No. 11-___

IN THE

Supreme Court of the United States

VANDROTH BACKUS, WILLIE HARRISON BROWN, CHARLESANN BUTTONE, BOOKER MANIGAULT, EDWARD MCKNIGHT, MOSES MIMS, JR., AND ROOSEVELT WALLACE,
Appellants,

v.

THE STATE OF SOUTH CAROLINA, NIKKI R. HALEY, in her capacity as Governor, JOHN E. COURSON, in his capacity as President Pro Tempore of the Senate, ROBERT W. HARRELL, JR., in his capacity as Speaker of the House of Representatives; MARCI ANDINO, in her capacity as Executive Director of the Election Commission, JOHN H. HUDGENS, III, Chairman, NICOLE S. WHITE, MARILYN BOWERS, MARK BENSON, and THOMAS WARING, in their capacity as Commissioners of the Election Commission,
Respondents.

On Appeal from a Three-Judge United States District Court in the District of South Carolina

JURISDICTIONAL STATEMENT

RICHARD A. HARPOOTLIAN
Counsel of Record
GRAHAM L. NEWMAN
RICHARD A. HARPOOTLIAN, P.A.
1410 Laurel Street
Columbia, SC 29201
(803) 252-4848
rah@harpootlianlaw.com

May 18, 2012

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

Appellants alleged at trial that the South Carolina legislature intentionally, expressly, and systematically used race for non-remedial purposes to pack black voters into election districts throughout the state, over and above what the Voting Rights Act requires, for two purposes: to minimize statewide black electoral influence and to limit the cross-racial appeal of the Democratic Party.

This claim is analytically distinct from the kind of "racial gerrymander" challenge to the design of an individual election district recognized in *Shaw v. Reno*, 509 U.S. 630 (1993).

The Questions Presented Are:

1. When race is a factor in the design of a redistricting plan, must the state bear the burden of proving either a remedial justification for the use of race or that the plan has a race-neutral purpose?

2. Whether in a Fourteenth Amendment claim that a state legislature intentionally and systematically used race to pack black voters excessively in election districts throughout the State, residents living throughout the State have standing to challenge the plan as a whole, as in partisan gerrymandering claims, or whether courts must ignore evidence of how particular districts were designed unless at least one plaintiff lives in those specific districts?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 11-___

VANDROTH BACKUS, WILLIE HARRISON BROWN, CHARLESANN BUTTONE, BOOKER MANIGAULT, EDWARD MCKNIGHT, MOSES MIMS, JR., AND ROOSEVELT WALLACE,
Appellants,

v.

THE STATE OF SOUTH CAROLINA, NIKKI R. HALEY, in her capacity as Governor, JOHN E. COURSON, in his capacity as President Pro Tempore of the Senate, ROBERT W. HARRELL, JR., in his capacity as Speaker of the House of Representatives; MARCI ANDINO, in her capacity as Executive Director of the Election Commission, JOHN H. HUDGENS, III, Chairman, NICOLE S. WHITE, MARILYN BOWERS, MARK BENSON, and THOMAS WARING, in their capacity as Commissioners of the Election Commission,
Respondents.

On Appeal from a Three-Judge United States District Court in the District of South Carolina

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge court (App. at 1a.) is unreported.

JURISDICTION

A three-judge court was convened in the District of South Carolina pursuant to 28 U.S.C. § 2284. The court entered judgment for the defendants. J. Defs., Mar. 9, 2012, ECF No. 215. A timely notice of appeal was filed on March 19, 2012. App. at 30a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISION, STATUTES, AND RULES INVOLVED

Relevant constitutional provisions, statutes, and rules are set forth in App. at 99a.

INTRODUCTION

In this decade's redistricting, South Carolina employed a novel, divisive, cynical, and constitutionally offensive use of race to pack black voters excessively into districts throughout the state. For the first time since the end of Reconstruction, the Republican Party fully controlled the legislative and executive institutions that designed this decade's redistricting plans. With partisan domination of the redistricting process, the Republican-controlled legislature took election districts created in previous decades pursuant to the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 *et seq*. ("VRA") – and that were *already performing* as effective VRA districts – and systematically used race to pack additional black voters into these districts. This statewide, intentional, and express use of race to further concentrate African-American voters into majority-black districts was neither justified nor required by the VRA, because the districts were already electing African-American candidates. The barely disguised motive of Republican legislators for using race to pack black voters into these districts

was twofold: (1) to minimize the political influence of black voters across the state by concentrating them into as few districts as possible and (2) to segregate the political parties by race in order to minimize the possibility of effective interracial electoral coalitions. In other Southern states where this decade's redistricting was controlled completely by the Republican Party, the same technique emerged.[1]

This race-based electoral segregation strategy is the subject of this litigation. Over the past decade, the voters of South Carolina, through voluntary migrations, have gradually produced more racially integrated communities. As black residents have moved from rural and urban areas to the suburbs and white residents have moved back into cities they once fled, black and white citizens are increasingly living in the same neighborhoods. This demographic mobility in South Carolina reflects national trends. *See* Sam Roberts, *Segregation Curtailed in U.S. Cities, Study Finds*, N.Y. Times, Jan. 30, 2012. Moreover, South Carolina's residents are not merely living together but also voting together: bi-racial coalitions of voters in South Carolina's racially integrated areas have repeatedly elected black candi-

---

[1] Both North Carolina and Georgia allegedly required 50% or higher BVAP without any analysis of what would elect the black candidate of choice. *See* Pls' Jt. Mem. Supp. Inj., 16-18, *Dickson et al. v. Rucho et al.*, 11-CVS-16896 (N.C. Sup. Ct.) (pending statewide challenge) *and* Letter from Manoj S. Varghese on behalf of Georgia Legislative Black Caucus, to T. Christian Herron, Jr., Chief, Voting Section, Civil Rights Division, Department of Justice, 4-8 (December 14, 2011) (on file with Department of Justice) (opposing Section 5 preclearance). *See also*, Ari Berman, *How the GOP is Resegregating the South*, The Nation, Jan. 31, 2012, *available at*: http://www.thenation.com/article/165976/how-gop-resegregating-south, App. at 83a.

dates preferred by black voters. In nine state House districts where blacks constituted less than a majority, biracial coalitions of whites and blacks elected minority-preferred black candidates between 2003 and 2010. If black candidates reflect the political preferences of their constituents, white voters support those candidates. In 2010, for example, Tim Scott, a black Republican, was elected to Congress from the First Congressional District with 65% of the vote, although the district is nearly 75% white. In the 2008 presidential election, Barack Obama was a more successful presidential candidate among white voters in South Carolina than John Kerry had been four years earlier; each earning 26% and 22%, respectively.[2]

The South Carolina General Assembly, however, sought to ignore increasing white support for black candidates and to destroy the effects of increasing residential integration by re-segregating voters by race, even where the VRA did not require it. In 2011, the General Assembly enacted Act 72, a legislative redistricting plan that drew electoral districts' boundaries to "pack" black voters into 30 majority-minority districts. During consideration of this plan, Republican committee and subcommittee chairs repeatedly relied on a rigid rule that the black voting age population of any proposed majority-minority district could only be increased and could not be reduced for any reason. The Republican leadership insisted on turning the nine integrated state House districts represented by black Representatives into black-majority districts. Although the General Assembly's

---

[2] Stephen Ansolabehere et al., *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 Harv. L. Rev. 1386, 1422 Table 9 (2010).

leaders explained these districts as efforts to comply with the VRA, no legislator provided any argument or evidence to suggest that biracial coalitions in integrated districts were not electing candidates preferred by black voters. Instead, affidavit testimony from a black Democratic member of the House (which the court below wrongly excluded as hearsay) explained that one white Republican House member candidly stated that the Republican majority's goal was to identify the Democratic Party in South Carolina as the "black party" in the minds of voters – and that under the state's redistricting plan, this goal soon would be reality.

The central question presented here is whether the Fourteenth Amendment permits a state to use race non-remedially to pack black voters into election districts, over and above the levels the VRA requires. The three-judge court erred by misunderstanding this case as a conventional *Shaw v. Reno* challenge. But this is not a case that challenges the design of a particular, individual election district as an excessive racial gerrymander. This case instead addresses legislative redistricting techniques that have emerged only in this decade's redistricting. This litigation challenges South Carolina's redistricting plan as a whole, alleging the state used race in non-remedial ways, irrespective of what the VRA requires, to concentrate black voters into a relatively few districts for the unconstitutional purposes of minimizing black electoral influence and racially segregating the political parties.

STATEMENT OF THE CASE

Following the 2010 Census, the South Carolina General Assembly passed the redistricting legislation at issue for the 124-member state House of Representatives.

1. The "Benchmark" Plans. To understand the evolution of electoral districts in South Carolina, it is important to set forth the election district system in place between 2003 and 2011. In 2001, the General Assembly was unable to override a gubernatorial veto of the post-2000 redistricting bill. In the ensuing stalemate, a three-judge federal court issued an order drawing the state House districts. *Colleton County Council v. McConnell*, 201 F.Supp.2d 618 (D.S.C. 2002). The *Colleton County* court held that the VRA mandated that South Carolina create certain electoral districts with percentages of black voting age population ("BVAP") sufficient to give black voters an equal opportunity to elect candidates of their choice and avoid "retrogression" of the black minority's exercise of the franchise. Because the use of race was subject to strict scrutiny under the Fourteenth Amendment, the court was "careful to narrowly tailor our draw so that this predominate use of race is limited to the accomplishment of the purposes of the VRA and no more." *Id.* at 640.

After considering rival expert testimony about the minimum BVAP necessary to insure compliance with the VRA, the *Colleton County* court ordered a plan that created 29 black-majority state House districts. In 2003, the legislature modified the House plan, again creating 29 majority-black districts out of a total of 124 House districts, with BVAPs ranging from 49.8 to 68.9%. *See* Act 55, 2003 S.C. Laws 255. The *Colleton County* court's plan, as modified by Act

55, governed South Carolina's House elections from 2003 until 2011 and now forms the "benchmark" for purposes of compliance with Section 5 of the VRA ("the benchmark plan"). *See* App. at 103a.

2. Success of Minority-Preferred Candidates in Majority-White Electoral Districts. From 2003 until 2010, the demographics of the majority-minority districts created by the benchmark plan changed, but minority-preferred candidates continued to be elected from what eventually became majority-white districts.

These demographic changes were driven by both inter and intra-state migration. Black residents in the state migrated from rural counties with large black populations to more populous and more integrated urban and suburban counties. These demographic shifts also transformed the racial composition of some of the benchmark districts originally drawn as majority-black districts under the *Colleton County* decision and Act 55. Eight of the benchmark plan's 29 majority-black districts became majority-white over the last decade.[3] Despite these demographic changes, all eight districts continued to elect black representatives. Additionally, the black candidates running in these eight districts faced either no competition or won election overwhelmingly. For example, House District 102 in Berkeley County had a BVAP of 50.96% in 2003. By 2010, the District's BVAP had decreased to 43.85%. Yet black Repre-

[3] The eight districts are: HD-12, HD-23, HD-49, HD-64, HD-102, HD-111, HD-116, and HD-122.

sentative Joe Jefferson defeated his white, Republican opponent 58.54% to 41.44%.[4]

The success of black-preferred candidates with white "cross-over" support also continued in the other seven districts and in one majority-white district under the benchmark plan.[5] For example, House District 79 had a BVAP of 22.16% in 2003. Under the benchmark plan, its BVAP was 34.7%. Nevertheless, District 79 voters elected black candidates in the three most recent elections. In short, black and white voters were forming biracial coalitions in response to societal integration, "pull[ing] and haul[ing] to find common political ground with other voters in the district" to elect candidates without regard to race. *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994).

3. The 2011 House Redistricting Scheme. The General Assembly's 2011 redistricting law, Act 72 of 2011, reacted to this trend by systematically destroying these biracial coalitions through a policy of racial segregation. In every possible case, Act 72 re-segregated black and white voters to the maximum extent possible through a perverse interpretation of the VRA. In the redistricting process, the legislature had *no* partisan electoral performance data before it. It did, however, have extensive racial demographic data and used that data pervasively. Act 72 deliberately maintained or increased the BVAP of the 21 remaining majority-black districts under the benchmark plan. In many of these districts, even those

---

[4] In 2004, Rep. Jefferson defeated his white, Republican opponent 61.31% to 38.46%. He was unopposed in 2006 and 2008.

[5] The South Carolina Senate also saw black candidates succeed in majority-white districts, including two districts, SD-10 and SD-29, with 31.9% and 45.8% BVAP, respectively.

that had a lower BVAP percentage under the adopted plan, this required dramatic racial districting to add sufficient population necessary to meet the requirement of one person, one vote while also keeping the BVAP percentage above 50%. Act 72 also packed the eight districts that were no longer majority-black districts by drawing these districts with a BVAP of 50% or greater. All eight of these districts were already represented by black Representatives during the period the benchmark plan was in effect. Finally, Act 72 packed black voters into District 79 because District 79 is represented by a black Representative. In total, Act 72 created 30 majority-black districts – one more than the *Colleton County* court found necessary a decade earlier and nine more than the benchmark plan. *See* App. at 103a. The Republican majority made no effort to explain why increasing the BVAP or number of majority-minority districts was necessary to comply with the VRA. Instead, the Republican leadership adopted a rigid policy of voting down every amendment that would reduce a majority-minority district's BVAP.

This policy was reflected in the testimony of frustrated Democrats who attempted to reduce the BVAP of particular districts in order to protect incumbents' existing integrated constituencies. The Election Law Subcommittee was responsible for passing the initial House plan which then went to the full House Judiciary Committee and then the House floor. State Representative Bakari Sellers, one of two black Democrats, along with three white Republicans, on the Subcommittee, testified that his amendment to change the shape of one majority-minority district to better preserve the district's constituency was a "nonstarter" for the Republican-controlled Subcommittee. App. at 74a.

Rep. Seller's amendment would have reduced the BVAP of House District 102. This single fact became the sole justification the Republican majority offered to reject the amendment. During Rep. Sellers' testimony, the district court heard a portion of the Subcommittee Audio Recording discussing one of Rep. Sellers' rejected amendments. In this discussion, the Republican Chair, Representative Alan Clemmons, explained to Rep. Sellers that "the majority of this Subcommittee has adopted a policy position that *we will not reduce black voting age population unless population absolutely demands it.*" Pls.' Ex. 66, RWH022017, at 00:48:00-00:49:10 (emphasis added). This "hard line" policy was later reiterated in a portion of audio played from the Judiciary Committee wherein Chairman James Harrison, a white Republican, explained that BVAP cannot be reduced by .8 percent. Pls.' Ex. 66, RWH022018, at 05:33:50.

Rep. Sellers testified that this rigid refusal to reduce any majority-minority district's BVAP was not an effort to take into account any non-racial factors. According to Rep. Sellers, "[t]hey had a hard, fast line, which I felt was incorrect, that they were not reducing black voting-age population in any district regardless of how high it was. It was an attempt to resegregate [voters]." App. at 70a. As Rep. Sellers noted, the subcommittee "did not deal with compactness, communities of interest," nor was it "concerned with public commentary." App. at 70a. Instead, "when it came to the implementation the only factor that was used was race." App. at 70a. None of Seller's testimony was contradicted by any witness.

In rejecting one proposed amendment, Judiciary Chair Harrison echoed subcommittee Chair Clemmons'

position: as a matter of policy, the BVAP of an existing majority-minority district could not be reduced. Harrison rejected a proposed amendment because it would have reduced the BVAP of District 82 "from 52.74 to 51.43," a reduction that, according to Harrison was "unacceptable under the VRA…." Pls.' Ex. 66, RWH02018, at 00:25:50 - 00:26:50. Subcommittee chair Clemmons repeated his earlier position, flatly stating that he would *"vote against any change that would decrease black voting age population in a majority-minority district." Id*. at 00:27:25 (emphasis added).

Republicans also increased the BVAP of districts with biracial constituencies that had consistently elected minority-preferred black candidates, *even over the objections of black incumbents who wanted to preserve their biracial coalitions*. Representative Mia Butler-Garrick, for instance, represented House District 79, which under the benchmark plan, had elected two different black representatives over the course of three different elections even though the district's BVAP in 2010 was merely 34.70%. When she objected to increasing dramatically the black population of her district, Subcommittee Chair Clemmons insisted that "we're working to get your BVAP [] up in your District." App. at 45a. When she appealed to Judiciary Chair Harrison, he explained "he might not have a choice because 'the lawyers' were advising him that [making District 79 majority-black] was probably what they were going to have to do." App. at 45a.

During a meeting of the Judiciary Committee, Rep. Harrison introduced an amendment that redrew District 79 with a 52% BVAP. The amendment split Rep. Butler-Garrick's own neighborhood to remove white voters and add black voters not previously in

the district. App. at 46a-47a. Rep. Butler-Garrick protested that:

> A majority-minority district is not warranted because there has been no Section 2 or performance analysis to support or justify this so we end up packing District 79 for no reason. I love the diversity of my District and so do the people of District 79. Even with a 34 percent BVAP, two African Americans have already won, which is proof that *we neither need nor are we asking for the additional protection of majority-minority status*.

App. at 48a. In sum, far from protecting black incumbents' interests in maintaining their constituencies, the Republicans' efforts to "pack" black voters overrode the incumbents' desire to preserve core constituencies that shared geographically compact communities of interest. The Republican leadership never offered any analysis as to why either Sections 2 or 5 of the VRA required maintaining or increasing districts' BVAPs when those districts were already electing African-American officeholders. Black House members opposed the plan on final passage with 18 voting against, five in favor, and four not voting.[6]

Through less official channels, however, individual Republicans indicated that the purpose of the scheme was to minimize the cross-racial appeal of the Democratic Party by insuring that Democrats were identified exclusively with black voters. Rep. Butler-Garrick testified that Representative Thad Viers

---

[6] Out of comity, the Senate did not pass substantive amendments to the House plan and *vice versa*. The final House vote for passage was 82 in favor, 23 opposed, 15 not-voting and three excused.

(R-Horry) shared this cold blooded strategy in a conversation she characterized as "lighthearted". According to Rep, Butler-Garrick:

> Rep. Viers told me that race was a very important part of the Republican redistricting strategy. …. Rep. Viers said that Republicans were going to get rid of white Democrats by eliminating districts where white and black voters vote together to elect a Democrat. *He said the long-term goal was a future where a voter who sees a "D" by a candidate's name knows that the candidate is an African-American candidate.*

App. at 49a-50a (emphasis added). The lower court ruled this portion of Rep. Butler-Garrick's affidavit was inadmissible hearsay. Plaintiffs objected on the ground that statements by Rep. Viers constituted admissions by agents of the defendant admissible under FRE 801(d)(2) and that the court had permitted similarly testimony by other legislators regarding statements of their colleagues.[7]

4. This Litigation. After the state's plan was precleared in the District of Columbia District Court, the plaintiffs filed suit on November 10, 2011, an amended complaint on November 23, 2011, and a second amended complaint on February 15, 2012, alleging that the plan violated the Constitution and the VRA. A three-judge court was convened pursuant to 28 U.S.C. § 2284. On March 1, 2012, the three-judge court convened and took two days of testimony. The court issued its Order March 9, 2012.

5. Trial before the Three-Judge Court. The plaintiffs' opportunity to present evidence of the Gen-

[7] Were this case to be remanded, plaintiffs would subpoena Rep. Viers to testify, obviating the hearsay objection.

eral Assembly's purpose was dramatically truncated by three of the lower court's contested procedural and evidentiary rulings. First, the court decided to compress the trial of this important and complex case into two days of live testimony. Second, the panel would not permit any direct evidence regarding legislators' purposes or motives in drafting and approving the 2011 plan, even though allegations of discriminatory purpose formed the foundation of the plaintiffs' case. Third, although the panel insisted that much of the evidence regarding legislative intent be presented as legislators' affidavits, the court also ruled that critical parts of these affidavits were inadmissible hearsay, even though the panel admitted live testimony from some legislators about other legislators' statements. *See e.g.*, App. at 71a-72a.

Despite these temporal and evidentiary limitations, plaintiffs presented essentially uncontested evidence that the General Assembly was motivated at least in part, by the purpose of increasing the BVAP in districts, for racial reasons, even when those districts were already electing black candidates. The legislators' affidavits and Rep. Sellers' testimony regarding Republican leaders' insistence on a minimum BVAP were uncontradicted at trial. In addition, plaintiffs presented expert testimony from Dr. Michael P. McDonald, Associate Professor of Government and Politics at George Mason University, that the pattern of legislative decisions regarding 21 House districts could best be explained as racial decision-making. In ruling that this testimony was insufficient to show unconstitutional use of race in the classification of voters, the lower court "grant[ed] Dr. McDonald the inference that race must have been a factor in changes involving exchanges of areas of low BVAP for areas of high BVAP" but nonetheless held that such

testimony did not show that "race predominated" in the legislature's decision-making. App. at 12a.

To rebut plaintiffs' case, defendants presented testimony from a single witness, Dr. Thomas Brunell, Professor of Political Science at the University of Texas, Dallas. Dr. Brunell testified that he had no evidence that South Carolina needed to add additional black voters to the districts in question in order for black voters to elect the minority community's preferred candidate to the state House. Dr. Brunell testified that "we can try to guess at the edges, but there's really no good way of knowing" whether race was the "predominant factor" in districting, even though this Court's precedents make that determination the critical legal issue. App. at 75a-76a. Brunell also testified that it was not possible to determine from the data available to the General Assembly whether a change made to the design of a district was made for political or racial reasons. App. at 77a-78a.

Although a social scientist rather than a lawyer, Dr. Brunell's testimony rested centrally on his legal theory that where voting is racially polarized, jurisdictions must draw minority "opportunity" districts with at least 50% BVAP – even if districts with a lower BVAP would provide an equal opportunity for the minority community to elect a candidate of choice. App. at 80a-81a. Dr. Brunell was untroubled by the state packing black voters into districts beyond the necessary level to give the minority community an equal opportunity to elect candidates of their choice. Brunell testified it was possible to explain the configuration of districts in the South Carolina House plan on grounds other than race, App. at 79a, but he did not offer any such expla-

nation. Instead, he simply argued that Dr. McDonald's racial explanation could not be conclusive as to the real cause of the redistricting decision.

ARGUMENT

I. The three-judge court failed to recognize that the state bore the burden of proving either a remedial justification for the plan's use of race or a race-neutral purpose sufficient to explain the redistricting plan.

The three-judge court either found that race was a factor in South Carolina's redistricting plan or, at least, decided the case on the assumption that race was a factor. *See, e.g.*, App. at 12a ("even granting Dr. McDonald the inference that race must have been a factor in changes involving exchanges of areas of low BVAP for areas of high BVAP," the court rejects the plaintiffs' case); App. at 18a (finding that the testimony of a key witness "strongly suggested that race was a factor in drawing many district lines . . ."); App. at 18a (holding that "race can be – and often must be – a factor in redistricting"). These findings are hardly surprising, given the fact that the legislature had only racial data available, but not partisan political data, and the uncontested trial evidence that key members of the state legislature repeatedly endorsed a policy of maintaining or increasing election districts' BVAP. By misreading this Court's precedents, the three-judge court concluded the intentional use of race as a factor did not place any serious burden of justification or proof of non-racial causation on the state.

The lower court's inattentiveness to the constitutional significance of the intentional use of race led the three-judge court to commit two legal errors. The

lower court failed to recognize that, once plaintiffs established that the legislature was partly motivated by the race of voters, the burden shifted to the state to prove either (1) that the redistricting scheme served a remedial purpose sufficient to justify racial classifications, such as compliance with the VRA, or (2) that the redistricting scheme would have been adopted for race-neutral reasons. The lower court's failure to place the burden of proof on the state to show justification or causation warrants this Court's review and precludes summary affirmance.

A. To the extent the General Assembly did not rebut the evidence that race was a factor in the redistricting plan, it should have been required to bear the burden of justifying that the use of race was necessary to comply with the Voting Rights Act.

The court below acknowledged that the General Assembly had considered race in order to comply with the VRA. App. at 18a-19a. The court, however, effectively endorsed the principle that race can be a factor in creating election districts even for non-remedial purposes – that race can be used even when the VRA does not require it and that the state bears no burden to provide a justification, let alone a compelling one, for using race as a factor. The three-judge court made no effort to explain how or why the General Assembly's policy of systematically increasing (or maintaining artificially high) BVAP in those districts was required by the VRA. Instead the court assumed that, so long as a majority-minority district's boundaries were consistent with "traditional, race-neutral principles," the General Assembly "did not overly rely on race in a manner that runs afoul of

the Fourteenth Amendment," App. at 19a, even if the use of race was not required by the VRA.

The failure to find that the General Assembly's undisputed use of race was required by the VRA violates this Court's precedent in both the redistricting context and other contexts in which public institutions have sought to justify race-based public policy. All the cases in which this Court has acknowledged that the Constitution permits race to be a factor in the districting process involve the use of race to comply with the remedial obligations of the VRA. What made the racially-designed districts unconstitutional in cases like *Shaw, Miller, Vera*, and others was precisely that those "highly irregular" districts could not have been required by the VRA because, even when voting is racially-polarized, the VRA only requires "reasonably compact majority-minority district[s]." *Bush v. Vera*, 517 U.S. 952, 979 (1996). When race is used excessively in the design of districts the districts are unconstitutional, unless the VRA requires them.

The Court has never held that race can be a factor in the design of election districts when the VRA does not require it. To the contrary: the Court has been extremely careful to note that any use of race in the design of democratic institutions is a highly sensitive matter under the Equal Protection Clause and can be justified *only* when the use of race is justified as required by the VRA.

Justice Brennan powerfully expressed this in his concurring opinion in the first case that addressed these issues. *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977). Justice Brennan endorsed the use of race in the design of election districts, but only where the VRA required it. Otherwise, he wrote, the

danger was too great that partisan legislatures would hide behind purportedly "benign" uses of race to pursue their own, nefarious objectives, such as splitting cross-racial coalitions:

> An effort to achieve proportional representation… might be a 'contrivance to segregate' the group, thereby frustrating its potentially successful efforts at coalition building across racial lines.… [Complaints about racial redistricting by minority politicians] illustrate the risk that what is presented as an instance of benign race assignment in fact may prove to be otherwise. This concern, of course, does not undercut the theoretical legitimacy or usefulness of preferential policies. At the minimum, however, it does suggest the need for careful consideration of the operation of any racial device, even one cloaked in preferential garb. And if judicial detection of truly benign policies proves impossible or excessively crude, that alone might warrant invalidating any race-drawn line.

United Jewish Organizations, 430 U.S. at 173 (Brennan, J., concurring).

Even as the Court has divided over various applications of the VRA, the Court has adhered to the principle announced by Justice Brennan that the use of race as a factor in district design is an extremely fraught matter under the Equal Protection clause and can be justified only for the remedial purposes of the VRA. As Justice Souter wrote for a unanimous Court: "It bears recalling, however, that for all the virtues of majority-minority districts as remedial devices, they rely on a quintessentially race-conscious calculus aptly described as the 'politics of the second best.'" *Johnson*, 512 U.S. at 1020. If, as some

Justices on the Court have stated, "[i]t is a sordid business, this divvying us up by race" to form election districts, *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting), it is a practice the Court has found constitutional only when the VRA requires it.

When remedial VRA districts are required, the Court has made clear that the use of race in designing democratic institutions inevitably entails significant compromises, costs, and tensions with the central thrust of the Equal Protection clause. Districts drawn for racial purposes are therefore constitutionally permitted only where demonstrably necessary. As Justice O'Connor wrote in *Bush v. Vera*: "[While] we combat the symptoms of racial polarization in politics, we must strive to eliminate unnecessary race-based state action that appears to endorse the disease." 517 U.S. at 993. Even in remedial contexts, therefore, the Court has required that race only be used where necessary. *See, e.g., Shaw v. Hunt*, 517 U.S. 899, 909 (1996) ("A State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions.") (*citing Croson*); *see also* The Law of Democracy 749 (Issacharoff, Karlan, Pildes 3d ed.)

Even in the remedial context, the Court has been exceedingly careful to impose specific burdens of proof on the government to ensure that race is legitimately used in the narrowest way necessary for these remedial purposes. For that remedial interest to rise to the level of a compelling state interest, it must satisfy two conditions. First, the discrimination involved must be specific and identified, rather than

a generalized assertion of past discrimination. *Shaw v. Hunt*, 517 U.S. at 909. Second, the state must have had a "'strong basis in evidence' to conclude that remedial action was necessary, '*before* it embarks on an affirmative-action program.'" *Id*., at 910 (emphasis in original) (citations to quoted cases omitted).

The three-judge court's cavalier conclusion that race was (or might have been) a factor in redistricting, whether or not the VRA required it, and that the state has no burden to show that the VRA specifically required packing black voters into already performing minority "opportunity" districts cannot be summarily affirmed because it flies in the face of this Court's uniform course of decisions in this area.

This is true even if – especially if – the General Assembly used race as a proxy for party affiliation, as the state's own expert suggested during direct examination. *See* App. at 77a-78a. Race can never be used as a proxy for other characteristics without meeting the requirements of strict scrutiny. *See, e.g., Vera*, 517 U.S. at 968 ("to the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is appropriate"); *id*. at 985 ("Fourteenth Amendment jurisprudence evinces a commitment to eliminate unnecessary and excessive governmental use and reinforcement of racial stereotypes"). Yet when South Carolina used race as a factor in designing districts, beyond what the VRA requires, it either used race for its own sake (a constitutionally forbidden purpose) or as a proxy for other purposes like partisan political aims (also a constitutionally forbidden purpose), or, as plaintiffs allege, for the equally unconstitutional purposes of excessively concentrating black voters into a few

districts to minimize black electoral influence and segregating the political parties by race. Because the lower court failed to understand the legal principles involved, it failed to apply the proper level of scrutiny, or allocate the burdens of proof and production when properly assessing these claims.

Redistricting laws are not insulated from the kind of constitutional scrutiny this Court applies anytime race is a factor in the enactment of laws. *See, e.g., Shaw v. Hunt*, 517 U.S. at 905-07 (noting that "[w]e explained in *Miller v. Johnson*, 515 U.S. 900, 904 (1995) that a racially gerrymandered districting scheme, like all laws that classify citizens on the basis of race, is constitutionally suspect."). Because the lower court misunderstood this Court's racial redistricting cases, it misunderstood this fundamental principle. The racial redistricting cases permit race to be used as a factor in redistricting, but only for remedial purposes made necessary by the VRA's requirements. That principle is consistent with the larger fabric of this Court's Fourteenth Amendment jurisprudence. Even when state institutions can permissibly use race as a factor in decision-making to advance remedial goals, they nevertheless bear the burden of showing a genuinely remedial purpose. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720-21 (2007). As *Croson* noted, "[t]he history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Id.* at 501. But the three-judge court's refusal to require any proof from the state that its intentional use of racial classifications was

necessary to enforce the VRA constituted precisely such forbidden "blind judicial deference."

B. Given plaintiffs' showing that the General Assembly's districting scheme was partly motivated by racial considerations, the state bears the burden of showing that it would have adopted its redistricting scheme absent any racial purpose.

The lower court placed the burden on plaintiffs to show not only that the General Assembly's districting was partly motivated by racial considerations but that those racial considerations, rather than non-racial factors, were the cause of the General Assembly's decision. *See* App. at 19a ("Because *plaintiffs have failed to demonstrate* that race predominated over traditional race-neutral principles, the Court is satisfied that the General Assembly did not overly rely on race in a manner that runs afoul of the Fourteenth Amendment") (emphasis added).

Requiring plaintiffs prove that race was not merely a contributing motive, but the but-for cause of the legislature's decision, is inconsistent with this Court's precedents. There is no dispute that race played *some* role in the General Assembly's decisions to increase districts' BVAPs. Given this showing that a racial motive partly contributed to the districting scheme, the lower court should have required some showing *from the defendants* that race-neutral factors could explain the districting scheme, if the VRA did not require these excessive concentrations of black voters.

A plaintiff's "[p]roof that the [governmental] decision … was motivated *in part* by a racially discriminatory purpose" normally "shift[s] to the

[government] the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 n.21 (1977) (emphasis added). If the government does not carry this burden of showing, by a preponderance of the evidence, that its race-neutral reasons would have sufficed to motivate its decision absent the racial motive, then the court must treat the government's ostensibly facially neutral law as, in fact, a racial classification. The law must be justified by some purpose sufficiently weighty to justify racial classifications, such as remedying past discrimination. *See Mt. Healthy City School Bd. v. Doyle*, 429 U.S. 274, 285 (1977).

The court below ignored this well-established *Arlington Heights*/*Mt. Healthy* framework of shifting burdens for determining causation in mixed-motive cases. Instead, the lower court purported to rely on the line of "racial gerrymandering" decisions starting with *Shaw v. Reno*, 509 U.S. 630 (1993), and required that the plaintiffs not only prove that race was a contributing cause to a governmental decision, but also prove that race was the but-for cause of the decision to the exclusion of all other possible nonracial explanations. *See* App. at 5a-8a.

The lower court misunderstood this Court's "predominant factor" line of cases. None of these decisions cast any doubt on the principle that, if the plaintiff shows a decision is partly motivated by racial purposes, then the burden shifts to the government to rebut the inference that racial purpose was the but-for cause of its decision. Rather than modifying this bedrock of equal protection doctrine, the

"predominant factor" decisions hold that the plaintiffs cannot shift the burden of proof to the government merely by showing that the government was *aware* of the racial consequences of its districting decision.

As *Shaw* noted, the legislature's mere *consciousness* of a districting scheme's racial consequences cannot suffice to shift the burden to the government, because "the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." *Shaw*, 509 U.S. at 646. Given that the government is required by the VRA to avoid either Section 2 vote dilution or Section 5 "retrogression," it should hardly be surprising that mere "awareness" of the racial consequences of districting cannot trigger either strict scrutiny or other burden-shifting rules. Indeed, the government must be *aware* of racial consequences to avoid imposing discriminatory effects on a racial minority.

The principle that the government's *consciousness* of racial consequences does not shift any burden to the government, however, hardly implies that the burden of proof does not shift when a plaintiff proves the government was actually motivated in part by a racially discriminatory *purpose*. For a state legislature to keep tabs on the racial effects of districting decisions to insure that those decisions do not dilute votes or impose retrogressive effects on minorities is one thing. For a state legislature to excessively "pack" black votes into segregated districts in ways the VRA does not require raises an entirely different constitutional question. In the latter case, the *Arlington Heights*/*Mt. Healthy* framework shifts the

burden to the state to explain why a racially segregative purpose is not the effective cause of a districting scheme.

That the "predominant factor" test does not preclude the *Arlington Heights/Mt. Healthy* framework is demonstrated by *Miller v. Johnson*, 515 U.S. at 916. *Miller* specifically reiterated the distinction between the legal consequences of proving the government was merely *aware* of racial consequences and the legal consequences of proving *purposeful* racial discrimination by citing *Feeney*'s observation that "'discriminatory purpose' … implies more than intent as volition or intent as awareness of consequences." *Id.* (*citing Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979)). Observing that the "distinction between being aware of racial considerations and being motivated by them may be difficult to make," *Miller* emphasized the "plaintiffs' burden" to establish the legislature's discriminatory motive required either "circumstantial evidence" 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." *Id.*

This description of plaintiff's burden specifically recognizes that "direct evidence going to legislative purpose" is distinct from, and goes far beyond, mere proof of governmental "awareness" of race. The latter cannot shift the burden to the government, but, under the *Arlington Heights/Mt Healthy* framework, the former must and does. This Court has repeatedly re-affirmed that the *Arlington Heights/Mt. Healthy* framework of shifting burdens governs proof of discriminatory purpose where a defendant has multiple

motives, some legitimate and some unconstitutional, for undertaking some action. *See Hunter v. Underwood*, 471 U.S. 222, 231-32 (1985); *Duren v. Missouri*, 439 U.S. 357, 369 n.26 (1979); *see also Desert Palace v. Costa*, 539 U.S. 90, 94 (2003) (applying burden-shifting framework to Title VII claims). Lower courts have also repeatedly used this framework for mixed-motive cases alleging unconstitutional discrimination regarding voting rights. *See, e.g., Burton v. City of Belle Glade*, 178 F.3d 1175, 1189 (11th Cir. 1999).

The *Shaw* line of cases did not sweep away this longstanding equal protection framework for determining whether a governmental decision was caused by an unconstitutional purpose where the evidence suggests mixed motives. This framework demands that, when plaintiffs provide some substantial evidence that key governmental officials actively used racial classifications to pursue an agenda of racial segregation for ends other than compliance with the VRA, the government bears the burden of providing some explanation for how such a purpose was not the but-for cause of the state's segregative action. The three-judge court ignored the *Arlington Heights*/*Mt. Healthy* framework, apparently because the three-judge court wrongly concluded the *Shaw* cases had somehow overridden that framework in the redistricting context.

II. Plaintiffs have standing to offer proof that South Carolina intentionally segregated black voters systematically, on a statewide basis, including in election districts where plaintiffs did not themselves reside.

The court below acknowledged the plaintiffs presented evidence that "strongly suggested that race was a factor in drawing many districts lines," App.

at 18a, but then refused to consider any evidence not pertaining to the boundaries of the districts in which plaintiffs themselves resided. The court reasoned that plaintiffs had standing to assert racial gerrymandering claims only if they "'live in the district that is the primary focus of their . . . claim' or they provide specific evidence that they 'personally . . . have been subjected to a racial classification.'" App. at 7a (*citing United States v. Hays*, 515 U.S. 737, 739 (1995)). This holding on standing resulted in the exclusion of a great deal of critical evidence that South Carolina engaged in a statewide, systematic policy of using race for non-remedial, unconstitutional purposes and significantly limited proof at trial on the central question of discriminatory purpose.

The three-judge court's holding on standing, and accompanying curtailment of evidence critical to proving discriminatory purpose, violates this Court's precedents for two independent reasons. First, the three-judge court wrongly construed plaintiffs' case as a conventional *Shaw* challenge and, therefore, inappropriately applied the standing doctrine set forth in *United States v. Hays*, 515 U.S. 737 (1995). Instead, the court should have applied this Court's standing precedents applicable to more routine Equal Protection cases, in which plaintiffs allege that state law or policy unconstitutionally employs race as a factor for impermissible purposes. Second, even assuming *Hays* does provide the appropriate standing rule here, the court failed properly to understand the type and scope of evidence that courts must consider, under this Court's precedents, in cases alleging the constitutional injury at issue.

A. *Hays*' standing doctrine is inapplicable to this case.

First, the Court inappropriately applied *Hays*. *Hays* applies to allegations that the boundaries of a particular electoral district so radically depart from traditional districting criteria that the district can only be rationally explained as the product of racial discrimination. *See Hays*, 515 U.S. at 740. *Hays* held that plaintiffs lack standing if they "do not live in the district that is the primary focus of the gerrymandering claim," because only residents of such a bizarrely shaped district suffer from "representational harm" *Shaw v. Reno* recognized. *Id*. at 744.

Here, plaintiffs alleged the General Assembly engaged in a state-wide, systematic scheme to segregate black voters from white voters for partisan advantage by maximizing BVAP in majority-black districts and thereby reducing the cross-racial appeal of the Democratic Party. The injury giving rise to standing is the injury of being subjected to a state-wide system of racially segregated districts, not the "representational harm" identified in *Hays*. Because plaintiffs are subjected to racial segregation regardless of the district in which they reside, they have standing to challenge the segregative scheme as a whole.

The proper analogy to plaintiffs' claim is not the *Shaw* line of decisions but this Court's decisions addressing challenges to partisan gerrymandering. *See League of United Latin American Citizens*, 548 U.S. 399 (2006); *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Davis v. Bandemer*, 478 U.S. 109 (1986); *Cox v. Larios*, 542 U.S. 947 (2004) (per curiam summary affirmance). This Court has been divided over whether allegations that partisan gerrymanders violate the equal protection clause are capable of being

resolved by judicially manageable standards. But the Court has never questioned that those plaintiffs have Art. III standing to challenge a partisan gerrymander on a statewide basis or required one plaintiff from every district in the state to have standing to challenge the partisan purpose and effects of a statewide districting plan. Because the presence of Art. III standing goes to the jurisdictional power of the Court, this Court would be required to raise this issue on its own before reaching issues about whether partisan gerrymandering states a cause of action under the Fourteenth Amendment, as *Davis* held, and whether such claims are justiciable, as the Court addressed in *Vieth*. *See e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210, (1995) (The Court must consider standing before reaching the merits); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992) (standing is jurisdictional).

Here, the injury alleged is the creation of a *statewide system* of racially segregated districts for partisan purposes rather than the remedial purpose of complying with the VRA. Given the state-wide character of the injury, plaintiffs' residence in a specific district is immaterial to standing. Plaintiffs do not have to include 124 individuals from each House district in order to have standing to challenge a systematic, statewide policy of using race for non-remedial and unconstitutional purposes in formulating a statewide districting plan.

B. Plaintiffs have standing to introduce evidence from districts where they do not reside as circumstantial proof of the General Assembly's racially discriminatory purpose regarding plaintiffs' districts of residence.

Second, even if plaintiffs have standing only because they reside in a racially "packed" district, proof of the General Assembly's racially discriminatory purpose regarding *all* districts in South Carolina is relevant circumstantial evidence of the General Assembly's likely intent with respect to districts in which plaintiffs do reside. That point is well established in this Court's equal protection precedents. There is only one districting authority in South Carolina and if this authority acts with a racially discriminatory purpose in one part of a statewide redistricting plan, then the likelihood increases that the General Assembly had a similar purpose in the rest of the plan.

That is precisely the point this Court endorsed in *Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189 (1973). In *Keyes*, this Court rejected the lower court's ruling that evidence of racial discrimination regarding student assignments within the peripheral area of Denver could not be used to establish a racially discriminatory purpose in the "core" areas of the school district. In holding that a racist decision by the school authorities in one part of the school district could be used to infer racism in decisions affecting other parts, the *Keyes* Court invoked the "well-settled evidentiary principle that 'the prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent

intent.'" *Keyes*, 413 U.S. at 208. According to the *Keyes* Court:

> Plainly, a finding of intentional segregation as to a portion of a school system is not devoid of probative value in assessing the school authorities' intent with respect to other parts of the same school system. On the contrary where, as here, the case involves one school board, a finding of intentional segregation on its part in one portion of a school system is highly relevant to the issue of the board's intent with respect to the other segregated schools in the system.

Id. at 207-08 (citations omitted).

For precisely these same reasons, if the General Assembly engaged in purposeful racial discrimination with respect to any districts, then such discrimination tends to show a consistent pattern of conduct highly relevant to the legislature's purpose regarding other districts. Given that plaintiffs allege their districts, like others in South Carolina, were the result of a single, integrated, systematic discriminatory scheme of purposeful racial segregation, evidence of such discrimination with respect to *other* districts is relevant to the General Assembly's motivation regarding the districts in which plaintiffs reside.

For either of these two reasons, the three-judge court's standing ruling improperly truncated the development of a full trial record that would have permitted plaintiffs to offer evidence about the legislature's systematic use of race on a statewide basis. This Court could summarily reverse on this issue alone and remand for proper development of a full trial record under the appropriate constitutional standards.

* * *

In *Georgia v. Ashcroft*, this Court quoted Congressman John Lewis, the great civil-rights leader from Georgia, who argued that by the early 2000s the time had come to reduce the role of race in redistricting by avoiding the unnecessary concentration of black voters into election districts:

> I think that's what the [civil rights] struggle was all about, to create what I like to call a truly interracial democracy in the South. In the movement, we would call it creating the beloved community, an all inclusive community, where we would be able to forget about race and color and see people as people, as human beings, just as citizens.

539 U.S. 461, 490 (2003) (upholding plan with overwhelming black legislative support). As Rep. Lewis said at the time, the South had "come a great distance," even since 1990, in the willingness of whites to vote across racial lines. *See* Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. Rev. 1517, 1563 (2002) (*quoting* Melanie Eversley, Redistricting Map for Georgia Goes to Court in D.C., Atl. J. Const., Feb. 4, 2002, at 1C (*quoting* Rep. Lewis)).

Similarly, Congressman James Clyburn of South Carolina, the African-American Assistant Democratic Leader of the U.S. House, who has represented his district for almost 20 years, testified that:

> The purpose of the Voting Rights Act is to level the playing field for minority candidates and voters, not to resegregate our society along strictly racial lines. Black voters want results on

> issues that matter in their daily lives. Because black voters are a minority in our state, they must, at some point, work together with white voters to elect representatives that both white and black voters agree will represent their interests. . . . I believe South Carolina is demonstrating an ability to look beyond skin color in our politics. Until some of our political leaders catch up with the people, this Court must step in and fix this unconscionable racial gerrymander.

App. at 40a.

Even as white voters move back into urban areas, black voters move into the suburbs, and residents from other states or overseas move into a rapidly growing South Carolina, the state legislature divisively and cynically used race to pack black voters unnecessarily into districts, over and above any level the VRA might require, to undermine existing interracial political coalitions and to separate and resegregate voters by race in election districts. Despite the importance of the issues – and despite concluding that race had been a factor in the legislature's action – the three-judge court compressed the trial into two days, refused to permit depositions of legislators regarding the role of race (or other factors) in the redistricting process, excluded as hearsay or as privileged the testimony of plaintiffs' legislative witnesses regarding racially-explosive statements other legislators made about the process,[8] refused to con-

[8] The court below held that legislators had essentially an absolute federal common law privilege, prohibiting any compulsory testimony and discovery from legislators or their agents about the legislative process and motive. Order, ECF No. 103, Feb. 8, 2012. Such testimony is often critical to determining

sider evidence on a statewide basis of the legislature's racial purposes, and failed to shift to the state the burden of proving either a remedial justification or a race-neutral purpose for the redistricting scheme. This Court should not summarily affirm that decision.

---

whether a plan's design reflects racial, partisan, or other purposes.

This Court has recognized that state legislators enjoy only a *limited* common-law privilege that must yield to the Constitution and other federal limits on state power. *United States v. Gillock*, 445 U.S. 360, 369 (1980). The overwhelming majority of three-judge courts in redistricting cases have held that when "the Constitution or a statute makes the nature of governmental officials' deliberations *the* issue, the privilege is a nonsequitur." *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998), *reh'g in part*, 156 F.3d 1279 (D.C. Cir. 1998); *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 95-96 (S.D.N.Y. 2003), *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003) ("legislators may, at times, be called upon to produce documents or testify at depositions."); *Manzi v. DiCarlo*, 982 F. Supp. 125, 129 (E.D.N.Y. 1997) ("the discovery and trial needs of plaintiff in enforcing her rights under federal law clearly outweigh the State Defendants' need for confidentiality"); *Fla. Ass'n of Rehab. Facilities v. State of Florida*, 164 F.R.D. 257, 261-68 (N.D. Fl. 1995) (a qualified privilege could be overcome by "a showing of need" in cases that turn on "the legislative process itself"); *U.S. v. Irvin*, 127 F.R.D. 169, 171-74 (C.D. Ca. 1989) (same); *see also Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 268, 97 S.Ct. 555, 565 (1977) (recognizing legislators could be compelled to give testimony at trial about government action).

In this case, those legislators who voluntarily waived their privilege offered uncontradicted testimony about the General Assembly's racial motive. The court below refused to permit plaintiffs to compel testimony from legislators responsible for crafting the redistricting plan.

CONCLUSION

For the reasons above, this Court should note probable jurisdiction and either summarily reverse the decision and remand for an adequate trial under the appropriate constitutional standards or require full argument and briefing of the important questions presented.

Respectfully submitted,

RICHARD A. HARPOOTLIAN
Counsel of Record
GRAHAM L. NEWMAN
RICHARD A. HARPOOTLIAN, P.A.
1410 Laurel Street
Columbia, SC 29201
(803) 252-4848
rah@harpootlianlaw.com

May 18, 2012

APPENDIX

APPENDIX A

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

[Filed 03/9/12]

Case No.: 3:11-cv-03120-HFF-MBS-PMD

VANDROTH BACKUS, WILLIE HARRISON BROWN, CHARLESANN BUTTONE, BOOKER MANIGAULT, EDWARD MCKNIGHT, MOSES MIMS, JR, ROOSEVELT WALLACE, and WILLIAM G. WILDER, on behalf of themselves and all other similarly situated persons,
Plaintiffs,

v.

THE STATE OF SOUTH CAROLINA, NIKKI R. HALEY, in her capacity as Governor, GLENN F. MCCONNELL, in his capacity as President Pro Tempore of the Senate and Chairman of the Senate Judiciary Committee, ROBERT W. HARRELL, JR, in his capacity as Speaker of the House of Representatives, MARCI ANDINO, in her capacity as Executive Director of the Election Commission; JOHN H. HUDGENS, III, Chairman, NICOLE S. WHITE, MARILYN BOWERS, MARK BENSON, and THOMAS WARING, in their capacities as Commissioners of the Elections Commission,
Defendants.

ORDER

Before HENRY F. FLOYD, United States Circuit Judge, MARGARET B. SEYMOUR, Chief District Judge, and PATRICK MICHAEL DUFFY, Senior District Judge.

Judge Duffy wrote the opinion, in which Judge Floyd and Chief Judge Seymour concurred.

PATRICK MICHAEL DUFFY, Senior District Judge:

This matter was tried without a jury beginning on March 1, 2012. The Court—having heard the arguments, read the submissions of counsel, and considered the evidence, including courtroom testimony, deposition testimony, affidavit testimony, and exhibits—enters judgment for Defendants based on the following findings of fact and conclusions of law.

INTRODUCTION

I. Factual Context

Ten years ago, this Court was forced to take on the "unwelcomed obligation" of devising redistricting plans in the face of an impasse arising from the veto of plans passed by the legislature in 2001. *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 623 (D.S.C. 2002). In 2003, the General Assembly enacted legislation that modified the Court's plan for the House and Senate. These enacted plans and the Colleton County plan for Congress were used through the 2010 elections and serve as the Benchmark plan for this current litigation. Between the 2000 and 2010 censuses South Carolina experienced significant population growth—the state's total population grew from 4,012,012 to 4,625,364. As a result of this population growth, South Carolina's House and Senate districts became malapportioned and needed to be redrawn. Additionally, South Carolina gained a Congressional seat, necessitating the drawing of new

Congressional election districts. The South Carolina General Assembly enacted Act 72 of 2011 ("House plan") and Act 75 of 2011 ("Congressional plan") to replace South Carolina's prior districts.[1] After these plans were enacted by the legislature and signed into law by Governor Haley, the House and the Senate submitted the plans to the United States Department of Justice for administrative preclearance pursuant to section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The Department of Justice granted preclearance to the plans, at which point the plans became effective. The requirement of administrative preclearance from the Department of Justice is limited to certain jurisdictions, such as South Carolina, that have a history of racial discrimination and is limited to a review of whether the Attorney General interposes any objection under section 5. While preclearance is a necessary and important step for those jurisdictions covered under section 5, it is limited in scope to administrative approval that the particular redistricting plan is not retrogressive under section 5 of the Voting Rights Act.

II. Procedural History

On November 11, 2011, Plaintiffs Vandroth Backus, Willie Harrison Brown, Charlesann Buttone, Booker Manigault, Roosevelt Wallace, and William G. Wilder ("Plaintiffs") initiated this declaratory judgment action. Plaintiffs filed an amended complaint on November 23, 2011, seeking declaratory and injunctive relief under section 2 of the Voting Rights Act of

[1] Additionally, the Senate enacted Act 71 of 2011 ("Senate plan"). The Senate plan was originally part of this litigation. However, both the Plaintiffs and Plaintiff-Intervenor Senator Dick Elliot have voluntarily dismissed claims related to the Senate plan.

1965, 42 U.S.C. § 1973, 42 U.S.C. § 1983, Article I, section 2 of the United States Constitution, and the Fourteenth and Fifteenth Amendments to the United States Constitution. Edward McKnight and Moses Mims were added as Plaintiffs in the amended complaint.

Defendants filed various motions to dismiss and the Court held a hearing on those motions on January 19, 2012. At the hearing, the Court granted several of the motions, but denied the motions to dismiss for failure to state a claim. However, the Court ordered Plaintiffs to submit a clarification of claims, identify the districts at issue, and submit alternative redistricting plans. Plaintiffs filed those clarifications on January 26, 2012. With the consent of Defendants, Plaintiffs filed their second amended complaint on February 15, 2012.

After discovery and various pre-trial motions, the Court held a trial in Columbia on March 1-2, 2012. Pursuant to the Court's order and agreement of the parties, the trial was abbreviated by the use of affidavits and deposition testimony.

III. Plaintiffs' Allegations

First, Plaintiffs allege, as to both the House and Congressional plans, a Fourteenth Amendment racial gerrymandering claim, as provided in *Miller v. Johnson*, 515 U.S. 900 (1995). Second, Plaintiffs assert a violation of section 2 of the Voting Rights Act as to both the House and Congressional plans. Third, although it is not abundantly clear, Plaintiffs seem to assert a vote-dilution claim under the Fourteenth Amendment. Finally, Plaintiffs assert that the plans violate the Fifteenth Amendment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(4), and 2201(a), and the suit is authorized under 42 U.S.C. § 1983. The three judge panel has been properly appointed by the Chief Judge of the Fourth Circuit Court of Appeals pursuant to 28 U.S.C. § 2284.

II. Overview of Fourteenth Amendment racial gerrymandering claim

Plaintiffs assert that the House plan and the Congressional plan violate the Equal Protection Clause of the Fourteenth Amendment. There are two types of equal protection claims that challenge the use of race in reapportionment: racial gerrymandering claims and vote-dilution claims. These claims are "analytically distinct." *Miller*, 515 U.S. at 911 (internal quotation marks omitted). The Court turns first to Plaintiffs' racial gerrymandering claim under the Fourteenth Amendment.

The essence of a racial gerrymandering claim is that states may not use race as the predominant factor in separating voters into districts. *Id*. at 916. Laws that classify citizens based on race are constitutionally suspect and therefore subject to strict scrutiny, and racially gerrymandered districting schemes are no different, even when adopted for benign purposes. *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 904-05 (1996). This does not mean that race cannot play a role in redistricting. *Miller*, 515 U.S. at 916. Legislatures are almost always cognizant of race when drawing district lines, and simply being aware of race poses no constitutional violation. *See Shaw II*, 517

U.S. at 905. Race may be a factor in redistricting decisions, but not the predominant factor. *See Easley v. Cromartie*, 532 U.S. 234, 241 (2001). In other words, only when race is the "dominant and controlling" consideration in drawing district lines does strict scrutiny apply. *See Shaw II*, 517 U.S. at 905.

Plaintiffs may prove that race was the predominant consideration in a variety of ways. At times, reapportionment plans may contain district lines that are so bizarre or highly irregular on their face—both by their geographic appearance and their demographic makeup—that they cannot be rationally understood as anything but an effort to separate voters based on race. *Shaw v. Reno* (*Shaw I*), 509 U.S. 630, 646-47 (1993). But bizarreness with regard to shape, although relevant, is not required to establish a racial gerrymandering claim. *Miller*, 515 U.S. at 915. Circumstantial evidence of a district's shape and demographics is only one way of proving a racial gerrymander. *Id*. at 916. Plaintiffs may also establish a racial gerrymandering claim through the use of "more direct evidence going to legislative purpose that [indicates] race was the predominant factor." *Id*. To prove that race was the predominant factor, Plaintiffs must always prove that the legislature subordinated traditional race-neutral principles—such as compactness, contiguity, and respect for political subdivisions or communities—to race as the primary consideration for drawing district lines. *Id*.; *see also Easley*, 532 U.S. at 241 (recognizing that plaintiffs who challenge a legislature's use of race as a criterion in redistricting must show, at a minimum, that it subordinated traditional race-neutral districting principles to racial considerations). Defendants may disprove that race was the predominant factor by demonstrating that legislative decisions adhered to

traditional race-neutral principles. *Miller*, 515 U.S. at 916.

If a plaintiff establishes that the legislature used race as the predominant factor in redistricting, the redistricting scheme will be subject to strict scrutiny. *See id*. at 920. Strict scrutiny requires the State to prove that its redistricting scheme is narrowly tailored to achieve a compelling governmental interest. *Id*. Remedying past discrimination may serve as such a compelling state interest, but the State must provide strong evidence of the harm being remedied. *See id*. at 922. Compliance with federal antidiscrimination laws alone will not always serve as a compelling governmental interest. *Id*. at 921. The prior three judge panel in *Colleton County* determined that "compliance with the Voting Rights Act is a compelling state interest." *Colleton Cnty*., 201 F. Supp. 2d at 639. It held that "[i]f there is a strong basis in evidence for concluding that creation of a majority-minority district is reasonably necessary to comply with the Act, and the race-based districting substantially addresses the violation, the plan will not fail under Equal Protection analysis." *Id*. (internal quotation and citations omitted).

Plaintiffs have standing to assert racial gerrymandering claims only if they "live in the district that is the primary focus of their . . . claim" or they provide specific evidence that they "personally . . . have been subjected to a racial classification." *United States v. Hays*, 515 U.S. 737, 739 (1995). Absent specific evidence showing that they were injured, such plaintiffs do not have standing to bring a racial gerrymandering claim. *Id*. It is not enough for plaintiffs to allege that they reside in a district adjacent to a racially gerrymandered district and that the racial

composition of their district would have been different absent the racial gerrymander. *Id*. at 746; *see also Sinkfield v. Kelley*, 531 U.S. 28, 30 (2000) (per curiam) (recognizing in *Hays* that the plaintiffs' "failure to show the requisite injury . . . was not changed by the fact that the racial composition of their own district might have been different had the legislature drawn the adjacent majority-minority district another way"). Plaintiffs cannot assert a generalized grievance and must show that they have been personally denied equal protection. *See Hays*, 515 U.S. at 743-44.

Plaintiffs have failed to introduce specific evidence that they have been personally subjected to a racial classification. Therefore, in assessing Plaintiffs' evidence as it relates to their Fourteenth Amendment racial gerrymandering claim, the Court will consider only those districts in which a Plaintiff resides.

III. Plaintiffs have failed to establish that race was the predominant factor in either the House or Congressional redistricting plans.

Plaintiffs failed to establish that race was the predominant factor used in drawing the district lines in either the House plan or the Congressional plan because their evidence did not support any of the following: (a) the reapportionment plans contained district lines that were so bizarre or highly irregular on their face that they cannot be rationally understood as anything but an effort to separate voters based on race; (b) the legislature subordinated traditional race-neutral redistricting principles to race; or (c) any legislative purpose indicating that race was the predominant factor. In contrast, Defendants were able to disprove that race was the predominant factor

by demonstrating that their decisions adhered to traditional race-neutral principles.

i. Race-neutral traditional redistricting principles

The Court in *Colleton County* identified race-neutral principles traditionally adhered to in South Carolina redistricting. *Colleton Cnty*., 201 F. Supp. 2d at 646-49. They include (1) recognizing communities of interest; (2) preserving the cores of existing districts; (3) respecting political boundaries, such as county and municipal boundaries, as well as geographical boundaries; and (4) keeping incumbents' residences in districts with their core constituents. *Id*. at 647. In this regard, the South Carolina House Elections Laws Subcommittee adopted Guidelines and Criteria For Congressional and Legislative Redistricting. Those guidelines and criteria require compliance with United States Supreme Court decisions on Constitutional law and the Voting Rights Act of 1965. *See* Def. Harrell Ex. 1, 2011 Guidelines and Criteria For Congressional and Legislative Redistricting, ¶¶ I-II. Specifically, the criteria explain that to comply with United States Supreme Court decisions, race can be a factor, but cannot be the predominant factor or be considered in a way that would subordinate the other criteria. *Id*. The criteria also provide the standard for population deviations in any plan: "the number of persons in Congressional districts shall be nearly equal as is practicable" and as to the House of Representatives, "efforts should be made to limit the overall range of deviation to less than five percent, or a relative deviation in excess of plus or minus two and one-half percent for each South Carolina House district." *Id*. at ¶ IV, b-c. Additionally, contiguity, compactness, protection of

communities of interests, and incumbency protection were all provided for in the criteria:

> V. Contiguity
>
> Congressional and legislative districts shall be comprised of contiguous territory.
>
> VI. Compactness
>
> Congressional and legislative districts shall be compact in form and shall follow census geography. Bizarre shapes are to be avoided except when required by one or more of the following factors: (a) census geography; (b) efforts to achieve equal population, as is practicable, or (c) efforts to comply with the Voting Rights Act of 1965, as amended. . . .Compactness will be judged in part by the configuration of prior plans . . . .Compactness will not be judged based upon any mathematical, statistical, or formula-based calculation or determination.
>
> VII. Communities of Interest
>
> . . . the Elections Laws Subcommittee, the House Judiciary Committee, and the South Carolina House of Representatives will attempt to accommodate diverse communities of interest to the extent possible.
>
> VIII. Incumbency Protection
>
> Incumbency shall be considered in the reapportionment process. Reasonable efforts shall be made to ensure that incumbent legislators remain in their current districts. Reasonable efforts shall be made to ensure that incumbent legislators are not placed into districts where they will be compelled to run against the incum-

> bent members of the South Carolina House of Representatives.

Id. at ¶¶ V-VII. In addition to promulgating theses criteria, the Subcommittee also established a priority among them should there be a conflict:

> IX. Priority of Criteria
>
> a. In establishing congressional and legislative districts, all criteria identified in these guidelines shall be considered. However, if there is a conflict among the requirements of these guidelines, the Voting Rights Act of 1965 (as amended), equality of population among districts, and the Unites States Constitution shall be given priority.

Id. at ¶ IX, a.

At trial, Plaintiffs introduced Dr. Michael P. McDonald, Associate Professor of Government and Politics at George Mason University, as their expert in this matter. Dr. McDonald opined that the General Assembly used race as the predominant factor in drawing twenty House districts and the Sixth Congressional District. In reaching this conclusion, his analysis followed essentially a two-step approach. First, broadly speaking, he identified districts that exchanged populations in a manner that resulted in a district experiencing a net increase in black voting age population (BVAP) or maintaining its BVAP. He reasoned that race must have been a factor in these changes. Second, after determining that race was a factor in these changes, he examined whether traditional race-neutral redistricting principles were subordinated. If they were, he concluded that race was the predominant factor.

Even granting Dr. McDonald the inference that race must have been a factor in changes involving exchanges of areas of low BVAP for areas of high BVAP, he did not convincingly demonstrate that the General Assembly subordinated traditional race-neutral reasons to race. The Court is of the opinion that Dr. McDonald relied on incomplete information when reaching his determination that traditional race-neutral principles were subordinated. He neglected to consider important sources of information in reaching his conclusion. More problematic, however, is that he failed to consider all the traditional race-neutral principles that guide redistricting in South Carolina. As a result, his opinion that race predominated is incomplete and unconvincing.

Throughout his cross-examination, Dr. McDonald admitted various sources of information that he failed to consider. For example, he conveyed the impression that he did not thoroughly review the House record surrounding the redistricting process. *See* McDonald Trial Tr. 174. Nor did he examine precinct lines to see whether changes were made to avoid splitting precincts. *Id*. at 178-79.

Particularly troubling is his admission that he failed to consider the guidelines and criteria that the General Assembly devised for the redistricting process, which, as we explained, contained guiding race-neutral principles. *Id*. at 175, l. 11. Dr. McDonald also neglected to review the prior three judge panel's decision in *Colleton County*, even though it contained a discussion of the traditional race-neutral principles that guide South Carolina redistricting. *Id*. at 175, l. 8. These latter two sources of information are important for understanding what the General Assembly professed to be following and what courts

have recognized as legitimate traditional race-neutral principles for redistricting in South Carolina. Yet Dr. McDonald considered neither.

Dr. McDonald's failure to consult this information resulted in his rendering an opinion without considering all the race-neutral principles that have traditionally guided redistricting in South Carolina. For example, Dr. McDonald admitted that he did not consider whether the General Assembly sought to keep communities of interest—as defined by economic, social, cultural, and historical ties, political beliefs, or voting behavior—intact. *Id*. at 176-77. Recognizing communities of interest is a traditional race-neutral redistricting principle in South Carolina. *Colleton Cnty*., 201 F. Supp. 2d at 647. Dr. McDonald also conceded that he did not consider incumbency protection, partly because he does not believe it is a race-neutral redistricting principle. McDonald Trial Tr. 179, ll. 17-18. Yet courts have recognized incumbency protection as a traditional race-neutral redistricting principle in South Carolina. *Colleton Cnty*., 201 F. Supp. 2d at 647. Because Dr. McDonald did not consider all of the traditional race-neutral principles that guide redistricting in South Carolina, the Court is unconvinced by his opinion that the General Assembly subordinated them to race.

On cross-examination, he admitted that all he considered in his analysis were geographic and demographic data and election results. McDonald Trial Tr. 173, ll. 12-18. This information is, of course, highly relevant. But it cannot form the sole basis for determining that traditional race-neutral principles were subordinated to the use of race in drawing district lines, unless it is so highly irregular or bizarre on its face as to be unexplainable on any

ground other than race, *see Shaw I*, 509 U.S. at 646-47. As the Court will later explain, that is not the case here. By so narrowly limiting the sources of information that he examined and failing to consider all of the traditional race-neutral principles that guide redistricting in South Carolina, Dr. McDonald was unable to provide the Court a reliable opinion that the General Assembly subordinated traditional race-neutral principles to race.

ii. Irregular shape

Plaintiffs also object to the "irregular and bizarre" shapes of districts in the adopted plan. Plaintiffs, primarily through Dr. McDonald's testimony, have criticized the shapes of the districts they challenge and have alleged that the shapes can be explained only as the result of the legislature's attempts to pack the BVAP into particular districts. "[T]he Supreme Court has made clear that '[t]he Constitution does not mandate regularity of district shape'; rather, for strict scrutiny to apply, 'traditional districting criteria must be subordinated to race.'" *Fletcher v. Lamone*, No. RWT-11cv3220, 2011 WL 6740169, at *13 (D. Md. Dec. 23, 2011) (emphasis omitted) (quoting *Bush v. Vera*, 517 U.S. 952, 962 (1996) (plurality opinion)) (internal quotation marks omitted).

Defendants, however, illustrated race-neutral reasons for the irregular looking shapes in the challenged districts. For example, respecting existing political boundaries where possible, such as county lines and old district boundaries, was one common race-neutral reason for the irregular looking shape of the districts. House District 59 is illustrative. In that district, Dr. McDonald took issue with the addition and subtraction of population from the district and the resulting shape. He opined that such a shape

could be explained only by the use of race as a predominant factor. On cross-examination, Defendants' counsel questioned Dr. McDonald about the map of House District 59, and Dr. McDonald admitted that the adopted district's shape reflects attempts by the House to respect former district boundaries, precinct boundaries, and county boundaries when possible. *See* Dr. McDonald Trial Tr. 216, ln. 17 & 219, ln. 4. The evidence submitted by Defendants shows that this same effort was made with regard to the other challenged districts and is a race-neutral explanation for why the particular shapes were necessary. Another common race-neutral explanation was that the census blocs were kept whole and those blocs have irregular shapes.

Moreover, the Court has reviewed the redrawn districts and compared them to the preexisting districts under the Benchmark plan. The redrawn districts are not so bizarre or highly irregular on their face that race can be the only rational explanation for them. Accordingly, more convincing evidence beyond their geographic appearance and demographic makeup is necessary to persuade the Court that race predominated in drawing them.

iii. Legislative purpose

Plaintiffs have also failed to prove any legislative purpose that indicates race was the predominant factor. In support of their claim that the legislature intentionally discriminated against African-Americans, Plaintiffs offer affidavit testimony of United States Congressman James E. Clyburn, South Carolina House of Representatives member Mia Butler Garrick, and South Carolina Senator C. Bradley Hutto. Each affidavit discusses the particular elected official's experiences during the redis-

tricting process. All three of them share the position that an African-American candidate of choice can be elected in particular districts without the district being a majority-minority district, and that BVAP is too high in many districts under the approved plans. However, despite these assertions and beliefs, they do not offer any convincing proof that race predominated in the General Assembly's drawing of the relevant House and Congressional districts.

In addition to these affidavits, Representative Bakari Sellars of the South Carolina House of Representatives testified at trial that the General Assembly intentionally packed African-Americans into voting districts and made redistricting decisions based solely on race rather than traditional race-neutral redistricting principles. Representative Sellars serves on the Election Law Subcommittee, which worked extensively in developing the House and Congressional plans. According to Representative Sellars, race was not only the predominant factor in developing these plans, but was often the only factor. Sellars Trial Tr. 13, ll. 12-13. He testified that the Subcommittee relied on predetermined demographic percentages and described how it would table amendments that lowered BVAP in a district. *See id*. at 32. During his testimony, Plaintiffs played a number of recordings depicting the tabling of such amendments after discussion concerning their effect on the district's BVAP. Representative Sellars particularly singled out the chairman of the Subcommittee as concerned solely with an amendment's effect on BVAP, even accusing him of using race to create a partisan gerrymander. *See, e.g*., *id*. at 13, 24, 26, 74, 89.

The Court first recognizes that Representative Sellars testified as to only two specific districts in which Plaintiffs lived—House District 102 and the Sixth Congressional District. Although he provided testimony and Plaintiffs played recordings relating to other specific districts, no Plaintiff lived in them. As a result, for the reasons previously explained, Plaintiffs lack standing to challenge those districts.

In any event, the Court finds that Representative Sellars's testimony is insufficient to show that race predominated in creating the House and Congressional plans. Representative Sellars did not demonstrate that his colleagues subordinated traditional race-neutral principles to race when drawing the districts in which Plaintiffs live. At times, he made generalized statements that they did so, but he never provided any in-depth explanation as to where or how. Although Representative Sellars testified that House District 102 had a bizarre horseshoe shape, he admitted that its shape was consistent with how it looked under the Benchmark plan. *Id*. at 61, l. 9. At other times, Representative Sellars applauded the General Assembly for abiding by a number of specific race-neutral criteria, such as incumbency protection, *id*. at 69-70, and, as relating to the Sixth Congressional District, public testimony, *id*. at 69. In the absence of any meaningful explanation or analysis as to how traditional race-neutral principles were subordinated to race, the Court declines to credit his opinion that race predominated.

Moreover, although Representative Sellars ascribed race as the motivating factor for a few specific legislators, particularly those serving on the Subcommittee with him, we are reticent to impute such motivations on the General Assembly, or even

the Subcommittee, as a whole. One representative may table an amendment for reasons relating to BVAP, while other representatives may table the same amendment for reasons unrelated to BVAP. Statements by individual legislators are certainly probative, but they do not necessarily reflect the motivations of the body as a whole or even a majority of it.

In sum, although Representative Sellars's testimony strongly suggested that race was a factor in drawing many districts lines, it failed to demonstrate that race predominated over traditional race-neutral principles in the districts in which Plaintiffs reside.

Therefore, after reviewing all of the testimony and evidence offered by Plaintiffs, the Court finds that Plaintiffs have failed to present any evidence tending to prove a legislative purpose indicating race was the predominant factor or any other racial discrimination by the legislature.

iv. Conclusion

In the end, Plaintiffs have failed to prove that race was the predominant factor in creating the House and Congressional plans. They focused too much on changes that increased the BVAP in certain districts and not enough on how traditional race-neutral principles were subordinated to race in making those changes. This approach risks ignoring that race might have been an unintended consequence of a change rather than a motivating factor. Moreover, it ignores that race can be—and often must be—a factor in redistricting. For South Carolina, a covered jurisdiction under the Voting Rights Act, federal law requires that race be a consideration. The General Assembly had to consider race to create districts that

complied with federal law, which it did. The Court's task is to ensure that, in drawing the districts, the General Assembly did not rely on race at the expense of traditional race-neutral principles. Because Plaintiffs have failed to demonstrate that race predominated over traditional race-neutral principles, the Court is satisfied that the General Assembly did not overly rely on race in a manner that runs afoul of the Fourteenth Amendment. Accordingly, the Court holds that Plaintiffs have failed to prove a Fourteenth Amendment racial gerrymandering claim.

IV. Overview of Section 2 of the Voting Rights Act

Congress enacted § 2 of the Voting Rights Act of 1965 to effectuate the guarantees of the Fifteenth Amendment. *Voinovich*, 507 U.S. at 152. Section 2 provides that states may not impose or apply electoral voting practices or procedures that "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). It further provides a totality-of-the-circumstances test for establishing such a violation:

> A violation . . . is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State . . . are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Id. § 1973(b). As the text of this provision indicates, the focus of § 2 is on the effect that the apportion-

ment scheme has on the opportunity for members of a political minority to elect representatives of their choice. *See Voinovich*, 507 U.S. at 155. Congress, in revising this provision in 1982, expressly repudiated an intent requirement that had previously applied. *Thornburg v. Gingles*, 478 U.S. 30, 43-44 & n.8 (1986).

The Supreme Court has set forth three "necessary preconditions"—commonly known as the "*Gingles* factors" or "*Gingles* preconditions"—that a plaintiff must satisfy to prove that an apportionment scheme impairs minority voters' ability to elect representatives of their choice. *Id*. at 50-51. They are as follows: "(1) The minority group must be 'sufficiently large and geographically compact to constitute a majority in a single-member district,' (2) the minority group must be 'politically cohesive,' and (3) the majority must vote 'sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.'" *Bartlett v. Strickland*, 556 U.S. 1, 11 (2009) (plurality opinion) (quoting *Gingles*, 478 U.S. at 50-51). These factors apply whether the § 2 challenge is to a multi-member district or a single-member district. *Growe v. Emison*, 507 U.S. 25, 40-41 (1993). "Unless these points are established, there neither has been a wrong nor can be a remedy." *Id*. The Supreme Court, in no uncertain terms, has held that "[i]n a § 2 case, only when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances." *Bartlett*, 556 U.S. at 11-12.

In *Bartlett v. Strickland*, the Supreme Court addressed whether the failure of an apportionment scheme to create crossover districts may form the basis of a § 2 violation. *Id*. at 6. A plurality[2] answered in the negative-failing to draw districts to create or preserve crossover districts does not give rise to a cognizable § 2 claim. *Id*. at 25-26. In so holding, the plurality emphasized that plaintiffs must satisfy the *Gingles* preconditions to state a § 2 claim. *Id*. at 11-12. It then held that the first *Gingles* precondition—which mandates that "[t]he minority group . . . be 'sufficiently large and geographically compact to constitute a majority in a single-member district,'" *id*. at 11 (quoting *Gingles*, 478 U.S. at 50)—requires that "the minority population in the potential election district is greater than 50 percent," *id*. at 18-20. In other words, plaintiffs alleging a § 2 violation must prove that the alleged vote-dilution practice prevented the creation of an election district that would have contained a majority of minority voters. *See id*. If they are unable to make that showing, they cannot satisfy the first *Gingles* precondition and

---

[2] Justice Kennedy authored the plurality opinion, which Chief Justice Roberts and Justice Alito joined. Justice Thomas, joined by Justice Scalia, wrote a separate opinion concurring in the judgment. They asserted that § 2 does not authorize vote-dilution claims at all. *Bartlett*, 556 U.S. at 26 (Thomas, J., concurring in the judgment). Because the plurality opinion reaches the judgment on the narrowest grounds, this Court treats it as controlling. *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion))).

therefore cannot state a § 2 claim. *See id*.[3] The Fourth Circuit had previously reached the same conclusion. *See Hall v. Virginia*, 385 F.3d 421, 430-31 (4th Cir. 2004).

The plurality opinion in *Bartlett*, however, left open the issue of whether proof that a legislature engaged in intentional discrimination when it drew lines to prevent the creation or preservation of crossover districts could form the basis of a cognizable § 2 claim. Although the plurality held that a § 2 violation could not arise from the simple failure to create or preserve a crossover district, it noted that the "case [did not] involve allegations of intentional and wrongful conduct." 556 U.S. at 20. It expressly reserved the issue of whether allegations of intentional discrimination would affect the analysis. *Id*. ("We therefore need not consider whether intentional discrimination affects the *Gingles* analysis."). And it instructed that its "holding does not apply to cases in which there is intentional discrimination against a racial minority." *Id*.

Plaintiffs in this case have alleged that the General Assembly engaged in intentional discrimination in drawing the House and Congressional district lines

---

[3] The plurality also recognized that "[i]n areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition—bloc voting by majority voters." 556 U.S. at 24. "It is difficult to see how the majority-bloc-voting requirement could be met in a district where, by definition, white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate." *Id*. at 16. The plurality expressed concern that if it "dispense[d] with the majority-minority requirement, the ruling would call in question the *Gingles* framework the Court has applied under § 2." *Id*.

in a manner that prevents the creation or preservation of crossover districts.

V. Plaintiffs' Section 2 claim fails as to both the House and Congressional plans

The Court need not decide what effect proof of intentional discrimination has on § 2 claims asserting that a redistricting body failed to preserve or create crossover districts. Plaintiffs have failed to prove intentional discrimination. Just as they have failed to demonstrate that race as opposed to race-neutral reasons drove the General Assembly's redistricting decisions, they similarly have not demonstrated that the General Assembly intended to pack African-American voters into districts to prevent the creation or preservation of crossover districts. In the absence of any proof that the General Assembly intentionally discriminated in creating the House and Congressional plans, Plaintiffs' § 2 claim is foreclosed by *Bartlett* and *Hall*. Under both cases, to satisfy the first *Gingles* precondition, Plaintiffs had to demonstrate that minority voters would form a majority in a potential election district but for the challenged districting practice. Plaintiffs have not shown that, absent the districting scheme imposed by the House and Congressional plans, African-Americans could form a majority of voters in another potential district. As a result, they have failed to prove a § 2 violation.

VI. Plaintiffs' Fourteenth Amendment vote dilution claim fails

The essence of a vote dilution claim under the Fourteenth Amendment is "that the State has enacted a particular voting scheme as a purposeful device 'to minimize or cancel out the voting potential of racial or ethnic minorities.'" *Miller*, 515 U.S. at 911

(quoting *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (plurality opinion)). Viable vote dilution claims require proof that the districting scheme has a discriminatory effect and the legislature acted with a discriminatory purpose. *Washington v. Finlay*, 664 F.2d 913, 919 (4th Cir. 1981).

To prove discriminatory effect, a plaintiff must show that the redistricting scheme impermissibly dilutes the voting rights of the racial minority. *Id*. Broadly speaking, this requires proof that the racial minority's voting potential "has been minimize[d] or cancel[led] out or the political strength of such a group adversely affect[ed]." *Id*. (alterations in original) (citations omitted) (quoting *Mobile*, 446 U.S. at 66, 84) (internal quotation marks omitted). Plaintiffs alleging vote dilution must offer "a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice." *Reno v. Bossier Parish Sch. Bd*. (*Reno I*), 520 U.S. 471, 480 (1997). That is because "the very concept of vote dilution implies-and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured." *Id*. Justice Souter has explained that "[w]hile the [benchmark] is in theory the electoral effectiveness of majority voters, dilution is not merely a lack of proportional representation and . . . the maximum number of possible majority-minority districts cannot be the standard." *Reno v. Bossier Parish Sch. Bd*. (*Reno II*), 528 U.S. 320, 367 (2000) (Souter, J., concurring in part and dissenting in part) (citation omitted). Instead, an inquiry "into dilutive effect must rest on some idea of a reasonable allocation of power between minority and majority voters; this requires a court to compare a challenged voting practice with a reasonable alternative practice." *Id*. at 367-68.

To prove discriminatory purpose, the plaintiff does not need to advance direct evidence of discriminatory intent. *Rogers v. Lodge*, 458 U.S. 613, 618 (1982). Instead, "discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Id*. (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)) (internal quotation marks omitted). Relevant factors to consider and weigh include the following: (1) whether bloc voting along racial lines exists; (2) whether minorities are excluded from the political process; (3) whether minority voter registration is low; (4) whether elected officials are unresponsive to the needs of minorities; (5) whether the minority group occupies a depressed socioeconomic status because of inferior education or employment and housing discrimination; (6) the historical backdrop leading to the passage of the redistricting legislation; (7) "the specific sequence of events leading up to the challenged decision"; (8) whether the redistricting body departed from the normal procedural sequence for passing redistricting legislation; (9) whether the voting strength of a cohesive minority group has decreased or "retrogressed"; and (10) whether district boundaries have been manipulated to adjust the relative size of minority groups, including instances of "packing." *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11-5065, 2011 WL 4837508, at *3 (N.D. Ill. Oct. 12, 2011).

Plaintiffs have failed to prove that the General Assembly acted with a discriminatory purpose. There is no convincing direct evidence indicating that the General Assembly drew the district lines for the purpose of diluting Plaintiffs' voting strength. Nor do the totality of the facts yield an inference that the

General Assembly acted with such a discriminatory purpose.

More importantly, Plaintiffs have failed to prove a discriminatory effect. They offered no evidence demonstrating how the House and Congressional plans dilute their votes. Although they offered alternative plans, they did not provide any analysis or explanation demonstrating how their plans show that the House and Congressional plans dilute minority votes, particularly their votes. There was no expert testimony describing how the House and Congressional plans minimized or cancelled out minority voting potential. Dr. McDonald asserted that certain districts in the plans contain a higher BVAP than necessary to elect a representative of choice, but that does not demonstrate dilution. He did not provide any testimony about the relative voting strength of the allegedly packed African-American voters if they had been placed in another district. Simply put, Plaintiffs have offered only allegations of packing based on increases in certain districts' BVAP and have not shown that the increase in BVAP in those districts diluted the voting strength of African-American voters.

VII. Plaintiffs' Fifteenth Amendment claims

Plaintiffs assert a vote dilution claim and a racial gerrymandering claim under the Fifteenth Amendment. It is unclear whether vote dilution claims are cognizable under the Fifteenth Amendment. In recent decisions, the Supreme Court has emphasized that it has never recognized such a claim. *See, e.g.*, *Reno II*, 528 U.S. at 334 n.3 (majority opinion) ("[W]e have never held that vote dilution violates the Fifteenth Amendment."); *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993) ("This Court has not decided

whether the Fifteenth Amendment applies to vote-dilution claims; in fact, we never have held any legislative apportionment inconsistent with the Fifteenth Amendment."). In light of these decisions, circuits are split on whether vote-dilution claims are cognizable under the Fifteenth Amendment. *Compare Prejean v. Foster*, 227 F.3d 504, 519 (5th Cir. 2000) ("Indeed, the Supreme Court has rejected application of the Fifteenth Amendment to vote dilution causes of action."), with *Page v. Bar*tels, 248 F.3d 175, 193 n.12 (3d Cir. 2001) ("We simply cannot conclude that the Court's silence and reservation of these issues clearly foreclose[] Plaintiffs' Fifteenth Amendment claim . . . .").

Even if vote-dilution claims exist under the Fifteenth Amendment, the Fourth Circuit has recognized that they are essentially congruent with vote-dilution claims under the Fourteenth Amendment. *Washington*, 664 F.2d at 919. Both require proof of discriminatory purpose and discriminatory, or dilutive, effect. *Id*. For the same reasons that Plaintiffs have failed to prove a Fourteenth Amendment vote-dilution claim, they have failed to prove a Fifteenth Amendment vote-dilution claim.

Plaintiffs' Fifteenth Amendment racial gerrymandering claim relies on *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). In *Gomillion*, the state legislature redrew the city lines defining Tuskegee, Alabama. *Id*. at 341. Prior to the revision, the city lines formed a square shape. *Id*. After the redrawing, the city lines constituted a "strangely irregular twenty-eight-sided figure." *Id*. The effect of the redrawing was to remove all of the city's 400 African-American voters, except four or five, from the city. *Id*. This effectively denied the removed citizens the right to vote in municipal

elections. *Id*. Not a single white voter was removed. *Id*. Some of the removed African-American voters challenged the legislation redrawing the lines. *Id*. The Court, emphasizing that the redrawing of the lines disenfranchised the African-American voters with respect to municipal elections on the basis of race, held that the plaintiffs had stated a cognizable claim under the Fifteenth Amendment. *See id*. at 346-48.

"Laws violate the Fifteenth Amendment if their purpose and effect are to discriminate against people on the basis of race/ethnicity with respect to their *ability* to vote." Gary D. Allison, *Democracy Delayed: The High Court Distorts Voting Rights Principles to Thwart Partially the Texas Republican Gerrymander*, 42 TULSA L. REV. 605, 622 (2007) (emphasis added). One commentator has warned that courts must differentiate between Fourteenth and Fifteenth Amendment racial gerrymandering claims. Henry L. Chambers, Jr., *Colorblindness*, *Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1431 n.139 (2002). Racial gerrymandering runs afoul of the Fifteenth Amendment when it denies racial minorities the ability to vote at all in an election based on their race, as occurred in *Gomillion*. *Id*. Fourteenth Amendment racial gerrymandering claims do not necessarily result in the denial of the right to vote. *See id*. Instead, the harm under the Fourteenth Amendment involves the State using racial classifications generally. Under Fourteenth Amendment claims, "[t]he voter is allowed to vote, albeit in a different district than she prefers." *Id*. Because Plaintiffs have offered no evidence, nor have they argued, that any Plaintiff was denied the ability to vote, the Court finds that the House and Congressional plans do not violate the Fifteenth Amendment.

CONCLUSION

Therefore, judgment is entered in favor of the Defendants as to all of Plaintiffs' claims. Having entered judgment in Defendants favor, all pending motions are moot.

Patrick Michael Duffy
PATRICK MICHAEL DUFFY
United States District Judge

March 9, 2012
Charleston, SC

APPENDIX B

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

[Filed 03/19/12]

Case No.: 3:11-cv-03120-HFF-MBS-PMD

VANDROTH BACKUS, WILLIE HARRISON BROWN, CHARLESANN BUTTONE, BOOKER MANIGAULT, EDWARD MCKNIGHT, MOSES MIMS, JR, and ROOSEVELT WALLACE, on behalf of themselves and all other similarly situated persons,

Plaintiffs,

v.

THE STATE OF SOUTH CAROLINA, NIKKI R. HALEY, in her capacity as Governor, GLENN F. MCCONNELL, in his capacity as President Pro Tempore of the Senate and Chairman of the Senate Judiciary Committee, ROBERT W. HARRELL, JR, in his capacity as Speaker of the House of Representatives, MARCI ANDINO, in her capacity as Executive Director of the Election Commission, JOHN H. HUDGENS, III, Chairman, NICOLE S. WHITE, MARILYN BOWERS, MARK BENSON, and THOMAS WARING, in their capacities as Commissioners of the Elections Commission,

Defendants.

NOTICE OF APPEAL TO THE
UNITED STATES SUPREME COURT

Notice is hereby given that Vandroth Backus, Willie Harrison Brown, Charlesann Buttone, Booker Manigault, Edward McKnight, Moses Mims, Jr., and Roosevelt Wallace, Plaintiffs in the above-captioned case, appeal to the United States Supreme Court this Court's Order (Mar. 9, 2012, ECF No. 214) denying Plaintiffs' Declaratory and Injunctive Relief from the South Carolina House (Act 72 of 2011) and Congressional (Act 75 of 2011) Redistricting Plans. (2d Am. Compl., ECF No. 122). Appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

s/ Richard A. Harpootlian
Richard A. Harpootlian (Fed. ID # 1730)
rah@harpootlianlaw.com
Graham L. Newman (Fed. ID # 9746)
gln@harpootlianlaw.com
M. David Scott (Fed. ID # 8000)
mds@harpootlianlaw.com
RICHARD A. HARPOOTLIAN, P.A.
1410 Laurel Street
Post Office Box 1090
Columbia, SC 29202
Telephone: (803) 252-4848
Facsimile: (803) 252-4810

ATTORNEYS FOR THE PLAINTIFFS

March 19, 2012
Columbia, South Carolina

APPENDIX C

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

[Filed 03/21/12]

Case No.: 3:11-cv-03120-HFF-MBS-PMD

VANDROTH BACKUS, WILLIE HARRISON BROWN, CHARLESANN BUTTONE, BOOKER MANIGAULT, EDWARD MCKNIGHT, MOSES MIMS, JR, and ROOSEVELT WALLACE, on behalf of themselves and all other similarly situated persons,
Plaintiffs,

v.

THE STATE OF SOUTH CAROLINA, NIKKI R. HALEY, in her capacity as Governor, GLENN F. MCCONNELL, in is capacity as President Pro Tempore of the Senate and Chairman of the Senate Judiciary Committee, ROBERT W. HARRELL, JR, in his capacity as Speaker of the House of Representatives, MARCI ANDINO, in her capacity as Executive Director of the Election Commission, JOHN H. HUDGENS, III, Chairman, NICOLE S. WHITE, MARILYN BOWERS, MARK BENSON, and THOMAS WARING, in their capacity as Commissioners of the Election Commission,
Defendants.

CERTIFICATE OF SERVICE FOR THE
NOTICE OF APPEAL TO THE
UNITED STATES SUPREME COURT

I, Richard Harpootlian, attorney for the Plaintiffs, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South

Carolina 29202, certify that on March 21, 2012, pursuant to the United States Supreme Court Rule 29.3, served by U.S. MAIL, the following document(s) to the below mentioned person(s):

Document(s): Notice of Appeal to the United States Supreme Court.

Served:

J.C. Nicholson, III
Alan Wilson
James Smith, Jr.
Robert Cook
SC Attorney General's Office
1000 Assembly Street
Rembert C. Dennis Building
Post Office Box 11549
Columbia, SC 29211

Benjamin Mustian
Tracey Green
Willoughby and Hoefer
930 Richland Street
Post Office Box 8416
Columbia, SC 29202

Robert Stepp
Robert Tyson, Jr.
Sowell Gray Stepp and Laffitte
Post Office Box 11449
Columbia, SC 29211

William Wilkins, Esquire
Kirsten Small
Nexsen Pruet, LLC
55 East Camperdown Way
Post Office Drawer 10648
Greenville SC 29603-0648

/s/ Richard A. Harpootlian
Richard A. Harpootlian, Esquire

APPENDIX D

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

[Filed 02/22/12]

Case No.: 3:11-cv-03120-HFF-MBS-PMD

VANDROTH BACKUS, WILLIE HARRISON BROWN, CHARLESANN BUTTONE, BOOKER MANIGAULT, EDWARD MCKNIGHT, MOSES MIMS, JR, ROOSEVELT WALLACE, and WILLIAM G. WILDER, on behalf of themselves and all other similarly situated persons,
Plaintiffs,

v.

THE STATE OF SOUTH CAROLINA, NIKKI R. HALEY, in her capacity as Governor, GLENN F. MCCONNELL, in his capacity as President Pro Tempore of the Senate and Chairman of the Senate Judiciary Committee, ROBERT W. HARRELL, JR, in his capacity as Speaker of the House of Representatives, MARCI ANDINO, in her capacity as Executive Director of the Election Commission; JOHN H. HUDGENS, III, Chairman, NICOLE S. WHITE, MARILYN BOWERS, MARK BENSON, and THOMAS WARING, in their capacities as Commissioners of the Elections Commission,
Defendants.

AFFIDAVIT OF THE HONORABLE
JAMES E. CLYBURN

I, James E. Clyburn, being duly sworn, state as follows:

1. I represent South Carolina's Sixth Congressional District in the United States House of Representatives. I was first elected in 1992 and have served the people of the Sixth District ever since. During my service in the Congress, I have had the privilege of serving as the Majority Whip, Chairman of the Congressional Black Caucus, and Vice Chair and Chairman of the House Democratic Caucus. I am currently serving as the Assistant Democratic Leader in the 112th Congress.

2. I currently reside in. Columbia, South Carolina. I was born and raised in Sumter, South Carolina. Prior to running for public office, I was involved in the Civil Rights movement as a student leader and member of the NAACP. As a young community organizer, I helped organize marches and demonstrations in an effort to repeal Jim Crow laws in the South. In 1971, in the aftermath of the "Orangeburg Massacre" and Charleston Hospital Strike, Governor John West appointed me as the first black South Carolinian to serve in the inner circle of South Carolina government since Reconstruction. In 1974, Governor West appointed me to lead the South Carolina Human Affairs Commission, a post I held until 1992 when I first ran and was elected to the United States Congress.

3. During my lifetime, I have witnessed dramatic progress toward greater racial equality in South Carolina and all across America. Much of this progress came at great cost during the Civil Rights efforts of the 1960's and 1970s. Many brave Americans suffered personal intimidation and physical violence at the hands of their white neighbors for seeking access to the rights secured them by our Constitution, That progress has been made cannot be

seriously doubted, but neither should it be taken for granted. I am proud to serve in the Congress during the presidency of President Barack Obama. I am also proud to be one of two black Congressmen from South Carolina. While I often disagree with my friend, Congressman Tim Scott (CD-1), [redacted]

4. Much of this political progress black candidates and voters have made in our state was made possible by the Voting Rights Act of 1965. Congress understood in passing the Voting Rights Act that it was necessary to give black voters an opportunity to elect candidates who would represent their common interests. This often required the creation of super-majority black districts with 65 percent or more of the population being black. At that time, this was the only way to ensure that black voters would have a chance to compete. A black candidate could not expect to win many white votes. The black community was under-registered to vote and often would not turnout to vote in the same numbers as whites due to decades of Jim Crow laws and voter suppression.

5. South Carolina has made great progress in race relations since the Voting Rights Act was first passed. While old prejudices about race are often slow to change, many things have clearly changed for the better. We have elected many black candidates to all levels of South Carolina government. Many of these black office holders are elected with the help of white voters, including some in districts where black voters are not a majority of the district's population. State Senators Floyd Nicholson and Gerald Malloy,

for example, were both elected in districts that were not majority black districts. Many black members of the state House of Representatives are also elected with less than fifty percent of their district comprised of black voters.

6. [redacted]

7. When the Federal Court drew South Carolina's Congressional Districts in 2002, the Sixth District had a Black Voting Age Population (BVAP) of 53.55 percent. Between 2002 and 2010, the BVAP of the District fell, as a result of natural population shifts, to 52 percent.

8. I believe black voters in the Sixth District will continue to choose me as their preferred representative in Congress. I also believe I have earned the trust of many of my white constituents who have also voted for me as their preferred member of Congress. Despite the reduction in the BVAP of the Sixth Congressional District between 2002 and 2010, I was reelected five times, with between 62.9 percent and 67.5 percent of the vote. On average, I received &5.8 percent of the vote during this period. In spite of these facts, Act 75 increases my BVAP to 55.18 percent.

9. I did not ask the General Assembly to increase the BVAP of the Sixth Congressional District. [redacted]

10. [redacted]

11. As a member of Congress, I cannot represent the interests of every South Carolinian who happens to be black. I can only represent the interests of the communities in my district, whether they are black or white. The new Sixth District is the largest of all the new districts in terms of geography. It includes very diverse communities, many of which have little in common with one another. For example, the Sixth District has expanded further north into Columbia's mixed-race northeastern suburbs but it also adds more of the oily of Charleston by running down to the Charleston Peninsula then turning north to add densely populated black neighborhoods on the northern portion of the Peninsula. The new district also adds Allendale, Hampton, and Jasper Counties, some of our state's poorest rural black areas. All of these communities have distinct needs and desires regardless of the race of the people who reside in them.

12. [redacted] or to accommodate another redistricting goal like improving the shape or compactness of the district or keeping communities of interest intact.

13. For example, the adopted plan trades an area I previously represented in Orangeburg County for a

different piece of geography in the southern part of Orangeburg County. The new area has a higher concentration of black voters. [redacted] Similarly, the Congressional Redistricting plan also trades white areas for black areas in Charleston and Berkeley Counties. This has the effect of making an already unusual looking protrusion into the Sixth District even more unusual as the adopted Sixth District now hooks around the eastern side of Berkeley County then hooks northward up the Charleston Peninsula.

14. Other areas in the new Sixth District also appear to have been driven by packing black voters in and keeping white voters out. For example, the new Sixth District gives up a substantial portion of Sumter County. However, it retains the easternmost portion of Sumter County that includes a predominantly black area on the eastern side of the City of Sumter. In order for me to reach my new constituents in Sumter County, I will have to drive through the Fifth Congressional District.

15. My objections to Act 75 have nothing to do with the particular voters or areas of the state that I am happy to represent if I am. fortunate enough to win another term in Congress. I have represented the Midlands, the Pee Dee and the Low Country as a member of Congress and I have great affection for the people and places in each of these regions [redacted]

16. [redacted] The purpose of the Voting Rights Act is to level the playing field for minority candidates and voters, not to re-segregate our society along strictly racial lines. Black voters want results on issues that matter in their daily lives. Because black voters are a minority in our state, they must, at some point, work together with white voters to elect representatives that both white and black voters agree will represent their interests. [redacted]

17. [redacted] I believe South Carolina is demonstrating an ability to look beyond skin color in our polities. Until some of our political leaders catch up with the people, this Court must step in and fix this unconscionable racial gerrymander.

/s/ James E. Clyburn
Affiant

Sworn to and subscribed before me
This 14th day of February 2012.

/s/ Gail P. Stukes
Notary Public of South Carolina
My Commission Expires: April 22, 2015

APPENDIX E

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Case No.: 3:11-cv-03120-HFF-MBS-PMD

VANDROTH BACKUS, WILLIE HARRISON BROWN, CHARLESANN BUTTONE, BOOKER MANIGAULT, EDWARD MCKNIGHT, MOSES MIMS, JR, ROOSEVELT WALLACE, and WILLIAM G. WILDER, on behalf of themselves and all other similarly situated persons,
Plaintiffs,

v.

THE STATE OF SOUTH CAROLINA, NIKKI R. HALEY, in her capacity as Governor, GLENN F. MCCONNELL, in his capacity as President Pro Tempore of the Senate and Chairman of the Senate Judiciary Committee, ROBERT W. HARRELL, JR, in his capacity as Speaker of the House of Representatives, MARCI ANDINO, in her capacity as Executive Director of the Election Commission; JOHN H. HUDGENS, III, Chairman, NICOLE S. WHITE, MARILYN BOWERS, MARK BENSON, and THOMAS WARING, in their capacities as Commissioners of the Elections Commission,
Defendants.

AFFIDAVIT OF THE HONORABLE
MIA BUTLER GARRICK

I, Mia Butler Garrick, being duly sworn, state as follows:

1. I serve in the South Carolina House of Representatives representing House District 79. My

House District as adopted during the 2011 Redistricting is located in the Northeast part of Richland County. Prior to Redistricting, House District 79 included part of Kershaw County.[1]

2. I have only served one term in the South Carolina House of Representatives. In 2010, I entered the race for House District 79 after the incumbent, Anton Gunn, decided he to take a position to work for the Obama Administration. I had only two weeks to prepare for the Special Primary and roughly five weeks to campaign for the General Election. I was obviously aware that District 79 included Northeast Richland County and Southwest Kershaw County, but I was otherwise only vaguely familiar with the District's demographics. After winning the election, I became more familiar with District 79 and came to appreciate its diversity. Prior to this recent Redistricting, African American voters comprised about 34.7 percent of the population. District 79 was also one of the fastest growing House Districts in the state and was still growing at a phenomenal rate.

3. After the 2010 Census numbers were released, House Judiciary Chairman, Rep. Jim Harrison (R-Richland) approached me about my District. He seemed acutely interested in District 79. He said that because of District 79's growth over the last decade, I would have to "shed"

[1] I have attached as Exhibit A what I believe to be a fair and accurate depiction of House District 79 prior to the 2011 Redistricting.

approximately 21,000-22,000 people. He suggested that because I represented approximately 21,000-22,000 people in Kershaw County it made sense to take me out of Kershaw County and keep the Richland County portion of my District the way it was. I agreed.

4. Shortly thereafter, on April 11, 2011, I went into the House Map Room to propose a map that reflected what Chairman Harrison and I discussed. During my first visit to the Map Room, Chairman Harrison, House Judiciary Committee legal counsel Patrick Dennis, Thomas Hauger, Rep. Rick Quinn (R-Lexington), and Reggie Lloyd were present. We all discussed the fact that it made sense to take me out of Kershaw County since I had to shed approximately the same number of people I represented there in order to bring District 79 into population deviation. We also spoke at length about the importance of keeping the Richland side of the District "whole" and including the newer portion of the Lake Carolina community where I live, so that my entire community would be intact.

5. I believe Lake Carolina is a community of interest that should be unified within a single House District. By "community of interest" I mean a cohesive neighborhood with similar issues and needs. For example, our children attend the same schools and the issues that are important to my neighbors and constituents are basically the same ones that are important to me. Many of us shop, dine, and gather for community events at the town

center located in the heart of Lake Carolina, which has also been drawn out of District 79.

6. We all agreed that this approach made perfect sense and drew a proposed map that took House District 79 out of Kershaw County entirely, added the previously excluded portion of the Lake Carolina community to the District, and added the neighboring community of Crickentree because these areas also share a community of interest with the core of District 79.

7. This proposed map raised my BVAP to approximately 42 percent. This made sense, as it was a "natural" result of removing Kershaw County from District 79. I was pleased that we were able to make the Richland County portion of the District more cohesive and compact.[2] I also believe the proposal we drew accurately reflected the community I represent: a mixed-race suburb of Columbia. Everyone who was present at the meeting that day also agreed that this approach made sense. Hater discovered that members of the Republican leadership had other plans for District 79.

---

[2] I have attached as Exhibit B what I believe to be a fair and accurate map depicting House District 79 and adjacent districts as drawn in the original House proposal introduced in the Election Law Subcommittee. I have also attached as part of this exhibit a demographic summary of all the House Districts in this proposal. I this demographic summary was generated pursuant to the House Preclearance Submission for the House Plan. I believe it is a fair and accurate representation of the proposal for House District 79 that I agreed to during my meeting in the House Man Room.

8. A couple of weeks later, I was approached by Rep. Alan Clemmons (R-Horry), Chairman of the Election Law Subcommittee, in the Statehouse lobby. He said, "Hey Mia, we're working to get your BVAP (black voting age population) up in your District, but we've got to tweak it some more to get it just right." I was stunned because I had neither asked him to do that, nor had I ever spoken with Rep. Clemmons prior to that about my district or proposed map. I responded, "Thanks Alan, but I don't want y'all to do that. Why would you think that I do?" He looked puzzled, but smiled and said, "I thought that's what you wanted." I replied, "No, I don't."

9. During the next legislative day, I walked over to Chairman Harrison's desk to talk with him about my conversation with Rep. Clemmons. I told Chairman Harrison that I appreciated the diversity of my District and did not want to artificially increase my BVAP. His response was that he might not have a choice because "the lawyers" were advising him that was probably what they were going to have to do. When I asked who "the lawyers" were, he would not give me a clear answer. He just kept saying that "the lawyers" were advising that this might "have to happen." I assumed he was referencing Patrick Dennis and other House legal staff, but I never was able to get a clear answer about which lawyers were giving this advice.

10. It was not until the final House Judiciary Committee meeting on June 6, 2011, that Rep. Clemmons' prediction came to fruition. I was

not able to attend the meeting, but I received a call from Rep. James Smith (D-Richland) who was present. He described what I later learned was Amendment #35, introduced by Chairman Harrison, which would increase the BVAP of District 79 to 52 percent by trading mixed-race areas for areas containing a higher concentration of black voters.[3] The other members of the committee were led to believe that I had, in fact, requested this change to increase my BVAP. This was not true. Rep. Smith, accurately, believed that I opposed this Amendment and called me just prior to the vote. I shared with Rep. Smith exactly what I had already shared with Reps. Harrison and Clemmons. He voiced my objections to the committee on my behalf, but they ignored my objections and passed their Amendment anyway.

11. Amendment #35 abruptly and significantly changed District 79 without any justification or consideration for those impacted by it. This Amendment took approximately half of my neighborhood out of the District and placed it in Rep. Boyd Brown's (D-Fairfield) District. The manner in which it separates the northern portion of my neighborhood from the southern portion, makes no sense. Not only does it split the community down the middle of the Lake, but it also splits neighborhood blocks them-

[3] I have attached as Exhibit C what I believe is a fair and accurate map depicting Amendment #35 and a demographic summary created by the House of Representatives as part of their Preclearance Submission.

selves.[4] Rep. Brown's district (HD-41) has no logical connection and shares no common interest with the portion of Northeast Richland County taken from District 79 as a result of Amendment #35. This does a great disservice to both his constituents and mine.

12. The only explanation for dividing my neighborhood in half in what seems an otherwise arbitrary manner is to exclude some of the white voters in my neighborhood from District 79. Amendment # 35 also reaches out and adds new, predominantly African-American neighborhoods to District 79.

13. House Republicans, led by Reps. Harrison and Clemmons, deliberately sought to split my community in order to "bump up" the District's BVAP to 52% and create a majority-minority district. I am unaware of any legal or statistical analysis done to justify using race to pack my district with additional BVAP. Rep. Harrison never answered my request for an explanation as to which "lawyers" deemed this necessary. I am a black South Carolinian. I was able to win election to the House when

[4] I have attached as Exhibit D a series of maps that I believe are a fair and accurate depiction of how this Redistricting Plan divides my neighborhood. These maps were generated using Google Maps, a free and publically available software service, and a House District overlay that was created by the House of Representatives and made publically available on their website. These images show a satellite view of the split between Districts 79 and 41 and demonstrate the arbitrary manner in which the neighborhood was divided. The original proposal for District 79 that I supported would include the remained of Lake Carolina south of Kelly Mill Road and east of Hard Scrabble Road, among other geography.

District 79 was 34 percent black. Prior to my election, then-Rep. Anton Gunn, who is also black, was elected twice. Both Anton and I earned the support of white and black voters to get elected. There was also never any showing as to why or how a packed District 79 benefits the District's communities, its constituents, or the State as a whole.

14. During the floor debate on June 14, 2012, I spoke out against the Republican packing plan and urged the House to adopt Floor Amendment #25 which would restore District 79 to the original proposal that kept my community whole. As I explained on the floor:

> There are a number of reasons why this is wrong. A majority-minority district is not warranted because there has been no Section 2 or performance analysis to support or justify this so we end up packing District 79 for no reason. I love the diversity of my District and so do the people of District 79. Even with a 34 percent BVAP, two African Americans have already won, which is proof that we neither need nor are we asking for the additional protection of majority-minority status.

15. As a result of my floor speech, I got a lot of feedback from my colleagues—Republicans and Democrats alike. Former-Rep. Dan Cooper (R-Anderson) and others teased me about being the only African-American they have ever met, who didn't appreciate a higher BVAP. Several House and Senate colleagues even told me that House Republicans were perplexed by my request to keep my commu-

nity whole and maintain the diversity it had. Some even tried to solicit the help of my Democratic colleagues to "talk to me" and help me "understand" how the Republicans' map benefitted me so I would not fight it or bring unnecessary attention to it. I kept wondering why packing District 79 was so important to the Republicans and why my input did not seem relevant or welcomed by them.

16. But it was Rep. Thad Viers (R-Horry) who let me in on the Republican redistricting strategy during our floor debates on redistricting. At that time, Rep. Viers was planning to run for the new Seventh Congressional District. We were having a very casual lighthearted discussion about his party's agenda in general, since I had openly taken issue with the divisiveness of some of the Republican Party's top agenda items and the amount of time the House was wasting on them. We were talking about race and I shared my view that their priorities seemed to be an intentional effort to divide South Carolinians along racial lines. As the conversation turned to redistricting, Rep. Viers told me that race was a very important part of the Republican redistricting strategy. At first, I thought he was joking because of the lighthearted nature of the conversation, but then I realized he was being candid with me. Rep. Viers said that Republicans were going to get rid of white Democrats by eliminating districts where white and black voters vote together to elect a Democrat. He said the long-term goal was a future where a voter who sees a "D" by a candidate's name knows that the candidate is an African-American candidate. As I carefully

considered what they were doing to my District, the "game-plan" Rep. Viers described suddenly made perfect sense. And after my proposed Amendment came closer to passing than any other Amendment that day, Rep. Viers whispered in my ear, "that was way too close. I've gotta keep my eyes on you." Then he chuckled and said, "Well now, South Carolina will soon be black and white. Isn't that brilliant?"

17. I subsequently realized that my Democratic colleagues were also complicit in this racial gerrymander. Most of them did not seem to understand my objection and would never take issue with a higher BVAP. The Democratic Caucus' view in large part appears to be motivated by individual and collective shortsightedness. Many of my Democratic colleagues believed their districts were "better than [they] thought they would be" and that "this redistricting plan is about the best that [they] could have hoped for." I understood these comments to be motivated by their desire-which is common knowledge among Republicans-to have as many black voters as possible.

18. Several of my Democratic colleagues have tried to convince me that the Republicans' map benefits me greatly, by "strengthening" the District so that I have a better, more secure chance of keeping the seat "as long as I want." If anything, they suggest that I need only be concerned about Primary opposition. This self-interest appears to be the most compelling motivation for the majority of them. I believe

this hurts all of our voters by separating us along purely racial lines and weakening competition so that incumbents become complacent in their "safe" districts.

19. I remember when Rep. Bill Clyburn (D-Aiken, Edgefield) came to me after he heard me speak about my amendment and why it was necessary. He said he did not know that upping my BVAP would actually hurt my District. And although he and other Democrats seemed shocked that I would actually propose or support anything other than a higher BVAP, he told me he would support my efforts to restore my District back to the original proposed version.

20. I do not believe that our Constitution or the Voting Rights Act permits the segregation of our citizens, which is exactly what is occurring under this Redistricting Plan. We need more District 79s, not fewer: I also do not believe I am a rarity, since my predecessor also won District 79 twice before I did. This Redistricting Plan threatens to once again segregate our state along racial lines. This is bad for my constituents and it is bad for black voters all over South Carolina. I believe the Republican strategy is regressive and illegal. Sadly, I also believe my Democratic colleagues have gone along with this scheme by trading the political power of the African American community for the "safety "of a higher BVAP or the "security" of a majority-minority district. We have diluted and diminished the natural diversity of our state in a manner that is likely to relegate

African-American voters to a "permanent minority" status.

21. I respectfully submit the above testimony for consideration by the Court and ask that the Court strike down this unconstitutional racial gerrymander.

/s/ Mia Butler Garrick
Affiant

Sworn to and subscribed before me
This 22nd day of February 2012.

/s/ [Illegible]
Notary Public of South Carolina

My Commission Expires: 11/6/2016

APPENDIX F

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

[Filed 02/22/12]

Case No.: 3:11-cv-03120-HFF-MBS-PMD

VANDROTH BACKUS, WILLIE HARRISON BROWN, CHARLESANN BUTTONE, BOOKER MANIGAULT, EDWARD MCKNIGHT, MOSES MIMS, JR, ROOSEVELT WALLACE, and WILLIAM G. WILDER, on behalf of themselves and all other similarly situated persons,
Plaintiffs,

v.

THE STATE OF SOUTH CAROLINA, NIKKI R. HALEY, in her capacity as Governor, GLENN F. MCCONNELL, in his capacity as President Pro Tempore of the Senate and Chairman of the Senate Judiciary Committee, ROBERT W. HARRELL, JR, in his capacity as Speaker of the House of Representatives, MARCI ANDINO, in her capacity as Executive Director of the Election Commission; JOHN H. HUDGENS, III, Chairman, NICOLE S. WHITE, MARILYN BOWERS, MARK BENSON, and THOMAS WARING, in their capacities as Commissioners of the Elections Commission,
Defendants.

AFFIDAVIT OF THE HONORABLE
MIA BUTLER GARRICK

I, Mia Butler Garrick, being duly sworn, state as follows:

1. I serve in the South Carolina House of Representatives representing House District 79. My House District as adopted during the 2011 Redistricting is located in the Northeast part of Richland County. Prior to Redistricting, House District 79 included part of Kershaw County.[1]

2. I have only served one term in the South Carolina House of Representatives. In 2010, I entered the race for House District 79 after the incumbent, Anton Gunn, decided he to take a position to work for the Obama Administration. I had only two weeks to prepare for the Special Primary and roughly five weeks to campaign for the General Election. I was obviously aware that District 79 included Northeast Richland County and Southwest Kershaw County, but I was otherwise only vaguely familiar with the District's demographics. After winning the election, I became more familiar with District 79 and came to appreciate its diversity. Prior to this recent Redistricting, African American voters comprised about 34.7 percent of the population. District 79 was also one of the fastest growing House Districts in the state and was still growing at a phenomenal rate.

3. After the 2010 Census numbers were released, House Judiciary Chairman, Rep. Jim Harrison (R-Richland) approached me about my District. He seemed acutely interested in District 79.

---

[1] I have attached as Exhibit A what I believe to be a fair and accurate depiction of House District 79 prior to the 2011 Redistricting.

He said that because of District 79's growth over the last decade, I would have to "shed" approximately 21,000-22,000 people. He suggested that because I represented approximately 21,000-22,000 people in Kershaw County it made sense to take me out of Kershaw County and keep the Richland County portion of my District the way it was. I agreed.

4. Shortly thereafter, on April 11, 2011, I went into the House Map Room to propose a map that reflected what Chairman Harrison and I discussed. During my first visit to the Map Room, Chairman Harrison, House Judiciary Committee legal counsel Patrick Dennis, Thomas Hauger, Rep. Rick Quinn (R-Lexington), and Reggie Lloyd were present. We all discussed the fact that it made sense to take me out of Kershaw County since I had to shed approximately the same number of people I represented there in order to bring District 79 into population deviation. We also spoke at length about the importance of keeping the Richland side of the District "whole" and including the newer portion of the Lake Carolina community where I live, so that my entire community would be intact.

5. I believe Lake Carolina is a community of interest that should be unified within a single House District. By "community of interest" I mean a cohesive neighborhood with similar issues and needs. For example, our children attend the same schools and the issues that are important to my neighbors and constituents are basically the same ones that are important to me. Many of us shop, dine, and

gather for community events at the town center located in the heart of Lake Carolina, which has also been drawn out of District 79.

6. We all agreed that this approach made perfect sense and drew a proposed map that took House District 79 out of Kershaw County entirely, added the previously excluded portion of the Lake Carolina community to the District, and added the neighboring community of Crickentree because these areas also share a community of interest with the core of District 79.

7. This proposed map raised my BVAP to approximately 42 percent. This made sense, as it was a "natural" result of removing Kershaw County from District 79. I was pleased that we were able to make the Richland County portion of the District more cohesive and compact.[2] I also believe the proposal we drew accurately reflected the community I represent: a mixed-race suburb of Columbia. Everyone who was present at the meeting that day also agreed that this approach made sense. Hater discovered that members of the Republican leadership had other plans for District 79.

---

[2] I have attached as Exhibit B what I believe to be a fair and accurate map depicting House District 79 and adjacent districts as drawn in the original House proposal introduced in the Election Law Subcommittee. I have also attached as part of this exhibit a demographic summary of all the House Districts in this proposal. I this demographic summary was generated pursuant to the House Preclearance Submission for the House Plan. I believe it is a fair and accurate representation of the proposal for House District 79 that I agreed to during my meeting in the House Man Room.

8. A couple of weeks later, I was approached by Rep. Alan Clemmons (R-Horry), Chairman of the Election Law Subcommittee, in the Statehouse lobby. He said, "Hey Mia, we're working to get your BVAP (black voting age population) up in your District, but we've got to tweak it some more to get it just right." I was stunned because I had neither asked him to do that, nor had I ever spoken with Rep. Clemmons prior to that about my district or proposed map. I responded, "Thanks Alan, but I don't want y'all to do that. Why would you think that I do?" He looked puzzled, but smiled and said, "I thought that's what you wanted." I replied, "No, I don't."

9. During the next legislative day, I walked over to Chairman Harrison's desk to talk with him about my conversation with Rep. Clemmons. I told Chairman Harrison that I appreciated the diversity of my District and did not want to artificially increase my BVAP. His response was that he might not have a choice because "the lawyers" were advising him that was probably what they were going to have to do. When I asked who "the lawyers" were, he would not give me a clear answer. He just kept saying that "the lawyers" were advising that this might "have to happen." I assumed he was referencing Patrick Dennis and other House legal staff, but I never was able to get a clear answer about which lawyers were giving this advice.

10. [redacted] I was

not able to attend the meeting, but I received a call from Rep. James Smith (D-Richland) who was present. [redacted]

11. Amendment #35 abruptly and significantly changed District 79 without any justification or consideration for those impacted by it. This Amendment took approximately half of my neighborhood out of the District and placed it in Rep. Boyd Brown's (D-Fairfield) District. The manner in which it separates the northern portion of my neighborhood from the southern portion, makes no sense. Not only does it split the community down the middle of the Lake, but it also splits neighborhood blocks them-

[3] I have attached as Exhibit C what I believe is a fair and accurate map depicting Amendment #35 and a demographic summary created by the House of Representatives as part of their Preclearance Submission.

selves.[4] Rep. Brown's district (HD-41) has no logical connection and shares no common interest with the portion of Northeast Richland County taken from District 79 as a result of Amendment #35. This does a great disservice to both his constituents and mine.

12. The only explanation for dividing my neighborhood in half in what seems an otherwise arbitrary manner is to exclude some of the white voters in my neighborhood from District 79. Amendment # 35 also reaches out and adds new, predominantly African-American neighborhoods to District 79.

13. House Republicans, led by Reps. Harrison and Clemmons, deliberately sought to split my community in order to "bump up" the District's BVAP to 52% and create a majority-minority district. I am unaware of any legal or statistical analysis done to justify using race to pack my district with additional BVAP. Rep. Harrison never answered my request for an explanation as to which "lawyers" deemed this necessary. I am a black South Carolinian. I was able to win election to the House when

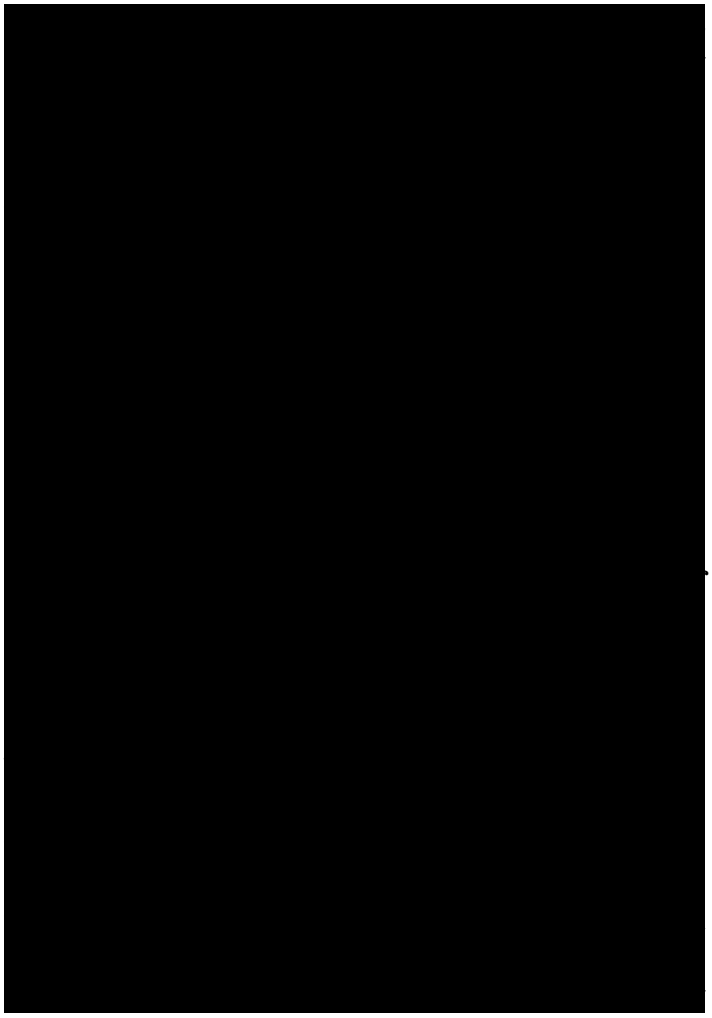
[4] I have attached as Exhibit D a series of maps that I believe are a fair and accurate depiction of how this Redistricting Plan divides my neighborhood. These maps were generated using Google Maps, a free and publically available software service, and a House District overlay that was created by the House of Representatives and made publically available on their website. These images show a satellite view of the split between Districts 79 and 41 and demonstrate the arbitrary manner in which the neighborhood was divided. The original proposal for District 79 that I supported would include the remained of Lake Carolina south of Kelly Mill Road and east of Hard Scrabble Road, among other geography.

District 79 was 34 percent black. Prior to my election, then-Rep. Anton Gunn, who is also black, was elected twice. Both Anton and I earned the support of white and black voters to get elected. There was also never any showing as to why or how a packed District 79 benefits the District's communities, its constituents, or the State as a whole.

14. During the floor debate on June 14, 2012, I spoke out against the Republican packing plan and urged the House to adopt Floor Amendment #25 which would restore District 79 to the original proposal that kept my community whole. As I explained on the floor:

> There are a number of reasons why this is wrong. A majority-minority district is not warranted because there has been no Section 2 or performance analysis to support or justify this so we end up packing District 79 for no reason. I love the diversity of my District and so do the people of District 79. Even with a 34 percent BVAP, two African Americans have already won, which is proof that we neither need nor are we asking for the additional protection of majority-minority status.

15. [redacted]

16. 

[redacted]

17. [redacted]

18. [redacted] I believe

this hurts all of our voters by separating us along purely racial lines and weakening competition so that incumbents become complacent in their "safe" districts.

19. I remember when Rep. Bill Clyburn (D-Aiken, Edgefield) came to me after he heard me speak about my amendment and why it was necessary. [redacted]

20. I do not believe that our Constitution or the Voting Rights Act permits the segregation of our citizens, which is exactly what is occurring under this Redistricting Plan. We need more District 79s, not fewer: I also do not believe I am a rarity, since my predecessor also won District 79 twice before I did. This Redistricting Plan threatens to once again segregate our state along racial lines. This is bad for my constituents and it is bad for black voters all over South Carolina. I believe the Republican strategy is regressive and illegal. Sadly, I also believe my Democratic colleagues have gone along with this scheme by trading the political power of the African American community for the "safety "of a higher BVAP or the "security" of a majority-minority district. We have diluted and diminished the natural diversity of our state in a manner that is likely to relegate

African-American voters to a "permanent minority" status.

21. I respectfully submit the above testimony for consideration by the Court and ask that the Court strike down this unconstitutional racial gerrymander.

/s/ Mia Butler Garrick
Affiant

Sworn to and subscribed before me
This 22nd day of February 2012.

/s/ [Illegible]
Notary Public of South Carolina

My Commission Expires: 11/6/2016

APPENDIX G

McDonald – Direct

* * * *

[10] A. Yeah, correct. Well, at least this—the statistical analyses that Dr. Brunell and Dr. Engstrom have done are well understood, so—

Q. And you used those in your—

A. I've used those in my work, as well, yes.

Q. Has that technique been subject to peer review?

A. Yes, it has.

Q. Has it been subject to published scholarly articles or subject to scholarly scrutiny?

A. Yes. In fact, on Dr. Engstrom's third method of performing what—racial bloc analysis called ecological inference, I've published on that, as well.

Q. Are there in existence standards and techniques—is a there a known potential rate of error on these techniques? And when you say—let me say this. Dr. Engstrom and Dr. Brunell used—you used them as a source of your opinion also, correct?

A. Correct.

Q. You relied on some of the work they did?

A. Correct.

Q. And you also rely on looking at the maps that were generated by the House of Representatives, correct?

A. Correct.

Q. So all these items would be what you would use in forming your opinion.

* * * *

[15] for the record.

Q. Say that again?

A. Dr. Brunell's name is spelled BRUNELL.

Q. Did you do that or did Kenney?

A. No, Mr. Kenney did that. He also had some trouble with the computer earlier, too.

Q. Okay. Let's go to the next screen. Okay. We're going to talk about and we're going to try to use some examples, specific districts to explain your opinion, okay? Right?

A. Yes.

Q. Okay. Now, these documents were prepared—these slides were prepared under your direction.

A. Correct.

Q. And tell us, the first slide demonstrates what? What does it show?

A. This is a map of the 49th District as adopted. It's represented by Richard King, a Democrat from York County.

Q. York County. What color is the district we're talking about?

A. It's in this bright orange color.

Q. Bright orange color. Okay. And in your analysis of this district do you believe that race was a predominant factor in how it was drawn?

A. I do.

Q. Okay. Well, let's walk through some of the issues. Next [16] screen, please. Okay. So the first screen, this screen shows what?

A. This is the population deviation of the benchmark district. So what we have here is a district, according to the 2010 census, that has 37,806 people within it. And as we heard earlier this morning, there's an ideal number so that every district would have exactly the same population. That ideal number is 37,301 for the 124 districts in the House. So if we just look at these two numbers we can see that House District 49 as it existed in the benchmark plan was 505 people over population, or a deviation of 1.35 percent. That 1.35 percent is also within the plus or minus 2.5 percent that the state legislature adopted as one of the guiding principles we heard earlier this morning for what would be an acceptable district in terms of its population deviation.

Q. Well, let me—

JUDGE SEYMOUR: Mr. Harpootlian, let me just interrupt for a second. Can you explain to me the relevance of this district? Is this one of the districts at issue?

MR. HARPOOTLIAN: One of the 20, yes, ma'am. I believe.

THE WITNESS: Yes.

MR. HARPOOTLIAN: Yes, ma'am. We noted 20 districts, this is one of them. Unless I'm losing my mind. Is it not on the list, your Honor?

* * * *

APPENDIX H

Sellers – Direct

* * * *

[14] Amendment number 1 which he crafted.

Q. Amendment number 1, please tell the court what Amendment number 1—

A. Usually we draft bills, you go in your office and come up with the wonderful dreams of what a bill should be and you put in a bill. In this case we didn't necessarily have a bill, but Amendment number 1 was the vessel that appears before us that—

Q. How was that designed, do you know?

A. I just—you know, I was in the map room every day and I was the person who would go in and attempt to talk with, you know, staff, or even pull down what was being drawn daily. I recall one instance going in on a, I can't recall the date, the log should be able to tell you, but I went in and it was the day after Representative Clemmons and Harrison and Harrell had been in, and the soon thereafter we had Amendment number 1.

Q. Did you participate in drawing the Amendment number 1?

A. No.

Q. Do you know anybody that did?

A. No.

Q. And so it appears—well, is there a name attached to 3?

A. I believe it's Clemmons.

Q. So Representative Clemmons, he is from where?

A. Horry County.

[15] Q. And he is white or African American?

A. White.

Q. And he is a Republican or Democrat?

A. A Republican.

Q. Okay. And that 3, was that just the House or was that House and Congress.

A. No, it was just the House. We treated Congress like a separate bill.

Q. That would have been a—

A. That would have been a separate—

Q. So let's talk about 3, which is just the House. And you indicated a process where you would propose amendments. What kind of amendments were you proposing?

A. Various amendments. You know, I recall I tried to implement what we heard in public hearings.

Q. Which was?

A. Which, for example, Anderson County, the Mayor of Anderson testified that he wanted to try to keep his community whole. And the City of Anderson has a decent percentage of black voting-age population, and I made efforts, many efforts, to keep that community whole. Instead, what was drawn was the African American population in those districts was—was fragmented and put into various districts. I specifically recall many instances where we tried to deal with my colleague Mia Butler's district and the fact she was able to win in a [16] non-majority district, and those efforts were rebuffed. I mean, there were a series of amendments. I tried to deal with my own

district and had some dialogue with Lonnie Hosey, who is another African American, a member of the African American Black Caucus. We addressed our district and that was rebuffed.

Anything that would take a district, if you had a black voting-age population of let's say 95 and you want to take it to 94-and-a-half, that would be tabled. They had a hard, fast line, which I felt was incorrect, that they were not reducing black voting-age population in any district regardless of how high it was. It was an attempt to resegregate.

Q. What?

A. Resegregate.

Q. Okay. And when the subcommittee was considering an amendment by you or someone that would be proposing an amendment which would reduce black voting-age population in a district, even keeping it above 50, were any other criteria considered such—

A. No.

Q. —compactness or—

A. No.

Q. Communities of interest?

A. No. No, we did not deal with compactness, communities of interest. We did at some time deal with incumbency. We did [17] not deal with the public comments or testimony that we heard. We did a very good job of window dressing. The process was sound; however, when it came to the implementation the only factor that was used was race.

Q. Now, you indicated a moment ago that there was a process where an amendment was proposed

and you mentioned the name Patrick Dennis. Who is he?

A. Patrick Dennis is our chief counsel of the judiciary committee.

Q. The judiciary committee?

A. Correct.

Q. And you indicated he would communicate some information—

A. Any bill we put up, any amendment that we put up, it did have the black voting-age population on it and Patrick would highlight or just point, just giving information, purely—he was not making a decision, he was just purely giving information to the chairman. The chairman would then move to table. He had three votes, and it didn't matter what the amendment was, if that black voting-age population went down a percentage point he would—

Q. And did you ever talk to Mr. Clemmons about this?

A. At length.

Q. And his reasoning for doing that—

A. I talked to Mr. Clemmons. I even talked to—attempted to talk to House counsel about this, and he did not have a

* * * *

[24] hired counsel for a legal opinion and take a break was so that we could actually get a why. But that never was given. The only issue that Alan Clemmons ever had in his mind, as you listen to the tape, he did not discuss public testimony, he did not discuss communities of interest, the only thing he

talked about was race. That's the only thing he ever talked about. That was his only basis for tabling anything that came up in our subcommittee.

Q. How many people were on the subcommittee?

A. Five.

Q. And you indicate two African Americans?

A. Correct. Karl Allen was there along—

Q. Okay. And the other members of this committee, when he made a motion to table, is there any discussion?

A. I never had any discussion with them. It was rare. Most of my discussion, which if you listen to all six hours or eight hours of tape, which got somewhat heated at times, was with the chairman.

Q. And when you indicated on the record, you said if you balance that with what we heard this morning about the simple fact of people wanted people to keep Barnwell County whole, this line that you can't take black people's percentages down is not actually what the law says, was there any response, either on the record or off the record, about keeping Barnwell County whole?

[25] A. There was public testimony about keeping—

Q. I'm talking about from Mr. Clemmons when you said keep it whole.

A. No. And even—there was not even a comment from counsel about the principles.

Q. Okay. Did you make Amendment number 13?

A. Yes.

Q. Okay. Can we see Amendment number 13?

A. This is my—

Q. Do you—how do you get those blue arrows off there? There we go. Do you recognize this map?

A. Yes. This is Joe Jefferson's district, I believe.

Q. Which is district number what?

A. Joe is 102.

Q. Okay. And what was—what was your issue there?

A. I mean, all of them were—I mean, in many instances I was trying to keep communities together, I was going to the members, to the incumbent, listening to what they had to say, because incumbency is a major issue, and listening to what we heard in our public testimony and draft districts based on that.

Q. And what was your issue with communities of interest in this district, do you remember?

A. Yes. I was—I know that this one had to do with Patsy Knight, as well. She was 97, I believe, in Dorchester County. [26] And all I was—all I was attempting to do on this map, all I was attempting to do in this amendment, like I was trying to do in many other instances, and I thought we were going to have success but we never did, was keep communities of interest together, areas that had been represented by incumbents for a period of time who wanted to maintain their representative, do that.

And the most ironic thing is that in my consideration race wasn't a factor. In drawing these maps race wasn't a factor. I was cognizant of BVAP, understanding that we are a voting rights state. However, that was never the predominant factor. But when we

went to committee, regardless of what amendment I put up, the only issue, nine times out of ten, just as you heard on eight, the only issue that was discussed was race. And I think that the most—I think the most important thing that Alan Clemmons continuously said was that if the BVAP went down that it was a complete nonstarter. So it shows his hard, fast line.

Q. Okay. Now, you were present on May 24, 2011 at—for a subcommittee meeting. This would be audio from Exhibit number 66, RWH022017. How about if you can play that. Listen to it and what it is, okay?

(Audio played)

Q. Is that Mr. Young speaking?

A. Tom Young.

* * * *

APPENDIX I

Brunell – Direct

* * * *

[29] Q. Has he provided any data or done any analyses which now would justify any conclusion offered by him about that?

A. Absolutely not.

Q. Okay. Now, Dr. McDonald also offered the opinion that race was a predominant factor in the drawing of the districts for the South Carolina House and Congressional plan, correct?

A. That's right.

Q. And have you taken a look at that for us?

A. Yes.

Q. And that's basically all in his first report, correct?

A. That's right.

Q. All right. Let's see slide 12, please. Tell me, it is also your opinion as expressed in Exhibit 30 that his calculation that race was a predominant factor is unsupported by the evidence.

A. That's correct.

Q. And now tell me why you think Dr. McDonald cannot draw the conclusion that he states from the evidence that he has.

A. Well, I mean his task is—from the outset is almost impossible. I mean, so he has to show that districts were drawn ignoring all these other principles and race was the predominant factor. That's hard to do, you know, because we don't—we don't

know why these districts—we can try to guess at the edges, but there's really no good way of knowing this. And he tried his best to kind of show, you know, these [30] swaps and moving black and white in and out, but I was completely unconvinced. I mean, I don't think you can conclude at all that even one the districts race was the predominant factor, let alone that the whole state was that was the predominant factor.

Q. I heard Dr. McDonald say today that he has subsequently become aware of the redistricting criteria adopted by the House but he was not aware of them at the time he did his initial report. Did you hear that?

A. I heard that.

Q. If Dr. McDonald did not take those criteria into consideration, could he draw any conclusion that's justified about what was the predominant factor in redistricting?

A. No, not really.

Q. And I think you understand, based upon the testimony that we have been through, that Dr. McDonald concludes that all changes to all lines in all districts that result in any change—

A. Right.

Q. —to the BVAP in those districts, if there was any change that resulted in any change in BVAP, he infers that race was the reason for the change. Is that your understanding of his opinion, as well?

A. Yes.

Q. Well, is that an opinion that is logically, reasonably

* * * *

[34] Q. Yeah, that was bad. Does Dr. McDonald assume implicitly when he looks at a single district and looks at all the changes, the red pieces and the blue pieces you saw on the screen, is his expressed or implicit assumption that all the changes to the district he's looking at—

A. Yes.

Q. —were done for the purpose of changing that particular district?

A. Yes.

Q. And yet it might have been for the purpose of changing an adjoining district, correct?

A. Right. When you look at one district by itself you can always criticize it, why did they do this, why did they do that. It's part of a gigantic puzzle. The pieces change shapes and you have to shift around. The changes you make here affect the surrounding district. Looking at one district by itself you can't really do it.

Q. Okay. I want you to assume with me, Dr. Brunell, that in South Carolina there is a significant correlation between race and political party affiliation, okay? Would that shock you if I were to ask you to assume that?

A. Not at all.

Q. Would that be inconsistent with any information you've gleaned in your career as a political scientist?

A. No.

[35] Q. If there is that correlation, then how do you distinguish a change to a district made for purposes of political reasons as opposed to racial reasons?

A. You can't.

Q. So can you as a matter of accepted social science conclude that a change that has an effect on—has a political effect was done for racial reason?

A. Right. They are sufficiently entangled it's going to be hard to figure out. It's just—it would be impossible to say that one was predominant over that one.

Q. There's ways in statics where you've got multiple variables that have an effect an another variable, you can do a statistical analysis to separate them out, can't you?

A. Sure.

Q. There's a way to do that statistically, a bivariant progression?

A. Yes.

Q. Did Dr. McDonald do any such thing here?

A. No.

Q. Is there any data, any evidence in the record that permits him to conclude that race was the reason for these changes as opposed to something else, like political affiliation?

A. I don't think so.

Q. Again, then with respect to Dr. McDonald's opinion that race was the predominant factor, how would you characterize

* * * *

[41] Q. Yes, sir.

A. He was—I mean he would look—he would talk about compactness, and I don't know if he—I think talked about communities of interest and these sorts of things. There were some other factors he was trying to look at, as well.

Q. Well, based on whatever—based upon his report and based upon his testimony, based upon his supplemental report, based upon any information that plaintiffs have proferred today with Dr. McDonald as the source, has he taken into account all the information necessary to offer an opinion that has any validity about whether race or anything else was a predominant factor in redistricting in South Carolina?

A. No, I don't think—I don't think any of us in this room could ever determine what the predominant factor was, whether it was race or anything else.

Q. Okay. Given the criteria we looked at and given the evidence that you've considered, is it possible to explain the districts that Dr. McDonald criticizes on grounds other than race?

A. Say that again?

Q. Yes. Given the criteria that we have considered, given the other information that you studied, the testimony that you heard, is it possible to explain the configuration of districts in the South Carolina House plan on grounds other than race?

* * * *

[54] normally do whites—are whites sufficiently numerous to defeat the African American preferred candidate. So—

Q. So your understanding of Gingles is that if there's a sufficient minority population to constitute a majority—

A. Right.

Q. —a numerical majority in a district and if they vote cohesively as a bloc.

A. Right.

Q. And then it's incumbent upon the state to create that district with those minority voters as the majority so they can vote as a bloc so they can elect a candidate of their choice.

A. You left out the white bloc, as well. But, yes, that's the third part.

Q. Right. Okay. Now, let's have the next slide please. I've asked you this. This is your understanding, these are legal principles and the court's going to decide all that, but we have had some testimony about it. So I'm not asking you as a lawyer but I'm asking you as a social scientist and as a person who has spent a lot of time and a lot of hours investigating election issues and redistricting issues, and who is up to his elbows, if you will, in the minutia of all of this.

When you are advising jurisdictions about drawing districts or if you are engaged in the process of drawing [55] districts, is it your understanding under Thornburgh versus Gingles that—is the question, well, we just need to put the minimum number of minorities in there that some expert thinks on a given day if the stars aligned would be just enough to elect a candidate on?

MR. HARPOOTLIAN: I object to the form, your Honor.

JUDGE FLOYD: I'll sustain that.

MR. STEPP: Well, I'll withdraw it. I'll withdraw it. I want the answer to relate to something we can all understand, so I appreciate it.

Q. (MR. STEPP) Is it the duty or is the point to create a district that has the minimum number of minority voters that somebody thinks might be sufficient to elect a candidate of choice?

A. No.

Q. Well, what is the duty under Thornburgh versus Gingles, as you understand it?

A. It's to draw a district where the minority, the racial minority, makes up a majority.

Q. We have had some conversation about Bartlett versus Strickland. I know, again, you are not a lawyer, but do you have an understanding under Bartlett versus Strickland that what is protected by the Voting Rights Act and protected by the United States Constitution is the right of a minority to elect candidates of their choice on the strength of their own [56] ballots?

A. That's right.

Q. And not in coalition with other voters.

A. That's right.

Q. So, again, does that suggest that jurisdictions should draw districts to the minimum number that is thought to be necessary to elect a candidate of choice, or under Gingles or under Bartlett is it your understanding those districts should be drawn to a numerical majority?

A. Yes, the latter, a numerical majority.

Q. All right. Thank you. When you do racial bloc voting analysis, tell us what it is you are trying to determine. What's the question you are trying to answer?

A. All I really want to know is, generally speaking, do whites and blacks vote as blocs in opposition to one another. And, again, the way that they define it in Gingles, if a majority of the minority group votes one way, and if a majority of the whites votes another, that's sufficient to say that's polarized.

Q. Okay. Are you trying to determine the percentage of minority votes necessary to elect a candidate of choice?

A. No.

Q. Are you trying to predict electoral outcomes, necessarily?

A. No.

Q. Are you concerned with turnout?

* * * *

APPENDIX J

THE NATION.
Published on *The Nation* (http://www.thenation.com)

How the GOP Is Resegregating the South

January 31, 2012

This article was reported in partnership with The Investigative Fund at The Nation Institute.

North Carolina State Senator Eric Mansfield was born in 1964, a year before the passage of the Voting Rights Act, which guaranteed the right to vote for African-Americans. He grew up in Columbus, Georgia, and moved to North Carolina when he was stationed at Fort Bragg. He became an Army doctor, opening a practice in Fayetteville after leaving the service. Mansfield says he was always "very cynical about politics" but decided to run for office in 2010 after being inspired by Barack Obama's presidential run.

He ran a grassroots campaign in the Obama mold, easily winning the election with 67 percent of the vote. He represented a compact section of northwest Fayetteville that included Fort Bragg and the most populous areas of the city. It was a socioeconomically diverse district, comprising white and black and rich and poor sections of the city. Though his district had a black voting age population (BVAP) of 45 percent, Mansfield, who is African-American, lives in an old, affluent part of town that he estimates is 90 percent white. Many of his neighbors are also his patients.

But after the 2010 census and North Carolina's once-per-decade redistricting process—which Republicans control by virtue of winning the state's General Assembly for the first time since the McKinley

administration—Mansfield's district looks radically different. It resembles a fat squid, its large head in an adjoining rural county with little in common with Mansfield's previously urban district, and its long tentacles reaching exclusively into the black neighborhoods of Fayetteville. The BVAP has increased from 45 to 51 percent, as white voters were surgically removed from the district and placed in a neighboring Senate district represented by a white Republican whom GOP leaders want to protect in 2012. Mansfield's own street was divided in half, and he no longer represents most of the people in his neighborhood. His new district spans 350 square miles, roughly the distance from Fayetteville to Atlanta. Thirty-three voting precincts in his district have been divided to accommodate the influx of new black voters. "My district has never elected a nonminority state senator, even though minorities were never more than 45 percent of the vote," Mansfield says. "I didn't need the help. I was doing OK."

Mansfield's district is emblematic of how the redistricting process has changed the political complexion of North Carolina, as Republicans attempt to turn this racially integrated swing state into a GOP bastion, with white Republicans in the majority and black Democrats ill the minority for the next decade. "We're having the same conversations we had forty years ago in the South, that black people can only represent black people and white people can only represent white people," says Mansfield. "I'd hope that in 2012 we'd have grown better than that." Before this year, for example, there were no Senate districts with a BVAP of 50 percent or higher. Now there are nine. A lawsuit filed by the NAACP and other advocacy groups calls the redistricting maps "an intentional and cynical use of race that exceeds

what is required to ensure fairness to previously disenfranchised racial minority voters."

And it's not just happening in North Carolina. In virtually every state in the South, at the Congressional and state level, Republicans—to protect and expand their gains in 2010—have increased the number of minority voters in majority-minority districts represented overwhelmingly by black Democrats while diluting the minority vote in swing or crossover districts held by white Democrats. "What's Uniform across the South is that Republicans are using race as a central basis in drawing districts for partisan advantage," says Anita Earls, a prominent civil rights lawyer and executive director of the Durham-based Southern Coalition for Social Justice. "The bigger picture is to ultimately make the Democratic Party in the South be represented only by people of color." The GOP's long-term goal is to enshrine a system of racially polarized voting that will make it harder for Democrats to win races on local, state, federal and presidential levels. Four years after the election of Barack Obama, which offered the promise of a new day of postracial politics in states like North Carolina, Republicans are once again employing a Southern Strategy that would make Richard Nixon and Lee Atwater proud.

The consequences of redistricting in North Carolina—one of the most important swing states in the country—could determine who controls Congress and the presidency in 2012. Democrats hold seven of the state's thirteen Congressional seats, but after redistricting they could control only three—the largest shift for Republicans at the Congressional level in any state this year. Though Obama won eight of the thirteen districts, under the new maps his vote

would be contained in only three heavily Democratic districts—all of which would have voted 68 percent or higher for the president in 2008—while the rest of the districts would have favored John McCain by 55 percent or more. "GOP candidates could win just over half of the statewide vote for Congress and end up with 62 percent to 77 percent of the seats," found John Hood, president of the conservative John Locke Foundation.

The same holds true at the state level, where only 10 percent of state legislative races can be considered a tossup "If these maps hold, Republicans have a solid majority plus a cushion in the North Carolina House and Senate," says J. Michael Bitzer, a professor of political science at Catawba College. "They don't even need to win the swing districts." North Carolina is now a political paradox: a presidential swing state with few swing districts. Republicans have turned what Bitzer calls an "aberration"—the Tea Party wave of 2010—"into the norm."

Republicans accomplished this remarkable feat by drawing half the state's black population of 2.2 million people, who vote overwhelmingly for Democrats, into a fifth of all legislative and Congressional districts. As a result, black voters are twice as likely as white voters to see their communities divided. "The new North Carolina legislative lines take the cake for the most grotesquely drawn districts I've ever seen," says Jeff Wice, a Democratic redistricting lawyer in Washington.

According to data compiled by Bob Hall, executive director of Democracy North Carolina, precincts that are 90 percent white have a 3 percent chance of being split, and precincts that are 80 percent black have a 12 percent chance of being split, but precincts with a

BVAP between 15 and 45 percent have a 40 percent chance of being split. Republicans "systematically moved [street] blocks in or out of their precincts on the basis of their race," found Ted Arrington, a redistricting expert at the University of North Carolina, Charlotte. "No other explanation is possible given the statistical data." Such trends reflect not just a standard partisan gerrymander but an attack on the very idea of integration. In one example, Senate redistricting chair Bob Rucho admitted that Democratic State Senator Linda Garrou was drawn out of her plurality African-American district in Winston-Salem and into an overwhelmingly white Republican district simply because she is white. 'The districts here take us back to a day of segregation that most of us thought we'd moved away from," says State Senator Dan Blue Jr., who in the 1990s was the first African-American Speaker of the North Carolina House.

* * *

Nationwide, Republicans have a major advantage in redistricting heading into the November elections. The party controls the process in twenty states, including key swing states like Florida, Ohio, Michigan, Virginia and Wisconsin, compared with seven for Democrats (the rest are home to either a split government or independent redistricting commissions). Republicans control more than four times as many seats at the Congressional level, including two-thirds of the seventy most competitive races of 2010.

This gives the GOP a major opportunity to build on its gains from 2010. Today GOP Representative Paul Ryan, nobody's idea of a moderate, represents the median House district in America based on party

preference, according to Dave Wasserman, House editor of the Cook Political Report. That district will become two points more Republican after the current redistricting cycle. "The fact of a Republican wave election on the eve of redistricting means that Republican legislators are in far better shape to shore up that wave," says Justin Levitt, a redistricting expert at Loyola Law School. Though public dissatisfaction with GOP members of Congress is at an all-time high, Republican dominance of the redistricting process could prove an insurmountable impediment to Democratic hopes of retaking the House, where the GOP now has a fifty-one-seat edge. Speaker of the House John Boehner predicts that the GOP's redistricting advantage will allow the party to retain control of the House, perhaps for the next decade.

Aside from protecting vulnerable freshmen, which would count as a major victory even if the GOP didn't pick up any new seats, the party's biggest gains will come in the South. Though the region has trended Republican at the presidential level for decades, Democrats managed to hang on to the Statehouses (which draw the redistricting maps in most states) for a remarkable stretch of time. Before 2010, Democrats controlled five Statehouses (in Alabama, Arkansas, Louisiana, Mississippi, North Carolina) and one chamber in two (Kentucky and Virginia). Two years later, Republicans control every Southern Statehouse except the Arkansas legislature and Kentucky House.

Race has always been at the center of the Southern Strategy, though not always in ways you'd expect. In addition to pushing hot-button issues like busing and welfare to appeal to white voters, Southern Republicans formed an "unholy alliance" with black Southern

Democrats when it came to redistricting. In the 1980s and '90s, when white Democrats ruled the Statehouses, Republicans supported new majority-minority districts for black Democrats in select urban and rural areas in exchange for an increased GOP presence elsewhere, especially in fast-growing metropolitan suburbs. With Democrats grouped in fewer areas, Republicans found it easier to target white Democrats for extinction. Ben Ginsberg, a prominent GOP election lawyer, memorably termed the strategy "Project Ratfuck."

Republicans prepared for the 2010 election with an eye toward replicating and expanding this strategy. The Republican State Leadership Committee (RSLC) unveiled the Redistricting Majority Project (REDMAP) in 2010 to target Statehouse races and put Republicans in charge of redistricting efforts following the election. Ed Gillespie, former chair of the Republican National Committee, became the group's chair, while Chris Jankowski, a corporate lobbyist in Virginia, handled day-to-day operations. The group, which as a tax-exempt 527 could accept unlimited corporate donations, became the self-described "lead Republican Redistricting organization," taking over many of the functions of the RNC. The RSLC attracted six- and seven-figure donations from the likes of the US Chamber of Commerce, tobacco companies Altria and Reynolds American, Blue Cross and Blue Shield, the Karl Rove—founded American Crossroads and the American Justice Partnership, a conservative legal group that has been a partner of the American Legislative Exchange Council, a state-based conservative advocacy group. Funding from these corporate interests allowed the RSLC to spend $30 million on state races in 2010, including $1.2 million in North Carolina.

One of the group's largest fenders in North Carolina was Art Pope, a furniture magnate who has bankrolled much of the state's conservative movement. Pope's Variety Wholesalers gave $36,500 to the RSLC in July 2010. The RSLC then gave $1.25 million to a group called Real Jobs NC to run attack ads against Democrats. In total, Pope and Pope-supported entities spent $2.2 million on twenty-two state legislative races, winning eighteen. After the election, the GOP redistricting committees hired the RSLC's redistricting expert, Tom Hofeller, to redraw North Carolina's districts. He was paid with state dollars through the General Assembly budget. (Hofeller says he has also been "intensely involved" in this cycle's redistricting process in Alabama, Massachusetts, Texas and Virginia.)

Pope has long been "the moving force behind Republican redistricting efforts in North Carolina," says Dan Blue Jr. (Pope says he supports an independent state redistricting commission.) In 1992 Pope urged Blue, then Statehouse Speaker, to create twenty-six majority-minority districts. Blue refused, creating nineteen instead. Pope then sued him. "He seemed to believe that African-Americans were required to be represented by African-Americans," Blue says. Twenty years later, Hofeller enacted Pope's strategy. "The best recent example of success is in North Carolina," the RSLC wrote in a July 2011 blog post.

* * *

The strategy was repeated in other Southern states including Georgia, Louisiana and South Carolina, as Republicans created new majority-minority districts at the state level as a means to pack Democrats into as few as possible. They also increased the BVAP in existing majority-minority Congressional districts

held by Democrats like Jim Clyburn in South Carolina and Bobby Scott in Virginia, who have occupied their seats for almost two decades.

Yet this year, unlike in past cycles, the unholy alliance between white Republicans and black Democrats has dissolved. Stacey Abrams, the first African-American leader of the Georgia House, denounced the GOP plan to create seven new majority-minority districts in the Statehouse but eliminate the seats of nearly half the white Democrats. "Republicans intentionally targeted white Democrats, thinking that as an African-American leader I wouldn't fight against these maps because I got an extra number of black seats," she says. I'm not the chair of the 'black caucus.' I'm the leader of the Democratic caucus. And the Democratic caucus has to be racially integrated in order to be reflective of the state." Under the new GOP maps, Abrams says, "we will have the greatest number of minority seats in Georgia history and the least amount of power in modern history."

Democrats accounted for 47 percent of the statewide vote in Georgia in 2008 and 2010 but, thanks to redistricting, can elect just 31 percent of Statehouse members. Abrams is especially upset that Republicans pitted incumbent white Democrats against incumbent black Democrats in four House districts in Atlanta, which she sees as an attempt to divide the party through ugly racial politics. They placed whites who represented majority-minority districts against blacks who represented majority-minority districts and enhanced the number of minority voters in those districts in order to wipe the white Democrats out," she explains. The new districts slither across the metropolis to pick up as many black voters as possi-

ble. Abrams says the new maps "look like a bunch of snakes that got run over."

The same thing happened in the Georgia Senate, where Republicans targeted State Senator George Hooks, who has been in the body since 1991 and is known as the "dean of the Senate." Hooks represented the peanut fanning country of rural Southwest Georgia, including Plains, the hometown of Jimmy Carter. Republicans dismantled his district, which had a BVAP of 43 percent, and created a new GOP district in North Georgia with a BVAP of 8 percent. They moved the black voters in his district into two adjoining majority-minority districts and two white Republican districts, and pitted Hooks against an incumbent black Democrat in a district that is 59 percent black. His political career is likely finished.

The GOP similarly took aim at Representative John Barrow, the last white Democrat from the Deep South in the US House. Republicans increased the BVAP in three of the four majority-minority Congressional districts represented by Georgia Democrats but decreased the BVAP from 42 to 33 percent in Barrow's east Georgia seat, moving 41,000 African-Americans in Savannah out of his district. Just to be sure, they also drew Barrow's home out of the district as well. Based on population shifts—Georgia gained one new seat from the 2010 census—the district could have become a new majority-minority district, but instead it's much whiter and thus solidly Republican.

As a consequence of redistricting, Republicans could control ten of Georgia's fourteen Congressional districts, up from eight in 2010, and could hold a two-thirds majority in the State Legislature, which would allow the party to pass constitutional amendments

without a single Democratic vote. When the dust settles, Georgia and North Carolina could send twenty Republicans, five black Democrats and two white Democrats to the US House. That's a generous number of Democrats compared with Alabama, Louisiana, Mississippi and South Carolina, which each have only one Democratic Representative in Congress—all of them black, from majority-minority districts.

In 1949 white Democrats controlled 103 of 105 House seats in the fanner Confederacy. Today the number is sixteen of 131, and it could reach single digits after 2012. "I should be stuffed and put in a museum when I pass away," says Representative Steve Cohen, a white Democrat who represents a majority-minority district in Memphis, "and people can say, 'Yes, a white Southern Democrat once lived here.'"

Unlike the Republican Party, which is 95 percent white in states like Georgia, North Carolina and South Carolina, the Democratic Party can thrive only as a multiracial coalition. The elimination of white Democrats has also crippled the political aspirations of black Democrats. According to a recent report from the Joint Center for Political and Economic Studies, only 4.8 percent of black state legislators in the South serve in the majority. "Black voters and elected officials have less influence now than at any time since the civil rights era," the report found. Sadly, the report came out before all the redistricting changes had gone into effect. By the end of this cycle, Republicans in Georgia, South Carolina and Tennessee could have filibuster-proof majorities in their legislatures, and most white Democrats in Alabama and Mississippi (which haven't completed redistricting yet) could be wiped out.

* * *

Texas, a state not known for subtlety, chose to ignore its rapidly growing minority population altogether. One of four majority-minority states, Texas grew by 4.3 million people between 2000 and 2010, two-thirds of them Hispanics and 11 percent black. As a result, the state gained four Congressional seats this cycle. Yet the number of seats to which minority voters could elect a candidate declined, from eleven to ten. As a result, Republicans will pick up three of the four new seats. 'The Texas plan is by far the most extreme example of racial gerrymandering among all the redistricting proposals passed by lawmakers so far this year," says Elisabeth MacNamara, president of the League of Women Voters.

As in the rest of the South, the new lines were drawn by white Republicans with no minority input. As the maps were drafted, Eric Opiela, counsel to the state's Congressional Republicans, referred to key sections of the Voting Rights Act as "hocus-pocus." Last year the Justice Department found that the state's Congressional and Statehouse plans violated Section 5 of the VRA by "diminishing the ability of citizens of the United States, on account of race, color, or membership in a language minority group, to elect their preferred candidates of choice." (Texas has lost more Section 5 enforcement suits than any other state.)

Only by reading the voluminous lawsuits filed against the state can one appreciate just how creative Texas Republicans had to be to so successfully dilute and suppress the state's minority vote. According to a lawsuit filed by a host of civil rights groups, "even though Whites' share of the population declined from 52 percent to 45 percent, they remain the majority in 70 percent of Congressional Districts." To cite just

one of many examples: in the Dallas-Fort Worth area, the Hispanic population increased by 440,898, the African-American population grew by 152,825 and the white population fell by 156,742. Yet white Republicans, a minority in the metropolis, control four of five Congressional seats. Despite declining in population, white Republicans managed to pick up two Congressional seats in the Dallas and Houston areas. In fact, whites are the minority in the state's five largest counties but control twelve of nineteen Congressional districts.

Based on these disturbing facts, a DC District Court invalidated the state's maps and ordered a three-judge panel in San Antonio to draw new ones that better accounted for Texas's minority population, which improved Democratic prospects. The Supreme Court, however, recently ruled that the San Antonio court must use the state's maps as the basis for the new districts, at least until a separate three-judge panel in Washington decides whether the maps violate the VRA. Final arguments will take place January 31, in a case that could have far-reaching ramifications for the rights of minority voters not just in Texas but across the South.

* * *

In a recent speech about voting rights at the LBJ presidential library in Austin, Attorney General Eric Holder noted that "no fewer than five lawsuits" are challenging Section 5 of the Voting Rights Act, which he called the "keystone of our voting rights laws." Section 5 requires that states covered by the act receive pre-clearance from the Justice Department or a three-judge District Court in Washington for any election law changes that affect minority voters.

Conservatives want to scrub this requirement. In a 2009 decision, the Supreme Court stopped short of declaring Section 5 unconstitutional but asserted that "the Act's preclearance requirements and its coverage formula raise serious constitutional questions." Justice Clarence Thomas, in a dissent, sought to abolish Section 5, arguing that intentional discrimination in voting "no longer exists." But in September a US District Court judge dismissed a challenge to Section 5, writing that it "remains a 'congruent and proportional remedy' to the 21st century problem of voting discrimination in covered jurisdictions." Voting rights experts expect the Supreme Court to address this issue in the coming year.

Meanwhile, just as they're seeking to declare Section 5 unconstitutional, Republicans are also invoking the VRA as a justification for isolating minority voters. "There's no question that's an unintended consequence," says Jankowski of the RSLC (which takes no position on Section 5). 'Republicans benefit from the requirement of these majority-minority districts. It has hurt the Democratic Party's ability to compete in the South." But Kareem Crayton, a redistricting expert at the UNC School of Law, argues that Republicans "clearly decided to ignore what federal law requires," noting that "a party that doesn't like federal mandates all of a sudden getting religion and talking about the importance of federal voting rights is more than a little ironic."

The VRA states that lawmakers must not diminish the ability of minority voters to participate in the political process or elect a candidate of their choice. 'There's nothing out there that says a state can't draw a 42 percent black district instead of a 50

percent black district as long as black voters still have the opportunity to elect a candidate of choice," argues Paul Smith, a prominent redistricting lawyer at Jenner & Block in Washington. The VRA, in other words, did not compel Republicans to pack minority voters into heavily Democratic districts. "Using the Voting Rights Act to justify racial discrimination is anathema to the purpose of the Voting Rights Act," says Stacey Abrams.

But also difficult for voting rights advocates to prove in federal court that packing minority voters into majority-minority districts diminishes their ability to elect candidates of choice. That's why the Justice Department has pre-cleared redistricting plans in every Southern state so Ear except Texas, much to the chagrin of civil rights activists. (Plaintiffs may have better luck in state court in places like North Carolina, where the court has acknowledged that civil rights groups have raised "serious issues and arguments about, among other things, the extent to which racial classifications were used.') "I have not been at all satisfied with the civil rights division of the Justice Department under the Obama administration," says Joe Reed, a longtime civil rights activist and redistricting expert in Alabama.

Wasserman says the Justice Department is saving its legal firepower to challenge restrictive voting laws passed by Republicans in half a dozen Southern states since 2010. The laws require proof of citizenship to register to vote, cut back on early voting, curtailed voter registration drives and required voters to produce a government-issued ID before casting a ballot. The department has already objected to South Carolina's voter ID law, since blacks are more likely than whites to lack the necessary ID.

"Every method that human ingenuity can conceive of is being used to undermine, dilute and circumvent the rights of minority voters to enjoy the franchise," says Reed.

The use of race in redistricting is just one part of a broader racial strategy used by Southern Republicans to not only make it more difficult for minorities to vote and to limit their electoral influence but to pass draconian anti-immigration laws, end integrated busing, drug-test welfare recipients and curb the ability of death-row inmates to challenge convictions based on racial bias. GOP presidential candidates have gotten in on the act, with Newt Gingrich calling President Obama "the best food-stamp president in American history." The new Southern Strategy, it turns out, isn't very different from the old one.

Source URL: http://www.thenation.com/article/165976/how-gop-resegregating-south

APPENDIX K

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 20. Elective Franchise
Subchapter I-A. Enforcement of Voting Rights
(Refs & Annos)
42 U.S.C.A. § 1973

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 20. Elective Franchise
Subchapter I-A. Enforcement of Voting Rights
(Refs & Annos)
42 U.S.C.A. § 1973c
(Effective: July 27, 2006)

§ 1973c. Alteration of voting qualifications; procedure and appeal; purpose or effect of diminishing the ability of citizens to elect their preferred candidates

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different

from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day

period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

APPENDIX L

[Insert Fold-In]

Summary of the 30 Majority-Black House Districts Drawn by 2011 Redistricting

House District	BVAP (2000 census) under Act 55 of 2003	Districts represented by black Representatives after 2004 election	Benchmark BVAP (2010 Census under Act 55)	Districts represented by black Representatives after 2010 election	Adopted BVAP	BVAP change from Benchmark to Adopted	Identified as Racial Gerrymander by Plaintiffs' Expert
12	**50.37%**	**Yes**	**47.96%**	**Yes**	**51.01%**	**3.05%**	**Yes**
23	**55.61%**	**Yes**	**49.08%**	**Yes**	**50.03%**	**0.95%**	**Yes**
25	56.36%	Yes	56.23%	Yes	55.85%	-0.38%	Yes
31	56.34%	Yes	56.65%	Yes	53.60%	-3.06%	No
41	57.11%	No	57.99%	No	55.19%	-2.80%	No
49	**50.00%**	**Yes**	**49.14%**	**Yes**	**51.95%**	**2.81%**	**Yes**
50	58.99%	No	58.82%	No	55.46%	-3.36%	No
51	61.28%	Yes	65.18%	Yes	62.28%	-2.90%	No
57	52.14%	No	53.61%	No	51.42%	-2.18%	Yes
59	55.89%	Yes	57.60%	Yes	60.67%	3.07%	Yes
62	58.20%	Yes	59.10%	Yes	54.55%	-4.55%	No
64	**50.77%**	**No**	**48.46%**	**Yes**	**51.98%**	**3.52%**	**Yes**
66	61.00%	Yes	62.31%	Yes	62.23%	-0.08%	No
70	60.18%	Yes	60.83%	Yes	60.78%	-0.06%	Yes
73	68.90%	Yes	72.96%	Yes	61.72%	-11.24%	No
74	58.27%	Yes	52.91%	Yes	55.34%	2.43%	Yes
76	56.26%	Yes	61.61%	Yes	58.77%	-2.84%	Yes
77	54.87%	Yes	55.13%	Yes	55.87%	0.74%	Yes
79	**22.16%**	**No**	**34.70%**	**Yes**	**51.44%**	**16.74%**	**Yes**
82	54.22%	Yes	50.45%	Yes	52.52%	2.07%	Yes
91	52.28%	Yes	55.22%	Yes	53.22%	-2.00%	Yes
95	63.28%	Yes	68.55%	Yes	62.64%	-5.92%	No
101	61.40%	Yes	62.33%	Yes	58.45%	-3.88%	No
102	**50.96%**	**Yes**	**43.85%**	**Yes**	**51.70%**	**7.85%**	**Yes**
103	**49.03%**	**Yes**	**48.45%**	**Yes**	**51.57%**	**3.12%**	**Yes**
109	55.24%	Yes	53.56%	Yes	51.85%	-1.71%	Yes
111	**54.94%**	**Yes**	**46.91%**	**Yes**	**51.77%**	**4.86%**	**Yes**
113	49.82%	Yes	53.66%	Yes	51.29%	-2.37%	Yes
121	50.73%	Yes	51.86%	Yes	54.20%	2.34%	Yes
122	**53.41%**	**No**	**48.91%**	**Yes**	**50.83%**	**1.92%**	**Yes**
Total: 124		24		27			21

* Districts in **bold** font elected black Representatives with majority-white populations.