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

DAWN CURRY PAGE, et al., **Plaintiffs,** **v.** **VIRGINIA STATE BOARD OF ELECTIONS, et al.,** **Defendants.**	**Civil Action No.: 3:13-cv-678**

INTERVENOR-DEFENDANTS VIRGINIA REPRESENTATIVES'
RESPONSE TO PLAINTIFFS' BRIEF ON AVAILABLE REMEDIES

INTRODUCTION

Plaintiffs' Brief On Available Remedies (DE 30) vividly confirms that it is simply not possible to intelligently resolve their liability claim and enter a remedy prior to next year's primary elections in Virginia. While it would be extraordinarily impractical and unfair to enter *any* remedy in the roughly three months that are still available, Plaintiffs have rendered this effort wholly impossible by failing to specifically identify, or even describe, the changes to the existing congressional map ("the Enacted Plan") they will seek, even though the Court directly ordered them to disclose the "remedial measures sought by Plaintiffs if they were to prevail in this action." Order at 2 (DE 27).

1. The reason for Plaintiffs' calculated decision to leave Defendants and the Court in the dark as to the remedy they seek is quite understandable—a description of any meaningful remedy here reveals that there is not nearly enough time to enter it. Specifically, the liability and remedial proceedings needed to adjudicate Plaintiffs' case would require extensive discovery and

additional expert testimony on, *inter alia*, the complex issues of 1) racial bloc voting, 2) whether a proposed remedial district would preserve black voters' opportunity to elect their preferred candidate, and 3) whether that district conforms with traditional redistricting criteria. Plaintiffs, quite understandably, are not asking the Court to simply dismantle the only congressional district in the history of Virginia that has provided black voters an opportunity to elect their preferred candidate and replace it with a square, "compact" district where black voters have no such opportunity because of the low black voting-age population ("BVAP"). And, of course, the Court would not blithely take such a momentous step based on the slapdash one-day hearing in February contemplated by Plaintiffs, and could not do so because it is obliged under Section 2 of the Voting Rights Act to provide black voters with a district where they can elect their preferred candidate, if it is feasible to do so. *See Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986); *see also Abrams v. Johnson*, 521 U.S. 74, 90 (1997) ("courts should comply with . . . section [2] when exercising their equitable powers to redistrict."); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 633 (D.S.C. 2002) (three-judge court) (same).

Plaintiffs recognize this reality, since their Complaint alleges that "Section 2" does not "justify" the challenged District 3 because "African American voters in this district are able to elect candidates of choice without constituting 56.3% of the districts voting age population," Compl. ¶ 44 (DE 1), and Plaintiffs' counsel confirmed during a scheduling conference call that Plaintiffs' remedy would continue to afford African American voters this ability to elect. Yet, although Plaintiffs contend that 56.3% BVAP is unnecessary to elect a minority-preferred candidate, and that District 3 is "pack[ed]," *id.* ¶ 4, they give no inkling of what BVAP is required to do so, or what percentage constitutes "packing," and whether a district conforming to Plaintiffs' (undisclosed) racial percentages is feasible without violating traditional districting

principles. Nor have Plaintiffs offered *any* expert analysis even relating to the complex question of what BVAP is needed, or even provided any hint as to what such a district would even look like or how many adjacent districts would need to be altered to accommodate this new district.

Yet resolving such questions about Plaintiffs' alternative district is essential not only to determine the appropriate remedy, but also to assess liability. Needless to say, the Court cannot reasonably adjudicate Plaintiffs' claim that the Legislature excessively and unconstitutionally used race in a manner not required by Section 2 unless Plaintiffs inform the Court (and Defendants) what a district would look like if the Legislature had followed their conception of the Constitution and Section 2. *See, e.g.*, *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."). At a minimum, any such claim would require expert testimony on the compliance of Plaintiffs' proposed "remedial" or "benchmark" district with Section 2 and traditional districting principles. As noted, Plaintiffs have not even offered an expert report on these complex questions and Defendants, of course, have no such rebuttal expert. Such expert testimony, standing alone, would require extensive discovery into prior voting patterns involving minority candidates in the relevant areas, as well as consideration of the substitute district's compliance with neutral districting principles.

That being so, it is quite obviously impossible to adjudicate liability and enter a remedy in the next three months, as Plaintiffs request. That is particularly true since any remedy can go no further than correcting the identified departure from the Constitution, so it is essential to know what constitutes a constitutionally adequate district and how District 3 departed from this norm. *See, e.g.*, *Upham v. Seamon*, 456 U.S. 37, 43 (1982); *White v. Weiser*, 412 U.S. 783, 794–95

(1973). Moreover, as explained below, this Court is required to accord the General Assembly ample time and opportunity to adopt a legislative remedy before it can enter a judicial remedy. *See Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (cited at Pls.' Br. at 3); *McDaniels v. Mehfoud*, 702 F. Supp. 588, 596 (E.D. Va. 1988) (cited at Pls.' Br. at 3). Yet the General Assembly cannot intelligently formulate, much less enact, the narrowest remedy "necessary to cure [the] constitutional . . . defect" unless it has before it an alternative district illustrating that defect and a possible remedy. *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794–95.

2. There is another fundamental reason why this Court cannot enter a remedy at the breakneck pace Plaintiffs advocate: Plaintiffs have left no time for direct review by the Supreme Court of any liability judgment in their favor. As detailed below, Plaintiffs' claim rests on a novel theory of discriminatory purpose which arose only last June; *i.e.*, that the Supreme Court's decision in *Shelby County v. Holder*, which relieved Virginia of its Section 5 preclearance obligations for *future* changes to its election laws, somehow rendered the *previously* constitutional District 3 unconstitutional. *See* Compl. ¶¶ 1–6. While this theory is meritless (as Defendants' forthcoming motions for summary judgment will show), at a minimum it is so obviously novel and controversial that Supreme Court review is needed *before* abolishing the only district in Virginia where black voters have the ability to elect their candidate of choice. For this reason, even in far less compelling circumstances than those present here, the consistent practice of courts in *Shaw* cases has been to delay ordering a remedy into effect prior to offering an opportunity for Supreme Court review or time for the legislature to adopt a remedy. *See, e.g.*, *Diaz v. Silver*, 932 F. Supp. 462, 467–68 (E.D.N.Y. 1996) (three-judge court) (in July of election year, granting legislature time to correct *Shaw* violation in congressional plan and collecting cases); *Moon v. Meadows*, 952 F. Supp. 1141, 1144 (E.D. Va. 1997) (three-judge court)

(granting General Assembly opportunity to enact a remedy for a *Shaw* remedy in District 3), *summ. aff'd*, 521 U.S. 1113 (1997) (quoted at Pls.' Br. at 4–5).

Thus, the only sensible course is for the Court to hear arguments on Defendants' forthcoming motions for summary judgment, decide whether discovery and a trial are even needed, and, if so, then schedule a trial in advance of the 2016 election cycle. Otherwise, the parties will be conducting discovery while potentially dispositive summary judgment motions are pending—and that discovery will be wasteful and pointless because, due to Plaintiffs' failure to disclose their benchmark alternative district, Defendants do not know what alleged violation and proposed remedy they are defending against. This approach hardly works any unfairness to Plaintiffs: Plaintiffs waited more than three months after the decision in *Shelby County* before filing suit, *see* Compl. (filed Oct. 2, 2013), and now want discovery, summary judgment, trial, and remedy to be finally resolved in less time than they took to draft their Complaint. The Court should reject Plaintiffs' invitation to rush to judgment and remedy in this case.

BACKGROUND

District 3 is the only congressional district in Virginia where black voters have the opportunity to elect a candidate of their choice. It is currently represented by Congressman Bobby Scott. *See* Virginia Members Of Congress, https://www.govtrack.us/congress/members/VA (last visited Dec. 10, 2013) ("Virginia Members"). It is "surrounded by Congressional Districts 1, 2, 4, and 7," Compl. ¶ 32, which are represented by Intervenor-Defendants Robert J. Wittman, Scott Rigell, Randy J. Forbes, and Eric Cantor, *see* Virginia Members.

District 3 was created as a majority-black district in 1991. *See Moon*, 952 F. Supp. at 1144. At that time, District 3's black voting-age population ("BVAP") was 61.17%. *See id.* In

1997, a three-judge court invalidated District 3 as an unconstitutional racial gerrymander and accorded the General Assembly the opportunity to enact a remedial District 3. *See id.* at 1151.

The General Assembly responded by adopting a new plan in 1998. *See* Va. Stat. § 24-302 (1998 Version) (Ex. A). The 1998 version of District 3 received section 5 preclearance and was not challenged under section 2 or as a racial gerrymander. *See* 42 U.S.C. § 1973c.

Following the 2000 census, the General Assembly adopted a new districting plan. *See* Va. Stat. § 24-302.1 (Ex. B) (2001 Version). That plan preserved District 3 in "similar" form to the 1998 version, *see* Compl. ¶ 29; *compare* 1998 District 3 Map (Ex. C), with 2001 District 3 Map (Ex. D), received preclearance from the Justice Department, and was not challenged under section 2 or as a racial gerrymander, *see* 42 U.S.C. § 1973c.

The General Assembly enacted the Enacted Plan in 2012 to reflect population shifts shown in the 2010 census. The Enacted Plan's District 3 "contains only slight variations from Congressional District 3" drawn in 1998 and 2001. Compl. ¶ 30; *compare* 1998 District 3 Map *and* 2001 District 3 Map, *with* 2012 District 3 Map (Ex. E). The General Assembly was required to add population to District 3 in the Enacted Plan in order to comply with the constitutional one-person, one-vote requirement. *See* Va. Stat. 24.02-302.2 (2012 Version) (Ex. F). The Enacted Plan increased the BVAP of District 3 from 53.1% to 56.3%. *Compare* 2001 Plan Demographics (Ex. G), *with* Enacted Plan Demographics (Ex. H). The Justice Department granted preclearance of the Enacted Plan, meaning that Virginia carried its burden to prove that the Plan was enacted without "any discriminatory purpose." 42 U.S.C. § 1973c(c).

The 2012 Elections were conducted under the Enacted Plan. Virginia's 2014 congressional primary is set by statute for June 10. *See* Va. Stat. § 24.2-515. The statutory candidate filing period begins on March 10, less than three months from now, and ends on March

27, 75 days before the primary. *See id.* § 24.2-522. The federal Military and Overseas Voter Empowerment ("MOVE") Act requires Virginia election officials to mail absentee ballots to deployed military personnel and other overseas voters at least 45 days before congressional primary elections—or no later than April 26—and additional lead time is need to allow for legal challenges, ballot printing, and other election administration tasks. *See* 42 U.S.C. § 1973ff.

Plaintiffs acknowledge that "[a]s of the date of the enactment of the [Enacted Plan], Virginia was considered a covered jurisdiction under Section 5 of the Voting Rights Act." Compl. ¶ 35. Plaintiffs therefore concede that the General Assembly acted constitutionally when it adopted the Enacted Plan and preserved District 3 as a majority-black district as section 5 required. *See id.*; *see also* Pls.' Br. at 2. Plaintiffs also mount no challenge to the 2012 congressional elections, which were conducted under the Enacted Plan.

Plaintiffs claim, however, that the General Assembly's constitutional purpose has been tainted—and the previously constitutional Enacted Plan and District 3 have been rendered unconstitutional—by the Supreme Court's intervening decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (June 25, 2013), which relieved Virginia of its obligation to obtain section 5 preclearance of future changes in its voting practices and procedures. *See* Compl. ¶¶ 4, 39; Pls.' Br. at 2. In particular, Plaintiffs claim that "[r]ace was the predominant consideration in the creation of Congressional District 3," Compl. ¶ 41, that this alleged "racial[] gerrymander" and "packing" of black voters "diminish[es] their influence in surrounding districts," *id.* ¶ 3, and that "Virginia can no longer seek refuge in Section 5" for its pre-*Shelby County* decision to preserve District 3 as section 5 then required, *id.* ¶ 5; *see also* Pls.' Br. at 2 (citing *Shaw v. Reno*, 509 U.S. 630 (1993)).

Plaintiffs waited more than three months after the decision in *Shelby County* to file this suit. *See* Compl. (filed Oct. 2, 2013). Plaintiffs nonetheless ask "that the Court hold an expedited trial on the merits and, assuming a finding in Plaintiffs' favor on liability, that the Court approve a remedial map" prior to the opening of Virginia's candidate filing period on March 10, less than three months from now. Pls.' Br. at 1. Plaintiffs, however, have not identified, much less described in any detail, the mid-decade "remedial map" that they ask Defendants to defend against and the Court to adopt on their accelerated time table. *Id.*

ARGUMENT

I. THE COURT CANNOT RESOLVE THE COMPLEX LIABILITY AND REMEDIAL ISSUES ON PLAINTIFFS' COMPRESSED TIMELINE

Since no serious interest of either the Plaintiffs or the public is furthered by rushing adjudication prior to the 2014 elections, and since any such rush to judgment is completely impracticable, severely prejudices Defendants' ability to fully defend the Plan in this Court and the Supreme Court, and usurps the General Assembly's sovereign prerogatives, it is clear that the Court cannot fairly resolve liability and remedial issues in the time-frame advocated by the Plaintiffs.

A. Plaintiffs Have Not Identified Any Irreparable Harm That Requires An Immediate, Pre-2014 Election Remedy

While Plaintiffs' invoke the incendiary phrase "racial gerrymander," Compl. ¶ 3, it is clear that the idiosyncratic sort of "racial discrimination" they allege will not visit any real-world injury, much less the sort of serious injury needed to even consider adopting the shortened liability and remedial procedures they advocate. To the contrary, for a variety of reasons, it is clear that allowing the 2014 election in the current District 3 would not subject Virginia citizens to the sort of purposeful racial discrimination which arguably needs to be prevented through emergency measures.

First, Plaintiffs concede that the General Assembly acted constitutionally in 2012, when it adopted the Enacted Plan and preserved District 3 as a majority-black district as Section 5 of the Voting Rights Act required. Plaintiffs therefore also do not allege that the 2012 elections, which were conducted under the Enacted Plan, were invalid. Instead, Plaintiffs make the novel and meritless argument that the Supreme Court's intervening decision in *Shelby County*, which relieved Virginia of its section 5 preclearance obligations for *future* changes to its election laws, somehow *retroactively* transformed the General Assembly's constitutional purpose in preserving District 3 into an unconstitutional purpose. *See id.* ¶¶ 1–6. Thus, even under Plaintiffs' theory, District 3's boundaries do not reflect any unconstitutionally discriminatory purpose and are not the product of an unconstitutional racial classification.

Second, the Justice Department precleared the Enacted Plan and current District 3 under Section 5, declaring them free of "*any* discriminatory purpose." 42 U.S.C. § 1973c(c) (emphasis added). *Third*, Plaintiffs acknowledge that the current District 3 contains "only slight variations" from the version of District 3 "drawn in . . . 2001" and in which black voters elected the candidate of their choice for a decade. Compl. ¶ 32. Thus, Plaintiffs' claims of irreparable injury requiring immediate relief is that District 3 will continue to be used for a *seventh* election cycle. *Fourth*, the 2001 version of District 3 had "only slight variations" from the version of District 3 that the General Assembly adopted in 1998 as a *remedy* for a *Shaw* violation—further confirming that District 3's shape poses no serious constitutional concern. *See id.*; *see also Moon*, 952 F. Supp. at 1144. *Fifth*, as a practical matter, the only "harm" to the allegedly victimized black voters in District 3 is that they will continue to reside in a district where they can elect their preferred candidate rather than having some of them transferred to districts where

their ability to do so is either nonexistent or more doubtful—hardly an "injury" of any cognizable magnitude.

In short, the "irreparable harm" that allegedly requires the Court's immediate remedial action is that some black voters will be permitted to vote in District 3 again in 2014, even though District 3 was preserved without any discriminatory purpose, was used for the (unchallenged) 2012 elections, has been virtually unchanged since the General Assembly's 1998 *Shaw* remedy, and is the only Virginia district where black voters have the opportunity to elect the congressional representative of their choice. *See* Pls.' Br. at 9–11. This hardly justifies rushing to judgment and remedy in three months.

B. Plaintiffs' Failure To Identify A Benchmark Alternative Plan Prevents A Finding Of Liability Or Entry Of A Remedy, Let Alone In Less Than Three Months

Moreover, Plaintiffs' liability and remedy cannot be adjudicated in the next three months because adjudication can neither be intelligently or finally resolved absent examination of what Plaintiffs contend is a constitutionally compliant alternative—yet resolution of that question requires far more discovery and trial time than is available, particularly since Plaintiffs have not even begun the preliminary steps for identifying and justifying this constitutional alternative. Specifically, Plaintiffs failed to identify for the Court and Defendants a benchmark alternative district that comports with their view of constitutional and statutory requirements and traditional redistricting principles, and to provide expert testimony in support of it. Without this alternative district, the Court cannot find liability or enter a remedy—and Defendants cannot even *defend* this case because they do not know what Plaintiffs claim *should* have been done.

"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." *Hall*, 385 F.3d at 428 ("As Justice Frankfurter once observed, 'talk of 'debasement' or 'dilution' is

circular talk. One cannot speak of 'debasement' or 'dilution' of the value of a vote until there is first defined a standard of reference as to what a vote should be worth.'" (quoting *Baker v. Carr*, 369 U.S. 186, 300 (Frankfurter, J., dissenting)). Indeed, "the very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997) (*Bossier I*). Thus, a redistricting plaintiff cannot even *plead*, much less *prove*, liability or a remedy for racial discrimination unless the plaintiff offers a nondiscriminatory benchmark alternative plan that comports with constitutional norms and traditional districting principles. *See, e.g.*, *Hall*, 385 F.3d at 428–32 (upholding dismissal of section 2 claim for failure to identify an alternative); *see also Bossier I*, 520 U.S. at 480 (a vote-dilution plaintiff must "postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice"); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000) (*Bossier II*) ("[T]he comparison must be with a hypothetical alternative . . . ."); *Holder v. Hall*, 512 U.S. 874, 880 (1994) (Kennedy, J.) ("[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) (O'Connor, J.)

This rule makes perfect sense: a federal court cannot determine whether a redistricting plan is *unconstitutional* unless it knows what a *constitutional* plan would look like. *See, e.g.*, *Bossier I*, 520 U.S. at 480; *Holder*, 512 U.S. at 880 (Kennedy, J.); *Gingles*, 478 U.S. at 88 (O'Connor, J.). And a defendant cannot take meaningful discovery or otherwise defend against a claim of unconstitutional legislative purpose without knowing how a legislature with a constitutional purpose allegedly would have acted. *See, e.g.*, *Bossier I*, 520 U.S. at 480; *Holder*, 512 U.S. at 880 (Kennedy, J.); *Gingles*, 478 U.S. at 88 (O'Connor, J.).

This is true for claims of racial discrimination under Section 2 of the Voting Rights Act, which require proving a discriminatory "result," and even *more* true for constitutional claims, which also require showing a discriminatory "purpose." *Washington v. Davis*, 426 U.S. 229, 240 (1976) (to establish Equal Protection violation, discriminatory effect "must ultimately be traced to a racially discriminatory purpose"). If a court cannot determine whether a challenged plan works a discriminatory *result* proscribed by Section 2 without a benchmark alternative plan, *see Gingles*, 478 U.S. at 50–51, it surely cannot determine whether the Legislature enacted the plan "because of" that adverse racial result, *see Bossier I*, 520 U.S. at 481–82; *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980); *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). Courts therefore have recognized the requirement of a benchmark alternative plan in cases alleging unconstitutional racial discrimination against minority voters. *See, e.g.*, *Bossier II*, 528 U.S. at 334 (noting that claims of racial discrimination against minority voters under the Fifteenth Amendment require "comparison . . .with a hypothetical alternative"); *Johnson*, 204 F.3d at 1346 (requiring benchmark alternative for Fourteenth Amendment discrimination claim); *Lopez v. City of Houston*, No. 09-420, 2009 WL 1456487, *18–19 (S.D. Tex. May 22, 2009) (same).

The need for an alternative plan in constitutional racial discrimination claims is particularly acute because, as the Court has specifically warned with respect to *Shaw* claims, federal courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Because "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions," federal courts must presume that state legislatures act in "good faith" and that their redistricting statutes are constitutional. *Id.* at 915–16. Thus, before a federal court can

invalidate a duly enacted redistricting plan based on race, it must be satisfied that the plaintiff has met the "demanding" burden to show that "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Easley v. Cromartie*, 532 U.S. 234, 241 (2001). A court can make this finding that the legislature acted with a discriminatory purpose only if it had other, nondiscriminatory alternative plans before it. *See, e.g.*, *Bossier I*, 520 U.S. at 480; *Holder*, 512 U.S. at 880 (Kennedy, J.); *Gingles*, 478 U.S. at 88 (O'Connor, J.).

Finally, of course, the legislature—which must be given the first opportunity to correct any flaws in a districting plan, *see infra* part II—or the reviewing court must have a nondiscriminatory alternative plan in order to enter a remedy. *See, e.g.*, *Gingles*, 478 U.S. at 88 (O'Connor, J.); *see also Bossier I*, 520 U.S. at 480; *Holder*, 512 U.S. at 880 (Kennedy, J.); *see also* Pls.' Br. at 1 (seeking undescribed "remedial plan" for the alleged violation). Since the remedy for an unconstitutional district may be no broader than is "necessary to cure any constitutional or statutory defect," the Court needs a clear idea of what constitutes an alternative constitutional district to enter a sufficiently targeted remedy (or to guide the General Assembly in its remedial efforts). *Upham*, 456 U.S. at 43; *White*, 412 U.S. at 794–95.

Yet, despite this Court's order that they disclose the "remedial measures" they seek here, Order at 2, Plaintiffs have not offered an alternative remedial plan or any expert (or other) testimony to justify it. Although Plaintiffs claim that current District 3 "dilutes" minority voting power through "packing," "fail[s] to comply with traditional districting principles," and is not needed to comply with Section 2, *see* Compl. ¶¶ 3, 33–34, 41, 44, they provide no guidance on any alternative district that both complies with traditional districting principles and has enough BVAP to satisfy Section 2, but not so much that it constitutes "packing." But such information is essential for the Court to assess whether the General Assembly's use of race was unjustified

because there existed a reasonable alternative that both better complied with neutral districting principles and satisfied Section 2, and for it to enter a remedy that accomplishes both objectives. As discussed below, resolving complicated questions requires far more discovery, expert testimony and trial time than Plaintiffs contemplate, particularly since Plaintiffs have not even offered the basic evidence needed to start this inquiry—*i.e.*, a proposed alternative district supported by expert testimony on racial voting patterns and compliance with districting principles.

C. Every Conceivable Remedial Map For Plaintiffs' Alleged Violation Is Fatally Flawed, And Cannot Be Implemented Through An Expedited Trial

Plaintiffs' failure to disclose their alternative plan is unsurprising because any conceivable remedy would mire the Court in complex factual issues and a protracted trial that cannot possibly be completed by March.

As noted, Plaintiffs allege that District 3's alleged subordination of districting principles was not needed to comply with Section 2 because Virginia could have complied with those principles while still preserving black voters' Section 2 right to "elect candidates of their choice." *See supra* p. 13; Compl. ¶¶ 41, 44.[1] And, of course, the issue whether there is an available alternative district that complies with both Section 2 and neutral principles must be resolved to determine, on the merits, whether Section 2 supplied the General Assembly with a *Shaw* justification for preserving District 3, *see* Compl. ¶ 44, and, on remedies, whether the remedial district complies with Section 2, *Abrams*, 521 U.S. at 90; *Colleton County*, 201 F. Supp.

[1] As noted, Plaintiffs contend that their proposed remedy will comply with Section 2 and therefore are not advocating a district that strips black voters of their only opportunity in Virginia to elect a candidate of their choice. Moreover, Plaintiffs' counsel indicated on a scheduling conference call that Plaintiffs were not seeking to simply reduce District 3's BVAP to its 2010 level of roughly 53%, and any such minor adjustments would not cure Plaintiffs' complaints about District 3's shape or "packing."

2d at 633. Consequently, to resolve liability and remedy, the Court must resolve whether Plaintiffs' hypothetical alternative district comports with traditional districting principles, as well as resolving a searching, fact-bound inquiry into the level of BVAP required to preserve black voters' "a[bility] to elect candidates of their choice" in District 3. *See* Order Denying Motion For Preliminary Injunction at 24, *Favors v. Cuomo*, No. 11-CV-5632 (DE 367) (E.D.N.Y. May 16, 2012) (three-judge court) (case referenced at Pls.' Br. at 7) ("*Favors* Order") (Ex. I); *Charleston County*, 365 F.3d at 346–53; *Moon*, 952 F. Supp. at 1150. As one of the cases Plaintiffs invoke vividly confirms, issues related to racial bloc voting and minority voters' ability to elect their representative of choice implicated by a Section 2 inquiry "typically require substantial expert testimony and analysis" and cannot be resolved without extensive discovery, trial, and factfinding. *Favors* Order at 24; *see also United States v. Charleston County*, 365 F.3d 341, 346–53 (4th Cir. 2004) (relying on expert evidence in resolving racial voting issues); *Moon*, 952 F. Supp. at 1150 (same); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 640–46 (D.S.C. 2002) (same) (three-judge court); *Marylanders for Fair Rep., Inc. v. Schaefer*, 849 F. Supp. 1022, 1058 (D. Md. 1994) (same) (three-judge court). The Court simply does not have time to resolve the complex evidentiary issues in proving *Shaw* compliance and the "ability to elect" BVAP-level, particularly since, even at this late date, Plaintiffs have not either suggested an alternative district or offered expert testimony to justify it.

II. THIS COURT MUST ACCORD THE GENERAL ASSEMBLY AMPLE OPPORTUNITY TO REMEDY ANY AFTER-THE-FACT VIOLATION IN THE ENACTED PLAN BEFORE ADOPTING A MID-DECADE JUDICIAL REMEDY

For the foregoing reasons, there is plainly not enough time to enter a remedy *even if* the Court did so unilaterally. It is even more implausible, however, because the Court is obliged (at least absent extraordinary emergency circumstances not present here) to provide the General Assembly with a reasonable opportunity to remedy any constitutional violation.

"Reapportionment is primarily a matter for legislative consideration and determination," and "legislatures have primary jurisdiction over legislative reapportionment." *White*, 412 U.S. at 794–95; *Upham*, 456 U.S. at 41. In other words, "it is the domain of the States, not federal courts, to conduct apportionment in the first place." *Voinovich v. Quilter*, 570 U.S. 146, 156 (1993). Federal courts therefore should "not pre-empt the legislative task nor intrude on state policy any more than necessary." *White*, 412 U.S. at 795; *Upham*, 456 U.S. at 41. In drawing a plan, a legislature obviously must "balanc[e] competing interests," *Easley*, 532 U.S. at 242, "the sort of policy judgments for which courts are, at best, ill suited," *Perry v. Perez*, 132 S. Ct. 934, 941 (2012) (per curiam).

Thus, as Plaintiffs' own cited case confirms, where a court finds a violation in a districting plan, it "should give the appropriate legislative body the first opportunity to provide a plan that remedies the violation." *McDaniels*, 702 F. Supp. at 596 (cited at Pls.' Br. at 3); *see also Wise*, 437 U.S. at 540 ("When a federal court declares an existing apportionment scheme unconstitutional, 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 for the federal court to devise and order into effect its own plan.") (cited at Pls.' Br. at 3). Indeed, "Supreme Court precedent requir[es] that federal courts give deference to state legislatures by at least giving them the initial opportunity to draft a constitutionally valid plan." *Diaz*, 932 F. Supp. at 467 (citing *Miller*, 515 U.S. at 900 and *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)). Consequently, this Court cannot enter a mid-decade judicial redistricting plan until it has accorded the General Assembly "an adequate opportunity" to enact its own remedy. *Upham*, 456 U.S. at 41; *see also Cane v. Worcester County*, 35 F.3d 921, 927 (4th Cir. 1994) ("Once a violation . . . has been established, a district court should give the appropriate

legislative body the first opportunity to devise a remedial plan."); *Moon*, 952 F. Supp. at 1151 (allowing General Assembly opportunity to cure *Shaw* violation) (quoted at Pls.' Br. at 5); *Diaz*, 932 F. Supp. at 467–68 (in July of election year, allowing legislature time to correct *Shaw* violation in congressional plan).

This deference to the General Assembly is particularly appropriate in this case. Plaintiffs' theory is that the Enacted Plan was constitutional at the time it was enacted, and only became unconstitutional due subsequent events outside of the General Assembly's control. *See* Compl. ¶¶ 1–6. Thus, even under Plaintiffs' theory, the General Assembly fully *complied* with the Constitution; that constitutional act somehow became unconstitutional because of a later decision of the Supreme Court invalidating Section 5. *See id.* Since, unlike in every other redistricting case, the General Assembly committed no constitutional wrong, it has a far greater entitlement to an opportunity to alter District 3 than the legislature in any other case. Moreover, under Plaintiffs' theory, the General Assembly has *new* responsibilities in 2013 (after *Shelby County*) that it did not have in 2012 when it adopted the Enacted Plan, so this will be its *first* opportunity to exercise its sovereign redistricting prerogative in Plaintiffs' new world. Depriving the General Assembly of its *only* opportunity to enact a plan under the new framework, even though it committed no constitutional wrong in 2012, would be no different than a court depriving a legislature of the first opportunity to redistrict after the new census, before it violated the Constitution. After all, since the General Assembly's act in 2012 was concededly free of unconstitutional discriminatory purpose, depriving it of the opportunity to redraw District 3 and affected surrounding districts would, quite literally, deny it the opportunity to redistrict even though it never committed a constitutional violation. Needless to say, this would be a facially improper exercise of a federal court's remedial power. *See Milliken v.*

Bradley, 418 U.S. 717, 738 (1974) ("A federal remedial power may be exercised only on the basis of a constitutional violation and . . . the nature of the violation determines the scope of the remedy."); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (same); *see also Voinovich*, 570 U.S. at 156 ("[I]t is the domain of the States, not federal courts, to conduct apportionment in the first place.").

Plaintiffs nonetheless suggest that this Court may bypass the General Assembly and impose a mid-decade remedial map because of the imminence of Virginia's candidate filing period. *See* Pls.' Br. at 3–8. However, particularly since Plaintiffs delayed filing their suit for more than three months after the *Shelby County* decision, the emergency exception permitting courts to dispense with deference to the legislative body is inapplicable here—as their own cases confirm.

Indeed, virtually all of the cases that Plaintiffs cite arose at the *beginning* of the decade and involved the same scenario: the legislature had failed to enact a districting plan based on new census data and, thus, had left in place an outdated plan that no longer complied with the one-person, one-vote requirement and was unconstitutional in its entirety. *See, e.g.*, *Scott v. Germano*, 381 U.S. 407, 409 (1965) (cited at Pls.' Br. at 3); *LULAC v. Perry*, 548 U.S. 399, 415 (2006) (cited at Pls.' Br. at 3); *Wise*, 437 U.S. at 540 (cited at Pls.' Br. at 3); *Desena v. Maine*, 793 F. Supp. 2d 456, 462 (D. Me. 2011) (three-judge court) (cited at Pls.' Br. at 5); *Favors* Order at 9 (case referenced at Pls.' Br. at 7).[2] In that scenario, the legislature already had been accorded ample opportunity to remedy the plan-wide constitutional violation, but had failed to do

[2] *See also Adamson v. Clayton Cnty. Elections and Reg. Bd.*, 876 F. Supp. 2d 1347, 1352–53 (N.D. Ga. 2012) (cited at Pls.' Br. at 6); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 661–62 (N.D. Ill. 1991) (cited at Pls.' Br. at 6); *In re Apportionment of State Legislature-1992*, 486 N.W.2d 639, 645 n.31 (Mich. 1992) (cited at Pls.' Br. at 6); *In re Constitutionality of S.J. Res. 2G*, 601 So. 2d 543, 544–45 (Fla. 1992) (adopting judicial plan because legislature had reached a political "impasse" and was no longer in session) (cited at Pls.' Br. at 6).

so due to a political impasse. *See, e.g.*, *Scott*, 381 U.S. at 409; *LULAC*, 548 U.S. at 415; *Wise*, 437 U.S. at 540; *Desena*, 793 F. Supp. 2d at 462; *Favors* Order at 9. It therefore became "the unwelcome obligation of the federal court to devise and impose a reapportionment plan pending later legislative action." *Wise*, 537 U.S. at 540. These plan-wide, equal-population cases thus offer *no* support for Plaintiffs' position that the Court should pretermit *any* opportunity for the General Assembly to address for the first time an alleged district-specific violation that arose mid-decade through no fault of the General Assembly, and only *after* the Enacted Plan had been precleared by the Department of Justice as free of "any discriminatory purpose," 42 U.S.C. § 1973c(c), and constitutionally used in the 2012 election.[3]

III. EXTENDING THE FILING DEADLINE WOULD NOT GIVE THE COURT SUFFICIENT TIME TO RESOLVE THIS CASE BEFORE THE 2014 ELECTION

Contrary to Plaintiffs' suggestion, *see* Pls.' Br. at 8–9, moving the dates of Virginia's candidate filing period is not an option that would afford the Court sufficient time to reasonably adjudicate this case before the 2014 election. In the first place, as a matter of federal law, the deadline cannot be moved because this would not afford the Board of Elections sufficient time to prepare the ballots that it must send to deployed military personnel and other voters living abroad. The MOVE Act requires Virginia election officials to *mail* absentee ballots to military

[3] Plaintiffs' meager authority from outside the equal-population impasse context fares no better. The government defendants in *Neal v. Coleburn*, 689 F. Supp. 1426 (E.D. Va. 1988) (cited at Pls.' Br. at 4 n.1), took the position that there was "no acceptable remedy," judicial or legislative, for the violation in that case, *id.* at 1438–39, so the court adopted the only remedy presented to it, *see id.* The plaintiffs and defendants all sought a judicial remedy in *Henderson v. Bd. of Supervisors of Richmond County*, Civ. A No. 87-0560-R. 1988 WL 86680, at *9–10 (E.D. Va. June 6, 1988) (cited at Pls.' Br. at 4 n.1), so there was no point to referring the remedy to defendants in their legislative capacity. Plaintiffs' other cases involve state courts implementing state-law redistricting requirements and remedies. *See, e.g.*, *In re Legislative Redistricting of State*, 805 A.2d 292, 298 (Md. 2002) ("The Maryland Constitution requires us, in addition to reviewing the plan, to provide a remedy."); *Stephenson v. Bartlett*, 582 S.E. 2d 247, 248–49 (N.C. 2003).

and overseas voters at least 45 days before congressional primary elections, and additional lead time is need to allow for legal challenges, ballot printing, and other election administration tasks. *See* 42 U.S.C. § 1973ff. Preparing the ballots before mailing requires considerable time: in fact, the Justice Department requires primary elections to be held *80 days* before the general elections so that general election ballots can be prepared in time for the MOVE Act's 45-day mailing deadline. *See* Memorandum In Support Of United States' Motion For Supplemental And Permanent Relief at 3, *United States v. New York*, No. 1:10-cv-1214 (N.D.N.Y. Sept. 19, 2011) (Ex. J). Virginia has a special need to fully comply with its MOVE Act obligations: the United States sued Virginia for failing to comply with the MOVE Act in the 2008 election, and Virginia devoted significant resources to training and MOVE Act compliance under the consent decree entered in that case. *See* Consent Decree, *United States v. Cunningham*, No. 3:08CV709 (E.D. Va. Dec. 10, 2010) (Ex. K). Thus, even if there were grounds for the Court to move Virginia's March 27 filing deadline to later in the year, changing that state law deadline will not solve the problem because the MOVE Act also requires knowing who the June 10 primary candidates are by roughly March 27. (March 27 is 75 days before June 10.)

Overwhelming considerations of the public interest and fundamental fairness also militate against the Court shortening the election schedule or entering a last-minute remedy. In the first place, "elections are complex to administer, and the public interest would not be served by a chaotic, last-minute reordering of [congressional] districts." *Favors* Order at 25. "It is best for candidates and voters to know significantly in advance of the petition period who may run where." *Id.*; *see also Diaz*, 932 F. Supp. at 466–68. Attempting to implement a remedial plan would create all of the problems that mid-decade redistricting does, disrupting "orderly campaigning and voting, as well as . . . communication between representatives and their

constituents." *LULAC*, 548 U.S. at 448. This interest in orderly election administration is so strong that the Supreme Court has held that a pre-election remedy "may be inappropriate even when a redistricting plan has actually been found unconstitutional because of the great difficulty of unwinding and reworking a state's entire electoral process." *Favors* Order at 25 (citing *Reynolds*, 377 U.S. at 585; *Roman v. Sincock*, 377 U.S. 695, 709–10 (1964)).

Moreover, "[t]he greatest public interest must attach to adjudicating these claims fairly—and correctly." *Id.* at 25. Given the novelty of Plaintiffs' theory and the fact-intensive nature of any conceivable violation and remedy, this Court simply would not "be able to give the issues or a possible remedy the careful consideration they deserve in such an abbreviated time frame" as Plaintiffs advocate. *Id.* at 26. And if this Court were to rush to judgment and remedy, there is a substantial risk that it could grant Plaintiffs a remedy that they do not deserve, that shifts the electoral map to some voters' disadvantage, and that disturbs the General Assembly's delicate political and policy choices, in contravention of the directive that federal courts in redistricting cases "should follow the policies and preferences of the State" and "honor" those policies to the maximum extent possible. *White*, 412 U.S. at 795; *Upham*, 456 U.S. at 41–43.

In short, it is not remotely possible or desirable to accomplish the following tasks in any reasonable time-frame before the 2014 elections:

1. Plaintiffs' disclosing their benchmark alternative plan, *see supra* Part I.A;
2. The Court deciding Defendants' forthcoming motions for summary judgment after oral argument on January 21, and determining whether discovery and a trial are necessary;
3. The parties conducting and completing discovery, including expert discovery;
4. The Court holding a trial and receiving evidence from all parties, including complex extensive evidence related to racial bloc voting and black voters' ability to elect candidates of their choice, *see supra* Part I.B;
5. The Court adjudicating the question of liability;

6. The Court then allowing the General Assembly reasonable time and opportunity to remedy the violation, *see supra* Part II;

7. If the General Assembly failed to remedy the violation within a reasonable time, the Court holding further hearings and consider additional evidence regarding remedies;

8. If Plaintiffs have their way, the Court appointing a special master or other expert to assist it in drawing a remedial plan, *see* Pls.' Br. at 7–8; and

9. The Court then drawing a remedial plan.

And even if the Court and parties somehow accomplished these Sisyphean tasks in less time than Plaintiffs took to draft their Complaint, there would be no time for an appeal of Plaintiffs' novel, untested legal theory to the Supreme Court, irreparably harming Defendants' appellate rights and creating the distinct possibility that the Court's 2014 remedy will have to be *undone* for 2016, to the irreparable harm of candidates and voters. *See Ctr. for Int'l Envtl. Law v. Office of USTR*, 240 F. Supp. 2d 21, 23 (D.D.C. 2003) ("de facto deprivation of the basic right to appeal" is "irreparable harm"); *Diaz*, 932 F. Supp. at 468 (in a *Shaw* case, where "it would appear most unlikely that a proper plan can be drafted by this court in sufficient time to avoid delaying at least the . . . primary," the "harm to the public in delaying either the primary or the general election or even changing the rules as they now stand substantially outweighs the likely benefit to the plaintiffs of granting a preliminary injunction at this time" (citing cases)). Accordingly, the far more sensible, and only fair, course is to resolve this case according "to the normal litigation procedures of pretrial motions, discovery, and direct and cross-examination of witnesses, all unhampered by the severe time constraints imposed" by upcoming election deadlines. *Puerto Rican Legal Def. & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 698, 700 (E.D.N.Y. 1992).

CONCLUSION

The Court should withhold any discovery or setting of a trial date until it has resolved summary judgment, because this case cannot be resolved in time for the 2014 elections, and therefore there is no need to rush.

Dated: December 13, 2013

Respectfully submitted,

/s/ Jonathan A. Berry
Michael A. Carvin (*pro hac vice*)
John M. Gore (*pro hac vice*)
Jonathan A. Berry (VSB #81864)
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
Tel: (202) 879-3939
Fax: (202) 626-1700
Email: macarvin@jonesday.com
Email: jmgore@jonesday.com
Email: jberry@jonesday.com

Counsel for Intervenor-Defendants Virginia Representatives

CERTIFICATE OF SERVICE

I certify that on December 13, 2013, a copy of the INTERVENOR-DEFENDANTS VIRGINIA REPRESENTATIVES' RESPONSE TO PLAINTIFFS' BRIEF ON AVAILABLE REMEDIES was filed electronically with the Clerk of Court using the ECF system, which will send notification to the following ECF participants:

John K. Roche, Esq.
Mark Erik Elias, Esq.
John Devaney, Esq.
PERKINS COIE, LLP
700 13th Street, N.W., Suite 600
Washington, D.C. 20005-3960
Tel. (202) 434-1627
Fax (202) 654-9106
JRoche@perkinscoie.com
MElias@perkinscoie.com
JDevaney@perkinscoie.com

Kevin J. Hamilton, Esq.
PERKINS COIE, LLP
1201 Third Avenue, Ste. 4800
Seattle, WA 98101-3099
Tel. (202) 359-8000
Fax (202) 359-9000
KHamilton@perkinscoie.com

Counsel for Plaintiffs

Mike F. Melis
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
Telephone: (804) 786-2071
Fax: (804) 371-2087
mmelis@oag.state.va.us

Counsel for Defendants

Dated: December 13, 2013

/s/ Jonathan A. Berry
Jonathan A. Berry

Counsel for Intervenor-Defendants Virginia Representatives