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' REPLY 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

Intervenors persist in the view of the facts they pressed at trial—a view that this Court rejected. The Court considered, but did not credit, Intervenors' argument that politics rather than race explained CD3. Relying on the legislative record and the plain words of the redistricting plan's sponsor, the Court determined, as a matter of fact, that race predominated. Intervenors understandably want to reargue those facts, but it is too late.

Intervenors are no more correct about the application of *Alabama* to those facts. Unable to harmonize *Alabama*'s central holding with their theory of the case, they avoid it altogether. They do not explain how the General Assembly's imposition of a mechanical 55%-BVAP floor can be reconciled with *Alabama*'s holding that a redistricting plan must be informed by a functional analysis of the percentage necessary to maintain a minority group's ability to elect a candidate of its choice. Moreover, they ignore the passage in *Alabama* that shows that in cases where there is *direct* evidence that race predominated in a redistricting plan, as in *Alabama* and this case, plaintiffs need not *additionally* prove that politics alone could not explain the redistricting; that burden is reserved instead for circumstantial-evidence cases like *Easley v. Cromartie*.[1]

Intervenors are also incorrect to suggest that *Alabama* undermines this Court's application of the narrow-tailoring requirement. They misread *Alabama* as granting blanket deference to the legislature, but that leeway is afforded only *after* the legislature has performed the functional analysis that the DOJ guidelines and *Alabama* require—an analysis that indisputably was not done here. Because *Alabama* confirmed the legal grounds on which the

[1] 532 U.S. 234 (2001).

Court based its decision, the Court should reaffirm its ruling that Enacted CD3 is an unconstitutional racial gerrymander.

Finally, the Court should reject Intervenors' request that any remedial deadline be open-ended in light of their planned second appeal to the Supreme Court. An indefinite postponement would prejudice the Commonwealth, prospective candidates, and voters in advance of the 2016-election cycle. The General Assembly and the Governor—and, if they fail to agree on a plan, this Court—will need adequate time to approve a plan in advance of the 2016-election deadlines. The Court should restore the schedule it previously ordered and permit the Commonwealth to enact a redistricting plan by the earlier of September 1 or 60 days after entry of judgment.

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

A. Intervenors improperly attempt to relitigate factual findings made by the Court.

As shown in our opening brief, this Court resolved the disputed facts against Intervenors and Defendants. The Court cited sufficient evidence to support its findings that the General Assembly used a 55%-BVAP floor in redistricting CD3,[2] that the evidence as a whole did not support the 8-3 split theory advanced by Defendants and Intervenors,[3] and that Enacted CD3 went further than necessary to protect African-American voters and was, therefore, not narrowly tailored to avoid retrogression.[4] Intervenors fail to credit that evidentiary support.

Instead, they reargue the facts. For instance:

- Intervenors insist that the "Court . . . never found[] that the racial motive 'predominated' over the 'offsetting' non-racial motives of 'incumbency protection'

[2] *See* Defs.' Opening Br. Regarding the Legal Effect of *Alabama Black Legislative Caucus v. Alabama*, at 4-5 (Apr. 10, 2015), ECF No. 145.

[3] *Id.* at 5-8.

[4] *Id.* at 8-11.

and 'partisan affiliation.'"[5] But that is exactly what the Court found in the portion of its opinion that begins, conspicuously, "For the reasons that follow, we find that Plaintiffs have shown race predominated."[6]

- Intervenors argue that their expert, John Morgan, "*never* said that the Legislature applied a BVAP floor in District 3."[7] But the Court disagreed, expressly finding that Morgan "acknowledged that the legislature 'adopted the [2012 Plan] with the [Third Congressional District] Black VAP at 56.3%' because legislators were conscious of maintaining a 55% BVAP floor."[8]

- For their argument that an incumbency-protection motive predominated, Intervenors place heavy emphasis, as they did at trial, on Janis's statement that one goal of the redistricting was '"to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 elections.'"[9] But the Court dismissed that statement as "rather ambiguous" and more properly understood when "[t]aken in context."[10] That finding buttressed the Court's conclusion 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."[11]

Intervenors then make legal arguments that rely on their discredited view of the evidence.

Alabama did not alter this Court's factual findings. And all parties have agreed that the factual record does not need to be reopened. Thus, the Court's factual findings can be set aside

[5] Intervenor-Defs.' Response Br. Regarding the Legal Effect of *Alabama Black Legislative Caucus v. Alabama*, at 5 (Apr. 23, 2015), ECF No. 151 (quoting *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270 (2015)). *Alabama* refers to "political affiliation," 135 S. Ct. at 1270, not "partisan affiliation," as quoted by Intervenors.

[6] *Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2014 WL 5019686, at *5 (E.D. Va. Oct. 7, 2014).

[7] Int-Defs.' Br. at 11.

[8] *Page*, 2014 WL 5019686, at *8 (quoting IX 13 at 27).

[9] Int-Defs.' Br. at 8 (quoting PX 43 at 4).

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

[11] *Id.*

"only for 'clear error.'"[12] Because the facts remain unchanged, only a reversal of the applicable law could lead to a different result. But as set forth below, *Alabama* shows that this Court's legal analysis was correct.

B. Contrary to Intervenors' arguments, *Alabama* reaffirmed the legal grounds on which the Court decided the case.

1. *Alabama* confirms that a legislature's use of an artificial BVAP floor triggers strict scrutiny.

Intervenors argue that this Court "misapplied the law" because it "is not enough for a plaintiff to prove that the 'legislature considered race' or targeted a specific 'racial balance' in the challenged district."[13] But that does not accurately describe what the Court found that the legislature did here. The Court determined that, as a matter of fact, the General Assembly did more than "consider" race—it imposed a fixed 55%-BVAP floor in the redistricting.[14] Intervenors cannot escape the legal consequence of that factual finding. *Alabama* instructs that, when "the legislature relie[s] heavily upon a mechanically numerical view as to what counts as forbidden retrogression,"[15] it makes race the predominant factor in the redistricting, triggering strict scrutiny.

Intervenors fail to explain why that central holding of *Alabama* does not apply here. Contrary to their characterization, this Court did *not* conclude that "a redistricting plan

[12] *Easley*, 532 U.S. at 242. Intervenors suggest that we "attempt to sidestep the Court's legal errors" by focusing on its findings of fact. Int-Defs.' Br. at 13. For the reasons set forth below, it is Intervenors who misinterpret the applicable law.

[13] Int-Defs.' Br. at 4 (quoting *Easley*, 532 U.S. at 253).

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

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

automatically fails strict scrutiny whenever it increases the BVAP in a majority-black district."[16] Rather, the Court held that the General Assembly's decision to increase the BVAP in CD3 *without conducting a functional analysis* was legally indefensible. This Court explained: "There is no indication that this increase of more than three percentage points was needed to ensure nonretrogression . . . because the 2012 Plan was not informed by a racial bloc voting or other, similar type of analysis."[17] Without that analysis, the General Assembly could not have determined—as *Alabama* says it must—the extent to which a redistricting plan must "preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice."[18]

In short, this Court's prior holding is entirely consistent with *Alabama*.

2. *Alabama* rejected Intervenors' argument that plaintiffs in direct-evidence cases like this one must prove that politics could not explain the enacted plan.

Alabama also rejected what has been Intervenors' primary argument: that under *Easley*, Plaintiffs had the burden to prove that the legislature "could have achieved its legitimate political objectives in alternative ways" that yield "significantly greater racial balance."[19] Intervenors claim that "*Easley* 'generally' requires *all* plaintiffs to disprove politics where it highly correlates with race,"[20] regardless of direct evidence that race predominated.

But the Supreme Court disagreed. It distinguished direct-evidence cases like *Alabama*, where the State "expressly adopted and applied a policy of prioritizing mechanical racial targets

[16] Int.-Defs.' Br. at 15.

[17] *Page*, 2014 WL 5019686, at *4 (citing Trial Tr. 342:11–23, 354:18–355:2).

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

[19] Int-Defs' Br. at 3 (quoting *Easley*, 522 U.S. at 258). *See also* Jurisdictional Statement at 24-25, *Cantor v. Personhuballah*, No. 14-518 (U.S. Oct. 31, 2014) (same).

[20] Jurisdictional Statement at 25, *Cantor*, No. 14-518.

above all other districting criteria (save one-person, one-vote),"[21] from circumstantial-evidence cases like *Easley*:

> We have said that the plaintiff's burden in a racial gerrymandering case is "to show, *either* through circumstantial evidence of a district's shape and demographics *or more direct evidence* going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S., at 916, 115 S. Ct. 2475. *Cf. Easley v. Cromartie*, 532 U.S. 234, 258, 121 S. Ct. 1452, 149 L. Ed.2d 430 (2001) (explaining the *plaintiff's burden in cases, unlike these*, in which the State argues that politics, not race, was its predominant motive).[22]

In other words, race can be shown to be the predominant factor *either* through circumstantial evidence of the sort involved in *Easley*, *or* through "more direct evidence" of "legislative purpose,"[23] as in *Alabama*. *Easley*'s requirement to prove that politics could not explain the district does not apply in cases where there is direct evidence that race predominated.

Because this case, like *Alabama*, is a direct-evidence case, it is different from *Easley*, a circumstantial-evidence case. The Court here found both "strong direct and circumstantial evidence" that race predominated.[24] The Court concluded that the General Assembly imposed a 55%-BVAP floor in drawing CD3 to meet the "primary," "paramount," and "nonnegotiable" goal of avoiding retrogression.[25] There was no such evidence in *Easley* that the North Carolina legislature used a racial floor in its redistricting. Indeed, the strongest evidence of racial motivation in *Easley* was the redistricting leader's comment that "I think that overall [the plan]

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[21] *Alabama*, 135 S. Ct. at 1267.

[22] *Id.* (emphasis added).

[23] *Id.*

[24] *Page*, 2014 WL 5019686, at *7; *see generally id.* at *6-14.

[25] Tr. 14-15, 25.

provides for a fair, geographic, *racial* and partisan balance throughout the State of North Carolina."[26] Five Justices found that comment insufficient to prove that race predominated,[27] while four Justices thought it adequate under the deferential standard of review.[28] That circumstantial evidence, which was nearly sufficient to carry the day in *Easely*, pales in comparison to the direct evidence found by the Court in this case.

3. Intervenors misconstrue *Alabama* as conflicting with this Court's narrow-tailoring analysis.

Intervenors offer three different ways in which *Alabama* supposedly shows that this Court misapplied the narrow-tailoring doctrine. They misread *Alabama*.

First, Intervenors suggest that narrow tailoring can be demonstrated in a redistricting suit by pointing to alleged deficiencies in the plaintiffs' alternative plan.[29] But as shown in our opening brief (at 9-11), a deficiency in someone else's plan does not satisfy the *government's* burden to prove that using race "is necessary . . . to the accomplishment of its purpose."[30] And

[26] *Easley*, 532 U.S. at 253 (emphasis added).

[27] *Id.* ("We agree that one can read the statement about 'racial . . . balance' . . . to refer to the current congressional delegation's racial balance. But even as so read, the phrase shows that the legislature considered race, along with other partisan and geographic considerations; and as so read it says little or nothing about whether race played a *predominant* role comparatively speaking.").

[28] *Id.* at 266 n.8 (Thomas, J., dissenting, joined by Roberts, C.J., and Scalia and Kennedy, JJ.).

[29] *See* Int-Defs.' Br. at 7 ("Plaintiffs' Alternative Plan confirms that the Legislature's non-racial political and incumbency-protection 'motives' . . . could only be achieved by pursuing . . . the alleged racial 'motive' of having a district with 53% (or 55% or 56%) BVAP").

[30] *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2418 (2013) (quotation and citation omitted); *see also id.* at 2419 ("Strict scrutiny is a searching examination, and it is the government that bears the burden . . . .").

Morgan, the only witness for Intervenors and Defendants, testified that he had no opinion on the narrow-tailoring question.[31]

Second, Intervenors argue that *Alabama* imposes a "deferential standard" that requires that a legislature put forth only "'*good reasons* to believe'" that using race is needed to comply with Section 5.[32] Intervenors reason that the General Assembly had "good reasons" for its race-based choice because the House of Delegates' redistricting plan was approved in 2011 with majority-black districts of "55% or higher BVAP" and it was "obviously reasonable to believe that black legislators did not want to harm black voters" by imposing a lower BVAP.[33] But that kind of reasoning was expressly rejected in *Alabama*. Without a functional analysis, the legislature cannot assign a mechanical racial floor or quota ostensibly to avoid retrogression. Doing so would give a State "carte blanche to engage in racial gerrymandering in the name of nonretrogression."[34]

Third, Intervenors place mistaken emphasis on the Supreme Court's observation that a legislature need not "'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 percent[age] minority population § 5

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[31] Tr. 349:16-19.

[32] Int-Defs.' Br. at 3, 14 (quoting *Alabama*, 135 S. Ct. at 1274).

[33] *Id.* 16 (emphasis removed).

[34] *Page*, 2014 WL 5019686, at *15 (quoting *Shaw v. Reno*, 509 U.S. 630, 655 (1993)). *See also Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1340 (M.D. Ala. 2013) (Thompson, J., dissenting) (noting the dangers of 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 . . . ."), *judgment entered*, No. 2:12-CV-1081, 2013 WL 6913115 (M.D. Ala. Dec. 20, 2013), *vacated and remanded*, 135 S. Ct. 1257 (2015).

demands.'"[35] But Intervenors take that out of context. Read in context of Part V of the opinion, that passage shows that the Court will grant such leeway only *after* the legislature has conducted a functional analysis that the DOJ guidelines call for[36] in order to answer the 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?"[37]

Here, the Court found that no "racial voting analysis informed [the General Assembly's redistricting] decisions."[38] The Court held that the General Assembly did not have *any* basis in evidence—let alone a "strong" one—to support a 55%-BVAP floor. As in *Alabama*, the legislature "asked the wrong question with respect to narrow tailoring," which "led to the wrong answer."[39] Intervenors now question whether a bloc voting analysis would have been helpful to the process and even dismiss as "irrelevant" the General Assembly's decision not to perform an analysis.[40] But *Alabama* reaffirms what the DOJ guidelines said in 2011: a functional analysis is indispensable.

For these reasons, Intervenors have not demonstrated any error in the Court's narrow-tailoring analysis.

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[35] Int-Defs.' Br. at 14 (quoting *Alabama*, 135 S. Ct. at 1273).

[36] *Alabama*, 135 S. Ct. at 1272.

[37] *Id.* at 1274.

[38] *Page*, 2014 WL 5019686, at *1 n.6.

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

[40] *See* Int-Defs.' Br. at 16-17.

C. The Court should order that remedial redistricting occur by the earlier of September 1 or sixty days from judgment.

Intervenors invite the Court to shrink from ordering the relief they previously sought and received: a remedial redistricting deadline of September 1, or 60 days from judgment in this case, whichever is earlier. Before *Alabama* was decided adversely to their position, however, Intervenors were satisfied with that schedule. They now abandon it and ask instead that any remedial redistricting be put off until they exhaust a second appeal to the Supreme Court. The Court should decline that invitation and restore the previous schedule.

Following this Court's issuance of a new remedial order, the Governor intends to call the General Assembly into special session to devise a lawful redistricting plan.[41] As the Commonwealth previously advised, it is important for the redistricting plan to be in place by January 1, 2016. An indefinite stay would unjustifiably compress the time needed for the Commonwealth, the candidates, and the voters to prepare for the 2016 congressional elections.

Intervenors previously argued that "postponing the remedial deadline until September 1 preserves the General Assembly's full range of legislative options, advances the public interest in orderly elections, [and] guarantees that a constitutional plan will be in place for the 2016 elections . . . ."[42] Their new schedule jeopardizes that "guarantee." As Intervenors themselves acknowledge, the Supreme Court would not decide a second appeal of this case until its next term—which commences in October 2015 and concludes in June 2016. That would substantially compress the period before the 2016-election cycle in which the Commonwealth would need to

[41] Under the Virginia Constitution, the "Governor may convene a special session of the General Assembly when, in his opinion, the interest of the Commonwealth may require . . . ." Va. Const. art. IV, § 6.

[42] Reply in Supp. of Int-Defs.' Mot. To Postpone Remedial Deadline at 7 (Feb. 12, 2015), ECF 135.

approve the new congressional districts. The new districts should be in place by January 1, 2016, the day after which candidates may start collecting the 1,000 signatures needed to run in a party primary[43] or to be listed on the ballot as an independent.[44] The Court's prior order imposed a sensible deadline of the earlier of September 1 or 60 days after the remedial order takes effect. There is no reason to abandon that schedule now that *Alabama* has confirmed that this Court's legal reasoning was correct all along.

CONCLUSION

The Court should reaffirm its earlier judgment. And rather than postponing remedial relief indefinitely, causing further delay and prejudicing the Commonwealth, prospective candidates, and voters, the Court should restore the schedule it previously ordered. It should allow the Commonwealth until the earlier of September 1, or 60 days following entry of judgment, to enact a remedial redistricting plan.

Respectfully submitted,

By: /s/

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[43] Va. Code Ann. § 24.2-521 (Supp. 2014).

[44] Va. Code Ann. § 24.2-505 (2011).

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 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