

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

-----

DAWN CURRY PAGE, et al.	:	
	:	
vs.	:	Civil Action No.
	:	3:13CV678
	:	
VIRGINIA STATE BOARD OF ELECTIONS, et al.	:	May 22, 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

Mark B. Rhoads, 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  
Office of the Attorney General  
3 900 East Main Street  
Richmond, Virginia 23219  
4 Counsel for the Virginia State Board of Elections

5 Michael A. Carvin, Esquire  
John M. Gore, Esquire  
6 Jones Day  
51 Louisiana Avenue, N.W.  
7 Washington, DC 20001-2113  
Counsel for Intervenor Defendant Eric Cantor

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
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. Mr. Kevin Hamilton and Mr. Robert W. Partin represent the plaintiffs.

Mr. Mike Melis represents the defendant Virginia State Board of Elections and others. Michael A. Carvin and John M. Gore represent the intervener defendants. Are counsel ready to proceed?

MR. HAMILTON: Yes, Your Honor.

MR. GORE: Yes, Your Honor.

THE COURT: All right, you may resume your witness, Mr. Gore.

MR. RHOADS: My name is Mark Rhoads. Rob Partin is not here today, so I'm taking his place.

THE COURT: I remind you, Mr. Morgan, you are under the same oath that you took yesterday.

1                                   **JOHN B. MORGAN,**  
2 a witness, called at the instance of the defendants,  
3 having been previously duly sworn, testified as  
4 follows:

5                                   DIRECT EXAMINATION

6 BY MR. GORE: (resuming)

7 Q Mr. Morgan, I want to ask you a few questions about  
8 Dr. McDonald's analysis of the racial effect of trades and  
9 volume on District 3 in the enacted plan and the  
10 alternative plan. You have your witness binder in front  
11 of you. Will you turn to tab 22, which is Plaintiffs'  
12 Exhibit 29, and will you turn to page eight of that  
13 exhibit. Does this chart show Dr. McDonald's analysis of  
14 the trades between District 3 and surrounding districts in  
15 the enacted plan?

16 A Yes.

17 Q And Dr. McDonald testified that areas moved into  
18 District 3 were predominantly black in the enacted plan.  
19 Looking at the area moved from District 1 to District 3,  
20 was that area predominantly black?

21 A The area moving from District 1 to District 3 was  
22 43 percent African-American and 44.6, so, no, it's not  
23 predominantly black.

24 Q Was it even majority black?

25 A No.

Morgan - Direct

301

1 Q How about the area moving from District 2 to District  
2 3, was that predominantly black?

3 A 36.7 and 37.9, so, no.

4 Q And was it even majority black?

5 A No.

6 Q And if you look at the last line of this chart, what  
7 does this chart say is the net change to the Third  
8 District's BVAP in percentage terms?

9 A On the bottom line of the chart, the figures say  
10 90.9 percent and 92.0 percent.

11 Q Mr. Morgan, can you show me anywhere on this chart  
12 where an area of at least 92 percent BVAP was added to  
13 District 3 from another district under the enacted plan?

14 A No.

15 Q Why is that?

16 A Because none of the areas were 90.9 or 92 percent.

17 Q And when you consider all the trades made to the  
18 enacted District 3, both the areas moved into the District  
19 3 and areas moved out, what was the overall effect on  
20 District 3's BVAP?

21 A The overall effect was to increase the black  
22 voting-age population by 3.2 percent.

23 Q Will you turn now to the chart on page nine which is  
24 the next page. Is this chart Dr. McDonald's analysis of  
25 the racial effect of trades in the alternative plan?

Morgan - Direct

302

1 A Yes.

2 Q And looking now to the area that was moved from  
3 District 4 to District 3, was that area predominantly  
4 black?

5 A From District 4 to District 3, yes, 75 percent and  
6 75.8 percent, yes.

7 Q How about the area moved from District 7 to District  
8 3, was that also predominantly black?

9 A Yes, 64 percent and 65 percent.

10 Q And according to this chart, what is the net change to  
11 the Third District's BVAP percentage considering all of  
12 the trades in the alternative plan involving District 3?

13 A The line on the bottom says that it's 22.1 and  
14 22.8 percent.

15 Q And what was the overall effect on District 3's BVAP  
16 of those trades in the alternative plan?

17 A The alternative plan reduced the black voting-age  
18 population from the benchmark district by about three  
19 percent.

20 Q So in your view, Mr. Morgan, are these 90.9 and 22.1  
21 percent, net BVAP percentage changes useful in analyzing  
22 these plans?

23 A Not really.

24 Q Why not?

25 A Well, because these are -- they are basically

1 mathematical constructs of the net change numbers.

2 There's no area moved into the district that's as high as  
3 these net numbers imply, and then the flip side of that is  
4 the -- it seems to enhance the differences between the two  
5 plans, but, in fact, as I described, the change was plus  
6 three on one hand, in one case, and minus three to the  
7 black voting-age population in the other case.

8 Q Okay. Mr. Morgan, I'd like to ask you a few questions  
9 about the political effect of the alternative plan. In  
10 any of the reports you reviewed in this case, did Dr.  
11 McDonald analyze the effect of that plan?

12 A No.

13 Q Did you analyze the political effect of the  
14 alternative plan?

15 A Yes.

16 Q What is your opinion about that question?

17 A Well, the alternative plan, particularly because the  
18 differences are in District 2 and District 3, they take  
19 District 2, which was a closely divided tossup 50/50  
20 district, and it turns it into a 55 percent Democratic  
21 district in the alternative plan.

22 Q Have you prepared a chart to document the political  
23 effect of the alternative plan?

24 A Yes.

25 Q Will you turn to tab 11 which is Intervenor

1 Defendants' Exhibit 22. Is that the chart you prepared?

2 JUDGE PAYNE: What tab?

3 MR. GORE: Tab 11, Your Honor.

4 THE WITNESS: Yes.

5 Q Is this chart table nine of your expert report?

6 A Yes.

7 Q And what does the data in this chart show about the  
8 political effect of the alternative plan in District 2?

9 A Well, similar to the other chart, this shows the  
10 political composition of the benchmark district and also  
11 plaintiffs' alternative districts and the difference  
12 between the two for both the 2008 presidential and the  
13 2012 presidential elections.

14 Q What is the change to District 2 under the 2008  
15 presidential election?

16 A District 2, this is Congressman Rigell's district. It  
17 goes from 49.5 percent Democratic to 54.9 percent  
18 Democratic, an increase of 5.3 percent in the Democratic  
19 vote share.

20 Q How about the 2012 election results?

21 A It goes from 50.3 in the presidential to 55.1.

22 Q And is 55 percent the level that Dr. McDonald  
23 testified is highly or safely Democratic?

24 A Yes.

25 Q And how does the alternative plan change -- political



1 change to District 2 compare to the political changes to  
2 other districts?

3 A Well, the change in District 2 in particular is  
4 against the party of the incumbent, so even though  
5 Congressman Rigell is a Republican, his district becomes  
6 5.3 percent more Democratic, and by contrast, there's  
7 another district in the plan that has a large swing.  
8 District 11 at the bottom of the chart is a 5.1 percent  
9 increase in Democratic strength, but this is in favor of  
10 the incumbent.

11 So this District 11, Congressman Connolly's district,  
12 gets five percent more Democratic, and in this case,  
13 District 2 would be the largest change of any district in  
14 the political performance, and it would be against the  
15 party of the incumbent.

16 Q Have you also prepared a chart showing the political  
17 composition of the trade involving District 3 under the  
18 alternative plan?

19 A Yes.

20 Q Will you turn to tab 12, Intervenor Defendants'  
21 Exhibit 23. Is this the chart you prepared?

22 A Yes.

23 Q And is it table 10 of your expert report?

24 A Yes.

25 Q How many people does the alternative plan move from

1 District 3 to District 2?

2 A From District 3 to District 2 it moves 126,980.  
3 That's line four of the chart.

4 Q What is the Democratic vote share in that area?

5 A It's 81 percent.

6 Q How many people does the alternative plan move from  
7 District 2 to District 3?

8 A It moves 45,798 people from District 2 to District 3.  
9 That's basically Hampton.

10 Q What is the Democratic vote share in that area?

11 A 50 percent Democratic in 2008.

12 Q So what is the political effect on District 2 of this  
13 trade in the alternative plan?

14 A Well, it makes District 2 much more Democratic.

15 Q And is the alternative plan then a bipartisan  
16 incumbency protection plan?

17 A No.

18 Q Was the enacted plan?

19 A Yes, as we've discussed before. As I've discussed,  
20 the enacted plan was a bipartisan incumbency protection  
21 plan and also preserved the cores of the district and  
22 protected the incumbents of both parties.

23 Q Mr. Morgan, let's talk about traditional districting  
24 principles. Just by way of background, what are  
25 traditional districting principles?

1 A The traditional districting principles are those  
2 criteria that legislators and map-drawers would commonly  
3 rely on when drawing districts.

4 Q What are the sources of those principles?

5 A The federal Constitution and federal laws, the state  
6 Constitution and state laws, court cases, and legislatures  
7 also -- legislatures also have criteria.

8 Q What are some examples of traditional districting  
9 principles in Virginia?

10 A Well, equal population requirements and compliance  
11 with the federal Voting Rights Act, of course, are  
12 requirements in traditional criteria. In Virginia, also  
13 the Virginia Constitution requires districts to be compact  
14 and contiguous, and I believe the Virginia Supreme Court  
15 has recognized incumbency considerations and community --

16 MR. HAMILTON: Objection, Your Honor. This is a  
17 legal opinion the witness is not qualified to render.

18 MR. GORE: Mr. Morgan is familiar with the legal  
19 principles as a redistrictor. It's background,  
20 simply background --

21 JUDGE PAYNE: Why don't you ask him what the  
22 traditionally accepted redistricting principles are in his  
23 profession or in the -- or that are traditionally used in  
24 redistricting. He doesn't need to explain the source  
25 right now.

1 MR. GORE: Okay.

2 Q Why don't we do this: Did the Virginia Senate adopt  
3 any criteria for drawing congressional districts in 2011?

4 A Yes.

5 Q Will you turn to tab 18 which is Plaintiffs'  
6 Exhibit 5. Are these the 2011 Virginia Senate criteria?

7 A Yes.

8 Q Which party controlled the Virginia Senate when these  
9 criteria were adopted?

10 A The Democrats.

11 Q Which party controlled the General Assembly when it  
12 adopted the enacted plan in 2012?

13 A By that time, the Republicans had control of the state  
14 senate.

15 Q And do you consider the 2011 Senate criteria to be a  
16 reliable and useful guide in describing traditional  
17 districting principles?

18 A Yes. They have the principles listed here.

19 Q Okay.

20 JUDGE PAYNE: Do you know if this was adopted,  
21 you said in 2012?

22 THE WITNESS: I don't know that it was  
23 affirmatively adopted. I don't know if it was repealed.  
24 I mean, the criteria were here.

25 Q And that leads to my next question, Your Honor, which

1 is, first of all, do the Senate criteria list criteria  
2 that are traditionally accepted in your profession as  
3 being traditional districting principles?

4 A Yes. Some I've already mentioned, contiguity and  
5 compactness. At the top, population equality, Voting  
6 Rights Act compliance. Under the discussion of  
7 communities of interest, they talk about communities of  
8 interest around social cultural factors, governmental  
9 jurisdictions, political beliefs, voting trends, and  
10 incumbency considerations under communities of interest.

11 Q Regardless of whether these criteria were readopted in  
12 2012 or somehow repealed, does the fact that they were  
13 adopted by Democrats enhance their usefulness and  
14 reliability in this case?

15 JUDGE PAYNE: What? Are you asking him does it  
16 make it more relevant?

17 MR. GORE: More relevant to judging the plan in  
18 this case.

19 JUDGE PAYNE: All right.

20 A Well, one way to look at it is that these criteria  
21 were adopted by the party opposite to the party that  
22 controlled the General Assembly in 2012, so if you are  
23 looking at the plan enacted by the Republican General  
24 Assembly under the Democratic Senate's criteria, it seems  
25 like that would be useful.

1 JUDGE PAYNE: Are you talking about his -- is  
2 that just your personal opinion, or are you testifying  
3 that that's how one in your profession measures  
4 resolutions of this sort adopted by the out-of-party  
5 power? Are you just giving us your personal opinion?

6 THE WITNESS: Well, Your Honor, I guess I would  
7 say that the criteria -- there's a set of criteria, and it  
8 was adopted by the opposite party, and, you know, it is  
9 just a set of criteria that you can apply to any plan, and  
10 in this case --

11 JUDGE PAYNE: I understand what you just said,  
12 but now listen -- as John Wayne said, listen tight. Are  
13 you saying that this is your personal opinion of what the  
14 effect of a plan adopted by an out-of-party power is, or  
15 is that a principle that is a part of the discipline which  
16 you practice in your expertise? Which one, or neither?

17 THE WITNESS: I say that a plan can be judged on  
18 many criteria, and in this case --

19 JUDGE PAYNE: Try again.

20 THE WITNESS: Yes, Your Honor. I would say that  
21 it's my opinion in this instance that it's useful.

22 Q Did you analyze whether the alternative plan performs  
23 as well under traditional districting principles as the  
24 enacted plan?

25 A Yes.

1 Q And what is your opinion on that question?

2 A The alternative plan -- looking at the criteria on the  
3 Senate criteria, the alternative plan compared to the  
4 enacted plan performs worse, as we've discussed, in the  
5 areas of the incumbency protection and preserving the  
6 cores of districts in the plan.

7 Q Is preserving a core a traditional districting  
8 principle in your opinion?

9 A Yes, and it's mentioned in these Senate criteria as  
10 governmental jurisdictions.

11 Q What is the purpose of preserving the cores of  
12 districts?

13 A Well, preserving the core of districts, it better  
14 facilitates the communities of interest that are formed  
15 around the districts, the benchmark or enacted districts,  
16 and you can measure how well the plans retain the core of  
17 the benchmark districts. So it facilitates better the  
18 communications between constituents and elected members.

19 Q How can preservation of cores be measured?

20 A Basically as a percent of the population of the  
21 preexisting districts. So in this case, you would look at  
22 the population from the previous district that's still in  
23 the new district.

24 Q Will you turn to tab 16 which is Intervenor  
25 Defendants' Exhibit 27. Did you prepare this chart?

1 A Yes.

2 Q And what is this chart?

3 A This shows the preservation of cores in the  
4 benchmark -- from the benchmark districts in the enacted  
5 plan and the alternative plan.

6 Q And what does this chart show about the retention of  
7 districts in the enacted plan and the alternative plan?

8 A It shows that the core retention percentages in the  
9 enacted plan were higher than the core retention  
10 percentages in the alternative plan, in particular in  
11 Districts 2 and 3 which are the two districts that changed  
12 between these two plans.

13 Q Viewing across all 11 districts, how much of the cores  
14 of districts does the enacted plan preserve?

15 A The enacted plan preserves the cores of the districts.  
16 The lowest is 71.2 percent in District 11, and the highest  
17 is 96.2 percent in District 4, so it's a range there, and  
18 I believe nine -- I think I believe I said in my report  
19 that nine of the 11 districts preserve 83 percent or more  
20 of the cores of the districts.

21 Q How much of the cores of Districts 2 and 3 does the  
22 enacted plan preserve?

23 A District 2 preserves 85 percent of the core of  
24 District 2, and District 3 is 83.1 percent of the core.

25 Q And does the enacted plan treat District 3 differently



1 than other districts with respect to preservation of core?

2 A No, it treats it equally.

3 Q How much of the cores of the Districts 2 and 3 does  
4 the alternative plan preserve?

5 A The alternative plan preserves 82.5 percent of  
6 District 2 and only 69.2 percent of District 3.

7 Q And does the alternative plan treat District 3  
8 differently than the other districts with respect to the  
9 preservation of cores?

10 A Yes. District 3 in the alternative plan would be the  
11 lowest preservation of cores of any district in the  
12 alternative plan or even in the enacted plan.

13 Q Mr. Morgan, is protection of incumbents a traditional  
14 redistricting principle?

15 A Yes.

16 Q And have you analyzed the protection of the incumbents  
17 enacted in the alternative plan?

18 A Yes.

19 Q Which plan better protects incumbents?

20 A Well, as we've discussed earlier, the incumbents were  
21 better protected in the enacted plan than the alternative  
22 plan.

23 Q And, Mr. Morgan, is compactness a traditional  
24 redistricting principle?

25 A Yes.

1 Q Did you analyze the compactness of District 3 in the  
2 enacted plan and the alternative plan?

3 A Yes.

4 Q And is there a professionally accepted standard for  
5 judging whether a district is compact?

6 A No, not that I'm aware.

7 Q How do demographers in your field measure compactness?

8 A Well, there are a number of compactness tests that are  
9 run on districts, and those scores are compared.

10 JUDGE O'GRADY: Define core for me, just to make  
11 sure that I'm understanding your tab 14 here. What do you  
12 mean by preserving -- what does the core mean?

13 THE WITNESS: Okay. The core is the population  
14 of the benchmark district. So you would look at what  
15 percentage of the population from the benchmark district  
16 is retained in the new district.

17 JUDGE O'GRADY: Democrats versus Republicans.

18 THE WITNESS: In this case, it's just the  
19 population. That's the measure that this percentage is  
20 showing, so 85 percent of the population is retained from  
21 the previous district.

22 JUDGE DUNCAN: You are talking about movement  
23 relative to the benchmark, what stays closer to the  
24 placement of the benchmark.

25 THE WITNESS: Yes, Your Honor.

1 JUDGE PAYNE: It's an absolute number, not  
2 partisan by party either way.

3 THE WITNESS: Yes, Your Honor, that's correct.

4 Q Just maybe a quick hypothetical. So if the benchmark  
5 district is 500,000 people, and 400,000 of those people  
6 ended up in the new district, what would be the percentage  
7 of retention?

8 A That would be 80 percent. 400,000 out of 500,000.

9 Q And --

10 JUDGE PAYNE: You were on protection of  
11 incumbents.

12 MR. GORE: I think we've asked a couple questions  
13 on that.

14 JUDGE PAYNE: What's this tab?

15 MR. GORE: There's no tab for that. We talked  
16 about that already.

17 Q And, Mr. Morgan, again, which one better protects  
18 incumbents?

19 JUDGE PAYNE: I think he said that.

20 Q We're moving now to compactness, and, Mr. Morgan, is  
21 that a traditional redistricting principle?

22 A Yes.

23 Q And is there a professionally accepted standard for  
24 judging whether a district is compact?

25 A No, not that I'm aware.

1 Q How do demographers in your field measure compactness?

2 A There's a number of compactness tests that are run on  
3 districts, and those results can be compared.

4 Q And have you prepared a chart showing the compactness  
5 scores of enacted District 3 and alternative District 3 on  
6 two of those measures?

7 A Yes, I ran the compactness scores for some test for  
8 all of the districts.

9 Q And will you turn to tab 13 which is Intervenor  
10 Defendants' Exhibit 24. Is this the chart you prepared?

11 A Yes.

12 Q And what does this chart show?

13 A Well, in particular, you are asking me about District  
14 3. It shows that in the enacted plan on the population  
15 polygon test, enacted District 3 is .54 and the  
16 alternative district is .53. So under that test, the  
17 enacted plan is more compact than the alternative plan.

18 Likewise, on the Ehrenburg test, District 3 is .25 in  
19 the enacted plan and .23 in the alternative plan. So  
20 under this test, the enacted plan is more compact than the  
21 alternative plan.

22 Q And did Dr. McDonald also prepare a chart showing  
23 these compactness scores on particular measures?

24 A Yes, he did.

25 Q And will you turn to tab 22, Plaintiffs' Exhibit 29.

1 Will you turn to page seven of that report. Is this the  
2 chart that Dr. McDonald prepared?

3 A Yes.

4 Q And which compactness measures did he use?

5 A In this chart, he's using the Reock test, the  
6 Polsby-Popper test, and the Schwartzberg test.

7 Q And are those measures more reliable than the measures  
8 you used?

9 A No.

10 Q Do they measure different things than the measures you  
11 used?

12 A Yes, the compactness test measures different things.

13 Q What does Dr. McDonald's chart show about District 3  
14 on the pre-measures in his chart?

15 A His chart in District 3, he shows a Reock score of .19  
16 for the adopted plan and .22 for the alternative plan. So  
17 that's a difference of .03, and the Polsby-Popper plan is  
18 .08 in the enacted plan and .11 in the alternative plan.  
19 So under those two measures, the alternative plan is more  
20 compact.

21 Then on the Schwartzberg test, the numbers in the  
22 chart say 3.07 for the adopted plan, and the number in the  
23 chart says 2.04, but we have acknowledged that there was a  
24 correction to that, that the actual number is 2.61, and in  
25 the case of the Schwartzberg test, the lower number is

1 more compact. So in this case, the Schwartzberg test, the  
2 alternative plan is more compact.

3 Q And are the differences on these measures between the  
4 enacted District 3 and alternative District 3 significant,  
5 in your opinion?

6 A No.

7 Q Why not?

8 JUDGE PAYNE: Under whose measurement test, or  
9 one used by Dr. McDonald?

10 Q So on the Reock score, you said there's a difference  
11 between the alternative District 3 and enacted District 3  
12 of .03?

13 A The difference in the Reock score is .19 and .22, so  
14 the difference is .03.

15 Q And in your professional judgment, is that difference  
16 in scores on those measures significant?

17 A No. It's higher in one, but it's very close.

18 Q And how about on a Polsby-Popper measure?

19 A It's .08 and .11. It's .03 difference. It is  
20 different, but it's not significant.

21 Q And how about on the Schwartzberg measure?

22 A Well, that one shows a greater difference at .261, but  
23 this is a different scale, but there is a difference.

24 Q And is that difference significant in your  
25 professional judgment?

1 A I don't think so.

2 Q Do you have an opinion as to whether enacted District  
3 3 or alternative District 3 is more compact?

4 A Well, as I point out in the other compactness scores,  
5 the enacted District 3 was more compact, and on these  
6 tests, the alternative district is more compact, and these  
7 compactness measures are at odds. So I don't see how you  
8 could say one is completely more compact than the other.

9 Q Mr. Morgan, I want to ask you now about contiguity.

10 JUDGE PAYNE: Excuse me just a minute. In your  
11 profession, practice of your discipline, what is the  
12 difference between the measures that you used on the one  
13 hand and the measures that Dr. McDonald used on the other  
14 in your view?

15 THE WITNESS: Well, the compactness tests measure  
16 different things. Generally these compactness measures  
17 will compare the shape of a district to an idealized  
18 shape, like a circle or some combination of that.

19 Some of these tests also look at population  
20 compared to a different district shape or an idealized  
21 district shape. They measure slightly different things,  
22 and, again, some of these can be at odds with each other.  
23 There's a whole range of these compactness tests.

24 JUDGE PAYNE: Why did you choose the ones you  
25 chose to use in your table 11 in Exhibit 24 of the

1 intervenor defendants?

2 THE WITNESS: Well, in the mapping software that  
3 I have, I think there are eight compactness tests, and  
4 those were two additional ones that just show that Dr.  
5 McDonald was asserting that the compactness of the  
6 alternative district was greater than the compactness of  
7 the enacted district, and I was showing some scores where  
8 that's not the case.

9 JUDGE PAYNE: All right.

10 Q Mr. Morgan, is contiguity a traditional districting  
11 principle?

12 A Yes.

13 Q Have you analyzed whether enacted District and  
14 alternative District 3 satisfy that principle?

15 A They are both contiguous.

16 Q And how are they both contiguous?

17 A Both the enacted plan and the alternative plan are  
18 contiguous over water without a connecting bridge.

19 Q And what is one example of where that's the case in  
20 alternative District 3?

21 A Well, you can see it on the map that's here. The map  
22 on the left shows the enacted district, and the map on the  
23 right shows the alternative district, and at the very top  
24 end of there, there's -- Surry County connects across the  
25 James River to James City County, and there's no bridge at



1 that point in the contiguity, but, again, both districts  
2 are contiguous.

3 Q Mr. Morgan, what is a split locality?

4 A A split locality is like a county or independent city  
5 that would be divided by a districting plan. So it would  
6 be split between district, say, A and district B.

7 Q And is avoiding split localities a traditional  
8 districting principle?

9 A Well, looking at the Senate criteria, they identify  
10 the localities as a community of interest on governmental  
11 jurisdictions, so split localities, avoiding splits could  
12 be a traditional criteria.

13 Q And does the Senate criteria say avoiding split  
14 localities was a principle entitled to any special weight?

15 A Well, the Senate criteria specifically said that they  
16 were entitled to no greater weight than any other  
17 community of interest.

18 Q Is it possible to avoid splitting localities entirely  
19 in a congressional redistricting plan?

20 A Well, it's possible, but it's not likely because of  
21 the zero population requirement.

22 Q Did the enacted plan improve on the number of split  
23 localities compared to the benchmark plan?

24 A Between the enacted plan and the benchmark plan, yes.

25 Q And do you recall how many localities were split in

1 the benchmark plan?

2 A I think there were 19 split in the benchmark plan.

3 Q And how many in the enacted plan?

4 A 14 involving population.

5 Q And have you prepared a chart showing the number of  
6 split localities in the enacted and alternative plans?

7 A Yes.

8 Q Will you turn to tab 14 which is Intervenor  
9 Defendants' Exhibit 25. Is this the chart you prepared?

10 A Yes.

11 Q And what does this chart show about the number of  
12 split localities in the enacted plan and the alternative  
13 plan?

14 A This lists the localities, the counties and  
15 independent cities in the Commonwealth that were split in  
16 the enacted plan and the plaintiffs' alternative plan.

17 Q And do the enacted plan and the alternative plan split  
18 the same localities without affecting population?

19 A The -- they split the same number of localities that  
20 affect no population on the bottom of the chart. There  
21 are three localities, Isle of Wight, James City, and  
22 Suffolk, that are split in both plans equally.

23 Q And is there any traditional districting principles  
24 against splitting localities in a way that does not affect  
25 population?

1 A Not that I'm aware of, and certainly not in my  
2 experience in Virginia.

3 Q In your professional opinion, is the fact the  
4 alternative plan splits one fewer locality than the  
5 enacted plan significant?

6 A In the chart, it shows there are 14 split localities  
7 in the enacted plan and 13 in the alternative plan. It's  
8 one fewer. It's not significant.

9 Q And is there any difference in the character of the  
10 split localities in the enacted plan and the alternative  
11 plan?

12 A Well, as we've discussed, when discussing the cores of  
13 districts, the enacted plan's split localities as regards  
14 to District 3, the enacted plan splits Hampton and Newport  
15 News and Norfolk, Prince George, Henrico, and Richmond.

16 Those are all split in District 3. All of those have  
17 been split under the benchmark plan. In the alternative  
18 plan, the alternative plan does not split Hampton, does  
19 not split Norfolk, which were split under the benchmark  
20 plan, but it introduces a new split in Portsmouth, and  
21 that was a split that was not contained in the benchmark  
22 plan.

23 Q So by keeping splits in localities that were split in  
24 the benchmark plan, does the enacted plan preserve  
25 communities of interest?

1 A Yes. It preserves communities of interest that are  
2 formed around the benchmark districts, and it retained --  
3 it also helps explain why the enacted plan shows a higher  
4 retention of the cores, because it keeps some of the same  
5 splits that were communities of interest formed around the  
6 benchmark districts.

7 Q Does the alternative plan's split of Portsmouth split  
8 communities of interest?

9 A It splits a very small portion of Portsmouth away from  
10 District 3, and it creates a different community of  
11 interest.

12 Q Mr. Morgan, did you also analyze the number of split  
13 VTDs in the enacted plan and the alternative plan?

14 A Yes.

15 Q And does the enacted plan improve on the number of  
16 split VTDs as compared to the benchmark plan?

17 A The enacted plan improves on the number of split VTDs  
18 as compared to the benchmark plan, yes.

19 Q Do you remember how many split VTDs there were in the  
20 benchmark plan?

21 A I think 26, but I think it's in my report.

22 Q Sure. If you'd like to turn to your report which is  
23 tab two, Intervenor Defendants' Exhibit 13. I believe  
24 your discussion of this point is on page 21.

25 A Yes. There are identified 26 split VTDs in the

1 benchmark plan.

2 Q And how many split VTDs are there in the enacted plan?

3 A There are ten split VTDs in the enacted plan involving  
4 population.

5 Q And in your experience, Mr. Morgan, is it possible to  
6 split fewer than ten VTDs affecting population in an  
7 11th District Congressional plan such as the enacted plan?

8 A Not ordinarily because of the zero population  
9 requirement. You would expect that there would be some  
10 VTDs split, and at a minimum, one for each division of the  
11 district.

12 Q Since we're in your expert report, will you turn to  
13 page 22. Is this table here, table 13, a chart you  
14 prepared?

15 A Yes.

16 Q And what does this chart show?

17 A This chart shows the split VTDs in the enacted plan  
18 and the alternative plan.

19 Q And how many split VTDs are there in those two plans?

20 A Well, there are -- they have the same number of split  
21 VTDs involving population. There are ten in the enacted  
22 plan and ten in the alternative plan. There are some  
23 additional VTDs involving no population that are split  
24 differently in the enacted and alternative plan.

25 Q Mr. Morgan, I'd like to ask you a few questions about

1 the plaintiffs' packing quota allegations. Can you turn  
2 to tab 32 which is Intervenor Defendants' Demonstrative 8.  
3 Mr. Morgan, what was the BVAP in benchmark District 3?

4 A The chart, it shows it's 53.1, 53.9 of the inclusive  
5 method in the benchmark district.

6 Q What is the BVAP in enacted District 3?

7 A 56.3.

8 Q And what is the difference in those two BVAPs?

9 A 3.2 percent.

10 Q Plaintiffs have alleged that this BVAP increase is a  
11 result of a quota or impermissible effort to attract black  
12 voters. Do you agree with that allegation?

13 A No.

14 Q What is the basis of your opinion?

15 A Well, as we've discussed before, the enacted plan is a  
16 bipartisan incumbency protection plan, and it has  
17 political considerations, and the preservation of cores  
18 explain how the plan was drawn, and in doing so, the black  
19 voting-age population increased.

20 Q And are you aware of any evidence in this case that  
21 moving this 3.2 percent BVAP from one district to another  
22 district would improve black voters' ability to elect  
23 candidates of their choice in the other district?

24 A Moving the three percent, not that I'm aware of.

25 Q And did this 3.2 percent increase in District 3's BVAP

1 subordinate traditional districting principles to race?

2 A No, it didn't subordinate the traditional principles  
3 to race for the reasons I've discussed.

4 Q And have you seen any alternative plans in this case  
5 that preserve precisely the 53.1 percent benchmark BVAP  
6 and better comply with traditional districting principles  
7 in the enacted plan?

8 A I haven't seen an alternative that does that.

9 Q And did the General Assembly have reason to believe  
10 that this slight 3.2 percent increase in District 3's BVAP  
11 was impermissible?

12 A No. I don't think the General Assembly had reason to  
13 believe that this slight increase was impermissible.

14 Q What was the General Assembly's experience in 2011  
15 with passing a plan for the House of Delegates?

16 A Well, based on the DOJ submission, the House of  
17 Delegates passed a plan in the House of Delegates that had  
18 12 majority-minority districts, and the House of  
19 Delegates' districts in all of those 12 were 55 percent or  
20 higher in black voting-age strength, and in some cases,  
21 the black voting-age population was increased above the  
22 benchmark level, and that House of Delegates plan was  
23 passed with bipartisan support in the House of Delegates.  
24 It received the support of eight of 12 minority members,  
25 and also it was pre-cleared by the Justice Department.

1 Q And did the General Assembly in 2011 have alternative  
2 House of Delegates districting plans before it that  
3 preserve the majority black districts but at levels lower  
4 than 55 percent BVAP?

5 A Yes. The House of Delegates had alternative plans  
6 before it that had lower black voting-age strength.  
7 Again, this is -- in the DOJ submission, they list some of  
8 those alternatives, but it shows the plan, that it was  
9 enacted and it was pre-cleared.

10 Q And did the General Assembly conduct a racial bloc  
11 voting analysis for the House of Delegates' plan?

12 A No.

13 Q And what is your opinion about this House of Delegates  
14 experience and how it relates to the enacted Congressional  
15 plan?

16 A Well, the House of Delegates experience, the members  
17 of the General Assembly had passed a plan. Again, the  
18 districts -- the minority districts were 55 percent or  
19 higher in black voting-age strengths for all the  
20 districts, and as I said, it receives minority support in  
21 the legislative vote. So, you know, when it came time for  
22 the congressional plan, that might have been something the  
23 General Assembly would have looked at.

24 Q And are you basing that opinion on your personal  
25 knowledge?



1 A No.

2 Q What are you basing it on?

3 A The DOJ submission.

4 Q And while you were working on the House of Delegates  
5 plan, did anyone ever tell you there was a 55 percent BVAP  
6 quota for majority districts?

7 A No.

8 Q Did the General Assembly apply a BVAP quota when it  
9 drew the House of Delegates' plan?

10 A No.

11 Q And have you discussed the General Assembly's approach  
12 to complying with Section 5 in the enacted Congressional  
13 plan with any delegates or persons involved in drafting  
14 that plan?

15 A The Congressional plan? No.

16 Q And did the General Assembly apply a BVAP quota when  
17 it drew the enacted Congressional plan?

18 MR. HAMILTON: Object to the form of the  
19 question, the lack of foundation. The witness just said  
20 he doesn't know.

21 JUDGE PAYNE: Lack of foundation.

22 Q Based on the public records that you reviewed, did you  
23 receive any evidence that the General Assembly applied a  
24 BVAP quota when it drew the enacted Congressional plan?

25 A I haven't seen any evidence of that in the public

1 record.

2 Q Have you reviewed the report of the independent  
3 commission on redistricting established by Governor  
4 McDonnell?

5 A Yes.

6 Q And was Dr. McDonald an advisor or consultant to that  
7 commission?

8 A Yes.

9 Q And did that commission perform a racial bloc voting  
10 analysis?

11 A No.

12 Q And what proposals did the commission make for the  
13 BVAP in Congressional District 3?

14 A I think there were three different proposals. One I  
15 think we've discussed was at 55 percent black voting-age  
16 strength. One was at 53 percent. I don't have the  
17 information in front of me.

18 Q And to your knowledge, did anyone criticize the  
19 commission for proposing to increase District 3's BVAP to  
20 55.1 percent in one of its options?

21 A Not that I know of.

22 Q Based on anything you reviewed, did anyone say, to  
23 your knowledge, that the commission had used a 55 percent  
24 quota?

25 A No, not that I know of.

1 Q So, Mr. Morgan, based on everything you reviewed in  
2 this case, did the enacted plan subordinate traditional  
3 principles to race?

4 A No, for the reasons I've discussed earlier.

5 Q Would the General Assembly have had reasons to make  
6 the changes to District 3 under the enacted plan  
7 regardless of the race of the affected voters?

8 A Yes. As I discussed, preserving the core of the  
9 districts, the political considerations, and incumbency  
10 protection explain the plan. I looked at the 2008  
11 presidential election in particular.

12 JUDGE PAYNE: I think he's been through all this,  
13 hasn't he?

14 MR. GORE: Yes. No further questions, Your  
15 Honor.

16

17 CROSS-EXAMINATION

18 BY MR. HAMILTON:

19 Q Good morning, Mr. Morgan.

20 A Good morning.

21 Q Before we get into all the details here, let's just  
22 start with your -- where you finished, and I think we're  
23 on common ground here, but let's see. You'll agree with  
24 me that in adopting the enacted plan, the General Assembly  
25 considered race; right?

1 A Well, I think that the General Assembly considered  
2 race --

3 Q The question is real simple. Yes or no, did they  
4 consider race?

5 A I think so. As it relates to, you know, compliance  
6 with Section 5 and Section 2, yes.

7 Q In fact, all else was secondary to that; right?

8 A I would disagree with that.

9 Q Do you have the notebook in front of you there?

10 A I have the witness notebook for the -- it says Morgan  
11 Witness Binder. That's what I have.

12 JUDGE PAYNE: What exhibits are you referring us  
13 to, Mr. Hamilton?

14 MR. HAMILTON: Tab two in the witness notebook  
15 prepared by Mr. Gore.

16 JUDGE PAYNE: The one we've been working out of.

17 MR. HAMILTON: That's correct, and for the  
18 record, it's Intervenor Defendants' Exhibit 13. It's Mr.  
19 Morgan's report.

20 JUDGE PAYNE: Okay. And the question is what?

21 Q Are you on page 25 of your report, sir?

22 A Okay.

23 Q In fact, you wrote that the Senate criteria treated  
24 compliance of the Voting Rights Act, including compliance  
25 with protection against unwarranted retrogression or

1 dilution of racial or ethnic minority voting strength, as  
2 the highest priority for the enacted plan after compliance  
3 with the constitutional equal population guarantees;  
4 correct?

5 A I believe I was quoting the Senate criteria, yes.

6 Q Okay. And, in fact, were those Senate criteria  
7 applied in preparing the enacted plan, sir?

8 A Were the senate criteria applied in preparing the  
9 enacted plan? The Senate criteria were available. They  
10 may have been applied.

11 Q You don't know?

12 A I can't say for certain.

13 JUDGE DUNCAN: Are we talking about Plaintiffs'  
14 Exhibit 5, the Senate committee resolution that's in  
15 the --

16 MR. HAMILTON: We are, Your Honor. It's  
17 cross-referenced. I'm actually discussing at the moment  
18 his expert report which cross-references --

19 JUDGE DUNCAN: Yes. I was asking if my  
20 understanding of the cross-reference was correct.

21 MR. HAMILTON: You are exactly right, Your Honor.

22 Q All right. In 2011, the Democratic Senate enacted the  
23 Senate criteria or adopted the Senate criteria; correct?

24 A Yes.

25 Q That's when the Democrats controlled the Senate?

1 A Yes.

2 Q And then the enacted plan was adopted by the  
3 Republican-controlled legislature; correct?

4 A I believe the final passage was in 2012, in January,  
5 yes.

6 Q There is -- the Republican legislature, after it took  
7 control, never readopted that plan; isn't that true?

8 JUDGE PAYNE: Never readopted what plan?

9 MR. HAMILTON: I'm sorry, the Senate criteria.

10 JUDGE PAYNE: Never readopted the criteria.

11 MR. HAMILTON: Correct. Thank you, Your Honor.

12 A I'm not aware that the Senate readopted the Senate  
13 criteria.

14 Q In fact, there's no evidence that Delegate Janis or  
15 anyone else ever referred to or applied, let's say  
16 referred to the Senate criteria in the legislative  
17 hearings concerning the adopted plan; isn't that true?

18 A I'm sorry. You are asking me about the legislative  
19 hearings?

20 Q Correct.

21 A I don't have all the legislative hearings in front of  
22 me.

23 Q Let's go back to your -- let's talk about your  
24 background a little bit. You graduated with a BA in  
25 history from the University of Chicago; correct?

1 A Yes.

2 Q An excellent institution, but you didn't attend the  
3 University of Chicago Law School, and you're not a lawyer;  
4 right?

5 A No.

6 Q And I ask, because in various places in your expert  
7 report, you describe various Voting Rights Act or  
8 constitutional cases. That's all just background; isn't  
9 that right? You are not offering a legal opinion?

10 A No, I'm not offering a legal opinion. I look at cases  
11 on my own because they're relevant to drawing districts,  
12 and in this instance, I looked at some cases that were  
13 mentioned in the briefs or were relevant here.

14 Q The answer to the question is, you are not offering a  
15 legal opinion?

16 A I'm not offering a legal opinion.

17 Q Thank you. You don't consider yourself an expert in  
18 the Voting Rights Act, do you?

19 A No.

20 Q And, in fact, you've never taken a course in  
21 statistics; is that right?

22 A No.

23 MR. HAMILTON: It's not right?

24 JUDGE PAYNE: That's not right?

25 THE WITNESS: It is right. I'm sorry. I have

1 not taken a course in statistics in college.

2 Q Now, I think you testified on direct examination  
3 yesterday that you worked on a number of other  
4 redistricting matters before getting involved in this  
5 litigation. Do you recall that testimony?

6 A Yes.

7 Q Sometimes you are hired by individual legislators;  
8 correct?

9 A Individual legislators basically representing a caucus  
10 of legislators. In some instances, it could be a single  
11 legislator, yes.

12 Q So the answer is yes, sometimes you are hired by  
13 individual single legislators?

14 A Yes.

15 Q Sometimes you are hired by legislative caucuses;  
16 correct?

17 A Yes.

18 Q In every one of those cases, you've been working for  
19 or been paid by the Republican legislators or caucuses;  
20 isn't that true?

21 A Well, again --

22 JUDGE PAYNE: That's a fairly straightforward  
23 question. Yes or no?

24 THE WITNESS: Legislators, yes. If you imply  
25 legislators at the county level, I've worked with entire



1 counties, but legislators, yes. Generally I'm retained by  
2 Republican members, yes.

3 Q People who pay you are Republicans?

4 A Yes.

5 Q You've never been paid by a Democrat legislator or  
6 caucus?

7 A No.

8 Q And it's fair to say, as you put it in your  
9 deposition, you generally work on the Republican side of  
10 the equation in redistricting. That's fair, isn't it?

11 A Generally, and, again, as I said also in my  
12 deposition, there are times when I work with Democrats as  
13 well.

14 Q Worked with Democrats. You've never been hired by a  
15 Democratic legislator or caucus?

16 JUDGE PAYNE: We've been there and done that.

17 THE WITNESS: Correct.

18 JUDGE PAYNE: Please understand, I think we're  
19 listening. We may not look like it, but we are.

20 Q Sir, you testified you were involved in assisting with  
21 redistricting in the House of Delegates in 2011/2012?

22 A Yes.

23 Q You actually drew some of those plans?

24 A Yes.

25 Q Paid about \$25,000 for your work?

1 A That sounds about right. It might have ended up being  
2 a little more than that.

3 Q And you were hired in that instance by the Republican  
4 caucus; right?

5 A I was hired by attorneys for the -- I was hired by  
6 Chris Marston who is an attorney for the Republican  
7 caucus. I worked closely with delegates in the House, if  
8 that answers the question.

9 Q In fact, you reported to Mr. Marston?

10 A I reported to Mr. Marston and the delegates. I worked  
11 very closely on this project with the delegates directly.

12 Q I believe you testified that you didn't work with any  
13 members of the Virginia General Assembly on its  
14 Congressional plan in either 2011 or 2012; did I hear you  
15 correctly?

16 A On the Congressional plan, I wasn't part of the  
17 Congressional redistricting process.

18 Q So you didn't work with any members of the Virginia  
19 General Assembly on the Congressional plan in 2011 or  
20 2012; yes or no?

21 A I didn't work on that, no.

22 Q And you didn't work with any staff on the  
23 Congressional plan; correct?

24 A No, I didn't work on the Congressional plan.

25 JUDGE PAYNE: I think he said it in direct and

1 several times now. He didn't work on the Congressional  
2 plan. I think we got that.

3 Q So you don't have any firsthand knowledge working on  
4 the Congressional plan about what Delegate Janis did or  
5 did not intend?

6 A No.

7 Q You don't have any knowledge from anyone else in the  
8 General Assembly about the intention behind the enacted  
9 plan?

10 A The Congressional plan, no. I saw Delegate Janis one  
11 time in 2011, and he was on his way out to seek a county  
12 office. The last time I saw him.

13 Q In preparing your report, which is Intervenor  
14 Defendants' Exhibit 13, let's talk about what you did or  
15 didn't do in preparing that report. First of all, I take  
16 it you didn't talk with any of the legislators who  
17 actually prepared the map including Delegate Janis?

18 A I didn't -- I mentioned in my deposition I had one  
19 conversation with Delegate Bell to ask him to get the  
20 Department of Legislative Services data that had been  
21 requested in this case, and that's the only contact I had  
22 with any members regarding the Congressional plan, and  
23 even in that case, we didn't speak of anything about that.

24 Q No email, no phone calls, no texts --

25 JUDGE PAYNE: I think none means none.

1 MR. HAMILTON: I'm sorry?

2 JUDGE PAYNE: None means none. You don't need to  
3 enumerate what all could possibly be encompassed by the  
4 word "none." We'll take it at face value.

5 Q You also didn't -- in preparing your report, you  
6 didn't call any of the staff members or Mr. Marston or  
7 anyone else to ask about considerations that went into  
8 preparing the enacted plan; correct?

9 A No.

10 Q You actually knew all these people and knew their  
11 phone number, but during the preparation of your report,  
12 that wasn't something you thought was necessary to do?

13 A That wasn't something I thought was necessary to do.

14 Q Fair to say that you -- it is fair to say, isn't it,  
15 that you actually, from personal knowledge, don't know why  
16 the General Assembly increased the BVAP in CD 3, using the  
17 exclusive method 56.3, or the inclusive 57.2 percent; you  
18 don't know?

19 JUDGE O'GRADY: Other than the public record?

20 JUDGE DUNCAN: He said from personal knowledge.

21 JUDGE O'GRADY: Personal knowledge?

22 MR. HAMILTON: Personal knowledge is what I'm  
23 asking.

24 A I don't have personal knowledge of that. What I  
25 analyzed in my report and what I've testified to is

1 information in the public record, in particular the DOJ  
2 submission which I looked at.

3 Q You don't really know what the General Assembly  
4 intended by drawing the plan one way or the other based on  
5 the public record -- or other than based on what your  
6 report says?

7 JUDGE PAYNE: I think he's answered that before.  
8 Let's go on. Let's focus on what really is important to  
9 you. He's answered several times what he didn't do.

10 Q Sir, let's talk about the legislative record. You  
11 know there's a transcript of a hearing before the General  
12 Assembly. That's a public record; correct?

13 A Transcript of the hearing before the General Assembly,  
14 yes.

15 Q You didn't look at the transcripts of the hearings  
16 before the public -- that are in the public record in the  
17 course of preparing your report; isn't that true?

18 A I didn't reference any of those hearing transcripts in  
19 my report.

20 Q And other than those --

21 JUDGE PAYNE: Excuse me.

22 JUDGE DUNCAN: I didn't understand that to be  
23 responsive. Could you repeat your question so I make sure  
24 I follow.

25 MR. HAMILTON: Thank you, Your Honor.

1 Q My question was, in preparing your report --

2 JUDGE DUNCAN: Did you look at was your question.  
3 You said did not reference.

4 MR. HAMILTON: Okay, thank you.

5 Q Did you look at or review any of the legislative  
6 record other than what might have been attached to the  
7 briefing that the lawyers have filed here?

8 A I looked at the DOJ submission, and I understand that  
9 there are hearing transcripts. I didn't look at them for  
10 my report.

11 Q Thank you, sir. You also didn't conduct a racial bloc  
12 voting analysis?

13 A No.

14 Q You know the term? You know what it is?

15 A Yes.

16 Q It's an important factor in any Section 5 case. You  
17 agree with that; right?

18 A I assume it can be, yes.

19 Q And you agree that it's an important thing to do when  
20 a legislature undertakes a redistricting effort?

21 A Well, I'm sure it can be, but, again, as far as I can  
22 tell, the General Assembly did not include a racial bloc  
23 voting analysis with its DOJ submission.

24 Q In fact, you, yourself, have never conducted a racial  
25 bloc voting analysis at any time in any context; right?

1 A Not as that's understood, that's correct.

2 Q In your deposition, you commented it seemed like a  
3 very complicated process?

4 A Yes.

5 Q The fact is, you don't know how to do a racial bloc  
6 voting analysis, just not something you do.

7 A It's not something I do, no.

8 Q So as a result -- we can look through your report, but  
9 there's nowhere in your report where you analyze the  
10 minimum number of black voting-age population residents  
11 needed to allow black voters to elect candidates of their  
12 choice in the enacted CD 3; correct?

13 A That's correct.

14 Q So as you sit here today, you can't tell us and you  
15 won't be offering an opinion, you haven't offered an  
16 opinion about whether or not African-American population  
17 in CD 3 could have elected their candidate of choice with  
18 53 percent BVAP. We just don't know that.

19 JUDGE PAYNE: Those are two different questions.  
20 One is whether he's going to testify. Now it's whether  
21 you know it. So do you want to break it up?

22 MR. HAMILTON: I apologize for the inarticulate  
23 question, Your Honor.

24 Q As you sit here today, you can't tell us whether or  
25 not the African-American population in CD 3 could have

1 elected their candidate of choice with a 53 percent BVAP?

2 A I'm not testifying to that. I cannot say that today.

3 Q And you can't say whether or not they could have  
4 elected their candidate of choice with 50.1 percent as in  
5 the alternative plan; correct? You don't know the answer  
6 to that because you haven't conducted a racial bloc voting  
7 analysis?

8 JUDGE PAYNE: Doesn't that follow from not having  
9 conducted the racial bloc voting analysis and from what he  
10 said before?

11 MR. HAMILTON: It might, Your Honor. I'm not  
12 sure. I want to make sure this witness and I are not in  
13 disagreement. I just have two or three questions on this.

14 A For the same reasons, yes. I don't have an opinion on  
15 that.

16 Q And not to belabor the point, but if we flipped around  
17 the other way, we could go up to 55 or to 57 percent BVAP,  
18 and you still wouldn't be able to tell us do they have the  
19 ability to elect, because in the absence of a racial bloc  
20 voting analysis, we just don't know; isn't that right?

21 A Again, the question is a little complicated as you've  
22 described it to me, but following the vein of your  
23 questioning, I agree.

24 Q Thank you. Now, you didn't analyze whether white  
25 portions of communities were split apart and not included



1 in CD 3; correct?

2 A White portions of communities were split apart and not  
3 included in CD 3?

4 Q Yes, sir.

5 A I guess I didn't analyze that.

6 Q Do you recall -- you were an expert in the Fayette  
7 County case in Georgia?

8 A Yes. It was the Fayette County case in Georgia. I  
9 was an expert for the defendants. I filed reports in that  
10 case.

11 Q Earlier this year.

12 A Yes. Well, actually in 2013 was the initial. There  
13 was some last-minute reports filed in 2014, yeah.

14 Q Thank you. If that happened, if white portions of  
15 communities were split apart and not included in CD 3,  
16 that could be evidence of not paying heed to traditional  
17 redistricting principles; right?

18 A If white portions of communities were split apart from  
19 communities in general?

20 Q You agree that if it's necessary to split out white  
21 population from a district or from communities in order to  
22 create a majority-minority district, that's evidence of  
23 not paying heed to traditional redistricting principles;  
24 isn't that true?

25 A You are asking me about the Fayette case?

1 Q I'm asking you about the general proposition.

2 A In general terms, it could be if there's not some  
3 other factor that accounts for the differences.

4 Q And that was one of the factors that you looked at in  
5 the Fayette case; correct?

6 A In the Fayette case, I was not looking --

7 Q Yes or no answer. That was one of the factors you  
8 looked at in the Fayette case; isn't that true?

9 A Yes, in addition to other factors.

10 Q Thank you. In fact, you relied on that factor, among  
11 others, to conclude that race was a predominant factor in  
12 a Section 2 case in Fayette County, Georgia; correct?

13 A Again, among other factors including population  
14 equality. There was --

15 JUDGE PAYNE: Is your answer to begin with yes or  
16 no?

17 THE WITNESS: It was one of the factors, yes.

18 Q You didn't analyze that factor here in your report;  
19 correct?

20 A I didn't analyze that in my report. Dr. McDonald had  
21 looked at the --

22 Q The question is whether you analyzed it in your  
23 report.

24 A No, I didn't analyze that in my report.

25 Q Thank you. Now, in that case, you looked at

1 compactness; true?

2 A In the Fayette County case, compactness measures were  
3 run. We looked at that, yeah.

4 Q And you used a couple of the same factors, same tests  
5 that were used in this case; correct?

6 A Yes. There were, I think, three tests used in the  
7 Fayette County case --

8 MR. HAMILTON: Your Honor, I move to strike. The  
9 question was yes or no. He answered the --

10 JUDGE PAYNE: Just try to answer the question as  
11 best you can, and if they need to follow up with the  
12 explanation, they'll do that on redirect.

13 Q In the Fayette case, you used the Reock test; correct?

14 A Yes.

15 Q You used the Polsby-Popper test; correct?

16 A Yes.

17 Q You said they complement each other; correct?

18 A I did say that in that case, yes.

19 Q You didn't use these other tests that you mentioned  
20 this morning in your deposition testimony; do you recall  
21 that?

22 A I used another compactness test, and they weren't the  
23 two that were in the report.

24 Q And I believe in response to questions from the Court,  
25 you testified that -- I think the Court asked why did you

1 choose the tests that you chose, and did I understand you  
2 to say you chose -- you looked through all the eight tests  
3 to try to find some that came out differently than Mr.  
4 Morgan so you could make the point that compactness  
5 sometimes varies depending on these tests. Is that the  
6 purpose of identifying those alternative tests?

7 A Well, there were two alternative tests, and there were  
8 eight in the program. I suppose I could have looked at  
9 all eight. Three of them were included. I included two  
10 additional ones.

11 JUDGE PAYNE: Listen to the question. He's  
12 asking you why it was you chose to use those, and in  
13 particular he's saying did you choose to them simply for  
14 the purpose of showing that different measurements would  
15 produce different results. Isn't that your question?

16 MR. HAMILTON: Exactly.

17 A Yes, different measures produce different results,  
18 yes.

19 Q The enacted plan -- changing subjects here a little on  
20 you. The enacted plan splits up Newport News between CD 2  
21 and CD 3; correct?

22 A The enacted plan, Newport News, yes.

23 Q The same is true of Hampton. The enacted plan splits  
24 Hampton between CD 2 and CD 3.

25 A Yes.

1 Q It's true, isn't it, that the racial split of those  
2 portions of Newport News into those districts could be  
3 telling of whether race was a predominant purpose. Could  
4 be telling. Isn't that true?

5 A It could be, but I haven't seen that in any report.

6 Q Do you recall -- you agree it's relevant and it could  
7 be telling; right?

8 A It could be telling, but, again, I haven't seen that  
9 in any report.

10 Q You can look at the plans, but -- and you may not have  
11 seen that in any report, but you didn't talk to anyone in  
12 the legislature about that treatment of Newport News or  
13 Hampton.

14 A I didn't talk to anyone in the legislature about the  
15 treatment of Newport News and Hampton, that's correct.

16 Q Now, you are not offering the Court an opinion on  
17 whether CD 3 is narrowly tailored in a constitutional  
18 sense under the *Shaw v. Reno* case; correct?

19 A I'm not offering that opinion.

20 Q You are not familiar with the concept of narrow  
21 tailoring?

22 A I've learned a little more about it, but as a legal  
23 doctrine, I'm not offering an opinion on that.

24 Q In your report -- let's see. Yesterday you testified,  
25 or maybe it was this morning you testified that you worked

1 with members of the General Assembly on the House of  
2 Delegates' districting plan; correct?

3 A Yes.

4 Q And in your report, you discuss the House of  
5 Delegates' plan; right?

6 A I discuss the House of Delegates' plan from the DOJ  
7 submission, yes.

8 Q Let's have you look at -- it's in the witness notebook  
9 in front of you. It's tab two.

10 MR. HAMILTON: And for the record, it's  
11 Intervenor Defendant Exhibit 13 at page 26. If I might  
12 ask that the ELMO be turned on, Mr. Neal.

13 JUDGE PAYNE: What page are you on, Mr. Hamilton?

14 MR. HAMILTON: 26 and 27, Your Honor. If we  
15 could zoom in on the highlighted text.

16 Q All right. Now, you state that the Virginia's enacted  
17 plan for the House of Delegates, and I quote, had a black  
18 VAP of above 55 percent in all 12 majority black  
19 districts, close quote. Did I read that correctly, sir?

20 A That is the first highlighted one. Yes, that's  
21 correct.

22 Q And then you further explain that the General  
23 Assembly, quote, enacted a House of Delegates' districting  
24 plan with a 55 percent black VAP as a floor, close quote.  
25 Did I read that correctly?

1 MR. GORE: Objection, Your Honor. I believe he's  
2 misquoted it. He needs to read the entire quote.

3 JUDGE PAYNE: What paragraph are you on?

4 MR. HAMILTON: It's the second -- let's see, in  
5 the paragraph --

6 MR. GORE: Second highlighted portion, Your  
7 Honor.

8 JUDGE PAYNE: I can't see the highlighted  
9 portion. We don't have the screens up here.

10 MR. GORE: The paragraph on the bottom that  
11 starts "Thus."

12 THE COURT: Thus is where we are, and your  
13 objection is that he did not read correctly --

14 MR. GORE: Mr. Hamilton didn't read the portion  
15 of line one that says "with strong support of bipartisan  
16 and black legislators."

17 MR. HAMILTON: I'm happy to read the entire  
18 quote, Your Honor.

19 JUDGE PAYNE: All right.

20 Q So we'll start from the beginning, read that sentence.  
21 "Thus, the General Assembly enacted, with strong support  
22 of bipartisan and black legislators, a House of Delegates'  
23 districting plan with a 55 percent black VAP," which means  
24 voting-age population, "as the floor for black majority  
25 districts subject to Justice Department preclearance under

1 Section 5 including districts within the geography covered  
2 by Congressional District 3." Did I read that correctly,  
3 sir?

4 A Yes, that sentence is in the report.

5 Q Floor means a minimum number. That's what floor means  
6 in the way you used it; right?

7 A Well, after --

8 Q Yes or no, sir?

9 A Yes.

10 Q Let's return to your report. Let's look for a minute  
11 at the last sentence on page 26, and, again, it breaks on  
12 to page 27, and the last sentence says, and I'll read it,  
13 "The General Assembly, therefore, had ample reason to  
14 believe that legislators of both parties, including black  
15 legislators, viewed the 55 percent black VAP for the House  
16 of Delegates' district as appropriate to obtain Section 5  
17 preclearance, even if it meant raising the black VAP above  
18 the levels in the benchmark plan." Do you see that?

19 A Yes.

20 Q Continue reading to the next sentence, "The General  
21 Assembly acted in accordance with that view for the  
22 Congressional districts and adopted the enacted plan with  
23 a District 3 black VAP at 56.3." Did I read that  
24 correctly?

25 A Yes.



1 Q When you say "that view" in that last sentence, the  
2 General Assembly acted in an accordance with that view,  
3 that's a reference to the previous sentence of 55 percent  
4 black VAP was appropriate to obtain Section 5  
5 preclearance; right? That's what you meant by that?

6 A Well, again, my statement was that the General  
7 Assembly had ample reason to believe that legislators of  
8 both parties viewed that.

9 Q That's what you meant by "that view"?

10 A Again, I'm saying that there was information before --

11 JUDGE PAYNE: I think the question is, do you  
12 know what the term -- when you say "that view" in the last  
13 sentence of that paragraph, what view are you referring  
14 to? Read the sentence that you are referring to or the  
15 view you are referring to is all he's asking, I think.

16 THE WITNESS: Okay.

17 JUDGE PAYNE: Is that it?

18 MR. HAMILTON: That's it, Your Honor.

19 JUDGE PAYNE: What view are you talking about?

20 THE WITNESS: That the legislators viewed the  
21 55 percent black voting age as appropriate to obtain  
22 Section 5 preclearance, and, again, I had established  
23 previously that this information came from the DOJ  
24 submission, and the previous sentence --

25 MR. HAMILTON: Strike as nonresponsive, Your

1 Honor.

2 JUDGE PAYNE: Again, we'll not pay attention to  
3 that.

4 Q The simple fact is that the General Assembly found  
5 appropriate a 55 percent floor; right? We can argue about  
6 whether that's right or wrong, but according to your  
7 report, that's what your conclusion is, that they found --

8 MR. GORE: Objection, Your Honor. That  
9 mischaracterizes the testimony and the report. Mr. Morgan  
10 hasn't purported to say what the General Assembly found.

11 MR. HAMILTON: Your Honor, I think he actually  
12 did --

13 JUDGE PAYNE: The report speaks for itself and we  
14 can pretty well read that, what it says, I think, and to  
15 the extent the report is quoting somebody or somebody  
16 else, we can figure that out.

17 MR. HAMILTON: Thank you, Your Honor.

18 Q The fact is, based on your research and your report,  
19 no racial bloc voting analysis had been done by the  
20 General Assembly. You know that?

21 JUDGE PAYNE: I think we all know that by now.  
22 Really and truly, can we stipulate that there was no  
23 racial bloc voting analysis?

24 MR. HAMILTON: I certainly stipulate that.

25 JUDGE PAYNE: By this witness or by the General

1 Assembly that we know about and move on. Turn mother's  
2 picture to the wall on this and go. Let's go.

3 Q Can I turn your attention to tab 35 in the notebook.

4 A In my notebook here?

5 Q In the witness notebook that's in front of you.

6 A Sure.

7 JUDGE PAYNE: That's Intervenor Defendants'  
8 Demonstrative 11.

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

10 JUDGE PAYNE: All right.

11 Q Yesterday afternoon you testified with respect to the  
12 population swaps. I think you also talked about that this  
13 morning between the various Congressional districts that  
14 are displayed on this table. Do you recall that  
15 testimony?

16 A Yes.

17 Q For each swap you compared two things: The black  
18 voting-age population change as a result of the swap and  
19 the change in political performance as a result of the  
20 swap. Do you recall that testimony?

21 A Yes.

22 Q In three of the four instances, you concluded that the  
23 difference was essentially the same; do you remember that?

24 A Yes, in that the political -- yes. As I understand  
25 your question, you are saying that the politics and the

1 racial components were similar. I concluded that, yes.

2 Q And with respect to three of these four swaps?

3 A Yes.

4 Q You'll agree with me that this isn't evidence that  
5 politics predominated the decision. At best, if we were  
6 to agree with your approach and your analysis, that at  
7 best, this is evidence that these swaps could be explained  
8 either by race or by politics; right? They are  
9 essentially the same. We can't tell which predominated  
10 over the other?

11 A I'm not sure I would agree with that as you are  
12 stating it.

13 Q Okay. If the swaps are essentially the same with  
14 respect to the impact on race and the impact on politics  
15 and that were our only evidence, we can't tell whether  
16 race or politics predominated; isn't that true?

17 MR. GORE: Objection, Your Honor. We can't tell,  
18 it's ambiguous. I don't understand the question.

19 JUDGE PAYNE: You object to the form of the  
20 question?

21 MR. GORE: Form of the question.

22 JUDGE PAYNE: Why don't you rephrase to get where  
23 you are trying to get.

24 Q I'm simply trying to point, and maybe it's obvious and  
25 I might be beating a dead horse here, but if you are

1 comparing these swaps, I think the point that you made  
2 yesterday was that the impact on politics and the impact  
3 on race was essentially the same. Isn't that the point  
4 you made yesterday?

5 A That they were -- yeah, they were very similar. They  
6 were correlated, yes.

7 Q So if we wanted to discern, like I believe this Court  
8 is going to have to, whether or not race predominated over  
9 other factors, this doesn't help us one way or the other.  
10 It doesn't explain that it was politics predominating over  
11 race. At best, it just shows it's neutral; isn't that  
12 true?

13 A I could agree with that.

14 Q Thank you. So we'd have to look at other things in  
15 the record in order to draw the conclusion, like you've  
16 done in your report, to draw the conclusion about whether  
17 race predominated or not?

18 A I feel like I should say more on this, but I won't.

19 JUDGE PAYNE: Mr. Gore will make a note. You can  
20 follow up with it if you need to follow up.

21 Q You testified yesterday about the data set that you  
22 received from Dr. McDonald; do you recall that testimony?

23 A Yes.

24 Q You said it was flawed because it contained 2012 VTD  
25 data set instead of the 2010 VTD data set; do you recall

1 that?

2 A Among other flaws, yes.

3 Q And you included 2012 political data in your analysis,  
4 didn't you?

5 A Yes.

6 Q And you're going to have to use the 2012 VTD set or  
7 make some adjustments if you're going to overlay the 2012  
8 political results on the VTD data set; isn't that true?

9 A Yes. The data set that I used for this was  
10 de-allocated to the bloc level and, therefore, would have  
11 been allocated back into the districts and accounted for  
12 that variance. That is the 2012 precincts were broken  
13 down and then reset into the 2010 VTDs for this analysis.

14 MR. HAMILTON: Move to strike, Your Honor. I  
15 didn't ask him what he did. The question is --

16 JUDGE PAYNE: I think it's a fair and responsive  
17 answer to your question. Overruled.

18 Q The fact is, the VTDs changed between 2010 and 2012;  
19 right?

20 A Yes.

21 Q Because of all the splits in the enacted plan among  
22 other things?

23 A There's many reasons the VTDs change. The enacted  
24 splits are only one factor. There are many more VTDs in  
25 2012 than 2010.

1 Q Now, you mention that you made a mistake; do you  
2 recall that?

3 A Yes, I discussed that, and it was discussed  
4 previously, and as soon as it was brought to my attention,  
5 I offered a correction.

6 Q The mistake was in coding certain VTDs as to whether  
7 they were or were not in the benchmark Congressional  
8 District 3; correct?

9 A Again, yes, using the NCEC data which was --

10 Q Sir, I'm not asking you that. The mistake was in  
11 coding certain VTDs as to whether they were or were not in  
12 the benchmark CD. That's the mistake you made; isn't that  
13 true?

14 A Yes.

15 Q And you were coding those so that you could prepare  
16 what later became Intervenor Defendants' Exhibit 50;  
17 right? That's why you were doing that coding, to create  
18 that analysis?

19 A Not precisely. I was doing this coding also to verify  
20 and re-create Dr. McDonald's tables.

21 Q Okay. And the purpose was to compare what was in  
22 enacted CD 3 to what was in benchmark CD 3 to either  
23 dispute Mr. McDonald's table or create your own competing  
24 analysis; right?

25 A Again, I was trying to track the -- the VTDs, as they

1 were in the NCEC data set, which were not the VTDs in  
2 2010, I was trying to track those which, again, was not  
3 included in the data set that was sent. So I was doing my  
4 best job to deal with the 2012 VTDs as they related to the  
5 enacted and alternative plans.

6 Q The data that you received from Dr. McDonald didn't  
7 contain benchmark indicators, whether particular VTDs were  
8 in or out of the benchmark; right?

9 A No. The data set included the 2012 VTDs. They had  
10 information on just the enacted districts, and that was  
11 it. And also, there's lots of other information there.

12 JUDGE PAYNE: Excuse me, just a minute, Mr.  
13 Hamilton. If your point is something to do with this  
14 notion, then it's okay to continue it, and that is this:  
15 If your point is to say that the mistake he made has an  
16 impact other than he's testifying to, then you can go on  
17 with it.

18 Otherwise, he's testified on the basis of the  
19 corrections, so it doesn't make any difference whether he  
20 made a mistake. He, like every other expert, makes  
21 mistakes, and even judges make them.

22 MR. HAMILTON: Of course. So do lawyers.

23 JUDGE PAYNE: Are you going to try to go  
24 somewhere else with it?

25 MR. HAMILTON: Of course.



1 JUDGE PAYNE: Okay. Well, get there, because  
2 we're having trouble following you focusing on just the  
3 mistake.

4 MR. HAMILTON: And I'm sorry. I think I'm  
5 arguing with the witness here a little bit because I'm  
6 trying to get a simple piece of foundation for where I'm  
7 going.

8 JUDGE PAYNE: Just ask the question, and if he  
9 has a problem, he will tell you.

10 Q You miscoded the entire city of Petersburg, didn't  
11 you?

12 A Yes.

13 Q That's what you were talking about yesterday?

14 A Yes.

15 Q So if we were to look at, and I won't take the Courts'  
16 time, but Exhibit 56 is an extract from the data set that  
17 you produced to us the day before yesterday that  
18 demonstrates the error, we could look at that.

19 A Could I see that, please? I have not seen that.

20 Q Take a look at Plaintiffs' Exhibit 56.

21 A I don't know if that's in my binder.

22 JUDGE PAYNE: Do you have any of those binders  
23 over there, Mr. Clifton? Plaintiffs' Exhibit what?

24 MR. HAMILTON: 56.

25 JUDGE PAYNE: In the second volume of the

1 Plaintiffs' Exhibits near the back. My 56 just has -- oh,  
2 I see. It's behind the disk. Do you see that?

3 THE WITNESS: Are these by tabs?

4 JUDGE PAYNE: Yeah, there's a tab on the  
5 right-hand side, and it's all the way near the back. The  
6 whole thing to the back. Is there no tab on there?

7 THE WITNESS: There's a tab. Which exhibit,  
8 please?

9 Q Let's start with Exhibit 54. It's one in a plastic  
10 sleeve.

11 A Exhibit 54, the exhibit list stops at 53.

12 Q If you flip the binder over -- don't look at the  
13 index -- you'll find it.

14 A Okay. So it wasn't in the contents.

15 Q That's correct.

16 A Okay.

17 Q And why don't you pull that out. It's in a plastic  
18 sleeve.

19 A Okay, sure.

20 Q You recall providing data set the day before  
21 yesterday?

22 A I recall providing a data set that was the NCEC data  
23 with some additional information, yes.

24 Q That was the data set that you had added some  
25 additional information. This is where the mistake was

1 made. I don't want to belabor that, but this is a  
2 printout of the entire database which shows the coding  
3 where you coded it whether it was inside or outside the  
4 benchmark; right?

5 A It shows that among other things.

6 Q Sure. There's a lot things on here. Exhibit 56,  
7 which we were originally looking at, is simply a blowup of  
8 the Petersburg precincts to show how those were coded. So  
9 if we were to look at --

10 A I don't have that exhibit in front of me. May I see  
11 that, please?

12 JUDGE PAYNE: Let's don't get testy with each  
13 other. 56 is near the back, and there are two parts to  
14 it. One is a disk, and the other part is a printout.

15 THE WITNESS: Okay, thank you. Now I see that,  
16 yes.

17 Q And you can look either at Exhibit 54, which is the  
18 big, long spreadsheet, but at my age it's hard to read  
19 things that small, or you can look at 56 which is simply a  
20 screen shot of one part of that. One way or the other,  
21 you can look at it.

22 A I see that exhibit. I see it.

23 Q And this is the seven -- if we look at Petersburg,  
24 you'll agree with me that you coded those as being in  
25 benchmark CD 3?

1 A Yeah.

2 Q That was the mistake?

3 A That was one of the mistakes, yeah.

4 Q And you created this corrected Exhibit 50 after you  
5 realized that you made that mistake?

6 A Yes.

7 JUDGE PAYNE: He created Exhibit 50?

8 MR. HAMILTON: Corrected Intervenor Defendants'  
9 Exhibit 50.

10 JUDGE PAYNE: After he realized he made that  
11 mistake.

12 MR. HAMILTON: That's right.

13 THE WITNESS: Yes.

14 Q And what you did with corrected Intervenor Defendants'  
15 Exhibit 50 was simply correct this mistake. I think you  
16 said there was one other one that you caught as well?

17 A Yes, there was one other one.

18 Q And you corrected those mistakes and then recreated  
19 Intervenor Defendants' Exhibit 50?

20 A Yes.

21 Q Is that accurate now to the best of your knowledge?

22 A Yes.

23 Q Are you familiar with the Suburban Park VTD in  
24 Norfolk?

25 A Yes.

1 Q That was in benchmark CD 3, wasn't it?

2 A Yes.

3 Q But in your coding on your spreadsheet that you used  
4 to create corrected Intervenor Defendant Exhibit 50, you  
5 didn't have a benchmark assignment at all for that?

6 A For Suburban Park?

7 Q In Norfolk.

8 A Okay. Then I guess there's another error.

9 Q Can you confirm that?

10 A Sure.

11 Q Same is true for Richmond city, 309?

12 A That I'm not sure about.

13 Q Take a look at the exhibit.

14 A So the problem is, Richmond renumbered its VTDs  
15 between 2010 and 2012. So without actually going to the  
16 geographic software, I'm not sure whether 309 is in or out  
17 of the district. It's a totally different data set. This  
18 NCEC data is the 2012, and Richmond renumbered its VTDs,  
19 so I can't actually say with just the number whether it's  
20 in or out. I would need the geographic software to verify  
21 that.

22 Q My question wasn't whether it's in or out. The  
23 question is, you didn't provide any designation for it in  
24 the coding; isn't that true? You can look at Exhibit 54,  
25 which is the entire data set, if you'd like to confirm

1 that.

2 A Well, the way I would view it is, if there's no  
3 designation, then it would be not in District 3.

4 Q There is -- okay. You didn't include a designation.  
5 You concede that?

6 A I did not include a designation, and to my point, I  
7 don't know because I don't have the geographic software in  
8 front of me.

9 Q Fair enough. And the same is true for the Willard VTD  
10 in Norfolk; right? You didn't provide any kind of  
11 benchmark designation for that one either.

12 A I disagree with that.

13 Q Okay. All right, so there were additional --

14 JUDGE PAYNE: What?

15 MR. HAMILTON: I'm just moving on.

16 JUDGE PAYNE: He was answering your question.

17 MR. HAMILTON: Oh, I'm sorry. I thought he did  
18 answer my question. He said he disagreed.

19 A I disagree with that, because there are two VTDs named  
20 Willard in this data set which gets to my point I brought  
21 up before that there are --

22 JUDGE PAYNE: Because there are two different  
23 names.

24 THE WITNESS: Yes. There's Willard and Willard.  
25 They are both in the set.

1 MR. HAMILTON: Your Honor, at this point I just  
2 move to strike.

3 JUDGE PAYNE: Well, I understand, but he was in  
4 the middle of his answer, and I think you've answered  
5 enough now. Mr. Gore can pick that up if he needs to.

6 Q Let's look at the Intervenor Defendants' Corrected  
7 Exhibit 50. This is the document, after you've gone  
8 through this analysis, that you believe corrected the  
9 mistakes that you generated; right?

10 JUDGE PAYNE: Is that in the -- it's in another  
11 notebook, isn't it?

12 MR. HAMILTON: I actually think it's in the  
13 witness notebook.

14 JUDGE DUNCAN: Tab 17.

15 JUDGE PAYNE: Yes, it is.

16 THE WITNESS: In the witness notebook.

17 JUDGE PAYNE: In the witness notebook. It's tab  
18 17.

19 THE WITNESS: Okay.

20 Q So this is a table that you prepared?

21 A Yes.

22 Q In order to address the VTD analysis prepared by Dr.  
23 McDonald; correct?

24 A Yes.

25 Q And the headings are a little confusing, but let's

1 take a look at them. The far right-hand column is  
2 entitled "In localities adjacent to enacted District 3."  
3 Do you see that?

4 A I see that.

5 Q We might consider that to be, at least the way Dr.  
6 McDonald was using it, it's kind of the pool, the pool of  
7 available precincts that we were selecting from, and then  
8 you were going to compare in the next column over the VTDs  
9 that were actually added into the plan; isn't that true?

10 MR. GORE: Object to the form. He can't comment  
11 on what Dr. McDonald thought about this.

12 JUDGE PAYNE: Why don't you ask him what he meant  
13 by it.

14 Q What did you mean by "in localities adjacent to  
15 enacted CD 3"?

16 A What I meant was what Dr. McDonald meant. In his  
17 report, he identified specific localities that were  
18 adjacent to District 3. They did not include two  
19 localities that were in District 3, it did not include two  
20 localities that were adjacent to District 3 as discussed  
21 in his report. In addition --

22 MR. HAMILTON: Your Honor, this is not responsive  
23 to the question.

24 JUDGE PAYNE: Well, I'm not sure you didn't ask  
25 it in such a way as to open it up.



1 MR. HAMILTON: Okay. Go ahead.

2 A To verify, I'm not making any statement about whether  
3 I agree with the characterization of localities adjacent  
4 to enacted District 3 as a pool of precincts. I'm  
5 replicating Dr. McDonald's report so that I could verify  
6 his numbers.

7 JUDGE PAYNE: I think you answered it now.

8 Q So the next column over, which is entitled "In enacted  
9 District 3 but not in benchmark three," those are the ones  
10 that you've identified -- the purpose of this column is to  
11 identify those that were selected; correct? Selected and  
12 included in enacted District 3.

13 A I don't know about selected. I would say that I  
14 represent that they were included in the enacted district  
15 but were not in the benchmark.

16 Q So the idea of your table here, Corrected Exhibit 3,  
17 was to examine the racial composition and political  
18 performance of the various precincts added to CD 3?

19 A No.

20 Q Correct?

21 A No.

22 Q Well, if we look at it in the middle line, the 65.4 on  
23 the far right-hand column of average Democratic vote  
24 performance, that is what Dr. McDonald -- that's a copy  
25 from Dr. McDonald's report; correct?

1 A No.

2 Q That number?

3 A No.

4 Q You added the Democratic performance?

5 A Yes.

6 Q And the 65.4 average Democratic vote percentage  
7 represents the average Democratic vote percentage in  
8 localities adjacent to enacted District 3, at least as  
9 described by Dr. McDonald?

10 A Yes.

11 Q And then if we look one box over to the left, there's  
12 a number 77.6; do you see that?

13 A Yes.

14 Q That's the average Democratic vote percentage of the  
15 VTDs in enacted CD 3 but not in benchmark CD 3?

16 A Yes.

17 Q And so if we compare those two, and I believe you did  
18 this on your direct examination, your point is at least if  
19 we use this analysis, this analytical structure of the  
20 VTDs in localities adjacent to enacted District 3 as  
21 described by Dr. McDonald, the enacted plan picks the more  
22 Democratic ones.

23 A I would disagree with the word "pick" because you are  
24 implying that all of the Democratic VTDs in the adjacent  
25 districts were available to be, quote unquote, picked, and

1 as I've discussed, they are not nearby. Some of these are  
2 30 miles away.

3 Q We're going to talk about that in a minute, but for  
4 the moment, forget the word "picked." Say "added." As it  
5 somehow ended up, whether they were selected or not,  
6 whether they were picked or not, they somehow ended up in  
7 the enacted plan, and the ones that ended up in the  
8 enacted plan, according to your analysis, reflected an  
9 average Democratic vote percentage of 77.6 percent;  
10 correct?

11 A Yes.

12 Q Thank you, sir. Now, the line down below that, the  
13 next line down, the average BVAP percentage here in the  
14 far right column, average non-Hispanic black voting-age  
15 population percentage in localities adjacent to enacted CD  
16 3, 43.5 percent; correct?

17 A Yes.

18 Q And those that somehow made it into the enacted CD 3  
19 but that weren't in the benchmark CD 3, that average  
20 non-Hispanic black voting-age population jumped to 56.3;  
21 correct?

22 A I think you mixed up the columns, but it's 43.3 is the  
23 number on the bottom right chart.

24 JUDGE PAYNE: 43.5.

25 A 43.5, and then in the enacted but not in the

1 benchmark, 56.3.

2 Q The ones that ended up in the enacted plan had a  
3 higher concentration of black voting-age population?

4 A That's what the chart shows, yeah.

5 Q The difference between these percentages, if we look  
6 at the difference between 77.6 and 65.4, and I don't mean  
7 this to be a math test, but that's about a 12.2  
8 difference; right?

9 A It is a 12.2.

10 Q The difference between 56.3 and 43.5 is 12.8 percent  
11 difference; correct?

12 A Yes.

13 Q Your analysis doesn't really tell us whether race or  
14 politics predominated here, just looking at that, at this  
15 corrected Exhibit 50. Can't really say politics  
16 predominated, can't really say race predominated; right?

17 A Okay.

18 Q Now, one of the things that's not on this chart is  
19 VTDs that were in benchmark CD 3 but that somehow got  
20 dropped or were not -- didn't end up in enacted  
21 Congressional District 3; correct? That's not reflected  
22 in this chart?

23 A I don't think it's reflected in this chart.

24 Q You looked at what was included but not what was  
25 excluded from the benchmark.

1 A Well --

2 JUDGE PAYNE: Those are two different questions.

3 MR. HAMILTON: Let me break it in two then.

4 Q Which chart shows us what was included in enacted  
5 District 3 but not benchmark District 3? That's the third  
6 column; right?

7 A Yes.

8 Q And it does not include what was in benchmark three  
9 but not in enacted District 3.

10 A Right. I don't have that data in this table.

11 Q Thank you. All right. I think you testified this  
12 morning that the alternative plan, you were comparing the  
13 alternative plan and the enacted plan and how they  
14 complied with traditional redistricting criteria. Do you  
15 recall that?

16 A Yes.

17 Q And one of the criteria is compactness, and I think  
18 you already talked about that?

19 A Yes.

20 Q At least if we use the Reock and Polsby-Popper test  
21 that you've used yourself elsewhere, the enacted plan is  
22 the least compact of all the -- the enacted CD 3 is the  
23 least compact of all the adopted Congressional districts  
24 as measured by those two tests; correct?

25 MR. GORE: Object to form. He said at least.

1 I'm not following the question.

2 MR. HAMILTON: Strike the word at least.

3 Q As measured by those two, CD 3 is the -- has the  
4 least -- is the least compact district of all the adopted  
5 Congressional districts in the plan; is that true?

6 A I would have to look at that. Is there a chart? We  
7 looked at my chart. Can I look at that chart again?

8 Q Of course.

9 JUDGE PAYNE: Do you want his -- are you asking  
10 him about his measurements or Dr. McDonald's measurements?

11 MR. HAMILTON: I believe they're the same, Your  
12 Honor.

13 THE WITNESS: Dr. McDonald's measurements are the  
14 ones I would be referring to. So I'm looking for Dr.  
15 McDonald's report, I guess?

16 MR. HAMILTON: That's right.

17 JUDGE PAYNE: What is it? What tab is it?

18 MR. HAMILTON: Give me just a moment, Your Honor.  
19 I'll find it.

20 THE WITNESS: It's in my binder. It's tab --  
21 somewhere between Exhibit 27 and 30.

22 MR. HAMILTON: It's Plaintiffs' Exhibit 27.

23 THE WITNESS: Which is tab 20 on my binder.

24 Q At page seven, and in the witness notebook, it's tab  
25 20.

1 A So you are asking me to agree that District 3 is the  
2 least compact --

3 Q I'm going to limit the question to the two tests that  
4 you used in Fayette County, Georgia, the Reock and  
5 Polsby-Popper test. But under those two tests that you  
6 used, you'll agree with me that CD 3 is the least compact  
7 of all the adopted Congressional districts in the enacted  
8 plan?

9 A Okay, so --

10 Q We're not disagreeing with that?

11 A I want to verify it. Under the Polsby-Popper,  
12 District 3 is .08, and the next closest one is District 11  
13 which is .09 under Polsby-Popper.

14 Q Which was the least?

15 A So District 3 is the least.

16 Q Thank you.

17 A And then District 3 is .19 on Reock, and the next  
18 lowest is District 9 which is .20.

19 Q Which is the least?

20 A It's the least, yes.

21 Q So you agree with me under the enacted plan as  
22 measured by the two tests that you've used before, CD 3 is  
23 the least compact of all the adopted districts?

24 A Yes, I agree.

25 Q So let's look at the Schwartzberg test as well. It's

1 the least compact there as well; right?

2 A No. I can't say that with certainty, because the  
3 number in the chart is different from the number that I  
4 ran.

5 Q Okay. All right --

6 A I'm sorry. To rephrase, I think that's correct. It's  
7 3.07 and 3.06. I think the difference was on the  
8 alternative plan, so, yeah, that is true as well.

9 Q So CD 3 is the least compact as measured by  
10 Schwartzberg as well?

11 A Because District 11 is 3.06, and District 3 is 3.07,  
12 and the Schwartzberg as the higher would be less compact.  
13 So by one hundredth of a point, yes.

14 Q The answer is the least compact as measured by all  
15 three --

16 JUDGE PAYNE: You know, was somebody going to ask  
17 him whether it makes any difference how compact it is and  
18 what the significance is between 3.6 and 3.7?

19 MR. HAMILTON: The question has already been  
20 asked, Your Honor.

21 JUDGE PAYNE: I didn't pick up the answer.

22 MR. HAMILTON: Okay. I'm sure we'll be  
23 addressing it.

24 JUDGE PAYNE: I'll ask him later.

25 Q Contiguity is another traditional redistricting



1 criteria. You mentioned that this morning?

2 A Yes.

3 Q You'll agree with me that there are more areas of CD 3  
4 that are contiguous by land in the alternative plan than  
5 under the enacted plan; that's true, isn't it?

6 A I don't know. I've not performed that analysis.

7 Q Okay. So you don't have a conclusion one way or the  
8 other?

9 A Sounds reasonable, but I have to assume so, because  
10 there's -- Newport News is the change that we've talked  
11 about, so I would assume so.

12 Q Now, we talked this morning about locality splits a  
13 little bit in your direct examination. CD 3, under the  
14 alternative plan, contributes to fewer locality splits  
15 than CD 3 under the enacted plan; right? We're not going  
16 to disagree about that?

17 A Locality splits, correct.

18 Q So we can look at that. There's a demonstrative.  
19 It's one of the tables that's up there. This is  
20 Plaintiffs' Exhibit 29 at page four. It's on the screen.  
21 You'll agree with me that -- this is VTD splits. Wrong  
22 slide.

23 A Yeah, those are VTD splits.

24 Q I don't think she has the right slide. Never mind.  
25 But you'll agree with me the alternative plan contributes

1 to fewer locality splits than -- in CD 3 than under the  
2 enacted plan; right? Locality splits.

3 A Yes. We've discussed that. There's one fewer  
4 locality split in the alternative plan than the enacted  
5 district.

6 Q And if we look at what is up on the screen, the same  
7 is true with respect to VTD splits.

8 A Well, again, I take -- I take issue with the way this  
9 is presented.

10 Q But the question is, the number of VTD splits listed  
11 by district, at least in Plaintiffs' Exhibit 29 at page  
12 four as displayed on the screen, there are far more VTD  
13 splits in CD 3 than any other; isn't that true?

14 MR. GORE: Object to the question. He's asking  
15 about what the chart shows, not what the actual facts are.

16 MR. HAMILTON: Let me rephrase.

17 JUDGE PAYNE: Object to the form of the question.  
18 Rephrase it.

19 MR. HAMILTON: I will rephrase it, Your Honor.

20 JUDGE PAYNE: All right.

21 Q The number of VTD splits in CD 3 is greater than the  
22 number of VTD splits in any other district in the enacted  
23 plan; isn't that true? We're not going to disagree about  
24 that?

25 A In the enacted plan and the alternative plan, yes.

1 Q My question was about the enacted plan.

2 A The enacted plan, yes.

3 Q Now, you mentioned in your testimony this morning that  
4 preserving district cores is the traditional redistricting  
5 criteria; do you recall that?

6 A Yes.

7 Q I think you said that that meant including most of the  
8 residents, that's how you measure it, by how many  
9 residents remain from the benchmark in the new enacted  
10 district; correct?

11 A That's my understanding, yes.

12 Q And you referred to the Virginia Senate criteria,  
13 which is Plaintiffs' Exhibit 5. I think it's in the  
14 notebook here. Why don't we take a look at that. It's  
15 tab 18 in your witness notebook. Do you have that in  
16 front you, sir?

17 A Yes.

18 Q You'll agree with me that the phrase cores of  
19 districts or district cores does not appear anywhere in  
20 this document; right? Those words.

21 A I don't believe that those words, as stated, appear in  
22 the document.

23 Q And there's a paragraph on communities of interest,  
24 but that's a little different concept, isn't it?

25 A Not necessarily. The communities of interest here are

1 governmental jurisdictions which I take to mean the  
2 governmental jurisdictions such as benchmark districts and  
3 localities.

4 Q All right. Dr. McDonald analyzed all of the number of  
5 residents or people who moved in and out of CD 3 under the  
6 enacted plan; right?

7 A Yes.

8 Q And maybe we could look at his analysis. It's  
9 Plaintiffs' Exhibit Number 27.

10 A Okay.

11 Q I'm sorry, I don't have a tab number.

12 JUDGE PAYNE: Tab 20. McDonald's report?

13 MR. HAMILTON: That's it.

14 THE WITNESS: So we're in the witness binder,  
15 okay.

16 JUDGE PAYNE: In your witness binder, it's tab  
17 20.

18 Q Tab 20, and the table, I think you testified this  
19 morning, is on page 14, table five, and I put it up on the  
20 screen for the Court.

21 A I didn't reference this table previously.

22 Q All right. Let's take a look at it. You've looked at  
23 these numbers before; right?

24 A Yes.

25 Q You don't dispute that they're accurate?

1 A They're accurate.

2 Q Let's look at the population movement. That's on page  
3 15, the next page over.

4 A Okay.

5 Q The second column here shows the number of residents  
6 who were taken out of their previous district under the  
7 benchmark and placed in the new district under the enacted  
8 plan; right?

9 A Could you rephrase the question.

10 Q Sure. See the column that says total population?

11 A Yes.

12 Q That is all the people who were affected by these  
13 swaps; right?

14 A Yes.

15 Q And if we totaled up all of the residents in that  
16 column, the sum is 181,540. Sounds about right, doesn't  
17 it?

18 A Yes.

19 Q So 181,540 people no longer comprise the core of their  
20 previous districts; right? That's how many people were  
21 moved?

22 A In all of the trades, yes.

23 Q And also, that at least in part, CD 3 could increase  
24 by 63,976 people.

25 A So Congressional District 3, yes, it needed to gain

1 population. It gained 63,976 to reach ideal population;  
2 yes.

3 Q Let's return to your table, your report, which is  
4 exhibit, Intervenor Exhibit 13 at page 24. This is out of  
5 your report. I think you testified about this table this  
6 morning.

7 JUDGE PAYNE: Is that tab two?

8 MR. HAMILTON: That is tab two. In the witness  
9 notebook it's tab two, for the record, Intervenor  
10 Defendants' Exhibit 13, and we're looking at the table at  
11 the bottom of page four. For your convenience, it's up on  
12 the screen as well. This is your calculation --

13 JUDGE O'GRADY: What page are you on, sir?

14 MR. HAMILTON: Page 24.

15 THE WITNESS: Thank you. It's table 14.

16 JUDGE O'GRADY: Thank you.

17 THE WITNESS: Yes, that's my table.

18 Q This is your analysis?

19 A Yes.

20 Q And you are comparing the preservation of cores of the  
21 benchmark districts in the enacted plan against the  
22 preservation of cores in the benchmark districts in the  
23 alternative plan; correct?

24 A Yes.

25 Q According to your calculation, an average of

1 86 percent of residents in districts came from the same  
2 benchmark districts under the enacted plan; correct?

3 A That is an average of the scores of each of the  
4 districts, yes.

5 Q And according to your calculation, 84.5 percent of the  
6 residents in districts came from the same benchmark  
7 districts under the alternative plan?

8 A Yes, the alternative plan keeps nine of the 11  
9 districts the same.

10 Q The alternative plan, on average, is about 1.5 percent  
11 lower than the enacted plan?

12 A Yes.

13 Q Okay. Let's talk for a minute about racial balance.  
14 If I've understood your testimony correctly, it's your  
15 view that the alternative plan does not result in greater  
16 racial balance than the enacted plan; is that right?  
17 That's what you said in your report?

18 A I believe that's what I said in my report.

19 Q And you define significantly greater racial balance to  
20 mean a district that is not racially identifiable; is that  
21 right?

22 A Can you show me in my report? I think I understand  
23 that, but I'd like to see the report.

24 Q Sure. Tab two, Intervenor Defendants' Exhibit 13,  
25 page 27, I think is where you want to look.

1 A Okay.

2 Q You define significantly greater racial balance to  
3 mean a district that is not racially identifiable.

4 A Well, that's not the definition of significantly  
5 greater racial balance. The sentence here is talking  
6 about a district.

7 Q Would you read the sentence?

8 A Sure. As I understand it, the purpose of the  
9 requirement is to cure an alleged racial gerrymander and  
10 turn the gerrymandered district into one that is not  
11 racially identifiable.

12 Q So in your view, a majority-minority district is, by  
13 definition, a racially identifiable district?

14 A In general, I would say yes. It's something -- it's a  
15 metric that could be identified. You would see that a  
16 district is a majority-minority district by looking at the  
17 census data, yes.

18 Q A majority-minority district, by your definition, is a  
19 racially identifiable district. Yes? That's your  
20 definition.

21 A That's not my only definition, but as you've described  
22 it that is -- that seems to make sense.

23 Q So the only way that you can achieve what you describe  
24 as significantly greater racial balance is by going from a  
25 majority-minority district to a district that is majority



1 non-black; is that your view?

2 A Well, there may be other ways to measure whether  
3 something is racially identifiable.

4 Q Sir, a majority white district is racially  
5 identifiable, isn't it? Identifiable by a different race?

6 A Sure.

7 Q Significantly greater racial balance could mean a more  
8 even distribution of racial groups across districts;  
9 right? That's one possible definition?

10 A I suppose that's a possible definition, yes.

11 Q Another possible definition of greater racial balance  
12 might mean a more even distribution of racial groups  
13 within a district; isn't that true?

14 MR. GORE: I object, Your Honor. This is all  
15 turning into legal questions about the Supreme Court's  
16 definition of significant --

17 JUDGE PAYNE: I think not.

18 MR. GORE: This witness is not an expert in law.

19 JUDGE PAYNE: I think he's asking about his  
20 definition.

21 MR. HAMILTON: May I proceed?

22 JUDGE PAYNE: Are you?

23 MR. HAMILTON: I'm asking about his report  
24 because --

25 JUDGE PAYNE: I said definition. I meant report.

1 You are on cross-examination. I'm not sure where you are  
2 getting with it.

3 MR. HAMILTON: Thank you, Your Honor.

4 JUDGE PAYNE: What point you are making with it.

5 Q So the question I think that we didn't have an answer  
6 to is, another definition of racial balance could mean a  
7 more even distribution of racial groups within a district;  
8 isn't that true?

9 A That could be a definition.

10 Q Under the enacted plan, CD 3 has a BVAP, using the  
11 inclusive method, of 57.2 percent; correct?

12 A Yes.

13 Q Under the alternative plan, CD 3 has a BVAP of about  
14 51 percent; correct?

15 A Correct.

16 Q And the number and percentage of black voting-age  
17 residents in CD 2 would increase under the alternative  
18 plan?

19 A Well, let's see. If I can look at the numbers,  
20 there's a chart on tab 32 of my binder that has those  
21 numbers.

22 Q But this isn't hard. The two previous questions you  
23 just answered, under the enacted plan, the BVAP is 57.2,  
24 and under the alternative plan it's only 51 percent. So

25 --

1 A You were asking me about District 2, and you haven't  
2 shown me any information about District 2, and the only  
3 place I see information about that is on this one chart.

4 Q Okay. Let's put the documents aside for a second.  
5 You know that the difference between the alternative and  
6 enacted plan is right here on these charts. It's the  
7 swaps between CD 2 and CD 3. That's the difference  
8 between these two; right?

9 A Yes.

10 Q So if the black population goes down in CD 3, it's  
11 going to be going up in CD 2 by definition, because those  
12 are the only swaps that make any difference in these two  
13 maps; right?

14 A Yes.

15 Q So if the number of black voting-age population goes  
16 down in CD 2, it's going to be going up in CD 3; isn't  
17 that true? It has to. It's just math.

18 A I think you got your districts reversed, but if it  
19 goes down in District 3, it goes up in District 2.

20 JUDGE PAYNE: I think this is a convenient point  
21 to take the morning recess, and we'll take a 20-minute  
22 recess during which time you can now undertake the art of  
23 triage.

24 MR. HAMILTON: I'll be very brief when I come  
25 back, Your Honor.

1 (Recess taken.)

2 JUDGE PAYNE: All right.

3 MR. HAMILTON: I have no further questions.

4 JUDGE PAYNE: It's a magnificent exercise of  
5 triage.

6 All right. Redirect.

7 JUDGE DUNCAN: Hopefully, to be emulated.

8

9 REDIRECT EXAMINATION

10 BY MR. GORE:

11 Q Mr. Morgan, just a couple of topics I'd like to  
12 touch upon. Will you turn to Tab 35 in your binder,  
13 which is Demonstrative 11, Intervenor-Defendants'  
14 Demonstrative 11.

15 Mr. Hamilton asked you a few questions about this  
16 demonstrative.

17 A I have that.

18 Q Do you remember those questions and talking about  
19 this demonstrative?

20 A Yes.

21 Q Mr. Hamilton talked about the difference in  
22 Democratic vote share and the difference in BVAP in  
23 areas moved in and out of District 3. Do you remember  
24 that line of questioning?

25 A Yes.

1 Q Does this demonstrative prove that race  
2 predominated in the Enacted Plan?

3 A It doesn't prove that race predominated in the  
4 Enacted Plan.

5 Q Why not?

6 A Well, because, as I went through this with you  
7 previously, the trades between Districts 1 and 3, 2  
8 and 3, 3 and 4, and 3 and 7 are -- they show a  
9 political benefit to incumbents of both parties, and  
10 they're explainable by politics, and incumbency  
11 protection, and the preservation of the benchmark  
12 districts.

13 Q Okay. Thank you.

14 Can you turn now to Tab 20, which is Plaintiff's  
15 Exhibit 27, and go to page 15 of that report? Do you  
16 recognize this chart?

17 A Yes. On page 15, yes.

18 Q Mr. Hamilton asked you some questions about this,  
19 and I think you pointed out, and I don't think there's  
20 a dispute on the math, that these trades involving  
21 District 3 affected about 181,000 people?

22 JUDGE PAYNE: Are you on page 15 now on the  
23 chart on that page?

24 MR. GORE: Yes, I am, Your Honor.

25 JUDGE PAYNE: Would you go over that again

1 because I think we were all trying to find where you  
2 were?

3 MR. GORE: Absolutely, Your Honor.

4 Q So Mr. Hamilton asked you some questions about  
5 this chart?

6 A Yes.

7 Q Do you remember that? And he added up the total  
8 population or at least suggested that the total  
9 population if you add it through all the columns is  
10 about 181,000 people.

11 A That's what he suggested, yes.

12 Q So that would be 181,000 people were moved into  
13 and out of District 3 through all of these trades  
14 combined?

15 A That's right, involving four districts.

16 Q How many districts were involved in those trades?

17 A Five districts if you include District 3.

18 Q Again, not meaning to turn this into a math  
19 exercise, but if there were five districts and 181,000  
20 people total moved, what's the average of people that  
21 were moved for each district?

22 A Maybe 32,000, 33,000.

23 Q Great. I'd like to compare that quickly to some  
24 changes we talked about in the Alternative Plan  
25 yesterday. Can you turn now to Tab 6, which is

1 Intervenor-Defendant's Exhibit 17?

2 A Yes.

3 Q What does this chart show? What does the  
4 right-hand side of this chart show?

5 A The right-hand chart shows the population changes  
6 for the Benchmark to the Alternative Plan.

7 Q How many districts are involved in the changes  
8 shown on this chart?

9 A There are three districts.

10 Q How much total population does the Alternative  
11 Plan move between those three districts?

12 A 287,000.

13 Q How does that compare to the number we just saw  
14 for the five districts in the Enacted Plan?

15 A It's much higher. Doing the same calculation, it  
16 would be just under 100,000. 96,000 average.

17 Q Per district?

18 A Per district.

19 Q Okay. Great. Now, will you turn to Tab 17, which  
20 is Intervenor-Defendants' Corrected Exhibit 50?

21 A Tab 17?

22 Q Yes.

23 A Okay.

24 Q Mr. Hamilton asked you some questions about the  
25 mistake that was made with respect to these charts.

1 Do you remember that?

2 A Yes.

3 Q Did that mistake and the correction of that  
4 mistake change any of the numbers in column one or  
5 column four of either of these charts?

6 A No, it had no impact on column one or column four.

7 Q Did the changes that were made to columns two and  
8 three through those corrections change your opinions  
9 in this case in any way?

10 A No.

11 Q Assume with me for a minute that Mr. Hamilton --  
12 Mr. Hamilton mentioned a few other VTDs that might  
13 have been misassigned in the data. Do you remember  
14 that?

15 A Yes.

16 Q Assume with me for a minute that he's correct and  
17 all of those were misassigned. Would that mistake  
18 affect your opinions or your analysis in this case at  
19 all?

20 A He mentioned three. I agreed with one of the  
21 three for sure. It wouldn't change my opinion, no.

22 Q If he was right about all three, would that change  
23 your opinion?

24 A No.

25 Q Dr. McDonald testified that this VTD pattern shown



1 in columns one and four showed that race predominated;  
2 is that right?

3 A That's my understanding of what he testified to.

4 Q Do you agree that columns one and four of the  
5 analysis shown there shows that race predominated in  
6 the Enacted Plan?

7 A No, I believe we looked at that in detail on my  
8 testimony that the political composition is an  
9 explanation for this.

10 MR. GORE: No further questions.

11 JUDGE PAYNE: All right.

12 Any other evidence from the defense?

13 MR. CARVIN: No other witness for the  
14 intervenor defendants.

15 JUDGE PAYNE: And you rest?

16 MR. CARVIN: We do.

17 JUDGE PAYNE: How about for the state?

18 MR. MELIS: We have no witnesses. We rest.

19 JUDGE PAYNE: You rest. All right.

20 Rebuttal.

21 MR. HAMILTON: Your Honor, we call --

22 JUDGE PAYNE: Hold on just a minute, please.  
23 Sorry, Mr. Hamilton.

24 What, Mr. Carvin?

25 MR. CARVIN: Just for the record, to make

1 sure I'm complying with the Federal Rules, we'd like  
2 at this point to renew our motion for a directed  
3 verdict as a matter of law at the close of our case.

4 JUDGE PAYNE: All right. We'll take that  
5 under consideration as well.

6 MR. MELIS: For the record, Your Honor, the  
7 defendants will join in that.

8 JUDGE PAYNE: Then yours will be, too.

9 All right, Mr. Hamilton. You said you had  
10 Dr. McDonald for rebuttal?

11 MR. HAMILTON: I do, Your Honor. I have what  
12 I think is about a half an hour in rebuttal, and then,  
13 of course, there will be cross-examination, and then I  
14 think we'll be done. But I wanted to alert the Court  
15 of that timing because yesterday I think I said an  
16 hour. I'll try and keep it to a half an hour. It  
17 might go a little bit over that, but that's what I'm  
18 anticipating.

19 JUDGE PAYNE: Dr. McDonald, please come back  
20 to the witness stand. You are under the oath which  
21 you took yesterday. And please keep that in mind,  
22 sir.

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

MICHAEL P. McDONALD, called in rebuttal by the Plaintiffs, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HAMILTON:

Q All right. Dr. McDonald, welcome back.

Can you please turn to Intervenor-Defendants' Exhibit 50?

A I have no books.

JUDGE PAYNE: What book do you want up there? The big book with intervenor defendants in it? Or do you want that tab that we were just using? How do you want to deal with it?

MR. HAMILTON: It's a very good question, Your Honor. What I need is Plaintiffs' Exhibit --

JUDGE PAYNE: Plaintiffs'?

MR. HAMILTON: Well, right now I'm looking at intervenor-defendants' exhibits. I'm going to use four exhibits. And the first is Intervenor-Defendants' Exhibit 50. It's in the last witness notebook.

JUDGE O'GRADY: Corrected 50?

MR. HAMILTON: Yes, corrected 50. That's Tab

1 17 of the witness notebook.

2 MR. GORE: Your Honor, if I may, I believe  
3 that the original 50 is what's displayed on the  
4 screen. So I'd ask that the corrected 50 be placed on  
5 the screen if that's the one we're talking about.

6 JUDGE PAYNE: You have in front of you, Dr.  
7 McDonald -- do you have a little notebook there that  
8 says, "Morgan Witness Binder"?

9 THE WITNESS: No, I do not.

10 JUDGE PAYNE: Well --

11 THE WITNESS: This is intervenor --

12 JUDGE PAYNE: Then go turn to Exhibit 50 in  
13 the intervenor defendants' book, and that's the last  
14 exhibit, I think. That will be fine. Just use that  
15 one.

16 THE WITNESS: Yes, I have that.

17 JUDGE PAYNE: All right. That's not the last  
18 exhibit.

19 BY MR. HAMILTON:

20 Q All right. If we can zoom in just a little bit so  
21 we can see the numbers a little more clearly.

22 JUDGE PAYNE: Now, is the corrected one on  
23 the screen? I think he had asked to have that done.

24 MR. HAMILTON: That is done.

25 JUDGE PAYNE: It's now taken care of. All

1 right.

2 BY MR. HAMILTON:

3 Q All right, sir. Mr. Morgan testified about VTDs  
4 in the adjacent columns. So before we get into what  
5 this table means or your analysis of this table, let's  
6 start with the word "adjacent."

7 Well, what did you mean by the word "adjacent"?  
8 Can you define that for us as used in your analysis?

9 A It's localities that are split by CD 3 or are  
10 adjacent, immediately adjacent, to CD 3. And in a  
11 footnote I also describe exclusions some counties do  
12 to some data limitations.

13 Q Mr. Morgan testified during the defendants' case  
14 that VTDs listed in the adjacent column could have  
15 been located miles, I think he said 20 to 30 miles,  
16 from the actual district border and therefore couldn't  
17 possibly have been included in CD 3. Do you recall  
18 that testimony?

19 A Yes, I do.

20 Q Did the General Assembly only assign VTDs that  
21 were immediately on the border with benchmark  
22 districts in this redistricting plan?

23 A They did not.

24 Q What did they do?

25 A In one case, in CD 5 they assigned VTDs that were

1 three counties removed from the benchmark district,  
2 for example. So, yes, at times the General Assembly  
3 went to extreme 50 miles or more to incorporate VTDs  
4 into benchmark districts.

5 Q So let's just very briefly look at a couple of  
6 examples. And I'd ask you to turn to Plaintiffs'  
7 Exhibit 48. It's not in the witness notebook.  
8 Plaintiffs' Exhibit 48.

9 A Yes.

10 Q What is this?

11 A These are maps that I've produced that show the  
12 districts, the benchmark -- well, the adopted  
13 districts, they are colored, and then there's some  
14 later maps in here where there are red outlines, and  
15 those were the benchmark districts. So we could  
16 overlay and see how the benchmark districts changed to  
17 the adopted districts.

18 Q So can you give us some examples of some VTDs that  
19 were in the interior and not on the border of the  
20 benchmark district that were selected in the Enacted  
21 Plan?

22 A For example, we were just discussing Petersburg.  
23 That's on page 8 of this exhibit. What we see is  
24 that benchmark District 3 is that red line. The City  
25 of Petersburg was not even adjacent, immediately

McDONALD - DIRECT

399

1 adjacent, to Congressional District 3, yet VTD that  
2 was on the far side, western side, of Petersburg was  
3 included in benchmark -- excuse me -- adopted  
4 Congressional District 3 as one example.

5 JUDGE PAYNE: Wait a minute. Are you saying  
6 that Petersburg wasn't adjacent in the Benchmark Plan?

7 THE WITNESS: Petersburg did not share a  
8 border with the benchmark District 3.

9 JUDGE PAYNE: Right, but it does in the  
10 Enacted Plan?

11 THE WITNESS: Correct, yes.

12 BY MR. HAMILTON:

13 Q In other words, when they were drawing the new  
14 Enacted Plan, this whole -- if we look at the map  
15 here, that is page 8 in Exhibit 48, the entire City of  
16 Petersburg was added to CD 3; isn't that true?

17 A Yes.

18 Q And so, again, just so we're all clear on this,  
19 the red line on this map that we're looking at right  
20 now, that's the old border of CD 3?

21 A Correct.

22 Q Okay. And the new border of CD 3 in the Enacted  
23 Plan?

24 A It's the salmon-colored, pinkish-colored VTDs.

25 Q Do you have another example?

1 A Another example which demonstrates the lengths to  
2 which the General Assembly went to with respect to CD  
3 3 and CD 2 is on page 7. It's a little more difficult  
4 to read. So I'll have to walk us through this.

5 The benchmark districts, again, are in red, and if  
6 we look at Newport News and Hampton, the middle part,  
7 the shared border between Newport News and Hampton,  
8 that area was previously in District 1, and Mr. Morgan  
9 testified to this as well. But what happened here is  
10 that CD 1 was moved north out of Newport News and  
11 Hampton. CD 2 used to come around and split Hampton  
12 just up to that borderline that was previously where  
13 District 1 was and District 2 on the northern part of  
14 Hampton.

15 After CD 1 moved north, CD 2 filled that vacuum  
16 and moved all the way into Newport News. And it  
17 didn't stop just there. The boundary on Newport News  
18 that was formerly between District 1 and District 3,  
19 that is also -- the other half of Newport News, that  
20 is that red boundary, that was District 3. And so the  
21 new CD 2 not only went through Hampton and Newport  
22 News but even went further into benchmark District 3  
23 in order to grab a precinct, I believe it's called  
24 Nelson precinct, that is in the northwest tip of now  
25 Congressional District 2, which is that green color in



1 Newport News.

2 JUDGE PAYNE: You mean that it does include  
3 it?

4 THE WITNESS: It does. So --

5 JUDGE PAYNE: You said it was done in order  
6 to do it. That's testifying to a purpose as opposed  
7 to a thought.

8 THE WITNESS: No. These are just the facts  
9 that the district lines changed in this way. And that  
10 when I was including localities that were adjacent to,  
11 and VTDs that were potentially in this pool of VTDs  
12 that could be included into this analysis, I thought  
13 it was reasonable given what actually occurred with  
14 the redistricting between the benchmark and the  
15 adopted district to include all of those VTDs in  
16 localities that were adjacent because --

17 Q Let me just stop you there. So just looking at  
18 the map, if we look at the top left-hand corner, that  
19 green arm that reaches out, that's all new territory  
20 that got added to the Third; is that right? Or got  
21 added to the Second? I'm sorry.

22 A Added to the Second, yes. The green area is the  
23 Second District. It's former boundary was in Hampton.

24 Q Where the red line is?

25 A The red line, yes.

1 Q So if we want to see how far they went into the  
2 interior we just look from the red line up to the  
3 highest point in the upper left-hand corner?

4 A Yes.

5 Q Just quickly one more. Any other examples?

6 A There's another example of distance that was  
7 traveled if we look on page 10.

8 Q What are we looking at here?

9 A Here we have, again, the overlay of the red  
10 districts or the red boundary is the benchmark  
11 district. That district, that red boundary  
12 encompasses New Kent. Mr. Morgan testified to this  
13 previously. So he knows this.

14 JUDGE PAYNE: I think the question, though --

15 THE WITNESS: New Kent was --

16 Q Stop.

17 JUDGE PAYNE: Which one was added?

18 MR. HAMILTON: Thank you, Your Honor. That  
19 is the question.

20 BY MR. HAMILTON:

21 Q The question is: Where is the VTD that was added  
22 on this map?

23 A Right. I'm giving you some context.

24 JUDGE PAYNE: You don't need anything but  
25 where it is right now. If he wants more than that, he

1 can get it.

2 A So the far western portion of -- excuse me --  
3 eastern portion of New Kent, that was a VTD that was  
4 formerly in Congressional District 3, and it was  
5 assigned to Congressional District 7. That's about  
6 30 miles. Twenty miles, excuse me.

7 Q Do you know the name of that precinct?

8 A I can't recall it right offhand.

9 Q All right. In light of those decisions that the  
10 General Assembly made in the Enacted Plan, do you  
11 believe that your definition of "adjacent" for the  
12 purposes of Exhibit 50 is appropriate?

13 A Yes, sir.

14 Q Now, I don't want to belabor this, but you looked  
15 at this underlying data, and I believe you found some  
16 errors in the underlying data used to create corrected  
17 Exhibit 50 or the original Exhibit 50?

18 A Yes.

19 Q Which VTDs did those affect?

20 A The VTDs that I identified were in Petersburg.

21 Q Okay. Did you identify any other errors?

22 A Yes, I did.

23 Q Where were those?

24 A These were VTDs that were unassigned in Mr.  
25 Morgan's added data to the NCEC data, and we discussed

1 those. Those were Suburban Park, Willard, and  
2 Lafayette, which is the dual split of Willard and the  
3 data within Norfolk, and then Richmond, 309 in  
4 Richmond, and I did have the luxury of having the  
5 geographic software on my laptop and was able to  
6 confirm that.

7 Q Other than Petersburg, Norfolk, Suburban Park,  
8 Norfolk, Willard and Richmond 309?

9 A Yes, those were -- Mr. Morgan had unassigned those  
10 to any district, and they should be properly assigned  
11 to CD 3.

12 Q Did corrected Exhibit 50 catch and correct all  
13 those errors?

14 A It did for the purposes of his table. He did  
15 correct all of the data that underlie the numbers in  
16 his table.

17 Q Mr. Morgan testified that these errors were  
18 insignificant to the outcome. Do you agree with that?

19 A No.

20 Q Why not?

21 A The assignment of Petersburg is -- Petersburg's  
22 potentially the highest black voting-age population  
23 locality in the Commonwealth of Virginia. So the  
24 misassignment of Petersburg would significantly affect  
25 your analyses.

1 Q Have you attempted to re-create this analyses  
2 yourself?

3 A I have.

4 Q When did you do that?

5 A Well, we had received --

6 Q Just when?

7 A We tried to is what I was going to first say. We  
8 were unsuccessful. Then we were successful after Mr.  
9 Morgan had provided the revised data. And that would  
10 be on two days ago in the afternoon.

11 Q Let me direct your attention to Plaintiffs'  
12 Exhibit 57. It should be in front of you.

13 A Yes.

14 Q We just need the first page. What is this  
15 document?

16 A The document, before we had Mr. Morgan's corrected  
17 VTDs or corrected analysis, corrected table I should  
18 say, we were working probably simultaneously. He was  
19 working and we were working on this. And so I put his  
20 original table there as a way to show what the changes  
21 were. And then the table below are the corrections  
22 that I had identified in the first four columns, and  
23 then there's a fifth column --

24 Q Hold on. I just want to be clear because I don't  
25 want to mislead the Court.

1 The top table is the original table produced by  
2 Mr. Morgan before Mr. Morgan corrected it himself,  
3 correct?

4 A Correct.

5 Q And the numbers there are identical to the  
6 original, I think it's Intervenor-Defendants' Exhibit  
7 50, to the best of your knowledge?

8 A Yes.

9 Q And then this table down below, Mr. Morgan's  
10 corrected table, when you gave it that title, had you  
11 seen Mr. Morgan's, the table that he himself actually  
12 corrected?

13 A No, I had not.

14 Q All right. So this is your efforts to correct Mr.  
15 Morgan's table before Mr. Morgan corrected his only  
16 table?

17 A Yes.

18 Q So the title might be more, "Mr. Morgan's table,  
19 corrected by Dr. McDonald," that would probably be a  
20 more accurate title?

21 A Correct, yes.

22 Q Thank you.

23 You said that there was an additional column.  
24 Which column is additional?

25 A This is the now fifth column in the corrected

1 table as I've described it down below, which is -- the  
2 heading for it is in benchmark District 3 but not  
3 enacted District 3. These were the VTDs that were  
4 removed from benchmark District 3.

5 Q Okay. So let's just go through this just to make  
6 sure we understand. We're looking at the bottom  
7 column. Maybe you could zoom in a little bit more on  
8 the bottom table here.

9 And so the center, the column entitled, "In  
10 Localities Adjacent to Enacted District 3," I think we  
11 understand what you mean by "adjacent" now. Is that  
12 what you consider to be the pool of potentially  
13 available VTDs that could have been assigned to CD 3?

14 A Yes.

15 Q And then the next column to the left, "In enacted  
16 District 3 but not in benchmark CD 3," can we think of  
17 that as sort of the ones that were selected or added  
18 to CD 3 in the Enacted Plan?

19 A Yes.

20 Q And the new column that you add on the far  
21 right-hand side in benchmark CD 3 but not in enacted  
22 CD 3, can we think of it in shorthand as those are the  
23 ones that were dropped from the benchmark?

24 A Yes.

25 Q So that's the table that you created?

1 A Yes.

2 Q So let's walk through this a little bit to  
3 understand what this is showing us. Looking at the  
4 political performance, the average Democratic vote,  
5 that's the middle line, what was the average  
6 Democratic vote in the localities adjacent to enacted  
7 CD 3?

8 A This is a number from my original report and this  
9 is 65.4 percent.

10 Q Okay. And out of that pool, what was the average  
11 Democratic vote of those selected? That is, reflected  
12 in the middle column in enacted CD 3, but not in the  
13 benchmark.

14 A I would point out at this point that Mr. Morgan  
15 identified one additional error when we were working  
16 on this. So that number is slightly different in his  
17 report and I do agree with his correction.

18 Q That's fine, but what's the number?

19 A It's 77.9. It's not going to make a material  
20 difference.

21 Q What's the correction?

22 A Excuse me?

23 Q What's the --

24 JUDGE PAYNE: If he agrees and they agree,  
25 does it make any difference about the correction?



1 MR. HAMILTON: I'm about to calculate the  
2 number. So I want to know if it's a significant  
3 difference.

4 A Mr. Morgan had identified in addition to the  
5 Petersburg errors that we had alerted them to Tuesday  
6 afternoon, that he had also misallocated a precinct in  
7 Hampton, and he made that correction when he produced  
8 his corrected table.

9 Q Does it change the number here?

10 A It changes it slightly.

11 Q What would it change it to?

12 A I believe it's -- we'd have to look at it.

13 Q You don't know?

14 A No.

15 Q We'll use this number then. It's not a material  
16 difference?

17 A It's not a big difference because it's only one  
18 precinct.

19 Q Okay. So looking at the -- let's go back to where  
20 we were before we went off on that excursion. If we  
21 look at the average Democratic vote performance from  
22 localities adjacent to enacted District 3, the average  
23 Democratic vote was what?

24 A Those in adjacent were 65.4 percent.

25 Q Of those that ended up in the Enacted Plan, what

1 was the average Democratic vote?

2 A 77.9 percent.

3 Q What's the difference between those two numbers?

4 A It would be 12.5 percent.

5 Q Okay. Now let's look at the ones that were  
6 dropped. What's the average Democratic vote of the  
7 VTDs in benchmark 3, but not in the enacted CD 3?

8 A 58.7 percent.

9 Q What's the difference between those two numbers?

10 A It's 6.7 percent.

11 Q So if we were just to look at that number, what  
12 would you conclude? What's your conclusion?

13 A That higher Democratic precincts were added to  
14 benchmark 3 than those that were removed.

15 Q Okay. Let's look at the next line down then.

16 Let's look at the racial impact of these moves.

17 So starting with the pool, the localities adjacent  
18 to enacted CD 3, what was the average black voting-age  
19 population in that pool of available districts?

20 A 43.5 percent.

21 Q And of those selected to be included in CD 3 but  
22 that were not in the benchmark, that is those that  
23 were added, what was the average BVAP?

24 A 57.0 percent.

25 Q What's the difference between those two numbers?

1 A 13.5.

2 Q Right. Okay. So now let's look at what was  
3 dropped. So of the pool and localities adjacent to  
4 enacted CD 3, the pool was 43.5. What was the average  
5 BVAP of those that were in the benchmark but that  
6 somehow didn't make it into the enacted CD 3?

7 A 22.4 percent.

8 Q 22.4 percent?

9 A Yes.

10 Q What's the number?

11 A 22.4 percent.

12 Q I guess I'm just asking you for the number in the  
13 lower right-hand box.

14 A Oh, 21.1. I thought you asked me to subtract.

15 Q No. So the difference between the pool and those  
16 that were dropped is?

17 A 22.4 percent.

18 Q Okay. 22.4.

19 So what do you conclude from that? Well,  
20 actually, let's do one more calculation before I ask  
21 you for your conclusion.

22 What's the difference between those that were not  
23 in the benchmark but added and those that were in the  
24 benchmark that were dropped?

25 A Which number?

1 Q 57 minus 21.1?

2 A The black voting-age population, the difference is  
3 35.9 percent.

4 Q A 35.9 percent swing?

5 A Yes.

6 Q Now, looking at these numbers, having considered  
7 the column that we've added, what's your professional  
8 conclusion?

9 A That the districts that were removed from CD 3  
10 were substantially whiter than those that were added  
11 to CD 3.

12 Q Have you concluded -- if you looked at both the  
13 race and political performance numbers, does this  
14 support or undermine your primary conclusion that race  
15 predominated in this redistricting plan?

16 A It does support it because the differential  
17 between the partisanship is much less than the  
18 differential that we're seeing when we look at the  
19 race.

20 Q Is that consistent with your original conclusion  
21 that white precincts were being moved out of CD 3 and  
22 black precincts were being moved into CD 3?

23 A Yes, it does. And what's going on here, these are  
24 just numbers.

25 JUDGE PAYNE: If he wants an explanation, Dr.

1 McDonald, he'll ask for it.

2 Q Yes, it does?

3 A Yes, it does.

4 Q Can you explain, please?

5 A Yes. So we're not just talking about -- I know  
6 where some of these districts are. So these are  
7 statistics, but what's going on here also is a  
8 subordination of traditional redistricting principles  
9 to put -- three of these districts, I mean, they are  
10 very blatantly --

11 MR. CARVIN: Objection. This goes well  
12 beyond rebuttal. It goes well beyond this chart. Now  
13 he's just testifying freelance on something that's not  
14 in his report and is not responsive to anything that  
15 Mr. Morgan said.

16 THE WITNESS: This is in my report.

17 JUDGE PAYNE: Excuse me.

18 Your response to his objection?

19 MR. HAMILTON: Your Honor, I think it's  
20 directly responsive to Mr. Morgan's testimony in the  
21 defendants' case, and it is in the report.

22 JUDGE PAYNE: It sounds to me like it's  
23 mostly argument. So maybe you can get it in the frame  
24 of an evidentiary construct and do it that way.

25 MR. HAMILTON: I will.

1 JUDGE PAYNE: Dr. Morgan, your job isn't to  
2 argue the case.

3 BY MR. HAMILTON:

4 Q Before we leave this exhibit, I'm just going to  
5 ask you one more question, Dr. McDonald. What if  
6 anything does the corrected table tell us about  
7 whether race was a predominant factor in drawing CD 3?

8 A It tells us that race was predominated over  
9 politics.

10 Q Why?

11 A Because the choice -- when the General Assembly  
12 selected VTDs to put into the adopted precincts, they  
13 choose heavily African-American and Democratic  
14 districts, but when we look at those that were  
15 removed, they were also heavily Democratic, a little  
16 bit less so, but they were much less so in terms of  
17 their race.

18 Q Thank you, sir.

19 Let's switch topics now. If I can direct your  
20 attention to Mr. Morgan's report. It is in the  
21 witness notebook and it's also Intervenor-Defendants'  
22 Exhibit 13. It's Tab 2 in that black notebook in  
23 front of you.

24 A Mr. Morgan's report?

25 Q Do you have it?

1 A Mr. Morgan's report, yes.

2 Q Please turn to page 26.

3 A Yes.

4 Q If I can direct your attention to the first full  
5 paragraph. Actually, let me flip you back a page.

6 The sentence beginning at the very bottom of page 25.

7 I'd like you to review the sentence that begins at the  
8 bottom of page 25 and then the paragraph completes at  
9 the top of page 26.

10 This is the segment of Mr. Morgan's report in  
11 which he offers evidence that the Enacted Plan does  
12 not diminish the ability of black voters to elect  
13 their candidates of choice. Have you read that?

14 A Yes.

15 Q What evidence does he offer to support that  
16 proposition?

17 A It's in the preceding sentence, and it says, The  
18 Enacted Plan increased District 3's black BVAP on both  
19 of Dr. McDonald's preferred measures 3.2 percent  
20 exclusive and 3.3 percent inclusive.

21 Q Does that tell you whether ability to elect has  
22 been diminished?

23 A No, it does not.

24 Q Why isn't that the safe way to approach it? Just  
25 to increase the BVAP to make sure that you're not

1 going to retrogress?

2 A Well, to belabor the point, you need to do a  
3 racial bloc voting analysis.

4 Q In the absence of that analysis, in your  
5 professional opinion, did the General Assembly have  
6 ample reason to use a 55 percent BVAP floor to receive  
7 DOJ preclearance?

8 A No.

9 Q Let's turn to page 24. Last subject and then I'll  
10 sit down. There's a table there at the bottom of page  
11 24 prepared by Mr. Morgan. Have you reviewed that  
12 table before?

13 A Yes.

14 Q What does it show?

15 A This shows his calculation for the preservation of  
16 cores of the benchmark districts.

17 MR. CARVIN: I'm going to object. When I  
18 asked him yesterday whether he reviewed this, he said  
19 no, and I was not allowed to ask any questions about  
20 this yesterday. So he can't now switch back and say  
21 he's familiar with it and offer an opinion on it. I  
22 was stopped from questioning him about this.

23 MR. HAMILTON: Your Honor, he was stopped  
24 from questioning him about it because Mr. Morgan  
25 hadn't testified about it, and we had a cart and horse



McDONALD - DIRECT

417

1 problem. The same reason I couldn't examine Mr.  
2 McDonald on his direct about Mr. Morgan because he  
3 hadn't testified about it.

4 MR. CARVIN: Well, obviously, the only chance  
5 I was going to have to ask Dr. McDonald about Mr.  
6 Morgan was yesterday. It was not at all remotely  
7 comparable. I was stopped because you objected and  
8 said I couldn't ask him the questions, and Dr.  
9 McDonald said he hadn't reviewed it. That's why I was  
10 stopped from asking.

11 MR. HAMILTON: Well, first of all, Your  
12 Honor, he wasn't stopped --

13 JUDGE PAYNE: Let's get this straight, to  
14 begin with. He has a right of cross examination. So  
15 if in fact he has reviewed it and he's qualified to  
16 testify about it, then Mr. Carvin will have a right to  
17 cross-examine him, and he hasn't been deprived of  
18 anything.

19 But the fundamental point that he is raising  
20 is that previously Dr. McDonald said he isn't familiar  
21 with this issue or with this table, and that therefore  
22 he was stopped from asking questions about this  
23 particular table.

24 So the threshold question is: When did he  
25 get familiar with it if he is familiar with it at all?

McDONALD - DIRECT

418

1 Between the time Mr. Carvin was questioning him or is  
2 Mr. Carvin simply wrong about his recollection?

3 MR. HAMILTON: I think --

4 JUDGE PAYNE: Ask the witness. That's what  
5 I'm suggesting to do. Ask the witness --

6 MR. HAMILTON: I will do that.

7 JUDGE PAYNE: -- about it.

8 When did he learn about this?

9 BY MR. HAMILTON:

10 Q When did you review this table in Mr. Morgan's  
11 report that's dated March 24, 2014?

12 A I reviewed it when I wrote a reply report to Mr.  
13 Morgan.

14 Q This was part of Mr. Morgan's report?

15 A Yes.

16 Q You wrote a reply to it?

17 A Yes.

18 Q Do you recall testifying yesterday that you didn't  
19 recall reviewing this?

20 JUDGE PAYNE: It's all right. You can go  
21 ahead and ask him the question. The objection is  
22 overruled.

23 BY MR. HAMILTON:

24 Q Do you recall testifying yesterday?

25 A Yes, I do. Yes, I do recall testifying yesterday,

1 but not on this point.

2 Q We may have consumed more time on this objection  
3 than the table is worth, but let me just ask you a  
4 couple questions about it.

5 It purports to represent a preservation of cores  
6 and an analysis of the preservation of cores in the  
7 benchmark districts prepared by Mr. Morgan. Is that  
8 your understanding?

9 A Yes.

10 Q What is the average retention percentage for  
11 Enacted and Alternatives Plans? What's the spread  
12 here?

13 A For the Enacted Plan, it's 86.0 and for the  
14 Alternative Plan it's 84.5.

15 Q How do those numbers compare?

16 A It's a 1.5 percentage point difference.

17 Q Let me direct your attention to page 25 of Mr.  
18 Morgan's report.

19 A Yes.

20 Q What's the next measure of retention of core?

21 A Mr. Morgan says the Enacted Plan preserves between  
22 71 percent and 96 percent of the cores of the  
23 benchmark districts. So he's providing a range of the  
24 preservation of cores.

25 Q What's the range for the Alternative Plan?

1 A He doesn't provide --

2 Q That's not my question.

3 A He doesn't provide it, so I'm going to have to  
4 calculate it.

5 Q It's in the table, isn't it?

6 A I'm going to have to look at it.

7 It's 69.2 to 96.2.

8 Q How do those changes compare?

9 A They are substantially similar.

10 Q What's the next metric, looking at page 25, that  
11 Mr. Morgan uses?

12 A It says, "And preserves 83 percent or more of the  
13 cores in nine of eleven districts, including District  
14 3."

15 Q Is there any special magic or significance to the  
16 cutoff of 83 percent that he used?

17 A No.

18 Q All right. Well, let's use it anyway. How do the  
19 plans compare using Mr. Morgan's 83 percent cutoff?

20 A He says that nine of the eleven districts were at  
21 this threshold of 83 percent or higher.

22 Q How about the Alternative Plan?

23 A That the Alternative Plan -- well, he doesn't --

24 Q You'll have to look at the table.

25 A Yeah, I'm going to have to look at the table

1 again. So at 83 percent or higher. So I believe it's  
2 seven of eleven districts.

3 Q What if we instead of using 83 percent, we used  
4 the cutoff of 82 percent retention? Now how do the  
5 numbers look? Start with the Enacted, how do they  
6 compare?

7 A The Enacted would have the same number as before,  
8 nine of 11.

9 Q How about the Alternative?

10 A At 82 percent, there's one district that changes,  
11 and so that would now be eight of eleven.

12 Q So how do they compare at least using Mr. Morgan's  
13 metrics?

14 A Substantially similar.

15 Q Does that reflect a significant difference in how  
16 the two plans treat preserving the cores?

17 A It's a slight decrease in preservation of cores by  
18 this metric.

19 Q Is it significant?

20 A No, it's not significant.

21 MR. HAMILTON: Thank you, sir.

22 No further questions, Your Honor.

23 CROSS-EXAMINATION

24 BY MR. CARVIN:

25 Q Why don't we begin where you left off. Could you

1 stay there on page 24 on Tab 2, please?

2 A Yes.

3 Q And you just commented on the fact that the  
4 overall percent retention score for all eleven  
5 districts only changed 1 1/2 percent, correct?

6 A Correct.

7 Q But the relevant issue here is obviously the  
8 changes to District 3 and District 2 because those are  
9 the only two districts that were affected by the  
10 plaintiffs' alternative, right?

11 A No.

12 Q Okay. Did nine of the eleven districts stay the  
13 same under plaintiffs' alternative?

14 A Yes.

15 Q Okay. So the only changes were to District 2 and  
16 District 3, correct?

17 A Yes.

18 Q And let's look at District 3. It previously  
19 retained 83.1 percent of the old population, and now  
20 it retains only 69.2 percent, correct?

21 A Correct.

22 Q Is that change significant?

23 A That is a large change, yes.

24 Q Is it significant?

25 A It is a big change, yes.

1 Q Is it significant?

2 A It is significant.

3 Q Okay. And it makes District 3 the lowest ranking  
4 district of all eleven districts on the Alternative  
5 Plan, correct?

6 A Correct.

7 Q Okay. And when you discussed compactness and  
8 offered your expert opinion, you thought it was very  
9 significant with respect to the Enacted Plan that  
10 District 3 ranked lowest of all eleven districts on  
11 compactness scores, correct?

12 A Correct.

13 Q And when you discussed locality splits for the  
14 Enacted Plan, you thought it was very significant that  
15 District 3 ranked lowest on locality splits, correct?

16 A Correct.

17 Q When you discussed VTD splits in the Enacted Plan,  
18 you thought it was very significant that District 3  
19 ranked lowest on VTD splits, correct?

20 A Yes.

21 Q So, obviously, you think it's very significant  
22 that District 3 now ranks lowest on the cores measure,  
23 correct?

24 A I do find that it's lower, yes. It is  
25 significant, yes.

1 Q If you could turn to Plaintiffs' Exhibit 57,  
2 please.

3 A Yes.

4 Q Okay. You have a corrected table. This is your  
5 correction, just to make it clear, for both the  
6 Enacted Plan and the Alternative Plan, correct?

7 A Correct. There's another one.

8 Q The first page is your corrections to the Enacted  
9 Plan. So this is taking away all of the data  
10 discussion we've been having. This is your view of  
11 the correct numbers, correct? The one on the bottom.

12 A Actually, it is not.

13 Q Because of the 77.9? This one precinct you talked  
14 about?

15 A Yes.

16 Q Let's put that to the side. That aside, this  
17 represents your view, not Mr. Morgan's view, correct?  
18 The one that says "Mr. Morgan's corrected table."

19 A No, for that reason.

20 Q Okay. Put that aside. Mr. Morgan's corrected  
21 table is your correction of his table, correct?

22 A Yes.

23 Q Okay. And just so I'm clear, in localities  
24 adjacent to enacted District 3, right, that has a  
25 65.4 percent Democratic vote share, correct?



1 A Correct.

2 Q Okay. And then we look at the racial percentage  
3 in enacted District 3 but not benchmark District 3,  
4 correct? The column to the left.

5 A Yes, the column to the left, yes.

6 Q Just so we're clear, those were the districts that  
7 were added to 3, right?

8 A Yes.

9 Q And the racial percentage is 77.9, correct?

10 A Correct.

11 Q And there's a 12.5 percent gap between the ones  
12 that were left out and the ones that were put in in  
13 terms of Democratic vote share, right?

14 A Can you say that again? 12 percent?

15 Q You just went over this on direct.

16 A It wasn't quite 12 percent. So that's why.

17 Q It's a 12.5 percent gap, right?

18 A Yes.

19 Q And I just want to make it clear. The difference,  
20 65.4, is Democratic vote share. 77.9 percent is  
21 Democratic vote share, correct?

22 A Yes.

23 Q And there's a 12.5 percent gap between those that  
24 were added and those that were left out, correct, in  
25 terms of Democratic performance?

1 A Yes.

2 Q The column directly beneath that doesn't look at  
3 Democratic vote share. It looks at BVAP. Correct?

4 A Correct.

5 Q And there's a 13.5 percent racial gap, correct?

6 A Correct.

7 Q So, obviously, the political and racial gaps are  
8 basically the same, aren't they?

9 A Yes.

10 Q One is 12.5 percent and the other is 13.5 percent?

11 A Yes.

12 Q Then you add a whole new column to Mr. Morgan's  
13 analysis, right? This far right-hand corner in  
14 benchmark District 3 but not enacted District 3?

15 A Yes.

16 Q And in layman's terms, these are the VTDs that  
17 were taken out of District 3 and put into one of the  
18 adjacent Republican districts, right?

19 A One of the adjacent districts, yes.

20 Q All of which are Republican, correct?

21 A What do you mean by "Republican"?

22 Q They have Republican incumbents.

23 A Okay. The ones with Republican incumbents, yes.

24 Q So, first of all, only five VTDs were moved  
25 out of District 3, right?

1 A Well, five high Democratic-performing precincts,  
2 yes.

3 Q There was 189 high Democratic performing in the  
4 benchmark or in the enacted, right?

5 A That's the first column, sort of the upper  
6 left-hand corner, 189, yes.

7 Q Okay. And they moved a lot more than five VTDs  
8 out of District 3. These are only the subset that are  
9 high Democratic performing?

10 A Yes.

11 Q So you didn't count all of the predominantly  
12 Republican districts that they were moving from  
13 District 3 into the adjacent districts with Republican  
14 incumbents, right?

15 A Right.

16 Q So out of the handful of VTDs that they moved out,  
17 the Democratic vote share is 58.7, correct?

18 A Correct.

19 Q Which is very close to your 55 percent floor that  
20 you used to select these things, right?

21 A Yes.

22 Q Okay. Now, let's look instead of what they moved  
23 out of District 3, let's look at what the General  
24 Assembly moved into District 3. Okay? First of all,  
25 they moved in 30 VTDs, right?

1 A Yes.

2 Q Which is six times more than they shed, correct?

3 A Yes.

4 Q And VTDs they moved in were 77.9 percent  
5 Democratic given your caveat from before, right?

6 A Yes.

7 Q Okay. So they moved in six times as many  
8 districts as they moved out. Let me put it this way.  
9 They moved 30 districts with an 8 percent Democratic  
10 vote share out of the adjacent districts, and they  
11 moved five at 58.7 percent Democratic vote share into  
12 the adjacent districts, right?

13 A Yes.

14 Q Now, that will politically benefit the Republicans  
15 in the adjacent districts. You lose thirty 78 percent  
16 Democratic VTDs and you only pick up five 58 percent  
17 districts, correct?

18 A No, not necessarily true.

19 Q All right. Why don't you explain to me how losing  
20 30 districts at 78 percent Democratic doesn't help you  
21 if you're picking up five at 58 percent?

22 A Okay. So I can explain how there's a -- three of  
23 these precincts in benchmark District 3 but not in  
24 enacted District 3, those that were removed, are three  
25 precincts that are located --

1 MR. CARVIN: Move to strike.

2 JUDGE PAYNE: I think you asked him to  
3 explain.

4 MR. CARVIN: All right.

5 Q Are you going to explain?

6 A Yes. I happen to know what these precincts are.  
7 They are three precincts that were described in my  
8 report. Three of them are Willard, Lafayette and  
9 Suburban Park. These are the three precincts in  
10 District 2 in Norfolk that come around and wrap around  
11 that large yellow area, which is they put a naval air  
12 station there, and wrap around --

13 MR. CARVIN: Your Honor, I move to strike.  
14 He's discussing three precincts. He's not discussing  
15 the 35 VTDs that are on his chart that I asked him  
16 about. And he's given a long narrative.

17 MR. HAMILTON: Your Honor, he was asked. The  
18 answer is responsive. He asked him, Please explain.  
19 It's cross-examination. Perhaps he shouldn't have  
20 asked the question, but he asked the question, Please  
21 explain, and the witness is trying to explain there's  
22 a significance to these three precincts.

23 MR. CARVIN: Yes, but we're not talking about  
24 these three precincts, and what I asked him to explain  
25 was --

1 JUDGE PAYNE: Let's start again with the  
2 question. Please answer just the question with  
3 relation to the precincts that he's asking about.

4 THE WITNESS: He had asked me --

5 JUDGE PAYNE: We're going to start again.

6 BY MR. HAMILTON:

7 Q The question is: Please explain.

8 JUDGE PAYNE: No. The answer is -- I mean,  
9 the question is, start from the beginning with what  
10 your question is. Then let him explain what it is  
11 that he disagrees with. Get the fundamental question  
12 on the table first.

13 Q In mathematical terms, if a hypothetical district  
14 gained three districts at 78 percent Democratic and  
15 lost five VTDs that were 58 percent Democratic, that  
16 would make the district more Republican, correct?

17 A In the hypothetical, no.

18 Q You think losing Democratic voters and gaining a  
19 fewer amount of Democratic voters hurts the districts  
20 shedding those VTDs?

21 A Not all of the VTDs that were added into the  
22 benchmark District 3 were at the average of  
23 77.9 percent. There are some that are down at the  
24 58.7. They are similar to those that were in  
25 benchmark District 3 that were removed.

1 Q That's why it's called an average.

2 A Right.

3 Q And for every 58 percent district, there must be a  
4 98 percent district if we come out at 78 percent,  
5 which is why I'm trying to ask you a general question.

6 So let me ask at the most general level possible,  
7 okay? In general terms, if a district sheds 30 VTDs  
8 that are 78 percent Democratic, and picks up five  
9 districts at 58.7 percent, does that suggest that the  
10 legislature did not have a political motive to enhance  
11 the Republican composition of the district shedding  
12 those VTDs and adding those VTDs?

13 A In the hypothetical single district, and we're  
14 talking about four, that would be true.

15 Q Okay. And all four of them are Republican  
16 districts with Republican incumbents, correct?

17 A Correct.

18 Q Now, just so I'm clear. Under your corrected  
19 table, right, for the Enacted Plan --

20 A Yes.

21 Q -- you looked at 189 VTDs in enacted District 3,  
22 correct?

23 A Correct.

24 Q And 159 of those VTDs came from the benchmark  
25 District 3, correct?

1 A Correct.

2 Q So 84 percent of the VTDs in enacted District 3  
3 came from benchmark District 3?

4 A Yes.

5 Q Also if I have this correct, in enacted District  
6 3, the average BVAP percentage is 59.5?

7 A Yes, that's the first column, the bottom.

8 Q If you turn to the next page, in alternative  
9 District 3, in plaintiffs' alternative District 3, the  
10 average BVAP percentage is 59.8, correct?

11 A Correct.

12 Q So the average BVAP in plaintiffs' alternative in  
13 District 3 is higher than the average BVAP in the  
14 enacted District 3, correct?

15 A For the 55 percent Democratic VTDs, yes.

16 Q Yes. And surely we know that the drafters of  
17 alternative District 3 were not trying to increase the  
18 BVAP of District 3. They were trying to decrease it,  
19 correct?

20 A That was a goal of that a plan, yes.

21 Q All right.

22 MR. CARVIN: No further questions. Thank  
23 you.

24 JUDGE PAYNE: All right. Any redirect?

25 MR. HAMILTON: Your Honor, I'll be very



1 brief.

2 REDIRECT EXAMINATION

3 BY MR. HAMILTON:

4 Q Dr. McDonald, during Mr. Carvin's  
5 cross-examination, he asked you about these five VTDs,  
6 the drop column, the ones that were dropped. Why is  
7 that significant?

8 A Why was that significant?

9 Q I thought you said they were.

10 A Yes.

11 Q You tell me. Are they significant?

12 A Yes. These five VTDs, I know where their location  
13 is because we just discussed how we had to add them  
14 into Mr. Morgan's data in order to correct his data.  
15 So I know which ones they are.

16 Q So where are they?

17 A They are three precincts that are located in  
18 Norfolk.

19 Q What was unusual about the precinct selection in  
20 Norfolk?

21 A These are three precincts that -- Suburban Park,  
22 Willard and Lafayette.

23 MR. CARVIN: I apologize. These are not the  
24 VTDs that were corrected for Mr. Morgan.

25 MR. HAMILTON: That's not -- I'm sorry. Go

1 ahead.

2 MR. CARVIN: Therefore, they are proceeding  
3 on a false premise to try to make this sound as if it  
4 is rebuttal to Mr. Morgan. This is entirely new  
5 testimony.

6 MR. HAMILTON: I'm actually --

7 JUDGE PAYNE: You asked him why was it  
8 significant. Let's get an answer to that directly and  
9 try it within a couple of sentences. And then if he  
10 wants more, he can ask you more.

11 THE WITNESS: Let me cut to the chase.

12 JUDGE PAYNE: Why is it significant? Or why  
13 did you think it was significant?

14 A Let me cut to the chase. I can provide a  
15 configuration of precincts that would increase the  
16 Republican performance of all of CD 2 that would also  
17 move about over 800 African-Americans into CD 2. And  
18 it involves three of these districts that were  
19 removed -- excuse me -- precincts that were removed  
20 from CD 3 to CD 2.

21 JUDGE PAYNE: Go ahead.

22 JUDGE DUNCAN: What was the question?

23 Q The question is this: We were talking about this  
24 table, Plaintiffs' Exhibit 57. You were asked about  
25 it by Mr. Carvin. We were looking at the five VTDs

1 that were dropped from benchmark CD 3.

2 JUDGE O'GRADY: Where is this in your report?

3 THE WITNESS: It's not in the report. It  
4 only became evident once we started getting involved  
5 with all of this data back and forth.

6 MR. HAMILTON: The parties have supplemented  
7 their reports by these last minute exhibits that were  
8 created --

9 JUDGE PAYNE: We're talking about a chart  
10 that is in plaintiffs' correct and  
11 Intervenor-Defendants' Exhibit 50 that is corrected;  
12 is that right?

13 MR. HAMILTON: We're talking about  
14 Plaintiffs' Exhibit 57.

15 JUDGE PAYNE: 57.

16 MR. HAMILTON: It's the same document that  
17 Mr. Carvin just cross-examined him on. It's the same  
18 document I examined him on yesterday.

19 JUDGE PAYNE: And the question was: Why is  
20 the move of five significant? Is that the question?

21 MR. HAMILTON: Yes. Well, Mr. Carvin made  
22 that point in cross-examination, so yes.

23 JUDGE PAYNE: That was the question. And he  
24 answered something to the effect that he could create  
25 a bunch of districts that would add 800 people. I

1 don't understand the answer.

2 MR. HAMILTON: I'd like to move to strike as  
3 nonresponsive to my own witness, if I could, and ask  
4 the question again.

5 JUDGE PAYNE: Do you object?

6 MR. CARVIN: I'm probably more confused than  
7 anybody else, but I'll wait for the next question.

8 JUDGE PAYNE: Sustained.

9 MR. HAMILTON: Thank you, sir.

10 BY MR. HAMILTON:

11 Q So listen to the question, Dr. McDonald. There's  
12 five VTDs, I believe you testified, that were dropped,  
13 and that we analyzed the political and racial  
14 performance of them in Plaintiffs' Exhibit 57. Are  
15 you with me so far?

16 A Yes.

17 Q And Mr. Carvin was making the point that there's  
18 30 that were being added. You wanted to explain, I  
19 believe, during the cross-examination that you knew  
20 where these were and there was something significant  
21 about where they were. So could you just give us two  
22 sentences on that?

23 A Yes. These are precincts that are located in  
24 Norfolk. They are part of that claw, whatever you  
25 want to call it, that comes around and grabs

1 predominantly white neighborhoods in Norfolk formerly  
2 out of District 3.

3 Q In grabbing those precincts out of Norfolk, did  
4 they split the City of Norfolk?

5 A The City of Norfolk was already split.

6 Q Did they exacerbate that split?

7 A No, they did not.

8 Q Did they select -- was there a racial pattern to  
9 the selection of those precincts?

10 A Yes.

11 Q What was that racial pattern?

12 MR. CARVIN: I'll object. There's absolutely  
13 no evidence about the racial composition of those VTDs  
14 or their political composition anywhere in Mr.  
15 McDonald's report or anywhere in his effort to correct  
16 the seven VTDs which are no where near Norfolk in Mr.  
17 Morgan's Exhibit 50.

18 MR. HAMILTON: I totally disagree, Your  
19 Honor. The next question I was going to ask him to  
20 look at the exhibit and tell us what is reflected on  
21 the page in front of him.

22 JUDGE PAYNE: You mean his report?

23 MR. HAMILTON: In this exhibit that is in  
24 evidence.

25 JUDGE PAYNE: Then ask that question.

1 BY MR. HAMILTON:

2 Q Sir, if you look at Plaintiffs' Exhibit 57, we're  
3 talking about those five precincts you just described  
4 in Norfolk has having a racial impact, can we see that  
5 in Plaintiff's Exhibit 57? And if so, where?

6 MR. CARVIN: I have to object. And maybe  
7 just to clarify so I won't have to object again. This  
8 says five VTDs. He's mentioned two, as best I can  
9 tell, or one. Is he testifying about all five?

10 JUDGE PAYNE: He wants a clarification of the  
11 question because of the numerical difference.

12 MR. HAMILTON: He's testifying about all  
13 five.

14 JUDGE PAYNE: Then you need to ask the  
15 question that way.

16 BY MR. HAMILTON:

17 Q Do you have it in front of you, sir?

18 A The numerical --

19 JUDGE PAYNE: Ask the question again.

20 Q Right now the question is: Do you have  
21 Plaintiffs' Exhibit 57 in front of you, sir?

22 A Yes, I do.

23 Q Looking at the far right column, does this  
24 document identify the racial makeup of those five  
25 VTDs?

1 A It does provide an average.

2 JUDGE PAYNE: It does provide what?

3 THE WITNESS: An average, yes, of their  
4 racial composition.

5 Q What is that average?

6 A 21.1 percent.

7 Q That's the BVAP average?

8 A Correct.

9 Q How would you describe that?

10 JUDGE PAYNE: The black voting-age  
11 population?

12 MR. HAMILTON: Correct.

13 JUDGE PAYNE: Not the racial composition of  
14 the district. It's different, isn't it?

15 THE WITNESS: The racial composition black  
16 versus non-black.

17 JUDGE PAYNE: So you're saying that you can  
18 deduce that from the voting-age population?

19 MR. HAMILTON: May I ask a clarifying  
20 question, Your Honor?

21 JUDGE PAYNE: Yes, please.

22 BY MR. HAMILTON:

23 Q Dr. McDonald, of the five VTDs listed on  
24 Plaintiffs' Exhibit 57, the average non-Hispanic black  
25 voting-age population is 21.1 percent, correct?

1 A Correct.

2 Q And that is a very low BVAP number; isn't that  
3 true?

4 A Yes.

5 Q That that's those five precincts, correct?

6 A Correct.

7 Q At least some of which are in the City of Norfolk?

8 A Correct.

9 MR. HAMILTON: Thank you, sir. No further  
10 questions.

11 JUDGE PAYNE: All right. Any other evidence  
12 in rebuttal?

13 MR. HAMILTON: No, sir, Your Honor.

14 JUDGE PAYNE: All right. The case is  
15 submitted.

16 We have a briefing schedule. I think the  
17 last brief is due on something like June the 27th; is  
18 that right?

19 MR. HAMILTON: That's what I believe, Your  
20 Honor. Around that time. I don't have the order  
21 right exactly in front of me.

22 JUDGE PAYNE: Then the next time -- if we  
23 want argument, and we'll tell you if we do, but we  
24 need to schedule it to make sure we get it  
25 accomplished. What is the day of the week of the



1 27th? Anybody know?

2 MR. HAMILTON: It's a Friday, Your Honor.

3 JUDGE PAYNE: All right. And Monday is the  
4 30th?

5 MR. HAMILTON: Monday is the 29th.

6 JUDGE PAYNE: Monday is the 29th?

7 MR. HAMILTON: That can't be right.

8 JUDGE PAYNE: That's a fast weekend, but --  
9 what day is -- if Friday is the 27th.

10 MR. HAMILTON: It would be the 30th.

11 JUDGE PAYNE: The reason I'm asking is  
12 because there are eight availability limitations.  
13 That ensuing Monday and Tuesday, July 21, is a period  
14 when argument can be had. It would be rushing  
15 everybody to do the argument, but it can at least be  
16 accomplished, and we could hear your points if we're  
17 ready to do that. And I don't know that we are.

18 Do you have any problem with the week of July  
19 the 21st?

20 MR. CARVIN: I'm sorry. July 21?

21 JUDGE PAYNE: July 21.

22 MR. CARVIN: I apologize, Your Honor. Can I  
23 give you a conditional yes and just double check my  
24 schedule and get back to you within an hour, but I  
25 think it's okay.

1 JUDGE PAYNE: How about you-all?

2 MR. HAMILTON: Mr. Devaney I think would be  
3 available. I don't have his schedule. I am  
4 unfortunately out of the country in the month of July,  
5 but Mr. Devaney can argue in my stead. He's appeared  
6 before this court.

7 JUDGE PAYNE: How about June 29 and 30? Does  
8 anybody have any objections to that? We don't know  
9 what we're doing yet.

10 MR. HAMILTON: Again, I would have to confirm  
11 with Mr. Devaney, but I can do that this afternoon.

12 JUDGE PAYNE: All right. It looks to me like  
13 that we will hear argument if we want it, we'll call  
14 you and let you know, the week of July the 21st,  
15 early in the week. Probably Monday. And we'll wait  
16 and see. You're going to call back to the office and  
17 let me know if you're available then.

18 MR. HAMILTON: And if I might have the  
19 opportunity to consult with Mr. Devaney.

20 JUDGE PAYNE: You're going to call him?

21 MR. HAMILTON: I will. He's currently in  
22 trial in Florida at the moment. So I won't be able to  
23 reach him until this evening.

24 JUDGE PAYNE: That's no problem.

25 MR. HAMILTON: Thanks.

1 MR. CARVIN: Your Honor, again, just for the  
2 record, we renew our motion for judgment as a matter  
3 of law.

4 JUDGE PAYNE: All right.

5 MR. MELIS: And the defendants join in that,  
6 Your Honor.

7 JUDGE PAYNE: All right.

8 Thank you very much. We'll take it all up at  
9 the right time.

10 Thank you very much. The matter is  
11 submitted.

12 MR. HAMILTON: Thank you, Your Honor.

13

14 (The proceedings were adjourned at 12:30  
15 p.m.)

16

17 We, P.E. Peterson and Diane J. Daffron,  
18 certify that the foregoing is a correct transcript  
19 from the record of proceedings in the above-entitled  
20 matter.

21

/s/

22

\_\_\_\_\_  
P. E. Peterson, RPR, CCR

\_\_\_\_\_  
DATE

23

/s/

24

\_\_\_\_\_  
DIANE J. DAFFRON, RPR, CCR

\_\_\_\_\_  
DATE

25