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

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

INTERVENOR-DEFENDANTS VIRGINIA REPRESENTATIVES'
MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs ask this Court to dismantle the only congressional district in Virginia where black voters have the ability to elect the candidate of their choice. But Plaintiffs cannot satisfy their "demanding" burden, *Easley v. Cromartie*, 532 U.S. 234, 241 (2001), to prove that District 3 is unconstitutional under *Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*), for one simple reason: they have *conceded* that the General Assembly acted constitutionally when it enacted the current congressional districting map ("the Enacted Plan") and preserved District 3 as a majority-black district, as Section 5 of the Voting Rights Act required. Since Plaintiffs do not dispute that District 3's racial composition was driven by the legitimate purpose of Section 5 compliance, they inherently and obviously cannot show that an illegitimate use of "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without" District 3. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Absent such a showing, Plaintiffs' *Shaw* claim fails, and Defendants are entitled to summary judgment. *See, e.g.*, *Easley*, 532 U.S. at 241.

Plaintiffs' invocation of the Supreme Court's post-enactment decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (June 25, 2013), fails to address, much less overcome, these obvious and fatal implications of their concession. Plaintiffs' theorize that, by relieving Virginia of its Section 5 obligations with respect to *future* changes to its election laws, *Shelby County* somehow *retroactively* rendered the constitutional Enacted Plan unconstitutional and transformed the General Assembly's constitutional, non-discriminatory purpose into an unconstitutional, discriminatory purpose.

This argument is as meritless as it is novel. To belabor the seemingly obvious, whether a legislature had an impermissible racial purpose in enacting a law is judged by whether the

legislature had an impermissible racial purpose in enacting the law; *i.e.*, its purpose when the law was enacted. If the legislature's purpose at enactment was constitutional, the law complies with the Constitution. If *subsequent* events *change* the constraints that confronted the legislature at the time of enactment, this obviously says nothing about the purpose underlying the law as enacted. Under Plaintiffs' contrary theory, if Justice Kennedy had voted with the four dissenting justices in *Shelby County* to uphold Section 5 in 2013, this would somehow mean that the General Assembly had a constitutional purpose in 2012. But since five Justices invalidated Section 5 in 2013, this somehow means that the General Assembly had an illegitimate racial purpose in 2012. Again, however, the General Assembly's purpose must be assessed by what it did, not by what the Supreme Court subsequently did.

In short, nothing in *Shelby County* obligates the General Assembly to do *anything*, much less to interject mid-decade voter confusion and instability into Virginia's election system by undoing the Enacted Plan that was adopted less than two years ago and constitutionally used for the 2012 election. And, to the extent Plaintiffs ask the Court to examine the legally irrelevant question of the purpose underlying the 2013 General Assembly's *inaction* regarding District 3 after *Shelby County*, there is an obvious non-racial purpose for eschewing "corrective" action—the serious costs, disruption and voter confusion entailed in altering districts in the middle of a decade.

Even if Plaintiffs could overcome their lack of a cognizable legal theory, they have not adduced evidence sufficient to entitle them to a trial. Most fundamentally, even now, Plaintiffs have refused to disclose their proposed alternative to District 3 and, thus, cannot prove liability or entitlement to any specific remedy. Plaintiffs' adamant refusal to even generally describe what a constitutionally compliant District 3 should look like, in the face of the Court's Order

directing them to disclose the "remedial measures sought . . . if they were to prevail in this action," Order at 2 (DE 27), is particularly inexcusable gamesmanship, because Plaintiffs have now revealed that their purported concern about District 3 is simply a pretext to accomplish a *state-wide redistricting*. Remarkably, after having assured the Court that they are seeking a modest remedy to District 3 that can be adjudicated in *one day*, Plaintiffs' reply brief on remedies reveals that they actually *oppose* a remedy that simply "correct[s] the identified departure from the Constitution" in that District, but instead will seek a "*wide reaching*" remedy where the Court will "'mak[e] *substantial changes* to the existing plan'" that go far beyond District 3. Pls. Reply In Support Of Brief On Available Remedies at 12 (quoting *Abrams v. Johnson*, 521 U.S. 74, 85–86 (1997)) (emphases added) (DE 34) ("Pls.' Reply"). In short, under Plaintiffs' theory, a state legislature that enacted a concededly constitutional law will have its sovereign redistricting prerogative usurped by the federal judiciary not only with respect to the challenged district, but for virtually all districts in the state. Simply stating this outlandish proposition should suffice to refute it.

Finally, even if Plaintiffs could overcome their lack of a legally cognizable theory, the record already demonstrates that Plaintiffs cannot adduce evidence to satisfy their heavy burden to prove that the General Assembly "subordinated traditional race-neutral districting principles . . . to racial considerations." *Easley*, 532 U.S. at 241. Another three-judge court in the Fourth Circuit recently granted summary judgment to the defendants in a *Shaw* case involving a much more bizarrely shaped district than District 3 because the plaintiffs could not show "that the State moved African-American voters from one district to another because they were African-American and not simply because they were Democrats." *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 901 (D. Md. 2011) (three-judge court), *summ. aff'd* 133 S. Ct. 29 (2012). Plaintiffs have

completely ignored partisan politics and other "non-racial reasons," such as "incumbent protection" and preserving the cores of existing districts, that explain the shape and composition of District 3. *Id.* at 903. Thus, in all events, the Court should grant Defendants summary judgment and dismiss this case.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Virginia was a covered jurisdiction under Section 5 of the Voting Rights Act from 1965 until the Supreme Court's decision in *Shelby County*. *See Shelby County*, 133 S. Ct. at 2620–31.

2. Section 5 required Virginia to submit any changes to its election or voting laws to federal preclearance. *See* 42 U.S.C. § 1973c.

3. Congress amended Section 5 in 2006. *See Shelby County*, 133 S. Ct. at 2621.

4. As amended in 2006, Section 5 prohibited Virginia from enacting any change to its election or voting laws with "any discriminatory purpose." 42 U.S.C. § 1973c(c).

5. As amended in 2006, Section 5 also prohibited Virginia from enacting any change to its election or voting laws that "diminish[ed] the ability" of minorities "to elect their preferred candidates of choice." *Id.* §§ 1973c(b), (d).

6. District 3 is the only congressional district in Virginia where black voters have the ability to elect their candidate of choice. *See* Statement Of Anticipated Minority Impact, Virginia Preclearance Submission, *available at* http://redistricting.dls.virginia.gov/2010/Data/Ref/DOJSubmission2012/Attachment_5_cong.pdf (last visited Dec. 18, 2013) (Ex. A); Virginia Members, available at https://www.govtrack.us/congress/members/VA (last visited Dec. 18, 2013) ("Virginia Members").

7. District 3 is represented by Congressman Bobby Scott, a Democrat. *See* Virginia Members.

8. District 3 is surrounded by Districts 1, 2, 4, and 7 in the current congressional districting map ("the Enacted Plan"). *See* Enacted Plan Map (Ex. B).

9. District 1 is represented by Congressman Robert Wittman, a Republican. *See* Virginia Members.

10. District 2 is represented by Congressman Scott Rigell, a Republican. *See id.*

11. District 4 is represented by Congressman Randy Forbes, a Republican. *See id.*

12. District 7 is represented by Congressman Eric Cantor, a Republican. *See id.*

13. District 3 was created as a majority-black district in 1991. *See Moon v. Meadows*, 952 F. Supp. 1141, 1144 (E.D. Va. 1997) (three-judge court), *summ. aff'd*, 521 U.S. 1113 (1997).

14. The 1991 version of District 3 encompassed New Kent, King William, King and Queen, and Essex counties. *See* 1991 District 3 Map (Ex. C).

15. The black voting-age population ("BVAP") in the 1991 version of District 3 was 61.17%. *See Moon*, 952 F. Supp. at 1144.

16. In 1997, a three-judge court invalidated the 1991 version of District 3 as an unconstitutional racial gerrymander, and allowed the General Assembly the opportunity to enact a remedial District 3. *See id.* at 1151.

17. The General Assembly enacted a new districting plan and new District 3 in 1998. *See* Va. Stat. § 24-302 (1998 Version) (Ex. G).

18. Neither Plaintiffs nor any other party challenged the 1998 version of District 3 under Section 2 of the Voting Rights Act or as a racial gerrymander.

19. The General Assembly enacted a new congressional districting plan in 2001 to reflect population shifts shown in the 2000 Census. *See* Va. Stat. § 24-302.1 (2001 Version) (Ex. H).

20. The 2001 plan preserved District 3 in "similar" form to the 1998 version of District 3. Compl. ¶ 29; *compare* 1998 District 3 Map (Ex. D), *with* 2001 District 3 Map (Ex. E).

21. The 2001 plan received preclearance under Section 5. *See* Va. Stat. § 24-302.1 note (2001 Version).

22. Neither Plaintiffs nor any other party challenged the 2001 version of District 3 under Section 2 of the Voting Right Act or as a racial gerrymander.

23. The 2010 Census revealed population shifts in Virginia that required a new districting plan. *See* 2001 Congressional Districts, *available at* http://redistricting.dls.virginia.gov/2010/Data/2010%20PL94-171/current%20congress.pdf (last visited Dec. 18, 2013) (Ex. I).

24. In particular, Districts 2, 3, 5, 6, 8, and 9 were underpopulated, and Districts 1, 4, 7, 10, and 11 were overpopulated. *See id.*; Statement Of Change, Virginia Preclearance Submission, *available at* http://redistricting.dls.virginia.gov/2010/Data/Ref/DOJSubmission 2012/Attachment_3_Cong.pdf (last visited Dec. 18, 2013) (Ex. J).

25. The Virginia Senate approved a number of criteria for drawing the new congressional districting plan, including achieving "population equality"; complying with the Voting Rights Act; drawing "contiguous" and "compact" districts; uniting "communities of interest"; and accommodating "incumbency considerations." Sen. Comm. On Privileges And Elections Resolution No. 2—Congressional District Criteria I–VI (Mar. 25, 2011), *available at* http://redistricting.dls.virginia.gov/2010/Data/Ref/Criteria/Approved_congress_criteria_SEN_3-25-11.pdf (last visited Dec. 18, 2013) (Ex. K) ("Sen. Criteria").

26. The General Assembly enacted the Enacted Plan in 2012. *See* Va. Stat. 24.02-302.2 (2012 Version) (Ex. L).

27. The Enacted Plan's District 3 "contains only slight variations from Congressional District 3" drawn in 1998 and 2001. Compl. ¶ 30 (DE 1); *compare* 1998 District 3 Map *and* 2001 District 3 Map, *with* 2012 District 3 Map (Ex. F).

28. The current version of District 3 does not include any part of New Kent, King William, King and Queen, or Essex counties. *See* 2012 District 3 Map.

29. The General Assembly was required to add population to Districts 2, 3, 5, 6, 8, and 9 in order to comply with the one-person, one-vote requirement. *See* Statement Of Change.

30. To achieve compliance with the one-person, one-vote requirement, the General Assembly exchanged areas across several districts. *See* Statement Of Anticipated Minority Impact at 2–4.

31. These exchanges included moving the City of Petersburg from District 4 to District 3 and New Kent County from District 3 to District 7. *See id.*

32. The net effect of these and other shifts was to increase the BVAP of District 3 from 53.1% to 56.3%. *Compare* 2001 Congressional Districts at 3, *with* Enacted Plan Congressional Districts at 3, *available at* http://redistricting.dls.virginia.gov/2010/data/congressional%20plans/2012%20HB251_Bell/HB251_Bell.pdf (last visited Dec. 18, 2013) (Ex. M).

33. The Justice Department granted preclearance of the Enacted Plan, meaning that Virginia carried its burden to prove that the Plan was enacted without "any discriminatory purpose." 42 U.S.C. § 1973c(c); *see also* Mar. 14, 2012 Preclearance Letter, *available at*

http://redistricting.dls.virginia.gov/2010/Data/Ref/preclearance_letters.pdf (last visited Dec. 18, 2013) (Ex. N).

34. The 2012 election was conducted under the Enacted Plan.

35. Virginia's 2014 congressional primary is set by statute for June 10. *See* Va. Stat. § 24.2-515.

36. The statutory candidate filing period begins on March 10, less than three months from now, and ends on March 27, 75 days before the primary. *See id.* § 24.2-522.

37. The Supreme Court issued its decision in *Shelby County* on June 25, 2013. *See* 133 S. Ct. at 2620–31.

38. That decision relieved Virginia of its Section 5 obligations with respect to future changes to its voting and election laws. *See id.* at 2627–31.

39. Plaintiffs did not bring any legal challenge to or *Shaw* claim against the Enacted Plan prior to the Supreme Court's decision in *Shelby County*.

40. Plaintiffs acknowledge that "[a]s of the date of the enactment of the [Enacted Plan], Virginia was considered a covered jurisdiction under Section 5 of the Voting Rights Act." Compl. ¶ 35.

41. Plaintiffs concede that the General Assembly acted constitutionally when it adopted the Enacted Plan and preserved District 3 as a majority-black district as Section 5 required. *See id.*; *see also* Pls.' Br. On Available Remedies at 2 (DE 30) ("Pls.' Br.").

42. Plaintiffs also mount no challenge to the 2012 congressional elections, which were conducted under the Enacted Plan. *See* Compl. ¶¶ 1–6.

43. Plaintiffs claim, however, that the General Assembly's constitutional purpose has been tainted—and the previously constitutional Enacted Plan and District 3 have been rendered

unconstitutional—by the Supreme Court's intervening decision in *Shelby County*. *See* Compl. ¶¶ 4, 39; Pls.' Br. at 2.

44. In particular, Plaintiffs claim that "[r]ace was the predominant consideration in the creation of Congressional District 3," Compl. ¶ 41, that this alleged "racial[] gerrymander" and "packing" of black voters "diminish[es] their influence in surrounding districts," *id.* ¶ 3, and that "Virginia can no longer seek refuge in Section 5" for its pre-*Shelby County* decision to preserve District 3 as Section 5 then required, *id.* ¶ 5; *see also* Pls.' Br. at 2 (citing *Shaw I*).

45. Plaintiffs purport to plead a *Shaw* claim under the Equal Protection Clause, but do not advance any claims under Section 2 of the Voting Rights Act. *See* Compl. ¶¶ 46–51.

46. Plaintiffs waited more than three months after the decision in *Shelby County* to file this suit. *See id.* (filed Oct. 2, 2013).

47. Plaintiffs ask "that the Court hold an expedited trial on the merits and, assuming a finding in Plaintiffs' favor on liability, that the Court approve a remedial map" prior to the opening of Virginia's candidate filing period on March 10, less than three months from now. Pls.' Br. at 1.

48. Plaintiffs seek "substantial," statewide changes to "multiple districts in the Commonwealth" based on an alleged *Shaw* violation localized to District 3. Pls.' Reply at 12.

49. Plaintiffs have refused to identify the mid-decade "remedial map" that they ask Defendants to defend against and the Court to adopt on their accelerated time table. Pls.' Br. at 1; Pls.' Reply at 2–4.

50. Plaintiffs designated only one expert, Dr. Michael McDonald, before the deadline for expert disclosures in this case. *See* McDonald Rep. (Ex. O).

51. Dr. McDonald offers the opinion that "race" was the General Assembly's "predominant purpose" in shifting areas between District 3 and surrounding districts, but did not consider the Senate Criteria or analyze whether race-neutral criteria explain those shifts. *See id.* at 12–26.

52. Last year, another three-judge court in the Fourth Circuit considering a *Shaw* claim rejected an indistinguishable opinion from Dr. McDonald as "incomplete and unconvincing." *Backus v. State*, 857 F. Supp. 2d 553, 562 (D.S.C. 2012) (three-judge court), *summ. aff'd*, 133 S. Ct. 156 (2012).

STANDARD OF REVIEW

"The plain language of [Fed. R. Civ. P. 56(a)] mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party bear[s] the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "In such a situation, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 322–23.

In a case alleging a racial gerrymander, a court's summary judgment analysis must be conducted "in the context of the courts' traditional reluctance to interfere with the delicate and politically charged area of legislative redistricting." *Chen v. City of Houston*, 206 F.3d 502, 505 (5th Cir. 2000). Indeed, because "[r]eapportionment is primarily a matter for legislative consideration and determination," *White v. Weiser*, 412 U.S. 783, 794 (1973); *Upham v. Seamon*, 456 U.S. 37, 41 (1982), and "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions," federal courts must presume that state

legislatures act in "good faith" and that their redistricting statutes are constitutional, *Miller*, 515 U.S. at 916.

Thus, as the Court has specifically warned with respect to *Shaw* claims, federal courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Id.* Specifically, courts must "recognize these principles, and the intrusive potential of judicial intervention into the legislative realm, when assessing under the Federal Rules of Civil Procedure the adequacy of a plaintiff's showing at the various stages of litigation and determining whether to permit discovery or trial to proceed." *Id.* at 916–17.

ARGUMENT

I. PLAINTIFFS' CONCESSION THAT THE ENACTED PLAN WAS CONSTITUTIONAL AT ITS ADOPTION DEFEATS THEIR CLAIM

Plaintiffs' concession that the General Assembly acted with a constitutional, non-discriminatory purpose when it preserved District 3 as a majority-black district in the Enacted Plan defeats their *Shaw* claim. Indeed, that concession forecloses Plaintiffs from proving that the General Assembly adopted the Enacted Plan "because of" its alleged discriminatory effects. *Personnel Adm'r v. Feeney*, 442 U.S. 265, 279 (1979). Moreover, *Shelby County*'s post-enactment removal of Virginia's Section 5 obligations for *future* changes to its election laws did not obligate Virginia to do *anything*, much less replace the Enacted Plan mid-decade after it had been constitutionally used in the 2012 election. The Court should grant Defendants summary judgment.

A. Plaintiffs Cannot Satisfy Their Burden To Prove That The General Assembly Adopted The Enacted Plan With A Discriminatory Purpose

It is well-established that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977); *see also Feeney*, 442 U.S. at 279; *Washington v. Davis*, 426

U.S. 229, 240 (1976). This requirement is particularly exacting for *Shaw* racial gerrymander claims. In such cases, the plaintiff must prove that "race was the *predominant* factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916 (emphasis added). For a plaintiff to succeed, "[r]ace must not simply be *a* motivation for the drawing of a majority-minority district." *Easley*, 532 U.S. at 241; *cf. Arlington Heights*, 492 U.S. at 266 ("[D]iscriminatory purpose must have been 'a motivating factor in the decision.'"). Thus, the plaintiff must show that "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Easley*, 532 U.S. at 241. Plaintiffs bear the burden to make this showing, and it is "a demanding one." *Id.*

Plaintiffs, however, do not even *allege* that the General Assembly "acted with" an impermissible discriminatory purpose, *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997) (*Bossier I*), or that improper racial considerations were the "predominant factor motivating the legislature's decision" to adopt the Enacted Plan, *Miller*, 515 U.S. at 916. Rather, they forthrightly concede that District 3 was maintained as a majority black district "because of," *Feeney*, 442 U.S. at 279, the need to comply with the "non-retrogression" command of Section 5 of the Voting Rights Act. *See* Compl. ¶¶ 1–6. It is well-recognized and undisputed that compliance with Section 5 is not an impermissible purpose under *Shaw*. Indeed, compliance with Section 5 is not just a *legitimate* purpose, it is a "compelling state interest" which justifies race-conscious districts that might otherwise violate the *Shaw* standard. *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 639 (D.S.C. 2002) (three-judge court) ("[C]ompliance with the Voting Rights Act is a compelling state interest."); *Backus*, 857 F. Supp. 2d at 559 ("[C]ompliance with the Voting Rights Act is a compelling state interest."); *LULAC v. Perry*, 548 U.S. 399, 475 n.12 (2006) (Stevens, J., joined by Breyer, J., concurring in part and

dissenting in part) ("agree[ing] . . . that compliance with § 5 of the Voting Rights Act is also a compelling state interest"); *id.* at 485 n.2 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part) ("agree[ing] . . .that compliance with § 5 is a compelling state interest"); *id.* at 518 (Scalia, J., joined by Roberts, C.J., Thomas, J., and Alito, J., concurring in part and dissenting in part) ("compliance with § 5 of the Voting Rights Act can be" a compelling state interest).

Nor can there be any question that District 3 had to be maintained as a majority-black district under Section 5, particularly since a new, more stringent "no diminution in minorities' ability to elect" standard was added to Section 5 in 2006, precisely in order to require the preservation of such districts, by overturning the Supreme Court's decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), that had permitted diminishing such districts in certain circumstances.[1]

Accordingly, all agree that the General Assembly's redistricting law was not tainted with an unconstitutional racial purpose. Since considerations of race in redistricting do not violate the Fourteenth Amendment if they further the compelling need to comply with Section 5, Plaintiffs' concession concerning Section 5 compliance requires summary judgment in favor of Defendants.

[1] Congress amended Section 5 in 2006 to prohibit any change in voting or election laws that "diminish[ed] the ability" of minorities "to elect their preferred candidates of choice." 42 U.S.C. §§ 1973c(b), (d). Congress' avowed purpose was to overturn *Ashcroft*, which had construed Section 5 to permit conversion of majority-minority districts into minority-minority districts in certain circumstances. *Ashcroft*, 539 U.S. at 479–80. Congress vehemently criticized *Ashcroft* for "misconstru[ing] and narrow[ing] the protections afforded by Section 5." 42 U.S.C. § 1973c note, Findings (b)(6); *see also* H.R. Rep. No. 109-478, at 65-72, 93–94 (2006) (*e.g.*, Ashcroft made Section 5 "a wasteful formality," that perversely "would encourage states to turn black and other minority voters into second class voters"). Thus, Congress prohibited any diminution in minority voters' ability to elect their preferred candidate, thereby precluding reducing a majority-black district to a minority-black district or otherwise making a safe black district any less safe. 42 U.S.C. §§ 1973c(b), (d).

1. Plaintiffs seek to evade this inexorable logic by noting that Section 5 was subsequently invalidated in *Shelby County* and, consequently, "Virginia can no longer seek refuge in Section 5 as an excuse to racially gerrymander congressional District 3." Compl. ¶ 5. But, of course, events that occur *after* a legislature has acted cannot have influenced the legislature's purpose *when* it acted. And since the only basis upon which a state law can be invalidated under *Shaw* is an improper legislative purpose, subsequent events which cannot possibly shed light on that purpose are, by definition, irrelevant and offer no grounds for invalidation.

The only action that the General Assembly has taken with respect to congressional redistricting was passing the Enacted Plan in 2012. Since this action complied with the Constitution because it was motivated by the non-racial—indeed, compelling—purpose of Section 5 compliance, the redistricting law does not constitute a constitutional violation and therefore cannot be altered or overturned by a federal court. *Milliken v. Bradley*, 418 U.S. 717, 738 (1974) ("Federal remedial power may be exercised only on the basis of a constitutional violation."). Thus, Plaintiffs' entire theory is irreconcilable with the self-evident truism that a constitutional law cannot be struck down as unconstitutional.

For this reason, Plaintiffs' assertion that "Virginia can no longer seek refuge in Section 5," Compl. ¶ 5, is simply baffling, and reflects their fundamental confusion concerning the only allegedly unconstitutional state action they may challenge and the only action they are challenging. The General Assembly does not need to "take refuge under Section 5" now or in 2014, because it is not doing anything concerning redistricting now or in 2014. The only redistricting action the General Assembly has taken occurred in 2012, when all agree it *could* "seek refuge in Section 5." Since Section 5 existed at that relevant time of passage, and since the

only legally relevant question is the interest underlying the law that was enacted, the conceded fact that the Enacted Plan was constitutionally justified means that the Enacted Plan is constitutional, regardless of whether it would have been unconstitutional if passed in 2014.

The validity of the legislative purpose underlying challenged laws is obviously assessed by examining the purpose underlying the law in the real world; *i.e.*, the interest or purpose of the legislature that actually enacted the law at the time they actually enacted it in light of the actual realities extant at that time. It is not assessed, as Plaintiffs apparently believe, on what the Legislature's purpose would have been in an alternative, hypothetical world that did not exist—*i.e.*, a world without Section 5. Every case assessing discriminatory purpose confirms this truism.

As noted, the question under *Shaw* is whether an impermissible consideration of race was the "predominant factor *motivating the legislature's decision*" on the districts' racial composition. *Miller*, 515 U.S. at 916 (emphasis added); *see also Easley*, 532 U.S. at 241 ("motivation for the drawing of a majority-minority district"); *Feeney*, 442 U.S. at 279 (was the legislature's decision "because of" an impermissible factor). Accordingly, the question is what was the interest or motive of the enacting legislature. And a legislature can only be motivated by, and can only have an interest regarding, things that exist (Section 5), not by things that do not exist (the Supreme Court's later invalidation of Section 5). Since it is conceded that compliance with Section 5 was the General Assembly's predominant purpose or compelling interest underlying District 3's racial composition in 2012, the predominant factor motivating that decision could not have been an improper consideration of race.

Consequently, every court's assessment of a racial gerrymander purpose has examined the legislative record and evidence to determine whether the proscribed discriminatory purpose existed *at the time* the redistricting plan was enacted, not some later time. *See, e.g.*, *Shaw v.*

Hunt, 517 U.S. 899, 905–06 (1996) (*Shaw II*); *Easley*, 532 U.S. at 1464–70; *Miller*, 515 U.S. at 917; *Old Person v. Cooney*, 230 F.3d 1113, 1130 (9th Cir. 2000) (rejecting discrimination claim where "there was no discriminatory purpose in the adoption of the plan"); *Jeffers v. Beebe*, 895 F. Supp. 2d 920 (E.D. Ark. 2012) (three-judge court) (holding that past history of racial discrimination in voting did not establish discriminatory purpose in enactment of redistricting plan); *Fletcher*, 831 F. Supp. 2d at 901 (past "lamentable incidents of racism in Maryland" did not taint redistricting plan).

While legislative purpose is always assessed by what the legislature thought at the time of enactment, this analysis is particularly required when assessing a "compliance with the Voting Rights Act" justification under *Shaw*. This is because such justifications do not turn on whether Section 5 *required* the majority-minority district enacted by the legislature, but whether the legislature had a strong *reason to believe* that Section 5 so required. Specifically, "if the State has a '*strong basis in evidence*' for concluding that creation of a majority-minority district is reasonably necessary to comply with [the Voting Rights Act], and the districting that is based on race 'substantially addresses the [Voting Rights Act] violation,' it satisfies strict scrutiny." *Bush v. Vera*, 517 U.S. 952, 977 (1996) (quoting *Shaw I*, 509 U.S. at 656; *Shaw II*, 517 U.S. at 918 (emphasis added)); *see also Colleton County*, 201 F. Supp. 2d at 639 ("If there is a strong basis in evidence for concluding that creation of a majority-minority district is reasonably necessary to comply with the [Voting Rights] Act, and the race-based districting substantially addresses the violation, the plan will not fail under the Equal Protection analysis."); *Backus*, 857 F. Supp. 2d at 559 (same); *Moon*, 952 F. Supp. at 1149 (same).

Here, it is undisputed and clear that the General Assembly had a strong—indeed, compelling—evidentiary basis to conclude that converting District 3 from a majority-black

district into a minority-black district would constitute impermissible retrogression, particularly under the more stringent "ability to elect" standard that was added to Section 5 for the avowed purpose of overturning *Ashcroft's* authorization of so diminishing majority-minority districts. *See supra* p. 13 & n.1. Accordingly, District 3 indisputably satisfies *Shaw* because the General Assembly had a strong basis in evidence to conclude that it had to be maintained as a majority-black district.

Indeed, the requirement that a Voting Rights Act justification focus exclusively on legislative purpose at the time of enactment is so strong that the Supreme Court forecloses judicial inquiry even to post-enactment *evidence* supporting the legislature's articulated Voting Right Act justification, because that evidence was not before the legislature at the time of enactment. *See*, *e.g.*, *Shaw II*, 517 U.S. at 910 (rejecting a voting analysis demonstrating that the challenged district was required by Section 2 because the analysis was not before the legislature at the time of enactment). Since courts cannot consider even post-enactment *evidence* concerning Section 5 compliance because the legislature did not actually consider that available evidence, they *a fortiori* cannot consider post-enactment invalidation of Section 5, which the legislature *could not* have considered because it was not available.

The final proof that discriminatory purpose is to be assessed solely by the enacting legislature's purpose at the time of enactment is provided by the cases striking down laws because the enacting legislature had an illicit purpose, but upholding the *same* laws when enacted by a subsequent legislature with new information and a different purpose. *See Hunter v. Underwood*, 471 U.S. 222, 231 (1985) (striking down felon disenfranchisement provision enacted with discriminatory purpose even though that purpose had dissipated and state could reenact the provision without that purpose); *Hayden v. Paterson*, 594 F.3d 150, 163 (2d Cir.

2010) (upholding dismissal of challenge to current felon disenfranchisement law where enactment could not be "traced to a purpose to discriminate on the basis of race" and there was no "discriminatory purpose behind the course of action," even though prior disenfranchisement laws had been enacted for discriminatory purpose (emphasis in original)); *Johnson v. Gov. of Fla*., 405 F.3d 1214, 1222-25 (11th Cir. 2005) (same). Just as a law with an unconstitutional purpose at enactment remains unconstitutional notwithstanding subsequent developments affecting purpose, a law with a constitutional purpose at enactment remains constitutional notwithstanding subsequent developments affecting purpose.

In sum, since the Enacted Plan's District 3 concededly was motivated by a legitimate, compelling purpose, that District is constitutional because the only relevant constitutional issue is the enacting legislature's purpose. Counter-factual hypotheticals concerning what the legislature should have or would have done if Section 5 did not exist are of no moment.

2. To the extent Plaintiffs are suggesting that District 3 should be judicially dismantled because the General Assembly in 2013 *failed* to enact "*corrective*" legislation for that District after *Shelby County*, this suggestion is equally meritless because (1) the Constitution only prohibits laws enacted with a discriminatory purpose, not legislative inaction allegedly attributable to such a purpose and (2) it is indisputable that there are obvious and important non-racial reasons why the General Assembly would not embark on a virtually unprecedented mid-decade redistricting.

At the threshold, nothing in *Shelby County* created any *new* obligation in Virginia or any other covered jurisdiction, much less a new obligation to *replace* election laws that were previously precleared under Section 5. *See Shelby County*, 133 S. Ct. at 2627–31. Section 5 obviously did *not* require any jurisdiction to *make* changes to its voting laws, but only *prohibited*

discriminatory changes. *See* 42 U.S.C. § 1973c. Thus, *Shelby County* merely relieved Virginia of Section 5 obligations for any *future* changes to its election laws. *See id.*; *Shelby County*, 133 S. Ct. at 2627–31.

Even more fundamentally, federal courts cannot remedy or invalidate legislative inaction because there is no state law that conflicts with the Constitution and thus nothing to review. That is, Plaintiffs must show that the General Assembly selected a "course of *action* . . . because of" an improper purpose. *Feeney*, 442 U.S. at 279 (emphasis added); *Washington*, 426 U.S. at 240.

In any event, Plaintiffs cannot possibly establish that race is "the predominant factor" since there are obvious non-racial reasons for deciding not to adopt "corrective" legislation for District 3. The first such reason is that the General Assembly quite sensibly disagrees with Plaintiffs' meritless notion that District 3 *needs* any correction, since it undoubtedly adheres to the uniform view that a law enacted with a constitutional purpose cannot be struck down on the grounds that it has an unconstitutional purpose.

Second, the General Assembly has compelling non-racial reasons not to create the "costs and instability" of mid-decade redistricting. *LULAC*, 548 U.S. at 421 (plurality op.). The obvious voter confusion, disruption of constituent relations, administrative costs and severe partisan friction entailed in mid-decade redistricting are so onerous that virtually no state has ever voluntarily done so, and the rare exceptions were avowedly done to enhance the majority's political prospects relative to the first enacted redistricting plan. *See, e.g.*, *id.* at 448 (Stevens, J., joined by Breyer, J., concurring in part and dissenting in part) ("interests in orderly campaigning and voting, as well as in maintaining communication between representatives and their constituents" weigh heavily against mid-decade redistricting). Indeed, the obvious problems caused by mid-decade redistricting are why the Supreme Court allows "[s]tates [to] operate

under the legal fiction that their plans are constitutionally apportioned throughout the decade," even though ongoing population shifts render the districting plan non-compliant with the one-person, one-vote requirement as a matter of fact. *Id.* at 421 (plurality op.) (citing *Ashcroft*, 539 U.S. at 488 n.2 (2003); *Reynolds v. Sims*, 377 U.S. 533, 583 (1964)). Thus, the General Assembly's inaction in revisiting the Enacted Plan and District 3, even assuming implausibly that this is the product of conscious choice and that it is susceptible to judicial review, is amply justified by the non-racial purpose of maintaining stability in the election system and constituent-representative relationships. *Cf. McCleskey v. Kemp*, 481 U.S. 279, 298–99 (1987) ("As legislatures necessarily have wide discretion in the choice of criminal laws and penalties, and as there were legitimate reasons for the Georgia Legislature to adopt and maintain capital punishment, we will not infer a discriminatory purpose on the part of the State of Georgia" for maintaining the capital punishment statute despite evidence of "racially disproportionate impact").

II. PLAINTIFFS HAVE NO ALTERNATIVE PLAN OR EVIDENCE THAT WOULD ENTITLE THEM TO A TRIAL

Even if Plaintiffs' novel legal theory were cognizable, summary judgment for Defendants still would be warranted because, as in *Fletcher*, 831 F. Supp. 2d at 901–03, Plaintiffs have fallen woefully short of providing or even describing the threshold evidence needed to potentially establish a *Shaw* violation, and thus failed to provide the predicate required for "intrusive judicial intervention into the legislative realm" in a context where federal courts must exercise "extraordinary caution." *Miller*, 515 U.S. at 916–17.

A. Plaintiffs Have Offered No Benchmark Alternative Plan As Required To Prove A Discriminatory Purpose And Entitlement To A Specific Remedy

As Defendants have explained, a plaintiff alleging racial discrimination in a districting plan must offer a benchmark alternative plan that comports with traditional redistricting

principles and the plaintiff's view of the Constitution. *See* Intervenor-Defs.' Resp. To Pls.' Br. On Available Remedies at 10–14 (DE 33) ("Intervenor-Defs.' Resp."); Defs.' Memo. In Resp. To Pls.' Br. On Available Remedies at 6 n.3 (DE 32). This requirement is a prerequisite to the plaintiff establishing both liability and entitlement to a specific remedy. *See* Intervenor-Defs.' Resp. at 10–14; *see also Bossier I*, 520 U.S. at 480; *Hall v. Virginia*, 385 F.3d 421, 428 (4th Cir. 2004) ("Any claim that the voting strength of a minority group has been 'diluted' must be measured against some reasonable benchmark of 'undiluted' minority voting strength.").

Plaintiffs do not point to an alternative plan that was before the General Assembly in 2012 and comports with Plaintiffs' notion of constitutional requirements, as is typically done in discriminatory purpose cases, presumably because *all* such plans were drawn to comply with Section 5. *See, e.g.*, *Shelby County*, 133 S. Ct. at 2627–31. The Justice Department, moreover, exhaustively examined all of those plans when it conducted its preclearance review—and it determined, based on comparison with those plans, that the Enacted Plan was free of "any discriminatory purpose." 42 U.S.C. § 1973c(c).

Plaintiffs also have stubbornly refused to provide their post-*Shelby County* alternative district, *see* Pls.' Reply Br. at 2–4, despite this Court's Order directing them to disclose the "remedial measures sought," Order at 2 (DE 27), their filing of *two* briefs on remedies, *see* Pls.' Br.; Pls.' Reply Br., and the Court's and Defendants' inability to litigate the case, much less on Plaintiffs' compressed timeline, without Plaintiffs' alternative plan, *see* Intervenor-Defs.' Resp. at 8, 19–22.

Plaintiffs seek to justify their decision to withhold this essential nondiscriminatory alternative by contending—without a single citation to on-point authority—that they are not required to disclose their alternative district because they advance a constitutional claim, instead

of "a Section 2 claim." Pls.' Reply at 2–3. Plaintiffs, however, fail even to mention the ample case law applying the benchmark-alternative requirement to constitutional claims. *See, e.g.*, *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000) (*Bossier II*) (noting that claims of racial discrimination against minority voters under the Fifteenth Amendment require "comparison . . . with a hypothetical alternative"); *Johnson v. DeSoto County*, 204 F.3d 1335, 1346 (11th Cir. 2000) (requiring benchmark alternative for Fourteenth Amendment discrimination claim); *Lopez v. City of Houston*, No. 09-420, 2009 WL 1456487, *18–19 (S.D. Tex. May 22, 2009) (same); *see also* Intervenor-Defs.' Resp. at 11–13.

This application of the benchmark-alternative requirement makes perfect sense: as the Court has specifically warned with respect to *Shaw* claims, federal courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller*, 515 U.S. at 916; *see also* Intervenor-Defs.' Resp. at 11–13. A federal court simply cannot determine whether a redistricting plan is *unconstitutional* unless it knows what a *constitutional* plan would look like. *See, e.g.*, *Bossier I*, 520 U.S. at 480; *Holder v. Hall*, 512 U.S. 874, 880 (1994) (Kennedy, J.); *Thornburg v. Gingles*, 478 U.S. 30, 88 (1986) (O'Connor, J.); *Johnson*, 204 F.3d at 1346. And a defendant cannot defend against a claim of unconstitutional legislative purpose without knowing how a legislature with a constitutional purpose allegedly would have acted. *See, e.g.*, *Bossier I*, 520 U.S. at 480; *Holder*, 512 U.S. at 880 (Kennedy, J.); *Gingles*, 478 U.S. at 88 (O'Connor, J.); *Johnson*, 204 F.3d at 1346.

In fact, this requirement is even *more* important for constitutional claims than it is for Section 2 claims precisely because constitutional claims focus on *why* a legislature chose a district (discriminatory purpose), *see Arlington Heights*, 429 U.S. at 265, while Section 2 claims simply focus on the "result" of the district on minority voters, without regard to the legislature's

purpose, *Gingles*, 478 U.S. at 43–44. In assessing why a legislature chose an option that allegedly relies on race to an impermissible degree, it is essential to know what non-racial options were available to it and why they were rejected, although such an inquiry is unnecessary to assess a Section 2 discriminatory "result." This is why purpose cases focus on the available alternatives before the legislature that it rejected in favor of the alternative it adopted. *See, e.g.*, *Arlington Heights*, 429 U.S. at 266; *Bossier II*, 528 U.S. at 334; *Johnson*, 204 F.3d at 1346.

Moreover, ending Plaintiffs' deliberate silence on what a nondiscriminatory plan looks like is necessary to provide Defendants with a minimally fair opportunity to mount a defense. Plaintiffs remain ambiguous on the threshold questions of whether District 3 violates *Shaw* because (1) District 3's BVAP is slightly higher than District 3's 2010 BVAP; (2) the General Assembly considered race at all; or (3) District 3's BVAP exceeds what Section 2 requires for blacks to elect their preferred representative. Defendants cannot defend the General Assembly unless Plaintiffs identify which of these challenges they are pursuing, and indicate what a district without these flaws would look like.

Worse still, it now appears that Plaintiffs seek to mount an attack on *virtually all* districts in the Commonwealth, even though their Complaint challenges only District 3. Compl. ¶¶ 1–6. Specifically, Plaintiffs contend that the remedy here "is controlled by *Abrams v. Johnson,*" Pls.' Reply at 12, which approved a *state-wide* remedy for a *state-wide* violation because the *entire* redistricting plan was impermissible, since it implemented an "entirely race-focused approach to redistricting—the max-black policy," *Abrams*, 521 U.S. at 85–86. Thus, Plaintiffs contend that this case is *not* controlled by *Upham*, which involved a defect in "two contiguous districts." *Upham*, 456 U.S. at 38.

Thus, according to Plaintiffs, this case involves an *Abrams*-like state-wide racial policy that infects the entire map and requires "substantial changes to the existing plan" throughout the Commonwealth, rather than an impermissible purpose relating only to "two contiguous districts," as in *Upham*. Pls.' Reply at 12. Yet Plaintiffs have provided no clue concerning *which* "multiple districts" besides District 3 were affected by Defendants' "'entirely race-focused approach,'" what that race-focused policy consisted of, or what a map would look like absent this system-wide defect. *Id.* (quoting *Abrams*, 521 U.S. at 85). Accordingly, Plaintiffs need to provide their alternative districting scheme now to enable Defendants to know whether it involves just District 3 (as their Complaint says) or a system-wide defect (as their latest brief says), and to know *how* race deformed District 3 or the other districts.

Finally, even if Plaintiffs' alternative is not needed for liability, it *concededly* is needed for entering a remedy and Plaintiffs want that remedy entered by March. And it is undisputed that such a remedial hearing will have to assess the remedy's compliance with Section 2, which necessarily requires complex expert analysis of minority voters' ability to elect their preferred candidates. But Plaintiffs have not even *identified* such racial bloc voting experts or the proposed remedial districts they should analyze. Since Plaintiffs seek a remedy in roughly the next three months, they need to offer an alternative map, supported by expert racial bloc voting analysis, *now,* if their remedy can hope to be entered in 2014. Accordingly, Plaintiffs will suffer no additional burden if required to offer an alternative map now to assess liability, since all agree it is needed for remedy, and Plaintiffs contemplate a remedial hearing immediately after the liability hearing.

B. Plaintiffs Have No Evidence That The General Assembly Subordinated Traditional Race-Neutral Principles To Racial Considerations

Even if Plaintiffs could survive their failure to disclose their benchmark alternative plan, their claim still would fail because, as in *Fletcher*, they have not offered or identified a scintilla of evidence that could potentially refute the non-racial explanations for District 3's shape.

Most fundamentally, because "race and political affiliation" often "are highly correlated," plaintiffs bringing *Shaw* claims must decouple the two and prove that the purported discriminatory effect is attributable to "race *rather than* politics." *Easley*, 532 U.S. at 242 (emphasis in original). In fact, because a political purpose does not violate *Shaw*, a legislature can subordinate traditional districting principles to gerrymander (or support) Democrats "even if it so happens that the most loyal Democrats happen to be African-American Democrats and even if the State were conscious of that fact." *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999); *id.* at 551–52 ("Evidence that blacks constitute even a super majority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race."). Thus, in *Easley*, the Supreme Court overturned as *clearly erroneous* a three-judge court's finding of a *Shaw* violation concerning a contested district because the evidence adduced at trial was equally consistent with a political and a racial purpose, and therefore failed to establish that "race *rather than* politics *predominantly* explain[ed]" the challenged plan. *Easley*, 532 U.S. at 243, 257–58 (emphases in original).

The three-judge court in *Fletcher* recently applied this rule to grant the defendants summary judgment on a *Shaw* claim. *See* 831 F. Supp. 2d at 901. Without trial, *Fletcher* rejected a racial gerrymander claim against Maryland's 2011 congressional redistricting plan even though "several districts" were "unusually odd," and made the "original Massachusetts

Gerrymander look tame by comparison," such as a district "that is more reminiscent of a broken-winged pterodactyl, lying prostrate across the center of the State." *Id.* at 902 & n.5. The three-judge court nonetheless upheld these oddly shaped districts on summary judgment because "[m]oving Democrats for partisan purposes does not establish a violation of the Fourteenth Amendment." *Id.* It therefore rejected the *Shaw* claim because "the plaintiffs have not shown that the State moved African-American voters from one district to another because they were African-American and not simply because they were Democrats." *Id.* The three-judge court emphasized that "[d]istinguishing racial from political motivations is all the more important in a State like Maryland, where the vast majority of African-American voters are registered Democrats." *Id.* at 901–02. The Supreme Court summarily affirmed. *See* 133 S. Ct. 29.

Here, District 3 is represented by a Democrat, the surrounding districts are all represented by Republicans, and the Complaint alleges that the district "packed" blacks—who, as in Maryland, are overwhelmingly Democratic—into the District. *See* Compl. ¶ 3. Accordingly, District 3's shape and racial composition are just as readily explained by politics as race, but Plaintiffs cannot even suggest how to differentiate the two. Thus, Plaintiffs cannot show that "race *rather than* politics" explains those changes. *Easley*, 532 U.S. at 243 (emphasis in original); *Fletcher*, 831 F. Supp. 2d at 901. As in *Fletcher*, summary judgment is therefore warranted. *See* 831 F. Supp. 2d at 901.

Moreover, as in *Fletcher*, there are obvious, non-racial explanations other than politics for District 3's shape. The plan concededly preserves District 3 as it was in the old redistricting, *see* Compl. ¶ 30, and plainly does the same for the other congressional districts. Thus, District 3's shape is readily explained as an effort to protect incumbents of both parties, *see Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *Fletcher*, 831 F. Supp. 2d at 903; *Jeffers*, 895 F. Supp. 2d at

936, and to "preserv[e] the cores of prior districts," *Karcher*, 462 U.S. at 740; *Fletcher*, 831 F. Supp. 2d at 903; *Jeffers*, 895 F. Supp. 2d at 936. These are non-racial reasons which defeat a *Shaw* claim. *Fletcher*, 831 F. Supp. 2d at 903; *Jeffers*, 895 F. Supp. 2d at 936; *Backus*, 857 F. Supp. 2d at 561; *Colleton County*, 201 F. Supp. 2d at 646–49.

Indeed, the General Assembly had a particularly strong interest in "preserving the core" of District 3. *Karcher*, 462 U.S. at 740; *Fletcher*, 831 F. Supp. 2d at 903; *Jeffers*, 895 F. Supp. 2d at 936; *Backus*, 857 F. Supp. 2d at 561; *Colleton County*, 201 F. Supp. 2d at 646–49. As Plaintiffs recognize, the current District 3 contains "only slight variations" from the version of District 3 that the General Assembly adopted in 1998 as a *remedy* for the *Shaw* violation found in *Moon*, and then preserved in 2001. Compl. ¶ 30; *compare* 1998 District 3 Map (Ex. D) *and* 2001 District 3 Map (Ex. E), *with* Enacted Plan District 3 Map (Ex. F). The 1998 *Shaw* remedy dramatically altered District 3 from its challenged shape, and the post-1998 shape bears a strong judicial imprimatur. *Compare* 1991 District 3 Map (Ex. C), *with* 1998 District 3 Map. The General Assembly thus had every reason to preserve District 3 to the maximum extent practicable, and no reason to overhaul a district adopted to cure the very evil that Plaintiffs now allege.

Moreover, given Plaintiffs' recognition of the substantial similarity between the 1998, 2001, and current versions of District 3, they bear the threshold burden to explain how the 1998 and 2001 versions that they did not challenge can be *constitutional* while the current version is somehow *unconstitutional*. Plaintiffs do not even attempt to engage this burden. Instead, they studiously ignore the 1998 version of District 3, and their lone expert focuses on the prior version struck down as a *Shaw* violation in *Moon*. *See, e.g.*, McDonald Rep. at 6, 9, 10 (Ex. O).[2]

[2] Of course, comparison of District 3 to the *unconstitutional* district struck down in *Moon*

Plaintiffs thus have made no attempt to establish that race "predominates" over race-neutral factors in the Enacted Plan. *Easley*, 532 U.S. at 241. Even at this early stage of the litigation, it is clear that Plaintiffs will not be able to offer any evidence to meet this burden. Indeed, Plaintiffs designated a single expert, Michael McDonald, before the deadline for expert disclosures in this case. But Dr. McDonald does not mention the Senate Criteria for the Enacted Plan, and does not analyze political considerations, incumbency protection, preservation of district cores, or communities of interest *at all*. *See* McDonald Rep. at 12–26. Due to similar deficiencies, another three-judge court last year rejected as "incomplete and unconvincing" an indistinguishable opinion from Dr. McDonald in a *Shaw* case. *Backus*, 857 F. Supp. 2d at 562. The *Backus* court found it incurably "problematic" that Dr. McDonald "failed to consider the . . . criteria that the [South Carolina] General Assembly devised for the redistricting process" and "failed to consider all the traditional race-neutral principles" that guided the challenged congressional redistricting plan, including preservation of "communities of interest" and "incumbency protection." *Id.* Dr. McDonald's opinion in this case is similarly flawed, and falls far short of satisfying Plaintiffs' "demanding" burden to prove that the General Assembly "subordinated traditional race-neutral districting principles . . . to racial considerations." *Easley*, 532 U.S. at 241.

Finally, it should be noted that Plaintiffs cannot correct these fatal deficiencies through discovery or a trial. First, additional information concerning what the General Assembly

(continued…)

tells the Court precisely nothing about the constitutionality of District 3 or the General Assembly's purpose in adopting the Enacted Plan. Nor does Dr. McDonald's comparison of District 3 to *other* districts in the Enacted Plan, *see* McDonald Rep. at 7–12, advance the constitutional analysis because those districts by definition are not *alternatives* to District 3. *See, e.g.*, *Bossier I*, 520 U.S. at 480; *Bossier II*, 528 U.S. at 334; *Holder*, 512 U.S. at 880 (Kennedy, J.); *Gingles*, 478 U.S. at 88 (O'Connor, J.); *Johnson*, 204 F.3d at 1346.

actually considered in 2012 is beside the point under Plaintiffs' unique theory, since they want the Court to assess what would have happened in a hypothetical world where Section 5 did not exist. Moreover, Plaintiffs *cannot* inquire into or discover legislative materials and deliberations because clearly established legislative privilege shields legislators and their aides and agents from being compelled to testify or to disclose documents regarding legislative matters. *See, e.g.*, *Arlington Heights*, 429 U.S. at 268; *Gravel v. United States*, 408 U.S. 606, 617 (1972); *EEOC v. Washington Suburban Sanitary Comm'n*, 631 F.3d 174, 180 (4th Cir. 2011).

Accordingly, Plaintiffs will have to disprove through *external*, *objective* evidence that District 3 was designed to achieve partisan advantage in districts surrounding District 3, to protect incumbents, or to preserve the core of a district which constituted an acceptable remedy for a *Shaw* violation. Since they have offered no expert testimony on this, and are foreclosed from acquiring direct evidence from the General Assembly, it is clear that they will not be able to offer such evidence at trial. Accordingly, since such proof is essential to prove a *Shaw* claim, judgment should be entered against Plaintiffs now, before they drag Defendants into fruitless discovery that will inevitably entail lengthy legislative privilege disputes. Indeed, Plaintiffs already have served Defendants with burdensome, irrelevant interrogatories and requests for production, and have served sweeping third-party subpoenas on the clerk of the Virginia House of Delegates, the clerk of the Virginia Senate, the Division of Legislative Services, and a former legislator for materials and information that are shielded from disclosure by legislative privilege.

CONCLUSION

The Court should grant Defendants summary judgment.

Dated: December 20, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 20, 2013, a copy of the INTERVENOR-DEFENDANTS VIRGINIA REPRESENTATIVES' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT was filed electronically with the Clerk of Court using the ECF system, which will send notification to the following ECF participants:

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