic vote share in Congressional District 2 from roughly 50 percent to about 55 percent, right at the threshold of what McDonald considered to be a "highly Democrat" area. Trial Tr. 304-05. Not only would this represent the largest political shift in any of the districts redrawn under the Plaintiff's Alternative, but it would be a significant political shift against an incumbent.

McDonald did not dispute Morgan's analysis. In fact, McDonald admitted that the Alternative Plan does not protect all political incumbents:

> Q: So the alternative plan subordinates traditional districting principles to race, but unlike the enacted plan, does not further the General Assembly's political goals of having an 8 [Republican]/3 [Democrat] incumbency protection plan; correct?
>
> A: Yes.

Q: Yes, it does not?

A: Yeah. That's why I'm trying to think how to formulate the answer.

Q: And you have no basis for disagreeing with the notion then that the alternative plan moves an overwhelmingly Democratic group into District 2 and moves and evenly divided group out of District 2, do you?

A: No, I do not.

* * * *

Q: And you don't have any basis for disagreeing with the fact that that move converts District 2 from a 50 percent toss-up district to a heavily Democratic 55 percent noncompetitive district, do you?

A: No, I do not.

Q: And if all of that were true, then this would be not only - this would be directly undermining the General Assembly's goals of incumbency protection and maximizing Republican congressional representation; correct?

A: If those were the goals of the General Assembly, yes.

Trial Tr. 180:10-18; 184:10-24. At no point have the Plaintiffs even attempted to explain how an Alternative Map that threatens to unseat a Republican incumbent and create a 7-4 partisan split in Virginia's Congressional Delegation serves the political objectives of the Republican-controlled General Assembly.

If race truly predominated over politics in the creation of the Enacted Plan and C.D.3, then the Plaintiffs should have been

able to produce an alternative plan that remedied the alleged racial gerrymandering without disturbing the political viability of incumbents or the partisan ratio in Virginia's Congressional Delegation. Instead, the Plaintiff's Alternative Plan would have a significant effect on both the racial demographics and the political environments of Congressional Districts 2 and 3. The Alternative Plan itself, I think, actually provides strong and persuasive evidence that protection of incumbents, not race, was the predominant factor in the redistricting reflected in the Enacted Plan. Apart from that, the Alternate Plan also fails to show that "the legislature could have achieved its . . . political objectives in alternative ways that are comparably consistent with traditional redistricting principles." Easley, 532 U.S. at 258.

The majority acknowledges "that parties attacking redistricting boundaries must show 'that the legislature could have achieved its legitimate political objectives in alternate ways that are comparably consistent with traditional redistricting principles.'" (citing Cromartie II, 532 U.S. at 258). Then, it says that the attacking party is not confined in its form of proof to submitting an alternative plan. I do not quarrel with that statement as a general proposition, but it is difficult to envision what other form of proof could effectively establish that element of a plaintiffs' racial gerrymandering

claim where, as here, the Plaintiffs' expert acknowledges, and the evidence shows, that protection of incumbents was, at least, an important goal of the redistricting.

However, that is of no moment here because the Plaintiffs, in fact, offered in evidence the Alternative Plan in an effort to meet their burden to show "that the legislature could have achieved its . . . political objectives in alternate ways that are consistent with traditional redistricting principles." Having done so, they cannot be excused from the probative consequences of their own evidence merely because other forms of proof conceptually might have been available.

The majority is correct that the Alternative Plan provides a slight improvement in splits and that its splits affect fewer people, but that is accomplished at the expense of protecting incumbents. When all is said, I submit that the Alternative Plan shows that this case is about politics, not race, for it seeks to accomplish here a more favorable result for Democrats than does the Enacted Plan that was created through the legislative process.

I. Any Analogy To Shaw v. Hunt Is Inapt

It is suggested that this case is analogous to Shaw II, in which the Supreme Court applied strict scrutiny to North Carolina's creation of two majority-minority districts. I find this analogy inapt for several reasons.

First, North Carolina's District 12 was not merely the least compact district in the state, but "[had] been dubbed the least geographically compact district in the nation." Shaw II, 517 U.S. at 906. An earlier Supreme Court opinion had described the district in almost surrealist terms:

> Northbound and southbound drivers on I-85 sometimes find themselves in separate districts in one county, only to "trade" districts when they enter the next county. Of the 10 counties through which District 12 passes, 5 are cut into 3 different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them. One state legislator has remarked that "'[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district.'"

Shaw v. Reno (Shaw I), 509 U.S. 630, 636 (1993) (internal citations omitted). While C.D.3 could hardly be described as comely, there is no evidence that its irregularities are an outlier of the sort at issue in Shaw II.

Second, the record in Shaw II included explicit and repeated admissions that race was the predominant factor in the redistricting plan. North Carolina's preclearance submission had "expressly acknowledged that [the redistricting plan's] overriding purpose was to comply with the dictates of the Attorney General's December 18, 1991 letter and [thereby] to create two congressional districts with effective black voting

majorities." Shaw II, 517 U.S. at 906 (quoting from district court record). Perhaps more importantly, in Shaw II, the defendants formally conceded to the district court "that the state legislature deliberately created the two districts in a way to assure black-voter majorities." Id. (quoting Shaw v. Barr, 808 F. Supp. 461, 470 (E.D.N.C. 1992)). There is no such concession in this case,[46] and no explicit admission of predominant racial purpose was made in Virginia's Section 5 preclearance submission.

Third, in Shaw II the above indicators of racial predominance were "confirmed" by the testimony of "the redistricting plan's principal draftsman, who testified that creating two majority-black districts was the 'principal reason' for Districts 1 and 12." Id. (quoting from district court record). In this case, the principal draftsman, Delegate Janis, did not testify, so the Court and the parties must determine Delegate Janis's intent from what he said during the redistricting process. And, as explained in Section II.B, Janis's statements in the floor debates do not, in my view, show that race predominated here. Furthermore, because the Enacted Plan maintains rather than creates a majority-minority district,

[46] As explained previously, I conclude that no such concession was made here.

the race-neutral factors of incumbent protection and core preservation deserve much more weight in the analysis here, than would the comments made in Shaw II. In the end, however, it is far from clear that the Shaw II Court would have found that race was the predominant factor in the absence of strong corroborating evidence in the Shaw II draftsman's comments. And, as explained above, I do not believe that this record presents corroborative evidence that race predominated over politics (and particularly political incumbency protection).

III.

With respect for the views of my good colleagues in the majority, I think that the record in this case, considered as a whole, shows that the Virginia General Assembly set out to redraw district lines to protect incumbents and, in so doing, it also sought to respect traditional redistricting principles. The legislature was also fully aware of its obligation to comply with federal law and thus, of necessity, it considered race in trying to assure that compliance. But, at all times and in all the decisions it made, the predominant factors in the General Assembly's redistricting decision were the protection of incumbents and the use of traditional redistricting principles, not race.

For the reasons outlined above, I would find that race was not the predominant factor in the drawing of C.D.3. And, for the same reasons, I cannot conclude that the Plaintiffs have met their burden to prove that race was the predominant factor in this redistricting. Therefore, I would enter judgment in favor of the Defendants and dismiss the action with prejudice.[47]

/s/
Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: June 5, 2015

[47] Given that, under the majority opinion, the Virginia General Assembly must develop a new plan, I share the view that September 1, 2015 is the appropriate date for completion of that task. The Intervenor-Defendants' suggestion that we delay that task pending appeal is, in my view, a premature suggestion for a stay pending appeal. If there is an appeal, a motion for stay can be filed and the applicable law respecting stays can be applied after both sides are heard from.

APPENDIX D

Black Percentage Of Ideal House District Size if No Additional Black Persons Added, Based on 2010 Census Numbers

HD	2001 Plan Ideal Pop.	B% of ideal 2010 B. pop.	District
19	45,521	29,590	65.00%
32	45,521	23,022	50.57%
52	45,521	25,944	56.99%
53	45,521	19,704	43.29%
54	45,521	19,801	43.50%
55	45,521	26,162	57.47%
56	45,521	25,513	56.04%
57	45,521	24,767	54.36%
58	45,521	29,153	64.04%
59	45,521	22,012	48.36%
60	45,521	24,743	54.36%
67	45,521	26,188	57.52%
68	45,521	22,663	49.79%
69	45,521	24,105	52.95%
70	45,521	24,270	53.32%
71	45,521	24,485	53.79%
72	45,521	23,727	52.12%
76	45,521	31,219	68.58%
77	45,521	25,731	56.53%
78	45,521	22,930	50.37%
82	45,521	24,789	54.47%
83	45,521	23,359	51.31%
84	45,521	20,911	45.94%
85	45,521	20,340	44.68%
97	45,521	21,426	47.07%
98	45,521	24,673	54.14%
99	45,521	29,181	64.10%
103	45,521	28,283	62.13%
73	45,521	23,380	51.36%

The numbers in column three are from NPX-322.