incumbents; an acceptable political cause but one that causes voter dilution in the African American community for the next decade.

As Respondents noted in their response brief, the Section 2 process had a heavy influence on the configuration of the L.A. districts. Had the Commission followed the VRA mandate to create a Section 2 African American majority district, many of the compactness issues and contiguous issues which were so interrelated to the L.A. CD's raised in the Petition, would have been more easily resolved and in compliance with the criteria of Article XXI. It would have also enabled one of those three districts to be designated a Section 2 Latino majority district and gone much further to provide the substantial proportionality for the Latino community as discussed above. However, the failure to observe the provisions of the VRA lead the Commission down an alternative course creating substantial VRA concerns and compliance issues.

V. PETITIONERS HAVE MET THEIR BURDEN OF PROOF AND HAVE ESTABLISHED THAT RACE WAS THE PREDOMINANT FACTOR IN REDISTRICTING COMMISSIONS DECISIONS REGARDING CD'S 37, 43 AND 44.

In their opposition, the Commission argues that the standard for a racial gerrymandering claim is a demanding one. However, the United States Supreme Court in *Miller v. Johnson* 515 U.S 900 (1995) made clear that a Petitioner could establish such a claim through direct and circumstantial evidence. In *Miller*, the United States Supreme Court considered a challenge to the State of Georgia's redistricting plan. The case was brought to the court by white voters in the

Eleventh Congressional District of the state of Georgia. The irregularly shaped district, which stretched 6,784.2 square miles (17,571 km2) from Atlanta to the Atlantic Ocean, was created to encompass enough of Georgia's African-American population to create a district where an African-American would have a high chance of being elected.

The Court ruled against the district, declaring it to be a "geographic monstrosity." It was declared unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, according to the interpretation in *Shaw v. Reno*.

In discussing the burden of proof to prove a violation of the equal protection clause, the Court in Miller, stated:

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can "defeat a claim that a district has been gerrymandered on racial lines." Shaw, supra, at 2827. These principles inform the plaintiff's burden of proof at trial.

The Supreme Court went on to say:

> "In our view, the District Court applied the correct analysis, and its finding that race was the predominant factor motivating the drawing of the Eleventh District was not clearly erroneous. The court found it

> was "exceedingly obvious" from the shape of the Eleventh District, together with the relevant racial demographics, that the drawing of narrow land bridges to incorporate within the District outlying appendages containing nearly 80% of the district's total black population was a deliberate attempt to bring black populations into the district. 864 F. Supp., at 1375; see id., at 1374-1376. Although by comparison with other districts the geometric shape of the Eleventh District may not seem bizarre on its face, when its shape is considered in conjunction with its racial and population densities, the story of racial gerrymandering seen by the District Court becomes much clearer. See Appendix B (attached); see also App. 133. Although this evidence is quite compelling, we need not determine whether it was, standing alone, sufficient to establish a Shaw claim that the Eleventh District is unexplainable other than by race. The District Court had before it considerable additional evidence showing that the General Assembly was motivated by a predominant, overriding desire to assign black populations to the Eleventh District and thereby permit the creation of a third majority black district in the Second. 864 F. Supp., at 1372, 1378."

Here as in *Miller*, there is both substantial direct and circumstantial evidence the Commission was motivated by a predominant, overriding desire to create three African American opportunity districts in Los Angeles County.

VI. THE FACT THAT THE COMMISSION IGNORED TRADITIONAL REDISTRICTING CRITERIA IN CREATING CONGRESSIONAL DISTRICTS 37, 43 AND 44 IS POWERFUL CIRCUMSTANTIAL EVIDENCE THAT RACE WAS THE PREDOMINANT FACTOR IN CREATION THESE DISTRICTS.

There is substantial circumstantial evidence that race was the predominant if not the sole reason for the three Congressional District's composition. Much like the Georgia legislature in *Miller*, here the Commission ignored several traditional redistricting criteria to create these districts. Most telling is the fact that despite having evidence of racially polarized voting and a letter from their own

attorney stating the need for VRA districts in this area, the Commission did not consider these three districts to be section 2 districts. Therefore they ignored compliance with the VRA and compliance with VRA is not a rational available for the Commission in this instance.

The Commission ignored other traditional redistricting criteria, which included but are not limited to compactness, contiguity and a respect for political subdivisions. It is clear by simply looking at the 37th, 43rd and 44th Congressional district lines that compactness was of no regard. In addition, there nothing contiguous about the way the African American Community in the 37th and 43rd districts is cut in half by the Commission. When discussing the creation of a VRA protected African American district that would keep the African American community together Commissioner Parvenu stated that, an African American VRA protected district "doesn't really do the African American community any justice...it actually benefits the African American community to not have those higher percentages." (Attached to the RJN as Exhibit "P", p. 45)

The compactness and contiguity of that community has been ignored. In that same vein, any respect for the African American community in these districts as a political subdivision has also been ignored. Dividing the African American community in this manner does nothing to forward or respect the historically traditional criteria of districting. Rather it merely acknowledges the Commission has succumbed the immediate political benefits generated from political

gerrymandering and thrust aside the priorities of the 14th Amendment and the VRA.

VII. AS IN *MILLER*, THERE IS SUBSTANTIAL DIRECT EVIDENCE THAT THE COMMISSION WAS PREDOMINATELY MOTIVATED BY RACE WHEN IT CREATED CD'S 37, 43 AND 44.

The Commission argues that it could consider race in drawing the Congressional districts involved in this case. However, there is substantial direct evidence that it was predominately motivated by race when it created these districts. It is clear that creating three diluted African American districts was not simply a consideration for the Commission, it was their foremost concern.

In discussing the requirement that the Commission must create at least one VRA district in Los Angeles County Commissioner Parvenu stated that having a African American VRA protected district "doesn't really do the African American community any justice, it actually benefits the African American community not to have those higher percentages." (Citizens Redistricting Commission Transcript, May 28, 2011 attached to the RJN as Exhibit R, p. 45)

He further stated the creation of three African American districts that purposefully separates and dilutes the African American community: "The net result of this is exactly what I talked about earlier, that the core focus is not on the urban core of Los Angeles. What this does is regionalize it into north, central and south. My issue too is that I've been all over this state and I have patiently listened and advocated for other ethnic groups and their ability to have districts where they

could be elected and keep their communities whole...what this does is reduces the areas where African American candidates can be elected from three to one packed into that one district. I see the logic of the geographic logic and placement, but it effectively disenfranchises, disengages, or makes opportunity district less available for African Americans to run and be candidates at a congress level in this part of the city. Been all over this state and it seems interesting to me that when it comes to this part of the city the VRA is now an instrument to be used against the African American population." (Citizens Redistricting Commission Transcript, July 24, 2011 attached to the RJN as Exhibit Q, p. 374)

Other Commissioners made similar statements. In discussing the Commission's decision to create three districts rather than one or two VRA protected districts Commissioner Galambos Malloy stated that "it's not just about §2 and §5...fair and effective representation for minorities is not an option it is part of our job, it is what we were put here to do." (Citizens Redistricting Commission Transcript, July 24, 2011 attached to the RJN as Exhibit Q, p. 236) Commissioner Forbes stated when discussing these districts "we have constantly applied the standard of effective representation and I am afraid if we don't go to this configuration we will significantly reduce the opportunity to have this community of interest effectively represented." (Citizens Redistricting Commission Transcript, July 24, 2011 attached to the RJN as Exhibit Q.)

Additionally, Commissioners Parvenu and Galambos Malloy made clear that they would not vote for any maps that did not include three African American

opportunity Congressional Districts in Los Angeles County. Also, Commissioner Galambos Malloy stated that she was aware that she and Commissioner Parvenu could operate as a veto on any maps because they were both from the "Decline to State" pool. (Citizens Redistricting Commission Transcript, July 24, 2011 attached to the RJN as Exhibit Q, p. 218-238.)

Much like the Georgia Legislature in *Miller*, it is clear that the Commission was primarily motivated by the desire to create three CD's in Los Angeles County that African American candidates had an opportunity to win. The direct evidence of a racially motivated gerrymander is more substantial than the evidence before the Court in *Miller*. Here, we have direct statements from the Commissioners themselves that they were motivated to ensure that African Americans would retain three seats in the heart of Los Angeles County.

The use of this detailed racial data was purposefully exploited in the creation of these district lines. Most importantly, when looking at all these considerations in the aggregate it is clear that not only were the traditional districting criteria ignored, that criteria clearly became subordinate to race in the form of the deliberate and conscious separation and dilution of the African-American community in order to protect three incumbents.

VIII. THERE IS SUBSTANTIAL EVIDENCE THAT RACE WAS A PREDOMINATE FACTOR IN DRAWING THESE LINES THUS THE COURT MUST REVIEW THESE LINES UNDER A STRICT SCRUTINY STANDARD.

As shown above, there is substantial direct and circumstantial evidence that race was the predominate factor in drawing CD's 37, 43 and 44. Because strict scrutiny is the standard of review, the court must find that it was necessary for the lines to be drawn in this way in order to further a compelling state interest. Since the Commission did not consider these three CDs to be VRA Section 2 districts, compliance with VRA is not a defense available to the Commission for purposes of meeting the compelling state interest, if any is even available for justifying the Commission's race based actions. Therefore the court must determine what exactly is the compelling state interest that justified the Commission's actions.

As mentioned in our opening brief, the Commission received extensive testimony from the public to retain the 37th Congressional District as an African-American majority district. Testimony was received advocating spreading out the African-American population between the three districts (Quinn Dec ¶7). Retaining these three diluted African-American districts would prove to be problematic due to the decline of the African American population of Los Angeles County. In order to retain these three districts an awkward gerrymander of South and Southwestern Los Angeles County would be required. (Quinn Dec ¶25) As shown above, it is clear from review of the testimony and statements from certain Commissioners, that the sole (and or predominate) motive behind the

Commission's lines was to keep three diluted African-American districts which was perceived by the Commission as a benefit to the current incumbent members. Therefore race, not some other compelling governmental interest was the reason behind the drawing of the LA County CD district lines.

Because race was the predominate factor used in creating the District lines of the 37th, 43rd and the 44th Congressional districts and no compelling state interest is proffered by the Commission, it is clear that the these lines violate the Fourteenth Amendment and in doing so, other CDs and communities are being affected by these unconstitutional district lines.

The racial gerrymander of CD's 37, 43 and 44 had a ripple effect throughout Southern California. The effect of this racial gerrymandering was to fracture the representation of many cities and communities outside the LA County African American population core. (Quinn, p. 26) It also denied the creation of additional effective Latino Congressional districts. (Quinn Dec, ¶24). The Commission's purpose and the effect of its actions was to preclude the establishment of one or two African-American majority-minority districts which would have correspondingly lead to one or possibly two Latino majority-minority district. In light of the voter polarization attested to by the Baretto Study and recognized in the Gibson Dunn memo, (Quinn Dec., ¶¶12 and 16) it is highly likely the incumbent(s) would not have been successfully re-elected against a Latino opponent. Had Section 2 districts been drawn, the political protection afforded the three African-American incumbents would not have been available to

them. (Quinn Dec. ¶19) Based upon that record it is abundantly clear that the three districts with the diluted 30% African-American CVAP in each district was the primary reason for manner in which the lines were drawn. The impact of this gerrymandering caused the loss of an additional Latino majority district, in violation of the Fourteenth Amendment.

Dated: October 17th, 2011 Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Elizabeth R. Toller, Declare:

I am a resident of the State of California and over the age of eighteen years and not a party to the within-entitled action; my business address is 2603 Main Street, Suite 1050, Irvine, California 92614. On October 17 2011, I served the following document(s) described as:

PETITIONERS RADANOVICH, ET. AL. REPLY TO REDISTRICTING COMMISSIONS OPPOSITION TO VERIFIED PETITION FOR EXTRAORDINARYRELIEFIN THE FORM OF MANDAMUS OR PROHIBITION

on the following party (ies) in said action:

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X **BY U.S. MAIL:** By placing said document(s) in a sealed envelope and depositing said envelope, with postage thereon fully prepaid, in the United States Postal Service mailbox in Sacramento, California, addressed to said party (ies), in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

X **BY ELECTRONIC MAIL:** By causing true copy(ies) of PDF versions of said document(s) to be sent to the e-mail address of each party listed above.

Lowell Finley Office of the Secretary of State 1500 11th Street Sacramento, California 95814	*Attorney for Respondent* DEBRA BOWEN, SECRETARY OF STATE

X **BY U.S. MAIL:** By placing said document(s) in a sealed envelope and depositing said envelope, with postage thereon fully prepaid, in the United States Postal Service mailbox in Sacramento, California, addressed to said party(ies), in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit for each party listed above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on October 17, 2011 at Irvine, California.

Elizabeth R. Toller