

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

-----  
DAWN CURRY PAGE, et al.

vs.

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

:  
:  
: Civil Action No.  
: 3:13CV678  
:  
: May 21, 2014  
:  
:

COMPLETE TRANSCRIPT OF THE BENCH TRIAL

HEARD BEFORE: THE HONORABLE ALLYSON K. DUNCAN  
THE HONORABLE LIAM O'GRADY  
THE HONORABLE ROBERT E. PAYNE

APPEARANCES:

Kevin Hamilton, Esquire  
Perkins Coie, LLP  
700 13th Street NW  
Suite 600  
Washington, D.C. 20005

Robert W. Partin, Esquire  
McCandlish Holton, PC  
1111 East Main Street  
Suite 1500  
Richmond, Virginia 23218  
Counsel for the plaintiffs

Peppy Peterson, RPR  
Official Court Reporter  
United States District Court

1 APPEARANCES: (cont'g)

2 Mike Melis, Esquire  
3 Office of the Attorney General  
4 900 East Main Street  
5 Richmond, Virginia 23219  
6 Counsel for the Virginia State Board of Elections

7 Michael A. Carvin, Esquire  
8 John M. Gore, Esquire  
9 Jones Day  
10 51 Louisiana Avenue, N.W.  
11 Washington, DC 20001-2113  
12 Counsel for Intervenor Defendant Eric Cantor  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

THE CLERK: Civil action number 3:13CV00678, Dawn Curry Page, et al., versus Virginia State Board of Elections, et al. Will counsel please rise, state their names for the record, and identify the parties they represent.

MR. HAMILTON: Good morning, Your Honor. Kevin Hamilton representing the plaintiffs.

MR. PARTIN: Your Honors, Robert Partin, also representing the plaintiffs.

MR. CARVIN: Good morning, Your Honors. Michael Carvin representing the intervenor defendants.

MR. GORE: Good morning, Your Honors. John Gore, also representing intervenor defendants.

MR. MELIS: Good morning, Your Honors. Mike Melis representing the State Board of Elections defendants.

JUDGE PAYNE: Thank you very much. We're glad to have you here. There will be 15 minutes opening statement for each side. Mr. Hamilton, if you'd like to proceed.

MR. HAMILTON: Good morning, Your Honors. For the record, my name is Kevin Hamilton, and I appear today on behalf of the plaintiffs, Gloria Personhuballah and James Farkas. Thank you for the opportunity to appear

1 before you.

2           The equal protection clause of the 14th Amendment  
3 forbids race-based redistricting absent a compelling state  
4 interest, and even then, only when narrowly tailored to  
5 meet that state interest. In its 2012 congressional  
6 redistricting plan, the evidence will show, the Virginia  
7 General Assembly manipulated Virginia's Third  
8 Congressional District by moving white voters out of the  
9 district and packing black voters into the district, all  
10 with the goal of achieving a predetermined minimum number  
11 quota of black voters.

12           As the evidence will show, the target was not  
13 identified by political performance. It was explicitly  
14 based on race. The evidence will show that race, not  
15 politics, was the predominant purpose of the redistricting  
16 plan from start to finish.

17           The author of the redistricting plan, Delegate  
18 Bill Janis, contended that this effort to pack the black  
19 voters into the Third Congressional District was somehow  
20 required by the Voting Rights Act and admitted that this  
21 was his paramount concern, a primary focus, and that he  
22 was most especially focused on such purported compliance.

23           These admissions vividly demonstrate the General  
24 Assembly's predominant focus on the racial composition of  
25 the district. By contrast, Delegate Janis flatly

1 admitted, without qualification, that partisan performance  
2 was, quote, not a factor, close quote, in preparing  
3 Congressional District 3, an admission that was and will  
4 remain in this trial uncontradicted and undisputed before  
5 this Court.

6 Bill Janis, the evidence will show, was not just  
7 the primary author of the redistricting map, he was the  
8 sole author. As one of the Republican caucus lawyers,  
9 Chris Marston, put it, quote, Janis is pre-Lone Ranger on  
10 this one, close quote.

11 The evidence will show nothing to justify this  
12 race-based decision-making, no compelling state interest,  
13 no narrow tailoring. The defendants cannot produce any  
14 legal basis or record evidence that the Voting Rights Act  
15 required them to increase the minority population in a  
16 district that was already performing extremely well for  
17 the minority-preferred candidate who was winning with more  
18 than 70 percent of the vote in the benchmark CD 3.

19 Indeed, the evidence will show that the  
20 map-drawers failed to conduct any racial bloc voting  
21 analysis whatsoever. The standard under Section 5 is  
22 retrogression, of course, but the authors of the map  
23 failed to conduct even the most rudimentary racial bloc  
24 voting analysis to determine whether or how to adjust the  
25 black voting-age population in order to avoid

1 retrogression.

2           Instead, they simply chose to pack more black  
3 voters into the third, to reach and exceed an arbitrary  
4 preset number, 55 percent, in direct violation of  
5 constitutional equal protection guarantees.

6           Under the enacted plan, the evidence will show,  
7 57.2 percent of the voting-age population of the Third  
8 Congressional District is black. Let me first address  
9 evidence that will show that race was the predominant  
10 factor in drawing CD 3, and then I'll address just briefly  
11 the evidence demonstrating why politics was not.

12           First, and most importantly, the evidence will  
13 show that Delegate Janis repeatedly emphasized that he  
14 considered race the highest priority in drawing CD 3,  
15 purportedly in an effort to comply with the Voting Rights  
16 Act. This issue really isn't in dispute.

17           Second, and wholly apart from Delegate Janis's  
18 admissions, the Senate criteria for redistricting  
19 explicitly lists VRA compliance as an overriding criteria.  
20 On March 25th, 2011, the Senate committee on privileges  
21 and elections adopted a set of criteria to govern the  
22 redistricting process.

23           Defendants have repeatedly cited these criteria  
24 even though there's no evidence that they were actually  
25 used in drawing the enacted plan, but if they were, it

1 only proves the point, they explicitly state that the  
2 Voting Rights Act compliance must supersede any other  
3 conflicting considerations.

4 Third, and perhaps most compellingly, the General  
5 Assembly used a fix target of 55 percent BVAP, or black  
6 voting-age population, to draw CD 3. Defendants' own  
7 expert, John Morgan, who was involved in the redistricting  
8 process, has explained in his report that supporters of  
9 the 2012 plan, the enacted plan, quote, viewed the  
10 55 percent black VAP as appropriate to obtain Section 5  
11 preclearance even if it meant raising the black voting-age  
12 population above the levels in the benchmark plan, close  
13 quote.

14 Rather than actually analyze the voting  
15 performance of the district, they simply adopted this  
16 floor as shorthand for compliance and swapped population  
17 to excise white voters and pack black voters into the  
18 district until they achieved or exceeded that target  
19 percentage. This is direct evidence of race-based  
20 redistricting.

21 Fourth, the evidence will show that the General  
22 Assembly used this arbitrary racial target without ever  
23 conducting any sort of racial bloc voting analysis. I  
24 said that a moment ago. Regression is measured in the  
25 ability to elect, and the only way to measure ability to

1 elect, other than guessing or using stereotypes, is  
2 through some analysis of racial voting patterns. And the  
3 problem here is, there was never, even to this day, any  
4 such analysis by the defendants or by the General  
5 Assembly, just an arbitrary racial target or quota, and  
6 that's forbidden.

7 Fifth, the bizarre shape of the Congressional  
8 District 3 -- it's on a poster board before the Court --  
9 reveals the General Assembly's convoluted efforts to pack  
10 black voters into Congressional District 3, and our expert  
11 witness, Dr. McDonald, will explain a little bit about  
12 that.

13 Sixth, the evidence will show that enacted CD 3  
14 fares worse by almost every measure using traditional  
15 redistricting criteria than the alternative map proposed  
16 by the plaintiffs. All of those interests, the  
17 traditional redistricting criteria, were subordinated to  
18 meet the author's preset floor of 55 percent black  
19 voting-age population.

20 Seventh, the population swaps employed by the  
21 General Assembly will demonstrate that race was a  
22 predominant factor. Even though population needed to be  
23 added to CD 3 in order to meet the population requirement,  
24 the authors of the plan began by removing residents from  
25 the district, and the reason why is because merely adding



1 black voters to the district would be insufficient to  
2 reach the predetermined 55 percent quota. So, instead,  
3 they swapped largely white precincts, or VTDs, for largely  
4 blacks precincts, or VTDs, in order to reach that quota.

5 Finally, the General Assembly's predominant use  
6 of race to increase the black population is evident in the  
7 ultimate composition of the district. The enacted plan  
8 significantly increased the black voting-age population  
9 from 53.9 percent to 57.2. Remarkably, black voters  
10 accounted for over 90 percent of the voting-age residents  
11 added to CD 3 under the enacted plan.

12 So now let me turn just briefly to the other side  
13 of the equation, why politics was not a predominant factor  
14 in drawing CD 3, and this, I'll just note in passing, is  
15 the only defense offered by defendants, none of whom were  
16 actually involved in drawing the plan.

17 Neither Delegate Janis nor any other legislator  
18 will testify. The defendants will stand at this podium  
19 and ask you to disregard what the legislators actually  
20 said about their intent in favor of defendants'  
21 speculation as to the factors considered by the General  
22 Assembly.

23 So, first, and perhaps most compellingly, the  
24 evidence will show that Delegate Janis explicitly denied  
25 that he took partisan concerns into account when drawing

1 CD 3. In a presentation to the Senate committee on  
2 privileges and elections, he said without qualification,  
3 quote, I have looked at the partisan -- I haven't, I  
4 haven't looked at the partisan performance. It was not  
5 one of the factors I considered in the drawing of the  
6 district, period, close quote. Delegate Janis was clear,  
7 unequivocal, and definitive, and there's no evidence to  
8 the contrary that will be introduced by any party to this  
9 lawsuit.

10 Second, Delegate Janis's own list of  
11 considerations, which he discussed on the floor of the  
12 General Assembly, pointedly omits any mention of partisan  
13 performance or partisan consideration.

14 Third, the evidence will show that highly  
15 democratic and black VTDs were included in CD 3 while  
16 highly democratic but non-black VTDs were excluded from  
17 the district. That is race, not politics, predominated.

18 Fourth, and perhaps most dramatically, the  
19 General Assembly's use of a race target for CD 3 at  
20 55 percent demonstrates that race, not politics, was a  
21 predominant factor in preparing these plans. Delegate  
22 Janis could have adopted a partisan performance measure or  
23 a quota for CD 3 and its surrounding districts, and that's  
24 exactly what one would expect to see if this were a  
25 political gerrymander predominantly, but nothing like that

1 will be presented in this courtroom, and for good reason.

2           There is no evidence of any sort of political  
3 quota. We actually filed a subpoena for one of the  
4 political consultants and the lawyers, and we received  
5 documents, reviewed them. There is nothing, and there  
6 will be no evidence presented in this court that it was a  
7 political quota. Instead, the General Assembly chose to  
8 adopt and utilize a racial target for CD 3. Not politics.  
9 It was race.

10           None of this was necessary. Plaintiffs have  
11 submitted an alternative map for CD 3 that shows that  
12 Virginia could have achieved its redistricting goals  
13 without packing black voters into CD 3. The map makes  
14 modest changes affecting only two districts, CD 2 and CD  
15 3. All this, we submit, is more than sufficient to carry  
16 plaintiffs' burden and shift us to the second step of the  
17 analysis under *Shaw*.

18           Once we've demonstrated that race was a  
19 predominant factor, defendants must demonstrate that  
20 Virginia's districting legislation is narrowly tailored to  
21 achieve a compelling state interest. Defendants will be  
22 unable to meet that exacting standard by any stretch. As  
23 an initial matter, defendants will be unable to identify a  
24 compelling state interest to justify the use of race.

25           The defendants contend that the General

1 Assembly's alleged goal of complying with Section 5  
2 justified its use of race when drawing this district, but  
3 the only way to survive strict scrutiny, at least since  
4 the Supreme Court's decision in *Miller v. Johnson*, is to  
5 show that the plans were actually required by Section 5,  
6 and there's no plausible argument that Section 5, properly  
7 interpreted, required the black voting-age population of  
8 CD 3, a district already performing extremely well for the  
9 minority-preferred candidate, 70 percent of the vote, to  
10 be further increased.

11 The question under Section 5 is, has there been  
12 retrogression, and that is whether the proposed plan would  
13 reduce minority voters' effective ability to elect the  
14 candidate of their choice. It most assuredly does not  
15 command a state to match, much less significantly  
16 increase, the preexisting level of minority population.  
17 If that's what Delegate Janis believed, he was just wrong.

18 The burden is on the State to establish that it  
19 had a strong basis in evidence for believing that Section  
20 5 required it to draw CD 3 with this level of black  
21 voting-age population, and in the absence of that showing,  
22 the plan necessarily fails strict scrutiny, and here, the  
23 defendants will fail such a showing.

24 JUDGE PAYNE: Thank you.

25 MR. HAMILTON: Delegate Janis admitted, as will

1 defendants' own expert, that no racial bloc voting  
2 analysis was conducted, but in the absence of it, it's  
3 simply impossible to have a strong basis in evidence for  
4 believing that Section 5 required even holding a BVAP  
5 study much less augmenting it in such a material way.

6 JUDGE PAYNE: I think you've gone to your  
7 15 minutes, Mr. Hamilton.

8 MR. HAMILTON: Thank you, Your Honor.

9 JUDGE PAYNE: The defendants, Mr. Carvin.

10 MR. CARVIN: Morning, Your Honors. Michael  
11 Carvin for the intervenor defendants. There's only three  
12 facts this Court needs to know to know that race did not  
13 subordinate traditional districting principles in this  
14 plan.

15 All the General Assembly did here, on the basis  
16 of the undisputed evidence, is preserve a majority black  
17 district. This majority black district being preserved  
18 had been entered as a remedy for a *Shaw* violation in 1998.  
19 It had been enacted in 2002 without anyone contending it  
20 was a *Shaw* violation even though they had challenged the  
21 Senate and House of Delegates districts in the *Wilkins*  
22 case.

23 Fact number two, all the majority white districts  
24 in the state, the other ten districts, they preserve the  
25 cores of those districts just as they preserve the cores

1 of District 3. And third, the minor changes, relatively  
2 minor changes that were made to District 3, like the  
3 others, were all beneficial to the Republican incumbents  
4 who were adjacent to District 3 in District 1, District 2,  
5 District 4, and District 7.

6 So the facts, none of which are disputed,  
7 established that this plan did not subordinate any  
8 traditional districting principles, and plaintiffs  
9 certainly cannot meet their burden to suggest otherwise.  
10 The facts establish that District 3 was treated the same  
11 as all of the other majority white districts in the state,  
12 and there was no use of race to subordinate traditional  
13 districting principles. They simply followed the  
14 traditional districting principles recognized by the  
15 Virginia Supreme Court in *Wilkins*, preserving the cores of  
16 existing districts and incumbency protection.

17 Again, they preserved the core of District 3.  
18 The only changes they made shored up the Republican  
19 incumbents and also Representative Scott in District 3.

20 Nor can the plaintiffs show that race was a  
21 predominant factor which prevailed over politics as  
22 *Cromartie* requires them to do. They need to show that  
23 race, rather than politics, did this, but it's quite clear  
24 that District 3 was good for the Republicans, because all  
25 four of the adjacent districts were held by Republican

1 incumbents. So there was no reason to dismantle District  
2 3 or change what plaintiffs referred to as its bizarre  
3 shape, because that would have had a negative political  
4 effect both on Representative Scott if his BVAP was  
5 decreased and if all of these Democrats were spread around  
6 to the adjacent Republican districts.

7 Again, it is undisputed that every one of these  
8 changes that the plaintiffs criticize between District 3  
9 and the adjacent districts benefited politically the  
10 Republican incumbents, so it cannot possibly be that they  
11 can show that race, rather than politics, predominated.

12 Our expert, Mr. Morgan, will walk you through  
13 this. He's very familiar with Virginia politics, has  
14 testified as an expert in other cases, but the truth is,  
15 he's simply icing on the cake, because everything I just  
16 said is undisputed.

17 Dr. McDonald, plaintiff's expert, agreed that all  
18 of these changes were politically beneficial for the  
19 Republican incumbents, would have made perfect sense if  
20 race had not been a factor and if District 3 had been a  
21 majority white district.

22 Before Dr. McDonald was retained as an expert, he  
23 wrote an article for the University of Richmond Law Review  
24 where he described this plan as an eight-to-three  
25 incumbency protection plan where they were simply trying

1 to maintain the status quo, and where they rejected an  
2 effort to move BVAP out of District 3 because of its  
3 negative political effect on, in that case, Congressman  
4 Forbes from the Fourth District, just like plaintiffs'  
5 alternative has a negative political effect on Congressman  
6 Rigell in District 2, and I think their main argument is  
7 here that they don't have to meet the burden that  
8 *Cromartie* clearly imposed on plaintiffs.

9           They want this Court to find that politics, for  
10 the first time in the history of Virginia and probably in  
11 the United States, didn't play a role in redistricting.  
12 And they focus on one sentence by one legislator to have  
13 you come to this extraordinarily counterintuitive  
14 assumption, but what the plaintiffs didn't tell you in  
15 your opening statement is that far from suggesting that  
16 incumbency and the political interest of incumbents were  
17 not at issue, Representative Janis stated, in probably the  
18 most candid statement you'll ever see on the floor of any  
19 legislature, that the incumbents drew their own districts.  
20 He said, I met with each one of them, they gave me  
21 specific directions, suggestions on how to draw the  
22 districts and I met with them, and they all confirmed that  
23 I had followed their directions.

24           So Mr. Janis didn't need to look at a bunch of  
25 partisan statistics, because he knew, like everyone else



1 in the world knew, that incumbents are not going to  
2 suggest changes to their district that hurt themselves,  
3 their own chances for reelection.

4 So he wasn't saying that politics didn't play a  
5 role in this. He said he didn't have to look at politics,  
6 and, obviously, that's because the incumbents had already  
7 drawn the district.

8 In terms of this race versus politics VTD  
9 analysis that they're going to offer up, it is identical  
10 or actually worse than the one that was rejected in  
11 *Cromartie 2* as facially deficient.

12 As to this notion which was again repeated in the  
13 opening statements that saying compliance with Section 5  
14 of the Voting Rights Act or the Voting Rights Act  
15 generally is somehow a confession that race was used to  
16 subordinate traditional districting principles is absurd.  
17 Every court that enters a redistricting plan in the case  
18 of legislative impasse makes the obvious point that the  
19 Voting Rights Act trumps all of the other state law  
20 considerations which is all that Representative Janis  
21 said.

22 That's not an admission that you've committed a  
23 *Shaw* violation. It's an articulation of an interest which  
24 prevents a *Shaw* violation. You can't penalize Section 5  
25 jurisdictions by adhering to the Voting Rights Act by

1 saying plaintiffs are somehow relieved of their burden of  
2 showing that race predominated, but even if you equate  
3 compliance with the Voting Rights Act with some kind of  
4 impermissible racial purpose, it still doesn't get them  
5 anywhere, because even if they were preserving the  
6 majority black district because Section 5 required them to  
7 do it, that was not subordinating a traditional  
8 districting principle. That was consistent with the  
9 traditional districting principle of preserving the cores  
10 of existing districts that they applied everywhere else.

11 Alternatively, even if they had a racial reason,  
12 i.e., complying with Section 5, they also had a nonracial  
13 reason for doing it which was preserving the cores. They  
14 have also -- the utter failure of proof by the plaintiffs  
15 here is shown by the fact that, again, *Cromartie* says that  
16 plaintiffs in these cases need to show, at the least,  
17 propose an alternative that significantly -- has  
18 significantly greater racial balance, that accomplishes  
19 the legislature's political goals, and that accomplishes  
20 the legislature's traditional districting principles.

21 This fails on all three counts. I think this is  
22 unique among *Shaw* cases where they have not presented a  
23 race-neutral alternative. They have not presented  
24 something that says if you change what they don't like  
25 about the shape, here's how all traditional districting

1 principles will be better adhered to.

2 What they have instead proposed for this Court is  
3 what their own expert concedes is a racial gerrymander  
4 that subordinates traditional districting principles that  
5 was drawn to a 50 percent quota. So they haven't even  
6 tried to show the race-neutral alternative.

7 The reason they present this 50 percent  
8 alternative is because of what we again heard during the  
9 opening, that it was somehow wrong for the legislature to  
10 go from 53.1 to 56.3 percent BVAP. They should have hit  
11 53.1 right on the button, and if they didn't do that,  
12 they've somehow violated *Shaw*.

13 But increasing the district by three percent is  
14 not a problem. All the Supreme Court says under narrow  
15 tailoring is you need to substantially address Section 5.  
16 You need not to have the bear minimum. That's what *Bush*  
17 *v. Vera* says.

18 But more importantly, if going from 53.1 to 56.3  
19 is a problem, it's only a problem if it subordinated  
20 traditional districting principles, that extra three  
21 percent. But they haven't proposed an alternative at 53.1  
22 that says, see, if they had done 53.1, we wouldn't have  
23 had all these other problems.

24 What have they proposed? One that is at  
25 50 percent, and they say that's what we should have done.

1 We should have run a racial bloc voting analysis and then  
2 gone to the point to avoid retrogression. What we  
3 shouldn't have done was increase the BVAP above the  
4 retrogression.

5 But their racial bloc voting analysis shows that  
6 50 percent is not the point at which you avoid  
7 retrogression. That was an arbitrary quoted number  
8 plucked out of the air. Their racial bloc voting analysis  
9 shows that you should go -- you could go down to 25 or 30  
10 percent BVAP, and blacks would still be able to elect the  
11 representative of their choice.

12 So if it was wrong for us to increase the BVAP by  
13 three percent above the benchmark BVAP, then going 25 to  
14 20 percent above what they think is the retrogression  
15 point has an even worse narrow tailoring problem.

16 And if we had indulged in what they we should  
17 have done, which was had this racial bloc voting analysis  
18 and then gone to the Justice Department, that means we  
19 would have had to have replaced a 53.1 percent district  
20 with a 30 percent district or a 25 percent district.

21 The Justice Department has never pre-cleared  
22 non-retrogressive, any kind of severe dismantling of  
23 majority black districts in those circumstances, and it  
24 surely would have greatly complicated any effort to do so.

25 Finally, their alternative doesn't better comply

1 with traditional districting principles. The sum total of  
2 the advantage of their proposed alternative is one fewer  
3 locality split, one, and that is supposedly why the  
4 legislature should have done it, but they admit that it's  
5 worse in terms of preserving the cores of the districts,  
6 because the minor changes they make to our plan deletes  
7 the core of District 3 from 83 percent of its prior  
8 population to 69 percent.

9 And most importantly, it is not an incumbency  
10 protection plan which was the neutral principle being  
11 followed by the Virginia legislature. It's an incumbency  
12 destruction plan. All of their so-called efforts to  
13 alleviate these locality splits transferred -- transformed  
14 District 2 with a one-time incumbent, Representative  
15 Rigell, from a 50 percent toss-up district to a 55 percent  
16 democratic district which their own expert agrees is  
17 highly and heavily democratic and not competitive.

18 So all they're offering you at the end of the day  
19 is the General Assembly did what the governor's bipartisan  
20 commission on which Dr. McDonald served it. They offered  
21 up a 55 percent BVAP alternative, and all the General  
22 Assembly did was exactly what everybody in the  
23 redistricting process did.

24 They want you now to take that very  
25 run-of-the-mill preserving the core of a majority black

1 district and substitute in a racial gerrymander, what  
2 their own sponsors call a racial gerrymander to effectuate  
3 the democratic political gerrymander of District 2.

4 That's not a proper role for federal courts.  
5 That has nothing to do with *Shaw*. That has nothing to do  
6 with the 14th Amendment or racial neutrality. Thank you.

7 JUDGE PAYNE: Thank you.

8 MR. MELIS: Your Honor, the State Board of  
9 Elections adopts the arguments of the intervenor  
10 defendants.

11 JUDGE PAYNE: All right. Thank you. Call your  
12 first witness, Mr. Hamilton.

13 MR. HAMILTON: Your Honor, we call Dr. Michael  
14 McDonald.

15 Your Honor, before we begin, if I might, the  
16 parties have stipulated to two facts I'd like to read into  
17 the record.

18 JUDGE PAYNE: All right.

19 MR. HAMILTON: First, the plaintiff, Gloria  
20 Personhuballah, is the plaintiff's correct name, and her  
21 residence address is 1557 South --

22 JUDGE PAYNE: Wait a minute. Do you need to put  
23 her address in the record, because all we have to do is  
24 excise it. Do you stipulate that she lives within the  
25 district? Is that what it is?

1 MR. HAMILTON: That's exactly what it is, Your  
2 Honor.

3 JUDGE PAYNE: We just have to excise it if we put  
4 it in the record, so why don't we -- do you stipulate that  
5 she lives in the district, Mr. Carvin?

6 MR. CARVIN: Not to nitpick. Stipulating that  
7 she lived in the benchmark District 3 or in the enacted  
8 District 3? I'm happy to stipulate to either, but I  
9 wanted to make the record clear.

10 JUDGE PAYNE: In the district that's under  
11 attack.

12 MR. HAMILTON: Under the enacted plan. The  
13 parties exchanged emails before trial to be clear about  
14 that.

15 MR. CARVIN: We're happy to stipulate.

16 JUDGE PAYNE: You agree, Mr. Melis?

17 MR. MELIS: Yes, Your Honor.

18 MR. HAMILTON: With respect to James M. Farkas,  
19 it's his correct name, and he also lives within Virginia's  
20 Third Congressional District in the enacted plan.

21 JUDGE PAYNE: So stipulated, gentlemen? All  
22 right.

23 MR. HAMILTON: Thank you, Your Honor. I'd also  
24 like to move Exhibits 1 through 57 into evidence.

25 JUDGE PAYNE: I think they're already in without

1 objection, are they not?

2 MR. HAMILTON: There were four additional  
3 exhibits added last night.

4 JUDGE PAYNE: Are there any objections to those?

5 MR. CARVIN: No, Your Honor, and we have a  
6 similar housekeeping change to one of our exhibits. Would  
7 it be convenient to explain that at this point?

8 JUDGE PAYNE: Sure. What is it?

9 MR. GORE: Your Honors, we have a corrected  
10 Exhibit 50, Intervenor Defendant Exhibit 50. We've  
11 already placed it in the witness copy of the binders.

12 JUDGE PAYNE: If you just hand it to Mr. Clifton,  
13 he'll bring us our copies. You need to make sure you put  
14 it in the official set.

15 MR. GORE: It's already in there, Your Honor.

16 JUDGE PAYNE: All right. Thank you.

17 MR. HAMILTON: Last housekeeping matter, Your  
18 Honor, the final trial exhibit numbers as are reflected in  
19 the notebooks before Your Honors do not match the exhibit  
20 numbers cited in plaintiffs' trial brief. We prepared a  
21 translation table, just a two-page table that  
22 identified -- that allows the Court to translate. If it  
23 would be helpful, I'd follow that --

24 JUDGE PAYNE: You can do it, but we're going to  
25 have post-trial briefs, so that's where I think you need



1 to correlate your exhibits. We're using exhibit numbers  
2 that you have actually given us in our binders; is that  
3 correct?

4 MR. HAMILTON: Today we will be, and, of course,  
5 in the post-trial briefing, absolutely, Your Honor.

6 JUDGE PAYNE: All right.

7 MR. HAMILTON: With the Court's leaving, I'll  
8 file that this afternoon in case one of the members of the  
9 panel wants to review that.

10 JUDGE PAYNE: Sure.

11

12 **MICHAEL McDONALD,**  
13 a witness, called at the instance of the plaintiff,  
14 having been first duly sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MR. HAMILTON:

17 Q Dr. McDonald, good morning. Can you please state your  
18 name for the record.

19 A Michael McDonald.

20 Q Mr. McDonald, where do you live?

21 A Fairfax, Virginia.

22 Q Is your house on the market?

23 A Yes, it is.

24 JUDGE PAYNE: Excuse me. How do you spell your  
25 name?

1 THE WITNESS: Michael --

2 JUDGE PAYNE: No, the last.

3 THE WITNESS: M-c-D-o-n-a-l-d.

4 JUDGE PAYNE: All right.

5 Q Why is that, sir, your house is on the market?

6 A Yes, I recently took a position at the University of  
7 Florida as a preeminent scholar.

8 JUDGE PAYNE: As a what?

9 THE WITNESS: Preeminent scholar.

10 JUDGE PAYNE: Will you move up a little bit and  
11 pull the mike to you. It will pick you up if you get it  
12 close enough.

13 Q Dr. McDonald, you are an expert for the plaintiffs in  
14 this litigation?

15 A I am.

16 Q Are you here to testify about your work and your  
17 reports?

18 A I am.

19 Q Thank you. Let's start with Plaintiffs' Exhibit 25.  
20 It's in the notebooks there in front of you. Just take a  
21 quick look at that.

22 JUDGE PAYNE: That's his CV.

23 MR. HAMILTON: That's correct, Your Honor.

24 JUDGE PAYNE: Do you agree he's an expert? Are  
25 you offering him as an expert in the area of what?

1 MR. HAMILTON: In the area of political science,  
2 Your Honor.

3 JUDGE PAYNE: Do you agree he's an expert in that  
4 discipline, Mr. Carvin?

5 MR. CARVIN: Yes, we do.

6 MR. MELIS: Yes, sir, Your Honor.

7 JUDGE PAYNE: He's accepted. We can go ahead.  
8 We've read his CV.

9 MR. HAMILTON: Thank you, Your Honor.

10 Q You are currently a professor where?

11 A George Mason University.

12 Q Have you attended law school?

13 A No.

14 Q Not a lawyer?

15 A No.

16 Q And your current position?

17 A Associate professor.

18 Q Could you describe briefly for the Court the work  
19 you've done with respect to redistricting either as a  
20 consultant or as an expert witness?

21 A I've been involved in redistricting as a consultant or  
22 expert witness in 14 states.

23 Q Have you worked with both Republicans and Democrats?

24 A At times, yes.

25 Q You and I have worked together before; is that right?

1 A Correct.

2 Q And when was that?

3 A That was in recent litigation in Ohio.

4 Q Have you worked with any of the other lawyers in this  
5 courtroom?

6 A Yes, I've worked with Mr. Carvin.

7 Q Mr. Carvin who represents the intervenor defendants?

8 A I have, yes.

9 Q When did you work with him?

10 A This was last decade in Arizona in defense of the  
11 Arizona commission's work, and Mr. Carvin was an  
12 intervenor in that litigation.

13 Q And who was Mr. Carvin representing, if you recall?

14 A I believe it was the Republican party.

15 Q When were you retained as an expert in this case?

16 A Somewhere abouts the end of November.

17 Q Of what year?

18 A Of 2013.

19 Q How much are you being paid?

20 A \$300 an hour.

21 Q Is that contingent in any way on the content of your  
22 opinion?

23 A No.

24 Q How much have you been paid to date in total?

25 A Roughly \$35,000.

1 Q Sir, have you prepared any reports in this case?

2 A I have.

3 Q Let's take a quick look at those. It's Exhibits 26  
4 through 30 if you can take a look at that.

5 A Yes, these are my reports in this case.

6 Q How many reports have you prepared?

7 A I believe five, four.

8 Q Why so many?

9 A We've been going back and forth, initially with  
10 defendants' first expert witness, Dr. Burnell, and then  
11 later with their current expert, Mr. Morgan.

12 Q Thank you. Let's turn to Virginia itself. Do you  
13 have any redistricting experience in Virginia?

14 A Yes, I do.

15 Q And can you explain that, please.

16 A With the help of Christopher Newport University, we  
17 conducted jointly a redistricting competition for students  
18 during the last round of redistricting, and then that  
19 effort was folded into the governor's independent  
20 bipartisan advisory redistricting commission.

21 Q What was the governor's independent bipartisan  
22 advisory commission?

23 A This was a commission that was created by executive  
24 order by Governor McDonnell to advise him on  
25 redistricting.

1 Q When was that established?

2 A Early in 2011. I believe it was January was when the  
3 executive order was issued.

4 Q What was your role with the commission?

5 A I was a consultant on IT issues and on mapping.

6 Q So what did the commission ultimately do? Did it  
7 generate some maps?

8 A It did.

9 Q And did you work on any part of the commission's work  
10 in particular?

11 A I was primarily responsible for drawing House of  
12 Delegates districts for the commission, and I oversaw the,  
13 a team of William and Mary Law School students who had won  
14 the student competition and aided the commission in  
15 drawing congressional redistricting plans.

16 Q Can you describe the conditions under which the  
17 commission was working?

18 A The executive order provided no funding for the  
19 commission, and it had to operate in a very tight time  
20 frame before the legislative session on redistricting  
21 began.

22 Q No funding?

23 A No funding.

24 Q So you relied exclusively on volunteers?

25 A Volunteers and donors, primarily Republican donors.

1 Q Did you have any involvement with the congressional  
2 redistricting plans produced by the commission?

3 A Say that again for me, please.

4 Q Did you have any involvement with the congressional  
5 redistricting plan?

6 A I oversaw the work of the William and Mary Law School  
7 students.

8 Q Did any of the proposed congressional plans suggest  
9 increasing the black voting-age population of CD 3?

10 A They did.

11 Q Did you, as part of your work with the commission,  
12 analyze whether any of the proposed plans would have  
13 violated the equal protection clause?

14 A I did not.

15 Q Why not?

16 A We had insufficient time and resources to conduct any  
17 such analyses.

18 Q Did you do any racial bloc voting analyses?

19 A We did not.

20 Q Now, a moment ago, Mr. Carvin mentioned a Law Review  
21 article you published that's maybe the most attention any  
22 Law Review article has ever garnered here. What was that  
23 Law Review article about?

24 A It was a history of redistricting in Virginia from the  
25 colonial times to the present.

1 Q Did it discuss the independent bipartisan advisory  
2 commission?

3 A It did.

4 Q What was that discussion, briefly?

5 A It discussed the circumstances around the commission's  
6 work.

7 Q Did your article draw any conclusions about whether  
8 race was a predominant purpose behind the enacted plan?

9 A It did not.

10 Q Did you even address that?

11 A We did no such analyses.

12 Q At the end of the day, did you receive any awards or  
13 commendations for your work with the Virginia  
14 redistricting independent bipartisan commission?

15 A The Senate gave a commendation to us for the work on  
16 the competition, and the software that we developed has  
17 received numerous awards.

18 Q All right. Let's turn to your work specifically with  
19 respect to this case. What materials did you review in  
20 order to form your expert opinions and prepare your  
21 reports in this matter?

22 A I reviewed the census data, the Section 5 submission  
23 from the Commonwealth of Virginia to the Department of  
24 Justice, the Virginia State Board of Elections' election  
25 data, hearings and transcripts from the legislative



1 record, and hearings that the legislature held in public  
2 comments.

3 Q Did you review any of the Department of Justice  
4 redistricting guidance?

5 A Generally, yes.

6 Q And did you review any applicable or historical case  
7 law concerning Virginia's redistricting efforts?

8 A I did.

9 Q What was that?

10 A Specifically I looked at a case, *Moon v. Meadows*, that  
11 found a district that was pre-cleared by the Department of  
12 Justice in the 1990s to be an unconstitutional  
13 gerrymander.

14 Q Thank you. Dr. McDonald, do you feel you had an  
15 opportunity to review the materials, all the materials  
16 necessary to reach the conclusions that you provided in  
17 your report?

18 A Yes, I do.

19 Q So let's discuss some of the factual background for  
20 Virginia's 2012 congressional redistricting. Why did  
21 Virginia have to redraw its districts?

22 A After a new census, we discovered that the districts  
23 had become out of balance in terms of population. At that  
24 stage, the districts must be balanced, and redistricting  
25 commences.

1 Q When did the federal census data for Virginia, for the  
2 Commonwealth become available?

3 A If I recall correctly, this was February of 2011, and  
4 then we had a revision because of a misallocation of the  
5 Norfolk naval base.

6 Q Who ultimately drew the Virginia congressional  
7 redistricting plan based on your research?

8 A In the public record, Delegate Janis is the one who is  
9 identified as the author of the redistricting plan.

10 Q Sounds like the independent bipartisan commission also  
11 proposed a plan?

12 A They did.

13 Q And then some students at William and Mary?

14 A Those were the individuals who drew that plan. There  
15 was actually three plans.

16 Q But the enacted plan was prepared by who?

17 A Delegate Janis.

18 Q Thank you. How do you know that Delegate Janis drew  
19 that plan?

20 A Because he said so.

21 Q Take a look at Plaintiffs' Exhibit 43, if you would.

22 A Yes.

23 Q Can you identify that document?

24 A This is a transcript of the second reading of House  
25 Bill 5004 which is the congressional redistricting plan

1 that was eventually enacted.

2 Q Is the transcript of a hearing before what body?

3 A The House of Delegates.

4 Q Did you review this transcript as part of your  
5 research in developing your opinions in this case?

6 A I did.

7 Q Why?

8 A Because this is where Delegate Janis explains his role  
9 in the redistricting and the criteria which he used in  
10 developing the redistricting plan.

11 Q While we're here, if you can flip back one exhibit to  
12 Exhibit 42. What is that?

13 A This is a videotape of that same transcript.

14 Q So 42 is the video, 43 is the transcript, they are  
15 both of the same hearing?

16 A Yes.

17 Q So then let's take a look at page 14 of Exhibit 43, if  
18 we might, and we've put it up on the ELMO. Is this the  
19 passage where Delegate Janis says that he was the author  
20 of the map?

21 A Which line do you want me to read?

22 Q If you could look at line 16, page 14, line 16.

23 A So Mr. Armstrong, who is questioning Janis, asks the  
24 question, "Can the gentlemen identify who he was referring  
25 to when he used the pronoun 'we'?"

1 Delegate Janis in response, "What I will say is this  
2 is my legislation. I looked at this legislation. I  
3 looked at the data. We looked at the recommendations of  
4 the congressional district. We tried to reconcile  
5 sometimes-competing recommendations from various  
6 congressional members. We looked at the data from the  
7 census bureau."

8 JUDGE PAYNE: Slow down a little bit.

9 THE WITNESS: My apologies. "I was most  
10 especially focused on making sure the Third Congressional  
11 District did not retrogress in its minority voting  
12 influence."

13 Q I'd like to stop for just a minute and focus on that  
14 sentence in the middle on line 21. "We tried to reconcile  
15 sometimes-competing recommendations from various  
16 congressional members." Do you see that?

17 A I do.

18 Q Is that consistent with what Mr. Carvin mentioned a  
19 minute ago in opening statement, that he allowed --  
20 Delegate Janis somehow allowed the congressional members  
21 to draw their own districts?

22 A No.

23 Q Why not?

24 A This is -- he's drawing the map, and he's taking into  
25 account recommendations from those members of Congress.

1 He's not allowing them to draw their own districts.

2 Q Okay, thank you, sir.

3 JUDGE PAYNE: What page are you talking about?

4 MR. HAMILTON: This is Exhibit 43, page 14, and  
5 specifically that sentence --

6 JUDGE PAYNE: I got it.

7 MR. HAMILTON: Thank you, Your Honor.

8 Q Now, sir, and we don't have this for the ELMO, but if  
9 we could turn to page 21 of the same exhibit, tell me when  
10 you are there.

11 A Yes, I'm there.

12 Q If I could direct your attention to line 18.

13 A Yes.

14 Q And so would you read the question and the answer,  
15 please.

16 A Line 18?

17 Q I'm sorry, line eight.

18 A So again, Mr. Armstrong asks, "Once again, the  
19 gentleman referred to the pronoun 'we' in terms of the  
20 development of permissive criteria. Can the gentleman  
21 identify who 'we' is in the development of the permissive  
22 criteria that he just enunciated?"

23 Delegate Janis's response is, "'We' is me."

24 Mr. Speaker: "It's the royal 'we.'"

25 Mr. Janis: "I'll try to use -- I'll be the first

1 person singular if that removes any confusion, Mr.

2 Speaker."

3 Q Okay. Is there any evidence from reviewing this  
4 transcript or any of your other research that anyone other  
5 than Delegate Janis drew this map?

6 A No.

7 Q Let's turn to Plaintiffs' Exhibit 53, if you would,  
8 sir. Are you there?

9 A I'm there.

10 Q I'll represent to you this is an email we received  
11 from a Republican lawyer, Chris Marston, in response to a  
12 subpoena plaintiffs issued to him. Do you know who Mr.  
13 Marston is?

14 A He's counsel to the Republican caucus in the House of  
15 Delegates.

16 Q Okay. Can you take a look at this email chain and  
17 tell us how it starts down at the bottom.

18 A You have to read it from backwards forwards. So the  
19 bottom of the chain, what we see is the -- Carl Anderson,  
20 who is the chairman of the Republican party of Hampton, is  
21 making a request of delegates locally in the Hampton Roads  
22 area, and he's asking -- in the second paragraph down,  
23 he's asking for -- there's a precinct of VTD that's been  
24 split. It's called Macon precinct. That's split in the  
25 adopted plan, and he's asking that those splits be

1 rectified somehow so that that precinct will no longer be  
2 split.

3 Q What happens to that request?

4 A It goes to -- from Delegate Oder to -- sent to Chris  
5 Marston, and Delegate Oder is asking Chris Marston, can  
6 you help somehow is the question, and then Chris Marston's  
7 response is, "Janis is pretty Lone Ranger on this one, but  
8 I'll send it to him with a copy for you indicating if the  
9 conference committee does consider any changes to the  
10 plan."

11 Q Lone Ranger, what did you understand that reference to  
12 be?

13 A That he's working alone on the redistricting plan.

14 Q All right, thank you. Is that consistent with your  
15 understanding from your research?

16 A Yes.

17 Q Okay. Did Delegate Janis's plan --

18 MR. CARVIN: I'm sorry, objection. They laid no  
19 foundation for what research, if any, Dr. McDonald did  
20 into the internal legislative processes of the General  
21 Assembly and how he is in any way qualified to offer an  
22 opinion on that.

23 JUDGE PAYNE: Sustained.

24 Q Based on your review of the transcript and what Mr. --  
25 what Delegate Janis said, Delegate Janis, what did

1 Delegate Janis say about who authored the plan?

2 A That he did.

3 Q Is there any evidence that you were able to find that  
4 anyone else had anything to do with this?

5 A No.

6 Q Thank you, sir. All right, let's -- did Delegate  
7 Janis's plan ultimately get signed into law at some point?

8 A Later it did, yes.

9 Q And when was that?

10 A It was actually in 2012. This legislative floor  
11 debate that we just read is from 2011, so between -- in  
12 2011, the House of Delegates and the Senate came to  
13 loggerheads on competing redistricting plans. Once  
14 Republicans gained a functional majority in the Senate,  
15 then the same bill, exact same bill was introduced in  
16 2012, and it was carried by a different sponsor because  
17 Delegate Janis was no longer in the House of Delegates,  
18 and that bill was then enacted, signed by both chambers  
19 and enacted into law.

20 Q If the Court wanted to hear about additional detail on  
21 the procedural history of the bill, where would it look?

22 A In the Section 5 submission from the Commonwealth of  
23 Virginia to the Department of Justice.

24 Q Okay. Take a look quickly, just to identify it for  
25 the record, at Plaintiffs' Exhibit 8, and my question to



1 you is, is that the 2012 Section 5 submission by the  
2 Commonwealth of Virginia?

3 A This is the attachment of that Section 5 submission  
4 that discusses the legislative history of the  
5 redistricting plan.

6 Q We won't go through the detail. It's there for the  
7 Court if the Court is interested. How many congressional  
8 districts were drawn in the enacted plan?

9 A 11 of them.

10 Q I'm sorry?

11 A 11.

12 Q And one of those was CD 3?

13 A Yes.

14 Q Can you describe -- we've got a blow-up of the enacted  
15 plan next to the alternative plan up here for the Court to  
16 review, but could you just describe for the record enacted  
17 Congressional District 3?

18 A Enacted Congressional District 3 has a bizarre shape.  
19 It stretches from Richmond to Norfolk skipping back and  
20 forth across the James River.

21 MR. CARVIN: I apologize for interrupting. Would  
22 it be all right if I saw the map he was referring to?

23 JUDGE PAYNE: Sure. Do you have a smaller  
24 version?

25 MR. HAMILTON: We provided these.

1 JUDGE PAYNE: Do you want to move?

2 MR. CARVIN: Either I move or inconvenience the  
3 witness anyway to turn or maybe --

4 JUDGE PAYNE: You can move it back a little bit  
5 if you want so everybody, the lawyers can see.

6 THE CLERK: Would the Court like me to have a  
7 seat over here for him?

8 JUDGE PAYNE: Can you see it from there,  
9 Mr. Carvin?

10 MR. CARVIN: If it's all right, we can stand  
11 right here.

12 JUDGE PAYNE: You can sit right there.

13 A The district is bizarrely shaped. It stretches from  
14 Richmond to Norfolk skipping back and forth across the  
15 James River mostly to capture predominantly  
16 African-American communities.

17 Q So to be clear looking at the demonstrative exhibit,  
18 the big blowup on the easel, the one on the left is the  
19 enacted plan?

20 A Yes. It's a blowup of the Hampton Roads area.

21 Q And the one on the right, what is that?

22 A That's the alternative redistricting plan.

23 Q Okay. So just looking at the one on the left, which  
24 color is CD 3?

25 A It's yellow.

1 Q And is that consistent with the alternative map?

2 A Yes.

3 Q So yellow. What's in green?

4 A That's CD 2.

5 Q So down in the Norfolk area, can you describe what is  
6 happening there?

7 A In Norfolk, we have the Third Congressional District.  
8 It wraps around a small -- three predominantly white  
9 precincts that are not connected to the Second District  
10 via bridge or anything else. They are only connected by  
11 water. You have to skip across water twice to get to  
12 those white communities.

13 It wraps around and grabs those, and then the Second  
14 District is wrapping -- the Third District comes up to get  
15 a large precinct, Titustown Center, which is part of the  
16 naval air station, and then the Second District wraps  
17 around that to get to those three precincts that are just  
18 to the south of the naval air station.

19 Q So Norfolk, the city, is in how many different  
20 congressional districts?

21 A Two.

22 Q And which portions are in CD 3? Can you describe that  
23 demographically?

24 A They are the predominantly African-American portions  
25 of Norfolk.

1 Q And which are in CD 2?

2 A The predominantly white communities.

3 Q Okay. Now, directing your attention to Newport News  
4 and Hampton, what is happening up there?

5 A Same scenario that we just discussed. Predominantly  
6 black African-American communities in Hampton and Newport  
7 News are assigned to the Third Congressional District, and  
8 predominantly white communities or white communities are  
9 assigned to the Second Congressional District.

10 Q Does Hampton and Newport News share a common municipal  
11 border?

12 A They do.

13 Q Okay. And how many -- are the two cities split apart  
14 by the enacted map?

15 A They are, yes.

16 Q When -- what is the history of -- talk for just a  
17 minute about the history of CD 3. You mentioned before  
18 *Moon v. Meadows*. Why did you look at that case?

19 A In *Moon v. Meadows*, the Court laid out a series of  
20 criteria that they evaluated in determining whether or not  
21 the map that had been adopted in the 1990s was an  
22 unconstitutional gerrymander.

23 Q And what were the factors that the Court was looking  
24 at?

25 A The Court looked at populations that were moved in and

1 out of the adopted then-unconstitutional eventually  
2 district. They looked at the locality splits, both the  
3 splits like Norfolk or Hampton or independent cities as  
4 well. They looked at VTD splits or precinct splits, and  
5 they looked at the shape of the district, and they  
6 examined also whether or not water was used to bypass  
7 racial communities.

8 Q All right, thank you, sir. Can I direct your  
9 attention to Plaintiffs' Exhibit 50.

10 A Yes.

11 Q What is this document, sir?

12 A This is a history of the change of the black  
13 voting-age population in the Third Congressional District  
14 from 1991 through 2012 using a metric that stated -- that  
15 the Commonwealth of Virginia included in their Section 5  
16 submissions.

17 Q Thank you. If I might ask Mr. Neal to toggle over to  
18 the laptop so I may display some illustrative exhibits.  
19 I'll be displaying a number of exhibits. They've been  
20 reviewed to the opposing counsel, and there are no  
21 objections either to our illustratives or to the  
22 illustratives that the defendants intend to use during  
23 their presentation.

24 JUDGE PAYNE: Do we have them?

25 MR. HAMILTON: I'm sorry?

1 JUDGE PAYNE: Do we have them?

2 MR. HAMILTON: They're going to be displayed on  
3 the screen in just a moment.

4 JUDGE PAYNE: They may have better eyes than I  
5 do, but I can't see anything.

6 MR. HAMILTON: I can't either, Your Honor.

7 JUDGE PAYNE: Do you have a hard copy of each one  
8 of the ones you're going to use for each of us?

9 MR. HAMILTON: I don't, Your Honor, but I will at  
10 lunch.

11 THE CLERK: Do you have the document up, because  
12 I don't see it.

13 MR. HAMILTON: I do. While we worry about that,  
14 let's move forward with the examination and hope that we  
15 can display this.

16 Q Let's start -- so Exhibit 50, Dr. McDonald, is a  
17 display of the population changes in CD 3.

18 MR. HAMILTON: Your Honor, it's exactly the same  
19 thing as Exhibit 50. I reformatted it to make it look a  
20 little prettier, so it's what you've got in your hands  
21 there.

22 Q Let's start with 1991. What was the black voting-age  
23 population of the Third Congressional District in 1991?

24 A 61.17 percent.

25 Q And what happened to that CD?

1 A That was found unconstitutional.

2 Q That's the *Moon v. Meadows* district?

3 A Correct.

4 Q How does the 2012 enacted Congressional District 3  
5 compare to the congressional district invalidated in *Moon*  
6 *v. Meadows* geographically?

7 A It's very similar.

8 Q How so?

9 A Like that redistricting plan, the Third Congressional  
10 District skips along the James River back and forth  
11 picking up predominantly African-American communities.  
12 Like the third -- the unconstitutional Third District, it  
13 includes portions of Petersburg as well.

14 Q And you already indicated that *Moon v. Meadows* found  
15 the district unconstitutional. I think you identified the  
16 factors the courts looked at. Did you, during the course  
17 of your analysis, look at the same factors that the Court  
18 had identified in *Moon v. Meadows*?

19 A I did.

20 Q Now, what happened after the *Moon v. Meadows* court  
21 struck down CD 3?

22 A A remedial map was drawn and pre-cleared by the  
23 Department of Justice.

24 Q And which -- what year was that?

25 A That's 1998.

1 Q So if we're looking at this table, either in  
2 Exhibit 50 or in the illustrative exhibit that's up on the  
3 screen, that would be the second column there?

4 A Correct, the 1998 column.

5 Q And black voting-age population of that district was  
6 what?

7 A 50.47 percent.

8 Q Now, you mentioned that it was pre-cleared by the  
9 Department of Justice?

10 A That's correct.

11 Q With that black voting-age population?

12 A Correct.

13 Q What cities did the Third Congressional District lose  
14 under the remedial plan in 1998?

15 A It lost Petersburg and Portsmouth.

16 Q Okay. And where are those cities in today's enacted  
17 CD 3?

18 A They are in today's enacted CD 3.

19 Q When was Portsmouth added back?

20 A In 2001.

21 Q And when was Petersburg added back?

22 A 2012.

23 Q 2012. So let's just pause there for a moment. Did I  
24 hear you correctly say Petersburg was moved out of the  
25 Third Congressional District in 1998?



1 A Correct.

2 Q And it was added back just in the enacted plan?

3 A Correct.

4 Q So to be clear, was Petersburg in the benchmark Third  
5 Congressional District?

6 A It was not.

7 Q It was not. You are sure?

8 A Absolutely sure.

9 Q Okay. Hold that thought, and we'll come back to it in  
10 a minute. What was the black voting-age population --  
11 well, you said the black voting-age population in '98 was  
12 50.47. When did the CD next change, the Congressional  
13 District 3 change next?

14 A After the next census in 2000, in 2001.

15 Q And what was the black voting-age population then?

16 A This was 53.2 percent as the Commonwealth of Virginia  
17 reported to the Department of Justice.

18 Q Maybe this is a good time to pause and ask, why do you  
19 say it like that?

20 A Well, the Commonwealth of Virginia used a metric which  
21 the Department of Justice recommends when first reporting  
22 black voting-age population. It's in my reports. It's  
23 called the exclusive method because it only counts  
24 African-Americans as people who are -- have, on the census  
25 forms, identified themselves as African-American or

1 African-American and white.

2 After the 2000 census, the census started allowing  
3 people to use multiple racial categories, so it was then  
4 feasible to have people of multiple racial categories.

5 The OMB and the Department of Justice then say if  
6 there are racial issues at stake, the appropriate measure  
7 to use is what I call the inclusive method which is to  
8 look at anyone who identifies themselves as  
9 African-American or African-American and any other of the  
10 four racial categories, white, Asian, native American, or  
11 Asian-Pacific, even multiple categories, so in the OMB and  
12 Department of Justice guidelines, that's the correct  
13 percentage. These are percentages, that's this inclusive  
14 method. The percentages that are reported here are the  
15 exclusive method that only look at black and black plus  
16 white.

17 Q Thank you, sir. Okay, so 2001, it was 53.2 percent?

18 A Yes, using this exclusive method.

19 Q Was that submitted to the Department of Justice  
20 pursuant to Section 5 for preclearance?

21 A It was.

22 Q With 53.2 percent?

23 A Yes.

24 Q And was it pre-cleared?

25 A Yes.

1 Q And then how did that change using the exclusive  
2 method for counting in the enacted plan?

3 A It changed in 2012 to 56.3 percent using this  
4 exclusive method.

5 Q If we use the inclusive method, what is the total  
6 black population in 2012?

7 A 57.2 percent.

8 Q And you are not able to use -- just to be apples to  
9 apples, would it be possible to go back to 1991 and  
10 calculate the numbers on these tables using the inclusive  
11 method?

12 A It would not, because prior to 2000, the census bureau  
13 only allowed people to check off one of the five races.

14 Q If the Court wanted to confirm the numbers you just  
15 testified to, where would you find those in the exhibits  
16 before the Court?

17 A They are found in my expert reports.

18 Q In addition, would they be contained in the Section 5  
19 submissions?

20 A These specific numbers are located in the Section 5  
21 submissions, yes.

22 MR. HAMILTON: And, Your Honors, I won't take the  
23 time to go through the notebook and identify each one.

24 The 1991 Section 5 submission is Plaintiffs' Exhibit 23.

25 The 1998 Section 5 submission is Exhibit 21, and the 2001

1 Section 5 submission is Exhibit 19. And I'm happy to go  
2 through them in detail if the Court would like, but I  
3 think with the reference in the record, I'll move ahead.

4 Q Now, let's discuss, if we could, the conclusions that  
5 you can draw from looking at Plaintiffs' Exhibit 50.

6 A The district that has 51.17 percent black voting-age  
7 population would be suspect, because it had been found  
8 unconstitutional by the *Moon v. Meadows* court that the  
9 Department of Justice will preclear a plan as low as  
10 50.47 percent black voting-age population.

11 Q What's happened over time to CD 3?

12 A It's incrementally increased its black voting-age  
13 population.

14 Q Is it closer now to the *Moon v. Meadows* district, or  
15 is it closer to the remedial district drawn in 1998?

16 A It's closer now to the *Moon v. Meadows* district than  
17 the remedial district.

18 Q Let's discuss the political performance of the Third  
19 Congressional District since 2001. Who is the current  
20 incumbent in that district?

21 A Representative Bobby Scott.

22 Q When was he first elected to the United States House  
23 of Representatives?

24 A 1992.

25 Q If you turn back to Plaintiffs' Exhibit 27, I think

1 that's your initial report.

2 A Yes.

3 Q And specifically, if you could turn to page 11?

4 A Yes.

5 Q Can you describe the table that's found in the middle  
6 of the page, and I'm displaying it on the overhead.

7 A This is the vote share that Bobby Scott received and  
8 his opponents from 2002 through 2012.

9 Q Can you explain the numbers in 2002, 2006, and 2008?  
10 Those are very high numbers. Why is that?

11 A He's running unopposed by a major party Republican  
12 opponent.

13 Q And he won with what percentage of the vote?

14 A He's winning over 95 percent of the vote.

15 Q In those three elections?

16 A In those three elections.

17 Q What about the other two, in 2010 and 2012, did he  
18 have an opponent?

19 A Yeah. The Republicans choose to run a candidate  
20 against him. In those elections -- in 2010, he receives  
21 70 percent of the vote. In 2012, he receives 81.3 percent  
22 of the vote.

23 Q Was the 2010 election conducted under the enacted  
24 plan?

25 A It was not.

1 Q What plan was in place in 2010?

2 A That was the benchmark plan.

3 Q And he won by 70 percent of the vote?

4 A In a Republican waive year of historic proportions, he  
5 won with 70 percent of the vote.

6 Q Anyone else in Virginia have a winning margin of  
7 70 percent or better?

8 A I'd have to look at the State Board of Elections. I  
9 believe in 2010, someone did.

10 Q Anyone else in Virginia in the --

11 A In Virginia, yes.

12 Q -- in the congressional delegation have a  
13 winning percent --

14 A I believe Goodlatte did.

15 Q In your professional opinion, was Representative Scott  
16 at risk of losing reelection in any of the elections  
17 listed on this table in Exhibit 27?

18 A No, he was not.

19 Q And what plan was in place for the 2012 election?

20 A The adopted plan.

21 Q And how did he do in that election?

22 A He received 81.3 percent of the vote.

23 Q Is Representative Scott the black population's  
24 congressional candidate of choice in CD 3?

25 A Presumably so, because they're the majority of the

1 population of the district, and he's receiving 70 percent  
2 of the vote.

3 Q Let's turn for a minute to the results of the 2010  
4 census and some of the legal requirements for  
5 redistricting.

6 JUDGE PAYNE: Excuse me. Before you go away from  
7 this page 11, do you have anywhere in your report the  
8 percentage of the voters that were African-American and  
9 the percentage that were not?

10 THE WITNESS: Yes.

11 JUDGE PAYNE: Where is that in your report?

12 THE WITNESS: Those were those tables that we  
13 were just looking at, and they are found in my report.  
14 They would be --

15 JUDGE PAYNE: I mean of the people who actually  
16 voted.

17 THE WITNESS: Oh, the people who actually voted.

18 JUDGE PAYNE: The people who actually voted in  
19 the election. Do you have any record in here of what  
20 percentage of the people who actually voted were  
21 African-American and what percentage were not?

22 THE WITNESS: Right. To do -- to answer your  
23 question, what experts --

24 JUDGE PAYNE: Yes or no? Start with that.

25 THE WITNESS: Not specifically of Bobby Scott,

1 but I have looked at some other candidates.

2 JUDGE PAYNE: I'm talking about in the Third  
3 District, do you have that? Do you have that figure for  
4 the Third District in this report?

5 THE WITNESS: Not for Bobby Scott, no.

6 JUDGE PAYNE: All right, thank you.

7 JUDGE DUNCAN: Excuse me. Could I ask one other  
8 thing? You said that you extrapolated from the data that  
9 the Department of Justice will preclear a plan as low as  
10 50, and I didn't get --

11 THE WITNESS: .47.

12 JUDGE DUNCAN: And for that, your authority in  
13 the record is?

14 THE WITNESS: The district that was pre-cleared  
15 as a remedial district to the *Moon v. Meadows* decision.

16 JUDGE DUNCAN: Thank you.

17 THE WITNESS: You are welcome.

18 Q Let's just follow up on that. In your experience, are  
19 you familiar with Department of Justice preclearance?

20 A Yes, I am.

21 Q Has the department pre-cleared plans below 50 percent?

22 A They have.

23 Q Have they done that frequently?

24 A If the evidence provides support that an

25 African-American or minority candidate of choice can be



1 elected out of a district, they will do that. The  
2 frequently question is, how frequently are there districts  
3 of that magnitude, and there aren't many, but there are  
4 some that exist out there.

5 Q Thank you, sir. And then just to follow up on Judge  
6 Payne's question, why don't you have the breakdown, the  
7 racial breakdown of the actual voters in CD 3? Is that  
8 data available?

9 A We do not have the race of voters in the State of  
10 Virginia.

11 Q It's not reported?

12 A It's not reported.

13 Q So if you wanted to collect the data, you wouldn't be  
14 able to.

15 A We would have to infer it through statistical  
16 analyses, but we cannot directly collect this information.

17 Q Thank you, sir. All right, so let's go back to the  
18 2010 census and some legal requirements, and we were going  
19 to have you turn to page 14 -- Exhibit 27, page 14, and if  
20 you could, describe the table that appears at the top of  
21 the page.

22 A This is statistics for the -- population statistics  
23 for the benchmark and the adopted districts.

24 Q What do you mean with the term benchmark?

25 A It's a term of art that's used in this sort of

1 litigation. It refers to the districts that were in place  
2 prior to the last redistricting.

3 Q And as used on this table, the phrase adopted means  
4 the enacted plan?

5 A Correct.

6 Q What does the first column show?

7 A The first column shows the total population of those  
8 districts.

9 Q Under both plans, the adopted and the benchmark?

10 A Correct.

11 Q What does the next column show?

12 A This is what's called the ideal population. In order  
13 for the districts to have exacting equal population across  
14 the Commonwealth of Virginia, this is the population  
15 number that you would have to have in order to achieve  
16 that goal.

17 Q So how many people needed to be added to the Third  
18 Congressional District to reach the ideal or required  
19 population?

20 A Right. So this is the third column labeled deviation.  
21 The benchmark district was under the ideal population by  
22 63,976.

23 Q Okay. And then what's down at the bottom, the bottom  
24 line of this table? Could you explain what that means?

25 A The bottom line of this table. This is -- there's a

1 row that is the change of the district from the benchmark  
2 to the adopted and then the percent net black voting-age  
3 population that was added to the benchmark district.

4 Q So do I understand this to say that using the  
5 inclusive method, this is the one, two, three, four, five,  
6 sixth, seventh column over, counted that way, 92 percent  
7 of the net movement was black voting-age population?

8 A Well, it's the sixth after the heading, so if you look  
9 under the heading that's black VAP (inclusive method),  
10 yes, 92 percent net of the population that was moved into  
11 the adopted district from the benchmark district was  
12 African-American. The black voting-age population was  
13 African-American.

14 Q Okay. Thank you. Other than the constitutional equal  
15 population requirement, we've heard some talk in the  
16 opening statements about the Voting Rights Act. Does the  
17 Voting Rights Act apply to Virginia and its redistricting  
18 decisions?

19 A It does.

20 Q Which sections?

21 A Section 2 and Section 5.

22 Q What is Section 2 as far as you understand it?

23 A Section 2 covers the entire country, and it requires,  
24 in certain circumstances, a majority-minority district be  
25 drawn.

1 Q And what is Section 5 as far as you understand it?

2 A Section 5 refers to nonretrogression, so it -- only  
3 certain jurisdictions are required under Section 5 to  
4 demonstrate that a new redistricting plan shall not  
5 retrogress the abilities of a minority community to elect  
6 a candidate of their choice.

7 Q If I could direct your attention to Defendants'  
8 Exhibit 9, it should be the smallest black notebook on the  
9 edge there.

10 JUDGE PAYNE: Defendants' or the intervenor  
11 defendants?

12 MR. HAMILTON: Defendants', Your Honor.

13 THE WITNESS: I would add, as I'm looking to  
14 this, Section 5 is no longer operative in the State of  
15 Virginia as of last year.

16 JUDGE PAYNE: Which exhibit do you want,  
17 Defendants' Exhibit what?

18 MR. HAMILTON: Number nine.

19 JUDGE PAYNE: All right.

20 THE WITNESS: Yes.

21 Q Dr. McDonald, can you identify Defendants' Exhibit 9?

22 A This is the federal register, and it is a notice that  
23 has been written by the Department of Justice. It's  
24 Entitled Guidance Concerning Redistricting Under Section 5  
25 of the Voting Rights Act.

1 Q What is your understanding of the purpose of this  
2 guidance?

3 A This was guidance that was produced in February 2011  
4 prior to the redistricting, and it was intended to give  
5 jurisdictions across the country guidance on how to adhere  
6 to Section 5 of the Voting Rights Act.

7 Q If I can direct your attention to the second page of  
8 the exhibit, it's numbered 7471, and the heading is  
9 Analysis of Plans. Can you read that first paragraph into  
10 the record, please.

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

20 Q Is there a section of this guidance that describes  
21 retrogressive effect?

22 A There is.

23 Q Where is that?

24 A It's on that same page. It's in the second column  
25 towards the bottom. There is a subheading entitled

1 Retrogressive Effect.

2 Q Can you read the -- let me direct your attention to  
3 the first paragraph in the third column. Maybe you can  
4 summarize for us rather than read the whole thing into the  
5 record. What is it saying here?

6 A Well, the first sentence is pretty descriptive. It  
7 says, "A proposed plan is retrogressive under Section 5 if  
8 its net effect would be to reduce minorities' effective  
9 exercise of the electoral franchise."

10 Q Is that consistent with your understanding of the  
11 Section 5 standard?

12 A Yes.

13 Q Okay. And let's look at the next paragraph. If you  
14 could read that paragraph, please. It begins with "In  
15 determining"?

16 A Yes. "In determining whether the ability to elect  
17 exists in the benchmark plan and whether it continues in  
18 the proposed plan, the Attorney General does not rely on  
19 any predetermined or fixed demographic percentages at any  
20 point in the assessment.

21 "Rather, in the department's view, this determination  
22 requires a functional analysis of the electoral behavior  
23 within the particular jurisdiction or election district."

24 Do you want me to continue reading?

25 Q Please do, to the end of the paragraph.

1 A "As noted above, census data alone may not provide  
2 sufficient indicia of electoral behavior to make the  
3 requisite determination. Circumstances such as differing  
4 rates of electoral participation within discrete  
5 proportions of a population may impact on the ability of  
6 voters to elect candidates of choice even if the overall  
7 demographic data show no significant change."

8 Q Thank you. Is that consistent with your understanding  
9 of the way that the Department of Justice reviews Section  
10 5 submissions?

11 A Yes. They look at electoral performance. They don't  
12 look strictly at the census black voting-age population.

13 Q And is that what is sometimes referred to as a racial  
14 bloc voting analysis?

15 A It is.

16 JUDGE PAYNE: These are analyses performed by the  
17 Department of Justice? Is that what you are saying?

18 THE WITNESS: Usually what happens is that  
19 jurisdictions will do --

20 JUDGE PAYNE: On that particular question, I was  
21 just asking whether the Department of Justice is making  
22 the analysis.

23 THE WITNESS: They may do their own analysis, or  
24 the jurisdiction may do their own analysis.

25 Q In your experience, is it recommended that the

1 jurisdiction does its analysis, racial bloc voting  
2 analysis?

3 MR. CARVIN: Objection. There's no foundation  
4 that he knows --

5 JUDGE PAYNE: Sustained. You can ask him that  
6 question if you want to, but there's no foundation yet.

7 MR. HAMILTON: Thank you. Let me try.

8 Q Have you reviewed Section 5 submissions by various  
9 jurisdictions to the Department of Justice for  
10 preclearance?

11 A I have.

12 Q Do some of them contain racial bloc voting analyses?

13 A I have. I've assisted with the development --

14 JUDGE PAYNE: Excuse me. The question was,  
15 Doctor, if you listen to the question, was some of the  
16 ones you reviewed, did they have those analyses done by  
17 the jurisdiction.

18 THE WITNESS: Yes. One of the jurisdictions that  
19 I reviewed, I actually participated in the development of  
20 those statistics.

21 JUDGE PAYNE: So of the ones that you've  
22 reviewed, did all of them have it, or are you saying that  
23 just one had it?

24 THE WITNESS: Not all of them have them, no.

25 JUDGE PAYNE: The only one you knew about is one,



McDonald - Direct

65

1 or do you know of more?

2 THE WITNESS: I know of more.

3 JUDGE PAYNE: I think that's what he's trying to  
4 ask.

5 MR. HAMILTON: Thank you, Judge Payne. I  
6 appreciate the assistance.

7 JUDGE PAYNE: Please listen to the question and  
8 answer the question. They know what they want to try to  
9 get out, and it will go faster if they do that.

10 Q So, Dr. McDonald, if I understand you correctly, you  
11 reviewed a number of Section 5 submissions; is that true?

12 A Yes.

13 Q You participated in at least one?

14 A Yes.

15 Q Have you participated in more than one?

16 A No, I have not.

17 Q And putting aside the one that you participated in,  
18 some of the ones that you reviewed, did they contain  
19 racial bloc voting analyses?

20 A Yes, they did.

21 Q And then the one that you prepared, did you prepare a  
22 racial bloc voting analysis?

23 A I assisted on one for the Arizona commission.

24 Q Thank you. You answered my next question which was,  
25 where. Okay, thanks so much.

1           As far as you know, does the Section 5 analysis  
2     require the Department of Justice or the United States  
3     District Court for the District of Columbia to determine  
4     whether race was the predominant purpose behind a  
5     redistricting decision?

6     A     It does not.

7     Q     Why not?

8     A     The only criteria in terms of the ability to elect --

9           MR. CARVIN: I'm sorry. We switched from Justice  
10    Department practice to a lay witness's, nonlawyer's views  
11    on Section 5. This is not proper testimony on a legal  
12    issue.

13           JUDGE PAYNE: Is that testimony in the report?

14           MR. CARVIN: No, it's not, Your Honor.

15           JUDGE PAYNE: Sustained.

16    Q     Okay. Well, let's turn to page 7470 of Defendants'  
17    Exhibit if we could. Tell me when you are there.

18    A     Yes.

19           JUDGE PAYNE: Exhibit 9.

20           MR. HAMILTON: Yes, same exhibit, Your Honor.

21    Q     The first full paragraph in the third column begins  
22    "The Attorney General may not."

23    A     Yes.

24    Q     Could you read that paragraph, please.

25    A     "The Attorney General may not interpose an objection

1 to a redistricting plan on the grounds that it violates  
2 the one-person-one-vote principle, on the grounds that it  
3 violates *Shaw v. Reno*, or on the grounds that it violates  
4 Section 2 of the Voting Rights Act. The same standard  
5 applies to a declaratory judgment action. Therefore,  
6 jurisdictions should not regard a determination of  
7 compliance with Section 5 as preventing subsequent legal  
8 challenges to the plan under other statutes by the  
9 Department of Justice or private plaintiffs."

10 Q So does preclearance by the Department of Justice  
11 foreclose the possibility that race was a predominant  
12 purpose behind a plan, in your mind?

13 A It does not. It did not in the *Moon v. Meadows*  
14 instance as well.

15 Q Was the CD 3 in *Moon v. Meadows* pre-cleared by the  
16 Department of Justice?

17 A It was.

18 Q And nonetheless, the *Moon v. Meadows* court found that  
19 it was racial gerrymander; is that correct?

20 MR. CARVIN: Objection, leading.

21 JUDGE PAYNE: As Judge Merhige said, that went  
22 out with the Coolidge administration, Mr. Carvin, but by  
23 the same token, you are getting into a lot of things that  
24 are fairly obvious. Just the mere fact that we're here  
25 today answers most of those.

1 MR. HAMILTON: Thank you, Your Honor.

2 JUDGE PAYNE: Let's get on to the meat of what  
3 you are doing, if you would, please.

4 MR. HAMILTON: All right, thank you.

5 Q Were there any public statements in the legislative  
6 record that you reviewed that show that Virginia's  
7 lawmakers were aware of the Voting Rights Act when drawing  
8 the Virginia congressional district?

9 A Yes.

10 Q Where was that? Who said that?

11 A Delegate Janis.

12 MR. CARVIN: I object to this entire line of  
13 inquiry. He has filed four expert reports. He has never  
14 once referred to Delegate Janis's statements on the Voting  
15 Rights Act or politics or anything else.

16 MR. HAMILTON: Your Honor, it's in Exhibit 43  
17 which is in the record, and the witness --

18 JUDGE PAYNE: The objection is that it wasn't  
19 within the disclosures required by Rule 26, and the proof  
20 of that is either it's in there or it's not. What are you  
21 pointing me to?

22 MR. HAMILTON: Well, I'm not pointing you to one  
23 of his reports, Your Honor.

24 JUDGE PAYNE: His objection is he can't testify  
25 to this because he didn't have it in his report under

1 Rule 26. It's not, therefore, an appropriate disclosure,  
2 and he's beyond the scope of what he was authorized to  
3 testify about.

4 Where in his report is this testimony on this  
5 topic, I think, is the objection; is that right,  
6 Mr. Carvin?

7 MR. CARVIN: That's correct, Your Honor.

8 JUDGE PAYNE: I think that point needs to be  
9 proved by you in order for him to testify about it. He  
10 can't just add as he goes along. That's the whole purpose  
11 of the Rule 26 disclosures, is that he stay within the  
12 bounds of what he did in his report so that the other side  
13 will have an opportunity to address those reports and to  
14 cross-examine and they'll know where we are heading.  
15 Where in his report does he testify to it?

16 MR. HAMILTON: Your Honor, he doesn't testify to  
17 this specific statement. The evidence is in the record in  
18 Exhibit 43, and the witness has testified this was the  
19 foundation of the opinion that was disclosed and was  
20 contained in the report.

21 JUDGE PAYNE: Objection sustained.

22 MR. HAMILTON: Thank you, Your Honor.

23 JUDGE PAYNE: He can't testify about it if he  
24 didn't comment on it in his report. It's not good enough  
25 that it was in something that he read.

1 MR. HAMILTON: Okay.

2 Q Dr. McDonald, do you know whether Delegate Janis  
3 focused on the racial population data in the consideration  
4 of the plan?

5 MR. CARVIN: Same objection. The word Delegate  
6 Janis doesn't appear in any of his four reports.

7 JUDGE PAYNE: Maybe this is a good time for you  
8 to sort through what was in his report and what's not so  
9 we can get going and be confined. It's not so rigid as to  
10 require anything -- as to limit to anything -- unless he  
11 actually said it, but it's got to be fairly encompassed  
12 within the scope of the report or it doesn't fit the rule  
13 and it is not within -- it doesn't give them adequate  
14 notice. And we'll change court reporters at this time,  
15 take a 20-minute recess and be back.

16 MR. HAMILTON: Thank you, Your Honor.

17 JUDGE PAYNE: 20 minutes from -- I can't even see  
18 that clock, but you can use that clock.

19

20 (Recess taken.)

21

22

23

24

25

McDONALD - DIRECT

71

1 JUDGE PAYNE: All right. This is just a  
2 reminder. I think if you need to point us to  
3 something, we can read, and let's get down to the meat  
4 of what it is that he's going to testify about, if you  
5 would, please, Mr. Hamilton.

6 MR. HAMILTON: I will indeed, sir.

7 BY MR. HAMILTON:

8 Q Dr. McDonald, I'd like to turn to your opinions  
9 about enacted CD 3.

10 At the conclusion of your research and analysis  
11 were you able to reach a conclusion with respect to  
12 whether race played a role in the drawing of Enacted  
13 Plan's Third Congressional District?

14 A I was.

15 Q What was that opinion?

16 A It's found in my first expert report, that's  
17 Exhibit 27 for the plaintiffs.

18 Q Instead of telling us where it's found, why don't  
19 you just tell us what the opinion was.

20 A That race was a predominant factor in the creation  
21 of the plan.

22 Q Before you explain how you reached that  
23 conclusion, let me ask you this: Didn't the General  
24 Assembly have to consider race? Isn't that required  
25 by the Voting Rights Act?

1 A Yes, they did consider race.

2 Q What's wrong with race being a predominant factor  
3 in redistricting?

4 A Traditional redistricting principles were subsumed  
5 to race.

6 Q Let's talk about how you got to your principled  
7 conclusion. What factors did you examine to reach  
8 your conclusion that race was a predominant factor in  
9 drawing CD 3?

10 A I examined the compactness of the districts. I  
11 examined how the districts had split locality  
12 boundaries, precinct or VTD boundaries. I examined  
13 the overall shape of the district, and I examined the  
14 way in which the district used water to bypass racial  
15 communities.

16 These were all factors that the *Moon* Court  
17 examined. And one additional one was the movement of  
18 racial populations in and out of the Third  
19 Congressional District.

20 Q You've mentioned traditional redistricting  
21 criteria a couple of times. What are they?

22 A Those are similar to what I just outlined. That  
23 list.

24 Q Let's take compactness first. This is discussed  
25 on your expert report?



1 A Yes.

2 Q Page 7?

3 JUDGE PAYNE: Just ask him to testify what  
4 his conclusion was on compactness that led him to his  
5 conclusion. You don't have to have him read the  
6 report.

7 MR. HAMILTON: Thank you, Your Honor.

8 JUDGE PAYNE: And if somebody wants him to  
9 read it, he'll get into that.

10 Q What were your conclusions with respect to  
11 compactness, sir?

12 A That the Third Congressional District is the least  
13 compact district of any district in the Commonwealth  
14 of Virginia.

15 Q What tests did you use to measure compactness?

16 A Well, one, I just looked at it visually, which is  
17 what courts typically do when they examine these sorts  
18 of claims and compactness claims.

19 In addition, there are some statistical procedures  
20 we can use, measures that we can develop to measure  
21 the degree of compactness of districts.

22 Q What are those called?

23 A The three that the Commonwealth of Virginia  
24 provided in their Section 5 submission and what I used  
25 were ones called Reock, Polsby-Popper and

1 Schwartzberg.

2 Q Are those measures summarized in a table in your  
3 report on page 7?

4 A They are.

5 Q And I have that up on the screen. And as measured  
6 by those various tests, do the tests come out all the  
7 same?

8 A Yes. In the Reock and the Polsby-Popper, a lower  
9 value means that the district is less compact. The  
10 Schwartzberg is the other way around. A higher value  
11 means that the district is less compact. On all three  
12 measures the Third District is the least compact  
13 district.

14 Q Thank you, sir.

15 So let's talk about the next redistricting  
16 criteria: Contiguity. First of all, what is  
17 contiguity?

18 A Contiguity means that all portions of a district  
19 are connected to one another.

20 Q Is the enacted CD 3, according to your analysis,  
21 contiguous?

22 A It is contiguous.

23 Q Is it contiguous by land?

24 A It is not.

25 Q What do you mean by that?

McDONALD - DIRECT

75

1 A It's connected at points, and this is in the maps  
2 that you see in front of you in the left-hand screen,  
3 vividly illustrated that the James River and  
4 tributaries are used to connect various portions of  
5 the Third Congressional District.

6 Q Were you able to form a conclusion as to why that  
7 happened, what was going on with connecting the  
8 districts by the James -- the portions of the  
9 districts by the James River?

10 A When we looked at the portion of the Third  
11 Congressional District that's assigned to Newport News  
12 and the portion that's assigned to Hampton, the  
13 intervening geography, the land that's between those  
14 two districts is predominantly white communities.

15 So what's being done here is that the James River  
16 is being used to bypass those white communities to  
17 connect the two predominantly African-American  
18 communities in Newport News and Hampton.

19 When we look down into Norfolk, what we also see  
20 is that water is being used twice. Once across  
21 tributary Willoughby Bay, and a second time through  
22 something called the Lafayette River, without a  
23 connecting bridge, by the way, to bypass an  
24 African-American community to place a white community  
25 that's in that little pocket within the Second

1 District that the Third District wraps around.

2 Q Did you form a conclusion as to whether this  
3 traditional redistricting criteria had been respected  
4 or subordinated to other considerations?

5 A I did.

6 Q What's that conclusion?

7 A That race had been subordinated. I mean that  
8 traditional redistricting principles had been  
9 subordinated to race.

10 Q Let's turn to the last redistricting criteria that  
11 you mention, and that's respecting local political  
12 boundaries. What are the local sort of political  
13 boundaries that we're talking about?

14 A We're talking about counties and independent  
15 cities in Virginia.

16 Q What conclusion did you reach with respect to --  
17 with respect for local political boundaries?

18 A That the Third Congressional District split more  
19 locality boundaries than any other district in the  
20 Commonwealth of Virginia.

21 Q And you summarized your conclusion in a table?

22 A Yes.

23 Q Where is that table?

24 A This is on page 9.

25 Q How does the number of localities split compare in

McDONALD - DIRECT

77

1 between all of the congressional districts in the  
2 Enacted Plan?

3 A I'm not sure I understand that question.

4 Q Looking at your table --

5 A Yes.

6 Q You have it there in front of you. Which one has  
7 the highest split?

8 A The third.

9 Q Okay. What's the next highest?

10 A The first.

11 Q How many splits does the first have?

12 A Five.

13 Q How many does the third have?

14 A Nine.

15 Q Okay. Did the Congressional District Three  
16 contribute to some of the splits in CD 1?

17 A Yes. If a district splits a locality, it must  
18 share a locality with one or more districts. And so  
19 two of the splits that are involved with District 1  
20 actually also involved District 3 as well. They share  
21 a boundary.

22 Q So having compiled this data and looked at it,  
23 what conclusion did you reach with respect to the  
24 locality splits?

25 A That, again, that traditional redistricting

McDONALD - DIRECT

78

1 principles have been subordinated to race.

2 Q Did you analyze any other local political  
3 subdivisions?

4 A Yes, I also examined VTD splits.

5 Q VTD, what does that stand for?

6 A It's a Census Bureau term. It refers to voting  
7 tabulation district, but we might commonly think of  
8 them as precincts.

9 Q So you also analyzed VTD splits. Is that  
10 summarized in a table in your report as well?

11 A I do, yes.

12 Q Where would we find that?

13 A It's on page 10.

14 Q How many VTDs are split by the entire Enacted  
15 Plan?

16 A I'd have to do that math.

17 Q Let me ask you this way: Which congressional  
18 district splits the most VTDs?

19 A The Third Congressional District.

20 Q How many VTDs are split?

21 A Fourteen.

22 Q What's the next highest one?

23 A The Fourth Congressional District.

24 Q How many VTD splits does the Fourth have?

25 A Seven.

McDONALD - DIRECT

79

1 Q Does the Congressional District 3 contribute to  
2 any of the VTD splits in Four?

3 A All of them.

4 Q Now, have you heard the term "technical splits of  
5 VTDs" before?

6 A Yes.

7 Q What does that mean?

8 A It comes up in Mr. Morgan's report, for example,  
9 and he believes or he states in his report that if a  
10 split of a voting tabulation district does not involve  
11 population, for example if it involves water, then it  
12 doesn't actually count as a split. It's only  
13 technically split.

14 Q How does that -- how is that factored in here?  
15 Did you consider whether some of these VTD splits in  
16 14 -- VTD splits in CD 3 were merely technical splits?

17 A I did not.

18 Q Mr. Morgan has testified they are irrelevant  
19 because they don't affect any population. Do you  
20 agree with that?

21 A I do not.

22 Q Why not?

23 A Because these are VTDs -- they may not be visible  
24 in the top chart, but they are a little bit more  
25 visible in that bottom chart that's on the floor.

McDONALD - DIRECT

80

1 These are VTDs that are, for example, in Newport News  
2 that are in that area that's associated with the  
3 Second Congressional District, as an example, and they  
4 extend out to the county boundary with, say, the Isle  
5 of Wight. So that water is assigned to a VTD, and the  
6 Third Congressional District is using the water there,  
7 the James River, to bypass those white communities.

8 It has to assign some geography, so it's assigning  
9 this zero population water geography to bypass those  
10 white communities in Hampton and Newport News in order  
11 to connect the predominantly African-American  
12 communities in Newport News and Hampton together.

13 You wouldn't have to do these splits if you  
14 weren't trying to bypass those communities using  
15 water.

16 Q What conclusion did you draw from having looked at  
17 where these VTD splits occurred and the number or  
18 frequency of VTD splits?

19 A That race had been -- that traditional  
20 redistricting principles had been subordinated to  
21 race.

22 Q So let's talk about how CD 3 changed in the  
23 Enacted Plan. You mentioned before it was  
24 underpopulated. Did the General Assembly simply add  
25 people from other districts until it reached the ideal



McDONALD - DIRECT

81

1 number?

2 A It did not.

3 Q What did it do?

4 A It removed some population from the Third District  
5 and added -- which made it even more difficult to  
6 balance that population. It also would be a violation  
7 of the district cores because population within the  
8 current Third District had been removed from that  
9 district. And then to compensate the district that  
10 the population had been moved out of the district,  
11 even more population needed to be moved back into the  
12 district.

13 Q Did you reach a conclusion as to why population  
14 was removed from CD 3 before population was added back  
15 in?

16 A I did.

17 Q What's your conclusion, sir?

18 A That traditional redistricting principles had been  
19 subordinated to race.

20 Q Let's look at Exhibit 27, page 15.

21 JUDGE PAYNE: Excuse me. The composition of  
22 the group that was moved out, what was your testimony  
23 as to what was the composition of that group?

24 THE WITNESS: The population that had been  
25 moved out of the Third Congressional District?

McDONALD - DIRECT

82

1 JUDGE PAYNE: Yes.

2 THE WITNESS: It was predominately white.

3 JUDGE PAYNE: What about the population that  
4 was moved in?

5 THE WITNESS: It was predominantly  
6 African-American.

7 MR. HAMILTON: Thank you, Your Honor. I was  
8 going to actually ask a few more question on that  
9 exact topic to try to flesh that out a little bit.

10 Q If you could turn to page 15 of your report, which  
11 is Exhibit 27. Is there a table there that summarizes  
12 your analysis of these population movements?

13 A Yes.

14 Q I've displayed it up on the screen as well.

15 Can you describe this chart that we're looking at?  
16 It's table 6 on page 15 of Exhibit 27 in your report.

17 A So the columns in the first column we're looking  
18 at is a definition of what population we're talking  
19 about. This is population that, for example, was  
20 moved from the first to the third, third to the first,  
21 second to the third, and third to the second, and so  
22 on.

23 Q So that we understand this chart, let's just look  
24 at the first line, and it's entitled, or the first  
25 column is entitled, "Benchmark to Adopted District."

McDONALD - DIRECT

83

1 And below there there's like a one with an arrow  
2 pointing to a three. Do I understand that correctly  
3 that that line is going to discuss the population that  
4 moved from CD 1 to CD 3?

5 A Yeah, for example -- or two to CD 3 as well.

6 Q But that first line is one to three, correct?

7 A Correct.

8 Q And the second line would be three to one; is that  
9 correct?

10 A Correct.

11 Q Thank you, sir.

12 Okay. So let's look at the swaps between CD 3 and  
13 CD 2. That would be the third and fourth line of data  
14 on this chart; is that right?

15 A Right.

16 Q How many voting-age residents were moved from CD 3  
17 to CD 2?

18 A So this would be on the fourth line down, three to  
19 two. Total population that was involved was 25,501,  
20 and of that, the voting-age population was 20,049.

21 Q How many voting-age residents were moved from CD 2  
22 to CD 3?

23 A Again, 27,917 is the total population. Voting age  
24 is 20,543.

25 Q So now to get to the question the Court asked you

MCDONALD - DIRECT

84

1 a moment ago, what was the percentage of black  
2 voting-age residents moved out of CD 3?

3 A Out of CD 3 and into CD 2, the number was --

4 Q No. I'm not asking the number, sir. I'm asking  
5 the percentage.

6 A The percentage using the inclusive method would be  
7 18.8 percent black voting-age population.

8 Q That's the number of black voting-age residents  
9 moved out, 18.8 percent, is that correct?

10 A Correct.

11 Q What's the percentage of black voting-age  
12 residents moved in to CD 3?

13 A 37.9 percent.

14 Q Say that again.

15 A 37.9 percent.

16 Q Almost double?

17 A Yes.

18 JUDGE PAYNE: That's a different method.  
19 It's 36.7 percent if you use the exclusive method. If  
20 you compare apples and apples. Your first comparison  
21 was the exclusive method. When you first answered  
22 18.3 percent, I thought you were talking about the  
23 exclusive method. And when you answered about the  
24 37.9 percent, that's the inclusive method.

25 THE WITNESS: If I did, I apologize. I

McDONALD - DIRECT

85

1 misspoke. I meant to use the 18.8 percent for the  
2 inclusive method.

3 JUDGE PAYNE: Maybe I just misheard you.

4 Q So either way, the data is on the chart, however  
5 way the Court wants to consider it. The far right  
6 column, we would look at the third and fourth line to  
7 get the inclusive method; is that right, sir?

8 A The far right column is the inclusive method, yes.

9 Q The next column over, the second to the right of  
10 the far right column is what method?

11 A The exclusive method.

12 Q So we can look at the data either way. Does it  
13 make a material difference either way?

14 A Not a large difference.

15 Q Thank you, sir.

16 A But it does make somewhat of a difference.

17 Q Now, where on the map did these swaps occur?

18 A Between the second and the third. This would be  
19 population predominantly that's on -- if you look at  
20 that hook that's in Norfolk, that pocket of green that  
21 was in the Second Congressional District formerly was  
22 in the Third Congressional District. So that's  
23 predominantly white areas that were in the Third  
24 Congressional District. In the benchmark Third  
25 Congressional District.

McDONALD - DIRECT

86

1 Q Okay. Is it also in Newport News and Hampton or  
2 is that some other set of --

3 A There's a precinct as well in Hampton that was  
4 moved out of the Third Congressional District as well.

5 Q How about Newport News?

6 A No.

7 Q All right. Thank you, sir.

8 A Not between the second and third.

9 Q Let's examine just one more set of these swaps.  
10 Let's look at the swaps between three and four. How  
11 many voting-age residents were moved from benchmark CD  
12 3 to benchmark CD 4?

13 A 4,176.

14 Q How about the other way around. How many  
15 voting-age residents were moved from four to three?

16 A 27,835.

17 Q So, again, the question that the Court asked a  
18 moment ago, of the voting-age population moved out of  
19 CD 3 and into CD 4, what percentage of them were black  
20 voting-age residents?

21 A 42.1 percent.

22 Q Now, the other question, how about those moved  
23 out? What's the black voting-age population?

24 A 75.8 percent.

25 Q So, again, after analyzing these population swaps,

McDONALD - DIRECT

87

1 did you reach a conclusion with respect to whether  
2 race played a role in the redistricting?

3 A Looking across all of the swaps that were made  
4 between the third and the surrounding districts, I  
5 came to the conclusion that traditional redistricting  
6 principles had been subordinated to race.

7 Q You testified earlier that at the conclusion of --  
8 after reviewing the Census data, CD 3 was  
9 underpopulated how much?

10 A Roughly, 63,976. Not even roughly.

11 Q How many people in order to achieve -- in order to  
12 add 63,976 people to CD 3, how many people were moved  
13 in and out of CD 3 to achieve that correction?

14 A Roughly, if we tally up all these numbers, it's  
15 roughly 180,000 people.

16 Q 180,000?

17 A Correct.

18 Q Have you examined the political performance of the  
19 VTDs included in or left out of the enacted CD 3?

20 A I have.

21 Q Why did you look at that?

22 A To examine whether or not political considerations  
23 may be an explanation for the changes to the Third  
24 Congressional District.

25 Q Did you reach a conclusion as a result of that

McDONALD - DIRECT

88

1 investigation?

2 A Yes, I did.

3 Q What was your conclusion?

4 A I concluded that race had trumped politics.

5 Q Let's walk through your analysis here to see how  
6 you got to that conclusion. What did you look at?

7 A I examined the election results within the VTDs  
8 and the racial character of the black voting-age  
9 population of the VTDs.

10 Q Did you also look at whether they were included or  
11 excluded from CD 3?

12 A Yes.

13 Q How did you decide which VTDs were in localities  
14 adjacent to the enacted Third Congressional District?

15 A Any localities where the Third Congressional  
16 District either split or -- those would be one  
17 definition. The other would be any locality that  
18 would be adjacent to the Third Congressional District.

19 Q Okay. Could these VTDs have been added in or out  
20 of CD 3 without substantially affecting the  
21 compactness of the district?

22 A It really depends on how you wanted to go about  
23 doing the drawing, but in some cases, yes. In fact,  
24 you could improve the compactness.

25 Q How did you -- let's talk the other factor. How



McDONALD - DIRECT

89

1 did you figure out what was strongly Democratic VTD?

2 A I looked at those VTDs where there was a  
3 Democratic performance. It was an average of five  
4 statewide elections, it's in my report, and that  
5 average above 55 percent.

6 Q So you looked at the population of VTDs with  
7 average Democratic performance of 55 percent or  
8 greater?

9 A Correct.

10 Q As a result of that conclusion, that analysis,  
11 your conclusion was?

12 A That among the pool of available VTDs that could  
13 have been placed within the Third Congressional  
14 District that were highly Democratic performing, those  
15 that had higher black voting-age population were  
16 placed within the Third Congressional District.

17 Q What happened to the strongly Democratic VTDs with  
18 largely white population.

19 A They were left out of the Third Congressional  
20 District.

21 Q Where were they put?

22 A In some cases, for example, they were put into the  
23 Second Congressional District.

24 Q Okay. All right. Let's look at Plaintiffs'  
25 Exhibit 28, if we could.

McDONALD - DIRECT

90

1 And while we're getting there, Mr. Neal, if we  
2 could switch over to the ELMO, that would be helpful.

3 Are you there, sir?

4 A Plaintiff's 28, yes.

5 Q What is this?

6 A This is a report that I wrote in reply to  
7 defendant's first expert witness, Dr. Brunell.

8 Q On page 7 and 8 of your report, this is where you  
9 discuss the VTD analysis you just testified to; is  
10 that right?

11 A Yes, it's a section that's entitled, "Race or  
12 Politics."

13 Q I'd like to have you turn to  
14 Intervenor-Defendants' Exhibit 50.

15 JUDGE PAYNE: Is he using the corrected one  
16 now? They corrected this this morning by substituting  
17 one in. Is he testifying about the corrected one?

18 MR. HAMILTON: He's not. He's testifying  
19 about the original one, and then we'll get to the  
20 corrected one, Your Honor. There's a story here.

21 Q Do you have it there in front of you, sir?

22 A Yes, I do.

23 Q Was this document provided to you as part of  
24 Dr. Brunell's report?

25 A It was not.

McDONALD - DIRECT

91

1 Q Was it included in Mr. Morgan's report?

2 A It was not.

3 Q When did you first see it?

4 A I saw it roughly a week or so after Mr. Morgan's  
5 deposition. So early May.

6 Q That was after your deposition?

7 A After my deposition.

8 Q Is it addressed in any of your reports?

9 A It is not.

10 Q So did you testify about it in your deposition?

11 A I did not.

12 Q Have you had a chance to look at it?

13 A I have.

14 MR. HAMILTON: Your Honor, this document was  
15 produced belatedly. I'm not objecting to it. And  
16 counsel, I've already discussed it with him. So we're  
17 going to proceed with this. We're going to consider  
18 it as a supplement to the reports under the rules.

19 JUDGE PAYNE: Well, 50 is admitted and  
20 corrected 50 was admitted, too, right?

21 MR. HAMILTON: That's correct, Your Honor.

22 JUDGE PAYNE: Without objection?

23 MR. HAMILTON: That's correct, Your Honor.

24 JUDGE PAYNE: All right.

25 BY MR. HAMILTON:

McDONALD - DIRECT

92

1 Q All right. Have you had a chance to look at it?

2 A Yes.

3 Q What does it purport to show?

4 A The first and fourth columns replicate the  
5 analyses that were found in my reply to Brunell. So  
6 those are reporting statistics that were reported in  
7 my previous report, at least in the enacted plan, not  
8 in the Alternative Plan.

9 Q What's been added?

10 A Added are two additional columns, one reporting  
11 statistics in column two. It's labeled "In enacted  
12 District 3." These would be VTDs that were in enacted  
13 District 3 and benchmark District 3.

14 Mr. Morgan used the word "enacted" where I used  
15 the word "adopted" to describe the adopted or enacted  
16 congressional redistricting plan.

17 Q So there's some additional data that's been added  
18 by Mr. Morgan to your VTD analysis that was in your  
19 report; is that right?

20 A Right. This --

21 Q Is that right, sir?

22 A I believe so, yes.

23 Q Thank you.

24 Have you had a chance to review Mr. Morgan's  
25 testimony about this exhibit in his deposition?

McDONALD - DIRECT

93

1 A I have.

2 Q Did he testify in his deposition that he created  
3 the table from data that you used in preparing your  
4 report?

5 A Yes, he did.

6 Q Is that possible?

7 A No, it is not.

8 Q Why not?

9 A Because there were no benchmark identifiers that  
10 were provided to Mr. Morgan.

11 Q When was that data first provided to you?

12 A About four o'clock yesterday.

13 Q Let me direct your attention now to Plaintiffs'  
14 Exhibit 54 and 55.

15 A Yes.

16 Q What are those two documents?

17 A 54 is a -- is the spreadsheet that was -- a  
18 printout of the spreadsheet that was provided to us by  
19 Mr. Morgan.

20 Q That's 54, the paper. So if the Court were to  
21 open that up, is it easy to read?

22 A No.

23 Q And Exhibit 55, what's that?

24 JUDGE PAYNE: Excuse me just a minute, Mr.  
25 Hamilton.

McDONALD - DIRECT

94

1 Are you right now in the process of  
2 impeaching Mr. Morgan? Is that what's going on?

3 MR. HAMILTON: I'm actually trying -- it's a  
4 little bit of two things, Your Honor. What I'm trying  
5 to do is lay a foundation for the next exhibit that's  
6 coming, which is 56 and 57. It is, candidly, a bit of  
7 impeachment.

8 JUDGE PAYNE: That should wait until after  
9 Dr. Morgan testifies and use that in rebuttal. You  
10 don't have to anticipate everything that's going to  
11 happen.

12 MR. HAMILTON: I totally recognize that, Your  
13 Honor.

14 JUDGE PAYNE: Because the way we can deal  
15 with it best is to get to the point that you want to,  
16 leave the impeachment alone, and you don't ever need  
17 to use it if, in fact, he admits on cross-examination  
18 the points you want to do.

19 MR. HAMILTON: Unfortunately, Mr. Morgan  
20 doesn't understand what we've done. So the corrected  
21 table, in our view, isn't corrected, and I'm going to  
22 have the witness explain Exhibit 57, which is an  
23 update using the data that became available last night  
24 at four o'clock.

25 JUDGE PAYNE: Have him do what he did. Just

McDONALD - DIRECT

95

1 what he did. You don't need to -- we don't know yet  
2 what Morgan's actually going to say in response to  
3 whatever y'all talked about yesterday. And let's let  
4 that develop. And then you'll have an opportunity to  
5 call the witness back in rebuttal or to cross-examine  
6 on it fully. But let's stay on your case now, if you  
7 don't mind.

8 MR. HAMILTON: I will do my best, Your Honor,  
9 and I'm sure you'll tell me if I stray the line.

10 BY MR. HAMILTON:

11 Q Sir, you looked at the data that was provided by  
12 Mr. Morgan last night?

13 A Yes, I did.

14 Q Did you use that data to prepare another exhibit?

15 A In part.

16 Q Okay. Why did you do that?

17 A Well, to assure that we have all got the same  
18 facts straight, we need to be able to replicate each  
19 other's work.

20 Q What was it when you examined this CD -- the  
21 database that is Exhibit 55 that was provided  
22 yesterday, what did you discover?

23 A I discovered that Mr. Morgan had misassigned some  
24 of the VTDs in the Benchmark Plan.

25 Q Where were those?

McDONALD - DIRECT

96

1 A They were in Petersburg and then there were some  
2 additional ones that were located in Norfolk and  
3 Richmond.

4 Q Have you taken those --

5 JUDGE PAYNE: Mr. Hamilton, excuse me, but  
6 aren't you really just doing what we talked about?  
7 Aren't you really attacking Morgan's report? And the  
8 time to do that is when you cross-examine him and in  
9 rebuttal. Otherwise, we don't even know the context,  
10 and you're having to build the context, then you're  
11 tearing it down. And that is distracting from  
12 understanding what your case is.

13 So why don't you just stay right now with  
14 your case. You can deal with this later. You're  
15 going to be given time to do it.

16 MR. HAMILTON: Your Honor, I would like to  
17 direct his attention to Exhibit 57, if I can.

18 JUDGE PAYNE: Yeah, but the way you're doing  
19 it is to do it the wrong way. That's the point. So  
20 try it and see if you can do it.

21 MR. HAMILTON: Okay. I'll try my best.

22 JUDGE PAYNE: It may not even be necessary to  
23 talk about Exhibit 57 until after Morgan testifies.

24 MR. HAMILTON: Okay.

25 BY MR. HAMILTON:



McDONALD - DIRECT

97

1 Q Okay. Dr. McDonald, please turn your attention to  
2 Plaintiffs' Exhibit 57 if you would, please. Do you  
3 have it there in front of you?

4 A Yes.

5 Q Did you prepare this table?

6 A Yes.

7 Q Have you added an additional column?

8 A Yes. Mr. Morgan's --

9 Q Let's not talk about Mr. Morgan. Let's just talk  
10 about what this table shows.

11 JUDGE PAYNE: Mr. Hamilton, it's hard for him  
12 to do that because the whole table is Mr. Morgan's and  
13 what's wrong with it. So why don't we just go on with  
14 something else and come back to Mr. Morgan's when we  
15 need to.

16 MR. HAMILTON: Okay.

17 Q Let's take a look at Intervenor-Defendants'  
18 Exhibit 14, if you would, please, sir.

19 A Yes.

20 Q This is Mr. Morgan's report?

21 A Yes.

22 Q Have you had an opportunity to review that?

23 A I have.

24 Q Mr. Morgan, does he describe compliance with the  
25 Voting Rights Act as a consideration in redistricting?

McDONALD - DIRECT

98

1 A Yes, he does.

2 Q According to Mr. Morgan's analysis, how important  
3 is compliance with the Voting Rights Act?

4 JUDGE PAYNE: Are you trying to ask him what  
5 his opinion is on that topic?

6 MR. HAMILTON: I am, sir.

7 JUDGE PAYNE: Then do that without reference  
8 to Morgan's. You're not here to attack Morgan in this  
9 part of your case. So just ask him what his opinion  
10 is on the topic, if you will, and that I think will  
11 get us where you want to be, and then we'll move on.  
12 And when Morgan comes on, you'll have plenty of chance  
13 to cross-examine him, and you can put on this witness  
14 as a rebuttal witness.

15 BY MR. HAMILTON:

16 Q Dr. McDonald, how do you determine whether a  
17 districting change diminishes the ability of minority  
18 voters to elect their candidate of choice?

19 A The way to ascertain that is to conduct a racial  
20 bloc voting analysis.

21 Q Is there any other kind of analysis that would  
22 allow you to determine how many black voting-age  
23 residents are needed to preserve the ability to elect  
24 a candidate of choice?

25 A There are many flavors of racial bloc voting

McDONALD - DIRECT

99

1 analyses, but you'd have to do one of those sorts of  
2 analyses.

3 Q Do you know whether there was any racial bloc  
4 voting analysis performed by anyone with respect to  
5 the Virginia redistricting in 2011 or 2012?

6 A I do not.

7 Q How about just comparing the black voting-age  
8 population in the Benchmark to the Enacted Plan, is  
9 that sufficient?

10 A It is not.

11 Q Why not?

12 A Well, the Department of Justice says in its  
13 guidelines that that is not sufficient, and the reason  
14 is is that you have to look at the racial patterns of  
15 voting within the district. You have to know whether  
16 or not there's going to be sufficient white crossover  
17 voting to elect a candidate of choice in the new  
18 district.

19 So it's feasible that you could even increase the  
20 minority percentage within a district and it still not  
21 be effective at electing a candidate of choice.

22 JUDGE DUNCAN: Excuse me. Is that the same  
23 as saying, as the point was made about the federal  
24 register statement, that the Department of Justice  
25 looks at electoral patterns, not Census data?

McDONALD - DIRECT

100

1 THE WITNESS: That's correct.

2 BY MR. HAMILTON:

3 Q Let's go to Intervenor-Defendants' Exhibit 32.

4 It's in the small notebook on the edge of the witness  
5 stand.

6 JUDGE PAYNE: What number did you say, sir?

7 MR. HAMILTON: Intervenor-Defendants' Exhibit  
8 32.

9 JUDGE PAYNE: Thank you.

10 THE WITNESS: Yes.

11 Q What is this?

12 A This is the committee hearing in the Senate on the  
13 redistricting, congressional redistricting.

14 Q Can you turn to page 18, please?

15 JUDGE PAYNE: This is the 2011 hearing?

16 MR. HAMILTON: That's correct, Your Honor.

17 JUDGE PAYNE: Not the 2012?

18 MR. HAMILTON: The hearing on April 7, 2011.

19 Q Do you have page 18 in front of you, sir?

20 A I do.

21 Q Who is Senator Vogel?

22 A She was a sponsor of one of the congressional  
23 redistricting plans.

24 MR. CARVIN: Same objection. All of this  
25 parsing through the legislative history is no part of

McDONALD - DIRECT

101

1 his expertise. They are trying to use him as a  
2 vehicle to get the plaintiffs' view of the legislative  
3 history.

4 MR. HAMILTON: Your Honor, it's in the  
5 record. It's an uncontested exhibit. I'm happy to  
6 move on.

7 JUDGE PAYNE: I know it's in the record, but  
8 his objection is far different than that, and that's  
9 not something upon which he opined in the process set  
10 by the rules. And if that's the case, his objection  
11 is sustained. And it sounded to me like you agree  
12 that it was.

13 So let's move on.

14 MR. HAMILTON: I agree.

15 BY MR. HAMILTON:

16 Q Sir, are you familiar with the Department of  
17 Justice preclearance practice?

18 A I am.

19 Q Was CD 3 in 2001 precleared by the Department of  
20 Justice?

21 A It was.

22 Q What was the black voting-age population then?

23 A That was in a previous slide. I believe it was  
24 53.2 percent using the exclusive method.

25 Q So let's focus on 2011. We weren't just redrawing

1 districts for congressional elections. We were also  
2 redrawing General Assembly districts; is that true?

3 A That's true.

4 Q Were any of those legislative districts below  
5 55 percent?

6 A Yes, they were.

7 Q Were those precleared by the Department of  
8 Justice?

9 A They were.

10 Q When were they precleared?

11 A In 2011.

12 Q Was that before or after the General Assembly took  
13 up the -- passed the congressional redistricting map?

14 A It was before.

15 Q Where would we find that information in the  
16 record?

17 A That would be in the Section 5 submission for the  
18 Senate districts.

19 Q Okay. Is it also in one of your reports?

20 A It is.

21 Q Which report?

22 A My rebuttal report to Mr. Morgan.

23 Q Take a look at Plaintiffs' Exhibit 30, if you  
24 would, please.

25 A Yes.

McDONALD - DIRECT

103

1 Q Is that your reply report?

2 A It is.

3 JUDGE PAYNE: What page?

4 Q Direct your attention to page 2.

5 A Yes.

6 Q That's the table with respect to the state Senate  
7 district, sir?

8 A Yes.

9 Q And those were all precleared by the Department of  
10 Justice?

11 A Yes.

12 Q All right. Let's turn to a couple of other  
13 points. First of all, tailoring. Can you explain  
14 what narrow tailoring means with respect to  
15 redistricting?

16 A That once race is determined to be the predominant  
17 factor in the creation of a redistricting plan, that  
18 the district should be drawn such that it has just  
19 enough population, black population, within it to  
20 achieve the goal of producing a district able to elect  
21 a candidate of choice while also, again, not subsuming  
22 traditional redistricting principles.

23 Q Do you understand what Virginia has identified as  
24 a compelling interest to justify the consideration of  
25 race in this case?

1 A Yes, compliance with Section 5.

2 Q Assuming for the sake of argument that Virginia's  
3 compelling interest was that, did you reach an opinion  
4 about whether enacted CD 3 is narrowly tailored to  
5 serve that interest?

6 A I did.

7 Q What is that conclusion?

8 A That it was not.

9 Q Why?

10 A Because traditional redistricting principles had  
11 been subsumed in order to increase the black  
12 voting-age population of the district.

13 Q How would one know how many black voting-age  
14 residents were needed to protect their ability to  
15 elect a candidate of choice?

16 A One would perform a racial black voting analysis  
17 and from that analysis determine what percentage was  
18 needed to elect a candidate of choice.

19 Q Did you do such an analysis in this case?

20 A Yes, I did.

21 Q Where could the Court find that if it wanted to?

22 A That report would be in my rebuttal to  
23 Dr. Brunell, if I'm correct.

24 Q Take a look at Plaintiffs' Exhibit 30.

25 A Yes.



1 Q Is that where the -- is that where your racial  
2 bloc voting analysis --

3 A Yes, it's in my reply to Mr. Morgan, not to  
4 Dr. Brunell.

5 JUDGE PAYNE: What page are you talking about  
6 referring to the page?

7 MR. HAMILTON: Page 4, Your Honor.

8 JUDGE PAYNE: Page 4?

9 MR. HAMILTON: (Nodded head affirmatively.)

10 BY MR. HAMILTON:

11 Q Could you describe to the Court your racial bloc  
12 voting analysis and how you went about that?

13 A Well, racial bloc voting analysis, generally what  
14 they do is you correlate the voting results within  
15 precincts with the racial character or minority  
16 character of the precincts. And generally what you  
17 find is that higher black, in this case, voting-age  
18 population precincts tend to have a higher vote share  
19 for the African-American candidate of choice. And  
20 from that correlation, one can infer how  
21 African-Americans -- the levels of support that  
22 African-Americans have for the African-American  
23 candidate of choice and what whites also, or  
24 non-blacks, have for support for the African-American  
25 candidate of choice.

1 Q What conclusion did you reach as a result of your  
2 racial bloc voting analysis?

3 A Well, first, that there is racial polarization,  
4 but that there's also a substantial amount of white  
5 crossover voting for the African-American candidate of  
6 choice such that a district that was not necessary to  
7 increase the black voting-age population of the  
8 district in order to elect a candidate of choice.

9 Q Is there a table that summarizes your conclusions  
10 in your report?

11 A Yes, it's at page 5.

12 Q Page 5. So did your analysis show whether it was  
13 necessary to increase the black voting-age population  
14 in the Enacted Plan to ensure that there would be no  
15 retrogression?

16 A I believe that -- it's my expert opinion that it  
17 was not necessary to increase the black voting-age  
18 population of the district in order to elect an  
19 African-American candidate of choice.

20 Q Why is that?

21 A Because there was sufficient support for -- well,  
22 there's a number of factors here. One is that this  
23 racial bloc voting analysis shows that there's  
24 sufficient level of support. The other is the Senate  
25 analysis or black voting-age population, which we just

1 looked at, a third is the historical black voting-age  
2 population in the district that was precleared by the  
3 Department of Justice.

4 And the fourth is the voting results  
5 for Representative Scott, the historical voting  
6 patterns within that district over the course of the  
7 last decade.

8 Q Are you familiar with plaintiffs' alternative map  
9 for Congressional District 3?

10 A I am.

11 Q What districts does the Alternative Plan change?

12 A It only changes the shared boundary between the  
13 Second and the Third Congressional Districts.

14 Q Can you describe the changes made by -- well,  
15 first of all, is the Alternative Plan up here on the  
16 easel?

17 A Yes, it's the one that's on the right.

18 Q Instead of the left?

19 A Yes.

20 Q Okay. So can you describe the changes made by the  
21 Alternative Plan?

22 A What the Alternative Plan does is it makes the  
23 localities of Newport News, Hampton and Norfolk whole  
24 by placing all of Newport News and Hampton within the  
25 Third Congressional District and all of Norfolk within

McDONALD - DIRECT

108

1 the Second Congressional District. It gives almost  
2 all of Portsmouth to the Third Congressional District  
3 except for a very tiny sliver that's connected through  
4 a tunnel in order to balance back the populations of  
5 the Second and Third Congressional Districts. That  
6 population is 1,018, if I recall correctly.

7 Q Did you prepare a report analyzing the Alternative  
8 District?

9 A I did.

10 Q Turn to Plaintiffs' Exhibit 29, if you would,  
11 please.

12 A Yes.

13 Q What is that?

14 A This is my analysis of the Alternative Plan.

15 Q Did you examine compactness?

16 A I did.

17 Q Did you reach a conclusion -- what was your  
18 conclusion with respect to compactness?

19 A That the Third Congressional District was no  
20 longer the least compact district.

21 JUDGE PAYNE: What exhibit are you talking  
22 about?

23 MR. HAMILTON: Excuse me, Your Honor?

24 JUDGE PAYNE: What exhibit are you referring  
25 to?

McDONALD - DIRECT

109

1 MR. HAMILTON: I'm referring to Plaintiffs'  
2 Exhibit 29, which is Dr. McDonald's report analyzing  
3 the Alternative District.

4 JUDGE PAYNE: Sorry. I just heard the wrong  
5 number.

6 BY MR. HAMILTON:

7 Q All right. Do you summarize your analysis of the  
8 compactness of the Alternative Plan in your report  
9 that's contained in Exhibit No. 29?

10 A Yes.

11 Q Where would we see that?

12 A It's in the section that's labeled "Compactness."  
13 It starts on page 6 of my report.

14 Q And it continues to page 7?

15 A Correct.

16 Q What does the table show?

17 A Again, that the Alternative Plan is no longer --  
18 the Third Congressional District in the Alternative  
19 Plan is no longer the least compact district.

20 Q Is that consistent or inconsistent with visual  
21 inspection?

22 A Yes.

23 Q Is it consistent or inconsistent?

24 A Sorry. Yes, it's consistent with visual  
25 inspection as you can clearly see from the two

1 exhibits.

2 Q What statistical tools did you use to measure the  
3 Alternative Plan and compare it to the Enacted Plan?

4 A I used the same compactness scores that had been  
5 used previously in my expert report and the  
6 Commonwealth of Virginia had provided in their Section  
7 5 submission, the Reock, Polsby-Popper and  
8 Schwartzberg measures.

9 Q Let's turn to contiguity. Is Alternative CD 3  
10 contiguous?

11 A Yes, it is.

12 Q Is it in any way different in its contiguity with  
13 respect to the original Enacted Plan?

14 A Yes, it's no longer using water as a means to  
15 bypass racial communities.

16 Q Is it contiguous by land?

17 A Yes, it is.

18 Q Let's turn to respect for local political  
19 boundaries, the third traditional redistricting  
20 criteria. Is that discussed in your report?

21 A It is.

22 Q Where?

23 A On page 4 of the summary tables that starts on  
24 page 3 is the discussion.

25 Q What does the summary table show?

1 A That the number of locality splits has been  
2 reduced in the Third Congressional District.

3 Q How do the Alternative and Enacted Plans compare  
4 on this score?

5 A They're similar. I mean, the Third Congressional  
6 District does have nine locality splits and the  
7 Alternative Plan has eight locality splits.

8 Q Did you look at VTD splits?

9 A Yes, I did.

10 Q Where would we find that in your report?

11 A That's Table 2, which is directly under Table 1.

12 Q How does the Alternative and Enacted plans compare  
13 on that score?

14 A Again, the Third Congressional District still has  
15 the most, but the number of VTD splits has been  
16 reduced from 14 to 11.

17 Q What localities would no longer be split between  
18 CD 2 and CD 3 under the Alternative Plan?

19 A Well, the localities that would no longer be split  
20 would be Norfolk, Hampton and Newport News.

21 Q What does the last row in that Table 3, the total  
22 population split, on page 5 of your report show us?

23 A It's illustrating that the -- if you look at the  
24 map visually, you can see that a substantial geography  
25 of Norfolk, Hampton and Newport News is split between

1 the Second Congressional District and the Third  
2 Congressional District. That geography represents  
3 population. In fact, it represents hundreds of  
4 thousands of people.

5 So what's happening here in the Third  
6 Congressional District is that in the Alternative  
7 Plan, by making Newport News, Hampton and Norfolk  
8 whole and splitting only a sliver of Portsmouth, the  
9 affected populations by splits of these localities  
10 between the Second and Third Congressional District  
11 have been reduced from 241,096 people to 1,016.

12 Q Does the Alternative Plan put two incumbents in  
13 the same district?

14 A Not to my knowledge.

15 Q How does Alternative CD 3, when you take all these  
16 considerations together, compare with Enacted Plan CD  
17 3 with respect to the traditional redistricting  
18 criteria?

19 A It fares better on these traditional redistricting  
20 criteria.

21 Q All of them?

22 A Yes.

23 Q You hesitate.

24 A Well, it's also moving a substantial amount of  
25 population in and out of the Third Congressional



1 District.

2 Q All right. Let's turn to how the Alternative and  
3 Enacted Plans compare in terms of their treatment of  
4 black residents. What's the BVAP percentages in  
5 Alternative CD 3?

6 A The Alternative CD 3 using the inclusive method, I  
7 recall it's 51 percent.

8 Q 51 percent. Where would we find that in your  
9 report?

10 A That would be on --

11 Q Is that Plaintiffs' Exhibit 29 at page 1?

12 A Perhaps. If I can get there. I do not see it on  
13 that page. Yes, there it is in the first paragraph.

14 Q So what's the black voting-age population in  
15 Alternative CD 3?

16 A It's 51.0 percent.

17 Q What's the black voting-age population using the  
18 inclusive method in Enacted CD 3, so we're comparing  
19 apples to apples?

20 A In Enacted CD 3, it's 57.2 percent.

21 Q In your professional opinion, would the black  
22 residents in Alternative CD 3 be able to elect their  
23 candidate of choice?

24 A Yes.

25 Q How do you know that?

1 A Yes.

2 Q I said, "How do you know that?"

3 A Through the analyses of the four different facts  
4 that I discussed previously.

5 Q Your racial bloc voting analysis?

6 A Yes.

7 Q What do you calculate to be the percentage of  
8 voters who would support the black candidate of choice  
9 in Alternative CD 3?

10 A Please say that again.

11 Q What do you calculate to be the percentage of  
12 voters who would support the black candidate of choice  
13 in Alternative CD 3?

14 A I would need to look back at that number. If you  
15 can point me to it, I would appreciate it.

16 Q Look at Plaintiffs' Exhibit 30, page 5.

17 A Can you state the question again?

18 Q What do you calculate to be the percentage of  
19 voters who would support the black candidate of choice  
20 in Alternative CD 3?

21 A You're asking me a question about all the voters  
22 together.

23 Q Let me rephrase the question then. How would you  
24 characterize the chances of the black candidate of  
25 choice being elected in Alternative CD 3?

1 A Very high.

2 Q In the last election under the Benchmark Plan, the  
3 black voting-age population in CD 3 was what?

4 A Sorry. I'm starting to lose you here. Say that  
5 again for me.

6 Q What was the black voting-age population in CD 3  
7 under the Benchmark Plan?

8 A CD 3 under the Benchmark Plan was 53.9 percent.

9 Q How did the minority candidate of choice do?

10 A The minority candidate of choice in 2010 won  
11 70 percent of the vote.

12 Q After the Enacted Plan was adopted --

13 JUDGE PAYNE: Isn't this the same thing we've  
14 been over before?

15 MR. HAMILTON: I was laying a foundation to  
16 ask him the next question, Your Honor.

17 JUDGE PAYNE: Okay. Why don't you just ask  
18 him that one because we got the first part of it.

19 Q According to your analysis of the black voting-age  
20 population, how would the minority candidate of choice  
21 likely do?

22 A He would win that election.

23 Q Have you looked at the Alternative Plan with  
24 respect to whether it's narrowly tailored?

25 A Yes.

1 Q What conclusion did you reach there?

2 A That this District race is still the predominant  
3 factor in the creation of this District, but now the  
4 black voting-age population has been reduced, the way  
5 in which the District now has greater respect for  
6 local political boundaries. It's no longer using  
7 water to circumvent racial populations. It's much  
8 more compact in its shape. So there it's more  
9 narrowly tailored to achieve the goal of electing an  
10 African-American candidate of choice.

11 Q The last thing I'd like to discuss with you, sir,  
12 racial balance. In your opinion, does the Alternative  
13 Plan create greater racial balance than under the  
14 Enacted Plan?

15 A Balance, as I understand it, means something  
16 that's 50/50. And so 51 percent would have a greater  
17 balance than 57.2 percent.

18 Q How about CD 2?

19 A What about CD 2?

20 Q How would it fare under the Alternative Plan on  
21 this measure of racial balance?

22 A It would have more African-Americans within it, so  
23 it would have -- it had fewer than 50 percent, so it  
24 would have more of a balance between the two races.

25 Q If we were instead to use balances not just within

McDONALD - DIRECT

117

1 the population totals within the district but  
2 comparing district to district, does the Alternative  
3 Plan improve or degrade the racial balance between CD  
4 2 and CD 3?

5 A It improves it.

6 MR. HAMILTON: Thank you, Dr. McDonald.

7 I very no further questions at this point.

8 JUDGE PAYNE: Mr. Carvin, Mr. Melis, who's  
9 going to cross-examine? You have different interests,  
10 so who's going to start?

11 MR. CARVIN: Do Your Honors have an idea of  
12 when we would be breaking for lunch?

13 JUDGE PAYNE: About one o'clock.

14 MR. CARVIN: One o'clock.

15

16 CROSS-EXAMINATION

17 BY MR. CARVIN:

18 Q Good afternoon, Dr. McDonald.

19 JUDGE PAYNE: That doesn't mean you have to  
20 be finished by one o'clock.

21 MR. CARVIN: I apologize, Your Honor?

22 JUDGE PAYNE: That doesn't mean that sets a  
23 constraint on your cross-examination.

24 MR. CARVIN: No. I was just trying to figure  
25 out the break point. Thank you, Your Honor.

1 BY MR. CARVIN:

2 Q In terms of your background, just to be clear, I  
3 did not retain you in Arizona.

4 A That's correct.

5 Q Now, the changes that were made to District 3 in  
6 2012, you attribute those to race, correct?

7 A Predominantly, yes.

8 Q And District 3 is adjacent to four other  
9 districts, correct?

10 A Correct.

11 Q And in 2012, District 3 swapped population with  
12 all four of those districts, right?

13 A Correct.

14 Q And District 1 is adjacent to District 3?

15 A Correct.

16 Q And that has a Republican incumbent, Whitman,  
17 correct?

18 A Correct.

19 Q And District 2 is adjacent to District 3, correct?

20 A Correct.

21 Q And that has a Republican incumbent, Rigell,  
22 correct?

23 A Correct.

24 Q And in 2012, he was a new incumbent, correct?

25 A Correct.

1 Q He had beat a Democratic incumbent in 2010?

2 A Correct.

3 Q Under the Enacted Plan, he's in a toss-up  
4 district?

5 A It's one that had gone back and forth over the  
6 last decade.

7 JUDGE PAYNE: Excuse me. Are you saying that  
8 CD 3 is a toss-up district?

9 MR. CARVIN: No, CD 2.

10 JUDGE PAYNE: CD 2 is a toss-up district; is  
11 that what you said?

12 THE WITNESS: Yes, it's a district that moved  
13 back and forth between the parties over the last  
14 decade.

15 JUDGE PAYNE: I'm having a little trouble  
16 hearing you.

17 JUDGE DUNCAN: Would you mind asking the  
18 question again, please?

19 Q Under the Enacted Plan, District 2 with new  
20 incumbent Rigell in it is a toss-up district, correct?

21 A Yes, it's a district that moved back and forth  
22 between the parties, yes.

23 Q And District 4 is adjacent to District 3, correct?

24 A Yes.

25 Q And that has a Republican incumbent in it?

1 A Yes.

2 Q Republican incumbent Forbes?

3 A Yes.

4 Q And District 7 is adjacent to District 3?

5 A Yes.

6 Q And the current occupant of that seat is

7 Republican incumbent Cantor, correct?

8 A Yes.

9 Q Now, you did not specifically analyze the  
10 political effect of the swaps between these districts,  
11 correct?

12 A Correct.

13 Q And you say that there is a clear racial pattern  
14 in these swaps, correct, as you testified on direct?

15 A Yes.

16 Q And I'd like to focus on whether there's an  
17 alternative non-racial explanation, whether these  
18 swaps had a political effect and a political purpose.

19 A Okay.

20 Q And Mr. Morgan did analyze the political effect of  
21 the swaps between District 3 and the four adjacent  
22 Republican districts, right?

23 A Yes.

24 MR. CARVIN: If it's all right to expedite  
25 things, I'd like to hand the witness a binder that



1 encompasses different exhibits so they are already  
2 there. So we don't have to keep switching back and  
3 forth between books.

4 And I'd also like to provide Your Honors with  
5 the same binders.

6 JUDGE PAYNE: That will be fine. Thank you.

7 These are just what you want to use in  
8 cross-examining Dr. McDonald?

9 MR. CARVIN: Exactly, but they're from three  
10 different books. I just thought it would be easier.

11 JUDGE PAYNE: Yes, it will be easier than  
12 flipping back and forth.

13 BY MR. CARVIN:

14 Q Do you have that book in front of you now?

15 A Yes, I do.

16 Q I'd like to -- if you could, turn to Tab 5,  
17 please, which is Intervenor-Defendants' Exhibit 13.

18 A Yes.

19 Q If you could turn to page 13 of Mr. Morgan's  
20 report, which is Intervenor Exhibit 13.

21 A Yes.

22 Q We went through this in a lot of detail in the  
23 deposition. So keeping with Judge Payne's admonition,  
24 just to cut to the chase, the bottom line is that all  
25 of these swaps between District 3 and the four

1 adjacent Republican districts were politically  
2 beneficial for the Republican incumbents, correct?

3 A To a certain extent, yes.

4 Q Okay. Well, if you want to go through it in  
5 detail, we can. Let's start at the bottom. Okay?

6 This is, just to be clear, a chart that shows what  
7 was taken from the Benchmark District 3 and placed in  
8 the adjacent districts and what was taken in the  
9 Benchmark Adjacent Districts and placed in Benchmark  
10 3, correct?

11 A Correct.

12 Q So let's start at the bottom of the chart. In  
13 terms of the partisan composition of the populations  
14 that were taken from District 3 and put into  
15 Representative Cantor's 7, they were roughly  
16 36 percent Democratic and 34 percent Democratic,  
17 correct?

18 A I'm sorry. I'm not following that.

19 Q All right. If you could look at the bottom of  
20 page 13, table 8.

21 A Yes.

22 Q Now we're looking at what kind of population was  
23 shifted from the black Democratic District 3 to  
24 Representative Cantor's District 7?

25 A Yes.

1 Q Okay. And the partisan composition of the people  
2 who went from 3 to the Republican district was,  
3 roughly, if you want to look at it this way,  
4 63 percent Republican or 64 percent Republican.

5 A I think you had said previously "Democratic."  
6 That's why I lost you. Okay. Yes, I agree with that.

7 Q I think I said 36 percent Democratic, but it's the  
8 same thing.

9 A Yes.

10 Q And the 36,000 people or so who were moved from  
11 Representative Cantor's district into District 3 were  
12 roughly 85 percent Democratic or 86 percent  
13 Democratic, correct?

14 A Correct.

15 Q So that was politically beneficial for  
16 Representative Cantor. He was gaining 64 percent  
17 Republican population and losing 86 percent Democratic  
18 population, correct?

19 A Well, with a caveat to it.

20 JUDGE PAYNE: Does that mean yes, but with a  
21 caveat?

22 THE WITNESS: Yes, but with a caveat.

23 Q The caveat being?

24 A We actually don't know how Cantor performs with  
25 these particular constituents. We know the

1 presidential election results within this population,  
2 but we don't know how he would fare. And there are  
3 instances of districts around the country where you  
4 find Democrats and Republicans -- I know it's rare,  
5 but there are people who can win in districts that are  
6 of the other political persuasion.

7 Q And you haven't examined whether this rare  
8 phenomenon exists in District 7, right, where people  
9 who voted for John McCain and Mitt Romney don't vote  
10 for Eric Cantor?

11 A No one has.

12 Q The answer is no, you have not looked at it?

13 A No.

14 Q So your caveat is not based on any actual  
15 political analysis you've done, correct?

16 A Correct.

17 Q Now, in terms of District 3 and District 4, again,  
18 District 4 is Republican incumbent Forbes' district?

19 A Yes.

20 Q In 2012. And he shifted population to District 3,  
21 and the population that was shed from Republican  
22 incumbent Forbes' district to District 3 was roughly  
23 86 or 88 percent Democratic, correct?

24 A Yes.

25 Q And the population that he picked up from District

1 3 was, first of all, a much smaller population,  
2 correct?

3 A Correct.

4 Q It was roughly one-seventh of the population that  
5 he shifted to District 3, correct?

6 A Correct.

7 Q Whereas, District 4 sent 35,000 people to District  
8 3, District 4 only picked up 5700 people from District  
9 3?

10 A Correct.

11 Q Among that relatively small group, they were 53 or  
12 55 percent Democratic?

13 A Correct.

14 Q Again, absent your unexplored caveat, that would  
15 be politically beneficial for Representative Forbes,  
16 correct?

17 A Yes.

18 Q Then we'll turn to Districts 2 and 3. And here  
19 the population shifted between District 2 and District  
20 3 was roughly equivalent, right?

21 A Yes.

22 Q 25,501 going out, 27,917 coming in --

23 A Yes.

24 Q -- to District 3?

25 A Yes.

1 Q So in terms of the population that the Republican  
2 incumbent Rigell shed from District 3, that was  
3 roughly 64 percent or 69 percent Democratic, correct?

4 A Yes.

5 Q In the presidential election.

6 And in terms of the population that he picked up,  
7 that was roughly 47 or 48 percent Democratic?

8 A Yes.

9 Q So, again, absent your unexplored caveat, that  
10 would be politically beneficial for Republican  
11 incumbent Rigell, correct?

12 A Correct.

13 Q Now, Whitman is a bit more complicated. The  
14 people that went from District 1 to District 3 was  
15 roughly or exactly 23,288, right?

16 A Yes.

17 Q And the people coming into District 1,  
18 Representative Whitman's district, was a much smaller  
19 population of 7,351, correct?

20 A Yes.

21 Q Now, the people that went into District 3 from  
22 Representative Whitman's districts were 60 to  
23 66 percent Democratic, correct?

24 A Yes.

25 Q And the people that went into District 1 were

1 actually slightly higher Democratic, 75 or 76 percent  
2 Democratic, correct?

3 A Yes.

4 Q But even though there was a slightly higher  
5 Democratic representative in terms of the people that  
6 went into District 1, the fact that there was a  
7 smaller number meant that the swaps between 1 and 3  
8 actually produced fewer Democratic voters in District  
9 1 than had been there in the Benchmark Plan, correct?

10 A Yes. I could elaborate to explain to the Court  
11 what's going on here because it is complicated.

12 JUDGE PAYNE: Well, just answer his question  
13 and if there's any elaboration needed, Mr. Hamilton  
14 will ask you that on redirect examination, and that's  
15 the order of things.

16 THE WITNESS: Okay.

17 Q So if a legislature wanted to enhance Republican  
18 incumbents electoral process, it would make perfect  
19 sense to do what the legislature did in the Enacted  
20 Plan, right?

21 A Sorry. I didn't quite follow that question. I'm  
22 sorry.

23 Q If a legislature wanted to enhance Republican  
24 incumbents electoral process, it would make perfect  
25 sense to make the swaps that the Enacted Plan made

1 relative to the Benchmark Plan, correct?

2 A With the unexplored caveat, yes.

3 Q The swaps had a clear political effect then,  
4 right?

5 A With the caveat, yes.

6 Q Just like they had a clear racial effect.

7 A They did have a racial effect, yes.

8 Q Just as you inferred a racial purpose from the  
9 racial effect of these swaps, it would be fair to  
10 infer a political purpose from these swaps, correct?

11 A You could infer some, yes, a political purpose  
12 from just solely these statistics.

13 Q So if race was not a factor at all, if every  
14 person involved in these swaps was white, it would  
15 have made perfect sense to make these swaps, correct?

16 A Right. If we did not evaluate race at all, yes,  
17 in your hypothetical. Yes.

18 JUDGE PAYNE: I think, though, the question  
19 is different than that. I understood the question to  
20 be: If the race was white, it would have made perfect  
21 sense. Was that your question, Mr. Carvin?

22 MR. CARVIN: Yes.

23 JUDGE PAYNE: That's the question he asked  
24 you.

25 THE WITNESS: It makes sense with the caveat,



1 yes.

2 BY MR. CARVIN:

3 Q Okay. And you did an article about the 2012  
4 congressional redistricting, correct?

5 A Correct.

6 Q That was published in the University of Richmond  
7 Law Review?

8 A Yes.

9 Q If you could turn to, please, Exhibit 9. Tab 9,  
10 Intervenors' Exhibit 55.

11 A Yes.

12 Q Is that the article?

13 A It appears so, yes.

14 Q And you wrote this before you were retained by  
15 plaintiffs in this case, right?

16 A Excuse me?

17 Q You wrote this article before you were retained as  
18 an expert by plaintiffs in this case, correct?

19 A Yes.

20 Q When you were looking at it as a disinterested  
21 academic, you determined that this was a political  
22 gerrymander by the General Assembly, correct?

23 A Yes, we evaluated the partisan performance of the  
24 districts and had determined that the intent was to  
25 create an 8-3 Republican majority.

1 Q Right. So they purposely enhanced Republican  
2 voting power or preserved it at eight for political  
3 purposes, correct?

4 A Yes.

5 Q Let's be more specific about what you wrote in  
6 your article. If you could turn to page 2 of the  
7 article. Do you see where it says "Introduction" on  
8 page 2?

9 A Yes.

10 Q And the first two sentences read, do they not, In  
11 the 2012 general election, Virginia Republican  
12 candidates for the United States House of  
13 Representatives won a combined 70,736 more votes than  
14 Democratic candidates out of the 3.7 million votes  
15 cast for the major party candidates, yet won eight of  
16 the state's eleven House seats. This is the power of  
17 gerrymandering, correct?

18 A "Thus is the power of gerrymandering," but yes.

19 Q So you opined that there's only a slight advantage  
20 in terms of congressional votes for Republicans over  
21 Democrats in Virginia, but they had captured a largely  
22 disproportionate amount of seats, eight to three, with  
23 this narrow vote margin, that they had engaged in a  
24 political gerrymander; correct?

25 A Yes, that was one of the things that they were

1 doing, yes.

2 Q You say that Virginia redistricting has been and  
3 continues to be mired in politics in this article,  
4 don't you?

5 A Yes.

6 Q And you say, Even if people involved in  
7 redistricting, say legislators, may have articulated  
8 neutrally districting criteria that are nominally  
9 devoid of political considerations, the truth is that  
10 such political considerations are at the forefront,  
11 though, for those who conduct redistricting, correct?

12 A Well, at times those neutral criteria can  
13 themselves have a race conscious effect that's behind  
14 them.

15 JUDGE PAYNE: I think, Dr. McDonald, please  
16 listen to the question. He asked you a question about  
17 what you said. And if there's an explanation needed  
18 in response to that answer, Mr. Hamilton will be free  
19 to call upon you to give that explanation.

20 Do you want to try again, Mr. Carvin?

21 BY MR. CARVIN:

22 Q You opined in this article and you believed that  
23 although people enacting the redistricting plans may  
24 profess that they are acting pursuant to neutral  
25 redistricting criteria that are nominally devoid of

1 political considerations, the reality is that such  
2 political considerations are at the forefront for  
3 those who conduct redistricting, correct?

4 A No.

5 Q If you could turn to page 2 of your report there  
6 right underneath what I just read.

7 A The Law Review?

8 Q Yes. Page 2.

9 A Yes.

10 Q Same page. And I'm going to read you the second  
11 to the last sentence in that same first paragraph.

12 "These administrative goals are nominally devoid  
13 of political considerations, but such considerations  
14 are at the forefront of those who conduct  
15 redistricting." Is that what you wrote?

16 A Yes.

17 Q When you said, "these administrative goals," you  
18 meant a political criteria that you had referenced in  
19 the prior two sentences, correct?

20 A Yes, traditional redistricting principles.

21 Q And you actually examined in Virginia whether or  
22 not the disproportionate representation of Republicans  
23 was attributable to these neutral criteria or by  
24 conscious line drawing by Republicans to maximize  
25 their representation, correct?

1 A Sorry, I lost you in that question.

2 Q Well, okay. There's a theory out there, right,  
3 that even though Republicans wind up with eight seats  
4 out of eleven when the vote tally was roughly split  
5 down the middle, but that could be attributable to the  
6 fact that Democrats tend to concentrate themselves in  
7 the same districts?

8 A Yes.

9 Q And, therefore, even use of neutral criteria will  
10 produce a disproportionate Republican representation.  
11 In layman's term, Democrats have essentially packed  
12 themselves into districts; is that right?

13 A I think this is where I'm having my disagreement  
14 with you.

15 Q Can you answer the question?

16 A Yes.

17 Q And you actually examined in this article whether  
18 or not the disproportionate representation of  
19 Republicans in Virginia was attributable to these  
20 neutral demographic factors or to the fact that the  
21 legislature had consciously drawn the line to get to  
22 an eight-three partisan division, correct?

23 A Correct, with an explanation.

24 Q Okay. Why don't we just turn to page 12 and the  
25 article can speak for itself.

1 I think the first full paragraph at the top of 12  
2 describes what I just said. If you look at the second  
3 sentence, you wrote, did you not, "Any set of measures  
4 may carry a set of second-order biases, such that  
5 adherence to ostensibly neutral administrative  
6 criteria may produce a gerrymander affecting electoral  
7 outcomes of partisan balance, competition, and racial  
8 representation," correct?

9 A Correct.

10 Q And then you further explain this in the last  
11 sentence of that paragraph. You say, "Some have  
12 claimed that this is primarily the result of drawing  
13 districts that adhere to administrative criteria and  
14 not a product of partisan Republican gerrymandering,  
15 as Democratic voters are believed to be inefficiently  
16 concentrated in urban areas from a redistricting  
17 standpoint," correct?

18 A Yes.

19 Q So what you did in this article then was try and  
20 figure out whether the fact that the Republicans had  
21 gathered eight seats was attributable to this  
22 inefficient concentration versus the way the General  
23 Assembly consciously drew the lines for political  
24 purposes, correct?

25 A That was one of the goals, yes.

1 Q Okay. And the way you examined that was you  
2 looked at neutral plans produced by neutral people,  
3 including the commission you worked on, correct?

4 A I wouldn't call all of those plans neutral. They  
5 all had certain inherent criteria that were being  
6 attempted to be achieved in all those plans.

7 Q But in terms of the line drawers' intent, you  
8 looked at people who weren't trying to maximize  
9 partisan balance for either party, and then you  
10 compared the results of what those districts did to  
11 the results in the General Assembly's plan, right?

12 A Yes, with that caveat about whether or not they  
13 are neutral or not, yes.

14 Q Okay. Well, maybe you can turn to page 21 of your  
15 article. And this time I'm going to direct your  
16 attention to the third full paragraph.

17 A Yes.

18 Q And your first sentence, you've just gone through  
19 these alternative plans by at least these ostensibly  
20 neutral line drawers and seen what kind of partisan  
21 balance they produced. And you explained --

22 JUDGE PAYNE: Is that right? Had you just  
23 done that in the article? You shook your head yes.  
24 You need to be on the record.

25 THE WITNESS: I'm reading the sentence right

1 now is what I'm sort of nodding along with.

2 Yes, we looked at a number of plans at this  
3 point. Yes, we had done this analysis.

4 Q And you analyzed the partisan effect that would be  
5 produced by those plans, right?

6 A Correct.

7 Q And you say, "The numerous congressional plans  
8 demonstrate that the Republican legislature had a  
9 choice to create a Republican-favored congressional  
10 plan and was not mechanically following administrative  
11 criteria that resulted in a Republican-favored plan  
12 created as a byproduct of Democrats' inefficient  
13 concentration in urban areas," correct?

14 A Correct.

15 Q So you concluded that the General Assembly's  
16 strong preference for Republicans was not attributable  
17 to these neutral criteria but to conscious choices the  
18 legislature had made, correct?

19 A That's my conclusion, yes.

20 Q And we can do this as slowly or as quickly as you  
21 want, but the way you explain that conclusion in the  
22 next three sentences to say, We've looked at these  
23 other plans that have majority-minority districts and  
24 that have similarities to the General Assembly plan  
25 and they only produce a 6-5 Republican-Democratic



1 partisan balance, correct?

2 A Some of these plans, yes.

3 Q But that was the basis for your conclusion that  
4 the 8-3 was a result of conscious decision making by  
5 the legislature because these other plans with similar  
6 characteristics had only produced a 6-5 Republican  
7 advantage, correct?

8 A We were using these comparisons to draw this  
9 conclusion, yes.

10 Q So your last sentence says, "Partisan balance in  
11 the congressional plan thus was not constrained by  
12 geography," correct?

13 A Yes.

14 Q It's a product of conscious choice by the  
15 legislature?

16 A Yes.

17 Q While we're here, before we leave, one of the  
18 things you looked at was whether or not the plans had  
19 minimized splits of local political boundaries,  
20 correct?

21 A Yes.

22 Q And if you look at the third sentence from the  
23 top, you say, "The adopted plan's partisan bias is not  
24 a consequence of favoring minimal splits of local  
25 political boundaries either." And you say, "While the

1 adopted plan scores highly in this regard with 37  
2 splits, plans with a similar amount of splits come to  
3 the 6-5.

4 But the relevant point is that you think the  
5 legislature's plan scored highly in terms of  
6 minimizing boundary splits, correct?

7 A Compared to these other plans, yes.

8 Q Written by, among others, the commission that you  
9 were on, right?

10 A Well, I was not a member of that commission, no.

11 Q You oversaw the congressional line drawing for the  
12 commission?

13 A Yes. The students were the ones who actually drew  
14 the districts, yes.

15 Q But you gave them parameters, right?

16 A I gave them some parameters.

17 Q And one of the commission's parameters -- we're  
18 going to come back to this in detail -- was to  
19 minimize the number of jurisdictional splits to the  
20 extent practicable, correct?

21 A Yes, that was one of the commission's criteria.

22 Q Okay. Now, if you could turn to the precise  
23 analysis you did of the partisan balance in these  
24 plans, which I think is outlined on page 14 of your  
25 article.

1 A Yes.

2 Q Just so everyone is oriented, this is a table  
3 analyzing, among other things, splits and Republican  
4 leans of the various alternatives you were looking at,  
5 correct?

6 A Correct.

7 Q Okay. And just so everybody knows what we're  
8 talking about, Adopted is the plan that was enacted,  
9 correct?

10 A Correct.

11 Q And Dem was the leading Democratic alternative  
12 introduced in the legislature by Senate Locke,  
13 correct?

14 A Correct.

15 Q Option 1 and Option 3, do you see that?

16 A Correct.

17 Q These are the three options that the commission  
18 that you were an adviser to proposed for the  
19 legislature's consideration, correct?

20 A Correct.

21 Q All right. And let's look first at the Republican  
22 lean column. Okay? Do you see that?

23 A Yes.

24 Q And that tells you how many seats you think are  
25 going to lean Republican in the various plans

1 proposed, correct?

2 A It's the -- well, not correct. I can give you the  
3 precise definition if you wish.

4 Q Yes.

5 A So we're using the 2008 presidential vote here.  
6 And using that as a measure, it's similar to those  
7 statistics that you were just presenting from  
8 Mr. Morgan.

9 Q So when you were in academia and you were trying  
10 to assess the partisan balance, you used the 2008  
11 presidential vote that Mr. Morgan used to assess the  
12 partisan composition of these districts, correct?

13 A Correct.

14 Q And you didn't issue any caveats in this article  
15 that this may not reflect the actual underlying  
16 congressional vote in these districts, correct?

17 A No. This is, again, this is a normalized vote,  
18 which is a very standard sort of way to do it in  
19 academia, but, again, there's incumbency advantage and  
20 other things that factor into these when we actually  
21 do analyses for specific incumbents. There's nothing  
22 in here about incumbents.

23 Q When you did your partisan analysis and published  
24 it pursuant to normal political science standards, you  
25 determined that the adopted plan would have eight

1 Republican lean districts, right?

2 A Correct.

3 Q Which preserves the amount of districts and the  
4 amount of Republican incumbents in the Benchmark Plan,  
5 correct?

6 A Yes.

7 Q And the Dem alternative would give only seven  
8 seats to Republicans, right?

9 A Right.

10 Q Do you see that Dem 7?

11 A That's correct.

12 Q In this fight between the 8-3 Republican-sponsored  
13 alternative and the 7-4 Democratic-sponsored  
14 alternative led to an impasse in the legislature in  
15 2011, correct?

16 A Correct.

17 Q The Democrats would not pass the 8-3  
18 Republican-preferred alternative and the Republicans  
19 would not pass the 7-4 Democratic-preferred  
20 alternative, right?

21 A Correct.

22 Q Therefore, no plan passed in 2011?

23 A Correct.

24 Q It wasn't until the Republicans gained effective  
25 control of the Senate in 2012 that they were able to

1 pass this Enacted Plan, correct?

2 A They gained control in 2011, but they passed it in  
3 2012, yes.

4 Q The 2011 election?

5 A Yes.

6 Q Almost the day they took control, they passed it,  
7 correct? January 20?

8 A Yes. It was very soon afterwards.

9 JUDGE PAYNE: They were elected in 2011, but  
10 they took control in 2012; is that what you're saying?

11 THE WITNESS: Yes, that's correct.

12 JUDGE PAYNE: When they were sworn in.

13 THE WITNESS: Some people, not from Virginia,  
14 often think that we have these odd-even numbered year  
15 elections. So I was just clearing that up in the  
16 record.

17 Q If you could turn to page 10 of your article, and  
18 if you could look at the second full paragraph in your  
19 article, please.

20 A Yes.

21 Q And you described this impasse. In the first  
22 sentence you write, "While the General Assembly was  
23 able to reach a bipartisan compromise to redistrict  
24 the two chambers controlled by different political  
25 parties." I'm going to pause there. But they were

1 unable to reach a compromise on the Senate plan and on  
2 the House of Delegates plan, correct?

3 A Yes.

4 Q That's what you meant by that?

5 A Yes.

6 Q You go on to say, "It was unable to reach  
7 agreement on a congressional plan," correct?

8 A Correct.

9 Q Then you say, "The sticking point was whether to  
10 protect all incumbents, giving the Republicans an 8-3  
11 edge among the state's eleven districts, or to restore  
12 the African-American population to the Fourth  
13 Congressional District that had been shifted to the  
14 Third Congressional District during the last  
15 redistricting, yielding a Democratic-leaning Fourth  
16 Congressional District with 45 percent  
17 African-American voting-age population and reducing  
18 the Republicans' edge to 7-4," right?

19 A Correct.

20 Q So the fight was about whether or not they were  
21 going to endanger Republican incumbent Forbes in  
22 District 4 by shifting BVAP from District 3 in a way  
23 that would turn it into a Democratic-leaning district,  
24 correct?

25 A Yes.

1 Q And it was because of that desire to protect the  
2 incumbent and maintain the Republicans' 8-3 advantage  
3 that the Republicans in the General Assembly opposed  
4 it, right?

5 A Right. This is, again, the -- we discussed this  
6 in deposition. We are characterizing the fight as it  
7 was reported in the popular press. This is no  
8 analysis that we're doing here to talk about  
9 incumbency protection or anything of that nature.

10 Q What? I'm reading. There's no quotation marks  
11 around these sentences. These are your sentences.

12 A It's footnoted, which indicates that we're  
13 referring to another authority when we're discussing  
14 this information here.

15 Q I'm sorry. Normally, in Law Reviews, if the  
16 author makes an assertion, that is his assertion, and  
17 then he'll drop a footnote to support his assertion.  
18 That's what your footnotes were doing here, correct?

19 A We were dropping a footnote to talk about, yes --  
20 there's no incumbency protection analysis that's done  
21 in this Law Review article. So that's why I'm  
22 explaining that.

23 Q All right. Let's proceed a step at a time.

24 This paragraph reflects your conclusions, not some  
25 conclusion of some reporter that you cite in a



1 footnote, correct?

2 A We are characterizing what was in the popular  
3 press at this point.

4 Q Where in that paragraph does it say you're  
5 characterizing what's in the popular press?

6 A Well, you don't always do that with every sentence  
7 that you write in every academic writing. So it's not  
8 here, but it's footnoted. So why else put the  
9 footnote there if it wasn't coming directly -- if  
10 there wasn't another source for an authority?

11 Q I don't want to be belabor this, but the reason  
12 you put footnotes at the end of sentences in Law  
13 Reviews is to support the assertion that the author is  
14 making. So I'll ask you again. Is that the purpose  
15 of the footnote in your article?

16 A It's not in this case.

17 Q It's not? You were acting as a conduit for the  
18 article that's cited at footnote 220? You expected  
19 the reader to go read that and you were acting as sort  
20 of a ventriloquist dummy for whatever that article  
21 said?

22 JUDGE PAYNE: I think we have got the point,  
23 Mr. Carvin. You don't need to go any further with it.

24 MR. CARVIN: Okay.

25 Q Those articles don't say anything, do they, about

1 incumbency protection or 8-3?

2 A I would have to go look them up.

3 Q All right. I'm going to hand you the article.

4 JUDGE O'GRADY: This is the article that  
5 footnote 202 references? Is that what you're doing?

6 MR. CARVIN: Just for the record, Your Honor.

7 Q There are two assertions, both in 204, where you  
8 cite an article, right, and then if you go back to the  
9 footnotes, that lists two different -- excuse me.  
10 This would be footnote 202 or 201. And that lists two  
11 articles, right?

12 JUDGE PAYNE: The sticking-point sentence has  
13 a footnote 202. And that has two articles in it; is  
14 that right?

15 MR. CARVIN: Right.

16 Q If you look at footnote 202, there's an article by  
17 Mac McLean and then an article by Bob Lewis, right?

18 A Right.

19 Q And those are the articles I just handed you.

20 In those articles -- have you had a chance to  
21 review them?

22 A I'm looking at them right now. I have to refresh  
23 my memory with them.

24 Q Have you had an opportunity to review them?

25 A Yes.

1 Q In either of those articles, did they say that  
2 this was a plan to protect all incumbents and preserve  
3 the 8-3 partisan --

4 A It's talking about preserving Forbes versus Scott.

5 Q They're focusing on the one district. So they  
6 don't get into the fact that the plan protected all  
7 incumbents, right?

8 A Yes.

9 Q Just so we don't lose the point, this article  
10 suggests, this conclusion suggests, that the reason  
11 the Republicans were opposing the plan was not some  
12 gratuitous desire to increase BVAP in District 3, but  
13 because they felt that shedding BVAP from District 3  
14 would be contrary to their desire to protect all  
15 incumbents and preserve the 8-3 balance, correct?

16 A I lost you on what do you mean by "this article."

17 Q Your article.

18 A My article. Because we had two other articles.

19 Q I apologize. I was trying to turn you -- whatever  
20 you were trying -- whoever you were trying to --  
21 whatever views you were trying to convey in this  
22 paragraph, this paragraph does not attribute the  
23 maintaining the BVAP in District 3 to any gratuitous  
24 desire to pack or subordinate traditional  
25 redistricting principles, but to protect all

1 incumbents, particularly incumbent Forbes in District  
2 4, from the consequences of shifting a heavily  
3 Democratic population from District 3 to District 4,  
4 right?

5 A Right. What we're trying to do here in the  
6 article is just talk about the disagreement between  
7 the two plans, and I think we have probably  
8 mischaracterized "to protect all incumbents" because  
9 really what the disagreement is between the -- really,  
10 it's what are you going to do with the Fourth  
11 Congressional District. So whether you're going to  
12 protect the incumbent in the Fourth Congressional  
13 District with these alternative plans.

14 Q It was eight Republican incumbents, right?

15 A Yes.

16 Q If they protected all eight, it would be an 8-3  
17 division, correct?

18 A Correct.

19 Q If they didn't, then it would go down to 7-4?

20 A Correct, but we did not do any incumbency analysis  
21 here.

22 JUDGE PAYNE: Excuse me just a minute, Dr.  
23 McDonald.

24 THE WITNESS: Yes.

25 JUDGE PAYNE: All you have to do is answer

1 his questions. And every time that you take an  
2 excursion to explain something, then it leads to more  
3 questions, and it protracts the examination.

4 Your lawyer will have an opportunity to  
5 ask -- not your lawyer, but the lawyers for the  
6 plaintiffs will have an opportunity to ask you any  
7 questions that they think are important in  
8 cross-examination. And it will all go better if you  
9 just listen to the question and answer the question.

10 That particular one could have been satisfied  
11 by putting a period after your first word, which was  
12 "right." And that's the way usually it's goes.

13 Now, is this a convenient point to take  
14 lunch?

15 MR. CARVIN: Yes.

16 JUDGE PAYNE: We'll have an hour recess for  
17 lunch.

18 (Luncheon recess taken.)  
19  
20  
21  
22  
23  
24  
25

1 JUDGE PAYNE: All right, Mr. Carvin. Dr.

2 McDonald, I remind you you are under the same oath which  
3 you took earlier today.

4 BY MR. CARVIN: (resuming)

5 Q Good afternoon, Dr. McDonald. I'd just like to finish  
6 up on the article very quickly. If you can go to --  
7 again, this is tab nine in your book, Intervenor  
8 Exhibit 55. If you could go to the bottom of page 19,  
9 please.

10 A Yes.

11 Q And here you are describing what Republicans did in  
12 2012 after they had functionally taken over the Senate  
13 following the 2011 state elections; correct?

14 A Yes.

15 Q Okay. And the last sentence on the bottom of 19 says,  
16 "In the legislature, two competing plans emerged, one from  
17 the Republicans who favored an eight-to-three partisan  
18 division of the state that protected all incumbents and  
19 one by the Democrats with the 7/4 partisan division." Is  
20 that what you wrote?

21 A Yes.

22 Q And you said, "The partisan contention involved the  
23 Fourth Congressional District represented by Republican  
24 incumbent Randy Forbes. Democrats wished to fashion this  
25 district into a roughly 45 percent African-American

1 district, sometimes called a minority influence district,  
2 that would likely elect a Democratic while Republicans  
3 wished to preserve the district's Republican character;  
4 correct?

5 A Correct.

6 Q So the reason the GOP opposed moving substantial black  
7 population out of District 4 was because they wished to  
8 preserve the district's Republican character, in that case  
9 District 4?

10 A Yes.

11 Q So they didn't want to change District 3 transferring  
12 BVAP to District 4 for political reasons?

13 JUDGE PAYNE: They did or didn't? I didn't hear  
14 your question. They did or did not?

15 Q The Republicans did not want to change District 3 by  
16 transferring BVAP into District 4 for political reasons;  
17 correct?

18 A Mostly, yes.

19 Q Okay. And both incumbency protection and politics are  
20 nonracial reasons; correct?

21 A Please restate that. I'm sorry.

22 Q Both politics and incumbency protection are nonracial  
23 reasons; correct?

24 A Yes. They can be, yes.

25 Q And you have no reason to think they weren't here.

1 A No, I do not.

2 Q And plaintiffs' alternative here, like the Democratic  
3 plan that was rejected in the General Assembly for  
4 political and incumbency protection reasons, transfers  
5 BVAP from District 3 to an adjacent district, in this case  
6 District 2?

7 A Yes.

8 Q And that makes it more politically difficult for the  
9 Republican incumbent in District 2, Representative Rigell;  
10 correct?

11 A It could, yes.

12 Q Now, you did not analyze the political composition of  
13 the swaps between District 3 and the adjacent districts in  
14 the way that Mr. Morgan did; correct?

15 A Correct.

16 Q Okay. But you did do a study that you described on  
17 direct where you looked at the VTDs within District 3 that  
18 had a 55 percent Democratic vote share and the VTDs in  
19 localities adjacent to District 3 that had a 55 percent  
20 Democratic vote share; correct?

21 A Correct.

22 Q If you could turn to tab two, Plaintiffs' Exhibit 28,  
23 please.

24 A Yes.

25 Q If you could -- this is your second report in this



1 case; correct?

2 A Correct.

3 Q And if you could turn to page eight of that report,  
4 please.

5 A Yes.

6 Q And the reason you selected VTDs with Democratic  
7 performance greater than 55 percent you explain in the  
8 first sentence on this page; right?

9 A Yes.

10 Q And you say that is because Democratic performance  
11 greater than 55 percent, which is above the accepted level  
12 political scientists consider to be competitive and, thus,  
13 are considered to be heavily Democratic; correct?

14 A Correct.

15 Q So a 55 Democratic vote share is considered not  
16 competitive and heavily Democratic; correct?

17 A With a caveat, yes.

18 Q What is the caveat?

19 A The caveat is that I have not done a full-blown  
20 competitiveness analysis for this.

21 Q You can have a running unexplored caveat for the rest  
22 of this testimony; okay?

23 A I like unexplored caveats, yes.

24 Q Now, just to be clear, though, the VTDs you analyze  
25 this are not those that were swapped between District 3

1 and the adjacent districts; right?

2 A Correct.

3 Q And they're not the VTDs that are next to the VTDs  
4 that were swapped between adjacent districts?

5 A No.

6 Q They are not?

7 A Some are.

8 Q Right, but you weren't limiting it to districts -- to  
9 VTDs that were adjacent to swapped VTDs; correct?

10 A Correct.

11 Q You would have counted VTDs in the middle of District  
12 3 in your analysis; correct?

13 A In some cases, yes.

14 Q Well, you looked at all the VTDs in District 3,  
15 correct, including those in the middle of District 3?

16 A Not all, because of a data limitation, but, yes, we  
17 looked at VTDs that were in District 3.

18 Q Just to clarify the record, when you were looking at  
19 VTDs with a 55 percent Democratic performance, you would  
20 look at VTDs in the middle of District 3.

21 A Correct.

22 Q That wouldn't have been swapped to adjacent districts  
23 unless you had dismantled District 3 and changed its form  
24 quite dramatically; correct?

25 A In some instances, yes.

1 Q Okay. So you weren't looking at VTDs that were near  
2 enough for a legislature to move them to the adjacent  
3 districts. That was not one of the limitations on the  
4 VTDs in your study; right?

5 A It's a double negative, but, no.

6 Q Okay. And the truth is, the vast majority of the VTDs  
7 that you looked at in connection with the 2012 enacted  
8 plan in District 3 were already in District 3 before the  
9 2012 enacted plan; correct?

10 A Please restate that for me. I just want to understand  
11 the question.

12 Q I don't want to get into this debate we had this  
13 morning, but about 159 or 160 of the VTDs -- let me start  
14 again. About 159 or 160 of the 189 VTDs you looked at in  
15 District 3 were already in District 3 under the benchmark  
16 old District 3; correct?

17 A Yes, I assume that's correct. I have not done that  
18 analysis.

19 Q So you really weren't trying to focus on the VTDs that  
20 were selected by this General Assembly in 2012. You  
21 included VTDs that had been selected for inclusion in the  
22 old District 3 by prior General Assemblies; correct?

23 A You've lost me here, because the district is, in some  
24 ways, substantially similar, so the selection of  
25 localities would be similar.

1 Q Right. Well, let me make it as simple as I can. They  
2 basically preserved the shape and the population of the  
3 benchmark District 3, didn't they?

4 A They?

5 Q The General Assembly in 2012.

6 A In some respects, yes.

7 Q Okay. And if they preserved -- assume with me that  
8 they preserved the basic core of District 3 and most of  
9 the population. What you say were decisions to put a VDT  
10 into District 3 by the 2012 General Assembly was really  
11 just a decision by the 2012 General Assembly to continue  
12 the VTDs that were already in there; correct?

13 A No.

14 Q Well, is it not a fact that 160 of the 189 VTDs that  
15 you looked at in your study for District 3 were in the old  
16 benchmark District 3?

17 A Again, I take your representation to be true.

18 Q Okay. So the vast majority, 84 percent of the VTDs  
19 that you analyzed, were already in District 3?

20 A Yes.

21 Q Now, did you do this analysis of the plaintiffs'  
22 alternative plan?

23 A I did not.

24 Q Okay. But you did introduce -- but assume with me  
25 then that in the -- and the plaintiffs' alternative plan

1 differed from the enacted plan mainly by an effort to move  
2 a lot of black majority VTDs out of District 3 into  
3 District 2.

4 A Yes. That was one component of what was going on, but  
5 it wasn't solely that, because there's also Petersburg and  
6 Richmond as well.

7 Q I'm talking about the difference between plaintiffs'  
8 alternative plan and the enacted plan. The only  
9 difference is that they moved roughly 126,000 people from  
10 District 3 to District 2, and they were largely a black  
11 population; correct?

12 A Correct, yes.

13 Q And the consequence of this conscious effort to move  
14 VTDs from District 3 to District 2 was to reduce district  
15 three's BVAP from 56.3 to 50.2; correct?

16 A To 53.2?

17 Q 50.2.

18 A 50.2. So you are using the exclusive method, 51 by  
19 the inclusive, yes.

20 Q And even though the plaintiffs' alternative made a  
21 conscious effort to move black VTDs out, the fact remains  
22 that the 55 percent Democratic VTDs in District 3 are  
23 still 59.8 percent black; correct?

24 A Please say that again for me. I want to understand  
25 the question.

1 Q In the alternative plan -- well, you make the point  
2 that in the enacted plan, the VTDs in District 3 are  
3 59.5 percent black; correct?

4 A Can you point me to that statistic?

5 Q Yeah. It's in tab two. This is what you testified on  
6 this morning; right? So I guess it would be --

7 A Yes. I'm sorry. I'm trying to think about two and  
8 three, and so it's 53.9 percent by the inclusive method.  
9 That's where I lost you on that.

10 JUDGE PAYNE: Between the way you all did the  
11 question and the way the answer came out, I'm not sure  
12 what you are answering. So you used the word "its," and  
13 that's an indefinite pronoun. Can you reshape the answer,  
14 or do you want him to redo the question?

15 THE WITNESS: I would like him to redo the  
16 question.

17 JUDGE PAYNE: Go ahead. Mr. Carvin, get it out  
18 fully.

19 Q Maybe it would be helpful to turn to where you did  
20 this analysis which was, I believe, in your second expert  
21 report.

22 JUDGE PAYNE: Is that tab two?

23 MR. CARVIN: Yes.

24 A The reply report?

25 Q Yes, tab two, Plaintiffs' Exhibit 28.

1 A Yes.

2 Q Okay. Maybe I should have done this more slowly. If  
3 you turn to page eight of that report.

4 A Yes.

5 Q Okay. And you say there, do you not, that you  
6 conclude that race, rather than politics, was driving it?  
7 Because of the 189 VTDs assigned to the adopted Third  
8 District, the average black VTD within the Third District  
9 was 59.5 percent; correct?

10 A Correct, yes.

11 Q Okay. And then of the 116 VTDs you looked at outside  
12 of District 3, the localities, the average black VTD is  
13 43.5 percent; correct?

14 A Yes.

15 Q Okay. Now I want you to assume with me that the  
16 plaintiffs' alternative plan, that the average amount of  
17 black VAP in the plaintiffs' alternative plan is not  
18 59.5 percent black but 59.8 percent black.

19 A Okay.

20 Q Okay. So the plaintiffs' alternative plan, even  
21 though they were trying to get VDT, black VDTs out of  
22 District 3, they still had a black VAP of 59.8 percent.

23 MR. HAMILTON: Object to the form of the  
24 question, Your Honor. He's asking him to assume the  
25 conclusion and then ask him if the assumption is correct.

1 Q We can do this if you want by going to --

2 JUDGE PAYNE: I gather he agrees with your  
3 objection to the form of the question, so he's going to  
4 try again.

5 MR. CARVIN: Okay. I didn't want to spend a lot  
6 of time on this. We need to go to Plaintiffs' Exhibit 57  
7 that was introduced this morning, that plaintiffs  
8 introduced.

9 JUDGE PAYNE: That's not in the tab?

10 MR. CARVIN: It's not, no. It was just handed up  
11 today.

12 MR. HAMILTON: Your Honor, then I would object as  
13 beyond the scope of the direct. They called it  
14 Exhibit 57. The Court directed me to address that in our  
15 rebuttal case.

16 MR. CARVIN: Which is why I didn't want to spend  
17 a lot of time on it, but --

18 JUDGE PAYNE: So why are you asking about it now?  
19 Isn't this cross-examination of his rebuttal examination?

20 MR. CARVIN: I'm just trying to make the point  
21 that the same criticisms he makes of the enacted plan are  
22 true of the alternative plan.

23 JUDGE PAYNE: Well, ask him that question.

24 Q Isn't that true?

25 A What's the question, please?



1 Q Isn't there a racial gap between the VTDs in the  
2 plaintiffs' alternative plan and the VTDs in the adjacent  
3 districts similar to the gap you identified in the enacted  
4 plan?

5 A I can't answer that question at this time.

6 Q Even looking at Plaintiffs' Exhibit 57, you can't  
7 answer that question?

8 A There's further errors in plaintiffs' --

9 MR. HAMILTON: Same objection, Your Honor. This  
10 is beyond the scope of direct.

11 MR. CARVIN: Let me make it as broad as I can.

12 Q District 3 has a BVAP of 56.3 percent; right?

13 A Okay, yes.

14 Q Is that true?

15 A 56.3. I think you are using the inclusive method  
16 again.

17 Q And VTDs --

18 A Exclusive --

19 JUDGE PAYNE: What's the answer?

20 THE WITNESS: I'm just trying to -- he's -- I'm  
21 sorry, Your Honor. He's switching between different BVAP  
22 numbers, and I'm trying to keep in my head which numbers  
23 that you are using here. I'm sorry.

24 Q Let me clarify. All of my questions will be based on  
25 the BVAP the way the Justice Department calculates it

1 which you call the exclusive method; okay?

2 So under that exclusive method, is not the BVAP of  
3 District 3 56.3 percent in the enacted plan?

4 A The enacted plan, yes. That's the DOJ number, yes.

5 Q And isn't District 3 built by VTDs?

6 A Yes.

7 Q So any sample of VTDs where you take VTDs from  
8 District 3 will necessarily be more black in their  
9 composition than VTDs taken from 20 or 25 percent of white  
10 districts adjacent to District 3; correct?

11 A Not necessarily.

12 Q Have you examined that question?

13 A That's what the analysis is trying to get at.

14 Q And did you examine -- okay, I'm sorry.

15 JUDGE PAYNE: Wait a minute. That's what which  
16 analysis is trying to get at?

17 THE WITNESS: The analysis we just quoted from in  
18 my report.

19 Q Isn't it logical to infer that if you're taking VTDs  
20 out of a majority black district, you're going to have a  
21 higher representation of black people in those VTDs than  
22 if you're taking VTDs out of a majority white district?

23 A Not necessarily.

24 Q Okay. Explain.

25 A We're talking about highly performing Democratic

1 precincts to begin with, so not all of those white  
2 precincts in the surrounding localities will meet the  
3 threshold of 55 percent. So to look at that analysis,  
4 which is what I did in my report, we looked at that  
5 number.

6 So that is trying to get this character, but you are  
7 making a more broader general claim that all of those VTDs  
8 will be selected. They have -- obviously some of them  
9 have because it's a very substantial black voting-age  
10 population in that pool of precincts that are both  
11 55 percent.

12 Q And you didn't ask yourself the question -- let's not  
13 get into what Mr. Morgan looked at. You didn't ask  
14 yourself the question whether the black VTDs, majority  
15 black VTDs in District 3 were substantially more  
16 Democratic than the VTDs you selected from outside of  
17 District 3; correct? You didn't analyze that issue?

18 A I did look at some of these precincts, yes.

19 Q You didn't analyze in terms of the report you provided  
20 in tab two, Plaintiffs' Exhibit 28; correct?

21 A Tab two...

22 Q You lumped together any VTD with more than  
23 55 percent --

24 JUDGE PAYNE: Let him answer the question that's  
25 on the table. He was looking for his report, I guess.

1 A So this is, again, looking back at this on page eight?

2 Q Yes.

3 A Please ask the question.

4 Q You lumped together all VTDs with above 55 percent  
5 Democratic vote share. You treated a VTD with a  
6 95 percent Democratic vote share the same way you treated  
7 a 55 percent VTD; correct?

8 A Yes.

9 Q And you didn't analyze whether or not the VTDs in  
10 District 3 tended to be more of the 90 percent or  
11 80 percent Democratic districts than the VTDs outside of  
12 District 3, did you?

13 A That's in the average of the black VAP.

14 Q Right.

15 A Yes.

16 Q But you didn't look at what the average Democratic  
17 vote share was in those District 3 districts; right?

18 A Not in this report, no.

19 Q Or any other report.

20 A We only looked at -- we had a cutoff, or I had a  
21 cutoff point of 55 percent or higher.

22 Q Right.

23 A Yes.

24 Q And you said that had an average BVAP of 59.5 percent;  
25 right?

1 A Correct.

2 Q But you didn't ask yourself what was the average  
3 Democratic vote share of those districts, did you?

4 A Correct.

5 Q And you didn't ask yourself whether the average  
6 Democratic vote shares of those District 3 VTDs was higher  
7 than the average Democratic vote share of the VTDs in the  
8 localities outside of District 3, did you?

9 A No. We just used that 55 percent cutoff. I just used  
10 that 55 percent cutoff.

11 Q Let me ask you about preserving the cores of the  
12 districts. You did not specifically analyze how much of  
13 the districts' population or cores was retained in the  
14 2012 district, did you?

15 A No.

16 Q Mr. Morgan analyzed that; correct?

17 MR. HAMILTON: Object to the form of the  
18 question, Your Honor. It's beyond the scope. Now we're  
19 rehabilitating Mr. Morgan when he hasn't been impeached to  
20 begin with.

21 JUDGE PAYNE: Why don't we -- is that your only  
22 question, is that Morgan did it?

23 MR. CARVIN: I can cut through it.

24 Q You agree, don't you, that they largely preserved the  
25 cores of all the exiting districts in the plan?

1 A No, I do --

2 MR. HAMILTON: I'll withdraw --

3 JUDGE PAYNE: Whoa, whoa, whoa. You are both  
4 talking at the same time. What did you say?

5 MR. HAMILTON: I was withdrawing the objection.  
6 Because the way Mr. Carvin rephrased the question, he  
7 wasn't asking about Mr. Morgan's report, so I have no  
8 objection.

9 JUDGE PAYNE: We don't have a question or an  
10 answer for the record yet.

11 Q Do you think that the 2012 plan enacted by the General  
12 Assembly largely retained the cores of the old districts?

13 A No.

14 Q All right. You did not analyze that issue, did you?

15 A I did analyze that issue.

16 Q You didn't analyze the population retained in the new  
17 districts from the old districts, did you?

18 A It's implicit in my report, yes.

19 Q Did you explicitly look at them?

20 A Yes.

21 Q Where?

22 A Where we were looking at the trades of the districts,  
23 the populations between districts. You can calculate the  
24 number that you wish needed to say something about from  
25 those statistics.

1 JUDGE PAYNE: That's not the question, though.  
2 The question is not whether you can do it. The question  
3 is whether you did do it, as I understand the question,  
4 and there's a difference.

5 THE WITNESS: Right. So, yes, the population is  
6 moved from the second -- from the Third District to  
7 adjoining districts and districts into the Third District.  
8 That is a number that is in my report.

9 Q You didn't -- there's no number in your report that  
10 analyzes how much percent of the old population was  
11 retained in the new districts for all 11 districts?

12 A Right. It's not calculated --

13 Q You gotta listen to my question --

14 JUDGE PAYNE: Wait a minute.

15 THE WITNESS: Sorry.

16 MR. CARVIN: Move to strike.

17 Q For all 11 districts, did you analyze the percentage  
18 of population retained from the old district?

19 A No.

20 Q With respect to the five districts, District 3 and the  
21 four adjacent districts, did you explicitly calculate the  
22 percentage of population retained from the old districts?

23 A No.

24 Q Okay. Could you please turn to tab five, page 24, of  
25 Mr. Morgan's report. Do you see that?

1 A Yes.

2 Q Now, he explicitly analyzed the percentage of  
3 population retained in the enacted plan and the  
4 plaintiffs' alternative plan from the benchmark districts,  
5 didn't he?

6 MR. HAMILTON: Objection, Your Honor. This is  
7 beyond the scope of direct. We're talking about Mr.  
8 Morgan's report before Mr. Morgan testified.

9 MR. CARVIN: It's not beyond the scope. I'm  
10 simply seeing if he disagrees with it so I can figure out  
11 whether or not he disagrees with our basic contention that  
12 they retained the cores of the existing districts.

13 JUDGE PAYNE: You can ask the question, but don't  
14 ask it with reference to Morgan or the report. Morgan is  
15 not in here ready to go and testify yet, so we need to  
16 keep the order of things in the right way, but you can ask  
17 the larger question without reference to Morgan's report.

18 MR. CARVIN: All right.

19 Q Did District 3 in the enacted plan retain 83 percent  
20 of the population from the old District 3?

21 A Where does that number come from?

22 Q I'm asking you if you disagree with that assertion.

23 JUDGE PAYNE: Actually what you asked him was  
24 whether it did that. Do you know if it did that or not?

25 THE WITNESS: It's actually found in the Section



1 5 submission from the Commonwealth of Virginia to the  
2 Department of Justice.

3 JUDGE PAYNE: So the answer is yes.

4 THE WITNESS: So the answer is yes.

5 Q And the answer is they did retain 83.1 percent;  
6 correct?

7 A Yes.

8 Q And district seven retained 88.1 percent of the old  
9 population; correct?

10 A I assume that's correct.

11 Q And District 4 retained 96.2 percent of the old  
12 population; correct?

13 A Again, I assume that's correct.

14 Q And District 2 retained 85 percent of the old  
15 population; correct?

16 A I assume that's correct.

17 MR. HAMILTON: I object, Your Honor. Now the  
18 witness -- I object for lack of foundation. He hasn't  
19 established a foundation for the witness's testimony.

20 MR. CARVIN: He's an expert. We have made  
21 preserving cores an issue of this from the beginning. If  
22 he has a different view, I'm just trying to figure out if  
23 it has anything to do --

24 JUDGE PAYNE: You asked him the question, and he  
25 said he assumed it was true. Your objection is that the

1 witness's answer is speculative? Is that what your  
2 objection is?

3 MR. HAMILTON: That's right, Your Honor, and  
4 there isn't foundation --

5 JUDGE PAYNE: That's different than whether it's  
6 speculative. Which is it, foundation or speculation?

7 MR. HAMILTON: Both, because he has no foundation  
8 to testify --

9 JUDGE PAYNE: Sustained.

10 Q You have not analyzed the percentage retained from the  
11 old districts to the new districts?

12 A Yes, I answered that question previously.

13 Q All right. So did District 1 retain 76.5 percent of  
14 its old population?

15 A I answered that I hadn't done that analysis, and so  
16 I'm assuming you are presenting the correct numbers.

17 JUDGE PAYNE: I think his problem, Dr. McDonald,  
18 is if you say you did the analysis, then you are bound to  
19 be able to answer the question, or you just don't remember  
20 it, or you didn't do the analysis, and he's trying to get  
21 to the point, I think, whether you actually did the  
22 analysis or did not, and if you did not, just say you  
23 didn't and we'll be done with it. If you did it, then you  
24 did it, and you don't remember where it is. And he has to  
25 then show you where it is. So let's go.

1 THE WITNESS: As I already answered, I have not  
2 done that analysis.

3 JUDGE DUNCAN: May I clarify? For District 1,  
4 are we talking about Congressional District 1 now?

5 MR. CARVIN: District 1 is one of the districts  
6 adjacent to --

7 JUDGE DUNCAN: I was just making sure I was  
8 following the colloquy.

9 MR. CARVIN: The last question, which admittedly  
10 undoubtedly got convoluted, was whether or not District 1  
11 retained 76.5 percent of old District 1's population.

12 Q Do you agree with the plaintiffs' trial brief that the  
13 new District 3 closely resembles in shape benchmark  
14 District 3?

15 A That plaintiffs' alternative? Yes, except for the  
16 Hampton Roads area.

17 Q I'm sorry. The new enacted District 3 closely  
18 resembles the benchmark District 3?

19 A Yes.

20 Q So they essentially -- if these numbers I gave you are  
21 correct, they essentially preserve the shape and the  
22 population of the old District 3 in the 2012 enactment;  
23 correct?

24 A Essentially, yes.

25 Q Now, the plaintiffs have produced an alternative plan

1 here; right?

2 A Yes.

3 Q And that has 50.1 or 50.2 percent BVAP under the  
4 exclusive method?

5 A Under the exclusive method? Yeah, it's 50.2 percent,  
6 I believe.

7 Q And basically the only difference between plaintiffs'  
8 alternative three and the enacted three is the swaps  
9 between District 3 and District 2 that's identified on the  
10 map; correct?

11 A Correct.

12 Q In all other respects, plaintiffs' alternative  
13 District 3 is identical to enacted District 3; correct?

14 A Correct.

15 Q And alternative three, like enacted District 3,  
16 subordinates traditional districting principles to achieve  
17 the goal of creating a majority-minority district;  
18 correct?

19 A Please say it again for me.

20 Q Plaintiffs' alternative three, like enacted District  
21 3, subordinates traditional districting principles to  
22 achieve the goal of creating a majority-minority district;  
23 correct?

24 A Yes.

25 Q And the drafters of the plaintiffs' alternative plan

1 drew it to achieve a 50 percent quota; correct?

2 A A majority district, yes. 50 percent would be a  
3 majority, yes.

4 Q But a bare majority?

5 A Yes.

6 Q And the purpose of the alternative plan was a  
7 majority-minority district but no more than the bare  
8 majority district; correct?

9 A Correct.

10 Q So the drafters of the alternative plan preserved as  
11 much of legislature's District 3 as they could except for  
12 their express desire to have as narrow a majority in  
13 District 3 as possible.

14 A Correct. That would be one of the things that they  
15 attempted to do.

16 Q Okay. And with respect to these changes between three  
17 and two, what they did was move a lot of high BVAP VTDs  
18 from District 3 into District 2; correct?

19 A Correct.

20 Q And those changes had a racial purpose.

21 A Yes. There was a racial component to those changes,  
22 yes.

23 Q And it's a racial gerrymander if your racial purpose  
24 is to decrease BVAP just in the same way as if your  
25 purpose is to increase BVAP; correct?

1 A Not -- it is a racial purpose, but not necessarily.

2 Q Well, if you consciously decrease BVAP, that  
3 constitutes racial gerrymander in the same way that  
4 consciously increasing BVAP does; correct?

5 A No.

6 Q Do you remember having your deposition taken in this  
7 case?

8 A Yes.

9 Q On April 11th, 2014?

10 A Yes.

11 Q And I'm going to hand your deposition up. If you  
12 could turn to page 51 of your deposition, please.

13 A Yes.

14 Q Okay. And were you asked these questions and did you  
15 give this answer: "Okay, we're talking about race, the  
16 use of race predominating over traditional districting  
17 principles. So that would constitute a racial  
18 gerrymander; is that correct?

19 "Answer: Yes.

20 "And that would be true if race predominated an effort  
21 to reduce black voting-age population as well as an effort  
22 to enhance black voting-age population; correct?

23 "Answer: Yes."

24 Were you asked those questions and did you give those  
25 answers?

1 A Yes.

2 Q And you talked to the drafter of the plaintiffs'  
3 alternative plan before you did your report on it; right?

4 A Yes.

5 Q And the drafter was Eric Hawkins of the National  
6 Committee for an Effective Congress?

7 A Yes.

8 Q And he told you his goal was to draw a bare majority  
9 BVAP district?

10 A That was one of the goals.

11 Q Let's talk about the plaintiffs' alternative  
12 compliance with traditional districting principles, and  
13 again, just so nobody is misled, the board here that  
14 compares the enacted district to the alternative district  
15 only has a very small portion of these two districts in  
16 it; right?

17 A That's correct.

18 Q Everything that goes above this district, the  
19 districts are identical; correct?

20 A Correct.

21 Q And you agree that the plaintiffs' alternative  
22 district is not compact; correct?

23 A The plaintiffs' alternative? It is more compact than  
24 the previous, but it is still --

25 MR. CARVIN: Move to strike.

1 Q Do you agree that the plaintiffs' old --

2 JUDGE PAYNE: Excuse me just a minute. I know  
3 you moved to strike, but we need to have him, Mr.  
4 Hamilton, have his say, and then we need to rule one way  
5 or the other. Do you agree it wasn't responsive, Mr.  
6 Hamilton, or not?

7 MR. HAMILTON: I don't, Your Honor. I believe it  
8 was responsive. It was responsive to the question that  
9 was asked.

10 MR. CARVIN: I asked him whether or not it was  
11 compact, not whether it was more or less compact than the  
12 enacted plan.

13 JUDGE PAYNE: I think the motion to strike is  
14 granted. Ask the question again. Please just answer the  
15 question.

16 Q Do you agree that alternative District 3 is not  
17 compact?

18 A Agree that it is not compact? Yes.

19 Q And it replicates, except for this part here shown on  
20 the maps, all of the parts of enacted District 3 that you  
21 criticize as a racial gerrymander; correct?

22 A Yes.

23 Q And those criticisms apply equally, obviously, to  
24 alternative District 3 as they do to enacted District 3?

25 A Those areas that we are talking about not here that



1 are on the maps, yes.

2 Q And one criticism of enacted District 3 is it  
3 perpetuates the non-compact benchmark District 3; correct?  
4 Perpetuates the non-compact shape.

5 A Correct, yes. Non-compact shape, yes.

6 Q And then with respect to the changes between benchmark  
7 District 3 and the enacted plan, you criticized those as  
8 well, didn't you?

9 A Please restate that question for me.

10 Q In addition to retaining the core non-compact District  
11 3, you also criticize enacted District 3 because of the  
12 changes that were made to benchmark District 3.

13 A (No response.)

14 Q Let me make it simple.

15 A Yeah, sorry. I'm not following. That's a very  
16 complicated question.

17 Q You criticized the trades between District 3 and  
18 District 1 and District 4 and District 7 and District 2;  
19 correct?

20 A Benchmark to the adopted, yes.

21 Q Let's start with the trades between District 4 and  
22 District 3. The enacted switched Petersburg from four to  
23 three, and that subordinated traditional districting  
24 principles to race; correct?

25 A Yes.

1 Q And that transfer of Petersburg from District 4 to  
2 District 3 was similar to the unconstitutional district in  
3 *Moon*; correct?

4 A Yes.

5 Q And that's equally true of plaintiffs' alternative;  
6 correct?

7 A Yes.

8 Q And you criticized the swaps between three and seven;  
9 right?

10 A Yes.

11 Q And you said that adding New Kent to district seven  
12 and transferring high-density black VTDs to three from  
13 Henrico and Richmond subordinated traditional districting  
14 principles to race; correct?

15 A Yes.

16 Q And all of those criticisms apply equally to  
17 plaintiffs' alternative plan; right?

18 A Yes.

19 Q If you could turn to tab three, Plaintiffs'  
20 Exhibit 29, please.

21 A Say that again, please. I'm sorry.

22 Q Tab three, Plaintiffs' Exhibit 29. And if you could  
23 turn to page four.

24 A Yes.

25 Q This is your expert report in this case analyzing

1 plaintiffs' alternative plan?

2 A Yes.

3 Q And this morning you criticized the locality splits in  
4 the enacted plan as subordinating traditional districting  
5 principles because it had more locality splits in District  
6 3 than any other district in the state; right?

7 A Yes.

8 Q And it had nine locality splits; correct?

9 A Yes.

10 Q And plaintiffs' alternative has -- District 3 has  
11 eight locality splits; correct?

12 A Yes.

13 Q And that is more than the locality splits of any other  
14 district in the state.

15 A Yes.

16 Q So that two locality splits in plaintiffs' alternative  
17 plan subordinate traditional districting principles to  
18 race; correct?

19 A This is an indicator, yes.

20 Q And you also claim, and this counts if you look at the  
21 VTD splits in your table, that counts VTD splits that  
22 affect people and those that don't affect people; correct?

23 A Correct.

24 Q Even if you count VTD splits that have no effect on  
25 human beings, the alternative plan has 11 VTD splits;

1 correct?

2 A Correct.

3 Q And that is more VTD splits than any other district in  
4 the state; correct?

5 A Correct.

6 Q So the alternative plan subordinates traditional  
7 districting principles, the traditional districting  
8 principle of preserving VTDs; correct?

9 A Correct.

10 Q So the alternative plan subordinates traditional  
11 districting principles to race, but unlike the enacted  
12 plan, does not further the General Assembly's political  
13 goals of having an 8/3 incumbency protection plan;  
14 correct?

15 A Yes.

16 Q Yes, it does not?

17 A Yeah. That's why I'm trying to think how to formulate  
18 the answer.

19 Q You agree that the alternative plan does not further  
20 the General Assembly's political or incumbency protection  
21 goals of having an 8/3 partisan division; correct?

22 A Yes, with a caveat.

23 Q Okay. What is the caveat?

24 A After the basis of looking at the legislative record,  
25 we don't have knowledge that the goal was to create an 8/3

1 split.

2 Q Assume with me that what you wrote in your Richmond  
3 article and what would benefit the General Assembly  
4 politically was a desire to have an incumbency protection  
5 plan in an eight-to-three partisan division; okay? Assume  
6 with me what you wrote in your own University of Richmond  
7 article was correct; okay?

8 A Assuming that's correct.

9 Q Okay. Assuming what you wrote is correct, it is true,  
10 therefore, that plaintiffs' alternative plan does not  
11 further the General Assembly's goal of protecting eight  
12 Republican incumbents and preserving an eight-to-three  
13 partisan division; correct?

14 A Assuming what I wrote was correct before looking at  
15 the entirety of the evidence that we presented in this  
16 case, yes.

17 Q Okay. Now, the reason it doesn't do that is because  
18 plaintiffs' alternative plan has a very negative effect on  
19 Congressman Rigell's future reelection prospects; correct?

20 A Potentially, yes.

21 Q It converts District 2 into a likely -- a seat that  
22 will likely elect a Democratic, doesn't it?

23 A It will be more favorable to a Democratic candidate,  
24 yes, but he may still win in that district because of  
25 incumbency advantages and other things.

1 Q Let's turn to tab five, Mr. Morgan's report, page 16.

2 A Yes.

3 Q Okay, Mr. Morgan says that the alternative plan moves  
4 126,980 people from District 3 to District 2. You agree  
5 with that; right?

6 MR. HAMILTON: Objection, Your Honor. Same  
7 objection. We're getting the cart before the horse.

8 JUDGE PAYNE: Sustained. If he agrees with  
9 absolute figures, that's one thing, but stay away from the  
10 report.

11 Q Do you agree with it?

12 A Can you please restate the question for me.

13 Q Does the plaintiffs' alternative plan, which you  
14 analyzed, move 126,980 people from District 3 to District  
15 2?

16 A I'd have to look back at my reports to see that.

17 Q All right, go ahead.

18 JUDGE PAYNE: Which report do you want in front  
19 of you there?

20 Q Tab three.

21 A Yes.

22 JUDGE PAYNE: The answer is yes then?

23 THE WITNESS: Yes, I'm looking at tab three.

24 Q Did you look at the political composition of the  
25 126,000 people moved from District 3 to District 2?

1 A I did not.

2 Q You have no basis for disagreeing with the assertion  
3 that 81 percent of the people moved from District 3 to  
4 District 2 are Democrats, do you?

5 A I have no basis for that, yes, disagreement.

6 Q And did District 2 move 45,798 people to District 3?

7 JUDGE PAYNE: In the alternate plan?

8 MR. CARVIN: In the alternative plan.

9 A I don't know that number offhand. Let me see. It's  
10 on maybe page nine? I'm trying to find it for you. I  
11 think this is it. But this is from the benchmark, not  
12 from the adopted.

13 Q I'm sorry?

14 A The statistics that I reported were from the benchmark  
15 to the alternative, not the adopted to the alternative. I  
16 think that's the question you are asking me.

17 Q No.

18 A No, it's not, okay. Can you please restate the  
19 question for me.

20 Q If you don't trust the exact same figures in Mr.  
21 Morgan's report, why don't you turn to tab three, page  
22 nine, of your report.

23 A Yes.

24 Q Okay. And you report, do you not, that the  
25 alternative plan moved 45,798 people from benchmark

1 District 2 to District 3; correct?

2 A Yes.

3 Q And you didn't analyze the political leanings of those  
4 people moved, did you?

5 A No.

6 Q Okay. So you have no basis for disagreeing with the  
7 assertion that those people are split evenly between  
8 Republicans and Democrats?

9 A No.

10 Q And you have no basis for disagreeing with the notion  
11 then that the alternative plan moves an overwhelmingly  
12 Democratic group into District 2 and moves an evenly  
13 divided group out of District 2, do you?

14 A No, I do not.

15 Q And you don't have any basis for disagreeing with the  
16 fact that that move converts District 2 from a 50 percent  
17 toss-up district to a heavily Democratic 55 percent  
18 noncompetitive district, do you?

19 A No, I do not.

20 Q And if all of that were true, then this would be not  
21 only -- this would be directly undermining the General  
22 Assembly's goals of incumbency protection and maximizing  
23 Republican congressional representation; correct?

24 A If those were goals of the General Assembly, yes.

25 Q So you have no basis for asserting that plaintiffs'



1 alternative serves the legislature's political goals.

2 A Can you please rephrase the question again or restate  
3 it.

4 Q Let's move on. The alternative plan's changes between  
5 three and two can't be explained by enhancing Republican  
6 political efforts; correct?

7 A Between three and two in the alternative plan?

8 Q Yes.

9 A No.

10 Q But the enacted plan's changes between three and two  
11 can be explained by enhancing Republican political  
12 prospects; correct?

13 A Partially.

14 Q And do you know what the changes to District 3 and 2  
15 did to the percentage of people retained in District 3  
16 from the benchmark district?

17 A As I previously stated, I have not calculated that  
18 percentage.

19 Q So you have no basis for disagreeing with the  
20 assertion that the changes, just the changes between two  
21 and three in the alternative plan, decreased the core  
22 retention of the enacted plan from 83.1 percent to  
23 69 percent, do you?

24 A I do not.

25 Q Okay. So this alternative that you are offering up is

1 not an alternative that shows -- that does not subordinate  
2 traditional districting principles; right?

3 A It's such a double negative, so I'm just trying to  
4 understand the question.

5 Q This alternative doesn't show what a plan would look  
6 like if the line-drawer had adhered to race-neutral  
7 traditional districting principles rather than  
8 subordinating traditional districting principles to race.

9 A Did not -- yes, it did not, with a caveat.

10 Q What's the caveat?

11 A Caveat is, within the Hampton Roads area, we can see  
12 that localities are kept nearly intact with the exception  
13 of that small split of Portsmouth, so other traditional  
14 redistricting principles within the area between the  
15 second and third, there is improvement on those  
16 traditional redistricting principles.

17 Q Okay. That's not a caveat. That's nonresponsive.  
18 I'm asking you again, is the plaintiffs' alternative  
19 reflection of a plan where the line-drawer adheres to  
20 race-neutral traditional districting principles?

21 A To some extent, yes.

22 Q That would be only in the swaps between two and three.

23 A Right, yes.

24 Q And you think that race didn't factor into it in two  
25 and three?

1 A That race did not factor --

2 Q Even though the avowed goal --

3 JUDGE PAYNE: Wait a minute. Wait a minute. The  
4 first question is off the table, so now you are starting  
5 again.

6 MR. CARVIN: Yes.

7 Q You told me before that the avowed goal of the  
8 line-drawer was to decrease the BVAP from 56.3 to 50.1.  
9 Are you contending that race was not a factor in how they  
10 drew those lines?

11 A Race was a factor, yes.

12 Q Okay. So this is not an example even in this area of  
13 where the line-drawer was adhering to race-neutral  
14 traditional districting principles. Race was a primary  
15 motivation; correct?

16 A In this region, race is more balanced, so, no.

17 Q It's a factor in this region.

18 A It's a factor in this region.

19 Q And it's a predominant factor in the rest of the plan?

20 A Yes. It is also a factor in the rest of the plan,  
21 yes.

22 JUDGE PAYNE: But his question was, was it a  
23 predominant factor in the rest of the plan, the  
24 alternative plan, in your opinion.

25 THE WITNESS: Yes.

1 Q So there's no plan in front of the Court that  
2 illustrates how traditional districting principles would  
3 be honored if race was not a factor or a predominant  
4 factor; correct?

5 JUDGE PAYNE: I don't know if that's a fair  
6 question for him to answer. That's sort of argument. Go  
7 ahead with something else. Do you have anything else?

8 Q Well, the alternative plan is not designed to show  
9 what a race-neutral plan would look like. It's designed  
10 to show narrow tailoring under Section 5; is that your  
11 understanding?

12 A Yes.

13 Q And you testified on direct that it's more narrowly  
14 tailored because it's just a bare majority, 50.2 percent,  
15 where the enacted plan is 56.3 percent.

16 A Yes.

17 Q And the compelling government interest here is  
18 complying with Section 5 of the Voting Rights Act; right?

19 A Well, it's no longer operative in Virginia, so...

20 Q What do you think it's narrowly tailored to?

21 A A potential Section 2 challenge.

22 Q Assume with me that the plaintiffs have argued that  
23 this is narrowly tailored to comply with Section 5; okay?

24 A Okay.

25 Q Do you think this is narrowly tailored to comply with

1 Section 5?

2 A Yes, I do.

3 Q Okay. Now, Section 5 says you can't retrogress  
4 minorities' ability to elect their candidates of choice  
5 compared to the benchmark plan; right?

6 A Yes.

7 Q Okay. And this doesn't mean that you need to preserve  
8 a 50 percent BVAP; correct?

9 A Please restate the question.

10 Q The command of Section 5 is not to reduce the BVAP  
11 below the point where minorities are able to elect their  
12 candidate of choice. It is not to stay above 50 percent  
13 BVAP; right?

14 A Correct. There is no magic number, yes.

15 Q And the truth is, in the south, in modern times,  
16 blacks are able to elect their candidates of choice in  
17 districts with much less than 50 percent BVAP; correct?

18 A In some locales, yes.

19 Q And this is one of those locales; correct?

20 A I believe so.

21 Q Okay. And you did a racial bloc voting analysis to  
22 analyze this; right?

23 A Among other things, yes.

24 Q And that analysis shows that District 3 is an  
25 effective district where blacks can elect their candidate

1 of choice with a BVAP in the high 20s or the low 30s;  
2 correct?

3 A That's not in my report, no.

4 Q Could you turn to your deposition, please. Do you  
5 still have that in front of you?

6 A Yes, I do.

7 Q If you could turn to 209, please.

8 A Yes.

9 Q All right. If you look at the Qs and As at the bottom  
10 of 209, with that kind of white crossover, referring to  
11 your racial bloc voting analysis, you could take this down  
12 to the low 30s and would still provide blacks an  
13 opportunity to elect a candidate of choice.

14 Do you want me to do the math for you?

15 If you want to do the math, you can do it, but if you  
16 represent the math to be true, then I would agree with  
17 you.

18 Question: Okay.

19 Answer: This is consistent with what I've seen in  
20 other jurisdictions in the south; correct?

21 A Yes.

22 Q Okay. So the truth is that under your racial bloc  
23 voting analysis, and I will do the math with you in a  
24 minute, you could elect a candidate of choice even if you  
25 decrease the BVAP to the low 30s; correct?

1 A If you represent that to be true.

2 Q Let's do the math. If you could turn to tab four.

3 This is Plaintiffs' Exhibit 30.

4 A Yes.

5 Q And if you could turn to page five?

6 A Yes.

7 Q And this is the racial bloc voting analysis you did  
8 for District 3?

9 A Yes.

10 Q And you weren't talking about the enacted District 3,  
11 you were contemplating a District 3 with a 51 percent  
12 BVAP; right?

13 A That's not what this analysis is.

14 Q All right. If you could look at the first column of  
15 your chart. Do you see that?

16 A Yes.

17 Q Where it says, estimated vote for candidate of choice  
18 in 51 percent BVAP district, not analyzing the chances of  
19 electing a minority candidate of choice in a 51 percent  
20 BVAP district?

21 A Yes, I am. I'm sorry. I didn't quite understand the  
22 question.

23 Q And basically -- let's turn to the results, and then  
24 we'll come back and do the math. If you turn to the top  
25 of page six, please.

1 A Yes.

2 Q Okay. And you say in the third full sentence, do you  
3 not, that the baseline support for the minority candidates  
4 of choice in a 51 percent black VAP district is in the mid  
5 to upper 60s range.

6 A Correct.

7 Q Which means that in a 51 percent district, you would  
8 expect the black candidate of choice to get up to the high  
9 60s; right?

10 A Yes.

11 Q And 55 percent is a safe district, correct, not  
12 competitive?

13 A Generally speaking, we think in terms of -- see, you  
14 are asking a different question. I have to say no to that  
15 answer, and we can -- I can explain.

16 Q When you chose the precincts that you were going to  
17 analyze in your race-versus-politics analysis, you chose  
18 districts with a 55 percent Democratic performance share;  
19 correct?

20 A Right.

21 Q That's because you said those were districts that were  
22 not competitive but were heavily Democratic; correct?

23 A Right.

24 Q Now, here you are saying that the anticipated vote at  
25 51 percent BVAP is from 65 to 69 percent; correct?



1 A Can you please point to those numbers for me.

2 Q You say in the sentence I read to you a minute ago,  
3 the baseline support for the minority candidate of choice  
4 in a 51 percent black district is in the mid to upper  
5 60 percent range; correct?

6 A Yes, correct.

7 Q Mid to upper 60s is 65 to 69 percent?

8 A Yes.

9 Q 65 to 69 percent is a super safe district; correct?

10 A Yes.

11 Q Well above providing blacks an equal opportunity to  
12 elect their candidate of choice; right?

13 A Yes.

14 Q Now let's do the math. Let's go back to page five;  
15 okay?

16 A Yes.

17 Q And you looked at the race between President Obama and  
18 McCain in 2008; right?

19 A Correct, yes.

20 Q And you looked at the governor's race in 2009  
21 involving Mr. Deeds, Senator Deeds, for governor?

22 A Yes.

23 Q And that was a white-on-white race, two white  
24 candidates?

25 A Correct.

1 Q The more probative race is the president's race  
2 because it's more probative to look at races involving  
3 minority candidates?

4 A Mixed race candidates -- races are usually more  
5 probative of value, yes.

6 Q And your estimated support -- this was a standard  
7 regression analysis, Goodman's double regression, how we  
8 predict vote outcomes in voting rights cases?

9 A Yes, it's a very standard procedure that's used in  
10 voting rights.

11 Q And the turnout of black voters is roughly the same as  
12 the turnout of white voters your analysis shows?

13 A Roughly, yes, but those statistics are not presented  
14 here.

15 Q Okay, but what we talked about at the deposition, and  
16 that was the conclusion you got from these statistics;  
17 correct?

18 A Correct.

19 Q And your anticipated level of support from black  
20 voters for the black preferred candidate is 104.3 percent  
21 or 96.1 percent; right?

22 A Yes.

23 Q And the real number is somewhere in between roughly  
24 100 percent support, right, of blacks for the  
25 black-preferred candidate?

1 A It's probably closer to 96 percent. The numbers start  
2 tailing off just as you get up to 100 percent, so there  
3 was no precinct that had 100 percent support even though  
4 it was near 100 percent minority district.

5 Q Let's assume, therefore, he had a 25 percent BVAP  
6 district. If he got 98, 96 percent of the black vote,  
7 that means the black candidate of choice would start with  
8 24 percent of the vote; right?

9 A Thereabouts, yes.

10 Q Okay. And then 75 percent of the voters are  
11 non-black; correct?

12 A Correct.

13 Q Okay. And the support you expect from non-black  
14 voters for the black candidate of choice is between  
15 38.6 percent and 43.6 percent; right?

16 A Oh, yes.

17 Q And 40 percent of 75 is 30 percent; correct?

18 A 40 percent of 35, yes. 40 percent of 35.

19 Q 40 percent of 75 is 30 percent; correct? Two times 15  
20 equals 35, times 15 equals 75. Two-fifths is 40 percent.

21 MR. HAMILTON: Object to the form of the  
22 question.

23 Q Do you know what 40 percent of 75 --

24 A If you could just give me a second.

25 Q Sure, take your time. I can give you a calculator.

1 A That would be great. I'm trying to keep a number of  
2 numbers in my head at the same time.

3 JUDGE PAYNE: Mr. Carvin, you are on  
4 cross-examination, so you've been given a good bit of  
5 latitude, but we seem to be going far off the bases here.  
6 Maybe you want to tether, get back to the base a little  
7 bit.

8 MR. CARVIN: Okay.

9 A 30, yes.

10 Q Okay. So if you add the 30 percent from the non-black  
11 75 to the 24 percent from the 25 percent BVAP, that adds  
12 up to 54 percent; correct?

13 A Yes.

14 Q So this analysis would support the notion that surely  
15 at 30 percent, blacks in District 3 would be able to elect  
16 their candidate of choice at 30 percent BVAP.

17 A Likely we would want -- this analysis alone, yes.

18 Q And you said this morning that there was no basis --  
19 well, in fact, in this, you say, do you not, at the end,  
20 that given this racial bloc voting analysis, there's no  
21 basis for increasing the black BVAP above 51 percent;  
22 right? If you want to turn to page 12, that will be fine.

23 A I'm on page 12.

24 Q I'll just ask you the simple question. Is it your  
25 opinion that in District 3, a 50 percent BVAP is the

1 lowest BVAP needed for blacks to elect their candidate of  
2 choice?

3 A That 50 percent is the lowest BVAP needed. A  
4 50 percent district would be performing for an  
5 African-American candidate, so, yes.

6 Q 44 percent district would also --

7 JUDGE PAYNE: I don't think that was the  
8 question. Ask the question again. Listen to the question  
9 and answer the question he was asking, because you changed  
10 the question in your answer without intending to, I'm  
11 sure.

12 THE WITNESS: I'm sorry, Your Honor. I'm really  
13 trying to answer the question. I apologize.

14 JUDGE PAYNE: I said that. You have a hard job.  
15 Go again.

16 Q Based on your analysis, is 50 percent the lowest BVAP  
17 required to provide black voters with an opportunity to  
18 elect their candidate of choice?

19 A No.

20 Q You could have a substantially lower BVAP?

21 A Yes.

22 JUDGE PAYNE: You are talking about in District  
23 3.

24 MR. CARVIN: District 3.

25 THE WITNESS: Yes.

1 Q So, therefore, 50 percent is not tied to the BVAP  
2 needed to avoid retrogression, it is well above that  
3 point; correct?

4 A Correct.

5 Q Now, Virginia, as you point out, did not do a racial  
6 bloc voting analysis of the kind you did here, right, as  
7 far as you know?

8 A Yes.

9 Q And if you haven't done a racial bloc voting analysis,  
10 the best course, like what the bipartisan commission you  
11 served on, is simply to not go below the benchmark BVAP;  
12 correct?

13 A Best course, we had --

14 MR. HAMILTON: Your Honor, I object to the form  
15 of the question, and I'm not sure if it's a legal  
16 question, the best course, in which case it's  
17 inappropriate for that reason. I'm not sure of the  
18 measuring stick the witness is supposed to answer that  
19 question with.

20 JUDGE PAYNE: So what do you say about the  
21 objection to the form of the question, Mr. Carvin?

22 MR. CARVIN: I'm asking him whether or not it  
23 makes sense if you haven't done a racial bloc voting  
24 analysis, isn't the best course to not go below the BVAP  
25 like the bipartisan commission upon which you served.

1 MR. HAMILTON: Same objection, Your Honor. I  
2 don't know how the witness is supposed to answer the  
3 question.

4 JUDGE PAYNE: Best course for what purpose, I  
5 suppose, is what his objection is, Mr. Carvin, and I think  
6 he's right.

7 MR. CARVIN: That's fair enough.

8 Q You're trying to secure preclearance from the Justice  
9 Department where you need to prove non-retrogression. If  
10 you haven't done a racial bloc voting analysis, the best  
11 and safest way of achieving preclearance is not to go  
12 below the BVAP, correct, the benchmark BVAP?

13 A No.

14 Q No? The commission upon which you served.

15 A Yes.

16 Q And where you advised them --

17 A I was a consultant. I didn't serve on it.

18 Q Where you consulted them on how to draw it, they made  
19 the decision about which you did not object to make sure  
20 they didn't go below the benchmark BVAP; correct?

21 A Incorrect.

22 Q Is that incorrect?

23 A Incorrect.

24 Q They decided they could go below it; correct?

25 A Correct.

1 Q This is not in your folder. Do you still have the  
2 Intervenor's Exhibit 45?

3 JUDGE PAYNE: It's a book --

4 MR. CARVIN: This is not, unfortunately, Mr.  
5 McDonald's book, but I'd like him to turn to Intervenor's  
6 Exhibit 45.

7 JUDGE PAYNE: Do you have that, Dr. McDonald,  
8 that book? Is that an email that you are talking about?

9 MR. CARVIN: Yeah.

10 JUDGE PAYNE: Do you have that, Dr. McDonald?

11 THE WITNESS: Yes.

12 Q This is an email from you to the people that were  
13 drawing the congressional districts under your  
14 supervision; correct?

15 A Correct.

16 Q In your connection as a consultant for the commission;  
17 correct?

18 A Correct.

19 Q Okay. And the first line of your email is, "I've  
20 shared a congressional plan called Dr. McDonald Third  
21 District variant which demonstrates how to create a plan  
22 that has a Third Congressional District more than  
23 53.2 percent plus black VAP and connects the Eastern Shore  
24 with a bridge in the Newport News area. Did you write  
25 that?



1 A Yes.

2 Q And then the next sentence is, "These are two  
3 absolutely must requirements," and the word "must" is all  
4 caps; correct?

5 A Yes.

6 Q "For the plan to be considered by the commission. A  
7 53.2 percent plus black VAP district," and then another  
8 consideration.

9 So, Dr. McDonald, isn't it a fact that the commission  
10 did not want a BVAP below the benchmark BVAP? Wasn't that  
11 a must?

12 A No.

13 Q Can you explain to me why you told these people in  
14 your email eight days before the commission came out with  
15 its plans why a 53.2 percent black VBAP [sic] was a must  
16 when, in fact, it was not a must?

17 A If you turn fortunately to the next exhibit,  
18 Intervenor Defendants' Exhibit 46, there's -- at the  
19 bottom of that page, there's, under the Section 2, maps  
20 must be -- maps drawn must ensure compliance with the  
21 federal Voting Rights Act. The last bullet point there,  
22 it says that the BVAP shall not be below 50.5 percent.

23 Q Now I need Plaintiffs' Exhibit 46. And that's  
24 Tuesday, March 22nd, 2011?

25 A Correct.

1 Q Right?

2 A Correct.

3 Q And the next email, is it March 23rd, 2011?

4 A Correct.

5 Q I'm going to ask you again, why did you say on  
6 March 23rd, 2011, that it was a must not to be below the  
7 BVAP if that was not the commission's position?

8 A This is to draw a single district, and I cannot recall  
9 the circumstances that led to this email. I assume that  
10 it had some conversation that I had with commissioners  
11 that I was relaying on to the map-drawers for the  
12 congressional district.

13 Q Well, you don't say for this particular district, do  
14 you? You say there are two absolutely must requirements  
15 for the plan to be considered by the commission; correct?

16 A I say --

17 Q Doesn't that convey to the reader that is a  
18 requirement for a plan to be considered by the commission?

19 A I say how to create a plan, not all plans.

20 Q No, you say a plan to be considered, don't you?

21 A For a plan to be considered.

22 Q Right. And -- all right. Did they ever produce any  
23 plans that have 50.5 percent BVAP on them?

24 A I believe they did.

25 Q You do?

1 A Yes.

2 Q We'll come back to that. I want you to remember that.  
3 You think they came out publicly with a plan that  
4 recommended a 50.5 percent BVAP; is that correct?

5 A I thought you said 55 percent.

6 JUDGE PAYNE: 50.5.

7 Q 50.5.

8 A 50.5. I do not believe that they did.

9 Q They did, okay.

10 A Did not.

11 Q And, in fact, the two plans that you had anything to  
12 do with were 55 percent BVAP and 53-point-something BVAP;  
13 correct?

14 A I believe so.

15 Q Let's turn to your deposition at page 227. Were you  
16 asked this question and did you give this answer: "So I  
17 understand, it makes sense that you wouldn't want to  
18 decrease BVAP below the benchmark if you haven't done a  
19 racial bloc voting analysis because you couldn't prove to  
20 the Justice Department that it didn't diminish the ability  
21 to elect; correct?

22 "Answer: Correct."

23 Were you asked that question and did you give that  
24 answer?

25 A Yes.

1 Q And, again, the General Assembly had not done a racial  
2 bloc voting analysis; correct?

3 A Correct.

4 JUDGE PAYNE: Excuse me, Mr. Carvin. You  
5 referred to Exhibit 46 in the interveners in one of your  
6 answers. It's a memorandum from Holsworth to you dated  
7 March 22.

8 THE WITNESS: Correct.

9 JUDGE PAYNE: The earlier memo that you sent,  
10 Exhibit 45, is that a reply to or comment on what  
11 Holsworth said in his memo?

12 THE WITNESS: I don't remember the circumstances  
13 that led to that email.

14 JUDGE PAYNE: All right.

15 THE WITNESS: So I can't answer that question for  
16 you. I'm sorry.

17 JUDGE PAYNE: Excuse me.

18 Q And you contend that by going to 56.3, that that packs  
19 blacks into District 3?

20 A I've never used the word pack.

21 Q Oh, your counsel used it. So you don't think District  
22 3 is packed?

23 A I believe it's above what was necessary to elect a  
24 candidate of choice.

25 JUDGE PAYNE: The question was, do you believe

1 District 3 is packed.

2 THE WITNESS: We have to define what the term  
3 packed means.

4 Q Do you think it's packed under any definition?

5 JUDGE PAYNE: Why don't you just ask him what his  
6 definition is. What do you understand packed to mean, Dr.  
7 McDonald? That's used in the vernacular. What do you  
8 understand it to mean?

9 THE WITNESS: Well, in the voting rights  
10 litigation in Section 2, it means to create a district  
11 such that there's so much African-American population  
12 within that district that you could have created a second  
13 district, but you are unable to do so because so much of  
14 the African-American population was placed within that  
15 district.

16 JUDGE PAYNE: That's what you understand the term  
17 packed when a lawyer asks about it to mean?

18 THE WITNESS: Yes.

19 JUDGE PAYNE: Now, with that understanding, do  
20 you have a question, Mr. Carvin?

21 Q Do you think District 3 is packed?

22 A No.

23 Q But you nonetheless criticized them for having  
24 56.3 percent in there; right?

25 JUDGE PAYNE: I think we've got that point there,

1 Mr. Carvin. We have been paying attention.

2 Q Well, I just want to go back to you discussed the  
3 criteria that the Justice Department examined when they  
4 are pre-clearing plans; correct?

5 A Correct.

6 Q If you could turn to tab 24 in your book, please.

7 JUDGE PAYNE: That's in the witness book that you  
8 gave him.

9 MR. CARVIN: Yes, back to the witness book now.

10 JUDGE PAYNE: That would be exhibit what? Tab  
11 24. Is that the federal register? It's a plaintiffs'  
12 exhibit somewhere because he referred to it earlier.

13 MR. CARVIN: I'm afraid I don't have the exhibit  
14 number. It's actually Defendants' Exhibit 9, Your Honor.

15 JUDGE PAYNE: Defendants' Exhibit 9, okay.

16 Q If you could turn to page 7472 of this, please.

17 A Yes.

18 Q Okay. The very top left-hand corner, it's describing  
19 the factors that the Justice Department will assess in  
20 granting preclearance under Section 5; correct?

21 A Yes.

22 Q One of the factors they looked at is whether  
23 minorities are overconcentrated in one or more districts;  
24 correct?

25 A Correct.

1 Q And the enacted plan was pre-cleared?

2 A It was.

3 Q And then the other, some of the other factors it looks  
4 at is whether the district ignores other relevant factors  
5 such as compactness and contiguity?

6 A Yes.

7 Q Is that another factor they looked at? And whether  
8 the proposed plan departs from objective redistricting  
9 criteria, that's another factor they look at?

10 A Skipping around, yes.

11 Q And one of the reasons that you think that a district  
12 with a 50.5 or 50.49 percent BVAP could have been  
13 pre-cleared is because that was the BVAP that -- of the  
14 plan that was pre-cleared in 1998 to replace the *Moon*  
15 district?

16 A That's one piece of evidence, yes.

17 Q If you could turn to page 7470.

18 A Yes.

19 Q The plan that was pre-cleared in 1998 came in the wake  
20 of a plan that was truck down under *Shaw v. Reno*; correct?  
21 The *Moon* --

22 A I'm just trying to remember the *Shaw* line of cases. I  
23 guess.

24 Q It was struck down as a racial gerrymander under the  
25 14th Amendment; correct?

1 A Yes.

2 Q And you know, therefore, that that plan could not have  
3 served as the benchmark for retrogression for the 50.5  
4 plan introduced; correct?

5 A Correct.

6 Q Okay. And in the 1980s, that -- the last legally  
7 enforceable plan would have been the benchmark; correct?

8 JUDGE PAYNE: In 1998, the most -- the benchmark  
9 plan would have to have been a plan in the 1980s; is that  
10 your --

11 MR. CARVIN: Yes.

12 Q Is that correct?

13 A I am not sure what the Department of Justice would do  
14 in that case.

15 Q Turn to page 7470, tab 24, please.

16 A Yes, I'm there.

17 Q Lower right-hand corner, second, the last full  
18 paragraph, the Justice Department says, does it not, that  
19 a plan found to be unconstitutional by federal court under  
20 the principles of *Shaw v. Reno* and its progeny cannot  
21 serve as the Section 5 benchmark, citing *Abrams v.*  
22 *Johnson*, and in such circumstances, the benchmark for  
23 Section 5 purposes will be the last legally enforceable  
24 plan predating the constitutional plan; correct?

25 A Unconstitutional plan, but, yes.



1 Q Unconstitutional plan. And in this case, the last  
2 legally enforceable plan was the redistricting plan  
3 established by the legislature in the 1980s; correct?

4 A I believe so.

5 Q That plan did not have any majority black districts in  
6 it, did it?

7 A I don't know the answer to that question.

8 Q You've read *Moon*. Don't you know that this was the  
9 first time they had created it in the 1990s?

10 A Again, I have read it, but I'd have to refresh my  
11 memory.

12 Q All right. If there were no majority black districts  
13 in the 1980s redistricting plan, then 55.5 percent BVAP  
14 would be a higher BVAP than the benchmark districts;  
15 correct?

16 A 55.5? Yes.

17 Q 50.5?

18 A You said 55. I'm pretty sure I heard that. 50.5,  
19 yes.

20 Q Okay. So the fact that it was pre-cleared in 1998  
21 when it was compared to a majority white district doesn't  
22 indicate in any way that decreasing it from 53.1 to 50.5  
23 would also be pre-cleared by the Justice Department;  
24 right?

25 A The Department of Justice -- no. I'll just answer the

1 question. No. I mean, I'm -- let me make sure -- please  
2 ask the question again so I make sure I answer it  
3 correctly.

4 Q All right. Now, the increase from 53.1 to 56.3 you  
5 view as unnecessary; correct?

6 A I don't believe I answered that last question  
7 correctly.

8 Q Okay. Do you think there's anything problematic about  
9 going from 53.1 to 56.3?

10 A The question preceding that I don't think I answered  
11 correctly.

12 JUDGE PAYNE: You were talking -- I think you  
13 already said that you didn't think you answered it  
14 correctly, and he was starting all over again to ask the  
15 question again.

16 THE WITNESS: It was the previous question.

17 JUDGE O'GRADY: He missed two questions. Do you  
18 withdraw that question, Mr. Carvin?

19 Q I didn't realize you were going back two questions,  
20 but I'll reask it. The fact that the *Moon*, the post-*Moon*  
21 plan at 55 percent BVAP was pre-cleared doesn't tell you  
22 very much, because the benchmark was well below  
23 50.5 percent; correct?

24 A I'm having trouble parsing that sentence, so --

25 Q Do you want to try again?

1 A Yes.

2 Q There was no black district serving as the benchmark  
3 for the 1998 preclearance that was in excess of 50.5;  
4 correct?

5 JUDGE PAYNE: There wasn't any black district at  
6 all.

7 MR. CARVIN: Thank you.

8 JUDGE PAYNE: What difference -- it's all  
9 speculative, isn't it?

10 Q The fact that they pre-cleared a plan that was  
11 50.5 percent and higher than any prior district doesn't  
12 tell you they would have pre-cleared a plan at  
13 50.5 percent if you were decreasing the BVAP from  
14 53.1 percent; correct?

15 A I assume that the Department of Justice would have,  
16 and perhaps -- I've not seen the Section 5 submission from  
17 the Commonwealth of Virginia. There may have been a  
18 racial bloc voting analysis there. The Department of  
19 Justice may have done a racial bloc voting analysis to  
20 determine whether or not that district would have been  
21 performing at 50.5 percent. I assume that they did,  
22 because it was submitted for consideration.

23 Q But the benchmark in 1998 was not higher than  
24 50.5 percent BVAP; correct?

25 A Correct.

1 JUDGE PAYNE: Can we move on?

2 Q And the benchmark this time would be higher; correct?

3 JUDGE PAYNE: I think we understand the point.

4 Go ahead. Anything else that you've got?

5 Q I was just wondering -- does that clarify your prior  
6 answer? I thought that's why we went through it all  
7 again.

8 A Yes. My clarification is they may have done a racial  
9 bloc voting analysis to determine.

10 Q Do you have any reason to believe that the increase  
11 from 53.1 to 56.3 itself subordinated traditional  
12 districting principles more than a 53.1 percent BVAP  
13 district would have?

14 A Again, can you please restate the question? You've  
15 thrown three numbers at me.

16 Q Do you have any concerns that the increase from 53.1  
17 to 56.3 resulted in subordination of the traditional  
18 districting principles?

19 A The numbers in and of themselves are not necessarily  
20 indicative of that.

21 MR. CARVIN: Your Honor, I don't know what your  
22 plans are. I do have a bit more. What I'd like to do is  
23 do some triage on it, and if this would be a convenient  
24 time for a break --

25 JUDGE PAYNE: We're going to need to switch court

1 reporters anyway, so I think triage is appropriate. How  
2 much longer do you think you have?

3 MR. CARVIN: I didn't expect this to take as  
4 long. If we can have questions and answers, I should be  
5 done in 30 minutes, 40 minutes.

6 JUDGE PAYNE: 30 more?

7 MR. CARVIN: 30 more.

8 JUDGE PAYNE: We'll see. All right. We'll take  
9 a recess.

10

11 (Recess taken.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 JUDGE PAYNE: Mr. Carvin, when we set the  
2 schedule you were going to have two to three hours of  
3 cross-examination and you have kind of gone beyond  
4 that. So maybe 15 to 20 minutes, wrap it up. All  
5 right?

6 MR. CARVIN: I'll try to move as fast as I  
7 can.

8 BY MR. CARVIN:

9 Q Dr. McDonald, I'd like to look at the options of  
10 the commission you served on proposed. That's at Tab  
11 8, Intervenor-Defendants' Exhibit 28.

12 A I'm on Tab 8. Which page is it on?

13 Q Yes. If you could turn to page 24.

14 A Yes.

15 JUDGE PAYNE: What's the exhibit?

16 THE CLERK: Tab eight, Intervenor Exhibit 28.

17 JUDGE PAYNE: Tab 8. Okay.

18 A Yes, I'm there.

19 Q Okay. The first proposal is called, "Third  
20 District Option 1"?

21 A Yes.

22 Q And the proposed BVAP in that is 53.6 percent; is  
23 that correct, down in the lower left-hand corner?

24 A Yes.

25 JUDGE PAYNE: What page are you on?

1 MR. CARVIN: Page 24.

2 JUDGE PAYNE: All right. Thank you.

3 Q And that's higher than the benchmark BVAP?

4 A It is.

5 Q And that has 41 county and city jurisdictional  
6 splits?

7 A Yes.

8 Q That's four more than the Enacted Plan?

9 A Yes. The model plan is the current, yes.

10 Q And --

11 A I'm sorry to interrupt you. The current plan has  
12 47. So it was six less.

13 Q The current plan is the Benchmark Plan?

14 A Yes.

15 Q The Enacted Plan reduced the splits from 47 to 37,  
16 correct?

17 A Thank you for providing that number. Yes.

18 Q So the commission's proposal had four more  
19 jurisdictional splits than the one enacted by the  
20 General Assembly?

21 A Yes.

22 Q Congressional District Option 2, the BVAP is  
23 55.1 percent; correct? That's on page 25 in the lower  
24 left-hand corner.

25 A Yes.

1 Q Okay. And that's also above the BVAP by roughly  
2 2 percent for the benchmark?

3 A Yes.

4 Q And that has 38 county and jurisdictional splits?

5 A Yes.

6 Q That's one more than the General Assembly's?

7 A Yes.

8 Q And I'm not even going to discuss option 3 because  
9 that's something you had nothing to do with. That was  
10 some kind of political deal involving congressmen that  
11 came in at the last minute.

12 A I didn't have anything to do with any of these  
13 points.

14 JUDGE PAYNE: He's not asking you anything  
15 about it.

16 THE WITNESS: Well, he's asking a compound  
17 question.

18 JUDGE PAYNE: I know, but he wasn't going to  
19 ask about it. So if he's not going to ask about it,  
20 don't answer.

21 THE WITNESS: Okay.

22 Q Then if you could just turn to -- skip that. Just  
23 in terms of the relative compactness scores between  
24 the Enacted Plan and plaintiffs' Alternative. You can  
25 take your eyes off the commission plan. I'm now



1 asking you a question about the relative compactness  
2 scores of the Alternative Plan and the -- I'm sorry.  
3 The plaintiffs' Alternative Plan and the General  
4 Assembly's plan, right?

5 A Okay. Yes.

6 Q Those differences are relatively smaller, are they  
7 not, the compactness scores?

8 A The differences in the compactness scores, yes,  
9 they are relatively small.

10 Q And they're not significant under any professional  
11 standard, correct?

12 A Correct.

13 Q There's no minimum score for compactness?

14 A Unless the jurisdiction wishes to, but not in this  
15 situation.

16 Q And all of these compactness scores are inherently  
17 manipulable?

18 A Yes.

19 Q Because of this, as you point out, courts  
20 generally just measure compactness through visual  
21 inspection, right?

22 A Yes.

23 Q And there's no professional standard that says the  
24 three measures you use are better or more reliable  
25 than other measures such as the ones used by Mr.

1 Morgan?

2 A Correct.

3 Q Preserving VTDs is not a traditional districting  
4 principle, correct?

5 A Preserving VTDs is not -- it can be.

6 Q Turn to your deposition at page 36, please.

7 A Page 36?

8 Q Yes. Do you see it in front of you?

9 A Yes, I'm there.

10 Q Question: And other than municipal and county  
11 boundaries, is it traditional to preserve precinct  
12 lines?

13 Answer: It's not a traditional districting  
14 principle; however, I see a reasonable election  
15 administrative goal to preserve those boundaries.  
16 Some states don't do it at all. Some states do.

17 Were you asked that question and did you give that  
18 answer?

19 MR. HAMILTON: Your Honor, I object to the  
20 reading of a partial answer. I think the record  
21 should reflect the entire answer given in the  
22 deposition.

23 MR. CARVIN: Actually, that's helpful. I was  
24 trying to save time, but it's actually better.

25 BY MR. CARVIN:

1 Q So it's more of an issue for an individual state  
2 whether or not they're going to respect local precinct  
3 boundaries. Some states are very explicit about  
4 having to draw all these precincts, the districts out  
5 of those precincts. It's either in the state code or  
6 the state Constitution.

7 JUDGE PAYNE: That completes the question?

8 Q We asked that question. Did you give that answer?

9 A Yes.

10 Q There's nothing in the Virginia State Code or  
11 State Constitution about preserving VTDs?

12 A That's correct.

13 Q When you were analyzing the various aspects of the  
14 options for the commission, you didn't even look at  
15 the extent to which they split VTDs, correct?

16 A That's correct.

17 Q Surely, if -- the VTDs are voting tabulation  
18 districts, right?

19 A Correct.

20 Q So as a general matter, if it doesn't affect  
21 voters, if it doesn't affect population, then  
22 splitting the VTD is of no consequence as a general  
23 matter?

24 A Please restate that question for me.

25 Q A VTD is a voting tabulation district, correct?

1 A Correct.

2 Q So it's purpose is to tabulate votes. So if it  
3 doesn't affect voters, if it doesn't affect people, as  
4 a general matter it's of no consequence, a VTD split?

5 A No, I do not agree with that.

6 Q You think if you split a VTD, but it doesn't  
7 affect a voter, that it somehow is contrary to  
8 traditional districting principles?

9 A It can be it. It can be an indication --

10 Q I'm going to ask you again. As a general matter,  
11 it doesn't matter if you split a VTD when no  
12 population is affected, correct?

13 A I'm going to disagree with that, no.

14 Q Why would it matter?

15 A Again, as I've testified previously, VTDs were  
16 being split in order to bypass racial communities.

17 Q If VTDs are not being split to bypass racial  
18 communities, as in this case, as a general matter  
19 splitting the VTD, if it doesn't affect population,  
20 it's of no consequence, right?

21 A They can affect -- because VTDs are -- no. I'll  
22 directly answer the question no.

23 Q And the VTDs -- may I approach? The VTDs that  
24 were split here are out in the James River and places  
25 like that, right?

1 A Right, yes.

2 Q And so what bothers you is not that the fish in  
3 the river were affected, but what bothers you is that  
4 they were going from here to here through the water  
5 and in the process splitting the VTDs. That's your  
6 concern, right?

7 A Right, yes.

8 Q That's also your concern for water contiguity,  
9 that they were bypassing the community to unite those  
10 two districts, right?

11 A Yes.

12 Q But water contiguity without a connector such as a  
13 bridge is also permissible in Virginia, correct?

14 A It is.

15 Q Okay. And it's not impermissible to consider race  
16 in redistricting under *Shaw*, correct?

17 A Yes.

18 Q It's only impermissible if you subordinate  
19 traditional districting principles?

20 JUDGE PAYNE: Mr. Carvin, come on. That's  
21 all law. We don't need him to testify about whether  
22 it's permissible or not under the case law.

23 BY MR. CARVIN:

24 Q All I'm trying to get at is it's not to split VTDs  
25 or the contiguity, it's the fact that they considered

1 race in going around it, right?

2 JUDGE PAYNE: You mean, is that his opinion?  
3 I think he said that about three times. Let's go on.  
4 You've asked that question two or three times.

5 MR. CARVIN: Okay.

6 BY MR. CARVIN:

7 Q Now, we also talked about how the Alternative Plan  
8 has one fewer political boundary split than the  
9 Enacted Plan. One fewer locality split.

10 A Yes.

11 Q If the General Assembly preferring cores over --  
12 and incumbency protection over boundary splits, then  
13 they might well choose the Enacted Plan over the  
14 Alternative Plan?

15 A Can you give me that list again? Cores over --

16 Q The Enacted Plan, I think we've agreed, is better  
17 in terms of preserving cores and incumbency protection  
18 than the Alternative Plan. And if the General  
19 Assembly thought those traditional districting  
20 principles are more important than political  
21 boundaries, then it might well be reasonable for them  
22 to choose the Enacted Plan over the Alternative Plan,  
23 correct?

24 A If those were the only criteria, yes.

25 Q Because the choice between preserving cores and

1 incumbency protection, there's no principle that says  
2 political boundaries are more important than that,  
3 right?

4 A Correct.

5 Q And we could go into this if you want in detail,  
6 but the Senate redistricting criteria enacted by the  
7 Democratic Senate don't suggest that preserving  
8 jurisdictional boundaries are more important than  
9 preserving cores or incumbency protection, right?

10 A Correct.

11 Q And you gave testimony in a case called *Backus*  
12 *against South Carolina*?

13 A Yes, I did.

14 Q And you were testifying for Democratic plaintiffs  
15 who were bringing *Shaw* claims against South Carolina  
16 State, House, and congressional plans?

17 A I did.

18 Q And those plans had been enacted by a  
19 Republican-controlled legislature?

20 A They were.

21 Q In that analysis, what you did was you analyzed  
22 the swaps between districts and saw whether or not  
23 they tended to increase BVAP?

24 A Yes.

25 Q And you said that the BVAP was higher than was

1 needed to elect black candidates of choice?

2 A Yes.

3 Q And you criticized the bizarre shapes of the  
4 districts?

5 A Yes.

6 Q And the Court in that case rejected your  
7 testimony, did it not?

8 A Yes.

9 Q It said that you relied on incomplete information?

10 A Correct, yes.

11 Q And that you neglected important redistricting  
12 principles such as incumbency protection, correct?

13 MR. HAMILTON: Objection, Your Honor. I'm  
14 not sure we're going to litigate the South Carolina  
15 case all over again.

16 JUDGE PAYNE: Sustained.

17 BY MR. CARVIN:

18 Q Do you think that criticism was warranted and have  
19 you altered your testimony in this case --

20 JUDGE PAYNE: You mean, has he altered his  
21 testimony in this case because of the criticism of the  
22 Court? Is that the question?

23 MR. CARVIN: Yes.

24 Q Have you changed your approach to analyzing these  
25 cases in the wake of the three-judge court's criticism



1 in *Backus* to the approach you took?

2 A There were substantially different facts that were  
3 involved in this litigation, so I did not analyze a  
4 completely similar set of criteria between the two,  
5 and I'd have to go back to my expert reports in that  
6 case to look at it, but I know a couple jump out at me  
7 immediately. For example, the water contiguity issue  
8 is something I did not raise in South Carolina, and  
9 I'd have to look through the reports to see what  
10 other --

11 JUDGE PAYNE: All right, Mr. Carvin.

12 MR. CARVIN: No further questions. Thank  
13 you.

14 JUDGE PAYNE: Okay. Redirect.

15 Mr. Hamilton, you're not going to use the  
16 redirect technique of repeating everything that was  
17 said on cross and everything that was said on direct,  
18 are you?

19 MR. HAMILTON: I'm certainly going to try not  
20 to, Your Honor.

21 JUDGE PAYNE: You're always trying to do  
22 something. Let's get it done. Okay.

23 REDIRECT EXAMINATION

24 BY MR. HAMILTON:

25 Q All right. Dr. McDonald, you were asked a series

1 of questions about your Law Review article. Do you  
2 recall that?

3 A Yes.

4 Q We're not going to go through the details of the  
5 Law Review article, but at the time you wrote that Law  
6 Review article, had you looked at the legislative  
7 history?

8 A Partially.

9 Q Had you looked at the -- had you conducted a  
10 racial bloc voting analysis?

11 A No.

12 Q Had you analyzed the voting tabulation district  
13 splits or the population trades or any of the other  
14 analyses that you've done in this case?

15 A No.

16 Q Which is your better informed judgment about what  
17 was going on with the Virginia redistricting, that Law  
18 Review article or the reports you prepared for this  
19 court?

20 A The extensive reports I prepared for this  
21 litigation.

22 Q Okay. Changing subjects. Mr. Carvin asked you  
23 about the bipartisan commission that you had  
24 participated in. You were a consultant. You weren't  
25 on the commission; is that right?

1 A That's correct.

2 Q Again, in connection with that bipartisan  
3 commission, did you do any of the research that we  
4 just went through that you've done in this case?

5 A I have not. I did not.

6 Q Why not?

7 A The commission had no resources and little time to  
8 complete its task.

9 Q Mr. Carvin asked you a few questions about the  
10 population swaps between CD 3 and CD 2. Do you recall  
11 that testimony?

12 A Yes.

13 Q And I think he said something like, So it had a  
14 clear political effect and it had a clear racial  
15 effect. Do you recall those questions?

16 A I do.

17 Q In your analysis in your reports, did you try and  
18 tease out which was the predominant factor between  
19 politics and race?

20 A I did.

21 Q Is that the whole point in your report?

22 A Yes.

23 Q I won't ask you to tell us what your conclusion is  
24 because I'm confident the Court can remember it. Mr.  
25 Carvin discussed -- spent some considerable amount of

1 time talking about the potential political impact of  
2 some of these swaps. Do you recall that testimony?

3 A Yes.

4 Q I think he asked you something like: So if all  
5 these voters were white, would politics explain this  
6 all? You do you recall that?

7 A Yes.

8 Q Were all these voters white, sir?

9 A No.

10 Q Is politics, at least in your understanding of the  
11 Voting Rights Act and jurisprudence under Section 5, a  
12 compelling state interest?

13 JUDGE PAYNE: Isn't that a legal question?

14 MR. HAMILTON: It is, sir, and I recognized  
15 that as I was saying it. So I'll withdraw the  
16 question.

17 Q Mr. Carvin asked you a number of questions about  
18 the alternative map and whether it replicated various  
19 errors that you've identified in your various reports.  
20 Do you recall that?

21 A Yes.

22 Q Why is that?

23 A Can you elaborate the question?

24 Q Why is it that it replicates some of the problems  
25 with the population swaps and with respect to other

McDONALD - REDIRECT

229

1 congressional districts other than CD 2 and CD 3?

2 MR. CARVIN: I have to object. I don't know  
3 what the foundation would be for him to tell you why  
4 the plan did X and Y.

5 JUDGE PAYNE: Your response?

6 MR. HAMILTON: Well, Your Honor, I think the  
7 answer is --

8 JUDGE PAYNE: His objection, I guess, is  
9 relevance.

10 Is that what your objection is?

11 MR. CARVIN: And foundation.

12 JUDGE PAYNE: And foundation.

13 MR. CARVIN: To the extent I understand the  
14 question, he's asking why the plan looks different,  
15 and I don't know that he's laid a foundation.

16 JUDGE PAYNE: His objection is foundation.

17 MR. HAMILTON: I think I can solve the  
18 problem by just rephrasing the question if I might.

19 BY MR. HAMILTON:

20 Q The Alternative Plan -- how did the Alternative  
21 Plan and the Enacted Plan compare outside of the  
22 portions that we see here on the map?

23 A They are exactly the same.

24 Q And do you know why it was drawn like that?

25 MR. CARVIN: Same objection.

1 MR. HAMILTON: It's a yes or no question,  
2 Your Honor, asking for the foundation: Do you know  
3 why.

4 JUDGE PAYNE: Overruled.

5 A Yes.

6 Q Why is that?

7 A To make minimal changes --

8 JUDGE PAYNE: You have to know how he found  
9 out. You can't say, "Do you know" and get it in. You  
10 have to lay the foundation, which I thought you were  
11 going to do with the next question.

12 BY MR. HAMILTON:

13 Q How do you know that, sir?

14 A I know that through the conversation that I had  
15 with the map drawer.

16 Q Who was that?

17 A Eric Hawkins.

18 Q Where is he employed?

19 A NCEC, National Committee for an Effective  
20 Congress.

21 Q So based on that foundation, why was the map drawn  
22 that way?

23 A The intent, as I understood it, was to only make  
24 changes between District 2 and District 3 such that  
25 there would be minimal disruption to elections in

1 other districts.

2 Q I'd like to direct your attention to  
3 Intervenor-Defendants' Exhibits 45 and 46. I think  
4 they are in the book that Mr. Carvin prepared for us.  
5 No, they're not.

6 JUDGE PAYNE: They are in the intervenor  
7 defendants' book.

8 MR. HAMILTON: That's right.

9 THE WITNESS: Which number?

10 Q Let's start with 46. Intervenor-Defendants'  
11 Exhibit 46.

12 A Yes.

13 Q This was the email that was briefly discussed.  
14 Who is this email from?

15 A Myself.

16 Q No. I'm looking at Exhibit 46.

17 A Oh, I'm sorry. I'm one exhibit behind. Yes.

18 Q Who is this from?

19 A This is from the chairman of the commission.

20 Q What's his name?

21 A Bob Halsworth.

22 Q And he was chairman of the commission?

23 A Yes.

24 Q Why was he writing you this email, if you know?

25 A He was sending me the criteria that the commission

1 was going to proceed with and was asking for any input  
2 that I might have on those criteria.

3 Q Okay. If you'll look down a couple of pages, we  
4 have this email that goes on one, two, three pages,  
5 and then on the fourth page of the document, and for  
6 the record, down at the bottom it says, McDonald  
7 000905. There seems to be a different document  
8 attached here. What is this?

9 A This appears to be the, these criteria, perhaps  
10 what was going to be relayed to the public from the  
11 commission.

12 Q So the purpose of the chairman's email to you was  
13 to identify the principles that the commission was  
14 going to be applying?

15 A Yes.

16 Q And it says here in this preamble section on page  
17 906 under section heading 2, do you see that section,  
18 if I could direct your attention to it?

19 A Section 2, yes.

20 Q What does it say there?

21 A Two sections of the Voting Rights Act are --

22 JUDGE PAYNE: We can read it.

23 Q Okay. The second paragraph refers to Section 2.  
24 Do you see that?

25 A Correct.



1 Q And the third paragraph reference to Section 5?

2 A Correct.

3 Q What applicability does Section 2 have to  
4 Virginia?

5 A It states that -- well, Section 2 is that under  
6 certain circumstances, you must draw a minority  
7 district, an opportunity district.

8 Q A majority-minority district meaning a BVAP of  
9 50 percent or higher?

10 A Right. Some have interpreted the Bartlett  
11 decision to say that it must be a majority district.

12 JUDGE PAYNE: We don't have a Section 2 issue  
13 in this case, do we?

14 MR. HAMILTON: No, we don't, Your Honor.

15 JUDGE PAYNE: Why are we getting into this?

16 MR. HAMILTON: Because it's relevant to the  
17 question of -- Mr. Carvin asked why he didn't draw a  
18 map that goes below 50 percent BVAP. And I'm trying  
19 to get that answer.

20 JUDGE PAYNE: All right.

21 MR. HAMILTON: I think I've made the point.

22 BY MR. HAMILTON:

23 Q If you could turn to Tab 46, Exhibit 46,  
24 Intervenor-Defendants' Exhibit 45, the preceding  
25 exhibit.

1 A Yes.

2 Q This is the email Mr. Carvin asked you about?

3 A Yes.

4 Q And it mentions 53.2 percent black BVAP. Now, Mr.  
5 Carvin kind of skipped by the other thing that you  
6 were talking about. What is that other factor?

7 A Connection of land by bridges.

8 Q What is that? Can you explain what that means?

9 A Well, the governor when he made his charge to the  
10 commission said that we must connect districts if they  
11 were going to cross water with bridges.

12 Q The governor said that?

13 A The governor, yes.

14 Q Did the Enacted Plan do that?

15 A It did not.

16 Q Just a couple more questions here.

17 Mr. Carvin asked you some questions. He actually  
18 read some portions of your deposition testimony into  
19 the record about increasing or about -- let me find  
20 it. Page 227, line 5.

21 A Can you give me that page number again?

22 Q 227, line 5.

23 A Yes.

24 Q Just so that we're all on the same page, the  
25 question was: "So I understand, it makes sense that

1 you wouldn't want to decrease BVAP below the benchmark  
2 if you haven't done a racial bloc voting analysis  
3 because you couldn't prove to the Justice Department"  
4 --

5 JUDGE PAYNE: You've gotten too fast there  
6 for all of us.

7 MR. HAMILTON: Sorry. I'll slow down.

8 Q "So I understand, it makes sense that you wouldn't  
9 want to decrease BVAP below the benchmark if you  
10 haven't done racial bloc voting analysis because you  
11 couldn't prove to the Justice Department that it  
12 didn't diminish the ability to elect, correct?"

13 And your answer was, "Correct."

14 A Correct.

15 Q Did I read that correctly?

16 A Yes.

17 Q Okay. So did Mr. Carvin ask you about increasing  
18 the BVAP in that situation?

19 A No.

20 Q Would you know without doing a racial bloc voting  
21 analysis whether increasing the BVAP is necessary to  
22 prevent retrogression?

23 A No.

24 Q Would you know whether holding BVAP steady would  
25 be sufficient to prevent retrogression without doing a

1 racial bloc voting analysis?

2 A No.

3 Q How about if you dropped it a percentage point?

4 Would you know that without doing a racial bloc voting  
5 analysis?

6 A No.

7 Q Just before Mr. Carvin finished, we were looking  
8 at the proposed -- the plans that were various plans  
9 that were proposed by the bipartisan commission. Do  
10 you recall that?

11 A Yes.

12 Q We skipped one.

13 A Yes.

14 Q This is Intervenor-Defendants' Exhibit 28. Could  
15 you turn to that exhibit, please?

16 A Yes.

17 Q We didn't talk about option 3. What was the black  
18 voting-age population for option 3 as proposed by the  
19 independent bipartisan commission?

20 A 52.5 percent.

21 Q Is that higher or lower than the benchmark BVAP?

22 A Lower.

23 Q All right. Last subject. Compactness scores.

24 Mr. Carvin asked you a couple of questions about  
25 whether the compactness score differences were

1 relatively small or whether they were significant or  
2 not under any professional standard. Do you want that  
3 question?

4 A Yes.

5 Q Is there a professional standard for compactness?

6 A There is not.

7 Q Okay. So we can't say it's insignificant or it's  
8 significant because there's no standard to measure it  
9 against?

10 A Right. It's an expert judgment.

11 Q Then he asked you about the different measures of  
12 compactness that you used. And apparently there are a  
13 number of others; is that right?

14 A Correct. They were also in the Commonwealth's  
15 Section 5 submission.

16 Q That's my question. Which of these measures of  
17 all the ones that are out in the world did  
18 Commonwealth of Virginia use in submitting its Section  
19 5 submission to the Department of Justice?

20 A The three that I used.

21 Q Is that why you used them?

22 A Yes. I thought we would have no disagreement.

23 MR. HAMILTON: No further questions, Your  
24 Honor.

25 JUDGE PAYNE: All right. Ready to start with

1 your witnesses, please.

2 MR. CARVIN: May I just ask two questions?

3 JUDGE PAYNE: Oh, are you playing California  
4 rules?

5 MR. CARVIN: Well, I was going to ask you if  
6 I can.

7 JUDGE PAYNE: Let's see if you can do it with  
8 two if they're new. If the first one isn't something  
9 new, just turn around and sit down.

10 MR. CARVIN: I do just want to straighten out  
11 this issue about what the commission's position was on  
12 decreasing BVAP.

13 RECROSS EXAMINATION

14 BY MR. CARVIN:

15 Q You have referenced Intervenor-Defendants' Exhibit  
16 46. If you could turn to it. Does it not say at the  
17 bottom, To be safe, the commission directed those  
18 drawing the plans on behalf of the commission to try  
19 not to draw any plans with less percentage BVAP than  
20 the percentage that was precleared during the 2000  
21 redistricting cycle.

22 Is that what the first bullet says?

23 A Yes.

24 Q And the second bullet that references the  
25 50.5 percent is preceded with this sentence, is it

1 not? The exception to this direction is that those  
2 drawing plans on behalf of the commission may draw up  
3 plans that would increase by one district the number  
4 of majority-minority districts and in such cases may  
5 decrease the percentage BVAP of the current number of  
6 majority districts to 50.5 percent. So it's only if  
7 you're adding a majority-minority district that you  
8 can decrease the BVAP to 50.5 percent. Isn't that  
9 true?

10 MR. HAMILTON: Object to the form of the  
11 question, Your Honor. He's reading the sentence  
12 incompletely.

13 JUDGE PAYNE: Sustained. And it's more than  
14 two questions. So that's it.

15 You have a right of redirect as to what he  
16 asked. Do you want to use it?

17 MR. HAMILTON: No, Your Honor.

18 JUDGE PAYNE: Thank you. We'll have the  
19 defendants' witnesses.

20 (The witness was excused from the witness  
21 stand.)

22 MR. CARVIN: Your Honor, for the record, we'd  
23 like to move for a directed verdict at this time and  
24 judgment as a matter of law.

25 JUDGE PAYNE: All right. We'll take that

1 under advisement.

2 MR. MELIS: Your Honor, just so the record is  
3 clear, the state joins in that motion.

4 JUDGE PAYNE: We'll take the same course with  
5 yours.

6 All right. Who are we calling?

7 MR. GORE: Your Honor, we call John Morgan.

8 Good afternoon, Your Honors. I also have  
9 prepared a witness specific binders.

10 JUDGE PAYNE: That will be fine.

11 MR. GORE: If I can hand those up.

12

13 JOHN MORGAN, called by the Defendant, first being  
14 duly sworn, testified as follows:

15

16 DIRECT EXAMINATION

17 BY MR. GORE:

18 Q Good afternoon, Mr. Morgan.

19 A Good afternoon.

20 Q Mr. Morgan, will you introduce yourself to the  
21 Court?

22 A My name is John Morgan.

23 Q How do you spell your name?

24 A M-o-r-g-a-n.

25 Q Where do you live?



MORGAN - DIRECT

241

1 A I live in Fairfax, Virginia.

2 Q What do you do for a living?

3 A I'm a demographer, a redistricter. I do  
4 demographic and legislative analysis.

5 Q Where are you employed?

6 A Applied Research Coordinates.

7 Q What is your position there?

8 A I'm president of that company.

9 Q In what year did you join Applied Research  
10 Coordinates?

11 A Well, I joined the firm in 1991, and I've worked,  
12 you know, in other jobs during that time, but 1991 is  
13 when I started.

14 Q Will you turn in your binder to Tab 1, which is  
15 Intervenor-Defendants' Exhibit 12?

16 A Yes.

17 Q Is that the most recent copy of your C.V.?

18 JUDGE PAYNE: Is he accepted as an expert?

19 MR. HAMILTON: He is, Your Honor.

20 JUDGE PAYNE: In what area?

21 MR. GORE: Demography and redistricting.

22 JUDGE PAYNE: In those areas?

23 MR. HAMILTON: No objection, Your Honor.

24 JUDGE PAYNE: All right.

25 BY MR. GORE:

MORGAN - DIRECT

242

1 Q Mr. Morgan, following the 1990 Census, were you  
2 involved in redrawing redistricting plans?

3 A Yes.

4 Q In what states were you involved in that work?

5 A I was involved in Florida, Illinois, Indiana,  
6 Michigan, Wisconsin, New Jersey, New York, and --  
7 let's see if I missed one. I think that's it.

8 Q How about following the 2000 Census?

9 A After that, I worked in some of those same states,  
10 but I also added Georgia, Iowa, North Carolina, and  
11 Rhode Island.

12 Q How about following the 2010 Census?

13 A In the 2010 Census, I worked in Connecticut,  
14 Indiana, Georgia, Kansas, Missouri, New Jersey, New  
15 Mexico, North Carolina, Ohio, Pennsylvania, South  
16 Carolina and Virginia.

17 Q Which plan were you involved in drawing in  
18 Virginia in 2011?

19 A I assisted in drawing the House of Delegates'  
20 plan.

21 Q What was your role in the drawing of that plan?

22 A Well, I worked with the attorneys for the  
23 delegates and I also worked with the delegates  
24 directly in helping them draft a plan to put before  
25 the General Assembly.

1 Q Were you involved in drawing the Congressional  
2 Redistricting Plan in Virginia in either 2011 or 2012?

3 A No.

4 Q Have you ever drawn redistricting plans for local  
5 governments?

6 A Yes.

7 Q Where have you done that?

8 A I've drawn local plans in Muncie, Indiana;  
9 Atlantic City, New Jersey; Newark, Essex County, New  
10 Jersey; Ocean County, New Jersey; Raleigh, North  
11 Carolina; Craven County, which is New Bern, North  
12 Carolina; Sampson County and Fayette County, Georgia.

13 Q When you're hired to draw redistricting maps, who  
14 ordinarily retains you?

15 A Generally, I'd be hired by the Republican members  
16 of the Caucus for Leaders of the House or Senate or  
17 Republican members of the commission.

18 Q Have you ever worked with Democrats in drawing  
19 redistricting plans?

20 A Yes, I have.

21 Q How has that been?

22 A Well, typically, as part of the redistricting  
23 process, I would work with Democrats as part of  
24 negotiations with other members of the General  
25 Assembly.

1 I would also in some cases, since I'm working  
2 directly with the commission, I would be hired by the  
3 county or the whole commission and work with the  
4 members of both parties.

5 In one case in Florida, I worked with Democratic  
6 law makers directly. In fact, Representative Corrine  
7 Brown, who's now a congresswoman, she praised my work  
8 on the floor of the Florida House.

9 Q Have you received training in redistricting?

10 A Yes.

11 Q From whom?

12 A I've received training from the Caliber  
13 Corporation, which is one of the redistricting  
14 software vendors. I've also received training from  
15 Republican organizations, and also from the National  
16 Conference of State Legislators.

17 Q Have you ever trained other people in how to draw  
18 redistricting plans?

19 A Yes.

20 Q On whose behalf have you done that?

21 A I volunteered for the NCSL, which is the  
22 Conference of State Legislators. I've also worked  
23 with Republican organizations, and I've trained  
24 legislators who are going to be involved in the  
25 redistricting process.

MORGAN - DIRECT

245

1 Q Have you ever been qualified to testify in court?

2 JUDGE PAYNE: I think he's accepted him as an  
3 expert.

4 MR. GORE: I'm just laying the foundation,  
5 Your Honor. Thank you.

6 JUDGE PAYNE: Well, I think it's in his C.V.,  
7 which we've got.

8 MR. GORE: Thank you. Okay.

9 Q Are you being paid for your work in this case?

10 A Yes, I am.

11 Q How much?

12 A \$250 an hour.

13 Q Is that amount contingent in any way on the  
14 outcome of this case?

15 A No.

16 Q Have you prepared an expert report in this case?

17 A Yes.

18 Q Will you turn to Tab 2 of your binder, which is  
19 Intervenor-Defendants' Exhibit 13?

20 Is this a copy of your expert?

21 A Yes.

22 Q Mr. Morgan, what data and information did you  
23 consider in forming your opinions in this case?

24 A Well, I considered the legal briefs that were  
25 submitted to the Court, the reports by Dr. McDonald

1 and Dr. Brunell, the portions of the Section 5  
2 preclearance, some of the court cases that were  
3 mentioned in the briefs, maps and data sets from the  
4 current and previous congressional districts, as well  
5 as the plaintiffs' Alternative Plan. I looked at the  
6 Census redistricting data, and also political data  
7 from the Department of Legislative Services, and the  
8 State Board of Elections in Virginia, as well as the  
9 redistricting software.

10 Q Did you consider any data that was made available  
11 to you after your report was filed?

12 A Yes. I received some data from the plaintiffs', I  
13 believe Dr. McDonald's underlying data for some of his  
14 analysis.

15 Q Are the data, information and software the types  
16 of data, information and software that experts in your  
17 field ordinarily rely upon?

18 A Yes.

19 Q So, Mr. Morgan, what were you asked to do in this  
20 case?

21 A I was asked to look at the Enacted Congressional  
22 Plan and to consider whether traditional redistricting  
23 principles were subordinated to race in its drawing.

24 Q Were you also asked to look at the plaintiffs'  
25 Alternative Plan?

1 A Yes, I was.

2 Q Based on everything you reviewed in this case,  
3 what is your opinion regarding the Enacted Plan?

4 A Well, regarding the Enacted Plan, my opinion is  
5 that the Enacted Plan did not use race as a  
6 predominant factor and that it did not subordinate  
7 traditional redistricting principles. Instead, it's  
8 an incumbent protection plan, a bipartisan incumbent  
9 protection plan, that, in fact, politics and the  
10 preservation of cores and incumbent protection explain  
11 the plan more readily than race.

12 Q Based on everything you've reviewed in this case,  
13 what is your opinion regarding the plaintiffs'  
14 Alternative Plan?

15 A Well, the plaintiffs' Alternative Plan, certainly  
16 as it relates to certain traditional redistricting  
17 criteria, performs worse than the Enacted Plan, and  
18 certainly in the areas of core retention and  
19 incumbency protection it performs worse.

20 Q Mr. Morgan, let's talk for a moment about the  
21 background of the Enacted Plan. What was the  
22 constitutional population equality requirement for the  
23 Enacted Plan?

24 A The Enacted Plan would have to be at zero  
25 population, basically, within one of the ideal

1 districts' size.

2 Q What was the ideal total population?

3 A It was 727,366.

4 Q So if I'm understanding correctly, did that mean  
5 that all of the eleven districts had to be within one  
6 person total population of that number?

7 A Yes.

8 Q Will you turn to Tab 34, which is  
9 Intervenor-Defendants' Demonstrative No. 10?

10 A Okay.

11 Q Were any of the benchmark districts underpopulated  
12 under the 2010 Census figures?

13 A Yes, they were.

14 Q Which districts were those?

15 A District 2, District 3, District 5, District 6,  
16 District 8, District 9, those were all underpopulated.

17 Q Were any of those districts adjacent to District  
18 3?

19 A Yes, District 2 was adjacent to District 3.

20 Q How underpopulated was District 2?

21 A District 2 was underpopulated on this chart it  
22 says by 81,182. But the way I look at it, it's  
23 11 percent, 11.2 percent underpopulated.

24 Q Okay. Will you turn to Tab 27, which is  
25 Intervenor-Defendants' Demonstrative 3? What is this



1 demonstrative?

2 A This shows the Benchmark Congressional District 3.  
3 This was the plan that was in force before the  
4 redistricting.

5 Q What effect did District 2's underpopulation have  
6 on the drawing of the Enacted Plan?

7 A Well, District 2, being underpopulated 11 percent,  
8 would have needed to take population from other  
9 adjacent districts. So it would have needed to have  
10 taken population from District 4 or District 3 or  
11 Districts 1. And it couldn't take population because  
12 it's a coastal district. It has the Eastern Shore and  
13 borders the Atlantic Ocean.

14 Q So it had to move west in order to gain  
15 population?

16 A Yes.

17 Q Where did District 2 move to gain the population  
18 it needed?

19 A District 2 gained a little bit of population from  
20 District 3, and the majority of its population from  
21 District 1 to achieve population equality.

22 Q Was there a reason that District 2 could not or  
23 did not expand into District 4 to gain population?

24 A Well, it could have expanded into District 4, but  
25 District 4 is the home area of Congressman Randy

1 Forbes. He's from Chesapeake. He was a state senator  
2 there. He was also a delegate there. And that would  
3 be considered his home base, I think.

4 Q So what would have been the effect of moving  
5 District 2 into Chesapeake?

6 A Well, depending on how it would be done, it could  
7 put Congressman Forbes in with Congressman Rigell and  
8 certainly it would take the base of Congressman  
9 Forbes' district away.

10 Q What effect did District 2's westward expansion  
11 into District 3 have on the drawing of Direct 3 in the  
12 Enacted Plan?

13 A Again, District 2 took a relatively small amount  
14 of population from District 3, about 2400 people, but  
15 that would have required District 3 to get its  
16 population from other surrounding districts such as 1,  
17 4, and 7.

18 Q Will you turn now to Tab 28, which is  
19 Intervenor-Defendants' Demonstrative 4? What is that  
20 demonstrative?

21 A This shows the enacted congressional districts.

22 Q Does this map show the changes to District 3 and  
23 surrounded districts that we just discussed?

24 A Yes.

25 Q What changes does this map show the Enacted Plan

MORGAN - DIRECT

251

1 made to District 3 and surrounding districts?

2 A Well, it shows that essentially what happened in  
3 the redistricting process starting with District 2 was  
4 that District 2 took some territory from District 3,  
5 and it exchanged some territory back into District 3,  
6 and there were some trades between 3 and 2 in Hampton,  
7 but primarily what happened was District 2 took the  
8 portions from District 1 in Hampton and Newport News,  
9 and District 1 retreated from Hampton and Newport News  
10 with the exception of one precinct. And that's what  
11 happened with District 2.

12 Regarding District 3, District 3, which was also  
13 underpopulated, that took its population from District  
14 4. Again, it took the City of Petersburg from  
15 District 4. It took some precincts in Henrico, and  
16 some precincts in Richmond, and in this case of  
17 Henrico and Richmond, those were localities which were  
18 already split. And in the case of Petersburg, the  
19 entire locality of Petersburg was put into District 3  
20 from District 4.

21 Q Thank you, Mr. Morgan.

22 Let's talk now for a moment about your opinion  
23 that politics rather than race explains the Enacted  
24 Plan. In any of the reports you reviewed in this  
25 case, did Dr. McDonald consider the political effect

1 of the Enacted Plan?

2 A No, he didn't consider the political effect of the  
3 Enacted Plan.

4 Q Did you analyze the political effect of the  
5 Enacted Plan?

6 A Yes.

7 Q Why did you do that?

8 A Well, I was asked to analyze the political trades  
9 and the effect of the Enacted Plan. It's my  
10 understanding that if politics -- if the changes to  
11 the districts are equally explainable under politics  
12 as they are under race, that the plaintiffs would lose  
13 this case.

14 MR. HAMILTON: Objection. Move to strike,  
15 Your Honor. It's a legal opinion. He's not qualified  
16 to issue a legal opinion.

17 JUDGE PAYNE: He's explaining why he did it.  
18 But why do we need to hear that?

19 MR. GORE: He was just explaining his  
20 understanding, Your Honor, of why he was asked to do  
21 it. He answered that he was asked to do it and he  
22 performed the analysis.

23 JUDGE PAYNE: Well, I understand. We'll  
24 strike the last part of it where he talks about who  
25 loses the case.

1 BY MR. GORE:

2 Q What election data did you use to analyze the  
3 political effect of the Enacted Plan?

4 A I looked at election data from the Department of  
5 Legislative Services and also from the State Board of  
6 Elections.

7 Q Did you prepare a chart showing the political  
8 effect of the Enacted Plan on the various  
9 congressional districts?

10 A Yes.

11 Q Will you turn to Tab 9 of your binder, which is  
12 Intervenor-Defendants' Exhibit 20? Is this the chart  
13 you prepared?

14 A Yes.

15 Q Is this Table 7 of your expert report?

16 A Yes.

17 Q What does this table show?

18 A This table shows the -- again, this is the  
19 Department of Legislative Services election data for  
20 2008 on this chart. And it also has the 2012  
21 presidential election data which I received from  
22 counsel, and that's derived from the State Board of  
23 Elections' data.

24 And, again, what it shows here, more specifically,  
25 is it shows the political composition of the Benchmark

1 Districts for each of the Congressional Districts 1  
2 through 11, and then next to that is the enacted  
3 political scores for the presidential race and the  
4 difference.

5 And then further over it shows the 2012 data for  
6 the benchmark, the enacted, and the difference.

7 Q Why did you use the 2008 and 2012 presidential  
8 election results to conduct this analysis?

9 A Well, especially regarding the 2008 presidential  
10 election, that was election data that was available to  
11 the General Assembly at the time of redistricting.  
12 And that is something that redistricters would have  
13 not only had access to but in my opinion would have  
14 paid attention to.

15 Q What about the 2012 presidential election results?

16 A Well, as I've discussed in my report, the 2012  
17 presidential election, while not available to the  
18 redistricters at the time, it essentially validates  
19 the presidential returns from 2008.

20 So when you see some of the changes that were made  
21 between the Benchmark and the Enacted Plan, there's  
22 this additional political data four years later that  
23 show a few more election results.

24 Q What in particular does this table show about the  
25 political effect of the Enacted Plan across the

1 Commonwealth, across the eleven districts?

2 A Well, it shows that district by district -- and,  
3 again, looking at the column on change, that I show  
4 the current parties of, for example, in District 1,  
5 the current party is a Republican, incumbent  
6 Congressman Rob Whitman. And I show that the change  
7 in the 2008 presidential made the district more  
8 Republican.

9 So it shows, essentially, that the changes in the  
10 districts were in favor of the incumbents in most  
11 cases.

12 Q How many Republican districts were there in the  
13 Benchmark Plan?

14 A There were eight Republican districts and three  
15 Democratic districts.

16 Q How many of those Republican districts became more  
17 Republican under the Enacted Plan?

18 A Essentially, seven of the eight became more  
19 Republican.

20 Q How many of the three Democratic districts became  
21 more Democratic under the Enacted Plan?

22 A Two of the three Democratic districts became more  
23 Democratic, including District 3.

24 Q What were the two exceptions that did not become  
25 more politically unified one way or the other?

1 A Okay. On the table, District 9 gets slightly more  
2 Democratic. And, again, if we look at the Democratic  
3 vote share, the Benchmark District was 39 percent  
4 Democratic and the Enacted Plan is 39.7. So there's a  
5 slight Democratic increase. That's the Ninth  
6 District, which is in Southwest Virginia. And that's  
7 represented by Congressman Morgan Griffith, a  
8 Republican.

9 Q What about District 8?

10 A District 8 is represented by Congressman Jim  
11 Moran. And that district went from 67 percent  
12 Democratic to 66 percent Democratic. It became  
13 slightly less Democratic, essentially, to shore up  
14 neighboring District 11, which became substantially  
15 more Democratic. That's Congressman Connolly's  
16 District.

17 Q Did the General Assembly treat District 3  
18 differently than other districts in terms of politics  
19 under the Enacted Plan?

20 A No, it treated District 3 the same way.

21 Q Which districts surround District 3 in the  
22 Benchmark and Enacted Plans?

23 A So surrounding District 3, District 2, which we  
24 talked about, District 1, District 4 and District 7  
25 are all surrounding District 3.



1 Q Which of those districts are represented by  
2 Republicans?

3 A All four of them.

4 Q Who are the Republican incumbents in those  
5 districts?

6 A Congressman Rob Whitman from the Northern Neck,  
7 Congressman Scott Rigell -- I'm Sorry. Northern Neck  
8 Congressman Whitman is District 1.

9 District 2 is Congressman Scott Rigell from  
10 Virginia Beach.

11 District 4, Congressman Randy Forbes from  
12 Chesapeake.

13 And then District 7 is Congressman Majority Leader  
14 Eric Cantor, who is in Richmond.

15 Q What was the political effect of the Enacted Plan  
16 on the four Republican districts surrounding District  
17 3?

18 A They each got more Republican.

19 Q Now, let's talk for a moment about District 2.

20 According to the 2008 presidential election  
21 results, what was the political composition of  
22 District 2 prior to the Enacted Plan?

23 A Again, this is still on the same chart. The  
24 Benchmark District 2 was 49 percent for Senator McCain  
25 and 49 percent for Senator Obama, then a candidate for

1 president. So it was just even-steven on the  
2 presidential vote.

3 Q Prior to the Enacted Plan, what was the recent  
4 political history for congressional elections in  
5 District 2?

6 A Well, District 2 had gone back and forth.  
7 Congresswoman Thelma Drake held the district in 2004  
8 and 2006. She lost reelection in 2008. And  
9 Congressman Nye then succeeded her. And then  
10 Congressman Nye was defeated in 2010 by Scott Rigell,  
11 who now is the incumbent congressman from District 2.

12 Q Was Congressman Nye a Democratic?

13 A Yes, Congressman Nye is a Democrat and  
14 Congresswoman Drake and Rigell were Republicans.

15 Q In your opinion, why is that recent political  
16 history significant?

17 A Well, District 2 was a toss-up district. It's  
18 gone back and forth. And it's significant because, as  
19 a very closely divided district, the  
20 Republican-controlled General Assembly would have had  
21 reason to protect incumbent Congressman Rigell in that  
22 district.

23 Q I'd like to talk now about areas that were moved  
24 in and out of District 3 in the Enacted Plan.

25 Did you prepare a chart showing the political

MORGAN - DIRECT

259

1 composition of those areas?

2 A Yes.

3 Q Will you turn to Tab 10, which is

4 Intervenor-Defendants' Exhibit 21?

5 A Okay.

6 Q Is that the chart you prepared?

7 A Yes.

8 Q Is it Table 8 of your expert report?

9 A Yes.

10 Q Will you turn now to Tab 35, which is

11 Intervenor-Defendants' Demonstrative 11?

12 A Okay.

13 Q Does the chart at the top of Demonstrative 11

14 replicate the same data as the Exhibit 21 we were just

15 looking at?

16 A Yes.

17 Q What is the chart at the bottom of Demonstrative

18 11?

19 A It's labeled Plaintiffs' Exhibit 28 and

20 Intervenor-Defendants' Exhibit 21. I believe this is

21 a chart from one of Dr. McDonald's reports showing the

22 black voting-age percentage and racial data for those

23 trades.

24 Q Let's focus on these specifics trades now. We

25 were just talking about District 2. What were the

1 population and political composition of the areas  
2 moved between Districts 2 and 3 under the Enacted  
3 Plan?

4 A Okay. Let's see. That's row three, District 2  
5 into District 3, 27,917 population. And that was  
6 64 percent Democratic in the presidential election,  
7 69 percent in 2012.

8 And on the portion that was moved from District 3  
9 into District 2 was 47 percent Democratic in 2008 and  
10 then 48 percent Democratic in 2012. And that's,  
11 again, row four.

12 Q What is the significance of these facts?

13 A Well, they are, essentially, even on population.  
14 It's about a 2400 population difference, which is what  
15 I referenced earlier in taking out a slight population  
16 from District 3.

17 So it moved into District 3 portions that are  
18 64 percent Democratic, which is strong Democratic  
19 territory, and then it takes -- into District 3 from  
20 2. And then it takes some territory that's relatively  
21 speaking Republican, and certainly not a Democratic  
22 stronghold, from 3 into 2.

23 Q What would the effect of this trade have been on  
24 District 2's political composition?

25 A Well, again, this was District 2. And the

1 Benchmark was an evenly divided district. So this  
2 would have helped Congressman Rigell by adding some  
3 more Republican territory and taking some Democratic  
4 territory out.

5 Q Referring to Demonstrative 11, what was the racial  
6 composition of those areas moved between Districts 2  
7 and 3 in the Enacted Plan?

8 A So, again, this is row three and four in the  
9 second table. And the population numbers are the  
10 same. And then if you look over to the black  
11 voting-age population, the portion moved into District  
12 3 was 36.7 or 37.9 under the two metrics Dr. McDonald  
13 has. And then the portion moved out of District 3  
14 into District 2 was 18.3 or 18.8 percent  
15 African-American.

16 Q So what is the difference in the Democratic vote  
17 share between these two areas?

18 A Okay. Well, if you look back up at rows three and  
19 four, so it's 64 percent Democratic vote share and  
20 47 percent Democratic vote share. So it's about a  
21 17 percent difference.

22 Q What is the difference in the BVAP or black  
23 voting-age population between those two areas?

24 A Again, this is row three and four. And the bottom  
25 chart 36 and 18 is about 18 percent difference.

MORGAN - DIRECT

262

1 Q How does the difference in political composition  
2 compare to the difference in BVAP?

3 A They are essentially the same.

4 Q Is there a similar pattern in the traded areas  
5 between District 3 and other surrounding districts?

6 A Yes.

7 Q Let's move to District 4.

8 What was the population and political composition  
9 of the areas moved between Districts 3 and 4 in the  
10 Enacted Plan?

11 A Okay. These are rows five and six in the chart.  
12 So the portion that was taken from 4 and put --

13 JUDGE PAYNE: Excuse me. Chart meaning 35  
14 now?

15 THE WITNESS: Yes, sir.

16 MR. GORE: The top chart behind Tab 35.  
17 There's a page with two charts.

18 JUDGE PAYNE: Yes, but earlier he had  
19 referenced an earlier chart. I just wanted to make  
20 sure.

21 THE WITNESS: Sorry.

22 JUDGE PAYNE: Okay.

23 A Okay. So the two charts on this page, and this  
24 is, it says, 4 to 3. So it's 35,000 population,  
25 35,447. And the Democratic vote share for president

1 in 2008 is 86 percent. That's essentially the City of  
2 Petersburg, which we've had discussed about earlier.

3 And then the portion that's moved from District 3  
4 into District 4 is a smaller population, 5713, and  
5 that is 53 percent Democratic.

6 Q What is the significance of this trade?

7 A Well, again, it removes highly Democratic  
8 territory from District 4, puts it into District 3,  
9 and then it takes a smaller amount of population from  
10 District 3 into 4. And this has the effect of  
11 increasing the Republican strength of District 4 and  
12 the Democratic strength of District 3.

13 Q What is was the racial composition of the areas  
14 moved between Districts 3 and 4 in the Enacted Plan?

15 A Okay. In the chart below, it shows that  
16 information. So the portion that was taken from  
17 District 4, put into District 3, is 35,447. And it's  
18 75 percent African-American, 75.1 or 75.8, the two  
19 numbers at the end of the chart.

20 Q How about the area moved from District 3 to  
21 District 4?

22 A 41.4 or 42.1 percent.

23 Q What is the difference in Democratic vote share  
24 between these two areas?

25 A Again, in the first chart, it's a difference in

1 2008 of 86 percent and 53 percent. So it's  
2 33 percent.

3 Q What is the difference in BVAP between those two  
4 areas?

5 A 75 minus 41 is 34 percent.

6 Q How does the difference in political composition  
7 compare to the difference in BVAP?

8 A They are essentially the same.

9 Q Let's move to District 7. What were the  
10 population and political composition of the areas  
11 moved between Districts 3 and 7 in the Enacted Plan?

12 A The area moved from District 7 into District 3 is  
13 85 percent Democratic. It's 36,000 people in 2008  
14 presidential.

15 And then the area moved from District 3 into  
16 District 7, which is essentially New Kent County, is  
17 36 percent Democratic.

18 Q What is the significance and effect of this trade?

19 A Well, New Kent County would -- again, the portion  
20 moving into District 7 from 3 is a Republican area,  
21 which would help Congressman Cantor's district. And  
22 then the areas moved from 7 into 3 are strongly  
23 Democratic areas.

24 Q What was the racial composition of those areas  
25 moved between Districts 3 and 7 in the Enacted Plan?



MORGAN - DIRECT

265

1 A That's the last two rows of the bottom chart. And  
2 that's 64 percent African-American, 64.4 or 65. And  
3 then the portion moved from 3 into 7 is 14.1, 14.5.

4 Q So what is the difference in Democratic vote share  
5 between those two areas?

6 A It's essentially 49 percent.

7 Q How about the difference in BVAP?

8 A 50 percent.

9 Q How do those two differences compare to each  
10 other?

11 A They are essentially the same.

12 Q Let's move now to District 1. What were the  
13 population and political composition of the areas  
14 moved between Districts 3 and 1 in the Enacted Plan?

15 A Okay. The area moved from District 1 into  
16 District 3, which is the first line in the chart, is  
17 60 percent Democratic under the 2008 presidential.  
18 And it's 23,288 people. And then the portion moved  
19 from 3 into 1 is relatively smaller, 7351 population,  
20 and 75 percent Democratic.

21 Q Is this different than what we saw in the trades  
22 between District 3 and other surrounding districts?

23 A Yes. The percentages are different than the other  
24 examples.

25 Q How is that?

1 A In this case, the population moving from 3 into 1  
2 has a higher Democratic vote share at 75 percent than  
3 the area moving from 1 to 3, which is 60 percent.

4 Q Is this trade still consistent with the political  
5 effect of strengthening incumbents in District 3 and,  
6 more particularly, surrounding districts?

7 A Yes, because of the size of the population, the  
8 differences are such that the -- even though the area  
9 moving from 3 into 1 is more intensely Democratic,  
10 it's also smaller. And the area moving from 1 into 3  
11 is, you know, it's still Democratic, but it's not as  
12 intense, but there's a lot more Democratic territory.

13 Q So when you look at the political effect of these  
14 changes to District 3 and surrounding districts, what  
15 is your conclusion about the Enacted Plan?

16 A Well, the Enacted Plan makes these political  
17 trades, and, as such, it unifies the political  
18 composition of the districts in favor of the  
19 incumbents in all instances in this area.

20 Q Would the General Assembly have had reason to make  
21 these trades between District 3 and surrounding  
22 districts regardless of the race of the affected  
23 voters?

24 A Yes, it politically strengthens incumbents of both  
25 parties.

MORGAN - DIRECT

267

1 Q In your opinion, do these trades between District  
2 3 and surrounding districts support Dr. McDonald's  
3 conclusion that race predominated in drawing the  
4 Enacted Plan in District 3?

5 A No, they don't support that conclusion because, as  
6 I've seen in this data, politics is an explanation for  
7 these trades.

8 Q Thank you, Mr. Morgan.

9 You previously testified as an expert in a Section  
10 2 case on behalf of Fayette County, Georgia; is that  
11 right?

12 A Yes.

13 Q What were the plaintiffs in that case suing about?

14 A They were suing for the first time creation of a  
15 majority-minority district in Fayette County, which  
16 had previously had at-large elections.

17 Q What was your understanding of the issue the Court  
18 was required to resolve in that case?

19 A Well, as a Section 2 case, they have to determine  
20 if there's a Section 2 liability. And then, if so,  
21 find an appropriate remedy for that.

22 Q Did you conclude in that case that race  
23 predominated in the majority black district that the  
24 plaintiffs --

25 JUDGE PAYNE: Can you tell us why --

MORGAN - DIRECT

268

1 MR. GORE: This came up at his deposition,  
2 Your Honor.

3 JUDGE PAYNE: A lot came up at his  
4 deposition, but what's this case in Georgia got to do  
5 with this case?

6 MR. GORE: I anticipate it's going to be a  
7 subject of his cross-examination.

8 JUDGE PAYNE: Well, if it is, you can deal  
9 with it on redirect.

10 MR. GORE: I will do that, Your Honor. Thank  
11 you.

12 BY MR. GORE:

13 Q Now, Mr. Morgan, there's some talk today about the  
14 VTD analysis that Dr. McDonald conducted with respect  
15 to the Enacted Plan.

16 A Yes.

17 Q Are you familiar with that analysis?

18 A Yes.

19 Q What was Dr. McDonald's analysis?

20 A Well, Dr. McDonald analyzed VTDs that were  
21 55 percent Democratic voting strength, and he looked  
22 at those that were inside Enacted District 3, and  
23 those that were 55 percent plus that were outside of  
24 Enacted 3, and localities adjacent to Enacted District  
25 3.

1 Q How many sets of VTDs did Dr. McDonald identify?

2 A He identified 189 that were inside District 3 and  
3 116 that were outside District 3 in localities that  
4 were adjacent to District 3.

5 Q What was the average BVAP in those two sets of  
6 VTDs?

7 A The average black voting-age strength of the VTDs  
8 in District 3 was 59.5 percent. And I think the  
9 average black voting-age strength of the VTDs in  
10 adjacent localities was 43.5.

11 Q What was Dr. McDonald's conclusion based on that  
12 analysis?

13 A Well, he concluded that because there was a  
14 16 percent difference in the average black voting-age  
15 population of the VTDs inside the district and those  
16 Democratic performing VTDs outside the district, that  
17 race was the primary concern over politics in the  
18 Enacted Plan.

19 Q Do you agree with that conclusion?

20 A I don't.

21 Q Why not?

22 A Well, because, as I've seen and discussed in the  
23 data, politics is equally -- explains equally those  
24 trades that were made. And in looking at the highly  
25 performing Democratic VTDs, it's been discussed, and I

MORGAN - DIRECT

270

1 agree, that there's a range of voter strength in those  
2 VTDs, not simply 55 percent. Some of those 55 percent  
3 VTDs are much stronger than others.

4 Q Do you believe there are any other reasons why Dr.  
5 McDonald's method of analysis is unreliable or not  
6 useful?

7 A Yes.

8 Q What are those?

9 A Well, just with the methodology?

10 Q Yes.

11 A Okay. Well, some of the VTDs included in the 189  
12 are essentially located within District 3, and they  
13 are, essentially, not going to be available for trades  
14 to other districts nearby. So they're strong  
15 Democratic performing VTDs, but they are locked into  
16 District 3.

17 Q How about the VTDs that are in localities adjacent  
18 to District 3?

19 A Well, in Dr. McDonald's report, he identifies four  
20 localities that are not included in his data set,  
21 which was provided by the NCEC, the National Committee  
22 for an Effective Congress.

23 And those four localities, two are in the  
24 district, Charles City County, and then, let's see,  
25 the other one that was in the district was Surry

1 County. And then there are two that are located  
2 outside the district. And that's Colonial Heights and  
3 Southampton. And he said he did not have data  
4 available for those.

5 So with that caveat, which he identified in his  
6 report, he still made the VTD analysis.

7 Q Of the 116 VTDs that were in localities adjacent  
8 to District 3, were they located on the border with  
9 District 3?

10 A No, they were not all located on the border. In  
11 fact, some of the VTDs are up to 30 miles away from  
12 District 3. They are in a locality that may be  
13 adjacent to District 3, such as Sussex County, but the  
14 VTDs in question are not on the border.

15 Again, some areas are 20 miles away. Some areas  
16 are 30 miles away.

17 Q How does the racial composition of District 3 in  
18 the surrounding districts affect this analysis as  
19 well?

20 A Well, District 3 is a majority African-American  
21 district. And so it doesn't seem surprising that most  
22 of the VTDs in the sample of those VTDs are going to  
23 have a high black voting-age population. And the  
24 surrounding districts, which are not majority black  
25 districts, have a lower black voting-age average, even

1 in the Democratic performing VTDs.

2 Q Did Dr. McDonald consider which of these VTDs or  
3 in which districts these VTDs were located under the  
4 Benchmark Plan?

5 A Well, not in this analysis, and I think there's  
6 been discussion and I agree that most of these  
7 highly-performing Democratic VTDs are 55 percent and  
8 up that are in the Enacted Plan are in fact also in  
9 the Benchmark Plan.

10 Q Are you familiar with the data that Dr. McDonald  
11 used to perform his VTD analysis?

12 A I am familiar with that data, yes.

13 Q And it came from this group, the NCEC?

14 A Yes.

15 Q What is the NCEC?

16 A The National Committee for an Effective Congress.

17 Q And what is its mission?

18 A Well, my understanding is it's a liberal  
19 organization that --

20 MR. HAMILTON: Objection to the question,  
21 Your Honor. Lack of foundation.

22 Q Do you know what the NCEC's mission is?

23 A I have dealt with the NCEC in my work. And I  
24 understand them to be a liberal organization that  
25 favors congressional candidates that are progressives.



MORGAN - DIRECT

273

1 Q When did you receive the NCEC data?

2 A I received the NCEC data after I had done my  
3 report in the early part of April as part of the  
4 documents that Dr. McDonald produced for his  
5 deposition, I believe.

6 Q You already mentioned that there were some  
7 omissions from the data with respect to four  
8 localities; is that right?

9 A Yes.

10 Q When you reviewed the NCEC data, did you discover  
11 any flaws in it?

12 A Yes.

13 Q What were those flaws?

14 A Well, the first flaw is that the VTD data set that  
15 is represented as a set of VTDs are not the 2010 VTDs.  
16 They are, in fact, the 2012 VTDs.

17 Q Were all of these VTDs counted once?

18 MR. HAMILTON: Objection, Your Honor. None  
19 of this is in Mr. Morgan's report.

20 MR. GORE: The reason it's not in his report,  
21 Your Honor, is because he didn't get the data until  
22 after his report was due. It was something that was  
23 turned over by Dr. McDonald before his deposition.  
24 Mr. Morgan analyzed the data at that point. So it  
25 couldn't possibly have been in his report.

MORGAN - DIRECT

274

1 JUDGE PAYNE: Is that right?

2 MR. HAMILTON: It was produced.

3 JUDGE PAYNE: Dr. McDonald testified about  
4 this earlier today, did he not?

5 MR. HAMILTON: That's a different issue, I  
6 believe, but yes, it's the same data set. We've had  
7 these documents going back and forth all the way up to  
8 four o'clock yesterday.

9 JUDGE PAYNE: Objection overruled. If it  
10 came in late and you-all agreed to deal with it as a  
11 supplemental report, then that's how we'll treat it.

12 MR. GORE: Thank you, Your Honor.

13 BY MR. GORE:

14 Q Were there any other flaws in the data?

15 A Well, yes. In looking at the NCEC data that I  
16 received finally from Dr. McDonald, one of the reasons  
17 I didn't perform necessarily a similar VTD analysis is  
18 I couldn't replicate the data because the precincts  
19 were different.

20 The 2012 precincts were the ones that were in the  
21 NCEC data, not the 2010 VTDs that would have been used  
22 at the time of redistricting. And, in addition, the  
23 VTDs in this NCEC data set are double counted. There  
24 are many instances of VTDs that are counted twice,  
25 including highly performing Democratic VTDs that are

1 counted more than once.

2 Q Were you able to replicate Dr. McDonald's analysis  
3 and numbers using the NCEC data?

4 A Once I got the data, I was able to replicate the  
5 numbers he came up with, yes.

6 Q Did you perform a similar VTD analysis of the  
7 Alternative Plan using the NCEC data?

8 A Yes.

9 Q Why did you use the flawed NCEC data to perform  
10 these analyses?

11 A Well, I trying to make an apples-to-apples  
12 comparison using the same data set.

13 Q Have you prepared charts that show the results of  
14 these analyses?

15 A Yes.

16 Q Will you turn to Tab 17 of your binder, which is  
17 Intervenor Defendants' Corrected Exhibit 50.

18 A Okay.

19 Q Are these the charts you prepared?

20 A Yes.

21 Q Does the top chart show your replication of Dr.  
22 McDonald's VTD analysis for the Enacted Plan as well  
23 as other information?

24 A Yes, it shows portions that Dr. McDonald had in  
25 his report with some additional data that was from the

1 NCEC data and derived from them.

2 Q Is the bottom chart your parallel analysis for the  
3 Alternative Plan?

4 A Yes.

5 Q Now, when you first were using the flawed NCEC  
6 data, did you make a mistake in assigning some VTDs to  
7 whether they had been in or out of benchmark District  
8 3?

9 A Well, what I would do, in answering that question,  
10 is I would point out that the portion that Dr.  
11 McDonald discusses in his report -- and you can see in  
12 the top left there's 189 VTDs in Enacted 3, and then  
13 on the outer column there's 116 in localities adjacent  
14 to District 3. Those numbers agree exactly with Dr.  
15 McDonald's numbers.

16 Again, so columns one and four are going to agree  
17 exactly with Dr. McDonald's VTD count. The area where  
18 I erred was in showing the total number of VTDs that  
19 were in both the enacted District 3 and the benchmark  
20 District 3. And, essentially, that centered around  
21 Petersburg and one additional VTD in Hampton that I  
22 had mislabeled. So it was a net difference of just a  
23 few.

24 Q Did you correct that data?

25 A Yes.

MORGAN - DIRECT

277

1 Q Is Exhibit 50 a corrected exhibit based on that  
2 corrected data?

3 A Yes.

4 Q Did those corrections change any of the numbers in  
5 the first or fourth column of your chart?

6 A No, there was no impact on the first column or the  
7 fourth column.

8 Q Did they change some of the numbers in the second  
9 and third columns?

10 A Yes, and there's been discussion about the  
11 character of the VTDs that were highly Democratic that  
12 were in the benchmark and in the enacted district.

13 JUDGE PAYNE: Is your point that 17 is the  
14 one he's relying on?

15 MR. GORE: Yes.

16 JUDGE PAYNE: And that he made some mistakes.  
17 Those mistakes were attributable to the flawed data  
18 that you've explained?

19 MR. GORE: Yes.

20 JUDGE PAYNE: Then if he wants to attack him  
21 on cross-examination about it now that we understand  
22 the circumstances, let him do it. You don't need to  
23 explain it away. That just takes a lot of time and  
24 it's distracting from understanding what point you  
25 really are trying to make.

MORGAN - DIRECT

278

1 MR. GORE: I understand. I was moving to  
2 that point now, Your Honor.

3 JUDGE PAYNE: Well, I was too late.

4 MR. GORE: I was too late, I think, Your  
5 Honor, by one question.

6 Q What did the first and last columns of this chart  
7 show?

8 A Okay. Again, most of this material was in Dr.  
9 McDonald's report. Again, I point to the 189 VTDs in  
10 enacted District 3 and that the average black  
11 voting-age population was 59.5.

12 And then on column four, there were 116 VTDs that  
13 are in localities adjacent to enacted District 3 as  
14 defined by Dr. McDonald and his data set, and that the  
15 average black voting-age population was 43.5.

16 The additional information was I also provided the  
17 average Democratic vote share, which is in the second  
18 row. So the average Democratic vote share of the  
19 VTDs, the highly Democratic VTDs, 55 percent plus, is  
20 80.9 percent in enacted District 3.

21 And then over on the fourth column in the second  
22 row, the average Democratic performance of the VTDs is  
23 65.4 in the localities that are adjacent to enacted  
24 District 3.

25 Q Just to make sure I'm understanding this

1 correctly, instead of treating all the highly  
2 Democratic VTDs as 55 percent, you actually calculated  
3 the averages using the actual numbers?

4 A Yes.

5 Q Whether above 55 percent or how far above it was?

6 MR. HAMILTON: Objection. Leading.

7 JUDGE PAYNE: Overruled.

8 A Yes, I performed the same average that was  
9 produced on the average black voting-age population,  
10 but for the Democratic vote share.

11 Q What do columns one and four tell you about these  
12 two sets of VTDs that Dr. McDonald identified?

13 A Well, it shows me that the VTDs that are inside  
14 District 3 are, again, at 80 -- basically, 81 percent  
15 Democratic versus the Democratic VTDs that are outside  
16 at 65 percent. The areas inside District 3 are much  
17 more Democratic than the areas -- the VTDs that are  
18 Democratic that are outside of District 3.

19 Q What is the difference in average BVAP between  
20 these two sets of VTDs?

21 A It's about 15.5 -- 15.5.

22 Q That's the difference in BVAP?

23 A I'm sorry. That is not the difference in BVAP.  
24 The difference in the black voting-age population is  
25 16 percent.

1 Q How about the difference in Democratic vote share?

2 A That is 15.5.

3 Q How do those two numbers compare to each other?

4 A They are essentially the same.

5 Q When you consider the actual averages of the BVAP  
6 and Democratic vote share, what is your opinion about  
7 the Enacted Plan?

8 A Well, in terms of looking at the Democratic  
9 performing VTDs, the difference in the average black  
10 voting-age strength and the average Democratic  
11 performance are essentially the same. So politics and  
12 race are very congruent here.

13 Q In your opinion, does Dr. McDonald's VTD analysis  
14 support the conclusion that race trumped politics in  
15 District 3?

16 A Well, again, the VTD analysis, subject to all the  
17 other discussions of the data, it shows that politics  
18 is an equally explainable -- the Enacted Plan is  
19 equally explainable under politics as it is under  
20 race.

21 Q What conclusions, if any, do you draw from the  
22 second and third columns of this chart?

23 A Well, my main point in doing this, and maybe it  
24 wasn't necessary to put it into a chart, but the idea  
25 was basically to show that most -- an overwhelming



1 majority of the Democratic performing VTDs were  
2 already in the benchmark district.

3 Q Does the chart on the bottom of Exhibit 50 show  
4 your parallel VTD analysis of the Alternative Plan?

5 A Yes.

6 Q What do the first and last columns of that chart  
7 show?

8 A It shows that there were 160 VTDs in alternative  
9 districts 3 that were 55 percent Democrat or above and  
10 there were 145 VTDs that were in localities adjacent  
11 to alternative District 3, again, as defined in this  
12 data set.

13 And then the average black voting-age population  
14 of those in District 3 was 59.8 and the average  
15 Democratic -- sorry. The average black voting-age  
16 strength was 46.4 in the VTDs outside of District 3.

17 Q How about the average Democratic vote shares in  
18 those two sets?

19 A It was 80.6 in District 3 and 68.8 outside of  
20 District 3.

21 Q So what is the difference in the average BVAP  
22 between the two sets of VTDs and the Alternative Plan?

23 A The average difference first in the black  
24 voting-age population is 13.4 and the average  
25 difference in the Democratic vote share is about 13.8.

1 Q So does the Alternative Plan fix the --

2 A I'm sorry. 12.8. No, 11.8. Let me get this  
3 right, I'm sorry. I'm doing the math on the fly.

4 Do I want a calculator? No, I think we'll be  
5 okay.

6 Q So what is the difference in average Democratic  
7 vote share?

8 A It's 11.8.

9 Q So does the Alternative Plan fix the alleged  
10 racial pattern in the VTD samples that Dr. McDonald  
11 identified in the Enacted Plan?

12 A Again, focusing on what Dr. McDonald concluded was  
13 the important metric, the difference between the  
14 average black voting-age population of the VTDs in the  
15 Alternative Plan, or in this case the Enacted Plan,  
16 and the average black voting-age strength of the VTDs  
17 outside of it, the difference in the Enacted Plan is  
18 16 percent and the difference in the Alternative Plan  
19 is 13.4 percent.

20 JUDGE PAYNE: But the question was: Is your  
21 opinion that the alternate does or does not fix the  
22 VTD problem that was identified by Dr. McDonald?

23 THE WITNESS: I see similar characteristics.  
24 I don't see that it fixes the problem as described in  
25 the question.

MORGAN - DIRECT

283

1 JUDGE PAYNE: So the answer is no?

2 THE WITNESS: The answer is no.

3 BY MR. GORE:

4 Q Mr. Morgan, I'd like to ask you a little bit about  
5 your opinion regarding the Alternative Plan. And you  
6 can look at these maps up here if that's easy for you  
7 and you want to refer to those.

8 What is the difference between the Alternative  
9 Plan and the Enacted Plan?

10 A Again, the Enacted Plan is on my left and the  
11 Alternative Plan is on my right. The Enacted Plan, as  
12 we've discussed, and the Alternative Plan are the same  
13 except in the boundaries between Districts 2 and 3.

14 Q Are all of the other districts in the Alternative  
15 Plan and Enacted Plan identical?

16 A Yes.

17 Q Does this demonstrative here show all of the  
18 differences between the enacted District 3 and the  
19 alternative District 3?

20 A Between the enacted and the alternative, yes.

21 Q What was the -- what is the BVAP in enacted  
22 District 3?

23 A It was, I believe, 53.2 percent. No, that was in  
24 the benchmark. I apologize. It was 56.2 percent in  
25 the enacted district.

1 Q How about in the Alternative Plan?

2 A 50.2 on the exclusive metric.

3 Q So do these changes to the composition of District  
4 3 decrease the BVAP in District 3?

5 A Yes.

6 Q By how much?

7 A Between the enacted and the alternative, it's  
8 about 6 percent.

9 Q Okay. Dr. McDonald has testified that the  
10 Alternative Plan subordinates traditional  
11 redistricting principles to race. What is your  
12 opinion regarding the role of race in the Alternative  
13 Plan?

14 A Well, I would say that the Alternative Plan is at  
15 least as race conscious as the Enacted Plan because it  
16 replicates the same trades on the northern end of  
17 District 3 that Dr. McDonald criticized and it lowers  
18 the black voting-age population from the benchmark,  
19 which was 53 percent, to 50.2 percent, and in that  
20 sense it's aiming for a specific target that is  
21 essentially 50 percent.

22 Q What are the trades on the northern end of the  
23 district that the Alternative Plan replicates?

24 A Those were the trades that Dr. McDonald criticized  
25 putting Petersburg into District 3 from District 4,

1 which he concluded was predominantly racial, taking  
2 New Kent out of District 3 and putting it into  
3 District 7, and then taking the VTDs in Henrico and  
4 Richmond into District 3 in drawing the plan on the  
5 northern end of the district.

6 Q So to offset those trades, what trades does it  
7 make differently on the other end of the district to  
8 get to the 50.2 percent BVAP level?

9 A Well, I suppose you can look at it one of two  
10 ways. Either if you make the trades on the northern  
11 end of the district, then the Alternative Plan  
12 District 3 reduces the black voting-age population  
13 down to its target of 50 percent by making trades  
14 between Districts 2 and 3 in Norfolk and in Hampton  
15 and in Newport News to reduce the black voting-age  
16 population or you can look at it the other way, which  
17 is that the trades on the southern end of the district  
18 reduced the black voting-age population below the  
19 level of the majority relative to the benchmark, and  
20 then it would need to go get additional black  
21 voting-age population from the areas on the northern  
22 end of the district; Petersburg, Henrico and Richmond.

23 Q In your opinion, is the Alternative Plan justified  
24 by the nonracial explanation of politics, preservation  
25 of cores, or incumbency protection?

1 A No, not on politics, core preservation or  
2 incumbency protection because it has a dramatic  
3 political effect on Congressional District 2 by  
4 placing all of Norfolk into Congressional District 2.

5 Q You mentioned earlier in your testimony that in  
6 the Benchmark Plan, District 1 occupied much of  
7 Newport News and also extended into Hampton. Do you  
8 remember that testimony?

9 A Yes, District 1 was, in the Benchmark Plan,  
10 included portions of Newport News and portions of  
11 Hampton.

12 Q And you testified, I believe, that the Enacted  
13 Plan moved most of that area into enacted District 2?

14 A Yes, most of the population from District 1 was  
15 moved into District 2. It needed population to get to  
16 population equality.

17 Q What was the effect of the Enacted Plan's movement  
18 of that territory from District 1 to District 2?

19 A So the portion of Newport News that was moved from  
20 District 1 into District 2 was fairly evenly divided.  
21 It's slightly Republican relative to that part of the  
22 world. So it had the effect of helping District 2.  
23 And actually District 2 before and after redistricting  
24 is still very evenly divided. It's still about a  
25 50/50 district.

1 Q What does Alternative Plan do differently with  
2 that territory that was in benchmark District 1?

3 A Well, it takes all of the territory that was  
4 available for Congressional District 2, which was, you  
5 know, politically somewhat helpful to District 2 and  
6 it puts it entirely in District 3, and therefore it  
7 has quite an effect on District 2, especially in  
8 conjunction with Norfolk's population added to  
9 District 2.

10 Q Have you prepared a chart showing the population  
11 affected by the trades between Districts 1 and 2 and  
12 Districts 2 and 3 in the Enacted and Alternative  
13 Plans?

14 A Yes.

15 Q Okay. Will you turn to Tab 6, which is  
16 Intervenor-Defendants' Exhibit 17?

17 A Okay.

18 Q How many people total were moved between Districts  
19 1 and 3 or affected by the moves between Districts 1  
20 and 3 in the Enacted Plan?

21 A Okay. So in moving from the Benchmark Plan to the  
22 Enacted Plan, the population moved in and out of  
23 District 3 and 1, it was 23,000 and 7,000. So the  
24 subtotal on this page is 30,000 affected population  
25 between 1 and 3.

1 And then down below, District 2 and 3 trade  
2 population, but the sum of those is 53,000 that are  
3 affected between the Benchmark and the Enacted. So  
4 the overall affected population is 84,000, which is,  
5 in this chart, it shows it's 11.6 percent of an ideal  
6 congressional district.

7 Q How many -- turning to the chart on the right, how  
8 many total people were affected by the trades between  
9 Districts 1 and 3 in the Alternative Plan?

10 A Well, as we discussed, the Alternative Plan takes  
11 portions of District 1 and puts them into District 3,  
12 and that's 100,000 people. And then that same  
13 precinct we've mentioned, the 7351, goes out, and add  
14 those two together, it's 114,000. And then the  
15 population that goes from 2 to 3, which is,  
16 essentially, Hampton, is 45,000, and the portion from  
17 3 to 2 is 126. So that's 172.

18 And then subtotaling the subtotals or totaling the  
19 subtotals, it's 287,000, which is 39.5 percent of an  
20 ideal district.

21 Q So how does the total number of people affected by  
22 the Alternative Plan's trades compare to the total  
23 number of people affected by the Enacted Plan's  
24 trades?

25 A Well, the Alternative Plan relative the Benchmark



1 affects a lot more people.

2 Q And is there a reason why the Alternative Plan  
3 affects more people or has to have this effect in  
4 order to accomplish the objectives of the Alternative  
5 Plan?

6 A Well, as I understand it, the objectives were to  
7 lower the black voting-age population of the  
8 alternative district to a lower number, and it also,  
9 as has been discussed, there's one fewer locality  
10 split in the process of doing that.

11 Q Have you prepared a chart showing a racial  
12 composition of the trades between Districts 1 and 3  
13 and Districts 2 and 3 in the Enacted Plan?

14 A Yes.

15 Q Will you turn to Tab 7, which is  
16 Intervenor-Defendants' Exhibit 18?

17 A Okay.

18 Q Is this the chart you prepared?

19 A Yes.

20 Q What was the racial effect of the trades between  
21 Districts 1 and 3 in the Enacted Plan?

22 A Well, between 1 and 3, the percentage of black  
23 voting-age population was about 43 percent in the  
24 portion that went into District 3 from District 1, and  
25 the portion that went out of District 3 into District

1 1 was about 43 percent. So the percentages are about  
2 the same.

3 The numbers are a little different as a net result  
4 of that trade. About 5,500, 5,600 black voting-age  
5 population is moved into District 3.

6 Q What is the racial composition of the trades  
7 between Districts 2 and 3?

8 A In Districts 2 and 3, the trades, again, are  
9 essentially equal in population. There's a net 2400  
10 to District 2 from District 3, and the portion moving  
11 from 2 to 3 is 36.7, 37.9 percent African-American,  
12 and the portion moving out is 18.3, 18.8 percent.

13 Q What is the net total number of voting-age  
14 population brought into District 3 through these  
15 trades?

16 A The net voting-age population?

17 Q Yes.

18 A It's 13,193.

19 Q What's the net total number of black voting-age  
20 population brought into District 3 through these  
21 trades?

22 A Well, it says 93, 99, and 96.58.

23 Q Have you also prepared a chart showing the racial  
24 composition of the trades between the Districts 1 and  
25 3 and Districts 2 and 3 in the Alternative Plan?

1 A Yes.

2 Q Will you turn to Tab 8, which is  
3 Intervenor-Defendants' Exhibit 19?

4 A Yes.

5 Q Is this the chart you prepared?

6 A Yes.

7 Q So what is the racial composition of the areas  
8 traded between Districts 1 and 3 in the Alternative  
9 Plan?

10 A The portion traded from District 1 to District 3,  
11 it's 100,000 people, and it's 29.6 percent  
12 African-American voting age and 30.3. And then the  
13 portion out is, again, that same VTD, Greenwood,  
14 Newport News, that's 43.6 and 44.8.

15 Q How does this racial composition compare to the  
16 racial composition of the Enacted Plan's trades  
17 between those districts?

18 A Well, it adds more -- it adds more total black  
19 voting-age population, but, as a percentage, it's much  
20 lower than the portions that were added in the Enacted  
21 Plan.

22 Q Okay. What is the racial composition of the areas  
23 traded between Districts 2 and 3 in the Alternative  
24 Plan?

25 A So the portions moved from District 2 into

1 District 3, which is, essentially, Hampton, is  
2 27 percent, 27.7 percent African-American voting age,  
3 and it's about 46,000 people. And the area removed  
4 from District 3 put into District 2 is 126,980  
5 population, and that's 56.8, 57.6 percent  
6 African-American.

7 Q So, Mr. Morgan, as a result of all these trades  
8 involving District 3, what is the net total voting-age  
9 population brought into District 3 in the Alternative  
10 Plan?

11 A So there's a net of 16,541 voting-age population.

12 Q What's the net change to the black voting-age  
13 population as a total number?

14 A It's reduced by 23,293 or 23,232.

15 Q So the Alternative Plan brings 16,541 people of  
16 voting age into the district but does so in such a way  
17 as to remove 23,293 black persons of voting age; is  
18 that right?

19 A Yes.

20 Q What is the overall effect of these trades on the  
21 BVAP in alternative District 3?

22 A Well, as a result of these trades in conjunction  
23 with the other changes that are replicated in both the  
24 Enacted and the Alternative Plan, this lowers the  
25 black voting-age population of the Alternative Plan

1 from 53.1 to 50.2.

2 Q So assume with me for a moment that the drafter of  
3 the Alternative Plan had made these trades first  
4 before equalizing the population in District 3, what  
5 would the effect on District 3's VBAP have been?

6 A Well, with these trades alone, the black  
7 voting-age population would have gone below the  
8 benchmark level of 53 percent and it would have, in  
9 fact, gone below a majority of 50 percent. It would  
10 have been, again, below majority.

11 Q In that scenario, what would the drafter of the  
12 Alternative Plan have needed to do in order to raise  
13 District 3's BVAP back up to a majority black level?

14 A The plan drafter would have had to take additional  
15 black voting-age population from somewhere else  
16 instead of from Norfolk, which was right there.

17 Q Based on your analysis of these trades, what is  
18 your opinion about the role of race in the Alternative  
19 Plan?

20 A Well, as I mentioned, race is predominant in the  
21 Alternative Plan in the sense that all of these trades  
22 are serving to reduce the black voting-age strength  
23 just to a barely 50 percent level.

24 Q Thank you.

25 MR. GORE: If I may ask the Court what the

MORGAN - DIRECT

294

1 Court's preference is for concluding today. I'm at a  
2 stopping point, but I'm happy to keep on.

3 JUDGE PAYNE: We'd like to conclude to the  
4 extent it's possible to do so. How much longer do you  
5 think you have?

6 MR. GORE: Maybe another hour.

7 JUDGE PAYNE: That's all you've got is -- you  
8 don't have any other witnesses other than Dr. Morgan?

9 MR. GORE: Mr. Morgan is our only witness,  
10 that's right, Your Honor.

11 JUDGE PAYNE: And then there's  
12 cross-examination of Mr. Morgan and redirect.

13 MR. GORE: Correct.

14 JUDGE PAYNE: All right. We'll conclude this  
15 evening, but now that assumes that you have an hour.  
16 And the cross examination is how long, Mr. Hamilton or  
17 whoever is going to do it?

18 MR. HAMILTON: I would imagine about two  
19 hours, Your Honor.

20 JUDGE PAYNE: Okay. And your redirect is not  
21 going to be very long.

22 MR. GORE: I don't imagine so, Your Honor.

23 JUDGE PAYNE: All right. And there are no  
24 other witnesses; is that correct?

25 MR. HAMILTON: We would call Dr. McDonald in

MORGAN - DIRECT

295

1 our rebuttal case, Your Honor.

2 JUDGE PAYNE: How long do you think that's  
3 going to be?

4 MR. HAMILTON: Probably no more than an hour.

5 JUDGE PAYNE: Your part of it?

6 MR. HAMILTON: Correct.

7 JUDGE PAYNE: Is my math correct that you  
8 think we're looking at five or six hours tomorrow?  
9 You have an hour. He has, what, two hours for  
10 cross-examination?

11 MR. HAMILTON: That's correct, Your Honor.

12 JUDGE PAYNE: That's three. And then you  
13 have redirect, which is short.

14 MR. GORE: Yes.

15 JUDGE PAYNE: And Dr. Morgan on direct for an  
16 hour. Mr. Carvin will, I guess, do the cross. I mean  
17 Dr. McDonald. So four and a half, five hours.

18 All right. You can leave your materials here  
19 if you'd like to. The courtroom will be locked up and  
20 you're welcome to leave your materials here.

21 We'll start at nine o'clock in the morning.

22 MR. GORE: Thank you, Your Honors.

23 JUDGE PAYNE: Thank you.

24 (The proceedings were adjourned at 5:30 p.m.)

25 We, P. E. Peterson and Diane J. Daffron,

MORGAN - DIRECT

296

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

4 /s/

5 P. E. PETERSON, RPR, CCR

DATE

6 /s/

7 DIANE J. DAFFRON, RPR, CCR

DATE

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25