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

GOLDEN BETHUNE-HILL, *et al.*, Plaintiffs, v. VIRGINIA STATE BOARD OF ELECTIONS, *et al.*, Defendants, v. VIRGINIA HOUSE OF DELEGATES, *et al.*, Intervenor-Defendants.	Civil Action No. 3:14-cv-00852-REP-GBL-BMK

PLAINTIFFS' TRIAL BRIEF

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

This action arises from the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which indisputably forbids race-based redistricting absent a compelling state interest and, even then, only when narrowly tailored to meet that state interest.

In its 2011 House of Delegates redistricting plan, the Virginia General Assembly sorted voters by race into House districts 63, 69, 70, 71, 74, 75, 77, 80, 89, 90, 92, and 95 in order to meet or exceed a predetermined 55% threshold of Black voting age population ("BVAP") in each district. The author of the redistricting plan, Delegate Chris Jones, argued that the Voting Rights Act ("VRA") required that overt racial sorting of voters. But merely invoking the VRA does not shield race-based redistricting from constitutional scrutiny. And here, it underscores the General Assembly's intense focus on the racial composition of these districts. Thus, Plaintiffs will easily meet their burden of showing that race was the predominant consideration when the General Assembly drew the districts.

In contrast, Defendants and Intervenors (collectively, "Defendants") cannot possibly justify their race-based decisions under the exacting strict scrutiny standard. There is no evidence that the VRA required the map-drawers to apply the same racial floor to all 12 districts. In fact, the evidence will show significant *differences* between the districts. The map-drawers failed to recognize those differences, however, because they did not conduct any analysis of (or even inquiry into) the racial voting patterns, electoral history, or other unique features of each individual district. There is simply no legal precedent justifying the use of a fixed racial target under these circumstances. To the contrary, the Supreme Court has emphatically held that legislatures violate the Equal Protection Clause when they "rel[y] heavily upon a mechanically numerical view as to what counts as forbidden retrogression." *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1273 (2015).

That is precisely what happened here.

Plaintiffs respectfully request that this Court invalidate House districts 63, 69, 70, 71, 74, 75, 77, 80, 89, 90, 92, and 95 and ensure that constitutional districts are adopted for the upcoming House of Delegates elections.

II. EXPECTED EVIDENCE AT TRIAL

A. Background

As a result of the 2010 census, Virginia was required to redraw its House of Delegates districts to balance population totals within each district. That task was taken up by Delegate Chris Jones, a member of the House of Delegates who had been deeply involved in Virginia's last redistricting cycle. *See* Plaintiff's Exhibit ("Pl. Ex.") 35 at 46:18-48:21.

On April 11, 2011, the House and Senate adopted HB 5001. The legislation included a redistricting plan for Virginia's House districts (authored by Delegate Jones) and a redistricting plan for Virginia's Senate districts (which originated in the Senate). *See* Pl. Ex. 48 at 10. Governor McDonnell vetoed HB 5001 based on his objections to the Senate plan. *See id*. The House and Senate subsequently adopted HB 5005, which included a substantially similar House plan (again authored by Delegate Jones) and a significantly revised Senate plan. *See id*. 10-11. Governor McDonnell signed HB 5005 (the "Enacted Plan") on April 29, 2011. *See id*. at 12.

Like the plan adopted in 2001 (the "Benchmark Plan"), the Enacted Plan includes 12 districts in which Blacks are a majority of the voting age population: House districts 63, 69, 70, 71, 74, 75, 77, 80, 89, 90, 92, and 95 (the "Challenged Districts"). Pl. Ex. 45 at 1. When the Benchmark Plan was adopted in 2001, BVAP in the Challenged Districts ranged from 53.4% to 59.7%. *See id* at tbl. 5.1. Immediately before the Enacted Plan was passed, BVAP in the Challenged Districts ranged from 46.3% to 62.7%. *See id*. Under the Enacted Plan, BVAP in all of the Challenged Districts exceeds 55%. *See id*.

B. The Record Is Replete With Direct and Circumstantial Evidence that Race Was the Predominant Consideration in the Drawing of the Challenged Districts

1. The Direct Evidence of Racial Predominance Is Overwhelming

In most racial gerrymandering cases, determining whether race predominated or not requires careful scrutiny of circumstantial evidence—the shape of districts; deviations from contiguity; split precincts, cities or counties; and similar markers that might suggest that race played a central role. But that type of indirect evidence pales almost to irrelevance where, as here, overwhelming *direct* evidence shows that the legislature employed a mechanical racial threshold to sort voters by the color of their skin into electoral districts. That direct evidence of race-based redistricting emphatically answers one of the central questions in this case: whether race was the predominant consideration in the drawing of the Challenged Districts.[1]

a. The House Criteria Illustrate the Primacy of Race

Before any redistricting plans were introduced in the House, the House Committee on Privileges and Elections adopted official criteria to govern the redistricting process. *See* Pl. Ex. 16 (the "House Criteria"). Notably, the House Criteria were proposed by Delegate Jones—the undisputed architect of the Enacted Plan. Delegate Jones later confirmed that he dutifully followed the House Criteria in drawing the Enacted Plan, including the Challenged Districts. *See* Pl. Ex. 40 at 46:1-3 ("[I]n putting this plan together, we tried to make sure that the criteria was followed, and I think it was.").

[1] Plaintiffs have attached as an Appendix to this Trial Brief selected excerpts from their proposed trial exhibits, with key passages highlighted for the convenience of the Court. Complete copies of these exhibits are contained in Plaintiffs' proposed trial exhibits, a list of which is filed contemporaneously with this Trial Brief. As discussed at the pretrial conference, Plaintiffs' counsel anticipates that all of these exhibits (as well as those proposed by Defendants and Intervenors) will be admitted into evidence by way of a stipulation, although that stipulation has not yet been finalized.

The House Criteria clearly describe the House's legislative priorities. "Population Equality" among districts is the first and most important priority. *See* Pl. Ex. 16 at 1 ("The population of each district shall be as nearly equal to the population of every other district as practicable."). The second priority is avowedly racial. Titled "Voting Rights Act," it requires that "[d]istricts shall be drawn" to avoid "the unwarranted retrogression or dilution of racial or ethnic minority voting strength." *See id*.

All other redistricting considerations and principles—including compactness, incumbency protection, "voting trends," and "political beliefs"—are subordinate to those two prime directives. *See id*. at 1-2. Indeed, to avoid any doubt on that score, the House Criteria declared the primacy of the one-person, one-vote principle and the VRA not once but twice. *See id*. ("Nothing in these guidelines shall be construed to require or permit any districting policy or action that is contrary to . . . the Voting Rights Act of 1965."); *id*. at 2 (stating, in a section titled "Priority," that "population equality among districts and compliance with federal and state constitutional requirements and the Voting Rights Act of 1965 shall be given priority in the event of conflict among the criteria").

b. Statements by the Delegates Demonstrate That Race Played a Predominant Role in the Design of The Challenged Districts

(i) Statements by Delegate Jones

Delegate Jones, the author of the House Criteria and the Enacted Plan, repeatedly emphasized that race was central to his redistricting decisions. At one early hearing, for example, Delegate Jones explained that population equality and complying with the VRA were "*the most important things* to [him] as [he] drew this map." Pl. Ex. 35 at 35:15-18 (emphasis added). That was no slip of the tongue. In fact, Delegate Jones repeated the same sentiment several times. *See, e.g.*, *id*. at 45:21-46:4 ("[T]he most important thing for me and for us is the principle that one-

person, one-vote and compliance with the Voting Rights Act and I am confidence [sic] that what is before us does exactly that."); *id*. at 81:11-13 ("I was trying to put together a map and a plan that would meet those two tenants [sic]; the one-person, one-vote and the Voting Rights Act."); *id*. at 121:6-11 ("[B]ut I will say . . . the bill that is before this body, does two things and I think it does two things well. It represents the one-person, one-vote and it further complies with the Voting Rights Act[.]").[2]

Equally important, Delegate Jones made clear that compliance with the VRA outweighed all other race-neutral considerations (except for population equality). *See id*. at 56:2-4 (Delegate Jones explaining that "communities of interest, while important . . . were not the overarching driver of this plan"); *id*. at 137:9-19 ("I would just let the gentleman know that . . . we in the [Privileges and Elections] Committee had communities of interest, Number 5 [in the House Criteria]. . . . Number 2 is compliance with the Voting Rights Act."); *id*. at 138:21-139:1 ("I would say to the gentleman that again compactness . . . was Number 3 on the list.").

(ii) Statements by Other Delegates

Delegate Jones was hardly alone in expressing these views. To the contrary, many of his colleagues were equally forthright about the centrality of race in the 2010-11 redistricting cycle, particularly with respect to the Challenged Districts.

For example, evidence at trial will show that Delegate Jones relied heavily on certain delegates, including Delegate Lionell Spruill and former Delegate (now Senator) Rosalyn Dance, to help him draw the Challenged Districts or communicate with affected delegates. The views of Senator Dance and Delegate Spruill are therefore especially probative. And both publicly

[2] Further underscoring his focus on race at that hearing, Delegate Jones criticized redistricting maps created by university students, *see id*. at 39:15-40:1-6; 40:18-41:5, and redistricting maps created by Governor McDonnell's Bipartisan Advisory Redistricting Commission, *see id*. at 69:12-70:10, mainly because, in his view, those maps did not impose high enough BVAP levels in their majority-minority districts.

acknowledged the central importance of race in the configuration of the Challenged Districts. *See* Pl. Ex. 35 at 148:4-7 (Delegate Spruill praising Delegate Jones because "[w]hat other plan, what other group has come to the Black Caucus and [said], 'Hey, we have a plan to increase the black minority votes. We have a plan to make sure that you're safe.'"); *id*. at 157:2-11 (then-Delegate Dance advocating for HB 5001 because "it does support the 12 minority districts that we have now and it does provide that 55 percent voting strength that I was concerned about").

Consistent with her contemporaneous statements, Senator Dance will testify at trial that race was the predominant consideration in the drawing of the Challenged Districts, and in particular that it was her paramount concern when collaborating with Delegate Jones on draft maps. Delegate Jennifer McClellan—another legislator who worked closely with Delegate Jones in drawing the Challenged Districts—will offer similar testimony, as will former delegate and minority leader Ward Armstrong.

c. The Use of a "Nonnegotiable" Racial Threshold Vividly Demonstrates that Race Played a Predominant Role in the Design of the Challenged Districts

Just weeks ago, a three-judge court in this district found that the Virginia General Assembly used a "55% BVAP floor" to draw Virginia's Congressional District 3 *and* the Challenged Districts. *Page v. Va. St. Bd. of Elections*, No. 3:13cv678, 2015 WL 3604029, at *9 (E.D. Va. June 5, 2015) ("*Page II*"). In reaching that conclusion, the *Page II* court relied on the report of the *Page II* defendants' expert John Morgan, who freely admitted that the House enacted "'a House of Delegates redistricting plan with a 55% Black VAP as the floor for black-majority districts.'" *Id*. (quoting Pl. Ex. 52 at 26).[3]

[3] Mr. Morgan has been identified as a fact witness in this case, likely to be called by the Intervenors during their case in chief.

The admission in Mr. Morgan's report is more than enough to establish the existence of the 55% BVAP threshold in this case. But the additional evidence confirming that racial rule is frankly overwhelming. The evidence at trial will show that Delegate Jones embraced and defended the 55% threshold at every turn—in private email, in committee hearings, and on the floor of the House of Delegates. *See, e.g.*, Pl. Ex. 35 at 42:8-12 (Delegate Jones explaining to his colleagues on the House floor that "[w]e had to keep the core of those [Challenged Districts], because I think that's very important, and because of the population shifts you did see a decrease in some of the percentages, *but all were above 55 percent*") (emphasis added).

Delegate Jones' remarks during a April 5, 2011 floor debate are especially revealing. There, Delegate Jones openly advocated for the 55% BVAP threshold, arguing that "the effective voting age population [in the Challenged Districts] needed to be *north of 55 percent*" in order to comply with the VRA. *Id*. at 70:7-9 (emphasis added). Thus, Delegate Jones assured his colleagues, he had drawn each of the Challenged Districts to "fully compl[y] with the Voting Rights Act *as 55 percent or higher*." *Id*. at 66:11-14 (emphasis added). As a result, "every single, solitary district majority-minority is *over 55 percent*." *Id*. at 108:3-4 (emphasis added).

It is undisputed that Delegate Jones did not conduct any analysis to determine whether the 55% BVAP threshold was necessary or appropriate in any of the Challenged Districts. *See id.* at 54:18-55:4 ("DEL. ARMSTRONG: Can the gentleman tell me whether he or any persons that worked with him . . . took into account any retrogress[ion] analysis regarding minority performance in any of the 12 majority-minority districts . . . ? DEL. JONES: I would say to the gentleman I'm not aware of any."). Nevertheless, Delegate Jones treated that racial threshold as a nonnegotiable, bright-line rule. For example, when asked whether he "distinguish[ed] as there being a difference between a 55 BVAP versus a 53 BVAP? . . . That is, does the gentleman

consider that a significant difference?," *id*. at 113:3-8, Delegate Jones replied: "I would say yes[.]" *Id*. at 113:11.

Delegate Jones' private communications are equally candid. For example, in early April 2011, Delegate Jennifer McClellan asked to "unsplit," or keep whole, certain precincts in the Richmond area. Delegate McClellan made the request on behalf of local election officials who thought the splits complicated election administration. But in trying to draw a map that "unsplit" those precincts, Delegate McClellan inadvertently dropped the BVAP in Challenged District 71 below Delegate Jones' predetermined 55% BVAP floor. Upon discovering that result, Delegate Jones rejected the change. As Delegate McClellan later explained to one of the interested election officials: "I spoke to Chris Jones . . . . Apparently, the changes we discussed . . . would have pushed the voting age African American population in the 71st District down to 54.8%. *The target criteria was 55%, so the change can't be made*." Pl. Ex. 30 (emphasis added). The election official replied: "Darned . . . . . so close and yet so far away! A measly 0.2%!" *Id*.

Later, in an email titled "F/up" sent to the chief of staff for Speaker William Howell, Delegate Jones confirmed Delegate McClellan's version of events:

> I followed up with Jennifer McClellan this afternoon and she reconfirmed that the request of the [election officials] exceeded the *55% threshold* when they did [it] for all affected districts *and that she would have never requested it if it didn't*. I am not sure what got lost in translation, but the good news is it is fixed now[.]

Id. (emphasis added).[4]

While Delegate Jones' statements are conclusive, this Court need not rely on them alone. Evidence at trial will show that the 55% BVAP threshold was common knowledge among

[4] Delegate Jones may testify that some of these split precincts were "unsplit" in the final version of the Enacted Plan because he found ways to keep the precincts whole while still maintaining at least a 55% BVAP threshold in surrounding districts. At most, however, that shows that Delegate Jones was willing to accommodate traditional, race-neutral redistricting principles *only to the extent* that they could be reconciled with the 55% BVAP threshold.

legislators. For example, consistent with the exchange above, Delegate McClellan will testify that she discussed the 55% BVAP threshold with Delegate Jones on many occasions; that the 55% figure was fixed and "nonnegotiable"; and that the 55% BVAP threshold was a "primary consideration" in drawing the Challenged Districts. Delegate McClellan will also testify that she intentionally altered electoral boundaries in draft maps submitted to Delegate Jones to ensure that those maps complied with the 55% BVAP threshold. Similarly, Senator Dance will testify that Delegate Jones instructed her to comply with the 55% rule in drawing draft maps, and that she also understood the 55% threshold to be inflexible and "nonnegotiable."

Senator Jill Holtzman Vogel, too, explicitly acknowledged the 55% rule during floor debates in the Virginia Senate. *See* Pl. Ex. 39 at 33:4-6 ("But [the map-drawers in the House of Delegates] clearly believed that was the law, because if you look at the House Plan, they were careful not to retrogress below 55 percent[.]"). Like Delegate Jones, Senator Vogel apparently thought that the VRA demanded a fixed numerical percentage of BVAP throughout the Commonwealth. *See id*. at 33:17-20 ("And in the Commonwealth of Virginia right now in the Senate, 55 percent is the benchmark."). Moreover, she insisted that the U.S. Department of Justice had never precleared a plan with less than 55% BVAP. *See id*. at 18:13-16 ("The lowest amount of African Americans . . . that has ever been precleared . . . is 55.0").[5]

The direct evidence of a racial threshold is, in short, widespread and conclusive.

2. The Circumstantial Evidence of Race-Based Redistricting Is Equally Strong

Given the overwhelming *direct* evidence that race was the predominant consideration in the drawing of the Challenged Districts, there is little need to examine *circumstantial* evidence

[5] Senator Vogel's statements were not only incorrect as a general rule (the Department of Justice has specifically disavowed specific numerical percentages), but they were also incorrect *as to Virginia itself*, where numerous districts have been precleared with less than 55% BVAP. *See* Pl. Ex. 45, tbl. 5.1. Putting aside the historical facts, it is now clear that adopting a state-wide BVAP threshold is flatly forbidden, as the Supreme Court made abundantly clear in *Alabama.*

bearing on the same issue. In any event, the circumstantial evidence is equally strong and only confirms what the direct evidence has already made obvious: race predominated and trumped all other considerations.

a. Compactness and Respect for Political Boundaries

Lack of compactness often provides circumstantial evidence of race-based redistricting. *See, e.g., Shaw v. Reno* ("*Shaw I*"), 509 U.S. 630, 646-47 (1993). Here, Plaintiffs' expert Professor Stephen Ansolabehere will testify that the Enacted Plan is significantly less compact than its predecessor.

The difference is especially stark with respect to the Challenged Districts. As Professor Ansolabehere will explain, under the commonly accepted Reock measure of compactness, the Enacted Plan reduces the average compactness of the Challenged Districts from .37 to .32—a 13.5% reduction. The reduction in the other 88 districts is far smaller. *See* Pl. Ex. 50 at 17. Professor Ansolabehere will also testify that:

- The Enacted Plan reduces the compactness of most of the Challenged Districts and makes one of the Challenged Districts (Challenged District 95) the least compact district in the Enacted Plan;
- The Enacted Plan reduces the compactness of Challenged Districts 74, 77, and 95 to "extremely low" levels; and
- The Enacted Plan results in "extremely large reductions" in the compactness of Challenged Districts 63, 80, 89, and 95.

Id. at 17, 18. Moreover, Professor Ansolabehere will testify that the Enacted Plan increased the number of split political boundaries. In particular, the Enacted Plan "increased the splitting of county boundaries in the areas covered by the Challenged Districts," *id*. at 20, and "increase[d] the number of [Voting Tabulation Districts ("VTDs")] that are split . . . , both statewide and among the VTDs in the Challenged District," *id*. at 21.

With the exception of minor methodological disputes, none of Defendants' experts will disagree with those conclusions. *See* Pl. Ex. 51 at 3.

b. Racial Sorting

Professor Ansolabehere will also show that the General Assembly resorted to extensive racial sorting to ensure that all of the Challenged Districts met or exceeded the predetermined 55% BVAP threshold. For example, Professor Ansolabehere will testify that:

- The BVAP in VTDs moved *into* the Challenged Districts is far higher than the BVAP in VTDs moved *out of* the Challenged Districts. *See* Pl. Ex. 50 at 27-37.

- The *partisan* differences between the VTDs moved into and out of the Challenged Districts are much smaller than the *racial* differences between the same VTDs. *See id*. at 38-43.

- Race is a strong predictor of which VTDs were placed in Challenged Districts and which were not. "Party," on the other hand, "is *not* a statistically significant predictor of whether a VTD is included in one of the Challenged Districts[.]" *Id*. at 43 (emphasis added).

Here again, with the exception of minor methodological disputes, Defendants' experts will not disagree with Professor Ansolabehere. *See* Pl. Ex. 51 at 3-4.

C. The General Assembly's Use of Race Was Not Narrowly Tailored

Finally, evidence will show that the General Assembly's use of a rigid racial threshold was not narrowly tailored to advance a compelling state interest.

As explained above, the General Assembly subjected all of the Challenged Districts to the same predetermined 55% BVAP threshold. Remarkably, however, *it made no effort to determine whether that threshold was actually necessary to avoid retrogression in any of the Challenged Districts.* Delegate Jones did not conduct or review any racially polarized voting analyses or similar statistical analyses to arrive at the 55% figure, as he will candidly admit. *See* Pl. Ex. 35 at 54:18-55:4 ("DEL. ARMSTRONG: Can the gentleman tell me whether he or any

persons that worked with him in the development of the plan that resulted in HB 5001 took into account any retrogress[ion] analysis regarding minority performance in any of the 12 majority-minority districts . . . ? DEL. JONES: I would say to the gentleman I'm not aware of any."). Nor did he consult other resources, or do any other type of analysis, to determine whether that particular figure was justified. For example, Delegate Jones will admit that he didn't review the contemporaneous redistricting plan for Virginia Senate districts, or review maps or election results from Virginia's prior redistricting cycles to evaluate their BVAP levels and compare them to the electoral results on a district-specific (or any other) basis, or review maps or election results from other jurisdictions to examine their BVAP levels and election results, or review maps from other jurisdictions that had been precleared (or rejected) by DOJ. His lack of interest in such a review is, indeed, striking.

In short, although covered jurisdictions often perform racially polarized voting analyses or comparable "functional" analyses of voting behavior, and although such analyses are specifically discussed in the Department of Justice's Section 5 guidance, *see* Pl. Ex. 9, Delegate Jones performed no analysis whatsoever to determine whether the 55% BVAP threshold was "reasonably necessary 'in order to maintain the minority's present ability to elect the candidate of its choice[.]'" *Bethune-Hill v. Va. St. Bd. of Elections*, No. 3:14cv852, 2015 WL 3404869, at *11 (E.D. Va. May 26, 2015) (quoting *Alabama*, 135 S. Ct. at 1274).

Instead, Delegate Jones selected the 55% figure based on input from (unnamed) community members and a small number of delegates. *See* Pl. Ex. 35 at 169:11-15 ("The number that we have before us that has been called arbitrary was gleaned from testimony of the community[.]"). But nothing in the record indicates *why* those particular individuals believed that

a 55% BVAP threshold was necessary to avoid retrogression in their districts—let alone all of the Challenged Districts. And Delegate Jones never asked them.

At trial, Professor Ansolabehere will offer a district-by-district analysis of racial voting patterns in the Challenged Districts—precisely the sort of analysis Delegate Jones did not do. He will reach two crucial conclusions. First, he will conclude that racial voting patterns vary dramatically across the Challenged Districts, thereby undermining the map-drawers' one-size-fits-all-approach. *See* Pl. Ex. 50 at 47-51. Second, he will explain that "none" of the Challenged Districts "required a BVAP in excess of 55 percent in order to ensure that African Americans had the ability to elect their preferred candidates." *Id*. at 53-54.

Defendants' experts will not dispute those conclusions. Indeed, Defendants' expert, Dr. Katz, will concede that there were significant differences between each of the districts and his analysis, in fact, demonstrates those differences and largely serves to confirm Dr. Ansolabehere's conclusions.

III. ARGUMENT

A. Racial Gerrymandering Is Indisputably Unconstitutional

"As with any law that distinguishes among individuals on the basis of race, 'equal protection principles govern a State's drawing of [electoral] districts.'" *Page II*, 2015 WL 3604029, at *6 (quoting *Miller v. Johnson*, 515 U.S. 900, 905 (1995)). As the Supreme Court has explained:

> Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters[.]

Shaw I, 509 U.S. at 657. Thus, "race-based districting by our state legislatures demands close judicial scrutiny." *Id*.

"To successfully challenge the constitutionality of the [Challenged Districts] under the Equal Protection Clause, Plaintiffs first bear the burden of proving that the legislature's predominant consideration in drawing its electoral boundaries was race." *Page II*, 2015 WL 3604029, at *6. "If they make this showing, the assignment of voters according to race triggers the court's 'strictest scrutiny.'" *Id.* (quoting *Miller*, 515 U.S. at 915). The burden then shifts to Defendants "to demonstrate that the redistricting plan was narrowly tailored to advance a compelling state interest." *Id.* A race-based redistricting plan is narrowly tailored only if "the legislature [has] a strong basis in evidence in support of the (race-based) choice that it . . . made." *Alabama*, 135 S. Ct. at 1274 (internal quotation marks and citation omitted).

Here, the evidence shows that racial goals overshadowed all others. Moreover, Defendants cannot establish that they used race to advance a compelling state interest. And even if they could, they could not possibly show that they had a "strong basis in evidence" for employing a predetermined, across-the-board 55% BVAP threshold. The Challenged Districts, accordingly, fail to pass constitutional muster.

B. Race Was the Predominant Consideration in Drawing the Challenged Districts

"The Supreme Court has cited several specific factors as evidence of racial line drawing." *Page II*, 2015 WL 3604029, at *7. Those factors include "statements by legislators indicating that race was a predominant factor in redistricting," "evidence that race or percentage of race within a district was the single redistricting criterion that could not be compromised," the "creation of non-compact and oddly shaped districts beyond what is strictly necessary to avoid retrogression," and "creation of districts that exhibit disregard for city limits, local election precincts, and [VTDs]." *Id.* Here, as in *Page II*, "all of these factors are present," *id.*, and race was plainly the predominant consideration in the drawing of the Challenged Districts.

1. The Record Includes Numerous "Statements by Legislators Indicating that Race Was a Predominant Factor in Redistricting"

In *Page II*, the court concluded that race predominated largely because the "legislative record [was] replete with statements indicating that race was the legislature's paramount concern." *Id*. at *8. Here, the legislative record is even more compelling.

First, the House Criteria show that race was the General Assembly's paramount concern. The House Criteria—the House's lone official expression of its redistricting priorities—expressly identify "compliance with Section 5 of the VRA . . . , and, accordingly, consideration of race" as an important requirement. *Id*. at *1. Indeed, in terms of importance, only population equality among districts outranks the VRA in the House Criteria. *See* Pl. Ex. 16 at 1.

But as the Supreme Court recently explained, "an equal population goal is not one factor among others to be weighed against the use of race to determine whether race 'predominates'"; instead, "it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to *how* equal population objectives will be met." *Alabama*, 135 S. Ct. at 1270. Thus, for purposes of the predominance analysis, this Court must ignore the reference to population equality in the House Criteria. It follows that the *most important* requirement in the House Criteria is a *racial* requirement: namely, complying with the VRA. *See* Pl. Ex. 16 at 1. That official endorsement of race-based redistricting amounts to "a candid acknowledgment" that race predominated in the drawing of the Challenged Districts, *Page II*, 2015 WL 3604029, at *8, and leaves little doubt that race "was uppermost in the minds of Virginia's legislators" when they drew those districts, *id*. at 22 n.15.

Second, Delegate Jones—the architect of the Challenged Districts—routinely emphasized the importance of race both publicly and privately. Indeed, according to Delegate Jones, complying with the VRA was "*the most important thing*[] to [him] as [he] drew

this map" (not counting the background principle of population equality). Pl. Ex. 35 at 35:15-35:18 (emphasis added). He also candidly acknowledged that other considerations took a backseat to that racial goal. *See id*. at 56:2-4 (stating that "communities of interest, while important . . . were not the overarching driver of this plan"); *id*. at 137:9-19 ("I would just let the gentleman know that . . . we in the [Privileges and Elections] Committee had communities of interest, Number 5. Because Number 1 was one-person, one-vote. Number 2 is compliance with the Voting Rights Act."); *id*. at 138:21 (noting that "compactness . . . was Number 3 on the list").

In *Page II*, the court concluded that race predominated in part because Delegate William Janis, the author of the challenged congressional district, stated on the House floor that avoiding retrogression was his "primary focus," his "paramount concern," and a "nonnegotiable" requirement. *Page II*, 2015 WL 3604029, at *9, *10 (internal quotation marks and citations omitted). Here, Delegate Jones' statements to that effect are even more categorical. Thus, as in *Page II*, this Court should "accept the explanation of the legislation's author as to its purpose" and conclude that race predominated in the drawing of the Challenged Districts. *Id*. at *10.

Third, this Court may look to statements by other legislators to discern whether race predominated. Other delegates did more than acknowledge Delegate Jones' race-based approach; they applauded it. For example, Delegate Lionell Spruill urged his colleagues to vote in favor of HB 5001 because (according to Delegate Spruill) Delegate Jones told Delegate Spruill that "we have a plan to increase the black minority votes. We have a plan to make sure you're safe." Pl. Ex. 35 at 148:5-7. Similarly, then-Delegate Rosalyn Dance, another legislator who worked closely with Delegate Jones in drawing the Challenged Districts, urged her colleagues to vote for HB 5001 because "it does support the 12 minority districts that we have now and it does provide that 55 percent voting strength that I was concerned about." *Id*. at 157:2-11.

Faced with unambiguous legislative statements like these, courts routinely hold that race predominated in electoral line-drawing. *See, e.g., Bush v. Vera*, 517 U.S. 952, 961 (1996) (race predominated where "testimony of individual state officials confirmed that the decision to create the districts now challenged as majority-minority districts was made at the outset of the process and never seriously questioned"); *Page II*, 2015 WL 3604029 , at *9 (race predominated where author of challenged district stated that he was "most especially focused" on complying with the VRA when drawing challenged district); *Smith v. Beasley*, 946 F. Supp. 1174, 1194 (D.S.C. 1996) (race predominated where legislator stated that "any amendment [to a challenged district] could not go below 60% [Black population] and 57% BVAP").

This Court should do the same.

2. There Is Indisputable "Evidence that Race or Percentage of Race Within a District Was the Single Redistricting Criterion that Could Not Be Compromised"

As explained above, evidence at trial will show that the General Assembly used a 55% BVAP threshold to draw the Challenged Districts. *See, e.g.*, Pl. Ex. 35 at 42:8-12 (Delegate Jones explaining that "because of the population shifts you did see a decrease in some of the [BVAP] percentages [in the Challenged Districts], *but all were above 55 percent*") (emphasis added); *id*. at 66:10-14 (Delegate Jones arguing that HB 5001 "fully complies with the Voting Rights Act *as 55 percent [BVAP] or higher*") (emphasis added); *id*. at 70:7-9 (Delegate Jones arguing that "the effective voting age population [in the Challenged Districts] needed to be *north of 55 percent*") (emphasis added); *id*. at 108:3-4 (Delegate Jones explaining that "every single, solitary district majority-minority is *over 55 percent*") (emphasis added).

Evidence will also show that both Delegate Jones and his colleagues considered that racial threshold to be nonnegotiable. And in fact, it appears that Defendants now admit as much. *See* Pl. Ex. 68 at 28:10-15 (Intervenors' counsel arguing that the "55 percent number doesn't

come from thin air. It comes from testimony before the House of Delegates. That's to find numbers needed to be able to create functioning minority districts.").

As the Supreme Court recently explained, using a predetermined racial target or threshold to draw electoral boundaries triggers strict scrutiny:

> That Alabama expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote) provides evidence that race motivated the drawing of particular lines in multiple districts in the State.

Alabama, 135 S. Ct. at 1267. Nor is that a novel rule. Time and again, the Supreme Court has subjected rigid racial quotas to strict scrutiny in the redistricting context. *See Bush*, 517 U.S. at 996 (Kennedy, J., concurring) ("[W]e would no doubt apply strict scrutiny if a State decreed that certain districts had to be at least 50 percent white, and our analysis should be no different if the State so favors minority races."); *see also, e.g.*, *Page II*, 2015 WL 3604029, at *9 (use of 55% BVAP floor to draw Virginia's Congressional District 3 showed that race predominated); *Clark v. Putnam Cnty.*, 293 F.3d 1261, 1267 (11th Cir. 2002) (statement by map-drawer that "her predominant consideration . . . was to maintain the core of the existing majority minority districts and strive toward a 60% black VAP" was evidence that race predominated); *Beasley*, 946 F. Supp. at 1206-07 (concluding that the map-drawers' "insistence on minimum racial percentages in certain districts" was strong "evidence of racial gerrymandering"). This case is no different.

Defendants will no doubt argue that Delegate Jones imposed the racial threshold solely to comply with the VRA. That may well be, but the point is irrelevant. Plaintiffs do not contend, and will not seek to prove, that Delegate Jones acted with racial animosity and such a showing is decidedly irrelevant and unnecessary for Plaintiffs to succeed. Even when acting in good faith and with the best of intentions, "[c]overed jurisdictions [do not have] *carte blanche* to engage in racial gerrymandering in the name of nonretrogression," *Shaw I*, 509 U.S. at 655, and therefore a

"racially gerrymandered districting scheme" is "constitutionally suspect" even if "the reason for the racial classification is benign or the purpose remedial," *Shaw v. Hunt* ("*Shaw II*"), 517 U.S. 899, 904-05 (1996). Thus, just as the General Assembly's use of a 55% BVAP threshold to draw a congressional district triggered strict scrutiny in *Page II*, so too its use of a 55% BVAP threshold to draw House districts triggers strict scrutiny here.

3. Given the Overwhelming Direct Evidence of the General Assembly's Intent, the Circumstantial Evidence is Far Less Important (But in Any Event is Equally Compelling)

As noted, the direct evidence of racial predominance is overwhelming, clear, and conclusive. The House's official redistricting criteria exalt race above all other factors; Delegate Jones and other delegates repeatedly declared that race was their paramount concern in drawing the Challenged Districts; and Delegate Jones "relied heavily upon a mechanically numerical view as to what counts as forbidden retrogression" to configure the Challenged Districts. *Alabama*, 135 S. Ct. at 1273. Where, as here, the direct evidence leaves no doubt that race "was uppermost in the minds of Virginia's legislators," *Page II*, 2015 WL 3604029, at *8, that is the end of the inquiry. But, in any event, the available circumstantial evidence is equally compelling and confirms what the direct evidence conclusively establishes: that race was the General Assembly's predominant consideration in drawing the Challenged Districts.

4. The Enacted Plan Created "Non-Compact and Oddly Shaped Districts Beyond What Is Strictly Necessary to Avoid Retrogression"

"In addition to [direct] evidence of legislative intent," courts may "also consider the extent to which the [challenged] district boundaries manifest that legislative will." *Page II*, 2015 WL 3604029, at *10. Thus, "[e]vidence of a 'highly irregular' reapportionment plan 'in which a State concentrated a dispersed minority population . . . by disregarding traditional districting

principles such as compactness, contiguity, and respect for political subdivisions'" may provide evidence of impermissible racial gerrymandering. *Id*. (quoting *Shaw I*, 509 U.S. at 646-47).

Plaintiffs' expert Professor Ansolabehere will explain how the General Assembly subordinated race-neutral redistricting principles to the dictates of a rigid racial quota. That testimony, which will be largely undisputed, will provide additional circumstantial evidence that race was the predominant consideration in the drawing of the Challenged Districts. *See Page II*, 2015 WL 3604029, at *13 (finding that race predominated based in part on challenged district's irregular shape, disregard for political boundaries, and other "inconsistencies with respect to the traditional districting criteria").

Defendants appear to argue that race could not have predominated because the districts at issue here are equally compact or more compact than districts rejected in earlier cases in Virginia and elsewhere. *See* Pl. Ex. 68 at 27:1-3 (Defendants' counsel arguing that the districts "that are being attacked here look nothing like the plans which had been rejected by the Supreme Court in prior litigation"). There are at least two problems with such an argument.

First, it simply fails to grasp the significance of compactness. In the absence of direct evidence of legislative intent, lack of compactness may provide circumstantial evidence that race predominated. *See Shaw I*, 509 U.S. at 646-47. In other words, "[s]uch circumstantial evidence is one factor that contributes to the overall conclusion that the district's boundaries were drawn with a focus on race." *Page II*, 2015 WL 3604029, at *11. That certainly does not mean, however, that Plaintiffs must show that the Challenged Districts are non-compact to establish that race predominated. *See Alabama*, 135 S. Ct. at 1267 (plaintiffs' burden is to show, "either through circumstantial evidence . . . *or more direct evidence going to legislative purpose*," that "race was the predominant factor") (emphasis added) (internal quotation marks and citation

omitted). Thus, even if the Challenged Districts were in fact perfectly "compact" (which Plaintiffs most certainly dispute), that would hardly save them from constitutional challenge if drawn with race as the predominant consideration. It is the *predominant purpose* that subjects districts to strict scrutiny, not mere irregular shape. Once it is established that race did predominate (say, for example, by a legislator's express admissions to that effect or the use of a "mechanical" racial threshold), then the a district's shape becomes largely irrelevant.

Here, Plaintiffs will show that the General Assembly reduced compactness and disregarded political boundaries in drawing the Challenged Districts, thus providing additional circumstantial evidence that race predominated. But given the overwhelming direct evidence on that score, there is no need to attempt to divine legislative intent from lines on a map. The General Assembly *expressly said*—in many ways, and on many occasions—that race was its predominant consideration. Given that "direct evidence going to legislative purpose," academic disputes about compactness scores and compactness measurements are largely sideshows and should not consume inordinate amounts of time at trial.

Second, Defendants' argument fails on the merits. Defendants seem to believe that only extreme non-compactness may indicate racial gerrymandering. *See* Pl. Ex. 68, at 24:18-23 ("We're going to show the Court the various districts that had been rejected in prior *Shaw*-style litigation, and you'll see that they all involve plans which have districts that, frankly, don't look like districts. They don't bear any resemblance to any notion of geography."). Thus, Defendants' expert Thomas Hofeller devotes many pages of his expert report to the argument that the Enacted Plan complies with the compactness requirements of Virginia's Constitution. He also tries to show that the compactness of the Enacted Plan compares favorably with redistricting plans in other states. But none of that is helpful. "To show that race predominated, Plaintiffs need not

establish that the legislature disregarded every traditional districting principle." *Page II*, 2015 WL 3604029, at *11. Moreover, "[i]rregularities in shape need not be so extreme as to make the district an outlier nationwide; courts simply consider a 'highly irregular and geographically non-compact' shape evidence of the predominance of race." *Id.* at *15 (quoting *Shaw II*, 517 U.S. at 905-06). Thus, much of the analysis Defendants apparently intend to offer will either be superfluous or flatly irrelevant.

C. Politics Did Not Outweigh Race

It seems that Defendants will also argue that politics, not race, was the predominant consideration in the drawing of the Challenged Districts. *See* Pl. Ex. 68, at 29:1-5 (Defendants' counsel arguing that "[t]his plan was drawn for political purposes," and that "the notion that race predominated simply flies in the face of reality"). That argument fails as well.

First, to the extent that this defense amounts to a claim that the General Assembly purposely targeted White Democrats, it is nothing less than *another* admission that race was the General Assembly's predominant consideration. *See* Pl. Ex. 68, at 28:21-24 (Defendants' counsel arguing that the "vast majority of the incumbents got reelected except for *a few democratic white members lost. That's the predominant purpose of the plan*. We shouldn't pretend anything else.") (emphasis added). *Racial* gerrymandering, at the risk of stating the obvious, is impermissible.

Second, the record simply does not support that politics was the aim. Again, there is clear, conclusive, and overwhelming evidence, both direct and circumstantial, that race was the most important factor in the configuration of the Challenged Districts. In contrast, nothing in the record suggests that politics was the predominant consideration. In fact, the record makes clear that political factors played a marginal role at best. For example:

- The House Criteria expressly subordinate political considerations to racial considerations.

- Virginia's Preclearance Submission makes clear that "partisan factors were present *but muted* in establishing new districts." Pl. Ex. 44 at 12 (emphasis added).

- While the record is replete with statements about a rigid *racial* threshold, nothing in the record even hints at *partisan* thresholds, targets, or quotas.

- During the redistricting process, neither Delegate Jones nor his political allies emphasized politics. In fact, they downplayed politics. *See, e.g.*, Pl. Ex. 17.

- Plaintiffs' expert Professor Ansolabehere will testify that race is, by far, the most powerful predictor of which VTDs were placed in Challenged Districts, while partisan considerations are not.

Thus, Defendants cannot hide behind post hoc, made-for-litigation arguments that politics overshadowed race. *See Page II*, 2015 WL 3604029, at *14("While 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, supports that view to the extent they suggest.").

To be clear, Plaintiffs do not dispute that "partisan political considerations, as well as a desire to protect incumbents, played a role in drawing district lines. It would be remarkable if they did not." *Id*. at *13 But race may be the predominant consideration even if a legislature's redistricting process is not "purely race-based," *Bush*, 517 U.S. at 959, and the fact that "the legislature addressed [political concerns need not] in any way refute the fact that race was the legislature's predominant consideration," *Shaw II*, 517 U.S. at 907. Here, even if politics played some role, it was at best a secondary role, and it mattered only *after* compliance with the inflexible and "nonnegotiable" mechanical 55% BVAP threshold.

D. The Challenged Districts Cannot Survive Strict Scrutiny

Because race was a predominant factor in the General Assembly's configuration of the Challenged Districts, Defendants "must demonstrate that [Virginia's] districting legislation is

narrowly tailored to achieve a compelling interest." *Miller*, 515 U.S. at 920. "[R]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (internal quotation marks and citation omitted). Defendants cannot begin to meet that exacting standard.

1. Defendants Cannot Show that the Challenged Districts Serve a Compelling Interest

Defendants will argue that the General Assembly's alleged goal of complying with Section 5 of the VRA justified its use of a rigid racial threshold in drawing the Challenged Districts. Even if this Court were to disregard the intervening decision in *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013),[6] before compliance with Section 5 could possibly be a compelling interest, a defendant must show that advancing that interest was its "actual purpose," Shaw II, 517 U.S. at 908 n.4, and that it had "a strong basis in evidence . . . for believing" that the districting decision at issue was "'reasonably necessary under a constitutional reading and application of'" the VRA, *id.* at 911; *Miller*, 515 U.S. at 921. Here, Delegate Jones admittedly did not perform any analysis to determine whether a 55% BVAP threshold was required to avoid retrogression in any of the Challenged Districts, much less *all* of them. As a result, Defendants cannot credibly argue that they were serving a compelling interest when they formulated and applied that "nonnegotiable" mechanical racial threshold.

[6] In *Shelby County*, the Court held that the coverage formula of the VRA was unconstitutional, and accordingly Section 5 no longer applied to certain jurisdictions, including Virginia. *See id*. at 2631. Because Virginia is no longer subject to Section 5, it is unclear whether Section 5 compliance can serve as a compelling interest that justifies Virginia's race-based redistricting. Plaintiffs understand that this argument was rejected in *Page II*. *See Page II*, 2015 WL 3604029, at *16 & n.27. But the Supreme Court has not yet decided "whether, given [*Shelby County*], continued compliance with § 5 remains a compelling interest." *Id.*

2. The General Assembly's Use of Race Was Not Narrowly Tailored

Even if the VRA remains a compelling interest, and even if Defendants could show that their rigid racial threshold advances that interest, Defendants cannot show that the "mechanically numerical" approach they chose was narrowly tailored. *Alabama*, 135 S. Ct. at 1273.

In *Alabama*, the Supreme Court addressed a case much like this one. The Alabama legislature set out to redraw its House districts in compliance with the VRA. At the outset, the legislature determined that "it was required to maintain roughly the same black population percentage in existing majority-minority districts" in order to avoid retrogression. *Id*. But the legislature did not perform any analysis to determine whether maintaining those levels was necessary to preserve minorities' ability to elect their candidates of choice. Instead, like the General Assembly in this case, the Alabama legislature simply "relied heavily upon a mechanically numerical view as to what counts as forbidden retrogression" without any evidence to support that view. *Id*. at 1273.

The Supreme Court held that Alabama's "mechanically numerical" approach was not narrowly tailored. In reaching that conclusion, it explained that a legislature must have a "*strong basis in evidence* in support of the (race-based) choice that it has made." *Id*. at 1274 (emphasis added) (internal quotation marks and citation omitted). Alabama's legislators, however, had no basis in evidence—let alone a strong basis—to believe that an inflexible racial floor was necessary. Nor was that surprising because, as the Supreme Court put it, Alabama's legislators simply asked the "wrong question":

> They asked: "How can we maintain present minority percentages in majority-minority districts?" But given § 5's language, its purpose, the Justice Department Guidelines, and the relevant precedent, they should have asked: "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?" Asking the wrong question may well have led to the wrong answer.

Alabama, 135 S. Ct. at 1274.

Here, like the legislature in *Alabama*, the General Assembly asked the wrong question. It should have asked: "'To what extent must we preserve existing minority percentages [in *each* of the Challenged Districts] in order to maintain the minority's present ability to elect the candidate of its choice?'" *Id*. And to answer that question, it should have performed—on a district-by-district basis—the sort of "functional analysis" outlined in the Department of Justice's Section 5 guidance and cited favorably in *Alabama*. *See id.* at 1272 (explaining that the Department of Justice's Section 5 guidance "state[s] 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 [and] census data alone may not provide sufficient indicia of electoral behavior to make the requisite determination"); *see also* Pl. Ex. 9 (Department of Justice Section 5 guidance). As the District Court for the District of Columbia has explained:

> Section 5 requires a multi-factored**,** functional approach to gauge whether a redistricting plan will have the effect of denying or abridging minority citizens' ability to elect representatives of their choice. It does not lend itself to formalistic inquiry and complexity is inherent in the statute. The ability to elect can rarely be measured by a simple statistical yardstick[.]

Texas v. United States, 831 F. Supp. 2d 244, 272 (D.D.C. 2011) (emphasis added). Thus, at the very least, the General Assembly and Delegate Jones were obligated to "take account of all significant circumstances" in evaluating the necessity of a 55% BVAP threshold. *Alabama*, 135 S. Ct. at 1273.

But that is precisely what they *failed* to do. In fact, as discussed above, Delegate Jones did not consider *any* potentially relevant information. He did not perform a statistical analysis of

racial voting patterns in the Challenged Districts (or any other sort of functional analysis); he did not review the Senate's contemporaneous redistricting plan; he did not review potentially relevant electoral data from Virginia or other jurisdictions; and he did not review maps that had been precleared (or rejected) by DOJ.

Plaintiffs acknowledge the *Page II* court's passing observation that a racial bloc voting analysis [is not] always necessary to support a narrow tailoring argument. In this case, however, the General Assembly did not simply fail to conduct a racial bloc voting analysis. It failed to conduct *any* sort of analysis or make *any* sort of inquiry to establish the necessity of its overtly race-based redistricting decisions. Whatever else might be required to support a "narrow tailoring" argument, it most assuredly requires more than asking unnamed members of the "community" or sitting delegates what they wanted or what they thought necessary to ensure their own reelection. That is a far cry from the "strong basis in evidence" the Supreme Court requires to justify race-based decision making. *Alabama*, 135 S. Ct. at 1274. And to rule otherwise would all but eviscerate the Supreme Court's repeated insistence that narrow tailoring for race-based redistricting must be justified by a "strong basis in *evidence*."

Here, Delegate Jones lacked a strong basis in evidence for his predetermined, across-the-board 55% BVAP threshold. *See Alabama*, 135 S. Ct. at 1273 (legislature's "mechanically numerical" approach to redistricting was not narrowly tailored); *Page II*, 2015 WL 3604029 , at *16-17 (legislature's 55% BVAP quota was not narrowly tailored); *Beasley*, 946 F. Supp. at 1210 (same). And if there was any doubt on this score, it is put to rest by the illegal results that necessarily flowed from the 55% BVAP threshold. For example, in order to comply with the threshold, the General Assembly increased the BVAP in some Challenged Districts (e.g., Challenged District 71) even though those districts had elected minorities' candidates of choice

for years. As the Supreme Court has made clear, however, a plan that augments minority voting strength more than necessary is unconstitutional. *See Shaw I*, 509 U.S. at 655 ("A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression.").

In sum, the evidence that will be placed before this Court at trial will demonstrate, in short, that race was the General Assembly's predominant purpose, and the General Assembly's race-based redistricting was anything but narrowly tailored. The Challenged Districts are therefore unconstitutional, and all that remains to decide is the proper remedy.

E. This Court Should Impose an Immediate and Effective Remedy

Plaintiffs respectfully submit that this Court should, following trial, promptly enter an immediate and effective remedy. Courts regularly exercise the "power . . . [either] to require valid reapportionment or to formulate a valid redistricting plan." *Scott v. Germano*, 381 U.S. 407, 409 (1965). If time allows, a court should give the appropriate legislative body an opportunity to enact a new plan that avoids the constitutional infirmities in the invalidated plan. *See McDaniels v. Mehfoud*, 702 F. Supp. 588, 596 (E.D. Va. 1988); Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 Geo. Wash. L. Rev. 1131, 1133 (2005).

As the Supreme Court has explained, however, "[a]lthough the legislative branch plays the primary role in . . . redistricting, our precedents recognize an important role for the courts when a districting plan violates the Constitution." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 415 (2006). In particular, where it is clear that the appropriate legislative body will not or cannot enact a valid plan in time, as when the "imminence of . . . [an] election makes [referral to the legislative branch] impractical," then "it becomes the 'unwelcome obligation' of

the federal court to devise and impose a reapportionment plan pending later legislative action." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (principal opinion) (internal citation omitted).

F. Plaintiffs Are Entitled to Reasonable Attorneys' Fees and Costs

Plaintiffs brought this lawsuit under 42 U.S.C. § 1983, and prevailing parties in § 1983 actions "should ordinarily recover an attorney's fee . . . ." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (internal quotation marks and citation omitted). Prevailing parties are also entitled to recover their expert fees. *See* 42 U.S.C. § 1973*l*(e). Plaintiffs request the opportunity—should they prevail—to demonstrate their attorneys' fees, expert fees, and costs by post-trial motion.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court invalidate Virginia House of Delegates districts 63, 69, 70, 71, 74, 75, 77, 80, 89, 90, 92, and 95 and ensure that constitutional districts are adopted for the upcoming House of Delegates elections.

DATED: June 19, 2015

By: */s/ Aria C. Branch*

John K. Roche (VSB# 68594)
Marc Erik Elias (admitted *pro hac vice*)
Bruce V. Spiva (admitted *pro hac vice*)
Elisabeth C. Frost (admitted *pro hac vice*)
Aria C. Branch (VSB # 83682)
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: 202.434.1627
Facsimile: 202.654.9106

Kevin J. Hamilton (admitted *pro hac vice*)
Abha Khanna (admitted *pro hac vice*)
Ryan Spear (admitted *pro hac vice*)
William B. Stafford
(admitted *pro hac vice*)
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

On June 19, 2015, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Jennifer Marie Walrath
Katherine Lea McKnight
Baker & Hostetler LLP (DC)
1050 Connecticut Ave NW
Suite 1100
Washington, DC 20036
202-861-1702
Fax: 202-861-1783
jwalrath@bakerlaw.com
kmcknight@bakerlaw.com

Effrem Mark Braden
Baker & Hostetler LLP (DC-NA)
Washington Square
Suite 1100
Washington, DC 20036
202-861-1504
Fax: 202-861-1783
mbraden@bakerlaw.com

Of counsel:

Dale Oldham, Esq.
1119 Susan St.
Columbia, SC 29210
803-772-7729
dloesq@aol.com

Attorneys for Intervenor-Defendants

Jeffrey P. Brundage
Daniel Ari Glass
Kathleen Angell Gallagher
Eckert Seamans Cherin & Mellott LLC
1717 Pennsylvania Ave NW, Suite 1200
Washington, D.C. 20006
202-659-6600
Fax: 202-659-6699
jbrundage@eckertseamans.com
dglass@eckertseamans.com
kgallagher@eckertseamans.com

Godfrey T. Pinn, Jr.
Harrell & Chambliss LLP
Eighth and Main Building
707 East Main Street
Suite 1000
Richmond, VA 23219
gpinn@hclawfirm.com

Anthony F. Troy
Eckert Seamans Cherin & Mellott LLC
707 East Main Street
Suite 1450
Richmond, Virginia 23219
804-788-7751
Fax: 804-698-2950
ttroy@eckertseamans.com

Attorneys for Defendants

By */s/ Aria C. Branch*
Aria C. Branch (VSB #83682)
Perkins Coie LLP
700 13th St. N.W., Suite 600
Washington, D.C. 20005-3960
Phone: (202) 654-6338
Fax: (202) 654-9106
ABranch@perkinscoie.com

Attorneys for Plaintiffs

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

GOLDEN BETHUNE-HILL, *et al.*,

Plaintiffs,

v.

VIRGINIA STATE BOARD OF ELECTIONS, *et al.*,

Defendants,

v.

VIRGINIA HOUSE OF DELEGATES, *et al.*,

Intervenor-Defendants.

Civil Action No. 3:14-cv-00852-REP-GBL-BMK

APPENDIX TO PLAINTIFFS' TRIAL BRIEF
(EXCERPTS OF SELECTED TRIAL EXHIBITS)

Plaintiffs respectfully submit this Appendix, which contains excerpts of selected trial exhibits, with key passages highlighted, for the convenience of the Court. As discussed during the Pretrial Conference, Plaintiffs anticipate that all of these exhibits will be admitted pursuant to a stipulation of all counsel, although the parties have not yet finalized that stipulation. Complete copies of these exhibits are reflected in Plaintiffs' List of Witnesses & Trial Exhibits, filed contemporaneously with this Appendix.

Ex. No.	Description
Plaintiffs TX 007	Email from C. Marston to K. Alexander Murray re RPV Leadership Roster, dated December 9, 2010
Plaintiffs TX 009	Federal Register - Department of Justice Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice [76 Fed. Reg. 7470-7473 (Feb. 9, 2011)]
Plaintiffs TX 017	Email from G. Paul Nardo to Caucus Members re Messaging on House Redistricting Maps, dated March 29, 2011
Plaintiffs TX 018	Email from C. Marston to D. Oldham and dloesq@aol.com re Commission's 13 MM Plan, dated March 30, 2011
Plaintiffs TX 022	Email from C. Marston to C. Jones re HD61-HD75 Dale's Options, dated April 1, 2011
Plaintiffs TX 030 *(selected pages)*	Email string between J. McClellan, K. Showalter, L. Haake and K. Stigall re HB5001 as passed Senate, dated April 8, 2011
Plaintiffs TX 033 *(selected pages)*	Transcript of 2011 Special Session I Virginia House of Delegates Redistricting Floor Debates, dated April 4, 2011
Plaintiffs TX 035 *(selected pages)*	Transcript of 2011 Special Session I Virginia House of Delegates Redistricting Floor Debates, dated April 5, 2011
Plaintiffs TX 038	Email from C. Marston to C. Jones re AP_Blk, dated April 6, 2011
Plaintiffs TX 039 *(selected pages)*	Transcript of Privileges and Elections Redistricting Senate Hearing, dated April 7, 2011
Plaintiffs TX 052	Report of John B. Morgan Regarding Plaintiffs' Alternative Plan and the Enacted Plan, dated March 14, 2014 (re Page v. State Board of Elections)
Plaintiffs TX 068 *(selected pages)*	Transcript of Pretrial Hearing Conference Call, dated June 4, 2015

DATED: June 19, 2015

By: */s/ Aria C. Branch*

John K. Roche (VSB # 68594)
Marc Erik Elias (admitted *pro hac vice*)
Bruce V. Spiva (admitted *pro hac vice*)
Elisabeth C. Frost (admitted *pro hac vice*)
Aria C. Branch (VSB # 83682)
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: 202.434.1627
Facsimile: 202.654.9106

Kevin J. Hamilton (admitted *pro hac vice*)
Abha Khanna (admitted *pro hac vice*)
Ryan Spear (admitted *pro hac vice*)
William B. Stafford
(admitted *pro hac vice*)
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

On June 19, 2015, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Jennifer Marie Walrath
Katherine Lea McKnight
Baker & Hostetler LLP (DC)
1050 Connecticut Ave NW
Suite 1100
Washington, DC 20036
202-861-1702
Fax: 202-861-1783
jwalrath@bakerlaw.com
kmcknight@bakerlaw.com

Effrem Mark Braden
Baker & Hostetler LLP (DC-NA)
Washington Square
Suite 1100
Washington, DC 20036
202-861-1504
Fax: 202-861-1783
mbraden@bakerlaw.com

Of counsel:

Dale Oldham, Esq.
1119 Susan St.
Columbia, SC 29210
803-772-7729
dloesq@aol.com

Attorneys for Intervenor-Defendants

Jeffrey P. Brundage
Daniel Ari Glass
Kathleen Angell Gallagher
Eckert Seamans Cherin & Mellott LLC
1717 Pennsylvania Ave NW, Suite 1200
Washington, D.C. 20006
202-659-6600
Fax: 202-659-6699
jbrundage@eckertseamans.com
dglass@eckertseamans.com
kgallagher@eckertseamans.com

Godfrey T. Pinn, Jr.
Harrell & Chambliss LLP
Eighth and Main Building
707 East Main Street
Suite 1000
Richmond, VA 23219
gpinn@hclawfirm.com

Anthony F. Troy
Eckert Seamans Cherin & Mellott LLC
707 East Main Street
Suite 1450
Richmond, Virginia 23219
804-788-7751
Fax: 804-698-2950
ttroy@eckertseamans.com

Attorneys for Defendants

By */s/ Aria C. Branch*
Aria C. Branch (VSB No. 83682)
Perkins Coie LLP
700 13th St. N.W., Suite 600
Washington, D.C. 20005-3960
Phone: (202) 654-6338
Fax: (202) 654-9106
ABranch@perkinscoie.com

Attorneys for Plaintiffs

Exhibit 7

Exhibit 7

From: Chris Marston <chris.marston@gmail.com>
To: Katie Alexander Murray <katiegalex@yahoo.com>
Subject: Re: RPV Leadership Roster
Date: 12/9/2010 6:28:17 PM
Attachments:

E-mail is okay too. Just be careful in how you describe what you're seeking. We need to keep out any hint of unfairness (except the fundamental unfairness of the Voting Rights Act) or partisanship.

For example, "I'm working on an important project for Speaker Howell and the House Republican Caucus. In order to develop redistricting plans for Virginia in full compliance with the Voting Rights Act, we need to collect data for Racial Block Voting analysis. One way to analyze the data is to look for elections in which an African-American candidate and a White candidate both compete (either in one party's primary, or in a general election)."

I think that's pretty safe. Some of these folks may try to engage you in a conversation about what they think new maps should look like. Do your best to politely decline to have that conversation. You might say, "I am just responsible for collecting this important data for Racial Block Voting and the Caucus is committed to a fair redistricting process that complies with applicable laws and results in districts with as nearly equal population as practicable."

If they push and push, feel free to tell them to call me.

Thanks,
Chris

On Thu, Dec 9, 2010 at 5:21 PM, Katie Alexander Murray <katiegalex@yahoo.com> wrote:

> Thanks Chris,
>
> I noticed on the list that their email addresses are listed. Would it be ok if I sent an initial email, or would you prefer for me to do everything over the phone?
>
> Katie

From: Chris Marston <chris.marston@gmail.com>
To: katiegalex@yahoo.com
Sent: Wed, December 8, 2010 9:26:16 AM
Subject: RPV Leadership Roster

Katie,

Here's the RPV Leadership Roster. The unit chairs are listed after the state central committee.

Feel free to identify yourself as calling from the House Republican Caucus.

The information you need is whether any election, including Democrat primaries, featured a black and a white candidate. Elections for state House, state Senate, Boards of Supervisors/City Councils, Constitutional Officers (Sheriff, Commonwealth's Attorney, Clerk of Court, Treasurer, Commissioner of the Revenue), School Boards, and even Soil and Water Conservation District Directors.

What I need back is the Election Year (whether it was a general or a special election, most will be general), the office, and which candidate was black and which was white. If a chair just remembers that there was a contest with a black and a white, but doesn't remember names, the State Board of Elections website has results for many elections, especially in recent years, so we can check there for names.

Let me know if you have any questions.

Thanks,
Chris

Exhibit 9

Exhibit 9

FEDERAL REGISTER

Vol. 76 Wednesday,
No. 27 February 9, 2011

Part III

Department of Justice

Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice

DEPARTMENT OF JUSTICE

Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice

AGENCY: Office of the Assistant Attorney General, Civil Rights Division, Department of Justice.

ACTION: Notice.

SUMMARY: The Attorney General has delegated responsibility and authority for determinations under Section 5 of the Voting Rights Act to the Assistant Attorney General, Civil Rights Division, who finds that, in view of recent legislation and judicial decisions, it is appropriate to issue guidance concerning the review of redistricting plans submitted to the Attorney General for review pursuant to Section 5 of the Voting Rights Act.

FOR FURTHER INFORMATION CONTACT: T. Christian Herren, Jr., Chief, Voting Section, Civil Rights Division, United States Department of Justice, Washington, DC 20530, (202) 514–1416.

SUPPLEMENTARY INFORMATION: Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, requires jurisdictions identified in Section 4 of the Act to obtain a determination from either the Attorney General or the United States District Court for the District of Columbia that any change affecting voting which they seek to enforce does not have a discriminatory purpose and will not have a discriminatory effect.

Beginning in 2011, these covered jurisdictions will begin to seek review under Section 5 of the Voting Rights Act of redistricting plans based on the 2010 Census. Based on past experience, the overwhelming majority of the covered jurisdictions will submit their redistricting plans to the Attorney General. This guidance is not legally binding; rather, it is intended only to provide assistance to jurisdictions covered by the preclearance requirements of Section 5.

Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c

Following release of the 2010 Census data, the Department of Justice expects to receive several thousand submissions of redistricting plans for review pursuant to Section 5 of the Voting Rights Act. The Civil Rights Division has received numerous requests for guidance similar to that it issued prior to the 2000 Census redistricting cycle concerning the procedures and standards that will be applied during review of these redistricting plans. 67 FR 5411 (January 18, 2001). In addition, in 2006, Congress reauthorized the Section 5 review requirement and refined its definition of some substantive standards for compliance with Section 5. In view of these developments, issuing revised guidance is appropriate.

The "Procedures for the Administration of Section 5 of the Voting Rights Act," 28 CFR Part 51, provide detailed information about the Section 5 review process. Copies of these Procedures are available upon request and through the Voting Section Web site (*http://www.usdoj.gov/crt/voting*). This document is meant to provide additional guidance with regard to current issues of interest. Citations to judicial decisions are provided to assist the reader but are not intended to be comprehensive. The following discussion provides supplemental guidance concerning the following topics:

- The Scope of Section 5 Review;
- The Section 5 Benchmark;
- Analysis of Plans (discriminatory purpose and retrogressive effect);
- Alternatives to Retrogressive Plans; and
- Use of 2010 Census Data.

The Scope of Section 5 Review

Under Section 5, a covered jurisdiction has the burden of establishing that a proposed redistricting plan "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in [Section 4(f)(2) of the Act]" (i.e., membership in a language minority group defined in the Act). 42 U.S.C 1973c(a). A plan has a discriminatory effect under the statute if, when compared to the benchmark plan, the submitting jurisdiction cannot establish that it does not result in a "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States,* 425 U.S. 125, 141 (1976).

If the proposed redistricting plan is submitted to the Department of Justice for administrative review, and the Attorney General determines that the jurisdiction has failed to show the absence of any discriminatory purpose or retrogressive effect of denying or abridging the right to vote on account of race, color or membership in a language minority group defined in the Act, the Attorney General will interpose an objection. If, in the alternative, the jurisdiction seeks a declaratory judgment from the United States District Court for the District of Columbia, that court will utilize the identical standard to determine whether to grant the request; i.e., whether the jurisdiction has established that the plan is free from discriminatory purpose or retrogressive effect. Absent administrative preclearance from the Attorney General or a successful declaratory judgment action in the district court, the jurisdiction may not implement its proposed redistricting plan.

The Attorney General may not interpose an objection to a redistricting plan on the grounds that it violates the one-person one-vote principle, on the grounds that it violates *Shaw* v. *Reno,* 509 U.S. 630 (1993), or on the grounds that it violates Section 2 of the Voting Rights Act. The same standard applies in a declaratory judgment action. Therefore, jurisdictions should not regard a determination of compliance with Section 5 as preventing subsequent legal challenges to that plan under other statutes by the Department of Justice or by private plaintiffs. 42 U.S.C. 1973c(a); 28 CFR 51.49.

The Section 5 "Benchmark"

As noted, under Section 5, a jurisdiction's proposed redistricting plan is compared to the "benchmark" plan to determine whether the use of the new plan would result in a retrogressive effect. The "benchmark" against which a new plan is compared is the last legally enforceable redistricting plan in force or effect. *Riley* v. *Kennedy,* 553 U.S. 406 (2008); 28 CFR 51.54(b)(1). Generally, the most recent plan to have received Section 5 preclearance or to have been drawn by a Federal court is the last legally enforceable redistricting plan for Section 5 purposes. When a jurisdiction has received Section 5 preclearance for a new redistricting plan, or a Federal court has drawn a new plan and ordered it into effect, that plan replaces the last legally enforceable plan as the Section 5 benchmark. *McDaniel* v. *Sanchez,* 452 U.S. 130 (1981); *Texas* v. *United States,* 785 F. Supp. 201 (D.D.C. 1992); *Mississippi* v. *Smith,* 541 F. Supp. 1329, 1333 (D.D.C. 1982), appeal dismissed, 461 U.S. 912 (1983).

A plan found to be unconstitutional by a Federal court under the principles of *Shaw* v. *Reno* and its progeny cannot serve as the Section 5 benchmark, *Abrams* v. *Johnson,* 521 U.S. 74 (1997), and in such circumstances, the benchmark for Section 5 purposes will be the last legally enforceable plan predating the unconstitutional plan. Absent such a finding of unconstitutionality under *Shaw* by a Federal court, the last legally enforceable plan will serve as the benchmark for Section 5 review. Therefore, the question of whether the

benchmark plan is constitutional will not be considered during the Department's Section 5 review.

Analysis of Plans

As noted above, there are two necessary components to the analysis of whether a proposed redistricting plan meets the Section 5 standard. The first is a determination that the jurisdiction has met its burden of establishing that the plan was adopted free of any discriminatory purpose. The second is a determination that the jurisdiction has met its burden of establishing that the proposed plan will not have a retrogressive effect.

Discriminatory Purpose

Section 5 precludes implementation of a change affecting voting that has the purpose of denying or abridging the right to vote on account of race or color, or membership in a language minority group defined in the Act. The 2006 amendments provide that the term "purpose" in Section 5 includes "any discriminatory purpose," and is not limited to a purpose to retrogress, as was the case after the Supreme Court's decision in *Reno* v. *Bossier Parish* ("*Bossier II*), 528 U.S. 320 (2000). The Department will examine the circumstances surrounding the submitting authority's adoption of a submitted voting change, such as a redistricting plan, to determine whether direct or circumstantial evidence exists of any discriminatory purpose of denying or abridging the right to vote on account of race or color, or membership in a language minority group defined in the Act.

Direct evidence detailing a discriminatory purpose may be gleaned from the public statements of members of the adopting body or others who may have played a significant role in the process. *Busbee* v. *Smith,* 549 F. Supp. 494, 508 (D.D.C. 1982), *aff'd,* 459 U.S. 1166 (1983). The Department will also evaluate whether there are instances where the invidious element may be missing, but the underlying motivation is nonetheless intentionally discriminatory. In the *Garza* case, Judge Kozinski provided the clearest example:

> Assume you are an anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings toward minorities don't matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood.

Garza and United States v. *County of Los Angeles,* 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part), *cert. denied,* 498 U.S. 1028 (1991).

In determining whether there is sufficient circumstantial evidence to conclude that the jurisdiction has not established the absence of the prohibited discriminatory purpose, the Attorney General will be guided by the Supreme Court's illustrative, but not exhaustive, list of those "subjects for proper inquiry in determining whether racially discriminatory intent existed," outlined in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 268 (1977). In that case, the Court, noting that such an undertaking presupposes a "sensitive inquiry," identified certain areas to be reviewed in making this determination: (1) The impact of the decision; (2) the historical background of the decision, particularly if it reveals a series of decisions undertaken with discriminatory intent; (3) the sequence of events leading up to the decision; (4) whether the challenged decision departs, either procedurally or substantively, from the normal practice; and (5) contemporaneous statements and viewpoints held by the decision-makers. *Id.* at 266–68.

The single fact that a jurisdiction's proposed redistricting plan does not contain the maximum possible number of districts in which minority group members are a majority of the population or have the ability to elect candidates of choice to office, does not mandate that the Attorney General interpose an objection based on a failure to demonstrate the absence of a discriminatory purpose. Rather, the Attorney General will base the determination on a review of the plan in its entirety.

Retrogressive Effect

An analysis of whether the jurisdiction has met its burden of establishing that the proposed plan would not result in a discriminatory or "retrogressive" effect starts with a basic comparison of the benchmark and proposed plans at issue, using updated census data in each. Thus, the Voting Section staff loads the boundaries of the benchmark and proposed plans into the Civil Rights Division's geographic information system [GIS]. Population data are then calculated for each district in the benchmark and the proposed plans using the most recent decennial census data.

A proposed plan is retrogressive under Section 5 if its net effect would be to reduce minority voters' "effective exercise of the electoral franchise" when compared to the benchmark plan. *Beer* v. *United States* at 141. In 2006, Congress clarified that this means the jurisdiction must establish that its proposed redistricting plan will not have the effect of "diminishing the ability of any citizens of the United States" because of race, color, or membership in a language minority group defined in the Act, "to elect their preferred candidate of choice." 42 U.S.C. 1973c(b) & (d). In analyzing redistricting plans, the Department will follow the congressional directive of ensuring that the ability of such citizens to elect their preferred candidates of choice is protected. That ability to elect either exists or it does not in any particular circumstance.

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. Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district. As noted above, census data alone may not provide sufficient indicia of electoral behavior to make the requisite determination. Circumstances, such as differing rates of electoral participation within discrete portions of a population, may impact on the ability of voters to elect candidates of choice, even if the overall demographic data show no significant change.

Although comparison of the census population of districts in the benchmark and proposed plans is the important starting point of any Section 5 analysis, additional demographic and election data in the submission is often helpful in making the requisite Section 5 determination. 28 CFR 51.28(a). For example, census population data may not reflect significant differences in group voting behavior. Therefore, election history and voting patterns within the jurisdiction, voter registration and turnout information, and other similar information are very important to an assessment of the actual effect of a redistricting plan.

The Section 5 Procedures contain the factors that the courts have considered in deciding whether or not a redistricting plan complies with Section 5. These factors include whether minority voting strength is reduced by the proposed redistricting; whether minority concentrations are fragmented

among different districts; whether minorities are overconcentrated in one or more districts; whether alternative plans satisfying the jurisdiction's legitimate governmental interests exist, and whether they were considered; whether the proposed plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries; and, whether the plan is inconsistent with the jurisdiction's stated redistricting standards. 28 CFR 51.56–59.

Alternatives to Retrogressive Plans

There may be circumstances in which the jurisdiction asserts that, because of shifts in population or other significant changes since the last redistricting (*e.g.,* residential segregation and demographic distribution of the population within the jurisdiction, the physical geography of the jurisdiction, the jurisdiction's historical redistricting practices, political boundaries, such as cities or counties, and/or state redistricting requirements), retrogression is unavoidable. In those circumstances, the submitting jurisdiction seeking preclearance of such a plan bears the burden of demonstrating that a less-retrogressive plan cannot reasonably be drawn.

In considering whether less-retrogressive alternative plans are available, the Department of Justice looks to plans that were actually considered or drawn by the submitting jurisdiction, as well as alternative plans presented or made known to the submitting jurisdiction by interested citizens or others. In addition, the Department may develop illustrative alternative plans for use in its analysis, taking into consideration the jurisdiction's redistricting principles. If it is determined that a reasonable alternative plan exists that is non-retrogressive or less retrogressive than the submitted plan, the Attorney General will interpose an objection.

Preventing retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle. 52 FR 488 (Jan. 6, 1987). Similarly, preventing retrogression under Section 5 does not require jurisdictions to violate *Shaw* v. *Reno* and related cases.

The one-person, one-vote issue arises most commonly where substantial demographic changes have occurred in some, but not all, parts of a jurisdiction. Generally, a plan for congressional redistricting that would require a greater overall population deviation than the submitted plan is not considered a reasonable alternative by the Department. For state legislative and local redistricting, a plan that would require significantly greater overall population deviations is not considered a reasonable alternative.

In assessing whether a less retrogressive plan can reasonably be drawn, the geographic compactness of a jurisdiction's minority population will be a factor in the Department's analysis. This analysis will include a review of the submitting jurisdiction's historical redistricting practices and district configurations to determine whether the alternative plan would (a) abandon those practices and (b) require highly unusual features to link together widely separated minority concentrations.

At the same time, compliance with Section 5 of the Voting Rights Act may require the jurisdiction to depart from strict adherence to certain of its redistricting criteria. For example, criteria that require the jurisdiction to make the least possible change to existing district boundaries, to follow county, city, or precinct boundaries, protect incumbents, preserve partisan balance, or in some cases, require a certain level of compactness of district boundaries may need to give way to some degree to avoid retrogression. In evaluating alternative or illustrative plans, the Department of Justice relies upon plans that make the least departure from a jurisdiction's stated redistricting criteria needed to prevent retrogression.

The Use of 2010 Census Data

The most current population data are used to measure both the benchmark plan and the proposed redistricting plan. 28 CFR 51.54(b)(2) (Department of Justice considers "the conditions existing at the time of the submission."); *City of Rome* v. *United States,* 446 U.S. 156, 186 (1980) ("most current available population data" to be used for measuring effect of annexations); *Reno* v. *Bossier Parish School Board,* 528 U.S. 320, 334 (2000) ("the baseline is the status quo that is proposed to be changed: If the change 'abridges the right to vote' relative to the status quo, preclearance is denied * * *.").

For redistricting after the 2010 Census, the Department of Justice will, consistent with past practice, evaluate redistricting submissions using the 2010 Census population data released by the Bureau of the Census for redistricting pursuant to Public Law 94–171, 13 U.S.C. 141(c). Thus, our analysis of the proposed redistricting plans includes a review and assessment of the Public Law 94–171 population data, even if those data are not included in the submission or were not used by the jurisdiction in drawing the plan. The failure to use the Public Law 94–171 population data in redistricting does not, by itself, constitute a reason for interposing an objection. However, unless other population data used can be shown to be more accurate and reliable than the Public Law 94–171 data, the Attorney General will consider the Public Law 94–171 data to measure the total population and voting age population within a jurisdiction for purposes of its Section 5 analysis.

As in 2000, the 2010 Census Public Law 94–171 data will include counts of persons who have identified themselves as members of more than one racial category. This reflects the October 30, 1997, decision by the Office of Management and Budget [OMB] to incorporate multiple-race reporting into the Federal statistical system. 62 FR 58782–58790. Likewise, on March 9, 2000, OMB issued Bulletin No. 00–02 addressing "Guidance on Aggregation and Allocation of Data on Race for Use in Civil Rights Enforcement." Part II of that Bulletin describes how such census responses will be allocated by Federal executive agencies for use in civil rights monitoring and enforcement.

The Department will follow both aggregation methods defined in Part II of the Bulletin. The Department's initial review of a plan will be based upon allocating any multiple-item response that includes white and one of the five other race categories identified in the response. Thus, the total numbers for "Black/African American," "Asian," "American Indian/Alaska Native," "Native Hawaiian or Other Pacific Islander" and "Some other race" reflect the total of the single-race responses and the multiple responses in which an individual selected a minority race and white race.

The Department will then move to the second step in its application of the census data to the plan by reviewing the other multiple-race category, which is comprised of all multiple-race responses consisting of more than one minority race. Where there are significant numbers of such responses, we will, as required by both the OMB guidance and judicial opinions, allocate these responses on an iterative basis to each of the component single-race categories for analysis. *Georgia* v. *Ashcroft,* 539 U.S. 461, 473, n.1 (2003).

As in the past, the Department will analyze Latino voters as a separate group for purposes of enforcement of the Voting Rights Act. If there are significant numbers of responses which

report Latino and one or more minority races (for example, Latinos who list their race as Black/African-American), those responses will be allocated alternatively to the Latino category and the minority race category.

Dated: February 3, 2011.

Thomas E. Perez,

Assistant Attorney General, Civil Rights Division.

[FR Doc. 2011–2797 Filed 2–8–11; 8:45 am]

BILLING CODE 4410–13–P

Exhibit 17

Exhibit 17

From: G. Paul Nardo <gpn740@gmail.com>
To: GMail <gpn740@gmail.com>
Subject: Fwd: Messaging on House Redistricting Maps
Date: 3/29/2011 7:09:50 PM
Attachments: 20110329 - Message Points on House Redistricting Plan & Maps.doc

---

Caucus Members,

THIS E-MAIL IS VERY IMPORTANT; PLEASE READ, SAVE & USE

As promised, I'm attaching suggested "messaging points" for your use in response to inquiries (media, constituents or others) about House Bill 5001, redistricting legislation introduced today by Delegate Chris Jones.

Like before, the Speaker, Chris & Rob Bell strongly encourage you to stick to these key points.

Remember: the public record is open and anything you or your LAs say can and may be used in a possible lawsuit challenging a final enacted plan that's sent to DC. Accordingly, to help ensure success on all fronts (legislative, legal, political, etc.), it is absolutely imperative that each and every one of us exercise diligent message discipline.

Further Heads Up:

A first and obvious question tonight that the media (and many of you) are asking is: "Who got put in with whom in the Jones plan? The answer: *Dems Johnson & Phillips, Dems Miller & Lewis, Reps Athey & Sherwood, and Dem Abbott & Repub. Oder as well as Dem Armstrong and Repub Merricks.* Should someone ask a follow-up as to "Why?" the plain and honest answer is this: *the Jones plan follows the dictates of population/demographic changes and the requirements of the federal Voting Rights Act.*

More specific "local" questions for you in your own individual district are likely to be along the lines of: "Did you want to represent this or that area?" or "Do you like the way the Jones plan does this or that?" and so forth. The smart answer would be something like: *"I'm looking forward to introducing myself to these new people"* or *"I don't know why Del. Jones drew the map this or that way, you'll have to ask him. But, the most important thing for me is my wanting to work hard to reach out to and work with these areas so I can most effectively represent them in the House."*

If you get asked a question that you cannot answer, just say so because it's Delegate Jones' legislation. You look forward to finding out more about it when Special Session I on Redistricting begins in earnest next week. Hopefully, you get the gist of what we're strongly suggesting.

Finally, if you have any specific questions and/or need help, please do not hesitate to call the Speaker, Chris Jones, Rob Bell or me. Here's the appropriate contact numbers:

Speaker Howell (540) 840-0241
Del. Chris Jones (757) 676-4961
Del. Rob Bell (434) 249-8590

Hope this helps,

GP

---------- Forwarded message ----------
From: **G. Paul Nardo** <gpn740@gmail.com>
Date: Tue, Mar 29, 2011 at 5:58 PM
Subject: Heads Up -- House Redistricting Maps will be available on DLS Website in near future
To: House Majority Caucus Members

Caucus Members,

FYI. The URL for the DLS website is http://redistricting.dls.virginia.gov/2010/

I'll have some macro messaging points around to everyone within the next hour. The DLS website is overwhelmed presently as they try to get the House, and I believe Senate, map posted. In the meantime, everyone is STRONGLY URGED to not talk to folks about things until you get the messaging points.

Thanks,

GP

Exhibit 18

Exhibit 18

From: Chris Marston <chris.marston@gmail.com>
To: Dale Oldham - Redistricting <doldham@rnchq.org>, dloesq@aol.com
Subject: Commission's 13 MM Plan
Date: 3/30/2011 6:03:36 PM
Attachments:

Dale,

I don't have the plan yet, but one of the commissioners tells me the lowest BVAP% is 53.5 and the highest is 58.

Thanks,
Chris

Exhibit 22

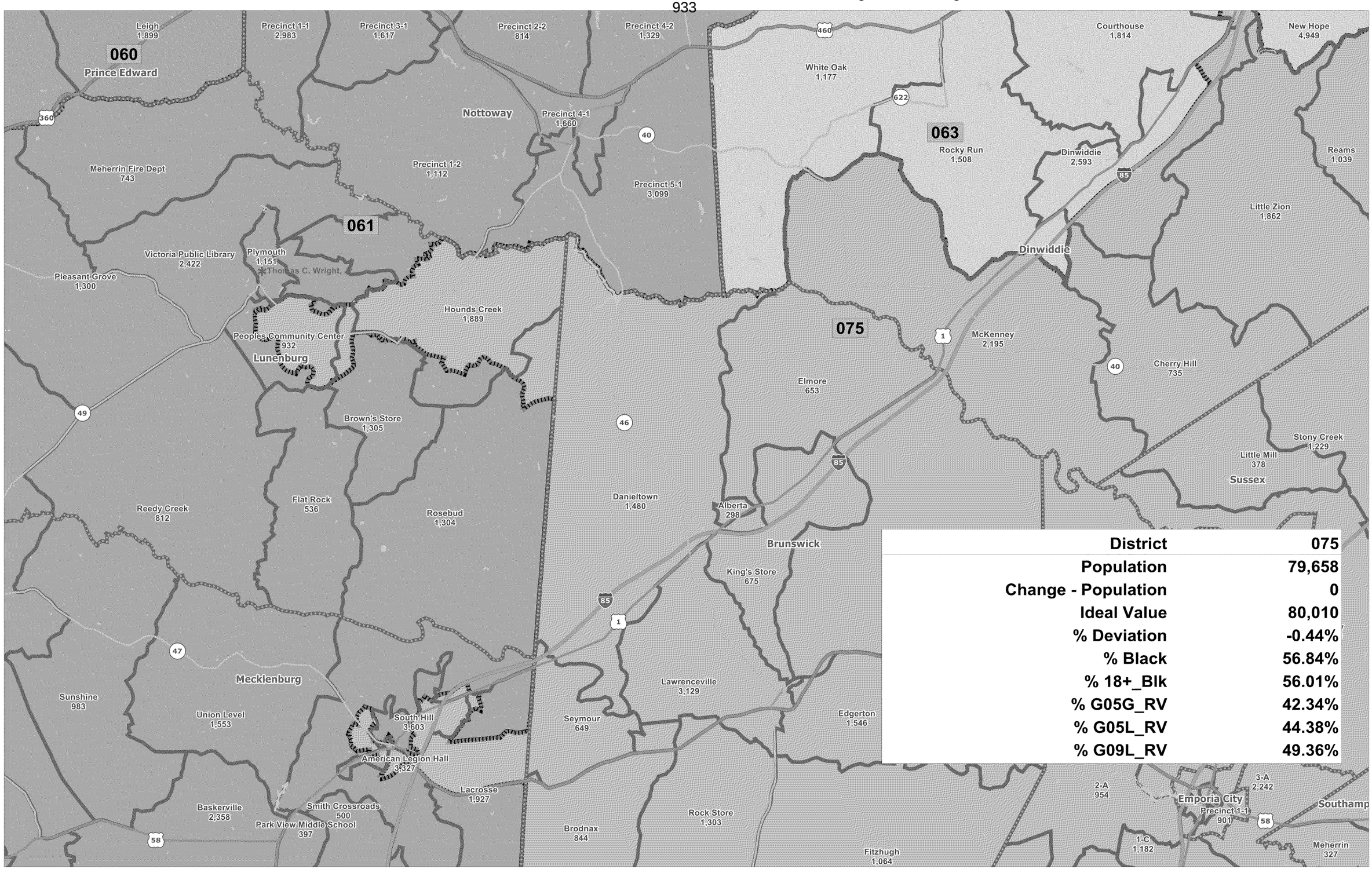
Exhibit 22

From: Chris Marston <chris.marston@gmail.com>
Sent: Friday, April 1, 2011 10:33 PM
To: scj <scj@schrisjones.com>
Subject: HD61-HD75 Dale's Options
Attach: DLO-Southside-3.pdf; DLO-Southside-2.pdf

Someone's having trouble following directions.

Here are the two options that Dale proposes, neither of which fully address Tyler's concerns.

I'll try and generate another one that gets it done without dropping the %BVAP too low.



District	075
Population	79,658
Change - Population	0
Ideal Value	80,010
% Deviation	-0.44%
% Black	56.84%
% 18+_Blk	56.01%
% G05G_RV	42.34%
% G05L_RV	44.38%
% G09L_RV	49.36%

District	075
Population	79,534
Change - Population	0
Ideal Value	80,010
% Deviation	-0.59%
% Black	56.79%
% 18+_Blk	56.07%
% G05G_RV	42.04%
% G05L_RV	44.05%
% G09L_RV	48.89%

Exhibit 30

Exhibit 30

From: Haake, Lawrence <HaakeL@chesterfield.gov>
Sent: Friday, April 8, 2011 4:30 PM
To: Showalter, Kirk - Voter Reg <Kirk.Showalter@Richmondgov.com>; Jennifer L McClellan <DelJMcClellan@house.virginia.gov>
Cc: Kent Stigall <KStigall@house.virginia.gov>
Subject: RE: HB5001 as passed Senate

There are only 363 voters in the 70th part in Pct 515, too few legally to open a precinct, so I'm going to try to move it into another magisterial district and merge with another 70th House precinct. If so, then my side is clear.

Thanks for the effort.

Larry Haake
GR Chesterfield

From: Showalter, Kirk - Voter Reg [mailto:Kirk.Showalter@Richmondgov.com]
Sent: Friday, April 08, 2011 16:10
To: Jennifer L McClellan
Cc: Haake, Lawrence; Kent Stigall
Subject: RE: HB5001 as passed Senate

Darned…..so close and yet so far away! A measly 0.2%! Well, at least we gave it a good try and for that I must thank you! I have some additional ideas how we might fix that and will work with you, Betsy, Delores and Larry over the coming months to see if we can address it next January.

J. Kirk Showalter
General Registrar
City of Richmond
(804) 646-5950

From: Jennifer L McClellan [mailto:DelJMcClellan@house.virginia.gov]
Sent: Friday, April 08, 2011 2:14 PM
To: Showalter, Kirk - Voter Reg
Cc: HaakeL; Kent Stigall
Subject: Re: HB5001 as passed Senate

Kirk,

I spoke to Chris Jones and Kent Stigall. Apparently, the changes we discussed based on the map of the Davis precinct you sent would have pushed the voting age African American population in the 71st District down to 54.8%. The target criteria was 55%, so the change can't be made. When you and I were working in Legislative services, we indeed moved the wrong part of Davis, which is why the numbers looked correct to us.

Given the time constraints on this thing, I don't think we have enough time to try to come up with a fix that keeps the 69th, 70th, and 71st all at 55% African American voting population and within a 1% total population deviation. We can try to do some cleanup next year. I know that doesn't help you think election cycle, but that may be the best we can do.

Jenn

Jennifer L. McClellan

Virginia House of Delegates
71st District
P.O. Box 406
Richmond, VA 23219
(804) 698-1071

To: "Jennifer L McClellan" <DelJMcClellan@house.virginia.gov>
From: "Showalter, Kirk - Voter Reg" <Kirk.Showalter@Richmondgov.com>
Date: 04/08/2011 12:34PM
Cc: "Haake, Lawrence" <HaakeL@chesterfield.gov>
Subject: HB5001 as passed Senate

Dear Jennifer:
I saw the new version of HB5001 that passed the Senate. Unfortunately (and unlike the Senate substitute version) it did not include any of the fixes to the split precincts that we worked on. Was there a particular reason for this? Should I pursue Governors' amendments to make the changes?
I would very much appreciate your guidance on this at your earliest convenience. I am leaving early today, but can be reached on my cellphone at 387-7331. Otherwise, I will be in my office during usual hours. The number here is 646-5950.

J. Kirk Showalter
General Registrar
City of Richmond
(804) 646-5950

[attachment "image001.jpg" removed by Jennifer L McClellan/HDel/HOD]

Exhibit 33

Exhibit 33

2011 SPECIAL SESSION I

VIRGINIA HOUSE OF DELEGATES

REDISTRICTING FLOOR DEBATES

Monday, April 4, 2011

Job#: 82096

Pages 1 - 51

Transcribed by: Daphne Hurley

for point of personal privileges.

THE SPEAKER: The gentlewoman has the floor.

DEL. DANCE: Mr. Speaker and Members of the House, I had what might be considered an honor and a curse to have been assigned to be one of the members, the six members that serve on the Redistricting Committee for the House and one of the six members that serve on the Reapportionment Committee for the House.

And I can tell you that throughout this process I've learned a lot about redistricting. Wasn't here 10 years ago when the last lines were drawn, but I, I will challenge anybody on my side of the aisle as far as knowing as much about the software and the demographics and statistically how Virginia is laid out and what we had to deal with as far as the plan, the House Bill that has been introduced by Delegate Jones.

That is truly an example, I found out, to be of bipartisanship, because there were no gray lines. Whether you're a Democrat or Republican and you were assigned to draw those lines, you

would have found much difficulty. I don't think anybody will have pretty lines, nice neat bows in a row, as they'd like to have. And I don't think anybody would say that whatever their lot is that it's perfectly the way they would like it to be.

But I will say that as one had a lot of impact from both sides of the aisle, I know because I tried to reach out to all those that I could on my side of the aisle, and I know that our chair, Delegate Jones, was willing to listen to anything and everything that we throw to him to consider as he developed his plan.

And one of the things that I was most concerned about of course as an African-American was the 1965 Voting Rights Act as related to the 12 minority districts that we have in the House and making sure that they were strong. The trending -- because we can't tell people where to move or leave -- live, showed that a lot of the populations were shifting into areas.

In order to maintain those 12 districts it required some movement and sometimes not perfect

adjustments between precincts. There might have been some split areas, but those were the kind of things that were happening, but we were talking with legislators as we went. Things were not done in a vacuum.

I know that even though a bill has been introduced, that in working with our Chair that there is going -- there are still options and, of course, some amendments and I'm sure before a bill is passed there will be some more amendments there.

And I see this as truly a fair process. It's not a perfect process, but I don't think it's one that will have us jumping up and down and have fits. We're not going to agree; but we can respectfully agree or disagree as we go.

But I'm still proud to be a part of this team. I still hope that at the end of day that there will be more of us in agreement than not and that we will be able to pass a plan and leave this House. Because I think this is one of the most important bills that we will pass and that is what

the 100 House seats will look like in the next 10 years.

And I was pleased to be a part of that committee and I'm not going to be jumping up and down and say it's African-American or Euro-Americans, but I do say that we need 55 percent at least voting African-Americans, not just a population to show 55 percent African-Americans. Because a lot of us know that statistics show that we don't always vote.

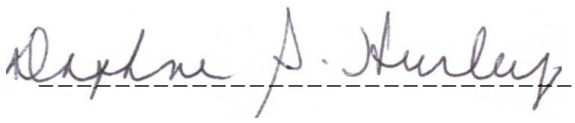
Even though I come -- I live in Petersburg, predominantly African-American, if the percentage might be -- it should be 100 percent. It will be 40 percent. If it was (unintelligible word) if I live in the community and I was your American -- if it was 100 percent, you'd get about 60 percent. And so you have to deal with those realities. That's the realities we're dealing with as we model, as we look at the statistics that we're working with.

And hope you all will consider that. And I stand open even on my side; if those legislators

C E R T I F I C A T E

I, Daphne S. Hurley, Court Reporter, certify that I transcribed from digital recording of the proceedings held on the 4th day of April 2011.

I further certify that to the best of my knowledge and belief, the foregoing transcript constitutes a true and correct transcript of the said proceedings. Given under my hand this 4rd day of May 2015.



Daphne S. Hurley

My commission expires: August 20, 2018
Notary Public in and for
the State of Maryland

Exhibit 35

Exhibit 35

2011 SPECIAL SESSION 1

VIRGINIA HOUSE OF DELEGATES

REDISTRICTING FLOOR DEBATES

Tuesday, April 5, 2011

Job No.: 81658

Pages 1 - 174

Transcribed by: Daphne Hurley

DELEGATES: Aye.

MR. SPEAKER: Those opposed "No." Substitute agreed to. The gentleman from Suffolk.

DEL. JONES: Mr. Speaker and Ladies and Gentlemen of the House, the substitute that is before you for House Bill 5001 is the every 10 year bill that this body and the General Assembly must consider required by the Constitution and that is to reapportion and redistrict the 100 districts in the House of Delegates and the 40 districts in the Senate of Virginia.

The plan before you as amended, in my opinion, is a fair amendment. It's representative of all Virginians, including our minority communities.

This past decade we had serious population shifts within our Commonwealth. Yesterday I was trying to explain, I didn't do a very good job of explaining maybe the fall line. What I did last night, I prepared a map for us to look at.

If you look at the red, red means bad. That means you lost. Yellow means you lost as well.

So if you can see coming from Hampton Roads, across up through Lynchburg and on up into the great far reaches of southwest up in the hills that are so beautiful and down to the great far southwest, that is about 3.1 seats, I believe.

And blue is good. Blue means you picked up. This little area up here picked up 2.88 seats. It does not include Stafford, I do not believe. So if you can look at the map and what -- you know, like I said yesterday, you have to play it where it lies in golf.

This is what the numbers tell you. The numbers are very simple. You had some moderate growth compared to the overall growth of Virginia and coming up through central Virginia up into the Valley. You had tremendous growth up in the Northern Virginia area, especially Louden County and Prince William County.

But you had in reference to the balance of the Commonwealth tremendous loss of population proportionally. So no, this was not a plan to go just grab and put somebody in another district.

The map's pretty clear that you've got to move three seats. We had over a 1., 1.7 seat loss here in Hampton Roads. A 1.14 seat loss in Southwest Virginia and about a, between these three about an 8/10s of a loss in that part of our Commonwealth.

Just kind of wanted to give a visual so we can see what we have to work with when we're actually drawing the lines, which is required by our Constitution and the mandate of the one-person, one-vote.

You know, much has been written about a bipartisan map, bipartisan cooperation for the last several years. This is my 14th year in this body. 14th session. Excuse me. Not year. And I have heard since I guess I arrived the need for a bipartisan way of going about and redrawing the lines for this Commonwealth that the people have been left out of the process.

Well, we are the people's representative. We stand every two years. This is the people's House and every two years they decide if they want us to come back or not. When I got here in 1998 I think

I was Number 95. Today I'm Number 28. That tells you the turnover that we have had in this body in seven election cycles.

So giving -- given, excuse me, the task at hand and our Constitution the P&E Committee met a week-and-a-half ago on Friday and considered criteria and we had I believe five that we chose. They were of population equality, the Voting Rights Act, contiguity and compactness, single member districts and communities of interest.

I mention these because we've heard these terms kicked around in many different I guess meetings, forums, et cetera, and I think all these criteria are important as they do represent what is the fabric of the Commonwealth, our people.

But there's a couple of things from my perspective, and not just mine, but the Constitution, that require our utmost attention. Quite simply, the law; one-person, one-vote. That trumps the Voting Rights Act; equal protection under the 14th Amendment. That was our Number 1 criteria.

Number 2 was the Voting Rights Act. I can't say that I can relate to what occurred back in the '60s because I was just a young man, but I can tell you that the Voting Rights Act is something that has made a tremendous difference in America.

It has changed the fabric of this country because all people have an opportunity to participate in the process, as they should, as they well should. We heard a speaker, several speakers, one in Hampton and one yesterday, who was talking about the factual that he defended the rights of Americans when he felt like he did not have that right, full rights accorded or forwarded to him.

So Number 1 and Number 2 are the most important things to the P&E Committee. They were the most important things to me as I drew this map.

Yesterday we had another bill that was before us. That was I think the College Competition Plan. The young man did a fabulous job. I thought that he did exceptionally well. I think

the gentleman from Dickinson was laughing, he says, "Chris, that was you 40 years ago." He was being kind of polite. Maybe about 42 years ago, but I wasn't going to tell him that.

Their Number 1 criteria was communities of interest, contiguity and compactness. They're Number 3 and Number 5 on our list. They're Number 3 and Number 5 for a reason; because one-person, one-vote is the overarching principle of what this country stands for in my opinion.

So with that in mind, as I -- as we went to put a map together and criteria we took a 1 percent, plus or minus 1 percent deviation. Some say, "Why did you do plus or minor 1 percent? Why didn't you do plus or minus 2 percent from 10 years ago?"

Well, since the last time we were here with this exercise there have been several court cases that have spoken to that and when you look at the criteria in the court case that was decided, it was then Georgia. It was the Larios case. There was an intentional concentration of one party and

the under population of another party. There were four different sets of criteria that were violated. And so what used to be the plus or minor 5 percent safe harbor no longer exists.

And Virginia is very unique. We have a tight timeline. People think we have rushed this through. But I will tell from 10 years ago we got the data on like the 7th or the 8th of May -- or March. It made it very tight for us to get everything done, passed, and to DOJ in time to be able to have primary elections in the summer.

This year we got the data on I think the 8th or something of February, which afforded us an opportunity to have time for some public comment and public hearings across the State with plans in hand as we went to the public.

We had six public hearings last fall. As chairman of the Reapportionment Committee we had a public comment period the last week of session that took the existing districts as they stood and we pulled in the data that we -- that was given to us by the Census, from the April 1st, 2010 Census.

Then we had a series jointly with the Senate, eight public hearings. We received a bevy of testimony from all walks of life; local-elected officials, registrars, community leaders, members of this body and the other body, private citizens just concerned about their community.

So as we went through that process we heard a lot of comments about communities of interest, but also protecting the one-man, one-vote, or the one-person, one-vote, and I think most importantly not retrogressing with regards to the number of majority/minority districts or the effective voting strength of those communities.

We heard a gentlewoman from Petersburg yesterday speak of an effective voting strength. And when we looked at what was the best thing to do, demographic shifts, population shifts caused a reconfiguring of the map as has been alluded by the gentleman from Henry and a article that was in the Roanoke Times today and some individuals yesterday.

I did note when I looked at the gentleman

from Henrico, I stayed up again late last night and I studied the plans from the college students and I did look at their plans and I did test, put the test to it. Because it's not an academic exercise for us. We're bound by the law. I know when I was in college I used to always -- "Man, these guys are really smart" when a professor would tell me how things would work in the lab or, you know, a theory.

When I got out in the real world sometimes it didn't really work. Gosh, it makes sense in a clean, sterile lab, but when you put it out in the world it just doesn't happen. It just doesn't work.

So I thought I would peel back the onion, as we like to say back at home, and I looked at the first place winner in the competition division. They had 10 majority/minority districts. We currently have twelve. Their deviation was plus or minus 4 and 4.75 percent. A total deviation of 9.5 percent, where we have 2 percent.

And the low black voting age population of

registered votes, age eligible, I should say, was 50.6 percent to get 10 districts. If I wasn't constrained by the law I could draw the prettiest map in town. They could be concentric circles like the gentleman from Henrico would love to have. They could be compact and contiguous.

But we're not about compact and contiguous when it trumps the rights and I think the ability of the one-person, one-vote to be equally represented.

The gentleman from Prince William has 190,000 people in his district today. The gentleman from Henry has 68,000. He has enough for a Senate seat within their deviation. Now, some would say that, you know, that's not right. So that's why we're here today to reset the maps for the next 10 years.

Then I looked at the University of Richmond first place commission, the commission division and they had seven majority/minority seats. They had a 9.8 percent deviation and their low on the percentage was 50.2 percent. The University of

Virginia, they were the second place in the competition, had nine majority/minority seats. They had a better deviation, 2.94 percent, but they still were as low as 59.2 percent on the voting age population.

Now, everything that I have seen in my 25 years in elected office has indicated to me that in the minority community there, there are not as many registered per hundred as there are in the white community and then the turn out is different as well.

So if you don't -- as we heard in our testimony, and as Delegate Dance and Spruill and some other individuals and leaders in the community have said, if you don't have an effective voting strength then there's a good chance that over the time of 10 years you will see a dilution of their ability and there is the community.

Not that I am -- it's not my seat. I think the gentleman from Chesapeake, Mr. Spruill, would agree with this. He can probably get elected with

a lower percentage. But he represents the community and the law states it's the community's ability to elect the candidate of their choice.

So that's why the testimony led me when drawing this map to not retrogress with the number of seats, which we didn't, and to keep an effective voting majority within each and every district. We had to keep the core of those districts, because I think that's very important, and because of the population shifts you did see a decrease in some of the percentages, but all were above 55 percent.

So as I continued to work, work this map I tried to do the best I could to meet the plus or minor 1 percent. It's obvious to me that from comments I received from colleagues who called me, who stopped by my office, who wanted to discuss their community and what the bill as introduced last week would do to that community if it passed, I said, "I'll be glad to sit down with each and every one of you who want to meet with me" and I did and I think through that process you have this

Census data?

DEL. JONES: I do know that the second floor I believe compiled the '10 elections, the '09 elections and I think they just got the '08 elections put in their computer.

DEL. ARMSTRONG: Further questions, Mr. Speaker.

MR. SPEAKER: Will the gentlemen yield?

DEL. JONES: I yield.

DEL. ARMSTRONG: Can the gentleman share with me what data that he used in order to determine the minority/majority district voter participation, what retrogression data he would have used in consideration in adopting a plan that that would have had 12 minority/majority districts?

DEL. JONES: I'd say to the gentleman that I used the data as it was provided by the Census Bureau to look at percent black population and percent black voting age population.

DEL. ARMSTRONG: Further questions, Mr. Speaker.

MR. SPEAKER: Will the gentlemen yield?

DEL. JONES: I yield.

MR. SPEAKER: The gentleman yields.

DEL. ARMSTRONG: Would the gentleman agree with me that just determining, in determining a majority-minority district is more than just determining what population that one has to analyze whether or not based on past voting patterns whether or not the minority population within such district has the ability to elect its candidate of choice and that requires more than just an analysis of raw Census data?

DEL. JONES: Mr. Speaker, I'd say to the gentleman he may be giving me more credit than he should. What I did, I listened to testimony that was provided during the process of all these public hearings that we had and I tried to respond to the community and what they felt was an effective percentage that they would need to have and effective representation of the candidate of they choice.

DEL. ARMSTRONG: Further questions,

Mr. Speaker.

MR. SPEAKER: Will the gentlemen yield?

DEL. JONES: I yield.

MR. SPEAKER: The gentleman yields.

DEL. ARMSTRONG: So the gentleman I guess is suggesting that there was not an analysis of that data that went into the preparation of the plan that's related in HB 5001?

DEL. JONES: Mr. Speaker, I would say to the gentleman that I gave him very succinctly what I used. His question to me was what did I use in my preparation of the plan to present to this body and I just gave him the answer of the process.

DEL. ARMSTRONG: Further question, Mr. Speaker.

DEL. JONES: I have not finished my answer.

DEL. ARMSTRONG: I apologize, Mr. Speaker.

DEL. JONES: I think it's called a PL. I always get it backwards, the data that comes from the Census Bureau. It has 264 categories. It's got every iteration you can think of combination of percentages. And simply what I looked at was

the existing core districts that were in place for the 12 majority-minority districts and I saw that in the 71st District in particular that the majority percentages dropped from almost 60 percent to 50 percent.

And so in putting together a plan I felt communities of interest were very important and that the percent of black and black voting age population were the two things that would drive putting those districts back to a competitive level where they might have retrogressed over the 10 years period.

DEL. ARMSTRONG: Further question, Mr. Speaker.

Mr. Speaker: Will the gentlemen yield?

DEL. JONES: I yield.

Mr. Speaker: The gentleman yields.

DEL. ARMSTRONG: Can the gentleman tell me whether he or any persons that worked with him in the development of the plan that resulted in HB 5001 took into account any retrogress analysis regarding minority performance in any of the 12

majority-minority districts that are part of HB 5001?

DEL. JONES: I would say to the gentleman I'm not aware of any.

DEL. ARMSTRONG: Further question, Mr. Speaker.

Mr. Speaker: Will the gentlemen yield?

DEL. JONES: Yes, sir.

Mr. Speaker: The gentleman yields.

DEL. ARMSTRONG: The gentleman just mentioned that communities of interest were an extremely important criteria. Would the gentleman say that that was a more important criteria in the development of the 12 majority -- majority-minority districts than would have been the racial voting pattern and whether or not the minority population of those districts can elect their candidate of choice?

DEL. JONES: No, sir. I'd say to the gentleman, as I stated in my opening remarks on the bill itself, that the most important items were one-person, one-vote plus or minus 1 percent

deviation, full compliance with the Voting Rights Act, and communities of interest, while important, are not the overarching, were not the overarching driver of this plan.

DEL. ARMSTRONG: Further question, Mr. Speaker.

Mr. Speaker: Will the gentlemen yield?

DEL. JONES: Oh, yes, sir, I yield.

Mr. Speaker: The gentleman yields.

DEL. ARMSTRONG: Could the gentleman tell me though where in terms of development of the 12 majority-minority districts what were the most important criteria that were considered of those that were developed?

DEL. JONES: Mr. Speaker, I would say to the gentleman there wasn't a most important criteria. You know, I'm not a very sophisticated person. I'm not the smartest guy in the room most of the time. And I looked at what had happened over the last 10-year period given the existing population and demographic shifts and I tried to restore back to the best of my ability to the levels that were

existing after House Bill 1 one passed in 2001.

DEL. ARMSTRONG: Further question, Mr. Speaker.

Mr. Speaker: Will the gentlemen yield?

DEL. JONES: I yield.

Mr. Speaker: The gentleman yields.

DEL. ARMSTRONG: So if gentleman indicates there was not a full retrogression analysis done, how does, how can the gentleman assure us that the 12 majority-minority districts that are comprised in HB 5001 are actually districts in which the minority population is able to select its candidate of choice?

DEL. JONES: Mr. Speaker, I would say to the gentleman that typically as I understand it, that is done in your process when you file with DOJ. I had to look at given the tight time frame that we had to deal with the percentage of black population and the percentage of black voting age population and that was the approach that I used.

10 years ago I don't -- didn't use the methods that the gentleman is suggesting. I am

confident from the testimony in the community that what is before you is a plan that will allow the minority community to elect a candidate of their choice based on the input received during the public hearing process and from the individual members of the Black Caucus and the black community.

DEL. ARMSTRONG: Further question, Mr. Speaker.

Mr. Speaker: Will the gentlemen yield?

DEL. JONES: Yes, sir.

Mr. Speaker: The gentleman yields.

DEL. ARMSTRONG: Well, would the gentleman not agree with me that he had available to him the resources of the Division of Legislative Services; that if the gentleman had requested a full retrogression analysis of the majority-minority districts it could have been accomplished?

DEL. JONES: Mr. Speaker, I would say to the gentleman that if he says so, I'll believe him.

DEL. ARMSTRONG: Further question, Mr. Speaker.

Mr. Speaker: Will the gentlemen yield?

DEL. JONES: I yield.

Mr. Speaker: The gentleman yields.

DEL. ARMSTRONG: So the gentleman would not dispute that statement, the affirmative statement that I just made?

DEL. JONES: Mr. Speaker, I do not have enough knowledge to agree or disagree. That is his opinion. I certainly -- he certainly is entitled to it.

DEL. ARMSTRONG: Further question, Mr. Speaker.

Mr. Speaker: Will the gentlemen yield?

DEL. JONES: I yield.

Mr. Speaker: The gentleman yields.

DEL. ARMSTRONG: The gentleman alluded in his answer that given the "time constraints." Is the gentleman suggesting that there was insufficient time in which to conduct a full analysis of the majority-minority districts in their population and whether they're able to select their candidate of choice?

DEL. JONES: No, sir, that was not what I was answering to his question. He's a very accomplished attorney and I understand where he's going with his questioning. My comment was just a statement of fact.

As a matter of fact, let me read -- gosh, I think I've got a couple quotes here that might help as we look at the, what we're having to deal with. This is Bob Gibson from the Sorenson Institution. "The Voting Rights Act for all practical purposes guarantees that districts with a majority of black or Hispanic residents stay about as strongly majority-minority or considerably Hispanic for the next 10 years as they were during the past decade."

And I think that that's pretty obvious to those who follow the process; that if you don't get it back as best as you can to the previous strengths that there's a chance that they might not perform as they should. Hence, the valuable nature I think of the testimony that we received from the minority community during the whole

DEL. ARMSTRONG: Well, in determining compliance with the Voting Rights Act and whether or not these majority-minority districts are able to select its candidate of choice, did the gentleman do anything more than speak with the members that may represent those particular districts at the present time?

DEL. JONES: Yes, sir. I spoke with several citizens along the way who came to see me or called me and I listened to what they had to say. We had individuals at the public hearings who stated their concern; that the dilution of the percentage of voting age population would greatly diminish their chance to be able to elect a candidate of their choice.

DEL. ARMSTRONG: Further question, Mr. Speaker.

Mr. Speaker: Will the gentlemen yield?

DEL. JONES: I yield.

Mr. Speaker: The gentleman yields.

DEL. ARMSTRONG: But the gentleman did not include any type of retrogression analysis? And

by retrogression analysis I would mean an analysis of voting patterns of particular minority districts over, say, the last five to 10 years that would indicate that those districts would continue to be able to select its candidate of choice.

DEL. JONES: Mr. Speaker, I'd said to the gentleman of the plans that have been submitted and/or circulated around that were complete and total plans, the plan that is before you, in my opinion, fully complies with the Voting Rights Act as 55 percent or higher, which is testimony that we heard during the public hearings of percentage voting age population.

DEL. ARMSTRONG: Further question, Mr. Speaker.

Mr. Speaker: Will the gentlemen yield?

DEL. JONES: I yield.

Mr. Speaker: The gentleman yields.

DEL. ARMSTRONG: But again, just to make certain I'm clear, that the gentleman believes it is in compliance, but the gentleman didn't, he or

his colleagues or members of the majority party, develop any empirical data that would tend to establish that?

DEL. JONES: I would say to the gentleman, Mr. Speaker, that I think anyone who thinks they know exactly what will be in full compliance probably hasn't been doing this very long. Because the process is that you have to submit to the voting right -- the section of the Department of Justice, the voting section, for preclearance. If there were certain litmus tests that had to be met you would not need to have preclearance.

So I think I've answered the gentleman's questions with regards to the retrogression analysis and I'd be glad to answer any other questions that he would have, but I have finished answering those questions.

DEL. ARMSTRONG: Further question, Mr. Speaker.

Mr. Speaker: Will the gentlemen yield?

DEL. JONES: I yield, yes, sir.

Mr. Speaker: The gentleman yields.

DEL. ARMSTRONG: Is the gentleman familiar that the Governor of the Commonwealth, Robert McDonnell, appointed a commission to develop a number of redistricting plans for the House of Delegates, the State Senate and congressional districts?

DEL. JONES: I am, I would say to the gentleman.

DEL. ARMSTRONG: Further question, Mr. Speaker.

Mr. Speaker: Will the gentlemen yield?

DEL. JONES: I yield.

Mr. Speaker: The gentleman yields.

DEL. ARMSTRONG: I would ask the gentleman if he is familiar that, that two of the plans issued by the Commission dealt with the redrawing or redistricting of House of Delegates lines?

DEL. JONES: I would say yes, sir, I am aware.

DEL. ARMSTRONG: Further question, Mr. Speaker.

Mr. Speaker: Will the gentlemen yield?

DEL. JONES: I yield.

Mr. Speaker: The gentleman yields.

DEL. ARMSTRONG: Is the gentleman aware that one of those two plans developed by the Commission created a 13th majority-minority district?

DEL. JONES: I would say to this the gentleman, Mr. Speaker, yes, I am.

DEL. ARMSTRONG: Further question, Mr. Speaker.

Mr. Speaker: Does the gentlemen yield?

DEL. JONES: I yield.

Mr. Speaker: The gentleman yields.

DEL. ARMSTRONG: Can the gentleman explain to me the reasonings in his putting together HB 5001 as to why he did not create a 13th majority-minority district?

DEL. JONES: Mr. Speaker, I'd say to the gentleman I think he's answered his own question with his line of questioning earlier about an effective -- I think he's conflicted or he's confused in his approach here.

I think his line of questioning earlier was

taking into the fact that I didn't do a high enough percentage to be -- to ensure that one would elect, a community could elect the candidate of their choice. I have looked at the 12 and the 13th plan, Option 1 and Option 2, and neither one of those plans met what I think from the testimony that we heard throughout this process that the effective voting age population needed to be north of 55 percent. Each of those plans had a low of I think 52, 52 percent.

And from my experience in 25 years of running for office, having gone door-to-door, I know from analyzing quote, unquote my election results where there's a lower voter turn out, and in my opinion based on what we had heard from testimony, something of in the 52 percent, I do not think would be an effective voting strength for that community to be able to elect their candidate of choice.

DEL. ARMSTRONG: Further question, Mr. Speaker.

Mr. Speaker: Will the gentlemen yield?

DEL. JONES: I yield.

Mr. Speaker: The gentleman yields.

DEL. ARMSTRONG: Can the gentleman cite to me any empirical data on any of the 12th or potential 13th minority-majority district that would indicate that something less than a 55 percent minority-majority district would not allow the minority community in those districts to elect their candidate of choice?

MR. JONES: Mr. Speaker, I think I've answered this question earlier and I'm not going to -- it is my opinion from what I have experienced and my belief and the testimony received from the community that they would like to have the best possible opportunity to elect the candidate of their choice and that further dilution of the voting age population would do, would do a couple of things, but maybe allow them not to have the ability to elect the candidate of their choice either in a primary or in a general election.

DEL. ARMSTRONG: Further question,

Mr. Speaker.

MR. SPEAKER: Will the gentleman yield?

DEL. JONES: I yield.

MR. SPEAKER: The gentleman yields.

DEL. ARMSTRONG: So the gentleman has stated that in his opinion nothing below a 55 percent minority-majority district would be sufficient for the minority community to elect its candidate of choice?

MR. JONES: I'm not sure he was listening closely. I said it's my opinion from the testimony that was received during our public hearings that the community felt that they needed a percentage of 55 percent or better. That was my response to the gentleman.

DEL. ARMSTRONG: Further question, Mr. Speaker.

MR. SPEAKER: Will the gentleman yield?

DEL. JONES: I yield.

MR. SPEAKER: The gentleman yields.

DEL. ARMSTRONG: The testimony the gentleman is referring to, was that testimony that was

received during official public hearings of the House Privileges & Elections Committee?

MR. JONES: Yes, sir, it was. I believe it was probably in the court record. We had a court reporter at all of our meetings.

DEL. ARMSTRONG: Further question, Mr. Speaker.

DEL. JONES: I yield.

MR. SPEAKER: The gentleman yields.

DEL. ARMSTRONG: So the gentleman is stating that the entire basis of his opinion was garnered at those public opinion -- public hearings in which evidence was received and the record and transcript made?

MR. JONES: No, sir, I didn't say the entire. The entirety ws not.

DEL. ARMSTRONG: Further question, Mr. Speaker.

MR. SPEAKER: Will the gentleman yield?

DEL. JONES: I yield.

MR. SPEAKER: The gentleman yields.

DEL. ARMSTRONG: Can the gentleman share with

Mr. Speaker.

MR. SPEAKER: Will the gentleman yield?

DEL. JONES: I would yield.

MR. SPEAKER: The gentleman yields.

DEL. ARMSTRONG: So while the gentleman received testimony from various groups, the gentleman did not affirmatively contact any such groups?

MR. JONES: I would say to the gentleman that I did not affirmatively contact anybody, mainly because I was trying to put together a map and a plan that would meet those two tenants; the one-person, one-vote and the Voting Rights Act.

DEL. ARMSTRONG: Further question, Mr. Speaker.

MR. SPEAKER: Will the gentleman yield?

DEL. JONES: I yield.

MR. SPEAKER: The gentleman yields.

DEL. ARMSTRONG: I would say to the gentleman that one of my concerns has been that this process is rushed and that there has been insufficient time for the public to comment once plans were

MR. SPEAKER: Will the gentleman yield?

DEL. JONES: I yield, yes, sir.

MR. SPEAKER: The gentleman yields.

DEL. MORRISSEY: Prefacing my question with a comment that I've got the empirical data in front of me of every single district and the percentage of VAP, black voting age population, with the House plan as compared with the percentage of the black voting population in the Commission's plan, can you tell me why in every single one of the districts, with the exception of two or three that are tied, the population in the House plan did not reach the same number as the population of the black voting age population in the Commission's plan?

MR. JONES: Mr. Speaker, I must admit to the gentleman -- I told my wife I wouldn't use any versus from songs, so I won't. I'm a little dazed and confused. I'm looking here at the -- what I have for the Commission plan, Option 1, and I have a high percentage of black voting age population of 56.8 and the low of 52.7.

Now, I can tell the gentleman that in House Bill 5001 that is substituted before this body, we -- every single, solitary district majority-minority is over 55 percent. Now, I know I wasn't that good at math, I'm not a math major, but from my reading of this and my double-checking it, that's what I have.

So maybe we just have -- you know, numbers can say different things to different people and I can stand to be corrected based upon what I've had available to me throughout this process and I have -- and I am detail person. I double-check it twice. You know, I'm not a very good carpenter, so I always measure three times before I cut one time.

So I'm looking at it and I do not agree with that statement. As a matter of fact, the average black voting age population is 54.4 percent in the 12 plan from the Commission.

DEL. MORRISSEY: Would the gentleman yield for another question?

MR. SPEAKER: Will the gentleman yield?

DEL. MORRISSEY: Given that the gentleman then studied the plan, I would ask him does he distinguish as there being a difference between a 55 BVAP versus 53 BVAP?

MR. JONES: Mr. Speaker --

DEL. MORRISSEY: That is; does the gentleman consider that a significant and meaningful difference?

MR. JONES: Mr. Speaker, I would say based on the testimony that we have, that we heard during the process I would say yes, based on the testimony from the community.

DEL. MORRISSEY: Would the gentleman yield for another question?

MR. SPEAKER: Will the gentleman yield?

DEL. JONES: I yield.

MR. SPEAKER: The gentleman yields.

DEL. MORRISSEY: Is the gentleman aware that the Governor's Bipartisan Commission that, as he already agreed, constituted constitutional scholars, as well as other academicians and professor and judges, were able to create a 13th

for another question?

MR. SPEAKER: Will the gentleman yield?

DEL. JONES: I yield.

MR. SPEAKER: The gentleman yields.

DEL. MORRISSEY: With respect to BVAPs, I note that the gentleman has repeatedly at least seven or eight times used the phrase "according to testimony that we received."

Not withstanding that, and given the fact that the gentleman just referred to the gentlewomen from Alexandria, Ms. Herring, Delegate Herring, who was able to win a district that had less than 50 percent BVAP, would you not agree that it is possible to elect an African-American representing 53 BVAP and not the mandated 55 BVAP?

MR. JONES: Mr. Speaker, I would say to the gentleman that I have in my 25 years of being in office -- when I first went to City Council we actually had an African-American who was representing now the fast growing area of Bennett's Creek in the Sleepy Hole Borough. And I would say yes.

I also had the chance when I served on the City Council to have a, a majority-minority district under perform and to elect a white person. Of course, four years later they elected a candidate of their choice. One would say that both were the candidates of choice.

So I would say to the gentleman, I would leave it to his devices to come to a conclusion. My job was to do the best I could to make sure we complied fully with the Voting Rights Act.

DEL. MORRISSEY: Would the gentleman yield for another question?

MR. SPEAKER: Will the gentleman yield?

DEL. JONES: I yield.

MR. SPEAKER: The gentleman yields.

DEL. MORRISSEY: Not withstanding whatever conclusions that I come to, I'm more interested in the conclusions that you or the members of the P&E came to.

Would you not agree that if there is a district that was somewhere around 51 BVAP or 52 BVAP that they ought to have a, the opportunity to

MR. SPEAKER: The gentleman yields.

DEL. MORRISSEY: Is the gentleman aware that one of the student's plans that complied with compactness, contiguity, community of interest equal population and the Voting Rights Act had a county/city split that was half of what HB 5001 was?

MR. JONES: Mr. Speaker, I can't speak to what that plan was. I would just let the gentleman know that once again there was a reason that I had -- that we in the P&E Committee had communities of interest, Number 5. Because Number 1 was one-person, one-vote. Number 2 was compliance with the Voting Rights Act. Contiguity, compactness are required by I think our Constitution and code and single member districts we did -- we went there and did that back 30 years ago. So it was Number 5 for a reason.

DEL. MORRISSEY: Would the gentleman yield for another question, Mr. Speaker?

MR. SPEAKER: Will the gentleman yield?

floor.

DEL. DANCE: Thank you. As a member of the House Redistricting Committee I support House Bill 5001 in its substitute form as we have before us and it's again for more than just the one reason that it mirrors the -- or doesn't mirror, but it does support the 12 minority districts that we have now and it does provide that 55 percent voting strength that I was concerned about as I looked at the model and looked at the trending as far as what has happened over the last 10 years.

And one of the best examples I can give for that and most concern was the area that was mentioned prior and that is Delegate Tyler's area in the 75th. Because Delegate Tyler is an African-American that now finally sits in a minority seat that's been there for years, but there have been three tries by minorities in the past to win that seat and they were not able to do so.

And if that district is below that 55 percent voting strength, then I don't think she would be

able to hold the seat that she now holds today and I was really, really concerned about that. That issue was addressed and it is now in that House Bill 5001 and I'm glad it's there.

That is the -- and for the rest of the house -- or the minority districts, it shows 55 percent voting. And it's voting. Not just people being there, but the effective opportunity for them to hold minority seats. And not just for us incumbents that are in the seats, but for those that would come after us.

And as was mentioned by Delegate Hope and he was asking about the 27th, the 69, the 70, 71, they represent minority seats. Not the 27, but the 69, the 70, the 71; they represent minority seats (inaudible words) even though minorities might not be in there. And if we are to preserve the rights for minorities to have a voice, as to whether or not they want to have a minority serve them or someone of the majority persuasion, that they have that choice. And they could lose that choice if they did not have the voting strength

DEL. ARMSTRONG: Mr. Speaker, Ladies and Gentlemen of the House, I think that I oppose HB 5001 and there are public policy reasons why I would do so, but I'm not going to talk about those on engrossment.

What I would like to restrict my comments to is what I perceive as a legal analysis of where we are. Now, regardless of the comments that have been made here on the floor, Virginia is subject to the Voting Rights Act, Sections 2 and Section 5. Regardless of whether we've talked to one another, not talked to anyone, have extended courtesies, not extended courtesies; it doesn't matter. We either comply with the Voting Rights Act. The bill is flawed. It will not be approved at the Justice Department or, let's not forget, that the Attorney General has the option of filing in federal court in the District of Columbia.

What concerns me, Mr. Speaker, in listening to the debate here today is there appears to have been a failure to analyze the 12 minority-majority districts in terms of its voting pattern.

Certainly the gentleman from Suffolk, who clearly I think from the discussion here today, oversaw the bill and the process has heard a number -- or has had a number of public hearings where he listened to constituents, but that is antidotal information.

Without a, a, a, an analysis of retrogression of the voting patterns one can't tell, for example, whether or not a 53 percent minority district might actually be able to elect its candidate of choice. Somewhere else perhaps only 57 or 58 percent. And the gentleman has enunciated an arbitrary figure of 55 percent and nowhere that I can find in the case law or in the decisions that have come out of the Department of Justice have indicated that that is a magic number. It is arbitrary.

And that there appears to have been a failure to do this retro, retrogression analysis. We don't know whether or not these districts have been, I'll just the terms cracked or packed, which is the slang term for diluting minority districts

or putting too much minority population in there.

And I think that the reason that we have gotten to this point is there's been insufficient time for this analysis to be conducted. That this process has been rushed. We all know that Virginia by having -- virtue of the fact that our elections are in the off year and that occurs in 2011 immediately upon the presentation of the Census data.

Still, though, we're, we're essentially looking at one week from the time that these, this plan was developed until it's voted on. And with insufficient time for various civil rights organizations or other interest groups to conduct an analysis, what we don't know here today is whether or not a 13th or perhaps 14th minority district could be created and done so without dilution of the 12 existing minority-majority districts.

Certainly no one -- I nor anyone else is suggesting that we dilute the 12 existing ones, but if a 13th and certainly a 14th can be

created -- I received late yesterday information that a 14th district might be able to be created in Southside, Virginia with, with a 50.25 minority population. That without a retrogression analysis one would not know, that may very well -- that that district be able to elect its candidate of choice.

And so regardless of how we got to this point, if this bill doesn't comply with Sections 2 and 5 of the Voting Rights Act, this bill is going to be invalidated by DOJ or the first federal court that deals with it. And I think we -- and I don't demean the gentleman. I don't dispute him at that he stayed till 2:00 in the morning working on this, but if you haven't done the necessary analysis to determine what the minority impact is on the minority community, we have failed and this plan has serious potential of being rejected.

The other thing that lastly I would say, that the gentleman from Arlington and his questions, in my review of particularly districts in northern Virginia there appears that Republican districts

proposal, House Bill 5001, offer minorities the same or even a greater opportunity to elect candidates of choice as the current plan. I don't believe that it does, Mr. Speaker. I think it racially dilutes some competitive districts, and case is in part is in Northern Virginia, and I urge my colleagues to reject engrossment.

Thank you, Mr. Speaker.

MR. SPEAKER: The gentleman from Henrico, Mr. Morrissey.

DEL. MORRISSEY: Thank you, Mr. Speaker.

DEL. MORRISSEY: Mr. Speaker, I rise to speak in opposition to House Bill 5001.

MR. SPEAKER: The gentleman has the floor.

DEL. MORRISSEY: Thank you, Mr. Speaker. I'd also urge the body to vote against 500-, HB 5001. While during my remarks and others we spoke about compactness and we spoke about communities of interest. My focus, likewise, would be on complying with the Voting Rights Act. I think the empirical evidence is somewhat overwhelming, Mr. Speaker, that we could produce effectively a

13th and a 14th majority-minority district.

The 14th majority-minority district would be 50.25 black voting age population. As the minority leader said, the figure of 55 percent is something that was pulled out of the sky. We have people in this body that are elected with 53 and as the delegate from Suffolk said, even under 50 percent.

As my good friend and brother from Chesapeake, Delegate Spruill said, perhaps mistakenly, the goal isn't to elect people of color. The goal is pursuant to the Voting Rights Act to have enough majority-minority districts so that there is the opportunity to elect people of color. There is the opportunity under the Governor's plan, Mr. Speaker, that was decidedly nonpartisan. It was --

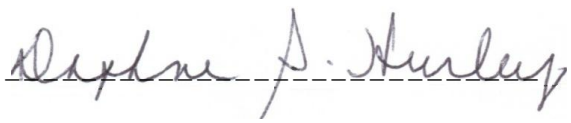
MR. SPEAKER: The House will come to order.

DEL. MORRISSEY: It constituted constitutional scholars who paid attention to the U.S. Constitution and the State Constitution. There were academics who went around the State

C E R T I F I C A T E

I, Daphne S. Hurley, Court Reporter, certify that I transcribed from digital recording of the proceedings held on the 5th day of April 2011.

I further certify that to the best of my knowledge and belief, the foregoing transcript constitutes a true and correct transcript of the said proceedings. Given under my hand this 3rd day of May 2015.



Daphne S. Hurley

My commission expires: August 20, 2018
Notary Public in and for
the State of Maryland

Exhibit 38

Exhibit 38

From: Chris Marston <chris.marston@gmail.com>
Sent: Wednesday, April 6, 2011 4:09 PM
To: scj <scj@schrisjones.com>
Subject: AP_Blk

Chris,

I ran the numbers on HB 5001 as engrossed--
AP_BVAP
Avg-58.2%
Hi-61.9%
Low-55.7%

BVAP
Avg-57%
Hi-60.14%
Low-55.02%

AP_ means all parts, so it includes anyone who checked Black in whatever combination with any other races.

It will take a considerable amount of time to run it for other plans.

Thanks,
Chris

Exhibit 39

Exhibit 39

PRIVILEGES AND ELECTIONS

REDISTRICTING

SENATE HEARING

BEFORE: SENATOR JANET HOWELL, CHAIRWOMAN

PLACE: COMMONWEALTH OF VIRGINIA

GENERAL ASSEMBLY BUILDING

RICHMOND, VIRGINIA 23218

DATE: APRIL 7, 2011

TIME: 2:00 p.m.

Crane-Snead & Associates
4914 Fitzhugh Avenue, Ste 203
Henrico, Virginia 23230
804-355-4335

5.

MADAM CHAIR: Sure.

SENATOR VOGEL: When Senator Watkins and I undertook to do a map, we were basically going through the same exercises that anybody would go through, and that was to come up with a map that we felt was as clean as possible, was as considerate of the parameters set forth in the law, and trying, really, as a test, to see, could we get, for example, half a percent deviation districts that we believed were -- that met those criteria.

So when it came to Section 5 -- I just want to be very clear about this -- that we believed that that was not really a question that was subject to any debate. The lowest amount of African Americans in any district that has ever been precleared by the Department of Justice is 55.0. And I think there is a legitimate reason for that, and that reason is if you want to afford minority districts the opportunity to elect a minority to the House or to the Senate. If you go back and you look over time in cases where legislators have argued that you can go below that percentage, the outcomes have been, in fact, pretty stark. And in these cases, African Americans have not been elected.

And I have -- if you'll just bear with me for a moment, I'm going to provide you with a couple of

examples. Senator Lucas in 2001 had a special election in the 4th Congressional District, where the district was over forty percent African American, but not over fifty percent, that failed to elect Senator Lucas. And while that's a much lower number than we're talking about, that's relevant.

In 1991, where her district was 56 percent black voting-age population, she was --

MADAM CHAIR: Excuse me. Was that congressional?

SENATOR VOGEL: Yes, that was congressional.

MADAM CHAIR: Thank you.

SENATOR VOGEL: In 1991 Senator Lucas had an election where her district was 56 percent black voting-age population, or BVAP, and she won that race. But, bear in mind, she only won that with 51.8 percent of the vote. So that's 56 percent.

In Georgia in 2002 -- and I think this is the one that's most instructive, and this is the one that we considered carefully in trying to determine, you know, are we going to break any new ground here at 55 percent, or should we not be consistent with the law and consistent with what the Department of Justice has said. That is, in Georgia, in 2002, the Senate majority plan dropped the black voting-age population of the Black Senate majority

leader's district to 51 percent BVAP, that's black voting-age population, and dropped the black voter registration percentage to about 49.5 percent.

Here is what's critical there. The Senate majority leader lost his election after he testified that his district would, in fact, elect an African American. I think that's very relevant here. There was no magic in us trying to break any new ground here. We were just simply following what, I believe, is not subject to any question; that is, as of today, the lowest percentage that the Department of Justice has ever approved is 55.0.

Thank you very much.

SENATOR MCEACHIN: Madam Chair.

MADAM CHAIR: Senator McEachin.

SENATOR MCEACHIN: In response to that -- and I'll be happy to share with you this information once I get my hands on it -- but first of all, I take issue with the fact that the lowest number that has ever been approved by the DOJ is 55.5. That's number one.

Number two, Madam Chair, what I would suggest to the Committee is that the comments that my good friend has just made about the Voting Rights Act has sort of turned the matter on its head. The purpose of the Voting Rights Act is not -- and I repeat not -- to elect African Americans. The purpose of the Voting Rights Act is to

give African Americans the opportunity to elect a candidate of their choice. The fact that the Senator from Georgia that you referenced lost the election simply means that that was not the candidate of their choice. That does not mean that the number 50.1 percent, or whatever the number was that you cited, was too low.

I would also suggest that you look at recent Virginia history and understand. Congressman Scott, when he was first elected to the General Assembly, was elected from a majority white district. I would also submit to you that, as I understand it -- if I'm wrong, someone please correct me -- that an African American mayor was elected in Portsmouth, elected in Newport News, and elected in Hampton, none of which have majority African American populations, and yet all were successfully elected mayor of their cities.

So what I would suggest to you is that the magic number that you're throwing out -- or that you're suggesting, pardon me -- is, in fact, not what is required. What is required is that districts allow African Americans to select a candidate of their choice.

SENATOR VOGEL: Madam chair.

MADAM CHAIR: Senator Vogel.

SENATOR VOGEL: I would just like to respond, if I may, in addressing that question. I don't disagree with

my colleague's comments about what the underlying mission is of Section 5. There is no question. It is to ensure that that population, the minority population, has the ability to elect a candidate of their choice. That is absolutely true.

But it has been the position of the Department of Justice, and I will speak to this very confidently, that 55.0 is the percentage that they believe is what is qualified, and that has been, at least in the past to date, their position regarding what it would take to be able to elect a candidate of your choice, whomever that might be.

Thank you, Madam Chair.

MADAM CHAIR: Thank you.

Senator Watkins, did you have more in your presentation?

SENATOR WATKINS: Yes, I did.

MADAM CHAIR: All right. Go ahead.

SENATOR WATKINS: I think that it's important. You know, this is an important statement of what we are trying to do here. There's no question about that. We have to comply with the law. But, also, this is Virginia. These are our citizens that we're dealing with, in terms of their representation. And it's all of the citizens. It's not one community or another.

If I could, I'll just discuss briefly the different regions of the state, and what we did, and the rationale behind it.

Hampton roads. This plan recognizes that Virginia Beach is Virginia's largest city. The population exceeds two full Senate districts. Accordingly, there is one district, District 2 -- and I will point out, if you notice, we renumbered all of the districts. We tried to use some rationale with starting in the east with one, moving through Virginia and mostly the twenties and thirties, and moving over into the southwest with the thirties and up to the forties. They are different numbers. So nobody gets wed to any number.

So District 2 is entirely within Virginia Beach, and in District 1, 75 percent of the population is from Virginia Beach. And this should allow Virginia Beach to have two Senators whose primary, if not exclusive, focus is on that city.

Planned districts, based primarily in Chesapeake, District 3; Norfolk, District 5; Portsmouth, District 4, allowing those cities to elect senators who represent them. The peninsula contains one entire Section 5, District 7, and the bulk of District 9. The 6th District runs between Norfolk and the peninsula, with the population between the localities relatively evenly split,

which should provide a healthy competition and a Senator who will give both parts of Hampton Roads their strong attention.

The slow population growth in Hampton Roads necessitates a district being lost from this region. Because slow population growth has impacted both the peninsula and South Hampton Roads, it makes sense that half of the loss should come from each side of the water.

All river, all water crossings in this area are over bridges. They're not merely water connections. District 1 uses the Chesapeake Bay Bridge Tunnel to connect with Virginia Beach in North Hampton County. District 6, using the Hampton Roads Bridge Tunnel, connects between Norfolk and Hampton. And the 8th District, using the James River Bridge, connects with between the Isle of Wight and Newport News. In the 9th District we use the Coleman Bridge to connect between York and Gloucester Counties.

The Metro Richmond population growth over the last decade has been comparable to that of the rest of the state. Accordingly, Metro Richmond is entitled to maintain the same representation that it currently has. That is achieved in this plan. It keeps two Section 5 Districts in 10 and 11. It keeps a compact district in Western Henrico, 15; and a compact District in

Chesterfield and Colonial Heights, 12.

The 16th and the 14th Districts are also representing parts of Metro Richmond. In Northern Virginia, the districts in Northern Virginia are drawn to respect jurisdictional boundaries and communities of interest. I understand Oakton and Senator Peterson don't particularly jive. One district, 24, is entirely within Arlington County, while Alexandria is kept whole in a neighboring district, 23.

Whenever possible, within the half-percent deviation, main thoroughfares are used to divide districts, such as I95, the Capital Beltway, the Dulles Toll Road, et cetera. Fairfax City, Falls Church, Arlington and Alexandria have a population of 1.46 million, enough to justify 7.32 seats in the Senate of Virginia.

There are seven districts that stay entirely within these localities, and only one district that comes into Fairfax from the south or west, 29. To pick up the remaining population, expanding out into Loudoun, Prince William, Manassas, Manassas Park, the localities of the Northern Virginia planning district had the population of 2.23 million people, enough to justify 11.15 Senate seats.

There are 11 districts entirely within this

region, with the 18th District coming into South Prince William to pick up some of the remaining population. Western and southwestern Virginia is drawn to keep counties intact. The 40th district has no split localities, while the neighboring 39th has only one split, and that's in Pulaski County, to keep within the half-percent deviation.

Currently, there are three rather large districts in Western Virginia; the 21, 22, and the 25, and this map makes two more important districts, the 35th, based around Roanoke, and the 33rd, based around Charlottesville. Much of the remaining population goes into the 34th District, which is the more rural district on the outskirts of Roanoke and Charlottesville. It was determined that two compact and one larger district would be preferable.

I would point out that what we wind up with, when all is said and done, is there are two pairings where incumbents wind up in the same district. In both of those pairings, it's a democrat and a republican, both of them. There are no pairings of two republicans or two democrats. It's a republican and a democrat, and there are two open seats that are available.

And, Madam Chairman, that is the synopsis, if you would. I apologize for it taking so long, but I think that it clearly gives us a good opportunity to -- a good

plan.

MADAM CHAIR: This is a very important subject, so thank you for giving us that explanation.

Senator Deeds.

SENATOR DEEDS: Madam chair.

Senator Watkins, the district that I represent, Bob Gibson, who is now at the Sorensen Institute, once called it a bat out of West Virginia. That was the district you all drew, the 25th, ten years ago. It looks like now the 34th district, which would be the one that I'm in, would be a boomerang district; wouldn't you agree?

SENATOR WATKINS: I'm not very good at art.

SENATOR DEEDS: Yes, I can tell. Ink spots.

SENATOR WATKINS: But I think you're in there on your own, and I think it's a democratic district.

SENATOR BARKER: Madam Chair.

MADAM CHAIR: Senator Barker.

SENATOR BARKER: Madam Chair, just a couple of comments, because I think the discussion on the Voting Rights Act is very significant.

My understanding is that there have been a number of districts approved with less than 55 percent African American, and, in fact, many of the districts we're looking at right now are less than 55 percent African American population, voting-age population, at this

particular time.

I think it's also important to point out that we do have a number of individuals, African Americans, who have been elected in districts that are far lower than fifty percent, than 55 percent African American voting-age population. Just in Northern Virginia alone I can think of many, many officials in districts that are less than 25 percent, and many incidents of less than ten percent who have been elected, including the Mayor of the City of Alexandria, two members of the House of Delegates, former County Board Chair, the Sheriff of Prince William County, School Board members at large, within Fairfax County School Board members, members from individual districts.

So I think it's important to ensure that African Americans have a chance to have influence in districts beyond just the Voting Rights Act Districts, and I think they certainly are exercising that to a substantial degree now.

I think it is important that we not pack African American voters into a very, very limited number of districts, or into a majority in any way that to some extent disenfranchises their opportunity to have influence in other districts.

SENATOR VOGEL: Madam Chair.

MADAM CHAIR: Yes, Senator Vogel.

SENATOR VOGEL: I wonder if you would indulge me for a moment just to speak more broadly to Senator Watkins' proposal.

MADAM CHAIR: Of course.

SENATOR VOGEL: I would just like to say that, in speaking broadly as an exercise in comparison, I would like to say that, in deference to the fact that Senator Watkins has done this four times, he brings a perspective to this that some of us don't have.

But I will say that he undertook this exercise -- and I was happy to participate in that process -- to, again, hearkening back to my earlier comments, really test to see how good a map can you draw, how low can you keep those deviations respecting One Person/One Vote. I would be remiss if I didn't just take a moment to talk about the deviation issue.

The deviation issue, as evaluated, is less about -- and I know we had this discussion, and I know Senator Puckett talked about this, and he was right to be very concerned about this notion of not breaking up towns, not splitting local jurisdictions. And, certainly I'm hearing a lot from some of my local jurisdictions about this. At the end of the day, the notion is that that is our underlying mission, is to try to keep those communities of interest, respecting local boundaries,

together.

And that deviation discussion -- is five percent appropriate, is two percent, does that have any bearing on that? One of the things we attempted to do was to see how low we could do it. We got it to half a percent, which I thought was fairly extraordinary, keeping more of these communities together. That, I thought, was pretty important.

But more than the percentage deviation, is there a pattern to that deviation, because when someone wants to come in and challenge you, they're not challenging you on your percentage nearly as much as they're challenging you on is there a pattern.

As we tried to do this around the state and keep that deviation at half a percent, we were very mindful, again, looking at the legal parameters. If we're trying to get through a plan that has the greatest likelihood of being precleared -- because I think all of us sitting here, no matter where we are in this process, would have to say that the underlying goal of this process is to pass out a map that will preclear, that will pass legal muster, whether it's with the Department of Justice, or, if it's in litigation, a Court will say is okay, legally okay, indefensible. Because all of us would like to have that certainty come November, what district we may or may not

be running in.

So, that said, this going back to the deviation issue, we were careful to be considerate of that and not create any situation where there's a pattern. By contrast, in the map that has been introduced, I do believe that there's a serious issue. And I know that Senator Watkins spoke to that briefly. That notion that there is a pattern to deviation, to the extent that those communities that are growing more slowly are underpopulated within that deviation, and the communities that are growing more quickly are overpopulated somewhat.

I think that that does pose a concern, somewhat. Again, getting to the place where we think we can preclear this plan, I think it's useful to be mindful of that consideration and mindful of that future objection, because if you are looking at this in the context of One Person/One Vote, that is something that's, after all, the whole mission of redistricting.

The notion that you have poor Mark Herring sitting in the 33rd District on two full Senate seats. That is both an undue burden on him as a legislator, and, two, an issue for the people he represents.

So where we don't want to be is in a position where we're starting right out of the box, and districts like this that Senator Herring represents, with those

deviations that already start with them being overpopulated. So I thought that was important to mention, just in terms of contrast and what your plan did.

I would like to go back and just one more time mention this whole notion of retrogression. I did not mean to get us off track there in the discussion of Section 5. I only mention that because I think it was raised, and because it is, again, key. I think it goes to the very core of what we're trying to do when we get out of the legislative session. I don't think any of us want to come back here in June and July and August, and then potentially run again next year, because we weren't careful enough about some minor tweaking to put forward a plan that we believe will pass legal muster.

And Senator Barker -- the Senator from Prince William, I apologize. I'm supposed to address you that way -- was correct in commenting about the elections that you referenced. That is absolutely true. People have been elected, even though they didn't have a majority in their district. But that isn't -- and I think I perhaps was not as clear as I should have been -- that isn't the underlying goal of what Section 5 preclearance, addressing retrogression, goes to.

The notion is that you're looking not to

retrogress the benchmark. That is where we are. And that is why I believe, and I have not discussed this with my colleagues in the House, this whole notion of what benchmark they used. But they clearly believed that was the law, because if you look at the House Plan, they were careful not to retrogress below 55 percent, which is the benchmark in the Commonwealth of Virginia.

And I think that is, under Section 5, it prohibits -- and let me just be clear about what Section 5 does -- it prohibits retrogression. It's not out there talking about any sort of arbitrary standards. But, more importantly, it is talking about retrogressing minority districts that change the voting practice or procedure that would leave minorities in a position worse off in the new plan than they were under the old benchmark plan.

That's nearly all that was about, keeping that 55 percent. And I assume my colleagues in the House undertook it for the exact same reason; it is a benchmark question. And in the Commonwealth of Virginia right now in the Senate, 55 percent is the benchmark.

I will tell you that the most recent Virginia redistricting rejection from DOJ was in 2002 -- and I went back and looked at this just for this issue -- where Cumberland County dropped the black total population, or BVAP, Voting-Age Population of the district from 55.9

percent to 55.3 to percent. Now, clearly, that's above 55. And they also dropped -- sorry, 55.9 to 55.3.

DOJ noted that, because the alternatives could be drawn in a way that didn't drop it, that would have, in fact, increased it, that the drop demonstrated an intent to retrogress, and it didn't preclear that proposal. That's pretty stark.

So I just thought I would mentioned this as an intent to be clear about this as an issue of benchmarking, and that was the whole notion of the 55 percent.

Thank you.

MADAM CHAIR: Yes, thank you, Senator Vogel. I couldn't agree with you more that we are all very eager to have our plan precleared, and I want to assure you that we meet all the legal requirements of both Federal and State law, as well as the Constitutions.

SENATOR WATKINS: Madam Chair, that's my plan.

MADAM CHAIR: Okay. Were there any other questions from members? Okay. Would anyone in the public like to address this amendment in the nature of a substitute or Senator Watkins?

Okay. Well, then we have on the floor a motion to adopt Senator Watkins' amendment in the nature of a substitute.

SENATOR MCEACHIN: Madam Chair.

enormous amount of dissatisfaction across all these cities. These cities have different interests, different economies, different conditions, as many cities across the Commonwealth do. I don't think that has been considered.

We've eliminated a seat. We've taken one, the remaining Senate seat is in Virginia Beach, and 65 percent of the voters from Virginia Beach will be represented by that seat, and, yet, 35 percent from Chesapeake, a city of 250 thousand.

So I'm not going to try to ramble on and on here, just to say that I do think also we have to work, and we must try to work, particularly given this two-percent variance, which we just committee-approved. I didn't vote for it, but to do a better job of putting cities and towns of interest and the people that are represented -- this is about people who are represented -- into a much more orderly, systematic way and make improvements.

I agree with the Senator from Bath County, that if we made mistakes ten years ago, we ought to try to improve upon them. I will guarantee we will be back here ten years from now -- maybe not us, but someone will be back here ten years from now, saying what were they thinking.

Thank you.

MADAM CHAIR: Thank you. Did anyone wish to

speak? If not, before us now is a motion to report an amendment in the nature of a substitute for House Bill 5001, as amended.

The Clerk will call the role.

CLERK: Senator Martin.

SENATOR MARTIN: No.

CLERK: Senator Deeds.

SENATOR DEEDS: Yes.

CLERK: Senator Whipple.

SENATOR WHIPPLE: Yes.

CLERK: Senator Obenshain.

SENATOR OBENSHAIN: No.

CLERK: Senator Puckett.

SENATOR PUCKETT: Yes.

CLERK: Senator Edwards.

SENATOR EDWARDS: Aye.

CLERK: Senator Blevins.

SENATOR BLEVINS: No.

CLERK: Senator McEachin.

SENATOR MCEACHIN: Aye.

CLERK: Senator Peterson.

SENATOR PETERSON: Aye.

CLERK: Senator Smith.

SENATOR SMITH: No.

CLERK: Senator Barker.

SENATOR BARKER: Yes.

CLERK: Senator Northam.

SENATOR NORTHAM: Yes.

CLERK: Senator Vogel.

SENATOR VOGEL: No.

CLERK: Senator McWaters.

SENATOR MCWATERS: No.

CLERK: Senator Howell.

MADAM CHAIR: Yes.

CLERK: Nine ayes, six nays.

MADAM CHAIR: The bill is reported, nine ayes, six nays. There being no more business to come before the Committee, the Committee will rise.

NOTE: At this time the hearing was adjourned.

CERTIFICATE OF COURT REPORTER

I, Kellie Milner, hereby certify that I was the court reporter in the Privileges and Elections Hearing for the Senate on the 7th day of April, 2011, at the time of the hearing herein.

I further certify that the foregoing transcript is a true and accurate record of the incidents of the hearing herein, to the best of my ability.

Given under my hand this 8th day of May, 2011.

_____
Kellie Milner, Court Reporter

Exhibit 52

Exhibit 52

Report of John B. Morgan Regarding Plaintiffs' Alternative Plan and the Enacted Plan

Page v. State Board of Elections

Background Information

My name is John B. Morgan. I have been retained by the defendants to offer an expert opinion regarding Plaintiffs' Alternative Plan and the Enacted Plan. I hold a B.A. in History from the University of Chicago. As detailed in my CV, attached as Exhibit A, I have extensive experience in the field of redistricting, working on redistricting plans in the redistricting efforts following the 1990 Census, the 2000 Census, and the 2010 Census. I have testified as an expert witness in demographics and redistricting. I am being compensated at a rate of $250 per hour for my services in this case.

In preparing this analysis, I considered the following: the legal briefs submitted to the court, reports by Dr. Michael McDonald and Dr. Thomas Brunell, court cases mentioned in the briefs and reports, relevant portions of the Sec. 5 preclearance submissions to the Department of Justice, various maps and datasets from the current and previous congressional districts, the Plaintiffs' Alternative Plan maps and data, the 2010 redistricting PL94-171 data and Census geography data from the Census Bureau, political and redistricting data from the Department of Legislative Services and the Virginia State Board of Elections, and the Maptitude for Redistricting geographic information system (GIS) software and manuals from Caliper Corporation.

The redistricting geographic information system (GIS) software package used for this analysis is Maptitude for Redistricting from Caliper Corporation. The redistricting software was loaded with the census PL94-171 data from the Census and the Census geography as well as available redistricting and political data from Department of Legislative Services and the Virginia State Board of Elections. The full suite of census geography was available, including Census Places, Voting Districts, water bodies, and

roads, as well as Census Blocks which are the lowest level of geography for which the Census Bureau reports population counts.

The Department of Legislative Services provided political data for 2008 and 2009 for use during the General Assembly redistricting process. I prepared reports and analysis based on this data for the Benchmark, Enacted and Alternative Plans. In addition, I was provided data for the 2012 presidential election by counsel and asked to analyze this data for the Benchmark, Enacted, and Alternative Plans.

Table 1. Benchmark 2001 Congressional Districts Election Data

CD	Current Party	Rep. Gov '09	Dem. Gov '09	Rep. Lt. Gov '09	Dem. Lt. Gov '09	Rep. Att. Gen. '09	Dem. Att. Gen. '09	Rep. Pres. '08	Dem. Pres. '08	Other Pres. '08	Rep. U.S. Sen. '08	Dem. U.S. Sen. '08	Other U.S. Sen. '08		Rep. Pres. '12	Dem. Pres. '12	Other Pres. '12
1	R	65%	35%	62%	38%	63%	37%	53%	47%	1%	38%	61%	1%		52%	47%	1%
2	R	62%	38%	56%	44%	60%	40%	50%	50%	1%	34%	64%	1%		48%	50%	1%
3	D	34%	66%	33%	67%	35%	65%	25%	75%	1%	18%	81%	1%		23%	75%	1%
4	R	61%	39%	59%	41%	61%	39%	50%	49%	1%	37%	61%	1%		49%	50%	1%
5	R	61%	39%	60%	40%	62%	38%	52%	47%	1%	35%	64%	1%		52%	46%	2%
6	R	67%	33%	66%	34%	67%	33%	58%	41%	1%	41%	58%	1%		59%	40%	2%
7	R	66%	34%	63%	37%	65%	35%	54%	45%	1%	39%	59%	1%		54%	44%	1%
8	D	39%	61%	37%	63%	36%	64%	32%	67%	1%	25%	73%	1%		30%	68%	1%
9	R	67%	33%	66%	34%	66%	34%	59%	39%	1%	36%	63%	1%		64%	34%	2%
10	R	61%	39%	58%	42%	58%	42%	48%	51%	1%	38%	61%	1%		48%	51%	1%
11	D	55%	45%	52%	48%	52%	48%	44%	56%	1%	35%	64%	1%		42%	57%	1%

Table 2. Enacted Congressional Districts Election Data

CD	Current Party	Rep. Gov '09	Dem. Gov '09	Rep. Lt. Gov '09	Dem. Lt. Gov '09	Rep. Att. Gen. '09	Dem. Att. Gen. '09	Rep. Pres. '08	Dem. Pres. '08	Other Pres. '08	Rep. U.S. Sen. '08	Dem. U.S. Sen. '08	Other U.S. Sen. '08		Rep. Pres. '12	Dem. Pres. '12	Other Pres. '12
1	R	66%	34%	63%	37%	64%	36%	53%	46%	1%	39%	60%	1%		53%	46%	1%
2	R	62%	38%	57%	43%	60%	40%	50%	49%	1%	35%	64%	1%		49%	50%	1%
3	D	31%	69%	29%	71%	31%	69%	22%	78%	1%	16%	83%	1%		20%	79%	1%
4	R	63%	37%	60%	40%	62%	38%	51%	48%	1%	39%	60%	1%		50%	49%	1%
5	R	62%	38%	61%	39%	62%	38%	52%	47%	1%	36%	63%	1%		53%	46%	2%
6	R	67%	33%	67%	33%	68%	32%	58%	41%	1%	42%	57%	1%		59%	39%	2%
7	R	68%	32%	65%	35%	67%	33%	56%	43%	1%	41%	58%	1%		57%	42%	1%
8	D	40%	60%	38%	62%	38%	62%	33%	66%	1%	26%	73%	1%		31%	68%	1%
9	R	66%	34%	66%	34%	66%	34%	59%	40%	1%	36%	63%	1%		63%	35%	2%
10	R	63%	37%	60%	40%	60%	40%	50%	50%	1%	39%	60%	1%		50%	49%	1%
11	D	50%	50%	47%	53%	47%	53%	38%	61%	1%	30%	68%	1%		36%	62%	1%

Table 3. Plaintiffs' Alternative Congressional Districts Election Data

CD	Current Party	Rep. Gov '09	Dem. Gov '09	Rep. Lt. Gov '09	Dem. Lt. Gov '09	Rep. Att. Gen. '09	Dem. Att. Gen. '09	Rep. Pres. '08	Dem. Pres. '08	Other Pres. '08	Rep. U.S. Sen. '08	Dem. U.S. Sen. '08	Other U.S. Sen. '08		Rep. Pres. '12	Dem. Pres. '12	Other Pres. '12
1	R	66%	34%	63%	37%	64%	36%	53%	46%	1%	39%	60%	1%		53%	46%	1%
2	R	57%	43%	52%	48%	55%	45%	44%	55%	1%	31%	68%	1%		44%	55%	1%
3	D	38%	62%	36%	64%	37%	63%	28%	71%	1%	20%	78%	1%		25%	73%	1%
4	R	63%	37%	60%	40%	62%	38%	51%	48%	1%	39%	60%	1%		50%	49%	1%
5	R	62%	38%	61%	39%	62%	38%	52%	47%	1%	36%	63%	1%		53%	46%	2%
6	R	67%	33%	67%	33%	68%	32%	58%	41%	1%	42%	57%	1%		59%	39%	2%
7	R	68%	32%	65%	35%	67%	33%	56%	43%	1%	41%	58%	1%		57%	42%	1%
8	D	40%	60%	38%	62%	38%	62%	33%	66%	1%	26%	73%	1%		31%	68%	1%
9	R	66%	34%	66%	34%	66%	34%	59%	40%	1%	36%	63%	1%		63%	35%	2%
10	R	63%	37%	60%	40%	60%	40%	50%	50%	1%	39%	60%	1%		50%	49%	1%
11	D	50%	50%	47%	53%	47%	53%	38%	61%	1%	30%	68%	1%		36%	62%	1%

The Enacted Plan preserves between 71% and 96% of the cores of the Benchmark districts, and preserves 83% or more of the cores of 9 of the 11 districts, including District 3. The Enacted Plan preserves 85% of the core of District 2 and 83% of the core of District 3.

The Alternative Plan performs significantly worse than the Enacted Plan on this criterion. The Alternative Plan preserves only 69.2% of the core of District 3, down from 83% in the Enacted Plan. In other words, Alternative District 3 would be the *worst performing* district in terms of preservation of cores in either the Enacted or the Alternative Plan. Dr. McDonald offers no explanation as to why the only majority-minority district in Virginia should be entitled to less continuity and respect for incumbency protection than every other district.

Protection of Incumbents

The Senate Criteria included the factor of "incumbency considerations." Senate Criteria V. This factor encompasses not just preserving the cores of districts but also strengthening incumbents politically. As explained, the Enacted Plan respects this factor significantly, while the Alternative Plan undermines it, particularly in District 2, where Congressman Rigell would be gravely weakened in his re-election prospects.

Compliance with the Voting Rights Act

The Senate Criteria treated compliance with the Voting Rights Act, "including compliance with protections against unwarranted retrogression or dilution of racial or ethnic minority voting strength," as the highest priority for the Enacted Plan after compliance with the Constitutional equal-population requirement. Senate Criteria II. I understand that a redistricting plan complies with Section 5 only if it does not diminish the ability of minority voters to elect their candidates of choice.

The Enacted Plan increased District 3's Black VAP on both of Dr. McDonalds' preferred measures

3.2% (exclusive) and 3.3% (inclusive). 2/21/14 McDonald, page 8. The Enacted Plan thus did not diminish the ability of black voters to elect their candidates of choice. The Enacted Plan received preclearance from the Department of Justice.

In 2011, Virginia was one of the first states to complete its statewide legislative redistricting and seek Section 5 preclearance from the Department of Justice. The General Assembly passed a redistricting plan for the House of Delegates which required preclearance for the 2011 elections. The benchmark House of Delegates plan had 12 districts in which African-Americans formed a majority of the total and voting age populations. Many of those districts were located in the geography covered by Congressional District 3. During the redistricting process, the House of Delegates considered a number of proposed plans that preserved the 12 majority-black districts. Some of these alternative plans had Black VAP below 55%. House of Delegates Section 5 Submission, Statement of Minority Impact, page 5.

But the House of Delegates plan that the General Assembly enacted had a Black VAP of above 55% in all 12 majority-black districts – including the districts within Congressional District 3. This required increasing the Black VAP in some of the 12 majority-black benchmark districts from the Black VAP level at the time of the 2010 census. Eight of the 12 members of the House of Delegates Black Caucus voted in favor of the Enacted House of Delegates plan. House of Delegates Section 5 Submission, Statement of Minority Impact, page 5.

Thus, the General Assembly 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 subject to Justice Department preclearance under Section 5, including districts within the geography covered by Congressional District 3. The General Assembly therefore had ample reason to believe that legislators of both parties, including black legislators, viewed the 55% black VAP for the House of Delegates districts as appropriate to obtain Section 5 preclearance, even if it meant raising the Black

VAP above the levels in the benchmark plan. The General Assembly acted in accordance with that view for the congressional districts and adopted the Enacted Plan with the District 3 Black VAP at 56.3%

The Alternative Plan, by contrast, decreases District 3's Black VAP by 2.9% and drops it to a razor-thin majority of 50.2% (exclusive) and 51% (inclusive). These levels are below the 55% that the General Assembly found appropriate to comply with Section 5 for House Districts.

Dr. McDonald states that "a racial bloc voting analysis" is required to prove what Black VAP is necessary to comply the Voting Rights Act. 1/20/14 McDonald, page 11. Dr. McDonald provides no such analysis of the Alternative Plan. Thus Dr. McDonald cannot – and does not – opine that the Alternative Plan could or would have received preclearance under Section 5.

Therefore the Alternative Plan would have presented obstacles to obtaining Section 5 preclearance that the Enacted Plan did not present. The Alternative Plan drops District 3's Black VAP well below the 55% that the General Assembly believed was appropriate to obtain preclearance for House Districts and decreases District 3's Black VAP to a razor-thin majority below the Benchmark Black VAP level. Had the Alternative Plan been before it, the General Assembly had ample reason to prefer the Enacted Plan, which increased District 3's Black VAP above 55% and faced none of these hurdles to achieving Section 5 preclearance.

The Alternative Plan Does Not Bring About Significantly Greater Racial Balance Than the Enacted Plan

I have been asked to analyze whether the Alternative plan brings about "significantly greater racial balance" than the Enacted Plan. As I understand it, the purpose of this requirement is to cure the alleged racial gerrymander and turn the gerrymandered district into one that is not racially identifiable. The Alternative Plan fails that purpose because it preserves District 3 as a racially identifiable majority-

black district on both of Dr. McDonald's Black VAP measurements. The Alternative Plan District 3 replaces a black-majority district with a black-majority district and in doing so would not seem to cure the alleged racial predominance that Dr. McDonald criticizes in the Enacted Plan, including the changes to the Benchmark District 3 that the Alternative Plan replicates.

The Enacted Plan is not a Racial Gerrymander

Based on my review and analysis of the available data discussed throughout this report, I also conclude that the Enacted Plan is not a racial gerrymander. In my opinion, politics rather than race predominated and the Enacted Plan is consistent with traditional redistricting principles, including the criteria identified by the Virginia Senate and followed by the General Assembly.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on March 14, 2014 in Fairfax, Virginia.

John B. Morgan

Exhibit 68

Exhibit 68

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

GOLDEN BETHUNE-HILL, et al.	:	
	:	Civil Action No.
vs.	:	3:14CV852
	:	
VIRGINIA STATE BOARD OF ELECTIONS, et al.	:	June 4, 2015

COMPLETE TRANSCRIPT OF THE CONFERENCE CALL

BEFORE THE HONORABLE ROBERT E. PAYNE

UNITED STATES DISTRICT JUDGE

APPEARANCES:

Kevin J. Hamilton, Esquire
Perkins Coie, LLP
1201 Third Avenue
Suite 4800
Seattle, Washington 98101

Bruce V. Spiva, Esquire
Aria C. Branch, Esquire
Perkins Coie, LLP
700 13th Street, NW
Suite 600
Washington, D.C. 20005
Counsel for the plaintiff

Peppy Peterson, RPR
Official Court Reporter
United States District Court

for the hearing of motions *in limine*?

MR. HAMILTON: I don't believe so, Your Honor. This is Mr. Hamilton. I don't believe so, Your Honor.

JUDGE PAYNE: We probably need to set that date, so we'll see how we proceed. All right, it might be helpful to discuss item five, the theories of the case for each side, to kind of help get us oriented and thinking in the right direction, and we may end up, each of us, of the judges may have questions as you go along, so anybody, just feel free to interject at such time as you want to. So start with the plaintiff.

MR. HAMILTON: All right. Thank you. Your Honor, from the plaintiff's perspective, this is a really straightforward case, and our case theory is fairly simple. The equal protection clause of the 14th Amendment forbids race-based redistricting absent a compelling state interest, and even then, even if the state does identify a compelling state interest, it can use race only when it's narrowly tailored to meet the state interest. That's the law.

Our theory of the case is that in 2011, the Virginia General Assembly used race as the predominate factor in drawing the 12 house districts that are at issue in this case; B, had no compelling state interest for doing so; and C, in any event, failed to narrowly tailor

those districts to meet whatever state interest defendants or intervenors might identify.

The case, we think, is substantially easier and clearer than the recent Page decision which involved the Third Congressional District in Virginia last year before this Court, and that's for two reasons. First, to the extent that there was any doubt about the controlling legal standards for such a claim, they have been emphatically laid to rest by this Court's decision in the Page case last year and by the Supreme Court's decision in the recently decided case of *Alabama Legislative Black Caucus v. Alabama*.

There, the Supreme Court made it clear that a legislature may not utilize, and I quote, mechanical racial targets, close quote, in a misguided effort to comply with the Voting Rights Act non-retrogression standard. That alines precisely with this Court's ruling in Page to the same effect.

So that's the first reason, the law is substantially --

JUDGE PAYNE: Is it your view that there was some mechanical formula or figure used? Is that what you are going to seek to prove?

MR. HAMILTON: Exactly, Your Honor, and that's the second reason why this is an easier and clearer case

than Page. The record before the Court, the delegates, Delegate McClellan, Delegate Dance, and Delegate Armstrong will testify that they were aware and they were told of a 55 percent black voting age population threshold or floor that was used in drawing all of the 12 majority/minority districts, and you'll hear during the course of the trial that black voting age population figure repeated over and over again in testimony and in the documents, 55 percent BVAP, B-V-A-P, is how, as you know, Your Honor, is how it's referred to.

In addition, the chief map drawer, Delegate Jones, who the intervenors intend to call, himself repeatedly and emphatically articulated that 55 percent BVAP floor in the floor debates before the House of Delegates and in email communications that have been produced during the course of discovery.

There are transcripts of several floor debates and a committee hearing that we'll be presenting and putting into evidence in which the delegate, Delegate Jones, is responding to questions on the floor of the House about how it was drawn. The evidence will show that when requests were made to fix a precinct split or a voting tabulation district split, it was rejected. Even though the black voting age population resulting from fixing that split would have been 54.8 percent, it was

rejected, and the reason given was because it didn't meet the 55 percent target, and that's a quote from the document, and we'll be presenting that in evidence.

Two-tenths of a percent was too much, and that demonstrates how the black voting population threshold or floor was used to trump all other considerations.

So we think the case is pretty straightforward. The legal standards have been reiterated and clarified, and the record is even clearer and stronger than the record that was before the Court last year in Page.

JUDGE PAYNE: All right. Judge Lee or Judge Keenan, do you all have any questions for the plaintiff on that topic?

JUDGE LEE: I don't have any questions.

JUDGE KEENAN: I only had one question with regard to the absence of a compelling state interest and in any event no narrow tailoring. Does the plaintiff intend to present evidence in its case in chief, or is that going to be saved for rebuttal?

MR. HAMILTON: The expert witness -- I mean the answer is, Your Honor, I believe we'll be presenting evidence on that with respect to -- in our case in chief, and this is how it works, or this is how it will be presented, I think.

In these cases, often the explanation is -- I

think the explanation of the state here for using the 55 percent black voting age population is we needed to prevent retrogression, meaning we needed to prevent any retrogression in the ability of the minority community to elect a candidate of their choice, to have opportunity to elect the candidate of their choice, and typically, the way that a state would do that in order to comply with the Voting Rights Act is to conduct a racial block voting analysis in order to determine what level of BVAP, of black voting age population, do we need to have in this district to ensure that the minority population has the opportunity to elect its candidate of choice.

And the problem here is that the State did not do a racial block voting analysis, and, of course, that's obvious because they used a single number for 12 districts across the board, and even the defendants -- I'm sorry, the intervenor's own expert will say that he'd be shocked, he'd be surprised if the level of white crossover voting would be the same in all 12 districts such that black BVAP were -- exactly the same for all 12 would have been required.

So that's part of our case in chief of identifying -- sort of blowing up -- you can't -- the State cannot point to compliance with Section 5 of the Voting Rights Act as their defense using race.

And the other -- the only other explanation they'll come forward with is it was all about politics, and that is not a defense to using race in violation of the 14th Amendment. That is not a legitimate -- that may be a legitimate purpose in the course of redistricting, but it's not a compelling state interest, and the problem here is that the map drawers used race, not politics.

It's a 55 percent black voting age population floor that was used. They didn't use, you know, some measure of democratic or republican political performance. If they did, that would have been permissible. That's legal to do, but the 55 percent rule is not 55 percent democratic performance or republican performance. It's 55 percent black voting age population.

It's sorting people by the color of their skin. It's forbidden by the 14th Amendment absent a compelling state interest, and part of our case in chief through Dr. Dr. Ansolabehere will be to explain that there was no racially polarized voting analysis done here, and this was not done in an effort to comply with the Voting Rights Act.

JUDGE PAYNE: Does that answer your question, Judge Keenan?

JUDGE KEENAN: Yes, thank you.

JUDGE PAYNE: Do you propose to present, Mr.

Hamilton, as a part of your case, an alternative map to show what it would have -- or should have looked like if the proper procedures had been followed?

MR. HAMILTON: Your Honor, it's Mr. Hamilton for the plaintiffs. We have not -- we have not prepared our own map for use -- or maps from all 12 legislative districts. We do intend to offer maps that were before the House of Delegates at the time.

JUDGE PAYNE: The things that they had available to them to consider.

MR. HAMILTON: Correct.

JUDGE PAYNE: But you're not offering your own map to show what properly should have been done.

MR. HAMILTON: Correct, Your Honor, we're not.

JUDGE PAYNE: As I understand what you said in discussing your case, you do not intend to take on each district individually, because what you are doing is striking at the one basic point, and that is the application of the 55 percent BVAP figure as a floor, and that permeated and controlled all of the drawing -- the drawing of all the districts that are at issue, and you're not really going to be attacking them district by district; is that correct?

MR. HAMILTON: Not really, Your Honor. We will be attacking them individually through the use of Dr.

Ansolabehere who goes through each individual one. I think the Court in *Alabama* made it clear, and perhaps that's the genesis of the Court's question, made it clear that you do -- it is a district-specific analysis that's required, and that is exactly what Dr. Ansolabehere will be doing.

You are absolutely correct, Your Honor, that the same 55 percent rule is applied to all 12, and that, of course, is a fact that's relevant to each of the 12 districts, but in addition, Dr. Ansolabehere is looking at compactness of each of the 12 districts, and he's doing an analysis of the VTD which is the -- or precincts that were moved into and out of each one of the 12 districts in order to analyze both race and politics to answer the question, what's the more powerful explanation for which precincts were included and which precincts were excluded -- is it race or is it politics -- and the conclusion that he comes to is that, by far, race is a far more powerful explanation or predictor for explaining -- in other words, you can have similarly situated politically performing districts, and if one is more heavily black than the other, then the black district is more likely included rather than excluded.

JUDGE PAYNE: That's really a rebuttal point, though. Once they raise the issue of political reasons,

if they do that, then you put on your testimony about that's not correct; isn't that how you go about it?

MR. HAMILTON: I think it's an inherent part of our case in chief, Your Honor, that we have to demonstrate that race was the predominant factor in drawing these districts, and one of the pieces of evidence that goes to that point is how those precincts were selected. I mean, they were selected because of race. I mean, I think it's necessarily race, not politics --

JUDGE PAYNE: But as to each of the 12 districts, you are saying that the 55 percent is the controlling factor, and the other factors that you are going to discuss through the doctor, whose name has slipped my mind now --

MR. HAMILTON: Ansolabehere.

JUDGE PAYNE: -- is really for the purpose of explaining why race is the predominant question, issue.

MR. HAMILTON: That's right. That's exactly right.

JUDGE PAYNE: Okay. How about the defendants?

MR. TROY: Your Honor, Tony Troy. We believe that the plan is defensible. I was going to emphasize, but the discussion just verified that each and every district has to be looked at and analyzed, and the defendant intervenors are, I know, going to be presenting

evidence on each of those instances.

JUDGE PAYNE: All right. Mr. Braden.

MR. BRADEN: Your Honor, this case, from our point of view, is very much simply a replay of *Wilkins v. West* from ten years ago. The same attacks were made on the Virginia redistricting plan following the last census.

This plan is, in many ways, like that plan except the plan that was adopted following the last census is a plan that is -- the House delegate is more compact. It doesn't have the contiguousness issues that were present in the other plan, and it had much broader political support.

The *Shaw* claim that's being made by the plaintiffs in this case requires that they show that race predominates over all other traditional race-neutral principles for redistricting, that the plan itself is unexplainable other than based upon race.

We're going to show the Court the various districts that had been rejected in prior *Shaw*-style litigation, and you'll see that they all involve plans which have districts that, frankly, don't look like districts. They don't bear any resemblance to any notion of geography.

Our intention is to go through district by district and explain why the districts look the way they

are. They are more compact, and, in fact, they are compact as defined under the Virginia constitution. The Virginia constitution, unlike most states, has a very specific provision about districts being compact and contiguous.

The plan adopted by the legislature here clearly meets those requirements as articulated in *Wilkins v. West*. It's a more compact plan, and the contiguous issues that were raised in that litigation, frankly, were solved in this plan.

So this is a plan under Virginia law that is compact. That's the basic principle we're talking about here, that in all the *Shaw* cases is the beginning of the process of an indication of this plan is not explainable under traditional redistricting criteria.

So it's our intention simply to go district by district and explain why the lines are drawn the way they are. The long and short of it is, yeah, is race considered? Absolutely race is considered, but race does not get you to strict scrutiny unless you have ignored the other traditional redistricting criteria and race is predominant.

If race alone, if the consideration of race alone resulted in strict scrutiny, then every single legislative plan in the United States, with the exception of Vermont

and Maine, would be subject to strict scrutiny.

If you look at *Cromartie*, you look at the whole line of *Shaw* cases which control here, the first step is the plaintiffs have to show that race predominated over all other, all other criteria. It cannot prove that. We will walk through -- and that's the reason why we have the architect of the plan.

The process of drawing a legislative plan is complex, complex both legally and politically. So, you know, it's going to be -- we're talking about Delegate Jones being on the stand for a lengthy period of time so you can walk through the process of the line-drawing process, why the districts look the way they do.

I hear that they're going to call Delegate Armstrong, the minority leader, and one of the reasons why the plan was drawn the way it was is now Delegate Jones is no longer a member of the legislature. He lost his seat because of the way the lines were drawn. He was a minority leader.

So what we're talking about here is a process of walking through for the Court why this plan is faithful to a series of criteria which were adopted by the legislature, very specific criteria adopted by the legislature and very traditional. So we just simply are going to walk through the process and explain to the Court

the plans that are being attacked here look nothing like the plans which had been rejected by the Supreme Court in prior litigation. We don't look anything like those.

This is a plan where race was most certainly considered, but that doesn't get you strict scrutiny. So if you've got the strict scrutiny, we certainly believe we could survive that, too, because it must be a compelling state interest to comply with one-person-one-vote but also to comply with the Voting Rights Act, and in this case, we're not simply talking about compliance for purposes of preclearance under Section 5, but we're also talking about compliance under Section 2.

Thornburg v. Gingles requires the creation of districts where you have racial block voting present which the history of Virginia certainly is an indication of that. We have a substantial legislative record where we've gone around the state and gotten testimony. There's plenty of history of Section 2 litigation in the state of Virginia where they found racial block voting.

So there's -- the *Thornburg v. Gingles* series of cases most certainly means that we have to look at discrete minority communities. If we can draw a reasonable district around them that's reasonably compact and we have racial block voting and polarized voting, we have to create those under Section 2.

So we're not only talking here about a compelling interest under section -- to get the plan pre-cleared. We're also talking about the needs of Section 2 to get the plan so we're not in a piece of litigation where the same plaintiffs lawyers we have right now are suing us because we didn't create these districts.

JUDGE PAYNE: Are you going to offer evidence that all that was taken into account in constructing the plan?

MR. BRADEN: Absolutely. No question about that whatsoever. We had a series of hearings around the state. The 55 percent number doesn't come from thin air. It comes from testimony before the House of Delegates. That's to find numbers needed to be able to create functioning minority districts.

You know, this litigation -- we should all be very candid. This litigation is not about representation of the minority community. The problem the plaintiffs have with the plan is the fact that after the plan was drawn, it had the political effect that people intended it to have. The vast majority of the incumbents got reelected except for a few democratic white members lost.

That's the predominant underlying purpose of the plan. We shouldn't pretend anything else. This Court should be well-aware of that. That's what's going on

here. This plan was drawn for political purposes. The effect of the plan in the actual following election was just what was predicted was going to happen.

So the notion that race predominated simply flies in the face of reality, both the way the plan looks, the way the plan was constructed, the evidence underlying it, and the effect of the plan. The effect of the plan was some white democratic members of the legislature lost. Has nothing to do with race. It had a lot do with politics.

JUDGE PAYNE: Are you saying that you're going to offer evidence that the predominate purpose was to knock out some democrats? Is that what you are saying?

MR. BRADEN: Absolutely. That was one of the predominate -- the magic word here, a predominate purpose, the predominate purpose of the plan was to maintain the status quo. That is, in fact -- the recognized purpose of the plan was to maintain the status quo. Because of population changes, certain districts had to be moved around the state.

When you move districts around, there is losers. Republicans were in charge. The losers were white democratic members, absolutely. No one should -- we don't need any political scientist from Harvard to tell us the reality of what happened here. The notion that somehow or

another there's some standard use of racial polarized voting, I see no history -- the State of Virginia has submitted a number of plans to the Department of Justice for preclearance. I can find no record of the State of Virginia hiring a political science professor to do a racial block voting before doing this submission.

The record, I believe even in the *Page* case, the *Page* Court recognized that a racial block voting analysis by political scientists was not necessarily better than the elected members from those districts.

The 55 percent number comes from members elected from those districts and people who live in those districts as to what was necessary for the minority community to elect their candidate of choice. It's not a number picked from thin air.

JUDGE PAYNE: All right. Now, Judge Lee, Judge Keenan, do either one of you have any questions at this point?

JUDGE LEE: I'm ready to hear the evidence in support of oral argument. I think we've already heard some closing arguments now. Thank you.

JUDGE PAYNE: We have, haven't we? I have this question: What is the significance in the law of saying that the political result, the objective was to knock democrats out of seats? Does that present a

quintessential political gerrymander case that we're dealing with here? If so, what does that do to the legal construct of the case if we accept that view? I'm sure --

MR. HAMILTON: Your Honor, this is Mr. Hamilton for the plaintiff. It's no different than the argument that was advanced in the *Page* case and that's always advanced in the *Shaw* line of cases that it's politics, not race, and that's exactly why courts look to the evidence, and what the Court, the Supreme Court has held in these cases is if you're going to use race, and your explanation for using race is that you need to do it in order to prevent retrogression under the Voting Rights Act, then you have to have a strong basis in evidence for that belief, and the strong basis of evidence typically is a racial block voting analysis, and the absence of doing that makes it awfully difficult for the State to say that we had to do this in order to prevent retrogression in a minority -- to allow -- to prevent retrogression from a minority community's ability or opportunity to elect candidates of their choice.

This isn't something that's been made up. It's in the Department of Justice regulations that were in evidence last year before this Court and will be in evidence again this year in this case.

JUDGE PAYNE: But, Mr. Hamilton, no Court has

ever held that a block voting analysis case is the only way to prove what they're proving; is that right?

MR. HAMILTON: Fair enough, but it's certainly not the case that it's the opposite. It's not the case that a court has ever said, oh, well, we've had some black delegates say I need a higher number of -- again using race -- black voters in my district in order to get reelected. The constitutional analysis is no different than if you flip that around and you have white delegates saying --

JUDGE PAYNE: I understand. I just was asking the question if there's a case that I'm unaware of about that, but the question -- I don't recall in *Page* that there was any evidence or that it was the same as what Mr. Braden just said.

In *Page*, it was a combination of the political desire plus the traditional voting -- traditional redistricting criteria that the defendants rode as their defense.

Here, we seem to be talking about achievement of a particular political result as the predominate purpose, and to my knowledge, the Supreme Court has never upheld political gerrymandering absent some purpose such as to maintain a balance, fair balance or to achieve fairness.

That's why I was asking Mr. Braden the question,

whether or not that's what he was doing. So neither one of you see this construct -- this is raising a different issue than is raised in *Page* which is fundamentally what was the predominate purpose, and that's as far as you are going, Mr. Hamilton, and that's as far as you are going; is that correct, Mr. Braden and Mr. Hamilton?

MR. BRADEN: It's our belief that you do not get to strict scrutiny until the plaintiffs prove that the predominant purpose was race.

JUDGE PAYNE: Okay.

MR. BRADEN: Until such time, the Court does not need to consider the issue of strict scrutiny. It's the wrong construct at that stage.

JUDGE PAYNE: All right, Mr. Hamilton, you're of the same view, that you are trying this in the same mold as *Page*, and your theory is race was the predominant purpose, and there's no part of your complaint that's any different than that; is that right?

MR. HAMILTON: That's correct, Your Honor, and it's very clear from the application of the uniform 55 percent --

JUDGE PAYNE: You don't need to make the argument again. I think, as Judge Lee said, we heard it. How about these motions *in limine*, have you gotten any notion yet as to whether you're going to have motions *in limine*,

need for a carryover day, it will be the 13th. Counsel, do you have anything? Nobody.

MR. HAMILTON: No, Your Honor.

JUDGE PAYNE: Thank you very much. We look forward to working with you.

JUDGE KEENAN: Thank you, Judge Payne.

JUDGE LEE: Thank you all, counsel.

(End of proceedings.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/
P. E. Peterson, RPR

Date