No. 14-1504

In The
Supreme Court of the United States

ROBERT J. WITTMAN, *et al.*,

Appellants,

v.

GLORIA PERSONHUBALLAH, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

MOTION TO AFFIRM BY VIRGINIA STATE BOARD OF ELECTIONS APPELLEES

MARK R. HERRING
Attorney General of Virginia

CYNTHIA E. HUDSON
Chief Deputy Attorney General

TREVOR S. COX
Deputy Solicitor General

STUART A. RAPHAEL*
Solicitor General of Virginia

900 East Main Street
Richmond, VA 23219
(804) 786-7240
sraphael@oag.state.va.us

*Counsel of Record for Virginia State Board of Elections Appellees James B. Alcorn, Clara Belle Wheeler, and Singleton B. McAllister, in their official capacities

July 22, 2015

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WWW.COCKLELEGALBRIEFS.COM

RESTATEMENT OF QUESTIONS PRESENTED

1. Whether the district court committed clear error in finding that race was the predominant factor in redrawing Virginia's Third Congressional District (CD3)—triggering strict scrutiny—where the evidence, viewed in the light most favorable to the plaintiffs, supported the court's conclusion that: (1) avoiding retrogression under § 5 of the Voting Rights Act was the "primary focus" and the "paramount," "nonnegotiable" concern in the redistricting; (2) the legislature increased the black voting-age population in CD3 from 53.1% to 56.3% in order to meet a mechanical threshold of 55%; (3) minority voters in CD3 already were able safely to elect their candidate of choice; and (4) the legislature performed no functional analysis to determine if increasing the black voting-age population was necessary to protect voting rights.

2. Whether the district court committed clear error in finding that the use of race was not narrowly tailored to avoid retrogression in CD3, given the absence of any functional analysis supporting the need to increase the concentration of black voters from 53.1% to 56.3%.

NOTICE OF CHANGE IN PARTY NAMES

The following appellees, defendants in the district court, were sued in their official capacities as members of the Virginia State Board of Elections:

- Charlie Judd, Chairman of the Virginia State Board of Elections;
- Kimberly Bowers, Vice-Chair of the Virginia State Board of Elections;
- Don Palmer, Secretary of the Virginia State Board of Elections.

They no longer serve in those capacities. The current officials are:

- James B. Alcorn, Chairman of the Virginia State Board of Elections;
- Clara Belle Wheeler, Vice-Chair of the Virginia State Board of Elections; and
- Singleton B. McAllister, Secretary of the Virginia State Board of Elections.

Under Rule 35.3, appellees Alcorn, Wheeler, and McAllister are substituted for Judd, Bowers, and Palmer.

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GLOSSARY

BVAP	Black Voting-Age Population
CD#	Virginia Congressional District No.
The Congressmen	Appellants Robert J. Wittman, Bob Goodlatte, Randy Forbes, Morgan Griffith, Scott Rigell, Robert Hurt, David Brat, Barbara Comstock, Eric Cantor, and Frank Wolf
DOJ	The U.S. Department of Justice
DX	Defendants' Trial Exhibit No.
IX	Intervenor-Defendants' Trial Exhibit No.
JS	Jurisdictional Statement
PX	Plaintiffs' Trial Exhibit No.
Tr.	Trial Transcript Page No.
VRA	Voting Rights Act of 1965, 79 Stat. 439, as amended, 52 U.S.C. § 10301 *et seq*.
VTD	Voting Tabulation District

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Pursuant to Rule 18.6, Appellees James B. Alcorn, Clara Belle Wheeler, and Singleton B. McAllister—in their official capacities as members of the Virginia State Board of Elections—move to affirm the decision of the district court.

INTRODUCTION

Plaintiffs-Appellees, voters in Virginia's Third Congressional District (CD3),[1] sued the members of Virginia's State Board of Elections alleging that the Virginia General Assembly's 2012 congressional redistricting plan is a racial gerrymander. Virginia's eight Republican congressmen intervened in the district court to defend the plan. They or their successors are the Appellants here. The Office of the Attorney General of Virginia defended the plan alongside the Congressmen until the three-judge district court, after a full trial on the merits, declared the plan unconstitutional. The Congressmen alone have appealed.

On appeal, it is settled that the evidence must be viewed in the light most favorable to the plaintiffs, who prevailed at trial, and that the district court's factual findings can be set aside only for clear error.

Applying that standard, substantial evidence supported the district court's finding that racial considerations predominated in the redistricting. The sole author of the Enacted Plan explained that avoiding retrogression in CD3, under § 5 of the Voting Rights Act, was his "primary focus" and the "paramount" and "nonnegotiable" concern. He said that his plan satisfied § 5 by increasing the black voting-age population in CD3 from 53.1% to 56.3%. But the

[1] A glossary of abbreviations is found *supra* at viii.

evidence was undisputed that African-American voters in CD3 were already able to safely elect their candidate of choice, and that no functional analysis was performed to show the need to increase the concentration of black voters any further. And while the parties disputed whether the legislature applied a 55%-BVAP floor of the kind rejected in *Alabama Legislative Black Caucus v. Alabama*,[2] sufficient evidence supported the trial court's finding that there was such a floor. Accordingly, the district court did not err in concluding that racial considerations predominated in the redistricting, triggering strict scrutiny.

The appellants are mistaken that the plaintiffs failed to satisfy the legal requirements of *Easley v. Cromartie*.[3] They argue that *Easley* requires proof in *every* case of an alternative plan that comports with the legislature's traditional redistricting goals while also improving racial balance. Assuming for argument's sake that such a requirement applied here, the district court did not commit clear error in concluding that the plaintiffs' alternative plan passed muster. The appellants counter that the plaintiffs' alternative plan would have jeopardized the legislature's alleged intent to cement an 8-3 split favoring the 8 Republican members of Virginia's congressional delegation. But the district court, in rejecting that theory, relied

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[2] 135 S. Ct. 1257 (2015).

[3] 532 U.S. 234 (2001).

on the sponsor's own admission disclaiming such partisan motives. Doing so was not clearly erroneous. And in any case, *Alabama* makes clear that proof of an alternative plan, like other methods needed in circumstantial-evidence cases like *Easley*, is not necessary in direct-evidence cases like this one.

Because strict scrutiny applied and because the defense expert disclaimed any opinion on the narrow-tailoring question, the district court likewise did not err in holding that the legislature's use of race was not necessary under § 5 to protect the ability of minority voters to elect their candidate of choice. Accordingly, the Court should summarily affirm.

STATEMENT OF FACTS

1. Virginia currently has eleven congressional districts.[4] CD3 is the only majority-minority district.

As originally drawn in 1991, CD3 had a black population of 63.98% and a BVAP of 61.17%.[5] The district court in *Moon v. Meadows* described how the General Assembly created CD3 as "an amalgamation principally of African-American citizens contained within the legislatively determined boundaries for the

[4] IX 2 (map).

[5] PX 50.

obvious purpose of establishing a safe black district."[6] The district was "anchored in the tidewater cities of Norfolk, Suffolk, and Portsmouth."[7] The district used "only the open water of the Chesapeake Bay and the James River to connect the disparate and non-contiguous portions" of various "areas where blacks predominate, before terminating . . . in the City of Petersburg, which it also divides racially," and extending north to the "heavily black eastern suburbs of Richmond, racially dividing the capital city nearly in half before terminating in a small black neighborhood in northern Henrico County."[8]

Virginia submitted its 1991 congressional redistricting plan for preclearance under § 5 of the VRA, and DOJ precleared it in February 1992.[9]

In 1997, applying this Court's decisions in *Shaw v. Reno*[10] and *Miller v. Johnson*,[11] the three-judge court in *Moon* invalidated CD3 as an unconstitutional racial gerrymander. The court said the evidence was "overwhelming that the creation of a safe black

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[6] 952 F. Supp. 1141, 1144 (E.D. Va.), *aff'd mem.*, 521 U.S. 1113 (1997).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] 509 U.S. 630 (1993) (*Shaw I*).

[11] 515 U.S. 900 (1995).

district predominated in the drawing of the boundaries."[12] It also found that the "bizarre" shape and "racial characteristics" of the district supported the conclusion that racial considerations predominated in its drawing.[13]

In response, the legislature redrew CD3 in 1998, omitting the cities of Portsmouth and Petersburg.[14] The BVAP in CD3 dropped from 61.17% in the original plan to 50.47% in the revised plan.[15] DOJ precleared that plan,[16] and it was never challenged.

In 2001, after the 2000 census, the General Assembly again redrew Virginia's congressional districts.[17] The redistricting plan shifted a number of black voters from CD4 into CD3 and CD5.[18] As a result, the BVAP in CD3 increased from 50.47%, in the 1998 plan, to 53.1% in the enacted plan.[19]

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[12] 952 F. Supp. at 1145.

[13] *Id.* at 1147 (citing *Shaw I*, 509 U.S. at 646).

[14] Tr. 48:13-15; PX 21 at 1-2 (Virginia's 1998 § 5 submission).

[15] PX 50.

[16] Tr. 48:8-12.

[17] PX 19 (Virginia's 2001 § 5 submission).

[18] *Hall v. Virginia*, 385 F.3d 421, 424 (4th Cir. 2004) (footnote omitted).

[19] PX 27 at 14. One summary exhibit referenced a "53.2%" BVAP figure in the 2001 plan, rather than 53.1%. PX 50. There were references at trial to both numbers. *Compare* Tr. 49:16, 50:17 *with* Tr. 212:16, 326:4. The district court's opinion used the 53.1% figure. JS 9a, 20a, 40a.

DOJ precleared that plan,[20] and CD3 was not challenged.[21]

2. Following the 2010 census, one-person-one-vote requirements dictated that each congressional district have a population of no less than 727,365 and no more than 727,366; CD3 was underpopulated by 63,976 citizens.[22]

On February 9, 2011, DOJ issued its Guidance on Voting Rights Act Compliance,[23] discussed by this Court in *Alabama*.[24] The Guidance clarified that fixed racial targets were not required to obtain preclearance of redistricting plans submitted by covered jurisdictions under § 5 of the VRA:

> In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the

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[20] *Hall*, 385 F.3d at 424 n.1.

[21] A challenge was rejected to CD4 that had alleged minority-vote dilution under § 2 of the Voting Rights Act. *Id.* at 423. The opinion in *Hall* was authored by Judge Duncan, who authored the majority opinion of the three-judge court in this case. Redistricting challenges to Virginia's House and Senate districts were also rejected by the Supreme Court of Virginia in *Wilkins v. West*, 571 S.E.2d 100 (Va. 2002).

[22] PX 13 at 12:3-8; PX 27 at 14; Tr. 58:17-22, 381:23-382:2.

[23] 76 Fed. Reg. 7,470 (Feb. 9, 2011) (DX 9).

[24] 135 S. Ct. at 1272-73.

> Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district.[25]

Two weeks later, the General Assembly commenced a special session dedicated to redistricting.[26] The House of Delegates was controlled by Republican members, the Senate by Democrats.[27]

On March 25, 2011, the Privileges and Elections Committee of the Virginia Senate adopted criteria to consider in drawing new congressional districts.[28] But the plan that became CD3 originated in the House of Delegates.

The sole author of what became the congressional redistricting plan was Delegate Bill Janis (R-Henrico).[29] Janis's plan increased the total black population in CD3 from 56.8% to 59.5%, and it increased the BVAP from 53.1% to 56.3%.[30] Janis's plan, among other things, returned to CD3 the City of Petersburg, which had been removed in 1998 after *Moon* invalidated the district.[31]

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[25] 76 Fed. Reg. at 7,471; *see also* Tr. 62-63.

[26] PX 8 at 5.

[27] *See* Tr. 40:10-19.

[28] PX 5.

[29] Tr. 34:6-38:6; PX 43 at 14:1-15:3.

[30] PX 27 at 14.

[31] Tr. 47:14-48:22.

Delegate Janis spoke at length about his plan on the House floor on April 12, 2011.[32] At the outset, he said that he drew his plan "based on several criteria."[33] "First, and most importantly," the districts had "to comply with the one-person-one-vote rule."[34] The "second criteri[on]" was "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."[35] "Third, 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."[36] He said the districts were 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 ensure that each district had the right 727,365 benchmark."[37] "Wherever possible," Janis "attempt[ed] to keep together jurisdictions and localities,

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[32] PX 43 at 2-49.

[33] *Id.* at 3:2.

[34] *Id.* at 3:3-7. *Alabama* now makes clear that "an equal population goal" is simply a "background" requirement in any congressional redistricting, not a factor to be weighed against the use of race to determine if race predominates. 135 S. Ct. at 1270.

[35] PX 43 at 3:16-22.

[36] *Id.* at 4:6-8.

[37] *Id.* at 4:9-14.

counties, cities and towns."[38] He added that his plan split "fewer jurisdictions than the current congressional district lines."[39] He said that his plan "[w]herever possible . . . seeks to preserve existing local communities of interest" and in some instances to "reunite such communities" fractured in earlier plans.[40]

Janis also said that he spoke with all of the existing congressional delegation, and that "[b]oth Republican and Democrat members provided specific detailed and significant input in recommendations to how best to draw the lines for their districts."[41] He added that "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" and "that they support the line of their congressional district" as drawn.[42]

Although Janis's initial remarks identified nonretrogression in CD3 as the "second" criterion, his later comments in response to questions from the floor characterized nonretrogression as the single most important factor:

> And that's how the lines were drawn, and that was the *primary focus* of how the lines

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[38] *Id.* at 4:21-22.

[39] *Id.* at 5:1-2.

[40] *Id*. at 5:8-11.

[41] *Id.* at 5:16-19.

[42] *Id.* at 6:1-6.

> . . . were drawn was to ensure that there be no retrogression in the 3rd Congressional District.[43]

At other points Janis made similar comments, such as: "I was most especially focused on making sure that the 3rd Congressional District did not retrogress in its minority voting influence";[44] and nonretrogression was "one of the paramount concerns" that was "nonnegotiable."[45]

Delegate Armstrong (D-Martinsville) asked whether any functional voting analysis had been conducted to determine the percentage of minority voters needed in CD3 in order for black voters to elect a candidate of their choice.[46] Janis did not identify any.[47] Armstrong then argued against Janis's plan, explaining that it "is not enough to merely look at the minority population to determine if that is a minority majority district for voting purposes. You have to conduct the voting pattern analysis in order to determine what that percentage is."[48] "And when you don't do the regression analysis . . . you can crack and

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[43] *Id.* at 25:13-16 (emphasis added).

[44] *Id.* at 14:24-15:1.

[45] *Id.* at 25:8-10.

[46] *Id.* at 12:23-13:6.

[47] *Id.* at 13:7-14:10, 15:9-22.

[48] *Id.* at 47:4-8.

pack, the slang terms used to either put too many minorities in a district or too few."[49]

At the end of debate, the House of Delegates approved the Janis plan by a vote of 71 to 23.[50]

Later that day, the Senate Committee on Privileges and Elections took up the Janis plan and a substitute plan proposed by Senator Mamie Locke (D-Hampton). Delegate Janis repeated the opening comments he had given on the House floor in support of his plan.[51] In response to further questioning, Janis admitted that, while he had solicited each congressman's views about his own proposed district, he had not solicited an opinion "from any of them as to the entire plan in its totality . . . ."[52]

Senator Creigh Deeds (D-Charlottesville) then asked Janis, "Do you have any knowledge as to how this plan improves the partisan performance of those incumbents in their own district?"—to which Janis replied: "I haven't looked at the partisan performance. It was not one of the factors that I considered in the drawing of the district."[53]

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[49] *Id*. at 47:18-22.

[50] *Id.* at 49:14-17.

[51] IX 9 at 4-9.

[52] *Id.* at 9:6-7, 13:23-14:2.

[53] *Id.* at 14:7-13.

With regard to her proposed plan, Senator Locke explained that she intended to create two majority-minority districts.[54] The Senate Committee adopted the Locke proposal and the Senate approved and transmitted it to the House.[55]

The Locke and Janis plans were then considered by the House of Delegates.[56] In the floor debates, Delegate Janis argued that his plan was certain to obtain DOJ preclearance while the Locke plan faced "uncertainty as to whether or not [it] would actually be permissible under the Voting Rights Act, particularly because it takes the 3rd Congressional District and retrogresses it" from a "56 percent minority voting district" "to a 40 percent minority voting district."[57]

The House rejected the Locke plan[58] and the House and Senate conferees were unable to resolve the deadlock.[59] The 2011 Special Session adjourned sine die.[60]

Before that session concluded, however, the legislature did reach agreement on redistricting plans

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[54] *Id.* at 18:12-18.

[55] *Id.* at 25:25-26:1; PX 8 at 8.

[56] PX 45.

[57] *Id.* at 7:13-8:20.

[58] *Id.* at 11:8-9.

[59] PX 8 at 8.

[60] *Id*.

for the Virginia House of Delegates and Senate.[61] Each of the twelve majority-minority districts in the House-of-Delegates plan had a BVAP of at least 55%.[62] In the floor debates surrounding that plan, some members spoke of the need to get "at least 55 percent performing" in majority-minority districts[63] and expressed concern that the need to comply with § 5 of the VRA "was not really a question that was subject to any debate. The lowest amount of African Americans in any district that has ever been precleared by the Department of Justice is 55.0."[64]

After the November 2011 elections, Republicans continued to control the House of Delegates and also obtained control of the Senate. Delegate Janis did not run for reelection but his 2011 redistricting plan was reintroduced and adopted by both the House and Senate and signed into law on January 25, 2012, by then-Governor Robert F. McDonnell.[65]

Before the final vote, Senator Locke protested on the Senate floor that CD3 "has been packed" with African Americans, protecting incumbents in the surrounding districts but leaving African Americans in the First, Second, and Third Congressional Districts

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[61] IX 13 at 26.

[62] *Id*.

[63] IX 30 at 13:23-24 (statement of Del. Dance).

[64] IX 32 at 18:12-16 (statement of Del. Vogel); *see also id.* at 20:8-11, 22:6-12.

[65] PX 8 at 8-9.

"essentially disenfranchised."[66] Senator McEachin (D-Richmond) agreed that the plan was "packing the 3rd Congressional District and deliberately denying minority voters the opportunity to influence congressional districts elsewhere."[67] He said that the plan violated the VRA because the black-voter concentration "is not necessary . . . to afford minorities the opportunity to choose a candidate of their choice."[68]

The Senate adopted the Janis plan on a vote of 20-19.[69] The DOJ precleared the plan in March 2012.[70]

On June 25, 2013, this Court, in *Shelby County v. Holder*, invalidated the coverage formula in § 4 of the VRA, under which Virginia had been a covered jurisdiction that was required to seek preclearance under § 5.[71]

3. The plaintiffs—voters residing in CD3—commenced this action in October 2013, claiming that CD3 was unconstitutional because "[r]ace was the predominant factor" in its creation and that the use of race was "not narrowly tailored to serve a compelling state interest."[72] Pursuant to 28 U.S.C. § 2284, the

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[66] PX 47 at 16:2-6.

[67] *Id.* at 23:15-18.

[68] *Id.* at 22:13-16.

[69] *Id.* at 25:16.

[70] JS 10a.

[71] 133 S. Ct. 2612, 2631 (2013).

[72] Compl. at 9, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. Oct. 2, 2013), ECF No. 1; *see* JS 3a-4a.

chief judge of the Fourth Circuit designated a three-judge court, consisting of Judge Duncan, Judge Payne and Judge O'Grady.[73] Without objection, the eight Republican congressmen from Virginia intervened to defend the district as drawn—Eric Cantor (CD7), Robert J. Wittman (CD1), Bob Goodlatte (CD6), Frank Wolf (CD10), Randy J. Forbes (CD4), Morgan Griffith (CD9), Scott Rigell (CD2), and Robert Hurt (CD5).[74] The three Democratic congressmen, including Bobby Scott (CD3), did not seek intervention.

The district court denied the defendants' and the Congressmen's motions for summary judgment, finding "genuine disputes of material fact."[75] The case was then tried on May 21-22, 2014.

The record consisted of the parties' trial exhibits, admitted without objection, and the live testimony of two expert witnesses. For the plaintiffs, Michael McDonald qualified without objection as an expert in political science.[76] His expert reports were admitted into evidence[77] and he testified at length about his finding that race was the predominant factor in drawing CD3, subordinating traditional redistricting

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[73] Order, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. Oct. 21, 2013), ECF No. 10.

[74] Order, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. Dec. 3, 2013), ECF No. 26.

[75] Order, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. Jan. 27, 2014), ECF No. 50.

[76] Tr. 27:3-6.

[77] PX 26-30.

principles.[78] McDonald also testified about his analysis of an Alternative Plan[79] under which the BVAP in CD3 could have been lowered to 50.2%,[80] while improving performance with regard to traditional redistricting principles, including compactness, contiguity, and reducing splits in localities and precincts (VTDs).[81]

McDonald's cross-examination focused on the defense claim that his Alternative Plan would have increased the Democratic vote share in CD2 (Congressman Rigell's district), changing it from a "50 percent toss-up district" to a 55% Democratic district, thereby jeopardizing an 8-3 split in Virginia's congressional delegation.[82] The defendants and Congressmen also sought to show that Alternative CD3 would not have maintained the core of the district as well as Enacted CD3. Alternative CD3 would have contained only 69.2% of the population of the original district, while Enacted CD3 preserved 83.1%.[83]

The defendants and Congressmen also challenged McDonald's credibility. They pointed out that, before testifying for plaintiffs, McDonald had published a law review article noting the apparent intent

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[78] Tr. 25-239.

[79] Tr. 107-17; *see* PX 29 (analysis), 49 (maps).

[80] Tr. 157:13-18; PX 29 at 1, 8.

[81] Tr. 109-17.

[82] Tr. 184:15-19.

[83] IX 27; Tr. 422:18-21.

of the 2012 redistricting plan "to create an 8-3 Republican majority."[84] At trial, however, McDonald explained that when he wrote that article, he had not yet done the analysis needed to determine if race was the predominant factor in redrawing CD3.[85]

The defendants and Congressmen offered John Morgan as their expert witness. Morgan qualified without objection as an expert in demography and redistricting.[86] He testified that the creation of CD3 was explainable by politics and incumbency protection and did not subordinate traditional factors to race.[87] He admitted on cross-examination, however, that he had made mistakes in his quantitative analysis.[88] Although he corrected some of those errors before trial, more were brought out during cross-examination.[89] Morgan insisted that the errors did not affect his opinion that politics alone could explain the redistricting.[90]

There was conflicting evidence at trial about whether the General Assembly applied a 55%-BVAP floor or quota in establishing CD3. Morgan, who worked for Republican members of the House of

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[84] Tr. 129:3-25.

[85] Tr. 32:7-11, 226:9-21.

[86] Tr. 241:18-23.

[87] Tr. 247:2-11.

[88] Tr. 359-66.

[89] Tr. 365:3-10.

[90] Tr. 392:3-24.

Delegates in redrawing the House-of-Delegates districts in 2011,[91] opined that the General Assembly acted in accordance with a reasonable belief that a BVAP of at least 55% in CD3 was necessary to obtain preclearance from the DOJ.[92] He based that opinion on his understanding that the black-majority districts in the House-of-Delegates plan had all exceeded 55% BVAP and that several alternatives, having less than 55% BVAP, had been rejected.[93] Plaintiffs also pointed to floor statements by legislators in 2011 that referenced their belief in a 55%-BVAP floor.[94] In addition, Virginia's § 5 submission touted the 56% BVAP of Enacted CD3 as being "over 55 percent,"[95] comparing it to other proposed plans that would have resulted in BVAP "below 55 percent."[96] At trial, however, Morgan denied having personal knowledge that General Assembly members applied a 55% floor or quota.[97]

4. The divided three-judge district court held that CD3 was an unconstitutional racial gerrymander, enjoined Virginia from conducting any further congressional elections under the 2012 plan, and "require[d] that new districts be drawn during Virginia's

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[91] Tr. 242:17-25.

[92] Tr. 351:20-353:8; IX 13 at 26-27.

[93] Tr. 327:14-328:23; IX 13 at 26-27.

[94] PX 45 at 7-8; IX 30 at 13-14; IX 32 at 18, 20, 22.

[95] PX 6 at 2.

[96] *Id.* at 3, 4.

[97] Tr. 328:24-330:1.

next legislative session to remedy the unconstitutional districts."[98] After the Congressmen appealed, this Court vacated the judgment and remanded for further consideration in light of *Alabama*.[99]

On remand, the district court concluded, again, that CD3 was unconstitutional and that *Alabama* supported that conclusion. Writing for the majority, Judge Duncan explained that the "legislative record here is replete with statements indicating that race was the legislature's paramount concern in enacting the 2012 Plan."[100] The court also found that the legislature used "a 55% BVAP floor" in redrawing CD3.[101]

With regard to the experts' testimony, the majority found McDonald's testimony credible; the court rejected the defense claim that McDonald's analysis was discredited by his earlier law review article, written before he had all of the relevant facts.[102] The majority also discounted the testimony of the defense expert. The court found "significant" that Morgan

> proffers no academic work, does not have an advanced degree, that his undergraduate degree was in history, that he has never taken

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[98] *Page v. Va. State Bd. of Elections*, 58 F. Supp. 3d 533, 554-55 (E.D. Va. 2014), *vacated and remanded sub nom. Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015).

[99] *Cantor*, 135 S. Ct. at 1699.

[100] JS 18a.

[101] JS 20a-21a.

[102] JS 21a-22a n.16.

> 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.[103]

Finding that race was the predominant consideration in the redistricting, the majority applied strict scrutiny. It concluded that, while compliance with § 5 was a compelling state interest,[104] the legislature's use of race was not "narrowly tailored" to meet that interest. In particular, "the 2012 Plan was not informed by a racial bloc voting or other, similar type of analysis."[105] The General Assembly, moreover, increased the BVAP in CD3 from 53.1% to 56.3%, despite that Congressman Bobby Scott, "a Democrat supported by the majority of African-American voters," was being re-elected with 70% of the vote.[106] Under Enacted CD3, "he won by an even larger margin, receiving 81.3% of the vote" in the 2012 election.[107]

Having found the 2012 plan unconstitutional, the court enjoined any further elections under that plan

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[103] *Id.*

[104] JS 36a-38a.

[105] *Id.* 9a; *see also id.* 21a ("[T]he use of a 55% BVAP floor in this instance was not informed by an analysis of voter patterns.").

[106] JS 40a; *see* PX 27 at 11.

[107] JS 40a; *see* PX 27 at 11.

until a new redistricting plan is adopted.[108] The court gave the Virginia General Assembly until September 1, 2015 to adopt a new plan.[109]

In dissent, Judge Payne reached opposite conclusions about the experts' credibility. He flatly rejected McDonald's testimony,[110] concluding that "McDonald's views, in whole and in its constituent parts, are not entitled to any credibility."[111] He believed Morgan's testimony instead.[112] Judge Payne also concluded that statements by Delegate Janis about the importance of nonretrogression in CD3 failed to prove that race was the predominant factor in the redistricting.[113] And he was unpersuaded that the legislature imposed a 55%-BVAP floor in redrawing CD3, characterizing the evidence on which the majority relied as "a patchwork quilt."[114]

The Congressmen filed a timely notice of appeal.

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[108] JS 94a.

[109] *Id.*

[110] JS 48a-53a.

[111] JS 53a.

[112] JS 83a-85a.

[113] JS 62a.

[114] JS 66a-67a.

ARGUMENT

As the district court recognized when it denied summary judgment,[115] the facts concerning the General Assembly's motives in redrawing CD3 were hotly contested. We joined with the Congressmen to defend Enacted CD3 at trial. Had the majority viewed the evidence as we argued, Enacted CD3 would not have been found unconstitutional. But the majority did not see it that way.[116]

Now that the case is on appeal, the district court's findings can be reviewed "only for 'clear error.'"[117] The Court may not reverse such findings simply because it "would have decided the case differently."[118] Rather, under the "clearly erroneous" standard, the question is "whether 'on the entire evidence,' [the Court] is 'left with the definite and

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[115] Order, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. Jan. 27, 2014), ECF No. 50.

[116] In noting that the current Attorney General of Virginia, Mark R. Herring, did not appeal, Judge Payne may have incorrectly implied that the previous Attorney General, a Republican, was the one who defended the plan at trial. JS 45a n.30. In fact, General Herring was inaugurated on January 11, 2014, and his office defended the plan alongside the Congressmen at the May 2014 trial. Only after the district court declared that plan unconstitutional, on October 7, 2014, did the Attorney General decline to appeal.

[117] *Easley*, 532 U.S. at 242 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)).

[118] *Id.*

firm conviction that a mistake has been committed.'"[119]

That demanding standard simply cannot be met here. Reviewing the trial record in the "light most favorable" to plaintiffs,[120] as the Court must, the evidence supported the majority's findings that (1) race predominated in drawing CD3 and (2) the Enacted Plan was not narrowly tailored to avoid retrogression under § 5. Accordingly, the Court should affirm.

I. The district court did not commit clear error in finding that race was the predominant factor in redrawing CD3.

A. Substantial evidence supported the majority's finding that race was the predominant factor and that the General Assembly used a 55%-BVAP floor.

There were two categories of direct evidence on which the majority could reasonably conclude that race predominated in drawing CD3.

First, Delegate Janis, the plan's sole author, insisted in the floor debates that nonretrogression in CD3 was the "primary focus"[121]—indeed, the

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[119] *Id.* (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

[120] *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 213 (1993).

[121] PX 43 at 25:14.

"paramount,"[122] "nonnegotiable"[123] concern. Although the dissent below identified some statements by Janis that suggested that race was one of several factors,[124] quoting prepared remarks twice given by Janis,[125] the majority did not commit clear error in relying on Janis's unscripted comments to conclude that race was the predominant factor.

Second, the majority found that the General Assembly applied a 55%-BVAP floor when it concentrated black voters in CD3. That point was advanced by the Congressmen's and the defendants' own expert, Morgan, who had served as the Republican consultant for the House-of-Delegates redistricting plan in 2011. Morgan stated under oath[126] that the legislature used a 55%-BVAP floor in revising CD3:

> [T]he General Assembly 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* . . . including districts within the geography covered by Congressional District 3. The General Assembly . . . had ample reason to believe that legislators of both parties,

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[122] *Id.* at 25:8.

[123] *Id.* at 25:10.

[124] JS 54a-56a.

[125] *Compare* PX 43 at 2-6 (statement of Del. Janis on floor of House of Delegates), *with* IX 9 at 4-9 (statement of Del. Janis to Senate Committee on Privileges and Elections).

[126] IX 13 at 28.

> including black legislators, viewed the 55% [BVAP] for the House of Delegates districts as appropriate to obtain Section 5 preclearance, even if it meant raising the [BVAP] above the levels in the benchmark plan. *The General Assembly acted in accordance with that view for the congressional districts and adopted the Enacted Plan with the District 3 [BVAP] at 56.3%*.[127]

Although Morgan later claimed that he lacked personal knowledge of any 55%-BVAP floor,[128] the majority did not commit clear error in relying on the prior admission,[129] particularly in light of the corroborating evidence offered by plaintiffs. Virginia's § 5 submission advocated the 56.3% BVAP of Enacted CD3 as being "over 55 percent,"[130] comparing it to other alternative plans that would have resulted in BVAP "below 55 percent."[131] Plaintiffs also introduced floor debates in which Delegate Morrissey asked Janis: "[I]s there any empirical evidence whatsoever that 55 percent African-American voting population is different than 51 percent or 50? Or is it just a number that has been pulled out of the air?"[132] Janis responded that his plan (exceeding 55% BVAP) made getting

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[127] *Id.* at 26-27 (emphasis added); Tr. 351:20-352:25.

[128] Tr. 328:24-330:25.

[129] JS 20a-21a.

[130] PX 6 at 2.

[131] *Id.* at 3, 4.

[132] PX 45 at 7:9-12.

§ 5 preclearance a "certainty," whereas the 40% BVAP in Senator Locke's competing plan jeopardized preclearance.[133] Plaintiffs also introduced the floor debates on the House-of-Delegates redistricting plan, containing several statements about the need for a 55%-BVAP floor in order to obtain DOJ preclearance.[134]

The dissenting judge discounted the evidence on which the majority relied, but he was mistaken about a key assumption. The dissent explained that:

> 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

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[133] *Id.* at 7:13-8:20.

[134] *E.g.*, IX 30 at 13:23-25 (statement of Del. Dance that population shifts were required between three districts to get "at least 55 percent performing" in majority-minority districts); IX 32 at 18:11-16 (statement of Del. Vogel that "when it came to Section 5—I just want to be very clear about this—that we believed that that was not really a question that was subject to any debate. The lowest amount of African Americans in any district that has ever been precleared by the Department of Justice is 55.0"); *id.* at 20:8-11 ("We were just simply following what, I believe, is not subject to any question; that is, as of today, the lowest percentage that the Department of Justice has ever approved is 55.0."); *id.* at 22:6-12 ("But it has been the position of the Department of Justice, and I will speak to this very confidently, that 55.0 is the percentage that they believe is what is qualified, and that has been, at least in the past to date, their position regarding what it would take to be able to elect a candidate of your choice, whomever that might be.").

> or as the product of a racial quota), they did not do so.[135]

In fact, Senator Locke condemned the plan precisely because CD3 "has been packed" with black voters, so that "those African-Americans living in the 1st, 2nd, and 4th congressional districts that abut the 3rd are essentially disenfranchised."[136] Senator McEachin likewise characterized the plan as "packing" African Americans into "a single congressional district, more than what is necessary to elect a candidate of choice," thereby "depriving minorities of their ability to influence elections elsewhere."[137]

"The issue in this case is evidentiary."[138] The district court resolved the conflicting evidence by finding that the General Assembly imposed a 55%-BVAP floor in drawing CD3 to meet the "primary," "paramount," and "nonnegotiable" goal of avoiding retrogression. Because sufficient direct evidence supported that conclusion, it was not clearly erroneous.

That direct evidence distinguishes this case from *Easley*, on which the Congressmen rely. In *Easley*, there was scant evidence that race played a significant role in the North Carolina legislature's redistricting. The strongest evidence of racial motivation was the redistricting leader's comment that "I think

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[135] JS 69a (Payne, J., dissenting).

[136] PX 47 at 16:2-6.

[137] *Id.* at 22:3-10.

[138] *Easley*, 532 U.S. at 241.

that overall [the plan] provides for a fair, geographic, *racial* and partisan balance throughout the State of North Carolina."[139] Five justices found that comment insufficient to prove that race predominated,[140] while the four other justices thought it adequate under the highly deferential, clear-error standard of review.[141]

In contrast to *Easley*, there was ample direct evidence in this case, viewed in the light most favorable to plaintiffs, that race was the predominant consideration. The majority of the district court so found, and that finding was not clearly erroneous.[142]

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[139] *Id.* at 253 (emphasis added).

[140] *Id.* ("We agree that one can read the statement about 'racial . . . balance' . . . to refer to the current congressional delegation's racial balance. But even as so read, the phrase shows that the legislature considered race, along with other partisan and geographic considerations; and as so read it says little or nothing about whether race played a *predominant* role comparatively speaking.").

[141] *Id.* at 266 n.8 (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.).

[142] The district court's finding that race predominated in drawing CD3 does not mean that race predominated in Virginia's other redistricting plans. *See Alabama*, 132 S. Ct. at 1265 ("A racial gerrymandering claim . . . applies to the boundaries of individual districts. It applies district-by-district. It does not apply to a State considered as an undifferentiated 'whole.' ").

B. It was not clear error to reject the claim that the legislature intended to preserve an 8-3 split in Virginia's congressional delegation.

Contrary to the claim in the Jurisdictional Statement, it was not "undisputed" at trial that the purpose of the Enacted Plan was to preserve an 8-3 split favoring Republicans in Virginia's congressional delegation.[143] That point was contested and the district court cannot be said to have committed clear error in resolving the evidentiary conflict in the plaintiffs' favor.

First, Delegate Janis stated unequivocally that he had *not* "looked at . . . partisan performance"; it "was not one of the factors that I considered in the drawing of the district."[144] That statement does not square with the claim that Janis, as the plan's sole author, intended to cement an 8-3 split favoring Republicans.

Second, there was no direct evidence to support the 8-3-split theory. Janis said that he drew the districts "to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 elections."[145] But the majority found that statement "ambiguous."[146] It was similar to

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[143] JS 17-18.

[144] IX 9 at 14:11-13.

[145] PX 43 at 4:6-8.

[146] JS 33a.

Janis's statement that his plan respected "the will of the electorate by not cutting out currently elected congressmen from their current districts nor drawing current congressmen into districts together."[147] Making sure that two incumbents do not have to run against one another is different from concentrating partisan support in order to entrench an 8-3 split.

Likewise, while Janis said that each congressman had approved the lines for his own district,[148] he also said that no congressman had seen the totality of the plan.[149] The Congressmen's sworn interrogatory answers also conflicted with the 8-3-split theory by, for example:

- not mentioning that partisan considerations informed their comments to Janis;[150]
- omitting any mention of having spoken to Janis;[151]

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[147] PX 43 at 4:15-18.

[148] *Id.* at 5:24-6:6.

[149] IX 9 at 9:6-7, 13:23-14:2

[150] PX 36 at 3 (Rep. Griffith) ("I had a conversation [with Janis] regarding redistricting and stated something along the lines of 'I want my district to be as contiguous as possible and divide as few geopolitical subdivisions as possible. It would be nice if my house were in the 9th Congressional District.' ").

[151] PX 39 at 1-2 (Rep. Wittman); PX 38 at 1-2 (Rep. Rigell); PX 40 at 1 (Rep. Wolf).

- denying that they had any input into his plan;[152] or
- attesting to their lack of knowledge about how the plan was developed.[153]

Given the comparatively weak evidence supporting the 8-3-split theory, the district court did not commit clear error by crediting Janis's explicit testimony that he did not look at partisan performance in drawing the plan. The Congressmen credit Janis's other, more ambiguous statements as a "display of candor rarely seen among legislators engaged in redistricting."[154] But the majority was entitled to find Janis's direct testimony on point to be candid and, on this point, dispositive—particularly when corroborated by the Congressmen's own interrogatory answers.

Third, plaintiffs adduced circumstantial evidence that race predominated over politics. Their expert, McDonald, testified that:

- "The district is bizarrely shaped. It stretches from Richmond to Norfolk

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[152] PX 34 at 1-2 (Rep. Forbes) ("Janis asked for my feedback and comments on the redistricting plan, but I did not provide any.").

[153] PX 33 at 2 (Rep. Cantor) ("I do not know what materials were used, considered, consulted or created that relate to efforts by the Virginia State General Assembly to draw and adopt the 2012 Congressional Redistricting . . . ."); PX 35 at 2 (Rep. Goodlatte), PX 36 at 6 (Rep. Griffith), PX 37 at 2 (Rep. Hurt), PX 38 at 2 (Rep. Rigell) (all same, verbatim).

[154] JS 20.

skipping back and forth across the James River mostly to capture predominantly African-American communities."[155] In Norfolk, for example, "it wraps around a small—three predominantly white precincts that are not connected to the Second District via bridge or anything else. They are only connected by water."[156]

- Enacted CD3 is the least compact[157] and least contiguous[158] of Virginia's 11 congressional districts; it also splits more localities and VTDs than any other district.[159]

- Benchmark CD3 was underpopulated by 63,976, but 180,000 people were moved between districts to net the number required.[160] As a result, the percentage of black voters moved into CD3 was disproportionately high compared to groups moved out of CD3.[161] And several highly Democratic-performing but largely white VTDs that could have been included in

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[155] Tr. 42:13-16.

[156] Tr. 43:8-11; *see* PX 27 at 4 (map).

[157] Tr. 74:5-13.

[158] Tr. 74:18-76:9.

[159] Tr. 76:10-79:3.

[160] Tr. 87:3-16.

[161] Tr. 83:25-87:6.

> CD3 were left out in favor of denser black VTDs.[162]

It is true that McDonald had written a law review article before his expert engagement in which he said that the 2012 redistricting plan was consistent with preserving an 8-3 split. Judge Payne, in dissent, found that McDonald's earlier writing impeached his trial testimony.[163] But the majority found McDonald's trial testimony credible and believed his explanation that when he wrote that article, he: had not yet read the legislative history; had not performed a racial bloc voting analysis; had not yet analyzed population trades between districts; and had not drawn any conclusions about whether race was the predominant factor in redrawing CD3.[164]

As for the defense expert, the majority discounted Morgan's contrary testimony that politics explained CD3, pointing to Morgan's weaker credentials and the analytical errors exposed at trial.[165] Judge Payne, by contrast, believed Morgan's testimony.[166]

When, as here, reasonable triers of fact hearing the same evidence could have decided the case differently or formed different opinions about the credibility of the parties' respective experts, "such questions

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[162] Tr. 89:6-23.

[163] JS 48a-53a.

[164] JS 21a n.16; *see* Tr. 226:4-21.

[165] JS 21a n.16.

[166] JS 83a.

of credibility are matters for the District Court."[167] And credibility determinations such as these "can virtually never be clear error."[168]

C. Plaintiffs were not required to submit an alternative plan in order to prove that racial considerations predominated, but the plan they submitted supported that conclusion as well.

Relying on *Easley*, the Congressmen argue that the plaintiffs had the burden to introduce an alternative plan to show how the districts could have been redrawn consistent with traditional redistricting principles while bringing about greater racial balance.[169] They claim that the Alternative Plan offered by McDonald[170] was insufficient to meet that burden.

Assuming that plaintiffs had that burden, there was sufficient evidence that they met it. McDonald's Alternative Plan used a BVAP of 50.2% in CD3,[171] significantly less than the 56.3% in the Enacted Plan. And sufficient evidence supported the majority's conclusion that his plan "maintains a majority-minority district and achieves the population increase needed for parity, while simultaneously minimizing

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[167] *Bush v. Vera*, 517 U.S. 952, 970 (1996) (plurality).

[168] *Anderson*, 470 U.S. at 575.

[169] JS 10-11, 24.

[170] PX 29 (analysis), 49 (maps).

[171] PX 29 at 1, 8.

locality splits and the number of people affected by such splits."[172] Indeed, McDonald testified so at length.[173]

The Jurisdictional Statement overstates the claim that the Enacted Plan better preserved the cores of existing districts than the Alternative Plan. Although the Alternative Plan preserved 69.2% of the core of Benchmark CD3, compared to 83.1% under Enacted CD3, 69.2% was not significantly worse than in Enacted CD11, which preserved 71.2% of the benchmark district.[174] Moreover, Morgan conceded on cross-examination that the *total* average difference in core preservation for the Enacted Plan and the Alternative Plan across all 11 districts was only 1.5%.[175] And McDonald testified that the range of core-preservation statistics for the two plans was "substantially similar"[176] and that the difference was "not significant."[177]

The majority rejected the defense's main criticism of the Alternative Plan—that it failed to preserve an alleged 8-3 split in favor of Republicans—not only finding that claim "overstated" but rejecting the premise that the legislature intended to ensconce an

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[172] *See* JS 28a.

[173] Tr. 109-17; *see also* PX 29.

[174] IX 27; *see also* Tr. 312:2-24.

[175] Tr. 383:5-12.

[176] Tr. 420:8-9.

[177] Tr. 421:15-20.

8-3 split.[178] As shown in the previous section, the majority's conclusion on that point was supported by substantial evidence and is not clearly erroneous.

More fundamentally, this Court has not required a plaintiff to offer an alternative plan in a direct-evidence case like this one. An alternative plan is a tool that may reveal the role that race played in a circumstantial-evidence case. "[B]izarreness" of shape likewise may be "circumstantial evidence" of racial gerrymandering, yet no "threshold showing" of bizarreness is necessary in every case.[179] Even the dissent below agreed that a plaintiff "is not confined in its form of proof to submitting an alternative plan."[180]

Nor does *Easley* require proof of an alternative plan in every redistricting challenge. The Court there found the evidence too weak to "show that racial considerations predominated in the drawing of the District's . . . boundaries."[181] In the next paragraph—on which the Congressmen rely—the Court then said:

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[178] JS 16a n.12 ("[T]he 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. This inference is not supported by the record.") (citation omitted).

[179] *Miller*, 515 U.S. at 912-13.

[180] JS 89a.

[181] 532 U.S. at 257.

> In a case *such as this one* where majority-minority districts . . . are at issue and where racial identification correlates highly with political affiliation, 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. That party must also show that those districting alternatives would have brought about significantly greater racial balance.[182]

The context shows that the Court was talking about cases with only weak evidence of racial motivation, not cases involving direct evidence of racial engineering. Without direct evidence, a plaintiff necessarily must use other means to show discriminatory purpose—such as analysis of shape, compactness, contiguity, or an alternative plan that meets the legislature's permissible redistricting goals without undue reliance on race. Circumstantial proof is unnecessary when *direct* evidence proves that race predominated.

Alabama makes that distinction plain:

> We have said that the plaintiff's burden in a racial gerrymandering case is "to show, *either* through *circumstantial* evidence of a district's shape and demographics *or* more *direct* evidence going to legislative purpose,

[182] *Id.* at 258 (emphasis added).

> that race was 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 916]. *Cf. Easley v. Cromartie*, 532 U.S. 234, 258 [ ] (2001) (explaining the *plaintiff's burden* in cases, *unlike these*, in which the State argues that politics, not race, was its predominant motive).[183]

The "*Cf.*" citation to *Easley*, coupled with the Court's parenthetical summary distinguishing plaintiffs' burden in direct-evidence cases like *Alabama*, make clear that the burdens *Easley* described do not apply in direct-evidence cases like this one.

Indeed, if the Congressmen's argument were right, then a plaintiff would lose a redistricting challenge—despite direct evidence of racial packing and smoking-gun admissions of racial animus—simply because the plaintiff failed to offer an alternative plan to reduce such packing. That notion is foreign to the "well-established principle that when hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action, the Constitution requires redress by the courts."[184]

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[183] 135 S. Ct. at 1267 (emphasis added).

[184] *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014).

II. The district court did not commit clear error in finding that the legislature's use of race was not narrowly tailored to protect minority voters' ability to elect their candidate of choice.

"If race is the predominant motive in creating [a district], strict scrutiny applies, and the districting plan must be narrowly tailored to serve a compelling governmental interest in order to survive."[185] The district court was correct in ruling that compliance with the nonretrogression requirements of § 5 constituted a compelling state interest in 2012, when the district was redrawn.[186] This Court has repeatedly assumed that compliance with the Voting Rights Act is a compelling state interest.[187]

As for narrow tailoring, § 5 compliance cannot justify the use of race-conscious measures that are *unnecessary* to avoid retrogression:

> 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

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[185] *Abrams v. Johnson*, 521 U.S. 74, 91 (1997) (citation omitted).

[186] JS 14a, 36a-38a.

[187] *E.g.*, *Abrams*, 521 U.S. at 91; *Bush*, 517 U.S. at 977 (plurality); *see also Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996). The Court has left open whether "continued compliance with § 5 remains a compelling interest" in light of *Shelby*. 135 S. Ct. at 1274.

> elect representatives of its choice not be diminished, directly or indirectly, by the State's actions.[188]

In other words, 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."[189]

The district court did not commit clear error in concluding that Enacted CD3 flunked that test. No functional voting analysis supported the need to increase the BVAP in CD3 to 56.3%, let alone to impose a 55%-BVAP floor.[190] CD3 had been "a safe majority-minority district for 20 years."[191] Congressman Scott, supported by the majority of African-American voters, was already winning 70% of the vote when running against Republican opponents.[192] Under Enacted CD3, he defeated the Republican candidate in 2012 with 81.3% of the vote.[193] Indeed, McDonald testified that his racial bloc voting analysis showed that the candidate of choice of African-American voters could have been elected even if CD3 had a BVAP as low as 30%.[194]

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[188] *Bush*, 517 U.S. at 983 (plurality opinion).

[189] *Id.* (quoting *Shaw I*, 509 U.S. at 655).

[190] JS 9a, 20a-21a, 37a n.26, 42a.

[191] JS 40a.

[192] *Id.*; PX 27 at 11.

[193] JS 40a; PX 27 at 11.

[194] Tr. 196:14-197:25.

Nor did the majority err in rejecting the argument that the plan needed to exceed a 55%-BVAP floor in order to obtain § 5 preclearance.[195] The DOJ's 2011 guidance made clear that no such floor was required and that DOJ looks for "a functional analysis" of electoral performance.[196] In fact, DOJ had precleared CD3 in 1998 with a BVAP of 50.47%.[197] And McDonald testified that DOJ, in 2011, precleared five majority-black Senate districts in Virginia with BVAP percentages less than 55%, including one with a BVAP of 50.8%.[198] In spite of those facts, the Janis plan did not merely maintain the existing BVAP percentage in CD3 but materially augmented it.[199] Given its findings of fact, the district court was correct that permitting the use of racial floors unsupported by any functional analysis would give a State "carte blanche to engage in racial gerrymandering in the name of nonretrogression."[200] That theory would dangerously resemble a "one-way ratchet: the black population of a district could go up, either through demographic shifts or redistricting plans . . . [b]ut the

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[195] JS 41a-42a.

[196] 76 Fed. Reg. at 7,471; *see* Tr. 62-63.

[197] Tr. 48:5-12; PX 50.

[198] Tr. 102:1-103:11; *see* PX 30 at 2.

[199] *Cf. Bush*, 517 U.S. at 983 ("The problem with the State's argument is that it seeks to justify not maintenance, but substantial augmentation, of the African-American population percentage . . . .").

[200] JS 39a (quoting *Shaw I*, 509 U.S. at 654).

legislature could never lower the black percentage . . . ."[201]

The district court did not err in its narrow-tailoring conclusion because, quite simply, the Congressmen and defendants did not offer their *own* evidence on narrow tailoring. Once plaintiffs showed that race predominated, the burden shifted to the defense to prove that the use of race in fashioning CD3 was narrowly tailored to avoid retrogression.[202] Yet Morgan, the only defense witness, testified that he was offering *no opinion* on the narrow-tailoring question.[203] That admission was dispositive. The narrow-tailoring prong in a redistricting case "allows the States a limited degree of leeway" in complying with the Voting Rights Act, provided the State has a "'strong basis in evidence'" to conclude that the majority-minority district "is reasonably necessary to comply" with the law.[204] There could be no such

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[201] *Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1340 (D. Ala. 2013) (Thompson, J., dissenting), *rev'd*, 135 S. Ct. 1257 (2015).

[202] *E.g.*, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2419 (2013) ("Strict scrutiny requires the [government] to demonstrate with clarity that its 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.'") (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978) (opinion of Powell, J.)).

[203] Tr. 349:16-23.

[204] *Bush*, 517 U.S. at 977 (plurality); *Alabama*, 135 S. Ct. at 1274.

"strong basis in evidence" in the absence of any evidence to carry that burden.

That evidentiary gap cannot be bridged by pointing to the *plaintiffs'* Alternative Plan. As shown above, sufficient evidence supported the majority's conclusion that the Alternative Plan would have met the legislature's redistricting goals while improving racial balance. But more importantly, strict scrutiny requires the *government* to prove "that its use of [race] is necessary . . . to the accomplishment of its purpose."[205] Showing that someone else's plan would not work does not show that the government needed to use a mechanical racial floor in order to protect minority-voting rights.

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"It is a sordid business, this divvying us up by race."[206] "Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin."[207] Such explicit reliance on race "threatens to carry us further from the goal of a political system in

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[205] *Fisher*, 133 S. Ct. at 2418 (quotation and citation omitted); *see also id.* at 2419 ("Strict scrutiny is a searching examination, and it is the government that bears the burden . . . .").

[206] *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part).

[207] *Shaw I*, 509 U.S. at 657.

which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire."[208]

The Congressmen make good arguments about their view of the conflicting evidence; we joined those arguments in the district court. But the majority of the three-judge court did not agree with that view of the evidence and resolved the many factual conflicts in plaintiffs' favor. This case must be assessed in light of the majority's factual findings, its credibility determinations, and the clear-error standard. And that assessment mandates affirmance.

In light of its conclusion that the Enacted Plan is unconstitutional, the district court was also correct about the need to proceed expeditiously.[209] Virginians in the "Third Congressional District whose constitutional rights have been injured by improper racial gerrymandering have suffered significant harm."[210] They "are entitled to vote as soon as possible for their representatives under a constitutional apportionment plan."[211]

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[208] *Id.*

[209] JS 43a.

[210] *Id*.

[211] *Id*. (quoting *Cosner v. Dalton*, 522 F. Supp. 350, 364 (E.D. Va. 1981)).

CONCLUSION

The Court should summarily affirm.

Respectfully submitted,

MARK R. HERRING
Attorney General of Virginia

CYNTHIA E. HUDSON
Chief Deputy Attorney General

TREVOR S. COX
Deputy Solicitor General

STUART A. RAPHAEL*
Solicitor General of Virginia

900 East Main Street
Richmond, VA 23219
(804) 786-7240
sraphael@oag.state.va.us

**Counsel of Record for Virginia State Board of Elections Appellees James B. Alcorn, Clara Belle Wheeler, and Singleton B. McAllister, in their official capacities*

July 22, 2015