

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

DAWN CURRY PAGE, et al,)	
)	
Plaintiffs,)	
)	
v.)	
)	
VIRGINIA STATE BOARD OF)	
ELECTIONS, et al.,)	Civil Action No. 3:13-cv-678-REP-LO-AKD
)	
Defendants,)	

**PLAINTIFFS’ REPLY BRIEF REGARDING ALABAMA LEGISLATIVE BLACK
CAUCUS V. ALABAMA**

The question presented by the United States Supreme Court on remand—and that this Court in turn posed for the parties—was simple: Did any of the legal holdings in *Alabama* disturb this Court’s conclusion that CD 3 is a racial gerrymander? As Plaintiffs and Defendants both explained in their opening briefs, and as even a cursory review of the Supreme Court’s decision in *Alabama* reveals, the answer to that question is a resounding “no.”

It thus comes as no surprise that Intervenors barely address the legal holdings of *Alabama* at all, instead turning their brief into what amounts to a motion for reconsideration and an attempt to re-litigate this Court’s settled findings of fact. Intervenors’ reticence to discuss *Alabama* at length is understandable. *Alabama*’s articulation of the “predominant factor” analysis is in lockstep with this Court’s analysis, and *Alabama* held that a state fails the narrow tailoring analysis where (as here) it relies mechanically upon a strict BVAP threshold instead of conducting an actual retrogression analysis.

Alabama thus does nothing to change this Court’s conclusions—it bolsters them. Indeed, this Court’s ruling remarkably previewed the Supreme Court’s decision in *Alabama*.

Accordingly, Plaintiffs respectfully request that the Court fully reinstate and reaffirm its Memorandum Opinion and Judgment.

A. Nothing in *Alabama* Disturbs the Court’s Conclusion that Race Predominated Over Other Considerations in the Creation of CD 3

1. *Alabama* Confirms that This Court Conducted a Proper Legal Analysis as to Predominance

As noted in Plaintiffs’ opening brief, *Alabama*’s holding as to the “predominant factor” analysis was narrow and inapplicable to this case: The *Alabama* District Court “did not properly calculate ‘predominance’” because it “placed in the balance, among other nonracial factors, legislative efforts to create districts of approximately equal population.” *See* ECF No. 140-1 (“Slip Op.”) at 15. This precise holding has no relevance here, because this Court did not make the same error. In short, *Alabama* provides no legal holding that would even affect, let alone overturn, this Court’s conclusion on the predominance of race in drawing CD 3.

Nonetheless, Intervenors briefly cite to *Alabama*’s articulation of the long-established standards governing the predominant factor inquiry and then offer the entirely unsupported conclusion that this Court did not understand the predominance standard and made a “basic error” in its analysis. ECF No. 151, at 5. Intervenors are wrong.

In articulating the basic predominant factor analysis, the Supreme Court stated:

To understand this conclusion, recall what “predominance” is about: A plaintiff pursuing a racial gerrymandering claim must show 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 do so, the “plaintiff must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations.”

Slip Op. at 16 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). If this language looks familiar, that's because it is: The Court's opinion quoted *exactly the same passage* of *Miller* in articulating exactly the same predominant factor analysis:

“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.”

Mem. Op. at 14 (quoting *Miller*, 515 U.S. at 916).

Nor did the Court fail to apply the standard it set out. Intervenors' astonishing claim that the Court “never required Plaintiffs to prove, and never found, that the racial motive ‘predominated’ over the ‘offsetting’ non-racial motives” strains credulity. ECF No. 151, at 5. This was, in fact, the central focus of the trial and all of the briefing before the Court. The Court's opinion could not have been clearer, stating in no uncertain terms: “Plaintiffs have shown race predominated.” Mem. Op. at 13; *see also id.* at 37 (describing strict scrutiny analysis in light of “[t]he fact that race predominated when the legislature devised Virginia's Third Congressional District in 2012”); *id.* at 48 (“Plaintiffs have shown that race predominated in Virginia's 2012 Plan[.]”). The opinion repeats the same conclusion in multiple different ways. For instance, in “conclud[ing] that compliance with Section 5 of the VRA . . . , and accordingly, race, ‘was the [legislature's] predominant purpose,’” *id.* at 4, it cites Intervenors' concession to that effect. It credits Del. Janis's explicit statements of race as the predominant purpose, “deem[ing] it appropriate to accept the explanation of the legislation's author as to its purpose.”

Id. at 22. And it further examines the host of circumstantial evidence to support “the overall conclusion that the district’s boundaries were drawn with a focus on race.” *Id.* at 26.

Indeed, the opinion devoted an *entire section* to its conclusion regarding the “Predominance of Race over Politics.” *Id.* at 30. It specifically found that Intervenor’s “post-hoc political justifications” have no support in the direct or circumstantial evidence, *id.* at 34, and determined that “it is clear” that respecting the will of the Virginia electorate was “subordinate” to compliance with the VRA, *id.* at 34. It concluded that the State’s “explicit and repeated admissions of the predominance of race . . . when taken together with the circumstantial evidence of record, compel our conclusion that race was the legislature’s paramount concern.” *Id.* at 36-37 (internal quotation marks and citation omitted).

Intervenor’s curious suggestion that the Court’s finding that “race predominated” does not mean that the Court found that “race predominated” is creative, but defies both the plain language of the opinion and common sense. To the contrary, in light of the record evidence (which is further discussed below), the Court considered—and rejected—the same post-hoc “political” justifications for CD 3 that Intervenor offer here. They are no more persuasive the second time around.

A final word on Intervenor’s misleading discussion of *Easley v. Cromartie*, 532 U.S. 234 (2001), on pages 6-7 of their brief. Intervenor quote a passage in *Alabama* that references *Easley* and contend that plaintiffs asserting racial gerrymandering claims must proffer an alternative plan that achieves the General Assembly’s political goals, and cannot prove the legislature’s motive in the absence of such a plan. ECF No. 151, at 6-7 (citing Slip Op. at 10). Intervenor’s reading of both *Alabama* and *Easley* is strained past the breaking point.

For starters, there is simply no support for this argument in the *Alabama* decision itself. Intervenors spin this argument entirely out of a lone “cf” citation to *Easley* in a section of *Alabama* that has no bearing here—the Supreme Court’s discussion of how the district court erroneously applied the racial gerrymandering analysis to the redistricting plan as a whole rather than to individual districts. As the Supreme Court explained, the district court’s analysis was erroneous because a plaintiff need not show that a plan *in its entirety* was motivated by race but, rather, that “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a *particular district*.” Slip Op. at 10 (quoting *Miller*, 515 U.S. at 916) (emphasis added). In support of *that* proposition, the Supreme Court included a “cf” citation to *Easley*. *Id.* Nowhere in *Alabama* does the Supreme Court articulate the rule that Intervenors posit.

Nor does anything in *Easley* itself support Intervenors’ attempt to put Plaintiffs’ alternative map on trial. ECF No. 151, at 7. Plaintiffs could articulate why *Easley* is readily distinguishable from this case. But they need not do so, because this Court has already done so. As the Court explained at length in its opinion, the record here contains ample, direct evidence of the General Assembly’s racial motives, and a specific disavowal by the sole author of the plan of any political purpose. In *Easley*, by contrast, the record was replete with “overwhelming evidence” that the legislature drew districts to effectuate legitimate political concerns. Mem. Op. at 33-37. An alternative plan can provide additional, circumstantial evidence of the legislature’s intent, but is certainly not required. Thus, as the Court has already stated, *Easley* does *not* hold that a plaintiff’s burden cannot be established through direct evidence, or require the Court to close its eyes to all evidence of race-based redistricting other than an alternative plan, including the map-drawer’s admission that race was the predominant purpose.

2. Intervenor’s Attempts to Re-Litigate the Court’s Factual Findings and Re-Write The Record Are Unavailing—Ample Evidence Supported the Court’s Conclusion That Race Was the Predominant Factor

Not only does *Alabama* confirm that the Court’s legal analysis as to predominance was correct, its discussion of many of the same factors that led to this Court’s determination that race predominated when the Virginia legislature drew the boundaries of CD 3 validates and bolsters this Court’s conclusions with respect to the predominance analysis. The similarities are, indeed, remarkable.

In response, Intervenor’s request that the Court reconsider its decision and re-sift through the record evidence, all in a misguided effort to reargue the factual findings underpinning the Court’s conclusions. *See, e.g.*, ECF No. 151, at 5-13. Perhaps most egregiously, whereas this Court specifically found that the General Assembly “adopted a floor of 55% BVAP for the Third Congressional District,” Intervenor’s now refer to this BVAP threshold as “imaginary.” Dkt. #151, at 12. This all goes well beyond the scope of the remand ordered by the Supreme Court and the briefing requested by this Court. Plaintiffs respectfully submit that there is no need for the Court to indulge Intervenor’s attempt to use their *Alabama* brief as a vehicle to reargue the Court’s settled factual determinations.

Even if appropriate at this point, the Intervenor’s effort is simply futile. Intervenor’s claim that “the undisputed record forecloses any finding that race subordinated traditional principles in Enacted District 3.” Their effort to rewrite history is remarkable and at times Orwellian. For example, Intervenor’s now claim that “there is *no* dispute that the Legislature treated majority-black District 3 *exactly the same* as the majority-white districts across the Commonwealth.” ECF No. 151 at 2. If that is true, Plaintiffs (and this Court) must have overlooked the portion of the legislative record where the General Assembly explained that it believed that preserving White

voting strength was “nonnegotiable,” Mem. Op. at 20 (citing Pl. Ex. 43, at 25) and it used a 55% White Voting Age Population floor to maintain the racial demographics of white-majority districts, Mem. Op. at 43 (citing Int.-Def.’s Trial Ex. 13, at 26-27). In reality, that record does not exist. The record that *does* exist fully supports the Court’s conclusion that race was the predominant factor behind the drawing of CD 3.

First, as the Court found, Intervenors themselves “conceded that compliance with Section 5 was [the legislature’s] predominant purpose or compelling interest underlying District 3’s racial composition in 2012.” Mem. Op. at 18 (quoting Int-Def.’s Mem. Supp. Mot. Summ. J. 15, ECF No. 39).

Second, the General Assembly used a “[r]acial [t]hreshold [a]s the [m]eans to [a]chieve Section 5 [c]ompliance.” Mem. Op. at 19. Intervenors’ dismissal of this fact as a mere “theor[y]” of Plaintiffs, ECF No. 151, at 11, belies this Court’s careful examinaiton of all of the evidence in finding this fact. The Court’s conclusion that the General Assembly applied a racial threshold in creating CD 3 was consistent not only with the legislative record and Virginia’s Section 5 submission, but with Intervenors’ own expert analysis in this case. Intervenors’ claim that Plaintiffs “failed to unearth a nonexistent statement from a legislator or plan architect that BVAP will be maintained,” ECF No. 151, at 10, takes an impressively ostrich-like approach to dealing with adverse evidence.

When asked on the House floor whether he had “any empirical evidence whatsoever that 55 percent African-American voting population is different than 51 percent or 50,” or whether the 55% threshold was “just a number that has been pulled out of thin air,” Del. Janis—the plan’s sole author—justified the use of a 55% BVAP floor as “weighing a certainty against an uncertainty.” Pl. Ex. 45 at 7. Virginia’s Section 5 submission consistently uses a 55% BVAP

threshold to explain the Plan's impact on racial minorities. Pl. Ex. 6 at 2. As Intervenors' own expert explained, the General Assembly adopted a 55% BVAP floor to avoid Section 5 liability. Mr. Morgan wrote that the General Assembly "found [the 55% BVAP floor] appropriate to comply with Section 5 for House [majority-minority] Districts." Int.-Def. Ex. 13 at 26-27. He found that "the General Assembly . . . had ample reason to believe 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." *Id.* The General Assembly then "acted in accordance with that view for the congressional districts and adopted the Enacted Plan with the [CD3] Black VAP at 56.3%." *Id.* at 27; see also Tr. 351:20-352:19. Intervenors' claim that Mr. Morgan "*never* said that the Legislature applied a BVAP floor in District 3," ECF No. 151, at 11 (emphasis in original), ignores the fact that Mr. Morgan *expressly* said that it did.

That brings us to Intervenors' carefully crafted distortion of select statements of the Plan's sole author, Del. Janis, from which Intervenors wildly extrapolate to claim that politics was the driving force behind CD 3. This is, of course, the same defense offered at trial, and repetition hardly strengthens its force. Certainly nothing in *Alabama* supports Intervenors' efforts to rewrite the legislative record. In its opinion, the Court surveyed many of the explicit statements by Del. Janis that his primary purpose was to maintain a certain BVAP in CD 3 in perceived service of the VRA. Mem. Op. at 19-22. Intervenors say that Delegate Janis's statements . . . cannot be viewed as equivalent to *Alabama's legislative* statements requiring no diminution in *BVAP*." ECF No. 151, at 10. Why not? Del. Janis explained precisely how he drew CD 3: He simply looked at the BVAP numbers "to ensure that the new lines that were drawn for [CD 3] would not retrogress *in the sense that they would not have less percentage of [BVAP] under the proposed lines in 5004 than exist under the current lines.*" Pl. Ex. 43 at 10,

12-13 (emphasis added); see also Pl. Ex. 13 at 8 (“So mindful that the voting rights act requires us not to retrogress [CD 3], what these lines reflect is under the new proposed lines, *we can have no less than the percentages that we have under the existing lines*”) (emphasis added).¹ These are precisely the kinds of statements *Alabama* has found was “strong, perhaps overwhelming, evidence that race did predominate.” *Compare* Slip Op. at 17 (“The legislators in charge of creating the redistricting plan believed . . . that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible.”).

Finally, Intervenors attack the Court’s previous conclusion that the shape and configuration of CD 3 shows that the General Assembly subordinated traditional redistricting criteria, such as compactness, contiguity, and respect for political subdivisions, to racial considerations in crafting the district. ECF No. 151, at 12. Intervenors do not even attempt to tether this discussion to any aspect of the *Alabama* decision; this is little more than editorial commentary on this Court’s opinion. Intervenors, admittedly, had little choice but to attack this Court’s reasoning because *Alabama* looked to similar circumstantial evidence as additional evidence of the legislature’s race-based motives. Slip Op. at 17-18. But the Court already considered—and rejected—Intervenors’ arguments on this score. Intervenors offer nothing to suggest that the Court erred in concluded that CD3’s “irregularity of shape and lack of compactness,” use of water contiguity to connect African-American communities and bypass white communities, and frequent and unnecessary splitting of political subdivisions all provided circumstantial evidence of the Legislature’s race-based approach to drawing CD 3. Mem. Op. at 23-30.

¹ So much for Intervenors’ claim that Del. Janis’ “statements say *nothing* about preventing a BVAP decrease in District 3.” ECF No. 151, at 10.

3. The Court Has Already Considered and Rejected Intervenors' Post-Hoc Claims That Political Considerations Predominated

As Intervenors would have it, Del. Janis, the plan's sole author, had the overriding objective to advance partisan objectives, and the evidence of this was so blindingly clear that this Court committed clear error in resolving disputed facts in support of its ultimate conclusion that race predominated. ECF No. 151, at 2-3.² Again, Intervenors' arguments are not new. They were considered and rejected by the Court in its thorough opinion. Mem. Op. at 30-37. In any event, Intervenors' renewed attempt at revisionist history fails.

Del. Janis specifically disavowed any consideration of partisan performance. When asked whether he had "any knowledge as to how this plan improves the partisan performance of those incumbents in their own district[s]," Del. Janis answered unequivocally: "I haven't looked at the partisan performance. It was not one of the factors that I considered in the drawing of the district." Int.-Def. Ex. 9 at 14 (emphasis added). Intervenors implicitly suggest that Del. Janis was being duplicitous when he said this. But like the Court did, Plaintiffs instead "deem it appropriate to accept the explanation of the legislation's author as to its purpose." Mem. Op. at 22. Moreover, Del. Janis' statement is entirely consistent with his description of his redistricting criteria, which never once mentioned partisan performance. *See* Pl. Ex. 43 at 3-7, 18-20.

Intervenors point to the legislative record to suggest that Del. Janis's overriding objective was "'to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 election,' when voters elected 8 Republicans and 3 Democrats (as opposed to the 5-6 split resulting in 2008)." ECF No. 151, at 8 (quoting Defs. Br. 6). While Intervenors tout this statement as "a display of candor rarely seen among legislators engaging in

² Intervenors cannot seriously dispute that this Court's factual findings are reviewable only for "clear error." *Compare* ECF No. 151, at 13 *with Easley*, 532 U.S. at 242.

redistricting,” ECF No. 151, at 8, their own distortion of the legislative record is all the more conspicuous. The record itself reveals that “respect[ing] . . . the will of the Virginia electorate” came “[t]hird” among Del. Janis’s redistricting considerations, after non-retrogression and population equality. Pl. Ex. 43 at 3-4 (emphasis added); *see also id.* at 19 (“[T]he 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.”). To the extent this statement reflects a partisan motive, the fact that the Plan’s author explicitly subordinated it to race definitively disproves that politics predominated the redistricting process. *See Mem. Op.* at 34 (“Taken in context . . . it is clear that this goal was ‘permissive’ and subordinate to the mandatory criteri[on] of compliance with the VRA.”).

Also absent from the record is *any* reference to the 8-3 partisan split Intervenor’s contention that was the driving force behind the Plan. Del. Janis spelled out precisely how he applied the “will of the Virginia electorate”: “[W]hat that meant was we based the territory of each of these districts on the core of the existing congressional districts” in an attempt to make a “minimal amount of change or disruption to the current boundary lines.” Pl. Ex. 43 at 4, 19. Indeed, because the “current boundary lines” were the same in 2008 and 2010, when they generated *different* partisan divides, Intervenor’s suggestion that Del. Janis sought to achieve a certain partisan balance falls flat. Moreover, as discussed below, the Plan’s removal of over 180,000 people from their existing districts to increase the population of CD 3 by a mere 63,976, Tr. 87:7-17, only demonstrates that, as promised, Del. Janis’s interest in core preservation gave way to his concerted effort to maintain a specific racial composition in CD 3. *Compare Slip Op.* at 17-18 (discussing district in which Legislature added 15,785 individuals to the new district, the overwhelming majority of whom were non-white).

That factual record bears an uncanny resemblance to the record in *Alabama*. In *Alabama*, the Supreme Court found “strong, perhaps overwhelming” evidence that race was the predominant factor where the State of Alabama “sought to achieve numerous traditional districting objectives, such as . . . minimizing change, *and protecting incumbents*,” but placed “greater importance” on the goal of ensuring compliance with the Voting Rights Act and population equality. Slip Op. at 2, 17 (emphasis added). Here, the General Assembly never identified incumbency protection as one of its redistricting criteria, and clearly subordinated all other criteria it did identify to the “nonnegotiable” goal of complying with the Voting Rights Act and population equality. Mem. Op. at 8 (“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.’”) (quoting Pl. Tr. Ex. 5 at 2).

This Court plainly utilized the correct legal framework in determining that race was the predominant factor behind CD 3, and its conclusion found ample—indeed, overwhelming—support in the factual record. *Alabama* bolsters the Court’s existing conclusion and provides no reason to revisit it.

B. There Is No Straight-Faced Argument That the General Assembly’s Use of Race in Drawing CD 3 Survives Strict Scrutiny Review

1. *Alabama* Reinforces This Court’s Holding that CD 3 Fails Strict Scrutiny

Intervenors’ claim that *Alabama* “squarely rejected the Court’s construction of the narrow tailoring standard” is equally ill-conceived. ECF No. 151, at 14. To the contrary, *Alabama* unequivocally endorsed this Court’s emphasis on the substantive retrogression standard over the fixed numerical percentages used by the General Assembly in drawing CD 3. This presents Intervenors with a serious problem. Intervenors’ means of extricating themselves from the horns

of this dilemma is to (a) ignore the actual narrow tailoring holding of *Alabama*, and (b) distort this Court’s opinion. But this transparent sleight of hand falls short of the mark.

As explained in Plaintiffs’ opening brief, at trial Intervenors offered a full-throated endorsement of the very kind of mechanistic, threshold-based approach that the Supreme Court rejected in *Alabama*. Indeed, *Alabama* confirms that “Section 5 does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority’s ability to elect a preferred candidate of choice.” Slip Op. at 19. Thus, a legislature relying on Section 5 to justify a race-based approach to drawing a district cannot seek succor in a crude, mechanistic approach untethered to the voting patterns in the area in question. Rather, it should conduct a functional analysis of electoral behavior in the district to provide it with a “strong basis” in evidence to believe that the race-based action it took was reasonably necessary. *See id.* at 19-22; Department of Justice (“DOJ”) Guidelines Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7471 (2011) (DOJ preclearance determinations are not based “on any predetermined or fixed demographic percentages. . . . Rather . . . this determination requires a functional analysis of the electoral behavior within the particular jurisdiction”).³

This is precisely the lens through which the Court examined the record here. Unable to fault the Court’s actual analysis, Intervenors grossly mischaracterize it. The Court most

³ *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 519 (2006) (“To support its use of § 5 compliance as a compelling interest with respect to a particular redistricting decision, the State must demonstrate that . . . it had a strong basis in evidence for believing . . . that the redistricting decision at issue was reasonably necessary under a constitutional reading and application of the Act.”); *Bush v. Vera*, 517 U.S. 952, 977 (1996) (“If the State has a strong basis in evidence, for concluding that creation of a majority-minority district is reasonably necessary to comply with § 2, and the districting that is based on race substantially addresses the § 2 violation, it satisfies strict scrutiny.”) (internal quotation marks and citations omitted).

assuredly did not “conclude[] that the Enacted Plan failed strict scrutiny” merely “because it ‘increased [District 3’s] BVAP.’” ECF No. 151, at 15 (citing Op. at 41). Nor did it hold that “a redistricting plan automatically fails strict scrutiny whenever it increases the BVAP in a majority-black district.” *Id.* at 15. To the contrary, as the Court’s opinion plainly states, the Court concluded that the Plan failed narrow tailoring because the State had *no* basis in evidence for concluding that a mathematical 55% BVAP threshold “was reasonably necessary to avoid retrogression.” Mem. Op. at 40 (quoting *Shaw v. Reno*, 509 U.S. 630, 655 (1993); *see also id.* (citing *Miller*, 515 U.S. at 921; *Bush*, 517 U.S. at 983)).

That is precisely the narrow tailoring analysis that *Alabama* demands, and the Legislature’s failure to make this showing with respect to CD 3 is precisely why this Court concluded that CD 3 failed strict scrutiny.

2. Intervenor’s Brief Simply Confirms That the General Assembly Had No Basis for Concluding That Use of a BVAP Threshold Was Necessary

Oddly, at the same time Intervenor’s argue vociferously that there was no 55% BVAP threshold, they attempt to justify it, arguing that the General Assembly had “very good reasons to believe that this level [i.e., “55% or higher”] was needed.” ECF No. 151, at 16. Intervenor’s inability to muster any evidence in support of this assertion is, however, telling.

Intervenor’s do not present a single piece of evidence explaining why the General Assembly would have “very good reasons” to believe that CD 3 “needed” to have a BVAP of 55% or more. *Id.*⁴ They cannot, because the General Assembly admittedly made no attempt to

⁴ Intervenor’s post-hoc reliance on statements by legislators about use of a 55% BVAP threshold in drawing districts in a *House of Delegates* redistricting plan to justify using such a threshold for CD 3, ECF No. 151, at 16, sits uncomfortably with their complaint that “Mr. Morgan’s statement about a BVAP floor in the 2011 Democratic House of Delegates plan says absolutely nothing about the existence of such a floor in the 2012 Republican Enacted Plan.” *Id.* at 11.

determine the number of Black voters needed to avoid retrogression. Without this analysis, the General Assembly could not and did not know whether it had to add Black voters to CD 3 to avoid retrogression, or whether Black voters could be removed. That ends the analysis.

Alabama makes abundantly clear that a legislature cannot use a mechanical BVAP threshold in the absence of any evidence suggesting that such a threshold is necessary.⁵ Slip Op. at 19-21.

Intervenors further attempt to excuse the General Assembly's packing of Black residents into CD 3 by making the unsubstantiated claim that the General Assembly did not have enough money to protect voters' constitutional rights by conducting the requisite analysis of racial voting patterns. ECF No. 151, at 16. Intervenors provide no evidence to support this astonishing contention, and it's not difficult to understand why: none exists. Even more remarkable is Intervenors' assertion that because Plaintiffs' racial bloc voting analysis shows that the General Assembly's preordained 55% threshold was unnecessary, it proves that the type of functional analyses found lacking in *Alabama* are not "reliable" and "would have served no purpose." *Id.* In other words, Intervenors argue that evidence Plaintiffs submitted during this litigation that disproves the need for a 55% BVAP threshold constituted the General Assembly's "strong basis in evidence" for adopting a 55% BVAP threshold in the first place. At the risk of stating the obvious, the General Assembly could hardly have relied on an analysis that didn't even exist at the time. The argument is, in any event, flatly inconsistent with any reading of *Alabama*, and it most certainly does not excuse the General Assembly from failing to conduct even the most rudimentary functional analysis to support its race-based approach to drawing CD 3.

⁵ Nor was there any reason to believe, in the absence of actual analysis, that a 55% BVAP threshold was reasonably necessary to avoid retrogression. Intervenors ignore the actual history in Virginia, where DOJ previously *twice* pre-cleared CD 3 with BVAPs lower than 55% and, most recently, pre-cleared the State's 2011 Senate Plan, in which all five majority-minority districts were below this threshold. Pl. Exs. 20, 22, 30.

This Court appropriately rejected the mechanical interpretation of the retrogression standard that the General Assembly adopted and that Intervenors defiantly championed in this lawsuit. The Supreme Court did precisely the same in its decision in *Alabama*. *Alabama*, in short, hardly requires reevaluation of this Court's decision; it supports it entirely.

C. The Court Should Adopt An Appropriate Deadline for General Assembly to Enact a Remedial Districting Plan

In the conclusion to their opening memorandum, Plaintiffs asked the Court to reinstate and reaffirm its prior decision and order the General Assembly to enact a remedial districting plan no later than September 1, 2015, the deadline set by the Court in its Order of February 23, 2015, ECF No. 138. Although *Intervenors* were the ones who requested that the Court postpone the previous April 1, 2015 remedial deadline to September 1, 2015, they now complain that the deadline they requested is too soon.

Intervenors note the General Assembly will next be in session in January 2016. But in its February 23, 2015, Order, the Court found unconvincing Defendants' claim of harm in the form of the expenses the Commonwealth will incur to hold a special session. ECF No. 137, at 4-5. Intervenors also ask the Court to delay the remedial deadline until after the Supreme Court decides a hypothetical future "second direct appeal" by Intervenors. ECF No. 151, at 17. The Court can deal with that hypothetical if it arises, as it did in its February 23, 2015, Order. But it is not difficult to imagine Intervenors' next argument if the Court resets the remedial deadline until some time late in the Supreme Court's 2015-2016 term—as Intervenors implicitly suggest that the Court do: There is not sufficient time to implement a remedy before the 2016 elections.

The Commonwealth of Virginia has now conducted two elections under an unconstitutional congressional map. Two elections is enough.

II. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court fully reinstate and reaffirm its Memorandum Opinion and Judgment. In accordance with the Court's Order of February 23, 2015, ECF No. 138, Plaintiffs further request that, upon reinstatement of the Memorandum Opinion and Judgment, the Court allow the General Assembly no more than sixty (60) days, and in no event later than September 1, 2015, to enact a remedial districting plan.

Dated: April 30, 2015

Respectfully submitted,

By /s/ John K. Roche

John K. Roche (VSB# 68594)
Marc Erik Elias (admitted *pro hac vice*)
John Devaney (admitted *pro hac vice*)
Perkins Coie LLP
700 13th St. N.W., Suite 600
Washington, D.C. 20005-3960
Phone: (202) 434-1627
Fax: (202) 654-9106
Email: JRoche@perkinscoie.com
Email: MElias@perkinscoie.com
Email: JDevaney@perkinscoie.com

Kevin J. Hamilton (admitted *pro hac vice*)
Perkins Coie LLP
1201 Third Avenue, Ste. 4900
Seattle, WA 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000
Email: KHamilton@perkinscoie.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2015, I caused the foregoing to be electronically filed with the Clerk of this Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Mike Melis
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071
Fax: (804) 786-1991
mmelis@oag.state.va.us

Jonathan Andrew Berry
Jones Day
51 Louisiana Ave NW
Washington, DC 20001
202-879-3939
Fax: 202-626-1700
jberry@jonesday.com

*Attorneys for Defendants James B. Alcorn,
Matthew A. Gray, and Singleton B. McAllister
in their official capacities*

John Matthew Gore
Jones Day
51 Louisiana Ave NW
Washington, DC 20001
(202) 879-3930
Fax: (202) 626-1700
jmgore@jonesday.com

Frederick W. Chockley , III
Baker & Hostetler LLP
1050 Connecticut Ave NW
Suite 1100
Washington, DC 20036
(202) 861-1500
fchockley@bakerlaw.com

Michael Anthony Carvin
Jones Day
51 Louisiana Ave NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Jennifer Marie Walrath
Baker & Hostetler LLP (DC)
1050 Connecticut Ave NW
Suite 1100
Washington, DC 20036
202-861-1702
Fax: 202-861-1783
jwalrath@bakerlaw.com

*Attorneys for Intervenor-Defendant Virginia
Representatives*

Cullen Dennis Seltzer
Sands Anderson PC
1111 E Main Street
24th Floor
P O Box 1998
Richmond, VA 23218-1998
804-648-1636
Fax: 804-783-7291
cseltzer@sandsanderson.com

*Attorneys for Movants Robert B. Bell,
Christopher Marston, and William Janis*

*Attorneys for Interested Parties Clerk of the
Virginia Senate, Clerk of the Virginia House,
and Division of Legislative Services*

Respectfully submitted,

By/s/ John K. Roche

John K. Roche (VA Bar No. 68594)

Perkins Coie LLP

700 13th St., N.W., Suite 600

Washington, D.C. 20005-3960

Phone: (202) 434-1627

Fax: (202) 654-9106

JRoche@perkinscoie.com

Attorneys for Plaintiffs