Robert D. Popper
Senior Attorney
Director, Voting Integrity
Judicial Watch, Inc.

February 16, 2021

My name is Robert D. Popper. I am a Senior Attorney and Director of voting integrity efforts at Judicial Watch, Inc. Judicial Watch is a Washington, D.C.-based public interest nonprofit dedicated to promoting transparency, accountability, and integrity in government, politics, and the law.

I was admitted to the Bar in New York in 1990, and I have been practicing as a litigator for 32 years. I have special knowledge and expertise in the area of voting law and have written both popular and scholarly articles on the subject.[1] I have particular expertise in the areas of racial and political gerrymandering. In 1991, with Professor Daniel Polsby, I wrote an article describing a mathematical way to measure the geographic compactness of congressional districts.[2] This standard is now known as the "Polsby/Popper" criterion and is one of the most widely used tests of district compactness. In 1997, I brought a lawsuit that ultimately led to New York's 12th Congressional District being enjoined as an unconstitutional racial

[1] *See, e.g.*, *How H.R.1 Intends to Overturn Supreme Court Rulings on Elections*, THE HILL, March 21, 2021; *The Voter Suppression Myth Takes Another Hit*, WALL ST. J., December 28, 2014; *Florida Gets Another Chance to Appeal for the Right to Clean Voter Rolls, They Should Take It*, THE DAILY CALLER, December 11, 2014; *Political Fraud About Voter Fraud*, WALL ST. J., April 27, 2014; *Little-Noticed Provision Would Dramatically Expand DOJ's Authority at the Polls*, THE DAILY CALLER, March 28, 2014; and, with Professor Daniel D. Polsby, *Guinier's Theory of Political Market Failure*, 77 SOC. SCI. Q. 14 (1996); *Racial Lines*, NAT. REV. 53, February 20, 1995; *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652 (1993); *Gerrymandering: Harms and a New Solution*, Heartland Institute Monograph (1990).

[2] Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301 (1991).

gerrymander.[3]

In 2005, I joined the Voting Section of the Civil Rights Division of the U.S. Department of Justice, where I worked for eight years. In 2008, I received a Special Commendation Award for my efforts in enforcing Section 7 of the National Voter Registration Act of 1993 ("NVRA"), which requires state offices providing public assistance to offer those receiving it the opportunity to register to vote. That same year, I was promoted to Deputy Chief of the Voting Section. In my time at DOJ, I managed voting rights investigations, litigations, consent decrees, and settlements in dozens of states. I helped to enforce all the statutes the Department is charged with enforcing, including the NVRA, the Help America Vote Act of 2002, the Uniformed and Overseas Citizens Absentee Voting Act of 1986, and the Military and Overseas Voter Empowerment Act of 2009. I managed lawsuits enforcing the Voting Rights Act of 1965, as amended, including the minority language provisions of Section 203; the preclearance provisions of Section 5; the anti-intimidation provisions of Section 11; and both vote denial and vote dilution claims under Section 2.

In 2013, I joined Judicial Watch. In my time there, I have filed voting rights lawsuits in federal and state courts alleging claims under the First, Fourteenth, and Fifteenth Amendments, Section 2 of the Voting Rights Act, the NVRA, and a number of state constitutional provisions. Among other things, I am currently representing plaintiffs pursuing gerrymandering claims in Maryland State court.

In preparation for my testimony, I looked at Florida's proposed congressional districts in maps drawn by the Florida House Redistricting Committee (*see* H000C8011, dated

[3] *Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997) (three-judge court), *aff'd mem.*, 521 U.S. 801 (1997).

2/10/2022; H000C8003, dated 11/29/2021; H000C8001, 11/29/2021, available at https://redistrictingplans.flsenate.gov/). In sum, my testimony is that proposed Congressional District 3 is highly vulnerable to being enjoined in a lawsuit that could be filed in federal court on the basis of principles embodied in the landmark ruling of *Shaw v. Reno*, 509 U.S. 630 (1993) and its progeny.

In *Shaw*, the Supreme Court first held that "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification" states a federal, constitutional claim "under the Equal Protection Clause." 509 U.S. at 642. Two years later in *Miller v. Johnson*, 515 U.S. 900 (1995), the Supreme Court upheld a lower court ruling invalidating a Georgia district on the basis of *Shaw*. The Court explained that "the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts." 515 U.S. at 911. Assigning voters on that basis "embod[ies] stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id*. at 912.

The racial intent behind the district challenged in *Miller* was apparent "when its shape is considered in conjunction with its racial and population densities." *Id*. at 917. Because "[r]ace was … the predominant, overriding factor" in its design, the district could not be "upheld unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review." *Id*. at 920. "To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Id*. The Court noted in particular that "creating a third majority-black district to satisfy the Justice

Department's preclearance demands" under Section 5 of the Voting Rights Act was not enough under the circumstances to justify the challenged district:

> As we suggested in *Shaw*, compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws. … The congressional plan challenged here was not required by the Voting Rights Act under a correct reading of the statute.

Id. at 921.

More recently, in *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797-98 (2017), the Court made clear that a plaintiff challenging a district under *Shaw* was *not* required to "establish, as a prerequisite to showing racial predominance, an actual conflict between the enacted plan and traditional redistricting principles." The Court recognized that "the 'constitutional violation' in racial gerrymandering cases stems from the 'racial purpose of state action, not its stark manifestation.'" *Id*. at 798 (citation omitted). *Bethune-Hill* is also noteworthy in that the Court, under a deferential review for "clear error," did not overturn the district court's finding that a district with 55% BVAP was necessary to avoid liability under Section 5 of the Voting Rights Act. But the Court in another case summarized *Bethune-Hill's* findings as follows:

> [W]here we have accepted a State's "good reasons" for using race in drawing district lines, the State made *a strong showing of a pre-enactment analysis with justifiable conclusions*. In *Bethune-Hill*, the State established that the primary mapdrawer "discussed the district with incumbents from other majority-minority districts[,] … considered turnout rates, the results of the recent contested primary and general elections," and the district's large prison population. … The State established that it had performed a "functional analysis," and acted to achieve an "informed bipartisan consensus."

Abbott v. Perez, 138 S. Ct. 2305, 2335 (2018) (emphasis added). Significantly, the Court in *Abbott* rejected a proposed justification for a race-based district where the State of Texas

argued that it was necessary to comply with Section 2 of the Voting Rights Act, but had not made the required strong showing. *Id.* at 2334. Similarly, in *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017), the Court rejected a claim that a race-based district was necessary to comply with Section 2 when the State of North Carolina could not show the preconditions required to make such a claim.

Turning to Congressional District 3 in the proposed plan, I believe it will be vulnerable to a serious—and probably a winning—*Shaw*-type claim under the Fourteenth Amendment. I understand that there will be little dispute that the district was drawn with its racial characteristics as the predominant consideration. I also understand that the shape of the district will be well-explained by the effort to include African-American populations around Tallahassee and Jacksonville. Moreover, the district clearly violates traditional districting criteria. Its Popper-Polsby score is 10%, and its Reock score is 11%. These are very low compactness scores for any U.S. congressional district, and in both cases these are the lowest compactness scores in the State of Florida.[4]

I also believe that the defenders of District 3 will be unable to justify the district so as to satisfy their burden of strict scrutiny. To begin with, I am unaware of the existence of any sort of "a strong showing of a pre-enactment analysis with justifiable conclusions." *Abbott*, 138 S. Ct. at 2335. But further, even if the race-based character of the districts could be justified under federal or Florida law, the district's noncompactness will compel the legal conclusion that it is not "narrowly tailored" to achieve its goals, as it must be to satisfy strict

[4] District 3 also has the third worst Area/Convex Hull score in the State. However, I do not consider the Area/Convex Hull test to be a reliable compactness measure. There are too many district indentations and distortions it simply cannot "see." Accordingly, it is too forgiving.

scrutiny. *See Miller*, 515 U.S. at 921 ("The congressional plan challenged here was not required by the Voting Rights Act under a correct reading of the statute.").

As a final point, the fact that the BVAP in District 3 is at around 44% according to the House Committee's online information (or 42% according to the Princeton Gerrymandering Project) will defeat the State's ability to justify the district. The Supreme Court has held that no Section 2 claim is possible where the minority VAP is less than 50%. *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009) ("It remains the rule … that a party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent."). The Supreme Court has at least suggested that the same rule applies in the context of Section 5. *Perry v. Perez*, 565 U.S. 388, 398-99 (2012) ("The court's order suggests that it may have intentionally drawn … a 'minority coalition opportunity district' in which the court expected two different minority groups to band together to form an electoral majority"; and, if so, "it had no basis for doing so. *Cf. Bartlett* …"). *See also In re Senate Joint Resolution of Legislative Apportionment* 1176, 83 So. 3d 597, 625 (2012) ("Just as Section 2 jurisprudence guides the Court in analyzing the state vote dilution claims, when we interpret our state provision prohibiting the diminishment of racial or language minorities' ability to elect representatives of choice, we are guided by any jurisprudence interpreting Section 5.").

In sum, if I were counseling clients about whether to sue to enjoin District 3 in federal court, I would recommend that they do so, suggest that they are likely to prevail, and tell them that they would then be likely to receive an award of costs and legal fees.

R. D. P.