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.,	)	**Civil Action No.: 3:13-cv-678**
	)	
Defendants.	)	
	)	

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND RULES

INTRODUCTION

Plaintiffs' Opposition attempts to obfuscate, but cannot escape, the concession fatal to their novel theory: that the General Assembly's motivation in preserving District 3 as a majority-black district was the "compelling state interest" of complying with Section 5 of the Voting Rights Act. *See* Pls.' Opp. at 26 (DE 42); *see also* Intervenor-Defs.' Mem. at 1–2, 11–20 (DE 39). Plaintiffs therefore cannot possibly meet their "demanding" burden, *Easley v. Cromartie*, 532 U.S. 234, 241 (2001), to prove that an illegitimate use of "race was a 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); *see also* Intervenor-Defs.' Mem. at 1–2, 11–20. Absent such a showing of improper racial purpose at the time the General Assembly adopted the current congressional districting plan ("the Enacted Plan"), Plaintiffs' racial gerrymander claim inherently fails. *See* Intervenor-Defs.' Mem. at 1–2, 11–20. Since it is undisputed and indisputable that the Supreme Court's 2013 *Shelby County v. Holder* opinion did not "change[] or even inform[] the General Assembly's actual motivation for adopting [District] 3 in 2012," Pls.' Opp. at 19, that *post hoc* judicial decision inherently cannot undermine the constitutionality of that District.

In short, since it is clear that the legitimacy of the legislature's purpose or interest is assessed at the time of enactment, and since it remains undisputed that Section 5 compliance provided a "compelling state interest" to preserve District 3 as a majority-black district in 2012, Defendants are entitled to summary judgment. There is certainly no point in engaging in Plaintiffs' inherently artificial and biased approach of examining whether—based on real-world legislative history, etc.—"race was the predominant factor for [District] 3 *when it was created*" (Pls.' Opp. at 8 (emphasis added)), but simultaneously *ignoring* the *principal* real-world

justification for District 3—*i.e.*, compliance with Section 5. There is nothing to Plaintiffs' approach of minutely examining every scintilla of evidence reflecting the General Assembly's *actual* purpose *in 2012 except* its *Section 5* purpose.

For these reasons, in a recent case advancing a *Shaw* claim, a three-judge court squarely rejected the suggestion that *Shelby County* retroactively "nullified the interests of the State . . . in complying with Section 5 of the Voting Rights Act." Mem. Op. and Order at 162, *Ala. Leg. Black Caucus v. Ala.*, No. 2:12-cv-691 (M.D. Ala. Dec. 20, 2013) (three-judge court) (Pryor, J., joined by Watkins, J.) ("Ala. Op.") (Ex. A). Instead, that court "evaluate[d] the [challenged redistricting] plans in light of the legal standard that governed the Legislature when it acted, not based on a later decision of the Supreme Court that exempted Alabama from future coverage under section 5." *Id.* The court therefore upheld the challenged plans because "[t]o comply with section 5, the Alabama Legislature chose the only option available: to protect the voting strength of black voters by safeguarding the majority-black districts." *Id.* at 167. Thus, the fact that the General Assembly likewise pursued "the only option available" and "safeguard[ed]" District 3 as a majority-black district dooms Plaintiffs' claim. *Id.*

1. Plaintiffs offer two arguments for ignoring the General Assembly's actual Section 5 justification for District 3, but neither has merit. First, relying on cases where the Supreme Court *changed its view* concerning the *constitutional legitimacy* of a legislative purpose, Plaintiffs argue that the Enacted Plan should be adjudicated as if it had no Section 5 justification, even though such justification plainly existed in the real world. But the cases cited by Plaintiffs simply make the unremarkable point that, if the legislature had a constitutionally *illegitimate* purpose *at the time of enactment*, the law is invalid, regardless of whether the Supreme Court established the invalidity of the purpose prior to, or after, enactment. A constitutionally invalid

purpose is not somehow immune from judicial review simply because its illegitimacy was established by the Supreme Court after enactment.

Thus, Plaintiffs' cases would apply here only if the Supreme Court had reversed itself in 2013 and held that compliance with the Voting Rights Act does *not* justify race-based redistricting under *Shaw*. But there has been no such alteration of the justifications satisfying *Shaw* and there is nothing to Plaintiffs' radically different proposition that the constitutionality of a legislative purpose should *not* be assessed with regard to the legislature's actual purpose at the time of enactment, but under a hypothetical where the justification that actually existed—Section 5 compliance—somehow did not exist. Indeed, every case cited by Plaintiffs adjudges the constitutionality of the legislative purpose *at the time the law was enacted*.

Second, through transparent semantic gamesmanship, Plaintiffs attempt to obfuscate their concession that compliance with Section 5 is a "compelling state interest." In particular, Plaintiffs now contend that "a state's manipulation of minority populations in purported compliance with Section 5 is, *by definition*, a racial purpose," which creates a *prima facie Shaw* violation, requiring the State to "bear the burden" of proving its justification under strict scrutiny. Pls.' Opp. at 25, 26–28. The dispositive point, however, is that compliance with the Voting Rights Act justifies majority-minority districts such as District 3. That "VRA compliance" justification can be characterized as either a *non-racial* purpose or a *permissible* racial purpose. It is quite impossible to comply with Section 5 (or Section 2) of the VRA without directly considering race in forming districts, since Section 5, particularly as amended in 2006, forbids diminution in minorities' "ability to elect"—thus requiring preservation of majority-minority districts. *See* Intervenor-Defs.' Mem. at 12–13 & n.1, 16–18.

Thus, if Section 5 compliance motivated the General Assembly in drawing District 3, it

does not matter whether that district is characterized as a predominantly racial district justified by Section 5 or as a predominantly Section 5 district—in either event, it satisfies *Shaw*. Accordingly, Plaintiffs' concession that the General Assembly's motivation in 2012 was the compelling interest of Section 5 compliance, *see* Pls.' Opp. at 25–26, dooms their claim. (For the same reason, it is irrelevant, given Plaintiffs' concession, that it is the Defendant's "burden" to show VRA compliance—Defendants need not "prove" what Plaintiffs do not contest.)

2. Apparently recognizing that their concession on the General Assembly's Section 5 motivation is fatal to their case, Plaintiffs belatedly attempt to rewrite their own Complaint and pretend they alleged that District 3 was unconstitutional *before Shelby County* because Section 5 did *not* justify District 3 even in 2012. Specifically, although continuing to agree that Section 5 compliance justifies districts where race was the predominant factor, Plaintiffs now contend that their Complaint alleges that District 3 was not "narrowly tailored" to achieve that compelling interest. Pls.' Opp. at 8, 25–28. But, in fact, Plaintiffs' Complaint in no way hints that District 3 would be unconstitutional even if Section 5 were still effective after *Shelby County*.

Rather, the "narrow tailoring" allegation of their Complaint clearly related to *Section 2* of the Voting Rights Act, not a challenge to the General Assembly's effort to comply with *Section 5* prior to *Shelby County*. *See id.* at 26; *see also* Compl. ¶¶ 44–45 (DE 1). This is why Plaintiffs have always pointed to the date of the *Shelby County* opinion to justify their decision to wait until after the 2012 election and shortly before the 2014 election cycle to raise their claim, and to ask the Court and Defendants to rush to judgment and remedy based upon it. And this is also why Plaintiffs' counsel affirmatively assured the Court during a scheduling conference that they were not challenging the constitutionality of District 3 in 2012.

Finally, even if Plaintiffs could escape the dispositive legal force of the General

Assembly's Section 5 compliance, they have wholly ignored their demonstrated inability to prove that the General Assembly "subordinated traditional race-neutral districting principles . . . to *racial* considerations" in District 3. *Easley*, 532 U.S. at 241 (emphasis added). Plaintiffs do not even mention, let alone distinguish, *Fletcher v. Lamone*, where another three-judge court in the Fourth Circuit granted summary judgment against a *Shaw* claim involving a district that resembled "a broken-winged pterodactyl, lying prostrate across the center of the State," 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." 831 F. Supp. 2d 887, 901, 902 & n.5 (D. Md. 2011) (three-judge court), *summ. aff'd* 133 S. Ct. 29 (2012). Plaintiffs have simply ignored their burden to prove that "race *rather than* politics" explains District 3. *Easley*, 432 U.S. at 242. And the report of Plaintiffs' sole expert, Dr. McDonald, repeats the mistake that recently prompted a three-judge court in South Carolina to reject his opinion 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), because it ignores the race-neutral explanations for District 3 such as preservation of cores, unification of communities of interest, and incumbency protection. *See* Intervenor-Defs.' Mem. at 20–29.

Plaintiffs thus have come nowhere close to meeting their summary judgment burden, much less to justifying "the intrusive potential of judicial intervention into the legislative realm" in the vital local area of redistricting. *Miller*, 515 U.S. at 916. Indeed, Plaintiffs' ever-shifting theories and arguments only underscore that the time is far spent for Plaintiffs to produce the "other viable and constitutionally permissible alternatives to Congressional District 3" that their Complaint promised. Compl. ¶ 45. Plaintiffs, however, have missed their self-selected deadline to offer expert evidence demonstrating a basis on which the Court can dismantle District 3,

which the General Assembly adopted as a *Shaw remedy*, was constitutionally used in the 2012 election, and remains the only congressional district in Virginia where black voters have the ability to elect their candidate of choice. The Court should grant Defendants summary judgment.

ARGUMENT

I. THE GENERAL ASSEMBLY'S CONCEDED COMPLIANCE WITH SECTION 5 REQUIRES SUMMARY JUDGMENT IN DEFENDANTS' FAVOR

Plaintiffs' Complaint forthrightly acknowledged that the General Assembly maintained District 3 in order to comply with Section 5's "non-retrogression" command. *See* Compl. ¶¶ 1–6. And even now, Plaintiffs recognize that such compliance with Congress's Section 5 mandate was a "compelling state interest" at the time the General Assembly acted. *See* Pls.' Opp. at 26.

These concessions end the case as a purely legal matter: as Intervenor-Defendants have explained, the Enacted Plan cannot possibly *violate* the Constitution if it was adopted to serve Virginia's compelling *constitutional* interest in complying with Section 5. *See* Intervenor-Defs.' Mem. at 12–13 & n.1, 16–18. Even if more were needed, Intervenor-Defendants already have explained that the General Assembly had a strong basis in evidence to believe that preservation of District 3 as a majority-black district was required under Section 5, particularly in light of the 2006 amendments that prohibited 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); *see also* Intervenor-Defs.' Mem. at 12–13 & n.1, 16–18. The General Assembly therefore did not act with an impermissible racial purpose in adopting the Enacted Plan, and Plaintiffs cannot make out a Fourteenth Amendment claim. *See* Intervenor-Defs.' Mem. at 11–20.

Thus, all that remains of Plaintiffs' legal position are their untenable argument that *Shelby County* retroactively tainted the General Assembly's compliance with Section 5, and their newly conjured allegation that District 3 was not narrowly tailored to that interest. Both of these

arguments fail, and only underscore that the Court should enter summary judgment and avoid a needless trial on Plaintiffs' meritless claim.

A. *Shelby County* Did Not Affect The General Assembly's Purpose Or Remove Section 5 Compliance As A Compelling State Interest

"Plaintiffs do not contend that *Shelby County* changed or even informed the General Assembly's actual motivation for adopting [District] 3 in 2012." Pls.' Opp. at 25. Thus, *Shelby County* has no bearing on this case because the constitutionality of the General Assembly's purpose must be judged as of the time "when [District 3] was created," not some later time. *Id.* at 8; *see* Intervenor-Defs.' Mem. at 11–20.

Plaintiffs attempt to avoid this well-established and self-evident principle by asserting that a subsequent "change in the *constitutional* landscape may vitiate the compelling state interest Virginia may have claimed under prior law." Pls.' Opp. at 19 (emphasis added). This is obviously true and, just as obviously, irrelevant here.

There has been no change since 2012 in the *constitutional* standard established by *Shaw* and its progeny. The *Shaw* test remains the same and, it is undisputed, authorizes the use of race in redistricting to secure compliance with the Voting Rights Act. Accordingly, this case is completely different than those relied on by Plaintiffs—*i.e.*, cases in which the Supreme Court *changed the constitutional standard* by invalidating legislative purposes that had previously been blessed by the Court (or lower courts) as legitimate or compelling. Thus, if, at the time of enactment, the purpose of a campaign finance law was the formerly legitimate one of limiting the distorting effects of corporate speech, this enacting purpose was illegitimate because *Citizens United v. FEC*, 558 U.S. 310 (2010), changed the constitutional standard to condemn such an "anti-distortion" purpose. *See* Pls.' Opp. at 22–24. Similarly, creating unequally populated legislative districts became invalid once the Supreme Court ruled that the Constitution prohibited

such excessive inequalities. *Id.* at 21–22. In such cases, the purpose underlying the law at the time of enactment was constitutionally illegitimate, although its illegitimacy was not established until after Supreme Court precedent was altered or clarified to condemn that purpose.

In short, the cases invoked by Plaintiffs simply stand for the unassailable rule that a law enacted with the constitutionally illegitimate purpose is invalid, regardless of whether its illegitimacy was established by Supreme Court precedent that pre-dated or post-dated enactment. They plainly do not support Plaintiffs' unprecedented and entirely different assertion that a law's purpose should not be judged by the actual purpose underlying the law at the time of enactment, but by a hypothetical purpose that became available only at the time of the subsequent Supreme Court decision. Indeed, all of the cases cited by Plaintiffs refute their novel hypothesis by assessing the constitutional legitimacy of the law through examination of the purpose that existed at the time of enactment. *See, e.g.*, *Citizens United*, 558 U.S. at 359–66 (reviewing congressional interests at the time of enactment) (cited at Pls.' Opp. at 23); *SpeechNow.org v. FEC*, 599 F.3d 686, 692 (D.C. Cir. 2010) (reviewing congressional interest at the time of enactment) (cited at Pls.' Opp. at 23); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010) (reviewing legislative interest at the time of enactment) (cited at Pls.' Opp. at 23–24).

For this reason, the only other federal court to address Plaintiffs' novel claim rejected it out of hand. *Alabama Legislative Black Caucus v. Alabama* squarely held that *Shelby County* did not "nullif[y] the interests of the State defendants in complying with Section 5 of the Voting Rights Act." Ala. Op. at 162. The three-judge court in that case thus "evaluate[d] the plans in light of the legal standard that governed the Legislature when it acted, not based on a later decision of the Supreme Court that exempted Alabama from future coverage under Section 5 of

the Voting Rights Act." *Id.* That court therefore upheld the challenged plans because "[t]o comply with section 5, the Alabama Legislature chose the only option available: to protect the voting strength of black voters by safeguarding the majority-black districts." *Id.* at 167. That the General Assembly here likewise pursued "the only option available" and "safeguard[ed]" District 3 as a majority-black district dooms Plaintiffs' claim. *Id.*

B. Plaintiffs' Newly Conjured Narrow Tailoring Allegation Does Not Appear In The Complaint, Invalidate The Enacted Plan, Or Warrant A Trial

Despite Plaintiffs' counsel's prior statement that the Enacted Plan was constitutional at the time of enactment, Plaintiffs now seek to save their claim by retreating to the position that "even assuming Section 5 *could* qualify as a compelling interest under the circumstances at issue here," the General Assembly's consideration of race was not "narrowly tailored to satisfy that interest." Pls.' Opp. at 19–20. This newly minted argument is *independent* of *Shelby County*—but Plaintiffs offer no explanation as to why they waited until now to raise it or how they can expect the Court to rush to judgment and remedy on it on their compressed timeline. *See id.* Yet even if Plaintiffs were not estopped from raising the argument now, it rests on a dramatic rewriting of their Complaint and fails in all events.

1. Plaintiffs suggest that their Complaint alleged that the General Assembly's preservation of District 3 was not narrowly tailored to its interest in Section 5 compliance. *See id.* at 7, 26. But the Complaint's *only* allegation about the General Assembly's compliance with Section 5 is the allegation that Defendants may "*no longer*" invoke that compliance as a compelling state interest after *Shelby County*. Compl. ¶ 4 (emphasis added).

Plaintiffs attempt to seek refuge in paragraph 45, *see* Pls.' Opp. at 7, 26, but that revisionist effort is plainly false. Paragraph 45 does not even *mention* Section 5, let alone put Defendants on notice that the lack of "narrow tailoring" alleged there related to Section 5

compliance. *See* Compl. ¶ 45. To the contrary, paragraph 45 follows paragraph 44, where Plaintiffs allege that "*Section 2* of the Voting Rights Act" cannot "justify the use of race as a predominant factor in drawing Congressional District 3." *Id.* ¶ 44 (emphasis added). Thus, paragraph 45 reads as an *alternative* allegation that even if Section *2* could provide "a compelling state interest to create and maintain [District] 3 with race as the predominant factor, [District] 3 is not narrowly tailored to achieve *that* interest." *Id.* ¶ 45.

Moreover, there is no hint in these paragraphs (or elsewhere) that District 3 was not "narrowly tailored" to Section 5 compliance because Virginia did not "demonstrate that any BVAP less than 56.3% would have led to 'retrogression'"—the argument that Plaintiffs now advance in their Opposition. Pls.' Opp. at 27. Rather, the only assertion was that such BVAP was not required under *Section 2* because "African-American voters in this district are able to elect candidates of their choice without constituting 56.3% of the District's voting age population." *Id.* ¶ 44. The question whether minority voters have *an* "ability to elect" the candidate of their choice is relevant to Section 2, not Section 5. *Thornburg v. Gingles*, 478 U.S. 30, 48–51 (1986). Section 5 instead examines whether a change in election or voting laws "diminish[es] *the*" *preexisting* "ability" of minorities "to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b) (emphasis added). This distinction is critical: the fact that black voters may be "able to elect candidates of their choice" at a certain level of black voting-age population ("BVAP") for Section 2 purposes, Compl. ¶ 44, does not address the separate question of whether, at that BVAP level, black voters maintain *the same ability* to elect their preferred candidates that they enjoyed prior to the change for Section 5 purposes, *see* 42 U.S.C. § 1973c(b). Thus, paragraph 45 alleges a lack of a Section 2 narrow tailoring, not a lack of a Section 5 narrow tailoring. *See* Compl. ¶¶ 44–45.

Further, Plaintiffs represented in paragraph 45 that the alleged lack of narrow tailoring could be proven by reference to "other viable and constitutionally permissible alternatives to Congressional District 3." *Id.* ¶ 45. Yet Plaintiffs have stridently refused to deliver on this representation, and now claim that they have no obligation to provide the promised alternative district to the Court and Defendants. *See* Pls.' Opp. at 28–30. Plaintiffs are wrong as both a practical and a legal matter, as explained below. *See infra* Part II. And Plaintiffs' selective disavowal of that promise in their Complaint only further underscores the indefensibility of their selective, eleventh-hour reinterpretation of paragraph 45's narrow tailoring allegation.

Finally, in all events, even if Plaintiffs have properly pled a lack of narrow tailoring to the General Assembly's compelling interest in Section 5 compliance, Defendants have satisfied any requisite burden. As Intervenor-Defendants have explained, the "narrow tailoring" question is not whether the district conforms to the *Court's* view of what is the minimum necessary to satisfy Section 5. *See* Intervenor-Defs.' Mem. at 16. Rather, the question is whether the General Assembly had a "strong basis in evidence for concluding that" preservation of District 3 was "reasonably necessary to comply with" Section 5. *Bush v. Vera*, 517 U.S. 952, 977 (1996); *see also* Ala. Op. 160; Intervenor-Defs.' Mem. at 16.

Congress's 2006 amendments made Section 5 "more stringent," and expanded its operation "to prohibit more conduct than before." *Shelby County v. Holder*, 133 S. Ct. 2612, 2617, 2621 (June 25, 2013); *see also* Intervenor-Defs.' Mem. at 13. Through the amendments, Congress sought to undo the "significant[] weaken[ing]" in Section 5 caused by the Supreme Court's decision in *Georgia v. Ashcroft*, which "misconstrued Congress' original intent . . . and narrowed the protections afforded by [S]ection 5." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, Pub. L. No. 109-246, § 2,

120 Stat. 577, § 2(b)(6) (2006); *see also* Intervenor-Defs.' Mem. at 13 & n.1. In particular, *Ashcroft* had construed Section 5 to permit conversion of majority-minority districts into minority-minority districts based on the "totality of the circumstances." *See Georgia v. Ashcroft*, 539 U.S. 461, 479–80 (2003); *see also* Intervenor-Defs.' Mem. at 13 & n.1.

Congress therefore amended Section 5 to undo this "totality of the circumstances" analysis, and to prohibit any change in election or voting laws that "diminish[ed] the" preexisting "ability" of minorities ""to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b). Thus, to comply with this "more stringent" version of Section 5, *Shelby County*, 133 S. Ct. at 2617, a legislature could not "reduce the number of majority-black districts" in a redistricting plan or "significantly reduce the percentages of black voters in the majority-black districts," Ala. Op. at 167; *see also id.* ("Congress limited the redistricting options of states so that any diminishment in a minority's ability to elect its preferred candidate violates section 5."). Any elimination of a majority-black district would directly violate the "*Ashcroft* fix" added to Section 5 in 2006 and any BVAP diminution would quite plainly diminish minorities' "ability to elect" by the same percentage. This is particularly true since such diminution creates the distinct possibility that black voters would not constitute a majority of the actual electorate (even if a slight majority of the population, given turnout differentials), thus necessitating heretofore unneeded reliance on white cross-over voting to elect the preferred candidate. *See Hall v. Virginia*, 385 F.3d 421, 429 (4th Cir. 2004) ("[W]hen minority voters, as a group, are too small . . . to form a majority in the single-member district, they have no ability to elect candidates of *their own* choice, but must instead rely on the support of other groups to elect candidates." (emphasis in original)). Also, the General Assembly had the Section 5 burden to *prove* no diminution to the Justice Department—a daunting challenge which could be avoided only by

eschewing any BVAP diminution. *See, e.g., Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 328 (2000) *(Bossier II)* (covered jurisdiction "bears the burden" to prove non-retrogression).

For these reasons, in the recent Alabama case, the three-judge court held that the plans were narrowly tailored—even though they increased the BVAP in certain majority-black districts, *see id.* at 42–44—because the legislature "chose the only option available: to protect the voting strength of black voters by safeguarding majority-black districts and not substantially reducing the percentages of black voters within those districts," *see id.* at 167.

Here, as well, the General Assembly "chose the only option available . . . [t]o comply with section 5": it preserved the black majority in District 3, the *only* congressional district in Virginia where black voters have the ability to elect their candidate of choice. *Id.* That Section 5 *required* the General Assembly to preserve District 3 as a majority-black district means, *a fortiori*, that its doing so was narrowly tailored. *See* Intervenor-Defs.' Mem. at 12–13 & n.1, 16–17. Thus, even under Plaintiffs' new narrow tailoring allegation, the Court should grant Defendants summary judgment.[1]

II. PLAINTIFFS' DEMONSTRATED INABILITY TO PROVE A PREDOMINANT RACIAL PURPOSE WARRANTS SUMMARY JUDGMENT

Plaintiffs acknowledge that, even if the General Assembly's compliance with Section 5 did not defeat their claim as a legal matter, their claim still would fail absent a showing that race was the General Assembly's "predominant purpose" in adopting the Enacted Plan. Pls.' Opp. at 1, 11–19. Nonetheless, they simply ignore the numerous *non-racial* explanations for District 3's shape, and any changes to it in 2012. Accordingly, they have not met their "demanding" burden,

[1] Plaintiffs' suggestion that summary judgment should be denied because Defendants have not adduced any "expert testimony to demonstrate that any BVAP less than 56.3% would have" been retrogressive, Pls.' Opp. at 27, is irreconcilable with the three-judge court's decision in the Alabama case, which upheld districts as narrowly tailored to Section 5 without reference to any such expert evidence, *see* Ala. Op. at 160–73.

Easley, 532 U.S. at 241, to prove that an illegitimate use of "race was a predominant factor" in preserving District 3, *Miller*, 515 U.S. at 916; *see also* Intervenor-Defs.' Mem. at 21–30, or their burden to respond to a summary judgment motion with a "showing sufficient to establish the existence of an element essential to [their] case, and on which [they] bear[] the burden of proof," *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A. Plaintiffs Fail To Distinguish *Fletcher* Or To Offer Proof To Satisfy Their Summary Judgment Burden

Plaintiff do not even mention, let alone attempt to distinguish, the recent decision from a three-judge court in Maryland—and summarily affirmed by the Supreme Court—that rejected on summary judgment a *Shaw* challenge to a district far more bizarre than District 3. *See Fletcher*, 831 F. Supp. 2d at 901; Intervenor-Defs.' Mem. at 25–26. Because Maryland was not a covered jurisdiction, that district did not have a Section 5 justification. But the *Fletcher* court nonetheless upheld the district even though it resembled "a broken-winged pterodactyl, lying prostrate across the center of the State," *id.* at 902 & n.5, because "the plaintiffs ha[d] 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.* at 902.

Here, as well, Plaintiffs have eschewed their burden to prove that "race *rather than* politics" explains the General Assembly's preservation of District 3. *Easley*, 532 U.S. at 243 (emphasis in original). Plaintiffs do not even mention this burden, much less offer proof to satisfy it. *See* Pls.' Opp. at 11–19; Intervenor-Defs.' Mem. at 25–29. For this reason alone, their evidence is insufficient to survive summary judgment. *See Fletcher*, 831 F. Supp. 2d at 901-03.

Plaintiffs' effort to ignore *Fletcher* is understandable because it forecloses their *Shaw* claim and illustrates the utter insufficiency of their evidence. First, Plaintiffs point to the shape of District 3, asserting that it is "bizarre on its face." Pls.' Opp. at 12. Of course, District 3 is far

less "bizarre" than the district that resembled "a broken-winged pterodactyl, lying prostrate across the center of the State" upheld in *Fletcher*. *Fletcher*, 831 F. Supp. 2d at 902 & n.5.

Plaintiffs nonetheless persist in the argument that the "bizarre" shape of District 3 implies that the General Assembly "paid little attention to" traditional redistricting criteria. Pls.' Opp. at 12. But even if District 3's shape disregards certain traditional criteria, the relevant point is that such departures are at least as attributable to politics (as in *Fletcher*), or other criteria, such as preserving district cores and incumbency protection. All these arguments were detailed in Intervenor-Defendants' memorandum, *see* Intervenor-Defs.' Mem. at 25–29, but Plaintiffs do not even attempt to refute that these considerations, rather than race, explain District 3's contours. Plaintiffs do not so much as mention preservation of cores or incumbency protection, much less offer proof that District 3 was motivated by race, rather than these legitimate criteria. *See Easley*, 532 U.S. at 241; *Fletcher*, 831 F. Supp. 2d at 903; Pls.' Opp. at 11–19; Intervenor-Defs.' Mem. at 26–27.

Second, Plaintiffs point to Dr. McDonald's conclusory opinion that because District 3's BVAP slightly increased in the Enacted Plan, race must have been the General Assembly's predominant purpose. *See* Pls.' Opp. at 14 (citing McDonald Rep. at 14–25). Yet, as another three-judge court has already ruled in rejecting Dr. McDonald's conclusory assertions, merely "identify[ying] districts that exchanged population in a manner than resulted in a district experiencing a net increase in" BVAP is insufficient to demonstrate a predominant racial purpose. *Backus*, 857 F. Supp. 2d at 561. And, as in that case, Dr. McDonald ignored other race-neutral considerations that explain the challenged district. *Id.* at 561–62; *see also* Intervenor-Defs.' Mem. at 28–29.

Third, Plaintiffs invoke *Moon v. Meadows*, 952 F. Supp. 1141, 1144 (E.D. Va. 1997)

(three-judge court), *summ. aff'd*, 521 U.S. 1113 (1997), and contend that the current version of District 3 "closely resembles the 1991 district held unconstitutional" under *Shaw* in that case. Pls.' Opp. at 14. This contention borders on the risible: even a cursory examination of the pre-*Moon* version of District 3—which stretched north to encompass New Kent, King William, King and Queen, and Essex counties, *see* 1991 District 3 Map (Ex. B)—reveals that its shape bears little resemblance to the shape of current District 3, which does not include even a *part* of any of those counties, *see* 2012 District 3 Map (Ex. D). The current District 3, in fact, closely resembles the 1998 version that the General Assembly adopted as the *remedy* for the *Shaw* violation found in *Moon*. *Compare id.*, *with* 1998 District 3 Map (Ex. C). Indeed, given the strong judicial imprimatur for the 1998 remedy, the General Assembly had a potent incentive and reason to preserve the core of that district in 2012. *See* Intervenor-Defs.' Mem. at 27.

Plaintiffs assert that the current District 3's BVAP level of 56.3% is "more similar" to the 1991 version's BVAP level of 61.17% than the 1998 version's BVAP level of 50.47%. Pls.' Opp. at 15. But Plaintiffs' *Shaw* claim does not turn on District 3's *BVAP* level, but instead on whether its *shape* evinces a predominant racial purpose. Plaintiffs confirm as much because, as Plaintiffs note, the *Moon* court rested its finding of a *Shaw* violation on the "bizarre *shape*" of the challenged district. *Id.* (emphasis added).

Finally, Plaintiffs' contention that "statements by legislators and the parties here prove that race was the predominant purpose," Pls.' Opp. at 16, is a sleight of hand. Plaintiffs rest this contention on statements from Delegate Bill Janis, the Senate Criteria, and the parties that complying with the "'federal law mandate'" under Section 5 that Virginia "'not retrogress minority voting influence in'" District 3 was "'one of the paramount concerns'" in drafting the Enacted Plan. *Id.* (quoting statement of Del. Janis). But, as explained, compliance with Section

5 is *not* an impermissible racial purpose but instead a compelling government interest. *See supra* Part I. Moreover, even Plaintiffs are forced to acknowledge that Delegate Janis, the Senate Criteria, and the parties identified other paramount interests in drafting the plan, including "equal population" and incumbent "preferences." *Id.* at 17. Thus, the very statements Plaintiffs rely upon disprove their purpose allegation and warrant summary judgment.

B. Plaintiffs Have Failed To Identify Any Additional Evidence Or An Alternative Map That Precludes The Entry Of Summary Judgment Now

Plaintiffs thus have failed to meet their summary judgment burden to make a "sufficient" showing based on the evidence that a trial is warranted. *Celotex Corp.*, 477 U.S. at 322. This failure is particularly fatal in the *Shaw* context, where the Supreme Court has specifically admonished the federal judiciary to "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller*, 515 U.S. at 916. 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; *Chen v. City of Houston*, 206 F.3d 502, 505 (5th Cir. 2000).

Plaintiffs' passing suggestion that their failure to adduce evidence to discharge their burden should be excused because discovery is still "underway," Pls.' Opp. at 12, 19, overlooks the failure of their *legal* theory and misrepresents the procedural posture of the case. As explained, the fact that the General Assembly acted with the constitutional purpose to achieve Section 5 compliance defeats Plaintiffs' claim *on the law*, *regardless* of any evidence. *See supra* Part I; *see also* Intervenor-Defs.' Br. at 11–20.

Moreover, Plaintiffs have a gaping hole in their evidence of the General Assembly's alleged predominant racial purpose that no additional amount of discovery can fill. As

Intervenor-Defendants have explained, because legislative privilege prevents Plaintiffs from inquiring into or discovering legislative materials and deliberations, Plaintiffs must meet their burden to prove that the General Assembly subordinated traditional criteria to race through *external*, *objective* evidence offered through an expert. *See* Intervenor-Defs.' Mem. at 29. Dr. McDonald's report is woefully inadequate to satisfy this burden, for the reasons discussed above. Plaintiffs, moreover, cannot introduce a new expert or report at this late date: *Plaintiffs* aggressively pushed for the early deadlines for naming their expert and disclosing his report, and that those deadlines have already passed. *See* Scheduling Order (DE 27). Thus, far from being "premature," Pls.' Opp. at 12, summary judgment is mandated now because no additional discovery or fact-finding can cure Plaintiffs' failure of proof of a predominant racial purpose.

Even if Plaintiffs' protestations regarding the need for discovery had some merit, Plaintiffs have not properly raised them. Plaintiffs have submitted no "affidavit or declaration" documenting the specific discovery and facts necessary before summary judgment can be granted. Fed. R. Civ. P. 56(d). Their unsubstantiated plea that further discovery is required cannot defeat summary judgment. *See Evans v. Techs. Apps. & Serv. Co.*, 80 F.3d 954, 961 (4th Cir. 1996) ("[A] party may not simply assert in its brief that discovery was necessary and thereby overturn summary judgment when it failed to comply with the requirements of Rule [56(d)] to set out reasons for the need for discovery in an affidavit.").

Plaintiffs, in fact, have only exacerbated their failure of proof by refusing to disclose *any* of the "viable and constitutionally permissible alternatives to Congressional District 3" they promised in their Complaint. Compl. ¶ 45. Plaintiffs repeat their new refrain that they are not required to identify any such alternative because they advance a constitutional rather than statutory claim. *See* Pls.' Opp. at 28-30. Plaintiffs thus disregard the cases applying this

requirement to constitutional claims. *See, e.g.*, *Bossier II*, 528 U.S. at 334; *Johnson v. DeSoto County*, 204 F.3d 1335, 1346 (11th Cir. 2000); *Lopez v. City of Houston*, No. 09-420, 2009 WL 1456487, *18–19 (S.D. Tex. May 22, 2009); *see also* Intervenor-Defs.' Br. at 22. Plaintiffs' recitation of *Miller*, *see* Pls.' Opp. at 29, also overlooks that the record in that case contained several "alternative plans" that underscored the legislature's unconstitutional adherence to a "max-black" policy. *Miller*, 515 U.S. at 507. In fact, the requirement that the plaintiff produce an alternative district is even *more* crucial for constitutional than statutory claims precisely because constitutional claims involve an inquiry into legislative purpose. *See* Intervenor-Defs.' Br. at 22-23.

Most fundamentally, neither Defendants nor the Court can properly analyze or refute Plaintiffs' claims unless they have some idea of what Plaintiffs maintain the General Assembly *should have* done, which requires at least some precise *description* of the purportedly constitutionally compliant alternative district(s). At current count, Plaintiffs might be pursuing any of the following theories:

1. The General Assembly was not permitted to preserve District 3 as a majority-black district: Plaintiffs' Complaint acknowledged that the General Assembly advanced a compelling state interest when it preserved District 3 in order to comply with Section 5, *see* Compl. ¶¶ 1–6, but Plaintiffs now contend that its doing so was impermissible, *see* Pls.' Opp. at 19–20.

2. The General Assembly was permitted to maintain District 3's BVAP at a level where black voters have an ability to elect the candidates of their choice: Plaintiffs may want to reduce the number of black voters in District 3 while preserving some unspecified ability for those voters to elect candidates of their choice. Plaintiffs, however, have not provided

a voting rights expert to prove what BVAP level in District 3 would preserve this ability to elect.

3. The General Assembly's use of race tainted the entire Enacted Plan: Plaintiffs posited in their remedies briefing that this case "is controlled by *Abrams v. Johnson*" because they may ask the Court to make "wide-reaching" and "substantial changes" to the Enacted Plan. Pls.' Reply at 12 (DE 34). They therefore argued that *Upham v. Seamon*'s admonition that federal courts must adopt the narrowest remedy "necessary to cure [the] constitutional . . . defect" in a redistricting plan, 456 U.S. 37, 43 (1982) is "distinguish[able]" because, in that case, "only two contiguous districts out of 27" were affected by the constitutional violation, Pls.' Reply at 12. Plaintiffs now attempt to disavow as purported "hysteria" the position that their requested remedy could sweep more broadly than the violation they identify in District 3, even as they maintain the position that *Abrams* rather than *Upham* controls. *See* Pls.' Opp. at 30.

4. The General Assembly should have drawn District 3 without any consideration of race: Plaintiffs apparently disfavor this option because they ask the Court to consider race and to undo the alleged "diminishing" of black voters' influence in "surrounding districts" around District 3. Compl. ¶ 3. Plaintiffs, moreover, have not disclosed a race-free alternative district, described what such a district would look like, or explained how it could pass muster under Section 2 of the Voting Rights Act.

Thus, Plaintiffs have not consistently sponsored any theory of liability in this case, and every available theory fails as a matter of law and the established record. The Court should grant Defendants summary judgment and dismiss this case.

CONCLUSION

The Court should grant Defendants summary judgment.

Dated: January 6, 2014

Respectfully submitted,

/s/ Jonathan A. Berry

Michael A. Carvin (*pro hac vice*)
John M. Gore (*pro hac vice*)
Jonathan A. Berry (VSB #81864)
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
Tel: (202) 879-3939
Fax: (202) 626-1700
Email: macarvin@jonesday.com
Email: jmgore@jonesday.com
Email: jberry@jonesday.com

Counsel for Intervenor-Defendants Virginia Representatives

CERTIFICATE OF SERVICE

I certify that on January 6, 2014, a copy of the INTERVENOR-DEFENDANTS VIRGINIA REPRESENTATIVES' REPLY 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:

John K. Roche, Esq.
Mark Erik Elias, Esq.
John Devaney, Esq.
PERKINS COIE, LLP
700 13th Street, N.W., Suite 600
Washington, D.C. 20005-3960
Tel. (202) 434-1627
Fax (202) 654-9106
JRoche@perkinscoie.com
MElias@perkinscoie.com
JDevaney@perkinscoie.com

Kevin J. Hamilton, Esq.
PERKINS COIE, LLP
1201 Third Avenue, Ste. 4800
Seattle, WA 98101-3099
Tel. (202) 359-8000
Fax (202) 359-9000
KHamilton@perkinscoie.com

Counsel for Plaintiffs

Mike F. Melis
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
Telephone: (804) 786-2071
Fax: (804) 371-2087
mmelis@oag.state.va.us

Counsel for Defendants

Dated: January 6, 2014

/s/ Jonathan A. Berry
Jonathan A. Berry

Counsel for Intervenor-Defendants Virginia Representatives