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

DAWN CURRY PAGE, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No. 3:13cv678**
	)	
VIRGINIA STATE BOARD OF ELECTIONS, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN RESPONSE TO PLAINTIFFS' BRIEF ON AVAILABLE REMEDIES

Defendants Charlie Judd, in his capacity as Chairman of the Virginia State Board of Elections, Kimberly Bowers, in her capacity as Vice-Chair of the Virginia State Board of Elections, and Don Palmer, in his capacity as Secretary of the Virginia State Board of Elections (collectively "the SBE defendants"), by counsel, and pursuant to this Court's oral instruction at the November 21, 2013 status conference, the parties' subsequent Joint Status Report and Discovery Plan, and this Court's December 3, 2013 Order, state as follows for their Memorandum In Response To Plaintiffs' Brief On Available Remedies.

I. INTRODUCTION

Although the plaintiffs have not offered an alternative congressional district map for Virginia, they presumably seek to either 1) dismantle Virginia's only majority-minority congressional district, the core of which has existed - unchallenged - since 1998, and from which Virginia's first and only African-American congressman since Reconstruction has been elected

since 1992;[1] or, 2) remove African-Americans from that district and place them in different districts where they presumably cannot elect candidates of choice. If undertaken by this Court, either option would require a complex, intensive examination into appropriate black voting age populations and could potentially result in a chain reaction of shifts in populations among many - if not all - of Virginia's congressional districts.

The SBE defendants dispute the plaintiffs' contention that Virginia's Third Congressional District was racially gerrymandered in violation of the Equal Protection Clause of the Fourteenth Amendment. As the plaintiffs have conceded, and as evidenced by the timing of this lawsuit, the plaintiffs' challenge is based on the Supreme Court's June 25, 2013 decision in *Shelby County v. Holder,* 570 U.S. ___, 133 S. Ct. 2612 (2013), pursuant to which Virginia is no longer a covered jurisdiction under the Voting Rights Act of 1965 and no longer required to seek preclearance in changes to district lines so as to avoid retrogression in the ability of minorities to elect candidates of their choice.

There is no basis, however, to deem *Shelby County* retroactive in application and judge the redistricting at issue here as if Virginia was not covered by Section 5 when the lines were drawn. In other words, it is dispositive that, at the time Virginia redrew the boundaries of the Third District and enacted them into law on January 25, 2012, Virginia was required to maintain the Third District as an existing majority-minority district such that there was no retrogression in the ability of minorities to elect a candidate of their choice. In redrawing Virginia's congressional districts, the General Assembly ensured compliance with federal law as it applied at that time, prior to *Shelby County*. Thus, there can be no constitutional violation.

[1] *See* Congressman Bobby Scott - Biography, http://bobbyscott.house.gov/biography/ (last visited Dec. 13, 2013). Congressman Scott is also only the second African-American elected to Congress in Virginia's history. *Id.*

The case should be dismissed on summary judgment for the foregoing reasons and for all the reasons to be set forth in briefing ordered by this Court on December 6, 2013. But assuming the plaintiffs survive summary judgment, this Court and the parties should be allowed sufficient opportunity to discover and carefully consider the merits of the plaintiffs' claims - including any yet to be disclosed remedial plan - and Virginia's legislature should likewise be afforded the opportunity to address any constitutional infirmities this Court may find after a trial on the merits. Every effort should be made to allow Virginia's legislature an opportunity to redraw congressional district boundaries in a manner consistent with Constitutional requirements, applicable federal and state law, and state policy.

Moreover, the plaintiffs do not take into consideration logistical issues, disruption and costs of seeking to alter district lines and deadlines for the 2014 elections. The plaintiffs' proposals in their Brief on Available Remedies, truncate the judicial process and minimize the evidence that will be necessary to effectively redraw districts, bypass the legislative process, and disregard the inevitable disruption and confusion in the electoral process if this Court were to attempt to redraw lines prior to the 2014 elections. Particularly in this unique circumstance, where the plaintiffs concede that the General Assembly's actions were consistent with federal law as it applied to Virginia during the redistricting process,[2] and the plaintiffs did not file their lawsuit for three months *after* that law no longer applied, the Court should allow the November 14, 2014 election to proceed as scheduled so that no citizen is inadvertently disenfranchised as a result of confusion, mistakes and missed deadlines arising from a rushed redrawing of district lines.

[2] Virginia obtained preclearance from the Department of Justice under Section 5.

II. ARGUMENT

A. If The Plaintiffs Were Able To Establish That *Shelby County* Retroactively Renders Unconstitutional Acts Taken By The Virginia General Assembly In Compliance With Applicable Federal Law At The Time, The Virginia General Assembly Should Be Allowed To Redraw District Lines.

The Supreme Court has repeatedly held that redistricting matters should be left to state legislatures. "[R]edistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978) (citing *Connor v. Finch*, 431 U.S. 407, 414-415 (1977); *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973); *Burns v. Richardson*, 384 U.S. 73, 84-85 (1966)). The Court has recognized that "drawing lines for congressional districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance." *League of Latin Am. Citizens v. Perry*, 548 U.S. 399, 416 (2006).

State legislatures' authority to draft redistricting plans is well-established, and the Supreme Court has opined that "[a]s the Constitution vests redistricting responsibilities foremost in the legislatures of the States and in Congress, a lawful, legislatively enacted plan should be preferable to one drawn by the courts." *Id.* The overwhelming preference for a redistricting plan developed by a state legislature is in part influenced by the fact that a federal court lacks "the political authoritativeness that the legislature can bring to the task," and that a state legislature is the institution best situated to reconcile traditional policies with constitutionally required principles of population equality. *Connor*, 431 U.S. at 415. Accordingly, it is only where legislative bodies do not comply with this responsibility, or where an impending state election makes legislative action impracticable, that federal courts should intervene in matters of redistricting. *Wise*, 437 U.S. at 540.

"[I]n exercising its equitable powers, the Court should give the appropriate legislative body the first opportunity to provide a plan that remedies the violation." *McDaniels v. Mehfoud*, 702 F. Supp. 588, 596 (E.D. Va. 1988) (citing *McGhee v. Granville County*, 860 F.2d 110, 115 (4th Cir. 1988); *Tallahassee Branch of NAACP v. Leon County, Fla.*, 827 F.2d 1436, 1438-40 (11th Cir. 1987), *cert. denied*, 488 U.S. 960 (1988)). Further, where a legislatively adopted redistricting plan is found to be improper, "it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than" impose a court-devised alternative. *Wise*, 437 U.S. at 540.

In the instant case, where the plaintiffs posit a theory that *Shelby County* retroactively renders unconstitutional decisions made by the General Assembly to comply with federal law as it applied *prior to Shelby County*, deference to the legislature in redrawing lines is particularly necessary. By its very nature, this situation is unique. The need for courts to redraw lines may arise after legislatures have failed to act. *See Wise*, 437 U.S. at 540 ("Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the "unwelcome obligation," . . . of the federal court to devise and impose a reapportionment plan pending later legislative action."); *see also Desena v. Maine*, 793 F. Supp. 2d 456, 462 (D. Me. 2011). But the Virginia General Assembly did adopt a redistricting plan, in accordance with applicable federal law as well as state law and policy considerations. The redistricting plan was approved by the Department of Justice under Section 5. An unchallenged election was held in 2012. And not until three months after the 2013 *Shelby County* decision - the purported basis for retroactively rendering the redistricting plan

unconstitutional - did the plaintiffs seek to challenge the plan. Under these circumstances, there is no need for the harsh remedy of a court drawn district on what is virtually the eve of the electoral process. Instead, if the Court finds the need for relief, it should permit the Virginia legislature to act in a way that permits the development of the factual record required, places the responsibility for redistricting where it belongs, and gives voters the maximum amount of notice of any changes to their districts and ability to have input through the legislative process.

The plaintiffs downplay importance of the legislature in the redistricting process and implore the Court to draw lines in the interest of expediency.[3] Plaintiffs' Brief at 4. Where - as here - changing district lines has the potential effect of disenfranchising minority voters currently represented by a long serving member of Congress, a careful factual record would need to be developed to redraw the lines. This process is best left to the legislature. It is in the legislative process that voters can address committees, speak to their representatives and have an input on the redistricting process. The lack of a need for an expeditious remedy is borne out by the fact that the legislative district at issue was precleared by the Department of Justice.

[3] The plaintiffs ask this Court to redraw lines on a rushed schedule, but have not proffered any alternative redistricting plan - let alone one that comports with constitutional, federal and state law requirements. Thus, the plaintiffs' ultimate proposed remedy - new boundaries for the Third District and beyond - has yet to be disclosed while this Court is asked to rush to judgment on the merits and on remedies. But without identifying an alternative redistricting plan as a remedy, the plaintiffs cannot proceed with their claim that minority voting strength has been unconstitutionally weakened. *See, e.g.*, *Holder v. Hall*, 512 U.S. 874, 880 (1994) (In Section 2 vote dilution cases, "a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice."); *Thornburg v. Gingles*, 478 U.S. 30, 88 (1986) ("In order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind for how hard it should be for minority candidates to elect their preferred candidates under an acceptable system."); *Hall v. Virginia,* 385 F.3d 421, 428 (4th Cir. 2004) ("Any claim that the voting strength of a minority group has been 'diluted' must be measured against some reasonable benchmark of 'undiluted' minority voting strength.").

B. There Is Insufficient Time To Redraw Districts Prior To The November 2014 Election; Thus, The Election Should Proceed As Scheduled To Avoid Disruption, Confusion And Potential Disenfranchisement Of Voters.

Due to the delay in bringing this action, it is already too late to redraw the map prior to the November 2014 election without significant disruption and expense. The State Board of Elections ("SBE") has no role in the General Assembly's redistricting process and no role in the drawing of district lines. Instead, the SBE is charged with administering and implementing Virginia's election laws. *See* Va. Code §§ 24.2-103, -105. And Virginia's election laws, as passed by the General Assembly, are presumed to be constitutional. *See, e.g., McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 809 (1969) ("Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent."). Thus, the SBE seeks to ensure fair elections, conducted in an orderly manner and in compliance with laws passed by the General Assembly and applicable federal law.

In this regard, the plaintiffs' Brief on Available Remedies briefly references certain upcoming deadlines in the electoral process. Specifically, Va. Code § 24.2-515 mandates that primaries for the nomination of candidates must be held on the second Tuesday of June - which will be June 10 in 2014. And Va. Code § 24.2-522 mandates that the time period for filing of declarations of candidacy, petitions, and receipts indicating the payment of filing fees opens at noon on the ninety-second day before the primary, which is March 10 in 2014, and closes at 5:00 p.m. on the seventy-fifth day before the primary, which is March 27 in 2014. The SBE has no authority to alter these statutorily mandated deadlines. Moreover, these deadlines are only the proverbial "tip of the iceberg" with regard to the requirements for an orderly and properly administered 2014 election. When these legal and administrative requirements are considered,

this Court must reject the plaintiffs' suggestion that there is adequate time for it to redraw lines on a rushed schedule before the 2014 election.

1. The Virginia Election and Registration Information System.

The Virginia Election and Registration Information System (VERIS) is the statewide database by which, *inter alia*, registered voters are assigned to their respective election districts based on each individual voter's registration address. Each address is assigned to a specific street segment (a numeric range and the name of a street) and each street segment is assigned to its respective election district. Maintaining the integrity and accuracy of information in VERIS is critical to the administration of an election because it is the system used by the SBE and local registrars to administer an election. Changes to VERIS must be made with care, and require crosschecking and validation to ensure the accuracy of voter information. VERIS is used to ensure a particular voter is registered where he purports to vote. VERIS is what is used to qualify candidates for office. The process for verifying candidate petitions and determining candidate ballot access cannot function correctly if VERIS does not have all registered voters in the proper election districts. In short, VERIS is the central registration system used to ensure that elections in Virginia are run correctly.

When new district lines are created, each impacted locality reviews the new district lines to determine if any changes are necessary to each individual street segment. Statewide, there are over 216,000 individual street segments in VERIS. Once a locality has determined that changes need to be made, the locality officially notifies the SBE. The SBE must review the official request and either approve it or, if necessary, request more information. Once approved, the SBE sets up a temporary staging version of their street segments in VERIS. The locality completes the necessary data entry and notifies SBE once the changes have been completed. The

SBE then performs a series of data integrity checks on the changes, works with the locality to correct any problems, and moves the changes out of the temporary staging environment in VERIS.

Once the changes have been moved from the temporary staging environment, in most cases voters are automatically associated with their new districts. Additional reports are run by the localities to identify any voters who have become unlinked from a street segment or district and corrections to those individual voter records are made by the locality. In addition, if new precincts or split precincts are established or if any are disbanded in the redistricting effort, this information must also be entered into VERIS in coordination with SBE staff. Once this data has been entered, poll location information must also be entered into VERIS. Upon the conclusion of statewide redistricting in 2011, this entire process of updating VERIS took approximately six months.[4]

2. Voter Cards for Redistricting.

State law requires that voters be informed of changes to their assigned election districts, precinct or poll location. Va. Code § 24.2-306. Voter information cards are prepared, printed and mailed to each affected voter. The cards must be mailed a minimum of fifteen days prior to any election in which the voters will be voting in the changed election district. *Id.* Several weeks may be necessary to prepare a sizable mailing after VERIS has been updated. In the last statewide mailing of voter cards, the SBE assumed the responsibility for the large scale printing and mailing of voter cards (as opposed to leaving it to the localities in smaller redistricting efforts). Cards returned to the SBE must be sorted and returned to their respective localities. Upon receipt of a returned card, the locality must update the VERIS database with an entry

[4] This update took approximately six months because it had been ten years since the last statewide redistricting and VERIS was a new voter registration system.

reflecting the returned correspondence. Upon the conclusion of redistricting, and once the VERIS changes are fully implemented, this process can take approximately three months. As there is no appropriation to the SBE for another round of statewide redistricting voter card production and mailings, the responsibility and costs may fall on the localities.

3. Candidate Qualification.

Candidate qualification requires verification of candidate petitions. In a primary, the political parties are responsible for petition verification and for certifying a candidate's qualification not less than seventy days before the primary. *See* Va. Code § 24.2-527. Petition verification for independent candidates is performed by the local general registrar. Where necessary, the SBE will issue a statement of candidate disqualification due to lack of qualified voter signatures. *See* Va. Code § 506(C). The SBE also is responsible for adjudicating petition appeals by independent candidates. *Id.* Typically, two weeks are needed to fully conclude such an appeal. *Id.* The SBE estimates that the petition verification process for an independent candidate could take approximately one month to conclude.

4. Ballot Preparation.

Ballot preparation for an election – including primary elections - may begin only after the candidate qualification process has concluded. *See* Va. Code § 24.2-612. The SBE issues candidate certifications to each locality involved in an election. The certification contains the slate of qualified ballot names and the proper ballot order for each. The locality's voting equipment vendor or ballot printer will also receive the certification. The vendor uses the certification to prepare a proof of each ballot and submits the ballot proof to the local election officials. The locality reviews the ballot and, if approved, submits the ballot to the SBE for final approval.

If the SBE grants final approval, the locality orders printed ballots to be available no later than forty-five days in advance of the congressional primary to allow for absentee ballots. *See* Va. Code § 24.2-612. Moreover, both the federal Military and Overseas Voter Empowerment (MOVE) Act and Virginia law require the mailing of absentee ballots to military and overseas voters at least forty-five days prior to the congressional primary. *See* 42 U.S.C. § 1973ff; Va. Code § 24.2-460.[5] The process of ballot preparation to ballot availability typically takes at least two weeks in congressional elections.

5. Voter Confusion.

Changes in deadlines, particularly with regard to the June primary, will likely result in voter confusion, particularly among uniformed and overseas voters who do not have regular access to local media and campaign materials. The SBE and localities would need to engage in a public relations campaign to help ensure that voters are educated about the change in election dates.

In the end, the plaintiffs have articulated no tangible harm that they would suffer if the 2014 congressional election proceeded based on lines already in effect for one election and drawn in accordance with federal law as it applied to Virginia at that time. Nor did the plaintiffs demonstrate any sense of urgency in filing their lawsuit three months *after* the purported legal basis of their lawsuit went into effect, *i.e.*, the Supreme Court's *Shelby County* decision. In contrast to the lack of any articulated tangible harm to the plaintiffs, the potential harm to both the legislative process and the electoral process - including the possibility of inadvertent

[5] On December 10, 2010, the Commonwealth of Virginia and the SBE entered into a Consent Decree with the United States of America to implement procedures ensuring compliance with the MOVE Act. A copy of the Consent Decree is attached as Exhibit A.

disenfranchisement of voters - is real and substantial if the plaintiffs succeed in convincing this Court to redraw lines for the 2014 election on a rushed schedule.

III. CONCLUSION

For the foregoing reasons, the SBE defendants respectfully request that the litigation of the plaintiffs' case proceed with sufficient time to allow for deliberate consideration of the merits and that the 2014 congressional elections proceed in their normal course. If the Court determines that a constitutional violation exists in the Third Congressional District, the Court should afford the Virginia General Assembly an opportunity to correct the violation, with due regard for state policy decisions, in a manner consistent with applicable federal and state law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of December, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing (NEF) to the following:

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