IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

DAWN CURRY PAGE, et al.	:	
	:	Civil Action No.
vs.	:	3:13CV678
	:	
VIRGINIA STATE BOARD OF ELECTIONS, et al.	:	January 27, 2014
	:	

COMPLETE TRANSCRIPT OF THE MOTIONS HEARING

HEARD BEFORE: THE HONORABLE ALLYSON K. DUNCAN

THE HONORABLE LIAM O'GRADY

THE HONORABLE ROBERT E. PAYNE

APPEARANCES:

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P R O C E E D I N G S

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

MR. MELIS: Good morning. My name is Mike Melis. I represent the State Board of Elections, the defendant in this matter.

MR. CARVIN: Good morning. My name is Michael Carvin, and I represent the intervenor defendant.

MR. DEVANEY: Good morning. John Devaney on behalf of the plaintiffs.

MR. ROCHE: Good morning, Your Honors. John Roche on behalf of the plaintiffs.

MR. CARVIN: I should have mentioned John Gore is with me today, as is John Berry.

JUDGE DUNCAN: Good morning. We're ready to proceed.

MR. CARVIN: Good morning, Your Honors. My name is Michael Carvin for the intervening defendants. Mr. Melis and I have agreed, if it's all right with the Court, that I'll go first for the defendant.

Plaintiff's complaint here says that in the wake

of the *Shelby County* decision, Section 5 no longer justifies maintaining District 3 as a majority black district. I'd like to deal with that argument first and then the new argument that they've raised for the first time in their opposition to summary judgment after that.

Plaintiffs' essential theory is that they don't dispute that Section 5 justified maintaining District 3 as a majority black district in 2012 when it was enacted, but they argue that the *Shelby County* decision in 2013 somehow retroactively invalidated that constitutionally adequate justification. We don't think that makes any sense.

When you are analyzing whether or not a purpose or interest by the legislature enacting the law was adequate, you look at the purpose or interest of the legislator enacting the law. You look at it at the time of enactment. That's the only act, the legally consequential act that they're challenging. That's the only thing that they are able to look at.

You don't engage in a hypothetical which says, what if they had enacted the law in 2013 after *Shelby County*, or what if *Shelby County* had been decided in 2011. Every case cited here, both by us and them, analyzes the legislative purposes in terms of what the legislature was confronted with at the time of enactment. That makes, of course, perfect sense.

The legislature had elections it had to deal with in 2012. It had to get preclearance from the Justice Department in 2012. So the question was, what was their purpose at that time, not in this hypothetical world posited by plaintiffs.

Plaintiffs had essentially three responses to this argument. First, they cited a number of cases which we, of course, fully embrace, which is, if the constitutional standard has changed after enactment, you look at the newly developed constitutional standard.

In other words, if, in *Citizens United*, you thought that lessening corporate speech was okay at the time of enactment and Supreme Court precedent endorsed that, when they changed the precedent, make it clear that that purpose is no good, then obviously you strike down the law.

All that means, of course, is that the purpose underlying the law at the time of enactment was unconstitutional, was illegitimate. It doesn't matter whether the Supreme Court decision telling you it was illegitimate preceded enactment or postdated enactment. In either instance, there was an unconstitutional purpose at the time of enactment.

But that's got no relevance here. That would apply here only if the Supreme Court, after we had enacted

the law in 2012, said, compliance with the Voting Rights Act is no longer a legitimate justification.

If they had changed the standard under *Shaw*, then the cases they're identifying would have some relevance, but that's not what happened. The *Shaw* standard is exactly the same. Compliance with the Voting Rights Act is a legitimate constitutional justification. All that changed was some of the circumstances after enactment.

So they want to say that even though you had a completely legitimate purpose enacting it, and even though that purpose remains completely legitimate under Supreme Court precedent, you should, nonetheless, engage in this hypothetical and say, well, what if they had enacted it in 2013.

JUDGE PAYNE: Haven't they abandoned that approach to the case in their reply brief and, in essence, said that what happened here that was unconstitutional happened in 2012? Isn't that where we are as a result of the briefing?

MR. CARVIN: Your Honor, I'll let the plaintiffs speak to their ever-changing theories, and they have --

JUDGE PAYNE: But how do you read it? They have to address it.

MR. CARVIN: I don't think they've abandoned that argument. I think the new argument is supplementary to

what they're saying, and I'd like to make two points in that regard if I could.

In terms of their new theory, it's absolutely prohibited under *Cloaninger*, this Court's decision at 555 F.3d 324, 2009 decision, for them to articulate a new theory in opposition to a summary judgment motion, particularly after discovery is commenced and they have not amended their complaint. And they did not allege in their initial complaint that this was not narrowly tailored to be a Section 5 remedy. That's something that they invented in their opposition to summary judgment.

JUDGE PAYNE: Don't they allege that in paragraph 45?

MR. CARVIN: Yes. Let's look at paragraph 45. But I think to understand paragraph 45, Judge Payne, you need to look at the two preceding paragraphs if you have it in front of you.

Paragraph 43, if you have the complaint in front of you, consistent with the theme of the entire complaint says, "In particular, in the wake of *Shelby County*, Section 5 cannot justify the use of race as a predominant factor in drawing congressional district lines." That is not an argument that before *Shelby County* Section 5 didn't use it, and, of course, it says just the opposite.

Then you go to paragraph 44. It says, "Nor can

Section 2 of the Voting Rights Act justify" -- we've said Section 5 is no good because of *Shelby County*, and Section 2 doesn't work either, and they are talking in Section 2 terms about equal opportunity to elect.

Then you get to paragraph 45, and it says, "Even if there were a compelling state interest... there are other viable and constitutionally permissible alternatives to Congressional District 3."

Well, that's saying even if Section 2 did provide a compelling state interest, it's not narrowly tailored. They've already taken Section 5 off the table in paragraph 43, and then they make two arguments about Section 2. One is there's no compelling state interest, and number two is there's some narrowly tailored alternative that would better justify the majority black district.

So, no, and we don't just have to go by the complaint, Your Honor. As you'll recall, plaintiffs' counsel told you and opposing counsel two, three months after the complaint was filed, they're not challenging the district as it was drawn in 2012.

JUDGE PAYNE: You are talking about what was said on the conference call?

MR. CARVIN: Yes, I am.

JUDGE PAYNE: But in the next conference call or two conference calls later, he amended that statement and

retrenched from it, did he not, citing paragraph 45 as his justification?

MR. CARVIN: Well, that's true, but the point -- the question, I think, is whether or not they really alleged it in the complaint or whether they can make a new argument in their opposition to summary judgment.

We know that they were not making this argument in the complaint, A, because the complaint doesn't say it; B, because counsel told us the complaint didn't say it; C, when we were arguing about whether or not we should have a trial in February, and we kept saying, why did you wait so long to bring this case, why didn't you bring this case in 2012, they said, because *Shelby County* hadn't been decided.

All the briefs in terms of their laches and why they did it was keyed to the *Shelby County* decision. Well, if you're not making an argument in the wake of *Shelby County*, then that can't be the right thing.

I'd also point out that we had remedies briefing where we said three different times that they have conceded that Section 5 was legitimate in 2012, and they didn't dispute that at all in those briefings.

It's only when we file the motion for summary judgment and they realize that their original theory was completely baseless that they came up with the 11th-hour

idea to try and keep the case alive.

But I would like to point out a couple of other things. One is, even if they kept alive the notion that Section 5 was not permissible in 2012, you still don't get to that issue, because we only have to justify a district where race was the predominant factor, and it is their burden to show that race was the predominant factor, and they failed completely in that showing.

Under the case *Fletcher*, another three-judge court, in Maryland in this district, said, we are granting summary judgment for the plaintiffs because the plaintiffs have not met their burden of showing that the unusual shape was attributable to race rather than politics, and this, of course, comes directly from the *Easley* case.

JUDGE DUNCAN: Why isn't it enough to know that the district was drawn as it was to avoid retrogression and achieve preclearance added to the fact that the district is, I think you would acknowledge, a fairly peculiar shape and by looking at the racial composition of the populations that were added to the district in the revised 2012 map?

MR. CARVIN: We think it is enough to know that it was done to comply with Section 5 which gives us a compelling government interest.

JUDGE DUNCAN: That's a different issue. There's

a different -- you can't conflate the compelling interest with the showing in the first instance that race was a predominant factor. So I thought you had moved on to race as a predominant factor.

MR. CARVIN: I think there's some semantic confusion going on here that the plaintiffs are trying to create. So let's just think about this in a normal case in addition. Forget the fact that they conceded we have a Section 5 justification. When the plaintiffs have shown that race was the predominant factor, not politics, not preserving cores, not protecting incumbents, after they have done that, then we come forward and say, okay, but race was done to comply with Section 5.

JUDGE DUNCAN: Right.

MR. CARVIN: Now, they may try to create semantic confusion. You can say that that's a racial purpose that's justified by Section 5, or you can say it's a nonracial purpose, it's a compelling government interest. It doesn't matter. At the end of the day, if we show that race did predominate, we are still excused from any constitutional violation if it was done to comply with Section 5.

But I want to make sure the Court understands the order of that presentation. They first have to show that race, rather than politics, was the reason. This is just

like in *Fletcher*. Maryland is not a Section 5 jurisdiction. There was no Voting Rights Act justification, and they said, look, it doesn't matter if there's a Voting Rights Act justification, because the plaintiffs haven't met their burden of showing that race, rather than politics, combined.

JUDGE DUNCAN: And I agree with what you are saying about the structure, the analytical structure. I thought you were addressing or rebutting the notion that race was a predominant factor in arguing that the plaintiffs had not shown that.

MR. CARVIN: Exactly.

JUDGE PAYNE: But the next question is, in this case where -- the predominant factor analysis has to be made in perspective of acts taken under Section 5. If you do something under Section 5 for a racial purpose, isn't that probative, if not dispositive, of the predominance issue that animates the strict scrutiny analysis that brings then into play the compelling state interest and the narrow tailoring I think is something that we all might like to hear more about.

MR. CARVIN: Right. All I'm trying to emphasize is we went under two different theories. If I stipulate that race was the predominant factor, I still win because we had to consider race to maintain this as a majority

black district.

JUDGE DUNCAN: Are you conceding that, because I think the question is, as I understood it, or my question was, what's the first step of the analysis?

MR. CARVIN: Right. The reason we're all so confused about this is plaintiffs don't normally come in and concede that we've got a compelling state interest.

JUDGE DUNCAN: I'm sorry. I'm not conceding -- I'm just asking the question that starts at what I understand to be the beginning of the analysis. Is it your view that race was not the predominant factor?

MR. CARVIN: So just to be clear, if -- we think we win because they conceded Section 5, the legitimate justification, but now I assume the conversation is, assuming they didn't do that, let's move on and proceed as if this was a normal case.

Then what they would have to do is, A, show first race, rather than politics, was the reason, and I'm not conceding that race was. I am quite clearly arguing that they haven't met their *Easley* burden of showing that race was the dominant factor.

JUDGE PAYNE: What is the other factor in the pleadings and in the information we have on summary judgment that would allow us to dispose of that question on a matter -- in a way of summary judgment?

MR. CARVIN: It is their burden to eliminate nonracial factors. We made that argument in our motion for summary judgment, that they need to come forward and show you the nonracial reasons. Under *Celotex*, when a defendant makes an argument and the plaintiff has the burden of proof, the plaintiff is obliged to show all the evidence it can muster to disprove in this case that race was the factor.

JUDGE DUNCAN: But what more need they show other than the fact that the district was drawn as it was to achieve preclearance which, it would seem to me, necessarily indicates that it was drawn with race as, at the very least, a significant if not predominant factor, and then you add the other factors.

MR. CARVIN: No, I do not think that Section 5 compliance negates the need for them to eliminate race --

JUDGE DUNCAN: Not negates. Satisfies.

MR. CARVIN: No, and that's where I must respectfully disagree. *Easley* involved North Carolina, a jurisdiction that is largely covered by Section 5, and I'd like to quote for you what *Easley* tells plaintiffs they must do, and this makes it, I think, as clear as I can possibly be.

This is on the last page of *Easley* at the last page which says, "the party attacking the legislatively

drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance," in this case meaning a significantly less black District 3.

That's the prima facie case. Then and only then do we ask ourselves, if they've shown that race was the predominant factor, then we SAY, well, was race used to comply with Section 5 or was it used for some other reason, but we don't get to that question until they have eliminated the nonracial explanations. And *Easley* couldn't have been clearer on that.

There they went through the precincts that went in and out. It was the same thing. They were trying to shore up a black district with a black incumbent, Representative Watt, and they went through and showed that they have left out some Democratic districts that were predominantly white and they put in precincts that were predominantly black.

The Supreme Court said it was clearly erroneous as a matter of law, before you ever get to the Section 5 justification, to make the defendants explain whether or

not race was used for Section 5 or not. And that's my point.

Maybe the best way to think about it is, would we have done the same thing if all of these people were white, if race had never entered into it. What's their argument for why we departed from traditional districting principles? District 3 shows exactly the same districting principles that are applied to all the predominantly white districts in Virginia.

We preserve the core of that district and only made the changes they had needed, a fair amount of changes because they needed 64,000 more people. We preserved that core, and when we made the changes, we did it in a way, frankly, that helped the incumbents. Certainly that's a reasonable way to look at the map.

So they're arguing that Representative Scott and the black district need to be treated worse than the predominantly white district. You can preserve the cores and protect the incumbents in the white districts, but you can't do it for Representative Scott. That's not right.

If politics and incumbency protection and preserving the cores are our traditional districting principles, District 3 is completely justified on that basis. We didn't change dramatically the shape of this district at all. In fact, we had a special reason not to

change the shape of District 3 as compared to all the other districts which is, it looks very much like the district that the *Moon* court -- that came as a remedy in the wake of the *Moon* court case, and *Moon* had enjoined any district that violated the Constitution.

So *Moon*, at least implicitly, says this district complies with the constitution. Then they focus on the changes to these districts, okay, and they say here's what they did, but my first point is the changes to the district didn't make the district any uglier. They're arguing that the basic core was the ugly part, but more importantly, every change they identified as being racially motivated was -- could have been politically motivated.

They say that we brought Petersburg from District 4 into District 3. Well, Petersburg is a 90 percent Democratic district. District 4 is represented by representative -- Republican Representative Forbes. He lost a 90 percent Democratic city, and that went to Representative Scott. Helps both of them.

They complain that we switched New Kent County from District 3 to District 7. District 7 is represented by Eric Cantor who is the majority leader in the House, and he's a Republican. New Kent County is about a 66 percent Republican area, so moving New Kent County into

District 7 is a political advantage to Representative Cantor and to Representative Scott.

They also say that there was these precinct swaps in Henrico and Richmond going from District 7 into District 3. All of those were predominately Democratic.

Finally they complain that there was diversions between District 2 and District 3. Well, District 2 is represented by a Republican, and moving Democratic precincts helped him politically.

My point is -- by the way, Districts 2 and 3 make no sense from their perspective. Under their own analysis, the precincts that went from District 2 to District 3 were 36.7 percent black. In other words, they were decreasing the racial identifiability from 53 percent. That's where they said we should be doing.

So if they convince you that the switches between District 2 and District 3 were contrary to normal traditional districting principles, that helps me, because that shows that we are pursuing politics regardless of whether it increased the majority black district or decreased it as they did here.

Compare that to *Fletcher*. *Fletcher,* they granted summary judgment when they had this pterodactyl-like thing, and they said, look, you have to show us that moving black voters around was race rather than politics

driven, and they granted summary judgment because they couldn't come up with it.

Here, not only can they not come up with it, they can't deny that every change about which they're complaining was politically beneficial to the incumbents. So they are conceding that they have to -- that they haven't met their burden on politics, and, again, I want to repeat that their burden under *Easley* is they need to show three things.

They need to show that their alternative is as politically beneficial to the Republican legislature as what the legislature does. They have to say that their alternative adheres to traditional districting principles at least as well as ours, and third, they have to show that all of that could have been accomplished in a way that substantially changes the racial composition of District 3.

Well, not only did they not respond to this argument in their opposition to summary judgment, which means they lose under *Celotex*, they've never come up with an alternative that does any of those. They've maintained their alternative like it was some sort of state secret.

Plaintiffs come in and say, here's what they should have done, here's what they did, and here's why our alternative is better.

JUDGE PAYNE: What do you think that the plaintiffs' expert's affidavit and report does to your position that they have not refuted that the reasoning for the redistricting was political?

MR. CARVIN: Their plaintiffs' report is exactly the plaintiffs' report that was introduced in *Backus v. South Carolina*, same expert, same analysis, and the three-judge court there said that that was facially deficient, it was unconvincing and incomplete. And the reason they gave for it being incomplete and inconsistent was, yes, he showed, big surprise, that the precincts going into District 3 were heavily black, and some of those going out were more white again, they said, but he didn't look at alternative explanations, namely politics or preserving the cores of those districts.

JUDGE PAYNE: And you are saying that the expert -- his name escapes me -- does not do that in this report and this affidavit.

MR. CARVIN: He doesn't do two things. He says the changes maintain -- look, 64,000 people have to come in. I agree that if you are going to maintain it at 53 percent, 53 percent of those people need to be black. He says that's what happened. Big surprise. But what he doesn't say is that there's no nonracial explanation for bringing these core Democratic constituencies into

District 3 and taking these core Democratic constituencies out of District 4 or Republican districts into District 7.

JUDGE PAYNE: What way other than an expert's report that would prove that there was at least a factual issue on the political ground for the district could they possibly prevail?

MR. CARVIN: They would do what *Easley* says they do.

JUDGE PAYNE: No, I mean in summary judgment.

MR. CARVIN: No, no. Well, right. In summary judgment, they say, look, tell us what kind of evidence you're going to produce. In every case in the United States except this one where they refuse to show us their alternative, what they do is say, here's what they should have done, here's a map, here's what District 3 would look like, and then we would all sit around and say, does this alternative solve the same political problems, does it adhere to traditional districting principles, and does it make the district less black.

And the answer is, we haven't -- we're not even able to engage in that basic conversation because they refuse to produce the map. I will say, it's not a coincidence that they haven't come forward with the map, because they know their expert report refutes the notion, refutes the notion that we could have achieved the same

politics and preserving of cores.

In his reply brief for the first time they discuss some alternative which was the alternative advanced by the Democrats in the Senate. And they say that would have turned District 3 into a 42 percent BVAP district, and he says, you know, that district might look better than our district.

Well, A, obviously, if we had done that, we would have been denied preclearance, because if you go from 53 to 52 -- 42, particularly under the new Section 5, that would have never gotten off the drawing board, but in terms of the other preservations, the Senate Democrat plan redrew the entire state. So it's completely inconsistent with the traditional principle that we adhered to which was preserving the cores of the district.

Politically they have to say that's as good for us politically as what we have accomplished here to negate the hypothesis that what we were doing was politically motivated.

Well, their alternative would put Representative Randy Forbes in a 50 percent black VAP district, taking an incumbent who has very good chances of reelection and putting him in a district where he has virtually zero chances of reelection.

So they can't satisfy traditional districting

principles, they can't satisfy the other prong of *Easley*, that it would be better for politics.

JUDGE DUNCAN: As I had initially understood your argument from your brief, it was that it was not that race was not a predominant factor but that it was not an impermissible factor at the time that the district was created.

You say -- I'm looking at page 15 of your brief. "The question under *Shaw* is whether an impermissible consideration of race was the predominant factor," and it concludes that since it is conceded that compliance with Section 5 was the General Assembly's predominant purpose or compelling interest underlying the racial composition of the district, but the predominant factor motivating that decision could not have been an improper consideration of race. Not that there was no consideration of race, but that it was a proper consideration at the time.

MR. CARVIN: Right. Your Honor, I'm a defendant. I have to react to the plaintiffs' argument. Now we're back to the plaintiffs' first argument.

JUDGE DUNCAN: Well, if you could just focus on my question. It appeared to me that your argument has morphed somewhat in terms of what I understood it to be when you appeared to concede that race was a predominant

factor, just that it was permissibly so at the time.

MR. CARVIN: No, Your Honor, with respect. That response means this case should be disposed of. They've conceded that Section 5 was the interest underlying it, and if Section 5 is a legitimate justification, this case is over. Dismiss it, we win.

Now I've been told I have to move on to their next set of arguments where they retract that argument, and then they say, no, we've come up with a new theory. Even in 2012 it was no good. So, yes, you should read that paragraph and say, if the only racial argument being made is that Section 5 is no longer a justification, then we win, because if Section 5 wasn't justification for considering race at the time, it doesn't matter that *Shelby County* later invalidated Section 5. Full stop, dismiss the case.

I don't think you should go any further. I am now addressing the alternative that was posed to me by Judge Payne. Well, assume you allow them to amend their argument six months into the litigation in their opposition for summary judgment where they're now arguing, for the first time, um, no, Section 5 wasn't a justification in 2012.

Then I say, then we're back to the normal circumstance where they come forward. We don't have to

say a word. They come forward and show that race, rather than politics, explains what they consider the untoward-looking nature of District 3.

Once they have done that, and only when they have done that, shown that race was the dominate force, do you ask yourself the question, well, were they using race to comply with Section 5, or were they using race for the impermissible reasons under *Shaw*.

And I am saying that if you're going to allow them to amend their complaint six months into the litigation, which we think is completely improper, they still lose, because then they've got a different burden. Then they've got to show that race was the predominant factor, and if they can do that, they have to eliminate politics, incumbency protection, and preservation of cores as the reason for the district.

I've just explained that we made all of those arguments in our summary judgment motion. They were obliged under *Celotex* to forward with some evidence explaining to you, oh, no, we can show this, we can meet our *Easley* standard, and they didn't do it. They completely ignored our argument.

Then I go on and say, well, let's hypothesize that they hadn't ignored their responsibility under *Celotex*, and let's figure out, because I know this Court

wants to know where this case is going, whether they're ever going to be able to show that. And then I pointed out that we've got an excellent defense under preserving the cores of the district. We preserved District 3 just like all the other white districts.

All the changes to District 3, we've got an unanswerable argument that those would have been done if all of the people in the relevant precincts were white because of the political effect of those moves, and we also have the fact that -- there's no bones about it -- this was an incumbency protection plan, and we were trying not to move a lot of things around, and to the extent we made changes, we were trying to shore up.

In terms of Mr. McDonald's expert report, he doesn't dispute any of that. He just focuses on the fact, just like he did in South Carolina, that the boxes that came in were black and the boxes that went out were white. And just like in South Carolina, the Court said, well, okay, that's true, but we all know that there's an incredibly strong correlation between black voters and Democratic voters, so you have to prove to us, just like in *Fletcher* which you couldn't do, that the reason this was done because of race rather than because of politics, and they can't do that.

And that, I think, really ends this case, because

they can't make the showing. If they want to come up to you and articulate that they do have an alternative -- by the way, the second point I guess I'd make is, if they have preserved their Section 5 argument, they've only preserved it under paragraph 45 in terms of narrow tailoring, right?

Paragraph 45 says, even though there are compelling state interests to keep District 3 majority black, it wasn't narrowly tailored. Why not? Because there were viable and constitutionally permissible alternatives to District 3.

So in addition to everything else I'm saying, they have to show that there was a narrow-tailored way to comply with Section 5. Let's start --

JUDGE PAYNE: Don't you have to show that? Isn't narrow tailoring part of what you have to prove once we get into a strict scrutiny analysis?

MR. CARVIN: Fair enough, Judge Payne, and that's obviously true, it is our burden, and I will now meet our burden. We have narrowly tailored it because there is no viable alternative that still is a majority black district and still accomplishes the things I've discussed before. That is our defense. In a normal case, they will say, no, there isn't, here's one, but they haven't shown that to us.

JUDGE DUNCAN: But it's your burden.
MR. CARVIN: No, it is their burden --
JUDGE DUNCAN: Narrow tailoring isn't your burden --
MR. CARVIN: Obviously it's our burden.
JUDGE DUNCAN: What have you proffered to meet your burden other than your assertion?
MR. CARVIN: I can't -- in a normal case, I'd tell you why their alternative is no better than ours, but since they haven't proposed an alternative, all I can do is make the bold assertion that no such alternative exists.
Their theory, again, is that there are viable and constitutionally permissible alternatives. That's the reason they think there's a better --
JUDGE PAYNE: Do you need to make the bald assertion, or do you need to have, for example, an expert come in or everybody in the process come in, say an affidavit, and say, there were no other viable options that would comply with the Constitution, and then it's up to them to come back and prove it, and their silence then puts the sword to their case at that point, it would seem to me. So the question is, why don't you have to come forward with something to start the ball rolling, I guess is my question.

MR. CARVIN: Three reasons, Judge Payne.

JUDGE PAYNE: It may be three questions.

MR. CARVIN: I have three answers to why we don't have to come forward. Number one, we didn't know they were making this argument until their opposition to summary judgment, so we had no ability to do it.

Number two, we only have to answer the Section 5 narrow tailoring argument after they have disproved the political cores and incumbency protection explanations.

JUDGE DUNCAN: Let's assume for purposes of your answer that they have.

MR. CARVIN: Sure. Then we will come forward, and I will say that, no, there was no better alternative to creating a majority black district, and I don't have an expert to say this, but I'll use their expert. Their expert says that the entire contours of District 3 is a *Shaw* violation. Well, you can't get to 50 percent, you can't preserve District 3 if we are required to do so under Section 5 unless you maintain the cores.

They say that District 3 itself is void *ab initio*. That's the *Shaw* violation. They don't say the changes make it any worse. They say District 3 is the *Shaw* violation.

JUDGE O'GRADY: Don't we have to have a trial to decide that, as Judge Boyle did, in *Easley v. Cromartie 2*

case that you are referring to which lays out the burdens as you have identified them?

MR. CARVIN: Your Honor, you don't have to have a trial for three reasons. One is, the theory advanced in their complaint, as opposed to their new theory, is void *ab initio* as a matter of law, so there's no point in having a trial.

JUDGE O'GRADY: Haven't you ever had a case where there wasn't some moving parts to the plaintiff's action and there weren't modifications, highlights? You know, paragraph 45 becomes more important after they look at your summary judgment pleading, but it's not void of any information there. It just hasn't been explored the way you think it should have been explored, and Judge Payne knows the discovery end of this thing better than I do, but I did a little time in --

MR. CARVIN: Sure. I've had plaintiffs take a detour to the right and a detour to the left. I've never had them turn around and go back the other way on the highway which is what's happening here.

Here they said Section 5 was fine. That's what this case is about. They had a Section 5 justification in 2012. It disappeared in 2013. That was the theory of this case. That's what we responded to. That's a purely legal question.

Now they've come back in and said, forget all this discussion of *Shelby County*, forget plaintiffs' concession, we've got a whole new theory. You know what? It was no good in 2012, and now I am reacting to that.

JUDGE O'GRADY: That's where we are.

MR. CARVIN: That's where we are, and let's ask ourselves the question, have they gotten me to the point where I have to come up with a Section 5 defense as of 2012, and I would suggest that the Court do exactly what the Court did in *Fletcher* and say, look, is there some evidence out there, have they pointed to some evidence where we even need to have a trial. Have they told you, yeah, there is this alternative out there that's just as good politically for Republicans --

JUDGE O'GRADY: Well, you've laid that out, and you've laid that out well, the changes to the percentages in the different various districts. Obviously it creates kind of a head -- a puzzle there as to what is the end game in this suit to begin with.

That, you know, is something that I've thought about and, perhaps, will learn. What's the remedy, the real remedy at the end of the day? Does it change any other district, does it give any real opportunity for another district to have a second minority candidate, a viable candidate at the end of the day?

You've laid it out, but they have responded in kind, not to your satisfaction, but is it sufficient where we need to have a full record before we make a decision? Obviously the Supreme Court took, you know, wanted a full record in *Cromartie 2*, as I call it, the *Easley* case, and got it.

MR. CARVIN: Well, actually all they said in *Cromartie 1* was, you can't give summary judgment to the plaintiff which I fully agree with. They didn't say you can't give summary judgment to defendants, and they all but said you should have given summary judgment to defendants in *Cromartie*. Why? They made detailed findings of fact, three judges under Rule 52, and they said, that's clearly erroneous.

They said, that's clearly erroneous why? Because they laid out the standards what plaintiffs need to show at the least, and they've said time after time, they don't want federal courts getting involved in the minutia of redistricting until plaintiffs have shown that something really different is going on here. And they haven't shown anything but politics and preserving the cores is going on here.

As a practical matter, Your Honor, if and when they ever produce a map -- I think it's way past the point where they should have done that under *Celotex*, but, sure,

you can call it a trial if you want. All we're going to do is make exactly the same points I just made which is every change they've made is political, and what exactly would the trial entail? What new evidence would they possibly come up with?

I'd like to make two points in that regard. One is, they're not going to get any internal deliberations of the legislature because that's protected by legislative privileges. None of these cases, including *Backus*, have allowed that.

The second point I'd like to make in terms of summary judgment is, all, at the end of the day, you're going to be doing is looking at a bunch of numbers and stuff that experts have produced. It's not going to turn on any credibility determination. So this would really be a pointless waste of time.

JUDGE DUNCAN: Perhaps it would give you an opportunity to support or meet your burden of showing narrow tailoring now that you understand the argument that has been presented.

MR. CARVIN: You know, Your Honor, yeah, I suppose plaintiffs could always never reveal their real theory so we can defend against it until the eve of trial, and they can manipulate the system so they always get a trial because they never tell anybody in advance what

their theory is, but that's not the way the federal rules work. The federal rules tell you, if you've got a theory, if you've got some evidence to support a legally viable theory, you don't hide it in a box and produce it on the eve of trial. You produce it now so the defendants can respond to it.

And, so, no -- and by the way, I don't need any more information from them to make my defense. You've heard it at great length this morning. I know exactly what they're going to argue, and I know they're not going to be able come up with a plan, which is why they haven't come up with a plan.

Why do they need discovery? Why do they need extra time? What are they going to get from us that's going to help them draw up their alternative?

JUDGE PAYNE: Can I ask you another question that harkens back to a point that you started on and that you've come back to. There is in the record that the plaintiff said in a conference call that there was no challenge to the constitutionality vel non of the 2012 districting decision, and then I'd like to know -- I haven't put it together -- do you know the chronology that followed that in terms -- with respect to, A, when the summary judgment motion you filed was made and when they filed their reply and when that conference call occurred

in which he retrenched from his position in the original conference call, because it seems to me that has something to do with what's on the table under your *Cloaninger* argument.

MR. CARVIN: We can, obviously, provide the exact dates. In bold strokes I can tell you the concession was made before we filed their motion for summary judgment, and then the concession was immediately withdrawn.

JUDGE PAYNE: Was withdrawn before they filed their brief and reply?

MR. CARVIN: I think it was actually a few days after.

JUDGE PAYNE: After they filed their response --

MR. CARVIN: I could be corrected, but I think -- if you read their opposition --

JUDGE PAYNE: I can figure it out.

MR. CARVIN: If you read their opposition, they affirmatively withdraw Mr. Devaney's concession on the call on the face of the opposition. Then I believe we had a conference call with Your Honor, I'm going to say three days or so after that, in which Mr. Devaney essentially repeated what they put in the opposition for summary judgment.

The key point I'm trying to convey is, they never changed their theory until we showed in our motion for

summary judgment that their legal theory upon which this case is actually based was without merit.

Unless Your Honors have additional questions.

JUDGE DUNCAN: Thank you very much.

MR. CARVIN: Thank you very much.

MR. MELIS: May it please the Court, good morning. Mike Melis on behalf of the individual State Board of Elections defendants. I will do my best to keep my presentation brief.

We agree with and adopt the intervenors' arguments presented to the Court this morning, but there are a few points on behalf my clients I believe I need to emphasize. Certainly, if I'm covering ground that the Court already has heard and understands, then I will accept the direction of the Court to move it along.

A few points initially, I want to make it clear that on behalf of the State Board of Elections defendants, we do not concede that the plaintiffs have proven that race is the predominant factor in establishing the lines in the Third District.

What the record shows is that one of the factors, and it was a very important factor, was compliance with Section 5, and I'd like to address -- one of the questions from the Court today was -- I tried to write it down, but I might not have gotten exactly, but it was a question

about whether emphasizing compliance with Section 5 is not dispositive in this case, whether that's dispositive in this case, and I would submit to the Court that that cannot be dispositive in this case because then you have a situation where a state, which is doing its best to comply with the mandates of federal law that tell it this is what you must do in drawing your district lines, then falls into the trap of doing something that is purported to be unconstitutional.

The State is put in a Hobson's choice of either complying with federal law that may result in being unconstitutional or disregarding federal law which will result in not getting preclearance and not being able to have an election.

JUDGE DUNCAN: I completely understand what you present as a conundrum, but it's -- isn't it resolvable by following the analytical process through its progression? The question in an equal protection challenge is whether the law distinguishes between individuals on the basis of race.

Once you show that it does, even if it was done permissibly, which establishes, as you yourself assert or as the intervenor asserts, that there was a compelling state interest initially, that still simply goes to whether there's strict scrutiny; therefore, whether

there's a compelling state interest and was the district narrowly tailored. But the intervenor argued, quite accurately and clearly and appropriately I thought, that the inquiry looks to legislative intent at the time; right?

I mean, that's part of the argument, that it's not -- you are not looking at the legislative intent -- you have to look at it at the time the statute was enacted, and there seems to be a remarkable or at least some indication that the author of the map -- there's a lot of testimony that the reason for creating this district with a large percentage of black voters, that was the primary focus in order to achieve preclearance.

So it's not that one is in an irremediable situation. It simply moves the analysis farther along the continuum.

MR. MELIS: Here is the problem with that approach, and I understand, I think, what Your Honor is struggling with is perhaps you have a situation like one of those pictures where one person can see a face and the other person sees a grandmother or something like that.

JUDGE DUNCAN: Are you calling me a grandmother?

MR. MELIS: No, I'm calling the picture a grandmother. Your Honor does not resemble a grandmother in any way.

JUDGE DUNCAN: That's okay.

MR. MELIS: There's two points on that. One is, if we take that approach that simply complying with Section 5, and a legislature saying we will comply with the mandates of federal law constitutes race becoming the predominant factor, then we've already de facto, de jure instituted strict scrutiny upon a state who does that.

JUDGE DUNCAN: That is the logical consequence, and, in fact, what I understood to be the intervenor's argument is not that race wasn't a factor but that race was not, at the time, an impermissible factor.

MR. MELIS: And I don't know if this is a nuance difference between intervenor's argument and our argument. In that regard, our argument is that the General Assembly did not sit down and say, let's draw -- it was already drawn. Let's maintain a majority/minority district.

The General Assembly sat down and said, let us make sure we comply with all constitutional requirements and all federal law requirements. Okay, what does that require? That requires us that we don't retrogress in the drawing of Section 5.

And so in that regard, our position is race was not -- it wasn't race in and of itself that was the predominant factor. One of the important factors was compliance with federal law, and so --

JUDGE DUNCAN: But to do that necessarily involved a racial focus. That was the lens through which any action had to be taken, was it not?

MR. MELIS: Only because federal law mandates that you do that, not because the General Assembly had some intent to create or maintain a majority/minority district in and of itself. That was not the purpose, and, therefore, from our perspective, race was not the predominant purpose in that sense, in the sense that the predominant purpose was -- I'm sorry, not the predominant, one purpose was compliance with federal law. And was it an important purpose? Of course it was, but it was not the only purpose.

One, it wasn't -- race isn't the predominant purpose, and two, to the extent compliance with federal law was one of the purposes, it was one of the purposes, an important one, but not the exclusive one here in the drawing of the district which intervenor's counsel has identified many of the other purposes involved.

JUDGE PAYNE: Are you, Mr. Melis, really saying something like this: That if, as the plaintiffs suggest, Section 5 compliance is equivalent to or proves predominant racial motivation, then there can never be summary judgment in any case like this where a state has complied with Section 5 and alleges that it has, and that

the answer to that whole equation lies really in *Easley* when *Easley* says the plaintiff's burden is not just to show the racial purpose but to do one other thing, and that is to take each of the nonracial purposes that are indigenous to the decision process, and they must prove in their case that, in fact, they weren't adhered to, and that failing that, if you don't put that part of the equation in, then you are making compliance with Section 5 tantamount to the carrying the burden to prove racial -- predominant racial motivation and subjecting the Court to strict scrutiny? That's how I read your papers. Is that your argument?

MR. MELIS: Absolutely, Your Honor, everything except for you can never -- they'll never win summary judgment. I hesitate to say there isn't a way to win summary judgment in that regard, but I agree with everything else that Your Honor said. There is that other component of having to exclude other factors that needs to be taken into account.

JUDGE PAYNE: Maybe a more accurate statement is that always you would have to then go to the next stage of the equation, and they would have had a prima facie case of predominant racial purpose if they don't have to prove the other simply upon compliance with Section 5.

MR. MELIS: That's correct. And that is an

important factor, a critical factor under *Easley v. Cromartie* that needs to be taken into account.

The three points, and I'll run through these as quickly as I can, but the three points that we were going to make on behalf of the defendants, the State Board of Elections defendants in this case, first, addressing the *Shelby County* issue, it does not act retroactively in any way to render unconstitutional what the General Assembly did in its redistricting efforts.

The case that's been cited and that's been provided to the Court is the *Alabama Legislative Black Caucus v. State of Alabama* case which came out just a month ago, in December of 2013, and there, as here, at least initially as has been discussed, the plaintiffs argued that *Shelby County* retroactively nullified the State's interest in complying with Section 5.

The Court in that case disagreed. What the Court said, quoting on page 217, "All parties agree that the State of Alabama was governed by the preclearance requirements of Section 5 when the legislature approved the new districts. We evaluate the plans in the light of the legal standard that governed the legislature when it acted, not based on a later decision of the Supreme Court that exempted Alabama from future coverage under Section 5 of the Voting Rights Act," and we submit that the same

standard should apply today to Virginia.

In this case, there's no dispute that Virginia adopted its Congressional plan when it was a covered jurisdiction under Section 5. There's no dispute that it met Section 5's preclearance requirements. There's no dispute that had Virginia not demonstrated that it avoided retrogression and the ability of minority candidates to -- minority votes to elect a candidate of choice, Virginia would have been considered retrogressing.

In fact, had it not maintained the Third Congressional District in a manner in which -- not Representative Scott but in a manner which a generic African-American candidate could be elected, then Virginia would have been considered to have been retrogressing under the *Ketchum v. Byrne* case and the standards set forth there that even reducing the number of minority representatives results in retrogression. Virginia's only minority representative to Congress is Congressman Scott out of the Third District.

And yet Virginia did what it was supposed to do under Section 5. It received preclearance from the Department of Justice. It held its elections in November of 2012, and we're -- I know people don't think of it this way because we're in spring, but in terms of the requirement -- we're actually in wintertime, but in terms

of the requirements, we're well underway for an election in November of 2012 already.

JUDGE O'GRADY: 2014.

MR. MELIS: 2014. Thank you, Your Honor. Yes. A little time warp there. I'm sorry.

Therefore, it's our position that as recognized by the federal court in Alabama, *Shelby County* here doesn't have any retroactive effect on what Virginia has done in compliance with Section 5.

The plaintiffs don't cite anything in *Shelby County*, nor to any authority that can read *Shelby County* in that way, and we think that argument can be disposed of very easily just based on the reasoning of the Court in the Alabama case and, frankly, on logic and reason.

The second point we wanted to emphasize was that the plaintiffs cannot and have not met their burden of proof requiring them to both establish that race was the predominant factor and, as Judge Payne pointed out, the second part of that equation, exclude all other factors other than race that would explain the changes made in district lines.

JUDGE PAYNE: But haven't they made a factual issue with McDonald's report? Mr. Carvin says not so, but I think their position is that McDonald's report makes a factual issue on respecting whether that precludes summary

judgment.

MR. MELIS: We agree with Mr. Carvin on that point. Mr. McDonald's report is, just as it was in the *Backus* case, is not credible on its face in that regard, because all it does, all it does is look at the racial composition of who was brought in and who was brought out, and as in *Backus* and as in *Fletcher* in a summary judgment case, that's not enough.

He does not address any number of factors, traditional redistricting factors that were at play, and, in fact, the record in the Section 5 submission as well as in the parts of the record -- and I'll get to that in a second, the parts of the record the plaintiffs have addressed, or plaintiffs have included in their response, indicate any number of other -- all the other factors that -- traditional redistricting factors that Virginia took into account.

And specific to your point, Judge Payne, on the expert's report, I would cite to *General Electric Company v. Joiner* -- it's 522 U.S. 136 -- regarding experts. In that case, the Supreme Court said, "nothing in either *Daubert* or the Federal Rules of Evidence requires a district to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. The Court may conclude that there's simply too great an

analytical gap between the data and the opinion proffered."

That's exactly what we have here. There is too great an analytical gap between the raw data of here are the racial composition of people who are brought out and here is the racial composition of the people who are brought in and the ultimate opinion that it was done because of race. Too great --

JUDGE PAYNE: In your view, then, his opinion, in order to have done anything at this stage, would have to have shown that it wasn't politically motivated, at least created a factual issue, and he hasn't even dressed the political composition of the groups that were included and excluded.

MR. MELIS: That's correct, Your Honor, and any other number of other factors, not just politics. There's any number of other factors in play also that he does not even attempt to address. That was the problem in the *Backus* case as well. So to paraphrase what they've said, what the Supreme Court said regarding expert opinion, he has not -- it's simply too great an analytical gap between the data and his conclusion, and he provides nothing that bridges that gap between the data and his conclusion. That's why his report can't be relied upon to deny us summary judgment in this case.

JUDGE PAYNE: They say you can't get your Section 5 submission considered here, it's not admissible under the Federal Rules of Evidence. What is your response to that?

MR. MELIS: As we've indicated in our brief, there's a few responses to that. One, first of all, it's attached to their complaint, and so, you know, I know -- I know on a motion to dismiss, because I've argued that many times, that anything that's attached to the complaint and incorporated into the complaint can be considered by the Court. So right off the bat, we have that.

Second of all, we identified a couple of cases, I believe *Chen v. City of Houston* might have been one of them, where the Court talked about the evidence that courts consider in these types of cases, and one of them is a Section 5 submission.

The Section 5 submission is an official public record of the Commonwealth. It is the best, most comprehensive, and most complete evidence of the legislative record here. If the Court can't rely on a Section 5 submission, I don't know what the Court can rely on in determining what the legislative intent and what the legislative record was here. So for those reasons, we believe that argument can be quickly disposed of.

As we've discussed, there is any number of cases

in the Fourth Circuit, within our circuit, where you have three-judge panels, and even in *Easley v. Cromartie*, the Supreme Court, identifying the difficult, and is it a difficult burden, and they've made it difficult -- we've made it difficult -- as a society and as a system, we've made it difficult on purpose.

The difficult burden that the plaintiffs have is the two-part must-prove-race-is-a-predominant-factor as well as exclude other factors, and I know that there's -- it was somewhat referenced in the questioning earlier. I know there's a gut reaction to that, well, how would a plaintiff show that.

It is a difficult burden, and the reason it's so difficult is because of the deference that is shown to legislatures in drawing up district lines. And moreover, in analyzing -- in going through that analytical process, courts recognize that in attempting to comply with Section 5, legislatures not are only permitted but they are required by law to consider race as a factor.

Easley discussed it, *Backus* discussed it. In *Backus,* the quote on page 565 is, "race can be -- and often must be -- a factor in redistricting. For South Carolina, a covered jurisdiction under the Voting Rights Act, federal law requires that race be a consideration."

In *Colleton*, the Court in that case in South

Carolina, a case that preceded *Backus*, got to the point where the Court had to take up line-drawing itself, and we provided a quote from the Court in that case where it was discussing its efforts to draw the lines and identified situations where, as a court, the Court was in a situation where race had to predominate to comply with Section 5.

So this is not something new in the Fourth Circuit where we've addressed situations -- or where we've recognized situations where race certainly is a component and must be a component to comply.

But it's not the only component here. As we've mentioned, the plaintiffs haven't excluded other efforts. Politics, which is a constitutionally legitimate factor in redrawing district lines as set forth in *Easley*, *Backus*, and *Fletcher*, the plaintiffs are required to exclude that as a factor.

The *Fletcher* court granted summary judgment because, on page 901 of that decision, quote, the plaintiffs have not shown that the state moved African-American voters from one district to another because they were African-American and not simply because they were Democrats.

The Petersburg --

JUDGE PAYNE: Your view is that the plaintiff has to prove that as part of its burden in proving race as a

predominant purpose?

MR. MELIS: Yes. And a perfect example of how they haven't done that was there some discussion about the Petersburg/New Kent swaps. Certainly Petersburg was one of the largest. I believe it was the largest swap, the largest trade-off from one district to another.

As Mr. Carvin indicated, Petersburg, a reliably and predominantly Democratic district, went from the Republican Fourth Congressional District into the Democratic Third Congressional District which helps, and, again, the standard isn't, does it help Congressman Scott with all the privileges of an incumbent. The standard is, is it helping a generic Democrat to win in that district, and certainly moving Petersburg into that district certainly does.

But that Petersburg swap, as well as the New Kent swap discussed earlier, there's not only a political factor there, there's many others as well. You have Petersburg, an urban jurisdiction, moved into the Third Congressional District which has been, since 2000, an amalgamation of urban jurisdictions.

You have New Kent, a rural jurisdiction, being moved into the Seventh District which is primarily a rural jurisdiction. So you have politics, we've discussed that. Now you have communities of interest.

You have New Kent -- if you look at the map, it juts out and then back down again. You have New Kent being cut off. So now you have a better shape. So now we've got politics, communities of interest, and better shape. You have Petersburg and New Kent being swapped out. The jurisdictions are being kept together. They're not being split up. Again, you have communities of interest.

None of these issues are addressed by Mr. McDonald or the plaintiffs. They simply don't. They want the Court to simply say, well, you moved African-Americans in, you moved white people out, and, therefore, it was all about race without talking about any of these other factors.

And an example of where the plaintiff's evidence that they've submitted even supports the defense position in this is they cited to the -- and, again, to the extent individual legislators is any evidence of the intent of the entire legislature, I think that's an open question, but the plaintiffs provided video of the sponsor of the initial redistricting bill, Delegate Janis.

Now, the plaintiffs cited to sections where he spoke in response to direct questions about the racial composition of the Third District, and they say, see, he's talking about the racial composition of the Third

District, but that's because the questions he was getting was on that issue. Of course he is going to address that issue when he's being asked specifically the racial composition of the Third District.

When you view the entire video, you see Delegate Janis point out what factors were taken into account in drawing up the bill. Number one, one-person-one-vote which, in and of itself, is a constitutional requirement that had to be met, and you are dealing with a situation here with a severely underpopulated Third District. If it wasn't the most underpopulated, it was in the top two or three most underpopulated districts. So you're trying to find 63-, 64,000 to fit into this district to get it to the constitutional one-person-one-vote requirement.

Sort of showing the complex puzzle pieces that you are dealing with here, right next to the Third District you have the Second District which was also severely underpopulated and could only go in one direction. It could only go westward.

So right away you have to deal with this situation where you've got severely underpopulated areas, and you have the Second District having to move westward which is going to mean trade-offs with the Third District, but the point there is, that's just a minute example of the complexities involved in dealing with these districts,

particularly when you're trying to come up with the one-person-one-vote situation to comply with constitutional law.

Getting to the point, Delegate Janis emphasized that, he emphasized compliance with the Voting Rights Act, he emphasized maintaining the core of the districts, and as the Section 5 submission identifies, the core of the district in District 3 was maintained. It was, I think, 83 percent core retention, and even without looking at the numbers, you can look at the maps and see that the core of the district was maintained just as an eyeball test.

Maintaining incumbents was emphasized by Delegate Janis. Maintain and, where possible, reunite jurisdictions, maintain and, where possible, reunite communities of interest, and obtain recommendations from congressmen including specifically Congressman Scott was referenced in Delegate Janis's presentation, and consider comments from the public, and there were public hearings throughout the Commonwealth for the public to provide input into the districting.

So, again, none of those factors are considered by the plaintiffs, and, in fact, their own evidence shows that that was a primary consideration of the -- those were all primary considerations of the General Assembly.

So with that, Your Honors, it's the State Board

of Elections defendant's position that the plaintiffs cannot rely on *Shelby County* in any effort to redraw the district; and, B, the plaintiffs have not carried their burden of showing that race was the predominant factor to the exclusion of all other factors, and, therefore, we don't even get to a strict scrutiny analysis in this case.

Before I forget, there is one other point. Judge O'Grady, you had asked the question about being puzzled about the end game in this case and whether what we're looking at is maybe creating another district, another majority/minority district or some sort of minority influenced district.

Well, that's an interesting question, because then aren't we looking at an end game where we're doing nothing but taking race into account again? We're just doing the same thing again -- we're either doing something that we're not supposed to be doing, which is doing something just racially motivated to create a majority/minority district, or we're doing the exact same thing that the General Assembly did which is trying to do it in a manner which complies with Section 5, in which case it means what we did initially was permissible in the first place.

So why would we go through another process, a judicial process as opposed to a legislative process where

we're doing the same thing that the legislature did, and that's why that goes to the whole deference to the legislature issue. That's why the standard is so difficult to even get to that position in the first place.

JUDGE DUNCAN: Why would that be true if you were no longer a covered district and, therefore, no longer required to comply with Section 5?

MR. MELIS: We wouldn't be required to comply with Section 5 for preclearance requirements. We wouldn't need to be pre-cleared, but we certainly would need to avoid either a packing argument or a cracking argument, either one, which requires us to take race into account.

So we would be doing the very same thing that we would say the General Assembly shouldn't have been doing, except now it's happening in a judicial context, not in a legislative context. I would submit we should not get to that point, certainly not in this case where summary judgment is appropriate because they cannot and have not carried their burden.

JUDGE DUNCAN: Thank you very much. The Court will take a brief recess before hearing from the plaintiffs. Thank you.

(Recess taken.)

MR. DEVANEY: Good morning. John Devaney on behalf of the plaintiffs. Your Honors, my intent, of course, subject to where the Court might take me, is to focus my argument primarily on the structure of a -- the legal structure of a racial gerrymandering claim that alleges a violation of the equal protection clause.

So I will, for the most part, focus on race as predominant factor and then the strict scrutiny that applies to defendants upon making that showing to show there's a compelling state interest and that the use of race was narrowly tailored to achieve that interest. So that will be the structure of my argument.

Before turning to the merits --

JUDGE PAYNE: Before you do that, is it your theory that the 2012 process was the constitutional violation here?

MR. DEVANEY: Yes, Your Honor. I'm glad you asked, because it does go back to the series of conference calls that we had with Your Honor, and as Your Honor may recall, one of the very first conference calls that Mr. Melis and I participated in and before intervenors had joined the case, I pointed out that *Shelby County* certainly was a triggering point for us in bringing this action, but I also pointed out that one of our concerns in this case that you'll hear more about as I talk is that

the district, District 3, the black voting age population of the district was increased by 3.1 percent or more, depending on the methodology you want to use, and so as we allege in paragraph 45 of our complaint, and I definitely should have emphasized this --

JUDGE PAYNE: What was wrong here happened in 2012, not since.

MR. DEVANEY: That is correct, and that also *Shelby County* did change the game, and so we're certainly standing by our argument that the compelling state interest that Section 5 might have provided no longer existed once the applicability of Section 5 is struck down in *Shelby County*.

But, yes, obviously the purpose, the intent of the legislature occurred when it enacted this plan in 2012, and I do want to just go back and clarify that, Your Honor, as you'll recall, I did point out, one of our concerns in the very first conference call is lack of narrow tailoring with the fact that there's an unnecessary increase in this district of 3.1 percent in the black voting age population that the State has never explained, and that is why, in paragraph 45, we point out that there's a narrow tailoring problem.

I wish I had emphasized that in a subsequent conference call. Honestly, it was something I should have

said and I didn't, but it's in our compliant, I had raised it in the prior conference, the 3.1 percent. It's important to our complaint.

The procedural points I'd like to make before I turn to the merits are just a few in number. The first one is, and it's one the Court is very familiar with, on summary judgment, we, as the nonmoving party, are entitled to all favorable inferences. Our evidence has to be credited.

Second, when you have an issue of legislative intent, as we do in this case, it's an inherently factual question, and the Supreme Court in *Hunt v. Cromartie* made that quite clear, and I know it was discussed earlier this morning, in reversing a grant of summary judgment on a racial gerrymandering claim.

And there the Court said, "The legislature's motivation is itself a factual question," and "all that can be said on the record before us is that the motivation was in dispute." The same is true here. On the record before the Court, there is clearly, at a minimum, a material dispute as to what the legislatures's intent was.

Two more quick procedural points before I turn to the merits. One is that under Rule 56(c)(1), a party moving for summary judgment must, of course, base its motion on admissible evidence, and what's sorely lacking

from the motion in this case is -- by defendants and intervenors is admissible evidence to support the various claims you've heard this morning.

For example, there are claims that this map was designed for incumbency protection. Where is that in the evidence? It's not.

JUDGE O'GRADY: The point he made was it is your burden to demonstrate that there was not another purpose besides race in determining whether you had met the first prong.

MR. DEVANEY: And I would submit, Your Honor, that certainly at the summary judgment stage, they have an obligation to come forward at least with an assertion of incumbency protection --

JUDGE O'GRADY: No, it's not unfair for Mr. Carvin to say that you are a moving target and how long are they going to have to dance with you. The record is complete now. The pleadings have been filed. What I'm interested in hearing is does the plaintiff believe that it has met its burden going forward on demonstrating the predominant purpose, and have you also addressed substantively the other possible purposes for this redistricting as the record sits today?

MR. DEVANEY: Very well, Your Honor. I will turn to that now, and I will begin by focusing on race as the

predominant purpose, and I do want to emphasize that one of the disconnects in this case is the position of the defendants and intervenors that it is our burden to show that race was an illegitimate purpose, that there was some nefarious purpose that the legislature had --

JUDGE O'GRADY: Nobody believes that.

MR. DEVANEY: I was going to spend a little time on that, but, clearly, that's not the law. We just need to show that race was the predominant purpose.

Another disconnect between plaintiffs and defendants in this case is that defendants take the position as long as the General Assembly drew CD 3 in an attempt to comply with Section 5, case closed, game over, and the case law makes it very, very clear that's not true.

Miller v. Johnson, there you had an obvious attempt, repeated attempt by the State of George to comply with Section 5, and, boy, you know, they were in a real fix, and they tried and tried to do what the Department of Justice said to comply with Section 5, but that wasn't enough. Their plan was still struck down as unconstitutional gerrymandering.

JUDGE PAYNE: Do you take the view compliance with Section 5 is a prima facie case of proof of predominant racial motivation?

MR. DEVANEY: I certainly take the position that an attempt by a legislature to comply with Section 5 is inherently racial.

JUDGE PAYNE: That is not the question, though. Quite obviously this statute requires -- the 2006 amendment clearly requires race be taken into consideration, and if that were the answer, there would be no ability of the State to function and comply with Section 5 without also having a case made out that it's predominantly motivated by race.

My question to you is different than what you answered, and that is, do you take the view that compliance with Section 5, or the assertion of compliance with Section 5, is sufficient to be a prima facie case, satisfy your burden of a prima facie case that, in fact, racial motivations predominated in the redistricting? Do you take the view?

MR. DEVANEY: The short answer is, yes, I do.

JUDGE PAYNE: What do you do with the rest of *Hunt v. Cromartie* and *Easley* which says you have to deal with all the other factors that deal with redistricting as part of your case?

MR. DEVANEY: Two responses, Your Honor, which I will get to. The first one is that while certainly compliance with Section 5 is prima facie evidence of a

racial purpose in this case, we have other evidence that I will walk through.

Second, with respect to your question about disproving other factors, we do have evidence in this record. Apparently defendants haven't read Dr. McDonald's reply report which we filed with the Court last week.

In his reply report, he has a section titled race versus politics, and he talks about voting tabulation districts that were included in CD 3.

JUDGE PAYNE: Why is he filing a reply report?

MR. DEVANEY: Your Honor, I believe --

JUDGE PAYNE: What he is replying to?

MR. DEVANEY: He was replying to defendants' expert report, Dr. Brunell, and I believe the scheduling order in this case provided for --

JUDGE PAYNE: It wasn't available for the summary judgment briefing.

MR. DEVANEY: I'm trying to remember the timing. I believe that the reply -- that his report came after the judgment briefing, Your Honor, but we did submit that on Thursday or Friday of last week, and as I say, there is a section there titled race versus politics, and I just want to talk about that briefly.

I know I'm jumping ahead. I'll go back to race as a predominant purpose in a minute, but I guess this

does relate to that somewhat.

In that section of his report, he focuses on voting tabulation districts that have high Democratic performance, 55 percent or above, and he points out that the VTDs with that level of performance that are included in CD 3 are disproportionately black, that there are very high percentages of black voters in those VTDs, and if you look, as he points out, at similar VTDs, its surrounding districts, adjacent districts with high Democratic performance, you see that there's a significantly lower level of black population. It's about a 16 percent difference on average in the VTDs.

What does that tell us? At least at the summary judgment stage, that tells us that race is trumping politics, that they are moving blacks into CD 3 predominantly because of race and not because of politics.

If we're --

JUDGE PAYNE: Why? Why is that happening, in your view? Why did it happen? I didn't see anything in McDonald's reports that even remotely addressed why that happened, but I haven't read the rebuttal filed Friday.

MR. DEVANEY: Well --

JUDGE PAYNE: What are they trying to accomplish, in other words? Are they trying to make another district, keep another district from being -- black voters from

having an opportunity to elect a candidate of their choice, or what's going on? Why is it happening? It doesn't make any sense on the face of the papers.

MR. DEVANEY: Well, certainly our burden is to show that it is happening, and as to why it's happening, we still are in ongoing discovery in this case. Your Honor, we still have no documents from the House or Senate. Not a single document has been produced by them because of glitches they've had in their production and because of personnel changes in the Attorney General's Office.

So we hope to be able to explore that issue further, but I will tell you that why is it happening? Why are we seeing this hacking of blacks into CD 3? One of the obvious reasons would be to dilute minority voting strength in surrounding districts.

JUDGE PAYNE: With the movement that your expert -- let's take your expert's movement figures. You're saying that that shows, is evidence of dilution of the vote?

MR. DEVANEY: Well, you've asked what is the motive for moving blacks into CD 3 and the trades that Dr. McDonald walks through in his opening report, and my response is that one obvious motive is to put blacks into that district and thereby not allow them to have as much

influence in other districts, and that is one of the potential motives here.

I'll go back now to race as the predominant purpose. I won't walk through Delegate Janis's comments, because those comments, you're heard them. They all focus on compliance with Section 5, complying with race. The one thing I do want to emphasize, though, is if you look at Delegate Janis's comments, he talks about the need to meet a racial quota.

So there was this perception on the General Assembly's part that they had to keep the black voting age population precisely where it was, which is at about 53-point-something percent, and that anything less than that was insufficient.

So what you see is a concerted effort to at least hit 53 percent BVAP, a clear racial purpose, but what's interesting about this case is that for some reason, they actually increase the BVAP up to 56-point-something percent. So it was about 3.1 or 3.2 percent more than it had been which is not required by Section 5. I don't hear the State --

JUDGE O'GRADY: That was clearly done for political reasons; right? I mean, they're swapping the districts out. Are you going to carve out the corner of Petersburg and say, all right, you're a neighborhood, and

you've been together for X number of years, and we're going to carve out 3,000 people or 2,000 people because we don't want to go beyond the retrogression level that we're required to meet? I mean...

MR. DEVANEY: If it were clearly being done for political purposes, Your Honor, I would respectfully submit we wouldn't see this disparity in the population of the voting tabulation districts. We would see more voting tabulation districts with lower black populations being put into CD 3, so I can't accept the premise that it was clearly just for political purposes, and I think our evidence for summary judgment purposes clearly creates an issue of fact as to that.

JUDGE DUNCAN: Is the point you make about the increase in the black voting percentages, can you tie that in to a response to the -- your response to the argument that the legislature's intent wasn't to take race into account qua race but merely to comply with federal law? Can you parse that for me?

MR. DEVANEY: Yes, Your Honor. So if the intent of the legislature had been merely to comply with Section 5, one would expect to see them come in with a map that was at the same prior black voting age population, or perhaps even less, because you can -- actually you can move from 53 to 52, for example, and you can still have a

district where blacks can elect their preferred candidates. There's not a requirement that you stay at 53.

But, here, what we have, as I said, is this increase to 56 which shows more than just a desire to comply with Section 5, because that's not required to comply with Section 5 at all.

JUDGE DUNCAN: Is there anything else you can point to that takes politics out of the range of factors that were considered or excludes other factors?

MR. DEVANEY: Well, Your Honor, I rely for the political question primarily on our expert report which is all we have at this juncture, because we've not had discovery of the House and Senate, but you'll see there's a detailed discussion in his reply report of that issue.

I would further, though, point out that we relied also on the construction of the district as evidence of race is the predominant factor, and as my colleagues from the defendants have talked about, there was under population in this district of approximately 64,000 people, and our expert report -- I don't think there's any dispute about this -- establishes that under population was addressed by moving obviously about 64,000 people in the district. Of those people, 90 percent of people of voting age were black.

Clearly a racial purpose. That wouldn't happen by coincidence, and you have 64,000 people, I think the number is approximately 40- to 42,000 of them were black, and 90 percent, as I said, of the voting age population were black.

That evidence --

JUDGE PAYNE: I didn't see your expert, in making that kind -- in making the analysis he made on that point actually look at what the available base was to move. In other words, you can't move people from southwest Virginia into here, so you have to look at the demographics of the area that is available to move, and I didn't see that he even looked at that, and maybe I just missed it and didn't understand what it was that he was saying. Do you have a cite that I could look at to let me understand that better?

MR. DEVANEY: May I just go find the report one moment?

JUDGE PAYNE: Sure. I think it's on page 13 and 14 where he talks about that.

MR. DEVANEY: Thank you.

JUDGE PAYNE: Of the original report. It goes through maybe up to 16. Then he starts talking about the trades.

MR. DEVANEY: Well, Your Honor, as you know, he

walks through the detailed description of the trades, and I believe his discussion of the trades shows that if these trades weren't made, that you wouldn't have -- if you didn't exchange these high BVAP areas for low BVAP areas, that was unnecessary. You didn't have to do that. You easily could have moved surrounding low BVAP areas into the district to meet this under population requirement, and if I could approach the bench and just show you --

JUDGE PAYNE: That's all right.

MR. DEVANEY: Actually was hoping I could show you the map. Would that be helpful?

JUDGE PAYNE: I've got the map. Do you want to hand up something? Mr. Langford will bring it up. Is this in the record?

MR. DEVANEY: Your Honor, this is, I believe, a copy of the map attached to the defendants' motion for summary judgment, and this was provided to defendants over the weekend, and they agree this reflects the map that was enacted.

JUDGE PAYNE: But is it in the record? That's the point. That's, I think, what all of us would like to know. Is this, what you are handing up here, in the record?

MR. DEVANEY: Not this exact picture, but the map itself is in the record, and this is a demonstrative of

the map.

JUDGE PAYNE: Do you object to consideration --

MR. CARVIN: Your Honor, I don't know what a demonstrative of a map is. I think my colleague is saying this is a map that he showed us over the weekend that we didn't object to. To clarify, this is not the map that's in the record. I don't know that there's any material differences, frankly, but it's a different map than the one that's in the record.

JUDGE DUNCAN: How does this map, as opposed to the record, the map attached to the filing differ, and why do we need this map?

MR. DEVANEY: Your Honor, the primary reason is I wanted to make it easier for the Court to see a zoom-in of CD 3 so you could see where the populations were drawn and where they were taken out of.

MR. CARVIN: I'm sorry. There are two maps.

JUDGE PAYNE: Yes.

JUDGE DUNCAN: Why don't you just proceed with your argument. I don't feel comfortable being handed a map that we're not clear about.

MR. DEVANEY: Very well. Your Honor, the point is that, as was discussed earlier this morning, CD 3 is a bizarre, irregular shape, and what is clearly in the record is that the district starts north of Richmond, it

slides down the northern shore of the James River, it ends at the border abruptly of James City. It then jumps over James City, which is part of CD 1, and lands in a horseshoe shape in Newport News.

So you have a split in the district right there. It's not contiguous by land. It then ends up in Hampton. It splits the city of Hampton. It then hops over the James River to Surry where it's then dissected again by Isle of Wight which is part of a different district, CD 4, and then hops over to Portsmouth and then goes into Norfolk and tears apart Norfolk. It separates Norfolk by District 2 and District 3.

JUDGE PAYNE: Isn't this basically the configuration it's been since the plan that was adopted after *Moon v. Meadows?*

MR. DEVANEY: It's certainly similar to what was adopted after *Moon v. Meadows*.

JUDGE PAYNE: It's real close.

MR. DEVANEY: It is real close, but it has changed.

JUDGE PAYNE: Yes, it has, but you make it sound as if this came by whole cloth in 2012, and it didn't. There is a precursor to all this, and that is, this is what the people of Virginia have been operating under for years without any challenge at all and a district that was

adopted after there was a court challenge, and nobody said anything to the contrary for years.

MR. DEVANEY: That district, you are correct, Your Honor.

JUDGE PAYNE: Really all we need to talk about are the changes.

MR. DEVANEY: That remedy district has not been challenged, and the changes are, I believe, are significant. We have -- as I said, we have about 44,000 African-Americans have been moved into this district under the new version. We have an increase in the BVAP, we have a swapping out of different VTDs, low density traded -- high density traded for low density.

JUDGE PAYNE: All that was done in 2012.

MR. DEVANEY: And all that was done in 2012, yes, Your Honor, so it is very different.

JUDGE PAYNE: Why did you wait so long to file this lawsuit, and why aren't you in laches?

MR. DEVANEY: Your Honor, we -- as I mentioned before, for us, a triggering event, no doubt, was *Shelby County* decision that removed Section 5 as any potential compelling state interest.

JUDGE PAYNE: Even you agree that we can't judge what happened in 2013. We have to judge what happened in 2012. You knew all you needed to know in 2012 to bring

this case, and yet -- I mean, frankly, it looks like *Shelby County* is a stalking horse, frankly, is kind of what it looks like to me.

MR. DEVANEY: Your Honor, certainly in 2012, it was evident that this district was not narrowly tailored, and I will again say that for us, Section 5, when it was invalidated through the validation of section four, was a triggering event because it left no doubt --

JUDGE PAYNE: Section 5 still exists. The only thing the Court dealt with in *Shelby County* was the formulas, wasn't it?

MR. DEVANEY: That is correct.

JUDGE PAYNE: Therefore, Section 5 is rendered inoperative right now, but Section 5 wasn't stricken, was it?

MR. DEVANEY: Agreed. But it doesn't apply, and so our position is that the compelling state interest that may have existed under Section 5 no longer exists, because that is no longer in effect, and it no longer applies to Virginia.

Going back to race as a --

JUDGE PAYNE: I don't quite -- well, I guess you'll get to that, so let me hold the question until you get to compelling state interest. You are still talking about race as a predominant factor.

MR. DEVANEY: I am, and I just have two more points to make on that. The one is, I won't walk through all the trades in Dr. McDonald's report. They're there, they're in the record, I think you understand them, but to us, that's very powerful evidence that race was a purpose in drawing this district.

The other point I will make is the defendants, while they tout the fact that supposedly the General Assembly followed traditional redistricting principles in creating the district, and one thing I want to emphasize about that is when you talk about applying traditional redistricting principles, it's a district-by-district analysis.

You have to look at the specific district in question as was done in *Moon v. Meadows*. When you do that in this case, and the Supreme Court has emphasized also this district-by-district analysis, you see that CD 3 is a complete outlier. It's the lowest district in terms of compactness, it is highly noncontiguous, it is interrupted by land, it's interrupted by water.

It is the district that has the most splits of counties and cities in Virginia. It splits more voting precincts than any of Virginia's other congressional districts. In fact, the entire map splits 20 voting precincts, and CD 3 is involved in 14 of those splits.

As to preservation of cores, Dr. McDonald's report shows that thousands and thousands of voters were taken out of CD 3 and moved into CD 2 and adjacent districts for the purpose of increasing the black voting age population, so cores were not preserved in the way defendants claim.

That violation, those violations of traditional redistricting criteria are further evidence that race was the predominant purpose in drawing this map.

JUDGE O'GRADY: In looking at that, in *Easley v. Cromartie*, or *Cromartie II* as I call it, the plaintiffs actually identified how other districts could have been composed, and you know, proposed take X number of African-Americans out of this district and put them in this district, and this makes more sense, and they offered an alternative proposal to why it did or did not meet the predominant factor. Have you done that in this record?

MR. DEVANEY: In this record, no, Your Honor, we have not. We feel that for all the reasons I've described, we have very compelling evidence of race as the predominant purpose and certainly sufficient evidence at the summary judgment stage.

We will, though -- assuming we're permitted to go forward, and we think we should be, we will have an alternative map, and it is one that, as I represented to

the Court early on in this case, will have minimal change. It will not disrupt many districts in the state at all.

JUDGE PAYNE: Aren't you supposed to do that now, though, in response to your -- to their showing, such as it's been made, on the issue of narrow tailoring? Don't -- you haven't come forward with anything. Therefore, you are almost in a classic *Catrett* situation, *Celotex v. Catrett* situation in which they have put something forward, and you've done nothing with respect to a part of narrow tailoring that is an important component even under your allegation of paragraph 45, the last sentence.

MR. DEVANEY: Your Honor, two points in that regard. First of all, our burden is to show race as a predominant purpose.

JUDGE O'GRADY: Also exclude other reasons.

MR. DEVANEY: And exclude other reasons.

JUDGE PAYNE: That is your burden to get strict scrutiny. To avoid summary judgment, you have to do more. You have to deal with what happens to their case after you have obtained strict scrutiny. Let's assume that you've obtained strict scrutiny. They have to show a compelling interest.

You really basically don't even contest the compelling interest in paragraph 45, the paragraph you

contend is the operative paragraph of the theory you are pursuing. What you do is say it's not narrowly tailored. They have shown why they think it's narrowly tailed to achieve the objectives required by the law.

They say that you have submitted nothing to show an alternative that would have been any better, and whether you call that submitting the map or evidence of some sort, if that is the case or you can't get around that somewhere, then they still would be entitled to summary judgment under *Celotex*, they say. Why aren't they right?

MR. DEVANEY: Your Honor, they're wrong because we've presented evidence that this district was increased, the black voting age population was increased by, as I said before, more than three percent, and that's not necessary to comply with Section 5.

Under strict scrutiny, of course, it's the -- the state must show, for narrow tailoring, that it took the least restrictive means possible to serve the compelling state interest. There was no reason to increase by 3.1 percent. That, in itself, is a demonstration that there is not narrow tailoring. They did not have to do that, so the least restrictive means for accomplishing --

JUDGE PAYNE: That's an argument you are making. There's no proof of that.

MR. DEVANEY: No, but it is based on evidence, Your Honor. There's no dispute that the BVAP of this district increased by 3.1 percent.

JUDGE PAYNE: If they increased it by three percent and they did it for political reasons, then it's tailored to achieve the objectives, isn't it, or are you saying you don't consider, in assessing narrow tailoring, anything but race? Is that your position?

MR. DEVANEY: Certainly for -- when you speak of narrow tailoring, you do need to look at what state interest is being served. So my position is, yes, you look at did they need to increase by 3.1 percent to serve the state interest of trying to comply with Section 5. And the answer clearly is they did not.

So that, under long-established Supreme Court precedent applying the strict scrutiny standard, is not the least restrictive means, and, therefore, there is not narrow tailoring.

And so we think the evidence is -- that's clear evidence, not argument, it is evidence that is in the record. And so with respect to narrow tailoring, as I said before, we will at trial present a map, and it will show that there were other ways to do this that would not have violated the equal protection clause, but already we've got enough in this record to show narrow tailoring

was violated.

JUDGE O'GRADY: Mr. Devaney, what do you expect to get out of the discovery forthcoming from the legislature, the House, and the Senate? You've done -- you are familiar, I think, with what's come out of other cases you've brought. What do you expect to get that will help you and that we should wait to do anything on summary judgment because of?

MR. DEVANEY: Your Honor, there are a variety of potential issues that could be disclosed in discovery. One of them is why the increase in 3.1 percent. It wasn't necessary to comply with Section 5.

We believe we've put in evidence showing that it was racial, but we can certainly learn more about that. There was no articulation when this act was passed why they were increasing the BVAP, and that is something we would hope to learn through discovery. That's one issue.

Also, we've heard lots of statements from counsel about the fact that this map was for incumbency protection, the fact that it was to serve political purposes. I haven't seen evidence of that from them.

JUDGE O'GRADY: Other than Mr. Janis's statement, and you expect that you'll receive the substance behind those statements and it won't be privileged?

MR. DEVANEY: That would be our hope, and

certainly I recognize that legislative privilege in these cases is a potential hurdle. The privilege is held by individual legislators. It's something they can choose to waive, and we may have legislators who would choose to waive it.

Even non-privileged materials could shed lights on these important factual issues. So that is the type of information we would hope to discover, and, again, I'm not making any accusations against counsel for DLS, because we've worked very cooperatively in trying to get this discovery.

They contacted us last week, and I actually have an affidavit, if the Court would want to see it, explaining this saying, look, we're having technical glitches, we can't get emails from the House and Senate over to our server. We have a changeover in personnel with the new Attorney General coming in, and we can't get you documents. So we literally have nothing from the House and Senate even though we both have worked cooperatively to try to get it.

JUDGE DUNCAN: Recognizing the gaps in the record and your hope as to what can be obtained through discovery, what's the basis of your apparent assumption that this matter could be resolved quickly?

MR. DEVANEY: It is -- one is based on the fact

that it should be resolved quickly because we have an election coming up, but second, with respect to putting a case together, which I'm sure is Your Honor's question, as I've said to Judge Payne in our very first scheduling status conference, we do intend to rely primarily on the public record, not exclusively but primarily, and we have the experts who have already presented their opinions in this case, and I think that with some minimal additional discovery from the state, that we could be ready to go to trial very quickly. In fact, I recognize we would need to be ready to go to trial very quickly.

JUDGE DUNCAN: Assuming that we agree with you to try to do something in time for the 2014 election, but Judge Payne went into some reasons for your delay in bringing suit. Why should the burden of that decision be shifted to the Court and the State?

MR. DEVANEY: Certainly a fair question, Your Honor, and my response is one that I gave before which was *Shelby County* changed the state of affairs, and *Shelby County* created significant doubt about whether Section 5 is still compelling state interest.

JUDGE DUNCAN: That's correct. That's a substantive reason, not a timing or an expeditiousness reason.

MR. DEVANEY: Yes, but with *Shelby County* having

that effect, Your Honor, what we're left with under our claim is a racially gerrymandered map that is unconstitutional. And so to proceed with an election, if you accept for purposes of argument at least our theory, to proceed to an election under an unconstitutional map is something that should be avoided at all costs, and for that reason, I'm here to, unfortunately, ask you all to bear the burden.

JUDGE PAYNE: No, you are asking the State to bear the burden. The State is really what bears the burden. That's the entity that's saddled with this, and I don't just mean the official government. The whole structure, all the citizens of Virginia, it would seem to me, are bearing the consequence, and the deadline for qualifying for announcing is what, March --

MR. DEVANEY: March 10th.

JUDGE PAYNE: And then the deadline for qualifying is what?

MR. DEVANEY: Actually, I think the filing/qualifying deadline is March 10th through 24th.

JUDGE PAYNE: And then what happens? What's the other deadline?

MR. DEVANEY: And then there is a primary election, and actually absentee ballots would have to go out. I can't remember right off the top of my head --

JUDGE PAYNE: 45 days before that election under federal law.

MR. DEVANEY: I believe that's right, Your Honor.

JUDGE PAYNE: And the primary is June what?

MR. DEVANEY: I'd have to ask my colleagues' help with that.

MR. MELIS: I would have to double-check. I don't know off the top of my head.

MR. CARVIN: June 10th, Your Honor.

JUDGE PAYNE: June 10th. If there's as much factual dispute as you contend that has to be resolved to resort to discovery, how is it possible for the defendants to even have a fair shot at presenting their side of the case and you having a fair shot at presenting a case if we have to decide the case before the 24th of March? How can that be done?

MR. DEVANEY: Well, Your Honor, two responses.

JUDGE PAYNE: The other question is, why should it be done given that what you are really complaining about occurred in 2012, 18 months ago?

MR. DEVANEY: Two responses to that, Your Honor. One is, we expect documents this week, and over the next two weeks, this will have our full attention. We literally will complete our discovery within the next few weeks.

Second response is, when faced with the choice of sticking with candidate qualifying deadlines or moving forward with the potentially unconstitutional map, courts have very often moved back qualifying deadlines, and that is one of the answers to your question as well.

JUDGE O'GRADY: Run us through the record. Mr. Carvin spent a lot of time talking about how you hadn't included anything but race in the predominant argument. Tell us what else is in your record that demonstrates that you have considered the other alternatives. You mentioned politics but the other traditional considerations for the districting plan other than race.

MR. DEVANEY: Your Honor, right now, the state of the record, we address politics, and if your question is do we address incumbency, for example, I don't believe our evidence addresses incumbency.

JUDGE PAYNE: Don't you have to under *Hunt v. Cromartie* and *Easley?* Don't you have to, in essence, in order to prove the case, to carry your burden to get strict scrutiny? That is, to carry your burden to get strict scrutiny, don't you have to show disregard of all of the traditional redistricting factors?

MR. DEVANEY: Well, Your Honor, we believe that we have shown that the district ignores all the traditional redistricting factors. We have to show that

race was the predominant purpose and that traditional redistricting factors were subrogated.

JUDGE PAYNE: But you just answered the question that, in fact, all you've done is deal with the politics.

MR. DEVANEY: But politics and incumbency are not traditional redistricting factors. The traditional redistricting factors are contiguity, compactness, preserving cores. We've demonstrated that. That has not been done.

JUDGE PAYNE: I thought that politics was the source of all gerrymandering, racial or otherwise, back when gerrymandering first started.

MR. DEVANEY: Well, if one looks at the case law to what are traditional redistricting principles, if I'm recalling correctly, they are the principles I just recited: Equal population, contiguity, compactness, preserving cores. It's not protection of incumbents.

JUDGE PAYNE: In reality it is, isn't it?

MR. DEVANEY: Under the case law. That case law that applies and is binding, those are the factors, and we've demonstrated those factors were ignored egregiously in Congressional District 3.

If there are any additional questions?

JUDGE DUNCAN: No, thank you. Thank you very much.

MR. CARVIN: May I briefly respond?

JUDGE DUNCAN: Yes, you may.

MR. DEVANEY: I have to tell the Court, Mr. Carvin and I went to high school together 40 years ago and are long-time friends, and this is a very unusual moment for us.

JUDGE DUNCAN: You've handled it very well.

MR. CARVIN: It hasn't made me any more restrained in my criticism. I did want to actually pick up on Judge O'Grady's question in terms of what have they done to eliminate politics, cores, and protecting incumbents, and you'll see that this expert report doesn't do enough. In *Fletcher*, they had affidavits all to the same effect which the Court, nonetheless, granted summary judgment.

What Mr. Devaney didn't respond and tell you is that any of the changes made here are not completely explainable on the grounds of politics. As Mr. Melis and I have made clear, Petersburg was Democratic, New Kent was Republican. So this all makes perfect sense. If everybody in those localities had been white, the exact same thing would have been done for politics.

McDonald's reply report in no way disputes that. He does not do what I think Judge O'Grady mentioned was done in *Cromartie II* which was to go through and say,

here's a precinct that borders District 3 that is predominantly white but 80 percent Democratic, that was left out, and here was the racial one, and even that, again, in *Easley* when they did do that, was insufficient as a matter of law which is why it was clearly erroneous.

JUDGE DUNCAN: It is interesting, and Mr. Devaney is correct when he listed the traditional redistricting principles that courts have recognized. And as a practical matter, is it a very difficult task to disprove a negative. If you come up with -- I can foresee coming up with an exhaustible list, or almost an exhaustible list of other factors that might have influenced a legislature.

MR. CARVIN: Right, but the Supreme Court is a very daunting challenge, but there's obvious targets; right? You're talking about preserving a majority black district. The only three rationales that are ever going to come up are protecting an incumbent, politics, and cores, okay. That's what we're talking about.

So, no, you can't -- in other words, all of Mr. Devaney's traditional districting principles plus politics, which is, obviously, a traditional districting principle but one that's never discussed publicly, they don't put it in their reports, yes, we're going to engage in politics.

But nonetheless, *Easley* knew that politics was

behind it, and they're not going to condemn political gerrymanders by calling them racial gerrymanders. So you need to disentangle, as *Easley* said ad nauseam, race from politics.

So, no, we're not presenting a moving target here. I'll go through all of Mr. Devaney's traditional districting principles. Everything he said, compactness, contiguity, going down the river, splitting localities, all of those are true of the benchmark district, every single one.

Indeed, it's undisputed that we eliminated -- we lowered the number of localities split. We lowered the numbers of the VTD split, and he has said, I think now they've conceded they're not challenging the existing district. This case is all about going from 53 to 56.

So all he's criticizing is the changes, and there is not a scintilla, there's not a word in McDonald's report or in these briefs that the changes were bad.

Moving New Kent County was not a problem. Moving all of Petersburg -- they didn't split Petersburg, they moved all of it in. So that's one of the reasons, by the way, if you're trying to get 53 on the button, you would have had to split Petersburg, and that's one of the reasons that they went a little higher.

So, no, their attack on this is illegitimate

because they never said that the changes, as opposed to the existing district, are problematical, but the other reason that their attack on going from 53 to 56 is wrong is because you're not asking whether or not they achieved precisely the same BVAP as existed in the benchmark district.

The only way to do is that to split precincts or to move a bunch of precincts in and then move some white precincts in to offset it. You don't want them trying to get to 53, and by the way, consciously designing your district to get to 53 BVAP is just as race conscious as designing it to get to 56.

JUDGE O'GRADY: What significance do you believe that Mr. Devaney's argument about the percentage of African-Americans who are more likely to vote Democratic as was discussed in *Easley* has in this case than as a factor in the race predominance?

MR. CARVIN: Right. Look, we all understand that there's an extraordinarily strong correlation between race and Democratic voting patterns in Virginia as it was in North Carolina, but *Easley*, nonetheless, said you need to disentangle that.

The point I'm trying to convey is the expert in *Easley* actually did that. They said, okay, well, let's do the experiment; 80 percent white precinct in, 80 percent

black precinct out. That was found clearly erroneous. They haven't tried to do anything like that. Mr. Devaney can't come up here and deny that Petersburg is overwhelmingly Democratic or New Kent is predominantly Republican, so he can't make an argument that, again, everything that was done would have been done had race not factored into it purely for political reasons.

Then you couple it with the fact that these changes don't subordinate traditional districting principles at all, the changes as opposed to the existing district, so he strikes out on that ground.

Finally, this is exactly what was rejected in Alabama and was clearly condemned by the Supreme Court in *Bush v. Vera*. In Alabama, half, 14 of the 27 House districts increased in BVAP. Four of the eight Senate districts, majority black districts increased in BVAP, and they said, look, what the issue is is not if you hit it right on the button. Is it reasonably necessary, does it substantially address Section 5.

We're not going to come back here and micromanage every little change that's going on, and I strongly commend to the Courts' consideration *Bush v. Vera* on this precise point. Justice O'Connor, when she was striking it down, said, look, what we're not going to do is make you hit what is absolutely necessary to comply with Section 5.

She said that was an impossibly stringent standard. She said, we're not going to have an endless series of beauty contests which is what they want to do.

They want to buy another, I don't know, two, three months to come up with some whole new map which they haven't been able to produce so that they can say this is slightly prettier than our map which is just not the way to do it.

I guess I will switch to the notion we clearly cannot have any kind of trial on this for the 2014 election. Again, we haven't even seen the map. We didn't know their theory until they announced on December 31st what their theory was. We need some opportunity to defend against their new theory, so this cannot be done in a way that doesn't extraordinarily disrupt everything.

And I guess this is sort of a final practical point, if you will. He says this can all be done quickly, right? Well, that means that there's not going to be a whole lot of evidence that's not in front of you today that's ever going to be developed.

He's not going to get at the internal deliberations, because those are legislatively privileged under *Washington Suburban Sanitary*. So he is going to be left with basically what he's got now. If he could have made his argument, as they alleged in their complaint and

as they've now revived, that there was a viable alternative at 53 percent BVAP, well, they filed their complaint nine months ago.

They alleged back then they had a viable alternative. They don't need to get discovery against us to come up with a viable alternative, and it's just buying time for themselves.

As to the point which I know evokes, you know, memories of southern racisms and all of that, that you can't allow a racially unconstitutional district to go forward in an election, well, come on. This is not Selma in 1965.

At the end of the day, if they prevail, all you're going to do is move Petersburg back into District 4, and, of course, all you do to the people in Petersburg is take them from a district where they can elect their candidate of choice and put him into a district where they can't elect their candidate of choice.

So, A, I don't know what good you are doing for the black voters in the city of Petersburg, but the notion that any kind of immediate action is necessary to correct what he calls vote dilution is quite untrue. Thank you.

JUDGE DUNCAN: Thank you very much.

MR. MELIS: May I?

JUDGE DUNCAN: Yes, please, Mr. Melis.

MR. MELIS: I will be very brief. I think we've extensively covered the issues, but I picked up on something that I think is important for the Court to keep in mind when the Court is deciding what to do with this on summary judgment.

Mr. Devaney indicated that he intended to rely primarily on the public record, and, therefore -- but at the same time he needed more time to conduct discovery and whatnot. Well, the public record is before the Court. In fact, it's what the plaintiffs have indicated they didn't want the Court to consider on summary judgment but somehow later on they intend to rely on it. Don't rely on it now, give us a trial so we can rely on it then.

Public record is before the Court. There's the Section 5 submission that identifies, and, again, is the most complete and comprehensive legislative record that we have that identifies what it is that the legislature did in the redistricting process. It is the basis on which the Justice Department of the United States determined that Virginia has not retrogressed and allowed Virginia to proceed with its 2012 elections and the basis of which will be the 2014 elections as well which literally we're at the doorstep of.

So, I found that an interesting comment to make, because the Court has what it needs at this point to find

to rule on behalf of the defendants for summary judgment. That record identifies a whole mixture of traditional redistricting principles and does even address parties in an incumbency consideration, because the record identifies that the Third Congressional District, which was primarily a Democratic district, increased as a Democratic district, and neighboring Republican districts increased as Republican districts.

The record also identifies the population equality problems that the General Assembly was dealing with. Again, I mentioned the Second District, which neighbors the Third District constituting the Eastern Shore and parts of Virginia Beach and Chesapeake, was severely underpopulated, so you've got two back to back. The general --

JUDGE PAYNE: You need to slow down and speak up, if you will. I'm having a little trouble hearing you.

MR. MELIS: Sorry, Your Honor. I apologize. The General Assembly is dealing with these puzzle pieces of trying to get to equal population. That's identified in the public record that's before the Court.

There was discussion about splits. Five of the new -- precincts splits in the new -- that are in the current map are precinct splits that affect no population. That's in the public record.

So I think the Court has what it has before it right now based on the public record to determine that summary judgment is appropriate here, and I would just close with this argument: Mr. Carvin dealt with it very well, I think, under argument, well, you have a 53 to 56 percent increase, and that's got to be what we need to show.

As Mr. Carvin indicated, the process can't be about getting on the dot at 53 percent or 56 percent or 52 percent, because then what we're doing is we're taking this inherently political, inherently legislative process, taking it out of that arena and putting it into the judicial arena.

Essentially, if that's -- if what the plaintiffs are presenting to the Court is sufficient to allow that process to occur, well, that's how redistricting is going to end up being done, because we're going to be dealing with this issue in the courts rather than in the legislature. Respectfully, that's not the appropriate arena for this to occur. Thank you.

JUDGE DUNCAN: Thank you very much. The Court will take this under consideration, and we'll conduct any subsequent discussions that may be necessary, may become necessary probably telephonically. Thank you very much.

(End of proceedings.)

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

/s/
P. E. Peterson, RPR

Date