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

DAWN CURRY PAGE, et al, Plaintiffs, v. 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; DON PALMER, in his capacity as Secretary of the Virginia State Board of Elections, Defendants, v. CONGRESSMEN ERIC CANTOR, ROBERT WITTMAN, BOB GOODLATTE, FRANK R. WOLF, RANDY FORBES, MORGAN GRIFFITH, SCOTT RIGELL, and ROBERT HURT Intervenor-Defendants.	Civil Action No. 3:13-cv-678-REP-LO-AKD

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' AND INTERVENORS' MOTIONS FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

Defendants' and Intervenors' Motions for Summary Judgment should be denied. Both rely on a fundamental misapprehension of the law and attempt to brush aside plainly material issues of fact.

Perhaps most fundamentally, Defendants and Intervenors misunderstand the applicable burden. Plaintiffs need merely demonstrate that race was the predominant purpose in the General Assembly's 2012 reapportionment. Plaintiffs most certainly do *not* need to demonstrate that the Assembly acted illegitimately, much less that it intended to discriminate against or harm minorities. Once Plaintiffs demonstrate that race was the General Assembly's predominant purpose in composing the current Third Congressional District ("CD 3") -- as the record here vividly demonstrates -- then it is *Defendants'* burden to prove (on strict scrutiny no less) that the race-based districting both (a) served a compelling interest and (b) was narrowly tailored to serve that interest. On this record Defendants and Intervenors can establish neither prong; indeed, they barely attempt the task.

Instead, Defendants and Intervenors attempt to defend CD 3 by claiming that the General Assembly merely intended to comply with then-applicable Section 5 requirements. This is little more than a thinly-disguised effort to cloak mischievous racial gerrymandering in the guise of "compliance" with a statute that indisputably no longer applies to Virginia. But such a concession is more telling than perhaps intended, as it emphatically demonstrates that race was in fact the predominant purpose motivating the General Assembly.

These ill-conceived motions should be denied. Both are based on a fundamentally flawed understanding of applicable standards and the compelling record before the Court even before discovery commences.

I. FACTUAL BACKGROUND: THE 2012 REAPPORTIONMENT AND PRECLEARANCE PROCESS

The Virginia Constitution requires the General Assembly to reapportion the Commonwealth's congressional districts every ten years into districts of "contiguous and compact territory . . . constituted as to give, as nearly as practicable, representation in proportion to the population of the district." Va. Const., art. II, § 6. Although the Constitution called for reapportionment in 2011, the General Assembly failed to adopt a new congressional plan in either the regular session or the special session convened specifically to address redistricting.

When the General Assembly reconvened for its 2012 session, the Republicans had maintained their majority in the House of Delegates and had secured a voting majority in the Senate.[1] A congressional plan that Delegate Bill Janis (the "Janis Plan") had presented in the 2011 session was again presented to both the House of Delegates and the Senate, notwithstanding that the Senate had previously rejected the same plan. *See* Declaration of John K. Roche ("Roche Decl.") ¶ 2, Ex. A at 6. With the Republicans now having a voting majority in the Senate, the Janis Plan was approved by both chambers. Roche Decl. ¶ 3, Ex. B. Governor Bob McDonnell signed the Janis Plan into law on January 25, 2012. *Id*. It is codified as Va. Code Ann. § 24.2-302.2, which defines the 2012 Congressional Plan (the "2012 Plan"), including the challenged CD 3.

Following the enactment of the 2012 Plan, Virginia submitted it to the U.S. Department of Justice ("DOJ") for preclearance under Section 5 of the Voting Rights Act of 1965 ("VRA"), 42 U.S.C. § 1973c ("Section 5 Submission"). Until recently, Virginia was a "covered jurisdiction" under Section 5, which meant that the Commonwealth was obligated to obtain

[1] The 2011 election resulted in 20 Democrats and 20 Republicans in the Senate; the tie-breaking vote was held by Republican Lieutenant Governor Bill Bolling.

preclearance from the DOJ or the U.S. District Court for the District of Columbia before "enact[ing] or seek[ing] to administer" any alteration of its practices or procedures affecting voting. *Id*. § 1973c(a)). Under Section 5, a redistricting map in a covered jurisdiction could not be precleared if it would "'lead[] to a retrogression in the position of racial . . . minorities with respect to their effective exercise of the electoral franchise.'" *Riley v. Kennedy*, 553 U.S. 406, 412 (2008) (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)). Covered jurisdictions were identified by a "formula" set forth in Section 4 of the VRA. 42 U.S.C. § 1973b(b).

The Section 5 Submission emphasized CD 3's racial purpose. Its "Statement of Anticipated Minority Impact" asserted that the 2012 Plan "complie[d] with the requirements of Section 5 . . . by retaining minority strength in the redrawn [CD 3] comparable to the minority strength of the [previous CD 3] under the 2010 Census." Intervenors' Br., Ex. A (Dkt. 39-1) at 1. The Submission explained that the City of Petersburg, as well as population from the Cities of Hampton, Norfolk, and Richmond and the County of Henrico were shifted into CD 3 "to meet equal population requirements and the non-retrogression requirements of Section 5." *Id*. at 2.

On June 25, 2013, the Supreme Court decided *Shelby County, Alabama v. Holder*, 570 U.S. __, 133 S. Ct. 2612 (U.S. June 25, 2013), holding that the coverage formula in Section 4 is unconstitutional. As a result, Virginia is no longer a covered jurisdiction under Section 5.

II. LOCAL RULE 56(B) STATEMENT OF DISPUTED FACTS

Pursuant to LR 56(B), Plaintiffs must identify the facts enumerated by Defendants and Intervenors that are disputed. Publicly available data establish that many of these facts are

disputed. In addition, discovery has just begun,[2] and Plaintiffs are still gathering evidence relating to Defendants' and Intervenors' alleged facts. In view of ongoing discovery, a failure to dispute a fact at this stage should not be construed as an admission of that fact. At Defendants' request, Plaintiffs have provided an extension of time to respond to pending discovery requests. It is likely that additional material facts will be disputed once those responses are received. Nonetheless, the following facts enumerated and alleged by Defendants and Intervenors are disputed at this time:

A. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT: DISPUTED FACTS

11. Plaintiffs dispute Defendants contention that "the compactness scores for [the 2012 Plan] are nearly identical to those of the prior benchmark plan." "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Defendants submitted no declaration or affidavit to support their motion, but even if the Court were to ignore that failure, the documents Defendants submitted are not admissible for their purported purpose. In particular, Defendants cite the Section 5 Submission as support for many of their alleged undisputed facts. While that Submission might be admissible as evidence of the positions Virginia has taken or a source of its admissions, it is not evidence of the truth of factual assertions stated therein. For that purpose, the Submission is inadmissible hearsay, does not provide a foundation for many of the opinions it contains, and is not sufficient to create an undisputed issue of fact. Fed. R. Evid. 602, 702, 802.

[2] Ironically, while filing these motions on the one hand, Defendants on the other have sought an extension of the time within which to respond to Plaintiffs' straightforward discovery requests and have interposed instead "cut and paste" boilerplate objections, promising substantive responses at a future date.

With respect to Defendants' contentions relating to compactness, the Submission provides no explanation for how the compactness scores were calculated, and therefore, there is no foundation to support them. Even if there were, there is no basis for concluding that the compactness measures are "nearly identical" because Defendants have provided no means for measuring the difference between them.

12. Plaintiffs dispute Defendants' contention that CD 3 splits 14 localities, that this is a reduction from the 19 localities split by the former plan, that the new plan does not create any new splits, and that eight large localities are split. Defendants cite only the Section 5 Submission to support these allegations. As discussed, that Submission is not admissible to support these facts and Defendants stand bereft of any admissible evidence to support any of these propositions. Moreover, as Defendants acknowledge, the 2012 Plan splits a total of 17 localities. If Defendants contend that three of these should not be counted, they have presented no evidence in support, and Plaintiffs' expert, Dr. Michael McDonald, offers a different opinion. Intervenors' Br., Ex. O (Dkt. 39-15) at 8 ("McDonald Report"). Thus, it is a disputed issue of fact.

13. Plaintiffs dispute Defendants' contention that the 2012 Plan creates ten precinct splits, reduced from 26 under the former plan. Defendants cite only the Section 5 Submission to support these allegations. As discussed, that Submission is not admissible to support these facts. Moreover, as Defendants acknowledge, the 2012 Plan splits a total of 15 precincts in CD 3. If Defendants contend that five of these should not be counted, they have presented no evidence in support, and Dr. McDonald concludes otherwise. McDonald Report at 10.

15. Plaintiffs dispute Defendants' contention that the 2012 Plan retained 80 percent or more of the benchmark districts' core constituency population. Defendants cite only the

Section 5 Submission to support these allegations. As discussed, that Submission is not admissible to support these facts.

16. Plaintiffs dispute Defendants' contention that the 2012 Plan creates Congressional districts that align with one of the two major political parties and maintain the same political alignments as the previous plan. Defendants cite only the Section 5 Submission to support these allegations. As discussed, that Submission is not admissible to support these facts. In addition, Defendants provide no basis for the method chosen for their partisan predictions. Thus, the lack of foundation for Defendants' asserted facts are strong grounds for disputing them.

17. Plaintiffs dispute Defendants' contention that various factors affected the shape of CD 3 and that the current district has a certain percentage of Black residents. Defendants cite only the Section 5 Submission in support. As discussed, that Submission is not admissible to support these facts. Moreover, as Dr. McDonald explains in his Report, there are two distinct methods for calculating the number of Black residents in CD 3. McDonald Report at 12-13.

B. INTERVENORS' MOTION FOR SUMMARY JUDGMENT: DISPUTED FACTS

27. Plaintiffs dispute Intervenors' contention that the current CD 3 contains only slight variations from the version of CD 3 adopted in 1998. Intervenors cite the Complaint to support this fact, but the cited paragraph compares the current CD 3 to the 1991 and 2001 districts, not 1998. As the evidence discussed below demonstrates, the current composition of CD 3 is more similar to the unconstitutional district adopted in 1991 than the remedial District drawn in 1998. *See infra* at Sec. IV.B.3.

32. Plaintiffs dispute Intervenors' contention that the former CD 3 had a Black voting age population ("BVAP") of 53.1% and the current CD 3 has a BVAP of 56.3%. As Dr. McDonald's Report shows, there are different ways to count the number of Black residents based

on how individuals claiming multiple races are counted. McDonald Report at 12-13. The percentages of BVAP asserted by Intervenors are therefore not undisputed.

33. Plaintiffs dispute Intervenors' contention that DOJ granted preclearance of the 2012 Plan and that this means Virginia carried its burden to prove race was not the predominant purpose behind the current CD 3. Plaintiffs do not dispute that DOJ precleared the 2012 Plan, but for all of the reasons discussed herein, they contest Intervenors' conclusion of law that Virginia has carried its burden in this litigation.

41. Plaintiffs dispute Intervenors' contention that Plaintiffs concede that the General Assembly acted constitutionally when it adopted the 2012 Plan. As Plaintiffs have acknowledged, before *Shelby County*, Section 5 might have served as a compelling state interest justifying a state's race-based reapportionment. But even then, the General Assembly was still required to narrowly tailor its use of race. Plaintiffs have specifically alleged that the General Assembly's use of race was not narrowly tailored: "Even if there were a compelling state interest to create and maintain CD 3 with race as the predominant factor, CD 3 is not narrowly tailored to achieve that interest." Compl. ¶ 45. Intervenors have provided no facts to disprove this contention.[3]

43. Plaintiffs dispute Intervenors' contention that Plaintiffs claim that the General Assembly's purpose has been tainted and that a formerly constitutional plan is now

[3] Plaintiffs acknowledge counsel's response to the Court's question during the scheduling conference of December 6, 2013, concerning whether Plaintiffs claim that CD 3 was unconstitutional when enacted in 2012. In responding to that inquiry, counsel was focusing on the fact that prior to *Shelby County*, courts had recognized that Section 5 could serve as a compelling interest for race-based redistricting and that Section 5 therefore was likely a compelling interest for Virginia in 2012. Counsel neither emphasized nor retracted the allegations in the Complaint -- described in more detail below -- that Virginia's use of race in creating CD 3 was not narrowly tailored. That lack of tailoring existed at the time Virginia enacted the 2012 Plan.

unconstitutional. Plaintiffs claim that race was the predominant factor for CD 3 when it was created and, as described, that the General Assembly's use of race was not narrowly tailored.

48. Plaintiffs dispute Intervenors' contention that Plaintiffs seek statewide changes to multiple districts. As discussed herein, the brief cited by Intervenors to support this alleged fact does not support it.

49. Plaintiffs dispute Intervenors' contention that Plaintiffs have "refused" to submit a remedial map. For the reasons set forth below, Plaintiffs have no obligation to submit a remedial map and have not "refused" to do so.

51. Plaintiffs dispute Intervenors' contention that Dr. McDonald did not consider the Senate criteria or analyze whether race-neutral criteria explain those shifts. As Dr. McDonald's Report shows, he did consider the Senate criteria and possible reasons for the shape of CD 3. McDonald Report at 7-11.

52. Plaintiffs dispute Intervenors' contention that another three-judge court in the District of South Carolina rejected an indistinguishable opinion from Dr. McDonald. Dr. McDonald's opinion in the case cited by Intervenors was specific to South Carolina's redistricting efforts, including the history and specific districts of that state, and fundamentally different than the Report he prepared in this case. Dr. McDonald's Report in this case relies explicitly on the history of Virginia's CD 3, the *Moon v. Meadows* decision, and Virginia's demographic data, all of which are irrelevant to South Carolina's redrawing of districts. Thus, Dr. McDonald's report is clearly distinguishable from his report in the South Carolina case.

III. LEGAL STANDARD ON SUMMARY JUDGMENT

Summary judgment "is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Hunt v. Cromartie*, 526 U.S.

541, 549 (1999) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986)). Thus, when considering summary judgment, the Court must "'believe[]'" the evidence submitted by the nonmoving party "'and all justifiable inferences are to be drawn in [that party's] favor.'" *Id*. at 552 (quoting *Anderson*, 477 U.S. at 255).

Thus, in *Hunt v. Cromartie*, the Supreme Court reversed the district court's decision granting summary judgment on a racial gerrymandering claim where both plaintiffs and defendants had submitted evidence on the key issue of whether the legislature "subordinated traditional race-neutral districting principles . . . to racial considerations." *Id*. at 547. *See also id.* at 549, 552 (explaining that "[t]he legislature's motivation is itself a factual question" and "[a]ll that can be said on the record before us is that motivation was in dispute"); *Prejean v. Foster*, 227 F.3d 504, 509 (5th Cir. 2000) (describing "[l]egislative motivation or intent" as "a paradigmatic fact question" and holding that "defendants are entitled to summary judgment only if there is no genuine question of material fact as to the intent" of the legislature in enacting plan alleged to be a racial gerrymander). In this case -- where there are genuine issues of material fact on the key issue of whether racial considerations predominated the 2012 reapportionment of CD 3 and Defendants and Intervenors have failed to demonstrate that they are entitled to judgment as a matter of law -- the Court must deny the motions for summary judgment.

IV. ARGUMENT

Plaintiffs respectfully submit that the motions for summary judgment should be denied. Despite the fact that discovery has barely begun, Plaintiffs have substantial evidence that CD 3 was a racial gerrymander. As described in detail below, the district's bizarre shape, racial demographics, statements by the 2012 Plan's architect, statements by the Commonwealth in its Section 5 Submission -- and even admissions by the parties in the summary judgment motions

themselves -- all support Plaintiffs' claim that the predominant factor that motivated the division of Virginia's citizens in drawing the boundaries of the current CD 3 was race. Based on the evidence, it is indeed an understatement to say that the disputed issues of material fact render summary judgment inapplicable.

Defendants and Intervenors have also failed to demonstrate that -- as a matter of law -- they are entitled to judgment under the standard that governs Plaintiffs' racial gerrymandering claim. Perhaps recognizing this, the motions for summary judgment rely heavily on cases that are inapposite, advocate legal standards that are inapplicable, and fail completely to demonstrate that Defendants and Intervenors are capable of carrying the burden that will almost certainly fall to them at trial under the well-established burden shifting framework applicable to racial gerrymandering claims. That standard requires Defendants to demonstrate -- once Plaintiffs have carried their initial burden of establishing that considerations of race predominated the reapportionment decision -- both that (1) there was a compelling governmental interest for the use of racial classifications, and (2) the district was narrowly tailored to achieve that interest.

Defendants and Intervenors contend that a desire to comply with Section 5 explains CD 3 and, notwithstanding the decision in *Shelby County*, continue to assert that Section 5 provides the compelling interest that excuses the General Assembly's admitted reliance on racial classifications. But, *even if* Section 5 were applicable, Defendants and Intervenors have failed to prove as a matter of law -- in accordance with their burden -- that Section 5 compelled the creation of CD 3 as drawn by the General Assembly. Indeed, their failure to even attempt an argument that CD 3 is narrowly tailored to the purportedly compelling interest of Section 5 defeats their claim for summary judgment.

A. LEGAL STANDARD ON RACIAL GERRYMANDERING CLAIMS

Plaintiffs challenging the constitutionality of a plan as a racial gerrymander bear the burden of proving that race was the "predominant factor" motivating the districting decision in question. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Once plaintiffs have made this showing, the burden then shifts to defendants to satisfy strict scrutiny by proving that: (1) the state had a compelling governmental interest in making the race-based districting decision; and (2) the decision was narrowly tailored to achieve that interest. *Bush v. Vera*, 517 U.S. 952, 976 (1996).

B. DISPUTED ISSUES OF MATERIAL FACT ON WHETHER CONSIDERATIONS OF RACE PREDOMINATED PRECLUDE SUMMARY JUDGMENT

"[R]eapportionment is one area in which appearances do matter," *Shaw v. Reno* ("*Shaw I*"), 509 U.S. 630, 647 (1993), and Plaintiffs may demonstrate that a district is a racial gerrymander where the district has a "bizarre" or "irregular" shape and demographic data supports an inference that improper racial classifications predominated in the construction of that district. *See Miller*, 515 U.S. at 914. Plaintiffs may also support their claim with direct evidence of legislative motives, including admissions contained in the state's Section 5 preclearance submissions. *Shaw v. Hunt* ("*Shaw II*"), 517 U.S. 899, 906 (1996); *Bush*, 517 U.S. at 970; *Clark v. Putnam Cnty*., 293 F.3d 1261, 1272 (11th Cir. 2002).

Although discovery has just begun, the evidence collected to date is more than sufficient to satisfy Plaintiffs' burden of proof and to defeat the motions for summary judgment. First, the bizarre shape of CD 3, along with its subjugation of traditional criteria and the way racial populations were traded among districts, all demonstrate that the General Assembly's predominant concern was race. Second, CD 3 resembles the district found to be an unconstitutional racial gerrymander in *Moon v. Meadows*, 952 F. Supp. 1141 (E.D.Va.), *aff'd*, 521 U.S. 1113 (1997). Third, statements by legislators -- along with concessions on the record

from both Defendants and Intervenors -- demonstrate that race was the predominant purpose behind CD 3. Finally, Plaintiffs are awaiting responses to discovery requests from Defendants, Intervenors, and third parties who were involved in the reapportionment process, and it would be premature to find an absence of disputed material facts while this fact-gathering process is underway.

1. CD 3 Is Bizarrely Shaped and Disregards Traditional Redistricting Criteria

CD 3 is bizarre on its face. *Miller*, 515 U.S. at 913 ("Shape . . . may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines."). The District starts north of Richmond and slides down the northern shore of the James River, ending abruptly at the border of James City. It then jumps over James City, which is part of CD 1, and lands in a horseshoe shape in Newport News. It then leaps over southern and eastern Newport News in CD 2 and stops in Hampton. The second half of CD 3 starts anew on the southern shore of the James River, first darting west to swallow Petersburg and then sliding east through Surry. It then hops over Isle of Wight, which is in CD 4, covers Portsmouth, and runs up into Norfolk, tearing CD 2 into different areas on either side of Norfolk. This bizarre shape is evidence that the General Assembly was primarily motivated by race when drawing CD 3. *See* McDonald Report at 3-5.

Its disregard of traditional redistricting criteria is strong evidence that race was the General Assembly's predominant consideration in drawing CD 3. In particular, it paid little attention to compactness, contiguity, and political subdivision and precinct lines. *See Miller*, 515 U.S. at 915. CD 3 is the least compact Congressional district in Virginia, ranking last amongst all districts under the Reock, Polsby-Popper, and Schwartzberg Tests. McDonald Report at 7. CD 3 is also not contiguous over land. The lack of contiguity is particularly egregious in certain

places, such as Newport News and Hampton. The cities sit right next to each other on the North shore of the James River, but rather than connect them by land in one district, the General Assembly put portions of both cities in CD 3 and split them by running CD 2 right between them. *Id*. at 8. The General Assembly also wrapped CD 2 around Norfolk, further cutting off the portion of CD 3 on the South shore of the James River in Portsmouth from the portion on the North shore in Hampton. *Id*. at 8. CD 3 also splits more counties and cities than any other Congressional district in Virginia and contributes to most of the locality splits of its neighboring districts. *Id*. at 9. Finally, CD 3 splits more voting precincts than any of Virginia's other Congressional districts. *Id*. at 10. The 2012 Plan splits 20 voting precincts in all; CD 3 participates in 14 of them. *Id*. at 10. In sum, CD 3's tortured shape and disregard for traditional districting criteria demonstrate that race predominated in its creation.[4]

[4] Even if black letter summary judgment law did not require the Court to credit Plaintiffs' evidence and the reasonable inferences drawn from it (which it clearly does), *see Cromartie*, 526 U.S. at 552; *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 283 (4th Cir. 2013) ("It is elementary that, when a court considers a summary judgment motion, '[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.'") (quoting *Anderson*, 477 U.S. at 255), Defendants' self-serving assertions that traditional districting principles were not subordinated to considerations of race would be insufficient to rebut Plaintiffs' claim. *See, e.g., Putnam Cnty.*, 293 F.3d at 1270 ("The 'mere recitation' that traditional factors were not subordinated to race is insufficient to insulate the County's decision to maximize the black populations of [the challenged Districts].") (quoting *Miller*, 515 U.S. at 919). *See also id*. ("The fact that other considerations may have played a role . . . does not mean that race did not predominate. . . . If the line-drawing process is shown to have been infected by such a deliberate racial purpose, strict scrutiny cannot be avoided simply by demonstrating that the shape and location of the districts can rationally be explained by reference to some districting principle other than race, for the intentional classification of voters by race, though perhaps disguised, is still likely to reflect the impermissible racial stereotypes, illegitimate notions of racial inferiority and simple racial politics that strict scrutiny is designed to smoke out.") (internal quotation marks and citations omitted); *Bush*, 517 U.S. at 972-73 (rejecting testimony of legislators and staffers that non-racial considerations motivated reapportionment); *Prejean*, 227 F.3d at 510 (reversing grant of summary judgment where lower court credited affidavit of judge that drew the challenged plan averring that race did not predominate over traditional districting principles).

2. The Manner in Which the General Assembly Drew CD 3 Also Shows That Race Was the Predominant Purpose Behind the Plan

Virginia drew CD 3 to increase its concentration of Black voting age residents. At the time of the 2010 census, former CD 3 had 53.1% or 53.9% BVAP, (depending on how people claiming to have multiple races are counted). McDonald Report at 14. Under the current plan, the Black population in CD 3 increased to 56.3% or 57.2% of the voting age population. *Id.*.

Moreover, although CD 3 needed to gain population to meet equal population requirements, the General Assembly engaged in a complicated scheme of strategically moving certain population *out* of the prior version of CD 3, trading lower density BVAP communities for higher density BVAP communities in the surrounding districts. McDonald Report at 15-25. The net effect of these trades is that over 90% of the voting age population added to CD 3 in 2012 is Black. *Id*. at 25.

3. The Current CD 3 Has a Similar Composition to the District Held Unconstitutional in *Moon v. Meadows*

The CD 3 adopted by the General Assembly in 2012 also closely resembles the 1991 district held unconstitutional in *Moon v. Meadows*. Following the 1990 census, Virginia made CD 3 its first majority-Black Congressional district. The District had a total Black population of 63.98% and BVAP of 61.17%. Roche Decl. ¶ 4, Ex. C at 23. The District also included many of the communities found in the current CD 3, including Richmond, Petersburg, Newport News, Hampton, Portsmouth, and Norfolk. McDonald Report at 6. In 1998, a three-judge panel of this Court held that CD 3 was the result of unconstitutional racial gerrymandering. *Moon*, 952 F. Supp. at 1150. The General Assembly then drew a new district, which had a Black population of

53.59% and a BVAP of 50.47%. Roche Decl. ¶ 5, Ex. D at 22.[5] It achieved this result in part by returning Portsmouth, Suffolk, Hopewell, and Petersburg to CD 4. *Id*. at 20.

The 2012 version of CD 3 has a composition more similar to the unconstitutional district than the remedial one. In 1991, CD 3 had a total Black population of 63.98% and a BVAP of 61.17%, compared to 59.5% and 56.3% in 2012, and 53.49% and 50.47% in 1998. Thus, the concentration of Black residents is closer to the concentration under the unconstitutional plan. Also, in 2012, the General Assembly returned communities to CD 3 that had been removed under the remedial plan, most notably large portions of Petersburg. Thus, the General Assembly's decision to draw CD 3 with a similar composition to the district previously held unconstitutional is further evidence that CD 3's shape is primarily the result of racial gerrymandering.

Moreover, the factors that led the court to find CD 3 unconstitutional in 1998 require the same result here. In *Moon*, the court held that "[e]vidence of legislative intent, the bizarre shape of the district, and the subordination of traditional districting principles demonstrate that the Commonwealth intentionally drew [CD 3's] boundary lines" for racial purposes. 952 F. Supp. at 1146. In particular, the court relied on comments from the General Assembly and evidence that Black residents were moved into the district while non-Black residents were removed. *Id*. The court also found that CD 3's bizarre shape was evidence of the General Assembly's unconstitutional purpose. Finally, the court found that the splitting of localities and lack of compactness and contiguity were evidence that traditional redistricting criteria had been subordinated to race. The current CD 3 suffers from the same failings, and like the unconstitutional district, the shape of the current district was motivated primarily by race.

[5] The court never specifically approved the remedial map as a constitutional fix for the racial gerrymander.

4. Statements By Legislators and Parties Here Prove That Race Was the Predominant Purpose Behind CD 3

Finally, statements made by the map-drawers themselves -- and even Defendants and Intervenors -- drive home that race predominated the drawing of CD 3. All of these entities have claimed that the District was drawn with the primary goal of satisfying Section 5 standards. Thus, the General Assembly's declared intention to comply with Section 5 was in truth an effort to establish a certain racial composition of CD 3. Because the General Assembly's purported commitment to comply with Section 5 was obviously a commitment to reapportion with race as the predominant purpose, all of the General Assembly's statements regarding the priority of complying with the VRA support the conclusion that racial considerations drove Virginia's reapportionment efforts and that Plaintiffs have met their initial burden in this case.

a. Statements by the Map's Author

The author of the 2012 Plan made clear that the predominant concern in drawing CD 3 was the District's concentration of Black residents. On April 6, 2011, Del. Janis introduced HB5004, the legislation that would become the 2012 Plan. Roche Decl. ¶ 6, Ex. E at 7. The House of Delegates immediately sent the bill to the Committee on Privileges and Elections, and within a week, Del. Janis returned HB5004 to the floor of the House. There, he declared that when he drew the Plan's districts, he "was most especially focused on making sure that [CD 3] did not retrogress in its minority voting influence." Roche Decl. ¶ 7, Ex F at 14:40-15:13. He further stated that "one of the paramount concerns in the drafting of the bill was the constitutional and federal law mandate under the [VRA] that we not retrogress minority voting influence in [CD 3]." *Id*. at 9:30-10:25. Thus, Del. Janis explicitly avowed that maintaining a certain percentage of Black voting age residents in CD 3 was his primary purpose.

Del. Janis stated openly that he drew CD 3 by looking

> at the census data as to the current percentage of voting age African American population in [CD 3] and what that percentage would be in the proposed lines to ensure that the new lines that were drawn for [CD 3] . . . would not have less percentage of voting age African American population under the proposed lines in 5004 that exist under the current lines under the current Congressional District.

Id. at 9:30-10:25. In other words, Del. Janis drew CD 3 by comparing the former CD 3's BVAP percentage with the BVAP percentage in other possible plans. Although Del. Janis stated that he took into account other criteria such as equal population and the preferences of Members of Congress, he was clear that "*the primary focus* of how the lines in HB 5004 were drawn" was race-based. *Id*. at 24:57-25:55 (emphasis added). In his presentation to the House Committee on Privileges and Elections on April 7, 2011, Del. Janis described this focus on race as one of his two top priorities, the other being population equality. Roche Decl. ¶ 8, Ex. G at 3.

Thus, the author of the 2012 Plan explicitly and repeatedly stated that the predominant purpose behind the shape and composition of CD 3 was race. The General Assembly turned Del. Janis's purpose into law when it passed his plan on January 20, 2012. Roche Decl. ¶ 3, Ex. B. That alone is sufficient to carry Plaintiffs' burden.

b. Senate Redistricting Criteria

On March 25, 2011, the Senate Committee on Privileges and Elections adopted guidelines establishing the criteria for drawing congressional districts. *See* Intervenors' Br., Ex. K (Dkt. 39-11) at 1 ("Senate Guidelines"). Both Defendants and Intervenors rely on the Senate Guidelines in their motions. *See, e.g.*, Defs.' Br. 3-4 (Dkt. #37); Intervenors' Br. 28 (Dkt. #39). But the Guidelines, if anything, mitigate in favor of a finding that race was the predominant purpose behind CD 3, and especially so when viewed in the light most favorable to Plaintiffs.

As an initial matter, the Senate that adopted the Guidelines is not the Senate that approved the 2012 Plan. Rather, the 2011 Democratic-led Senate approved an entirely different congressional plan -- with an entirely different configuration of CD 3. Roche Decl. ¶ 6, Ex. E at 7-8. Defendants' and Intervenors' suggestions that the 2012 General Assembly relied on or applied these Guidelines is not supported by the record evidence.

In any event, the Senate Guidelines confirm that racial concerns took priority over other traditional districting considerations. They identify equal population and compliance with Section 5 as the Senate's top two Congressional criteria. *See* Senate Guidelines at 1. The Guidelines identify other criteria for consideration, including contiguity, compactness, single-member districts, and communities of interest, but state unequivocally that "population equality among districts and compliance with . . . the [VRA] shall be given priority in the event of a conflict among the criteria." *Id*. Thus, considerations of race were of paramount importance, elevated above all other criteria, save the federal constitutional requirement of equal population.

c. Defendants' and Intervenors' Concessions

Finally, both Defendants and Intervenors concede that the General Assembly's primary motivation in CD 3 was to separate voters based on race, purportedly in service of Section 5 obligations. Defendants concede that, by focusing on compliance with Section 5, they are necessarily stating an intention "to consider race"; that "there are points in the drawing of the district *where race must predominate*" to comply with the VRA; and that, in 2012, Virginia elevated compliance with Section 5 over traditional redistricting criteria. Defs.' Br. 9, 10, 11 (emphasis in original). Similarly, Intervenors profess that "compliance with Section 5 was the General Assembly's predominant purpose or compelling interest underlying [CD] 3's racial

composition in 2012," and contend that the General Assembly believed "it had to be maintained as a majority-black district." Intervenors' Br. 15, 17.

In short, in prematurely moving for summary judgment, Defendants and Intervenors have bolstered Plaintiffs' case: racial purpose predominated in the General Assembly's drawing of CD 3. Now, the burden shifts to Defendants to prove -- on strict scrutiny no less -- that this "presumptively unconstitutional race-based districting" was justified. *Miller*, 515 U.S. at 927.

C. DEFENDANTS HAVE FAILED TO DEMONSTRATE THAT THE GENERAL ASSEMBLY'S USE OF RACE AS THE PREDOMINANT FACTOR WAS JUSTIFIED AS A MATTER OF LAW

Defendants and Intervenors completely misconstrue the nature of the burdens in this litigation. Plaintiffs need not prove that the General Assembly was motivated by the "illegitimate," "improper," or "unconstitutional" use of race. Intervenors' Br. 1, 12, 13, 15. Plaintiffs need only demonstrate that considerations of race predominated in drawing CD 3; *Defendants* bear the burden of satisfying the demanding strict scrutiny standard to prove that the "presumptively unconstitutional" predominant use of race was legitimate. *Miller*, 515 U.S. at 927.

Defendants' and Intervenors' argument in this respect essentially assumes that Plaintiffs have met their burden of proving race as a predominant factor. Defendants contend, however, that they would prevail on strict scrutiny because, at the time of enactment, Virginia was a covered jurisdiction under Section 5, and *Shelby County* has no bearing on the compelling interest inquiry. This argument, however, ignores the fact that a change in the constitutional landscape may vitiate the compelling state interest Virginia may have claimed under prior law. The motions also ignore altogether the second prong of the strict scrutiny burden -- namely, that CD 3 was narrowly tailored to achieve Section 5 compliance. Thus, even assuming that Section

5 *could* qualify as a compelling interest under the circumstances at issue here, Defendants' and Intervenors' complete failure to establish that CD 3 is narrowly tailored to satisfy that interest necessarily defeats their claim for summary judgment.

1. Virginia Can Assert No Compelling Interest in Section 5

Section 5 mandates that certain "covered" jurisdictions obtain preclearance from DOJ or the U.S. District Court for the District of Columbia before changing any voting-related "standard, practice, or procedure." 42 U.S.C. § 1973c. When the 2012 Plan was enacted, Virginia was a "covered" jurisdiction under Section 5. On June 25, 2013, however, the Supreme Court held that the coverage formula provided in Section 4(b) of the VRA is unconstitutional. *Shelby Cnty.*, 570 U.S. ___, 133 S. Ct. 2612 (2013).[6] While Plaintiffs lament the *Shelby County* decision and support legislative efforts to restore application of the VRA's preclearance requirements, the current state of the law is that Virginia is no longer "covered" under Section 5. As a result, Defendants simply cannot, as a matter of well-settled law, rely on compliance with that provision as a compelling state interest.

Defendants' and Intervenors' vehement argument that *Shelby County* has no effect on the constitutionality of CD 3 is belied by their failure to cite any case law to that effect. Indeed, Defendants' argument on this point is limited to two paragraphs, without any case cite whatsoever, arguing simply that it is "dispositive" that Virginia was required to comply with Section 5 when it redrew the boundaries of CD 3. Defs.' Br. 13. Intervenors, meanwhile, rely

[6] Intervenors mistakenly assert that "five Justices invalidated Section 5 in 2013." Intervenors' Br. 2. In fact, the Court expressly stated: "We issue no holding on § 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions." 133 S. Ct. at 2631.

simply upon the "self-evident truism that a constitutional law cannot be struck down as unconstitutional." Intervenors' Br. 14.

Defendants' and Intervenors' unsupported assumption that the compelling interest inquiry ends as of enactment of a districting plan, however, ignores the well-established case law holding that changes in the legal landscape can render a law unconstitutional even if it would have survived strict scrutiny at some point in the past.

a. A Court May Order Mid-Decennial Redistricting in Light of Intervening Supreme Court Decisions

In *Reynolds v. Sims*, 377 U.S. 533, 579 (1964), the Supreme Court read the Equal Protection Clause to impose the one-person, one-vote rule on state legislative reapportionment, holding that "the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." The Court refined this "substantial equality" standard in a deluge of redistricting cases decided on the heels of *Reynolds*. *See, e.g.*, *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Wells v. Rockefeller*, 394 U.S. 542 (1969); *Swann v. Adams*, 385 U.S. 440 (1967).

In *Whitcomb v. Chavis*, 403 U.S. 124, 162-63 (1971), the Court affirmed an order requiring the Indiana General Assembly to redistrict based on population inequalities. The Court flatly rejected the State's argument that a federal court had already approved the districting scheme in 1965 and it could not be compelled to redistrict again before the next census:

> Here, the District Court did not order reapportionment as a result of population shifts since the 1965 *Stout* decision, but only because the disparities among districts which were thought to be permissible at the time of that decision had been shown by intervening decisions of this Court to be excessive.

Id. at 163. Thus, while a court may not order mid-decennial redistricting based on population shifts alone, , redistricting may be required when "intervening decisions of [the Supreme] Court"

establish that a current plan is no longer valid. *Id. See also Jackson v. DeSoto Parish Sch. Bd.*, 585 F.2d 726, 729 (5th Cir. 1978) ("A challenge to the constitutionality of a court-ordered reapportionment plan is not . . . precluded by principles of res judicata or collateral estoppel. It has long been established that res judicata is no defense where, between the first and second suits, there has been an intervening change in the law or modification of significant facts creating new legal conditions. . . . This court has thus been unwilling to bar subsequent challenges to reapportionment schemes, seemingly constitutional when instituted by the court, but apparently inadequate under the rapidly changing jurisprudence in this area."); *accord Moch v. East Baton Rouge Parish Sch. Bd.*, 548 F.2d 594, 598 (5th Cir. 1977).

Shelby County undoubtedly qualifies as a significant change in the law following the 2012 Plan's enactment. This intervening decision undermines Virginia's reliance on Section 5 as a compelling interest for its race-based districting decision and requires the Court to determine the merits of Plaintiffs' claim accordingly.

b. Under the First Amendment, a Law Fails Strict Scrutiny Where an Intervening Supreme Court Decision Finds the Interest Asserted No Longer Compelling

Federal courts' campaign finance jurisprudence provides, by analogy, additional support for this dynamic conception of strict scrutiny. Under the First Amendment, strict scrutiny applies to laws that burden pure speech, such as limitations on campaign expenditures. *See Citizens United v. FEC*, 558 U.S. 310, 340 (2010). The standard is the same as under the Equal Protection Clause: a law can survive strict scrutiny if it "furthers a compelling interest and is narrowly tailored to achieve that interest." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007). Where a law only indirectly burdens speech (e.g., limits on contributions rather than expenditures), the Court applies heightened scrutiny, asking whether it is "'closely drawn' to

serve a 'sufficiently important interest.'" *Davis v. FEC*, 554 U.S. 724, 740, n.7 (2008) (quoting *McConnell v. FEC*, 540 U.S. 93, 136 (2003), *overruled on other grounds by Citizens United*, 558 U.S. 310).

Citizens United struck down a provision of the Federal Election Campaign Act ("FECA") that barred corporations and unions from making independent expenditures for certain political ads. *See* 558 U.S. at 365-66. The Court held that the ban was not justified by the government's asserted interests in, among others, (1) preventing corruption or the appearance of corruption in the form of buying "influence over or access to elected officials," (i.e., non-*quid pro quo* corruption), *id.* at 359, and (2) preventing aggregations of wealth from drowning out the speech of others (the "antidistortion" interest). In so holding, the Court overruled two prior decisions that had recognized these interests as compelling. *Id*. at 365.

Shortly after *Citizens United*, two circuits found that that decision vitiated these two interests as applied outside the expenditure context—specifically, to laws limiting *contributions* to independent groups. In *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), the D.C. Circuit invalidated FECA's contribution limits as applied to certain independent political associations. The unanimous en banc court reasoned, "Given this precedent [of *Citizens United*], the only interest we may evaluate to determine whether the government can justify contribution limits . . . is the government's anticorruption interest." *Id.* at 692. The Court found the *quid pro quo* corruption interest inapplicable to contributions to independent groups.

Likewise, in *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010), the Ninth Circuit invalidated a city ordinance limiting contributions to "any person" making independent expenditures supporting or opposing a candidate. The court rejected the city's asserted anti-distortion rationale, noting that "the Supreme Court has overruled

Austin and explicitly rejected the 'anti-distortion rationale' upon which it rested." *Id.* at 693. The court also rejected reliance on the "broader definition of 'corruption,'" noting that *Citizens United* cabined that interest to apply only to *quid pro quo* corruption. *Id.* at 695 n.5.

Citizens United and its aftermath illustrate the dynamic quality of strict scrutiny: At Time 1, the government enacts measures advancing interests that qualify as compelling under the governing law. At Time 2, the Supreme Court overrules the governing law, rendering the interests non-compelling. At Time 3, courts strike down the measures because they no longer advance compelling interests. Based on this analogous authority, Defendants' and Intervenors' unsupported assertion that *Shelby County* cannot undo a state's compelling interest fails as a matter of law.

c. Intervenors Mischaracterize Plaintiffs' Claim

Intervenors grossly mischaracterize the basis of Plaintiffs' racial gerrymandering claim and, as a result, their attempt to defeat that claim wanders far afield.

First, Intervenors incorrectly suggest that Plaintiffs' claim is one of discriminatory intent. Intervenors' Br. 11, 17-18. But Plaintiffs need not allege or prove that the General Assembly was motivated by a desire to disadvantage minority voters:

> *Shaw* recognized a claim analytically distinct from a vote dilution claim. Whereas a vote dilution claim alleges that the State has enacted a particular voting scheme as a purposeful device to minimize or cancel out the voting potential of racial or ethnic minorities, an action disadvantaging voters of a particular race, the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts.

Miller, 515 U.S. at 911 (internal quotation marks and citations omitted). Plaintiffs need only show "that race was the predominant factor motivating the legislature's decision to place a

significant number of voters within or without a particular district." *Id.* at 916. Thus, the General Assembly's purported intent to comply with Section 5 can form the basis of a racial gerrymander.

Second, Intervenors miss the mark by arguing that *Shelby County* could not have "influenced the legislature's purpose *when* it acted." Intervenors' Br. 14 (emphasis in original). Plaintiffs do not contend that *Shelby County* changed or even informed the General Assembly's actual motivation for adopting CD 3 in 2012. Rather, Plaintiffs contend that, as a result of *Shelby County*, Defendants may no longer rely on Section 5 as a compelling interest justifying their admitted purpose in 2012: to divide voters between CD 3 and other districts based on racial grounds. In other words, Virginia's motive has not changed, but the constitutionality of its actions has.

Intervenors' misunderstanding is laid bare in a single sentence of their brief: "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." Intervenors' Br. 14 (emphasis added). Intervenors fail to recognize that a state's manipulation of minority populations in purported compliance with Section 5 is, *by definition*, a racial purpose. The burden Defendants (and Intervenors) bear is to prove that Virginia can continue to rely on Section 5 in the face of *Shelby County* to justify its predominant use of race to draw CD 3. Intervenors' argument that the General Assembly's original motivation has not changed is, therefore, of no moment.

In short, Intervenors have initiated summary judgment proceedings against the wrong case. Intervenors may not imagine a legal theory that finds no basis in Plaintiffs' pleadings and

then seek summary judgment on their manufactured argument. For this reason alone, summary judgment is inappropriate here.

2. Defendants and Intervenors Have Failed to Carry Their Burden

But even if Section 5 remains a compelling interest, there is another legal reason for denying the motions -- Defendants have not even attempted to show that they can satisfy their burden to prove that CD 3 was narrowly tailored to achieve that interest. *Shaw II*, 517 U.S. at 908; *Miller*, 515 U.S. at 920; *Bush*, 517 U.S. at 976.

Intervenors improperly base their motion on Plaintiffs' alleged "concession" that the General Assembly "acted constitutionally when it enacted the current congressional district map." Intervenors' Br. 1. It is true that the Supreme Court has assumed, without deciding, that VRA compliance *can* be a compelling state interest. *Bush*, 517 U.S. at 977. And it is true that if *Shelby County* did not undermine Virginia's reliance on Section 5, Section 5 could in fact be a compelling interest. But Plaintiffs do not concede that the 2012 Plan is constitutional. On the contrary, Plaintiffs' Complaint specifically alleges: "Even if there were a compelling state interest to create and maintain [CD 3] with race as the predominant factor, [CD 3] is not narrowly tailored to achieve that interest." Compl. ¶ 45.

The Supreme Court has explicitly rejected the contention that a state can justify its race-based redistricting by simply averring to the need for VRA compliance. *Miller*, 515 U.S. at 922. Instead, it has held that:

> When a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. Rather, we insist on a strong basis in evidence of the harm being remedied.

Id. Nor does VRA compliance necessarily shield a plan from challenge. *Shaw I*, 509 U.S. at 654 ("[T]he Voting Rights Act and our case law makes clear that a reapportionment plan that satisfies § 5 still may be enjoined as unconstitutional."). In fact, the Court has consistently struck down plans that were not narrowly tailored to achieve VRA compliance. *See, e.g.*, *Bush*, 517 U.S. at 983 (finding Texas "went beyond what was reasonably necessary to avoid retrogression") (internal quotation marks and citation omitted); *Shaw II*, 517 U.S. at 910-18 (concluding that districts were not narrowly tailored to comply with the VRA); *see also Miller*, 515 U.S. at 921 (rejecting districts as unconstitutional where not required under a correct reading of the VRA).

Thus, *even if* Defendants could show that CD 3 was drawn to comply with Section 5 -- and this Court determined that was and remains a valid compelling interest for subjugating traditional redistricting criteria to considerations of race -- Defendants must show that the General Assembly did not go "beyond what was reasonably necessary" to achieve that compliance to defeat Plaintiffs' racial gerrymandering claim. *Bush*, 517 U.S. at 983. But neither motion even attempts to make this showing. Instead, Defendants merely assert that the 2012 plan "complied with the requirements of Section 5 by maintaining Virginia's only majority-minority district" and "further ensured that [Virginia] did not retrogress under Section 5 by retaining minority strength in the redrawn [CD 3] comparable to the minority strength of the previous [CD 3]." Defs.' Br. 12-13; *see also* Intervenors' Br. 17 ("[CD] 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."). They offer no expert testimony to demonstrate that any BVAP less than 56.3% would have led to "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141. They point to no evidence that the General Assembly even analyzed (let alone retained an expert to analyze) how

high the BVAP of CD 3 must be to provide minorities an ability to elect their candidates of choice. Indeed, they make no effort to explain why they believe Section 5 required the General Assembly to *increase* the BVAP in CD 3 by over three percentage points. *See Moon*, 952 F. Supp. at 1150 ("There is simply no evidence that the Legislature took any steps to narrowly tailor [CD 3], nor has it produced enough evidence of a compelling government interest."). *Cf. Prejean*, 227 F.3d at 518 ("Narrow tailoring demands an explanation that the district chosen entails the least race-conscious measure needed to remedy a violation."). Nor do Defendants make any effort to defend CD 3 as justified by compliance with Section 2 of the VRA, much less demonstrate that the General Assembly had a "strong basis in evidence" for concluding that race-based redistricting was necessary and that CD 3 did not "subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid" liability, as required by the case law. *Bush*, 517 U.S. at 979. *See also Miller*, 515 U.S. at 921-22.

In sum, because Defendants and Intervenors have not even attempted to satisfy their burden to demonstrate narrow tailoring, summary judgment must be denied.

D. PLAINTIFFS NEED NOT PROVIDE AN ALTERNATIVE MAP AT THIS STAGE

As Plaintiffs previously explained in their reply brief on the question of available remedies, Intervenors' assertion that Plaintiffs are required to submit an alternative map at this stage confuses Plaintiffs' claims of racial gerrymandering with a claim brought under Section 2 of the VRA. Pls.' Remedy Reply Br. 2 (Dkt. #34). Again, Plaintiffs do not make a Section 2 claim -- they allege that CD 3 was an unconstitutional racial gerrymander and the cases that govern Plaintiffs' burden do not require Plaintiffs to adduce an alternative map to succeed. Plaintiffs need only demonstrate that racial considerations predominated the General Assembly's reapportionment of CD 3. Once Plaintiffs demonstrate their ability to make this showing --

which, based on the evidence summarized, they clearly have done -- the burden shifts to Defendants to satisfy strict scrutiny by demonstrating that (1) Virginia had a compelling interest in using race as a predominant factor, and (2) the use of race was narrowly tailored to meet that interest. *Bush*, 517 U.S. at 976.

None of the cases cited by Intervenors in either their remedy brief or their summary judgment motion actually support their argument that, to succeed on their racial gerrymander claim, Plaintiffs must offer an alternative map. To the contrary, in *Miller*, the Court affirmed the lower court's conclusion that plaintiffs had successfully carried their burden and demonstrated that the challenged district was a racial gerrymander based on (1) the shape of the district, (2) relevant racial demographics, and (3) evidence of motivation from pre-clearance documents -- *not* on any alternative map proffered by the plaintiffs. 515 U.S. at 917-19.

Moreover, Intervenors' argument in this regard seems to assume that, if the 2012 Plan was drawn to comply with Section 5 or was precleared by DOJ, Plaintiffs cannot succeed on their claim. *See* Intervenors' Br. 21 ("Plaintiffs do not point to an alternative plan that . . . comports with Plaintiffs' notion of constitutional requirements . . . presumably because *all* such plans were drawn to comply with Section 5. [DOJ], moreover exhaustively examined all of those plans . . . and it determined . . . that the Enacted Plan was free of any discriminatory purpose.") (emphasis in original) (internal citations and quotation marks omitted).

But that is not the law. Indeed, virtually every racial gerrymandering case involves a plan that was pre-cleared by DOJ. *See, e.g.*, *Miller*, 515 U.S. at 909, 918; *Moon*, 952 F. Supp. at 1144. That's hardly surprising, given that DOJ considered a different question in preclearance than courts tasked with determining whether a plan or district is an unconstitutional racial gerrymander. Pre-clearance asked specifically whether a proposed change to a covered

jurisdiction's voting laws had a "discriminatory purpose," 42 U.S.C. 1973c(c); a racial gerrymandering claim considers whether the legislature subordinated traditional districting standards to impermissible racial considerations. Defendants' efforts to conflate the two inquiries should be rejected.

Intervenors' assertion that "Plaintiffs seek to mount an attack on virtually *all* districts," Intervenors' Br. 23 (emphasis in original), is similarly untethered to reality. Intervenors cite the section of Plaintiffs' reply brief discussing available remedies that directly responded to Intervenors' reliance on *Upham v. Seamon*, 456 U.S. 37 (1982), and clarified that there is the "potential" that the impact could be "more wide reaching" than CD 3, making *Upham* inapplicable. Pls.' Remedy Reply 12. Intervenors' apparent hysteria in response is unwarranted and makes too much of this discussion. Finally, Intervenors' assertion that "Plaintiffs have provided no clue" as to which districts could be affected by a finding that CD 3 was racially gerrymandered is inaccurate. Dr. McDonald's expert report discusses in detail the population exchanges with neighboring districts that the General Assembly made to unconstitutionally maximize the Black population in the current CD 3. *See* McDonald Report at 12-25.

V. CONCLUSION

For all of the foregoing reasons, the Court should deny Defendants' and Intervenors' Motions for Summary Judgment.

Dated: December 31, 2013

Respectfully submitted,

By /s/_____

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

Kevin J. Hamilton (admitted *pro hac vice*)
Perkins Coie, LLP
1201 Third Avenue, Ste. 4800
Seattle, WA 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000
Email: KHamilton@perkinscoie.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of December, 2013, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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

Attorneys for Defendants Charlie Judd, Kimberly Bowers, and Don Palmer in their official capacities

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

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

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

Attorneys for Intervenor-Defendant Virginia Representatives

Respectfully submitted,

By /s/

John K. Roche (VA Bar No. 68594)
Perkins Coie, LLP
700 13th St., N.W., Suite 600
Washington, D.C. 20005-3960
Phone: (202) 434-1627
Fax: (202) 654-9106
JRoche@perkinscoie.com

Attorneys for Plaintiffs