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

Richmond Division

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

DEFENDANTS' OPENING BRIEF
REGARDING THE LEGAL EFFECT OF
ALABAMA LEGISLATIVE BLACK CAUCUS V. ALABAMA

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GLOSSARY

BVAP	Black Voting Age Population
CD#	Virginia Congressional District No.
DOJ	The U.S. Department of Justice
DX	Defendants' Trial Exhibit No.
IX	Intervenor-Defendants' Trial Exhibit No.
PX	Plaintiffs' Trial Exhibit No.
Tr.	Trial Transcript Page No.
VTD	Voting Tabulation District

INTRODUCTION AND SUMMARY

The outcome of this case, as in *Alabama Legislative Black Caucus v. Alabama*,[1] turned on a critical legal question:

> Does a State make race the predominant factor in a redistricting, thereby triggering strict scrutiny, if the State sets a racial floor to maintain a black-majority district, for the ostensible purpose of avoiding retrogression under Section 5 of the Voting Rights Act, but without conducting any functional analysis to determine if that racial floor is necessary to permit black voters to elect a candidate of their choice?

In *Alabama*, the Supreme Court answered that question in the affirmative, clarifying that Section 5 does *not* require a covered jurisdiction to maintain the same minority percentage in the redrawn district as in the benchmark district. Indeed, such a "mechanical interpretation," the Supreme Court concluded, "can raise serious constitutional concerns."[2]

As in *Alabama*, the facts as determined by the panel majority in this case showed that "the legislature relied heavily upon a mechanically numerical view as to what counts as forbidden retrogression."[3] Over the contrary arguments of Defendants and Intervenors, the Court found that the General Assembly used "a 55% BVAP floor" in redrawing CD3.[4] And it was undisputed that the General Assembly did not conduct a functional analysis to determine if a 55% BVAP floor was necessary to avoid retrogression in CD3.[5] In light of those facts, the panel majority concluded that race was the predominant factor in the redistricting, that strict scrutiny

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[1] *Ala. Legislative Black Caucus v. Alabama*, Nos. 13-895, 13-1138, 135 S. Ct. 1257 (U.S. Mar. 25, 2015) [hereinafter *Alabama*].

[2] *Alabama*, 135 S. Ct. at 1273.

[3] *Id.*

[4] *Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2014 WL 5019686, at *8 (E.D. Va. Oct. 7, 2014).

[5] *Id.* at *1 n.6; *see also id.* at *8 ([T]he use of a 55% BVAP floor in this instance was not informed by an analysis of voter patterns.").

applied, and that Defendants and Intervenors failed to prove that Enacted CD3 was narrowly tailored to avoid retrogression.

That decision is consistent with *Alabama*'s holding that the use of a fixed racial floor, unsupported by a functional analysis, makes race the predominant factor, triggering strict scrutiny. *Alabama* presented a similar factual situation. Just as this Court found that the General Assembly's use of a 55% BVAP floor in CD3 triggered strict scrutiny, the Supreme Court found that Alabama's "mechanical" use of a 70% BVAP floor triggered strict scrutiny. Alabama's redistricting plan, like the General Assembly's, was not informed by any analysis of the percentage necessary to maintain a minority group's ability to elect a candidate of its choice. The Supreme Court said that Alabama asked the wrong question—"How can we maintain present minority percentages in majority-minority districts?"—rather than the correct one: "To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?"[6]

Given its findings of fact on disputed evidence, this Court correctly applied the legal rule fleshed out in *Alabama*. Because nothing in *Alabama* changes this Court's factual findings, and because *Alabama* confirmed the legal grounds on which the Court based its decision, the Court should reaffirm its ruling that Enacted CD3 is an unconstitutional racial gerrymander.[7]

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[6] *Alabama*, 135 S. Ct. at 1274.

[7] The Court's finding that race predominated in drawing CD3 is a factual determination and does not mean that race predominated when the General Assembly revised its State voting districts. Indeed, the Supreme Court underscored this point in *Alabama*: "We have consistently described a claim of racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*." *Alabama*, 135 S. Ct. at 1265. *See also Bush v. Vera*, 517 U.S. 952, 965 (1996) (plurality) (court must "scrutinize *each* challenged district to determine whether . . . race predominated over legitimate districting considerations . . . .") (emphasis added); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (noting that evidence must be evaluated with regard to each "particular district"). Accordingly, the Commonwealth's decision not to appeal in this case, and its view that *Alabama* does not change the outcome here,

ARGUMENT:
ALABAMA DOES NOT ALTER THE LEGAL RULE APPLIED TO THE FACTS AS DETERMINED BY THE PANEL MAJORITY IN THIS CASE

A. Nothing in *Alabama* disturbs this Court's findings of fact, which could be set aside only if clearly erroneous.

This Court's decision depended on three key factual findings: that the General Assembly used a 55% BVAP floor in redistricting CD3; that the evidence as a whole did not support the 8-3-split theory advanced by Defendants and Intervenors; and that Enacted CD3 went further than necessary to protect African-American voters and, therefore, was not narrowly tailored to avoid retrogression.

Defendants joined with Intervenors in disputing those facts, and the Court recognized a factual dispute when it denied summary judgment.[8] After trial on the merits, however, the majority rejected our view of the evidence and resolved the factual conflicts in Plaintiffs' favor. We did not appeal the Court's decision in light of the deferential standard of review: the Supreme Court would reverse those findings "only for 'clear error'"[9] and would not reverse simply because it "would have decided the case differently."[10] In light of that demanding legal standard, Defendants could not say that this Court's findings were clearly erroneous, or that the Supreme Court would be "left with the definite and firm conviction that a mistake ha[d] been committed."[11]

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has no bearing on the pending challenge to various House of Delegates districts in *Bethune-Hill v. Virginia State Board of Elections*, No. 3:14-cv-00852 (E.D. Va. filed Dec. 22, 2014).

[8] Order, *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. Jan. 27, 2014), ECF No. 50.

[9] *Easley v. Cromartie*, 532 U.S. 234, 242 (2001).

[10] *Id.* (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)).

[11] *Id.* (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

Nothing in *Alabama* altered or undermined the Court's factual findings here. And because the law that this Court must apply to those facts was reaffirmed by *Alabama*, the outcome can be no different from before.

1. The General Assembly used a racial floor in redrawing CD3.

Following a two-day trial featuring more than a hundred exhibits, the Court found that the legislative record was "replete with statements indicating that race was the legislature's paramount concern in enacting the 2012 Plan."[12] The principal bases for that determination were floor statements by Delegate Janis, the plan's sole author:

> And that's how the lines were drawn, and that was the *primary focus* of how the lines . . . were drawn was to ensure that there be no retrogression in the 3rd Congressional District.[13]
>
> I was *most especially focused* on making sure that the 3rd Congressional District did not retrogress in its minority voting influence.[14]
>
> [Nonretrogression was] one of the *paramount* concerns and considerations that was not permissive and *nonnegotiable*."[15]

The Court relied on "the face of Delegate Janis's clear words" to conclude that race, in fact, predominated.[16]

There was conflicting evidence about whether the General Assembly applied a 55% BVAP floor in redrawing Enacted CD3. Intervenors' and Defendants' expert, John Morgan,

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[12] *Page*, 2014 WL 5019686, at *7.

[13] PX 43 at 25 (emphasis added).

[14] *Id.* at 14-15 (emphasis added).

[15] *Id.* at 25 (emphasis added). Janis maintained that rigid view of the nonretrogression requirements of § 5 despite vocal criticism from other legislators that his plan resulted in the unconstitutional packing of black voters into CD3. PX 47 at 16 (Sen. Locke); *id.* at 23 (Sen. McEachin).

[16] *Page*, 2014 WL 5019686, at *8.

opined in his report that the legislature used "55% [BVAP] as the floor for black-majority districts."[17] Although Morgan disavowed that part of his report at trial,[18] the Court rejected that pivot and relied on his original statement in its decision.[19] The Court also heard other evidence about a 55% floor, including evidence from the Section 5 submission[20] and various floor statements of legislators.[21]

After reviewing all the evidence, the Court found, as a matter of fact, that the General Assembly had applied a 55% BVAP floor in redrawing CD3.

2. Politics alone did not explain Enacted CD3.

The parties also presented conflicting evidence about whether politics alone could explain Enacted CD3. Defendants and Intervenors argued that the enacted plan preserved an 8-3 split of Republican and Democratic congressmen from Virginia's eleven congressional districts, making most of those districts safer for the incumbent. But the Court resolved that evidentiary conflict in favor of the Plaintiffs as well.

First, as the Court concluded,[22] Janis's own statements demonstrated that he did not consider partisan performance in drawing the lines. He said: "I haven't looked at the partisan

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[17] IX 13 at 26; Tr. 350-52.

[18] Tr. 326.

[19] *Page*, 2014 WL 5019686, at *8.

[20] Virginia's § 5 submission advocated the 56.3% BVAP of Enacted CD3 as being "over 55 percent," PX 6 at 2, and compared it to alternative plans that would have resulted in BVAP "below 55 percent," *id.* at 3, 4.

[21] For instance, Delegate Morrissey asked Janis: "[I]s there any empirical evidence whatsoever that 55 percent African-American voting population is different than 51 percent or 50? Or is it just a number that has been pulled out of the air?" PX 45 at 7. Janis responded that a BVAP of 56% made getting preclearance a "certainty." *Id.* at 7-8.

[22] *Page*, 2014 WL 5019686, at *13.

performance. It was not one of the factors that I considered in the drawing of the district."[23] That statement was difficult to square with the claim that Janis, as the plan's sole author, intended both to preserve the 8-3 split and to improve each incumbent's performance.

Second, the Court determined that no direct evidence supported the 8-3-split theory. Janis did say that he drew the districts "to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 elections."[24] But the Court found that statement "ambiguous."[25] It was of a piece with Janis's statement that his plan respected "the will of the electorate by not cutting out currently elected congressmen from their current districts nor drawing current congressmen into districts together."[26] Making sure that two incumbents did not have to run for the same seat, however, is different from increasing the partisan support in each district to perpetuate and entrench an 8-3 split. Likewise, although Janis said that each congressman had approved the lines for his own district,[27] he also said that he had not solicited an opinion "from any of them as to the entire plan in its totality . . . ."[28]

Janis's disavowal that politics played a controlling role contrasts starkly with *Easley v. Cromartie*,[29] where, as this Court recognized, there was "overwhelming evidence . . . articulating a legitimate political explanation for the state's districting decision, including unequivocal trial

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[23] IX 9 at 14.

[24] PX 43 at 4.

[25] *Page*, 2014 WL 5019686, at *13.

[26] PX 43 at 4.

[27] *Id.* at 5-6.

[28] IX 9 at 9, 13-14.

[29] 532 U.S. 234 (2001).

testimony by state legislators."[30] Here, by contrast, no legislators testified and the Court found that, "[w]hile Defendants have offered post-hoc political justifications for the 2012 Plan in their briefs, neither the legislative history as a whole, nor the circumstantial evidence, support that view to the extent they suggest."[31]

Third, the panel majority here credited the circumstantial evidence introduced by Plaintiffs that race predominated over politics. McDonald testified that the district was "bizarrely shaped";[32] that Enacted CD3 is the least compact[33] and least contiguous[34] of Virginia's eleven congressional districts, responsible for splitting more localities and VTDs than any other district;[35] and that a disproportionately large percentage of black voters were moved into CD3 to remedy the district's underpopulation,[36] even though highly Democratic-performing, largely white VTDs could have been included instead.[37]

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[30] *Page*, 2014 WL 5019686, at *13 (internal punctuation and citation omitted).

[31] *Id.*

[32] "The district is bizarrely shaped. It stretches from Richmond to Norfolk skipping back and forth across the James River mostly to capture predominantly African-American communities." Tr. 42. In Norfolk, for example, "it wraps around a small—three predominantly white precincts that are not connected to the Second District via bridge or anything else. They are only connected by water. You have to skip across water twice to get to those white communities." Tr. 43; *see* PX 27 at 4 (map).

[33] Tr. 71-74.

[34] Tr. 74-76.

[35] Tr. 76-79.

[36] Benchmark CD3 was underpopulated by 63,976, but 180,000 people were moved between districts to net the number required. Tr. 87. As a result, the percentage of black voters moved into CD3 was disproportionately high compared to groups moved out of CD3. Tr. 84-87.

[37] Tr. 89.

After reviewing the evidence, the Court again rejected Defendants' and Intervenors' arguments and made a factual determination that politics alone did not explain the redistricting.[38]

3. Enacted CD3 was not narrowly tailored to avoid retrogression.

Alabama also does not undermine the Court's factual conclusion that Enacted CD3 went further than necessary—and therefore was not narrowly tailored—to avoid retrogression. That finding was buttressed by several factual findings, none of which is clearly erroneous.

First, the majority found that CD3 had been "a safe majority-minority district for 20 years" and that there was no need to increase the BVAP from 53.1% to 56.3%.[39] Congressman Scott, supported by the majority of African-American voters, was already winning at least 70% of the total vote when running against Republican opponents.[40] McDonald testified that his racial bloc voting analysis of CD3 showed that the candidate of choice of African-American voters could have been elected even if CD3 had had a BVAP as low as 30%.[41]

Second, the majority found that the nonretrogression requirements of § 5 did not support applying "a floor of 55% BVAP."[42] As the Supreme Court held in *Alabama*,[43] the DOJ's 2011 Guidance made clear that a mechanical threshold was not required and that DOJ looks for "a functional analysis" of electoral performance.[44] DOJ had precleared CD3 in 1998 with a BVAP

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[38] *Page*, 2014 WL 5019686, at *14.

[39] *Id*. at *16.

[40] *Id.*; PX 27 at 11. In 2012, under Enacted CD3, he defeated the Republican candidate with 81.3% of the vote. *Page*, 2014 WL 5019686, at *16; PX 27 at 11.

[41] Tr. 196.

[42] *Page*, 2014 WL 5019686, at *17.

[43] 2015 WL 1310746, at *15.

[44] Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7,470, 7,471 (Feb. 9, 2011); *see* Tr. 62-63.

of 50.47%,[45] raising questions why the BVAP needed to be higher. McDonald also testified that DOJ precleared five majority-black Senate districts in Virginia in 2011 with BVAP percentages less than 55%, including one with a BVAP of 50.8%.[46] Notwithstanding those facts, the Janis plan did not merely maintain the existing BVAP percentage in CD3—it materially augmented it.[47]

The evidence submitted at trial here sufficed to support the majority's conclusion that Enacted CD3 was not narrowly tailored, particularly given that Defendants and Intervenors did not offer their *own* evidence on narrow tailoring. Because the Court found that Plaintiffs succeeded in meeting their burden to show that race predominated, strict scrutiny applies and the burden shifted to Defendants and Intervenors to prove that Enacted CD3 was narrowly tailored to avoid retrogression.[48] Yet Morgan, the only defense witness, testified that he had no opinion on the narrow-tailoring question.[49]

The narrow-tailoring prong in a redistricting case "allows the States a limited degree of leeway" in complying with the Voting Rights Act, provided the State has a "'strong basis in evidence'" to conclude that the "majority-minority district is reasonably necessary to comply"

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[45] Tr. 48; PX 50.

[46] Tr. 101-03; *see* PX 30 at 2.

[47] *Cf. Bush*, 517 U.S. at 983 ("The problem with the State's argument is that it seeks to justify not maintenance, but substantial augmentation, of the African-American population percentage . . . .").

[48] *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2419 (2013) ("Strict scrutiny requires the [government] to demonstrate with clarity that its 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.'") (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978) (opinion of Powell, J.)).

[49] Tr. 349.

with the law.[50] But there could be no such "strong basis in evidence" here when no such evidence was offered.

That evidentiary gap could not be bridged by pointing to *Plaintiffs'* Alternative Plan, which had a BVAP of 50.2%, but which Intervenors have argued was inferior to the Enacted Plan from the standpoint of preserving the 8-3 incumbent split and preserving the core of CD3.[51] Intervenors' reliance on Plaintiffs' Alternative Plan has at least four flaws.

First, strict scrutiny requires the *government* to prove "that its use of [race] is necessary . . . to the accomplishment of its purpose."[52] Showing that someone else's plan would not work perfectly does not show that the government's plan was narrowly tailored.

Second, the evidence was in conflict about whether the legislature really intended to preserve the 8-3 Republican-Democrat split and to make each incumbent's seat safer than before. As noted above, the majority was not persuaded by that claim, crediting instead Janis's statements that he did not examine partisan performance of incumbents and that it was not a basis for the redistricting.

Third, there was conflicting evidence about whether the Alternative Plan truly risked changing the 8-3 split to a 7-4 split.[53] McDonald testified that, while the Alternative Plan

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[50] *Bush*, 517 U.S. at 977 (plurality).

[51] *See* Jurisdictional Statement, *Cantor v. Personhuballah*, No. 14-518 (U.S. Oct. 31, 2014), at 36.

[52] *Fisher*, 133 S. Ct. at 2418 (quotation and citation omitted); *see also id.* at 2419 ("Strict scrutiny is a searching examination, and it is the government that bears the burden . . . .").

[53] Tr. 181. In fact, under Enacted CD2, which increased the Republican vote share by only 0.2%, Congressman Rigell was reelected in November 2014 (after the trial and the Court's decision) with 58.68% of the vote. Virginia Department of Elections, November 4, 2014-General-Election Results, http://elections.virginia.gov/index.php/resultsreports/election-results/2014-election-results/2014-nov-general/11042014_final.html.

increased the Democratic vote share in CD2, Congressman Rigell (R) would not necessarily lose his reelection in that district.[54]

Finally, Intervenors have overstated the claim that the Enacted Plan better preserved the cores of existing districts compared to Plaintiffs' Alternative Plan. Morgan conceded that the total average difference in core preservation for the Enacted Plan and the Alternative Plan across all 11 districts was only 1.5%.[55] McDonald testified that the range of core-preservation statistics for the two plans was "substantially similar"[56] and that the difference was "not significant."[57]

4. The Court's factual findings were not clearly erroneous.

On all three of these key factual issues, the Court sided with Plaintiffs. Although throughout the trial Defendants joined Intervenors in urging our view of the evidence, and reasonable triers of fact hearing the same evidence could have decided the case differently or formed different opinions about the credibility of the parties' respective experts,[58] we recognize that "such questions of credibility are matters for the District Court."[59] The Court's findings of

[54] Tr. 181.

[55] Tr. 383.

[56] Tr. 420.

[57] Tr. 421.

[58] McDonald had written a law review article before his expert engagement in which he had said that the 2012 redistricting plan was consistent with preserving an 8-3 congressional split. But the majority found reasonable McDonald's explanation that, when he wrote that article, he had not yet reviewed the legislative history and had not done a racial bloc voting analysis. *Page*, 2014 WL 5019686, at *8 n.11; *see* Tr. 226. The majority, in addition, discounted Morgan's testimony that politics explained CD3, finding that he had weaker credentials and committed repeated analytical errors. *Page*, 2014 WL 5019686, at *8 n.11.

[59] *Bush*, 517 U.S. at 970 (plurality).

fact can be set aside "only for 'clear error'"[60]—and *Alabama* did nothing to suggest that the majority's findings were clearly erroneous.

B. *Alabama* reaffirmed the legal grounds on which the Court decided the case.

The Supreme Court clarified in *Alabama* that Section 5 "does *not* require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice."[61] In so holding, the Supreme Court provided further support for this Court's decision, which was based on a finding, among others, that the General Assembly used "a 55% BVAP floor" in redrawing CD3 and did not provide substantial evidence to support the need for that threshold.[62]

In *Alabama*, the "legislators in charge of creating the redistricting plan believed, and told their technical adviser, that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible."[63] The district court accepted that goal as legitimate, concluding that the legislature was required to "'maintain, where feasible, the existing number of majority-black districts and *not substantially reduce the relative percentages of black voters in those districts*.'"[64] But the Supreme Court held that doing so was wrong:

> [T]his alternative holding rests upon a misperception of the law. Section 5 . . . does not require a covered jurisdiction to maintain a particular numerical minority percentage. . . . Section 5 does not require maintaining the same population percentages in majority-minority districts as in the prior plan.

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[60] *Easley*, 532 U.S. at 242.

[61] *Alabama*, 135 S. Ct. at 1272 (emphasis added).

[62] *Page*, 2014 WL 5019686, at *8.

[63] *Alabama*, 135 S. Ct. at 1271.

[64] *Id.* at 1272.

> Rather, § 5 is satisfied if minority voters retain the ability to elect their preferred candidates.[65]

Rather than setting a mechanical racial floor, § 5 requires a "functional analysis" to guide conclusions about the percentages necessary to maintain minority voters' ability to elect their candidate of choice:

> That is precisely what the language of the statute says . . . . That is also just what Department of Justice Guidelines say. The Guidelines state specifically that the Department's preclearance determinations are not based "on any predetermined or fixed demographic percentages . . . . Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district . . . ."[66]

By not performing a functional analysis in setting a floor, the Alabama legislature ignored "§ 5's language, its purpose, the Justice Department Guidelines, and the relevant precedent."[67] The legislature therefore failed to answer the correct question: "To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?"[68]

This Court applied the approach demanded in *Alabama*, even before the Supreme Court spelled it out there. In its memorandum opinion, the majority here plainly faulted the legislature's decision to arbitrarily increase the BVAP in Enacted CD3 without the benefit of a functional analysis to determine whether that was necessary: "There is no indication that this increase of more than three percentage points was needed to ensure nonretrogression . . . because

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[65] *Id.* at 1273.

[66] *Id.* at 1272 (quoting 76 Fed. Reg. 7,471). *See also* 76 Fed. Reg. at 7,471 ("In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment."); Tr. 62-63.

[67] *Alabama*, 135 S. Ct. at 1274.

[68] *Id.*

the 2012 Plan was not informed by a racial bloc voting or other, similar type of analysis."[69] In coming to that conclusion, the Court echoed the DOJ's redistricting Guidelines and the concerns some Virginia legislators had expressed about the absence of any such analysis.[70]

In light of this Court's factual findings, its legal conclusion was correct. Indeed, allowing an erroneous assumption that racial floors must be maintained, regardless of functional voting considerations, would give a State "carte blanche to engage in racial gerrymandering in the name of nonretrogression."[71] That theory would dangerously resemble a "one-way ratchet: the black population of a district could go up, either through demographic shifts or redistricting plans . . . [b]ut the legislature could never lower the black percentage . . . ."[72]

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[69] *Page*, 2014 WL 5019686, at *4 (citing Trial Tr. 342:11–23, 354:18–355:2). *See also id.* (explaining that "[a] racial bloc voting analysis, which legislatures frequently use in redistricting, studies the electoral behavior of minority voters and ascertains how many African–American voters are needed in a congressional district to avoid diminishing minority voters' ability to elect their candidates of choice").

[70] For instance, during debate on the Janis plan, Delegate Armstrong (D-Martinsville) asked whether any voting analysis had been conducted to determine the percentage of minority voters needed in CD3 in order for black voters to elect a candidate of their choice. PX 43 at 11-13. Janis did not identify any such analysis. *Id.* at 13, 15. Delegate Armstrong argued against the plan, explaining that it "is not enough to merely look at the minority population to determine if that is a minority majority district for voting purposes. You have to conduct the voting pattern analysis in order to determine what that percentage is." *Id.* at 47. "And when you don't do the regression analysis . . . you can crack and pack, the slang terms used to either put too many minorities in a district or too few." *Id.* Similarly, Senator McEachin (D-Richmond) said that the plan violated the Voting Rights Act because "60 percent African-American voting age population is not necessary in the 3rd Congressional District to afford minorities the opportunity to choose a candidate of their choice." PX 47 at 22.

[71] *Page*, 2014 WL 5019686, at *15 (quoting *Shaw v. Reno*, 509 U.S. at 630, 654 (1993)).

[72] *Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1340 (M.D. Ala. 2013) (Thompson, J., dissenting), *judgment entered*, No. 2:12-CV-1081, 2013 WL 6913115 (M.D. Ala. Dec. 20, 2013), *vacated and remanded*, Nos. 13-895, 13-1138, 135 S. Ct. 1257 (U.S. Mar. 25, 2015).

The Supreme Court noted in *Alabama* that a legislature need not "guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive."[73] Rather, a "court's analysis of the narrow tailoring requirement insists only that the legislature have a 'strong basis in evidence' in support of the (race-based) choice that it has made."[74] But here, the Court did not find that the General Assembly had *any* basis in evidence to support its adoption of a 55% racial floor for Enacted CD3.

Accordingly, *Alabama* supports this Court's conclusion that the General Assembly's use of a racial floor made race the predominant factor in redrawing CD3, thereby triggering strict scrutiny. And as noted above, Enacted CD3 could not survive strict scrutiny because the plan was not narrowly tailored to avoid retrogression.

CONCLUSION

Alabama does not alter the legal basis for the Court's conclusion that Enacted CD3 is an unconstitutional racial gerrymander.

Respectfully submitted,

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[73] 135 S. Ct. at 1273.

[74] *Id.* at 1274.

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the counsel of record for the parties.

By: /s/
Stuart A. Raphael