

Intervenor-Defendants have explained, *see* Juris. Stat. 1–2, 8–31 (Ex. B); Reply 3–10 (Ex. C), Plaintiffs wholly failed to satisfy this burden. Indeed, there is *no* dispute that the Legislature treated majority-black District 3 *exactly the same* as the majority-white districts across the Commonwealth. Juris. Stat. 10–11, 13–16, 28–31; Reply 3–10. Thus, even now, neither Plaintiffs nor their newly-allied Defendants have identified any *conflict*, much less *subordination*, between the Legislature’s political, incumbency-protection, and core-preservation goals and the alleged racial goal of maintaining District 3’s BVAP at 53% (or 55% or 56%).

Nor could Plaintiffs identify such a conflict, had they tried: in a series of concessions Plaintiffs never confront, Plaintiffs’ only witness, expert Dr. Michael McDonald, admitted that it would have made “perfect sense” for the Legislature to adopt the Enacted Plan for *political* reasons even if every affected voter “was *white*,” Tr. 128 (emphasis added), because the Republican-authored Enacted Plan’s changes involving District 3 had a “clear political effect” of benefitting “the Republican incumbents” in surrounding districts from which “[y]ou could infer” a “political purpose,” *id.* at 122, 128. Because the Legislature’s alleged use of race *coincided*, rather than *conflicted*, with its acknowledged race-neutral goals of politics, incumbency protection, and core preservation, it is not possible that the Legislature “subordinated” traditional principles to “racial considerations,” *Ala. Op.* 16, and the Enacted Plan is constitutional under *Alabama*, *see id.*; *see also* Juris. Stat. 1–2, 8–31; Reply 3–10.

In other words, race did not “*affect*” District 3’s boundaries at all, let alone “*significantly*,” *Ala. Op.* 7, 17 (emphases added), because the Legislature would have adopted the same Enacted Plan for political, incumbency-protection, and core-preservation reasons *regardless of race*, *see* Tr. 128; *see also* Juris. Stat. 8–24; Reply 3–10. In fact, based on the record evidence, the Enacted Plan was the *only* way to protect all incumbents and maintain an 8-

3 partisan ratio. *See* Juris. Stat. 13–14; Reply 6. Plaintiffs had the burden to offer an alternative plan showing “at the least” that the Legislature “could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles” and bring about “significantly greater racial balance” than Enacted District 3. *Easley v. Cromartie*, 532 U.S. 234, 258 (2001); *see also* Ala. Op. 10 (confirming that *Easley* articulates the plaintiff’s burden in a case where the plan’s proponents “argue[] that politics, not race, was its predominant motive”). But by Dr. McDonald’s own admission, Plaintiffs’ Alternative Plan *undermines* the Enacted Plan’s “political goals of having an 8/3 incumbency protection plan” and performs “significant[ly]” *worse* than the Enacted Plan on the traditional principles of politics, incumbency protection, and core preservation. Tr. 172–73, 180, 422–23; *see also* Juris. Stat. 3, 9–10, 14–15, 26–30; Reply 7–9.

Finally, *Alabama* squarely rejected this Court’s holding that strict scrutiny prevented the Legislature from doing anything “more than was necessary to avoid ‘a retrogression in the position of racial minorities,’” Op. 39 (quoting *Bush v. Vera*, 517 U.S. 952, 973 (1996)), and therefore from “increas[ing]” District 3’s BVAP, *id.* at 41; *see also id.* at 43 (narrow tailoring requires “least race-conscious measure”). *Alabama* clarified that strict scrutiny lays no such “trap for an unwary legislature,” but instead merely requires “a strong basis in evidence”—*i.e.*, “good reasons to believe”—that the use of race was needed to comply with Section 5, “even if a court does not find that the actions were necessary for statutory compliance.” Ala. Op. 22. Therefore, contrary to this Court’s prior ruling, a plan that increases the BVAP in the challenged district can satisfy strict scrutiny because narrow tailoring does not penalize a legislature for “plac[ing] a few too many minority voters in a district” or “a few too few.” *Id.* The record here—including Plaintiffs’ own racial bloc voting analysis—demonstrates that the Legislature

had more than ample reasons to believe that the Enacted Plan complied with Section 5. The Court therefore erred in holding that the Enacted Plan failed strict scrutiny. *See* Juris. Stat. 34–38; Reply 10–11.

For each of these reasons, the Court should adhere to *Alabama* and enter judgment dismissing Plaintiffs’ claim.

ARGUMENT

I. **ALABAMA CONFIRMS THAT THE COURT MISAPPLIED THE LAW AND FACTS IN CONCLUDING THAT RACE PREDOMINATED IN DISTRICT 3**

A. **The Court Failed To Apply *Alabama*’s Clear Requirements**

Alabama clarified and confirmed “what ‘predominance’ is all about”: a plaintiff *must* “prove that the legislature subordinated *traditional race-neutral districting principles*”—including the “offsetting traditional race-neutral districting principles” of “incumbency protection” and “political affiliation”—“to racial considerations.” *Ala. Op.* 16 (quoting *Miller*, 515 U.S. at 916) (emphasis in *Alabama*). Thus, a *Shaw* plaintiff must show a *conflict* between race and traditional districting principles that the legislature resolved by redistricting in a way that sacrificed traditional principles to racial objectives. *See id.* This makes perfect sense: where there is no conflict between race and traditional principles—or, in other words, where race and traditional principles independently would have led the legislature to adopt the same redistricting plan—it is impossible to “prove” or find that the legislature “subordinated traditional race-neutral districting principles to racial considerations.” *Id.*; Juris. Stat. 2–4, 8–24; Reply 1, 3–10.

It therefore is not enough for a plaintiff to prove that the “legislature considered race” or targeted a specific “racial balance” in the challenged district. *Easley*, 532 U.S. at 253. Indeed, even “direct evidence”—such as statements from sponsoring legislators—of such racial considerations or goals “say[s] little or nothing about whether race played a *predominant* role

comparatively speaking.” *Id.* (emphasis in original). Rather, as the *Alabama* court explained, a plaintiff must show that race had “a *direct and significant impact* on the drawing” of the challenged legislative district that “*significantly affect[ed]*” and “*change[d]*” the district’s boundaries compared to what those boundaries would have been if traditional principles had not been subordinated to race. *Ala. Op. 7*, 17 (emphases added); *see Juris. Stat.* 8–24; Reply 3–10.

The *Alabama* court’s confirmation of these bedrock principles underscores the Court’s basic error in this case. The Court found that “partisan considerations, as well as a desire to protect incumbents” “inarguably” “played a role in drawing” Enacted District 3. *Op. 32*. It therefore recognized that this is “a mixed motive suit” involving political, incumbency-protection, and race-related motivations. *Id.* But the Court never required Plaintiffs to prove, and never found, that the racial motive “predominated” over the “offsetting” non-racial motives of “incumbency protection” and “partisan affiliation.” *Ala. Op. 16*. Plaintiffs’ failure to prove that “race *rather than* politics” predominated in the Legislature’s changes to District 3 dooms their racial gerrymandering claim. *Easley*, 532 U.S. at 242 (emphasis in original); *see also Ala. Op. 16*; *Juris. Stat.* 8–24; Reply 3–10.

Plaintiffs’ failure of proof is unsurprising because the undisputed record forecloses any finding that race subordinated traditional principles in Enacted District 3, or changed District 3 from what it would have been absent racial considerations. *See Juris. Stat.* 13–14; Reply 3–8. Even Dr. McDonald admitted that it would have made “perfect sense” for the Legislature to adopt the Enacted Plan for *political* reasons even if every affected voter “was *white*.” Tr. 128 (emphasis added). That is because—again according to Dr. McDonald—the Republican-authored Enacted Plan’s changes involving District 3 had a “clear political effect” of benefitting “the Republican incumbents” in surrounding districts from which “[y]ou could infer” a “political

purpose.” *Id.* at 122, 128. These concessions comported with *all* contemporaneous statements—including Dr. McDonald’s pre-litigation law review article—universally describing the Enacted Plan *not* as a racial gerrymander, but as a “political gerrymander” that created “an 8-3 partisan division” in favor of Republicans and “protected all incumbents.” Int.-Def. Ex. 55 at 816; Juris. Stat. 2–3, 13–14; Reply 3–10.

In short, just as with every other majority-white district in the State, the Legislature preserved the basic core of District 3 and made minor alterations at the margins, which increased its BVAP by 3.2% and *uniformly* benefitted the four Republican incumbents in the adjacent districts. Tr. 128; *see also* Juris. Stat. 8–24; Reply 3–10. Conversely, any effort to cognizably alter District 3’s shape or reduce its BVAP would have injected significant Democratic voting blocs into the adjacent districts, to the political detriment of the Republican incumbents. *See* Juris. Stat. 17–27; Reply 3–10.

Thus, the Legislature’s alleged racial goal of maintaining (or slightly increasing) District 3’s BVAP did not *conflict*, but perfectly *coincided*, with the Legislature’s political, incumbency-protection, and core-preservation goals. *See* Juris. Stat. 13–14, 16–17; Reply 6. In other words, race did *not* “*affect*” District 3’s boundaries at all, let alone “*significantly*,” *Ala. Op.* 7, 17 (emphases added), because the Legislature would have adopted the same Enacted Plan for political, incumbency-protection, and core-preservation reasons, *see* Tr. 128; *see also* Juris. Stat. 8–24; Reply 3–10.

In fact, there is *no* evidence that the Republican-controlled Legislature could have achieved its political and incumbency-protection goal of protecting the 8 Republican and 3 Democratic incumbents *other* than through the Enacted Plan. *See* Juris. Stat. 13–14; Reply 6. The reason there is no such evidence is because the plaintiffs here wholly failed to meet “the

plaintiff's burden in cases" where the plan's proponents "argue[] that politics, not race, was its predominant motive." *Ala. Op. 10* (citing *Easley*). As a central part of that burden to decouple race and political considerations, a plaintiff must offer an alternative plan showing "at the least" that the legislature "could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" and bring about "significantly greater racial balance" than the challenged district. *Easley*, 232 U.S. at 258 (cited at *Ala. Op. 10*); *see also* *Juris. Stat.* 1–4, 8–16, 24–31; Reply 7–9.

Here, however, Plaintiffs' Alternative Plan *confirms* that the Legislature's non-racial political and incumbency-protection "motives" directly mirrored—indeed, could only be achieved by pursuing—the alleged racial "motive" of having a district with 53% (or 55% or 56%) BVAP. The Alternative Plan's BVAP reduction of only 3% resulted in a plan that performs "significant[ly]" worse than the Enacted Plan on the traditional principles of incumbency protection and core preservation because it creates a 7-4 partisan division by turning District 2, a 50/50 district currently represented by Republican Scott Rigell, into a "heavily Democratic" district. *Tr.* 119, 152–53, 304, 422–23; *Int.-Defs. Ex. 22*; *Juris. Stat.* 3, 9–10, 14–15, 26; Reply 7–9. Since reducing BVAP to even 50% significantly undermined the Legislature's political, incumbency-protection, and core-preservation goals, this demonstrates that any alleged goal of maintaining (or increasing) BVAP was not only fully consistent with, but necessary to, achieving the Legislature's non-racial purposes.

In sum, the Enacted Plan fully complied with *Shaw* because it treated majority-black District 3 precisely the same as the other, majority-white districts in Virginia; *i.e.*, making minimal changes to the core that politically benefitted incumbents. *See Juris. Stat.* 10–11, 13–16, 28–31; Reply 3–10. Condemning such equal treatment and requiring racially-based

differential treatment of minority districts would therefore turn the principles set forth in *Shaw*, and reaffirmed in *Alabama*, on their head. *See* Juris. Stat. 10–11, 13–16, 28–31; Reply 3–10.

B. Plaintiffs And Defendants Do Not Identify Any Conflict Between Race And Traditional Principles Or A Viable Alternative Plan

Plaintiffs and Defendants do not identify *any* conflict between race and traditional principles in the Legislature’s changes to Enacted District 3 or dispute that the Enacted Plan is the only plan in the record that achieves the Legislature’s preferred 8-3 partisan split. *See* Pls. Br. 4–8; Defs. Br. 4–8. They nonetheless offer four arguments for why Enacted District 3 violates *Shaw*’s requirements, as applied in *Alabama*. All of them fail.

First, Plaintiffs and Defendants contend that the Legislature did not *want* to protect all 8 Republican incumbents because, for the first time in American history, a legislature did not want to return all incumbents of the majority party to Congress. *See* Defs. Br. 6; *see also* Juris. Stat. 12–14; Reply 6–7. But this contention is directly contrary to the Court’s express finding that “partisan considerations” and “a desire to protect incumbents” “inarguably” “played a role in drawing” Enacted District 3, Op. 32, as well as to all of the undisputed evidence cited above, *see supra* Part I.A.

Indeed, the very quotes Defendants themselves invoke contradict this counterintuitive position. In fact, Delegate Janis expressly acknowledged the partisan goals of the Enacted Plan in a display of candor rarely seen among legislators engaged in redistricting. *See* Juris. Stat. 19–20; Reply 7. As Defendants recount, Delegate Janis sought ““to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 elections,”” when voters elected 8 Republicans and 3 Democrats (as opposed to the 5-6 split resulting from the 2008 election). Defs. Br. 6 (quoting Pls. Ex. 43 at 4). Accordingly, the Enacted Plan made only “minimal” changes and preserved “the core of the existing congressional districts.” Pls. Ex.

43 at 4, 6. When making changes to each district, Delegate Janis sought “the input of the existing congressional delegation, both Republican and Democrat,” and drew the lines based on the incumbents’ “specific and detailed recommendations.” Int.-Defs. Ex. 9 at 8. All of the incumbents “support[ed] the lines” for their districts (and were, unsurprisingly, re-elected in 2012). *Id.* Thus, the Enacted Plan did far more than merely avoid “cutting our currently elected congressmen from their current districts [and] drawing current congressmen into districts together,”” Defs. Br. 6 (quoting Pls. Ex. 43 at 4), but directly advanced the incumbents’ political preferences and preserved the 8-3 partisan split, *see* Juris. Stat. 19–21; Reply 7.

Second, Plaintiffs and Defendants attempt a strained analogy between District 3 and the Senate District 26 discussed in *Alabama*. *See* Pls. Br. 7; Defs. Br. 4–5. But Senate District 26 did not even *present* the issue that is *dispositive* for District 3. As established above, the fatal flaw in the challenge here is the complete absence of any proof that any alleged desire to maintain or enhance District 3’s BVAP predominated *over* political or other concerns, since any such racial goal was *coextensive* with the Legislature’s political goals. *See supra* Part I.A. *Alabama*, in contrast, did not involve *any* politics defense or any argument that the increase in Senate District 26’s BVAP was driven by politics and incumbency protection, rather than race. *See Ala. Op.* 10. Accordingly, Senate District 26 did not present the issue of whether a policy of maintaining existing BVAP conflicted with or subordinated political and incumbency protection goals. *See id.*

Thus, even if Delegate Janis’s statements here *echoed* those attributed to legislators in *Alabama* and established an unequivocal intent to maintain District 3’s BVAP, this is of no moment. For where, as here, the question is whether “race *rather than politics*” predominates, such “direct evidence” that the legislature targeted a specific “racial balance” would “say little or

nothing about whether race played a *predominant* role comparatively speaking.” *Easley*, 532 U.S. at 243, 253 (emphasis in original). Such “predominan[ce],” again, can be established only where, unlike here, racial concerns *subordinate conflicting* non-racial political or other factors. *See Ala. Op.* 6.

In any event, Delegate Janis’s statements do not echo the racial views of the Alabama legislature, but instead the legally correct views of the *Supreme Court* in *Alabama*. The *Alabama* plaintiffs presented evidence that legislators set out “to prevent the percentage of minority voters in each district from declining” and “relied heavily upon a mechanically numerical view” of Section 5. *Ala. Op.* 9, 21. The Supreme Court, however, clarified the crucial distinction between avoiding reductions in minority voting *percentages* and avoiding reductions in minority voting *strength*, holding that Section 5 “does not require a covered jurisdiction to maintain a particular numerical percentage” but rather “to maintain a minority’s ability to elect a preferred candidate of choice.” *Id.* at 19. Delegate Janis’s statements cited by Defendants precisely replicate the Supreme Court’s formulation: those statements say *nothing* about preventing a BVAP decrease in District 3, but, like the Supreme Court, say only that the Legislature sought to “mak[e] sure that the 3rd Congressional District did not retrogress in its minority voting influence.” Defs. Br. 4 (quoting Pls. Ex. 43 at 14–15). Delegate Janis’s statements therefore cannot be viewed as equivalent to *Alabama’s legislative* statements requiring no diminution in *BVAP*, since they are the same as the *Supreme Court’s* admonition against diminution in minority “*voting influence*.” *See Juris. Stat.* 21–24; Reply 9–10.

Having failed to unearth a nonexistent statement from a legislator or plan architect saying that BVAP will be maintained, Plaintiffs and Defendants attempt to fill this void by asserting that Defendants’ and Intervenor-Defendants’ expert John Morgan opined that the Legislature

employed a 55% BVAP floor in District 3. *See* Pls. Br. 7; Defs. Br. 4–5; *see also* Op. 19. But even if Mr. Morgan had said this, it would not reflect the Legislature’s purpose because, as the Court affirmatively noted, Mr. Morgan “did not work with or talk to any members of the Virginia legislature” regarding the Enacted Plan. Op. 20 n.11; Juris. Stat. 24 n.1.

Moreover, Mr. Morgan *never* said that the Legislature applied a BVAP floor in District 3. Rather, he explained that a year before adoption of the Enacted Plan, the Democrat-controlled Legislature had enacted, “with strong support of bipartisan and black legislators, a *House of Delegates* redistricting plan with a 55% Black VAP as the floor for black-majority districts.” Int.-Defs. Ex. 13 at 26 (emphasis added); Juris. Stat. 24 n.1. As Defendants go to great lengths to explain, a statement regarding an alleged use of race in one redistricting plan proves precisely nothing about an alleged use of race in a *different* redistricting plan adopted in a different year by a legislature controlled by a different political party. *See* Defs. Br. 2 n.7 (a “finding that race predominated in drawing CD3 . . . does not mean that race predominated when the General Assembly revised its State voting districts”). Defendants are entirely correct on this issue, for the reason they note: *Alabama* “underscored this point” when it emphasized that a claim for racial gerrymandering is “a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*.” *Id.* (quoting *Ala.* Op. 6) (emphasis in Defs. Br.). Since a racial intent in one district cannot be transferred to establish such intent in a different district in the *same* plan, Mr. Morgan’s statement about a BVAP floor in the 2011 Democratic *House of Delegates* plan says absolutely nothing about the existence of such a floor in the 2012 Republican *Enacted Plan*. *See id.*

Finally, Plaintiffs’ and Defendants’ theories concerning the Legislature’s purported BVAP floor are internally inconsistent and facially cannot explain the BVAP that actually

resulted in District 3. On the one hand, they claim that Delegate Janis used the benchmark BVAP as the floor, *see* Pls. Br. 7; Defs. Br. 4–5, but that would create a floor of 53.2%, thus *refuting* Plaintiffs’ and Defendants’ imaginary 55% floor. And, of course, the actual District 3 *increased* the BVAP to 56.3%, which Plaintiffs strenuously criticize in their discussion of Section 5. *See* Pls. Br. 8–12; Defs. Br. 8–11. Accordingly, Plaintiffs and Defendants are inconsistently arguing that the Legislature’s racial goal was both *maintaining* BVAP to satisfy Section 5 and *increasing* BVAP to “pack” black voters. Pls. Br. 7, 8–12; Defs. Br. 4–5, 8–11. But since the District 3’s BVAP *augmentation* could not have stemmed from some policy to *maintain* BVAP, the increase is necessarily attributable to something other than Delegate Janis’s alleged desire to maintain—namely, the undisputed beneficial *political* effect of transferring predominantly Democratic (and predominantly black) VTDs into District 3 and out of the adjacent Republican districts (and vice versa). *See supra* Part I.A; Juris. Stat. 17–24; Reply 3–6.

Third, Plaintiffs and Defendants invoke a handful of traditional districting principles, such as compactness, contiguity, and VTD splits, that, in their view, support a conclusion that race predominated in the Enacted Plan’s changes to District 3. *See* Pls. Br. 7; Defs. Br. 7. Plaintiffs miss the point entirely: these alleged “flaws” were all present (to a greater extent) in Benchmark District 3, so would *necessarily* continue if District 3’s core were preserved. *See* Juris. Stat. 27–31; Reply 5. And, again, such core preservation was the predominant principle driving *all* districts and was necessary to accomplish the Legislature’s political and incumbency-protection goals. *See supra* Part I.A; Juris. Stat. 27–31; Reply 5. Thus, these alleged *departures* from traditional districting principles reflect nothing more than *adherence* to the dominant and uniform principles of core preservation and incumbency protection. *See* Juris. Stat. 27–31; Reply 5. Again, the Alternative Plan *concededly* shared *these* flaws *and* also violated the core

preservation and incumbency protection principles, even though it reduced the benchmark BVAP by only 3%. *See* Juris. Stat. 27–31; Reply 5. Since such a minor departure from Enacted District 3’s shape and BVAP has such tangible negative effects on core preservation and the political prospects of at least one Republican incumbent, this again vividly confirms that District 3’s BVAP was not the result of subordinating these race-neutral principles, but maximizing them. *See* Juris. Stat. 27–31; Reply 5.

Finally, Defendants attempt to sidestep the Court’s legal errors by suggesting that its predominance finding is reviewable only for “clear error.” Defs. Br. 3. *Alabama*, however, makes clear that a three-judge court’s application of “incorrect legal standards in evaluating” a *Shaw* claim can be reversible error even if it is not clear that the court’s “predominance conclusions” necessarily would “have been different.” *Ala.* Op. 2, 17. Here, the Court applied an incorrect legal standard because it failed to assess whether “the legislature subordinated *traditional race-neutral districting principles*,” including the “offsetting” traditional principles of “incumbency protection” and “political affiliation,” to “racial considerations,” *id.* at 16, in this “mixed-motive suit,” Op. 32; *see also supra* Part I.A.

In all events, as in *Easley*, the Court’s finding that race predominated in the Enacted Plan was clearly erroneous. *See* Juris. Stat. 31–34. The myth perpetuated by Dr. McDonald that “African-American voters accounted for over 90% of the voting age residents added to the Third Congressional District,” Op. 41 n.22 (cited at Pls. Br. 7), has been debunked, Juris. Stat. 38 n.4. Moreover, Dr. McDonald’s VTD analysis, *see* Defs. Br. 7, is even *less* defensible than the similar analysis the Supreme Court rejected as a matter of law in *Easley*, *see* Juris. Stat. 31–34.

II. ALABAMA REJECTED THE COURT’S CONSTRUCTION OF THE NARROW TAILORING REQUIREMENT

Alabama not only confirmed the fundamental errors in the Court’s application of *Shaw*

and *Easley*, but also squarely rejected the Court’s construction of the narrow tailoring standard for satisfying strict scrutiny. *Alabama* held that “the narrow tailoring requirement insists only that the legislature have a strong basis in evidence in support of the (race-based) choice it has made.” *Ala. Op. 22*. Legislatures “may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance.” *Id.* (emphasis in original).

This deferential standard “does not demand that a State’s actions actually be necessary to achieve a compelling state interest in order to be constitutionally valid.” *Id.* The *Alabama* court therefore did not “insist that a legislature guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive” because “[t]he law cannot insist that a state legislature, when redistricting, determine *precisely* what percentage minority population § 5 demands.” *Id.* (emphasis in original). As the *Alabama* court explained, “[t]he standards of § 5 are complex; they often require evaluation of controverted claims about voting behavior; the evidence may be unclear; and, with respect to any particular district, judges may disagree about the proper outcome.” *Id.* “The law cannot lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) retrogressive under § 5 should the legislature place a few too few.” *Id.*

In contrast, this Court misstated the narrow-tailoring requirement confirmed in *Alabama* and, in the process, erred when it held that the Enacted Plan fails strict scrutiny. *See Juris. Stat.* 34–38; Reply 10–11. The Court held that a plan cannot be narrowly tailored where it “did more than was necessary to avoid ‘a retrogression in the position of racial minorities.’” *Op. 39*

(quoting *Bush v. Vera*, 517 U.S. 952, 973 (1996)); *see also id.* at 43 (narrow tailoring requires “least race-conscious measure”). It therefore concluded that the Enacted Plan failed strict scrutiny because it “increased [District 3’s] BVAP.” *Id.* at 41.

More specifically, *Alabama* rejected this Court’s conclusion that a redistricting plan automatically fails strict scrutiny whenever it increases the BVAP in a majority-black district. *See Ala. Op. 22* (strict scrutiny does not penalize legislatures for placing “a few too many minority voters in a district” and for placing “a few too few”). Moreover, the Court’s test would interject even *more* race-consciousness into redistricting because it would place states in a racial straitjacket requiring them to precisely pinpoint whatever BVAP level was “necessary to avoid” retrogression. *Op. 39*; *see also Juris. Stat. 34–35*; *Reply 10–11*. But *Alabama* forecloses turning narrow tailoring into such “a trap for an unwary legislature”: to the contrary, a legislature is not required to divine “*precisely* what percent minority population § 5 demands,” but is afforded broad discretion to choose among a range of options for achieving Section 5 compliance based on “controverted claims” and “unclear” evidence. *Id.* (emphasis in original); *see Juris. Stat. 34–38*; *Reply 10–11*.

Although strict scrutiny is not triggered because Plaintiffs failed to prove that the Legislature “subordinated traditional race-neutral principles to racial considerations,” *Ala. Op. 16*; *see supra* Part I, the Legislature clearly had “good reasons to believe” that the Enacted Plan was appropriate to comply with Section 5, *Ala. Op. 22*. Delegate Janis echoed *Alabama* and properly focused on not “retrogress[ing] minority voting influence” in District 3. *Compare Op. 2, 8* (quoting *Pls. Ex. 43* at 25), *with Ala. Op. 19*; *see also supra* Part I.B; *Juris. Stat. 21–24*; *Reply 9–10*. As Mr. Morgan explained, the year prior to adoption of the Enacted Plan, the Democrat-controlled Legislature adopted, with strong support from black legislators, a House of

Delegates redistricting plan with 55% or higher BVAP in all majority-black districts, including in geographic areas covered by District 3. *See* Int.-Defs. Ex. 13 at 26. Because it is obviously reasonable to believe that black legislators did not want to *harm* black voters, there were very good reasons to believe that this level of BVAP is what these expert legislators believed was needed to avoid diminishing those voters’ ability to elect preferred candidates. *See Georgia v. Ashcroft*, 539 U.S. 461, 484, 489–91 (2003) (finding “significant” the views of **“representatives . . . protected by the Voting Rights Act”** and deferring to black congressman’s views regarding retrogression and appropriate BVAP levels under Section 5 (emphasis added)). Thus, this provided a “strong basis” or “good reason” to believe that diminution substantially below that 55% BVAP level would make it difficult to prove non-retrogression. *Ala. Op.* 22; *see Juris. Stat.* 34–38; Reply 10–11.

In this regard, Plaintiffs repeatedly fault the Legislature for its undisputed—and irrelevant—decision not to conduct a costly and debatable racial bloc voting analysis. *See* Pls. Br. 11–12. But Plaintiffs’ own racial bloc voting analysis proves that such an analysis would not have provided the Legislature a reliable assessment of the nonretrogressive BVAP level in District 3. *See Juris. Stat.* 34–38; Reply 10–11. Plaintiffs’ racial bloc voting analysis suggests that a 30% BVAP level would be nonretrogressive—but there is no dispute that decreasing District 3’s BVAP by *more than 23%* would almost certainly have been denied preclearance as retrogressive, even if such a dramatic decrease could find support in a racial bloc voting analysis. *See Juris. Stat.* 37–38; Reply 11. Therefore, a racial bloc voting analysis would have served no purpose and would not have supplied the Legislature with a “good reason[] to believe” that any particular BVAP level was nonretrogressive. *See Juris. Stat.* 37–38; Reply 11. And, of course, *Alabama’s* deferential standard does not require a legislature to expend its limited resources on

such an unhelpful analysis, but instead made painstakingly clear that a legislature may rely on “controverted claims” and “unclear” evidence in formulating “good reasons to believe” that its actions are appropriate under Section 5. *Ala. Op.* 22.

Neither Plaintiffs nor Defendants dispute that this Court applied an incorrect legal standard to the strict-scrutiny question here. *See* Pls. Br. 8–12; Defs. Br. 8–11. Plaintiffs nonetheless attempt to save the Court’s analysis by arguing that it applied a “reasonably necessary” standard that was “close” to the *Alabama* standard. Pls. Br. 12. But even if Plaintiffs had properly characterized the Court’s standard, it still would fail under *Alabama*, which *reversed* a three-judge court’s use of a “reasonably necessary” standard as a matter of law. *See Ala. Op.* 22–23. For this reason as well, *Alabama* confirms that the Court should enter judgment dismissing Plaintiffs’ claim.

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Plaintiffs make a passing request that the Court set a remedial deadline of September 1, 2015 if it determines anew that the Enacted Plan violates *Shaw*. *See* Pls. Br. 13. Although this request goes beyond the issues on which the Court requested briefing, *see* 3/31/15 Order, Intervenor-Defendants briefly address it. As the Court has recognized, setting a remedial deadline during the pendency of a direct appeal deprives the Legislature, the Court, and the parties of “the views and instruction” of the Supreme Court and therefore is “wasteful” of legislative and judicial resources. *Mem. Op.* 4 (DE 137); *see also id.* at 5 (“[T]he interest of all is served by allowing the parties and the Court to proceed with the benefit of the views and instruction of the Supreme Court.”). Given that the Supreme Court’s Term expires on June 30, it will not decide this case on any second direct appeal by Intervenor-Defendants until after September 1.

Moreover, the Legislature is currently not in session and is not scheduled to convene in regular session again until January 2016, *see* Va. Const. art. VI, § 6, so setting a September 1 remedial deadline would impose significant costs on the Legislature and Virginia taxpayers, *see* Mem. Op. 4–5. Thus, while September 1 was an appropriate deadline to allow the Supreme Court to take action in the *first* direct appeal, *see id.*, it is not an appropriate deadline at this juncture. Rather, if the Court finds a *Shaw* violation, it should decide any appropriate remedial deadline as events unfold and to allow sufficient time to secure the “the views and instruction” of the Supreme Court in any second appeal. *Id.* at 4.

CONCLUSION

The Court should adhere to *Alabama* and enter judgment dismissing Plaintiffs’ claim.

Dated: April 23, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 23, 2015, a copy of the INTERVENOR-DEFENDANTS' RESPONSE BRIEF REGARDING *ALABAMA LEGISLATIVE BLACK CAUCUS V. ALABAMA* was filed electronically with the Clerk of Court using the ECF system, which will send notification to the following ECF participants:

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