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

DAWN CURRY PAGE, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No. 3:13cv678**
	)	
VIRGINIA STATE BOARD OF ELECTIONS, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendants Charlie Judd, in his capacity as Chairman of the Virginia State Board of Elections, Kimberly Bowers, in her capacity as Vice-Chair of the Virginia State Board of Elections, and Don Palmer, in his capacity as Secretary of the Virginia State Board of Elections (collectively "the SBE defendants"), by counsel, and pursuant to this Court's December 6, 2013 Order, state as follows for their Memorandum In Support Of Motion For Summary Judgment.

I. INTRODUCTION

On January 25, 2012, the Virginia General Assembly enacted new congressional district boundaries, a result of the redistricting process required by the U.S. and Virginia Constitutions. At that time, and during the entirety of the redistricting process, Virginia was a covered jurisdiction pursuant to Section 4 of the Voting Rights Act of 1965. Federal law required Virginia to comply with Section 5 of the Voting Rights Act by ensuring that Virginia's redrawn districts did not result in any retrogression in the ability of minority voters to elect a candidate of choice. As a result, federal law required Virginia's Third Congressional District - the sole majority-minority congressional district in Virginia - to remain a majority-minority district. In compliance with federal law as it applied to Virginia at that time, Virginia did just that.

Now, the plaintiffs argue that *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), retroactively renders unconstitutional Virginia's drawing of lines to maintain its only majority-minority district in compliance with Section 5 of the Voting Rights Act. But *Shelby County* has no retroactive effect and it does not render unconstitutional any earlier actions taken by the General Assembly to ensure compliance with the preclearance and non-retrogression requirements of Section 5. Thus, because Virginia drew the Third District's boundaries in a manner required by applicable federal law *at that time*, the plaintiffs cannot prevail.

Even assuming that the plaintiffs can somehow base their racial gerrymander claim on *Shelby County*, the plaintiffs still must meet their demanding burden of establishing that race was the "predominant motivation" of the General Assembly in drawing the 2012 plan and that the General Assembly ignored traditional redistricting principles. To meet this burden, the plaintiffs must exclude factors other than race that would explain the General Assembly's changes to district lines. But, based on the undisputed legislative facts, the plaintiffs cannot meet their burden because the General Assembly did not make race the predominant motivation in redistricting to the exclusion of traditional redistricting principles. And the plaintiffs' attempt to rely on *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997) in support of their racial gerrymander claim must fail due to the inherent differences between the Third District as it existed in 1997 and the current Third District.

II. STATEMENT OF UNDISPUTED LEGISLATIVE FACTS

1. Virginia's Third Congressional District was created as a majority African-American district in 1991. *See* Va. Code §§ 24.1-17.303 (1991); 24.1-17.303 (1992); 24.2-302 (1993); 1991 3rd Congressional District map as amended in 1992 and 1993 (collectively attached

as Ex. A). Virginia created the Third District with an African-American population of 63.98% and a black voting age population ("BVAP") of 61.17%. *Moon*, 952 F. Supp. at 1143-44.

2. In 1992, the Third District elected Virginia's first African-American Congressman since Reconstruction - and second African-American Congressman in Virginia's history - to office. *See* Congressman Bobby Scott - Biography, http://bobbyscott.house.gov/biography/ (last visited Dec. 18, 2013). Congressman Scott remains the incumbent in the Third District.

3. In 1997, a three-judge court ruled that the Third District, as it existed at that time, was racially gerrymandered in violation of the Equal Protection Clause of the Fourteenth Amendment. The court enjoined the holding of a congressional election in the Third District pending Virginia's enactment of a new redistricting plan. *Moon*, 952 F. Supp. at 1151.

4. In 1998, Virginia adopted a new redistricting plan in response to the *Moon* decision. *See* Va. Code § 24.2-302 (1998); 1998 Third Congressional District map (collectively attached as Ex. B).

5. In 2001, Virginia adopted a new redistricting plan based on the 2000 census. *See* Va. Code § 24.2-302.1 (2001); 2001-2011 Third Congressional District map (collectively attached as Ex. C).

6. In 2012, Virginia adopted the current, 2012 redistricting plan based on the 2010 census. *See* Va. Code § 24.2-302.2 (2013); 2012 Third Congressional District map (collectively attached as Ex. D).

7. To guide legislative deliberations for the 2012 redistricting plan, on March 25, 2011, the Senate Committee on Privileges and Elections adopted Committee Resolution No. 2, establishing goals and criteria concerning applicable legal requirements and policy objectives for

redrawing of Congressional districts. The adopted criteria included: 1) population equality among districts; 2) compliance with the laws of the United States and Virginia, including protections against the unwarranted retrogression or dilution of racial or ethnic minority voting strength; 3) contiguous and compact districts; 4) single member districts; and, 5) consideration of communities of interest as determined based on multiple factors. Population equality among districts and compliance with federal and state constitutional requirements and the Voting Rights Act of 1965 were given priority in the event of conflict among the criteria. *See* DOJ Submission Excerpts - Att. 4. (collectively attached as Ex. E).[1]

8. Virginia's population grew 13 percent, from 7,079,030 to 8,001,024, between 2000 and 2010. The pattern of growth was uneven across the Commonwealth. Thus, each of Virginia's congressional districts was altered both to bring each district into conformity with population criteria and to facilitate necessary changes in adjoining districts. *See* DOJ Submission Excerpts - Att. 3, at 1 (Ex. E). The ideal population for a congressional district based on the 2010 Census is 727,366. But deviations in seven of Virginia's eleven districts exceeded five percent. *Id.* at 3.

9. Prior to the 2012 redistricting, the Third District was 63,976 below the ideal population. *Id.* at 5. The neighboring Second District was the most underpopulated of the state's districts at 81,282 below the ideal size. *Id.* Some population was exchanged between the First, Second, and Third Districts to add population to the Third District, but most of the population required to erase the Third District deficit came from transferring 35,000 in Richmond and

[1] In addition to being a public record documenting legislative action, excerpts of Virginia's submission to the U.S. Department of Justice seeking preclearance of the 2012 redistricting plan under Section 5 are included in the plaintiffs' Complaint. Specifically, the Summary; Attachment 3: Statement of Change; Attachment 5: Statement of Anticipated Minority Impact; and Attachment 17: Legislative History of 2012 Virginia Congressional District Plan are all attached as Exhibit A to the plaintiffs' Complaint.

Henrico from the Seventh District, and transferring the City of Petersburg (39,000) from the Fourth District. *Id.* at 6. The shortfall in population in the Third District is offset by shifting the whole City of Petersburg from the Fourth to the Third district. Additional population from the Cities of Hampton, Norfolk, and Richmond and the County of Henrico also shifted to the Third. New Kent County was shifted from the Third District to the Seventh and fewer people from the City of Newport News and the Counties of New Kent and Prince George are assigned to the Third District. *See* DOJ Submission Excerpts - Att. 5, at 2 (Ex. E).

10. Regarding population equality, Virginia's congressional districts all are at 0.00 percent deviation. The Third District is one of 9 districts that have exactly the ideal population (727,366). *See* DOJ Submission Excerpts - Att. 3, at 9 (Ex. E).

11. Regarding compactness, the Supreme Court of Virginia has given "proper deference to the wide discretion accorded the General Assembly in its value judgment of the relative degree of compactness required when reconciling the multiple concerns of apportionment." *Jamerson v. Womack*, 244 Va. 506, 517 (1992). Thus, while statistical measures of compactness scores are not determinative as to Virginia's redistricting plans, the compactness scores for Virginia's 2012 redistricting plan are nearly identical to those of the prior, benchmark plan. *See* DOJ Submission Excerpts - Att. 3, at 10-11 (Ex. E).

12. Regarding locality splits, Virginia's 2012 plan split 14 localities, a reduction from the 19 localities split by the benchmark congressional plan.[2] All of the localities split by Virginia's 2012 plan were already split in the benchmark plan, including eight large localities with populations exceeding 100,000 (Chesterfield, Henrico, Fairfax and Prince William Counties

[2] These totals exclude three localities in each plan that technically are split but in which the entire locality population is in one district while one or more water blocks without population are in another district.

and the Cities of Hampton, Newport News, Norfolk, and Richmond). Virginia's 2012 plan reunited four smaller localities (Alleghany, Brunswick, and Caroline Counties and the City of Covington) and York County, which were split in the benchmark plan. *Id.* at 11.

13. Regarding precinct splits, the 2012 plan split 10 precincts across the state, a significant reduction from the 26 split precincts in the benchmark plan.[3] *Id.*

14. Regarding communities of interest beyond those reflected in localities and precincts, the General Assembly heard, considered, and balanced many points of view. Multiple House and Senate committee meetings and hearings were held throughout the state, allowing public input on Virginia's congressional and state plans. *See, e.g.*, Commonwealth of Virginia Division of Legislative Services, Redistricting 2010 - Redistricting Hearings and Meetings (Ex. F). Testimony and debates pointed out the wide variety of competing communities of interest, including those defined by geographic features such as mountain ranges and valleys, by economic character, by social and cultural attributes, and by services. *See* DOJ Submission Excerpts - Att. 3, at 11-12 (Ex. E).

15. Regarding partisan and incumbency considerations, no incumbents were placed in the same district and, with two exceptions that do not include the Third District, the 2012 plan retained 80 percent or more of the benchmark districts' core constituency population. *Id.* at 12, 15-16 (Tables 1 and 2) (Ex. E).

16. The election history reports for the benchmark plan and the 2012 plan show that the vote in Virginia's congressional districts aligns strongly with one or the other major political

[3] As in the case of split localities, these numbers exclude technically split precincts where all of the precinct's population is in one district and there is no population in the other district. Five such technically split precincts that do not affect any voters now exist along the James River, off Isle of Wight County and Chesapeake, in the Third District. *See* 2012 Third Congressional District map (Ex. D).

party. Alterations to the districts in the 2012 plan caused little or no change in the projected vote in about half the districts. The vote projection for the traditionally Democratic Third District reduced the Republican vote by three percent. The Republican vote is projected to increase by one to two percent in the traditionally Republican Fourth and Seventh Districts, both of which border the Third District. *Id.* at 12, 19 (Table 3) (Ex. E).

17. Population statistics based on congressional district boundaries under the benchmark plan reflected the need to add territory to the Third District so as to meet equal population requirements and the non-retrogression requirements of Section 5. Other factors came into play in the shaping of the district, including communities of interest, incumbency, and political considerations. The 2012 plan resulted in an increase in the Third District's BVAP from 53.1% to 56.3%. *See* DOJ Submission Excerpts - Att. 5, at 2 and Table 5.1 (Ex. E).

18. The U.S. Department of Justice determined that the 2012 plan does not effect any retrogression in the ability of minorities to elect candidates of choice under Section 5, granted Virginia preclearance, and allowed Virginia to proceed with the 2012 plan. Virginia obtained preclearance on March 14, 2012. *See* March 14, 2012 Preclearance Letter (Ex. G).

III. ARGUMENT

A. Standard Of Review.

Summary judgment is appropriate in the absence of any genuine issue of material fact where the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In such a motion, a defendant need not present evidence; it is sufficient to point to the lack of any genuine dispute as to material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). Where plaintiffs fail to establish an essential element of their case, all other facts are rendered immaterial, and entry of summary

judgment is required as a matter of law. *Id*; *see Laing v. Federal Express Corp.*, 703 F.3d 713, 722-23 (4th Cir. 2012) (holding that plaintiff's failure to present proof of racially discriminatory motive for plaintiff's termination entitled defendant employer to summary judgment).

In considering motions for summary judgment, a court may consider the motion and grant relief on the basis of legislative facts, legislative history, and other evidence subject to judicial notice. *See* Fed. R. Civ. P. 56(c)(1)(A) & (B); Fed. R. Evid. 201; *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 557-58 (4th Cir. 2013) ("[T]he government's purpose as stated in a legislative record may constitute a fact obtained from public record and subject to judicial notice" and a challenged law "and its legislative history [a]re legislative facts, the substance of which cannot be trumped upon judicial review" (quotation marks and citations omitted)); *see also Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993) ("Questions of . . . legislative history present legal issues that may be resolved by summary judgment").

B. The Plaintiffs Must Meet A Demanding Burden Of Proof.

In order for the plaintiffs to prevail, they must first establish that race was not just a factor, but "*the predominant factor*" motivating the General Assembly in drawing the 2012 plan and that the General Assembly ignored traditional redistricting principles. *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) ("*Cromartie II*"). The burden is on the plaintiffs to exclude factors other than race that would explain the changes made by the General Assembly to Virginia's congressional districts. *Id.* ("*Plaintiffs must show* that a facially neutral law is unexplainable on grounds other than race.") (emphasis added, quotations and citations omitted). This burden on plaintiffs who attack the constitutionality of a district is a "demanding one." *Id.* (quoting *Miller v. Johnson*, 515 U.S. 900, 928 (1995) (O'Connor, J., concurring)).

Moreover, plaintiffs cannot seek to invoke strict scrutiny without first carrying their threshold burden. A court deciding a racial gerrymandering claim does not even begin to apply strict scrutiny unless the plaintiffs first establish that race is the "dominant and controlling" consideration in drawing district lines. *Backus v. South Carolina,* 857 F. Supp. 2d 553, 559 (D.S.C. 2012), *aff'd* 133 S.Ct. 156 (2012) (three judge court) (citing *Shaw v. Hunt,* 517 U.S. 899, 905 (1996)); *see also Chen v. City of Houston,* 206 F.3d 502, 506 (5th Cir. 2000) ("To invoke strict scrutiny, [plaintiffs] must show that the State has relied on race in *substantial* disregard of customary and traditional redistricting practices." (citing *Miller,* 515 U.S. at 928 (O'Connor, J. concurring)).

The demanding burden placed on the plaintiffs arises from longstanding judicial deference to the legislative branch as to redistricting, and recognition that the task of drawing district lines falls within a legislature's sphere of competence. *Cromartie II,* 532 U.S. at 243 (citing *Miller,* 515 U.S. at 915.) The legislature is presumed to have acted in good faith. *Miller,* 515 U.S. at 916. And courts traditionally are reluctant "to interfere with the delicate and politically charged area of legislative redistricting." *Chen,* 206 F.3d at 505 (citing *Reynolds v. Sims,* 377 U.S. 533 (1964); *Hunt v. Cromartie,* 526 U.S. 541 (1999) ("*Cromartie I*")). "Hence, the legislature must have discretion to exercise the political judgment necessary to balance competing interests and courts must exercise *extraordinary caution* in adjudicating claims that a State has drawn district lines on the basis of race." *Cromartie II,* 532 U.S. at 242 (internal quotations and citations omitted) (emphasis added by *Cromartie II*).

Finally, it is critical to note that legislatures are not only permitted, but also often *required by law* to consider race as a factor in the drawing of district lines. *Id.* at 241; *Backus,* 857 F. Supp. 2d at 565 ("[R]ace 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."). And courts that have taken on the task of redrawing districts have specifically acknowledged the need to consider race in their own efforts at drawing lines:

> [W]here the Voting Rights Act requires that a majority-minority district be drawn or maintained, there are points in the drawing of the district *where race must predominate*, in the sense that we choose to draw the line in one particular direction over another because of race, though either direction would be consistent with traditional districting principles.

Colleton v. McConnell, 201 F. Supp. 2d 618, 640 (D.S.C. 2002)) (emphasis added).

C. *Shelby County* Does Not Retroactively Render Unconstitutional Acts Taken By The General Assembly To Ensure Compliance With Section 5 Of The Voting Rights Act As It Applied To Virginia At That Time.

The plaintiffs allege that, as of the Supreme Court's decision in *Shelby County*, Virginia's Third District - the current boundaries of which were formally enacted into law a year and six months before *Shelby County* was decided - became unconstitutional because Virginia is no longer a covered jurisdiction under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The plaintiffs concede that, when Virginia enacted its Congressional Plan, Virginia was a covered jurisdiction under Section 5 and the Congressional Plan was subject to preclearance requirements before it could take effect. Compl. ¶¶ 2, 35. The plaintiffs further concede that, to obtain preclearance, Virginia was required to demonstrate that its Congressional Plan avoided retrogression in the ability of minorities to elect candidates of choice. *Id.* ¶ 3, 5.[4] Accordingly, only as a result of *Shelby County* did the plaintiffs bring this gerrymander claim three months

[4] The defendants dispute the characterizations in paragraph 3 that "Virginia has used Section 5 as a justification to racially gerrymander congressional districts" and in paragraph 5 that, because Virginia is no longer a covered jurisdiction, "Virginia can no longer seek refuge in Section 5 as an excuse to racially gerrymander Congressional District 3." But, by these allegations, as well as the plaintiffs' representations through counsel, the plaintiffs have acknowledged that Section 5 expressly required Virginia to consider race in the drawing of district lines.

after the Court's decision. But *Shelby County* has no retroactive effect and it does not render unconstitutional any earlier actions taken by the General Assembly to ensure compliance with the preclearance and non-retrogression requirements of Section 5. Thus, because Virginia drew the Third District's boundaries in a manner required by applicable federal law *at that time*, the plaintiffs cannot prevail.

1. Section 5 required Virginia to seek preclearance, ensuring non-retrogression in the ability of minorities to elect candidates of choice.

Section 5 requires certain States, deemed to be covered jurisdictions under Section 4, to obtain federal permission before enacting any law related to voting - including changes to district lines. 42 U.S.C. § 1973c(a); *Shelby County*, 133 S. Ct. at 2618. Virginia was deemed to be a covered jurisdiction. Thus, prior to enactment of Virginia's Congressional Plan in 2012, Virginia was required to seek "preclearance" by way of either a declaratory judgment from the United States District Court for the District of Columbia or a submission to the Attorney General of the United States. *See* 42 U.S.C. 1973c(a). *See also South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (holding that the Voting Rights Act represents a valid exercise of congressional authority with which covered jurisdictions must comply).

The purpose of preclearance was to ensure that any new law related to voting "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 4(f)(2) [regarding language minority groups]." 42 U.S.C. 1973c(a). Section 5 further provides that:

> [a]ny . . . 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 4(f)(2) [regarding language minority groups] to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

42 U.S.C. 1973c(b). Thus, any "retrogression" in the ability of minorities to elect their preferred candidates of choice will not be granted preclearance and cannot be enacted. A new districting plan that has the effect of reducing the number of minority group representatives would be considered retrogressive. *See, e.g., Ketchum v. Byrne*, 740 F.2d 1398, 1402 n.2 (7th Cir. 1984) ("'Retrogression' may be defined as a decrease in the new districting plan or other voting scheme from the previous plan or scheme in the absolute number of representatives which a minority group has a fair chance to elect.") (citing *Beer v. United States*, 425 U.S. 130, 141 (1976); *Rybicki v. State Board of Elections of the State of Illinois*, 574 F. Supp. 1082, 1108-09 and nn.74 & 75 (N.D. Ill. 1982)).

2. Virginia complied with Section 5 by maintaining the Third District as a majority-minority district.

After population equality, the second criterion Virginia adopted for drawing district lines was compliance with applicable federal and state laws, expressly including the Voting Rights Act. *See* DOJ Submission Excerpts - Att. 4 (Ex. E). And to the extent there was a conflict in criteria, population equality and compliance with the Voting Rights Act were given priority. *Id*. As noted above, courts have acknowledged that compliance with Section 5 requires both states - and even courts themselves - to consider race in drawing district lines. *See Cromartie II*, 532 U.S. at 241; *Backus*, 857 F. Supp. 2d at 565; *Colleton*, 201 F. Supp. 2d at 640.

Section 5 compliance is determined by comparing proposed new districts to the existing benchmark districts. *Riley v. Kennedy*, 553 U.S. 406 (2008). Virginia's 2012 plan complied with the requirements of Section 5 by maintaining Virginia's only majority-minority district. Virginia further ensured that it did not retrogress under Section 5 by retaining minority strength in the redrawn Third District comparable to the minority strength of the previous Third District

under the 2010 Census. *See* DOJ Submission Excerpts - Att. 5, at 1 (Ex. E). As a result of these efforts, Virginia obtained preclearance from the U.S. Department of Justice on March 14, 2012. *See* March 14, 2012 Preclearance Letter (Ex. G).

3. *Shelby County* has no retroactive effect on Virginia's compliance with Section 5.

With regard to redistricting, *Shelby County's* effect is prospective not retroactive. In other words, during the next redistricting process, Virginia will no longer be required to seek preclearance under Section 5 because the Supreme Court struck down the coverage formula in Section 4 and Virginia is no longer a covered jurisdiction. Virginia's new lines will be effective upon enactment of a redistricting plan. *Shelby County* has no effect on the constitutionality of Virginia's compliance with Section 5 in 2012, when Section 5 applied to Virginia because it was a covered jurisdiction.

It is dispositive that, at the time Virginia redrew the boundaries of the Third District and enacted them into law on January 25, 2012, Virginia was required to maintain the Third District as an existing majority-minority district such that there was no retrogression in the ability of minorities to elect a candidate of their choice. In redrawing Virginia's congressional districts, the General Assembly ensured compliance with federal law as it applied at that time, prior to *Shelby County*. Thus, there can be no constitutional violation and the plaintiffs cannot prevail on their theory that *Shelby County* provides a basis for a racial gerrymander claim.

D. The Plaintiffs Cannot Meet Their Demanding Burden Of Proof Because The Undisputed Legislative Facts Establish That The General Assembly Considered Traditional Districting Principles When Establishing Virginia's 2012 Congressional District Plan And The Third District In Particular.

Even assuming that the plaintiffs can somehow base their racial gerrymander claim on *Shelby County*, the plaintiffs still must meet their demanding burden of establishing that race was the "predominant factor" motivating the General Assembly in drawing the 2012 plan and that the

General Assembly ignored traditional redistricting principles. *Cromartie II*, 532 U.S. at 241. To meet this burden, the plaintiffs must exclude factors other than race that would explain the General Assembly's changes to district lines. *Id.* But, based on the undisputed legislative facts, the plaintiffs cannot meet their burden because the General Assembly did not make race the predominant motivation in redistricting to the exclusion of traditional redistricting principles. Instead, the undisputed legislative facts demonstrate the General Assembly's consideration of such principles, including but not limited to, the following examples.

Congressional districts must have equal populations. *See Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969); *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). As a result of uneven population growth across the state, each of Virginia's congressional districts was altered both to bring each district into conformity with equal population criteria and to facilitate necessary changes in adjoining districts. *See* DOJ Submission Excerpts - Att. 3, at 1 (Ex. E). The ideal population for a congressional district based on the 2010 Census was 727,366. *Id.* at 3. After redistricting, Virginia's congressional districts are all at 0.00 percent deviation, demonstrating Virginia's consideration of this traditional redistricting principle and compliance with applicable law. Prior to redistricting, the Third District was 63,976 below the required population. *Id.* at 5. Now it has exactly the ideal population (727,366). *Id.* at 9. The primary source for the Third District's added population for purposes of equality was the entire city of Petersburg, in and of itself a community of interest.

Regarding its shape and geographic features, the Third District maintains contiguity by land, by water (primarily along the James River) and by bridges across the James. *See* 2012 Third Congressional District map (Ex. D). And it maintains substantially the same core jurisdictions as both the benchmark plan and Virginia's 1998 plan. *Compare* 2012 Third

Congressional District map (Ex. D), 2001-2011 Third Congressional District map (Ex. C), and 1998 Third Congressional District map (Ex. B).

As for compactness, the Supreme Court of Virginia has given "proper deference to the wide discretion accorded the General Assembly in its value judgment of the relative degree of compactness required when reconciling the multiple concerns of apportionment." *Jamerson v. Womack*, 244 Va. 506, 517 (1992). Thus, while statistical measures of compactness scores are not determinative as to Virginia's redistricting plans, the compactness scores for Virginia's 2012 redistricting plan are nearly identical to those of the prior, benchmark plan. *See* DOJ Submission Excerpts - Att. 3, at 10-11. Visually, the Third District now appears at least as compact as its benchmark, if not more so with the loss of New Kent County, thereby establishing a smoother line along the western side of the district's northern boundary. *Compare* 2001-2011 Third Congressional District map (Ex. C) to 2012 Third Congressional District map (Ex. D).

Regarding locality and precinct splits, Virginia's 2012 plan split 14 localities, a reduction from the 19 localities split by the benchmark congressional plan.[5] All of the localities split by Virginia's 2012 plan were already split in the benchmark plan and Virginia's 2012 plan reunited some localities that were split in the benchmark plan. *See* DOJ Submission Excerpts - Att. 3, at 11. The 2012 plan split 10 precincts across the state, a significant reduction from the 26 split precincts in the benchmark plan.[6] *Id.*

[5] These totals exclude three localities in each plan that technically are split but in which the entire locality population is in one district while one or more water blocks without population are in another district.

[6] As in the case of split localities, these numbers exclude technically split precincts where all of the precinct's population is in one district and there is no population in the other district. Five such technically split precincts that do not affect any voters now exist along the James River, off Isle of Wight County and Chesapeake, in the Third District. *See* 2012 Third Congressional District map (Ex. D).

As for communities of interest beyond those reflected in localities and precincts, the General Assembly heard, considered, and balanced many points of view. Multiple House and Senate committee meetings and hearings were held throughout the state, allowing public input on Virginia's congressional and state plans. *See, e.g.*, Commonwealth of Virginia Division of Legislative Services, Redistricting 2010 - Redistricting Hearings and Meetings (Ex. F). Communities of interest considerations for the Third District included the commonalities in urban areas such as the cities of Richmond, Petersburg, Hampton, Newport News, Portsmouth and Norfolk, as well as communities of interest with regard to the James River. *See* 2012 Third Congressional District map (Ex. D).

Regarding partisan and incumbency considerations, no incumbents were placed in the same district and, with two exceptions that do not include the Third District, the 2012 plan retained 80 percent or more of the benchmark districts' core constituency population - the Third District retained 83%. *See* DOJ Submission - Att. 3, at 12, 15-16 (Tables 1 and 2) (Ex. E). The election history reports for the benchmark plan and the 2012 plan show that the vote in Virginia's congressional districts aligns strongly with one or the other major political party. Alterations to the districts in the 2012 plan caused little or no change in the projected vote in about half the districts. The vote projection for the traditionally Democratic Third District reduced the Republican vote by three percent. The Republican vote is projected to increase by one to two percent in the traditionally Republican Fourth and Seventh Districts, both of which border the Third District. *Id.* at 12, 19 (Table 3) (Ex. E).

E. The Plaintiffs' Reliance On *Moon v. Meadows* Is Misplaced Because The Current Third District Is Substantially Different Than The 1993 Third District.

In an effort to support their racial gerrymander claim, the plaintiffs assert that "[t]he current Congressional District 3 contains only slight variations from Congressional District 3 drawn in 1991 and 2001 and found to be an unconstitutional gerrymander in 1997 [by *Moon v. Meadows*]." Compl. ¶ 30. The undisputed legislative facts demonstrate that the plaintiffs are wrong, and their reliance on *Moon v. Meadows* is misplaced. The Third District as it existed when the *Moon* court examined it had a BVAP of 61.17%. *Moon,* 952 F. Supp. at 1143-44. The current Third District's BVAP is 56.3%. *See* DOJ Submission - Attachment 5: Statement of Anticipated Minority Impact, at 2 and Table 5.1. Moreover, the Third District examined by the *Moon* court had a much more irregular shape than the current Third District. *Compare* 1991 3rd Congressional District map (Ex. A) to 2012 Third Congressional District map (Ex. D). In 1997, the largest geographic portion of the Third District stretched from Essex County in the north to Charles City County in the south, with tentacles stretching from Charles City County in a northwest direction into Richmond, a southwest direction into Petersburg, a southern direction into Surry County, and a southeast direction into Norfolk. Today, the Third Congressional District essentially follows the James River from Richmond in the northwest and Petersburg in the southwest to Norfolk in the southeast. Moreover, the Third District considered by the *Moon* court had no existing majority-minority district as a benchmark to determine retrogression under Section 5. *Moon,* 952 F.Supp. at 1144. The current Third District does. Thus, as a result of the obvious differences between the Third District as it existed in *Moon* and the current Third District, the *Moon* decision is inapposite and the plaintiffs' reliance on it is misplaced.

IV. CONCLUSION

For the foregoing reasons, the defendants respectfully request that their Motion for Summary Judgment be granted and that the plaintiffs' Complaint be dismissed with prejudice.

Respectfully submitted,

By: _____/s/ Mike F. Melis_____

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of December, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing (NEF) to the following:

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